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KENTUCKY COURT OF APPEALS.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. McDOWELL.

(Filed January 6, 1894—Not to be reported.)

Master and servant—Neglect—The foreman in appellant's workshop, who undertook to adjust a certain piece of machinery by getting upon a high platform that had no railing, and pressing with a scantling the part of the machinery to be repaired, fell from the platform and was thereby injured because the scantling he was using broke. He claims it was neglect to fail to have a railing on the platform. Held—Appellee knew and saw the risk he was running in attempting to adjust the machinery from the platform, and assumed that risk and can not recover for his injury. If he had notified any one of the danger of the platform it should have been appellant's agent who had charge of it, and who had authority to have a railing attached to it.

P. H. Darby, Holmes Cummins and J. P. Hobson for appellant.

E. D. Walker, R. C. Davis and Matt O'Doherty for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellee was foreman in the appellant's workshop in the city of Paducah. A pulley got too tight on one of the shafts to be loosened by the use of the hands alone, and the appellee took a piece of scantling and got upon a platform or walkway, about fourteen feet from the ground and about two feet wide, for the purpose of "prying" the pulley loose with the scantling. He did apply the scantling as a lever to pry the pulley loose, but by pressing on the lever with his hands he could not move the pulley. He then threw his legs over the lever for the purpose of putting his whole weight upon it, and the lever broke by his weight, causing him to fall to the ground and crippling himself. He claims that a railing upon the platform would have prevented his fall to the ground, and that it was negligence in the appellant not to have a railing on the platform, and that it had promised him to attach a railing to it.

The appellant says that he knew in using the lever as he did that if he fell he would fall to the ground.

It seems to us that the facts being before him as to his undertaking to pry with the scantling, and the result in case of a mishap, he took the risk as to the sufficiency of the scantling to bear him up. Also that, conceding he notified Mr. Rudd that the platform was dangerous without a railing, and that he promised to attach a railing soon, yet Mr. Rudd was not the proper person to notify because he did not have charge of the machinery but only the employment and discharge of the hands in the shop; but Mr. Briggs had charge of the machinery and repairs and was the proper person to order the railing to be put on, a fact that the appellee knew at the time.

The jury should have been instructed peremptorily to find for the appellant.

The judgment is reversed and remanded for a new trial.

COOTS, &c. v. YOWELL.

(Filed March 8, 1894.)

Conveyance to one for life, remainder to his children—Title in abeyance—Descent and distribution—A conveyance to A for life, remainder in fee to his children, heirs and legal representatives, vests the title to the life estate in A, and if he has no children at any time the title to the remainder in fee remains in the grantor ready to pass to the children of the life tenant should they come into being. And where the grantor dies before the life tenant, the title to the remainder vests in his heirs at law, subject to the same contingency.

Where the heirs at law of the grantor after his death convey to the life tenant all their interest in such land, such conveyance passes all contingent interest that such heirs of the grantor or their children may assert in the land

Where one of the heirs of the grantor after his death makes such conveyance to the life tenant and then dies before the life tenant, who dies without children, the children of such heir can not claim any interest in the land. Their right comes through their father, and not directly from their grandfather.

Sweeney, Ellis & Sweeney for appellants.

Little & Son, Powers & Atchison and John Feland for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

Jeremiah Yowell, in December of the year 1840, executed a deed to his son, Algeron S. Yowell, to a tract of land in Daviess county, "for and during his natural life, and the remainder in fee simple to the children, heirs and legal representatives of the said Sidney, to have and to hold the said tract of land and appurtenances to the said Algeron Sidney Yowell for and during his natural life, and the remainder in fee simple to decend to and belong and appertain to the children, heirs and legal representatives of the said Sidney Yowell at his death as their absolute estate forever."

His son Sidney, at the date of the conveyance, had neither wife nor children, and died childless, without ever having had a child born to him. His father died before Sidney, and after the

father's death his brothers and sisters, with a view of vesting in Sidney the fee, granted unto him by a regular conveyance all their right, title and interest, reversionary or otherwise, to this land.

John Yowell, one of the brothers of Sidney, died before the latter, leaving children. Sidney, the life tenant, then died, and having sold and conveyed this land to the appellant, the children of John Yowell brought this action to recover their interest in the land, claiming to have derived title by descent from their grandfather, and that their father had no interest in it. The court below held that as John Yowell died before the life tenant (his brother), his (John's) children took from or through their grandfather, and were entitled to recover as his heirs at law.

If the grandfather had survived his son John, the father of these children, in that event John's children would have inherited from their grandfather because the title was in him, there being no one to take the remainder interest; but the grandfather was dead, leaving John Yowell, one of his heirs, together with his brothers and sisters, and they hold the title in the same manner their father and the grandfather of their children held it during the continuance of the life estate. This was a contingent remainder in the children of the life tenant, supported by the life estate.

There were no children living when the deed was made to Sidney and none born, and, therefore, no title ever passed in remainder. The title, it is argued, was in abeyance, resting in nubibus, ready to pass to whoever might be the heir of the original grantor at the death of the life tenant, and upon this idea a recovery was permitted.

Suppose the original grantor had survived the life tenant, and before the termination of the life estate had sold all his interest, reversionary or otherwise, to a stranger, would not the title have passed, both by way of estoppel and because the failure of any one to take the remainder left still in him, the absolute fee?

The grantor, however, died and his interest passed to his heirs, and when they conveyed to the appellant did not their title pass in the same manner that it would have passed had the original grantor survived and made the conveyance before the death of the life tenant? They stood in his shoes, and a conveyance that would estop him would estop his heirs at law.

These children of John do not inherit from their grandfather, but from their father. He took from his father and they from John, their father. The title did not pass from the original grantor because there was no one to take the remainder, and the title being with the grantor passed to his heirs at law, and John being one the title to an interest was in him as heir, subject to pass from him on the happening of the contingency, viz., his brother Sidney having children.

While this title was in John, the father of these appellees, he conveyed the land away, and there was nothing to pass to his children. The transition of the title was in abeyance, ready for the remainderman at the expiration of the life estate, or when coming into existence so as to take. The title in this case never left the original grantor, and when he died it passed to his heirs, and if he had sold this land, instead of his children, they could not have inherited it from him, as he and those under him would have been estopped to say that at the time he sold he had no title.

Here is a contingent remainder created by deed; the title remains in the grantor until the contingency happens. It never did happen, and, therefore, the title remains in the grantor, and

at his death passed to his heirs; and his heirs having sold the land, their children are estopped from claiming.

Mr. Fearn says the title must remain in the grantor as there is no one to receive it. Where the devisee takes upon a contingency the title is in the heir, says Mr. Kent, subject to be defeated when the devise takes effect. (Kent's Com., volume 4, page 257.)

"If a contingent remainder be created in conveyance by way of use, the inheritance in the meantime remains in the grantor or his heirs, or descends to the heirs of the testator until the contingency happens." (Kent's Com., volume 4, page 257; Herbert, Gd'n v. Herbert's Ex'or, 85 Ky., 147.)

In our opinion the recovery should have been denied, and the judgment is reversed, with directions to dismiss the petition. (Pryor v. Castleman, 9 Ky. Law Rep., 752.)

Judge Pryor delivered the following response to a petition for rehearing:

While the court may have failed to understand the theory upon which the recovery was permitted below, still it presented the real question involved. It is claimed that the title passed out of the grantor at the date of the grant, A. S. Yowell taking a life estate, and the remainder interest was in abeyance, waiting for some one to come into existence who could take it. The life tenant had no children, and he could have no heirs in a legal sense until his death, and dying without children, it is claimed that the title then in abeyance went to the heirs of the life tenant.

It is manifest the remainder was to the children, and not to the heirs of the life tenant, in the event he had no children. This is the plain purport of the deed, "remainder in fee simple, to descend to and belong and appertain to the children, heirs and legal representatives of the said Algeron S. Yowell at his death as their absolute estate forever."

The words heirs and representatives had direct reference to the children of the life tenant, and the language of the conveyance does not in express terms, or by fair inference, authorize the conclusion that it was the intention of the grantor to pass the fee to the heirs of the life tenant in the event he died without children.

It is a plain deed to one for life, remainder to his children, and the contention that the heirs of Algeron took as purchasers in the event the life tenant died childless is not warranted by the language of the instrument. They took nothing under the deed, and the real point involved is the one discussed in the original opinion, and presents an interesting question.

Petition overruled.

WILMER, &c. v. HUNTINGTON.

(Filed March 8, 1894—Not to be reported.)

Pleadings—Mortgages—Plaintiffs alleged that H. executed various mortgages on a tract of land, described by metes and bounds; that subsequently the vendor, under whom appellee claims, with knowledge of said mortgages, received a conveyance from H. of about 5 acres of land, a part of the tract so mortgaged, which said 5 acres is described in the petition; that at a later time suit to foreclose the mortgage was brought, to which the appellee and his vendor were not made parties, and that under a judgment in this action the whole lot first described was sold by commissioner and purchased

by one of the plaintiffs; that said lot did not sell for enough to satisfy all mortgage liens, and a sale of said 5 acres to satisfy the balance of said lien debts is prayed for. An amended petition alleged that said 5 acres is a part of the land mortgaged by H. as mentioned in the petition. Held—The petition as amended states a cause of action, the intention of the pleader to allege that said 5 acres was a part of and included in the tract originally mortgaged to appellants being apparent.

C. J. Helm and O'Hara & Bryan for appellants.

J. C. Wright for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Lewis.

It is stated by William Wilmer and C. Willison, plaintiffs below, and who, jointly with some of the defendants, prosecute this appeal; that H. D. Helm, being owner of a tract of land described in the petition by metes and bounds, executed mortgages on it at different times and to different persons, including plaintiffs, to secure payment of sums severally due them; that subsequent to execution of the last one of said mortgages, and with full knowledge of liens on the land thus created and existing, the Cincinnati & Southwestern Railway Company purchased and received a conveyance for about 5 acres, part of said land, and likewise described in the petition by metes and bounds. And that H. E. Huntington, made defendant to the action and now appellee, has acquired all right, title and interest of the Cincinnati & Southeastern Railway Company in and to said land.

It is further stated that April 24, 1883, which was after the purchase by said company of the parcel of about 5 acres, C. W. Wallace, assignee of one of the notes, to secure payment of which said mortgages were executed, brought an action to enforce his lien, all the other mortgagees referred to being made defendants, though neither Huntington nor his vendor, the Cincinnati & Southeastern Railway Company, was a party; that under a judgment rendered in that action the master commissioner, in language of the petition, "pursuant of agrement of parties therein, offered for sale the entire tract of land first herein described, or so much thereof as would bring $26,244.98, being the amount of liens adjudged, and sold the entire tract to plaintiff, William Wilmer."

It is further alleged that the sum for which the land sold was not enough to satisfy all the lien debts, plaintiff and some of the defendants being left unpaid. Judgment is, therefore, asked in this action for a sale of "said last-described tract of land," by which was evidently meant the parcel of about 5 acres, to satisfy balance in their favor.

A general demurrer having been filed, the lower court adjudged as follows: "The petition does not show that the land sold to the railroad company, and afterwards acquired by Huntington, was involved in said action by C. J. Wallace, etc., or that it is embraced in any mortgage involved in said action. The demurrer of Huntington is sustained."

Thereupon plaintiffs filed an amended petition, in which it is stated substantially that the parcel of about 5 acres purchased by the railway company is part of the land mortgaged by H. D. Helm as before mentioned.

There is an apparent conflict between that and a previous statement of the original petition that the entire tract first therein

described was sold under the judgment mentioned. But in that description the abuttals are simply set out, without mention of the quantity of land mortgaged. And it may be, and we think the pleader meant to and did substantially allege, that the tract mortgaged contained really about 49 acres, of which only 45 was sold under the judgment, leaving the parcel of about 5 acres then undisposed of. In that case a cause of action, we think, has been stated. But, of course, to maintain this action it must be made to appear the parcel of about 5 acres was included in the various mortgages.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

CRUSE v. COMMONWEALTH.

(Filed March 31, 1894—Not to be reported.)

Criminal law—Evidence—Instructions—The evidence was sufficient to authorize the verdict finding appellant guilty of maliciously shooting and wounding another with intent to kill him, and the instruction concerning appellant's right of self-defeuse was favorable to him, and not prejudicial.

S. G. Wilkerson for appellant.

W. J. Hendrick for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was found guilty of the statutory crime of maliciously shooting and wounding another with intent to kill him.

The evidence is that the appellant claimed the right to the use of a mule on Sunday; that Garnett got the possession of the mule Sunday morning and rode it after a saddle; that while he was gone after the saddle the appellant said he would kill him for taking the mule; that upon Garnett's return with the mule the appellant shot him. The appellant says that he was induced to shoot Garnett by the belief that Garnett was drawing a pistol with which to shoot him. But the jury did not believe him, but believed that the appellant was guilty of malicious shooting as charged.

Instruction No. 5 is to the effect that if appellant had reasonable ground to believe, and did believe, that his life was in danger by Garnett, he had the right to shoot in self-defense. The instruction, under the circumstances, is favorable to the appellant. Instruction No. 6, asked by the appellant, was not authorized by the evidence.

The judgment is affirmed.

AULTMAN & TAYLOR Co., &c. v. FRASURE, &c.

(Filed April 5, 1894.)

1. Mortgage of wife's land to secure debt of husband—Acknowledgment—Coercion—A mortage of land executed by a wife to secure payment of a debt of her husband can not be enforced against her where it appears that the mortgagee knew that the wife claimed and owned the land, although the legal title was in her husband, and where the mortgage from the wife

was procured by coercion and threats on the husband's part, made in the presence of the mortgagee and the deputy clerk taking the acknowledgment, and when the acknowledgment was made in the presence of the husband.

2. Same—Collateral attack of clerk's certificate—Where the mortgagee was present when the acknowledgment was taken and saw and knew that the clerk made a mistake when he certified that the wife was examined separate and apart from her husband, and that she executed the mortgage voluntarily, parol evidence may be introduced by the wife in an action to enforce the mortgage to show said mistake.

F. A. Hopkins for appellants.

Jas. Goble and T. Y. Fitzpatrick for apellees.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Lewis.

The Aultman-Taylor Co. brought this action against William T. and Cyntha Frasure to recover on notes given to it by him for purchase price of a steam sawmill, and also to subject a tract of land on which they, March 1, 1884, executed a mortgage to secure the debt.

Judgment was rendered against him on the notes, and by sale of the mill one of them paid; but she, her husband refusing to join, filed a separate answer, alleging the mortgage was void because she signed and acknowledged it in presence of her husband and under coercion, against her will. She further states that the land was not, as recited in the mortgage, his property, but belonged to her; and plaintiff, her husband, and one Butcher had combined to defraud her out of it.

It appears that she acquired by gift of her mother and had allotted to her a certain tract of land, which was subsequently sold for about $1,250; and in 1877 she purchased of William Crisp the land in controversy at the price of $2,000, of which she, with proceeds of the other tract, and of personal property likewise derived from her mother, paid the sum of $1,600; but not being able to pay the residue, a part of the land, amounting in value to $400, was taken back by Crisp, and consequently no demand for balance of the $2,000 could legally or was ever after made by Crisp or his heirs or representatives, but she, with her husband, has, ever since the purchase, continued in actual possession of the land so paid for.

After the death of Crisp his vendor, Davidson, brought an action for about $589 unpaid purchase money, and under judgment his lien was enforced and the entire tract was sold July 9, 1883, for that sum, William T. Frasure becoming the purchaser; but he immediately instituted an action in his own name against heirs and representatives of Crisp, and obtained a judgment for sale of real property belonging to his estate to repay what had been bid by him at sale of the land in controversy to satisfy the debt of Davidson, and was thereby reimbursed except to the extent of about $104.25.

July 29, 1885, which was subsequent to sale of the Crisp land, William T. Frasure transferred his bid, and authorized commissioner's deed made to James Butcher for the entire tract, which was done. The consideration for that transfer, as recited in the contract between them, was payment already made by Butcher to Davidson of said $104.25, and to the Aultman-Taylor Co. $356.75 of the mill notes, and agreement to pay balance thereof, the entire consideration being $2,000.

Cyntha Frasure states in her answer, and we think truly, that

the purchase by her husband under judgment in the action of Davidson v. Crisp's heirs and representatives, of which she was not a party, subsequent institution of the action in his name and for the benefit against same defendants, and transfer, likewise for his own benefit, to Butcher were all done without her knowledge or consent.

No written evidence of her purchase of the land exists except an unsigned bond prepared by Crisp in February, 1877, and placed in the hands of an attorney at law, where it remained until this action was commenced. Although not actually signed, the paper seems to show her right to the land was then understood and recognized by both Crisp and her husband, for it contains a covenant to convey it to her; but independent of that evidence it is made clear she purchased and paid for that part of the tract now claimed by her, with the agreement by her husband it was to be her property, and has been in the adverse possession long enough to make her title good against Crisp's heirs; and we think it should also prevail against the deed made by the commissioner of court to Butcher, if the mortgage be as to her void upon either ground alleged in her answer, for although he denies any knowledge of her title at the time of his purchase from her husband, we are satisfied from all circumstances of this case he had sufficient notice to put him on inquiry.

As the mortgage was executed before Butcher purchased from William T. Frasure, he of course did not aid in procuring execution of it; but the evience shows satisfactorily that her husband attempted to cheat her out of the land, and procurement of the mortgage and his sale to Butcher were parts of his plan to do so.

That she executed the mortgage under coercion of her husband, aided by two of her sons and against her will, is made plain by the testimony; and we think it equally plain the agent of the Aultman-Taylor Co., who was present at the time, knew she did not freely sign and acknowledge it, and also knew she claimed the land as her own, for he was not only informed by Frasure, before arriving at her residence, she had not consented to execute it, but went there for the avowed purpose of seeing if she could not be induced to do so, as upon that depended the sale and delivery of the mill, the price of which had already been agreed on by him and Frasure.

After his arrival she said in his presence and that of her husband the deputy clerk need not be sent for, as she would not sign the mortgage; the land was hers and she did not intend to give it away. Nevertheless the deputy clerk was sent for, and not only did her husband threaten to leave and never again "strike a lick upon the farm" unless she signed and acknowledged the mortgage, but two of their sons made a similar threat. It further appears the agent of the company told her it was to her interest to sign it, and there is evidence the deputy clerk even persuaded her to do so. Being thus constrained and environed, finally, in language of a witness present, "she said she reckoned she would have to sign it, but it was awfully against her will," and the same witness and others testified "she was crying when she signed it, and kept on crying."

The mortgage, which had been previously written and is unusually long, verbose and tedious in detail, purports to convey not her fee simple title, although the agent was present and knew she claimed the land as her property, but merely her right of dower and homestead exemption, the evident intention being thus to ignore her right to the land, and estop her setting up claim to it. The evidence also shows that her husband, though getting from his seat, did not leave the room, but was present when the deputy clerk took her acknowledgment, if he did so legally.

The evidence thus conclusively showing that essential conditions of validity of the mortgage, as it affects Mrs. Frasure, were violated, the question arises, to what extent, if at all, it can be used to contradict the clerk's certificate.

Section 17, chapter 81, General Statutes, provides: "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer, in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question except upon the allegation of fraud on the part of the party benefited thereby or mistake on the part of the officer."

And in Pribble v. Hall, 13 Bush, 61, it was held that "the fraud which will under the statute let in an inquiry into the truth of the officer's certificate must relate to the obtaining of the certificate itself, not to the making of the instrument acknowledged."

But whether there was fraud in that sense on the part of the party benefited in this case we need not inquire because there was no allegation of the fact. It is, however, alleged the clerk committed a mistake in his certificate, and the evidence satisfactorily shows it not to be true, as he certifies either that Mrs. Frasure was examined separately and apart from her husband or that she voluntarily acknowledged the mortgage.

There may be reason for the rule, as settled by this court, that "when a certificate is regular on its face and has been recorded, it should not be open to assault by parol evidence" so as to affect innocent purchasers (Harpending v. Wiley, 14 Bush. 280); but when, as in this case, the mortgagee, by its agent, was present when the acknowledgment was taken, and knew the clerk made a mistake about essential facts he was required to certify, we do not see why the truth may not be shown by parol evidence, for if a certificate can not be called in question by reason of mistake on part of the clerk, committed in the presence of a vendee or mortgagee, there is no state of case in which it can be done, and the exception contained does not apply or operate at all; but whether the certificate of acknowledgment in question be valid and regular or not, the mortgage having, as the evidence shows, been obtained by fraud of the husband, in which the agent of the company participated, also by coercion, is void as to Mrs. Frasure, for, as said in Pribble v. Hall, if there was fraud in obtaining the deed no sort of acknowledgment could purge it away, and it would be equally invalid if the execution of it was procured by coercion.

By the judgment appealed from appellant, James Butcher, though the mortgage was set aside, was given a lien on the land for $104.23, the amount paid in satisfation of the Davidson debt. This, we think, was proper, inasmuch as the land was bound for that debte; but the lower court left open the question of enforcing a lien on the land for $356.75, paid by Butcher to the Aultman-Talyor Co. on the mill debt, and it is consequently not before this court for decision.

Judgment affirmed.

KNOXVILLE, CUMBERLAND GAP, &c. R. R. CO. v. MASON, HOGE & CO.

(Filed April 5 1894.)

1. Liens on railways for materials furnished—Pleadings—Even if the petition to enforce a subcontractor's lien for labor performed and materials furnished in the construction of a railroad was not sufficiently definite in its

allegations concerning the acceptance of the work or the taking of a final estimate by the engineer, this was a defect to be taken advantage of by special demurrer only, and where a general demurrer to the petition was filed and never acted upon by the trial court, and an answer was filed and issue joined and proof taken of the matters imperfectly alleged, this court will not on appeal hold that the petition stated no cause of action, the evidence showing that the contract of construction was fully complied with by the subcontractors, and that the railway has been accepted and is now being operated.

2. Same—Constitutional law—A contractor agreed for a fixed compensation to buy a right of way and sites for depot, etc., and to construct and equip a railroad and deliver the same to a railway company. Appellee, as subcontractor, agreed with the contractor to build a part of said road. After the making of these contracts, but before any part of the construction had been commenced, an act was passed by the legislature giving a lien on railroad to contractors and subcontractors furnishing materials or performing labor upon construction. Held—The subcontractors can claim a lien under this act upon the road constructed by them. While the legislature can not provide that a lien on land shall exist to secure the payment of pre existing contracts, because such enactment would make a new contract for the parties, yet in this case the property to which the lien was to attach did not exist at the time of the legislative enactment; it was brought into being by the subcontractors, and under the statute they are entitled to their lien.

E. F. Trabue, Pirtle, Speed & Trabue and James A. Chapman for appellant.

Wm. Lindsay and W. J. Hendrick for appellees.

Apppeal from Bell Court of Common Pleas.

Opinion of the court by Judge Pryor.

By an act of the legislature that became a law on the 12th of March in the year 1888 it was provided that all persons who perform labor or who furnish labor, materials or teams for the construction or improvement of any canal, railroad, turnpike or other improvement in this Commonwealth, by contract, express or implied, with the owner or owners thereof or by subcontract thereunder shall have a lien thereon and upon all the property and franchises of the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon, and upon all the property and franchises of the owner or owners thereof for the full contract price of said labor, material and teams so furnished or performed, which said lien shall be prior and superior to all other liens theretofore or thereafter created thereon.

By the 5th section its provisions are made to apply "to canals, railroads, turnpikes and other public improvements now in course of construction, in so far as they do not impair obligations heretofore created, etc.

The appellees in this case entered into a contract on the 18th of January of the year 1888 with the Cumberland Gap Construction Company to construct a portion of the Powells Valley Railroad, extending from Cumberland Gap to Powells river. This contract was entered into nearly two months prior to the passage of the statute under which liens were created on such improvements for the benefit of those whose labor and materials were used and expended in constructing them.

The appellees being subcontractors from the Cumberland Gap Construction Company, it is necessary to notice the contract made by that company for the construction of this railroad. That contract was made in August of the year 1887, and by its terms the construction company was to conduct and equip the entire

line of road, pay for the rights of way and depot grounds, and also obligated itself to pay the current expenses of the railway company during the time of construction. In consideration of this undertaking by the construction company the railroad company agreed to execute to the Central Trust Company of New York $1,700,000 of first mortgage bonds on its road, and also second mortgage bonds to the amount of $500,000, and to pay the construction company in installments as the work progressed by the delivery of the stocks and bonds, and also to give to the construction company, in part payment, $23,000 per mile of fully paid-up shares of stock.

The appellees, as subcontractors, completed their work and asserted a lien for their money by the present action in equity, claiming an indebtedness of about $47,000. The principal if not all the work for which this compensation is asked under their contract is for the construction of a tunnel under Cumberland mountain in this State. The lien is claimed by reason of the statute referred to, and from the record it appears that all the steps were taken by the appellees necessary to preserve their lien. The Powells Valley Railway Company, the Cumberland Gap Construction Company, the Central Trust Company of New York and the Louisville & Nashville Railroad Company were made defendants to the action, and all are nonresident corporations except the Louisville & Nashville Railroad Company.

The railway company was chartered by the Tennessee legislature, the construction company by the State of New Jersey and the central trust company is a New York corporation.

The Louisville & Nashville Railroad Company, a Kentucky corporation, after the railway had been completed, or at least that part of the work undertaken by the appellees, leased it from the appellant, but this corporation is no longer interested in the litigation, as the appellees disclaimed, in the court below, to interfere with the lease, but to hold their claim subordinate to that of the lessee.

The Cumberland Gap Construction Company, being a nonresident, was proceeded against by warning order, and although the real debtor is not an appellant in this court, nor was there a judgment against it, the Powells Valley Railway Company was proceded against by warning order only, the return by the officer as to a personal service having been quashed upon motion of the railway company, its appearance having been entered for that purpose alone.

The Central Trust Company, the holder of the bonds in trust for the contracting parties, the Cumberland Gap Construction Company and the railroad company, entered its appearance and is contesting the claim of the plaintiffs, denying also their right to any lien, and setting up its mortgages made for the purpose already stated.

There was a demurrer to the petition in the court below that seems never to have been disposed of, and it is insisted by counsel for the appellants that the petition is defective, as it fails to allege the work was received by the engineer, or completed to his satisfaction, as was agreed on by the express terms of the contract between the railway corporation and the construction company.

It is claimed that no final estimate was ever made by the engineer, and that the last monthly estimate can not be considered as a final estimate within the meaning of the contract. It is alleged in the petition that they (plaintiffs) "completed the entire work in the month of February, 1890, and the engineer fully estimated all the work done and performed up to that time."

It appears from the testimony that the work was completed in accordance with the contract, and from the pleadings and proof

that the company has accepted it and placed it in the possession of the Louisville & Nashville Railroad Company under a written lease, and the court must assume, under the issue made by the answer of the trust company, that the contract has been complied with. The petition, if defective, was only so to the extent that a special demurrer to make the averment as to performance and acceptance more specific, but in the absence of any action on the part of the court below as to the demurrer, whether general or special, and an issue made by the trust company that has been fully met by the proof, it is not necessary to notice further the objection made in this court to the petition. It presents a cause of action that is sustained by the testimony. There can be no doubt but that the appellees have a valid claim against the Cumberland Gap Construction Company for its work under their contract, and to the extent claimed.

The question involved in this case, and one of difficult solution, arises from the statute under which this lien is asserted. The statute was not in existence when the contract between the appellees and the construction company was entered into, nor when the original contract for construction was entered into, and it is for that reason claimed no lien exists, and that the effect of its application to pre-existing contracts is to enlarge the rights of the laborer or contractor.

Cases of high authority and entitled to great weight have been cited by counsel for the appellants, to the effect that liens can only be created on one's land by his consent or authority, and that to add to a contract by statute the right to a lien, when none existed when the contract was entered into, is giving a right to the one party or the other as valuable as the right of property itself, and creates a liability not agreed upon or contemplated by the parties to the contract.

The cases of Packer v. Mass. R. R. Co., 115 Mass., 580; Donally v. Clapp, 12 Cushing, 440; Meyer v. Bectindy, 18 Am. State Reports, ——, and other cases, sustain this doctrine. Nor are we disposed to question the principle contended for by counsel, but can not recognize its application to the facts of this case.

This is really a controversy between the original construction company and the appellees, and the latter, having constructed the work, is certainly entitled to compensation, to be measured by the terms of the contract between them.

There is no pretense that this work has been paid for, and while the trust company alleges in its answer that the bonds were issued and delivered to the Cumberland Gap Construction Company as the road progressed, it is at the same time insisting that the work for which this recovery is sought was never received by the engineer of the railway company, and that no cause of action ever existed.

This defense is made by a mere naked trustee, who has no pecuniary interest in the controversy, and neither the construction company nor the railway company has made any defense, although the railway company was not only cognizant of the litigation, but actually appeared in the case for the purpose of having the return of the service upon it quashed.

What has become of these bonds is not made to appear, and it is remarkable that the party really interested in this litigation, viz., the railway company, and that is to be more seriously affected by its results than any other party to the controversy if the original construction company has been paid for this work, made no defense.

While the contract for the construction of this road was entered into prior to the enactment under which this lien is sought to be enforced, the work was not executed or the materials furnished.

The thing sought to be subjected was not in existence, and no right of property could have been invaded by its enactment in so far as it affected these parties.

Whether or not this right of property could ever be asserted depended upon the labor of these construction companies and their compliance with their contract. The appellant, the railway company or its trustee, did not even own the right of way, the whole structure belonging to the construction company until completed and turned over to the railway company.

The appellees had not been paid for their labor, and had the right to cease work at any time when the railway company failed to comply with their part of the agreement. This they did not do because the statute then in force, and enacted when the appellant was not the owner of this road, or at least not entitled to its use or possession, gave them a lien for their labor, which, when performed, made that property which before had no existence.

These various corporations had the power, by virtue of their respective charters, to enter into these contracts, and the railway company to issue its bonds, and it might well be argued, if the position assumed by counsel for the appellants is correct, that in the absence of any contract for the construction of this road at the time the statute creating the lien was enacted the legislature had no power to enact it because it would give to the party constructing a lien superior to the bonds that, by the charter, the company was authorized to issue. The issual of these bonds was authorized to enable the corporation to construct its road, and to hold that a statute giving the lien was an impairment of the charter contract, or any other contract made for the construction of the road, whose bonds had been issued for its construction, and that the bonds were superior liens, would be to defeat the very purpose of the charter, and prohibit in effect the State from passing any law for the protection of those who undertake the construction of such improvements.

It is argued that bonds were to be received by the original construction company, and that by the judgment giving this lien the road is sold for money, by reason of a contract with these appellees to which the railway company was not a party, and for that reason the statute has added to the obligation of the original contract. The same argument might be urged where the statute existed prior to the making of the contract, and we think has no force in such a case as this.

This mortgage was executed after the lien was created by this statute, and the trust company knew, or will be presumed to have known, when the mortgage was executed and accepted that such was the general law of the State, and its equitable claim for priority should meet with little favor from the chancellor as against the higher and better equity of the appellees.

This court will not assume that the railroad company has complied with its contract or hasten to decide an act unconstitutional where the rights of the parties could not have been affected by its enactment, and although no equitable lien arises independently of the statute, it would be a perversion of justice, looking to the defense made, to give preference to these bonds in the hands of either the trust company or railway company over the claim of these appellees.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. COPAS.

(Filed April 12, 1894.)

1. Railroads—Injury to brakeman—Gross neglect—The evidence shows that the appellee was injured by reason of the gross neglect of those whose duty it was to load the cars properly, and that he could not, by the utmost diligence, have avoided the injury, therefore, the motion by defendant for a peremptory instruction was properly overruled.

2. Pleadings—Failure to reply to plea of contributory neglect—Although plaintiff failed to file a reply to defendant's plea of contributory neglect, and defendant was entitled to a judgment on the pleadings, yet the trial proceeded, and a motion for a peremptory instruction and also for a new trial was made by defendant without the attention of the court being called to the condition of the pleadings. Held—

First. The motion for a peremptory instruction was merely a demurrer to the evidence, and did not raise the question of the failure to reply.

Second. The motion for a new trial by defendant not having raised the question of plaintiff's failure to reply, and the attention of the trial court not having been called to the matter, this court must treat defendant as having waived the right to a reply.

James A. Mitchell for appellant.

Edward W. Hines and B. F. Proctor for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

We see no reason for reversing this case for the alleged error in refusing to grant the peremptory instruction.

The plaintiff had made out his case. In the discharge of his duty he had been seriously injured by reason of the gross neglect of those whose duty it was to load the cars properly, and could not, by the exercise of the utmost diligence, have avoided the injury inflicted by the projecting rails in the attempt to couple the cars.

The instructions made the company liable in the event the injury was the result of gross negligence on the part of the employes of the road, and the only question necessary to be considered arises from the failure of the plaintiff (appellee) to reply to the plea of contributory neglect.

The plaintiff in his petition had, by direct averment, negatived any negligence on his part, still it was incumbent on the defense to rely by plea on such contributory neglect on the part of the plaintiff as brought about the injury, and but for which the accident would not have happened.

Here was affirmative matter that required a reply, and the defendant was entitled to a judgment on the pleadings.

Was its right to such a judgment waived by failing to make a motion for such a judgment? It is not pretended that any reply as filed or offered to be filed, and even upon the motion for a peremptory instruction, the court would have been compelled to sustain the motion if apprised of the condition of the pleadings, but the court was not required to examine the pleadings for that purpose unless some motion was made for a judgment on that ground.

A motion for a nonsuit is a demurrer to the evidence only, and where the bill of exceptions fails to show a motion for a judgment on the pleadings, or that the court's attention was called to the failure to reply to the answer as one of the grounds for the

motion, this court must necessarily assume that the motion for a nonsuit applied alone to the evidence.

The court below had no opportunity of passing on the question so as to determine the necessity for a reply, but on the contrary instructions were asked by defendant and given as if the issue on the plea had been fully made up, and after verdict the motion for a new trial was based only on the usual grounds, and at no time was it claimed that the pleadings were so defective as to authorize a judgment for the defendant, the evidence sustaining the charge of negligence made by the plaintiff.

We can determine what took place below during the progress of the trial only from the record, and, therefore, can not assume that a demurrer to the evidence brought up the question as to the sufficiency of the pleadings. The case was tried as if the issue was made, and the right to a reply by the plaintiff to the answer waived.

Judgment affirmed.

BANKSTON, &c. v. CRABTREE COAL MINING CO.

(Filed April 12, 1894.)

1. A conveyance by a husband alone of land belonging to his wife does not pass any title whatever to the vendee, and the entry of such vendee, claiming under such deed, is hostile to the title of the wife.

2. A conveyance by a husband in which the wife is not named except in the attesting clause, which is as follows: "In testimony whereof, the said R., together with H., his wife, who hereby relinquishes all right to dower in and to the land conveyed in this deed, * * * have hereunto subscribed," etc., which conveyance purports to convey land belonging to the wife, must be regarded as the deed of the husband only.

3. Same—Limitation. Where a vendee claiming a wife's land under a deed made in 1871 entered and took possession at once and has held and claimed ever since, and the wife became discovert in 1883 and thereafter married again, and in 1891 instituted an action with her second husband to recover such land, Held—The wife's right of action has been barred long since by limitation.

T. G. Poore, Thos. H. Hines, Sol. F. Clark and Jas. R. Hewlett for appellants.

C. J. Waddill, Waddill & Pratt and Edward W. Hines for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hazelrigg.

On April 13, 1871, James H. Roden conveyed the land in controversy in this case to Geo. W. Woodruff, who took immediate possession, and under whom the appellee now asserts title.

The wife of Roden, however, was the real owner of the land, and was in fact paid the purchase money. She did not join in the deed, save that in the attesting clause we find this language: "In testimony whereof, the said Jas. H. Roden, together with Helen C. Roden, his wife, who hereby relinquishes all right to dower in and to the land conveyed in this deed, have hereunto subscribed," etc. She signed and acknowledged the deed with her husband.

In 1883 James H. Roden died. His wife subsequently married Bankston, and in July, 1891, Bankston and his wife instituted their action in ejectment for the land in question. The court

below dismissed their petition upon the ground, we presume, that their cause of action was barred by limitation; and whether it was or not is the sole question necessary to be determined on this appeal.

Section 1 of article 1, chapter 71, General Statutes, provides that "an action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff or to the person through whom he claims."

Section 2 of the same article provides that "if at the time the right of any person to bring an action for the recovery of real property first accrued such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

It is evident that the entry of Woodruff was hostile to the title of the female appellant and his holding adverse to her; but for her disability she could have asserted her cause of action immediately upon his entry. This is true because she did not join in the grant, and as to her the deed of her husband was of no effect. That deed did not convey any right to the vendee. Since the statute of 1846 the husband has had no vendible interest in his wife's lands, and as the deed of 1871 must be regarded as his deed alone, the wife's right of action accrued at once.

In Johnson, &c. v. Sweat, &c., it is said: "Prior to the adoption of that statute (1846) it had been held that the husband could sell and convey the land of the wife so as to be operative during the life of the husband, and consequently that in such case the wife's right of action did not accrue until the death of the husband. (Miller v. Shackelford, 3 Dana, 292; Butler, &c. v. Millan, &c., 88 Ky. 417.)

But although her cause of action accrued in April, 1871, yet she was under the disability of coverture, and perhaps of infancy, and, therefore, she may institute her action in spite of the lapse of fifteen years, provided she does so within three years after the time when her disability is removed. This removal was in 1883, and however we may compute the time, whether we give her fifteen years after 1871 and then three years thereafter, or limit her to fifteen years, as in other cases, provided her disability was removed as much as three years before the end of the fifteen years, as would seem to be the correct method of computation, is immaterial. Her right of action is barred in either event.

Suppose, however, that we regard the conveyance as one in which the wife joined with her husband, within the meaning of section 6 of the article and chapter referred to. That section provides that "if a woman, after she arrives at the age of twenty-one years, join with her husband in the conveyance of her lands or chattels real, and acknowledge the conveyance before an officer authorized to take her acknowledgment of the conveyance, no action shall be brought by her for the recovery of the lands or chattles real mentioned in such conveyance unless the action is commenced by her within three years after she becomes discovert."

If the judgment below in bar of the appellants' rights was based on the limitation provided in this section, it was because the court found, as a matter of fact, that the wife had reached her majority when she executed the deed of April, 1871, and we think the evidence is abundant to support this finding. We have her statement in June, 1891, before she began asserting this claim, that she was then forty-two years old. We have also the positive recollection of her relatives and of the neighbors, who fix the date by other circumstances which were impressed on their

minds beyond doubt that she was born December 25, 1849. Upon the removal of her disability, therefore, in 1883, she had three years only within which to have instituted her suit.

In any view of the case, therefore, the wife's cause of action was barred by limitation, and the judgment is affirmed.

MILLION v. COMMONWEALTH.

(Filed April 5, 1894—Not to be reported.)

1. Indictments—On the separate trial of appellant under an indictment jointly against himself, his father and his brotner, the evidence for both the Commonwealth and the defendant shows that only one shot was fired on the occasion of the homicide, and that one by appellant, therefore, he was not prejudiced by the alleged defect in the indictment, in that it alleged that each, the appellant, his father and his brother, shot and killed the deceased.

2. Same—Dying declaration—The written statement of the deceased was properly admitted as a dying declaration, although at the time it was originally written the deceased made no statement concerning his own condition, it appearing that subsequently, and at time when he believed he was going to die, the statement was reread to him and reaffirmed by him.

Thompson, Wilson & Taylor and Ben Lee Hardin for appellant.

W. J. Hendrick for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was indicted jointly with his father and brother for the murder of A. H. Sims, each being charged directly with the crime. Upon his separate trial it was shown by the State, indeed by the appellant himself, that there was but a single shot fired on the occasion of the homicide, and that was by the appellant. He was, therefore, not prejudiced by the supposed defect in the indictment, in that it charged that each shot and killed the deceased with a pistol. Confessedly he alone shot and killed Sims, and for that alone was he tried. He was in no danger when he fired the fatal shot, but his defense is that he shot to save the life of his brother, who was engaged in a quarrel with Sims, and the jury were properly instructed on that subject. The proof does not tend to show that his father was about to be injured, and the court committed no error in not instructing the jury in this behalf.

It is contended that it was error to permit the alleged "dying declaration" of Sims to go to the jury.

The proof is that when the declaration was reduced to writing nothing was said of his condition by Sims, but afterwards, and a few days before his death, when the paper was reread to him, he said he believed he was going to die; that his doctor had told him he could not live, and that he did not think he would last but a few days; that "it was his dying declaration that he was growing weaker every day, and that he believed he was going to die."

It seems to us that the deceased made the statement, or what is the same thing reaffirmed it, when under a sense of impending death. The contents of the paper "related to the cause of death," and the facts stated as occurring immediately after the shooting formed a part of the transaction.

We perceive no error in the record to the prejudice of the appellant, and the judgment is, therefore, affirmed.

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below dismissed their petition upon the ground, we presume, that their cause of action was barred by limitation; and whether it was or not is the sole question necessary to be determined on this appeal.

Section 1 of article 1, chapter 71, General Statutes, provides that "an action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued to the plaintiff or to the person through whom he claims."

Section 2 of the same article provides that "if at the time the right of any person to bring an action for the recovery of real property first accrued such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed."

It is evident that the entry of Woodruff was hostile to the title of the female appellant and his holding adverse to her; but for her disability she could have asserted her cause of action immediately upon his entry. This is true because she did not join in the grant, and as to her the deed of her husband was of no effect. That deed did not convey any right to the vendee. Since the statute of 1846 the husband has had no vendible interest in his wife's lands, and as the deed of 1871 must be regarded as his deed alone, the wife's right of action accrued at once.

In Johnson, &c. v. Sweat. &c., it is said: "Prior to the adoption of that statute (1846) it had been held that the husband could sell and convey the land of the wife so as to be operative during the life of the husband, and consequently that in such case the wife's right of action did not accrue until the death of the husband. (Miller v. Shackelford, 3 Dana, 292; Butler, &c. v. Millan, &c., 88 Ky. 417.)

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If the judgment below in bar of the appellants' rights was based on the limitation provided in this section, it was because the court found, as a matter of fact, that the wife had reached her majority when she executed the deed of April, 1871, and we think the evidence is abundant to support this finding. We have her statement in June, 1891, before she began asserting this claim, that she was then forty-two years old. We have also the positive recollection of her relatives and of the neighbors, who fix the date by other circumstances which were impressed on their

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Thompson, Wilson & Taylor and Ben Lee Hardin for appellant.

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Opinion of the court by Judge Hazelrigg.

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(Filed April 5, 1894—Not to be reported.)

1. Indictments—On the separate trial of appellant under an indictment jointly against himself, his father and his brotner, the evidence for both the Commonwealth and the defendant shows that only one shot was fired on the occasion of the homicide, and that one by appellant, therefore, he was not prejudiced by the alleged defect in the indictment, in that it alleged that each, the appellant, his father and his brother, shot and killed the deceased.

2. Same—Dying declaration—The written statement of the deceased was properly admitted as a dying declaration, although at the time it was originally written the deceased made no statement concerning his own condition, it appearing that subsequently, and at time when he believed he was going to die, the statement was reread to him and reaffirmed by him.

Thompson, Wilson & Taylor and Ben Lee Hardin for appellant.

W. J. Hendrick for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was indicted jointly with his father and brother for the murder of A. H. Sims, each being charged directly with the crime. Upon his separate trial it was shown by the State, indeed by the appellant himself, that there was but a single shot fired on the occasion of the homicide, and that was by the appellant. He was, therefore, not prejudiced by the supposed defect in the indictment, in that it charged that each shot and killed the deceased with a pistol. Confessedly he alone shot and killed Sims, and for that alone was he tried. He was in no danger when he fired the fatal shot, but his defense is that he shot to save the life of his brother, who was engaged in a quarrel with Sims, and the jury were properly instructed on that subject. The proof does not tend to show that his father was about to be injured, and the court committed no error in not instructing the jury in this behalf.

It is contended that it was error to permit the alleged "dying declaration" of Sims to go to the jury.

The proof is that when the declaration was reduced to writing nothing was said of his condition by Sims, but afterwards, and a few days before his death, when the paper was reread to him, he said he believed he was going to die; that his doctor had told him he could not live, and that he did not think he would last but a few days; that "it was his dying declaration that he was growing weaker every day, and that he believed he was going to die."

It seems to us that the deceased made the statement, or what is the same thing reaffirmed it, when under a sense of impending death. The contents of the paper "related to the cause of death," and the facts stated as occurring immediately after the shooting formed a part of the transaction.

We perceive no error in the record to the prejudice of the appellant, and the judgment is, therefore, affirmed.

McBRAYER v. McBRAYER'S EX'TX.

(Filed April 26, 1894.)

1. Construction of devise—Trade-mark—W. H. McBrayer owned and operated for many years a very valuable distillery, and his trade-mark, viz., "W. H. McBrayer, Cedar Brook Distillery," was of great value, being worth at least $200,000. By his will the distillery was devised to his grandchildren. In the ninth clause of his will the testator directed that his executors should operate his distillery for three years after his death, and then the will provides "after which time I desire that my name be entirely stricken from the business." Held—By the clause quoted the testator intended only that the business of operating the distillery should not be conducted in his name for longer than three years; he did not intend to destroy his trade-mark by forbidding the use of his name as a part of it, and the trade-mark under his will passed to his grandchildren.

2. The intent of the testator being manifest from his will, parol evidence of what he said before and after the making of the will is not admissible to show that his intent was different from that set out in the will itself.

3. Same—Where the will appoints testator's widow and son-in-law executors, a clause in it directing that in case of disagreement between the executors as to the best method of settling up, managing and disposing of the estate, the view held by the widow should be adopted, will not authorize a construction given the will by the widow, to be followed so as to change the intent of the testator as expressed in the will.

Humphrey & Davie and L. W. McKee for appellant.

D. W. Lindsey and Wm. Lindsay for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted in the court below for a construction of the 9th clause of the will of Judge W. H. McBrayer, of Anderson county, who died on the 6th of December, in the year 1888.

He left surviving him his widow, who is the plaintiff in the action, and the appellee in this court. She qualified as executrix, and also his son-in-law, D. L. Moore, qualified as executor.

The testator had but one child, a daughter, who died before the testator, leaving three children—Mary, Wallace and Wm. Moore—and these children, by the provisions of the will, are made the principal objects of his bounty. Their father was D. L. Moore, who was left as executor to manage the estate in conjunction with the widow of the testator.

He made a liberal provision for his wife, and also bequests of much value to his son-in-law and to his collateral kindred.

At the time of his death, and for many years prior thereto, he manufactured and sold whisky at his distillery in the county of Anderson. Its product was much used, and the trade-mark on the barrels so extensively known as to give the use of the trade-mark itself a value of not less than $25,000 a year. The trade-mark was "W. H. McBrayer, Cedar Brook Distillery," and of the value, as conceded by the pleadings, of a sum exceeding $200,000. The testator's property, when the specific devises were paid, consisted almost entirely of this noted distillery, and this, by the residuary clause of the will, passed to his infant grandchildren.

He had made a contract sometime before his death with Lucy & Brother, of Cincinnati, by which he sold them all the whisky distilled and to be distilled at the "Cedar Brook Distillery" be-

tween December 1, 1886, and December 1, 1891. This contract had to be complied with, and not only so, it was evident the distillery had to be operated in order to raise the money to satisfy the specific devises made to his kindred other than those who were his direct descendants. The distillery was operated under his own supervision for more than a year after the will was written, and by its provisions it was to be operated by his executor for three years from the time of his death.

He was a man of large business experience, and knew the necessity of having the distillery carried on by his executor until from its products the executor could discharge the burden upon his estate imposed by the provisions of his will.

With this in view we find the 9th clause of the will, now the subject of construction, to read as follows: "It is my will that my Cedar Brook Distillery shall be operated by my executors for three years after my death in order to carry out the bequests of this will, after which time I desire that my name be entirely stricken from the business, and my executors are hereby invested with all the rights, title and interest in said property necessary to the operating of the same, so that no trouble will or may be had with the government of the United States by reason of my said executors operating said distillery after my death."

By the 13th clause it is provided that "if at any time my executors shall disagree as to the best method of settling up, managing and disposing of my estate, the view held by my said wife shall in all cases be adopted, it being my desire to give her prominence and priority in everything that pertains to my estate."

It is claimed by the widow, and such was the ruling of the chancellor below, that by the provisions of the 9th clause of the will the trade-mark or brand attached to the product of the distillery, viz., "W. H. McBrayer, Cedar Brook Distillery," could no longer be used by his grandchildren in the manufacture or sale of the whisky at said distillery or elsewhere because of the provision in the 9th clause of the will of the testator by which the distillery is to be operated for three years by his executors after his death to carry out the bequests of the will, "after which I desire that my name be entirely stricken from the business."

It is insisted, from the language used, the purpose of the testator was that the name of W. H. McBrayer should no longer be connected with the distillery, and the trade-mark that gave the product of the distillery and the devise its chief value was thereby destroyed. In other words, the true meaning of this 9th clause is that after the expiration of the three years from the death of the testator his name was not to appear as a part of the brand or trade-mark, and to be in no manner connected with the business.

On the other hand it is contended for the appellants the testator's meaning was that after the expiration of the three years (the time in which the distillery was to be operated by his executors) his estate or his executors should no longer conduct the busine by using his name so as to make his estate liable, etc.

It is again argued that the name "W. H. McBrayer, Cedar Brook Distillery" is a valuable property right, which neither the executors nor the testator himself could destroy, and for that reason it passed to the devisees.

It is not necessary, in view of the conclusion reached, to determine the right of the devisor to prohibit the use of the trademark or that of his name in the manufacture of whisky by those to whom he devised the distillery, and while we perceive noth-

ing illegal or inconsistent with public policy in such a prohibition, although made a condition upon which the devise is to take effect, it is not required that this question should be further considered.

The testator could have had no conscientious motives prompting him to restrict the devise. He had been a distiller for many years, and had, without doubt, devised to these grandchildren the distillery property, that it might be used and operated for the purpose of making whisky, and if regarded by him as an evil he would not knowingly have vested them with the title to property which, when applied to its proper use, would have produced that which the testator was not willing to have his name associated with in any form. He was a man of intelligence and of much experience in the business affairs of life, and in the construction of his will we must look to the language used and the circumstances surrounding him as gathered from the writing itself in order to determine his intent and purpose when using the language found in the 9th clause of that instrument. He knew that to give to his executors as such the unlimited power as to time in which to operate the distillery might involve his estate largely in debt, and looking to the liabilities or the burdens he had placed upon the estate by the various bequests made, and knowing the capacity of his distillery, supposed that in three years from his death, with proper management by his executors, in whom he seems to have had the greatest confidence, the distillery would relieve his estate of the burdens upon it, and after that period he did not desire the business to be continued in his name by his executors, as it might result in financial disaster instead of a benefit to those interested.

His reputation or that of his distillery for making good whisky had been established, and the trade-mark placed upon the barrels. The product of the whisky made from the distillery after his death, although of an inferior quality, could not have affected the whisky or its reputation made and sold by the testator in his lifetime, and, therefore, it was not to save the reputation of his distillery or the whisky, as was argued by counsel, that this prohibition of the use of his name was inserted.

What the testator may have said after or before the making of his will can not be looked to in its construction. In a case like this the will must speak for itself, and no intent inconsistent with the language used, or in conflict with a rational construction of the will, should be adopted.

It required a large expenditure of means to keep the distillery in successful operation; many risks had to be assumed by his executors during the period they were required to make whisky. There was no direction, by implication or otherwise, by which the executors were required to convert the distillery into another and different manufactory, or any devise to the effect that the trade-mark or brand should never be used by his grandchildren or thier vendees.

What did the testator, then, mean when saying that after the expiration of the three years "I desire that my name be actually stricken from the business?" What business? The business of making whisky by my executors. His wish was that no greater risks should be assumed by his estate or liabilities incurred for which his estate would be responsible after that time.

Conceding, however, for the purposes of this case and in the discussion of the question involved, that there is an ambiguous meaning in the language used; that it is susceptible of two constructions, one of which will destroy, to a great extent, the value of the property, and another leaving it in the condition it is found at the expiration of the three years, relieved of all the bur-

dens placed upon it by the testator, it will be seen at once the chancellor will adopt that construction most favorable to the appellants, when it can work no injury to the dead, and is entirely consistent with the intention of the testator, gathered from his own language when making the devise.

A man of the intelligence and business capacity possessed by the testator, if he had desired to stop the making of whisky in this distillery, would have said so; but, on the contrary, he devises it to his descendants for the very purpose for which he had used it for so many years, and if his wish was to destroy his trade-mark, so as to lessen the value of what he had devised, or to sustain his reputation for making good whisky, he would have said so in express terms and by language that could have no dubious meaning.

He could have had no such religious or conscientious scruples as would have induced him to say that his name should no longer be connected in any manner with the distillery because he had placed that which produced the evil in the hands of infants, innocent of wrong, but for the very purpose of producing that out of which his entire fortune had been made.

He was doubtless an honest, conscientious man, as counsel maintain; and, if so, he would not have enabled, by his last will, his grandchildren to engage in a business that he had abandoned by reason of the evil resulting from it. It is plain to us that when the testator wanted his name entirely stricken from the business, his meaning was the business of making whisky in his name by his executors for his estate, and that the value of the trade-mark or the right of property in it devised to his grandchildren was not the subject of consideration by him when making the devise.

With this construction the personal and business integrity of the testator is made manifest, and carries into execution an intent that comports with the character of the man, the language of the will, and sustained by every rational view of the question presented.

The 13th clause of the will, authorizing and requiring the views of his wife to be adopted as to the method of managing, settling up and disposing of the estate when the executors differed, will not authorize a construction of the will as given by the widow to be followed so as to destroy the devise or change the intent of the testator.

The judgment of the chancellor below is reversed and the case remanded, with directions to enter a judgment to the effect that the brand or trade-mark ("W. H. McBrayer, Cedar Brook Distillery") passed under the devise to the grandchildren of the testator, and is their property.

CALDWELL, &c. v. JACOB, &c.

(Filed April 27, 1893.)

1. A life tenant will not be permitted to charge money expended by him in improving the estate for the purpose of increasing the income therefrom to the remaindermen or against the corpus of the estate.

2. Same—Case—An estate was devised to an infant for life, remainder to his descendants. The guardian of the infant, by direction of the chancellor in a suit in equity, expended the infant life tenant's absolute estate in improvements upon the estate held by him for life so as to increase the income therefrom. After the infant became of age he brought suit to have so much of the estate devised to him for life set apart to him as a fee simple estate as

would reimburse him for the expenditures put upon such estate by his guardian. Held—A life tenant will not be permitted to improve the estate and charge the improvements to the remaindermen or as a lien upon the estate. But where the chancellor, as in this case, erroneously takes an infant life tenant's means and expends it upon improvements of the estate held for life, and all the parties in interest are now before the court, and the life tenant's money or its value can be restored to him, and at the same time the estate originally devised to the remaindermen or its value, with its natural increase, can be preserved for the remaindermen, a court of equity should make such orders as will protect the rights of all parties and preserve for each his own estate.

E. F. Trabue and Wilson & Thum for appellants.

Simrall & Bodley for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Bennett.

By the will of John I. Jacob his son, Charles D. Jacob, was given some real estate in the city of Louisville in fee simple, and some in trust for him during his life, and then to be conveyed to such of his descendants as were living.

It seems that the trust estate was unproductive, and in order to make it more productive and to yield to Charles D. Jacob, who was then an infant, a large income, his guardian instituted suit in the chancery court of Louisville, the purpose of which was to obtain a decree authorizing the sale of a portion of Charles D. Jacob's fee simple estate, and to invest the proceeds in improving the trust estate so as to increase its productiveness. The decree was rendered, the property sold and the proceeds invested in improving the trust estate, which made it more productive and yielding greater income to Charles D. Jacob.

Sometime after he reached his majority he instituted suit in equity against the parties interested except the appellants, Mrs. Caldwell and Miss Lucy D. Jacob, who were infant children of Charles D. Jacob, and who were not made parties to the suit, seeking to relieve such portion of the trust estate that was improved by the proceeds of the fee simple estate as was supposed to be equivalent in value to whole amount thus invested from the trust, and to invest Charles D. Jacob with the fee simple title to the same. Charles D. Jacob obtained judgment according to the prayer indicated. Thereafter he sold a part of the property thus relieved of the trust to the appellee, Davis, and he thereafter instituted this action against the appellants, etc., to quiet his title against their claim of a remainder interest in said property. The court quieted his title, and the appellants have appealed.

It seems that I. R. Jacob, an adult brother of Charles D. Jacob, sold some of his fee simple estate that he held under his father's will in the same way that Charles D. Jacob held his. He thereafter obtained the judgment of the court relieving a portion of the improved trust estate from the trust and investing the fee simple title in him. Thereafter one of the contingent remaindermen, who was not a party to the suit, asserted her right to her part of the estate, and this court, in Johnson v. Jacobs, &c., 11 Bush, 646, held that her interest as contingent remainderman was not affected by the judgment in the case, and reversed the case as to her, with directions to allow an issue to be made up as to the question of improvement. Upon the return of the case issue was.

made according to the direction of this court, and then judgment was rendered in the lower court, and the case was again appealed to this court. In that appeal this court held that a life tenant could not "lay out money in building on the land and charge it on the estate in remainder or make it a personal charge against the remainderman."

The court cites numerous authorities. (See MS. opinion sustaining the rule.) There are two important reasons for this rule: First, to prevent the life tenant from consuming the interest of the remainderman by making improvements that the remainderman could not pay or that he did not desire; second, the improvements are made for the immediate benefit of the life tenant, and he usually makes them without reference to the wishes of the remainderman. But the appellees' contention is that I. R. Jacob was an adult and voluntarily made the improvements, knowing the character of the estate that he was improving. But in the case at bar Charles D. Jacob was an infant, and the improvements were made by the order of court and without his consent, and by taking the means that were his absolutely and improving the estate that he only held a life estate in, remainder in another, thereby apply his absolute estate to the improvement of the estate of another, and that it would be just and proper for his absolute estate to be restored to him by the remainderman. This view of the case can not be sustained on account of the rule forbidding the subjection of the remainder interest to the charge of improvements knowingly and intentionally placed upon it by the life tenant in order to protect the interest of the remainderman, etc. Now while the improvements were intentionally and knowingly made, it was done without the consent of the infant; but nevertheless it was done by competent authority, and to allow the infant, after he becomes of age, to charge the estate of the infant remainderman with the improvements in order to restore to the life tenant his estate, that was taken by order of court with which to make the improvements, would have the effect to take the property of the infant remainderman to reimburse the life tenant on account of an expenditure made while he was an infant for his benefit and by competent authority.

It is contended that courts of equity should always be zealous in protecting the rights of infants, but the protection should extend to all infants according to the equities existing between them. Here the property of the infant remainderman was improved by the expenditure of money belonging to the infant life tenant and for his benefit and by the direction of competent authority, and the infant remainderman could take no part in procuring the expenditure, nor could they prevent the same. Now would not equity say that the infant remainderman should not be charged with these improvements, but that the burden should fall on Charles D. Jacob? It seems to us that he should bear the burden.

The 11 Bush case supra clearly decides that the remaindermen were necessary parties to the Charles D. Jacob suit to have the trust removed, and as Mrs. Caldwell and Miss Lucy Jacob were not parties they are not bound by the judgment, but their contingent rights to an interest in the property still exist, and will become absolute if they survive their father. (11 Bush case supra.)

The judgment as to said parties is reversed.

(Modified opinion—Filed June 16, 1894).

Opinion of the court by Judge Pryor.

This court holds in the opinion rendered that a life tenant can not improve the estate so as to charge the remainderman with the improvements, but has not adjudged that if a court of equity can place the parties in statu quo so as to relieve the life tenant that this can not be done, and in a case where the improvements have not been voluntarily made by the life tenant. In this case Charles D. Jacob was an infant, and invested with a life estate in the property improved. His guardian applied to a court of equity, asking that the realty of his ward be sold in which he had the fee, and the proceeds applied to the improvement of the estate in which the infant, Charles D. Jacob, had an estate for life, remainder to his children or descendants. This was done by a court of equity, and when the chancellor had no power, according to the rule recognized by the principal opinion, and if so the infant life tenant is as much entitled to equitable relief as the contingent remaindermen of those entitled to the estate improved after the termination of the life estate. The one infant is as much entitled to relief as the other. Now if there is reserved to the infant or contingent remaindermen $30,000 of the trust estate, with its natural increase in value, then the contingent infant remaindermen get all they are entitled to. It is all the same estate originally devised by the father of Charles D. Jacob, and this estate is secured to them (the infant remaindermen) in that way, and Charles D. Jacob is returned the value of his fee invested in these improvements, which is $13,000 or $14,000.

No one is injured, but all are placed in the condition they were when the first error was committed by the chancellor in taking one infant's property to improve the property of another infant. This equity becomes the more apparent when it appears that Charles D. Jacob, who was an infant when the fee was sold, has had as much of the realty withdrawn from the trust as would satisfy him for the $13,000 the court had invested for him, and erected upon it a stone front valued at $27,000, and then sold to Davis for $36,000. This neither Davis nor his vendor, Charles Jacob, should lose unless the remainder interest is to suffer by it. Before the chancellor can relieve the appellant or quiet his title it must be made to appear that the remaindermen are left with the trust fund devised to them, with its natural increase—in other words, they must be placed in statu quo—must sustain no loss whatever. The doubt in the minds of the court is as to whether or not the contingent remaindermen have been placed in such a position as would enable them to realize the trust fund as originally devised with its natural increase. When they obtain this they have no cause to complain, and the case is reversed for further preparation on that point.

Reversed and remanded.

This is a modification of the original opinion.

KENTUCKY SUPERIOR COURT.

GLASER, &c. v. FRANKS.

(Filed April 4, 1894.)

Attachment for debt not due—Power of court to issue—Under the amendment of April 5, 1888, to section 238 of the Civil Code, which gives the clerk as well as the judge of the court in which is pending an action for debt not due the power to "grant" an attachment, the clerk has no power to issue the attachment until he has first made a formal order granting it. The power to issue comes from the granting order.

H. M. Woodford for appellants.

J. J. Cornelison for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Presiding Judge Brent.

These cases were pending in the Montgomery Circuit Court. The clerk of that court, without any order granting them, issued attachments. The debts sought to be secured were not due. The defendant moved to discharge the attachments on the face of the papers, and the motion was sustained on the ground that no order had been made.

Previous to the amendment of April 5, 1888, to section 238 of the Civil Code an order in such cases could only be granted by the court in which the action was pending, or any circuit judge, or the presiding judge of the county court, or, when these judges were absent from the county, by two justices of the peace. By that amendment the power was extended to the clerk of the court in which the suit was pending, so that section 283 now reads: "In such actions, if the petition, verified by the oath of the plaintiff, shows the nature and amount of the demand, and when it will mature, the court in which the action is pending, or the clerk thereof, or any circuit judge, or the presiding judge of the county court, may grant."

Whether the amendment authorizes the clerk to issue attachments in such cases pending in his own court, without a previous order made either by himself or some of the other officials named in the statute, is the only question presented by this appeal.

The appellant contends that, as the law authorizes the clerk of the court where the case is pending to grant as well as issue the attachment, no granting order is necessary when he acts, as he would be simply ordering or allowing himself to act.

The fallacy of this argument lies in the assumption that the statute authorizes the clerk to issue. His authority to grant an order comes from the statute; his power to issue from the granting order. When he does grant and issue both in these cases, he acts first judicially and then ministerially, and his previous judicial action (as in cases of injunction) is the sole authority for his ministerial action. That these different functions are entrusted to the same official does not make it less imperative that he should discharge each in its order formally and regularly, and when he has reached a determination on an application for an order of attachment in cases like these he should complete the record by making the corresponding order. Until this is done his

power to issue is in abeyance; there is no authority in himself to act further any more than there would have been had some other of the persons mentioned in the statute considered the application and failed to make the order.

We do not think the case of Kleine, &c. v. Nie, &c., 11 Ky. Law Rep., 583, has any application here. This question was not even collaterally considered.

Judgment affirmed.

GENTRY, &c. v. LITTLE.

(Filed May 9, 1894.)

1. Municipal ordinances—Impounding of animals running at large—Where a city ordinance provided for the impounding of animals running at large and for the sale of animals thus taken up to pay the fees and costs of impounding, and the officer in charge of the pound was sued by the owner for the possession of a cow taken up under the ordinance, it was not necessary for the defendant to allege in his answer, in order to constitute a good defense, that the plaintiff permitted the cow to go at large upon the streets, as the city has the right to subject the animal for fees and costs of impounding without regard to whether the owner was in fault.

2. Same—To authorize a sale under such an ordinance some formal proceeding should be had to determine the fact that the animals seized were actually running at large, in which the owner may have an opportunity of being heard and contesting the justice of the seizure or sale. If possible, personal service of summons should be had upon the owner of the animals, but if he is not known or is beyond the jurisdiction of the court, it is sufficient that the procedure be in rem, and that some public notice be given of the time and place of sale.

3. Same—Although the ordinance in question in this case provides that the person taking up an animal under the ordinance shall forthwith make a statement of the fact in writing under oath, and in such statement shall state the name of the owner if known, and if not known shall so state in said affidavit, the failure to make such a statement does not entitle the owner to possession of the animal, as the right to impound the animal precedes the statement, which is intended merely as a preliminary step to the bringing of the owner before the court and the taking of the steps necessary to subject the animal to the payment of fees and expenses.

J. A. Dean for appellants.

Little & Son for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barbour.

This action was instituted by the plaintiff, Little, against the defendants, Gentry and the City of Owensboro, to recover the possession of a cow, which was the property of the plaintiff, and to which he claimed the right of immediate possession.

The defendants in their answer justified the taking and detention of the cow under the following ordinance of the city of Owensboro:

"Section 1. That no cow, etc., shall be permitted to go at large upon any of the streets, alleys or unenclosed lots or places in the city of Owensboro; but this section shall not apply in cases where any such animals are being driven through the city, or from one place to another for the purpose of being sold, or being taken from one part of the city to another part for the purpose of being

slaughtered, or to be placed in a pen or other enclosure; nor to any cow or calf, or horse, mule or colt at large after sunrise or before sunset, nor while being driven to or from home.

"Should any such animal be found going at large in violation of this section, the same may be taken up by any one and be driven or conveyed to the place mentioned in the third section of this ordinance, and there shall be left until disposed of as hereinafter authorized and directed.

"Section 2. The person taking up such cow shall forthwith make a statement of the fact in writing under oath, and in said statement shall state the name of the owner, if known, and if not known said person shall so state in said affidavit. Said statement shall be filed in the Owensboro City Court, and kept there as a part of its records.

"If said affidavit shall disclose the name of the owner of such animal, the judge of said court shall issue a summons against said owner, commanding him to appear in said court on the next day thereafter to show cause, if any, why he shall not be fined $1 for violating this ordinance, and why such animal so taken up shall not be sold to satisfy the costs and charges of taking up, keeping and selling the same.

"If said affidavit shall disclose the fact that the owner of such animal is unknown, or is absent from Daviess county, Kentucky, then said court shall make a warning order on such affidavit, etc.

"If, when such owner has been duly summoned or warned as hereinbefore provided, said court shall determine, from the evidence, that there has been a violation of said ordinance, by such animals having run at large within the limits of said city, as aforesaid, said court shall make an order in which it shall describe the marks and give description of each animal to be sold, and direct the marshal of said city to sell the same to the highest bidder at public auction for cash in hand. After deducting the costs and charges of such proceedings the remainder of the proceeds shall be paid by said marshal to the treasurer of the city, which shall be held by him subject to the order of the former owner of such stock.

"Section 4. If the owner of any such animal, taken up as provided for in the first section hereof, shall appear before the court at any time before the sale, as provided for in this ordinance, and pay all costs and charges for the taking up, impounding and keeping, and also all marshal's costs, the court shall grant an order directing restoration of such animal to the owner."

The costs and charges of taking up were by ordinance fixed at a fee of 50 cents per head for taking up and impounding, and 25 cents per day for each day it shall remain in the pound for expense of keeping same. The answer then averred that by another ordinance the chief of the fire department shall be the keeper of the pound, and that the defendant, Gentry, was the chief of the fire department, etc. The answer further avers that on the night of November 3, after sunset in said city on said day and before sunrise on the succeeding day, the cow described in the petition was found running at large upon the streets, etc., and was by the hands in the employ of the street commissioner of said city, and under his control, taken up and placed in the pound, and remained there until taken by the sheriff under the order of delivery in this action, and that said cow at the time it was taken up and impounded was not being driven through the city or from one place to another for the purpose of being sold, nor being taken from one part of the city to another for the purpose of being slaughtered, nor to be placed in a pen or other enclosure. A demurrer to this answer was sustained, and the defendants de-

clining to plead further, a judgment was rendered awarding to the plaintiff the possession of the cow, from which judgment the defendants have appealed to this court.

The answer is aptly drawn, and alleges every fact which, under the ordinance, authorized the taking up and detention of the cow, unless it be, as is argued for the plaintiff, that there can be no violation of the ordinance except where the owner of the stock permits it to run at large, thereby necessitating an averment in the answer that the plaintiff permitted the cow to go at large upon the streets, etc. This contention grows out of a misconception of the purpose of the ordinance.

The ordinance is simply a police regulation, its sole purpose being to protect the public against the depredations of stock running at large, whether with or without the fault of the owner. As said by Hess and Bemis, in their work on Municipal Ordinances, "the ordinance is only indirectly aimed at the owner of the stray animals. He may in fact be wholly beyond the corporate jurisdiction. The corporation is put to trouble and expense in taking up the strays and in providing a suitable pound for their retention until claimed by the owner. The animals must be fed and cared for. To meet this expense the aniamls may be sold, even against the owner's consent, although the owner thereby forfeits his property. Although the acts of seizing, impounding and sale are ministerial, to be performed by the police authorities of the town, some formal proceeding should be had to determine the fact that the animals seized were actually running at large, and in which the owner may have an opportunity of being heard and contesting the justice of the seizure or sale. If possible, personal service of summons should be made upon the owner of the animals, but if he is not known or is beyond the jurisdiction of the court, it is sufficient that the procedure be in rem, and that some public notice be given of the time and place of sale.

"The public (especially in a city) have the right to be protected against stock being at large, whether they are at large with or without the fault of the owner. The danger to the public of mischief from the intrusion of animals is the same, whether they are at large with or without the fault of the owner, and the object of the ordinance was to protect the public from the mischief likely to result from the animals being at large irrespective of the cause." (34 Ohio Statutes, 587).

Any other interpretation of the ordinance would render it a useless piece of legislation, as it would be, in the fewest possible cases, where the consent of the owner could be shown.

It is true that the second section of the ordinance provides for the imposition of a penalty of $1 upon the owner, but it is evident that this penalty is only to be imposed where the owner is in fault, and the right to subject the animal for the fees and costs of impounding in nowise depends upon the conviciton of the owner for an intentional violation of the ordinance, for the ordinance provides for the subjecting of the animal, though the owner be unknown, or not before the court; and, further, "if, when such owner has been duly summoned or warned as hereinafter provided, said court shall determine from the evidence that there has been a violation of said ordinance by such animals having run at large within the limits of said city as aforesaid, said court shall make an order directing the marshal to sell same," etc.

It is also contended that the answer is bad because it fails to aver that the statement, which is the second section of the ordinance, is required to be made by the person taking up the ani-

mal, was not made and filed as required by the ordinance. It was not necessary to make such an averment, for the right to take the animal up and impound it precedes the statement, which is intended as a preliminary step to the bringing of the owner before the court, and the taking of the steps necessary to subject the animal to the payment of fees and expenses.

The answer, it seems to us, presents a good defense, and the judgment is, therefore, reversed and the cause remanded for proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

MYERS, &c. v. BREMAN.

Filed April 25, 1894. Appeal from Campbell Chancery Court. Opinion of the court by Presiding Judge Brent, affirming.

Mechanic's lien—Where one who employed a contractor to build an addition to his house was to pay for the work as it progressed, except a certain amount for which he was to execute his note upon the completion of the work, one who furnished materials, claiming to have done so upon the faith of an agreement with the employer and the contractor that the note was to be executed and when executed was to be assigned by the contractor to him to secure him for the materials furnished, has failed to establish the alleged agreement. But even if such an agreement had been made, it could not prejudice the other laborers and material men, as their liens commenced with the delivery of the goods and the beginning of their work, and attached pari passu as the deliveries were made and the work progressed.

M. J. Brown for appellants; John S. Ducker for appellee.

FRAIZE v. COMMONWEALTH.

Filed April 25, 1894. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Circuit clerks—Fraudulent witness—Claims—Defect in pleading cured—Where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, and yet the issue joined was such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect or omission is cured by the verdict.

In this action by the Commonwealth against a circuit clerk and the surety in his bond to recover the amount paid by the auditor on fraudulent witness claims issued by the clerk or his deputy, the petition was defective in failing to allege that the clerk made out and transmitted to the auditor, as required by the statute, an alphabetical list of claims, including the claims in question, as without such a list the auditor had no authority to pay them; but the defect was cured by a verdict for plaintiff, as it must be presumed, in the absence of the evidence, that the omitted fact was proved, especially as it has reference to the performance of a duty which the law imposes upon an officer.

2. Presumptions—The courts presume that officers discharge their duties.

Wm. Lindsay, D. C. Haycraft and W. H. Marriott for appellant; W. J. Hendrick and Ira Julian for appellee.

YOWELL'S ADM'R v. HUSTONVILLE, &c., TURNPIKE CO.

Filed April 25, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Limitation—This action to enforce a judgment was barred by limitation, more than fifteen years having elapsed without the issuing of an execution, and the fact that there was a former suit to enforce the judgment, in which certain payments were made, does not prevent the statute from operating as a bar, as that suit was abandoned. And whether a payment on a judgment would have the same effect in arresting the running of the statute that the issual of an execution would have is not necessary to decide, as the last payment on the judgment in this case was made more than fifteen years before the institution of this action.

2. Revivor— Conceding that an action may be revived by an amended petition as well as by the formal order prescribed by the Code. still the amendment must be filed within the time fixed by the Code for revivor, and as the petition in this case, which was treated by the lower court as an amendment to the petition in the former suit, was not filed until twelve years after the plaintiff's death, the statute was a complete bar.

H. W. Rives and Ben Spalding for appellant; S. A. Russell for appellee.

SHELBY COUNTY TRUST CO. v. HOWELL.

Filed April 25, 1894. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Construction of devise—Where a testator, after devising to his wife by the second clause of his will his residence and furniture during her widowhood, provided by the third clause that the rest of his estate, real and personal, "after setting apart to my widow all the law allows to widows of persons dying intestate," should be sold and the proceeds invested in bonds, and the income paid to his widow and only child, the widow under the third clause was not entitled to the value of her dower in the real estate directed to be sold, as the words quoted were intended to refer to the personal property, which is under the statute exempt from distribution.

2. Same—Although the testator provided by a subsequent clause of his will that if his wife should marry or die then her interest in the fund mentioned in clause 3 shall cease, the widow's right to the property directed to be "set apart" to her was not affected by her marriage, and in determining the property intended to be "set apart" the clause is to be construed as if she had not married again.

L. C. Willis and J. C. Beckham for appellant; G. G. Gilbert for appellee.

WRIGHT, UNSER & BRO. v. ROBINSON.

Filed April 25, 1894. Appeal from Daviess Circuit Court. Opinion of the court by Judge Yost, affirming.

Fraudulent mortgage—Parties in pari delicto—The parties to a mortgage executed for the purpose of defrauding the mortgagor's creditors being in pari delicto, the mortgagee can not maintain an action to enforce the mortgage.

J. R. Hays for appellant; D. C. Haycraft for appellee.

TURNR v. GERALD, &c.

Filed April 25, 1894. Appeal from Monroe Circuit Court. Opinion of the court by Judge Yost, reversing.

1. An heir at law can not maintain an action for a demand due his intestate ancestor, as this right vests alone in the administrator, unless some cause is assigned which makes it necessary for the suit to be brought in the name of the heir.

2. In a petition to enforce a vendor's lien the plaintiff must set out the contract, and if he has not already conveyed the character of the title to be

made. If he has conveyed that fact should be stated, and if not, he must allege that he is able and willing to do so according to the terms of his contract.

Lewis McQuown for appellant; W. A. Bullock for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. HENNEN, &c.

Filed April 25, 1894. Appeal from Hancock Circuit Court. Opinion of the court by Judge Yost, affirming.

Opinion on former appeal the law of the case—As the trial court, in its instructions to the jury and in the admission of testimony, followed the law as given by this court on a former appeal in this case, the judgment must be affirmed, even though this court may have been in error in its opinion on the former appeal.

Helm & Bruce for appellant; Sweeney, Ellis & Sweeney for appellees.

ALEXANDER v. MULLINS.

Filed April 25, 1894. Appeal from Laurel Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Revivor of judgment—Suit on return of "no property"—Where the defendant in a judgment died and execution was issued upon the judgment before there had been a revivor and before a sufficient length of time had elapsed to authorize a revivor, a return of "no property" upon such an execution gave the plaintiff no right to maintain an action to subject land belonging to the defendant.

2. Same—A judgment can not be revived against the personal representative of a defendant until after the lapse of six months from the qualification of his first representative, nor against a real representative until after the lapse of twelve months from the death of the defendant.

3. Same—To give the circuit court jurisdiction of an action to subject real property to the satisfaction of a judgment rendered in an inferior court there must be a return of "no property," not only upon an execution issued from the inferior court, but also upon an execution issued from the circuit court in accordance with section 723 of the Civil Code.

Ewell & Smith for appellant; H. C. Eversole for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. FINN, &c.

Filed May 9, 1894. Appeal from Simpson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Passenger carriers—Liability for assault by one passenger upon another—While a railroad company ought not to be held liable for the result of a sudden, unlooked-for assault committed by one passenger upon another, yet where, in view of all the circumstances and of the number and character of persons in a car, the employes in charge of the train have reason to anticipate injuries or indignities to passengers from their fellow passengers, it becomes their duty to exercise the utmost vigilance to prevent it, and if injury results from their failure to do so the company is liable.

In this action by the plaintiff, a female passenger, to recover damages for an indecent assault upon her by two drunken fellow passengers, a verdict for plaintiff is sustained by the evidence, the jury having the right to conclude from all the facts proved in the case that the defendant was guilty of negligence in not having some one of its employes in the coach to see that those two drunken and disorderly men did not disturb the other passengers.

2. Some of the instructions given being omitted from the record, there can be no reversal on account of any error which may appear in the instructions which are copied in the record, as such error, if any, may have been cured by the omitted instructions

J. A. Mitchell and C. W. Millikin for appellant; Goodnight & Roark and G. T. Finn for appellees.

SIMMONS HARDWARE CO. v. WHITAKER, &c.

Filed May 9, 1894. Appeal from Butler Circuit Court. Opinion of the court by Judge Yost, reversing.

Attachment obtained by collusion—Preference—The evidence in this case is sufficient to show that an attachment obtained by a father against the goods of his son was obtained by collusion between the father and son, and that certain acts done by the son for the purpose of aiding his father in procuring the attachment were done by him with the design to prefer his father to the exclusion of his other creditors, and an action by the son's creditors attacking the attachment as a preference having been consolidated with the attachment suit, the court should have declared that the acts done and permitted to be done by the debtor operated as an assignment for the benefit of all his creditors.

Sims & Covington, W. W. Williams, H. T. Clark, Speed Guffy, W. S. Taylor and John L. Scott & Son for appellant; B. L. D. Guffy, W. A. Helm and Edward W. Hines for appellee.

JACKSON v. MORRIS.

Filed May 9, 1894. Appeal from Henry Circuit Court. Opinion of the court by Judge Yost, reversing.

Usury—When one employed another to build a house for him, agreeing to pay him therefor its cost price and interest thereon at the rate of 15 per cent. "until paid," the contract for interest in excess of 6 per cent. was usurious. It can not be claimed that the interest was a part of the contract price of the house, no time being fixed for the payment of the debt.

Morris & Peak for appellant; John D. Carroll for appellee.

KRISH, AGENT v. DAVIS, &c.

Filed May 9, 1894. Appeal from Lawrence Circuit Court. Opinion of the court by Judge Yost, affirming.

1. The jurisdiction of a justice of the peace is limited to actions where the amount in controversy does not exceed $100, and where a creditor brought suit in a justice's court upon a demand exceeding that amount and had an attachment issued which was levied upon the defendant's goods, in an action by the defendant to recover damages for the wrongful seizure of his goods the court properly instructed the jury that the process issued by the justice was no protection to the creditor, the justice having no jurisdiction of the action.

2. Attachment wrongfully sued out—Although the plaintiff alleged in his original petition that the attachment was maliciously sued out, and in an amendment that it was sued out without probable cause, the complaint that the court permitted the plaintiff to prosecute two causes of action is not well taken, the jury being instructed that they could not find for plaintiffs unless they believed from the evidence that the attachment was procured by defendant maliciously "and" without probable cause.

Stewart & Stewart for appellant; Alexander Lackey for appellees.

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KENTUCKY COURT OF APPEALS.

SWEENEY & SONS v. KERR'S EX'OR.

(Filed February 15, 1894—Not to be reported.)

Attorneys' fee—Evidence—Certain attorneys represented G. and H. in a law suit up to the time of the death of H., when, it becoming evident that there was a conflict between the interests of G. and of the executor of H., the attorneys withdrew from the case as counsel for the latter and represented G. alone. The chancellor allowed the attorneys $3,700 as compensation up to the time they appeared for both G. and H., and directed that one-half of the sum allowed be paid by each party. Held—The record fully authorizes the allowance, and the apportionment of it between the parties is just and proper.

Sweeney, Ellis & Sweeney for appellants.

S. B. & R. D. Vance for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

There is another branch of this case remaining to be considered. W. N. Sweeney & Sons were the attorneys for Hugh Kerr and Gilmour in the actions against Beatty and David Clark, and in these consolidated cases a motion was made by the attorneys for an allowance of $10,000 for their services. The court below allowed them $3,750, one-half of which was to be paid by Kerr, and from that judgment they appeal. It seems that during the pendency of the actions against Clark and Beatty, and after the death of Gilmour, Sweeney & Sons, who were up to that time the attorneys for both Hugh Kerr and Gilmour, seeing the antagonism between the admininstrator of Gilmour and Hugh Kerr, abandoned, which was proper they should have done, the cause of Hugh Kerr, and represented alone the interest of Mrs. Gilmour, who represented the estate of her husband. He assailed the settlements made that affected the estate of Gilmour in favor of Hugh Kerr,

and all the chancellor could do was to allow Sweeney & Sons for their services as against Hugh Kerr rendered up to the time at which they ceased to be Kerr's attorneys. It was eminently proper that these attorneys should cease to litigate for Kerr when it was manifest that the interests of Gilmour and Kerr conflicted. The chancellor was then left, from the proof before him and the inspection of the record, to determine what Kerr and Gilmour should pay to Sweeney & Sons for their services up to the time Sweeney & Sons became the attorneys of Gilmour's administrator. This he has done by an allowance to be paid by Gilmour and Kerr jointly of $3,750. We are not disposed to disturb the finding.

Judgment affirmed.

MOREHEAD v. MOREHEAD.

(Filed March 22, 1894—Not to be reported.)

1. A homestead is "purchased" at the time it is paid for, within the meaning of the section of the statute relating to homesteads, which provides that the exemption shall not exist as to debts or liabilities existing prior to the "purchase of the land" or of the erection of the improvements thereon.

2. Same—A debtor may claim a homestead in land on which he did not actually reside at the time of the creation of the debt, provided he had prior to that time purchased it, and that he did occupy it as a housekeeper with a family at the time it was attempted to be subjected.

3. Same—Pleadings—Where a debtor alleges facts which prima facie show his right to a homestead against the plaintiff's claim, the plaintiff must allege and prove that the debtor comes within the exception of the statute, which provides that the homestead exemption shall not exist if the debt existed prior to the erection of improvements on the land.

In this case the plaintiff failed to allege that his debt existed before the erection of the improvements on the land by the defendant, and, therefore, his claim that defendant's plea of exemption is unavailing can not be heard.

4. Same—Time of creation of debt—Application of credits to account—Estoppel—The balance due of an account, composed of many items, is $99.70, and the last debit item of the account was $225, for rent at $45 per year from 1872 to 1877. The credits paid will be applied to extinguish the older items of the account, and the balance of $99.70 must be treated as having become due for rent for 1876 and 1877 and a small part of 1875, before all of which dates the defendant purchased the land now claimed as a homestead.

It appearing that in a suit concerning the account the plaintiff repelled defendant's plea of limitation as to certain old items of the account, by alleging and satisfying the court that the credit items of the account had been applied to the old debit items, and that the balance due was the last debit item, the plaintiff in this action, attempting to subject land of defendant to the payment of his judgment for such balance, is estopped to assert that the judgment was for the older items of the account so as to show that the debt was created before the homestead was purchased.

S. R. Crewdson and Edward W. Hines for appellant.

Wm. H. Holt and S. Y. Trimble for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, Mrs. H. E. F. Morehead, having obtained a judgment at law against the appellant, Tom Morehead, of color, in the Logan Circuit Court, in 1885, for the sum of $99.70, with interest thereon from January 1,

1873, and for costs, in 1890, caused an execution thereon to be issued and levied on eighty acres of land which the appellant owned and on which he resided with his family. Notwithstanding debtor claimed the property, estimated to be worth about $500, as a homestead, it was sold by the sheriff to the appellant at the price of $75. The equity of redemption was also sold and bought by her at the price of $7, these small prices, we may fairly assume, being the result of the asserted right of the defendant to homestead. Having obtained a sheriff's deed, she instituted this action for possession, and the sole defense made is that the debtor is entitled to the property as a homestead.

In her petition the appellant avers that her debt was created "prior to January 1, 1873, many years before the acquisition of said land by defendant."

These allegations the appellant denied, and the questions of fact to be determined are, first, when was the land purchased; and, second, when was the debt created?

In view of the construction of the word "purchase" in Moseby v. Bevins, 12 Ky. Law Rep., 805, the real question is, "when was the land paid for?" As it was there said that "the word" (purchase) was intended to be understood and applied in the sense of acquisition of a homestead by paying fully for it.

The appellee knows nothing on this point, and the negroes, the appellant, Tom, and his brother, Sam, who had bought the land jointly, though each was to pay for and have one-half of it, are illiterate, and ignorant of any date on which we can rely. But the testimony of J. W. Morehead, who had sold the land to these negroes, is reliable and conclusive of this question. He shows that in 1868 he sold them 160 acres of land at the price of $3,000, of which Tom paid down $300 and Sam $50, and thereafter they continued to pay therefor, Tom being industrious and energetic and hence paying nearly all that was paid, until "in July, 1874, when Tom finished paying for his half." On this the witness is emphatic. Tom, after July 3, 1874, owed nothing for his half of the land, though he was still held responsible as surety for some part of Sam's half.

We are of opinion, therefore, that, within the meaning of the statute and the construction given it by this court, the appellant had purchased his land, that is, acquired it by fully paying for it on July 8, 1874.

Here an incidental question arises. As the appellant was actually living on an adjoining rented tract he did not, in fact, occupy this land as a homestead until 1876 or 1877. But in Nichols v. Sennitt, 78 Ky., 630, this court, of precisely this question, said that "the statute gives the debtor the right to perfect his inchoate homestead right by occupancy when his purchase is made prior to the creation of the debt," etc.

The statute does not make actual occupancy prior to the creation of a debt an additional condition of homestead exemption. The appellant, as a housekeeper with a family, did occupy the land in controversy at the time of the levy and sale under the execution of the appellee, and had so occupied it for some thirteen years before that.

The basis of the appellee's judgment is the following account, which fixes the time of the creation of the debt:

"TOM MOREHEAD IN ACCOUNT TO H. E. F. MOREHEAD.

To balance on rent on settlement, 1872		$133 40
By cash, 1873	$10 00	
By cash, 1874	20 00	
By cash, 1875	20 00	
By cash, 1876	15 00	
By cash, 1876 (order)	14 00	
By cash, 1877	10 00	
By cash, 1878 (Sanders)	30 00	
To one house		25 00
To five years' lease, from 1872 to 1877		225 00
		$383 40
By cash, 1879	10 00	
By order, 1879 (Elkton)	12 50	
By work, 1879	6 00	
By cash, 1880	15 00	
By cash, 1881	1 00	
By cash, 1882	10 00	
By account, flour, etc., 1882 and 1883	15 20	
By cash, December, 1883	20 00	
By cash, August, 1884	20 00	
By cash, August 22, 1884	20 00	
By cash, date not known	35 00	
		$283 70
Balance due without interest, August 4, 1885		$99 70

"Interest on rent to be added."

The last charge against the appellant is for five years' rent at $45 per year, ending in 1877, therefore, the balance of the account remaining unpaid at the date of the judgment is necessarily composed of the items of rent for 1876 and 1877 and a small part of the year 1875. The payments made extinguished the account and each item on it save the balance at the end or latter part of the five years' lease. But there was a law suit over this account, and the defendant denied that he owed the first item therein—"To balance on rent on settlement 1872, $133.40."

He pleaded limitation in bar of a recovery, and it does look as if the lapse of thirteen years would have barred this disputed item. But the plaintiff, the present appellee, on September 8, 1885, pleads that "all the payments made by the defendant were made in discharge of this old balance of $133.40. There was, therefore, no old debt to plead limitation to, because it has been paid," and this plea she swears to.

It is true the negro denied the debt and said he was paying on the lease; at least that was what he thought he was doing. But the court did not adopt his contention, and gave judgment against him. How must the court have then applied the credits, or how must we conclude he applied them? Certainly they went to discharge the first or oldest items on the account sued on. This was at least the way to defeat the plea of the lapse of thirteen years. And now, after having prevented the statute from running against this old debt by applying, or causing the court to apply, the payments made by the defendant up to the time of the judgment in payment of the old balance, shall the appellee be allowed to say that her judgment for $99.70 consists of any part of this balance due in 1872, and is, therefore, a debt created

prior to the purchase of the land in 1874? Assuredly not. It is perfectly immaterial that the court fixed January 1, 1873, as the time when the judgment was to commence bearing interest. We may infer only that the court supposed the debt was then created, or it may have fixed this date as a compromise or average one, considering the comparatively recent dates of the payments. Therefore, we conclude that the appellant had bought and paid for his land in July, 1874, and that the debt of the appellee, for which she got judgment in 1885, was created in the main in 1876 and 1877; and further, that the appellant's inchoate right of occupancy, obtained in 1874, was perfected by an actual occupancy long before the issual and levy of the appellee's execution or even long before her judgment.

But it is contended by counsel for the appellee that the appellant can not claim this property as his homestead because he only erected his improvements in 1877, or about then, which is confessedly after the creation of the debt of appellee.

In Fish v. Hunt, 81 Ky., 584, it is said: "There is no exemption 'if the debt or liability existed prior to the purchase of the land or of the erection of the improvements.' The language of the statute is susceptible of but one meaning, and a debtor is not allowed to improve his land not occupied as a homestead by an expenditure of his means for that purpose so as to affect existing creditors." But let us see what effect to give this sound construction of the law in this case: The claimant of the homestead has only to aver the conditions upon which the exemption is granted. He does not need to negative the conditions which destroy it. If he be an actual bona fide housekeeper, with a family, of this Commonwealth, he need allege and prove these facts only; but he who assails his right must aver and prove the exceptions which destroy it. What are the exceptions? First, the exemption is not applicable if the debt or liability existed prior to the purchase of the land, or, second, of the erection of the improvements thereon. Now a debt may not exist prior to the purchase of the land, but may exist prior to the erection of the improvements, and whatever exception is to be relied on must be pleaded by the party on whom the duty devolves to plead it.

In Nichols v. Sennitt, supra, the petition alleged that Nichols was a housekeeper in good faith, with a family, and occupied as a homestead the premises sold, but did not allege that the improvements were made prior to the creation of the debt. The court said: "When exceptions to the general provisions of a statute are found in a distinct clause it is not necessary to allege that the complainant does not come within the exceptions. * * * The statement of the facts as set up in the petition made a prima facie case within the statutory exemption, and it devolved the duty on appellee to allege and prove that appellant was excepted out of the general provision."

In this case it is nowhere alleged in any plea of the appellee that the exemption is unavailing, because the debt was created prior to the erection of the improvements.

The fact which excepted the appellant out of the general provision must have been pleaded before we can consider it. But when were these improvements put on the land? Three witnesses only testify on the subject. The appellee says she does not know but that the appellant built his house while on her place and before he moved to his own place. This was prior to 1877. The appellant says that he built his house on the land and went there to live in 1876 or 1877. How long he built before moving he does not say. But

Sam Morehead, who was called as a witness for the appellee, says that the appellant put his house on it three years before he went to live on his own land, and that he left the appellee's place before the expiration of the lease, which fixes the erection more than three years prior to 1877. It is fairly shown, therefore, that the improvements were erected as early as 1874, and hence prior to the creation of the appellee's debt.

Upon any fair consideration of the proof and reasonable construction of the homestead statute the appellant is entitled to the property, and the judgment denying him the right to it is reversed, with directions to dismiss the appellee's petition.

BROADDUS v. MASON.

(Filed April 3, 1894.)

1. Contested election—Notice of—A notice of a contest of an election may be served in conformity with section 625 of the Civil Code by leaving a copy thereof at the usual place of abode of the person to be served, with a person over the age of sixteen years, residing in the same family with him, if he can not be found at such usual place of abode.

2. Same—Such service is sufficient, although the person with whom a copy of the notice was left was not actually at the defendant's usual place of abode when the notice was delivered, but was from 50 to 200 yards distant therefrom.

3. Same—Attempt to avoid service of notice—A defendant, who knew that his election to an office was to be contested, and who left his usual place of abode and the county of his residence to avoid the service of a notice of contest, and who subsequently availed himself of every opportunity to make defense of his right to the office, will not be heard to question the regularity of the service of the notice of contest upon him by leaving of the same at his usual place of abode.

4. Same—Jurisdiction of contesting board—The contesting board may correct returns made to it by the officers of elections so as to ascertain who in fact received the highst number of votes for an office.

5. Same—Parol evidence is admissible to show a mistake made by officers of elections in adding up the number of votes received by candidates.

Wm. Herndon for appellant.

W. G. Welch for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Lewis.

The question in this case is whether appellant, W. E. Broaddus, or appellee, W. B. Mason, is entitled to office of circuit court clerk of Garrard county, for which they were opposing candidates at the general election, held November 8, 1892.

The only complaint made by either party is of an alleged mistake in the return of officers of election at precinct No. 4, showing 146 votes for Broaddus and 136 for Mason. But the canvassing board accepting that return as true and examining it in connection with others, found Broaddus had received the highest number of all votes for that office in the county, and accordingly gave him a certificate of election.

The contesting board, however, found upon evidence heard that Broaddus

actually received at precinct No. 4 only 128 and Mason only 127 votes, which, being added to votes received by them respectively at other precincts, made a majority of four in favor of the latter, who was then adjudged entitled to the office in question, and upon appeal to the Garrard Circuit Court the same fact was found and same judgment rendered.

Officers of election at precinct No. 4 concur in their testimony a mistake was made in their return, and show, from the tally paper, kept while the votes were counted and cast up, plainly how it occurred.

It appears that at close of voting on that day the ballots were all taken from the box, and for purpose of counting placed in three separate lots on floor of the room where the election had been held. In one lot were put all ballots showing the straight Democratic ticket had been voted. In another all ballots showing straight Republican ticket had been voted, and in the third all ballots showing one or other ticket had been scratched, that is, one or more candidates had been omitted by the several voters.

Upon counting the two first-mentioned lots of ballots it was ascertained that each candidate whose name was on the Democratic ticket, including Mason, had received 124 votes, and it was so put on the tally paper, and each one whose name was on the Republican ticket, including Broaddus, had received 127 votes, and it was likewise so indicated on the tally paper.

Upon counting the third lot of ballots it was found that candidates for office of presidential election on the Democratic ticket, whose names were put at head of the ballots, had received 9 votes, which were added to 124 already counted, making 133, aggregate number of votes received by them at that precinct, while candidates for the same office on the Republican ticket had received eighteen votes, which were added to 127 already counted, making 145, aggregate number of votes received by them. But if the whole number of that class of ballots Mason received only three votes, which, added to 124 already counted for him, as should have been done, makes the actual number he received at that precinct 127, while Broaddus received only one vote, which, added to 127 already counted for him, as should have been done, makes the actual number he received there 128 votes. But the officers of election, though correctly counting ballots given to each candidate, erroneously added three votes found among the scratched ballots for Mason to 133, aggregate of votes given to candidates on Democratic ticket for the officer of elector, instead of adding to 124, actual and whole number already counted for him. And in the same way they added one vote found among scratched ballots for Broaddus to 145, aggregate of votes given to candidates on the Republican ticket for office of elector, instead of adding to 127, actual and whole number already counted for him.

It thus appearing a mistake was made in the return of said officers of election, correction of which gives Mason title to the office, we will now consider whether there were such errors of law by either contesting board or circuit court as authorize a reversal:

1st. Was proper notice of contest given in due time? The statute regulating elections requires the notice to be in writing, signed by contestant, stating his grounds of contest, etc., for an office like the one in question, given within ten days after final action of the board of canvassers, which, manifestly, is the act of issuing certificate of election to that candidate having, according to the returns, highest number of votes for a given office. But it does not prescribe the mode of serving such notice, and, consequently,

the legislature must have intended it done according to section 625, Civil Code, which provides that if a person to whom a notice is directed can not be found at his usual place of abode it may be served by leaving a copy there with a person over the age of sixteen years, residing in the same family with him.

Return of the sheriff shows appellant could not be found at his usual place of abode, and that there was a literal compliance in due time with the provision of the Code in such case. But both the contesting board and circuit court overruled a motion to permit correction of the return so as to conform to facts proved, and their action is now made ground for reversal. We think, however, the law was substantially complied with, even if the notice was served in the manner shown by evidence of witnesses. It appears the officer did in fact leave a copy of the notice with a person over sixteen years of age, residing in the same family with appellant, who was absent from the county continuously from the second day after receiving his certificate of election until after the expiration of the period within which the notice could be served. And though the person who received the notice was at the time from 50 to 200 yards distant from appellant's place of abode, testimony on the subject varying, it should be regarded as having been, in meaning of the Civil Code, left there with a proper person, for it is not material whether the person was at the time within touch of the place or 200 yards away if he was in other respects a proper person to leave the paper with and undertook to either deliver it or put it within the abode where appellant could get it on his return.

It appears he did, in compliance with his promise to the sheriff, immediately put the copy at a place in the dwelling house where it was reasonably certain appellant would get it, and where he did find it when he returned. Moreover, appellant knew appellee would contest his right to the office, and the evidence tends to show he left the county to avoid service of the notice consequently, he is not in a position to call in question sufficiency of service of notice, especially as he had and availed himself of full opportunity to make defense to the proceeding.

2d. The proposition of appellant's counsel on question of jurisdiction seems to be that after ballots have been counted and destroyed, as the statute requires, and certified return by officers of election made and duly filed with the canvassing board, there can be no recount or other action taken by the contesting board whereby to change the declared result. Clearly the canvassing board was not intended to perform any other than ministerial duties, for the statute restricts its power to examining or canvassing returns of an election, and giving a certificate of election to each candidate who has received prima facie highest number of votes for an office exclusively within gift of voters of a county, or giving certificate of number of votes received in the county by each candidate for an office not within exclusive gift of such county. So if that proposition be true, return of officers of election would have to be treated as conclusive in every case, and there could be no judicial inquiry as to their conduct, although the law may have been violated and will of the people defeated by mistake or fraud on their part.

The statute in express terms provides for a board, composed of judge of the county and two justices of the peace, for determining the contested election of any officer elected by the voters of the county, or of any justice's district therein, etc., and gives it jurisdiction "when another than the person returned shall be found to have received the highest number of legal votes

given" to adjudge such other person to be elected and entitled to the office. And with that end in view the contesting board is empowered to send for persons, papers and records, to issue attachments therefor, signed by its chairman, swear witnesses and issue commissions for taking proof. It seems to us if the contesting board, created for such purpose and invested with such powers, has no power to go behind returns of officers of election at each precinct and adjudicate and determine who was legally elected and entitled to an office like the one in question, it is impossible to see what was the purpose of creating it.

It may be difficult, on account of ballots being destroyed, in many cases to determine whether officers of election have miscounted them and thereby made a false return, yet it is well settled that in order to ascertain the fact, not who was returned elected, but who was in fact elected, parol evidence is admissible. (McCreary on Elections, section 468.)

But we need not consider what would be sufficient evidence in such case to authorize a judicial tribunal to set aside a return of officers of election, for this is not a case involving question of miscount of the ballots by officers of election, there being no controversy on that subject. The ballots were, so far as this record shows, correctly counted and number of votes to which each candidate was entitled ascertained. But officers of the election simply made a mistake in casting up or adding the votes together after being counted. And to establish that fact recounting the ballots is not necessary, the fact being satisfactorily proved, indeed demonstrated, by the tally paper, explained and corroborated by testimony of officers of election.

Judgment affirmed.

HUGHES, &c. v. CLARK, &c.

(Filed April 26, 1894—Not to be reported.)

Devises—Word "heir" construed as equivalent to "children" in certain will—A devise by a father of land to his daughers during their natural lives, "and at their death to descend immediately to their heirs," vested in each daughter a life estate of the land devised to her, remainder to her children, it being clear from the entire will that the testator by the use of the word "heirs" meant children.

Upon the death of any of the daughters unmarried and without children the land devised to her immediately passes to her surviving sisters, who acquire the fee simple title by descent of such land. The collateral heirs of the testator take no interest in the land under the will.

J. W. Bloomfield for appellants.

Burnett & Dallam for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hazelrigg.

Isaac Clark died in 1858, leaving a number of minor children, all daughters, save one, who has since died intestate and childless. The daughters have since died, save three, who, with the widow of the deceased, instituted this action against some of his collateral kindred for a construction of the will and settlement of the property rights of the parties interested. No children were ever born to the daughers, and it is assumed from the state of case presented in the pleadings that none can ever be born.

The language to be considered is: "I will and bequeath to my daughter, Fannie E. Clark, during her natural life; and at her death to descend immediately to her heirs, the following property," etc.

Precisely the same provision is made for each child. The chancellor held that the word "heirs" meant children, and it was, therefore, a devise to the daughter for life, and then to her children. There being none, the property, upon the death of a devisee, reverted to the testator's estate and descended to the surviving daughters. The result of this construction, which we approve as clearly carrying out the intention of the testator, is to invest the fee in the surviving daughters to such of the estate as comes to them by reason of the death of any devisee. Their original position is held subject to be defeated only upon having children who may take under the will. A joint conveyance of the property, therefore, passes the fee save on the contingency mentioned. In no event do the collaterals take under this will.

Judgment affirmed.

E., L. & B. S. R. R. CO., &c. v. ASLAND & CATLETTSBURG STREET RY. CO.

(Filed April 26, 1894.)

1. A street railway company has a right to cross the track of a steam railway company at grade, under the provisions of section 216 of the Constitution, which provides that "all railway, transfer and belt lines and railway bridge companies shall allow the tracks of each other to unite, intersect and cross at any point where such union, intersection and crossing is reasonable or feasible," it appearing that such street railway connects two cities, and under its charter may use steam, horse or other propelling power on said road in the transportation of freight or passengers.

2. Same—The petition of the railroad company in this case fails to allege facts showing that it is not reasonable or feasible for the street railway to cross its track at grade, and the exhibits filed show that the proposed point of crossing is in a level country, from which an approaching train can be seen 1,500 feet in one direction and 1,500 feet in the other direction, therefore, an injunction restraining the construction of such street railway was properly refused.

3. Same—Property rights of railroad in roadbed constructed by permission on a highway—Where a railroad constructs its roadbed by permission on a public highway it acquires no rights in such roadbed which excludes the public from enjoying thereon the uses and purposes for which the highway was dedicated, provided the passage of cars over the roadbed is not interfered with or obstructed.

4. Same—Compensation for use of such roadbed—A railroad company has no property rights in such roadbed constructed permissively on a highway that entitled it to compensation from a street railway company which lays its tracks at grade across the roadbed of the railroad company in such a manner as not to obstruct the passage of trains.

H. T. Wickham, Wadsworth & Cochran and Humphrey & Davie for appellants.

Knott & Edelen and Fairleigh & Straus for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Hazelrigg.

We learn from the petition of the appellants that they are the owners and operators of a railroad running through the town of Ashland, Ky., and

crossing what is now Winchester avenue in that town, but which was the old Ashland and Catlettsburg turnpike road when the railroad was first constructed; that the appellee owns a street railway in Ashland, and under the authority of its charter is about to extend it to the town of Catlettsburg, some four miles distant, along the turnpike road named. To prevent this extension, or at least to prevent the appellee from crossing the railroad at grade on Winchester avenue, the appellants filed their petition and obtained an injunction. A demurrer thereto having been sustained, their injunction dissolved and petition dismissed, they have appealed.

The sole question is the sufficiency of the petition. After stating the facts indicated above, and averring their willingness that the appellee might pass over or under the railroad at or near the point desired in such manner as would be safe, and alleging its willingness even to contribute to the cost of such structure (overhead or underground), they continue thus: "But because, as plaintiffs aver and charge, the crossing of said railroad at the point in question at grade, in accordance with said plan or any plan providing for a grade crossing, would be exceedingly dangerous, and would constantly expose to great risk and hazard passengers and property of the railroad and street railway company, and for these as primary reasons, and for the further reason that the application and request of defendant to be so permitted to establish such crossing is not reasonable or feasible, the said application and request of defendant was not allowed, and was refused by plaintiff, Chesapeake & Ohio Railway Co."

The plats and exhibits filed with the petition show the country to be level in the vicinity of the proposed intersection, and that along the railroad for 1,300 feet in one direction and for 1,500 feet in the other the approach of a train can be seen, and we may observe that it may be on this account that the pleader has hesitated to aver in direct terms that the proposed intersection is not reasonable or feasible.

The section of the Constitution supposed to authorize the intersection, and apparently sought to be circumvented by this pleading, is that "all railway, transfer and belt lines and railway bridge companies shall allow the tracks of each other to unite, intersect and cross at any point when such union, intersection and crossing is reasonable or feasible." (Section 216, Constitution.)

The petition shows evidence of careful preparation, and we are not inclined to attribute the adroit indirectness of these averments to accident by which merely the reasons controlling the refusal of the appellants to permit the intersection are set out in this argumentative form. It is to be inferred that the appellants were unable to say that the grade crossing or intersection was not feasible or reasonable. Indeed such an averment would have been contradicted by their own exhibits on file with the petition.

Under the section quoted we think that the appellee had the right to project its street railway along this avenue and street and across the railroad at grade; but the question is made that it can not do so without compensating the latter for an alleged deprivation or spoliation of its property rights at the point of intersection, and again we turn to the petition to ascertain the basis of this claim, the question being what property rights have the appellants on the turnpike in question of an exclusive character?

The averment is that the "Elizabethtown, Lexington & Big Sandy Railroad Co. acquired by purchase and by donation or grant, prior to November, 1880, the land and ways on which it theretofore constructed its said line of

road from West Ashland to the Big Sandy river, and has since, by itself or lessees, maintained and operated same, and is now, by its said lessees, in exclusive use and possession of the said line."

We are thus left to conjecture how the right was obtained to pass over this turnpike, then a highway. We infer it was by the permission of those controlling the road. The right was confessedly a "donation." In the nature of things it was but a permit to cross, sanctioned by legislative authority, and, therefore, a right to cross, but it was not exclusive of the rights of the public, nor can we suppose it to have been exclusive of such uses and purposes as those for which public highways and streets are established; and among these uses are the establishment and operation of street railways. (Louisville Bagging Mfg. Co. v. Central Passenger Railway Co., ante, 417.)

Even if this use imposed an additional servitude on the lands of the turnpike company it does not affect the right of the appellants to cross this highway or street, and they have nothing of which to complain. That company and its vendees, the county of Boyd, are not complaining.

In considering a similar question in the case of the Brooklyn Central & Jamaica R. R. Co. v. The Brooklyn City R. R. Co., 33 Barb., 420, the court said: "No use is proposed to be made of the Jamaica company s rails. The passage of its cars is not to be interrupted or impeded, and no injury is to be done its business; but upon some imaginary right of property at the point of intersection, and which it is thought the defendant will appropriate in crossing, the passage of its cars over the street is to be arrested and its routes of travel wholly interrupted. It was doubtless the intention of the legislature that both these grants should have effect; that the franchise should become valuable and profitable to the grantees and beneficial to the public at large. There is no other way in which they can have this effect and produce the desired result but by determining that when the rails of a railroad company are laid down in a public street they may be lawfully crossed and passed over by the cars of another company whenever such passing over can be effected without interfering with or impeding the progress of the cars passing along the track thus crossed. In short, the crossing of the plaintiff's track by the rails and cars of the defendants is not an appropriation of the property of the former to the use of the latter, but a mode of exercising the public right of transit over the highway."

So in this case we think that the "property rights" of the appellants, if not imaginary, are at least magnified by the contention of counsel. The trunk line has the right to cross the street, and the progress of its cars is not to be unreasonably impeded or interfered with. There is nothing in the petition and exhibits indicating such hindrance or interference.

It is urged, however, that the appellee is not a railway company in the meaning of the section of the Constitution quoted. We think, whatever may be said of street railways in general, that the charter of this company puts it in the class indicated by that section. The railway was to connect two cities. It might use "steam, horse or other propelling power on said road in the transportation of freight and passengers." (Johnson's Adm'r v. Louisville, &c., Ry. Co., 10 Bush, 231.)

But it is immaterial whether the appellee be such a railway company or not, if, as we have seen, its use of the street or highway is such as was contemplated in the original dedication, and no property right of the appellant is molested or destroyed.

We think the petition presents no equity entitling the appellants to the relief asked, and the judgment below is affirmed.

A. ADDAMS, CLERK COURT OF APPEALS—ON PETITION.

(Filed April 26, 1894.)

The Superior Court of Kentucky will, under the present Constitution, exist until January 1, 1895, it being clearly the intention of the framers of the Constitution that the new Court of Appeals established by the Constitution should be the successor of the present Court of Appeals and Superior Court, and the new Court of Appeals not being organized until January, 1895.

Opinion of the court by Judge Hazelrigg.

While this court, under the Constitution, is not given other than appellate jurisdiction, yet it is a part of its inherent power to determine such questions as pertain to the due hearing of causes properly brought before it. This involves the regulation of its dockets. It is made the duty of the petitioner—the clerk of this court—to keep suitable dockets for all appeals to this and the Superior Courts, and whether he is to continue the docket for the latter court is the question now before us. The answer depends on whether that court is to continue until January, 1895, when the Court of Appeals provided for by the new Constitution and the laws enacted thereunder shall for the first time be organized, or shall terminate in September, 1894, when the terms of its judges, so far as provided for under the old law, will expire.

If the public convenience, and indeed we may say the public necessity, for the continuance of that court until the organization of the new are to be taken into the account, the question would be of ready solution.

The court was the creature of necessity, and the relief afforded by it to this court and the litigants of the State demonstrates at once the wisdom of the law creating it, and the need of its continuance until its place can be supplied under the law providing for an increased membership of this court.

Looking to the reasons controlling the framers of the Constitution as shown in their debates, and the general plan in view as shown in the rearrangement of the judicial system, it seems evident that this court, in its numerically increased form, was to be the successor of the old courts—that is, of both the old Court of Appeals and the Superior Court.

In making the radical changes in the election system, especially in the particular of changing the time from August to November, for holding elections in the Commonwealth, and thus necessitating a change of time for induction into office from September to January after the election, a continuance of that court from September until January was not provided for in express terms, as was done with the other courts, but that such was the intention we do not doubt.

If this court, as it shall stand newly organized in January, 1895, is to be regarded under the Constitution as the successor of the old courts, and of this there can be no question, it is difficult to escape the conclusion that the tribunal to be succeeded shall continue until the law provides the successor.

And so regarding the new court, all motions, petitions for rehearing, pending in the Superior Court on the organization of the new tribunal in January, 1895, may be properly heard and determined by that court as its successor.

The framers of the Constitution were organizing a Court of Appeals to succeed both the appellate and Superior Courts, and the constitutional pro-

vision that the Superior Court shall continue until the terms of the present judges expire evidently means when its successors, composed in part of the present incumbents, who, in January, 1895, will form the new organization and take their seats, then the cases are to be transferred to the Court of Appeals, not as it now exists or will exist in September, 1894, but in January, 1895.

That court was the one the framers of the organic law were creating and to which the transfer of the cases from the Superior Court are ordered to be made. The Superior Court then no longer exists, and the present incumbents, together with the four judges to be elected, will constitute the court in January, 1895, created by the Constitution.

The clerk will conform his action accordingly and make out his docket for the Superior Courts as heretofore, ending with the organization of the new tribunal in January, 1895.

GIBBS v. BOARD OF ALDERMEN OF LOUISVILLE.

(Filed April 26, 1894.)

A temporary preventive order prohibiting a court of inferior jurisdiction from proceeding with a certain investigation, pending the hearing of a petition for a writ of prohibition does not continue in force after a final judgment refusing a writ of prohibition is entered, although an appeal, with supersedeas, is taken from such final judgment.

Hargis & Turner and F. Hagan for appellant.

H. S. Barker for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor, on motion for rule.

The board of aldermen of the city of Louisville were proceeding to investigate certain charges and specifications preferred against F. H. Gibbs, a park commissioner of that city, with a view of removing him from office if the charges made were sustained, when the latter, in a proceeding by motion, accompanied by a petition authorized by section 474 of the Civil Code, obtained a preventive order, prohibiting that board from proceeding with the investigation until the motion was decided.

The board of aldermen appeared to the motion, filed a demurrer to the petition, and upon the hearing the writ was denied. The applicant for the writ then prayed an appeal to this court, and executed a supersedeas bond in the court below in the ordinary form. He now applies for a rule against the board of aldermen to show cause why they should not be punished for contempt in disobeying the supersedeas, alleging their purpose to proceed with the investigation of the charges regardless of the supersedeas.

What was there for the applicant to supersede is the present inquiry. The court below has denied the writ and left the applicant without the relief sought. The intervening order was not in fact a writ of prohibition, but a command from the court to the board of aldermen to stay all proceedings until it could be determined whether or not the plaintiff was entitled to the writ.

The writ was not allowed to go, and the applicant, by a supersedeas, is attempting to obtain the relief the court denied him. It is like superseding

a judgment denying to the plaintiff the right of recovery in an action of debt, with no lien created by attachment or otherwise on the property of the defendant, or to obtain an injunction when the court has refused to grant it. The case of Smith v. Telegraph Co., 83 Ky., 269, and other cases are referred to by counsel, establishing the rule that where an injunction has been granted and finally dissolved a supersedeas restores the injunction or its effect until the case is disposed of on the appeal. Such cases bear some analogy to the case before us, but the rule recognized by them is at variance with the practice and judicial determinations upon such questions by the courts of other States, and the legislature, at its last session, doubting the wisdom of the rule in this State as to the effect of a supersedeas in cases where injunctions have been modified or dissolved, passed an act providing that "when an appeal shall be taken from any judgment granting, modifying, perpetuating or dissolving any injunction, the court which rendered the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying or continuing the injunction during the pendency of the appeal," etc., and also providing that the provisions of the Civil Code concerning supersedeas on appeals shall not apply to judgments granting, modifying, perpetuating or dissolving injunctions. The entire question as to the retention of the injunction until the appeal is disposed of is left to the discretion of the trial judge, who is familiar with the facts and the parties, and can perceive the danger that may happen to the rights of the litigants if there is an entire suspension of the injunction during the pendency of the appeal. This amendment to the Code will operate to prevent the hardships that litigants often sustain by reason of an injunction being made effective during an appeal, or by reason of the entire suspension of the writ after judgment in the court below until disposed of by this court. The trial judge is now left to protect the interest of litigants in such cases, and while the act was approved on the 19th of March, 1894, and is not operative until ninety days after the adjournment of the session at which it was passed, it is an amendment to the Code, wise in its provisions, and should, as far as practicable, be followed.

The writ of prohibition is the order from the superior to the inferior court of limited jurisdiction, prohibiting the latter from acting in a matter out of its jurisdiction, and by section 475 of the Code the granting or the refusal of the writ is the final order, and when the final order is entered the temporary preventive order has no longer any force in this or any other court, and the final order being a denial of the writ, the supersedeas affects only the question of costs. The preventive order was only intended to protect the litigant until the court could determine whether or not he was entitled to the writ of prohibition, and the court having denied the writ, the effect of a mere preventive order can not be revived by a supersedeas so as to make the writ of prohibition effective during the pendency of the appeal. This court, in the case of injunctions, had some doubt as to the efficacy of the rule when established, and is not disposed to extend it by applying it to writs of prohibition because a temporary order had been issued for the protection of the litigant until his case could be heard. He has applied for relief and it has been denied him, and his only remedy is by an appeal without a supersedeas except as to costs. This court does not mean to pass on the merits or to adjudge in any manner that the court below had the jurisdiction to interfere with the trial in progress before the board of aldermen.

The rule is refused.

FARRIS, &c. v. PERKINS, &c.

(Filed April 28, 1894—Not to be reported.)

Suit to recover land by reason of defect in warning order directing its sale—Presumption—In certain consolidated actions against nonresident heirs of a decedent to subject decedent's land to payment of his debts it appears that the warning order was duly and properly made in one action; but the record in another of the actions by a debtor does not show the existence of any affidavit or other evidence of the nonresidency of the defendants as a basis for the warning order. The land was sold under order of court in the consolidated action, and bought by appellees about ten years ago. Held—In view of the lapse of time since the sale, and of the fact that the nonresident heirs were duly summoned, constructively, in one of the actions, it should now be presumed their nonresidency was duly proved before the making of the warning order in the other case.

N. A. Richardson for appellants.

Hill & Denham for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Lewis.

This action was brought September, 1891, by appellants, children and heirs at law of R. C. Farris, to recover of appellees a tract of land described in the petition, which was sold in 1880 under judgment in several actions consolidated, and purchased by Freeman, under whom appellees claim.

It appears that Freeman, having a personal judgment against R. C. Farris, brought an action to subject the land in question to satisfy it, appellants, his heirs, being at the time nonresidents of the State. A judgment for sale of the land was rendered in that action. But subsequently Stephens, having also a personal judgment, brought an action to enforce satisfaction of it, asking that the previous sale to Freeman be set aside, which was done.

There appears to have been also an action for settlement of estate of R. C. Farris, the three actions being consolidated. And thereafter the land was again adjudged to be sold, and at the sale Freeman again purchased it. In the action of Freeman a warning order against appellants appears to have been duly and properly made, and they were constructively summoned. But though they were stated in the petition of Stephens to be nonresidents, no affidavit of the fact appears to have been made therein. And so far as this record shows the warning order was made in that case without proof of their nonresidence, which is the sole ground upon which they now, about ten years after the sale, seek to set it aside and recover the land from appellees, vendees of Freeman.

In view of the great length of time since the sale, and the fact they were constructively summoned in one of the consolidated actions, we think it should be now presumed their nonresidence was proved in the Stephens case prior to the warning order, and they should be regarded as having been before the court when judgment for sale of the land now sued for was rendered.

Judgment affirmed.

JOHN C. LEWIS CO. v. SCOTT.

(Filed April 28, 1894.)

1. Master and servant—Wrongful discharge before expiration of term—Damages—Where the master wrongfully discharges the servant before the expiration of the stipulated term the latter may recover nominal damages merely by alleging the breach of the contract; but it does not follow from the mere discharge that the servant has been damaged to the extent of the sum he would have received under the contract of employment for the remainder of the term.

In order to recover actual damages the servant must specially set out such damages—if by due diligence the servant was unable to obtain other employment before the expiration of the term or obtained less remunerative employment, the facts must be alleged to authorize a recovery of the actual damages.

2. Same—Evidence by the servant that she had remained unemployed during the term and had been unable to secure employment was incompetent where she failed to allege such facts in her petition.

W. W. Thum and Wilson & Thum for appellant.

Samuel B. Kirby for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

If an employe is under a contract to perform service for a stipulated time, and is wrongfully discharged by his employer before the expiration of his term of service, he may recover his actual damages. He may recover nominal damages on the mere allegation of the breach of the contract, but it does not follow that because he is wrongfully discharged and the contract, therefore, broken, he has been actually damaged to the extent of the sum he would have received under the contract.

By immediately obtaining more remunerative employment he may have been in fact profited by the discharge, therefore, in bringing his action, if he had been specifically damaged—that is, failed to find employment, or, finding it, is not paid as much as he would have received for like service under the contract—then he must say so, or be content with nominal damages only.

This principle was thus illustrated in Frazier v. Clark, &c., 88 Ky., 266: "If A, with his machine, undertakes to thresh the grain of B on a named day, at a fixed price per bushel, and B declines to permit the work to be done, it does not follow, as a matter of law, that A can recover the contract price, less the costs of his hands, as damages. If he should employ his machine in threshing a like quantity of grain for others on the same day, with no loss of time or inconvenience by reason of B's conduct, the injury is nominal only;" and because there was no allegation in the petition of any extra expense, loss of time or any special injury, that case was reversed in order that the plaintiff, if he desired, might amend his petition in that respect.

In this case the appellee brought her action against the appellant, alleging that she had been employed by the latter for one year at a salary of $3,500, in the capacity of modiste and dressmaker, and after serving one month, without fault on her part, she had been wrongfully discharged, thrown out of employment, left without money among strangers and greatly injured in reputation as a dressmaker, etc.

Her discharge was admitted by the answer, but the cause of it was attributed to the plaintiff's incompetency. Upon the trial, occurring some seven months after her discharge, she was awarded $2,200, the verdict of the jury seeming to be for the amount due under the contract up to that time; and, although she had not alleged that she had continued out of employment or had sought work, she was allowed to testify to that effect over the objection of the appellant.

Upon the principle announced this was clearly erroneous. If it was to be a part of her damages that she remained out of employment after seeking it, it was incumbent on her to allege the fact, and if because she brought her suit before the expiration of the contemplated term of service she could not fix the damage or loss with certainty, this was a burden she voluntarily assumed by bringing the suit when she did. She must lay the basis as best she may upon which the jury may assess her damages.

It would be an approximation, but is permissible, and is the most that could be required of her, and the best she could do unless she waited until the year was out. We are aware that some of the text-writers and the courts of some of the other States lay down a different rule.

Thus in Howard v. Daly, 61 N. Y., 362, it is said: "Prima facie the plaintiff is damaged to the extent of the amount stipulated to be paid. The burden of proof is on the defendant to show either that the plaintiff has found employment elsewhere, or that other similar employment has been offered and declined, or at least that such employment might have been found. I do not think that the plaintiff is bound to show affirmatively, as a part of her case, that such employment was sought for and could not be found."

Thus the measure of damages is the same everywhere. It is the contract price, less what the discharged employe has earned or might, by reasonable diligence, have earned; but the rule in this State is that the burden is on the plaintiff to make out his whole case. The law does not imply loss of time and employment by reason of the discharge.

These things are not necessarily the result of the discharge, and are in the nature of special damages, and must be pleaded. It does not follow necessarily that because the servant is thrown out of employment by his wrongful discharge, he will remain idle for the term he had intended to work. The law implies no such result; but if such be the result without his fault, and in spite of reasonable effort to find work, he may recover the whole contract price, provided he alleges and proves that state of case.

Such has been the rule in this State since the case of Whitaker v. Sandifer, 1 Duvall, 262. (Chamberlain v. McAllister, &c., 6 Dana, 358; Frazier v. Clark, &c., supra.)

Mr. Sutherland, in his work on Damages, recognizes this to be the rule in Kentucky (volume 2, page 474), saying: "In some States it is held that the plaintiff must show the amount of his loss by proving his diligence to get other employment, and what he has been able to realize."

He refers to cases from Mississippi, Texas, Arkansas, Kentucky and Virginia. The case of Duffiey v. Brennan (Superior Court decision, 1888), 12 Ky. Law Rep., 637, is also directly in point.

We perceive no other error in the introduction of testimony or in its exclusion. The instructions are correct. On the return of the case the plaintiff, if she desire, may amend her petition, as in its present form it does not support a judgment for other than nominal damages.

For the reasons indicated the judgment is reversed.

TRUSTEES OF MADISON ACADEMY v. BOARD OF EDUCATION OF RICHMOND.

(Filed April 28, 1894—Not to be reported.)

Conveyance to trustees for educational purposes—Power of trustees to lease—A lot was conveyed to trustees in 1816 for educational purposes, with the proviso that it was to revert to the grantor if suitable buildings for that purpose were not erected upon it within three years. The buildings were so erected, and now, having become dilapidated, and the trustees, having no funds with which to repair or erect new buildings, leased the premises to the appellees for ninety-nine years, who propose to erect large buildings upon the lot and use it for educational purposes, as contemplated in the original conveyance to the trustees. Held—The trustees have the authority to make such lease to carry out the object of the orginial trust deed.

C. H. Breck for appellant.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor.

George W. Pickles, Thomas Moberly and others state that in the year 1816 Robert Caldwell conveyed to Anthony Rollins, Archibald Woods and others, trustees, and to their successors, a lot of ground in the city of Richmond, Madison county, for educational purposes, with the proviso that if the trustees or their successors fail to improve the lot, by erecting a building upon it for the purpose of teaching students, for the term of three years, then the lot sold and conveyed, with the right and title, shall revert to the grantor, his heirs and assigns.

These appellants are the trustees of the academy, being the legitimate successors of the original trustees named in the conveyance by Caldwell. The building for school purposes was erected as required by the terms of the deed within the three years, and occupied as a school building. They have had possession for many years, holding the property in trust to carry out the purposes of the donor, but now the buildings are dilapidated and no means in their hands to improve the property or to erect or keep in repair such a school building as will meet the necessities of the people interested or accommodate the pupils who were the objects of the donor's bounty.

A corporation or body of men, known as the board of education of the city of Richmond, proposed to erect ample buildings, large enough to accommodate all the youth of that city as well as the county, if they can obtain such a title as will secure them in the use and possession of this lot, agreeing to use it solely for the purposes contemplated by the original conveyance creating the trust. The trustees of the academy have accepted the proposal of the board of education, and leased to the latter the lot of ground and its appurtenances for the term of ninty-nine years.

They wish to know whether the power to lease exists, and upon petition filed against the board of education in the court below the chancellor held they had this power. In this conclusion we concur. The facts alleged in the petition show that unless this arrangement is made the trust created by the donor will fail, and the evident purpose of the original deed was to create this trust for educational purposes, and any reasonable grant for a term of years should be upheld, the chancellor being satisfied the trust property will not be divested or used for other purposes than was contemplated by the donor.

These trustees, if possessed of the means belonging to the trust, could use

it for the period leased by erecting buildings, etc., and when without means, and others interested are willing to add to the trust property, so that the trust may not fail, it should delight the chancellor to aid in its execution.

We have no doubt as to the validity of this lease, and the right of the lessees to use the property in such a manner as in their judgment will promote the cause of education.

The judgment below is affirmed.

WHALEN v. NESBIT, &c.

(Filed April 28, 1894.)

1. Evidence—Pedigree—Evidence by a child of statements made by a deceased parent is competent for the purpose of proving family pedigree, and entries in an old family bible of births, deaths and marriages in the family are competent for the same purpose.

2. Same—The provision of the Civil Code that no person shall testify for himself concerning any verbal statements of one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living and who heard such statement, has no application to the well-established rule of law making declarations of deceased persons competent to prove family pedigree.

3. Evidence—Probate of will of nonresidents—Where a will of a nonresident relative to real estate in Kentucky has been admitted to probate without the State, and an authenticated copy of it has been admitted to probate as a will of real estate by the county court of this State where the land devised lies, such order of probate in this State not having been reversed, superseded or annulled, is conclusive as to its validity and competency as evidence.

4. Evidence—Proof of statements of deceased persons as to the location of corners and line trees now lost, and evidence of the location and calls of adjoining surveys patented subsequently, are competent to show the location of a disputed boundary.

T. J. Watkins for appellant.

F. A. Wilson and F. W. Darby for appellees.

Appeal from Lyon Circuit Court.

Opinion of the court by Judge Lewis.

Appellees brought this action to recover of appellant land of which he is in possession, but alleged by them to be within boundary of a tract of 2,666⅔ acres, for which a patent was in 1789 issued by Commonwealth of Virginia to James Kemp, under whom they claim title as follows: That he having died intestate, the land was inherited by his sister and only heir at law, Isabella K. Nesbit, who, surviving her husband, devised it to her son, Archibald Nesbit, who devised it to his brother, William Nesbit, by whom it was devised to appellees, his children.

The only claim of title to the land in dispute is made by appellant under a patent issued in 1888 by Commonwealth of Kentucky to Culp, his immediate vendor. Consequently it is manifest appellees are entitled to recover upon showing derivation of title in the manner mentioned, and that the land in controversy or any part thereof is covered by the patent of 1789. Indeed the only errors of the lower court complained of are in admitting incompetent evidence of these two facts.

Death of James Kemp, intestate and without other heir at law than his sister, Isabella K. Nesbit, the fact she was mother of Archibald and William Nesbit, and survived her husband, are shown by declarations of William, to which one of appellees, his son, testified as a witness, and at same time exhibited to the jury a family bible, in which is a record of births, deaths and marriages that he swore his father declared had been kept by and received from Isabella K. Nesbit.

That testimony comes within the well-settled rule admitting hearsay evidence in cases of pedigree, and is sufficient to satisfactorily show Isabella K. Nesbit inherited the land patented to her brother, James Kemp, especially when considered in connection with the great length of time, more than sixty years, during which she, as such heir at law, without dispute, claimed and exercised ownership of it; for it appears she sold and conveyed title, that has never been called in question to a part of it, as early as 1832. But it is contended such evidence is made incompetent by subsection 2, section 606, Civil Code, which provides that no person shall testify for himself concerning any verbal statement of one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living and who heard such statement.

In our opinion that provision has application to testimony, original in character, given in an action by one party to the prejudice of another party claiming under or through a dead person, whose statement is offered to be proved; not to testimony concerning a declaration of a dead person as to a matter of pedigree that is, though hearsay in character, made, according to long-established rules, competent from necessity.

The next error complained of is that the several papers purporting to be wills of Isabella K. Nesbit and Archibald Nesbit, probated in the State of Virginia, and of William Nesbit, probated in the State of Missouri, were improperly admitted as evidence of the title of appellees.

Section 30, chapter 113, General Statutes, is as follows: "Where a will of a nonresident relative to estate within this Commonwealth has been proved without the same, an authenticated copy and the certificate of probate thereof may be offered for probate in this Commonwealth. When such copy is offered the court to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the State or county of the testator's domicil, and shall admit such copy to probate as a will of personalty in this Commonwealth. And if it appears from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this Commonwealth by the law thereof, such copy may be admitted to probate as a will of real estate."

In Williams v. Jones, 14 Bush, 418, where that section was construed, this court held that "in order to entitle the will to probate here as a will of real estate it must appear from the foreign transcript not only that the will was admitted to probate in the foreign court, but that the evidence heard there was such that if it were introduced here it would authorize the probating of the will under our laws."

The facts necessary to render a will of either lands or personalty in this State valid are prescribed in section 5, chapter 113, as follows: "No will shall be valid unless it is in writing, with the name of the testator subscribed thereto by himself or some other person in his presence and by his

direction. And, moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

There can be no question of competency as evidence of the will of William Nesbit, for an authenticated copy of it and of the certificate of probate show all facts required by section 5 were proved in the probate court of Missouri, where he was domiciled. But it does not appear from the copy and certificate of probate of the will of either Isabella K. Nesbit or Archibald Nesbit that any distinct fact required by that section was proved in the court of Virginia, where they were domiciled. The order probating the will of the former recites merely that the last will and testament of Isabella K. Nesbit, deceased, was, on a day named, fully proved by the oaths of three witnesses thereto, their names being given, and was thereupon ordered to be recorded, and the order probating the will of Archibald Nesbit does not appear more explicit or extended.

But a copy of each will, accompanied by a certificate of probate, was admitted to record by the Lyon County Court, where the land is situated; and the question is thus presented, whether they were thereby rendered valid wills of real estate, and, as a consequence, competent evidence of title in this case.

Section 28 provides that "no will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive except as to the jurisdiction of the court, until the same is superseded, reversed or annulled."

Whether that section was intended to apply to a foreign will probated here under section 30 was considered, though not expressly decided in Williams v. Jones, this language being there used: "Where a foreign will is presented it my be admitted to probate as a will of personalty or as a will of realty or as a will of both, and the statute would seem to require that the order of probate should show whether it was admitted as a will of personalty or of realty also, and, when the order does so show it will probably be conclusive."

We now perceive no reason for holding such order of probate conclusive as to a domestic will, whereby title to real estate passes, that does not equally apply to foreign wills when admitted to probate by order of a county court of this State as will of realty. The language of the section just quoted does not authorize any discrimination, and it can not be fairly presumed the legislature intended to make titles to land uncertain and insecure merely because acquired under foreign wills.

The Lyon County Court, as appears from the record before us, after reciting in its order that a copy of the will of Isabella K. Nesbit and certificate of probate in Virginia court were presented and evidence had been heard, in express terms adjudged said copy be probated and admitted to record in that court as her last will and testament as to both personal and real estate in Kentucky; and the same proceeding was substantially had and order made in that court as to the will of Archibald Nesbit; and as neither order has been superseded, reversed or annulled, there was, it seems to us, no alternative for the circuit court but to treat both orders as conclusive of validity and competency as evidence of the two wills. It is true it does not appear what character of evidence was heard by the county court on motions to probate the two wills, nor is it within province of this or the circuit court to inquire. Though, in our opinion, proof that the statute of Virginia contained a provision like section 5 of our statute of wills would have fully au-

thorized the orders made by the Lyon County Court. Identity and location of the survey patented to James Kemp was satisfactorily shown on trial of this case, but there does not appear to be now any marked line or corner trees on the southern boundary of the tract. And another alleged error of the lower court was in permitting testimony as to relative location and calls of adjoining surveys, patented subsequent to date of Kemp patent, and proof of statements of persons dead as to where corner and line trees, now gone, originally stood. It seems to us that character of evidence is entirely competent, and has been often so recognized by this court.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

LOCKESHAN, JR. v. MILLER.

(Filed April 18, 1894.)

1. A sale of standing trees, in contemplation of their immediate separation from the soil by either the vendor or the vendee, where they are selected and marked by the purchaser with the knowledge and consent of the vendor, is a constructive severance and delivery of them, and the contract is enforcible not only against the owner of the land, but against any subsequent purchaser thereof with notice of the sale. But if one purchases land for a valuable consideration and acquires title thereto without notice of any such sale of the trees standing thereon, he is entitled to them, and the purchaser of the trees must look to his vendor for damages.

In this case the vendor of land having reserved 100,000 feet of poplar and ash, to be severed by a certain time, giving the vendee notice that he had sold that much timber upon condition that it was removed by the time specified, and telling him that it was to be his if not removed by that time, the time specified having passed without the timber having been severed, the purchaser of the timber can not enforce the contract against the purchaser of the land, although his purchase may in fact have been unconditional, the purchaser of the land having notice of a conditional sale of the timber.

2. Same—Passing of title—A sale of enough trees upon the vendor's land to make 100,000 feet did not pass the title to any particular trees nor give to the purchaser the right to enter and cut the timber without the consent of the vendor.

Wood & Day for appellant.

T. C. Johnson, Z. T. Hurst, W. W. McGuire and Wm. H. Holt for appellee.

Appeal from Wolfe Court of Common Pleas.

Opinion of the court by Judge Yost.

We concede that it is the settled doctrine in this State that a sale of standing trees, in contemplation of their immediate separation from the soil by either the vendor or vendee, where they are selected and marked by the purchaser, with the knowledge and consent of the vendor, is a constructive

severance and delivery of them; and that this contract is enforcible not only against the owner of the land, but against any subsequent purchaser thereof with notice of the sale.

It is, however, as well settled that if one purchase land for a valuable consideration, and acquires title thereto without notice of any such sale of the trees standing thereon, he is entitled to them, and the purchaser of the trees must look to his vendor for damages.

The question in this case is: If such a contract for the sale of standing trees had been made between the appellant and the appellee's vendor, did the appellee have notice thereof before he acquired title to the land?

The evidence shows that in the summer of 1889 one Elkins went upon a tract of land then owned by Boyd Lockeshan to inspect a part of the timber thereon with a view of its subsequent purchase, and that while making this inspection he marked certain of the trees which suited him. The parties failed to agree upon the terms of the sale, and the contract was never completed.

After this, on July 9, 1889, Boyd Lockeshan, by verbal contract, sold to the appellant, J. M. Lockeshan, Jr., 100,000 feet of timber, then in the trees growing on this land, and he was to obtain this amount from the trees marked by Elkins, and a sufficient number in addition thereto to make the 100,000 feet. There was no time fixed when the timber was to be severed from the land. By the terms of the contract the purchaser was given the free use of a certain road over the land to and from the timber to be used by him in hauling the timber from the land, provided the timber was cut and hauled by January 9, 1891. After that time he was to pay any damages resulting to the land by the hauling and removal thereon of any part of the timber.

On March 12, 1890, and before any of the timber had been removed, the appellee, Miller, bought the land from Boyd Lockeshan, and in the deed thus made we find the following reservation: "The party of the first part reserves 100,000 feet of poplar and ash, which is to be severved by January 9, 1891."

Between March 12, 1890, and January 9, 1891, the appellant cut and removed from the land a small portion of the timber, and the appellee made no objection or protest against his so doing, but after the latter date he refused to permit him to enter the land or to cut or remove any more of the timber.

This suit was then brought by the appellant for the claim and delivery of the timber, and afterwards, by an amendment, a specific performance of the contract was sought. In his petition the plaintiff alleged that at the time of his purchase of the trees he had marked and designated them, and that the defendant, at the time of his purchase of the land, had notice that they had been so selected and marked by him.

The defendant denied that the plaintiff had in his contract bought, selected or marked any certain trees on the land, or that he had contracted for more than a certain number of feet to be cut from the timber then growing thereon, and further denied either notice or knowledge of the sale as alleged.

The court heard the case and dismissed the petition, and from that judgment the plaintiff prosecutes this appeal.

The proof is conflicting as to whether or not any of the trees had ever been marked or selected by the plaintiff until long after the purchase of the land by the defendant, but we will not consider this question.

If they had been so marked and selected, did Miller have notice of the fact at the time of his purchase of the land? We may concede that the testimony of Boyd Lockeshan tends, in a measure, to show that Miller knew it.

On the other hand, Miller swears that when the trade was made Boyd Lookeshan told him that he had sold to the plaintiff 100,000 feet of poplar and ash timber standing on the land, which was to be cut and removed by January 9, 1891, and that it was then and there agreed, as a part of the trade, that if the timber was not removed by that time it was to be and remain the property of Miller. He further swore that when Miller was asked if there was a written contract between himself and the plaintiff, or whether the plaintiff had marked or branded any of the timber, or had any claim upon any of it which was marked or branded, he said, "No; that he had only sold him 100,000 feet, to be cut and removed in a certain time."

In this testimony Miller was corroborated by his father, who was present when the contract was made and heard the conversation between the parties. He is further supported by the stipulation in the deed which reserves not a certain number of marked trees, but only 100,000 feet of poplar and ash, which were to be severed by January 9, 1891.

The contract, as Miller maintains it was not enforcible as between his vendor and the plaintiff, was, therefore, of course, not enforcible against him, and he was bound no further than the letter of his contract as expressed in the reservation in the deed.

A sale of enough trees upon the vendor's land to make 100,000 feet did not pass the title to any particular trees, nor give to the purchaser the right to enter and cut the timber without the consent of the vendor.

In Moss v. Meshur, 8 Bush, 187, the court says: "A sale of timber trees upon appellant's land, in a number sufficient to make 40,000 staves, did not pass the title to any particular trees, nor give to the purchaser the right to enter and cut the timber without the consent of the appellant."

So a sale of all the timber upon appellant's land, to be cut on a particular part of the farm, suitable to make staves, does not pass the title until the trees are marked and designated so as to identify them.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. FINN, &c.

(Filed May 9, 1894.)

1. Passenger carriers—Liability for assault by one passenger upon another—While a railroad company ought not to be held liable for the result of a sudden, unlooked-for assault committed by one passenger upon another, yet where, in view of all the circumstances and of the number and character of persons in a car, the employes in charge of the train have reason to anticipate injuries or indignities to passengers from their fellow passengers, it becomes their duty to exercise the utmost vigilance to prevent it, and if injury results from their failure to do so the company is liable.

In this action by the plaintiff, a female passenger, to recover damages for an indecent assault upon her by two drunken fellow passengers, a verdict for plaintiff is sustained by the evidence, the jury having the right to conclude from all the facts proved in the case that the defendant was guilty of

negligence in not having some one of its employes in the coach to see that those two drunken and disorderly men did not disturb the other passengers.

2. Some of the instructions given being omitted from the record, there can be no reversal on account of any error which may appear in the instructions which are copied in the record, as such error, if any, may have been cured by the omitted instructions.

J. A. Mitchell and C. W. Millikin for appellant.

Goodnight & Roark and G. T. Finn for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Barbour.

The plaintiff, a colored woman, while a passenger upon defendant's train in transit from Bowling Green to Franklin, was most outrageously insulted and maltreated by two drunken white men, who were also passengers upon the same train.

In this action against the defendant to recover damages for the assault a jury awarded to her the small sum of $200. From the judgment upon that verdict the defendant has appealed to this court.

There are but two grounds for a new trial: First, that the verdict is against the evidence; second, that the court erred in giving instructions 1 to 8, and in modifying defendant's instructions—9, 10, 11 and 12.

Instructions 1 to 8 are copied in the record, but 9, 10, 11 and 12 are not. We can not, therefore, say that the court erred in regard to the instructions, for even if there appeared, taken by themselves, an error in either of the instructions given, and which are copied in the record, the error may have been cured by the instructions which were given, but which have been omitted from the record.

Was the verdict against the evidence? The plaintiff's evidence was substantially this: She bought a first class ticket from Bowling Green to Franklin; when the train reached Bowling Green she started to enter the second coach, but one of the defendant's employes would not let her go into that coach and made her go into the coach in front of it. This coach was partitioned off into two compartments—the rear one was used as a smoking car, and she passed through this into the front compartment, where she took a seat.

Several witnesses proved that the two men who so grossly wronged the plaintiff were drunk and disorderly and were trying to make a negro man, who was on the seat with them in the rear compartment of the car in which the plaintiff was seated, drink with them and dance for them. After a while the negro got up and went into the front compartment where the plaintiff was. Shortly after this the two drunken men followed, and as to what then occurred we will quote from the plaintiff's evidence. She says: "After leaving Bowling Green these two white men came in where I was. One came and sat down on the same seat with me. He was between me and the aisle. I got up to leave the seat and told him he could have it to himself. He pushed me back on the seat, saying, with an oath, sit down, and held me with one hand while he, with the other, tried to raise my clothes, and got them up to my knees and tried to put his hand under them. I broke loose. He again shoved me against the wall three times, hurting me very much. I finally succeeded in getting loose from him, and as I did he drew a pistol and flourished it over my head, which frightened me very much, and I went into the rear half of the coach."

She further states that after she had taken her seat in the rear part of the coach the conductor came along and asked her what she was doing in there and she told him that the white men in the other room had abused her, and, as she says, "he asked me which one, and what they had done, and I told him never mind; I was away from them then and wanted no more fuss."

There were none of the employes in the car at the time the assault was made upon the plaintiff. But after the train left Bowling Green the conductor and other employes passed through the car and ought to have known that these two men were drunk and misbehaving themselves; and in fact the brakeman, whose duty it was to look after the comfort and safety of the passengers in this car, knew that they were drunk.

It was in evidence for the defendant that at the time of the outrage the conductor was engaged in another car. The brakeman, who stood on the car in which the plaintiff took passage, was in the baggage car splitting a stick into which to fasten a message which it was the duty of the conductor to throw off at a station which they were approaching. Where the other employes were is not shown—perhaps it was not the place of any of them (other than the conductor and brakeman named) to look to this car.

The conductor and other employes on the train owe it to the passengers in their charge to exercise the highest degree of care, not only to protect them from injuries incident to that mode of travel, but to protect them from the indecent and ungentlemanly conduct of a disorderly fellow passenger. And as to female passengers the rule goes further, and their contract of passage embraces an implied stipulation that the company will protect them against general obscenity, immodest conduct or wanton approach. (L. & N. R. R. Co. v. Ballard, 85 Ky., 311.)

The company ought not to be held liable for the results of a sudden ununlooked for assault committed by one passenger upon another; but where the injury done to or the indignity offered the passenger might reasonably have been anticipated or naturally expected, in view of all the circumstances, and of the number and character of the persons in the car, it then becomes the duty of those in charge of the train to exercise the utmost vigilance to prevent it. (Hutchinson on Carriers, section 584.

It ought not to be possible in this country for such an outrage as was perpetrated on this helpless and unprotected female to be committed upon the passenger train of a railroad—manned, as we must assume, by a sufficient as well as an efficient force. While we will not go so far as to say that it is the duty of railroad companies under all circumstances to have an employe constantly in each car to see to the comfort and safety of the passengers, we are of opinion that the jury had the right to conclude, from all the facts proven in this case, that the defendant was guilty of negligence in not having some one of its employes in the coach to see that those two drunken and disorderly men did not disturb the other passengers.

We think that the defendant has no reason to complain of the judgment, and it is, therefore, affirmed, with damages.

SUPERIOR COURT ABSTRACTS.

SISK v. UTLEY'S ADM'R.

KIRKWOOD v. SAME.

Filed May 16, 1894. Appeal from Hopkins Circuit Court. Opinion of the court by Judge Yost, affirming in former case and reversing in latter.

1. Antenuptial contract—In this action by appellee as surviving husband, and also as administrator of his deceased wife, to recover judgment upon a note executed to her by the defendant, the evidence fails to sustain the defense that there was an antenuptial contract between the parties to the effect that neither was to claim or interfere with the property of the other.

2. For an error of the court in rendering judgment for more than was authorized by the pleadings the judgment is reversed, with directions to enter judgment for the proper amount.

Bradley & Co., T. J. Nunn and C. J. Waddill for appellant; James R. Hewitt, Thomas H. Hines and Thomas G. Poore for appellee.

UTLEY v. SISK.

Filed May 16, 1894. Appeal from Hopkins Circuit Court. Opinion of the court by Judge Yost, affirming.

Separation of conclusions—In this ordinary action in which the law and facts were submitted to the court, as there was no separation by the court of its conclusions of law and fact until after the motion for new trial was made and acted upon, and even then the appellant failed to except to the conclusions of law, the only question presented is as to the sufficiency of the pleadings to authorize the judgment.

James R. Hewlett, Thomas H. Hines and Thomas G. Poore for appellant; Bradley & Dempsey, T. J. Nunn and C. J. Waddill for appellee.

PROCTOR v. JOHNSON.

Filed May 16, 1894. Appeal from Logan Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Reversible errors—The testimony being conflicting, the chancellor's findings upon issues of fact will not be disturbed.

2. Pleading—To entitle the plaintiff to recover damages on account of defendant's failure to comply with his agreement to labor on plaintiff's farm when not engaged with his crops the plaintiff must allege that work of the kind stipulated was furnished defendant.

3. Right of defendant to dismiss counterclaim—As defendant's counterclaim was dismissed on his motion before submission, plaintiff not objecting or excepting, plaintiff can not now be heard to complain. Besides, as the dismissal was before submission, plaintiff had no right to object.

4. A reply can not contain a set-off or counterclaim against a counterclaim, nor a set-off against a set-off.

B. F. Proctor and E. W. Hines for appellant; Craddock & Sandidge and W. H. Holt for appellee.

RENO v. JAMES.

Filed May 16, 1894. Appeal from Muhlenberg Circuit Court. Opinion of the court by Judge Barbour, affirming. Judge Yost not sitting.

Banks—Authority of president to receive payment of notes—Ordinarily the cashier and not the president of a bank is the officer whose duty it is to re-

ceive directly, or through subordinate officers, payment of notes and bills due the bank. But authority may be conferred upon the president to receive payment of notes or the bank may allow him to hold himself out and act in such a manner and under such circumstances as to raise the presumption that he possessed such power, in which event the bank will be estopped to deny his authority to receive payment of one who, relying upon his authority, pays money to him.

In this case the evidence is sufficient to show that the president of a bank to whom a note due the bank was paid had authority to receive payment.

Julson & Wickliffe for appellant; Thomas H. Hines for appellee.

PERRY & MINOR v. PERRY.

Filed May 16, 1894. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Parties to actions—According to the common law rule, where an obligation was executed to several obligees and one died the right of action passed to the survivor and he alone could sue; but under the Code of Practice the personal representative of the deceased obligee is a necessary party, either as plaintiff or defendant. And the fact that the surviving obligee is sole devisee under the will of the deceased obligee does not affect the question, as the personal property of the testator passes to his personal representative to pay his debts and costs of administration, and after that to be paid over to the devisee.

2. Same—Demurrer—The defect on account of the failure to make the personal representative of the deceased obligee a party can be reached either by special or general demurrer.

3. Evidence as to transaction with decedent—One of the defendants was not competent to testify as to transactions and conversations with the deceased obligee, as none of the transactions or conversations were had in plaintiff's presence, and she never testified concerning them.

Lindsay & Botts for appellants; Wm. Carroll for appellee.

HERSPERGER, &c. v. SMITH, &c.

Filed May 16, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Judge Barbour, reversing.

Mortgage of homestead—Right of widow to rents after husband's death—Although the wife of a debtor joined with him in a mortgage on his land waiving homestead and dower, she had the right after her husband's death to the use and occupancy of so much of the land as represented the homestead until it was sold under the judgment enforcing the mortgage lien. And the land having, with her consent, been rented out by the administrator after her husband's death, she is entitled to the rents in the proportion of the value of the homestead interest to the value of the whole tract. But it was error to allow her all the rents. And while the administrator, as such, had no right to rent the land, still as he has done so and has received the money he should, after paying the widow as indicated, apply the balance in his hands to paying the costs in this action to settle the decedent's estate, including the attorney's fees. If there should not be enough to pay all these sums the mortgagee, who became the purchaser at the commissioner's sale, must make up the deficiency, the decedent having left no other property except that set apart to the widow under the statute. And as the widow got the benefit of the homestead right, she should contribute in that proportion to the payment of the taxes for the two years the land was rented.

Nat Gaither for appellants; Bell & Bell for appellees.

NEIGHBORS v. COMMONWEALTH.

Filed May 23, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Judge Yost, affirming.

Repeal of statute—Local option—The local option law of May 5, 1884, applicable to Hardin county, was not repealed by the act of March 15, 1890, resubmitting the question to the voters of that county. (Kirkpatrick v. Commonwealth, 15 Ky. Law Rep., 671.)

W. R. Haynes for appellant; W. J. Hendrick for appellee.

LOUISVILLE SAVINGS, &c. v. STERRETT'S ASS'EE.

Filed May 23, 1894. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Yost, reversing.

1. An assignee for the benefit of creditors takes the assigned property subject to all liens and encumbrances; and although the unencumbered property is not sufficient to pay the costs of the settlement of the estate, one who holds a lien upon property which is not more than sufficient to pay his debt can be required to pay out of the proceeds of the property only so much of the costs as he would have incurred if the action had been brought by him to enforce his liens.

2. When there are two or more mortgages of unequal rank upon the same property and the proceeds of sale under a decree in equity are insufficient to pay all the encumbrances in full, each mortgagee is entitled to be paid his cost as well as his debt, according to his priority; and while under this rule a subsequent mortgagee, after having incurred costs of suit and sale, may lose the costs as well as his demand, that was a risk he assumed by taking the subsequent encumbrance.

Strother & Gordon and J. J. Cornelison for appellant; Wood & Day for appellee.

HAWKINS, JR. v. COMMONWEALTH.

Filed May 23, 1894. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

Auditor's agent—Right to commissions as against sheriff—Where an auditor's agent surrendered his right to assess property and allowed the sheriff to make the assessment and collect the taxes, thereby placing the Commonwealth in a position which required her, under the statute, to allow the sheriff commissions, the auditor's agent thereby lost his right to demand commissions for himself. The State can not be compelled to pay both officers commissions for collecting the same taxes.

L. J. Crawford for appellant; W. J. Hendrick for appellee.

PADUCAH, &c., R. R. Co. v. DIPPLE.

SAME v. DIPPLE, &c.

Filed May 23, 1894. Appeal from McCracken Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. All persons having a joint interest in property must unite as plaintiffs in a suit touching the joint property or rights; and if the consent of one who should be joined as plaintiff can not be obtained, he should be made defendant.

Where a widow brought two separate actions to recover damages for injury to property owned by her and her infant children jointly, the one being brought by her in her own right and the other as next friend for her children, a special demurrer should have been sustained in each case, as all should have been united in one action; and upon the return of the case the court should order the infants to be made parties to the mother's petition, and that being done the court will dismiss the petition of the infants at the cost of their next friend.

2. Injury to abutting property caused by the construction and operation of a railroad along a street, being of a permanent nature, is a damage to the inheritance, and upon the death of the owner the heirs can maintain an action against the railroad company to recover the damages.

3. Same—Homestead—These actions being brought to recover damages for injury to the homestead of the decedent, it was error to allow the widow to recover as if she were entitled to exclusive possession of the homestead for life when under the statute the children so largely participate with her.

4. Joint owners—Apportionment of damages—The verdict should be for the gross damage, if any, to the whole estate in favor of the joint owners. The division of the damages, if any, can be determined after verdict, that being a matter that does not concern the defendant.

W. M. Reed and Husbands & Husbands for appellant; W. G. Bullitt for appellees.

COMMONWEALTH v. PROCTOR COAL CO.

Filed May 23, 1894. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. The act of May 5, 1884, exempting railroads from taxation for five years from the beginning of their construction, was repealed by the Hewitt revenue law of 1886. (Commonwealth v. Owensboro, &c., R. R. Co., 15 Ky. Law Rep., 449.)

2. Assessment—The fact that the appellee's road was assessed in the name of the "Proctor Coal Road," instead of in the name of the "Proctor Coal Co.," which is appellee's name, does not invalidate the assessment, as this is not the case of an assessment of property in the name of one who is not the owner, but simply a mistake in giving the name which could not possibly have misled any one.

3. Same—Presumptions—As the duties of the auditor and the railroad commission and the time they are to be performed are prescribed by statute, and it is conceded that they undertook the performance of those duties, the presumption must be indulged in their favor as public officers that they performed them at the time prescribed by law.

W. J. Hendrick for appellant: W. C. Herndon for appellee.

HEROLD v. FISH, &c.

Filed May 23, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. New trial—Surprise—In this action upon an account for legal services, in which judgment by default was rendered for plaintiff, the fact that defendant had, a few days before the case was set for trial, made a deed of assignment for the benefit of his creditors, and believed that the execution of this deed rendered it unnecessary for him to attend to the defense of the action, as he supposed the plaintiff's claim would be determined in the settlement of the assigned estate, was no such accident or surprise as authorized the setting aside of the judgment.

2. Limitation—Pleading—As the plaintiff alleged in his petition, after setting out the amount due and unpaid, that the defendant had "within five years last passed, and within five years after the rendition of the services, agreed and promised to pay plaintiff the amount, which he had failed to do," an answer simply denying that defendant had within five years, etc., or at any other time agreed or promised to pay plaintiff the sum of $225—the balance claimed by plaintiff—was not good as a traverse of the allegation of the promise to pay, as it may be that defendant owed all that was claimed, and had promised to pay it, though he may not have promised to pay the precise sum of $225.

3. Same—A denial of the promise to pay within five years can not be treated as presenting the plea of the statute of limitation. The facts which show that the action is barred must be alleged.

4. Payment—Pleading—The claim in the answer tendered of an additional credit is not good, as the answer does not aver that the payment was made to the plaintiff or any one for him.

Tarvin & Hall for appellant; O'Hara & Rouse for appellees.

WINCHESTER, &c., T. R. CO. v. BOARD OF COUNCILMEN OF WINCHESTER.

Filed May 23, 1894. Appeal from Clark Circuit Court. Opinion of the court by Judge Barbour, striking from docket.

1. An order dismissing a counterclaim is not a final order, from which an appeal lies. The error, if any, can be reached only by appeal from the final judgment in the case.

2. Granting of appeal at term subsequent to judgment—Even if an appeal could be prosecuted from such an order, the court would have no power to grant the appeal at a term subsequent to that at which the final judgment is rendered.

In this case, the court having sustained a demurrer to defendant's amended answer, pleading a counterclaim, which, the defendant declining to amend, was in effect a dismissal of the counterclaim, the court had no power, at a term subsequent to that at which final judgment for defendant upon a verdict in his favor was rendered, to enter an order expressly dismissing defendant's counterclaim and granting an appeal therefrom, and such an order was a nullity. And the fact that a motion to set aside the order sustaining demurrer had never been formally disposed of can not give validity to such an order, as the defendant, when he went into the trial upon the issues made by his original answer, necessarily abandoned that motion. The only way for the defendant to avail himself of the error, if any, in dismissing his counterclaim, was by appeal from the final judgment upon the verdict in his favor.

Geo. B. Nelson and B. F. Buckner for appellant; Benton & Bush for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. KREY.

Filed May 23, 1894. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

Railroads—Presumption that person on or near track will avoid approaching train—In this action against a railroad company to recover damages for injuries to plaintiff, a woman, resulting from her being struck by one of defendant's trains in attempting to cross its track at a street crossing, there being nothing to indicate to those in charge of the train that plaintiff was not in possession of all her faculties, the court should, under the evidence in the case, have instructed the jury, at defendant's request, that where those operating a railroad train see a person of mature years "on or near the track, and they give or have given the proper signals of their approach, either by blowing the whistle or ringing the bell, in time for the person to get out of danger, they have a right to presume that such person will do so, and are not bound to stop the train on account of such person."

Helm & Bruce for appellant; Lane & Burnett and O'Neal, Phelps & Pryor for appellee.

CARSTAIRS, McCALL & CO. v. CHAS. A. KELLY CO., &c.

Filed May 30, 1894. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. One who has taken warehouse receipts for an antecedent indebtedness from a person who in fact had no right to transfer them can not be said to have acquired them in the regular course of business, and the title thus acquired is subordinate to that of the true owner.

2. Lis pendens—Negotiable paper is generally excepted from the rule making a pending suit notice.

3. Unlawful preference—A transfer by an insolvent debtor to his creditor, although a preference, is not per se illegal, and unless attacked by suit filed within six months can not be disturbed.

Barnett, Miller & Barnett for appellants; Geo. C. Drane for appellees.

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KENTUCKY COURT OF APPEALS.

TRADERS DEPOSIT BANK v. WHITE, DUNKERSON & CO.

(Filed May 2, 1894—Not to be reported.)

Assignment by operation of law—Evidence—The fact that the mortgage assailed as an unlawful preference falsely recites the consideration was paid simultaneously with its execution, and that the mortgagor refused to execute it until the mortgagee threatened him with an immediate suit upon the indebtedness thus to be secured, indicates an intent to prefer and a knowledge on the part of the parties of the mortgagor's insolvency, and the mortgage was properly held to be an unlawful preference.

O'Rear & Bigstaff for appellant.

J. J. Cornelison for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

February 11, 1891, G. W. Goodpaster executed a mortgage on about 75 cattle to the Traders Deposit Bank of Mt. Sterling to secure a debt of $6,000, stated in the mortgage to have been loaned simultaneously therewith.

March 14, 1891, Goodpaster conveyed all his property to Mitchell in trust for payment of his debts. And August 7, 1891, White, Dunkerson & Co. brought this action for judgment setting aside said mortgage, and application of Goodpaster's property to payment of all his creditors alike.

In their petition it is stated that prior to the mortgage Goodpaster was indebted to them by note payable February 15, 1891, on which they recovered a judgment, upon which an execution was returned no property found; that the debt of Goodpaster to the Deposit Bank was not created simultaneously with, but prior to, the mortgage, which was made by Goodpaster in contempla-

tion of insolvency and with design to prefer the Deposit Bank to exclusion in whole or part to his other creditors.

The return on plaintiff's execution and assignment by Goodpaster of all his property for benefit of creditors satisfactorily show he was, at date of the mortgage, insolvent, and the statement in the mortgage the debt to the Deposit Bank was created simultaneously with the mortgage being, as disclosed by the evidence, false, would of itself be sufficient to show knowledge on part of both parties of insolvency of Goodpaster, and that the mortgage was a device, in meaning of the statute, resorted to in contemplation of insolvency. But the additional fact is proved that Goodpaster, fearing suits by other creditors, would follow execution of the mortgage, and his bankruptcy thereby precipitated, was at first averse to execution of the mortgage, but did finally execute it under threat of being immediately pressed for his entire indebtedness to the Deposit Bank, amounting to about $15,000.

That fact conclusively shows the Deposit Bank knew Goodpaster was on verge of bankruptcy, and further, that the latter, though at first disinclined, did at last make the mortgage in contemplation of insolvency and with a view to give preference to the former. In our opinion the judgment of the lower court, that the mortgage operated under the statute as an assignment and transfer of all the property and effects of Goodpaster for benefit of creditors generally, was proper, and is, therefore, affirmed.

N., C. & ST. L. R. R. CO. v. CARRICO.

(Filed May 3, 1894.)

1. Pleading—Injury to live stock in transit—A railroad presumptively knows whether or not live stock, during transit over its line of railway, was injured by the negligence of its agents in operating its trains, and, therefore, a denial of knowledge or information sufficient to form a belief as to such alleged neglect is insufficent, and not equivalent to a traverse of neglect alleged in the petition.

2. Jurisdiction—Summons—Appellees made a contract in Marion county with the L. & N. R. R. Co., by which the latter was to transport live stock from Lebanon, Ky., to Nashville, Tenn., and the appellant was to transport said stock from Nashville, Tenn., to Atlanta, Ga. Said stock was injured between Nashville and Atlanta through the neglect of appellant. Appellee sued appellant and the L. & N. R. R. Co. in Marion county, Kentucky, and had summons served on an agent of appellant in Fulton county, Kentucky, where appellant operates a line of railway. Held—The contract between appellant and appellee was made in Marion county, Kentucky, through the L. & N. R. R. Co. as agent of appellant, therefore, the Marion Circuit Court had jurisdiction of the action on the contract under section 73 of the Civil Code; and the service of the summons in Fulton county was sufficient under subsection 4 of section 51 of the Code to bring appellant before the court.

H. P. Cooper for appellant.

Rives & Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

This action was brought by appellee Carrico against the Louis-

ville & Nashville Railroad Company, and appellant Nashville, Chattanooga St. Louis Railroad Company, both being common carriers, to recover damages for injury to a car load of mules shipped at Lebanon, Marion county, Kentucky, under contract for safe delivery at Atlanta, Georgia.

The contract was made by appellee with the first-named company, which undertook to transport the animals to Nashville, Tennessee, to be carried from there by the latter company, which appears to either own or have in its possession and control a continuous line of railway to Atlanta.

It is in substance alleged that the Nashville, Chattanooga & St. Louis Company agreed to so transport appellant's mules from Nashville to Atlanta, receiving therefor a proportion for the whole amount fixed in the contract with Louisville & Nashville Company for the whole distance, but by negligence of its agents in operating the train on which the animals were placed they were greatly injured. But that company did not, as required by the Civil Code in such case, deny appellee's mules were, while being transported on its road, injured as alleged in the petition, but simply stated it did not have sufficient information to form a belief on the subject.

Subsection 7, section 13, authorizes such traverse by a party only where facts alleged in an adverse pleading are not presumptively within his knowledge. But where, as here, it is the duty of a railroad company, by its managing officers, to know whether its trains have been operated properly or in such manner as to destroy life and property, a mere denial of sufficient knowledge or information to form a belief concerning the fact does not amount to a traverse. The lower court, therefore, properly instructed the jury to find for the plaintiff, appellee, if it had jurisdiction to try the case at all.

The action having been dismissed as to the Louisville & Nashville Company, the question arises whether the Marion Circuit Court acquired jurisdiction of the N., C. &. St. L. Co. by simple service of process on its chief officer or agent in the county of Fulton, in which it operated one of its railroads. And that question depends upon construction of section 73, Civil Code, as follows: "An action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the contract is made, or in which the carrier agrees to deliver the property."

Appellant does not reside in the county of Marion, nor were the mules agreed to be delivered there. But it seems to us the contract in this case, having been made in Marion county by the Louisville & Nashville Railroad Company acting as appellant's agent, must, in meaning of that section, be regarded as made there by appellant itself; and, consequently, the Marion Circuit Court had jurisdiction of the person of appellant if the summons was served according to subsection 4, section 51, which provides that in an action brought pursuant to section 73, as was done in this case, "if a defendant operates a railroad it may be served upon defendant's passenger or freight agent at or nearest to the county seat of the county in which the action is brought."

The record, in our opinion, shows existence of each of the conditions of jurisdiction of the Marion Circuit Court, and validity of a service of summons prescribed by the Civil Code.

And as there is no question made of the correctness of the judgment upon any other ground, it must be affirmed.

N., C. &. ST. L. R. R. CO. v. HAMILTON.

(Filed May 3, 1894—Not to be reported.)

H. P. Cooper for appellant.

Rives & Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

The facts in this case are similar and the questions of law identical with the case of Nashville, Chattanooga & St. Louis Railroad Company v. Carrico, ante, 66, and the opinion in that case is adopted for this.
Judgment affirmed.

L. & N. R. R. CO. v. COMMONWEALTH.

(Filed May 3, 1894—Not to be reported.)

1. Indictment—Nuisance—Construction of railroad on turnpike—Under an indictment against a railroad company for erecting a public nuisance, committed by building its railway upon a turnpike road and failing to furnish a substitute, the defendant is entitled to an acquittal where the evidence shows that the substituted turnpike road for that taken by the railway was built and thrown open to the public about January 1, 1888, and the indictment was not found until February, 1891, there being no averment of continuous wrongdoing in the indictment.
2. Same—Instructions—It is error in such case to charge the jury that the substituted road must be as good "as the road destroyed, and as safe for the public travel," because where the railroad crosses the new turnpike it can not, for the very nature of the case, be as safe as was the old road before any railway was constructed.

W. C. McChord for appellant.

C. C. McChord, W. H. Sweeney and W. J. Hendrick for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was tried and convicted under an indictment for erecting a public nuisance, committed by building a railroad upon the roadbed of the Cartwright turnpike road for some 300 yards, and "failing to furnish a substitute for the turnpike road so destroyed sufficient for the public travel and such as there was before said injury."
Upon a former trial of this case the State sought to obtain a conviction, and succeeded in the lower court upon showing merely that the railroad had been built on the turnpike and was being operated thereon, and ignored the averment of the indictment to the effect that the nuisance complained of consisted not merely in erecting the railroad on the turnpike, but in not providing a substitute for such portion of the latter as had been occupied by the former. Upon an appeal to the Superior Court the judgment was reversed and the law of the case in the particular complained of was thus stated: "And it is probable that the indictment was drawn, as it is to anticipate a defense founded on this provision." This was a provision in the charter of the railroad authorizing it to occupy a portion of a public way, provided another was so substituted as not to impair the usefulness of the highway. "However that may be," continued the court,

"It is certain that the offense charged in the indictment consisted not in the mere destruction of part of the turnpike roadbed but also in failing to provide a substitute for the part so destroyed. Having so described it, to this description the Commonwealth is held."

Upon a return of the case it was tried out on the issues thus indicated, the question involved being the sufficiency of the substitute, and a second conviction resulting, the railroad company has appealed.

It appears that the railroad was built in 1886 and 1887 by a corporation known as the "Middle Division of the Cumberland & Ohio Railroad Company," the directors of which were citizens of Washington county, and one of whom was the president of the turnpike company. To best subserve the interests of the public in the erection of the depot, and at the requirement of the owner of the land needed for the construction of the railroad, the latter was so run as to require the occupancy of the turnpike for some 300 yards, and this location was determined on by the directors of the two corporations interested; but in pursuance of an arrangement to that effect, and by virtue of the requirements of the charter of the railroad company, a substituted turnpike was built by the railroad company higher up on the hillside, the work on both roads being completed about January 1, 1888. The substituted turnpike was at once thrown open to the public, and it has since continued to use it, and the railroad has since continued to operate its trains on the line indicated. This indictment was found in February, 1891, and the chief contention of the appellant is that the offense, if one has been committed, was committed more than twelve months before the finding of the indictment.

It will be observed that the indictment against the appellant is not for having built its railroad on the highway, which, as the proof shows, was in 1887, and for continuing the occupancy since, but for having failed to furnish a substitute sufficient for the public travel. There is no charge or complaint that the occupancy of the turnpike was illegal or wrongful. There could not be, in the face of the adjustment of the point of intersection and the location of the substituted road by the directors of the companies, and in view of the right of the railroad company to such occupancy under its charter. The point of the alleged offense is is in failing to construct a sufficient substitute. With this constructed, the right to so occupy the pike is conceded under the terms of the indictment. This work of substitution was completed and thrown open to the public, as we have seen, more than three years before the indictment was found. The appellant was allowed to operate its road as located without hindrance or protest, or even notice, that its substituted road was claimed to be insufficient.

Indeed the proof of competent engineers is that the new road was better than the old, and was in all respects a complete restoration of the highway, and there was no impairment of its usefulness. The verdict of the jury is due to the fact, doubtless, that the road was shown not to be as safe for travel as the old one was, and the jury were told that it was the duty of the railroad companies to have made a road "as good as the road so destroyed and sufficient and as safe for the public travel." Of course the road was not as safe with a railroad crossing it as it was without such crossing. Without regard to other questions, however, it seems to us that whatever dereliction of duty or

wrong the appellant is charged with in this indictment was committed when it built its road and constructed a substitute deemed insufficient for the purposes of the public; and this wrong was done more than one year before the finding of the indictment. There is no charge of continuous wrongdoing or any averment that any obstruction was continuously maintained.

To say that such "public nuisance has been permitted to continue up to the present time, is no charge against the party indicted, certainly no specific charge of any wrongful act or one which he is called on to answer.

The instruction asked for by the appellant—to find it not guilty—should have been given, and the judgment is reversed, with directions to dismiss the indictment.

ALFORD v. WILSON.

(Filed May 8, 1894.)

Statute of frauds—Specific execution of contract—A written power by persons desiring to purchase real estate authorizing their agent to offer a certain price for it, which was delivered to the owner of the property by the agent as the terms of the offer to purchase; and a written acceptance of the offer, endorsed by the owner thereon, constitutes a sufficient memorandum of the contract of purchase to satisfy the statute of frauds; and such contract may be specifically executed by a court of equity.

Breckinridge & Shelby for appellant.

Thornton & Kerr and J. R. Morton for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

The question on this appeal is the sufficiency of a petition in equity filed by the appellant for a specific execution of a contract alleged to be evidenced by the following writings:

"Lexington, Ky., March 2, 1893.

"We hereby authorize Stedman & Bowman to offer M.C. Alford thirteen thousand six hundred and fifty dollars ($13,650) for his lot on North Broadway, and fronting 130 feet on said Broadway and running back to an alley. Said lot is bounded generally on the east by Broadway, on the north by Armstrong, on the south by Fayette Park avenue.

"The payments on said lot shall be one-third cash and the balance in two equal payments, due respectively in one and two years from the date of transfer, notes to bear 6 per cent. interest, a good and sufficient deed to said lot to be furnished upon the payment of the purchase price.

"HALLIE WILSON,
"JAMES D. WILSON.

"I hereby accept the above offer.

"M. C. ALFORD."

The averments of the petition are that, upon the execution of the foregoing writing by the Wilsons, Steadman & Bowman, who were real estate brokers, made to the appellant the offer authorized by it, and presented the writing to him, and he thereupon accepted the offer, and in evidence of it wrote his acceptance at the bottom of the instrument; and that repeatedly since then he

has offered to perform all the conditions of the agreement on his part, and to make appellees a good and sufficient deed of general warranty, but they have refused to accept it, etc.

The chancellor held that the two writings did not constitute either a written contract or memorandum of a contract, and, therefore, the action was not maintainable by reason of our statute of frauds. It was conceded, however, that if the writing given to the brokers could be held under the facts presented in the case as being equivalent to a written offer by the Wilsons, then the case for the plaintiff was complete, and a concise, specific contract for the purchase of the land was made out. With great respect for the argument of the chancellor, we think this is precisely what the writing was intended to be, and, in fact, was—an offer by the Wilsons through their brokers to Alford. Even if we admit a discretionary power on the part of the brokers to make or not make the offer, yet they made it in parol, if we so please to consider it, but yet in the written terms dictated by the would-be purchasers.

This writing must be regarded as the offer of the Wilsons, not merely the "equivalent," but the very offer to be presented to the vendor, and for what must we say it was so offered? Certainly for acceptance or rejection, and at the moment of its acceptance the minds of the contracting parties met and the contract was complete. Is it to be supposed that it was thought necessary for these brokers to go around with this instrument, setting forth the boundary of the property and in detail the terms of the proposed purchase, merely as an evidence of their authority as brokers to treat with Alford on the subject of the purchase of his property? We think not. The writing was intended for Alford's acceptance or rejection as much so as if it had been addressed to him, saying that the signers "hereby offered for the property through their brokers, Steadman & Bowman, the sum of," etc.

And acting with this end in view and in pursuance of the intention with which the writing was prepared, the brokers did present it to Alford, who at once accepted it, his acceptance being likewise in writing.

The two writings thereby, and at once, became the contract of the parties, enforcible not alone against the Wilsons, but against Alford as well. The brokers stood in the shoes of their principals, and made not their own offer but that of their principals. The offer was continuous and bound the principals upon its acceptance, and after that it was equally binding on Alford. Mutuality of obligation, therefore, required in the case of Usher's Ex'or v. Flood, 83 Ky., 552, is not lacking in this case. The statute supposed to be fatal to the enforcement of the alleged contract provides that no action shall be brought to charge any person upon any contract for the sale of real estate unless the contract, "or some memorandum or note thereof, be in writing and signed by the party to be charged therewith," etc. (General Statutes, chapter 22, section 1.)

It seems to us that the substantial requirements of the statute have been complied with in this case and that the wirtings constitute a memoranda of the contract, signed by the parties to be bound, upon which an action for specific execution can be maintained. It is contended otherwise for the reason that the written acceptance was not delivered to the Wilsons or any one of them so far as the petition shows, and this contention is thought to be upheld by the case of Newberger v. Adams, 92 Ky., 27.

An examination of that case discloses that the offer of the proposed purchaser was not accepted by the vendor. The writing

endorsed on the offer was, "I will accept the $3,200 for the above described property, $1,000 in cash and the balance in equal payments of one and two years." And the offer differed materially from this conditional acceptance as to the terms of payment.

Under these circumstances the endorsement of the vendor was a rejection of the offer and a new proposal altogether, which, of course, must have been delivered to the vendee and accepted by him before it could be said that the minds of the contracting parties had met. This phase of the question is aptly discussed in the case of Drury v. Young, 58 Md., 546 (42 Am. Rep., 343), where it is said: "Now the statute itself is entirely silent on the question of the delivery of the note or memorandum of the bargain, and its literal requirements are fulfilled by the existence of the note or memorandum of the bargain, signed by the party to be charged thereby. The statute itself deals exclusively with the existence and not with the custody of the paper. If the non-delivery of the note does not violate the letter of the statute, would it violate its spirit and be liable to any of the mischiefs which the statute was made to prevent? The statute was passed to prevent fraud practiced through the instrumentality of perjury. It was passed to prevent the defendant from suffering loss upon the parol testimony of either a perjured or mistaken witness, speaking of a bargain different from the one in fact made. It made the defendant only liable when a note or memorandum of the bargain signed by himself was produced at the trial."

The statute under discussion in that case is similar to ours, as are all the statutes on that subject, having been adopted from the English Statute of Frauds, and many English cases are cited to substantiate the point involved. (Gibson v. Holland, L. R., 1, C. P., 1; Johnson v. Dodgson, 2 M. & W., 653.)

We think the demurrer should have been overruled, and the judgment dismissing the petition is reversed and cause remanded for proceedings conformable to this opinion.

BENNETT v. BENNETT.

(Filed May 10, 1894.)

1. Divorce—Restoration of property—The section of the Code which directs that a judgment for divorce shall contain an order for the restoration of all property not disposed of at the commencement of the action which either party may have acquired, directly or indirectly, from or through the marriage, was not intended to apply to specific property, as to which there is an issue made by the pleadings as to how it was acquired by the wife.

2. Same—Res adjudicata—Where the husband in an action for divorce by him dismissed his action before submission as to his claim to restoration of certain specific property, as to which the wife was asserting that she had not acquired it through the marriage, an order of restoration of property acquired by either party through the marriage, contained in the judgment of divorce granted on final submission, is not conclusive as to the right of restoration of such specific property. The rights of the parties to this property remains wholly unaffected by such formal order of restitution.

John S. Ducker for appellant.

E. W. Hawkins for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Hazelrigg.

In September, 1890, the appellee obtained a judgment of divorce from his wife on the ground of separation without cohabitation for five years next before the application therefor. In his petition he had sought to cancel a deed for a house and lot in Newport made by him to his wife through a trustee in 1866 upon the ground that it had been made solely in consideration or by reason of marriage. This the wife, who was in possession of the property by her tenants, resisted, and in her answer alleged that the property had been bought with her own means.

On August 25, 1890, the cause was continued, we presume, for preparation on the issues presented in the pleadings, but on the same day, "by consent," the order of continuance was set aside, and on motion of plaintiff the cause was "discontinued as to property." In a few days thereafter the case was submitted and a judgment rendered annulling the marriage, but appended to it, in the face of the plaintiff's discontinuance of any claim as to property, was this order: "And all property obtained by these paties during marriage, and directly or indirectly in consideration of the marriage, of which disposition was not made when this action was begun, is respectively restored to them."

Thereupon, the husband, who is the appellee, brought the present action for the enforcement of the order of restoration, alleging that his late wife refused to surrender the house and lot directed to be restored to him, as he contends in the judgment of September, 1890. The wife urges a number of reasons why the deed should not be set aside, or, if set aside, why her receipt of the rents ought not to be disturbed.

It is insisted, however, by the appellee that the judgment of restoration is conclusive of any question of title between the parties, and determines finally that the title has passed back to the original owner, leaving nothing for the court to do but to enforce the order restoring the title.

The section of the Code under which this contention is asserted is as follows: "Every judgment for a divorce from the bond of matrimony shall contain an order restoring any property not disposed of at the commencement of the action, which either party may have obtained, directly or indirectly, from or through the other during marriage, in consideration or by reason thereof, and any property so obtained without valuable consideration shall be deemed to have been obtained by reason of marriage. The proceedings to enforce this order may be by petition of either party, specifying the property which the other has failed to restore, and the court may hear and determine the same in a summary manner after ten days' notice to the party so failing." (Civil Code, section 425.)

Of section 462 of the old Code, which was like the new sections so far as the point now involved is concerned, this court, in Williams v. Gooch, 3 Met., 486, said: "The order of restoration contemplated by this section is a formal one, to be made in cases in which no mention of the property to be restored has been made in the pleadings, and was not designed to apply to any specific property or to settle any controversy with reference thereto even between the divorced parties. We doubt whether section 462 was intended to apply to any case in which an issue as to the restoration of specific property is made by the pleadings in the divorce suit."

So in Phillips v. Phillips, 9 Bush, 183, it was said of the same section: "The design seems to have been to regulate the mode

of enforcing the right of restoration, and not to establish or define such right."

Whatever may be said of the design of this section as it now appears in the Code, certainly it can be given no force in this case, or be construed to affect the rights of the wife to the property in dispute. It would be singular if the plaintiff, who was seeking a divorce and a cancellation of the deed, could obtain the relief he declined to ask for, when, if he had continued to ask it, it would have been refused. Except he had discontinued his claim to the property, he was not entitled to a trial. An issue had been raised as to its ownership by the pleadings of the defendant first filed, and by avoiding the issue, or in fact abandoning his claim to the property, it is insisted he got an order entitling him to what he had in fact abandoned. Instead of such being the result, it seems to us might well be argued that the discontinuance of his claim to the property in the action wherein the issue was made as to its ownership, worked a forfeiture of the right ever to claim it.

Indeed in her amended answer in this case the wife charges that "when the plaintiff by his counsel agreed with the defendant, in September, 1890, in case number 3,833 1-2 (which was the divorce suit), to discontinue all claim to the property involved if a submission were allowed on the claim for a divorce, defendant in good faith believed she would have the house and lot for her own, to do with as she saw proper."

It seems to us that the record so strongly conduces to establish some arrangement by which all claim to the property was to be withdrawn, provided the defendant would only formally object to the submission of the case and the obtention of the divorce, as to defeat the recovery of the property without a denial of the charge, or at least any explanation of this deliberate abandonment of any claim to the property in order, seemingly, that a divorce be at once had. The conclusion that there was such an arrangement or agreement is almost irresistible, but the facts may be inquired into on the return of the case as well as to the ownership of the property. We simply decide that the property rights of the parties are wholly unaffected by the formal order of restoration in the judgment of divorce, though the husband's rights may be precluded by reason of the arrangement indicated. We think that in any event, should the chancellor, upon a final hearing of the case, cancel the deed, the rights and equities of the wife are open for adjustment in case number 2,713, in which the property is already in the hands of the court's receiver. The cases should be heard together, and such order made as will secure the wife in such part of the estate of the husband as may be allotted to her should the property be restored to him.

Judgment reversed and cause remanded for proceedings not inconsistent with this opinion.

L. & N. R. R. CO. v. KY. MIDLAND RY. CO., &c.

(Filed May 10, 1894.)

1. Contract between railroads construed—The contract whereby appellant permitted appellee to construct a railroad track in appellant's freight yard, so as to connect appellee's main track with one of appellant's side tracks, was entered into for the sole purpose of forming a connection between the two roads, in order to create and facilitate interchange of business. Under

this contract neither road has any right to use the track built by appellee in appellant's yard for any other purpose than the interchange of freight without the consent of the other, and neither company has a right to place and keep cars on said track without the consent of the other.

2. Same—License—Such contract was not a mere license by appellant, revocable at its pleasure, allowing the construction and use of such track by appellee. The contract was founded on a valuable consideration, and is obligatory on both parties.

John W. Rodman for appellant.

John B. Lindsey for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

Decision of this case depends upon meaning and application of the following contract: "Whereas, the Ky. Midland Ry. Co. wishes to form a connection of its main track with one of the side tracks of the L. & N. R. R. Co. near the warehouse east of High street, and north of the L. & N. R. R. Co.'s main track, in the city of Frankfort, * * * as more particularly shown on the tracing made part hereof; and whereas, the L. & N. R. R. Co. has consented that the Ky. Midland Ry. Co. make said proposed connection upon the terms and conditions set forth herein. Now, therefore, this contract, made and entered into this 9th day of November, 1888, witnesses that said L. & N. R. R. Co. hereby agrees that said Ky. Midland Ry. Co. may make said proposed connection, as shown by said attached tracing, with a single track railway; the said connection to be made under the supervision and to the satisfaction of an engineer or the superintendent of the L. & N. R. R. Co., and to be constructed and maintained by said Ky. Midland Ry. Co. at its own expense and free of all cost and expense to said L. & N. R. R. Co. It is also agreed that if at any time the L. & N. R. R. Co. shall change the location of any of its tracks in said city of Frankfort, or shall lay any additional side track or side tracks or other tracks in said city, in such manner as will necessitate a change in the connection to be made under this contract, or in such manner as that the line of the Ky. Midland Railway will be crossed or otherwise further connected therewith, that said Ky. Midland Ry. Co. will make such crossing or crossings, connection or connections as may become necessary at its own cost and expense exclusively, and that said L. & N. R. R. Co. is to be at no cost or expense whatever, growing out of said connection or connections, crossing or crossings, should such crossing or crossings, connection or connections hereafter become necessary, because of any change or changes said L. & N. R. R. Co. may make at that point."

The action was brought September 24, 1890, by the Ky. Midland Ry. Co. and the Home Construction Co., the latter having in 1888 leased of the former company its road and now operating it, to enjoin the L. & N. R. R. Co. placing any of its cars upon that part of the main track of the plaintiff, Ky. Midland Ry. Co., between the northeast corner of South's warehouse, where it connects with one of defendant's side tracks, as shown by the paper made part of the contract, and the eastern line of defendants' freight yard, or in any manner whatever interfering with plaintiff's occupation and use of said track.

The L. & N. R. Co. in its answer made a counterclaim, set up

various grounds of defense, and prayed said contract be adjudged of no legal effect except as a temporary license, revocable at its pleasure.

Upon final hearing the chancellor adjudged that the Ky. Midland Ry. Co., and the Home Construction Co. as its lessee, are entitled to have, hold and maintain upon the freight yard of the L. & N. R. R. Co. its main track of railway, as now situated, from the eastern boundary of said freight yard along south margin thereof to the point of connection of same with one of the latter company's side tracks at northeast corner of South warehouse, and have the right to operate, maintain and use said track free from control, obstruction or interference of defendant; and, moreover, are entitled, in common with defendant, to use of the switch track along side of said warehouse, from northeast corner thereof west to the point of its clearance from defendant's switch track at a distance of about 50 feet for passage of cars and trains in interchanging business between the two roads; and to protect such rights the defendant was perpetually enjoined placing any cars upon said track between the northeast corner of said warehouse and boundary line of its freight yard against consent of plaintiffs, or in any manner interfering with plaintiffs in their enjoyment, occupation and use of said track. The effect of that judgment is to give to Ky. Midland Ry. Co. absolute and exclusive possession and control of said track, extending about 197 feet, to be used and enjoyed by it or its lessee, without right of the L. & N. Co., owner of the land on which it is situated, to place cars thereon for any purpose whatever without its consent.

It seems to us such construction and application of the contract in question is palpably variant from its true meaning and intention of the parties. and is no less than arbitrarily taking, under from of judicial process, the property of one and, without compensation, giving it to another, for it is too plain for discussion that the Ky. Midland Ry. Co. asked, and the L. & N. R. R. Co. agreed, to permit it to extend its main track to a suitable point of junction with a side track of the latter for the sole purpose of forming a connection of their roads, whereby to create and facilitate interchange of business.

The L. & N. R. R. Co. had no interest in such extension of the Ky. Midland Ry. for any other purpose, and it is unreasonable to say it intended to donate a portion of its freight yard, hardly large enough for its own purposes, for construction of a track which the Ky. Midland Ry. Co. would practically own and have right to operate, not for interchange of busines between the two roads, but exclusively for its own private purposes; and one of the grounds of complaint by the L. & N. R. R. Co. is that after the contract was made the Ky. Midland Ry. Co. constructed a side track from its own depot to a point of intersection with its main track, only about 10 feet from the freight yard of the former company, and that in order to move trains from one of said tracks to the other it is necessary to move them into the yard which the Ky. Midland Ry. Co. or its lessee has, against the protest and to annoyance and inconvenience of the L. & N. R. R. Co., been doing, and, under the judgment appealed from, may continue to do indefinitely.

Clearly the Ky. Midland Ry. Co. has, under the contract, no right to use that part of its main track laid inside the freight yard of the L. & N. R. R. Co. for any other purpose than to interchange of business between the two companies, nor right to place thereon or remove therefrom any cars except as such as may be destined for or brought from the L. & N. road.

It is equally clear to us that the writing in question, formally

signed as it is by officers of both companies, does not import a mere license given without consideration and revocable at pleasure by the L. & N. R. R. Co., but it is in substance and meaning an agreement whereby that company in consideration of outlay of money by the Ky. Midland Ry. Co., in constructing the track of 197 feet, and further consideration of mutual and reciprocal benefit by reason of connecting their roads, sells and grants a joint and equal interest in that part of its freight yard occupied by the track in question, that is to be used by them for the purpose of interchanging freight and passengers and transfer of cars from one main track to the other, but not to be occupied or used by either against consent of the other for any other purpose.

It is, however, alleged, and we think shown, that in virtue of a verbal agreement, upon faith of which the Ky. Midland Ry. Co. paid for removing and repairing that part of the switch track along side of said warehouse, the two companies were to have joint use of it for passage of cars from one main track to the other.

It would seem, independent of an express agreement, that use of that part of the switch track would be necessary in order to facilitate the purpose for which the track of 197 feet was constructed, and a right to reasonable use would be a result of the contract, and there was no necessity to fix by judgment the right to such use.

For the reasons indicated the judgment is reversed and cause remanded for dissolution of the injunction, except to the extent it restrains the L. & N. R. R. Co. from obstructing use of the track of 197 feet for interchange of business between the two companies, and for further proceedings consistent with this opinion.

BACON v. KY. CENTRAL RY. CO.

(Filed March 13, 1894.)

Options—Consideration—An optional agreement to convey, although without any covenant or obligation to purchase, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration or forms part of a lease or other contract between the parties that may be the true consideration for it.

Where it was stipulated in a lease of land to a railroad company that at the expiration of the lease the company should have the right to purchase the land at a certain price, the agreement was binding on the lessor, although there was no obligation upon the part of the lessee to purchase, the other undertakings of the lessee being a sufficient consideration.

Ward & Dickson for appellant.

G. C. Lockhart for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hazelrigg.

On the 17th of March, 1855, W. A. Bacon, the appellant, leased to the Covington & Lexington Railroad Co. 3 acres of ground near Paris, Ky., for the term of ten years.

The lessee agreed to fence off the ground into lots, keep it fenced and only use the premises for cattle lots; also to pass on its cars the lessor while on his own business and his wife and children during the continuance of the lease.

It further agreed that Bacon might put a pair of stock scales on the ground and use them, and would charge no freight for the transportation of the scales over its road, or of lumber to build an office or house for stockmen, and whatever sawdust was transported by the lessor for the shipment of stock from Paris was to be charged half freight.

This agreement was signed by both parties and put to record in the clerk's office of the Bourbon County Court. The lessee took possession of the ground and complied with the terms of the contract. On August 6, 1862, the lease was extended so as to run for twenty-five years from the expiration of the first lease, or until March 17, 1890, and was altered in boundary to some slight extent. It was also again stipulated that the lessee, then the Kentucky Central Railroad Co., should keep the ground fenced and use it for stock lots, and give Bacon a pass for himself and family over the railroad when traveling on his own business.

There was, however, added to the lease the following clause, and out of it grows the present controversy: "At the expiration of this lease, or upon the sale of said property by said Bacon, or in case of his death, the said company, by their authorized agent, shall have the right to purchase the said land now leased for the sum of $100 per acre, payment to be in cash at the time the deed is made and the land taken by said company. If after purchase the company shall decide to discontinue using said lots for stock purposes, the said Bacon or his heirs shall have the refusal to repurchase the same price per acre for the land, and to pay for all improvements that may be put on said land, including the fencing, provided they agree to do so within ninety days after the same shall be offered to them."

This "extended" lease was also signed by both parties and put to record.

Without disagreement of any substantial character, the parties continued under this contract—the lessor to obtain and use the passes, the half rates on sawdust, of which he was using large quantities in the monopoly he had secured of "bedding" the cars of all stock shipped from Paris, etc., and the lessee to use the lot only for cattle lots, keeping the same fenced, etc., until on the 17th of March, 1890, and again on the 18th the Kentucky Central Railway Co. tendered to Bacon the sum of $300 in payment for the ground embraced in the lease, and demanded a conveyance thereof under the terms of the contract. The latter refused to convey, and shortly filed his petition, seeking to recover possession of the land and damages for its detention and use since the termination of the lease. The company defended its holding by virtue of the contract, alleged compliance with all its terms, which was denied by Bacon, and sought to compel a conveyance. The chancellor decreed specific performance, and Bacon appeals.

He contends that the contract is not enforcible because the lessee was not obliged, at the expiration of the lease, to perform the contract of purchase. The lessor, by tendering a deed to the company, could not have obliged it to pay the stipulated price of $300.

To put the contention in another form, the contract, in so far as and inasmuch as it secures to the company a mere option to purchase the ground, is void for want of mutuality of obligation. It is argued that as both are not bound, neither is bound. This doctrine, it is insisted, is borne out by the case of Boucher v. Vanbuskirk, 2 A. K. Mar., 345, decided by this court in 1820, and followed in Barbour v. Pate, 2 T. B. Mon., 8; Jones v. Noble,

&c., 3 Bush, 697, and finally in a pronounced and conclusive form in Litz v. Goosling, &c., 14 Ky. Law Rep., 91.

On the other hand, it is insisted that what is termed by the counsel of appellee as the more modern doctrine that an optional agreement to convey, without any corresponding agreement to purchase and without any mutuality of remedy, is enforcible in equity if made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it, is authoritatively settled in the case of the Bank of Louisville v. Baumeister, &c., 87 Ky., 12, and cleary put in the case of Hawralty v. Warren, 3 C. E. Green, 124 (90 Am. Dec., 613), and numerous other cases cited.

A careful examination of these cases will, we think, fail to disclose any conflict between them. In the cases relied on by the appellant, the court finding in emphatic form a lack of mutuality of obligation and remedy, and no consideration whatever otherwise appearing, held this feature to be fatal to the enforcement of so "one-sided" a contract. As we shall see, there must always be mutuality of contract; but the obligation to convey need not always be accompanied by an obligation to purchase; other consideration may make the contract mutually binding.

In the Boucher-Vanbuskirk case, supra, Vanbuskirk let to Boucher 50 acres of land, adjoining other lands of the latter, upon which he might raise a house if he so desired and might clear the land "without let or molestation and enjoy the privileges of the same," and thereunto they set their hands and seals "the 9th of Feburary, 1811," and then followed the agreement that if Boucher should pay to Vanbuskirk $2.50 per acre the latter obligated himself to make the former a deed in fee for as much as he should pay, etc. The court announced the doctrine that "it is well settled that to enable either party to compel a specific execution the contract must be mutually binding on each," and said that there was nothing to distinguish the case from "the naked case of an agreement binding on one party." The improvements mentioned, if any, were put on the land by Boucher, and it was said there was nothing in the record to show that any were erected, were made voluntarily. He was not bound to erect any, and it is noticeable that Boucher bound himself by the contract in no particular whatever, nor was there any consideration for the lease which could form the basis for the option to purchase. So in the cases of Barbour v. Pate and Jones v. Noble, &c., supra, there is nothing in either of the contracts, the enforcement of which was denied, distinguishing them from the "naked case of an agreement binding only on one side," and there was no consideration to uphold the contract for an option.

In Litz v. Goosling, supra, Goosling and wife agreed, "in consideration of $1, to sell and convey unto E. H. Sudduth, * * * with general warranty of title, * * * all the coal in, upon and underlying a certain tract or parcel of land," etc.

The court refused to enforce the contract because of a lack of mutuality of obligation, but said: "If the contract for an option to purchase real estate at a certain price within a certain time be based upon a sufficient consideration, which may consist, of course, either in an advantage moving to the one party or a disadvantage to the other, then it is enforcible; but where a mere naked option, destitute of consideration, is given to one, it is not enforcible, because there is no mutuality of right and remedy."

Turning from these cases, where there was confessedly no sort of consideration to uphold the contracts, we notice, first, the case of The Bank of Louisville v. Baumeister, &c., supra, in which

this court said: "It is true, as argued, 'a contract must be mutual and one party can not be bound without the other.' And that does not mean that any one or more acts to be done by one of the parties must necessarily be, simultaneously with the consideration paid or agreed to be paid by the other. The conveyance of the lot upon demand and tender of the agreed price by Spalding was obligatory on Mrs. Bullitt, if at all, because it was part of the contract of lease, which, being founded upon a valuable consideration, was valid and enforcible as an entirety. * * * We perceive no reason why the owner of unproductive real estate may not, as part of a contract of lease, and in consideration of rent to be paid by his lessee, or expense to be incurred in making it productive, as seems to be this case, bind himself to sell it within a prescribed period at a stipulated price at the option of the lessee."

The same principle is determined in Page v. Hughes, 2 B. M., 439.

In Hawralty v. Warren, supra, it is said: "These immaterial or optional contracts are not favored in equity and it has been held, both in Great Britain and this country, that want of mutuality of obligation and remedy is a bar to specific performance (Lawrence v. Bulter, 1 Schodles and L., 13; Parkhurst v. Van Cortlandt, 1 Johns. Chy., 282: 7 Am. Dec., 427), etc., but modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey or renew a lease without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it." (Hatton v. Gray, 2 Choice Cas., chapter 164; Backhouse v. Crosby, 2 Eq. Cas., abstract 32, paragraph 44; Backhouse v. Mohnn, 3 Johns., 434, &c.)

"In this case the agreement was executed at the same time with the lease, and was part of the same transaction, and must, for this purpose, be treated as if part of the lease."

In re Hunter, 1 Edw., chapter 1, the court said: "In the next place it is said the covenant to sell is not mutual, the lessee not being bound to purchase, and that, as this is a 'one-sided' agreement, the court will not decree a specific performance," but after discussing the authorities the learned vice chancellor concluded thus: "The court may, therefore, in a proper case, where there is a covenant on one side and no mutuality, decree a performance. Besides, in a case like the present, it may peculiarly proper. The rent may have been fixed at $500 as an inducement to the power of purchasing the property. This is a fair inference."

To the same effect are the cases of Davis v. Robert, 89 Ala., 402 (18 Am. St. Rep., 126); Hall v. Center, 40 Cal., 63, and Suffrain v. McDonald, 27 Ind., 269. In the last-named case the court said: "Numerous authorities are cited upon the point that a mere offer to sell may be withdrawn at any time before it is accepted. That such is the law can not be controverted. But the agreement under consideration is not a mere naked proposition to sell the lot, nor can it be regarded as separate and distinct from the lease of the lot and the consideration stated in the agreement. The stipulations on the one side to lease the lot for a period of two years, with the right of the lessees within that time to purchase the same at the price and on the terms stated in the agreement, and on the other to pay the rent agreed upon and to erect the fence, must be regarded as constituting one en-

tire agreement, each particular stipulation forming an inducement thereto. The agreement to pay the rent and build the fence must be deemed to have been made in consideration as well for the privilege of becoming the purchasers of the lot as for its use."

Mr. Waterman, in his work on Specific Performance of Contracts, 269, lays down the same rule: "The mutuality and consideration," says that author, "consist in the fact that the vendee has done, upon the promise of the vendor, what the latter required, and it is immaterial that it was done without entering into a previous undertaking to do it.

In the case under consideration the company, for the use of 8 acres of unimproved ground and the right to buy it at the end of the lease for $300, agreed to pass, or furnish to the appellant, free travel on its cars for himself and family, haul the sawdust needed by him in bedding the cars for stock at half price, fence off the ground into subdivisions for cattle lots, and keep the same fenced, and, what was by no means an unimportant feature of the contract, retain and use the premises for stock lots. We say this latter was no unimportant part of the consideration because we gather from the contract referring to the appellant's use of sawdust, and which is made clear from the proof, that the chief point in view with Bacon was to have the company use his grounds as its stock lots and thus secure the right to "bed" the cars, the average yearly profit from which business, continued throughout the whole of the lease, was from $600 to $800. We can not say that the consideration furnished by the lessee was solely for the use of the ground. We must conclude that each and every stipulation on the part of one of the contracting parties is supported by and induced by each and every stipulation on the part of the other. We may read the contract as if by it the lessee agreed to perform the stipulations required of him, provided or on condition that he thus secured, by purchase, for a valuable consideration, the right or option to buy, and when the contract is so considered we find no authority in this State or elsewhere which induces us to sacrifice the equity of enforcing the agreement to the somewhat ambiguous though euphonistic doctrine of "mutuality and reciprocity of obligation."

On the issues of fact presented we think the lessee furnished and the lessor received in every substantial particular the service undertaken to be furnished under the contract. The benefits accepted by the lessor under the agreement were received throughout a period of some thirty-five years, and he will not now be heard to say "my passes were in an unsatisfactory form; I paid full freight for my sawdust, and was put to the slight inconvenience of waiting a few days for the rebate; I got passes only over the road as it was constructed when the contracts were made, and was not allowed to ride free over other lines of the company in the various States of the Union where the road had eventually been extended; I accepted the benefits secured under the contract, but it now occurs to me that this lease and option was a personal contract and not transferable, and I ought not to have accepted, and had no legal right to accept, the service from any save the original lessee."

These considerations were properly dismissed by the chancellor as sufficient to prevent an enforcement of the contract.

The judgment is, therefore, affirmed.

HENDERSON BELT R. R. CO. v. DECHAMP, &c.

SAME v. SCHLAMP.

1. A city ordinance granting to a railroad company the right to the use of the streets of the city for the construction and operation of its road, and providing that the company "will pay to any property owner all damages that may be recovered by such property owner, either against said railroad company or against the city, on account of the construction, location or operation of said road, or by reason of the filling, excavating or grading prescribed herein, and said company shall indemnify and save harmless said city from any liability direct or remote," is to be regarded as a contract, binding the company to pay only such damages as were recoverable by the law then in force, the purpose of the contract being to indemnify the city and not to make the company liable for remote, contingent or speculative damages.

2. Railroads—Injury to abutting property—For an injury to his private rights the owner of an abutting lot may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities.

3. Same—Measure of damages—In this action against a railroad company to recover damages for injury to abutting property resulting from the construction and operation of a railroad along the streets of a city, the court properly instructed the jury to find for plaintiffs if they believe from the evidence that the abutting property had been damaged by reason of the cut made by the company, or from the falling of soot and cinders upon the property, or from smoke entering the house, or from the vibrations or concussions of the running trains, but for a diminution of the value of the property, if any, caused by or resulting from a mere dislike of residing near a railroad or from smoke, cinders and soot as would fall on the property by reason of currents of wind, they were to allow no damage.

(Filed January 6, 1894.)

Yeaman & Lockett and H. F. Turner for appellant.

J. F. Clay and S. B. & R. D. Vance for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The city of Henderson, by an ordinance of its common council submitted a proposition to the appellant, the Henderson Belt Railroad Company, embracing the terms and conditions upon which the company might construct and operate its railway on certain streets of the city.

The company accepted the conditions and constructed its road. The track was to be constructed on a grade fixed by the council. The ties were not to be elevated above the surface of the street, and the whole was to be so maintained and operated as not to obstruct travel. Many matters of detail regulating the manner of making the fills and cuts, and providing for easy crossings, etc., are set forth in the ordinance, all looking to the protection and safety of the public. The meaning of section 3 of this ordinance or proposition is the subject of inquiry on these appeals, and this section is as follows: "Said company shall pay to any person or property owner any and all damages such person or property owner may sustain by reason of the construction, location or operation of said track or railroad, or by reason of the filling, grading and excavating of the work as prescribed or required herein; and said company will pay to any person or property owner any and all damage that may be recovered by such

person or property owner, either against said railroad company or against the city of Henderson, on account of the construction, location or operation of said road or track, or by reason of the filling, excavating or grading prescribed or required herein, and said company shall indemnify and save harmless said city from any liability, direct or remote, it may incur by granting the right of way as herein specified, or by the construction or operation of said track. Engines or trains of cars shall not stand or remain on any of the tracks in any of the streets or alleys, except Towles street," etc.

The appellees, Dechamp, &c., own and occupy as a residence a lot of ground fronting on Elm street and aligning on Audubon street for some 165 feet. Along the latter street the appellant's road runs. The appellee, Schlamp, owns a lot of ground on Alvasia and Vine streets, and on Vine and Alves street, the road running along Vine.

It is the contention of counsel for the appellees that the elements going to make up the damages ordinarily recoverable from railroads by reason of their lawful occupation and use of a street are enlarged in the present instance by virtue of the provisions of section 3 of the ordinance; and that, in addition to a recovery for proximate and direct damages, the ordinance or contract under which the company entered upon the street authorizes the recovery of all damages and never includes incidental and remote injuries. It is contended that the instructions to the jury authorized a recovery for injuries excluded by the general rules of law applicable to such cases. If so, the judgment should be reversed, as it seems to us clear that the purpose of the council was to indemnify the city against all claims for damages arising out of the construction of the work—to save it harmless from every liability without regard to the nature or origin of it. The point in view was safety to the city, and not the varied and differing causes of action that might accrue to the individuals. These were wisely left to the control of general laws. The contention of counsel would involve the opening up of entirely new sources of litigation, establish new causes of action and authorize a recovery for merely speculative and remote damages. This phase of the case was carefully considered by the Superior Court, and the learned judge delivering the opinion aptly said: "Conceding to the person or property owner, who is injured by the construction and operation of the road, the right to rely upon the contract, when the whole contract and the parties to it are considered, its purpose and meaning is plain. The city council was exercising a power granted to it—a power which should always be exercised with caution, and never abused. The grading of the street for the roadbed was to be made in accordance with the council's direction, and the evident purpose was to secure the city against damages occurring to individuals by any improper exercise of its power. The members of the council were the guardians of the city. The interests of the city and its people were, in a great measure, in their keeping; and we concede to them the right, and recognize it as their duty, in granting such privileges as are granted here, to guard the interest of the citizen. But certainly it was no part of their duty to alter the established rules of law, and we can not assume that it was their intention to create right in citizens and property owners, and increase the liability of the company to which they were granting a right beyond that which the law imposed."

We concur in this construction; nevertheless, the railroad company, neither with the consent nor the acquiescence of the council, nor in pursuance even of its direction, could so construct its roadbed or fix its grade as to destroy the property of the citizen

or materially affect its value. Such damages as were the direct and proximate result of the excavations complained of, and of the falling soot and cinders upon the property, are recoverable upon well-recognized principles, and do not depend upon contract. In the first-named case the jury were told to find for the appellees if they believed from the evidence that the abutting property had been damaged by reason of the cut made by the company, or from the falling of soot and cinders upon the property, or from smoke entering the house, or from the vibrations or concussions of the running trains; but for a diminution of the value of the property, if any, caused by or resulting from a mere dislike of residing near a railroad, or smoke, cinders and soot as would fall on the property by reason of currents of wind, they were told to allow no damage. If the smoke or cinders would not fall on the property except by the force of the wind, the jury were told that such damage was necessarily unavoidable in the opeartion of railroads, and for which the law allows no recovery.

In the second-named case the jury were told to find for the appellee, Schlamp, if his property had been rendered permanently less valuable by reason of being less accessible because of the fills and excavations made in front on the streets, and that for a diminution in value, if any, caused by a mere dislike of residing near a railroad, they were to allow no damages.

The damage recoverable under these instructions was the direct and proximate result of the appellant's wrongdoing, and the act was not rendered less hurtful to the appellees if authorized by the council. The municipal authorities could not transfer rights which the municipality did not possess, and the easement of access and immunity from falling soot and smoke directly from the engines of the company were private rights, entirely distinct from those of the public, and did not pass under the grant of the council, and for an injury to his private rights the owner of an abutting lot may recover compensation from a railroad company, notwithstanding the grant of the right of occupancy by the municipal authorities. (Elliott on Roads and Streets, 532; E. L & B. S. R. R. Co. v. Combs, 10 Bush, 382.)

The instructions are substantially correct and the proof of the damages explicit.

The judgments are affirmed.

RISNER v. COMMONWEALTH.

(Filed May 10, 1894.)

Selection of jury—In a county where the jury law, approved May 22, 1893, required that the jury commissioners should place in the wheel or drum two hundred names from which the juries should be drawn, an order of court directing them to put in only fifty names was illegal, and a party convicted by a jury thus chosen is granted a new trial.

Augustus Arnett for appellant.

W. J. Hendrick for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Lewis.

Samuel Risner and Leander Risner were jointly indicted for murder, and each convicted of manslaughter, though the latter only appeals.

The only ground for reversal that we will consider, or that, in our opinion, is sufficient to authorize reversal, is failure of the lower court to obtain the jury by whom they were tried in the mode prescribed by "an act concerning juries," which was approved May 28, 1893.

The transcript in this case is made out so unskillfully that we have had some difficulty in ascertaining precisely when and in what succession the various orders on the subject were made by the lower court, for some of them are not even dated; and to increase the confusion the original transcript did not contain all the orders, the omitted portion having been added since it was filed here.

It, however, appears that January 29, 1894, being first day of the term of court, the following order was made: "It appearing to the satisfaction of the court that the grand and petit jurors selected and drawn by the jury commissioners appointed at the October term, 1893, of this court, and summoned by the sheriff as grand and petit jurors for the present term of this court, were not selected and summoned as required by law. It is, therefore, ordered that all said jurors, grand and petit, be discharged as such for the present term of this court."

On the same day, January 29, an order was made appointing three jury commissioners for the period of one year from that date, who were directed to draw twenty names for grand jurors and thirty names for petit jurors at that term of court. And the commissioners on that day delivered to the judge in open court the jury lists, under seal, for that term, which were then delivered to the sheriff, who was directed to summon the persons named to appear on the third day of the term of court to serve as grand and petit jurors. On the 5th day of the term, being February 2, 1894, was made the following order: "All the names in the drum or jury wheel being drawn by the judge of court, and the jury not being completed, it is ordered that the jury commissioners reconvene for the purpose of selecting other jurors."

Following that order is a recital that "said commissioners, after selecting one hundred names and placing them in the jury wheel, returned same into court and delivered the same to the judge, who drew from said wheel one hundred names, as required by law, to serve as jurors at this term, and the clerk is ordered to certify said list to the sheriff, who is directed to summon each and all of said one hundred jurors."

In another part of the transcript, however, it is recited that "said commissioners delivered, in open court, to the judge, the drum or wheel case containing the two hundred names and the key and slips not used. Thereupon the court drew from said drum or wheel case one hundred names, one at a time, and recorded each name upon a sheet of paper in the order which they were drawn, and certified the same and delivered the list to the sheriff, who was directed to summon all whose names were on the list, which he did; and out of said list, as drawn and summoned, the jury was completed."

By section 1 of the existing statute on the subject the circuit judge of each county was required at the first regular term of circuit court therein after the act took effect, and annually thereafter, to appoint three proper persons as jury commissioners for one year. And the process by which they were required to obtain the necessary number of jurors is to take the last returned assessor's book for the county and from it carefully select from

intelligent, sober, discreet and impartial citizens, housekeepers, in different portions of the county, a number of persons corresponding to population thereof, the number required for Magoffin county where appellant was tried being not less than two hundred, each name so selected to be written on a slip of paper, and the slips deposited in a working drum or wheel case, from which is to be drawn a sufficient number of names to procure twenty persons qualified to act as grand jurors and thirty persons to act as petit jurors, each list to be recorded on paper and placed in a sealed envelope directed to the judge of the circuit court, and constitute the grand and petit jurors for the ensuing term of court. When the lists have been thus completed it is the duty of the commissioners to lock the drum or wheel case containing the remaining names and deliver it to the judge of court, who shall then place it and the sealed envelope in custody of the clerk.

Section 2 provides that if at any time it becomes apparent to the judge the names in the drum or wheel case will be exhausted before the next annual selection of commissioners, he, by an order entered of record, shall reconvene the commissioners, who shall select and place in said drum or wheel case the number of names of qualified grand and petit jurors stated in the order of the court reconvening them.

Section 3 provides that at each term within one year after commencement of that at which the commissioners were appointed the judge of the court shall draw from said drum or wheel case the names of twenty qualified grand jurors and thirty petit jurors, and shall place the lists in separate sealed envelopes, from which the next grand and petit jurors are to be drawn. Though it does not appear in what respect the jurors were selected and drawn illegally at the October term, 1893, we suppose it was because done in pursuance of the General Statutes, which were repealed by the statute of May, 1893. But whatever may have been the ground for the order of court discharging them, which, it must be presumed, was properly made, the alternative was presented to either supply their places or dispense altogether with both grand and petit jurors for that term of court. And though such condition as resulted from that order is not in express terms of the existing statute provided for, we think it was in the power of the court to then proceed to obtain grand and petit jurors in the mode prescribed by the statute, and to that end appoint jury commissioners, which seems not to have been done as required at the October term, 1893. But the jury commissioners were not directed by the court, as the staute prescribes, to place in the drum or wheel case the names of two hundred persons qualified for jurors from which to draw and return to court twenty grand and thirty petit jurors. But instead they, under order of court, selected and put in the drawer or wheel case only fifty names altogether, and from that list the requisite number of grand and petit jurors was obtained. And it was only after the list of twenty petit jurors thus obtained was exhausted in the effort to take up the jury to try appellant, which was only partially successful, that the jury commissioners, being reconvened, were directed to, and did, place in the drum or wheel case names of two hundred persons as required, from which number the trial jury was completed.

The effect of the first order was to give the jury commissioners more dangerous power and wider discretion in the matter of obtaining jurors than is authorized by either the evident policy or plain language of the statute. And while it is not made to directly or certainly appear appellant was thereby substantially prejudiced, still he had the right to insist upon being tried by only

a jury obtained according to the statute which was passed for the purpose of securing fair and impartial jurors. And to more effectually accomplish that end, the names of at least two hundred persons are required in a county of the population of Magoffin, to be selected and placed by the commissioners in the drum or wheel case, and thence blindly drawn by them or the judge of court, as the case might be.

Indeed that particular provision can not be disregarded in any substantial particular without defeating one of the principal purposes of the statute.

It seems to us that error of the court imperatively requires it, and the judgment is, therefore, reversed for new trial.

McGUIRE, &c. v. KIRK, &c.

(Filed May 12, 1894—Not to be reported.)

1. Patents—Under legislative act of 1835 county courts had authority to dispose of vacant lands lying in the respective counties.
2. Curative statutes—A patent having been issued for land under authority from a county court, under the act of 1835, for land lying without the limits of the county, can not, by a subsequent legislative act, be made effectual as to patents for lands entered, surveyed and patented in another county.
3. Void patents—Although the description of land embraced in a patent in this case is indefinite, yet it is not so indefinite as to render the patent void.

Stewart & Stewart for appellants.

Thomas H. Hines, Wm. H. Holt and R. C. Burns for appellees.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellees, claiming to own some 8,000 acres of land on Wolfe creek, in Martin county, Ky., sued Collinsworth and others for having wrongfully entered on their land and cut and removed timber therefrom.

The latter leaving the derivation of appellants' title virtually unassailed, justified their entry under Wm. McGuire, the ancestor of the appellants, and the question to be determined is, who has the superior title to the lands in controversy?

The appellees, for title, look to a patent from the Commonwealth which issued to Wm. Troy on May 28, 1866, for 6,820 acres, and the appellants claim under a patent to McGuire for 139 acres, dated July 7, 1847, and a survey of 1,400 acres, less 600 acres excluded, made October, 8, 1860, and carried into grant November 19, 1861. The McGuire patents were each based on Floyd county warrants. The court adjudged that, so far as the patent for 139 acres embraced land in either Johnson or Lawrence counties, it was void and conferred no title on the pantentee, McGuire, and of the correctness of this conclusion there can be no question.

By an act of the general assembly, February 28, 1835 (Statute Laws, volume 3, page 386), all the vacant lands in the counties east and north of the Tennessee river were vested in the respective county courts, to be disposed of for certain purposes, and of this statute this court, in Hart v. Rogers, 9 B. M., 419, said: "Whether we regard the letter or the general scope and object of these statutes, the rights and power conferred by them upon

the several county courts and these officers are strictly local and territorial, and that under these statutes no right can be derived either from a county court or a county treasurer, to land not lying within their own county. The attempt, therefore, to locate land in another county than in Floyd under the Floyd county warrant was inoperative for any purpose, and the act of legislature in 1851, purporting to legalize this survey of McGuire, was ineffectual in so far as it sought to transfer land entered, surveyed and patented, as in Floyd county, to the credit of any other county.

It was further found by the court that no part of the 1,400 acre tract was located in Lawrence county as was contended by the appellees, and, therefore, adjudged the appellants to be the owners of that tract, and that, therefore, so far as the Troy patent conflicted with the patent of November 19, 1861, it was void.

The court dissolved the injunction so far as sought to affect the lands of the 139 acres embraced within the limits of Floyd county, and so far as it affected the 1,400-acre tract, and perpetuated it as to the balance of the lands in controversy.

The chief contention of the appellants is that this judgment should be reversed because it is indefinite, and we may admit it to be so, as it does not adjudge what part of the 139-acre patent was located in Lawrence county.

The judgment, however, does not dispose of the case, and in fact an order of survey has been directed for the purpose of ascertaining accurately the facts in the particular mentioned. The principle determined by the court was correct, and the details are left for further proof. To such extent as the 139-acre tract may be found in Floyd county, or what was Floyd at the date of the survey, then the appellants succeeded as to it, and on final hearing the court can determine the question of costs. The proof is conflicting as to the possibility of running out the 1,400-acre patent, but the court upheld it to known objects, closing the survey by a line from the beginning of the last call to the mouth of Panther Fork of Wolfe creek. We do not think it so indefinite as to the exclusions and exterior boundary as to render it void.

On both the original and cross appeal the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

PERRY & MINOR v. PERRY.

(Filed May 16, 1894.)

1. Parties to actions—According to the common-law rule, where an obligation was executed to several obligees, and one died, the right of action passed to the survivor, and he alone could sue; but under the Code of Practice the personal representative of the deceased obligee is a necessary party, either as plaintiff or defendant. And the fact that the surviving obligee is sole devisee under the will of the deceased obligee does not affect the question, as the personal property of the testator passes to his personal representative to pay his debts and costs of administration, and after that to be paid over to the devisee.

2. Same—Demurrer—The defect on account of the failure to make the personal representative of the deceased obligee a party can be reached either by special or general demurrer.
3. Evidence as to transaction with decedent—One of the defendants was not competent to testify as to transactions and conversations with the deceased obligee, as none of the transactions or conversations were had in plaintiff's presence, and she never testified concerning them.

Lindsay & Botts for appellants.

Wm. Carroll for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Barbour.

This action was brought by Lucy Perry upon a note executed by the appellants to Green and Lucy Perry. The petition alleges that Green Perry had died, leaving a will by which he devised all his estate to the plaintiff, Lucy Perry. To this petition a special demurrer assigning a defect of parties and also a general demurrer were filed, both of which were overruled.

The contention is that the plaintiff could not maintain the action in her own name; that the personal representative of Green Perry was a necessary party.

It is clear that if both obligees were alive the action could not be maintained by one. But, according to the common-law rule, where an obligation was executed to several obligees, and one died, the right of action "passed to the survivor, and he alone could sue; the personal representative of the deceased obligee was not a necessary or proper party." (Hardin, 488; 1 Bibb., 462; Litt. Sel. Cases, 492.)

This rule, however, has been changed by the Code, which provides that every action must be prosecuted in the name of the real party in interest, except in certain cases, none of which apply here; and further, that all persons having an interest in the subject of an action and in obtaining the relief demanded may be joined as plaintiffs (Code, sections 18, 22); and still further, that parties who are united in interest must be joined as plaintiffs or defendants; but if the consent of one who should be joined as plaintiff can not be obtained, he may be made defendant, etc. (section 24).

That Green Perry's personal representative is a real party in interest—as much so as Susan Perry—we think can not be denied. The will of Green Perry can not affect the question. Under this will his personal estate passed to his personal representative—first, to pay his debts, and after the payment of his debts and costs of administration to be paid over to the devisee.

It is argued that a payment to Lucy Perry would have been a good payment. Why, then, would not a payment to Green Perry's personal representative be a good payment? Can there be any question but what if Lucy Perry had refused to sue upon the note, Green Perry's personal representative would have had the right to sue, making, of course, Lucy Perry a defendant? We think not.

We are of opinion that Lucy Perry can not maintain the action in her own name, and the court should have sustained the demurrers. Either the special or the general demurrer reached the question.

In view of another trial we will say that the court properly sustained the exceptions to E. R. Perry's depositions. He was a party, and testified exclusively to conversations, etc., with B. W. Perry, who was dead. None of the transactions or conversations were had in plaintiff's presence, and she never testified concerning them.

For the reason given the judgment is reversed and cause is remanded for further proceedings.

The plaintiff may amend and make Green Perry's personal representative a party.

LOUISVILLE SAVINGS, &c., CO. v. STARRETT'S ASS'EE, &c.

1. An assignee for the benefit of creditors takes the assigned property subject to all liens and incumbrances; and although the unincumbered property is not sufficient to pay the costs of the settlement of the estate, one who holds a lien upon property which is not more than sufficient to pay his debt can be required to pay out of the proceeds of the property only so much of the costs as he would have incurred if the action had been brought by him to enforce his liens.

2. When there are two or more mortgages of unequal rank upon the same property and the proceeds of sale under a decree in equity are insufficient to pay all the incumbrances in full, each mortgagee is entitled to be paid his cost as well as his debt according to his priority; and while under this rule a subsequent mortgagee, after having incurred costs of suit and sale, may lose the costs as well as his demand, that was a risk he assumed by taking the subsequent incumbrance.

(Filed May 23, 1894.)

Strother & Gordon and J. J. Cornelison for appellant.

Wood & Day for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Yost.

On the 15th of September, 1890, Charles Starrett, then the owner of four houses and lots in Mt. Sterling, a tract of land in Powell county, and a small amount of personal property, made an asignment to W. T. Fitzpatrick for the benefit of his creditors.

Prior to this he had given two mortgages upon the town property—the first to the appellant, the Louisville Savings, Loan & Building Co., and the second, inferior and subordinate thereto, to the appellee, the Traders Deposit Bank.

At the time of the assignment there was a purchase-money lien upon the Powell county land, and a mortgage in favor of the Traders Deposit Bank.

Fitzpatrick brought this suit for a settlement of the trust, and in all the proceedings had thereunder the superiority of the appellant's lien upon the houses and lots was nowhere and in no way questioned.

The court so adjudged, and ordered a sale of all of the property assigned.

The lots, when sold, brought enough to pay the appellant's lien, with interest, and the costs by it incurred, and a small sum over and above this amount. The Powell county land failed to bring enough to pay the liens upon it. The unincumbered personal property, after paying certain taxes, only brought $226.47, to be applied to the payment of the costs, which, including an allowance of $240 to the assignee and an equal sum to his attorney, were taxed at $658.

The court adjudged that the appellant should pay $300 of the cost, and from that judgment it prosecutes this appeal.

That the court erred in this apportionment of the costs seems

clear, and we fail to see how it arrived at this conclusion. The appellant was not adjudged to be in fault. It held a superior lien upon a part of the property assigned, and was responsible for no part of the costs except such as are hereinafter indicated.

The mortgage lien was, of course, a prior lien to the incumbrance or trust therein created by the deed of assignment, and yet the court allowed the assignee to draw from the proceeds of its sale $300 to pay himself and his attorneys for the settlement of the whole trust, thus, in effect, holding that an assignment placed a lien upon the property assigned superior to all pre-existing claims and liens, when in fact it could in no way affect these prior claims.

A deed of assignment, in effect, is but a lien upon the property for the benefit of one of the creditors of the assignor, and the rights and priorities of the parties are settled just as they would be if the claims were between mortgagees, whose liens were of unequal rank.

A debtor who makes such an assignment can not give his assignee a greater claim upon the property assigned than he himself has. He can only assign his interest, whatever that may be, subject, as it is, to all liens and incumbrances.

The judgment is anomalous in another particular. The object of the action was to sell those lots to pay, first, the liens thereon. The property brought enough to pay the superior lien and a part of the inferior lien, and the court required the holder of the prior lien to pay over one-half the costs for the settlement of the whole trust, while the inferior lien holders were adjudged to pay only a nominal sum.

Mr. Jones, in his work on Mortgages, section 1708, says that "where the proceeds of a sale under a decree in equity are insufficient to pay all the incumbrances in full, each mortgagee is entitled to be paid his costs as well as his debt according to his priority, whether the bill be filed by the first or any subsequent mortgagee. "If it happens," says the writer further, "that a subsequent mortgagee, after having incurred costs of suit and of sale, covers then as well as his demand, that was a risk he assumed by taking the subsequent incumbrance." This view was followed by the court in Litham v. Poyle, 17 N. J. Equity Reports, 40.

While it is a rule that a subsequent incumbrancer is not entitled to his costs until the debt and costs of prior incumbrances are satisfied, the court here, by requiring the costs to be paid out of the proceeds of the sale, cast almost the entire burden of the deficiency upon the prior incumbrances.

In the matter of the accounting of Dean (86 N. Y., 398), Fry, who was engaged in running a livery stable and owned a stable and a lot of carriages, horses, etc., mortgaged all of his property to a creditor to secure a debt of $40,000, and afterwards assigned to Dean. The assignee took possession of the property, sold it for the mortgage debt and $1, and claimed a commission on the $40,000. The court held that he was not entitled to commission as against the claim of the mortgagee.

In Loos & Haas v. Carty, 85 Ky., 591, the only property assigned was a stock of goods upon which there were three conflicting liens—a mortgage lien, questioned on the ground that a greater part of the goods had been placed in the store after the date of the mortgage; a landlord's lien, questioned on account of his failure to sue out a distress warrant in proper time, and a lien created by the levy of an attachment. There the assignee necessarily called upon the court to settle the rights of the parties, and the costs were ordered to be paid out of the proceeds of the sale.

In this case, however, there were no conflicting claims. All parties conceded the genuineness and superiority of the appellant's lien. No judgment was necessary to fix the rights, and in the suit above the only costs which it should be required to pay are such as it would have incurred if the action had been brought by it to enforce its lien upon this property. The inferior lien holders are responsible for any costs beyond this, unless there be no other property out of which the cost can be made.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

HALL, &c. v. OLIVER.

Filed May 30, 1894. Appeal from Powell Circuit Court. Opinion of the court by Judge Barbour, affirming.

Partial transcript—Upon this partial transcript the court must presume that appellee was entitled to an allowance for making certain surveys and reports, and that the sum allowed him was reasonable and such as was authorized by law.

S. F. J. Trabue for appellants; A. T. Wood & Son for appellee.

LYON, &c. v. LANCASTER.

Filed May 30, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

Liability on supersedeas bond—Prior to the act of March 24, 1888, it was the settled law of this State that a party could not appeal from a judgment which was an entirety, upon the ground that it did not give to him all the relief to which he was entitled, and at the same time enforce so much of the judgment as awarded to him partial relief. And this rule was not confined in its application to judgments for the recovery of money. Therefore, where, prior to that act, a plaintiff prosecuted an appeal from a judgment decreeing the sale of land to pay his debt subject to a prior lien, the existence of which the plaintiff contested, and the defendant prosecuted a cross appeal with supersedeas, although this judgment was affirmed upon the cross appeal, the defendant is not liable on the supersedeas bond, as it was not the bond which prevented plaintiff from enforcing the judgment, but his own act in prosecuting an appeal.

H. W. Rives for appellants; Knott & Edelen for appellee.

MILES & CO. v. COMMONWEALTH, FOR USE, &c.

NEW HOPE DISTILLERY CO. v. SAME.

Filed May 30, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. The opinion of this court upon a former appeal in this case is the irrevocable law of the case. (14 Ky. Law Rep., 107.)

2. Repeal by statute—By virtue of section 20 of the act of December 3, 1892, entitled "An act concerning construction of the statutes," which is but a re-enactment of chapter 21, General Statutes, no new law can be constructed to repeal a former law as to any offense committed against or claim arising under the former law.

3. Reversible errors—In the absence of a motion for a new trial in an ordinary action, the only question presented upon appeal is as to the sufficiency of the pleadings to support the judgment.

Noble & Shirley for appellants; Nat W. Halstead for appellees.

WESTERN DISTRICT WAREHOUSE CO. v. HAYES.

Filed May 30, 1894. Appeal from Graves Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Custom—Duty of warehouseman to insure—In this action to recover the value of tobacco destroyed by fire while on storage in defendant's warehouse, the plaintiff's case being based upon an alleged custom which made it the duty of the defendant to keep the tobacco insured for the plaintiff's benefit, the plaintiff can not recover if he was notified that there was no insurance on his tobacco and that it was held subject to his risk, even if the custom might otherwise have applied, and the jury should have been so instructed, there being testimony tending to show such notice.

2. Stockholder may testify for corporation after corporation has introduced other testimony—Although a stockholder in a corporation can not testify for the corporation as to conversations and transactions with a dead man, there is no reason why he should not be permitted to testify for the corporation in chief after it has introduced other testimony in chief, as subsection 4 of section 606 of the Civil Code is nothing more than a rule of practice prescribing the order of introducing testimony, and should not be so applied as to exclude the testimony of those who are not parties to the suit or controllers and managers of it, and where the order of their testifying could not possibly prejudice the adverse party.

W. S. Bishop and W. D. Greer for appellant; Smith, Robbins & Thomas for appellee.

AULT v. EVERITT, &c.

Filed May 30, 1894. Appeal from Bath Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Joinder of actions—Election—As a judgment in an action on an attachment bond is a bar to an action for maliciously suing out the attachment and vice versa, the necessary sequence is that the two causes of action can not be joined, and the court in this case rightly required the plaintiff to elect which of the two causes of action he would prosecute.

2. Only those who sign an attachment bond can be sued on it, and even conceding that an officer is authorized to issue an attachment upon the execution of a bond signed by the surety alone (a question not decided), yet in an action on such a bond the plaintiffs in the attachment proceeding who have not signed the bond can not be joined as defendants.

3. Demurrer—Appearance—Where a demurrer to a petition is filed in the name of the "defendants," it might be inferred, nothing else appearing, that all the defendants demurred; but it is competent for a particular defendant to show by his affidavit that he never appeared or authorized any one to enter his appearance for him.

4. Jurisdiction—Even conceding that one of the only two defendants properly joined as such in this action entered his appearance, that fact did not give the court jurisdiction of the other, both residing and being summoned in another county, although if the defendant who entered his appearance had been summoned in the county the court would, under section 78 of the Code, have had jurisdiction of both.

5. Improper joinder of actions—Appearance—Where the causes of action were improperly joined, and the plaintiff, being required to elect, elected to prosecute the cause of action as to which only two of the three defendants were proper parties, and as to which defendants, both residing and being summoned in another county, the court had no jurisdiction, the court should, upon their motion, have quashed the return on the summons al-

though they had, before the motion to elect, filed a demurrer to the petition, court had jurisdiction of them as to other cause of action by reason of the fact that the third defendant, who was properly joined with them as to that cause of action, was summoned in the county, the steps taken by them before the motion to elect must be regarded as taken by them for their protection as to that cause of action, and when it was abandoned they were in the same position as if those steps had not been taken, and can not be regarded as having entered their appearance.

Reuben Gudgell & Son for appellant; Tyler & Apperson and C. W. Goodpaster for appellees.

DUFFY, &c. v. WHITE, &c.

Filed June 6, 1894. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Brent, affirming.

1. Bill of exceptions—Where the trial judge certifies a bill of exceptions as "a true and complete bill of exceptions herein," the certificate is conclusive that the bill contains all the instructions offered, given and refused.

2. Landlord and tenant—Counterclaim—In this action to recover rent the defendant was entitled to credit by one-half the amount he had paid to secure the cancellation of a prior lease, and his counterclaim for that sum was properly allowed, such a credit being expressly provided for by written contract.

3. Prejudicial error—As the amount allowed the defendant upon his counterclaim for breach of covenant for quiet possession was not as much as the evidence authorized, the plaintiff can not complain because there was no evidence to authorize the jury to find the exact amount they did find.

Simrall, Bodley & Doolan for appellants; Dodd & Dodd and Pirtle, Speed & Trabue for appellees.

FINNELL'S ADM'R v. LOUISVILLE SOUTHERN R. R. CO.

Filed June 6, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Judge Yost, reversing.

Railroads—Vendor's lien—In this action to enforce a vendor's lien on land over which the vendee, holding under a title bond merely, had permitted a railroad company to construct its roadbed without the vendor's consent, the court having adjudged in effect that the railroad company acquired nothing by its contract with the vendee, and the railroad company having proceeded thereupon in the same action to have the land condemned, the company is responsible only for the value of the land taken by it as fixed in that proceeding, all irregularities in the proceeding being waived; but the plaintiff has a lien for the payment of his judgment for that value; and the fact that the railroad has been built and is in operation does not deprive him of the right to a judgment enforcing his lien, although it in effect dispossesses the company of its roadbed.

Bell & Bell for appellant; Frank D. Swope, C. A. Hardin, Sr., E. H. Gaither, C. A. Hardin, Jr., and Bullitt & Shield for appellee.

SOUTHERN PACIFIC CO. v. DUNCAN.

Filed June 6, 1894. Appeal from Jefferson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Where two railroad companies with connecting lines have an association or partnership, by which each is to receive freight on its own line for shipment over the line of the other, each company is a general agent for the other, their schedule of charges being a matter between them of which third persons can not be presumed to know, and apparently a freight agent of the one company has the same authority to make a contract binding upon the other that he has to make a contract binding upon his immediate principal, and a shipper has the right to rely upon this apparent authority, and is not

chargeable with notice of special limitations upon the agent's authority as to rates over the line of the other company.

2. Powers of freight agent—A person dealing with the freight agent of a railroad company has the right to suppose that he has all the powers ordinarily incident to his business unless he has knowledge to the contrary.

3. General and special agency—Estoppel—While a special agent can not bind his principal beyond the authority conferred upon him, a mere restriction upon an agent's authority does not make him a special agent. A special agency exists when the authority is to do a single act. A general agency exists when the authority is to do all acts in any particular trade or calling and where the principal has held out the agent as having a larger authority than he really possesses he will be estopped from setting up the actual terms of the agent's authority.

4. Same—Pleading—Where the petition alleges a general authority on the part of an agent, and the answer admits that there was authority, but claims that it was restricted, the restriction should be pleaded.

5. Pleading—Where an answer admits in effect that there was an agreement between the parties, it is essential that it should aver what that agreement was, in order that it may appear that the admitted agreement was materially different from that set out in the petition.

6. Same—A denial that the defendants "are" regularly engaged in the transportation of freight, etc., does not controvert the allegation that they were so engaged at the time of the contract sued on. Nor is it material whether they were "regularly" engaged in the business.

James Quarles and Bullitt & Shield for appellant; O'Neal, Phelps, Pryor & Seligman for appellee.

AMERICAN CENTRAL INS. CO. v. HEAVERIN.

Filed June 6, 1894. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Fire insurance—Waiver of notice of loss—In this action upon a policy of fire insurance, which required the insured to "give immediate notice in writing" in the case of loss, it appeared that on the morning of the fire the local agent knew of the loss and telegraphed the fact to the company, and within a few days the general agent came to the scene of the fire and then the plaintiff asked him if it was necessary to give the written notice, and he answered no. Held—That this was a waiver of the written notice.

2. Poofs of loss—Although the policy sued on required the assured to furnish proofs of loss within thirty days after the loss, his compliance with the requirements was not a condition precedent to the liability of the company, it being sufficient that the proofs of loss were furnished before suit was brought, which, by the terms of the policy, could not be maintained unless brought within twelve months after the fire; and this rule is not altered by the fact that the policy further provides that if the assured refuses to submit to an examination, or to furnish duplicate invoices, he shall forfeit all claims under the policy, this provision being in a separate clause and having no reference to the preceding clause concerning notice and the time in which proofs of loss must be furnished.

3. Same—The defendant can not complain that the proofs of loss made by the plaintiff were not such as were required by the policy, as it waived its rights to require any further proofs of loss by announcing that it did not intend to pay the loss because the proofs were not presented in time, and because the assured had been detected in an attempt to defraud the company. Although additional reasons were given for rejecting the claim, they did not carry with them the idea that if they were remedied the company would not insist upon its right to claim a forfeiture because of the failure to make the proofs in time and the fraudulent conduct of the plaintiff.

C. S. Walker for appellant; Sweeney, Ellis & Sweeney for appellee.

TOBIN v. SOUTH'S ADM'R.

Filed June 13, 1894. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. Evidence as to transaction with decedent—Prejudicial error—The court erred in refusing to allow the defendant to testify for himself as to a transaction with a decedent, the administrator, who was also one of the heirs of the decedent, having testified for himself in reference thereto. But as the verdict of the jury shows that they were in no way controlled by this evidence in their finding, the defendant was not prejudiced, and there can be no reversal on that account.

2. Evidence—Upon an issue as to the value of defendant's services the court properly refused to allow him to testify that he had other business that needed his attention, as this could not affect the value of his services to his employer.

3. Interest—As the accounts between the parties were unliquidated and no contract for interest is alleged, the court erred in allowing interest upon the amount found in plaintiff's favor.

W. H. Julian for appellant; John W. Rodman and Frank Chinn for appellee.

GARR, &c. v. BOSWELL, &c.

Filed June 13, 1894. Appeal from Jefferson Circuit Court. Opinion of the court by Judge Barbour, reversing.

Sale by joint tenants—Fraud—While one of several joint tenants has the right to sell his interest in land without consulting his co-tenants, and at any time and price he may choose, yet where, as in this case, the parties propose to sell together, and the act of one is dependent upon the act of the others, good conscience and fair dealing require that one should not undertake secretly to procure for himself more than it is understood and agreed each and all shall have; and if he does so the money thus fraudulently obtained should be divided between the parties as the nominal consideration for the land was divided.

Thomas F. Hargis and Oscar Turner, Jr., for appellant; F. Hagan for appellees.

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KENTUCKY COURT OF APPEALS.

HILL, &c. v. CORNWALL & BRO.'S ASS'EE, &c.
MERCHANTS NATIONAL BANK v. SAME, &c.
BANK OF LOUISVILLE v. SAME.
FARMERS & DROVERS BANK v. HILL, &c.

(Filed May 10 and 17. 1894.)

1. Partnership property—Dower—A father and two sons owning undivided interests in real estate which has been assessed as partnership property for many years as a factory, having made assignments, both as a partnership and as individuals for the benefit of their creditors, in a suit to settle the estate the wives of the individual partners are denied dower in said property.

2. Trusts—Revocation of same—A father owning an undivided one-third interest in real estate conveyed same to his two sons in trust for his daughter with the following proviso: "That the party of the first part hereby reserves to himself full and all species of power to revoke each or any or some or all the uses hereby created, and to cause them to shift to other person or persons, including himself, as he may choose, or to cause new uses to spring to the use of some other person or persons, including himself.

Held—That a deed of assignment for the benefit of creditors, which was subsequently executed by the grantor, was not an exercise of the power of revocation of this deed of trust, and that his assignee was not entitled to any part of this trust property for the benefit of creditors.

3. Trusts—The wife of an individual member of a partnership loaned to the firm a sum of money; the firm executed its note to her for it and at the same time another member of the firm conveyed to her husband a house and lot, being the individual property of the grantor, and recited in the conveyance that the sum (amount of firm note) was cash in hand paid. Held—That the wife holding the firm note was entitled to recover same as a preferred claim in the distribution of the assets of the firm.

4. Marshaling partnership and individual assets—The proper rule for distributing partnership and individual assets is to require a creditor of the partnership who elects to assert his priority in the distribution of the firm assets to remain still until the individual creditor out of the individual assets is made equal with him.

5. Usury—In the settlement of an insolvent estate the chancellor will, on his own motion, purge every claim of usury so far as the record shows same to exist.

6. Assignee's duty—Operating factory—Where an assignee for the benefit of creditors by the advice and consent of a majority of the creditors operated a factory which resulted in a loss, Held—Such action on the part of the assignee was not misconduct or wasting the estate.

7. Construction of statutes—Code of Practice—Under section 490, Civil Code of Practice, a creditor of a joint owner of real estate can not ask the court to order a sale of the whole property, because the same can not be divided without materially impairing its value. The aid of the chancellor can be invoked in such cases only by a joint owner or his assignee.

Fairleigh & Straus and R. W. Woolley for Hill, &c.

Helm & Bruce for Bank of Louisville.

Pirtle, Speed & Trabue for Farmers & Drovers Bank.

Blain & Kinkead and Humphrey & Davie for Merchants National Bank.

Muir, Heyman & Muir for assignee.

Appeal from Jefferson Circuit Court, chancery division.

Opinion of the court by Judge Pryor.

In the month of March, 1891, Cornwall & Bro. made an assignment for the benefit of creditors, and each member of the firm also made an individual assignment for the same purpose. The firm was composed of Wm. Cornwall and his two sons, Wm. Cornwall, Jr., and Aaron W. Cornwall. The business of the firm was the manufacture of soap and candles, and, being largely indebted individually as well as partners, many questions have arisen touching the character of the assets and the mode of payment or distribution of the trust fund between creditors. The Louisville Turst Company was made the assignee and filed this petition below, asking advice as to the administration of the several trusts, and for a final settlement of its accounts as assignee.

They owned real estate consisitng of the soap factory proper and the warehouse adjoining, that was used in the business. It is claimed by the firm creditors that this realty was partnership property, purchased and used for that purpose, and, therefore, to be treated as personalty and liable for the partnership debts, and on the other hand it is claimed to be realty, and a claim to a potential right of dower asserted by the wives of Wm. Cornwall, Jr., and Aaron Cornwall.

It is further claimed that Mrs. Hill, a daughter of Wm. Cornwall, Sr., and sister of the other two members of the firm, is the owner of an undivided one-third interest in the factory property under a conveyance from her father made and recorded long prior to the assignment, and that the firm is indebted to her for the rent of this one-third interest for many years, and this rent Mrs. Hill seeks to recover. The manner in which this property was held and the interest of the several claimants in it will be considered before determining the remaining questions presented. If the factory and warehouse building belonged to the firm, then the wives of Wm. and Aaron Cornwall have no claim to dower, as the entire property is insufficient to pay the partnership debts.

The elder Cornwall had been engaged in the same business

with his brother, John Cornwall, for many years, when John Cornwall died, and the partnership ended. The factory property was then sold by a decree of the Louisville Chancery Court, and Wm. Cornwall, Sr., though his son, William, purchased the factory, and in March, 1870, a commissioner's deed was made to Wm. Cornwall, Jr., for the entire factory.

The father, Wm. Cornwall, Sr., owned at the time of the sale one-half of the factory, and, therefore, had to pay only one-half of the proceeds of sale, or the purchase money. In a few days after the sale his son, Wm. Cornwall, Jr., conveyed to his father two-thirds of this factory, retaining the title to the one-third by gift from his father. The sons had no estate, or at least the entire capital for conducting the firm was furnished by their father.

The business was continued under the old firm name of Cornwall & Bro., but it is manifest that the factory was purchased for partnership purposes, and although paid for by the capital furnished by the father, the payment was out of partnership funds and the property used for partnership purposes. While it is true Aaron Cornwall did not arrive at age until 1874, three years after the purchase at the decretal sale, when he did arrive at maturity his father conveyed to him an interest of one-third in the factory, and in the year 1875 he conveyed the remaining third interest in the factory to his two sons in trust for his daughter, Sally, now Mrs. Hill. So it appears that Wm. Cornwall, Sr., had divested himself of the legal title to this property, or of his interest in it as purchaser under the decree to his three children. That Mrs. Hill was not a partner is evident, as she seems to have had no connection with the factory or its manufacturers, her two brothers holding the title for her, and in fact she had been receiving rent for the one-third interest.

While Wm. Cornwall, Sr., had divested himself of the legal title to the factory building, he had furnished all the capital with which to run it, and was certainly interested as a partner, and, when looking to the character of the partnership and the conveyances from the father to his two sons to enable them to have capital as well as himself in the enterprise, it can not well be argued that the senior Cornwall had no equitable right to have the entire property applied to the payment of the partnership debts. In their days of prosperity they might well have said, as they now state, that this realty was not considered or treated by the firm as partnership property, yet the firm books demonstrate that this one-third interest conveyed to each son constituted his capital invested in the enterprise, and that such must be the result of the acts and conduct of all the parties.

Wm. Cornwall states that this property was purchased for the purpose of being operated by the firm, and not only so, but that it had been so operated since that date, Wm. Cornwall, Jr., being then the only partner. The senior Cornwall, as the books of the firm show, put in to the concern at the beginning a large sum of money. There was no one else to furnish the capital. The factory sold at decretal sale for $44,500, and on the books of the firm the senior Cornwall is credited by his half interest, which is $22,250. There is an account on the books styled the "building, land and machinery account," and from it can be seen what was paid by the firm for the buildings, land and machinery, and the entries on the books show that the money due on the purchase of this factory was paid out of the firm money, and this firm money was the cash paid into the firm by Cornwall, Sr., and for which he was credited on his individual account, and went to pay what the firm owed for the one-half interest owned by John Cornwall, who was a member of the old firm.

The building and machinery account is charged with the one-half interest of Wm. Cornwall, Sr., and he is credited by it. Wm. Cornwall, Jr., is credited on the books with the value of his one-third interest that had been conveyed him by his father, and his father is charged with the amount, transferring or giving to his son in this way that much of his (the father's) capital. Like entries were made when Aaron Cornwall was given his one-third interest, Aaron being credited and his father charged with the amount.

The value of the third of the property conveyed to Mrs. Hill was credited to the building, land and machinery account, and this was proper, as that account had been charged with the entire cost. It must be assumed that all the parties consented to this conveyance to Mrs. Hill, leaving two-thirds of the building as property liable for partnership debts, and in fact partnership property. The factory and warehouse were both assigned by these partners as partnership assets, and the property or its value is found on the balance sheets of the firm's business down to the date of the assignment.

The warehouse property was paid for by the firm. It was bought for firm purposes and used as such. We have but little doubt on this question, and while the property held under these separate deeds would be treated as realty after paying partnership liabilities, it must be regarded as partnership property and was properly subjected to the payment of partnership debts.

The fact that separate conveyances were made to the sons by the father can not make it individual estate, because it was used and treated as a part of the partnership. If each of the three partners had owned a one-third interest before forming the partnership, and had agreed to erect a factory on the land and to credit each by the value of his interest on the firm books as capital furnished, could there be any reason for holding the property not liable for partnership debts? We can perceive none, and while the wives of each would be entitled in such a case to dower, as the title was held before the partnership was created in this case, the factory was purchased for partnership purposes, paid for out of the partnership funds, and used for partnership purposes.

In Spalding v. Wilson & Muir, 80 Ky., 589, where the conveyance was made to the two partners jointly, it was held that this made no difference. The property was purchased for partnership purposes and appropriated to those purposes and paid for by partnership funds, and, therefore, becomes partnership property.

In Carter v. Flexner (13 Ky. Law Rep., 608), this court, in the endeavor to reconcile the conflicting decisions and views of judges in regard to what has been termed the intention of the parties, said: "That where partners own real estate as partners it can not be treated or considered as personalty except for the purposes of the partnership, and then as assets for the payment of the firm debts, facts must exist showing that real estate is partnership property before it can be treated as personalty for partnership use and the payment of partnership debts."

The partners having the legal title to land in a court of law, the property must be regarded as realty, but when going into a court of equity, if partnership property, it must be used for the partnership purposes, and we are to determine from the facts before us whether the realty was purchased with the funds of the partners and for partnership purposes and so used, viz, for the partnership. If so, it becomes trust property for all the purposes of the partnership and the payment of the partnership indebtedness. After the partnership ceases and the debts are paid we must, if any realty is left, determine the mode of descent or

inheritance by the conveyance itself without reference to its having been once used as partnership property. The chancellor below was correct in his conclusion when holding that no potential right of dower existed.

The creditors, who are the appellants as to the point now raised, insist that Mrs. Hill, the daughter of Wm. Cornwall, Sr., has no interest in this factory property, free from the claims of creditors, by reason of the conveyance under which she holds. On the 7th of January, 1875, her father executed to her two brothers, Wm. Cornwall, Jr., and Aaron Cornwall, a conveyance of an undivided one-third interest in the factory in trust for the sole and separate use of Sallie W. Cornwall (now Hill) with this proviso: "That the party of the first part hereby reserves to himself full and all species of power to revoke each or any or some or all of the uses hereby created, and to cause them to shift to other person or persons, including himself, as he may choose, or to cause new uses to spring to the use of some other persons or person, including himself."

The contention is that such a conveyance would not, in equity, divest the grantor of title as against creditors; second, that our statute makes trust property liable for the debts of the cestui que trust, and this was a holding in trust for the grantor; and lastly, the grantor has executed the power of appointment for the benefit of creditors in the assignment made to the Louisville Trust Company.

The conveyance to the daughter, Mrs. Hill, was made at a time when the grantor (her father) was in a prosperous condition and with ample means to make such a transfer to his daughter, with a view to providing for her future wants, and no complaint is made as to any improper motive on the part of the grantor in executing the conveyance, and, if made, these creditors were in nowise affected by it, and, besides, it was executed from the purest and best of motives. It was executed nearly fifteen years before his financial troubles, and the grantor was endeavoring to provide for his daughter as he had for his two sons, to whom he had given or conveyed a similar interest.

It is contended that the reservation of power, with the right of appointment, destroyed the conveyance by the grantor, to his daughter, and left him, so far as creditors are concerned, as if no conveyance had been made.

There can be no doubt but that the title passed from the grantor to the grantee (his daughter) at the date of the conveyance, and if not made for a fraudulent purpose, we perceive no reason why the father could make such a settlement upon his daughter when not affecting the rights of others. She did not hold the property in trust for her father, but the title was in her, subject to the power reserved in the deed on the part of the grantor to change the use to or for the benefit of another.

This conveyance was of record. It affected none of these creditors. It was not prohibited by law, and, therefore, must be regarded as a valid instrument, unless revoked under the power. The statute of this State makes the property held in trust liable for the debts of the beneficiary, and this court has often so decided, but this record presents no such case. The beneficiary is not the debtor of these appellants, but holds under a conveyance from the debtor that vests in her the beneficial interest, subject to the power of revocation. The statute, we think, has no application to this character of case, and the argument that the reservation of power nullifies the conveyance is answered by the opinion of the Supreme Court in the case of Jones v. Clipton, 101 U. S., 225. That case was a conveyance by the husband to the wife of certain realty, the deed containing a clause reserving to

the grantor "the power to make the grant in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare."

The conveyance was made at a time when the husband was not involved, but subsequently became embarrassed and was adjudged a bankrupt. The assignee in bankruptcy contended that the deed passed no interest to the wife as against creditors, but was fraudulent as to future creditors, the husband retaining and controlling the use of the property, and further insisted that the power of revocation and appointment passed to the assinee for the benefit of creditors. The Supreme Court held, through Mr. Justice Field, that "the right of the husband to settle a portion of his property upon his wife and thus provide against the vicissitudes of fortune, when this can be done without impairing the existing claims of creditors, is indisputable."

The court proceeded also to say "the powers of revocation and appointment to other uses, reserved to the husband in the deeds in question, do not impair their validity or their efficacy in transferring the estate to the wife, to be held by her until such revocation or appointment be made."

It was also held in the same case that such a power was not an interest in the property that could be transferred to another, or sold under execution or devised by will, or that passed to the assignee. Such is the doctrine on the subjcet, and has been modified by our statute of wills to the extent only that in a devise of one's own estate, who has a discretionary power of appointment, shall operate as an execution of the power unless a contrary intention shall appear by the will.

It is claimed that the grant to the daughter was revoked by a deed of revocation at one time, prepared by the father for the purpose, and destroyed. The testimony of the grantor shows that this writing was executed to enable those who were engaged in the business of making soap and candles to form a sort of trust, in which like partnerships or companies could combine with the title to the factories owned by each, invested in the one head; that this contemplated movement failing, the revocation was never carried into effect, either by notice to his daughter or by any writing obligatory on either party, and we are satisfied that no revocation was ever made.

The wife of Wm. Cornwall, Sr., with whom he had not been living for years, asserted dower in the real estate assigned, and in order to obtain her relinquishment it was agreed, for a consideration expressed, that the wife should relinquish dower in the estate assigned and describing the factory as a part of the realty that had been passed to the assignee.

The object of this deed was to release all right to dower in the property assigned, nothing more. It was not the purpose or intention of the grantor, in the midst of his pecuniary embarrassments, to take from his daughter the estate he had given her, and thereby involve her in financial ruin. He did propose to creditors that he would revoke the grant if they would settle upon terms that had been submitted to them.

His proposition was not accepted, and we find no evidence in the record justifying the conclusion that the power reserved by the grantor in the conveyance to his daughter had been executed, but on the contrary the facts indicate a purpose not to deprive the daughter of the estate conveyed except upon certain condi-

tions, and the chancellor very properly refused to subject her estate to the demands of creditors.

The chancellor also adjudged properly in refusing to allow rent to Mrs. Hill for her interest in the factory after the year 1885. The scarcity of financial means is assigned as the reason for failing to pay this rent, but this can be no response to the claim, in the absence of other facts and circumstances bearing on the question. The dominion exercised by the grantor over the property conveyed to his daughter and his pecuniary necessities doubtless induced him to withdraw his liberality towards the daughter, and she failed to assert any claim for the reason that her father had not, only prior to 1885, paid her the most of the rent, but prior to and after that time had advanced to her considerable sums of money, more than would have compensated her for the rent, and it is a fair inference, to be gathered from payments made for both the daughter and her husband, that no claim for rent was intended to be asserted, and it would be inequitable, under the circumstances, to compel her father to pay it, or take from his creditors any part of his or the assigned estate for that purpose.

On the appeal of Eleanor Cornwall from that part of the judgment denying her claim for $9,000, the following facts are made to appear: She is the wife of Wm. Cornwall, Jr., and on July 25, 1875, a relative, Miss Henrietta Ormsby, conveyed to her a vacant lot on Ormsby avenue. The lot was valuable, worth $7,000 or $8,000. A dwelling was erected upon it by the husband in a short time, and they occupied it as a home.

The house was erected many years before the financial troubles of the firm. In the year 1890 this property was sold to Bonnie for $17,000, $5,000 of which was paid in a check to the wife, and two notes executed to her for the balance. The husband took charge of the cash, and doubtless used it.

Shortly after this sale the banks, to which the firm of Cornwall & Bro. were indebted in large sums, began to press them for money. The notes of the purchaser had been paid, and the firm, through its members (at least Aaron Cornwall), obtained this money from the wife through the husband. The money was obtained and placed by the firm, through its bookkeeper, to the credit of Wm. Cornwall, Jr., the husband.

Aaron Cornwall, knowing how the money was obtained and to whom it belonged, placed opposite to the credit given his brother the words "his wife's money," and when they had obtained over $7,000 of the wife's money, a note was executed to her by the firm for that amount, and after this other sums were borrowed, increasing the amount loaned by the wife to $9,000; that the firm knew the money credited to Wm. Cornwall, jr., was his wife's money, and that the husband held it for investment for the wife, is undoubted, and their obligation to secure it equally certain.

Aaron Cornwall, the member of the firm, knew it was the wife's money, and, when used, evidences of its being hers was always connected with its use. The husband recognized it as the wife's money, and it was repaid her by the firm in this way: Wm. Cornwall, Sr., owned a house and lot on Main street, and was desirous of securing Mrs. Cornwall, and of raising other money to meet the urgent demands of creditors. They state that upon consultation it was thought a mortgage upon the property would hasten what they were trying to avoid, viz, an assignment of their property, and in order to relieve the creditor for the time being, Wm. Cornwall, Sr., sold to Wm. Cornwall, Jr.,

this house and lot on Main street for $27,000, executing a deed reciting a consideration of $9,000 in hand paid, which was in satisfaction of the money due Mrs. Cornwall, and the notes for the balance belong to creditors or the assignee of Wm. Cornwall, Sr.

Counsel were advised with in reference to securing the wife in this manner, and Wm. Cornwall, Sr., as well as the other members of the firm, consented to it, and the note for $7,000 or more was left in the hands of Aaron Cornwall. It was a surrender by Wm. Cornwall, Sr., of his own estate to pay his son's wife, with the balance to be applied to the indebtedness of these assignors.

When the deed of assignment was made the assignee was informed of the nature of the claim of Mrs. Cornwall. He paid off the bonds executed for the property by Wm. Cornwall, Jr., and the balance of the proceeds are in his hands for Mrs. Cornwall or those entitled.

This is no stale claim asserted by the wife, nor is it affected by even a suspicion of unfairness or fraud; but, with bankruptcy impending over the firm, of which her husband was a member, his individual estate wrecked, as well as the partnership, it is argued that the wife voluntarily sold her home and placed the proceeds of the sale in her husband's hands, that all she had might be swallowed up in the general financial crash.

Such a view of the acts and conduct of the parties is not sustained by the testimoy, but, on the contrary, it is evident this money was borrowed as the wife's money and invested by those whose duty it was to invest it in this Main street property; that the proceeds of the sale of the home of the wife became her separate estate and was so regarded clearly appears; and whether the wife was or not a competent witness, or the husband for the wife, the testimony of the other members of the firm show the manner in which the money was obtained, to whom it belonged, and its being made secure in the conveyance of the Main street property.

The note to the wife by the firm, the husband being a member, must create a separate use in the wife, otherwise it could have no effect in law or equity. (Maraman v. Maraman, 4 Met., 89.)

That the conveyance was made to the husband, omitting the wifes' name, is not in the way of recovery; that she was beneficially interested to the extent of the money loaned the firm is evident, and in the effort to secure her and invest her money, the fact that the deed was made to the husband without her knowledge and in the belief that it would secure her, preserves instead of destroying the trust.

He held the property in trust for the wife to the extent her money was invested in it. No creditor of the debtor and husband is wronged by protecting the wife in a case like this. They could have given no credit to the husband on the faith of the wife's estate, to which she had the legal title. He had not used her money for years in the conduct of his business, as is usual in such claims, and when a bankrupt, his wife asserts her claim under some latent equity that her money was to be held in trust or invested for her benefit; but on the eve of his bankruptcy, and with a knowledge of his condition, the wife permits the loan of her money to the firm of which he is a member, and takes from the firm her note, evidencing the agreement to pay her and not the husband.

The justice of the claim can not be questioned, and if equity will interpose for the protection of those laboring under the disability of coverture, and secure what a confiding wife has placed in the hands of her husband to be invested for her, no case could be presented presenting stronger facts for relief than the one before us. In our opinion the chancellor erred in refusing

to allow the appellant, Mrs. Cornwall, the $9.000 invested of her money in the house and lot conveyed by Cornwall, Sr., to his son, William, on January 31, 1891.

On the appeal of the Merchants' National Bank, a creditor of the firm of Cornwall & Bro., the question as to the right of the bank to make double proof arises; that is, its right to prove its debt not only against the firm of Cornwall & Bro., but also against the individual assets of Wm. Cornwall, Sr., Wm. Cornwall, Jr., and Aaron Cornwall, all three of whom constituted the firm of Cornwall & Bro.

It is said, and this is true, that there was not a joint assignment of both partnership and individual property, but separate assignments, first, by the partnership and then separate assignments by each member of his individual estate, and the question asked is: Who are the cestui que trust in these several deeds? and the answer must be that all the creditors are the beneficiaries in each deed; but the question again arises: How are the assets from each assignment to be distributed between partnership and individual creditors?

We can perceive no distinction between a joint assignment, where the firm assets and the individual assets are assigned, and the case where each make separate assignments. The equitable rule is the same, and must be applied in the same way.

It is conceded that at law firm creditors have no lien upon the firm assets, and no contract right by which an individual creditor must stand aside until the partnership creditor is satisfied, but a court of equity gives to the firm creditor a lien through the partners, who have the right to demand the payment of firm debts before the partnership property can be applied to the individual debt of one of the partners, and this rule of equity giving the creditor of the firm priority over the individual creditor as to firm assets was so extended by this court, in the case of the Northern Bank of Kentucky v. Keyes, 2 Duvall, 169, as to compel the creditor, who elects to accept the benefit of this equitable rule, to remain still until the individual creditor, out of the individual assets, is made equal with him.

Counsel for the bank have cited many authorities in other States, including those from the Federal judiciary, establishing a different doctine, and presents with much force a line of reasoning sustaining their view of this equitable doctrine.

The rule in the case of the Northern Bank v. Keyes has been followed or recognized in this State in several reported cases, viz, Whitehead v. Chadwell, 2 Duvall, 432; in the case of Spratt's Ex'or v. First National Bank, 84 Ky., 85; and that of the Fayette National Bank v. Kenney, 79 Ky., 133.

It was not intended in the last named case to depart from the doctrine as settled in the Northern Bank v. Keyes, and for the reason that if an equity is created or flows from a rule of right that gives one set of creditors priority in the payment of debts out of one class of assets, those who are required to look for payment to another and different class of assets should at least be made equal before those electing to take this priority should share in the general distribution.

A joint and several liability may afford an equitable reason for giving a lien or rather priority to the partnership creditor in the distribution of the partnership assets, but he may elect not to assert this claim, but share with the individual creditor in the distribution of the entire assets, and to give the firm creditor priority in the first place, and then allow him to share with the individual creditor in the distribution of the individual assets is neither equitable nor just.

The firm creditor in fact credits the firm, and while each mem-

ber is individually liable also, the creditor is not allowed his priority because he has taken the precaution to have all the firm bound, but for the reason the partners have the right to have the firm assets applied to the payment of the partnership debts. The equity of the creditor comes in this way, and equity must come to the relief of those who are required to look on until the firm creditor has been paid. We adhere to the rule as settled by this court, however high the authority elsewhere.

The defense of usury was set up by Mrs. Hill (who had asserted her claim for rent) against the bank, and it is contended that she was not a creditor, and could not, therefore, make such a defense; and, if a creditor, that the plea of usury is not good. The law to be applied to this bank is that found in the National Bank act, under which this bank was organized.

Many of the notes executed by this firm to the bank had gone into the hands of third parties and been paid; other notes have been discounted by other banks, and long intervals between renewals, so that it is impossible to reach a correct conclusion as to what money was paid and when paid.

It is sufficient to say that the court below has conformed to the banking law, and the usury deducted is not for a larger sum than was proper; and if the pleadings were bad, it appearing from the record that there is usury, the case would be sent back with leave to amend; but as the chancellor has deprived the appellant of interest to the extent authorized, we are not disposed to reverse the case on account of any defect in the pleading.

A question of usury also arises on the appeal of the Bank of Louisville, and this must be decided under the usury laws of this State; and, looking to the various decisions, we think the bank has no cause of complaint.

It is insisted that Mrs. Hill, as in the case of Merchants' National Bank, had no right to make the plea of usury. She had set up a claim against the firm of Cornwall & Bro. for rent, and by the judgment below, and now affirmed by this court, it has been held she was not entitled to recover; still it appears from the record that usurious interest had been charged by the bank. That usurious interest had been ascertained, and in this controversy between creditors, where the assets are insufficient to pay the debts, the chancellor should take notice, although no plea is entered of the usury sought to be recovered, and reject the claim to that extent; in fact in any case where it is plain from the record that the party is seeking to recover usury, the chancellor should refuse to give judgment for the usury.

The case of Smith v. Young, 11 Bush, 12, has in effect been overruled in more than one reported case, and in several MS. opinions. A payment made at the date of the renewal, although regarded as a payment of the usury and the note renewed for the principal, will be regarded as a payment on the principal; and, although the note may be in the renewal signed by others than those originally bound, if the original obligor is still bound, all usury will be purged from the transaction so long as he remains liable. (Hart v. Hayden, 79 Ky., 346; Rudd v. Planter's Bank, 78 Ky., 513; Fitzpatrick v. Apperson, 79 Ky., 272.)

The chancellor, therefore, properly refused to render any judgment for the usury when, from the record, it was made to appear that the bank was seeking to recover it. The contract as to usury is void and can not be enforced. (Luckey's Adm'r v. Gegg, 12 Bush, 300.)

It is claimed by the bank that the assignee has mismanaged and wasted the assets, and should be held responsible. It seems that a meeting of the creditors (excluding the appellant), with an advisory committee at their head, authorized the continued operation of the factory to prevent the loss of assets, and to work up the material then on hand. It was supposed that a factory in full operation would be more likely to be sought after than one that had been abandoned, and to preserve the business of this factory and add to its value it was the part of wisdom to operate it, although there may have been a loss sustained.

We see nothing in the record that would authorize the chancellor to condemn the judgment of the assignee, when it is manifest that all parties acted in the best of faith, and with a view to advance the interest of creditors. The raw material on hand had to be manufactured. This valuable plant, with its trademark and business known in all parts of the country, had to be pursued—depreciation in value was what the assignee and the creditors desired to avoid—and the plan adopted was wise in its inception, and the exercise of the judgment of the assignee and nearly every creditor. There is nothing to complain of on account of the assignees action in the premises, nor is there any ground of complaint by reason of the allowance to the assignee.

The entire assets were of the value, as is stated, of $200,000, all of which passed through the hands of the assignee. As to the fees of counsel, the case comes to this court with proof sustaining the claim. There was a continuous service for two years, with questions arising of the greatest importance to the assignee and the creditors. The fee is $8,000, and while the sum may appear large, we can not assume from the record that it is unreasonable. The chancellor approved the allowance and is fully sustained by the testimony, without any conflicting proof.

There remains another question left undecided when the original opinion was delivered in regard to the judgment of sale of Mrs. Hill's interest in the factory.

The court in reading the record considered the question as pertaining to property involved in another case in which Cornwall's assignee was interested, and in this was mistaken.

Mrs. Hill claims that she was the joint owner of the factory proper, and in this she is sustained by this court; but she further insists that the chancellor had no power to order a sale of her interest at the suggestion of a creditor, who has alleged that the property was indivisible, and, being a vested interest in possession, should be sold as a whole, as authorized by section 490, Civil Code.

The right to sell the whole property, in case of a joint holding under section 490 of the Code, may be asserted by one of the joint owners against the others, and with the case made out as provided by that section a court of equity will order the sale. The right to sell in such a case is purely statutory, and the statute must be followed; and, although a creditor of the insolvent assignor has a beneficial interest, the chancellor's jurisdiction is confined to cases where one joint owner sues another, joint owner, and no individual or firm creditor can step in the shoes of the assignee, and because he may have a beneficial interest, large or small, assert the right to have the entire property sold.

Cases might occur where the assignee, from the charges in the petition and proof to that effect, is wasting the estate, and subjecting the property to sale at a sacrifice for the interest of one joint tenant, that a court of equity would interfere; but we have

no such case here, and if any creditor can sue at pleasure, regardless of the assignee, who has the legal title, it not only produces confusion but opens the door to this statutory relief for all parties interested in the estate.

The assignee in this case brought no action of this character, and while it may appear that a sacrifice of the property would result if not sold as a whole, it affords no reason for entertaining a jurisdiction unknown to the common law and not conferred by statute.

The assignee may be clothed with the mere legal title for creditors, still he is the party to sue; and if otherwise, contests would soon arise between the assignee and the creditors and every one interested asserting his right under this provision of the Code.

The judgment is, therefore, reversed as to Mrs. Eleanor Cornwall, with directions to enter a judgment for her for the amount indicated, and also reversed in so far as it directs the sale of Mrs. Hill's interest in the factory, and must stand affirmed in every other respect. This is not intended to preclude the assignee from asking the relief sought by the creditor as against Mrs. Hill.

GLASS v. COMMONWEALTH.

(Filed May 2, 1894—Not to be reported.)

1. The record does not contain the evidence, therefore, the correctness of order of the trial court refusing to grant appellee a continuance, on account of absent witnesses, can not be considered on this appeal.

2. The appellee was properly charged with challenges to jurors made by his codefendant as well as himself before he demanded a separate trial, the trial at outset having proceeded against both defendants.

Josiah Harris for appellant.

W. J. Hendrick for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted of the crime of robbery and sentenced to confinement in the penitentiary for the period of eight years. He complains of the judgment, because his application for a continuance on account of the absence of certain witnesses was overruled and because the verdict was contrary to the evidence. He does not bring up the evidence, hence we do not know of the materiality of the proposed testimony, and indeed, for aught the record shows to the contrary, the witnesses alleged to have been absent when the affidavit for a continuance was filed may have appeared during the trial and testified. He also complains that the court charged him with certain peremptory challenges to jurors, made by himself and his co-defendant, Trice, before a separate trial was demanded by him.

It appears that the trial proceeded at the outset against both defendants. A demand was then made for a separate trial. It was granted and the trial proceeded only as to the appellant. Section 198 of the Criminal Code seems conclusive of this objection, to wit: When several defendants are tried together the challenge of any one of the defendants shall be considered the challenge of all. The trial judge found, from the facts shown on the exam-

ination of the juror, Martin, that he was a citizen and housekeeper of McCracken county. We are of the same opinion, and this objection can not prevail, even if such matter were the subject of review. (Section 281, Criminal Code.)

The form and substance of the indictment and instructions are unobjectonable.

Wherefore, the judgment is affirmed.

BLAKELY, ASS'EE v. SMITH, &c.

(Filed May 12, 1894—Not to be reported.)

1. Attachments—Assignments for benefit of creditors—Priorities—An order of attachment delivered to an officer with directions not to execute it, does not create a lien on the defendant's estate until the direction to stay its execution is removed.

Therefore, a deed of assignment for the benefit of creditors, executed, acknowledged and lodged for record, before the officer holding an order of attachment was directed to execute it, passes title to grantor's estate free from all lien under the attachment.

2. The attaching creditors, who directed the officer to sell the assignor's estate under such attachments, are jointly liable with the officer to the assignee for such illegal seizure and sale.

Hill & Denham for appellant.

H. F. Finley and Crawford & Mason for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hazelrigg.

The question involved on this appeal is the sufficiency of the petition filed by the appellant against the appellee. The allegations are to the effect that one John Smith, on the 13th of May, 1891, conveyed his property in trust for the benefit of his creditors to the appellant, the deed of trust having been executed at 12 o'clock m. on the day mentioned, and filed for record and tax paid thereon at twenty minutes after two o'clock on the evening of the same day. It is further averred that after the deed had been so lodged for record, there was placed in the hands of the appellee as jailer certain orders of attachment against Smith's property, all of which had been issued on suits filed after the lodgment of the deed of trust for record, save that of W. E. Grinstead & Co. for some $1,800, which issued and came to the hands of the jailer on the morning of May 13, 1891, at eleven o'clock and twenty-five minutes; but it is charged in the petition that when this order was handed to the officer, Grinstead & Co. directed him "not to let Smith know he had it, and not to execute it or take any steps to execute it until they should direct him to do so," and that they did not, in fact, direct the officer to execute it until after the deed of trust was lodged for record. It appears from the orders of attachment, which are made exhibits in the petition, that they were all levied on the property of Smith late in the afternoon of May 13th, and after the deed of trust had been executed and lodged for record, the officer having actual notice, as is averred, of the assignment theretofore made.

It appears further from the petition that the personalty so seized by the officer and thereafter, over the protest of the appellant, as assignee, sold by him at the instance of the various

plaintiffs in the attachments, was of the value of $7,500, and the petition claims that sum of the appellee and his sureties for the alleged illegal seizure and sale.

By an amended petition the attaching creditors were also made defendants, and sought to be made jointly liable with the officer. A demurrer to the petition as amended was sustained, and the assignee declines to plead further. His petition was dismissed.

It seems to us beyond a question that the title to the property passed by the deed of trust to the appellant as assignee; that it did so free from any attachment lien seems equally clear. All of the orders of attachment came to the hands of the appellee to execute after the assignment. This is conceded to be shown by the petition and exhibits of all of them, save that of Grinstead & Co., and as to this, the direction not to execute it suspended the creation of any lien and made it a "dead letter" in the officer's hands until the stay was removed.

This question was determined in Gray's Adm'r, &c. v. Patton's Adm'r, &c., 13 Bush, 626, where an order of attachment came to the sheriff's hands on the 3d of August, 1860, but with a direction from the plaintiff's attorney not to levy it until further orders. On the 4th day of October thereafter the defendant on the attachment executed and delivered a mortgage to Gray's administrator, the lien of which was held to be superior to the attachment lien, for the reason that the order of attachment was not delivered to the sheriff to execute on the 3d of August, when he got it, and it was not, in fact, executed until the 6th of Ocotber, two days subsequent to the creation of the mortgage lien.

The only point urged in support of the ruling below by counsel for the appellee is that the time when the order of attachment came to hand, as shown by the endorsement thereon, was the time when the lien was created, and there can be no impeachmen or falsification of this on this action.

No authority is cited in support of this view, and we fail to see any reason supporting it. Certainly the authoriy of this court is conclusively against it. We are of opinion also that the court should have permitted the amended petition to be filed. All who engaged in the wrongful seizure and sale of the property may be held liable.

We learn from the amendment that those who are sought therein to be made defendants directed the illegal levy and sale, and, in fact, eventually got the benefits flowing therefrom.

The judgment is reversed and cause remanded, with directions to overrule the demurrer and permit the amended petition filed in the clerk's office on November 16, 1891, to be filed of record.

HARDWICK v. KEAN, RECEIVER, &c.

(Filed May 15, 1894.)

1. The allegations of a petition by a nonresident for the removal of a cause from a State to a Federal court must be taken as true when they are not controverted.

2. The petitioner has a right to file an amended petition for removal on the same day the original petition is filed, and before plaintiff has taken any step or filed any pleading in the case concerning the right of removal.

3. An action against the receiver of a railroad appointed by a Federal court, to recover damages resulting from his operation of the road, is a suit

"arising under the Constitution and laws of the United States" within the meaning of section 2, article 3 of the United States Constitution.

C. B. Hancock, Haggard & Benton and C. F. Spencer for appellant.

Humphrey & Davie and Arthur Carey for appellees.

Appeal from Powell Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is an action instituted in the Powell Circuit Court by J. R. Hardwick against Hamilton F. Kean, receiver of the Kentucky Union Railway Company, to recover damages resulting from alleged improper construction and operation of the road upon plaintiff's land.

At the time fixed by the Civil Code for defendant to answer he filed his petition for removal of the cause from Powell Circuit Court to Circuit Court of the United States for the district of Kentucky upon the ground he was and is a citizen of the State of New Jersey; and in an amended petition filed same day it was stated as an additional ground for removal that the action is one which arises under the Constitution and laws of the United States.

The bond required in such case having been filed, the lower court made an order for removal as applied for by defendant. Counsel urge as objection to the order that the cause for removal stated in the original petition was not proved, and that it was error to permit the amended petition filed at all.

The fact relied on was stated in the petition, verified by defendant's attorney as authorized by section 117, Civil Code, to be done in case the party be absent from the county.

The statute of the United States on that subject does not in terms require any other or further proof of a fact stated as a cause for removal of an action from a State Court to the Circuit Court of the United States than affidavit of the party applying or his attorney. In this case, however, no question can arise about sufficiency of the proof because the statement of the essential act in the petition for removal not being controverted was properly accepted by the court as true.

We do not see why defendant could not file his amended petition as was done before plaintiff had interposed any other pleading or taken any other steps in the case than to simply file his petition. And as it would have anyhow been in discretion of the court to permit it the amended pleading filed at the time it was done, it was not error to treat it as properly filed.

It appears from the record that defendant was appointed receiver by judgment of the Circuit Court of the United States, and, therefore, as held by the Supreme Court, such action against him as this is, in meaning of section 2, article 3, Constitution of the United States, a suit "arising under the Constitution and laws of the United States," and subject to removal from a State court to Circuit Court of the United States. (Bush v. Colbath, 3 Wall, 334; Feebelman v. Packard, 109 U. S., 421; Bock v. Perkins, 139 U. S., 628; Texas & Pacific R. R. Co. v. Cox., 145 U. S., 593.)

In our opinion, without deciding whether sufficient cause for removal was stated in original petition, there was, according to the cases cited, unquestionably sufficient cause in the amended petition, and the lower court had no other alternative but to transfer the case.

Judgment affirmed.

SMITH v. COMMONWEALTH.

(Filed May 12, 1894—Not to be reported.)

Criminal law—Instructions—It was erroneous for the court to give prominence in its instructions to threats made by accused convicted of manslaughter. Such facts were proper for the jury to consider in determining whether or not the accused acted under the belief that his life was in danger or that his brother's life was in danger.

See opinion for proper instruction to be given for one committing homicide on his premises in defense of his life or the life of his brother, or for the protection of either from great bodily harm.

T. F. Edwards for appellant.

N. A. Porter and W. J. Hendrick for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Will Smith, was convicted of manslaughter and his punishment fixed at sixteen years in the State prison. The offense charged was the killing of George Smith by shooting him with a pistol.

It seems that the deceased had threatened to take the life of the accused, and in such a determined way as induced a white man (the accused and deceased were both colored) for whom the two had been working, to notify the accused of the intention of George to kill him.

The facts are in substance these: They lived on adjoining premises, with a fence between the two buildings; the killing was in front of the house of the accused at the steps that led into the yard of appellant's house; a short time before the killing (only a few minutes) Jim Smith, a brother of the accused, heard a quarrel going on at the house of the deceased. Jim went over to see what was the trouble, and found the deceased quarreling with his (the deceased) brother, John. When the deceased saw that Jim, the brother of the accused, was present, said to Jim, "what the hell he was doing there," and then struck him. Jim ran back to his house, and while making this hasty retreat the deceased picked up an axe and threw at him, the axe passing over Jim's shoulders but not striking him. George, the deceased, then left his house by going out at the front gate into the street and approached the steps that led over the fence into the house of the accused, and inquired "what damn worthless son-of-a-bitch disliked the way he treated that boy." A brother of the deceased, John, replied "several of them don't like it." The deceased then said "if any damn-son-of-a-bitch don't like it let him come out and stand before me." When this remark was made the accused, who was on the steps at his own home, cried "look out," and fired three shots, or two at least, that struck the deceased in the stomach and ended his life.

The State proves that George, the deceased, had no weapon of any sort, while the defense shows that he had a knife in his hand and was making his way into the yard of the accused. That the deceased purposed to carry into execution his threats to take the life of the accused the jury could well have assumed under the circumstances and facts established. He had threatened the life of the accused, as is shown by testimony uncontradicted, and in the heat of passion, after throwing the axe at his (the accused) brother, had made his way to the entrance of

appellant's house for certainly some unlawful purpose, and whether the accused had the right to believe and did believe he was in danger of his own life or of great bodily harm, was a question for the jury. It was neither right nor proper for the court to call the attention of the jury to an instruction to the threats made or to the attempt of the accused to take the life of the accused's brother. All these were facts that had gone to the jury to enable them to determine whether or not the accused acted under the belief that his life was in danger or that of his brother.

The accused was at his own house, and if he believed and had reasonable grounds to believe that the deceased was about to invade its sanctity, for the purpose of taking the life of Jim or the life of the accused, he had the right to act in such a manner as to prevent it. He was not compelled to flee or hide in his own house to avoid the presence of one who but a moment before had attempted to take the life of his brother, and had also threatened to take the life of the accused. The instruction should have been so framed as to have said to the jury that the accused had the right to defend his brother and himself, and was not compelled to look for means of escape when on his own premises, if he believed and had the right from the testimony to believe that the deceased was about to enter his yard for the purpose of doing either his brother or himself great bodily harm.

Thus appellant is entitled to a new trial, and the judgment of conviction is reversed that he may receive one.

SIMPKINS' ADM'R, &c. v. WELLS, &c.

(Filed May 15, 1894—Not to be reported.)

Patents—Uncertain description—The calls of a patent for 100 acres and the description of the land in the certificate of survey are the same except as to the tenth call. This tenth call in the patent, if followed, would enclose a tract of 784½ acres; the same call of the certificate of survey, if followed, would enclose a tract of 866½. Neither of said tracts would conform to that described in the patent or certificate of survey as to location or as to the figure of the boundary. If, after running the first ten calls common to the patent and survey, we go back to the beginning and reverse the last calls of the patent until the disputed call is reached, and then add in lieu of it a short course, a boundary containing about 100 acres is obtained which is in all other respects similar to that described in the patent. Held—Neither the calls of the patent nor of the survey will be followed, but the lines will be so run as to embrace the 100 acres, and the patent so located will be sustained as a valid grant.

Alexander Lackey and John F. Hager for appellants.

Stewart & Stewart for appellees.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellants brought this action to restrain the appellees from committing waste and destroying timber on lands alleged to be within the boundary of a patent issued by the Commonwealth of Kentucky on April 3, 1856, to Wm. G. Wells, from whom they trace title to the lands on which the timber was being cut.

The appellees defended by claiming the lands in dispute upon

a survey for 100 acres made March 31, 1843, and upon which a patent issued on July 7, 1845, to Morgan Wells, from whom they trace their title. The lands were unenclosed or "wild" lands, and its possession being constructively in the holder of the legal title, it is manifest that the appellees must succeed unless, as contended by the appellants, the senior patent is void for uncertainty or does not cover the lands in dispute when properly run out, in which latter event there will, of course, be no interference between the two grants. Beginning at the white oak near the gap of a ridge, which seems to be satisfactorily established as the begining corner, the calls of the patent and those of the certificate of survey on which it was issued agree for nine consecutive calls; but the tenth in the patent is north 75 east 60 poles; in the survey it is north 75 east 60 poles. Thereafter to the beginning the calls agree. No natural object is called for after the sixth call, although water courses and well-defined ridges were necessarily crossed. Continuing the plat by the calls of the patent we reach the last or eighteenth call, which is north 65 west 20 poles, and find ourselves 327 poles from the beginning, and the course is south 84 west. Moreover, the patent would contain 784½ acres instead of 100 acres. When so run out the patent embraces the land in dispute. If we go back to the tenth call and run by the survey, when we reach the last call (north 65 west 20 poles) we are 220 poles from the beginning instead of 20, and the course is north 61 degrees 31 minutes east instead of north 65 west, and the quantity is 366½ acres instead of 100. Moreover, the lines cross each other when run out by the survey, and the land is located on the west of the calls down the Brushy Fork of Daniels creek instead of on the east, where the testimony shows it to be. This running does not embrace the land in dispute. It seems to us impossible to locate the land intended to be embraced in this patent by either of the above plans of running it out.

It is suggested that after running to the tenth call we then go back to the beginning and, reversing the calls, run to the variant or disputed call, and, if so, we may force the survey and patent to a close by a call only slightly differing from the patent and survey call, and the patent would then embrace something over 100 acres in its boundary. The junior patent would not then interfere with the senior, and the resultant figure be quite similar to the tracing from the surveyor's book to the survey made for the patent. This plan was adopted in correcting the patent under consideration in Alexander v. Lively, 5 Mon., 159. There it was said "if we commence at the beginning and run to the third corner and then return to the begininng and reverse the last and two next preceding lines, we will form an unenclosed survey or one which may be closed by one additional line, and when so closed it will include the quantity desired," etc.

Thus a new line was added and the patent sustained. Here we add no new line, though the precise course and distance supplied are unknown to any call, either of the patent or survey. Yielding to necessity, and as affording the only solution of the difficulty, we suppose this plan may be adopted and the validity of the patent upheld. There is then no interference with it by the Wm. G. Wells patent, save to the extent of a few acres where no timber was cut, and the quanity corresponds substantially with that demanded by the patent and the certificate of survey. Another corroborative circumstance is that the long parallelogram found at the southern border would extend nearly to the dividing ridge between the counties, then Floyd and Lawrence, now Johnson and Martin, without projecting into Lawrence or Martin

counties, as would be required under the contention of the appellees. Whether the patent would then include the improvements made by the ancestor of the appellees at the mouth of the Brushy Fork we can only tell by the process of the protraction, but these they hold unquestionably by long adversary possession. They do not, however, hold adversely up Daniels creek beyond the west line of the junior patent. The proof is abundant that to that line and to it only in that direction the ancestor of the appellees claimed for many years. The line was found to be well marked, the knotty poplar especially being well known as one of the corners of the Wm. G. Wells land. This line, the western boundary of the junior patent, may be regarded as the established line between the conflicting claimants, save as to the few acres of land mentioned heretofore.

By this adjustment of the lines of the patent and survey, and the recognition of the adverse holding of the appellees to line mentioned, we reach the conclusion that the lands on which the timber was cut belonged to the appellants.

The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

THIESING v. THIESING.

(Filed May 17, 1894—Not to be reported.)

1. Divorce—Custody of infant child—Where a divorce is granted the wife on account of the husband's abandonment, and there is nothing in the record showing or tending to show that the wife is wanting in any quality needed for the bringing up of a child in proper and moral courses, the custody of an infant child which is so young as to need maternal care and nurture should be awarded to her by the court.

2. Same—Alimony—An allowance of $25 per month for the maintenance of the wife and infant child is not excessive when the husband has $3,000 worth of real estate and has an income of from $125 to $130 per month.

Simmons & Simmons for appellant.

Tisdale & Gray for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

Winfield D. Thiesing and Mary D. Skinner were married March 14, 1889, a child was born in December, 1889, and in September, 1890, he abandoned her, leaving no means for her to subsist, and giving notice to the merchants in the neighborhood not to give her credit, and during this litigation has strenuoulsy sought to have restored to him every species of household property, however small in value, to which he had any claim.

The lower court, in the action instituted by her, rendered judgment for absolute divorce, and the only question for us to consider is as to custody of the infant child, and amount allowed for support of her and child, which is $25 per month.

Whatever was the common law rule on the subject, according to the policy of our laws and decisions of this court in a contest between father and mother who are separated as to custody of their infant offspring, the welfare and interest of the child or children is always regarded of paramount consideration.

Though the mother in this case may not be without fault, there is nothing in the record showing or tending to show she is impure or lacking in any quality needed for bringing up the child in moral courses. Certainly no reason exists for taking the child from her while so much in need of maternal nurture and care. The husband while sober, provident and industrious, is shown by the evidence to be ill tempered, penurious, selfish and narrow-minded. The principle if not first cause of trouble between them was his refusal to permit the child named for her father; and while she did not in that matter exhibt a proper spirit of consultation and concession, the fact that he permitted it to disturb him and ulitmately cause him to abandon her, shows a temper and disposition not fitted to have sole custody and training of the child. The court did not, therefore, err in giving the custody of the child to the mother, reserving, as was done, power to make any further or other order as may hereafter become necessary.

The allowance of $25 per month to her for her own and the child's support and maintenance was proper, and certainly not objectionable on account of being excessive in amount, for he is possessed of real estate worth $3,000 at least and has an income of $125 or $130 per month.

Judgment affirmed.

SMITH, &c. v. SNOWDEN, &c.

(Filed May 17, 1894—Not to be reported.)

1. Vendor and vendee—Joint owners—Lien—In an action by a vendor who had sold a one-third interest in certain real estate to the owner of the other two-thirds interest thereof to enforce his vendor's lien for unpaid purchase money, he is entitled to have his lien on the one-third interest enforced, although the wife of the owner of the two-thirds interest had advanced money to pay for said two-thirds with the understanding that she was to have interest in the property to the extent of her advancement. The sale of the one-third conveyed by the plaintiff does not affect her right as to the remaining two thirds.

2. Same—Mortgages—Parties—Where the vendor in his action makes one holding a mortgage on the whole property a party to the suit, and the latter by cross petition sets up his mortgage lien and asks for its enforcement, an order of sale of the entire three-thirds of the property to satisfy said mortgage is erronous before the husband and wife have entered their appearance or been brought before the court on the cross petition.

Riddell & Riddell, Hugh Rodman and P. U. Major for appellants.

J. B. White for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, Smith, owned the undivided two-thirds of four lots in the town of Proctor, and the appellee, Snowden, owned the other third.

In April, 1890, Snowden sold and conveyed his third interest to Smith in consideration of the sum of $1,500, of which $500 was paid cash, $100 by a note on one Bedgley, and for the balance

two notes were executed for $500 and $400 respectively, due in six and twelve months.

These notes were sold to the appellees, the Three Forks Deposit Bank, and suit having been brought on the larger one and judgment obtained against both Smith and Snowden, it was satisfied by the sale of Snowden's property. Snowden thereupon brought this action to enforce his lien as vendor on the interest he had sold to Smith. He made the bank a defendant because it held the other unpaid purchase money note. During the pendency of the suit the bank seems to have surrendered its claim to a lien as assignee of the vendor, Snowden, and obtained a mortgage from Smith and wife on the whole of one of the lots mentioned, and on the one-third interest in another, and in its answer and cross-petition set up its mortgage and asked its enforcement.

The appellants resisted the enforcement of Snowden's lien on the ground that when the four lots were purchased by Smith and Snowden Smith's wife had put in $1,250 towards paying for her husband's two-thirds interest, with the agreement known to Snowden that she was to have that much interest in the property, and that accordingly in June, 1891, a conveyance of one of the lots had been made by the husband to the wife.

The judgment below, however, affects only the interest sold by Snowden to Smith, and on this the vendor's lien exists and is enforcible without reference to what interest the wife may be entitled to in the balance. The conveyance of the husband could not defeat Snowden's lien on this one-third interest. The judgment as to Snowden, however, is for $88 too much, as is shown by his own statements, and for this reason alone is erroneous.

Upon setting up its mortgage the appellee bank, without making the obligees, Smith and wife, parties or bringing them before the court on its cross-petition, or without their appearance being entered thereto in anyway, obtained a judgment of sale. This was error.

For these reasons the judgment below is reversed and cause remanded for proceedings consistent with this opinion.

JOHNS v. FARLEY, &c.

(Filed May 19, 1894—Not to be reported.)

1. Evidence taken while a life tenant was plaintiff to settle the location of disputed boundary lines, if competent when taken, remains competent evidence in the action when, after the death of the life tenant, the remaindermen succeed him as plaintiffs in the action.

2. An action to correct a mistake in a deed can not be maintained thirty years after the execution of the deed; but where a deed executed in 1860 describes the land in such a manner as to convey no land at all, the vendor may, thirty years thereafter, maintain an action to locate the boundary between himself and his vendee and prove the land intended to be conveyed by the deed, and that the vendor and vendee have each been in possession of his own land ever since the execution of such deed.

Stewart & Stewart for appellant.

Alexander Lackey for appellees.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Hazelrigg.

Clay Farley was the owner of 500 acres of land, situated on the waters of Wolfe creek, in Lawrence county, and in June, 1860, executed a deed to John Burgett, in which the description of the land conveyed is as follows: "The following tract or parcel of land lying and being in the county of Lawrence and State of Kentucky, and on the White Oak fork of Emily's fork of Wolfe creek, beginning at the mouth of the lower Goodwin Cabin branch and including all the land of the 500-acre survey made by Benjamin Maynard and now deeded to Clay Farley, from the mouth of the lower Goodwin Cabin branch to the beginning, to have," etc.

In this action brought to quiet his title and correct the deed, if it may be construed as embracing the whole of the 500 acres, he avers that he sold to one Harman one-half only of the tract and retained the other half, and has in fact occupied it ever since; that at the direction of Harman, who had sold his half to Burgett, he (Farley) made the deed directly to Burgett, and by mistake of the draftsman the description was written in the ambiguous form indicated, but that he and Harman had agreed on a line dividing the tract into nearly equal parts, beginning at the mouth of the lower Goodwin Cabin branch, which was near the center of the 500-acre survey, and running in opposite directions to the back lines of the survey, thus dividing the tract into two parts of about equal size.

The appellant, Johns, who is the vendee of Burgett, denied that there was any mistake in the deed or that Farley had retained one-half the land, alleged that it included the whole tract; that he was an innocent purchaser, and also pleaded the statute of limitation in bar of the action. He also set up that Farley, in 1874, had conveyed the land to Thompson, James B., Emma, Thomas and Bertran Farley, and hence had no interest in the subject-martter of the litigation. The plaintiff concluded the issues by a reply, and Thompson Farley and the others mentioned came into the action claiming to be the owners in remainder under the deed from their father of 1874, set up by the defendant. Afterwards Farley, the original plaintiff, died, and the case was tried out between Thompson and the other Farley heirs, and the appellant, Johns. The testimony of the parties to the original transaction abundantly sustain the contention of the Farleys, and shows, moreover, that the appellant knew of the adverse holding and occupancy of Clay Farley in and to his portion of the land, which continued uninterruptedly for some thirty years, and in fact had himself bought timber from Clay Farley from off the land he was now setting up a claim to. This purchase was evidenced by a written contract in 1883 and is copied into the opinion of this court in Vinson, &c. v. McAlpin, 87 Ky., 357. Harmon, the vendee, of Clay Farley, is dead, but his widow as well as his son prove the case for the appellees beyond dispute. The conclusiveness of this proof is not and can not be questioned by counsel for the appellant, but it is claimed to be incompetent because taken while Clay Farley alone was plaintiff. It is not contended that the testimony was incompetent when taken, and we think it remained so when the remaindermen were the parties left as the successors and representatives of the original plaintiff.

As to the plea of statute of limitations, it may be admitted that if the action were one solely to correct a mistake in the deed of 1860 it would be long since barred. Recent discovery of the mistake would not stop its running, as in no event could an action be brought to correct it after ten years from the happen-

ing of the mistake, but the real question is, what in fact does the deed convey? Literally nothing.

All the 500-acre Maynard survey "from the mouth of the Lower Goodwin Cabin branch to the beginning," when the "beginning" in the deed, though not the beginning point of the patent, was at the mouth of the same creek, gives us no idea of what is meant, though we readily infer the whole tract was not intended to be conveyed, but only the part up or down "from the mouth of the Goodwin Cabin branch."

The issue presented on the pleadings was the location of the boundary lines of the lands claimed by the parties, and the action to settle such question is unaffected by the statute. The chancellor settled the disputed lines in accordance with the contention of the appellees, and the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

SOUTHERN PACIFIC CO. v. DUNCAN.

(Filed June 6, 1894.)

1. Where two railroad companies with connecting lines have an association or partnership, by which each is to receive freight on its own line for shipment over the line of the other, each company is a general agent for the other, their schedule of charges being a matter between them of which third persons can not be presumed to know, and apparently a freight agent of the one company has the same authority to make a contract binding upon the other that he has to make a contract binding upon his immediate principal, and a shipper has the right to rely upon this apparent authority, and is not chargeable with notice of special limitations upon the agent's authority as to rates over the line of the other company.

2. Powers of freight agent—A person dealing with the freight agent of a railroad company has the right to suppose that he has all the powers ordinarily incident to his business unless he has knowledge to the contrary.

3. General and special agency—Estoppel—While a special agent can not bind his principal beyond the authority conferred upon him, a mere restriction upon an agent's authority does not make him a special agent. A special agency exists when the authority is to do a single act. A general agency exists when the authority is to do all acts in any particular trade or calling, and where the principal has held out the agent as having a large authority than he really possesses, he will be estopped from setting up the actual terms of the agent's authority.

4. Same—Pleading—Where the petition alleges a general authority on the part of an agent, and the answer admits that there was authority, but claims that it was restricted, the restriction should be pleaded.

5. Pleading—Where an answer admits in effect that there was an agreement between the parties, it is essential that it should aver what that agreement was, in order that it may appear that the admitted agreement was materially different from that set out in the petition.

6. Same—A denial that the defendants "are" regularly engaged in the transportation of freight, etc., does not controvert the allegation that they were so engaged at the time of the contract sued on. Nor is it material whether they were "regularly" engaged in the business.

James Quarles and Bullitt & Shield for appellant.

O'Neal, Phelps, Pryor & Selligman for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Barbour.

In Janary, 1889, the appellee entered into a contract with the L. & N. R. R. Co. through its agent, C. E. Hockerson, for the transportation of a car load of "emigrant movables" or household goods from Louisville, Ky., to Los Angeles, California. In addition to the usual bill of lading was this written agreement: "It is agreed that Col. Duncan ships a car load of 'emigrant movables' to Los Angeles, through, without transfer, for $263, with permission to carry apples, bacon, lard, etc., of a lower grade, without being charged for it, car not to exceed 20,000 pounds."

The L. & N. R. R. terminated at New Orleans, and it was understood that the car was to be carried from that point to Los Angeles by the appellant, the Southern Pacific Co. The goods were carried by the L. & N. R. R. to New Orleans and there delivered to the Southern Pacific Co., which transported them in due time to Los Angeles. When the car reached that place the appellee paid the agreed price for the freight and was permitted to open the car, and had hauled from it part of the goods, when the agent, discovering that the car, in addition to household goods, contained apples, bacon and lard (though the whole load did not equal 20,000 pounds in weight), refused to allow him to remove any of these goods unless he first paid his company an additional sum of $128, claiming that these articles were not embraced by the term "emigrant goods," and were rated at a higher freight tariff. Duncan, refusing to pay this additional charge, the company retained the goods for a number of days. Finally, however, the company did deliver them to the appellee but in a damaged condition—the damages being a consequence of their detention. For this damage appellee brought this action against the L. & N. R. R. Co. and the Southern Pacific Co. The action was dismissed as to the L. & N. R. R. Co. and a judgment rendered against the Southern Pacific Co., from which judgment it prosecutes this appeal.

It is conceded that such goods as apples, bacon and lard, are not embraced in the term "emigrant movables," and the only question is, did the agent, Hockerson, have such authority as authorized him to make the special contract?

That he did have the authority to bind the company so far as the apellee is concerned we have no doubt.

The petition alleges that the defendants, the two companies, are regularly engaged in the transportation of freight between Louisville and Los Angeles, and that they are connecting railways at the city of New Orleans; that by agreement between themselves they had and maintained through rates of freight for the transportation of goods, etc., between said two cities in January, 1889; that each received from shippers on its own lines, etc., for shipment over the line of the other, and that both participated in the profits or earnings of such transportation in a ratio or proportion agreed upon between themselves. These allegations as to the association are not denied by the answer.

The answer denies that the defendants are regularly engaged in the transportation of freight between Louisville and Los Angeles, except as all railroads are in the habit of receiving

freight shipped over other lines, and denies that either of the defendants was authorized to ship freight over the line of the other except by mutual consent, and upon such terms as might at any time be stipulated by said companies respectively. It denies that the L. & N. R. R. Co. or its agent had authority to receive goods for transportation over the line of this defendant except with the consent of this defendant and upon the terms stipulated by it. That the answer does not put in issue the material averments of the section as to the association seems to us plain. A denial that the defendants are regularly engaged, etc., except, etc., does not controvert the allegation that they were so engaged in January, 1889. Nor is the fact that they were regularly engaged material. If they were engaged in the business when the appellee made the contract, the appellant is liable, and this, whether they were regularly engaged or merely engaged at that business for that month. Nor does the answer deny the agreement which it is alleged existed between the two companies. It in effect admits that there was an agreement, but fails to aver what it was, while it was essential that it should do, in order that it might appear that the admitted agreement was materially different from that set out in the petition. In view of the evidence the traverse perhaps could not have been more complete, because the appellant proves that there was an agreement substantially as alleged in the petition, but insists that the carriage of freight was to be regulated by a schedule which fixed the tariff on all freights, and that the articles shipped by the appellee could not have been shipped under the schedule of prices for the sum agreed upon by Hockerson and the appellee, and that, therefore, he, though having authority to contract for freight over its road, exceeded his authority. But these facts ought to have been pleaded; for when a general authority is agreed and the answer admits that there was authority, but claims that it was restricted, the restriction shoud be pleaded.

The allegations of the petition are comprehensive enough to show an association, if not a partnership, between the two companies, and, therefore, the mere denial of Hockerson's authority to receive the goods for transportation over defendant's line except with its consent and upon terms stipulated by it, when the stipulated terms are not stated, and the further denial that the L. & N. R. R. Co. or its agent was authorized to make for and on behalf of the defendant the contract or representation set forth and sued on, and the further denial that it is bound by the contract or that it is indebted to the plaintiff are but conclusions of the pleader.

But taking the case upon the evidence, it seems to us that the agent of the L. & N. R. R. Co. was as to the appellee, independent of the special authority to which we will hereafter refer, authorized to bind the appellant by the contract made with the appellee.

A person dealing with the freight agent of a railroad company has the right to suppose that he has all the powers ordinarily incident to his business, unless he has knowledge to the contrary. Prudent men are accustomed to rely on the acts and statements of such agents in reference to the business with which they are connected. Men have no time to stop and inquire of the heads of the departments as to the powers of those whom they have placed in positions for the purpose of dealing with the public. It is only when the custom of limiting the authority of the agent has become so general that it is a part of the ordinary business knowledge of the world that third parties should be affected by it. We have not lost sight of the rule that a special agent can not bind his principal beyond the authority conferred

upon him. But what is a special agency? It is not simply a restriction upon an agent's powers which make him a special agent.

"A special agency exists when the authority is to do a simple act. A general agency exists when the authority is to do all acts in any particular trade or calling. For the acts of the general agent within the general scope of his authority the principal is bound even though they may be in violation of his instructions, while the principal is not bound by the unauthorized acts of a special agent. But what is a special authority between principal and agent may have all the effects of a general authority as to third persons, the rule being that while the principal is not bound by the acts of a special agent beyond his authority, third persons in dealing with such an agent, being bound to ascertain his authority, yet when he has held out the agent as having a larger authority than he really possesses, he will be estopped from setting up the actual terms of his authority." (Lawston's Rights and Remedies, section 56.)

We have no doubt but what these two companies were general agents for each other. Their schedule of charges was a matter between them. Third parties could not be presumed to know of them. It would be singular indeed if before a person could make a contract for the shipment of goods over the lines of railroads, associated as these roads were, he should first be required to apply to the head of the department of each road

Apparently Hockerson had the same authority to make a contract binding upon the appellant that he had to make a contract binding on the L. & N. R. R. Co., and the appellee had the right to rely upon this apparent authority. It is true that Hockerson and other witnesses state that tney had no authority to make this special contract. That was their opinion, and it may be that as between the principal and agent the authority did not exist. But upon the conceded facts the authority must be held to have existed as to the appellee, who had no notice of the restrictions upon the agent's authority.

We have thus elaborated the authority as derived from the agreement between the two companies, in view of the facts that the court below in its findings seems to have doubted whether the evidence was sufficient to establish such authority.

But independent of all this we think that the evidence shows clearly that Culp, the agent of the L. & N. R. R. Co., did get special authority from appellant's officers in New Orleans to make this contract with the appellee. While Culp, on cross-examination, says he, or rather Hockerson, had no authority to make the contract, he shows that in this answer he was referring to his opinion of the general agreement between the two companies and not to the telegram which approved of the contract which was made with Duncan. He says so in a later answer. Upon either view of the case it seems to us that the appellee was entitled to the judgment, and it is, therefore, affirmed.

It is suggested that there is an error in the amount of recovery, it being larger than was authorized by the pleadings. The amount, however, is too small to authorize a reversal.

PHŒNIX INS. CO. OF BROOKLYN, N. Y. v. PHILLIPS.

(Filed June 13, 1894.)

1. Fire insurance—Knowledge of soliciting agent—Estoppel—Knowledge upon the part of the soliciting agent of a fire insurance company at the time he took an application for insurance that the insured building stood upon

leased ground will estop the company from relying upon a provision in the policy that "if the insured building stands upon leased ground it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy shall be void."

2. The failure of the insured to disclose the existence of a material fact as to which no inquiries were made will not render the policy void unless the fact was intentionally or fraudulently concealed.

B. F. Buckner for appellant.

Wilson & Thum for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Yost.

The appellant company issued a fire insurance policy upon a barn belonging to Phillips, the appellee, situated upon land which he had leased from one of Standiford's heirs, but the policy failed to state this fact. The fourth clause of the instrument provides that "if the building insured * * * by this policy stands on leased grounds * * * it must be so represented to the company, and so expressed in the written part of the policy, otherwise the policy shall be void." * * *

The barn burned, the company denied liability and this action was brought by Phillips to collect the amount due him upon the policy. The defendant based its defense upon the fact that the policy failed to show that the building insured stood upon leased premises, and the plaintiff in his reply alleged that these facts were all well known to the company when it accepted his application for insurance and issued the policy.

The evidence showed that the company, through the same agents who issued this policy, had insured buildings belonging to Phillips which had been built and situated on the Standiford farm for several years prior to the issual of this policy.

When the application was made for this insurance Pihllips was not present. A friend made a verbal application to the agents for the policy, and testified on the trial that he stated to the them that this barn was situated on the Standiford estate, on the Poplar Level road, about a mile and a half from the city. While the testimony was to a certain extent contradicted by one of the agents, the jury accepted it as true, and we will so assume it to be in considering the material question presented by this appeal.

It must be remembered that the application was received and accepted and the policy issued when Phillips, the insured, was not present. He said nothing; conceded nothing; represented nothing. No questions were asked him; no answers were by him given. No questions were asked his agent, nor were any representations made by him except that the property to be insured was situated upon the Standifod estate.

Knowledge of the solicitor of insurance in regard to existing facts, whether expressed in the policy or not, will create an estoppel.

The soliiting agent, while acting in the scope of his authority, will bind his company as firmly as could its chief officer while acting in that capacity. His knowledge, therefore, respecting any material fact touching the character of the risk, is implied to the company and creates an estoppel against defenses that would otherwise be voidable under the policy.

In Hartford Ins. Co. v. Haas, 87 Ky., 531, the Court of Appeals said: "When an agent issues a policy of fire insurance upon property of which the insured is not the absolute owner, with knowl-

edge of the nature and extent of the interest of the insured, the knowledge of the agent is that of the company, whether or not it has been acquired in the course of his employment as agent, and the contract is valid to the extent of the interest of the insured, although the policy provides that it shall be void if the insured is not the absolute and unconditional owner."

As we have shown Phillips acted in absolute good faith, as did his agent. He made no representations as to the character of the risk. He concealed nothing that he ought to disclose.

The rule is as was held by this court in Firemen's Fund Ins. Co. v. Mechendorf, 14 Ky. Law Rep., 157, where no inquiries are made, the intention of insured becomes material, and to avoid the policy it must be found not only that the matter was material, but also that it was intentionally and fraudulenlty concealed. As no questions were asked either the insured or his agent, of course nothing was concealed.

The judgment against the company is, therefore, affirmed.

SUPERIOR COURT ABSTRACTS.

CALDWELL, &c. v. SWEETZER, CALDWELL & CO.

Filed June 6, 1894. Appeal from Butler Circuit Court. Opinion of the court by Judge Yost, dismissing appeal from one judgment and affirming the other judgment.

Appeals—Failure to file transcript in time—Certain transfers made by an insolvent debtor to his creditor having been declared, in an action brought for that purpose, to operate as an assignment for the benefit of all his creditors, and the preferred creditor ordered to turn over to a receiver all of the property so sold and transferred to him, and a judgment rendered at the next term of the court against the preferred creditor for the value of the property which he had failed to return, the transcript of the record not being filed in this court in time to preserve the right to prosecute the appeal granted by the lower court from the former judgment, that appeal is dismissed. And assuming that judgment to be correct, as must now be done, the only question left is as to the correctness of the finding of the court as to the value of the property which is fully sustained by the evidence.

B. L. D. Guffy for appellants; W. A. Helm and E. W. Hines for appellees.

GEORGETOWN WATER CO., &c. v. THE CENTRAL THOMPSON-HUSTON CO.

Filed June 6, 1894. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

1. Venue of action—This action to enforce satisfaction of a judgment upon a return of "no property," pursuant to section 489 of the Code, was properly brought in the county in which the judgment was rendered.

2. Judgment prematurely rendered—Sale subject to mortgage—The court erred in rendering judgment for sale of property before service of process was had upon the holder of a mortgage on the property who was made a defendant, and upon his motion the judgment should have been set aside. It

can not be said that he was not affected by the judgment because the property was sold subject to his mortgage.

3. Judgment—The amount due upon the mortgage should have been ascertained and fixed by the judgment. As the judgment merely directs a sale of the property subject to the claim of the mortgagee, "not exceeding $35,000," it is too vague and uncertain.

Bell & Bell, R. P. Jacobs and J. J. Cornelison for appellant; Tyler & Apperson for appellee.

GEORGETOWN WATER CO. v. CENTRAL THOMPSON-HUSTON CO.

Filed June 6, 1894. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

1. Appearance—The defendant by its general demurrer and answer entered its appearance to the action and waived its right to object to the jurisdiction of the court.

2. Notice to take depositions on the 18th of the month, which was served on the 16th, was sufficient.

3. Corporations—Authority of agent—Where goods purchased for a corporation by its general manager, who was accustomed to make contracts for the corporation with its knowledge and acquiescence, were delivered to the corporation and retained by it, the corporation being sued for the price of the goods, can not be heard to deny the authority of the agent to make the purchase.

Bell & Bell and R. P. Jacobs for appellant; Tyler & Apperson and Turner & Son for appellee.

EDWARDS, &c. v. CRAIN, &c.

Filed June 6, 1894. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, reversing.

Rents and improvements—Where a daughter took possession of land under her mother's will, by which she was requested to take care of and support her father during his life, which she did, and the will was afterwards declared a nullity upon the ground that the mother, being a married woman, had no power to make a will, the court in adjusting the accounts between the daughter and the other heirs erred to the prejudice of the daughter in charging her with the rent of the land during her father's life, he being entitled to the use and occupation of the land or its rents during his life. And it was error to the prejudice of the other heirs to give the daughter credit by expenses incurred by her in the support of her father, they being demands against his estate and not the estate of the mother. For debts of the mother which the daughter had paid for her and for the mother's funeral expenses the daughter was properly given credit, and also for the value of improvements which she put upon the land.

W. L. Porter for appellants; George T. Duff for appellees.

THE WM. GLENNY GLASS CO. v. TAYLOR, &c.

Filed June 6, 1894. Appeal from Bracken Circuit Court. Opinion of the court by Judge Barbour, affirming.

Where a promissory note executed in this State is made payable in another State the law of the latter State determines its validity and interpretation. Therefore, a note executed in this State and made payable in the State of New York providing for the payment of a greater rate of interest than 6 per cent. is void because the laws of the State of New York provide that all such writings shall be void.

Ed. Daum, H. C. Weaver and W. H. Holt for appellant; George Doniphan and Thomas H. Hines for appellees.

TIPPENHAUER v. SPINKS.

Filed June 6, 1894. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, affirming.

Allegation and proof—Variance—Objection waived—In this action upon an account it is too late to object in this court for the first time that there is a variance between the allegations of the petition and the proof, as the only variance is as to the dates of certain items of the account by which it is apparent the defendant was not misled, he as well as the plaintiff having directed his proof to the items of the account as they were shown by the plaintiff's evidence to have been created.

Root & Root for appellant; John S. Ducker for appellee.

COVINGTON AND CINCINNATI BRIDGE CO. v. BRENNAN, BY, &c.

Filed June 13, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Suit by next friend—In this action by an infant suing by her mother as next friend, the plaintiff having failed to file the affidavit of the next friend, as required by section 37 of the Civil Code, the court, upon the defendant's motion to dismiss on that ground, erred in overruling the motion upon plaintiff's offer to file the affidavit of the next friend, as the affidavit tendered did not comply with the requirement of the law, in that it failed to show that the affiant was free from disability, and, besides, the paper was never filed or ordered to be filed.

2. Instructions to jury—As the petition alleged that as plaintiff was leaving the defendant's steam ferryboat she "fell' from the gang plank or float leading to the shore, and was injured, the court erred in instructing the jury that if the plaintiff "fell, stepped or jumped" from the gang plank, and was thereby injured as alleged, the law was for her. The plaintiff should have been restricted to the allegations of her petition.

Charles H. Fish for appellant; James P. Tarvin for appellee.

HELM, &c. v. CAMPBELL, &c.

Filed June 13, 1894. Appeal from Russell Circuit Court. Opinion of the court by Judge Yost, affirming.

Revivor of judgment—Where in an action for the settlement of a decedent's estate an order was entered directing the administrator to pay certain debts against the estate and reciting that there would then remain in his hands a certain sum which he was directed to distribute among the heirs, and subsequently the case was referred to a commissioner to ascertain and report the payments made by the administrator, and the amount, if any, which remained in his hands undisturbed, and thereafter the action was "on motion of the parties" stricken from the docket, a motion subsequently made by the heirs, after the administrator's death, to revive the "judgment" against his representatives was necessarily overruled, as no judgment in the meaning of the Code had ever been rendered against the administrator.

J. F. Montgomery for appellant; Hays & Stone for appellee.

SMITH v. CALLENDER.

Filed June 13, 1894. Appeal from Grant Circuit Court. Opinion of the court by Judge Yost, affirming.

Verbal contract not inconsistent with writing—Where a deed purported to convey a certain number of acres of land, a verbal contract by which the vendor agreed to have the tract surveyed, and if it fell short of that quantity to credit the note for the purchase price by a certain sum for each acre of the deficit, was not inconsistent with the writing, and in an action on the note it was competent for the plaintiff to prove the verbal agreement.

H. Clay White for appellant; M. D. Gray for appellee.

GRANT v. PEARCE, &c.

Filed June 13, 1894. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Corporations—Advances by stockholders—Promise made at stockholders' meeting binding on stockholders personally—Where certain stockholders in a corporation, the property of which was about to be sold under a deed of assignment, executed by the corporation for the benefit of its creditors, formed a syndicate and agreed to buy the property and organize a new corporation, and with that end in view executed a writing appointing two of their number a "committee to carry out the purpose hereinafter set forth," and constituted them the "agents and trustees of the subscribers hereto, with all the powers necessary to that end," and the "committee" named, after the new corporation was organized, advanced money for its use, and at a meeting of stockholders this action upon the part of the "committee" was recognized as within their authority, and the payment of the sum advanced was "guaranteed" to them, the stockholders present at that meeting must be regarded as binding themselves personally for the repayment of this sum in the proportion of the stock held by each, the corporation being bound independent of any agreement by the stockholders.

2. A mere verbal promise upon the part of one of the stockholders to pay his part of the sum advanced by the "committee" is enforcible, as it is not a promise to answer for the debt of another, and, therefore, not within the statute of frauds. Though the money was advanced ostensibly to the corporation, it was in reality advanced for the benefit of each member of it, and the promise by the stockholder was, therefore, a promise to repay the "committee" what they had advanced for him. And a stockholder having the power to bind himself by his own verbal agreement could confer the same power on his proxy.

Pirtle, Speed & Trabue for appellant; Dodd & Dodd for appellees.

BOARD OF TRUSTEES OF LEBANON v. SHUCK, &c.

SAME v. SAME.

Filed June 13, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Jurisdiction of police court—The provision in a town charter conferring upon the police judge "original jurisdiction of all civil cases where the amount in controversy does not exceed $500" is broad enough to embrace an action for injunction when the matter in controversy does not exceed $500. The jurisdiction to grant the injunction is an incident to the jurisdiction of the action, the additional power conferred "to grant injunction to the same extent that the presiding judge of the county court now has," having reference to temporary injunctions in actions pending in the circuit court.

2. Waiver of objection to jurisdiction—Even if the police court had no jurisdiction, as there was an appeal to the circuit court, which had jurisdiction of the subject-matter, the failure to make the objection in that court would seem to operate as a waiver of the objection to the jurisdiction.

3. Exemption from municipal taxation of land used for agricultural purposes—Under an act to extend the corporate limits of a town which provides that "nothing contained in this act shall be construed as conferring power upon the trustees of the town to impose a tax upon lands within the town limits which are used for agricultural purposes," a dwellinghouse and yard forming part of a tract of land used for agricultural purposes, can not be separated from the rest of the tract and taxed upon the ground that they are not used for agricultural purposes, there being no provision in the charter for thus separating or dividing the property.

John McChord for appellant; Finley Shuck and Knott & Edelen for appellees.

CITY OF COVINGTON v HALLAM & MYERS.

Filed June 18, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Persons contracting with a municipal corporation or its officers must, at their peril, inquire concerning the authority of the contracting agents to bind the corporation.

2. Liability of city for value of legal services—The fact that legal services rendered in behalf of a city in an action in which it was a defendant were rendered with the knowledge of members of the city council and of the city attorney, does not render the city liable, these officials having no authority to make contracts for the city or to employ counsel. The city could contract only through its council. Nor does the fact that the city derived benefit from the services raise an implied promise upon the part of the city to pay for them.

W. A. Byrne for appellant; D. A. Glenn for appellees.

LEBUS, &c. v. D. ROODE.

Filed June 20, 1894. Appeal from Harrison Circuit Court. Opinion of the court by Judge Yost, affirming.

Sales of personal property—Right of vendor to resell upon vendee's default—The vendor of shares of stock had the right upon the vendee's refusal to receive and pay for the shares to treat them as the property of the vendee and sell them with due precaution to satisfy his lien for the price, and then sue for and recover the difference between the contract price and the amount for which the property was sold. Nor was it necessary, although the price of the shares was on a decline, that the vendor should resell immediately after default by the buyer. It was sufficient that the right was exercised within a reasonable time.

J. Q. Ward and Ward & Kimbrough for appellants; J. Irvine Blanton for appellee.

DAVENPORT & BRANSFORD v. GUENTHER & SONS.

Filed June 20, 1894. Appeal from Daviess Circuit Court. Opinion of the court by Judge Yost, affirming.

Assignment—Contract for indulgence—Where the holders of a bill of exchange which appeared to be overdue sold and transferred it to another without disclosing the fact that they had, for a valuable consideration, agreed to extend the time of payment, although they knew at the time that the purchaser purchased it with the intention of bringing suit and attaching the property of the debtor forthwith, they were guilty of such constructive if not actual fraud as renders them liable on the assignment, although made without recourse on them.

An agreement by a creditor to grant his debtor indulgence in consideration of the payment of a certain sum of money is a binding contract, and extends the time of the maturity of the paper on which the indulgence was given.

Powers, Atchison & Miller for appellants; Weir & Weir for appellees.

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KENTUCKY COURT OF APPEALS.

BAILEY v. CONLEY.

(Filed May 10, 1894—Not to be reported.)

When sued by the vendor for specific execution of a contract of purchase of land the vendee has a right to require an exhibition of title by the vendor where there are apparent defects in it. And if the vendee does make such requirement and avers his willingness to comply with the contract the court should not then rescind the contract against his protest before an exhibition of whatever title the vendor has, the vendee having a right to waive defects therein or to accept a partial compliance with the contract.

Wm. H. Holt for appellant

Samuel H. Patrick for appellee.

Appeal from Knox Court of Common Pleas.

Opionion of the court by Judge Hazelrigg.

When sued on the contract for the balane of the purchase money due on the land bought by him of the appellee, Conley, the appellant, Bailey, by reason of the probable defects in the title, as set up in his answer, had the right to require of the appellee an exhibition of his title and an exhibition of a perfect title. When he did so require and averred his willingness to take the land, if such an exhibit should be made, the court should not have rescinded the contract over his protest, but should have required the appellee to exhibit such title as he had, and if defective he should be given a reasonable time within which to perfect it, and should be required to perfect it if he can do so. It may be that upon the exhibition being made the appellant may accept the title without further objection, or, if the title be good, save only as to a part of the land, the contract might still be enforced, such abatement from the purchase price being made as might be proper.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

COX, &c. v. PREWITT, &c.

(Filed May 17, 1894—Not to be reported.)

New trial—Newly-discovered evidence—Diligence—After a claimant to land had lost his case, because there was no record evidence showing either an entry or survey of the land for him, the plaintiff filed his petition for a new trial, wherein he averred that he had discovered since the trial the book of the county surveyor which supplied the defects in his evidence; that said surveyor had not filed said book in the surveyor's office or turned it over to his successor in office, but had retained it in his own possession since 1857; he averred that prior to the former trial he had searched the office of the county surveyor for such record. Held—The party is entitled to a new trial. There was no lack of diligence in seeking the evidence. He had a right to suppose before the former trial that the surveyor had performed his duty and turned over all his records to his successor in office.

J. W. Alcorn for appellants.

Hill & Denham for appellees.

Appeal from Whitley Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

In a former suit between the parties to this appeal Cox was defeated because, as said in the opinion of this court on the appeal of the case here, in January, 1889, "there was (is) no record evidence furnished by appellant showing either an entry or survey of the land made for Cox in 1857, nor does it appear he ever obtained an order of court entitling him to enter and have the land surveyed. (88 Ky., 156.)

In November, 1889, Cox applied for a new trial by filing his petition for that purpose on the ground of newly-discovered evidence. He set out the grounds in detail, but they were not deemed sufficient by the court below, as exhibited in the petition. His application was, therefore, dismissed and he has appealed. The evidence alleged to have been discovered is the book of a former surveyor of Whitley county, which, in violation of his duty, he has failed to turn over to his successor in office, and which contained the record made by such surveyor at the time of the entry and survey made by Cox in 1857, such book being still in the possession of the surveyor. The certificate of survey, as made by the surveyor, was filed and apparently supplied the record evidence, in want of which the judgment on the former trial had been adverse to Cox and his vendee. It appears from the petition that the complainants made search of the records of the surveyor's office before the trial for the record evidence they stood in need of, and which they discovered only after the trial. Not finding it where it belonged, it seems to us they had the right to suppose that after making the survey the officer had failed to record it.

We think it was not a lack of reasonable diligence on their part to fail to hunt up the former surveyor to ascertain if he had performed his duty. They had the right to rest on the presumption imputed to the officer and conclude that he had turned over to his successor all the records of his office. They aver that they had no reason to believe the former surveyor had retained any of the books belonging to the office and had failed in his duty to turn any of them over. The allegation as to where the original plat and certificate was found might have been more specific and

satisfactory, but, upon the averments of the petition, taken altogether, we think the appellants should now be entitled to a new trial, if his petition be taken as true, and to that end the judgment below is reversed, with directions to overrule the demurrer to the petition.

COMMONWEALTH v. LOUISVILLE TRUST CO.

KENTUCKY MANUFACTURING ESTABLISHMENT FOR THE BLIND v. SAME.

(Filed May 17, 1894—Not to be reported.)

1. Mortgage of charitable institution—Act authorizing construed—For the purpose of enabling a charitable institution for the blind, created by donation of money by the Commonwealth, to build additional buildings, the legislature authorized said institution to mortgage its grounds and buildings to raise money for that object. In this suit to enforce the mortgage lien so created. Held—Although the act authorizing the execution of the mortgage provided for a sinking fund, in which rents to be derived from the new building were to be paid for the purpose of satisfying the interest and principal of the mortgage, the mortgagee has a right to have the property itself sold to satisfy his lien, it appearing the buildings were never completed and that no rents have been derived from them.

2. Same—The act which created such institution provided that the property should revert to the Commonwealth if it ceased to be used for the charitable purpose contemplated; but the Commonwealth, having subsequently authorized the creation of this mortgage, can not claim the property or any lien upon it until after the mortgage is satisfied.

Fleming & Suter, C. B. Seymour and W. J. Hendrick for Commonwealth.

Simrall, Bodley & Doolan for Kentucky Manufacturing Establishment.

John W. Barr, jr., and W. O. Harris for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The corporation known as the Kentucky Manufacturing Establishment for the Blinds owned some real estate in the city of Louisville, a part of which (as described in the pleadings) had no building, upon it of any value, and in order to raise money to erect new buildings it applied to the legislature for authority to mortgage this property to raise funds for that purpose. The legislature authorized the corporation to issue bonds of certain denominations, payable at a certain time, and negotiate with those having money to loan, in order to raise the money on the bonds. It was authorized to secure the principal and interest of said bonds by first mortgage on this property, situated on the east side of Fifth street, in the city of Louisville. It did sell the bonds to the appellee, as the act authorized, and executed a deed of trust or mortgage on the property to secure the payment of $10,000, the amount of money obtained. They undertook to erect the building and failed to complete it, leaving the building unfinished and the appellee without its money.

No defense was interposed by the corporation, but it now complains and insists the appellee must look alone to the rents for the money loaned under a provision of the act creating a sinking

fund, into which the rents were to be paid, and the money arising therefrom applied to the redemption of the bonds or their payment. This was a mode from which the bonds were to be paid, based upon the idea that the buildings would be erected and rents collected.

With this the appellee had nothing to do, and when the bonds fell due was entitled to its money, but doubtless would have delayed enforcing its lien if there had been any probability of the success of the undertaking. In this the corporation has failed, and the money being due should be paid.

There was an express power given to mortgage to secure the principal and interest of these bonds, and to say that the creditor must look alone to the rents, is not warranted by any rational construction of the act.

It is said, however, that this institution is a mere charity, created by legislative grant, and from the funds of the State, and that by the act of 1882 it is provided, if the property ceases to be used for the purposes contemplated, it is to revert to the State, and, therefore, the State has a superior lien for the money ($15,000) originally donated for the purposes of purchasing this real estate; that the State had in view but one purpose is plain, and that was to aid this charity by donating the realty for the benefit of the blind, and in order to increase the facilties or the improvement of this unfortunate class of our citizens, the legislature thought proper to give the corporation the power to enlarge or increase its buildings, and to borrow money for that purpose by executing a first mortgage on the property.

The mode of relief the State has is not by appealing this case but to relieve by donation this property from the incumbrance upon it, as it is neither just nor equitable to assert this claim after authorizing the borrowing of the money by the issue of the bonds.

The judgment is affirmed.

JONES v. L. & N. R. R. CO.

(Filed May 17, 1894.)

Master and servant—Neglect—Where a section hand has been operating and has seen an ordinary hand car operated on a railway for a week, the ordinary use of his senses ought to teach him the levers of a moving hand car are dangerous, and should be avoided by one on the car; therefore, the failure of the section boss to inform an employe of the danger of such levers was not gross neglect; and the employe having been injured by stooping over and losing the motion of the lever when the car was in motion, the railway company is not liable for the damages sustained by him.

J. P. Hobson for appellannt.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having, while engaged as an employe of appellee in operating a hand car, been knocked from and run over by it, brought this action to recover for personal injury then received, which he states resulted from gross negligence of the section boss, to whose orders he was at the time subject.

The alleged negligence consisted in the section boss placing appellant at front end of the hand car, the most dangerous position, for the purpose of working one of the levers, without informing him of the peculiar danger to which he was thereby exposed, or instructing him how to avoid it, although he had been employed only a few days as a section hand and was unacquainted with the business of running hand cars; and in the section boss placing or permitting to be placed loose upon floor of the car working tools, in the effort to avoid contact with which, while working the lever, appellant was struck by the lever and knocked from the hand car, and received the injury referred to.

As the lower court, at conclusion of the evidence in behalf of plaintiff, instructed the jury to find for defendant, which was done, the only question for us to consider is whether that action of the court was proper.

It appears that appellant was employed as a section hand by the section boss in behalf of appellee, and commenced work on Monday, and received the injury complained of on the following Saturday; that each day during that period he, with his co-laborers, under control of the section boss, was engaged in the work he was employed to do, which required the hand car to be moved from place to place, and in moving which appellant, like other hands, took part. But he had never been before so employed, and, of course, was inexperienced and unskillful, being by occupation a day laborer of ordinary intelligence and capacity.

On the day he was injured the hands, accompanied by the section boss, had gone some distance from the station-house for the purpose of repairing the railroad, taking the hand car with them; and the manner in which the appellant was injured is thus stated by him as a witness: "When we started from where we did that work that morning the tools were first throwed up on the car, and there was what they call the spike-maul hammer was jostling down as the car was running, and it got down near my feet, and I got little afraid of the handle and just stooped there to throw the hammer aside on the car further, and I lost the motion of the lever, I suppose, or something; anyhow the lever struck me as I raised up in my breast here and pitched me off backwards on the road."

Accepting that statement as true, which must be done in determining whether the lower court was authorized to take the case from the jury, the inquiry is, first, whether appellee, by its servant, the section boss, was guilty of culpable negligence that was the proximate cause of appellant being knocked from the hand car and injured; second, if so, whether but for the concurring or co-operating fault of appellant the injury would not have occurred—that is, might the injury have been avoided by the exercise of ordinary care on his part?

No doubt, as counsel contends, "it is the duty of the master to give such warning to the servant of all defects or hazards incident to the occupation, of which the master knows or ought to know, and such information as may be warranted by ignorance, inexperience or want of capacity of the servant and the dangerous nature of the employment." But when a servant has actually operated and seen others operate an implement or machine often enough to enalbe him, by the exercise of ordinary intelligence and care, to learn how to avoid being injured by it, or when the mode of operating it is so simple as that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting upon the master to instruct him. No person who has once worked the lever of a moving hand car, or seen another do it, need be informed that it is

dangerous, in the expressive language of the appellant himself, to lose the motion of the lever.

Whether it was negligence in the section boss to place or permit the tools placed upon the floor of the hand car without being fastened is immaterial, because appellant was not injured thereby; nor was it negligence to permit him to take position on front end of the car, because, while the actual injury is likely to be more serious to a person falling or knocked of the front than off the rear end, the danger of being injured is not, as appears from the evidence, so great.

It, however, seems to us plain that whether the section boss was guilty of negligence or not, the injury received by appellant was not the proximate result of his want of knowledge of the danger of stooping to throw the hammer aside, but was caused by his own fault, and might have been avoided by the exercise by him of ordinary care; for the evidence does not show there was a reasonable probability of his being injured or endangered by the hammer handle; and if it had been necessary, which does not appear, for it to be put aside, he might, by calling attention of the section boss, had the car stopped for the purpose.

In our opinion there is no evidence showing or tending to show a cause of action in favor of appellant.

Judgment affirmed.

THACKER v. HOWELL.

(Filed May 19, 1894—Not to be reported.)

1. Location of boundary—Instructions—Where the only issue in the action was the location of land conveyed to plaintiff by a deed from Mitchell, an instruction that if the jury found that the land in controversy was embraced by the deed from Mitchell to the plaintiff, and that defendant, without plaintiff's consent, entered upon this land and cut and carried away timber or made enclosures thereon, they should find for plaintiff, was unobjectionable.

2. Same—Evidence—Where the source of the controversy was as to what "log chute" was meant in Mitchell's deed to plaintiff, there being two of them in the same locality, evidence concerning the location and use of both "chutes" was competent and necessary to a full understanding of the case.

Since defendant also claimed under a deed from Mitchell, later in date than plaintiff's deed, and since defendant's deed calls to run with plaintiff's line, the court properly permitted it to be read to the jury on the question of the location of the disputed division line.

Riddell & Riddell for appellant.

J. B. White for appellee.

Appeal from Estill Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

This is a contest over a strip of some three acres of land, on which was situated a log chute of some value. The single question involved was whether Mitchell's deed to the plaintiff, Thacker (now appellant), of March 10, 1891, embraced the land on which the appelle, Howell (the defendant below), is charged to have wrongfully entered and cut timber. Howell admits the entry but denies that Thacker's deed covers the land in contest.

Upon the proof submitted to them, and the instructions of the court, the jury found for the defendant, Howell. The appellant complains of instructions Nos. 1 and 2, and of supposed incompetent testimony allowed to go to the jury.

There is only one instruction in the record, and that one is to the effect that, if the jury believed from the evidence that the land in controversy was embraced by the deed from Mitchell to the plaintiff, and that the defendant, without plaintiff's consent, entered upon the land and cut and carried away his timber, or made enclosures thereon, they should find for the plaintiff.

To this instruction there can be no objection. The source of the trouble between the parties was as to what "log chute" was meant in the Mitchell deed, there being two of them in the same locality; hence proof of the location of both and the uses of both was not only not incompetent, as contended by appellant, but in fact necessary for a full understanding of the case.

It is urged that the court erred in permitting the appellee to read the deed from Mitchell to himself, as he does not, in apt terms at least, set up his ownership under that deed. It will be observed, however, that the plaintiff in his reply avers that the defendant bought from the same vendor, Mitchell, and that his deed from Mitchell calls for and runs with the plaintiff's line.

This would seem to make the testimony competent, but whether so or not it could not have affected the jury, as the issue submitted was not what the defendant's deed embraced, but what the plaintiff's deed included. If the defendant's deed covered the land in dispute, yet the plaintiff must succeed, under the instructions, if his deed embraced the land.

We need not discuss the complaint that the verdict is against the evidence. Considerable testimony supports it.

Judgment affirmed.

COMMONWEALTH, BY, &c. v. ADDAMS, CLERK.

(Filed May 19, 1894.)

1. The compensation of the present clerk of the Court of Appeals, who was in office when the Constitution was adopted, can not be changed by the legislature, section 161 of the Constitution, providing "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office," expressly forbidding it.

2. Constitutional law—The legislature can delegate to or confer upon the Court of Appeals the authority to fix the compensation to be allowed to deputies of the clerk of the Court of Appeals. Section 246 of the Constitution, providing that "no public officers, except the governor, shall receive more than $5,000 per annum as compensation for official services, independently of the compensation of legally authorized deputies and assistants, which shall be fixed and determined by law," means that the legislature shall regulate this compensation, and that branch of the government has no power to delegate this right or duty to another branch of the government, so as to make the judiciary its agent for fixing such compensation.

W. J. Hendrick for appellant.

Thos. H. Hines for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

A. Addams, the present clerk of the Court of Appeals, was in office and in the discharge of his duties prior to the adoption of the present Constitution.

In the month of June, 1893, the legislature passed an act requiring the clerk to report to the auditor all fees received by him, and after retaining for himself as a salary $4,000, and after paying his assistants or deputies and all expenses of the office, the balance remaining to be paid to the auditor for the State.

A heavy penalty is imposed on the clerk for failing to comply with the provisions of the act. There is a further provision to the effect that the salaries of the clerk's deputies shall be fixed by the Court of Appeals.

The clerk, it seems, has made no report of the proceeds of his office, on the ground the law has no application to his term of office; and, if so, is unconstitutional.

Under the former Constitution it was held that the fees of officers created by law or by the Constitution, as distinguished from salaried officers, were at any time subject to legislative control, and could be increased or diminished at the will of the law-making power. Under the present Constitution the legislature is not only prohibited from changing the salaries of public officers, so as to affect those in office during their terms, but by section 161 of the Constitution it is provided: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office," etc. So by these express provisions of the oragnic law it was evidently intended to prevent any interference with the salary or compensation of a public officer during his term of office.

While the office of the clerk of the Court of Appeals is not expressly mentioned, it is an office not only recognized by the Constitution; but by section 120 it is expressly provided, "the present clerk of the Court of Appeals shall serve until the expiration of the term for which he was elected, and until his successor is elected and qualified," and, therefore, it follows that the office of clerk of the Court of Appeals must, so far as the compensation is concerned, fall within the spirit and meaning of the provisions of the Constitution preventing legislative interference with the compensation during the term of office.

There has been no change made as to the duties of the office, or in its creation or organization, by the present Constitution as would necessarily requre or authorize the concluson it intended the compensation should be increased or diminished, but, on the contrary, in looking to the debates on this subject had in the convention, those favoring the reduction of compensation and salaries to public officials, and mentioning especially the office of Clerk of the Court of Appeals, disclaimed any purpose of interfering with the compensation of the present incumbent. (Debates in Convention, volume 3, pages 4202, 4203, 4236.)

The clerk had, as they doubtless knew, employed his deputies and contracted for their services during his term of office, and there is, therefore, no reason for departing from the entire spirit and meaning of the present Constitution and adopting the judicial interpretation given the former instrument, by which the compensation of officials could be changed at any time the legislature might deem proper.

The right of the legislature to regulate the fees of the person succeeding the present clerk, after his term expires and before his successor is elected and qualified, is unquestioned, and the

act before us would be construed was intended to affect his successor, if otherwise constitutional.

Section 246 of the Constitution proivdes: "No public officer, except the governor, shall receive more than $5,000 per annum as compensation for official services, independent of the compensation of legally authorized deputies and assistants, which shall be fixed and provided by law. The General Assembly shall provide for the enforcement of this section by suitable penalties, one of which shall be forfeiture of office by any person violating its provisions."

Whether or not the principal would forfeit his office by reason of his having a deputy whose salary is not fixed by law, is not necessary to be decided; but the framers of the Constitution evidently designed to enforce compliance with this section by imposing heavy penalties for its violation.

If the deputy is paid by the principal out of what the former obtains as compensation, or from his own pocket, we see no reason for complaint by any one or that it would violate this provision of the Constitution.

The legislature, by the present enactment, has conferred the power on this court to fix the salaries of the clerk's deputies, when it is plainly required that a law should be enacted fixing the sum to which they are entitled.

The attempt to confer such a power takes from the legislative department of the State the responsibility of fixing compensation for a certain class of officials and places it upon the judiciary. The Constitution requiring the compensation to be proivded for by law means that the legislature, to which belongs the sole power of making laws, shall regulate this compensation, and that branch of the government has no power to delegate this right to another branch by making the judiciary the agent for fixing salaries or compensation for State officials.

A law is not a complete law when it is nothing more than a delegated power attempted to be given by the legislature to some other department of the government to make the law. The law is not enacted and this court asked to approve it, but we are required to fix the compensation. The sole power to make laws is confided to the legislature, and in this case that body has surrendered its own judgment to that of this court in fixing these salaries, saying in effect that with the exercise of your judgment we will be satisfied. This can not be done, and this court, recognizing the wisdom of requiring each department of the government to act within its own sphere, would necessarily refuse to comply with the legislative will, if the act applied to the present clerk of the court. It could not be carried into effect if it did apply, as there is no salary fixed by law for his deputies or assistants.

The court below having adopted this view of the point raised, the judgment is affirmed.

McDONALD v. NORMAN, AUDITOR.

(Filed May 22, 1894.)

1. Contingent expenses of house of representatives—Copying—Where the house of representatives, for the proper expedition of its business, authorizes its clerk to employ some one to do such copying as he and his assistants can not do; the sum becoming due persons employed by the clerk to do such copying is a contingent expense of the general assembly, payment of which

is authorized under section 8, article 1 of chapter 15 of the General Statutes, upon the production of a voucher, countersigned by the clerk of the house.

2. Same—Constitutional law—Said article of the General Statutes is an "appropriation made by law" for the payment of such contingent expense, within the meaning of section 230 of the Constitution, providing that "no money shall be drawn from the State treasury, except in pursuance of appropriations made by law."

3. Same—The clerk of one house of the general assembly is required to certify the contingnt expense of only his own house under the law.

Thos. H. Hines for appellant.

W. J. Hendrick for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

It is shown from the record before us that G. R. Kellar, Clerk of the House of Representatives (session 1891-2-3), was directed by that body, in order to the proper expedition of its business, to employ some one to do such copying and engraving as he and his assistants could not do.

The appellant, McDonald, was so employed by the clerk, and did work of the character indicated to the amount of $1,148.50. On August 12, 1892, the House unanimously passed this resolution:

"Resolved, That the auditor of public accounts is hereby directed to issue his warrant on the treasury to such persons as have done engraving and copying for the clerks of this House, which warrants the treasurer is directed to pay: Provided, the vouchers for such work shall be countersigned by the clerk of the House, and approved by a majority of the Committee on Printing and Accounts, and the price shall not exceed," etc. (see House Journal, page 1902, volume 2).

The itemized account of the appellant is thus endorsed:

"I certify the 'above account as a contingent expense of the General Assembly, the same having been directed to be done by the House at the price named herein. This voucher is hereby certified to the auditor for payment under seciton 8 of article 1, chapter 15 of the General Statutes.

"G. R. KELLAR, Clerk H. R.

"Approved:
"N. S. WALTON,
"A. J. CARROLL,
"G. E. WILLETT,
"Of Committee on Printing and Accounts."

Upon declining to issue his warrant for the payment of the foregoing voucher the auditor was proceeded against by petition for mandamus, and upon an agreed state of case, as set out above, the court dismissed the petition and McDonald has appealed.

The law supposed to authorize the payment of this claim, as a part of the contingent expenses of the general assembly, is found in article 1, chapter 15 of the General Statutes, now chapter 192, article 1, acts 1891-2-3, which reads as follows:

"Sec. 1. The claims upon the treasury, specified in this chapter, shall be paid when due by the treasurer to the persons entitled to the same; the warrant to be issued by the auditor or other officer upon such proof of the service or demand as is herein required. * * *

"Sec. 8. The pay and mileage of the speakers and members of both houses of the general assembly, the compensation to the

officers of the two houses, * * * the compensation of the chief clerks upon the order of each house, stating the amount due; all other contingent expenses of the general assembly, upon the production of the vouchers, countersigned by the clerks of the respective houses."

It is claimed in the language of the affidavit supporting the demand "that the necessity for this work was an incidental contingency that developed in the midst of the session, caused by the large bills presented for consideration in re-enacting the statutes to conform to provisions of the new Constitution, and the large number of amendments adopted by each house to nearly all such bills;" and so we must regard it. It needs no argument to prove that this claim is a part of the contingent expense account of the house of representatives, and it seems to us clear that its payment is authorized under the statute quoted and referred to by the clerk in his certificate on the claims.

Section 230 of the Constitution (section 5, article 8, of the old) provides that "no money shall be drawn from the State treasury except in pursuance of appropriations made by law." * * * And here we have a statute duly passed by both houses and approved by the governor, providing in plain terms for the payment of the "contingent expenses of the general assembly upon the production of the voucher, countersigned by the clerks of the respective houses." And here, too, we have the voucher of the appellant for work directed to be done by one of the houses under the employment of its clerk, which is countersigned by the clerk as provided by law, and also approved by its Committee on Printing and Accounts, and ordered paid by a resolution.

It was not intended that the clerk of one house should countersign the vouchers for the contingent expenses of the other house. The clerks of the two houses required to attest the vouchers for the expenses of their own house respectively. Upon such attestation these expenses are payable just as the pay and mileage of the speakers and members of the houses are payable, and just as are the salaries and compensation of public officers are the agents of the State as provided in section 10 of the article and chapter mentioned.

Being a part of the contingent expense account of the general assembly, it no more a private claim against the State than is the pay or compensation of the officers mentioned. The court should have directed the payment of the claim, and the judgment dismissing the petition is reversed and cause remanded for that purpose.

THOMPSON, &c. v. MYERS, &c.

(Filed May 26, 1894.)

1. Where the sole devisee dies before the testator, the issue of such devisee take not as her heirs at law, but directly and immediately as legatees or devisees under the will, where it does not make or require a different disposition of the estate.

2. Descent and distribution—Purchaser of devisee's interest—Debts due testator by devisee—The title to real estate devised passes to the devisee charged only with the debts and liabilities of the testator. The testator's estate holds no lien on such land to secure debts due the testator by the devisee; the estate stands as any other creditor of the devisee. Therefore, a creditor of the devisee, who caused his undivided interest in the estate to be sold under execution before suit brought by the devisees under the will for

distribution, and who purchased such interest, took it free of any claim the estate had against the devisee for debts due the testator.

The notes due testator by the devisee can not be treated as, and were not, advancements in this case.

J. Q. Ward and G. G. Hughes for appellants.

S. W. Tolin and Wm. H. Holt for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Lewis.

In 1888 Joseph Myers died, leaving four children and two children of a deceased son. He had in 1884 executed a will, duly probated after his death, by which he devised his entire estate to his wife, Susan; but as she died first, and the will did not make or require a different disposition of the estate devised, it resulted that his children and grandchildren, under section 18, chapter 113, General Statutes, as heretofore construed by this court, took it "not as heirs at law of the deceased devisee but as legatees, directly and immediately under his will." (Carson v. Carson's ex'or, 1 Met., 300.)

It appears that all the legatees except one were indebted to the testator as shown by their several promissory notes that went into hands of the executor, and they instituted this action for division of land left by him, according to their respective rights, after charging each with his indebtedness; and to that end asked appointment of a commissioner to ascertain and report the amount each was indebted, and value of land subject to partition.

But appellant, Thompson, having a personal judgment against one of them, J. F. Myers, caused an execution issued and levied upon his undivided interest, being a fifth, in a tract of about 165 acres, which was regularly sold, he becoming purchaser and receiving the sheriff's deed therefor before the action was commenced; and having been made a party defendant, he filed an answer setting up claim to and asking that a fifth of the land be allotted to him in virtue of his title to the interest of J. F. Myers, acquired in the manner mentioned.

By the judgment rendered the division and allotment is to be made in the following mode: To value of the land, which the evidence shows is about $5,000, is to be added to aggregate indebtedness to the testator of all the legatees, amounting to about $4,000, and the sum thus found divided into five parts; but the value to which each devisee is entitled to be fixed by deducting from the dividend the amount of his indebtedness; and as the amount of J. F. Myers' indebtedness is estimated at about $1,676, it is manifest Thompson will get under the judgment much less than a fifth in value of the tract of land.

If, as plainly appears, he acquired by purchase the legal title to an undivided fifth of land prior to commencement of this action, he was entitled to have that quantity allotted to him without abatement, unless there was a pre-existing lien upon the interest of J. F. Myers.

The statute does not, it seems to us, create a lien in such cases expressly or by implication. Section 15, chapter 31, General Statutes, is as follows: "Any real or personal property or money given or devised by a parent or grandparent to a descendant shall be charged to the descendant, or those claiming through him, in the division and distribution of the undevised estate of the par-

ent or grandparent, and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised. The advancement shall be estimated according to the value of the property when given. The maintaining or educating, or the giving of money to a child or grandchild without any view to a portion or settlement in life, shall not be deemed an advancement."

If the money loaned by the testator to his son, J. F. Myers, and for which he took and held to time of his death promissory notes, could be fairly regarded as advancements, then Thompson, purchaser of his interest, would be entitled in division of the land to such quantity in value only as may be left after deducting from his share the amount of the notes, without interest; but it is not contended the notes are evidence of advancements made by the testator to his son, J. F. Myers, nor did the lower court treat them as advancements upon which, under the section quoted, no interest could be counted, but as debts to which was added interest, whereby the estimated sum for which he should account, if an advancement, was doubted.

It seems to us a fair and indeed necessary inference that if the legislature had intended to put debts due by an heir at law or devisee to the ancestor or testator upon the same footing as advancements mad by him, there would be a statutory provision requiring such heir at law or devisee to account in every case and at all events for amount of such indebtedness before he or his vendee or creditor could have any share of the estate.

There is, however, a way by which an heir at law or devisee may be made to thus account before participating in distribution of personalty, which goes into the hands of the personal representative. That may be accomplished through means of a stop-off, plead by the executor or administrator; but under the statute of this State, as often construed by this court, an heir at law or devisee takes an estate in land charged only with debts and liabilities of the ancestor or testator; and in case of alienation section 8, chapter 44, General Statutes, makes this provision: "When the heir or devisee shall alien before suit brought the estate descended or devised, he shall be liable for the value thereof, with legal interest from time of alienation, to the creditors of the decedent or testator; but the estate shall not be liable to the creditor, in the hands of a bona fide purchaser for valuable consideration."

If this was a contest between Thompson or a creditor of J. F. Myers, and purchaser of his interest in the land, and even a creditor of the testator, who had not acquired a prior lien, the title of the former would, in our opinion, prevail under that section, and he would be entitled to the share in the land thus purchased, without any abatement or diminution in favor of or for benefit of the latter; and if so, we do not perceive upon what theory his title can be affected or interest diminished at suit of or in favor of the other devisees. But the respective rights of a purchaser of an undivided interest of an heir at law or devisee, and of other heirs at law or devisees, in the matter of dividing land of the ancestor or testator, has been determined by this court in Scobee v. Bridges, 87 Ky., 427 (10 Ky. Law Rep., 390), when the precise question now before us was presented, except the ancestor died intestate.

There this language was used: "The estate of the intestate stood only as an ordinary creditor of the son, the latter becoming a debtor only to the personal representative upon their pay-

ment of the debts due by the son, and for which the father was liable as the surety. The estate descended to the son free of any lien for the debt due to the father, and these creditors having levied their executions and purchased this interest of Jas. W. Scobee, will hold it against any other creditor where no lien exists. The statute gives no lien, and the most vigilant in acquiring a lien by operation of law will be entitled as against those who fail to coerce."

There not only was the question involved in this case directly decided, but the reason for the rule governing in all such cases stated. Two of the notes, which Jas. W. Scobee had executed to his father were, however, for advancements, not debts; and as to amount of them it was held the purchaser must, according to section 15, chapter 31, account in division of the land just as Jas. W. Scobee would have been required to do; and thus was again, as had been often before recognized by this court, the distinction to be observd between debts due by an heir at law or devisee to the ancestor, and advancements made by him, in determining the rights of a purchaser or creditor in relation to claims of other heirs at law or devisee.

That case is decisive of the question here involved, and must control unless overruled, which we now see no reason for doing.

The case of Brown's adm'r v. Mattingly, 12 Ky. Law Rep., 869, does not necessarily conflict with it; for the contest there was between the administrator and an attaching creditor of one of the heirs at law, and the sole question involved was whether the former could plead indebtedness of that heir at law to the estate as set-off to his distributive share of personalty which had been attached by the latter. But whether the administrator had a right to rely upon the set-off, except to the extent of extinguishing that distributive's interest in the personalty, was not decided. It is true it was there said that "if his distributive share in the personal estate is not equal to the amount thus received, the real estate ought to be held to be charged with the payment of the remainder in the division, and he to receive that much less; but the other heirs at law were not before the court, and, consequently, it was not necessary to there determine their rights relative to that of the attaching creditor.

In our opinion, as the statute exists, Thompson was entitled to an undivided fifth of the tract of 165 acres of land, without any diminution of quantity by reason of J. F. Myers' indebtedness to the testator.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SHOUSE v. COMMONWEALTH.

(Filed May 31, 1894.)

An indictment accusing one "of the offense of malicious cutting, with intent to kill, committed in manner as follows—the said Shouse did unlawfully, willfully and feloniously cut, thrust and stab R. with a knife, from which cutting and stabbing said R. did not die," etc.—sufficiently charges the crime of malicious cutting with the intent to kill.

White & Smith for appellant.

Wm. J. Hendrick for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellant was convicted of the crime of malicious cutting with intent to kill.

The indictment accuses the appellant "of the offense of cutting John Reffet with intent to kill him, committed in manner as follows: The said Wm. Shouse did unlawfully, willfully and feloniously cut, thrust and stab John Reffet with a knife, from which cutting and stabbing said Reffet did not die," etc.

It is contended that it is not sufficiently charged that the appellant cut Reffet with intent to kill him. The 124th section of the Criminal Code provides: First, "the indictment must be direct and certain as to the offense charged; fourth, the particular circumstances of the offense charged, if they be necessary to constitute a complete offense."

The indictment charges that the appellant cut John Reffet with intent to kill him, committed as follows, to wit: The appellant did said cutting unlawfully, willfully and feloniously, from which Reffet did not die. It will be seen that the indictment is direct and positive as to the offense charged, and the person upon whom it was committed, and that it was done with intent to kill him. It then gives the particular circumstances of the offense charged so as to make it a case of malicious cutting. It seems to us the positive and direct charge that the appellant cut Reffet with intent to kill him having been once made, it was not necessary to repeat the same statement in giving the particular circumstances of the offense, for the Criminal Code expressly declares that the acts constituting the offense shall only be made in ordinary and concise language. The indictment charges a statutory offense.

The judgment is affirmed.

EVERSOLE v. COMMONWEALTH.

(Filed May 31, 1894.)

1. The verdict convicting appellant of manslaughter was not authorized by the evidence and ought to have been set aside, the jury returning it being either lacking in intelligence or controlled by passion and prejudice.

2. Criminal law—Evidence—Statements of a witness that some time after the homicide the accused came to her house excited and seemingly afraid of being shot, and said he was a shooting man and had killed two men, were incompetent and prejudicial.

3. Same—Instructions—Self-defense—One assaulted in his own yard and near the door of his own dwelling may stand his ground and defend himself, and is not required to attempt to flee or escape from his assailant. One can take the life of another in self-defense only when there is real or apparent danger of death or great bodily harm from the hands of his assailant; but one assailed at his own home is not required to escape or attempt to flee.

James Eversole, A. W. Baker and H. C. Eversole for appellant.

Wm. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

Joseph Eversole was indicted for murder of John Heid, but convicted of manslaughter and sentenced to confinement in the penitentiary for twenty-one years.

It appears that Saturday next before the killing, which occurred on Monday, Herd, accompanied by his wife, a sister of Eversole's wife, went to the house of the latter. Next day, Sunday, the two wives went to a house of religious worship, while the two husbands to some other place in search of whisky. On their way back they stopped at the church house and met a man named Hocker, who accompanied them to the home of Eversole, the two women having preceded them. After getting dinner the three men went to a place about eight miles distant to get more whisky, and, returning about 11 p. m., ate supper and went to bed, Hocker occupying a separate room, there being only two in the dwelling house, while Eversole and wife and Herd and wife slept in the same room. Where the children slept does not appear.

A short while before daylight Herd commenced quarreling with and threatening his wife so boisterously and violently that she got out of bed and left the house. After Eversole and wife got out of bed and the three sat about the fire. Herd still continued threatening his wife, and, in addition, maligned her father, who was dead, and spoke disrespectfully of her mother. The weather being cold, Eversole's wife carried a blanket to Herd's wife, who remained outside of the house through fear of her husband. But finally, assuming he was somewhat pacified, Herd's wife came back to the house, but he again quarreled with and drew a poker with purpose to strike her, and was only prevented by Eversole's wife, who interposed for protection of her sister. At the breakfast table Heard demanded a toddy of whisky be given to him, but upon failure to get it again commenced to boisterously threaten his wife, who was still kept out of the house through fear of him After breakfast Eversole and Hocker left the house for the purpose, as disclosed by a witness for the Commonwealth, of "getting away" from Herd. They, however, returned to Eversole's house, and after remaining a short time, Eversole announced his intention of going to a place indicated to look after his hogs, and, starting, was followed by Hocker and Herd. But after proceeding a short distance Eversole concluded to return to his home and was again followed by Herd and Hocker. And after getting into his yard and close to his porch door, the evidence of all those witnesses who were near enough to see all that occurred shows Herd, with an open knife, demanded Eversole's pistol, at the same time springing towards him, and then Eversole fired three shots, which resulted in his death.

The only cause Herd had, so far as disclosed by the evidence, for quarreling with and threatening his wife was that she hid the whisky, and he finally charged Eversole with conniving at and aiding her in doing so. The evidence discloses that Eversole, after breakfast, borrowed from Hocker the pistol with which the fatal wounds were inflicted, but after doing so he went away from his own house in order to avoid a conflict with Herd, and upon his return, finding him still in a quarrelsome mood, again left, evidently for the same purpose, and only after being followed by Herd up to his own door and assaulted with an open knife did he use the pistol.

The verdict in this case, as the record stands, shows the jury were either lacking in intelligence or controlled by passion and prejudice, and it is somewhat surprising the circuit judge would let such a verdict stand. For, notwithstanding the deceased had acted like a brute and bully, and accused, according to evidence of those present, after twice leaving his house to avoid a collision, shot him only when assaulted in his own yard and on his way into his own house, the jury fixed his punishment by confinement

in the penitentiary for the utmost length of time prescribed by statute in case of manslaughter.

The court erred in admitting the evidence of the witness, Nancy Potter, who testified that some time after the occurrence, the accused came to her house excited and seemingly afraid of being killed, and said he was a shooting man and had killed two men. Such evidence did not tend to illustrate the manner in which the homicide in question was committed nor the motive of accused for committing it, but was calculated and no doubt did excite prejudice of the jury.

Instruction No. 4 is erroneous and prejudicial. It was proper to tell the jury to acquit the accused, Eversole, if, at the time he shot and killed John Herd, he believed and had reasonable grounds to believe he was then and there in immediate danger of death or the infliction of great bodily harm at the hands of said Herd. But it was not proper to add, as a further condition, the jury should believe the killing was necessary or seemed to defendant, in the exercise of a reasonable judgment, to be necessary in order to avert or escape said danger, real, or, to the defendant, apparent.

The word "escape" is not proper under any circumstances, and it is particularly improper and misleading when used in reference to a person accused of homicide who is assaulted in his own yard and near to his own dwelling house. He there may stand his ground and is not required to flee or escape. He is, as well upon his own premises as elsewhere, obliged by the law to avoid taking human life when there is no real or apparent danger of there and then losing his own life or suffering great bodily harm at the hands of his assailant, but, being at his own dwelling house, he is not required to escape—that is, flee further in order to do so.

The judgment is reversed for a new trial consistent with this opinion.

COOPER v. ARNETT, &c.

(Filed May 26, 1894.)

1. A vendee holding under a title bond has a right to pay the balance due on the purchase price and to obtain a deed from the vendor even after a creditor of the vendor has caused an execution against the vendor to be levied on the land. The vendee having purchased in good faith and for a valuable, adequate consideration, can not be prevented from paying his debt to his vendor, except by attachment or other appropriate process.

2. The owner of land in which a right to a homestead exists, who sells and reinvests the proceeds in other lands on which he resides, has a homestead right in the latter lands against debts existing at the time of its purchase. Such a purchase of land is but the continuance of the original homestead right, and is not the obtention of a new homestead.

3. After the sale of one homestead and a reinvestment of the proceeds in another, the owner, in pleading his right to a homestead in the latter against a certain debt, is not required to allege that he sold the first homestead with the intention of reinvesting in the other.

Montgomery Merritt for appellant.

Waddill & Nunn and C. J. Waddill for appellees.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellee, Arnett, was the owner of a farm in Henderson county, on which, in February, 1890, and prior thereto, he and his

family resided, and in which he was entitled to a homestead. In April, 1890, he sold this farm for the sum of $4,000 and at once invested $2,400 of the money in the purchase of 244 acres of land in Hopkins county. He then sold to appellee, Sutton, 125 acres of the Hopkins county farm for $1,400, retaining and residing on the balance—some 119 acres—with his family, and the value of which is etimated to be not exceeding $1,000.

In February, 1890, Arnett became the surety of one Royster to the latter's creditors, and in April, 1891, the appellant, Cooper, as agent for such ceditors, obtained in the Henderson Circuit Court a judgment against Royster and Arnett for some $515, and in July thereafter had an execution to issue to Hopkins county, where it was levied on the lands owned by the appellee, Arnett, and his vendee, Sutton.

At a sale under the execution appellant bought the entire tract for his debt, and brought this action for an enforcement of his alleged lien.

It appears that Sutton did not pay some $400 of the purchase price of the 125 acres until after the levy of the appellant's execution in July, and for that reason his land was sought to be subjected to sale. Of this contention it is only necessary to say that the debtor had the right to pay his creditor unless prevented by attachment or other appropriate means. Sutton bought the land at a fair price, got a title bond therefor, and paid all the purchase money therefor except $400 before the levy of the execution. That he did not get a deed therefor until after the levy and pay the balance of the purchase price, does not result in placing his land in lien under the execution. Arnett was not then the owner of it, and the mere levy does not affect Sutton's land or Sutton to any extent or for any purpose.

As to Arnett, it is evident that as he had a homestead in the Henderson county farm, he had one in the land bought in Hopkins county with the proceeds of its sale. It is said that the answer does not disclose that he sold the first farm with the intention of reinvesting in a homestead, and the purchase of the later must be regarded as an original purchase of a homestead, and, therefore, the debt of the appellant was created prior to the purchase. We think this contention demands too strict a construction of the homestead act. Before any effort was made to reach the proceeds of the sale of the lands in Henderson county, or while such proceeds were in the hands of the debtor, at which time the inquiry might be material as to the intention with which the proceeds were held, the debtor does, in fact, invest it in a homestead, and this, we think, was not an original obtention or purchase of a homestead, or one obtained or purchased after the creation of the debt set up in this case. But may a debtor owning lands worth $4,000 sell it, invest $1,000 in other lands, and then, with $3,000 in his pocket, set up his exemption? The state of case presented would differ only slightly from a case where the owner sold off $3,000 worth of his land, retaining $1,000 worth as a homestead, as he could clearly do. But, however beneficial the answer to this question might be to the appellant, it is not presented in this case. When Arnett sold his Henderson county farm he was largely in debt, and the proof discloses that he proceeded to discharge his indebtedness out of the proceeds of the sale of his farm, and even with the Sutton purchase money was unable to pay all he owed, and borrowed other money for that purpose. This he had the right to do. If he omitted the debts he owed as surety, the remedy of the creditor was by a different proceeding from this.

There is another reason why this question is not presented here. The answer of Arnett brings him within the protection of the homestead statute, and, to deprive him of the benefit of the act, the appellant must plead the facts necessary for that purpose.

This he does not do.

The levy of the execution and the sale of the lands of the appellees gave no lien to and conferred no title on the purchaser, and the judgment dismissing his petition is affirmed.

LANCASTER, &c. v. REDDING.

(Filed May 31, 1894—Not to be reported.)

1. A widow may claim a homestead in real estate owned by her husband as well against the husband's heirs as his creditors.

2. Same—Case—At the time of his death the husband had not paid all the purchase money for the lot on which he had erected a dwelling and was residing. By agreement of all parties the vendor rented out the premises until the rent had fully paid the purchase price. The vendor then conveyed the property jointly to the widow and a child of the deceased husband by a former marriage, the deed vesting the widow with only a life estate in her half. Thereafter the widow occupied the premises and executed a note to the child for rent of one-half the property. The deed was never delivered to or accepted by the widow, and having been advised of her right to a homestead in the estate, she sued to cancel the rent note and the deed of conveyance, and to have the house and lot set aside to her as a homestead. Held—The widow is entitled to a homestead in the property, and the deed and note ought to be cancelled.

Victor F. Bradley for appellants.

Geo. E. Prewitt for appellee.

Appeal from Scott Court of Cmmon Pleas.

Opinion of the court by Judge Hazelrigg.

A short time before his death Dr. S. M. Redding, of whom the appellee is the widow, bought from his brother, N. D. Redding, a lot of ground in the village of Josephine, Scott county, and erected a small dwelling house thereon, which he and the appellee occupied at the time of his death in 1886. The purchase money not being fully paid, the vendor, N. D. Redding, who qualified as the administrator of his brother, under an arrangement with the appellee, took possession of the house and lot and rented it out until the purchase price was paid, at which time he conveyed the property to the appellee and Mrs. Lancaster, who was the only child of the decedent, the issue of a former marriage. This conveyance was never recorded, and purported to convey the appellee's one-half of the property to her for life, with remainder to Mrs. Lancaster.

The instrument was not delivered to the appellee or accepted by her, and when she learned of it she complained of the nature of estate conveyed to her. While occupying the premises, however, she executed her note to Mrs. Lancaster for $20, as rent for her half. After obtaining information of her rights, as she avers, she brought this action against Mrs. Lancaster and her husband to cancel the rent note and have the court adjudge the house and lot to her as a homestead, it being the only home her husband had

at his death, and its value being less than $1,000. The chancellor granted the relief asked.

The right of the appellee to the homestead in question is denied on the ground, first, that she is estopped because of her execution of the rent note; second, her husband had not paid for the property, and could not have asserted such right against the vendor, N. D. Redding; third, there had been no writing evidencing the contract between the vendor and vendee, and hence the latter had no title to the property; and, fourth, that the widow had abandoned the premises after the husband's death.

We do not deem it neessary to notice these contentions in detail. None of them present any reason whatever for denying the widow the right she claims. N. D. Redding in his lifetime never asserted, nor have his representatives after his death ever asserted any claim to the property or sought to sell it for any unpaid purchase money.

So far as this controversy is concerned, it is immaterial whether the contract was in writing or not, though the only direct proof is to the effect that there was a writing; nor is the appellee estopped from asserting the claim because of the execution of the rent note. By executing it she did the appellants no harm, and she was merely promising to pay for something already hers, but of which fact she was ignorant at the time. Nor did she ever claim under the alleged deed from N. D. Redding; on the contrary, as soon as she was properly advised, she repudiated it and brought this action. Her alleged abandonment was only temporary.

The only contenton that would seem to hinder the appellee in the assertion of her claim is that, as the homestead statute is purely one providing for exemption of certain real estate from seizure for debt, it has no place or application in a contest between the widow and children of the decedent.

This question is not seriously urged by counsel, doubtless because it seems to have been settled by this court in several cases that the widow may claim the homestead against her husband's heirs, whether there are creditors or not.

Thus in Gasaway, &c. v. Woods, &c., 9 Bush, 72, the widow of Wm. Blair was adjudged entitled to so much of the land of her deceased husband, including the homestead, as was of the value of $1,000, in a contest in which the heirs of Blair were contending that she should be allotted only her dower in the lands. And so in Loyd, &c. v. Loyd, 82 Ky., 521, it was held that infant children were entitled to a homestead in the real estate of their father in a contest between themselves and their adult brothers and sisters.

The statute under consideration, substantially as it existed when Gasaway, &c. v. Woods, supra, was decided, has been carried into the General Statutes and now into the Kentucky Statutes, and its re-enactment must be regarded as in view of this early construction o f the law.

The judgment, therefore, decreeing the house and lot to the widow during her occupancy of it as a homestead, as against the daughter, must be affirmed.

PENCE v. COMMONWEALTH.

HAYS v. SAME.

(Filed May 31, 1894.)

The omission of the clerk to make indorsement upon an indictment that it was returned and filed in open court, together with the date thereof, is not

an irregularity that authorizes the quashing of the indictment or an acquittal of the defendant.

Where the indictment is properly indorsed a true bill, and signed by the foreman, and in fact returned into open court by the grand jury, the court may subsequently and during the trial of the defendant permit the clerk to indorse upon it the date of such filing.

Samuel H. Patrick for appellants.

Wm. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Pryor.

The two appellants, Henry Hays and Wm. Pence, were indicted and convicted for burning the storehouse of Obediah Roberts and have appealed to this court.

Much of the testimony upon which Hays was convicted consisted of his own confession, and as to Pence it is plain that he was wearing upon his person shoes that had been in that store, and in the endeavor to account for the manner in which he obtained the possession, failed to make it satisfactory to the jury, and in fact never obtained them in the manner detailed by him. He was with Hays on the evening preceding the night of the burning, and the jury, knowing the parties and having before them the witnesses, have said that he is guilty, and of this we have but little doubt.

The only question necesary to be considered arises from the motion made by the attorney for the Commonwealth to have the clerk mark the indictment filed and insert also the day on which it was returned to the court. It was discovered, after the jury had been sworn and a witness being examined, that the clerk had failed to make this indorsement when the indictment was presented by the foreman of the grand jury. The attorney for the State then moved to have the indorsement made, it appearing the indictment had been returned into court with the other indictments at the term at which it had been found, but the clerk neglected to mark it filed. It is said that this was done without swearing the clerk for the Commonwealth's attorney, and, therefore, if proper, then to make the indorsement, the testimony was not sufficient to authorize it. There was no objection made to the statement of the clerk except as to his right to mark the indictment filed at a term other than the term at which the indictment was returned. We preceive no objection to the action of the court below.

It is not pretended that the grand jury had failed to return any indictment against these parties, and the indorsement filing it is to identify the term at which it was returned, and the omission of the clerk to do so is not such an irregularity as authorized the indictment to be quashed, or, as contended for by counsel, an acquittal of his clients.

When an indictment is found it must be indorsed a true bill, and that indorsement signed by the foreman, and without this indorsement it is not an indictment upon which the party charged can be tried, and while we preceive no such indorsement on the indictment in this case, we must presume it has been omitted in the copy made, as learned counsel raises no such question. The indorsement signed by the foreman is not only to enable the indictment to be identified, but it is the evidence of the fact that the indictment was concurred in by the grand jury, and must be

held to be an essential requisite. Its presentation into court and the filing by the clerk while it is always proper to make such an entry, the omission of the clerk to make it does not affect the validity of the indictment. When returned into court with the indorsement a true bill, signed by the foreman, it is an accusation upon which the party can be tried, and the omission of the clerk to make such an entry, may be supplied at a subsequent term, and certainly so in the absense of any proof showing that such an indictment was never returned. It is merely directory that section of the Code, and is not essential to the validity of the accusation, and it may, therefore, be shown that the indictment was returned into court as required by the Code.

Judgment affirmed.

MARTIN, ADM'R, &c. v. L. N. R. R. CO., &c.

(Filed May 31, 1894.)

1. Where a switchman employed on a train of one railway company is injured through the negligence of an engineer on a train of another company, the engineer and switchman can not be regarded as co equal fellow servants. The engineer causing the injury and the company employing him are liable in damages to the switchman injured.

2. It was inexcusable negligence for the engineer for one railway company to leave a detached car standing on a switch of another railway company in the nighttime so near to a connecting track as not to allow a man's body to pass between such detached car and cars moving on the connecting track. A brakeman riding on the ladder of a car on such connecting track in the nighttime in the discharge of his duty was not guilty of such contributory neglect as prevents him recovering for injuries sustained by him by being crushed between the moving and the standing cars.

3. Same—But where such detached cars had been standing on the switch of the railway company only a few moments before the accident, and were not placed there by it or with its knowledge, it is not liable to the injured brakeman, it appearing that the night was so dark that the engineer could not see the standing car, and that none of the employes of said railroad were negligent in regard to it.

But the other railway company and its employes who negligently left the detached car so standing are alone liable to the switchmen for the injuries he sustained.

Wm. Goebel for appellants.

J. W. Bryan for appellee, L. & N. R. R. Co.

Hallam & Myers and W. H. Jackson for other appellees.

Appeal from Kenton Circuit Court.

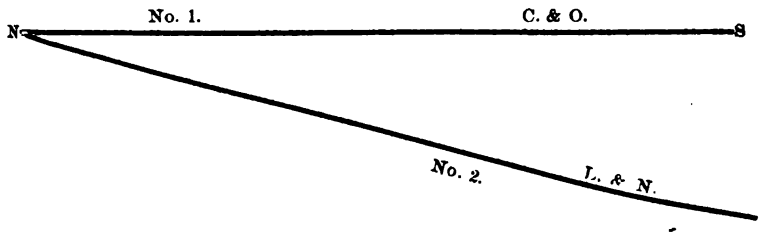
Opinion of the court by Judge Hazelrigg.

The appellant's intestate, James Smart, was fatally injured while in the discharge of his duties as switchman in the yard of the appellee, the L. & N. R. R. Co. at Central Covington.

By his petition the appellant seeks to recover damages for the death of Smart, because of the gross and wanton negligence of all of the appellees. By seperate answers the material averments of the petition were denied and contributory negligence on the part of Smart, pleaded.

Upon the conclusion of the plaintiffs testimony, the court peremptorily instructed the jury to find for the appellees, and this appeal questions the correctness of that instruction.

The proof conduces to show that on the night of September 14, 1892 Smart, as switchman in the service of the L. & N. R. R. Co., was engaged with other employes of the road in making up trains, switching, etc., on the company's yard, and had made a coupling on track No. 2 of the L. & N., as shown in the following drawing:



He then signaled with his lantern to the engineer in charge to move forward, and immediately climbed on a ladder on the side of the moving box car to ride to a point further north where other work awaited the crew.

At few minutes before this, not exceeding ten, the appellee, Robinson, in charge of a C. &. O. train, which had been loaded with freight in Cincinnati to be delivered to the L. & N. people in their Covington yard, brought some twenty-five cars into the yard and "kicked" them in on track No. 1, which, though in the L. & N. yard, was reserved and kept clear for the use of the C. & O. road. Robinson then detached his locomotive and with it quit the yard. He left the "dead" cars, however, on track No. 1 in such close proximity to track No. 2 that the side or corner of the standing or "dead" next to the switch was within a few inches of the line of passing cars on the other track. The space left was not sufficient to admit of the safe passage of persons on the sides of cars running on track No. 2.

The night was dark and this dangeorus proximity was not noticed by any of the crew on the L. & N. (or No. 2) track. Smart had ridden but a short distance when he was knocked off and fatally crushed.

The first question presenting itself, as it was upon the court's solution of this, we are told, that the peremptory instruction was based, is, was Smart guilty of such contributory negligence as but for it the injury would not have happened? Upon a similar state of case this court answered this question in the negative in the case L. & N. R. R. Co. v. Earl's adm'r, 15 Ky. Law Rep., 184, and a like conclusion was reached by the Alabama Supreme Court in Kansas City, &c., R. R. Co. v. Burton, 53 Am. and Eng. R. R. Cases, 115.

It is a matter of common observation that railroad companies furnish cars of the class in use on the occasion under consideration supplied with ladders, or appliances similar to ladders, to enable employes to discharge promptly and efficiently the duties imposed on them. Among those duties is their rapid transit from one part of the yard to another. The most prudent and cautious employes use these ladders or steps for that purpose. That is what they are for, as well as for ascending and descending over the sides of the cars. As said in the Earl case, "the custom of brakemen riding on the ladder from one point of work

to another was clearly established. This was the well known way of doing such work as was before Earl on this occasion."

Of course the rule is different with a passenger. He has no need to thus ride, and may not so protrude his person beyond the surface of the cars. A brakeman, however, after he has coupled or uncoupled certain cars, must oftentimes follow up the moving train and by his signals given from the top or oftener from the sides of the cars control the engineer in further work of the same kind. In going about this ordinary work in the usual way, he has the right to expect clear passage in his front. While he may not close his eyes to the perilous surroundings of his employment, he has the right to go about his ordinary work with the consciousness or safety, and is not required to see or look out for obstructions on the track. This is imposed on the superintendency. We conclude, therefore, that the deceased was not guilty of negligence on the night in question in riding on the appliances supplied for that purpose.

We next inquire what act, if any, was the negligent one, and whose, that caused the injury? We may say in general that we do not doubt it to be the duty of the enigneer in charge to see as far as he may that the track is clear of dangerous obstruction, by which we mean obstruction dangerous not only from being immediately on the track, but by reason of being dangerously close to it. Such also would seem to be the duty of the yardmaster of the management in control of the yard. But however alert we may demand these persons to be, we can not require of them impossible or impracticable things. It is not even suggested that these officials had aught to do with placing these cars on the switch, or had any control of their movements, and we can not impute negligence to an engineer if he fail to see in the dark. Ordinarily in cases of the kind we are considering the engineer himself is in control of the cars "kicked in" on the connecting switch, and if he leave them dangerously near, he is at once chargeable with negligence. But in the case at hand the obnoxious cars were not placed by him, and he is without fault in the premises. So the yardmaster of the owner can not, during every minute of time, see that those who bring cars upon the yard leave them in their precise and proper places. We do not doubt that if these "dead" cars had remained in their dangerous position such length of time as would have afforded the yard man a reasonable opportunity of discovering the danger, and he had failed to take steps to protect the workmen, negligence would be attributable to him and through him to his principal. Only a few minutes, however, elapsed from the time of the lodgment of the cars on track No. 1 before the accident occurred, and we are not disposed to regard this agent as neglectful of his duties. The case, therefore, as it is presented against the L. & N. railroad, need not be considered further.

It follows, however, from the principles announced, that the appellee, the Chesapeake & Ohio Railway Company, through the wrongful act of its agent, Robinson, in the light at least of the proof as it has been presented by the plaintiff alone, was guilty of the negligence which caused the injury complained of. As said in the Earl case, "it was inexcusable negligence to leave the 'kicked in' car so close to the main track that the engineer's cab could barely pass it."

Whoever else may be held to accountability for failing to afford the workmen engaged about the cars the portection to which they are entitled, and we have seen that the engineer of the moving train and the yardmaster in the superintendency of the premises

may be so liable under designated conditions, certainly the agent who actually places the cars in this dangerous position is guilty of negligence, for which his principal is to be held accountable. The negligent engineer and the injured employe, being not only in different grades of service but on different trains, can not be regarded as co-equals and the agents of each other. (L. &. N. R. R. Co. v. Rains, 15 Ky. Law Rep., 423; Voltz v. C. &. O. Ry. Co., 15 Ky. Law Rep., 727.)

While the proof is not as clear as it might be on the subject of who left the cars on the switch, the averments of the petition are that Robinson was the servant and agent of the defendant, the Chesapeake & Ohio Railway Company, and in control of its locomotive engine, and left the cars in the position described in the petition. This is not denied as we construe the answer.

Of course the appellee, Robinson, is liable directly for his own negligence and can not escape responsibility on the contention that he was acting merely as agent for another.

The judgment is affirmed as to the L. & N. R. R. Co., and reversed as to the other appellees.

KENTUCKY SUPERIOR COURT.

KY. GRAVEL ROAD CO. v. COMMONWEALTH.

(Filed June 20, 1894.)

Minute book not competent evidence to add to records of court—Upon the trial of an indictment for a misdemeanor a memorandum in the minute book showing the dismissal of a former indictment and a re reference of the prosecution to the grand jury is not competent evidence to show the indictment under which the defendant is being tried is a continuance of the prosecution begun in the former indictment. If a prosecution in the circuit court has been continuous it can be shown in no other way than by the records of the court, of which the minute book does not form a part.

Sweeney, Ellis & Sweeney for appellant.

W. J. Hendrick, R. S. Todd and J. Edwin Rowe for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Barbour.

The indictment in this case charges the defedant, a gravel road company, of the offense of allowing its road to become unfit for public travel, and so to remain for four days and more, to wit, for twenty-five consecutive days, and during which time toll was received and demanded by it, to wit, the said defendant, on the — day of ——, 1890, did unlawfully, etc.

It was found and returned by the grand jury on Apirl 14, 1893, and alleges that it was in lieu of a former indictment, etc. The defendant was tried and found guilty, and a judgment having been rendered against it, it prosecutes this appeal. The only question is, does it appear that this indictment was a continuation of the prosecution begun in a former indictment?

The facts as exhibited by the record are these: An indictment similar to the one in question, in so far as the offense and time of its commission is concerned, was returned on January 31, 1890. On January 19, 1892, this indictment was adjudged defective and was dismissed, and the prosecution referred to the grand jury. On January 30, 1892, the grand jury returned another indictment, charging the defendant with the same offense, committed at the same time, and alleging that it was found and returned in lieu of the indictment of January 31, 1890.

On January 30, 1892, the case was set for the 18th day of that term. On that day, on the defendant's motion, the cause was continued. No further order ever appears to have been made in the prosecution of this indictment, and so far as this record shows that indictment is still pending; but on July 23, 1892, the grand jury found and returned into court another indictment charging it with the same offense, committed at the same time. Upon the return of this indictment the defendant moved to set it aside on the ground that it was not found and presented as required by law. This motion was overruled. The case was continued at that term.

On April 13, 1893, a demurrer was sustained to this indictment, and the prosecution was referred to the grand jury. On the next day the grand jury returned into court the indictment upon which the judgment appealed from was rendered. The court allowed proof of the commission of the offense within twelve months prior to January 31, 1890, and instructed the jury to find the defendant guilty if the offense was committed within that time.

Appellant's contention is that the indictment of January, 30, 1892, was pending when the subsquent indictments (July, 1892, April 1893) were found, and that, therefore, there being no dismissal of this indictment and a rereference of the prosecution by the court, the grand jury had no power to return the subsequent indictments in perpetuation of the prosecution commenced by the indictment of January 31, 1890.

The Criminal Code provides, section 116: "The dismissal of the charge does not prevent it being again submitted to a grand jury as often as the court may direct, but without such direction it can not be again submitted."

"Sec. 170. If the demurrer be sustained on any other grounds than those mentioned in the last four sections, the case may be submitted to another grand jury, and an order to that effect may be made by the court on the record."

It is conceded for the Comomnwealth that unless there was a dismissal of the indictment found on January 30, 1892, and a rereference of the charge by the court that the defendant could not be tried and convicted under the indictment it was convicted under for the offense committed prior to January 31, 1890; but it is insisted that there was in fact such dismissal and rereference.

This, appellant claims, was shown by an entry upon the minute book, but which was not transcribed to the order book.

This is the recital upon the matter from the bill of evidence: "On motion for peremptory instruction the Commonwealth moved the court to enter nunc pro tunc the order made herein July 23, 1892, referring this prosecution to the grand jury, which was omitted to be entered at the time it was made, to which defendant objected, and upon the hearing of the motion the minute for the order was read from the minute book of this court, "and the motion to enter the order nunc pro tunc was overruled, each party reserving exceptions."

Several objections may be urged to the competency of the "min-

utes." They do not show that the indictment was dismissed, without which the court had no authority to refer the case; nor do they show that the omission to enter the order upon the order book was not intentional—the court may have reconsidered its ruling, and have concluded to make no order in reference to the matter. But waiving that, were the minutes competent?

The circuit court is a court of record; it can only speak by its records. If a prosecution in the court has been continuous the records will show it—it can be shown no other way. Are the minutes made by the clerk to be treated as the record of the court?

This question was answered in the negative in the case of Johnson v. Commonwealth, 80 Ky., 377. There the court, after pointing out the importance of record evidence, and condemning the loose practice in that case—which condemnation applies with special force to the loose practice in the case before us—says that "the minutes are generally too imperfect to show clearly and fully what the court has decided and done;" and, continuing, said: "Thus it will be seen that the minute book did not contain the legal orders of the court, and the signature of the judge did not increase their validity."

Whether, in the case before us, the judge signed the minutes or not does not appear. We are of opinion that the memorandum in the minute book was not competent evidence to show a continuous prosecution, and that the court should have sustained the appellant's motion for a peremptory instruction.

The judgment is reversed and the cause remanded for further proceedings as herein indicated.

MALONE, &c. v. CARRICO.

(Filed June 20, 1894.)

1. Libel—When the patrons of a district school thought the school was not being properly conducted they had the right to complain to the trustee, even though their judgment as to the manner in which it should be conducted was erroneous. Therefore, the teacher of such a school can not maintain an action for libel on account of a writing addressed by patrons of the school to the trustees complaining that she allowed the boys of the school "to take improper privilege" with her, unless she shows actual malice, and in such an action the court should have instructed the jury, as requested by defendants, that if the publication was made by defendants in good faith, with no intention of injuring the plaintiff, they should find for the defendants.

2. Same—To show the truth of the matter published is a complete defense to an action either of libel or slander, and in this case the court should, at the request of defendants, have instructed the jury that if the charges were true they should find for defendants.

3. Same—A person can not justify a libel because it was published by the advice of counsel, and, therefore, the court properly excluded evidence to the effect that defendants consulted counsel before publishing the writing.

H. W. Rives for appellants.

H. Philip Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barbour.

This is an action for libel, in which the following publication is complained of:

"To James Ed. Mattingly, Matthew Tandy and N. W. Bickett, trustees duly elected and qualified, and acting as such in and for School District No. 13 under laws governing the county and State aforesaid:

"You are hereby notified that we, the undersigned patrons of the aforesaid school district, object to the employment of Miss Emma Carrico as a teacher of said district school for this term of school for the reasons hereinafter set out, viz., that she failed to keep proper order in said school and exercise the discipline necessary to command the respect of her said pupils, by allowing the larger boys in said school, ranging in age from 14 to 17 years, to take improper privileges with herself and the girls in attendance at school, such as kissing, restling, putting in the bosom of the teacher's dress iron wedges, etc.; said teacher made no distinction between male and female, allowing both sexes to be excused at the same time to go into the woods to attend the calls of nature; allowing boys to cut each other's clothes with knives; allowing children to disturb passers-by with impudent and improper remarks at recess; allowing dancing and other improper acts which have a tendency to familiarize the sexes, thereby removing that delicacy and modesty which stimulate virtue and morality in the pupils. The above acts were allowed and encouraged by the teacher without calling for the assistance of the parents or trustees to aid her in their correction and suppression, as she should have done, if necessary, by expulsion as by law provided. The aforesaid trustees are hereby notified, for the reasons aforesaid, to remove said teacher, or to set a time and place and issue process compelling the at endance of the necessary witnesses, and hear the aforesaid charges as by law provided.

"This August 16, 1892."

This writing was signed by the defendants, who were patrons of the school, and was presented by them to the district trustees as a formal charge in regard to the management of the school by the plaintiff as teacher.

The plaintiff alleges that the charges made were made maliciously and were intended by the defendants to impute to her a want of cha-tity. The defendants admitted the publication and averred its truth, but denied the inuendo—denied malice, and relied upon privilege.

So far as they were allowed to, the defendants introduced evidence tending to show that all the charges, as made, were substantially true; but as to the charge that "said teacher made no distinction between male and female, allowing both sexes to be excused at the same time to go into the woods to attend the calls of nature," the court refused to allow the defendants to introduce any evidence, and upon the final submission of the case to the jury instructed them that as to this charge "the law is for the plaintiff, and that the jury should find for her such damages as she has sustained by reason of said charge."

The reason given by the judge for excluding this evidence and giving the instruction was, as orally announced at the time, that plaintiff was not to blame; that it was the fault of the trustees in not providing suitable accomodations. But there was no such issue as that. The question was, did she permit this? not whether, under all the circumstances, she could have avoided it.

There was in fact in the whole case but two questions: Were the defendants actuated by express malice? And were the charges true?

The defendants were patrons of the school and were deeply interested in its management, and when they thought the school was not being properly conducted they had the right to complain, even though their judgment as to the manner in which it should be conducted was erroneous.

"One may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights or to the rights of another, provided the publication be not unnecessarily made to other than those persons whom the publisher honestly believes can assist him in the protection of his own rights, or to others than those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights or the rights of others intrusted to their guardianship." (Townsend on Slander, 301.)

If the defendants believe that the school was conducted as stated in the writing, it was their right to make the complaint to those who could remedy it. That the trustees were the only persons authorized to remedy it is conceded; so that the principal question was, were the defendants influenced by malice? that is, a purpose to injure the plaintiff.

The second instruction was erroneous. The court had in the first instruction told the jury that they were bound to find for the plaintiff as to a part of the charge contained in the writing. In this second instruction the jury were told that if they believed that "defendants, one or all, with malice and without probable cause, published of and concerning plaintiff that she allowed and encouraged the larger boys in the school, ranging from 14 to 17 years, to take improper privileges with herself and the girls in attendance at school," etc. (excluding that part of the publication mentioned in instruction No. 1), the law is for the plaintiff, and the jury must find for her under this instruction, such as are guilty, if any, such damages as she has sustained by reason of said charges, not exceeding $10,000 in all under this instruction and No. 1; otherwise they, as to the publication set out in the instruction (No. 2), should find for the defendant, one or all, not guilty of malice; or the jury, if they from the evidence believe that the defendants, one or either, have shown good faith under this instruction, may lessen the finding as to one, all or either, and assess under this instruction separate amounts against one, all or either."

This instruction does not present the question as to the truth of the charge as fairly as it should; and it is still further objectionable and confusing upon the question of malice. While it says that the jury should find for those not guilty of malice, it at the same time authorizes a verdict against them, although they may have shown good faith, allowing good faith to be considered in mitigation only.

The court should have instructed the jury, as requested by the defendants, that if the publication was made by the defendants in good faith, with no intention of injuring the plaintiff, they should find for the defendants; for it must be conceded that the defendants were patrons of the school, and that the trustees to whom the complaint was made were the proper persons to make the complaint to.

So also should the court, as requested by the defendants, have instructed the jury that if the charges were true they should find for the defendants.

"It is now almost universally conceded that to show the truth,

of the matter published is a complete defense to an action either of libel or slander, a publication of the truth is, as to a civil action, absolutely privileged." (Townsend, 306.)

There were other errors complained of, but as they are not apt to occur again, it is unnecessary to refer them. We think the court properly excluded evidence to the effect that the defendants consulted counsel before publishing the writing. A person can not justify a libel because it was published by the advise of counsel.

The judgment is reversed and the cause remanded for a new trial.

SUPERIOR COURT ABSTRACTS.

WESTVIEW SAVINGS BANK AND BUILDING CO. v. ZOOK, &c.

Filed June 20, 1894. Appeal from Jefferson Circuit Court, Law and Equity division. Opinion of the court by Presiding Judge Brent, reversing.

1. Rescission—Pleading—Where a company which was the owner of much real estate in a town, and largely engaged in building, sold a house and lot to a house painter, agreeing to give him the painting for the company so long as his work was satisfactory, to entitle the vendee to rescind upon the ground that the work was not given him as agreed, he must show that he was ready, able and willing and offered to perform upon his part for a reasonable compensation such work as he stipulated for, or that the vendor had no such work and knew at the time it would have none; and the vendee failing to show this the court erred in decreeing a rescission.

2. Same—Tender of deed—In this action by the vendor to enforce its lien it is immaterial whether the deed was ever delivered and accepted, as the plaintiff, if it was not accepted, should be allowed to now execute and tender a deed with general warranty, and when that is done if the deed is not defective the court should enter a judgment of sale.

Rogers & Duncan for appellant; A. A. Haggan for appelles.

WEBB v. WELLS, &c.

Filed June 20, 1894. Appeal from Jackson Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

Sales of personal property—Lien—T. sold to S. at an agreed price a number of standing trees, which were to be cut into logs and hauled to a certain stream, the purchase money to be secured by a mortgage on the logs. Before the logs were cut or hauled S. agreed with W. to haul, deliver and raft in good order at a certain point eight rafts of logs to be cut from the timber he was getting from T. Before any of the conditions required to pass title as between S. and W. had been complied with S., pursuant to his original contract, executed to T. a mortgage on the logs to secure the unpaid purchase money for the timber, and subsequent thereto W. sued out an attachment and had it levied on the logs to secure his claim for advancements made to S. Held—That the fact that W. gave S. credit on the faith of his promise to deliver the logs did not give him a lien, as he got neither possession nor title; and as each party had an equal right to secure himself and T. obtained and recorded his mortgage before W. sued out his attachment, T. is entitled to priority, although he had notice at the time he took his mortgage of the agreement of S. to deliver the logs to W.

B. H. Conley and Cromwell & Franklin for appellant; Stewart & Stewart for appellees.

SHANK & CO. v. STEWART & BAKER.

Filed June 20, 1894. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Brent, affirming.

1. Burden of proof—In this action to recover the amount alleged to be due plaintiffs for goods which they had sold defendants, as defendants denied any knowledge or information sufficient to form a belief as to whether or not plaintiffs had manufactured or shipped the goods, denied that they received them; denied that they were delivered, and denied any indebtedness to plaintiffs on account of the goods, the burden of proof was on the plaintiffs and they were entitled to the concluding argument to the jury. Besides, defendants permitted plaintiffs to assume the burden and introduce their evidence first without any objection.

2. Right to amend pleadings—A the petition was filed in July, 1891, and the pleadings completed by a rejoinder in March, 1892, the court did not abuse its discretion in overruling a motion made in June, 1892, when the case was called for trial, to file an amended answer and transfer the action to equity.

3. Instructions to jury—The defendants c. ot complain of the court's failure to present by its instructions to the jury a view of the law as to which they asked no instruction.

James R. W. Smith for appellants; I. T. Woodson for appellees.

ST. JOHN'S EPISCOPAL CHURCH v. CLARKE.

Filed June 20, 1894. Appeal from Fayette Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Building contract—Extra work—Although a building contract provided that no extras should be charged for unless ordered as extras in writing by the architect and building committee, and the price of said work agreed or stated in the writing, yet in this action by the contractors to recover for extra work not so ordered, as the petition alleges that the work was done at the special instance and request of defendants, and when completed was accepted by them, the plaintiffs are entitled to recover therefor, as the extra work must be regarded as done under an independent contract.

2. Damages on account of defective work—As the damages allowed the defendants on their counterclaim on account of defective work were not enough, the judgment is reversed for that error.

Z. Gibbons for appellant; D. G. Falconer for appellee.

HUNTER v. TAYLOR COAL CO. OF KENTUCKY.

Filed June 20, 1894. Appeal from Ohio Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Water courses—Draining poisoned water from coal mine into creek—Where the owners of a coal mine drained the mine into a creek so impregnating the water of the creek with copperas and other deleterious substances as to render it unfit for domestic or farming purposes to the lower riparian owners and as to kill vegetation when the creek overflows its bed, the plaintiff, who owns a tract of land lying on the creek below the mines, is entitled to recover the damages sustained by him in consequence of the poisoned water, and in this action brought by him for that purpose the court erred in instructing the jury that if the drainage from the mine was necessary to enable the defendant to operate the mine, and was done in a proper manner, the plaintiff could not recover.

2. Same—Measure of damages—As the injury is not necessarily of a permanent character, the damages occasioned by the deprivation of the use of the water for domestic or farm purposes, and the injury to plaintiff's vegetation up to the time of trial is the criterion of damages. The instructions limiting the recovery to the time the action was instituted were erroneous.

E. D. Guffy, Guffy & Ringo and J. A. Smith for appellant; Taylor & McHenry for appellee.

KENTUCKY AND INDIANA BRIDGE CO. v. HELD.

Filed June 20, 1894. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Injury to abutting property—Evidence—In an action against a railroad company to recover damages to abutting property on account of the construction of defendant's road, it was not improper to allow the plaintiff to testify as to what he gave for the property, although he purchased it several years before the road was built. While the recovery in such cases is based upon the value of the property just before it was generally known the road was to be built, yet what the property was worth at different times is competent as testing the value of the witness' opinion.

2. Same—Testimony as to the business plaintiff did before and that he did after the building of the road was competent upon the question of the value of the property.

3. Same—The court properly excluded testimony showing that the property since the building of the road could, in combination with other property, be used for switching purposes for a railroad, which would make it valuable as manufacturing property, and would, therefore, enhance its value. According to this theory, the plaintiff must dismantle his house, seek a combination with other property in the neighborhood, and then seek a purchaser, whereas he is entitled to recover the damages done to the property as it is.

E. F. Trabue and Bullitt & Shield for appellant; Simrall, Bodley & Doolan and O'Neal, Phelps & Pryor for appellee.

WHITE, GREEN & HUFFAKER, &c. v. DYER.

Filed June 20, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

Composition agreement—Sufficiency of consideration—In these two actions against the same defendant, in which the defendant relied upon a composition, entered into between himself and his creditors, including plaintiffs, whereby they agreed to accept a certain per cent. of their respective debts in full of their several demands, plaintiffs, the two largest creditors, being made trustees by the composition agreement, it appearing that after the other creditors had been paid the agreed per cent. of their claims plaintiffs agreed with defendant if he would permit them to sell a house and lot he had mortgaged to them as trustees without going through the trouble and expense of a litigation, they would, in the event the property brought as much as a certain sum, release him from all further liability, there was a sufficient consideration for the agreement and it is binding.

Brown & Haycraft and W. H. Marriott for appellants; Sprigg & Chelf for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. WALTERS & SON.

Filed June 20, 1894. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, affirming.

Burden of proof—Ordinarily, where a plaintiff sues upon several demands and one is controverted and the plea of confession and avoidance is interposed as to the others, the plaintiff must first introduce his evidence, and is upon the whole case entitled to the conclusion of the argument to the jury. But cases may arise in which, under the peculiar facts, it would be proper to change the order of argument, the question in such cases being largely in the discretion of the court.

In this action against a railroad company for negligently killing one mule and injuring six others by the running of one of its trains upon them, as the answer admitted the killing of the one mule, but denied that any one of the six mules alleged to have been injured was touched or damaged in any way by defendant's trains, and also denied negligence, the court did not abuse its discretion in giving plaintiff the concluding argument to the jury.

J. A. Mitchell for appellant; B. F. Proctor and E. W. Hines for appellees.

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KENTUCKY COURT OF APPEALS.

GREEN, &c. v. COMMONWEALTH.

(Filed January 18, 1894.)

The general assembly alone has the authority to make the classification of the cities and towns of the Commonwealth provided for in the Constitution, and where a city has been assigned to a certain class by the General assembly the courts of the Commonwealth have no power to change such classification or to declare that the population of the city is such that it belongs to a different class.

Wm. Low for appellants.

W. J. Hendrick for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hazelrigg.

By an act of the General Assembly of the State, approved September 30, 1892, the cities of the Commonwealth were classified as required under the provisions of section 156 of the Constitution. The city of Pineville, Bell county, was classified or designated as a city of the fourth class. On June 28, 1893, the charter of cities of the fourth class was approved, and thereafter the mayor and council of the city of Pineville proceeded to enact such ordinances as were provided for in the charter for cities of this class, and otherwise to run the city government in conformity with the charter for the class indicated. Thereupon this action was brought against the mayor and councilmen, charging that the actual population of the town of Pineville, according to the census of 1890, was only 1,356, whereas the Constitution provided that to the fourth class shall belong cities and towns having a population of 3,000 or more, and less than 8,000; therefore, that the town was in fact, not one of the fourth class, and the officers named were wrongfully imposing upon the citizens an extravagant and illegal form of government. A demurrer to the petition was overruled, and, the appellants declining to plead further, the court adjudged that the town of Pineville belonged to the sixth class,

and that its officers—the appellants—were, without warrant of law, exercising the powers of councilmen of a fourth class city, and that their acts in laying off the city into wards, designating voting places, and providing for the election of officers of the town as for a city of the fourth class, were illegal and void.

The officers of the city have appealed, and the only question involved is whether the classification of the cities and towns of the Commonwealth shall be made by the courts, or made—as provided in the Constitution—by the General Assembly. To state the question is, of course, to answer it. The language of the Constitution is: "The General Assembly shall assign the cities and towns of the Commonwealth to the classes to which they respectively belong, and change assignments made as the populaiton of said cities and towns may increase or decrease, and in the absence of other satisfactory information as to their population, shall be governed by the last preceding Federal census in so doing; but no city or town shall be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor."

Clearly, therefore, to the legislative department of the government, in pursuance of some law enacted for that purpose, must be left the right to change the assignment of a city from one class to another, if the unambiguous direction of the Constitution is to be observed. No argument or citation of authority can make this plainer than the Constitution makes it.

The demurrer should have been sustained, and the petition dismissed, and to that end the judgment is reversed.

PLUM, &c. v. MITCHELL, &c.

(Filed May 3, 1894—Not to be reported.)

1. The wife of a vendor can not be compelled, against her will, to specifically execute a contract of sale made by her husband by the relinquishment of her dower right in the land sold.

2. Where the vendee refuses to take the land, because of such failure of the wife of the vendor to relinquish her dower right, he may recover damages of the vendor, and the measure thereof is the difference between the contract price and the actual value of the land purchased.

3. The question of the amount of such damages is one or a jury to determine, and where the parties submit it to the chancellor, his finding will be treated as the verdict of a properly instructed jury, and not set aside unless palpably against the evidence.

J. W. Greene for appellants.

Lindsay & Botts for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Lewis.

Appellants, Plum & Davis, brought this action for specific performance, and in the alternative for damages on account of violation by appellees of the following contract: "This is to certify that we have this day bargained and sold one farm known as the J. B. Mitchell farm to W. H. Plum and W. D. Davis for $20 per acre, to be paid in the following payments, to wit., on March 1, 1889, $1,680; March 1, 1890, $1,000; on March 1, 1891, and on March 1, 1892, $1,000.

W. H. PLUM,
W. D. DAVIS,
W. H. MITCHELL,
J. B. MITCHELL."

In an amended petition it was alleged it was part of the contract, though left out of the writing by mistake; that said land was, in quantity, 234 acres; that appellees were, on payment of first installment of purchase money, to deliver possession and make a valid deed, with clause of general warranty though retaining a lien for payment of residue of the price.

Though appellees state it was intended to sell only that part of the farm set apart to J. B. Mitchell in division between him and W. H. Mitchell it is demonstrable they sold the whole containing 234 acres.

J. B. Mitchell in his answer stated he had executed and then tendered a deed to that part of the land falling to him in the alleged division between him and W. H. Mitchell, reserving however, from the conveyance a passway through it from the part belonging to the latter. But the wife of J. B. Mitchell, as stated in his answer, refused to unite in the deed for purpose of conveying her dower right in the land, and for that reason and because less quanitty than sold was included, appellants did not nor were required to accept the deed. But as the wife of a vendor can not be compelled by the chancellor against her will to carry out a covenant to convey land by relinquishment of her dower right in the land sold, and the wife of J. B. Mitchell was not even made a party to this action, the only remedy the court could afford appellants was damages for violation of the contract by appellees. (7 B. Monroe, 655; Story's Equity, section 735.)

The criterion of damages in such case as this is the difference between the contract price and actual value of the land sold; and form the judgment of the chancellor assessing the amount of damages at $150, this appeal is prosecuted.

Either party had the right to submit the issue of amount of damages to a jury, but they both waived that right, and by consent the question was submitted to and tried by the chancellor. So that in revising his finding this court, in such state of case as has been often decided, must be governed by the same rule as controls in passing upon the verdict of a properly instructed jury; that is, not to set it aside unless palpably against the evidence.

There was a large number of witnesses on each side who testified to difference between actual value of the land and contract price, and, as generally concurs in such case, there is very great difference in the several estimates made by them. So that we can not say that the finding of the chancellor, who had the right and opportunity to weigh all the testimony, is so palpably against the evidence as to authorize reversal

Judgment affirmed.

HEDGER, &c. v. JUDY, &c.

(Filed May 12, 1894.)

1. Construction of will—Devise of land with lien upon it—Where a testator devised to his two brothers, who were nominated by the will as executors, a farm of 800 acres, on which a lien for about $4,000 existed, and made devises and bequests to others, and the latter would all be rendered valueless if the estate of the testator is applied to payment of the lien debt upon the farm, the will will be so construed, under all the circumstances of the case, as to require the brothers to take the farm cum onere, and to satisfy the lien debt with their own means.

2. Decedent's estate—Proof of debts—Executors can not be allowed credit for the amount of a judgment against their decedent and two others, which they paid, when it appears that the judgment was rendered against the three as executors of an estate, and there is no satisfactory evidence to show that the decedent received or failed to account for any part of such estate.

H. Clay White and Collins & Fenley for appellants.

W. W. Dickerson and J. T. Willis for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Lewis.

Sanford Hedger, by will dated July 16, 1884, and probated August 11, 1884, devised to his brothers, Jonathan and James Hedger, his farm, containing about 300 acres of land; also jointly with his sister, Margaret Judy, all household and kitchen furniture; to Margaret Judy, $1,000; to his nephew, John Judy, $1,000; to Reuben Hedger, an illegitimate child, then an infant, $1,000 to be paid to him upon becoming 24 years of age, also, in language of the testator, "all of the remainder of my estate that may be left after the payment of my funeral expenses, expense of settlement of my estate and all of my debts and the devise to Reuben Hedger, John Judy and Margaret Judy, to be paid to him as provided in the third clause of this will; and my executors are directed and requested to expend $500 in educating my son, Reuben Hedger." But it is in the same clause provided that if he should die before the age of 24, leaving no lawful child surviving him, all the money devised to go to Jonathan and James Hedger. Jonathan and James Hedger were appointed executors of the will and directed to have testator's estate settled up within six years.

But February 11, 1891, John Judy brought this action against James Hedger, surviving executor, Jonathan Hedger having died in 1885, for settlement of the estate, none having been made, though more than six years had elapsed since they qualified as executors, and to recover amount devised to him, no part of which nor of devises to Reuben Hedger and Margaret Judy had then been paid. The special commissioner, to whom the case was referred for auditing and settling the accounts and transactions of the surviving executor, reported he had paid debts in excess of assets of the estate of the sum of about $574, and as a consequence there was left in his hands no means with which to pay any part of the legacies. But, by the judgment appealed from by the executor, exceptions to the commissioner's report were sustained and credits allowed thereby to the executor were rejected to an aggregate amount sufficient to satisfy the legacies and leave a residuum for Reuben Hedger.

The first of those exceptions is to a credit of $283.95 allowed the executor on account of a personal judgment in favor of one Hartfield against Jonathan Hedger, which James Heder alleges he paid as executor upon proof not at all sufficient to show the estate of Sanford Hedger was liable therefor.

The second is to a credit of $1,312, being one-third of a judgment rendered in an action to settle the estate of Jacob C. Hedger in favor of legatees against James Hedger, surviving executor of his will, Jonathan and Sanford Hedger, the other executors, being then dead. The judgment was rendered in 1888 for amount of the estate of Jacob C. Hedger, found in the hands of James Hedger four years after death of Sanford Hedger. And without competent evidence showing satisfactorily Sanford

Hedger had, prior to his death, received as executor any part of the estate of his deceased father not accounted for, or was, at time of his death, in default in any respect, the special commissioner in this case allowed to James Hedger credit for one-third of that judgment, though it was rendered against him alone. But the lower court rejected the claim only to the extent of $749.-67, and there is no cross appeal that ruling will have to stand.

The third exception involves construction of the will, particularly clause 1, as follows: "I give and devise to my brothers, Jonathan Hedger and James Hedger, my farm upon which I now reside, containing about 300 acres of land, being the same tract purchased by me from my father, Jacob C. Hedger, deceased, and this devise is made to them for the love and affection I have to them and for their services in settling up my estate. And they, upon accepting the devise, are to make no charge for their services as my executors for settling my estate, and no allowance is to be made to them by the court therefor."

At date of the will and death of the testator there was unpaid purchase money, for which a lien on the land devised existed, to the amount of about $4,001. And the question presented for determination is whether the testator intended the devisees, Jonathan and James Hedger, to pay that sum out of their own means, or with assets of his estate.

The testator in clause 7, authorized his executors to sell all his lands except the tract devised to them to pay his debts, permitting them, however, to retain one of the tracts designated at the price of $1,400, which they did do. He also directed his personal property sold, proceeds of which were evidently intended to pay debts and legacies; and nothing to the contrary appearing, a reasonable inference would be that the amount unpaid of purchase price of the land devised to them was regarded by him as one of his debts and intended to be thus paid. But it seems to us, looking to the general tenor and purpose of the will, and giving effect to each part so as to make the whole instrument consistent and reasonable, the conclusion necessarily follows that he intended his two brothers, on Jonathan and James Hedger, to take the farm devised to them cum onere, and to release it from the existing lien with their own means and not by using assets of the estate.

The estate left by him was not so large, precarious or complicated as to make at all difficult for him to ascertain and fix approximately its value after deducting amount of indebtedness, which was also estimated; and that he was well acquainted with character, condition and value of his estate, and each part of it, is shown by the intelligent, careful and precise manner in which he disposed of it, the will containing thirteen clauses relating to different subjects, each one of which was considered minutely and methodically. Thus knowing, as we are satisfied the testator did, that to charge his estate with payment of the balance of purchase money of the farm would result in gift of his whole estate, about $8,000 in value, to his two brothers, Jonathan and James Hedger, and render nugatory all provisions for the other three devisees, it is unreasonable to suppose he intended to so charge it. It is made apparent from the will he had strong affection for his ilegitimate son Reuben, who, at date of it, was only about six years, and was strongly solicitous for his welfare. For, as stated in the will he had taken the child to his own home to raise and educate, and in anticipation of his own death not only gave him $1,000 and the residuum of his estate, but

directed $500 be used by the executors in educating him, but appointed one of them his guardian to care for and protect him.

To say that notwithstanding the anxious desire thus shown for the welfare and support of his helpless child, he expected and intended all provisions of his will in regard to him to become nugatory would be unreasonable.

In our opinion the testator intended each clause of his will to take effect and be carried out, and, therefore, did not desire or expect his estate to be charged with payment of any part of the purchase money of said farm, which would inevitably result in defeating that intention and depriving three of the devisees of their legacies.

Judgment affirmed.

AYDELOTT v. SOUTH LOUISVILLE.

(Filed May 24, 1894—Not to be reported.)

1. Constitutional law—Limitation of tax rate of municipality—Section 157 of the Constitution limiting the tax rate of municipalities can not be given a retroactive operation so as to prevent a municipality from issuing bonds to pay for a public improvement which had been authorized by legislation before the present Constitution was adopted.

2. Same—Where the incurring of an indebtedness by a municipal corporation for public improvement was authorized by an act of the legislature and the act had been complied with and the incurring of said indebtedness approved by a majority of the voters of the city as the act required before the adoption of the present Constitution, section 158 thereof can not be so construed as to prevent the issuing of bonds for said indebtedness, even after the Constitution of 1891 was adopted, that section expressly authorizing the contraction of an indebtbedness in excess of the limits named in it "when the same has been authorized under laws in force prior to the adoption of the Constitution."

Kirby & Smith for appellant.

M. S. Barker for appellee.

Appeal from Jefferson Circuit Court, law and equity division.

Opinion of the court by Judge Pryor.

The appellant, a taxpayer and citizen of the town of South Louisville, filed his petition below to enjoin the sale of the bonds of that town that had been issued but not sold under an act of the Legislature, approved February 25, 1890.

The act was required to be published three times in one of the daily newspapers of the city of Louisville and was to be approved by a majority of the voters of the town of South Louisville voting at an election to be held for that purpose. The provisions of the act were all complied with; a sinking fund created from which the town could pay the interest on the bonds as well as the principal, and all the steps taken to make the act effective, unless the clause of the new Constitution known as section 157 is given a retroactive operation, and the town, by reason of that section, prohibited from incurring such an indebtedness.

The act as stated was approved in Februray, 1890. The election was had on the 18th of March, 1890, resulting in the approval of the act, and on the 6th of July, 1892, the bonds, by a proper ordinance of the board of trustees, were directed to be issued, and were issued on the 1st of November, 1892.

The present Constitution was adopted on the 28th of September, 1891, after the vote had been taken but before the bonds were issued or directed by the trustees to be issued, and it is, therefore, urged sections 157 and 158 of that instrument nullify this legislation and render all the acts of the trustees of the town of South Louisville and its voters under the provisions of the act of February, 1890, void.

Section 157 of the present Constitution, in fixing the tax rate of cities, towns, counties, taxing districts and other municipalities, provides that the tax rate (for other than school purposes) shall not at any time exceed the following rates upon the value of the taxable property therein. It then proceeds to classify the towns and cities, and provides that for all towns or cities having a population of less than 10,000, the tax rate shall not exceed seventy-five cents on the $100, "unless it should be necessary to pay the interest on and provide a sinking fund for the extinction of indebtedness contracted before the adoption of this Constitution," and further providing that "no county, city town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose," etc.

Section 158 was intended to meet the necessity of incurring an indebtedness, including existing indebtedness created before the adoption of the Constitution, and to that end provides that "the respective cities, towns, counties, taxing districts and municipalities shall not be permitted to incur an indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum per centages on the value of the taxable property therein, etc.," and in cities and towns of the fifth and sixth classes 3 per centum on the value of the taxable property is the maximum to which you can go, and this includes the existing indebtedness and that about to be created.

There is, however, a proviso to this section: "Provided, Any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitaitons when the same has been authorized under laws in force prior to the adoption of the Constitution." This indebtedness was authorized prior to the adoption of the Constitution in aid of the improvement of the town and is not affected by any provision or section of that instrument, and the further provision to section 158 is to limit the tax rate upon the value of the property within the town or district for the payment of any increased indebtedness after the adoption of the Constitution, unless the public health or safety should require it.

In the case of Holtzhauer v. City of Newport, 15 Ky. Law Rep., 188, the question involved in this case has been in effect disposed of. It was there held that the authority given the city council was but an amendment to the city charter, and the original law of the city remained in force until the Legislature passed general laws as required by the Constitution for the government of towns and cities. (See section 166, New Constitution.)

It is evident the framers of the Constitution, in adopting the various sections of that instrument affecting municipalities, intended to prevent those in authority from placing upon the taxpayers such heavy burdens in the way of obligations for improvements and otherwise as had had, prior to its adoption, amounted almost to a confiscation of their property; and while the purpose was to require economy in municipal control, it was not

practicable to disregard at once all laws affecting the finances of towns and cities, and it was wisely provided that such cities and towns could legislate under their respective charters until other laws governing municipalities were enacted.

In this case the taxpayers had, in fact, by a popular vote, created the indebtedness before the Constitution was adopted. In our opinion the injunction was properly refused and the right to sell the bonds unquestioned.

Judgment affirmed.

THOMPSON v. COMMONWEALTH.

(Filed June 7, 1894—Not to be reported.)

1. An accomplice or co conspirator of a defendant may now testify in his behalf, the provisions of the Code rendering such evidence inadmissible having been repealed.

2. A conspiracy must be shown to the satisfaction of the court to have existed between the witness and the defendant in order to render evidence of the alleged co conspirator inadmissible in favor of defendant.

In this case the defendant was entitled to the benefit of the evidence of his alleged co conspirator, the evidence being insufficient to establish the conspiracy.

3. Criminal law—Instructions—Self-defense—The instruction limiting defendant's right to avail himself of the plea of self-defense, if he, "by his own wrongful act, made the harm or danger to himself necessary or excusable on the part of the deceased," was not misleading or prejudicial to the accused under the circumstances of the case, even if it might be improper in other cases.

4. Same—The instruction in this case required the jury to believe beyond a reasonable doubt the defendant shot and killed deceased as well as that a conspiracy for that purpose existed. The words "beyond a reasonable doubt" did not modify the latter clause of the instruction.

J. T. Hays and James D. Black for appellant.

W. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, in connection with Jackson Asher and David Turner, is charged in the indictment with the murder of Granville Fisher, and upon his separate trial in the Clay Circuit Court in March last was convicted and sentenced to the penitentiary for life.

His counsel contend that by the instructions the jury were not required to believe beyond a reasonable doubt that the accused shot and killed the deceased, but were so required to believe only as to the existence of the conspiracy between the defendants.

We think, however, that the clause "beyond a reasonable doubt" modifies not only the verb "conspired" but also the succeeding words, "shot and wounded." But even if there is ambiguity in the particular instructions complained of, it is evident from other instructions that the belief of the jury on the question indicated was required to be beyond a reasonable doubt; besides, a separate instruction required the jury to acquit if, upon the whole case, they entertained a reasonable doubt of the accused having been proven guilty.

Objection is also urged to the instruction authorizing the jury to acquit on the ground of self-defense and apparent necessity "unless the jury further believe from the evidence beyond a reasonable doubt that the defendant, Thompson, by his own wrongful act, made the harm or danger to him necessary or excusable on the part of the deceased."

It may be that such a modification of the law of self-defense would be misleading and prejudicial in some cases, but we do not see any objection to it here. The movement of the appellant with Asher toward the Frazier house was either for the purpose of attacking the deceased and his friend, in which case the act was wrongful and deprived him of the right to then defend himself, or it was for the purpose of going home and avoiding further difficulty, in which case the act was not wrongful. The issue was thus clearly submitted to the jury.

It seems to us, however, that the court erred in refusing to allow David Turner to testify in behalf of the appellant.

It is true that the witness was jointly indicted with the appellant, and with him charged with a conspiracy to submit this crime, but we think the evidence of such conspiracy is far from being satisfactory. The parties, theretofore friendly, had met at Harman's where the deceased appears to have been drinking and quarrelsome. He drew his pistol on the appellant and fired it into the gronud. Asher, Turner and the appellant left, and the negro man, McCall, testifies that Turner said "lets go and get a gun and kill them."

The proof shows, however, that Turner got no gun; was too far from the fight to have engaged in it, and was, in fact, unarmed and took no part in the trouble.

Whatever Turner may have said, he is not shown to have done anything; and whether he said anything is rendered doubtful by reason of proof strongly discrediting the testimony of the witness, McCall.

The conspiracy must be shown "to the satisfaction of the court" before the witness is disqualified. Inasmuch as the accused is not now precluded from testifying for himself, there would seem to be no good reason for rejecting the testimony of an alleged confederate. The law does not seek to suppress the truth, hence the accused may testify in his own behalf, and so now may an alleged accomplice or co-conspirator testify for his co-defendant, as the law makers have repealed the sections of the Code heretofore precluding such testimony, though the repealing act was not in force at the time of the trial of this case. We do not think that a conspiracy has been satisfactorily established, and especially are we indisposed to apply rigidly the provisions of these repealed sections of the Code, in view of this policy of the law, to thus extend rather than contract the scope of admissible testimony.

For this error alone the judgment is reversed, with directions to award the apellant a new trial.

SMITH v. COMMONWEALTH.

(Filed June 7, 1894—Not to be reported.)

1. **The evidence was sufficient to authorize the verdict convicting appellant of voluntary manslaughter, although it was so conflicting as that the jury might have believed the deceased killed himself or that accused killed him accidentally.**

2. Evidence of testimony formerly given by the accused concerning the killing was competent.

J. T. Hays for apellant.

W. J. Hendrick for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justie Bennett.

The appellant was found guilty of the crime of voluntary manslaughter for killing James Bailey.

The evidence is conflicting as to whether the appellant killed said Bailey or whether Bailey killed himself; and, if the appellant killed him, whether it was accidental or intentional. The jury was authorized from the evidence to believe either one of these propositions, and their conclusion was that the appellant was guilty of voluntary manslaughter.

The appellant testified upon two former occasions about the killing, and the manner of its occurrence. The Commonwealth, over the objections of the appellant, proved by several witnesses what appellant swore in reference to that matter; the witnesses said that they remembered the substance of appellant's evidence upon those occasions. Their testimony was competent.

The court instructed the jury properly in reference to the law of murder, self-defense, voluntary and involuntary manslaughter. There is no error.

The judgment is affirmed.

KY. CENTRAL RY. CO. v. CITY OF PARIS.

(Filed June 9, 1894.)

Dedication of footway over bridge to public use—Prescription—A railway company in 1854 constructed a bridge over a creek dividing a town, and built a footway under the bridge and attached to it, for which the company had no use, and which was used by the public. Approaches to this footway were made jointly by the railroad and the city. The railroad has twice enlarged and renewed this footway. The city exercised such a qualified control over it as was consistent with its ownership by the railroad and put gas lights on it and ordered the railroad to repair it. In 1889 the old bridge was taken away and a new one erected, on which no footway was constructed. In this action by the city to compel the railroad to restore the footway, Held—

First. A dedication of the way to the use of the public must be presumed from the nature of the long continued use of it by the public, and the right to the use has now become absolute by prescription.

Second. Since the old bridge and way was taken away by the voluntary act of this railway, and damages would be an inadequate remedy for the deprivation of its use, the chancellor has the authority to order a restoration of the footway, which he did.

G. C. Lockhart for appellant.

J. H. Brent for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Hazelrigg.

Adopting the chancellor's statement of the facts, we find that the Kentucky Central Railway Company owns and operates a line of railroad which, at Paris, crosses the Houston Creek, and by this creek the city of Paris is divided. The railroad was constructed in 1854 or 1855, and about that time a bridge was made over the creek by the railroad company.

But few citizens then resided on the north side of the creek, by far the larger part of the town being on the South Side. When the bridge was built, a footway was made under and attached to it. It is not shown why this footway was built, or rather no use for it by the company is shown. The public used it from the start, and that use has increased with the growth of the city. There were many desirable building sites on the north side, and now a large part of that side is built up with attractive homes. A deprivation of the right to use the footway will seriously affect the public, and particularly those citizens residing on the north side. The approaches to either end of the bridge were so made that persons might pass with facility from Main street in South Paris on to the footway, and crossing over reach an avenue now known as Mt. Airy, but then an open, unimproved street or lane.

The Lexington & Covington Railroad Company built the footway and that company and the city of Paris made the approaches thereto.

Some time in the 60's the railroad company substituted for this passway another—safer, more substantial and more adequate to the increasing uses thereof. And again in 1871 or 1872 for that way the Kentucky Central Railway Company, the appellant, substituted another superior to either of the others. In about September, 1889, the appellant tore down the old bridge and erected a new one in its stead, leaving off and declining to rebuild the foot passway in question. This action was then brought by the city to compel the rebuilding of the passway, or, if such relief could not be granted, then for judgment for the sum of $5,000 to be used in building a way in place of the one taken down.

The judgment of the court required the restoration of the footbridge or passway, and the railway company has appealed. It seems to us, upon the state of case presented, that there is more difficulty in the ascertainment of the remedy to be applied to right the wrong complained of than in determining the right to exist.

It can not be doubted that the owners of the bridge provided the passway solely for the public and intended a dedication thereof to the public use. Had these owners needed the way the use by others in passing over it might be held to have been merely permissive. The use of the way by the public and the control of it by the city, indicate an acceptance as complete as was compatible with the rights of the owners. The city might not enter on the bridge and repair the way, but it did light it up with gas, and by its officers cause the railroad company to make repairs, and aid in constructing the approaches. In a qualified way it had the oversight of it and did as much toward accepting the donation or dedication as it could do. It could not use it or control it in such manner as to interfere with the company's absolute dominion over the structure, but for such purposes as were consistent with the intendment of the dedication, it did use and control the way, and we think for such length of time as to conclude the owners and constitute a right by prescription.

But while such right in or over an artificial way may be thus acquired, it is contended that when the structure falls from decay or is necessarily removed, a restoration can not be directed.

This may be admitted. The law of specific performance may not be so applied, but when the deliberate agency of the owner, unaffected by the conditions mentioned, is the destroying power, are the courts powerless to afford redress? It can not be contended for a moment that a judgment for pecuniary compensation would have been appropriate or practicable. What is to be the measure of the compensatory damages? Manifestly the right to use the passway as it was and where it was is the peculiar element of value. The city does not own the structure, nor does the public, whose representative the city is, hence it may not go on the bridge to rebuild the footway. It seems to us, therefore, that the chancellor applied the only appropriate remedy when he directed the restoration. The doctrine that the exercise of this discretionary power on the part of the chancellor is within the recognized rules of equity is supported by abundant authority. (Wait's Actions and Defenses, volume 5, page 765; Fry on Specific Performance of Contracts, sections 85, 51, 52 and 54, and notes to section 40; Story's Equity Jurisprudence, section 728; Waterman on Specific Performance, section 28; and L. & N. R. R. Co. v. Zaring, 9 Ky. Law Rep., 107.)

Wherefore the judgment is affirmed.

CITY OF PINEVILLE v. CREECH.

(Filed June 14, 1894—Not to be reported.)

Taxation—Extension of boundary of town—A city extended its boundary so as to include a village one and one-quarter miles distant from it, situated on the opposite side of Cumberland river from it; and with a mountain 1,200 feet high and much wild, uncultivated land intervening between the two. The village has no improved streets, and the only road from the village to the town is over a dirt road and a bridge erected by the county in which both are located. Held—The property in the village derives no benefit whatever from the city, such as will authorize the imposition of the burden of municipal taxes upon it. The extension of boundary was clearly for purposes of increasing the city revenue only and an unauthorized abuse of the power of taxation.

D. B. Logan for appellant.

Wm. H. Holt for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1891, the authorities of the city of Pineville levied a tax of 50 cents on each $100 worth of property within its corporate boundary, and also a tax to pay a bonded debt for the construction of streets. The regularity of the tax is not questioned, or the right of the city to enforce it as against those who are within the corporate limits and receive benefits from the corporation. The appellee in this case, being within the corporate boundary, is resisting the payment of the tax on the ground that he receives no benefits from the corporation to a greater extent at least than those who live within the county in which the city of Pineville is located.

This appellee resided in a small town called Wasiota, in which there is a hotel, telegraph office, postoffice, an express office, and perhaps a store. His property consists of a small dwelling.

There is no street in the town unless the narrow dirt road passing through it could be called one.

The little town is on the L. & N. railroad and near the Cumberland river. It is about one and one-fourth miles from the city of Pineville, that city being on one side of the river and Wasiota on the other. Between the two places rises Pine Mountain, about 1,200 feet high. In order to reach the city the inhabitants of Wasiota travel over a dirt road to the river, then cross the bridge built by the county, and when over the bridge travel the dirt road to the city. This road is kept in order by the county, and no improvement made upon it by the city of Pineville since it was taken into the corporate limits by legislative authority. There seems to have been included within the extended boundary many acres of wild, uncultivated land, and it could never have been contemplated that all this territory, including Wasiota, should bear a part of the burden for municipal improvements within the city of Pineville. It derives no benefit from the streets, its electric lights, its convenience to places of public worship, and, in fact, derives no benefits such as would justify taxation required for city purposes. The extension may be necessary for the exercise of the police power of the city, but nothing more, and to hold this property liable for the tax imposed, would be to sanction the imposition of a burden, from which the owner of the property can receive no compensation whatever. It is an extension of boundary merely for purposes of revenue, with no benefit resulting to the party taxed from the city government.

This is clearly an abuse of the taxing power, and the fact the appellee purchased this property after the extension of the city boundary, and with a knowledge of that fact does not affect the question. The cases of Cheany v. Hoover, 9 B. M., 345; City of Covington v. Southgate, 15 B. M., 491, settle the question raised.

The judgment enjoining the collection of the tax is affirmed.

WHITTAKER v. COMMONWEALTH.

(Filed June 14, 1894.)

A father may be convicted of incest upon the uncorroborated testimony of his daughter alone. The daughter is not in such case, in any sense, the accomplice of the father.

Guffy & Ringo for appellant.

W. J. Hendrick for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was indicted, tried and convicted for the crime of incest.

He denied his guilt and his conviction was secured on the testimony alone of his minor daughter, the alleged victim of his lust. There was no testimony in corroboration of the daughter, and for this reason it is insisted that the jury should have been told to acquit.

They were in effect told that they might infer the consent of the daughter to the carnal knowledge of the father from it long continuance without complaint from her, and that if there was

such consent, then the daughter was an accomplice and they could not convict on her testimony alone, unless they believed such connection or carnal knowledge was had by the undue influence of the accused.

This instruction was more favorable to the appellant than he was entitled to. There could be no such consent as to affect in any way the guilt of the accused. The crime was committed against the daughter. She was not the accomplice but the victim of her father. If another had aided the father in the accomplishment of his purpose, he would have been an accomplice, but not so with the daughter. She might have committed a crime also; indeed did commit one unless she is guilty of perjury, but it was not the same crime that the father committed. Their crimes are separable under the statute.

Judgment affirmed.

CITY COUNCIL OF RICHMOND v. POWELL.

(Filed June 14, 1894—Not to be reported.)

A city can not become indebted for school purposes in an amount exceeding its income or revenue for one year without the assent of two-thirds of the voters thereof, voting at an election held for that purpose, section 157 of the Constitution forbidding the incurring of such indebtedness by a city in any manner "or for any purpose" without such assent of two thirds of the voters, applying as well to indbtedness for school purposes as to other municipal indebtedness.

P. H. Sullivan and C. H. Breck for appellant.

C. S. Powell for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor.

The board of education of the city of Richmond and the city council leased a lot of ground for the purpose of erecting a public school building upon it at a cost of about $22,000. The mode of payment contemplated is in city bonds, payable in twenty years, but redeemable in five years, the interest to be paid annually, and a tax of thirteen cents levied for that purpose and to create a sinking fund with which to pay the principal.

The proceeding on the part of the board of education and the council is authorized by an act of the General Assembly for the government of cities and towns of the fourth class, found in acts of 1891-92-93. The levy for any one year for maintaining schools, constructing buildings, etc., is limited, or can not exceed fifty cents on each one hundred dollars of value of taxable property, etc.

After the ground had been leased and a contract entered into for the erection of the building, the appellee, a taxpayer, is insisting that no such debt can be created by the council without a submission of the question to the popular vote, as required by section 157 of the Constitution, and the court below so held in which conclusion we concur.

That section provides that "the tax rate of cities towns, counties, taxing districts and other municipalities, for other than school purposes, shall not at any time exceed the following rates," etc., restricting the burden to be imposed for towns and

cities having less than ten thousand population to seventy-five cents on the hundred dollars, with this further provision: "No county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose, and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforcible by the person with whom made, nor shall such municipality ever be authorized to assume the same."

The contention by the appellants is that this section of the Constitution applies alone to an indebtedness for strictly municipal purposes, and the qualification "for other than school purposes" left the matter of taxation alone to the Legislature, when the means to be raised are to be applied solely to the purposes of education under our common school system.

If this construction is given the Constitution, then we find unlimited power in the Legislature on this subject, and the city council, when for school purposes, may be vested with the power to impose any burden, by way of taxation or indebtedness, that in its discretion may be deemed necessary for maintaining schools and erecting buildings for that purpose.

While it is made the duty of the board of education and the council to provide suitable school buildings, they must regard the constitutional limit placed upon their action in creating a municipal in debtedness for that purpose, and the section of the Constitution quoted in express terms prohibits the creation of a municipal indebtedness, "in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without first obtaining the assent of two-thirds of the voters of the municipality."

The qualification other than for school purposes was inserted to leave that question to legislative control; but when the city council proposes, in any manner or for any purpose, to create an indebtedness exceeding the income or revenue for the year, the wish of the voters must be consulted and their assent obtained before the obligation is created.

Schools must be maintained and school buildings erected, and it is the duty of those authorized by law to see that the provisions of the school law in this respect are carried out and to first acquire the assent of the voter is one of the means required to enable those to whom this duty is confided to maintain schools, when the indebtedness about to be created exceeds the sum the council would have the right to appropriate without regard to the voice of the people; nor does the fact that the interest on this indebtedness and the amount going to the sinking fund for the liquidation of the principal is within the income or revenue for each year affect the question.

It is an indebtedness assumed, although payable in installments, that exceeds the income, and is prohibited in express terms by the Constitution. If an indebtedness can be created for $22,000, payable in twenty years, an indebtedness for half a million would be justified if this provision of the Constitution is construed as contended for by appellant.

The very purposes of the Constitution would be disregarded with such a construction, and heavy burdens placed upon the property within the municipalities that caused much complaint

prior to the adoption of the present Constitution, and to remove the mischief the section in question was adopted.

The judgment below is affirmed. (Beard v. City of Hopkinsville, 15 Ky. Law Rep. 756.)

CITY OF SHELBYVILLE, &c. v. SHELBYVILLE WATER AND LIGHT CO.

(Filed June 14, 1894—Not to be reported.)

1. Constitutional limitation upon municipal indebtedness—The indebtedness to be incurred by a city of the fourth class, exceeding its income and revenue for one year, was approved by two thirds of the voters thereof at an election held for that purpose, and the tax rate that will be imposed to pay said indebtedness and all other municipal expenses will only slightly exceed 25 cents on the $100. Held—The indebtedness is authorized under section 157 of the Constitution.

2. Same—The value of the taxable property of the city is $1,350,954, and the indebtedness incurred is $60,750 (less than 5 per centum of the value of the property); therefore, section 158 of the Constitution does not forbid the incurring of such indebtedness.

P. J. Foree and E. B. Beard for appellants.

L. C. Willis and J. C. Beckham for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant is a city of the fourth class, and at the time of the contract with the appellee was not indebted in any sum. By that contract an indebtedness to the extent of some $60,750 for water supply was created, payable in thirteen and one-half years at the rate of $4,500 per year.

This was in excess of the income and revenue provided for any given year, but the obligation was not incurred or contract entered into until the assent of two-thirds of the voters of the city had been regularly obtained at an election held for that purpose.

The tax rate permissible under section 157 of the Constitution is 75 cents on the $100. The present rate in the city in question is 25 cents on the $100, and this rate need be increased but slightly in order to meet the payments as they fall due under the contract, or, for that matter, if the occasion demands it, to meet the interest on the debt and provide a sinking fund for the payment of the principal.

The conditions, therefore, imposed on municipalities in these respects under section 157 and 159 of the Constitution seem to be fully met. Under section 158, of that instrument, the aggregate indebtedness of the city can not exceed 5 per centum on the value of the taxable property therein, and we find the value of the taxable property in this city to have been $1,350,954 at the assessment next before the last one previous to the incurring of the indebtedness in question. So that the contract does not create an indebtedness in excess of the limitation imposed by section 158 of the Constitution.

The incorporation of the appellee appears to have been regular, and the steps leading up to the contract and the terms of same appear to be fully authorized.

The judgment of the lower court to that effect is affirmed.

EVANS' ADM'R v. PAGE'S EX'TX, &c.

(Filed May 26, 1894—Not to be reported.)

Liens—Consideration—A husband's will gave all his estate absolutely to his wife, who was appointed executrix, and directed her to pay all of testator's debts, power of sale of all the estate being given her for that purpose. The will further directed her to continue a partnership business of testator with his son in-law. This the widow did, and to pay debts of such firm she made an absolute conveyance of certain realty belonging to the testator to M. By an unrecorded writing M. agreed to give the wife the benefit of any profit he made out of the realty, when it was sold, above what he had paid for it. The wife finally abandoned all hope of redeeming such land, and abandoned all claim to any interest in it. Then M. sold and conveyed the land to the wife of the son in-law of testator. In an action by testator's creditors assailing this conveyance as fraudulent, Held—

First. Under the will the wife had authority to sell testator's land to pay his debts.

Second. The wife of the son-in-law, being a feme sole, possessed means to pay M. for the land, which she did, and the conveyance was a bona fide one for an adequate, valuable consideration.

Third. The vendee from M. is entitled to a superior lien on the property for what she paid for it, and for all improvements put upon it by her.

E. F. Trabue and B. F. Buckner for appellant.

Walter Evans and Lewis McQuown for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

John H. Page, a Louisville tobacco warehouseman of reputed wealth, died in May, 1878. By his will he gave to his wife, Elizabeth, the whole of his estate, both real and personal, to have and hold absolutely, but requested and directed her in a succeeding clause to pay out of the estate all just debts. He requested her to sell the Louisville property first, if it became necessary to sell any of his real estate to pay debts, but empowered her to sell and convey any of it. He requested and advised her to continue the operation of the Farmers Tobacco Warehouse in Louisville until the 1st of November, 1878, in order to realize as much as possible out of the warehouse assets to meet the liabilities of that business. He nominated his wife as executrix and requested the court to permit her to qualify without bond. The business partner of the testator had been his son-in-law, H. C. Pulliam, and he and Mrs. Page continued the business, not only until November, as provided by the will, but until in 1881, when Pulliam made an assignment for the benefit of creditors.

The proof conduces to show that the new firm made money, but owing to the heavy indebtedness of the old concern of Page Company the assignment was unavoidable. In order to raise money with which to keep up the struggle and pay or renew the paper of the old company Mrs. Page, as executrix, and in her own right, on the 6th of January, 1879, sold and conveyed to H. C. Murrell the testator's real estate in Louisville, consisting of three pieces, for the recited consideration of $15,100, of which $3,000 was paid cash, and for the balance Murrell executed his three notes for $4,000 each, due in six, twelve and eighteen months, with interest from date. It appears that in a former effort to raise money on this property Mrs. Page had conveyed

it to Pulliam, but she had been unable to use the notes, and that arrangement was abandoned. But by reason of that conveyance Pulliam and wife joined in the conveyance to Murrell. This conveyance was absolute on its face, and was put to record; but a few days thereafter a writing, signed by all the parties to the deed, was executed, to the effect that as Murrell was making the arrangement for the benefit of Mrs. Page and H. C. Pulliam, and in compliance with the will of the late J. H. Page, the property was to be sold and any benefit derived therefrom after paying the notes executed therefor was to go to Mrs. Page or such person as she might direct.

This writing provided that "the object and aim of said transaction is to enable E. J. Page and H. C. Pulliam to carry on, settle and adjust the business belonging to the estate of John H. Page, and also the business in the name of John H. Page, & Co.," etc.

It afterwards appeared that these notes were on such long time that they could not be used advantageously, and were cancelled, bankable paper being executed by Murrell in their stead. Renewals of this paper were made from time to time, and finally Murrell paid them off. Later on Mrs. Page abandoned all hope of redeeming the property and with her knowledge Murrell sold and conveyed, in June, 1881, one of the parcels to Mary Page Pulliam, wife of H. C. Pulliam; and daughter of John H. Page, for the sum of $7,000, and in August, 1882, he sold and conveyed to her another parcel for the sum of $4,300. The other parcel he sold to E. H. Brown for $3,000.

These transactions, especially the ones by which Mrs. Pulliam turns up as the owner of two valuable parcels of property, lately belonging to the estate of her father, while the debts of the estate remain unpaid, had a suspicious appearance to some of the creditors, and in an action to settle J. H. Page's estate the appellants, Evans and others, creditors of that estate, came in by answers and cross petitions against Mrs. Pulliam, Murrell and Brown, though as to the last named the case is not pressed, seeking to subject the parcels of land indicated to the payment of their debts.

The chancellor held that the conveyance to Murrell was executed to indemnify him for going on the paper of the executrix to enable her to pay the debts of the old firm of Page & Co.; that Mrs. Pulliam had the means with which to reimburse Murrell, and in good faith paid him the sums named in the deeds to her, and whether she had a perfect title or not under Murrell's deeds she had a superior equitable lien on the property for the sums paid by her to Murrell as for the value of the improvements made by her thereon, and in this conclusion we concur; that Mrs. Pulliam, after she became authorized to trade as a feme sole, 1879 accumulated, even from the beignning of her business as purchasing agent, milliner, etc., an immense profit, is overwhelmingly shown by the proof of the merchants with whom she dealt.

Without regarding her own testimony, that of those who furnished her supplies for her patrons and understood the extent of her business prove her profits to have been several thousand dollars per year.

In 1884-'85, when her health gave way, she was making from $8,000 to $10,000 per year. We agree with the chancellor that she paid Murrell the purchase money called for in his deeds to her out of her own separate funds. There is no evidence of fraud or bad faith on her part or that of Murrell, and in view of the fact that Mrs. Page had clearly abandoned the intention and disclaimed the right to redeem the property, she might well insist

that her purchase from Murrell vested her with the legal title rather than gave her a mere lien on it for her outlay; but as she must be held to have had knowledge of the original intention to permit a redemption of the property, we are not disposed to disturb the judgment putting her in Murrell's place and allowing her such lien as he had.

That Mrs. Page had the right to sell the property is clear, and she might do so either in her executorial or individual capacity. The creditors were to be paid by her and the purchaser was not bound to see to the application of the purchase money, although the lower court found, as a matter of fact, that the money was applied to the payment of the debts of the old firm of Page & Co.

She did sell it, and by a conveyance of record, absolute in its terms, put the title in Murrell.

It is true she secured the right to redeem it by a private writing, but this was abandoned when the looked-for better times did not come to the business. When Mrs. Pulliam bought the property, the record showing absolute title in Murrell, showed, in fact, the true condition of affairs. By regarding her as one who had, in good faith, with her own means, relieved the property of a bona fide lien to Murrell the judgment below giving her a lien for her purchase money and the value of her improvements is approved.

Judgment affirmed both on the original and cross appeals.

ERNST v. SHINKLE.

(Filed May 28, 1894.)

A clause in a will prohibiting the devisees from ever selling the lands devised to them is void, being in conflict with the statute prohibiting the creation of a perpetuity in real estate; and the devisees, who were vested under the will with a fee simple title, have power to sell and convey title to the estate devised in spite of such attempted limitation upon their power of alienation.

Richard P. Ernst for appellant.

J. W. Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Pryor.

Amos Shinkle died in the city of Covington in the year 1892, leaving a last will that was admitted for probate and is now in this court for construction. He left his wife and one son, Bradford Shinkle, survive him. The will, or that part of it for constructin, reads: "I give, devise and bequeath unto my dear and faithful wife, Sarah Jane Shinkle, and my son, Bradford Shinkle, all the remainder of my property, of whatsoever kind, in equal parts to each one, to share and share alike in every particular, except that the home house, No. 165 East Second street, Covington, Ky., and all the household furniture, of whatsoever kind belonging to A. Shinkle, shall belong to my wife during her lifetime; also the farm in the country called 'Center farm;' also the carriage and pair of horses; also the home stable and greenhouse attached to the home dwelling in the city of Covington, Ky., at 165 East Second street. These last named articles and real estate are to belong to my wife, and at her death it shall revert to my son, Bradford Shinkle, and his heirs. Bradford Shinkle shall be permitted to live in the home dwelling with his family during

his lifetime free from house rent. Taxes on the home dwelling, as well as other taxes, shall be paid out of the common fund. I further declare and say that it shall not be lawful to sell any of my real estate, unless it be the home dwelling, when, if sold, funds shall be invested in other real estate, which shall never be sold, but remain for a perpetual investment of the estate of A. Shinkle. and only the revenue arising therefrom shall be used.

"I further consent that if it should be thought best the farm in the country called 'Center farm' may be sold either by my wife, or if sold in her lifetime it may be sold by my son, but the proceeds thereof must be invested in real estate and held as other real estate is held in this, my will, not to ever be sold. * * * I hereby appoint my wife, Sarah Jane Shinkle, and my son, Bradford Shinkle, my executors, without security, with full power to do and perform any and all things that I could do if I was living, except as above stated (in regard to selling my real estate.")

The testator owned a lot of ground having no connection with the residence property on Sceond street or the Center farm nor is it encumbered in any manner by other provisions of the will or made the subject of a specific devise.

This lot of ground, as the pleadings will show, was sold by the devisees, the widow and Bradford Shinkle, to John P. Ernst, the appellant, and he declines to accept a deed from them on the ground that they have only a life estate, or at least are not vested with fee simple title.

The plain purpose of the testator was to prevent any sale of his realty for all future time, and also to vest the title in his devisees, with the right of alienation taken from them. This restraint upon alienation is not made a condition upon which they may accept the title, but a vesting of the fee or an attempt to do so in such a way as to prevent any sale or conveyance of the property, and in this manner create a perpetuity. What property he permits to be sold the proceeds he requires to be invested perpetually, withholding in express terms all power of disposition by his devisees.

While this devise does not create an estate tail or a perpetuity as defined by the common law, still the provisions of the will are in direct conflict with our statute on the subject. Section 27 of chapter 63, General Statutes, provides: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of a life and lives in being at the creation of the estate, and twenty-one years and ten months thereafter."

In this case all power of alienation is taken from the devisees in express terms, and the provision of the will by which alienation of the estate is prohibited must be held void and of no effect. Nor is there any attempt to create a life estate except as to the homestead on East Second street and the farm known as Center farm. This particular reality is given the wife for life, remainder to the son Bradford and his heirs, which creates a vested remainder in fee in Bradford as to this estate; and as to all the other realty, inlcuding the lot in question, the fee simple title is in the devisees, the widow and the son Bradford.

There was no purpose on the part of the testator to create a life estate on any of the realty except as to the homestead and the Center farm, and the fact of his creating a life estate as to this particular real estate in the widow, remainder to his son, negatives the idea of the testators' intention to create a less estate than a fee as to any other part of his realty. The testator doubtless believed he could pass the fee restricting the devisees in the

power of alienation so as to create an estate that could never be disposed of, and that would pass by descent from his devisees to those who would inherit from them, never at any time passing by conveyance or devise by those who took or held the realty through or from his immediate devisees.

Such was his plain intent to be gathered from his will. The only limitation placed by the testator on the estate devised to the appellees is that inhibiting its alienation, and such a limitation being void, the appellant must accept the deed tendered him and pay the purchase money. They have the fee simple title. The judgment below, according with this view, is now affirmed.

R BERTS, &c. v. LOUISVILLE SCHOOL BOARD.

(Filed May 31, 1894—Not to be reported.)

1. The school board of a district, or of a city composing a district, may so change the school building therein as to require white children to attend a school building previously used as a colored school, and the colored children to attend the school building theretofore used as a white school.
2. The right of the school board to thus exchange the white and colored school buildings is not affected in any degree by the effect such an exchange may have upon the value of property near the two school buildings.
3. The act of January 31, 1873, releasing the school revenue of Louisville of the burden of paying money into the sinking fund of the city to pay certain bonds, and permitting the school board to establish school buildings to provide adequate educational facilities for colored children, did not impress upon the schools thus created an exclusive use or trust for the colored children alone. The school board still retains general control and management of such schools for educational purposes.

Simrall & Bodley for appellants.

Randolph H. Blain for appellee.

Appeal from Jefferson Circuit Court, chancery division.

Opinion of the court by Judge Pryor.

The Louisville school board' having the management and control of the schools and the school buildings in the city of Louisville, that city being a school district in the territorial division of the State, thought proper to change the schools so as to have the colored children attend the school in a building located at Ninth and Magazine streets instead of the school in which they were being taught in a building at Sixth and Kentucky streets.

They are both school buildings, and the reason for making the change by the board is that the building at Sixth and Kentucky streets woud be more convenient to the white children, and that at Ninth and Magazine streets in the center of a large colored population. The question made is, has the board of education the power to make tihs change? For if this right does not exist, the convenience or inconvenience resulting to the pupils or patrons of either school, if the change is made, can not affect this question.

It is evident the board of education, under our general system of schools, is charged with the supervision of the education of both white and colored pupils, and their power extends to providing suitable school buildings, with competent teachers, the expenses to be paid out of the common fund. We know of no

other trust connected with this school property than the application of its use to the education of the children of the State, and when diverted to some other use the trust is violated, and those interested have the right to complain.

The school building, or the ground upon which it stands, was purchased by the board of education and paid for out of funds appropriated to school purposes, and an ordinary deed made to the board in April, 1873. This deed is like all other deeds made to trustees for school purposes under and by virtue of our common school laws. There is nothing in the conveyance that creates a trust for the colored population, excluding the whites, or that would prevent the building being used by the whites, the board at the same time affording like facilities for educating the colored children in the way of buildings, etc. There is no attempt to deprive the one race of proper school buildings for the benefit of the other. The building in which the colored children are to be removed or taught is equally commodious and of larger dimensions, and the judgment of this board of education must control unless there is shown a manifest purpose to abuse the trust confided to them.

It is claimed by the appellants that the act of January 31, 1873, under which the fund was obtained to purchase the building or ground at Sixth and Kentucky streets, created a trust for the exclusive use of colored children.

The preamble of that act reads: By an act of January 17, 1870, the great council of the city was authorized to issue and deliver to the school board eighty-five bonds of $1,000 each. The sinking fund was charged with them, and the receiver of tax required to pay out of school revenues sufficient to pay interest and principal at maturity, etc.

"And it has been represented that if the school revenues are relieved of the payment to the sinking fund of the remaining sixty-four bonds, twenty-one having been paid, and the sums thus relieved appropriated to the construction of these school houses for colored children in Louisville, the school board will be enabled to provide adequate educational facilities for the colored children of said city; now, therefore, to effectuate these ends," etc.

This school revenue, instead of going to the sinking fund, was permitted to be used by the board for the construction of these schoolhouses for colored children, to be located in the eastern portions and central portions of the city.

"The schoolhouses and the schools to be established and operated as the act provides therein shall be under the control and management of said school board."

Under our school system there are separate schools for colored and white children, and the trustees of the schools are required to provide facilities for educating both races, and the money to be applied for that purpose is taken from the common fund, and that fund raised by taxation.

There is no distinction or rather discrimination in favor of the one class over the other, and the schools only required to be separate. The effort to increase the facilities for educating the colored race was in its inception about the time of the passage of the act in question, and its purpose was to give to the board of education adequate means for supplying such school buildings as might be necessary or by them thought to be necessary for that purpose. Since that time schools and school buildings in which colored children are taught have increased, not only in the city

of Louisville, but throughout the State, the buildings and teachers paid out of the fund, raised by general taxation for school purposes.

The fund with which this building was purchased or constructed was a part of the school revenues, collected from white and black, and it could not have been designed by the Legislatuure to take this much of the shool revenue and create a perpetual trust in the three buildings for the education of the colored children in Louisville, but, on the contrary, the act provides in express terms that these buildings and schools are to be established and operated under the control and management of the school board. Both buildings are the property of the State, purchased and paid for from a fund raised by general taxation and dedicated to school purposes. The taxpayers of the municipality, both white and black, contribute to discharge this burden, and the school board or the trustees, acting as the mere agents for the State, are required by law to see that proper facilities are afforded both races for their education.

The construction given the act of January, 1873, by the appellants is not warranted by its language, and if adopted would sub vert the whole system as to the control of schools and school buildings by the trustees designated by the State for that purpose. It would in effect single out the colored population in the city of Louisville to the exclusion of all others upon which to donate a fund of $65.000 with which to erect buildings that could be used by that race only, and when the fund from which it was raised was the property of the State, to be used by both white and black under the control of trustees selected for that purpose. These buildings are as much the property of the State or its creation the municipality of Louisville as the school buildings in any school district outside the city, and no such trust as is contended for by the appellant was placed upon them by the act under consideration.

The effect of the location of this school will have or does have upon the value of the property located near it is not to be considered.

The judgment below dissolving the injunction is affirmed.

KREMER v. BULL.

SAME v. SAME.

(Filed June 16, 1894—Not to be reported.

Where the annuity, with payment of which testator's estate is charged, is less than the annual income of the estate, and advancements have been made to pay such annuity, the chancellor should order a sale of only so much of the realty as will pay the amount of such advancements. It is erroneous to anticipate annuities that are to fall due in the future and order a sale of realty to provide a fund for payment thereof before they become due.

In this case some plan ought to be devised by which the widow could take an absolute interest in discharge of her claim to an annuity which is consuming the entire estate.

Ernest Macpherson, C. B. Seymour and Byron Bacon for appellant.

John C. Russell for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This case is again here upon a judgment directing a sale of a part of testator's realty to pay the annuity to his widow. There is one indebtedness already accrued of $17,000, as is alleged, for money advanced by the appellee in paying this annuity to the widow, and a sale of real estate asked, amounting in value to $30,000, and perhaps more, to raise funds in anticipation of the wants of the widow and to meet the monthly payments provided for the widow by the will of her husband.

This estate is being frittered away for some reason until out of a large and valuable property there is but a small remnant left with which to pay the charges upon it created by the will. The loss of the value of the proprietary medicine, from which a large income was derived, has greatly lessened the value of the yearly income, and the constant demand for money to be derived from a sale of the realty will soon exhaust that part of the estate.

It is not only erroneous, but a judgment selling this realty for debts not incurred must be held void, and for this reason the chancellor should not anticipate the claims the widow may have upon the estate and sell the realty for that which is not a debt, and which may never become one.

The sums advanced are a charge upon the estate, and must be paid, if a sale of the realty (not specifically devised) is necessary for that purpose. It seems to us, by way of suggestion only, there should be some accounting or settlement of these large claims, with proof satisfactory that these moneys have been advanced.

The value of this estate has been so much lessened that some plan should be devised by which the widow could take an absolute interest in discharge of her claim, so as to prevent the retention of the case on the docket, and constant sales of realty made from time to time for the widow's support that must result in a sacrifice of the property and the entire destruction of the estate except such as has been specifically devised.

The judgment below is reversed on the exceptions by the purchaser, with directions to set aside the sales and for proceedings consistent with this opinion.

This opinion applies to both appeals, that of Chas. Kremer and Henry Kremer. (Meddis v. Bull's adm'r, 13 Ky. Law Rep., 767.)

COMMONWEALTH v. CLIFFORD.

(Filed September 22, 1894.)

Indictment—Embezzlement—It is not necessary that the owner of the money or property taken should consign it directly to the person who takes and appropriates it, in order to make the crime committed the statutory offense of embezzlement. The crime is complete if the accused, being intrusted with and in lawful possession of the property, fraudulently takes and carries it away with the felonious intent to appropriate it to his own use.

Therefore, an indictment for embezzlement is sufficient which alleges in substance that the accused, being an agent of the Adams Express Co. at Stanford, Ky., fraudulently and feloniously converted to his own use $100 which had been entrusted to said express company at Dallas, Texas, to be conveyed and delivered by it to H. at Stanford, etc.

Wm. J. Hendrick and J. S. Owsley, Jr., for appellant.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Lewis.

The question on this appeal by the Commonwealth is whether the lower court properly sustained a demurrer to the following indictment: "The grand jury * * * accuse Frank L. Clifford of the crime of embezzlement, committed as follows: The said Frank L. Clifford, * * on the — day of May, 1892, and before finding of this indictment, being a servant in the employment of the Adams Express Company at Stanford, a co-partnership authorized to do business and doing business as a common carrier of packages of money, goods and other things of value, did fraudulently and feloniously convert to his own use $100, * * which said money thus appropriated had been entrusted to said Adams Express Company at Dallas, Texas, to be conveyed by it to Stanford and delivered at said place to one M. E. Hulett, the owner, and entitled to possession of the same. But said Clifford, who was the servant and local agent of said Adams Express Company at Stanford, received said package which was conveyed by said company to Stanford and entrusted to said Clifford as agent aforesaid, to be delivered to said Hulett, and the said Clifford failed and refused to deliver said package to said Hulett and fraudulently embezzled and converted same to his own use," etc.

Embezzlement, as defined in Bishop on Criminal Law, section 567, upon authority of numerous cases cited, is a sort of statutory larceny committed by servants and other like persons where there is a trust reposed, and, therefore, no trespass; so that the act would not be larceny at the common law. And in Bouvier's Law Dictionary, volume 1, page 586, it is said in relation to various statutes in this country and England on the subject: "The general object of these statutes doubtless was to embrace as criminal offenses, punishable by law, certain cases where, although the moral guilt was quite as severe as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party secured him from punishment."

The distinction between the two offenses and reason for making what is called embezzlement, punishable by statute being so plain, the simple inquiry in this case is whether the offense as charged is provided against in section 1203, Kentucky Statutes, as follows: "If any carrier, porter or other person to whom money or other property or thing which may be the subject of larceny may be delivered to be carried for hire, or any other person, who may be entrusted with such property, embezzle or fraudulently convert to his own use, either in mass or otherwise, before delivery thereof at the place or to the person to whom the same were to be delivered, he shall be confined in the penitentiary not less than one nor more than five years."

It seems to us all the essential conditions of a complete offense under that section are stated in the indictment. It is alleged the accused wrongfully and fraudulently took and carried away the property of another with felonious intent to convert it to his use, which would have constituted larceny but for the fact the money was entrusted to him to be delivered to the owner; that made the act embezzlement described in and made punishable by the statute referred to.

It does not seem to us at all necessary that the owner should consign directly to the person who takes and appropriates the money or property in order to make a complete offense, it being sufficient if the accused being entrusted therewith, and in lawful possession thereof, fraudulently takes and carries away such per-

sonal property with felonious intent to appropriate it to his own use. Otherwise servants and agents, who have better opportunity to commit and more frequently commit the offense in question than any other class of persons, would in nearly every case escape.

In our opinion it was error to sustain demurrer to the indictment, and the judgment is reversed and case remanded that the demurrer be overruled and other proceedings consistent with this opinion be taken.

BOWMAN v. COMMONWEALTH.

(Filed September 22, 1894.)

1. The appellant ought to have been granted a change of venue, the evidence showing very great prejudice against his case in the county where he was tried.

2. While an officer attempting to arrest one for a misdemeanor may not shoot or kill the defendant merely to prevent his escape by peaceable means; yet if the defendant resists arrest with a deadly weapon, or in such a manner as to make it apparent that the officer can not make the arrest without subjecting himself to danger of death or of great bodily harm, he may shoot; and if he kills the defendant thus resisting, the homicide will be justified.

3. There was no evidence to show the existence of a conspiracy to kill the deceased between the judge who issued the warrant and the officer who attempted to execute it, and, therefore, no instruction on that subject should have been given.

Dishman & Hays and John T. Hays for appellaant.

Wm. J. Hendrick and W. R. Ramsey for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Pryor.

The appellant in this case was jointly indicted with Stephen Jones for the murder of Wm. Reeder, and on the trial was convicted and sentenced to the State prison for life.

It is charged in the indictment that Bowman and Jones conspired and agreed with each other to take the life of the deceased, and in pursuance of the conspiracy the offense was committed. Other counts in the indictment charged the one with aiding and abetting the other in the commission of the felony.

At the time of the killing the appellant, Bowman, was deputy marshal in the town of Barbourville, and Jones, who is indicted with him, the police judge of that town. Jones had issued a warrant for the arrest of the deceased for disorderly conduct and placed it in the hands of the appellant for execution.

The unfortunate young man, excited by liquor, was flourishing his pistol in the streets of the town where many people had congregated on that day, it being county court. He was defiant and evidently proposed to resist any arrest, and the want of vigilance on the part of those entrusted with the execution of the law led him, no doubt, to believe that he would not be molested by any of the town officers. He was not content with having his own way on the streets of the town, but about 8 o'clock at night he entered the private dwelling of Mrs. Thompson, whose daughter was entertaining some company, and presented his pistol at a young man calling upon her, and forced him to leave the room, and when the young man left presented the pistol at Miss Thompson. The noise and excitement produced from the conduct of the deceased caused the appellant to proceed to Mrs. Thompson's

house, and when he entered the pistol was presented at him more than once, and the hand in which the pistol was held, knocked down by Mrs. Thompson and the parties told to leave her house.

The appellant was evidently in fear of the deceased, at least neither himself nor Jones attempted to arrest him at that time. After he left the house of Mrs. Thompson the police judge issued a warrant for his arrest, and placed it in the hands of the appellant, and when the deceased was told of the warrant and the intention of the officer to arrest, he defied both the appellant and Jones, presenting his pistol at the appellant, saying that they and fifteen more men could not arrest him. He declared that the police judge could not have him arrested and he did not intend to be arrested by him or by any one with a warrant from him.

When the arrest was finally attempted, with the purpose on the part of the officer to at once execute the writ, the deceaed kept his pistol leveled upon him, but, when shot, was shot in the back of the head. It was after night and there were four or five pistol shots, and the appellant admits that when he fired the fourth shot he did not see the deceased, and this doubtless was the shot that killed the deceased.

The appellant and the deceased were on friendly terms, and the officer was constantly endeavoring to induce the deceased to submit to the arrest, and offered if he would do so to take him to his home and keep him all night and not to the jail, but instead of listening to the conciliatory proposals of the officer it is manifest from this record that the purpose of the deceased was to take life before he would submit to an arrest by him.

One witness states that the appellant said there would be a killing in town about 12 o'clock that night, and this proof, together with the fact that the appellant and Jones were consulting together and had determined to arrest the deceased, has been regarded as evidence of a conspiracy by the two to murder the deceased, and an instruction based upon that hypothesis given the jury.

What is the duty of an officer with a warrant of arrest in his possession against one charged with a misdemeanor, when confronted with a pistol in the hands of the accused, accompanied with the declaration that he will not submit to the mandate of the Commonwealth, would a return upon the writ, that the defendant by force and arms had prevented its execution, be held sufficient? or, when furnished with a posse, or after summoning law-abiding men to aid in the arrest, will the further response that the accused still defies arrest with pistol in hand be deemed an excuse?

We think not; nor will the fact that his own life was in imminent peril protect the officer from punishment for a failure to discharge his duty. If the law is not made supreme and its mandates obeyed and executed by officials entrusted with such duties, then the citizen is without protection, our social and governmental system destroyed and the process of the law made ineffectual by the presentation of a pistol at the breast of the officer who attempts to execute it.

In the case of a misdemeanor the mere effort on the part of the party charged to escape arrest or to avoid the officer or to flee when arrested will not justify the officer in taking his life, as held by this court in Doolin v. Commonwealth, 15 Ky. Law Rep., 408; but where the resistance to an arrest is with a deadly weapon, and it is apparent the officer can not make the arrest without subjecting himself to the danger of great bodily harm or of losing his own life, he may shoot.

Here the resistance to lawful authority was kept up—the deceased, armed with a deadly weapon and intending, as his conduct clearly evidenced, to use it, and if the appellant had reasonable grounds to believe he would use it, the law did not require him to risk his own life in order to save the life of one who was violating the law, and by force preventing the officer from discharging his duty. Mr. East says: "It may be premised generally that where persons having authority to arrest, and using the proper means for that purpose, are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable." (1 East. P. C., 295.)

"In misdemeanors and breaches of the peace, as well as in cases of felony, if the officers meet with resistance and the offender is killed in the struggle, the killing will be justified." (2 Bish. Criminal Law, 633, 3d ed.)

"Although an officer must not kill for an escape, where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground to believe his life is in peril, he may justify in killing the party." (1 Russell, 857, 9th ed.)

"So long as a party liable to arrest endeavors peaceably to avoid it he may not be killed, but whenever by his conduct he puts in jeopardy the life of any one attempting to arrest him, the act of killing him by those authorized and attempting to make the arrest will be excused." (State v. Wylie Anderson, S. Carolina, Hill, volume 1, page 213.)

Protection must be afforded ministerial officers in the discharge of their duties, and while the life of one charged with a minor offense ought never to be taken, although resisting arrest, unless absolutely necessary, still the order of arrest must be executed, and where the officers are resisted with such force as the use of a deadly weapon, or the attempt to use it in order to prevent the execution of the writ, he can meet it with like force if necessary to enable him to discharge his duty and to protect his own life or to save him from great bodily harm. He is not compelled to retreat, but can use such force as will enable him to take the body of the party charged and to overcome the resistance offered him.

There is no evidence that we can perceive of any conspiracy to take the life of the deceased by the parties to the indictment, and no instruction should have been given to that effect. The court below seems to have overlooked the necessity of informing the jury as to the duty of the appellant when the order of arrest was placed in his hands.

It was his duty to make the arrest, and to use such force as was necessary for that purpose, and, if the deceased resisted the arrest by the use of a deadly weapon, the accused had the right, if he believed, and had reasonable grounds to believe, that the deceased would shoot him if he attempted the arrest, to use his own weapon, even to the taking of the life of the deceased if necessary to enable him to execute the warrant, and the jury should have been so instructed.

When this case was called for trial the appellant moved for a change of venue, and the court refused to grant it, and as the case must go back it is proper to pass on that question. It is plain that those connected with the deceased, either by relationship or the ties of friendship, were much incensed at the conduct of the appellant, and the excitement ran so high as to cause the defeat of the county judge who had granted bail to the appellant. The witnesses for the State, who think the appellant could ob-

tain a fair trial, all, save one or two, concur in the statement that all those who had spoken out on the subject regarded the shooting as a bad murder. The newspaper contained a defense by the county judge of his action in granting bail, and was made in response to a published statement of the father, detailing the circumstances of the killing.

The witnesses for the defense, many and perhaps all of them, having but little interest in the defendant, he having lived in the county but a short time, state that he could not have a fair trial, by reason of the prejudice against his case, and the influence of those connected with the deceased. In our opinion the change of venue should have been granted, and for that reason, in connection with the errors of the trial court already referred to, this judgment of conviction is reversed and the case remanded for a new trial and for proceedings consistent with this opinion.

The bill of exceptions is properly a part of the record.

DOOLIN AND COPE v. COMMONWEALTH.

(Filed June 16, 1894—Not to be reported.)

The written declaration of the deceased, made shortly before his death, and beginning "believing myself to be now on my deathbed," was made under a belief of impending dissolution, and competent against defendants as a dying declaration.

W. O. Bradley for appellants.

Wm. J. Hendrick for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Bennett.

The appellants were convicted of the crime of manslaughter for killing W. T. Watson. It seems that Doolin was a constable, and tried to arrest Watson for a misdemeanor and summoned Cope to help him; that Watson ran, and in the pursuit Doolin shot him, from the effect of which the jury found that Watson died; the jury also found Coke guilty as aider and abettor.

The material facts of this case will be found in 15 Ky. Law Rep., 408, the case having been here once before. Doolin claims that he shot Watson in self-defense. He does not claim that he had the right to shoot him to prevent his escape.

Upon the trial of the case the court permitted the dying declaration of Watson to go to the jury. The declaration, as written, reads: "Believing myself to be now on my deathbed," etc. It is contended that this is but the expession of an opinion, etc., and is not certain enough to make it a dying declaration; but it seems to us that it does express the belief of "impending dissolution," for it means that the deceased was then in bed wounded, and that he believed he would die upon that bed of that wound. Besides, he had not long before been told by his doctors that there was no hope for him. The declaration was properly allowed to go to the jury.

The court gave the jury eight instructions, which covered the whole law of the case. The appellants objected to the fourth instruction only. We think that instruction is correct. The refused instructions were properly refused. The evidence authorized the verdict. We see no error in the record.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

HUNTER v. THE TAYLOR COAL CO. OF KY.

(Filed June 20, 1894.)

1. Water courses—Draining poisoned water from coal mine into creek—Where the owners of a coal mine drained the mine into a creek, so impregnating the water of the creek with copperas and other deleterious substances as to render it unfit for domestic or farming purposes to the lower riparian owners and as to kill vegetation when the creek overflows its bed, the plaintiff, who owns a tract of land lying on the creek below the mines, is entitled to recover the damages sustained by him in consequence of the poisoned water, and in this action brought by him for that purpose the court erred in instructing the jury that if the drainage from the mine was necessary to enable the defendant to operate the mine, and was done in a proper manner, the plaintiff could not recover.

2. Same—Measure of damages—As the injury is not necessarily of a permanent character, the damages occasioned by the deprivation of the use of the water for domestic or farm purposes, and the injury to plaintiff's vegetation up to the time of trial is the criterion of damages. The instructions limiting the recovery to the time the action was instituted were erroneous.

E. D. Guffy, Guffy & Ringo and J. A. Smith for appellant.

Taylor & McHenry for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Barbour.

The defendants own and operate a coal mine on Lewis creek, in Ohio county. It is necessary in the operation of the mine to drain the water from it, and to that end they dug a trench through which the water is emptied into Lewis creek. This water is so impregnated with copperas and other deleterious substances that it poisons the water in the creek and renders it unfit for domestic or farm purposes to the lower riparian owners, and when the creek overflows its bed the poisoned water kills the vegetation with which it comes in contact.

The plaintiff, who owns a tract of land which lies on both sides of the creek below the mines, brought this action against the defendant to recover the damages sustained by him in consequence of the poisoned water. Upon the trial the court instructed the jury that if the drainage from the mine was necessary to enable the defendants to operate the mine, and was done in a proper manner, the plaintiff could not recover. A verdict and judgment having been rendered against the plaintiff, he appeals.

In Pennsylvania Coal Co. v. Sanderson, 113 Pa. St., 126, the Supreme Court of Pennsylvania held that no legal liability was incurred by the natural and lawful use of his land by the owner thereof in the absence of malice or negligence; and that one opening a coal mine in the ordinary and usual manner may, upon his own land, drain or pump water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the

water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. This case accords with the defendant's contention, but we can not regard it as a correct enunciation of the law as applicable to the facts of the case which the court was deciding, or the case which is now before us. It is at war with the first principles governing the right of property, and is in conflict with every other case involving the question to which our attention has been called. The opinion itself was delivered by a divided court —four judges concurring and three dissenting. It overruled a prior opinion delivered by the same court in the same case. The cases and illustrations relied upon to support the opinion, in our judgment, fall far short of it. A man has a right to make a pond upon his land, and if from some unavoidable casualty the walls are swept away and the water flows upon his neighbor's land and detroys his crops, it is a case of damnum absque injuria. So a man has the right to put a mill upon his land, and if without his fault it should burn, and in the burning destroy his neighbor's property, the neighbor must suffer the loss as the result of inevitable casualty. Such are the illustrations relied upon to sustain the opinion.

The difference between the supposed cases and the case the court was trying is manifest. A man is not responsible for an injury caused to another by the act of God; but no one has the right, in the use of his property (that he may thereby obtain profit), to destroy the property of another. A citation of authorities to support this statement would be superfluous. Kinnard v. Standard Oil Co., 89 Ky., 468, though attempted to be distinguished by counsel, is a case in point; indeed it was a much stronger case for the defendant. There the only serious question was whether an action would lie for contaminating the subterranean water that flowed into the plaintiff's spring, it being conceded that if it had been surface water, or a vein of water underground, with a well defined and known channel, that the right of action would undoubtedly lie.

If counsel's contention, that one has the right, in a prudent manner, to use his property to the best advantage, although it results in the destruction of his neighbor's property, is correct, the neighbor would have the same right, and thus an irrepressible conflict would arise. We have not lost sight of the fact that the mining business is an industry of great importance, and one which Kentucky looks forward to as the surest source of its development into a greater and richer State. But the right of acquiring and protecting property is one of the inherent and inalienable rights guaranteed to the people, and even the most urgent public necessity (unless it be in a case of the greatest extremity) will not authorize the taking or destruction of a man's property without compensation.

The demurrer to the second paragraph of the answer should be sustained.

The injury is not necessarily of a permanent character, and the damages occasioned by the deprivation of the use of the water for domestic or farm purposes and the injury to his vegetation up to the time of the trial is the criterion of damages. The instruction limiting the recovery to the time the action was instituted was erroneous.

The judgment is reversed and the cause is remanded for a new trial.

Judge Barbour delivered the following response to the petition for rehearing:

That the petition presents a good cause of action does not admit of serious question. While the petition does not in terms say that the plaintiff is the "lower riparian owner," it does state facts which show that he is.

The court does not say in its opinion, as counsel claims, that "the injury is permanent." What the court does say is "the injury is not necessarily of a permanent character, and the damages occasioned by the deprivation of the use of the water, etc., up to the time of the trial is the criterion of damages."

The petition for rehearing is overruled.

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KENTUCKY COURT OF APPEALS.

NEEL, &c. v. NEEL.

(Filed May 19, 1894—Not to be reported.)

1. The grandmother executed the deed conveying the land to the children of her son, with a clear conception of the act she was doing, and without any fraud being practiced or undue influence exercised over her; she has since changed her mind and wishes to cancel the deed, but the evidence does not authorize the decree granting the relief she asks and setting the deed aside.

2. An executed contract will not be cancelled merely for inadequacy, improvidence, surprise and hardships, although these are sufficient grounds for a refusal to enforce specific execution of an executory contract.

Thos. H. Hines, B. L. D. Guffy and W. S. Taylor for appellants.

Edward W. Hines and W. A. Helm for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Hazelrigg.

In August, 1889, Julia A. Neel conveyed to the bodily heirs" of her son, Ewdard Neel, meaning, as she explained in the deed, his children then living and such as might thereafter be born to him, the undivided one-half of about 140 acres of land on Green river, Kentucky, worth some $500 or $600, reserving to herself, however, the use and control thereof during her life.

This conveyance to the children, of whom there were three and all infants of tender years, was at once acknowledged by the grantor before the proper officer, delivered to the father and put to record in the Butler County Court clerk's office.

In January, 1891, the grantor brought this suit to set aside the conveyance upon the ground that it had been obtained from her by the false representations of her son Edward, the father of the grantees, and because she had mistakenly executed a deed when she had intended to execute an instrument over which she would retain control, with power to revoke and alter it as she might see fit. The averments of the petition were all denied, and upon final hearing the chancellor set aside the conveyance.

The grantor testified that she was 66 years of age; had but little education or experience in business; had relied on her son Edward since her husband's death, some nine years before, to attend to her business; that she had made the deed because "Edward said that the other children were breaking him up, selling his interest in the home place and the redemption right to it. I thought," said the witness, "that I would deed him my one-half interest in the home place (my husband's estate owning the other half) to make him a home, if he needed it, since he told me they were breaking him up, but I always thought and aimed to take it back when I wanted to." She said he made the impression on her that the other children were getting more than their share of the estate, and that she had learned afterwards, by what people had told her, that this was not true, but that she didn't know it herself; that the other children had told her that "they had not gotten what was justly due them." Of the deed she said she expected Edward to keep it, but he told her he would take it to the office. Whether she told him to have it recorded, she didn't remember. Afterwards she got it and burned it, and thought by doing so the right or title she had conveyed was thereby revoked.

On cross-examination she was asked if Edward had requested her to make the deed in question. Her answer was, "I don't know that he did, but that he had told her at different times how the other children were treating him, and that was the reason she had made the conveyance. She also proved that she was a witness for Edward in the suit of the other children against him, and thought there were things done that ought not to have been done.

When asekd the direct question if Edward had asked her to make the deed, or if she had made it because she thought he had been wronged by the other children, she answered: "I made it because I thought they had wronged him, but I didn't aim to put it beyond my reach."

From the other testimony in the case we learn that the grantor was a woman of fair business capacity and of ordinary intelligence. A good business woman, says her brother, and capable of attending to her own and protecting her own interest. She was shown to have contemplated giving the land to Edward or his children ten or twelve months before she actually made the deed. She spoke of the children beating Edward in the Hudson and Jack Githers, matters; said they were wrong, and she had her brother counted up some $200 or $300 of this matter, and she avowed her intention "of making it back to him," and intended it for his children. She intended to give it by a deed, and not by a will. She was afraid to make it by will, as the other children "might law it out after she was dead."

The draftsman of the deed gives a full history of its execution, and the intelligent method with which the grantor indicated her puproses. At about the same time she made a will, giving her personal estate to her children equally, and also had her attorney to prepare a lease of the land in dispute. Her physician testified that he had known her since 1854, and regarded her as a woman of very fair business ideas in the ordinary affairs of life, with a practical rather than an ornamental education.

The circuit clerk had boarded with her in 1883, and thought she was a splendid financier; and a short while before making the deed she had called him in and told him of her intentions, though he did not think, in anwer to a question on the subject, she would know "what was necessary to make a will or deed

effective, or the difference in what was necessary to make a deed effective and a will effective."

In March or April, 1890, she was shown to have said to a witness that "the reason why she had fixed her business as she had was because Edward had been better to her than the other children."

We have thus given the facts with some minuteness because the conclusion we have reached of their legal effect differs from that of the chancellor. It seems to us that the grantor was entirely capable of doing what she did, and had a clear conception of the thing done. In no particular was she overreached or influenced by any false statements so far as shown by the proof. Certainly no fraud was practiced on her, and there is no mistake shown. As she admitted in her testimony, she simply "changed her mind."

We do not doubt, in a case like this, the chancellor should require only slight proof of undue influence or fraud or mistake to authorize a vacation of a conveyance, but there should certainly be some proof to that effect compatible with reason. Here the conduct of the grandmother of these infant grantees was entirely natural and reasonable. She was familiar with the litigation in which their father had been "broken up," and from her own knowledge we may presume felt that he had been wronged.

During the years she had lived with him she had no complaint to make of his treatment of her, and while making an adjustment of her business affairs, making her ill, and leasing the property, she remembered, doubtless, that her son had been "better to her" than the others, and so made the conveyance in question. She has since gone to her reward.

This is not an executory but an executed contract, and to effect a rescission "inadequacy, improvidence, surprise and hardships are not sufficient, although they will induce a chancellor to refuse specific performance."

The ground upon which courts of equity proceed in rescinding or cancelling executed contracts "is more narrow, and to be more carefully trodden than that upon which they refuse specific performance or even decree executory contracts to cancellation. Nothing but fraud or palpable mistake is ground for rescinding an executed contract." Graham v. Pancourt, 6 Casey, 89; Nace v. Boyer, 6 Casey, 109.)

Judgment reversed, with directions to dismiss the petition.

WHEAT, &c. v. McBRAYER.

(Filed May 22, 1894.—Not to be reported.)

Where joint owners of land mortgage it to secure a joint debt and one mortgagee owes the larger part of the debt, the others being merely his sureties as to it, a division of the land between the joint owners ought to be made before the land is sold to satisfy the mortgage lien, especially when it appears that the interest of the principal debtor in the land will nearly satisfy the entire debt, and that the land, after such division, will sell more advantageously than if sold as a whole. After the division the land of the principal debtor should be first sold.

Bell & Bell for appellants.

L. W. McKee for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hazelrigg.

In his action to sell the lands of the appellants, under mortgage to him, the appellee, at the November term, 1892, of the Mercer Circuit Court, obtained a judgment directing the commissioner to sell the interests of each of the defendants in the two tracts of land embraced in the mortgage, but Lock and wife, who were joint owners of the property, not having been made parties, as was shown by the answer of the appellants, the court directed that no sale be made until they were brought before the court.

The court further directed that after the succeeding term, and after Lock and wife had been summoned in the action, the dower interest of the defendant, Sarah E. Wheat, was to be allotted to her by three commissioners appointed by the court, and the residue divided between the mortgagees, L. W. and J. B. Wheat and the Locks, the Wheats getting one-third each and the Locks one-third, and as L. W. and J. B. Wheat owned a two-third interest in the same, that interest was also to be sold. Thus the entire interest in the land held by the mortgagors was to be subjected to the payment of the debt, but not utill after the allotment and division indicated. This seems to us to have been entirely proper. The answer had disclosed that of the debt for $7,000 against the land, L. W. Wheat owed $4,550, and the remainder was the joint debt of all. This was known to the mortgagee when the debt was created. It was admitted, however, that as to the mortgagee each owed the whole debt. The answer also disclosed that upon L. W. Wheat's one-third interest being set apart to him so that the purchaser would know what he was buying, the sale of it would easily pay the debt he owed and thus the sureties be saved from any loss, and that the lands remaining would more than twice pay the balance of the debt; and further, that a sale of these undivided interests as a whole would certainly result in a sacrifice of the land and work great loss on the sureties. The statements of the answer were uncontradicted.

At the succeeding term (February, 1893), the plaintiff filed an amended petition, making the Locks defendants to his action, to the effect, as he avers, that they might be represented in the process of allotting dower to Sarah E. Wheat. But no steps were taken to enforce the judgment of sale. On the contrary, the court, at the instance of the plaintiff, reversed its former ruling, sustained a demurrer to the answer and set aside so much of the former judgments as subjected the interest of Sarah E. Wheat to the satisfaction of the debt, and so much of it as required an allotment of dower and a dvision of the land. It then adjudged a sale of the undivided interests of L. W. and J. B. Wheat or enough thereof to satisfy the debt. Of this judgment L. W. and J. B. Wheat complain, and, we think, justly so.

Waiving the question of the power of the court to thus materially modify the judgment of the preceding term, it seems to us that with the undisputed fact before it, that the lands were so susceptible of division as to greatly promote its sale, the court should have directed the division suggested in the answer, and especially as its sale otherwise would result in its sacrifice. Moreover, why should not the land of the principal debtor be first subjected to sale as a matter of protection to his sureties? If a sheriff have an execution against two defendants therein, one of whom he knows to be the principal and the other the surety, it is his duty, and he may be so required, to first sell the property of the principal; and why should not the chancellor, with the necessary facts all before him, so sell the lands of the debtors

as to afford such protection as he may to the surety, keeping in view, of course, the legal rights of the creditors? Here the interests of all the mortgagors in the land are ultimately subject to sale under the judgment, and a just regulation of the order in which the sale is to be made is no interference with the plaintiff's rights, but in fact is in furtherance of them if the undisputed averments of the answer be taken as true. No unreasonable delay need result. The allotment and division may be made and approved at any term of court and judgment of sale entered.

If it appears that the property is probably insufficient to pay the debt, a receiver may be appointed during the delay consequent on the order of division.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

COMMONWEALTH v. WILLIAMSON, &c.

(Filed September 22, 1894.)

1. Grand larceny—Evidence—The appellees, representing themselves as feather renovators, procured matresses filled with valuable goose feathers from their owner, agreeing to renovate and return the same feathers to the owner. They returned said matresses filled with chicken and turkey feathers of comparatively little value. Held—If they obtained the possession of goose feathers with the intention of fraudulently converting them to their own use and did so convert them, they are guilty of grand larceny, and this is a question for the jury to determine.

2. Same—Evidence—Evidence that appellees, about the time such feathers were obtained, were shipping away from the express office in the place of the transaction large quantities of goose feathers, and were receiving chicken feathers in return, was competent.

But evidence of tranasctions between appellee and other parties, similar in character to the one set out in the indictment, was incompetent.

W. J. Hendrick and Sam T. Spalding for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The indictment charges the appellees with the crime of grand larceny, committed in manner and form as follows, to wit: "The said J. D. Williamson and J. S. Lawrence, in the said county of Marion, on the 2d day of February, A. D., 1894, and before the finding of the indictment herein, did unlawfully and feloniously confederate and conspire, and did feloniousy take and steal and carry away from the possession of Taylor Abell and Josie M. Abell 150 pounds of feathers, not their own or the porperty of either of them, but the property of the said Taylor Abell and Josie M. Abell, and of the value of $60, and all done with the felonious intent to convert them to their own use, contrary," etc.

The appellees pleaded not guilty, and upon the trial of the case, at the conclusion of the testimony for the Commonwealth, the court gave a peremptory instruction to the jury to find for the defendants, and the Commonwealth has appealed.

The proof shows that the appellees came to the house of the Abells and, representing themselves as feather renovators, procured a number of beds, then filled with goose feathers, which they agreed to renovate, make into mattresses and return to the Abells. The same feathers were to be returned. The feathers taken weighed 142 pounds, and were worth thirty cents per pound.

The appellees shortly returned the mattresses, and after leaving the house the Abells found, upon examination, that the mattresses had been filled with chicken and turkey feathers, worth comparativley nothing.

It is insisted for the State that the peremptory instruction should not have been given, and such is our opinion.

In Elliott v. Commonwealth, 12 Bush, 176, the law on the subject is thus stated: "If the owner of goods parts with the possession for a particular purpose, and the person who receives the possession, avowedly for that purpose, has a fraudulent intention to make use of the possession as the means of converting the goods to his own use, and does so convert them, it is larceny.

"But if the owner intends to part with the property and delivers the possession absolutely, and the purchaser receives the goods for the purpose of doing with them what he pleases, it is not larceny, although fraudulent means may have been used to induce him to part with them."

It follows that if when the appellees procured the goose feathers they did so with the intention of feloniously converting them to their own use, they are guilty as charged; and their intention was a question of fact to be ascertained by the jury. These principles seem to be well established. (2 Russell on Crimes, 21-24; Wharton's Am. Cr. Law, 631-5-6.)

We do not think that the testimony offered by the State, showing transactions between appellees and others similar in character to the one under consideration, was competent, but the proof of the agents of the express company, that the appellees, about the time of the transaction in question, were shipping large lots of goose feathers to Louisville, and receiving chicken feathers in return, seems clearly competent. The ownership and possession of the articles thus shipped formed the very subject-matter of dispute and investigation.

For the reasons indicated the court should not have withdrawn from the jury the consideration of the case, but have submitted the proof, with instructions in accord with the law as indicated herein.

COMMONWEALTH v. GRIEF.

(Filed September 22, 1894—Not to be reported.)

1. On the trial of one for receiving stolen property it is competent to prove that other stolen property was found in his possession in order to establish guilty knowledge on his part.
2. When the defendant, if guilty at all, is guilty only of larceny, proof of a previous larceny committed by him is incompetent.

Wm. J. Hendrick and W. F. Bradshaw for appellant.

James Campbell for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Pryor.

In an inidctment for receiving stolen property it is competent to show, as laid down by the text-books, that other stolen property was found in the possession of the accused. This is permitted to show guilty knowledge on the part of the accused.

Mr. Wharton says: "So when the hypothesis proposed is that A received certain articles from B, knowing them to have been stolen, it is relevant to show that A had received and pledged to other parties a series of other articles proved to have been stolen by B." (Wharton on Evidence, volume. 1, page 32, 3d ed.; also Devoto v. Commonwealth, 3 Met., 376, where the same doctrine is announced.)

In this case the indictment contained two counts—one for larceny and the other for receiving stolen goods, knowing them to have been stolen. The accused lived with his father, and the goods mentioned in the indictment were on the premises of the father, and it seems to us the accused, if guilty at all, was guilty of larceny, and the proof of a previous larceny committed by him was incompetent to establish the larceny charged. We must assume, however, that the verdict of not guilty was proper, as the trial resulted in an acquittal.

We are not disposed to adjudge from the facts before us that the court erred in rejecting the testimony.

ROGERS v. COMMONWEALTH.

(Filed September 27, 1894.)

1. An instruction that the law presumes that a sane man intends the natural and probable consequences of any act which he willfully and deliberately does ought not to be given on a trial for murder: such presumption is not one of law to be applied by the court, but at most is one of fact to be weighed by the jury.

In this case the fatal blow was struck with a wooden club, and defendant claims he did not intend to kill deceased when he used the club, and the instruction above named was highly prejudicial to him.

2. The evidence in this case was such as entitled the defendant to an instruction on the law of voluntary manslaughter, and the failure of the court to give it was a prejudicial error.

E. Dudley Walker, J. S. Wortham and W. R. Haynes for appellant.

W. J. Hendrick for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Hazelrigg.

From a judgment in pursuance of a verdict convicting him of the murder of W. R. Prewitt, and sentencing him to the penitentiary for life, the appellant, a lad of nineteen years, has appealed to this court, and complains, first, that the instructions given by the trial court, and particularly the one numbered the sixth, were prejuidcial to him, and second, that an instruction on the law of voluntary manslaughter was refused him.

Other alleged errors do not appear to be substantial, and need not be noticed. The first instruction presents the law of murder in unobjectionable form. The second, the law of involuntary manslaughter. The blow was inflicted with a wooden club—the half of a keg stave—and if by its use the accused did not intend to produce death he was to be found guilty of a misedmeanor only. The third instruction is on a point not involved here.

The fourth and fifth were on the subject of insanity, though there was no tesitmony tending to show such a mental condition,

save an affidavit of the accused for a continuance, stating that his mother would prove him feeble-minded. This issue appears to have been an insignificant one. The sixth and objectionable instruction is as follows: "The law presumes that a sane man intends the natural and probable consequences of any act which he willfully and deliberately does." There being no appreciable proof to the contrary, the accused must be held to be sane. The consequences of his willful and deliberate act was death. These consequences were easily assumed as naturally following the blow. Hence the instruction is to the effect that the accused is presumed to have intended to kill the deceased by the use of the club.

Mr. Wharton says: "The doctrine that malice and intent are presumptions of law to be inferred from the mere acts of killing, belongs, even if correct, to purely speculative jurisprudence, and can not be applied to any case that can possibly arise before the courts."

In Madden v. State, 1 Kansas, 356, quoted and approved in Farris v. Commonwealth, 14 Bush, 373, it is held that the presumption that the accused intended the natural and probable consequences of his own acts is not one of law to be applied by the court, but of fact to be weighed by the jury. (Payne v. Commonwealth, 1 Met., 375; Coffee v. The State, 3 Georgia, 283 Maher v. People, 10 Mich., 212.)

The only plea available to the accused under the insturctions to save himself from conviction for murder was that it was not his intention in using the club to produce death, and this plea he tried to make good by showing the facts and circumstances attending the assault. He showed that he had been a constant visitor at Prewitt's house for some time, was visiting his daughter, and while the old gentleman had spoken sharply to him the night before he had felt only aggrieved or hurt and not angered; that he sauntered into the shop of the deceased the next morning thinking or hoping that he would be received with a friendly nod or word and the way thus paved for a continuation of his visits. After waiting from ten to twenty minutes, the deceased not speaking to him, he suddenly picked up a wooden stick, struck the old man and ran home without conceiving that the lick could result seriously. He argues if he had intended to kill he would have used some deadly weapon, or at any rate some heavy iron bar or poker lying in the blacksmith shop. But this defense, as we have seen, while nominally left open to the accused by the second instruction, was practically closed by the legal presumption defined in the sixth.

In the second place we are convinced that the accused was entitled to have the jury instruced on the law of voluntary manslaughter. Whether or not malice, the very essence of murder, existed was a fact to be determined by the jury, and all the attending circumstances of the homicide, including the mental condition of the accused, whether sober or drunk, whether feeble-minded or otherwise, whether provoked and incited into sudden passion at the moment of the assault with the stick, the character of the weapon used, all were matters legally put in proof for the consideration of the jury, for the very purpose of guiding them to a correct conclusion on the degree of the appellant's guilt. We do not review the facts in detail, as there is to be anoter trial.

For the reasons indicated the judgment is reversed and a new trial directed upon principles consistent with this opinion.

HOWARD v. COMMONWEALTH.

(Filed September 27, 1894.)

1. Indictment—Joinder of offenses—An indictment against two parties for willful and malicious shooting, with intent to kill, charges in its first count that H. did the shooting; in the second count that S. aided and encouraged him; in the third that S. did the shooting; in the fourth that H. aided and encouraged him, and in the fifth count that I. did the shooting, and that H. and S. encouraged and aided him. Held—All the counts relate to the same shooting and wounding, and the crime set out in the fifth count does not relate to a different offense from that alleged in the other four counts.

2. Instructions—Aiders and abettors—An instruction authorizing the conviction of the appellant in the event that S. or I. or the appellant did the shooting "pursuant to a common understanding and intent to kill said M. between them all, or any two of them," was not prejudicial to the accused since the evidence did not disclose any act done by the other two, to which appellant was not a party.

Wm. H. Holt and John Feland & Son for appellant.

W. J. Hendrick for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

On the night of December 22, 1893, Isom Gwynn, Stewart Gwynn and the appellant, Howard, were on the streets of Owensboro in an intoxicated condition. By their boisterous conduct they attracted the attention of policeman Dan Miller, who approached Stewart Gwynn for the purpose of arresting him, Isom Gwynn and Howard being at the time some twenty-five or thirty feet in advance of Stewart. The latter defied the officer, drew his pocket knife and cut him in the face. Miller then knocked Stewart down with his billy, placed nippers on his wrist and was starting to the lockup with him when Isom and Howard turned back, one of them saying "lets get the son of a bitch." They rushed on the officer and struck him in the back, knocking him down, and just as he fell a shot was fired from a pistol, which went through his left hand just back of the thumb near the wrist joint.

After Miller was knocked down he continued to hold on to Stewart with his nippers. Isom and Howard jumped on the officer, one of them grabbing at his throat and the other attempting to wrench his pistol from his hand. While he was thus prostrate and wounded on the ground, with Isom and Stewart on him, he succeeded in firing two shots, one of which took effect in Isom Gwynn's neck. Howard wrenched the officer's pistol from him, and the parties then ran off in different directions. Isom, however, soon fell and shorlty died form the effects of the shot.

No weapons were found on the person of the dead man, Isom, or on the ground where the encounter took place, but on the next morning the officer's pistol, with two empty chambers, was found in the rear of a tobacco factory, in the direction of which Howard had been seen running immediately after the shooting. The appellant, Howard, and Stewart were arrested and indicted for maliciously and willfully shooting and wounding Miller with intent to kill him. At their trial Stewart was acquitted and Howard sentenced to the State prison for one year.

The errors of which the appellant complains are that, first, the

indictment charged more than one offense, and second, the instructions are erroneous and prejudicial.

First. The joint indictment consists of five counts: (1) Howard is charged with the shooting, and (2) Stewart Gwynn with aiding and encouraging him; (3) Stewart Gwynn is charged with the shooting, and (4) Howard with aiding and encouraging him. The last count (5) charges that Isom Gwynn did the shooting and Howard and Stewart Gwynn aided and encouraged him.

It is urged that, as Isom Gwynn is not alleged to have been a participant in counts from one to four inclusive, the charge of aiding and encouraging him, as set out in the fifth count, constitutes a separate offense, which is inhibited by section 126 of the Criminal Code. We think such a construction would be overstrict. When the indictment is considered as a whole the same transaction is evidently referred to in all the counts. The shooting and wounding of Miller is the sole charge. It is permissible under the section of the Code supra to charge the modes and means of the commission of the crime in the alternative, and aiders and abettors may now be held as principals under the statute. (Kentucky Statutes, section ——.)

Second. The first instruction authorizes a conviction if the jury believed beyond a reasonable doubt that either Howard or the Gwynns did the shooting, and the others were present and, knowing of the intention of the one so shooting, aided and abetted him therein.

The second instruction, and it is to this only that any special objection is urged, is that although the jury "may believe from the evidence beyond a reasonable doubt that one of said defendants willfully and maliciously shot the said Miller in the manner and with the intent supposed in the first instruction, yet they can not find either of said parties guilty of said shooting unless they can find from the evidence beyond a reasonable doubt which one of them did said shooting, unless they believe from the evidence beyond a reasonable doubt that said shooting was done pursuant to a common understanding and intent to kill said Miller between all or any two of them."

The criticism urged by learned counsel to this instruction is that the words "or any two of them" might mean the two Gwynns, and, therefore, even if Isom or Stewart Gwynn fired the shot that wounded the officer, yet Howard might have been convicted of the cirme by reason of its having been done pursuant to an understanding and intent common only to the Gwynns.

In other words, that though Howard may not have fired the shot or been a party to the understanding or intent to shoot the officer, yet he might be convicted under this instruction.

It may be admitted that if the proof disclosed any concert of action between the Gwynns or any act done by them in pursuance of a purpose not common to Howard, and in which he was not a paritcipant, there might be some force in this contention. But while Stweart Gwynn was under arrest and separated from the others, Howard and Isom rushed upon the officer in concert and precipitated the conflict, one grabbing for the throat of the officer and the other for his pistol. Therefore, the hypothesis upon which the language of the instruction under a different state of proof might have been prejudicial to the appellant was one impossible of adoption or even conception by the jury.

Moreover, it was not necessary to the conviction of the parties indicted that the crime should have been committed in pursuance of a common understanding or intent. The statute author-

izes the conviction of one who shall have "aided, counseled, advised or encouraged" another in such shooting. The indictment did not charge and need not have charged that the one aiding, etc., must have done so in pursuance of an understanding or intent common to any or all the participants.

The instructions were more favorable to the appellant than the law authorized.

We perceive no error in the record to the prejudice of the appellant, and the judgment is, therefore, affirmed.

POLLY v. COMMONWEALTH.

(Filed October 4, 1894—Not to be reported.)

1. Although an indictment for unlawfully detaining a woman against her will, with the intent to have carnal knowledge with her, alleges that the woman detained was under twelve years of age, this does not render it defective or authorize the trial of accused under it for any other crime denounced by the statute.
2. The court should not in its instructions group together all the evidence of an aggragating nature so as to call undue prominence to it, or to give it undue weight; the accused is entitled to have a free and fair consideration of all the competent evidence by the jury.

John L. Scott & Son and Baker & Baker for appellant.

Wm. J. Hendrick for appellee.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Hazelrigg.

This is a conviction under an indictment for unlawfully detaining a woman against her will, with intent to have carnal knowledge with her. (Section 1158, Kentucky Statutes.)

The indictment, in specifying the crime, charged, and this was shown to be the truth, that the woman detained was under twelve years of age; but this, although surplusage, does not render the indictment bad or charge a crime denounced in any other section of the statutes.

The facts are peculiar, and while strongly tending to raise a doubt of any guilty intention on the part of the accused, yet that question of intention is one of fact, to be determined by the jury; but in reaching its conclusion the jury must be left free to consider all the testimony. Certain parts of the proof, of an aggravating character or tendency, must not be grouped in the instructions.

Here the chief instruction tells the jury to find the accused guilty if the alleged detention was of a woman "under twelve years of age," and was "by getting in bed with her and by putting his hands and arms about her."

The accused, who was less than twenty years of age but married, testified that he was sent for by his father, and stepped over to his neighbor's to get the little Collins girl to stay with his wife while he was gone. He went to his father's, got home about 2 o'clock in the morning, and went into the room when it was dark. He undressed and started to get in the bed where he and his wife usually slept, and found, as he thought, his wife lying in the front of the bed. He called her by name, and put his hands on her shoulders, telling her to lay over. In a few mo-

ments the little girl answered, "This is not Ella." He then said, "Lay still; I meant no harm," and immediately got in bed with his wife, who was sleeping in another bed in the same room.

The girl testifies that after finding out who she was the accused offered her twenty-five cents and a dram to keep still and not awaken his wife; that he did not otherwise molest her, but got up and got in bed with his wife.

It seems to us that it was error to select certain portions of the testimony and submit them to the jury. It calls special attention to certain evidence and gives it undue prominence. This has often been condemned by this court.

Judgment reversed with directions to grant the accused a new trial in conformity herewith.

KENTUCKY SUPERIOR COURT.

GRANT v. PEARCE, &c.

(Filed June 13, 1894.)

1. Corporations—Advances by stockholders—Promise made at stockholders' meeting binding on stockholders personally—Where certain stockholders in a corporation, the property of which was about to be sold under a deed of assignment executed by the corporation for the benefit of its creditors, formed a syndicate and agreed to buy the property and organize a new corporation, and with that end in view executed a writing appointing two of their number a "committee to carry out the purpose hereinafter set forth," and constituted them the "agents and trustees of the subscribers hereto, with all the powers necessary to that end," and the "committee" named, after the new corporation was organized, advanced money for its use, and at a meeting of stockholders this action upon the part of the "committee" was recognized as within their authority, and the payment of the sum advanced was "guaranteed" to them, the stockholders present at that meeting must be regarded as binding themselves personally for the repayment of this sum in the proportion of the stock held by each, the corporation being bound independent of any agreement by the stockholders.

2. A mere verbal promise upon the part of one of the stockholders to pay his part of the sum advanced by the "committee" is enforcible, as it is not a promise to answer for the debt of another, and, therefore, not within the statute of frauds. Though the money was advanced ostensibly to the corporation it was in reality advanced for the benefit of each member of it, and the promise by the stockholder was, therefore, a promise to repay the "committee" what they had advanced for him. And a stockholder having the power to bind himself by his own verbal agreement could confer the same power on his proxy.

Pirtle Speed & Trabue for appellant.

Dodd & Dodd for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

Some time prior to 1888 the appellant and appellees and a number of other persons associated themselves together and became incorporated in the name of the American Maize Oil Cake Co. They purchased machinery and erected a plant at a cost of $18,000.

The company shortly afterwards failed and made an assignment for the benefit of its creditors. When the property of the corporation was about to be sold by the assignee, some of the stockholders, including the appellant, and the appellees, for the purpose of protecting their interests, formed a syndicate and agreed to buy the property and organize a new corporation. They entered into a writing of which the following is the substance:

1st. Gaulbert and Pearce (appellees) are appointed a committee to carry out the purposes hereinafter set forth, and are constituted the agents and trustees of the subscribers hereto, with all the powers necessary to that end.

2d. The committee are authorized to purchase the property, franchises, etc., for the susbcribers at a price not exceeding $25,000; the purchase to be made in the names of the said committee individually as trustees for the subscribers hereto.

3d. In the case of a purchase the committee and such of the subscribers as may wish to unite with them are directed to organize a new corporation with an authorized capital stock of $100,000, and to transfer their purchase to the new corporation.

4th. Each subscriber agrees within twenty days after notice of the organization of the new corporation to pay to the treasurer (the appellee, Pearce), his pro rata of the purchase price based on the actual amount already invested by him in the old corporation, and for the two amounts is to receive fully paid-up stock in the new corporation. And each subscriber is to pay in addition, within thirty days after notice, as an initial cash capital to begin operation on, an amount in cash which shall not be less than ten per cent. of the amount of his paid-up capital stock, for which he is to receive additional paid-up capital stock, dollar for dollar.

5th. It is further agreed that this agreement is for the mutual protection of the subscribers hereto on the basis of which has already been paid by them to the old corporaiton, or expended by them on its accounts, as fixed by them and set opposite to their names, and that they and each of them mutually agree to share on that basis his or their relative proportion of the risks and burdens hereby assumed.

The appellees, acting as a committee, purchased the property at the price of $2,100, and with the approval of the appellant incorporated as the U. S. Maize Oil Cake Co., and transferred their purchase to it in accordance with the agreement. The appellant had subscribed $2,000 to the old corporation, of which he had paid $1,600. To the new corporation, as provided under the latter part of the fourth article of the agreement, he paid two calls of seven and ten per cent. respectively, making the total amount paid out by him, $1,872. The new company shortly become in need of money with which to operate its plant. This money, to the extent of $6,000, was borrowed by the appellees, they securing its payment by their individual endorsements, and afterwards paying it. About this time, September 2, 1889, a meeting of the stockholders was held, at which all were present in person or by proxy except one stockholder. At this meeting, according to the minutes, "the report from the syndicate committee was received and accepted. It appearing that said committee, composed of Messrs. Gaulbert and Pearce, had advanced $6,000 by authority of the syndicate agreement for the operation of the mill at Cincinnati, and with a view of recouping them for the same, it was resolved that an opportunity be given to each stockholder to subscribe at par for $33\frac{1}{3}$ per cent. of his present holding, with twenty days in which to answer, the amount over and above $6,000 thus raised to remain in the treasury for operating

funds. In event the stockholders failed to respond, it shall be understood that he declines to avail himslef of such opportunity, and the syndicate committeee is directed to wind up the affairs of the company under due process of law, said Pearce and Gaulbert being guaranteed their $6,000." We think that the evidence shows that the appellant was personally present at this meeting. The stockholders failed to subscribe the 33⅓ per cent., and the appellees, by direction of the stockholders, wound up the business of the concern, and after paying other liabilities of the corporation, there remained due to the appellees the sum of $6,000.

Thereupon the appellees brought this action against the appellant, alleging that it was the agreement between the stockholders, that each was to pay his proportion of this sum, based upon the amount of stock held by him, and that appellant's share of the loss was $624. Appellees having obtained a judgment against appellant, he prosecutes this appeal.

It is not claimed that the appellees in anywise exceeded their authority, or that they made unnecessary or useless expenditures. It is reasonably certain that the stockholders, including the appellant, knew that the appellees were advancing money for the purpose of conducting the business of the company, and he concedes that he was willing and even consented that the appellees should be reimbursed by the corporation, but declares that he never agreed to be individually bound for the debt.

It is clear that, independent of the agreement made by the stockholders at the meeting of September 2, 1889, the appellees would have been entitled to reimbursement from the corporaiton. They were acting in good faith as trustees for their associates, and as they and the other stockholders, including the appellant, believed was for the best interests of all. Under these circumstances there was at least a moral obligation upon the part of the appellant, as well as the other stockholders, to share in the loss sustained.

If the stockholders did not in their meeting mean to bind themselves personally in the proportion of the stock held by each, when they said that the $6,000 had been advanced by the authority of the syndicate agreement for the opeartion of the mill, and that the appellees were to be guaranteed their $6,000, they could have meant nothing. That is what the proceedings of the meeting seem to us to mean, and it appears to have been understood in this way by every stockholder except the appellant; and even the appellant seems to have so understood it before the institution of the suit, for several witnesses say he promised to pay his part. That he did so promise must be taken as true, upon this appeal, as the fact was so found by the jury; but it is contended that even if he did promise, the promise is not enforcible because it is a promise to answer for the debt of another, and within the statute of frauds. This contention, it seems to us, is based upon an entire misconception of the relation of the parties.

These parties had associated themselves together under a corporate name for the purpose of securing their pecuniary interests —the thing they had embarked in was a mere experiment. Every advancement of money made by one was intended for the benefit of the others as well as himself, and, had the venture prospered, would have inured to the benefit of all.

Though the money was advanced ostensibly to the corporation, it was in reality advanced for the benefit of each member of it, and for the purpose of putting the concern upon a successful basis, as contemplated by the syndicate agreement. The promise was, therefore, a promise by the appellant to repay appellees

what they had advanced for him. Though the instructions are severally criticised, we see no objection to them.

The principal objection seems to be that they authorized a "proxy." by his mere verbal promise, to bind appellant to pay the debt of the corporation. We do not think so. As we have said, the debt was in reality a debt incurred for the benefit of the appellant, and if he could bind himself by his own verbal agreement, he could confer the same power on his proxy. The petition, in the view we have taken of the case, sets out a good cause of action.

We see no error to the substantial prejudice of the appellant in the admission of evidence. The only evidence we see that is at all objectionable is the statement of the witness Haldeman, to the effect that he "understood that he (appellant) agreed to all agreements we had made; there was no exceptions."

This was a part of a long answer embracing other matter which was competent, as well as some matters which were irrelevant and incompetnt. At the conclusion of the answer it is noted as objected to, and objection overruled and exception taken. What part of the answer it was that was objceted to does not appear; but be that as it may the evidence, though improper, could not have prejudiced the appellant's case, for we think his own evidence made out a case for the appellee. His purpose to bind himself as a stockholder, and not as an individual, is not in accord with his virtual admission that he was present at the meeting of September 2d, and agreed to what was then done.

The judgment is affirmed with damages.

ST. JOHN'S EPISCOPAL CHURCH OF LEXINGTON v. CLARK.

(Filed June 20, 1894.)

1. Building contract—Extra work—Although a building contract provided that no extras should be charged for unless ordered as extras in writing by the architect and building committee, and the price of said work agreed or stated in the writing, yet in this action by the contractors to recover for extra work not so ordered, as the petition alleges that the work was done at the special instance and request of defendants, and when completed was accepted by them, the plaintiffs are entitled to recover therefor, as the extra work must be regarded as done under an independent contract.

2. Damages on account of defective work—As the damages allowed the defendants on their counterclaim on account of defective work were not enough, the judgment is reversed for that error.

Z. Gibbons for appellant.

D. G. Falconer for appellee.

Appeal from Fayette Court of Common Pleas.

Opinion of the court by Judge Barbour.

This action was brought by the appellee to recover of the appellants a balance due upon the contract price for the carpenters' work done and materials furnished in the building of a church and for extra work and material alleged to have been done and furnished, and to have been accepted by the appellants.

The petition sets out a good cause of action. The answer denies that the materials furnished or the work done was of the quality or kind provided for by the contract. The first position

taken by appellants in their argument here is that the contract provided that no extras should be charged for unless ordered as extras in writing by the architect and building committee, and the price of said work agreed or stated in the writing.

In Escott v. White, 10 Bush, 170, the court held that "though a contract stipulated that no work should be considered extra unless ordered in writing and endorsed by the architcet, if extra work be done at the instance of the owner, from which a benefit is derived, it must be regarded as an independent contract, for which a recovery may be had."

The petition alleges that this work was done at the special instance and request of the defendants, and when completed was accepted by them. Certainly this allegation brings the case within the rule laid down in the Escott case. Besides, the answer admits that the work charged for as extra work was done, but avers that part of it was embraced in the original contract, and further alleges that the extra work plainitff did was by his agreement to be done in a workmanlike manner, and the materials which were to be used were to be of the first quality, etc.; but that the work was not done in a workmanlike manner and the materials were inferior, etc.

So upon this point there were but two questions: Was that part of the work named in the answer extra work, and was the work done in a workmanlike manner and the material furnished of the kind agreed upon? Upon this point the appellee's testimony sustains his contention, and we will accept the judgment of the court thereon as conclusive.

The principal contention is as to whether the main work was done in a workmanlike manner and the material furnished of the quality prescribed in the plans and specifications. After a careful examination of the evidence we are of the opinion that the work was not done in a workmanlike manner, and much of the material furnished was not of the quality required by the contract. The court below so found, and fixed the damage, on account of the defective work and material, at $250, which was directed to be deducted from $445.95, the amount claimed by the plaintiff. Yet the court allowed the plaintiff interest on the $445.95 from April 1, 1889, and only allowed the defendants interest on the $250 from October 8, 1890, the date of the filing of their answer. This was error, for if the plaintiff's work was done defectivley, and thereby damaged the defendants, he certainly should not be allowed interest on the whole of the amount claimed by him; but we are of opinion that the damages allowed by the court were not enough.

The principal damage was in the manner of constructing the roof and the ceiling and material therein, and we think that it will take at least $400 to place the roof in the condition it would have been in had the contract been complied with, and the defendants should be allowed that sum on this counterclaim.

The judgment is affirmed on the cross appeal and is reversed on the original appeal, and the cause is remanded, with directions to enter judgment for the plaintiff for $45.95.

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KENTUCKY COURT OF APPEALS.

BENT & CO. v. BARNETT, &c.

SAME v. SAME.

(Filed May 3, 1894.)

Improvement by guardian of ward's real estate—Right of contractor to subject increase in rents—Where the property of wards had been enhanced in value by improvements erected under a contract made by the guardian in good faith for the benefit of the wards, and it was held upon a former appeal that, although the guardian had no power to make the contract, the contractors might subject the rents of the property to the payment of the actual cost of the improvements to the extent that they had been increased by reason of the improvements, the fact that it now appears that, by reason of the decline in business or from other causes, there has been such a falling off in rents that they are very little in excess of what they were prior to the making of the improvements, does not entitle the contractors to apportion the rent so as to throw upon the infants any part of the burden of this loss. The contractors can subject only the amount in excess of that which the property yielded before the improvements were made.

Stone & Sudduth and Thomas F. Hargis for appellants.

John S. Jackman for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

This case has been heretofore in this court, and the judgment reversed, that the appellants might recover the enhanced rental value of the property by reason of the large expenditure made by them on appellees' property, the pleadings conducing to show that the increase in rental was almost double that of the old building.

The opinion was not based on the idea that the guardian had the power to make contracts that would involve his ward in debt, or subject their estate to the heirs of the builders; but for the reason that the guardian and these appellants were acting in good faith, and to give to the wards the proceeds of their labor

and the material furnished without any consideration whatever, would be inequitable and unjust, where the rights of the infants, by giving the enhanced value of the rents, could in no wise be prejudiced.

They had improved the buildings under these contracts with the guardian at a cost of near $22,000, when it now appears from the testimony that the property had been sold, the ground upon which the building stands being valued at $550 or $900 per front foot, being twenty-five feet, and the improvements at less than $10,000.

It is evident from the facts before us that an expenditure of $3,000 or $4,000 would have been sufficient to have remodeled the structure, or to have placed it in such condition as its rental would have been equal to the improvement, costing over $20,000. Those connected with the Fidelity Trust & Safety Vault Company, and having charge of this property, state that since August, 1890, after deducting the yearly necessary expenses on the property—taxes, insurance, etc.—there was a net rental of $1,145 per year, a part only of which went to these appellees.

The building, after its improvement, never exceeded in rental value $2,000. From the year 1876 to the date of sale, a period of fourteen or fifteen years, the wards, who are now adults, did not receive in the way of net rental a sum exceeding $500 or $600 per annum. The old building, at the time it was vacated, was renting for $2,500 per annum, and it may well be argued from this proof that the old building would have rented for as much as the new building, but whether so or not is immaterial. It may be conceded that the decline in business, or its transit from that part of the city to more favorable locations, has caused this falling off in the rent; still these owners of the property are not, in law or equity, required to share their burden of the loss.

This case was placed distinctly upon the ground that by giving to the appellants the enhanced value of the rents it would leave the rights of the appellees undisturbed, giving to them the rent they had been receiving, and placing them in the possession of a new building. We are now asked to apportion this small rental between these parties, when the appellants have no right whatever to be heard, except such as arises from a plain equity that would give them a small pittance for their labor and expenses, no one else. The facts, when made to appear, present no such case, and the chancellor acted properly in refusing to encumber the property of the appellees and in dismissing the claim of the appellants.

The judgments below are affirmed.

PARKLAND HILLS BLUE LICK WATER CO. v. HAWKINS & CO.

(Filed May 3, 1894.)

1. Trade-mark—A trade-mark may be a name adopted and used by a merchant or dealer in order to designate the goods that he sells, and distinguish them from those sold by another. The name of a place may be selected as a trade mark, and the natural product of a spring may be the subject of the protection afforded by it.

2. Same—The lessees of Blue Lick Springs, who handle the water of those springs as an article of commerce, and who have for many years used the name "Blue Lick Water" as their trade-mark, are entitled to the exclusive use of that name as a trade-mark, and upon their petition the defendants, who handle a mineral water obtained from an artesian well in a distant part of the State, are enjoined from using the words "Blue Lick" as a part of their trade-mark.

O'Neal, Pryor & Selligman for appellant.

John W. Barr, Jr., for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

The appellees are the lessees of the Lower Blue Lick Springs, in Nicholas county, Ky., and since 1888 have been engaged in handling "Blue Lick" water, a product of those springs, as an article of commerce.

The appellant is a corporation of recent creation, which has put on the market a water denominated "Parkland Hills Blue Lick Water," the words "Blue Lick" being made the most prominent part of the various advertising mediums adopted. This water is obtained from an artisan well near Louisville, Ky. The appellees brought this action to restrain the appellant from using the words "Blue Lick" in connection with the name of its water, and the relief asked having been granted by the court below, the corporation has appealed.

The record discloses that the water from the springs, now under the control of the appellees, has been famous under the appellation of "Blue Lick Water" for more than a century. It has been received with favor throughout the United States and in some foreign countries. It is said to be incomparable as an alterative and aperient, and highly valuable as a nervous stimulant, diaphoretic and diuretic.

The Blue Licks, the upper and the lower, have been known since the early settlement of the State, indeed years before the formation of the State. It was at the lower springs that in 1782 the memorable and sanguinary battle occurred between the whites and the Indians, making the spot historically renowned.

Buffalo and other wild animals had well-located "traces" to and from this spring, which they frequented to lick the deposits from the water, hence the first name was "The Licks." The commercial value of the water was early recognized, and years ago the predecessors of the appellees adopted the name "Blue Lick Water" as their trade mark.

The trade-mark of the appellees consists of a circular inscription of the words "The Celebrated Blue Lick Water," in large letters at the top of the circle, and the words "From E. C. Hawkins & Co., Sole Proprietors, Blue Lick Springs, Ky.," in small letters at the bottom of the circle. In the center is the erect figure of a Kentucky pioneer, with his rifle and dog, and on either side of the hunter are the words and figures: "Daniel Boone, 1782. Trade-mark."

The question before us does not affect the owners of the upper springs, the sole question being whether the plaintiffs are to be protected from the corporation engaged in selling the artisan water as "Blue Lick Water." Of this we entertain no doubt.

A trade-mark may be a name adopted and used by a merchant or dealer, in order to desingate the goods that he sells and distinguish them from those sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from the celebrity of his wares, or a reputation for superior skill, industry or enterprise in handling the article put upon the market. Any name may be so used that he may deem appropriate as designating the true origin or ownership of the atricle to which it is affixed; though he may

not appropriate a name indicative of the quality of his goods which others may employ with equal truth for the same purpose.

There is no conceivable reason why the name of a place may not be selected as a trade-mark, or the natural product of a spring be the subject of the protection afforded by it.

Thus in Newman, &c. v. Alvord, &c., 51 N. Y., 189, the plaintiffs were protected in the use of the word "Akron"—the name of the village where they made cement—against those who were making "Akron" cement at Syracuse.

So in Dunbar v. Glenn, 42 Wis., 118, the owner of the mineral spring "Bethesda" was given the exclusive use of that name as a trade-mark, indicating the origin or ownership of the water therefrom, and it was said the law relative to trade-mark applied, whether the vendible commodity be natural or artificial, for otherwise the purchaser would have imposed upon him an article that he never meant to buy, and the owner would be robbed of the fruits of the reputation he has successfully labored to earn.

So also in Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y., 291, it was held that the owner of a peculiar product of nature, such as mineral water, will be protected in the exclusive use of a name given to it, and employed as a trade-mark.

The word "Congress" in the phrases "Congress Water," and "Congress Spring Water" was held to be a legitimate trade-mark.

In the case under consideration, the name adopted by the appellees and their predecessors for the water from Blue Lick Springs, indicated the origin and ownership or place of the product, and is one in the exclusive use of which the appellees should be protected. The proof discloses a scheme by which, when the thirsty patron of certain dealers in the city of Louisville called for Blue Lick water, meaning genuine Blue Lick, which was consessedly the Nicholas county product, he was to be given water from the artisan well of the appellant. This was no less a fraud on the public than on the appellees. The purchaser has the right to get what he seeks, and the owner is entitled to the profit from the sale of the thing sought.

Judgment affirmed.

LYONS, &c. v. LANCASTER.

(Filed May 24, 1894—Not to be reported.)

Debtor and creditor—Land paid for out of trust fund—The land in controversy having been held upon a former appeal to be the property of appellee, and subject to the payment of debts due appellants, his creditors, it was error upon the return of the case to allow the appellee, as trustee for his children, to file an amended answer, claiming that payments made upon the land were paid out of the trust fund, and, thereupon, to adjudge that he, as trustee, was entitled to a lien on the land therefor. The debtor should not, under the circumstances of the case and at this stage of the litigation, be permitted, either as trustee or individually, to decrease or intermeddle with the fund to which his creditors have been adjudged entitled.

Rives & Spalding for appellants.

Thompson & McChord for appellee.

Apppeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

In the former opinion in this case the land in controvery—that is, 520 acres and 65 acres—was held to be the property of B. J. Lancaster, and subject to payment of debts of appellant, W. H. Lyon, and others, his creditors, without condition or reservation in favor of any other person except Wilson, to whom a balance of purchase money for the 520 acres was due, and for which he had a superior lien; but upon return of the case B. J. Lancaster, as trustee for his children, whose mother is now dead, was permitted to file an amended answer claiming that all payments hitherto made for the 65-acre tract, as well as payments to Wilson on the 520 acres, were made by or with means of Mary H. Lancaster, who devised her estate to the wife of B. J. Lancaster, and is now owned by said children. And the commissioner having found and reported that B. J. Lancaster, as trustee for his children, had, February 1, 1890, paid out of the trust fund $400 on notes held by Wilson for purchase money of the 520 acres, it was adjudged that he, B. J. Lancaster, as trustee, has a lien on the land therefor. This was error. For if such sum was paid it was done voluntarily, and the children of B. J. Lancaster must look to him alone to re-imburse them.

B. J. Lancaster certainly should not, under the circumstances of this case, and at this stage of the litigation, be permitted, either as trustee or individually, to decrease or intermeddle with the fund to which his creditors have been adjudged entitled.

In the former opinion it was decided that the lot of 28 mules had been purchased and paid for by B. J. Lancaster, and to the extent of the proceeds of sale of the mules had been paid to Wilson the land notes should be credited. The report of the commissioner now shows that of the proceeds of mules that have been sold $1,240 was paid to Mattingly, from whom they were purchased, and $1,100 thereof paid on Wilson's notes; and that no further sum has or now can be realized from that source.

The lower court sustained exception to the report, and made a rule on B. J. Lancaster to pay about $3,900, the amount assumed to have been realized from the mules. The rule was, however, subsequently discharged, though it was not definitely adjudged what, if any, sum should be paid or accounted for by B. J. Lancaster.

In our opinion it would not be just or equitable to hold B. J. Lancaster accountable for any greater amount than was actually realized by him from sale of the mules, and if he has paid Mattingly and Wilson all that has or can be realized, he ought not to be required to pay more.

There is, it seems to us, nothing to be further done in this case than to apply proceeds of the land sold, first, to pay balance of Wilson's debts, and then to apply residue to pay appellants, creditors of B. J. Lancaster.

But for the error indicated the judgment is reversed and remanded for further proceedings consistent with this opinion.

GEO. T. STAGG CO., &c. v. E. H. TAYLOR, JR. & SONS.

(Filed June 16, 1894.)

1. **Trade-marks**—Where a corporation doing business under the corporate name of E. H. Taylor, Jr. Co. operated two distilleries, known as the "O. F. C." and "Carlisle" distilleries, and upon the product of the former distillery a brand was used consisting of the letters and words "O. F. C. Handmade Sour-mash Whisky, E. H. Taylor, Jr., Distiller," and upon the

product of the latter a brand consisting of the words "Carlisle Standard Sour-mash Whisky, E. H. Taylor, Jr. Co., Distiller," the essential feature of the trade-mark in the one case was the letters "O. F. C." and in the other the word "Carlisle," as the words "hand-made" and "standard sour-mash whisky" were not intended as a part of the trade mark, even if they could have been so used, and for the name of the distiller in the brand there was to be substituted, as we must suppose, the name of the person of whom it could be truthfully said he was the distiller; and the subsequent use as an adjunct to these brands of the fac simile of the signature of E. H. Taylor, Jr., sometimes with and sometimes without the addition of the word "company," can not be regarded as making that signature a part of the trade-mark, E. H. Taylor, Jr., receiving no compensation therefor. And upon the withdrawal of E. H. Taylor, Jr. from the corporation, the corporation had no right to use his autograph signature or to advertise him as the distiller of whisky thereafter manufactured, there being no sale by Taylor to the company of the right to use his signature, and it being doubtful whether such a use could have been made of this autograph if it had been in express terms transferred, such a use of another's autograph being a fraud upon the public.

2. Same—Registration of—The statement in a registration of a trade-mark that certain words of the brand may be omitted shows that they are not regarded as a part of the trade-mark.

3. While the defendants were properly enjoined from using the name of Taylor as a part of their trade-mark, and from advertising their whiskies as "Taylor" or "Old Taylor," the plaintiffs are not entitled to an account of profits as the defendants acted under color at least of title and conveyance from Taylor and without any fraudulent intent, the use of the name of E. H. Taylor, Jr., and his autograph being in the nature of a license or permit which has not been abused or extended unreasonably.

4. The withdrawal of E. H. Taylor, Jr., from the E. H. Taylor, Jr., Co., and the purchase of all the stock of that corporation by a single stockholder suspended the existence of the co-operation so far as the public was concerned, and, therefore, E. H. Taylor, Jr., did not violate any of the legal rights of the sole stockholder of that corporation, who continued to operate the "O. F. C." and "Carlisle" distilleries by assuming, in connection with his sons in the operation of another distillery, the partnership name of E. H. Taylor, Jr. & Sons, although similar in appearance to the corporate name "E. H. Taylor, Jr. Co."

5. An order of reference to a commissioner, with directions to take an account of profits, was merely interlocutory.

D. W. Lindsey, John W. Rodman and Humphrey & Davie for appellants.

Wm. Lindsay and Geo. C. Drane for appellees.

Appeal form Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

In January, 1887, the appellees, E. H., J. S. and Kenner Taylor, formed a partnership under the name of E. H. Taylor, Jr., & Sons, and began the manufacture of whisky at what had theretofore been known as the "J. S. Taylor Distillery," in Woodford county, Ky. They at once changed the name of their distillery to the "Old Taylor" distillery, and before the end of the year had discontinued the use of he name "J. S. Taylor" in connection with the distillery or the whisky manufactured there, branding, advertising and selling their product as "Old Taylor" whisky.

They devised a brand which was put on barrels, bottles and other packages, and used in their advertisements, circulars, letter heads, etc., consisting of the words "Old Taylor Hand-

made Sour-mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Ky," arranged in a circle, and underneath this appeared the inscription "E. H. Taylor, Jr. & Sons" in fac simile of the handwriting of E. H. Taylor, Jr. They branded other of their whiskies later on "Old Taylor," and underneath these words placed the inscription "E. H. Taylor, Jr. & Sons" in the autograph of E. H. Taylor, Jr.

They continued without interference to operate the distillery and transact business as whisky merchants, with office and headquarters at Frankfort, some seven or eight miles distant from their distillery, until in the early part of 1889, when, as we learn from their petition, the appellants began to manufacture whisky at their distilleries, konwn as the "O. F. C." and "Carlisle" distilleries, and to imitate the brands of the appellees, use the autograph singature of E. H. Taylor, Jr., and otherwise interrupt and injure their business. On October 16, 1889, they brought this action to prevent the appellants from further using the brands and script in question and for damages.

The appellants asserted the right to use the disputed brands, including Taylor's autograph, and set-up, by way of counterclaim, that the appellees had themselves wrongfully appropriated the brands, trade-marks, labels, etc., of the appellants, for which they asked damages. They based their claim upon a state of case growing out of E. H. Taylor, Jr.'s, connection with themselves, in operating the "O. F. C." and "Carlisle" distilleries prior to the formation of the partnership of E. H. Taylor, Jr. & Sons in January, 1887.

Upon hearing, after an elaborate preparation of the case, the chancellor determined the issues of fact and of law adversely to the appellants, and enjoined them from using the words "E. H. Taylor, Jr., Distiller," and the autograph signature of E. H. Taylor, Jr., upon any whiskies produced at their "O. F. C." and "Carlisle" distilleries since January 1, 1887; ordered an account taken of profits on the whiskies manufactured by the appellants since January, 1887, in which the script autograph had been used, and dismissed their counterclaim.

The controlling questions are, has E. H. Taylor, Jr., so complicated himself with the business of the appellants during the years prior to January, 1887, as to deprive himself and his associates of the use of the firm name E. H. Taylor, Jr. & Sons, and as to confer on the appellants the right to use, against his will, the autograph signature of E. H. Taylor, Jr.? and have the appellants, in connection with E. H. Taylor, Jr., or otherwise, so appropriated the name "Old Taylor" for the whiskies theretofore made at the "O. F. C." and "Carlisle" distilleries as to preclude the appellees, E. H. Taylor, Jr. & Sons, from such use as a trade-mark or brand?

In 1868 or 1869 E. H. Taylor, Jr., became the owner of and began to operate a distillery in Franklin county, near Frankfort, to which he gave the name of "O. F. C." distillery, and to the product of which he gave the name of "O. F. C. Whisky." He put upon his packages of whisky, and used upon labels and in advertisements, a brand in circular form, consisting of the words "O. F. C. Hand-made Sour-mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Ky."

Taylor continued to operate the disitllery in this way until about May, 1877, when he failed and was forced by his creditors into bankruptcy. In December, 1877, a composition was effected with his creditors at twenty cents on the dollar, and Gregory, Stagg & Co., St. Louis whisky merchants and large creditors of

Taylor, agreed to furnish the funds necessary to effectuate the composition—an arrangement being made alike profitable to both parties.

In pursuance of this arragnement the O. F. C. distillery property was, by order of the U. S. District Court, reconveyed to Taylor, who, with his wife, conveyed the property to Geo. T. Stagg. Taylor then assigned to Stagg the O. F. C. trade-mark, and Stagg, Gregory, Stagg & Co. uniting with him, leased to Taylor the O. F. C. distillery property, with the right to use the O. F. C. trade-mark. Taylor continued the business in his own name, the "O. F. C." whisky, in the meantime attaining a phenomenal reputation, until the fall of 1879, when, for reasons not disclosed in the record, a corporation was organized and created, of the style of "The E. H. Taylor, Jr. Co." To that corporation Stagg, in October, 1879, conveyed the distillery property and also assigned the trade-mark.

As the trade-mark or brand is, to an important extent, the subject-matter of this litigation, we turn to the registration made of it by Taylor in the patent office in 1872, and to its reregistration in the same office by Geo. T. Stagg as assignee of Taylor, made shortly before its assignment to the E. H. Taylor, Jr. Co.

The specification filed by Taylor is as follows: "The whisky made by me is hand-made sour-mash whisky, and as such is known in the market. The trade-mark consists of the letters 'O. F. C.,' and is used with or without the words 'Hand-made Sour-mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Ky.,' or words to like effect. It is branded on the heads of the barrels or packages containing said whisky, and, therefore, mostly used in black color, though it may also, in suitable tint, be printed on labels that apply to bottles, and on show cards or notices that advertise the same to the public."

Stagg in 1878 thus described it: "My trade-mark consists of the letters 'O. F. C.,' the same being an arbitrary symbol. This trade-mark has generally been arranged as shown in the accompanying fac simile, to wit, in connection with the words 'Hand-made Sour-mash Whisky, E. H. Taylor, Jr., Distiller, Frankfort, Ky.;' but the said words may be transposed, some of them omitted or other words substituted, as may be found most convenient for the purpose intended, without materially changing the character of my trade-mark, the essential feature of which is the symbol consisting of the letters 'O. F. C.'"

Again, in October, 1881, the E. H. Taylor, Jr. Co. registered this trade-mark in the patent office in substantially the language employed by Stagg some three years before.

At this point in the history of the case we may state our conclusion to be that the trade-mark thus coming to the ownership of the corporation, E. H. Taylor, Jr. Co., consisted, so far as it was exclusively distinctive in its character, only of the letters "O. F. C." The other words were appropriately grouped about these letters to indicate the general character of the whisky, and that E. H. Taylor, Jr., was the distiller.

We do not suppose these words "hand-made sour-mash" are such as can properly be claimed and used exclusivley as a trade-mark, and we suppose the name "E. H. Taylor, Jr.," was one for which another name was to be "substituted" as "distiller" when occasion demanded it, which would be when Taylor ceased to be the distiller of the "O. F. C." whisky; but be this as it may, the intention of the parties adopting this trade-mark, as expressed in its repeated registration, is to the effect that the symbolic letters "O. F. C.," alone constituted the trade-mark.

Upon the organization of this corporation Stagg became its

president and E. H. Taylor, Jr., its vice-president, the stock being owned and controlled by them, with all distilling operations under Taylor's management.

It erected at once another distillery, adjacent to the O. F. C., and to it gave the name of the "Carlisle" distillery, and upon all packages of whisky maufactured at this distillery the company placed a brand, consisting of the words "Carlisle Standard Sour mash Whisky, E. H. Taylor, Jr. Co., Distiller, Frankfort, Ky."

There was no registration of this brand as a trade-mark, but the fair inference is that its "essential feature" was intended by the parties to be the word "Carlisle.' The words "standard sour-mash whisky" were not so intended, even if they could have been so used, and for the name of the distiller in the brand there was to be substituted, as we must suppose, the name of the person of whom it could be truthfully said he was the "distiller."

In the operation of these distilleries, the "O. F. C.," and the "Carlisle," the distiller was E. H. Taylor, Jr. That it was deemed important to indicate to the trade that he was the distiller is shown by the conduct of all the interested parties. He had been engaged in distilling for more than twenty years, and had given the "O. F. C." whisky a reputation equal to any made in Kentucky. Its superior quality was attributed largley to his skill as a distiller, and the intelligent and careful superintendency he gave to the methods of distillation.

In one of the E. H. Taylor, Jr. Co.'s circulars, and we use it as a sample of many others of the same import, it is said "Mr. Taylor's long experience in distilling and his intelligent acquaintance, theoretically and practically, with the arcana of fermentation and distillation, together with his known pride in excelling in the quality of product, are guarantee of that quality."

In 1880 or 1881, to still further impress on the public and the trade the personal connection of E. H. Taylor, Jr., with the manufacture of its whiskies, for the somewhat impersonal designation "E. H. Taylor, Jr. Co., Distillers," was substituted the words "E. H. Taylor, Jr. Co., Distillers," in the well-known and striking autograph signature of E. H. Taylor, Jr., with a "caution" to the trade that such script was the test of the genuineness of "O. F. C." and "Carlisle" whiskies in the market.

Was this autograph of E. H. Taylor, Jr., whether in the form of the individual name of "E. H. Taylor, Jr., Distiller," or of the corporate name of "E. H. Taylor, Jr. Co.," a part of the trade-mark of the O. F. C. and Carlisle whiskies?

In this connection it is interesting to notice the origin of the adoption of this script as shown by the testimony. Stagg says that on an occasion when Taylor was in St. Louis the latter noticed a striking script signature on packages of imported brandy, and was impressed with the idea that the signature of the company, as written by him, would be appropriate, and would look well on a barrel. Taylor suggested it, Stagg agreed with him, and it was done.

It is not pretended that the corporation purchased from Taylor the right thus to appropriate his personal signature, or that he was compensated therefor by any one in any way or to any extent. Taylor contends that it was a mere fancy with him, and was intended to show his personal identification with the distilling operations of the company.

That such was the intention seems clear enough, and such was doubtless the effect of the use of the script. The combination of Talyor's name and the fac simile of his striking signature would

easily and necessarily raise the inference that he was not only personally connected with the company, but was in fact its "distiller." It seems doubtful that such use could have been made of this autograph after Taylor withdrew from the concern, and ceased to be its distiller, even if in express terms he had attempted to sell it to the corporation or to Stagg. As aptly said by counsel, "public policy and common honesty would forbid any such transaction."

Be that as it may, there has been no such transfer or attempted sale. The claim of the appellants, through the E. H. Taylor, Jr. Co., to the continued use of this autograph is based on an inference merely, arising out of Taylor's consent to its use while he was identified with the business. It was not a part of the original trade-mark, but is claimed as a sort of adjunct thereto. Considering the circumstances of its adoption; that it was inspired by the mere fancy of Taylor; that there was no consideration for its use; that there was no agreement or contract connected with its use; and not overlooking the fact that its use pointed out Taylor as the distiller of the concern for the time being, and identified him therewith as much so as his physical features would have done, and that a continuance of this misleading feature would be an imposition on the public, we are convinced that, even after the adoption of this script, the trade-marks of the company, and those claiming thereunder, consisted of the smybol "O. F. C." and name "Carlisle."

These were the "essential features," and the fact that the other words might be "omitted," as shown by the specification of the O. F. C. trade-mark in the patent office, shows that these other words were not regarded as a part of the trade-mark. (See similar registration in Harris Drug Co. v. Stuckey, 46 Federal Rep., 624.)

In 1882, the E. H. Taylor, Jr. Co. purchased a third distillery, situated about six miles from Frankfort, in Woodford county, which had theretofore been owned and operated by J. S. Taylor. They operated this distillery in the name of J. S. Taylor, using the brand he had theretofore used, viz: "J. S. Taylor's Handmade Sour-mash Whisky, Woodford county, Ky.," and in addition thereto used the name "J. Swigert Taylor," in fac simile of his handwriting.

The company continued to operate these three distilleries, and to do so successfully until in December, 1886, when, in pursuance of a written contract to that effect, Stagg and the E. H. Taylor, Jr. Co. conveyed to E. H. Taylor, Jr., the J. S. Taylor distillery in Woodford county, in consideration of which Taylor relinquished all interest in and to the effects and business of the company and retired therefrom. Upon obtaining the J. S. Taylor distillery, Taylor at once associated his sons with himself in business, as E. H. Taylor, Jr. & Sons, and, as we have seen, began the manufacture of whisky at the J. S. Taylor distillery.

The withdrawal of E. H. Taylor, Jr., from the company left Geo. T. Stagg the sole owner of the stock of the company, and the "O. F. C." distillery was run by him in the name of the company until July, 1887. From that date until January, 1889, both the "Carlisle" and "O. F. C." distilleries remained idle, as the "Carlisle" distillery had remaned from the beginning of the year 1887.

The "Geo. T. Stagg Co." was organized in November, 1887, and thereafter the E. H. Taylor, Jr. Co. surrendered its distilleries, warehouses, dwelling houses, grain elevators, cattle pens and other properties, and its good will, trade-marks, brands, etc., to the Geo. T. Stagg Co., and that company leased these properties to the appellant, Stagg.

Upon the organization of the Goe. T. Stagg Co., the purpose of which organization was to operate ditstilleries, manufacture, purchase and sell whiskies, buy, feed and sell cattle, etc., the trade and public were notified by circulars. The apparently defunct E. H. Taylor, Jr. Co. notifying the "trade" that it had transferred to the "Geo. T. Stagg Co., of Louisville, Ky., the 'O. F. C.' and 'Carlisle' distilleries, situated near Frankfort, together with the brands, trade-marks, good will, etc., of the business," and directing "holders of warehouse receipts for the 'O. F. C.' and 'Carlisle' whiskies, stored in bonded or free warehouses," to hand in their receipts to that company when wishing to withdraw their goods.

The Geo. T. Stagg Co., on the same circular, stated to the public, among other things, "that in methods of manufacture and character of material used they would omit nothing to sustain the reputation of the products of the celebrated "O. F. C." and "Carlisle" whiskies. The company also placed in large letters on its office doors in Louisville the words "The Geo. T. Stagg Co., Distillers of 'O. F. C.' and 'Carlisle' Whiskies."

These circumstances, and others we need not stop to discuss, induce us to believe that it was the intention of all the parties, at the time of the withdrawal of Taylor from his business association with Stagg, that the corporation, E. H. Taylor, Jr. Co., was to cease all active business operations. It deliberately advertised itself as going out of business, and as having turned over its possessions, good will, etc., to another. The Geo. T. Stagg Co. stepped into its place, and so notified the public.

It may be true that Stagg, who owned all its stock, found it convenient to retain the name merely for purposes connected with certain governmental regulations. As a matter of law it stood suspended so far as the public was concerned. (Eisman v. Louisville Banking Co., 14 Ky. Law Rep., 705.)

We do not believe, and this is the point in considering the facts just enumerated, that it was incompatible with business integrity on the part of Taylor, or violation of any of the legal rights of Stagg or the Geo. T. Stagg Co., that Taylor should, in connection with his sons, assume the partnership name of E. H. Taylor, Jr. & Sons, though similar in appearance to the corporate name E. H. Taylor, Jr. Co. We think rather that it was the expectation of all the parties concerned that the name of E. H. Taylor, Jr., as a part of the corporate name of a defunct corporation, should, within a reasonable time, entirely disappear. That it was the ambitious purpose of Geo. T. Stagg to substitute his own name, or that of the corporation bearing his name, as the distiller and proprietor of the famous "O. F. C." and "Carlisle" distilleries, and their accompanying brands of whisky, we do not doubt. He made no complaint of the use of that firm name by the Taylors when they assumed it; but, on the contrary, sold them as such firm some twenty odd thousad dollars' worth of J. S. Taylor whisky in the spring of 1887.

It follows, from what we have said, that upon their resumption of business in 1889, the Geo. T. Stagg Co. and Stagg could not lawfully use the autograph signature of E. H. Taylor, Jr., as it might appear in the contract name E. H. Taylor, Jr. Co., or otherwise, or advertise him as the distiller of their "O. F. C." or "Carlisle" whiskies, as they claimed they had the right to do and in some instances did. Nor do we think the appellants can justly complain of the use by the appellees of the trademark "Old Taylor" whisky.

While there is abundant proof that the "O. F. C." and "Carlisle" whiskies were frequently called by dealers "O. F. C." (Taylor) or "Taylor's O. F. C.," "Taylor's Carlisle" or "Carlisle"

(Taylor), etc., yet the parties interested, and who alone had the right to name their whisky and adopt its trade-mark as a distinguishing feature, did not so call it or brand it "Taylor" or "Old Taylor" whisky, or in anywise associate the name Taylor with it, save in the use of the signatures heretofore discussed; though at the time the suit was instituted the proof conduces to show that the appellants began to apply to the "O. F. C." whisky the name of Taylor whisky.

We conclude, therefore, that the chancellor properly enjoined the appellants from advertising E. H. Taylor, Jr., as the "distiller" of their "O. F. C." or "Carlisle" whiskies, save when such statements were in fact true. The words E. H. Taylor, Jr., constituted no part of their trade-mark, and their use was an imposition on the public, save when they could be truthfully used. (Mattingly v. Stone, 12 Ky. Law Rep., 76; Browne on Trade-marks, sections 57 and 437.)

That the appellants were also properly enjoined from the use of the fac simile of the autograph signature of E. H. Taylor, Jr., save as to goods made before January, 1887; and this is true, whether used with or without the additional word "company." The effect is the same, and was intended to indicate the continued personal connection of Taylor with the "O. F. C." and "Carlisle" whiskies. The autograph can not be used to effectuate such an intention, and such was the manifest design and would be the necessary result of such use by the appellants. (Symonds v. Jones, notes to 17 Am. St. Rep., 485; Brown on Trade-marks, section 208.)

The judgment is also to be approved in denying to the appellants the use of the words "Taylor" or "Old Taylor" as brands for their whiskies, and in confirming such use to the appellees, and in dismissing the counterclaim of the appellants. But the decree directs an accounting of profits and that, too, from January 1, 1887, when there was no complaint until in 1889.

It can hardly be claimed that this is proper, even if damages are recoverable at all in this case. There has been no judgment or final order on this branch of the case, but the order of reference to the master indicates the basis for a further judgment. It does not seem to us that the appellees are entitled to an account of profits. The proof does not show any fraudulent intent on the part of the appellants or those under whom they claim.

It is shown they used no other brands, labels, advertisements, etc., than they had always used or supposed themselves entitled to use, and this they did under color at least of title and conveyance from Taylor. During the whole of the years 1887 and 1888, for a portion of which time at least the appellants manfactured whisky, there was no complaint.

In the conlusions reached we have adopted the theory of the appellees that the use of the name E. H. Taylor, Jr., and his autoghraph by the appellants was in the nature of a license or permit, and we do not see that this has been abused or extended unreasonably. Relief, in the way of damages, is frequently refused by courts of equity even where the right of the party to an injunction is acknowledged. (McLean v. Fleming, 6 Otto, 266; Cox's Am. Trade-mark Cases, 675-717.)

This order of reference, however, is merely interlocutory, and the future conduct of the case in this behalf will doubtless be based on correct legal principles.

Perceiving no error in the judgment it is affirmed.

COMMONWEALTH v. WEINGARTNER.

(Filed September 25, 1894—Not to be reported.)

1. An indictment for false swearing must negative by specific averment the matter alleged to have been sworn to by the accused. Where the false oath complained of in an indictment for false swearing was to the effect that the defendant had not authorized or consented to a certain thing, it was essential, to constitute a good indictment, that it should be averred that the defendant had authorized and consented to the thing referred to, it not being sufficient to allege that he "well knew" that he had authorized and consented to it.

2. Same—In an indictment for false swearing, alleged to have been committed in a trial before a justice of the peace, it is not necessary to allege facts showing the jurisdiction of the justice.

W. J. Hendrick for appellant.

Butler Hawkins for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

The indictment in this case, to which a demurrer was sustained by the court below, is for false swearing, and charges the appellee, Weingartner, with willfully, feloniously and knowingly swearing, deposing and giving in evidence, in a forcible detainer proceeding before Reuben Tedrow, a justice of the peace in and for Campbell county, "that Paul Henne, to whom he (the said Weingartner) had rented a house, had without his knowledge or consent, sublet the same, he (the said Weingartner) well knowing at the time of giving said evidence that the same was false. And he well knew that he had authorized and consented to the subletting of said house by said Paul Henne."

We suppose it to have been the intention of the prosecutor to charge, as it was necessary that he should charge, that the appellee swore that Henne had sublet the house without his knowledge or consent, when, in fact, Henne had sublet it with his knowledge and consent; and the statement that Henne had sublet with out appellee's knowledge and consent was false and so known to be when the witness testified.

We are inclined to think that the language of the indictment falls short of this. "It is a settled rule in criminal pleading," said this court in Commonwealth v. Still, 83 Ky., 275, "that an indictment for perjury," and one for false swearing as well, "must negative by special averment the matter alleged to have been sworn to by the accused."

In the case under consideration we may reach the conclusion by a porcess of reasoning, and only by such process, that to aver that the witness well knew he had authorized and consented to the subletting is equivalent to the averment that he had authorized and consented to it, but it is not in fact a specific averment of the falsity of the matter on which the false swearing is assigned, and this is held to be necessary in all the cases.

It is urged also that the indictment should have shown the jurisdictional fact that the premises in dispute in the forcible detainer case were instituted in Campbell county, else the justice would have been without authority to administer an oath. We think differently. The officer was authorized to administer oaths generally. The subject-matter of the controversy was one concerning which the witness could legally be sworn, and about

which, it sufficienlty appears, he was required to be sworn, and this meets the requirements of the Statute. (Section 2, article 8, chapter 29, General Statuts.)

The witness might have been sworn by the justice touching any matter, however immaterial, connected with the proceeding, even to locating the premises, and if he had knowingly and willfully sworn falsely, he is guilty without regard to whether or not the justice had jurisdiction to render a final judgment.

But for the reason indicated we shall not disturb the ruling of the lower court on the demurrer.

Judgment affirmed.

COMMONWEALTH v. BOWMAN.

(Filed September 29, 1894.)

1. Indictment—Facts defectively stated—Although facts constituting an offense are so defectively stated in an indictment as to make it bad on demurrer, yet if the facts stated therein constitute a public offense within the jurisdiction of the court, it is error in the court to arrest the judgment of conviction thereunder.

2. Same—Whether facts stated constitute a public offense—The court is restricted to the inqury whether the facts stated in the indictment constitute a public offense within the jurisdiction of the court. The indictment charges that the defendant "did forge and alter a note," etc., but it failed to charge that he did so without the authority of the makers thereof. To establish his guilt it is necessary to prove this fact.

W. J. Hendrick for appellant.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Quigley.

At the April term, 1894, of the Pendleton Circuit Court, the grand jury of Pendleton county indicted the appellee, Bowman, for forging and altering a promissory note, committed in manner and form as follows: "The said Stonewall Bowman, on the — day of December, 1892, in the county and State aforesaid, and before the finding of this indiement, did falsely, knowingly, fraudulently and feloniously and the wicked design to defraud, forge and alter an instrument purporting to be the promissory note of W. Y. Morris and James J. Brann for $10, dated December 26, 1892, and payable to the Falmouth Deposit Bank of Falmouth, Ky., and due four months after date thereof, by there and then feloniously altering and changing the said note after the same had been signed for $10, to and for $30, and did there and then feloniously thereafter present the same to the said bank and sell and discount the same for $30 to said bank with intent to defraud."

A demurrer was entered to the indictment and overruled, and an issue being joined and trial had, appellee was found guilty and his punishment fixed by the jury at confinement in the penitentiary for two years. Thereupon a motion was made in arrest of judgment, which motion the court sustained and dismissed the indictment, and from the judgment of the court so doing the Commonwealth prosecutes this appeal.

The only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court (section 276, Criminal

Code), and it has been repeatedly held by this court that although the facts constituting the offense are so defectively stated in the indictment as to make it bad on demurrer, yet if the facts stated therein constitute a public offense within the jurisdiction of the court, it is error in the court to arrest the judgment. (Tully v. Commonwealth, 11 Bush, 154; Hodgins v. Commonwealth, 11 Ky. Law Rep., 226.) So that it necessarily follows that the facts, when stated, though defectively so, must be sufficient of themselves to constitute a public offense within the jurisdiction of the court.

Section 122 of the Criminal Code of Practice repuires the indictment to state the acts constituting the offense, and in such a manner as to enable a person of common understanding to know what is intended. For the purposes of this appeal the court is restricted to the simple inquiry, do the facts stated in the indictment constitute a public offense within the jurisdiction of the court? The indictment is certain as to the party charged, the offense charged and the county in which the offense was committed. If deficient at all the deficiency consists in not alleging the particular circumstances of the offense charged—that is, the facts constituting the offense. This idea is tenable only upon the ground that the indictment is the pleadings of the Commonwealth and must state its grievance against the defendant in the manner prescribed by the Criminal Code of Practice as above set out, and that every materal fact necessary to be proven on the trial to convict the defendant must be stated in the indictment in order to constitute a public offense. In a case similar to this one, that of Stowers v. Commonwealth, 12 Bush, 343, there the indictment charged the offense to have been committed as follows: "The said N. M. Stowers, in the said county of Daviess, on the 9th day of March, 1872, and before the finding of the indictment, did forge the name of Ed. Bosley to an instrument of writing purporting to be the promissory note of N. M. Stowers and Ed. Bosley for $380, payable to Miss M. J. Smith, fourteen months after date, and dated 4th day of March, 1872, with intent to defraud," etc. This court held "that to charge a man with forgery is merely stating a conclusion of law, and that the indictment in this case is insufficient to support a judgment of conviction. The indictment should state the acts constituting the offense. If the indictment had charged that appellant signed Bosley's name to the instrument without authority, or that he procured somebody else to sign it with the intention to defraud, it may have been good, though there is some conflict of authority as to whether the indictment does not have to show the person the prisoner intended to defraud." And in the case of the Commonwealth v. Williams, 13 Bush, 267, this court said: "There are several modes in which a forgery may be committed. It may be by signing the name of a person without authority, by procuring it to be so done by another, or by fraudulenlty altering without authority, although signed. Under our system an indictment for forgery must inform the defendant of the particular acts relied upon to constitute his guilt."

The indictment under consideration charges that the defendant did forge and alter a note, etc.; it fails to charge that the note was altered by him without the authority of the makers thereof. This fact had to be proven to establish his guilt. It constituted the gist of the offense and should have been charged in the indictment in order to state facts sufficient to constitute a public offense within the jurisdiction of the court. (White v. Commonwealth, 9 Bush, 179.)

The demurrer having been overruled, and the motion in arrest

of judgment being simply in the nature of a demurrer to the indictment before final judgment, the judgment of the court sustaining the same and dismissing the indictment is affirmed.

COMMONWEALTH v. MURPHY.

(Filed September 29, 1894.)

Obtaining money under false pretenses—Section 1208 of the Kentucky Statutes defines the offense of obtaining money or property under false pretenses as follows: "If any person by any false pretense, statement or token, with intention to commit a fraud, obtain from another money, property or other thing which may be the subject of larceny," etc. The word "statement" is inserted evidently for the purpose of curing the defect in the statute as it existed in 1860, which was in these words, "any false pretense or token," and under which it was held that it was essential to conviction for this offense that the pretense whereby the money or property was obtained was a statement of some pretended past occurrence or existing fact made for the purpose of inducing the party injured to part with his property. It is not now indispensible that there should be a false statement in words of a past occurrence or existing fact in order to make the offense, but it is sufficient if there be a false pretense by conduct or conversation, direct or indirect, whereby one with intention to commit a fraud obtains money or property from another.

The evidence showing that the defendant, by his conversation and conduct, created in the mind of the witness the belief that he was authorized to give him a place as nightwatchman in the railroad depot at Cynthiana, although he did not state in terms that he had such authority, and thereby fraudulently obtained from witness $1.25, the lower court erred in instructing the jury to find the defendant not guilty.

Wm. J. Hendrick for appellant.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Lewis.

William Murphy having been indicted for the crime of obtaining money under false pretenses, and, under peremptory instruction by the court to find for him, acquitted by the jury, the Commonwealth appeals.

Price Ronald, prosecuting witness, testified that on a Saturday night he was, in a saloon, accosted and asked by accused if he would like to have a job of nightwatchman at the railroad depot in Cynthiana, for which he would get $2.75 each night, and that he could give it to him; that he (witness) would have to get a badge and wear it under his coat, but if any one was found loafing around the depot at night he must show the badge in order to arrest him, and might, if necessary, call on others to aid him in making the arrest. In language of witness, "I told him it was nearly winter time and I would like to have the job, and he hired me. He then asked me to give him $1.25 to send to headquarters so that I could go on duty the next night, and asked me if I had an indelible pencil. I told him I had not. He then pulled out a pencil and gave it to me. I gave him the $1.25 to send to headquarters. After he hired me at the price of $2.75 a night, before I agreed to work for the railroad company as night watchman, my brother came to the depot as he was going to Lexington and I told him about defendant wanting to hire me.

The defendant was in the telegraph office talking to the operator, and after he came out he told me that he sympathized with me, as I was a cripple, and wanted to help me; that if my brother had no objection he would hire me. My brother told him he had none. I can neither read nor write, and had never seen defendant before I had him arrested that night."

Defendant admitted on the trial he was not in the employment of the L. & N. R. R. Co.

In Glackan v. Commonwealth, 3 Met., 232, it was held essential to a conviction for obtaining money or property under false pretenses to allege and prove that the pretense whereby the money or property was obtained was a statement of some pretended past occurrence or existing fact made for the purpose of inducing the party injured to part with his money.

The statute defining and punishing the offense as existing in 1860, when that case was decided, being part of the Revised Statutes, is as follows: "If any person by any false pretense or token with intent to commit a fraud obtain from another money, property or other thing which may be the subject of larceny, or if he obtain by any false pretense with like intention the signature of another to a writing, the false making whereof would be forgery, he shall be confined in the penitentiary not less than one nor more than five years."

The evidence in this case does not show that defendant stated in terms the fact he was an agent of the L. & N. R. R. Co., and as such empowered to give the job of nightwatchman to Ronald, but by his conduct and conversation he created belief in the mind of his dupe he had such authority, and thus as effectually accomplished his fraudulent purpose of obtaining $1.25 as if he had stated the fact; for he not only told him he could give him the job at the price agreed on but falsely stated the money obtained was to be sent to headquarters of that company.

It does not, however, matter whether under the statute quoted as construed in the case cited defendant could or not have been convicted, for we are satisfied the evidence shows him guilty of the offense described in section 2, article 13, chapter 29, General Statutes, enacted evidently for purpose of curing the defect of the Revised Statutes, and now constituting section 1208 of the Kentucky Statutes, as follows: "If any person by any false pretense, statement or token, with intention to commit a fraud, obtain money from another, property or other thing which may be the subject of larceny," etc. So that it is not now indispensible there should be a false statement in words of a past occurrence or existing fact in order to make the offense, but it is sufficient if there be a false pretense by conduct or conversation, direct or indirect, whereby one with intention to commit a fraud obtains from another money or property. For if the word pretense was intended to mean nothing more than or different from "statement" it was useless to amend the old statute by inserting it.

In this case, according to the evidence, defendant, by false pretense, and with intention to commit a fraud, caused Ronald to believe he was authorized to give him the place of nightwatchman at stipulated wages, and thereby fraudulently obtained from him $1.25; and in our opinion, as the Commonwealth sustained the charge in the indictment, it was error of the lower court to instruct the jury to find defendant not guilty.

Wherefore, this opinion is ordered to be certified.

BUSH, &c. v. ROBINSON.

(Filed May 3, 1894.)

1. Corporations—Personal liability of shareholders—Waiver—Where a person sells lands to a corporation, part payment in cash and the residue in notes secured by lien on the land, with an oral agreement at the time of sale that he was to look only to the corporation and the land for the payment of the notes, he thereby waives recourse on the stockholders and the oral agreement is binding.
2. Same—Evidence—Oral evidence is competent to prove the collateral agreement if it does not contradict or vary the written contract.

Wm. Lindsay, Beckner & Jouett and Grubbs & Morancy for appellants.

J. M. Benton for appellee.

Ap eal from Clark Circuit Court.

Opinion of the court by Judge Lewis.

March 17, 1890, R. T. Coleman and H. W. Clark associated and became incorporated under chapter 56, General Statutes, name of the corporation being "Grand Boulevard Residence Company," and its principal place of business Louisville.

The articles of incorporation contain the following clauses: First, "that the general nature of business to be transacted is to buy, sell and deal in lands in Kentucky, to lay off same into boulevards, lots, streets, etc." Second, "the amount of capital stock authorized is $30,000, to be issued in shares of $100 each, which is fully paid up, represented by the conveyance of about 43 acers of land near Winchester, Clark county, and when said land is so conveyed to and accepted by the corporation said amount of stock shall be issued fully paid up and non-assessible for any purpose." Third, "the private property of the stockholders, directors and incorporators shall be exempt from corporate debts." On the same day a meeting was held for the purpose of organizing the company, when the capital stock of $30,000 was subscribed for and directed to be issued, fully paid up and non-assessible upon payment at rate of $15 per share by the subscribers, who were R. T. Coleman, S. S. Bush, G. F. Berry and W. E. Bradley. The next day, March 18, John V. Robinson conveyed to "Boulevard Residence Company" about 43 acres of land, the same mentioned in the articles of incorporation, at the price of $18,360, of which $4,590 was then paid, and for residue notes, secured by lien on the land, were executed by the company through its president, S. S. Bush.

This action was brought by Robinson in Clark Circuit Court against the company, and the stockholders named to recover amount of said notes, and personal judgment therefor was rendered not only against the company that made no defense, but against Coleman and Bush each to extent of $4,590, and against Berry and Bradley each to extent of $2,295.

Several grounds of defense to the action were relied upon in the lower court as they are here, but we need consider only that pleaded in paragraph six of the joint answer as follows: "There was an express contract and understanding with said Robinson that no personal liability was to attach to any officer or stockholder of the company by reason of said notes or by reason of any indebtedness that might be due to the company from other

sources; but that the contract was with the distinct understanding the only claim plaintiff (Robinson) had was against the corporation and said tract of land and not against any individual stockholder thereof."

It appears that prior to organization of the company S. S. Bush, being at Winchester, had purchased or obtained from Robinson an option on 20 acres for Coleman, Bush & Co., a firm engaged in buying and selling lands, which was by telegram enlarged to 43 acres. But when he went back to consummate the trade the deed was drawn so as to make the company vendee, and also sole obligor of the notes for deferred payments. Besides Bush, two witnesses having no interest in the action state that when the deed was presented to Robinson and the notes signed by the company by Bush, its president, and tendered, it was fully and clearly explained to and understood by him that the stockholders had paid of their subscriptions to the capital stock of the company money enough to make the cash payment on the land and did not intend to risk more, but that he was to look only to the corporation and the land, its only property or means for payment of. residue of purchase money, which he agreed to do.

The land was, as Robinson manifestly knew, purchased for purpose of mere speculation at a time when what is called "a real estate boom" prevailed at Winchester and vicinity, and at a price three times as great as, according to evidence in this case, it will now bring or probably would have brought very soon after the transaction; and it is an entirely reasonable belief that Robinson was willing and did agree to waive recourse on the stockholders rather than forego a sale whereby he would, without risk, obtain double the actual value of his land; and in our opinion, notwithstanding he testifies to the contrary, the evidence clearly supports the allegation of the answer.

But although the provision of articles of incorporation by which the stockholders were, upon the land being conveyed to the corporation, entitled to have issued to them as paid up the full amount of stock subscribed might, as between them and it, be valid, it was not so as to creditors. For section 14 of chapter 56, General Statutes, in terms provides that stockholders of a corporation shall not be exempt from individual liability to the amount of the unpaid installments on the stock subscribed by them or transferred by them for the purpose of defrauding creditors, and an execution against the company may to that extent be levied upon the private property of such individual; and having actually paid but $15 upon each share of stock of the face value of $100, the defendans, now appellants, are unquestionably liable for balance of purchase price of land to extent of the unpaid installments, unless released by the alleged agreement of the appellee, Robinson, and whether they were is the main question in this case.

In Cook on Stock and Stockholders, section 216, it is said "a corporate creditor may, by express contract made when the debt is incurred, waive his right to collect from the stockholder debts which the corporation fails to pay. And in Morawetz on Corporations, section 871, is this language: A statutory provision declaring that the shareholders in a corporation shall be individually liable to creditors, would not prevent the execution of contracts into which this liability does not enter. If a person contracting with the corporation should expressly agree to accept the obligation of the corporation without the special liability of its shareholders he would not be able to charge the latter. Such provision is solely for benefit of those dealing with the corporation and may be waived by them."

In support of the doctrine thus stated the following cases are cited: Brown v. Eastern Slate Co., 134 Mass., 590; Bassher v. Forbes, 36 Md., 134; French v. Luchemaker, 24 Cal., 518; Robinson v. Bidwell, 22 Cal., 379.

In Brown v. Eastern Slate Co. the plaintiff accepted promissory notes of the corporation in payment of property sold to the company under a written contract. At the same time he orally agreed with the directors that the shareholders should incur no personal liabilites for the claim, and the court held the oral agreement was binding.

In Bassher v. Forbes, a steam engine was purchased by a corporation, or which it gave notes secured by mortgage on certain lands, and the action was brought on the notes against a stockholder, alleged to be liable because the whole amount of the capital stock of the company had not been paid in, and he was a stockholder thereof to an amount greater than the demand sued on. But, upon proof of an oral agreement the vendor was to look to the mortgage and not to stockholders, he was held not entitled to recover.

In both cases cited the question of competency of oral testimony to prove such collateral agreement was considered, and it was held that as it did not contradict or vary the written contract it was competent.

In our opinion the effect of the agreement by Robinson to look to the company and to the lien on the land and not to the stockholders for payment of the notes sued on, was to exempt the latter from liability.

The judgment is, therefore, reversed and cause remanded for dismissal of the action against appellants.

GRAY v. CORNWALL'S ASS'EE.

(Filed May 17, 1894.)

1. Improvements erected by lessee to be purchased by lessor at expiration of lease—Equitable lien—Where a city lot was leased for a term of ten years, the lessee to erect a building which, at the expiration of the lease, was to be valued by referees, and upon the payment of valuation to lessee the premises were to be delivered into the possession of the lessors; and it was further provided that if the lessors should not be able to purchase or find a purchaser, the lease should be continued on the same terms as for the ten years until such time as they might be able to purchase at a valuation in mode mentioned, or until some other agreement should be made, the lease created an enforcible obligation on the part of the lessors to pay for the improvements and not a mere privilege to do so; and while the clause of the lease continuing its terms after the expiration of the first ten years was intended to give to the lessors ample time to make the payment, that time must have some limit, and more than twenty-five years having elapsed without any arbitration or agreement as to the valuation of the improvements, the lessee or his assignee is entitled to enforce his equitable lien for the value of the improvements.

2. Same—The lessee having purchased from the lessors a one-half interest in the property, he owns the property jointly with the appellant, who has purchased from the lessors the other half, which he holds subject to the lessee's lien for one-half the value of the improvements; and as each owner has a vested estate in possession, and the property is indivisible, the lessee or his assignee has a right to have the property sold under section 490 of the Civil Code, and incidentally to make appellant satisfy his equitable lien for one-half the value of the improvements; but even if the fee is in the lessee

to one-half the lot and all the buildings, the appellant owning one-half the ground alone, it can make no difference, the result being the same.

3. Buildings part of realty—The buildings, which are substantial five-story brick structures, are to be regarded as a part of the realty; but whether they are personal or real estate is immaterial, the chancellor in either case having jurisdiction to order the sale.

4. The equitable mode of arriving at the value of the improvements is to take their value, relative to that of the lot upon which they stand. It being evident that a sale must be made in any event, it was not error to order a sale before ascertaining the value of the improvements. The chancellor, when he has the fund in his hands, hearing proof as to the character and condition of the buildings at the date of sale, will be better able to fix a just basis of value.

Pirtle, Speed & Trabue and Stone & Sudduth for appellant.

Muir, Heyman & Muir for appellee.

Appeal from Jefferson Circuit Court, chancery division.

Opinion of the court by Judge Pryor.

The judgment below directed the sale of certain real estate situated on the northwest corner of Main and Seventh streets, in the city of Louisville.

The proceeding was had under section 490 of the Civil Code that authorizes "a vested estate in real property, jointly owned by two or more persons, to be sold by order of a court of equity, where the estate is in possession, and the property can not be divided without materially impairing its value or the value of the plaintiff's interest therein."

In or about the year 1865 the then owners in fee of this realty leased it to a man by the name of Thomas Slevin, and so much of the lease as applies to the point raised by counsel for the appellant is as follows:

"This indenture, made and entered into this 11th day of August, 1865, by and between John Martin, trustee for Nancy B. Martin and children, said Nancy B., John S. Martin and Mary A., his wife, James Martin, John P. Maher and wife, Mary Mc. (nee Martin), of the first part and Thos. Slevin of the second part, witnesseth that the parties of the first part hereby lease unto the party of the second part for the term of ten years, from the 1st day of April, 1866, the following described parcel of ground in the city of Louisville: Beginning at the northwest corner of Main and Seventh streets running westwardly and fronting 53 feet on Main street; thence at right angles northwardly 105 feet; thence at right angles eastwardly 53 feet to Seventh street; thence southwardly with Seventh street to the beginning; on these terms, namely, the storerooms now on said ground, occupying about 42 feet front (equal width back), belonging to said Slevin, survivor of T. E. Slevin, to be let by him to suitable tenants, he defraying the expense of keeping them in usual tenantable condition, and out of the rent received for them he is first to pay all taxes, city, State, etc., and repairs for streets, and to divide the remainder, as it becomes due and is collected by him, into equal halves, he to retain one-half and to pay the other half to said parties of the first part; he agrees to pay at the rate of $300 per year for the 10 feet 7 1-5 inches, more or less, unimproved ground, being the western part of said parcel, up to such time as he shall build thereon, after which he is to let such improvements, and after paying taxes, etc., divide

the net income half and half precisely in the same manner agreed on regarding the two houses named.

"At the expiration of the lease the parties of the first part shall choose a referee, the party of the second part shall choose one also, and these two, when chosen, shall choose a third, who shall value the whole of the improvements on said ground, and upon the payment of said valuation to said party of the second part, or to his heirs or assignee, the said premises with said improvements shall be delivered into the possession of the parties of the first part. If, however, the parties of the first part shall not be able to purchase or find a purchaser, then it is agreed that the lease shall be continued and extended for the same terms as agreed on for the ten years, till such time as they be enabled to purchase at valuation in mode just mentioned, or until some other mutual agreement or settlement shall be made."

As will be seen from this lease, it began in April, 1866, and was to run for ten years, at the expiration of which time Slev n was to have pay for the improvements, or rather their value, and the lessors (the Martins) were to take possession of the premises. A referee was to be selected by the parties to fix the value, "and if the Martins should be unable to pay for the improvements or to find a purchaser, then the lease was to be extended and continued for the same terms agreed on for the ten years, till such time as they (the Martins) may be enabled to purchase at valuation, in mode just mentioned, or until some other mutual agreement or settlement shall be made."

When the lease was executed a part of the lot of ground had upon it two storehouses fronting on Main street, and that part of the ground on which no building stood has been or was improved by Slevin, as authorized by the lease, by the erection of a building upon it, so the entire lot is covered by these buildings, and, as suggested by the counsel, the building standing on the lot when the lease was executed were evidently built by Slevin, as the lessors agreed by the terms of the lease to pay for those improvements. Slevin, under the lease, was to rent the property, and after paying all taxes, street improvements, etc., the net proceeds of the rental to be divided between the lessors and the lessee.

No settlement or agreement as to the value of the improvements made by Slevin was ever had between himself and the Martins, and the property has been used and occupied by tenants for nearly twenty-six years, and to the date of these proceedings, without any settlement, by reference to arbitration or otherwise as to the improvements, but the rents apportioned between the Martins or their vendees, as the terms of the lease required.

Wm. Cornwall, who owned in fee one undivided half of this lot of ground and all the buildings on the entire realty, made an assignment of his estate to the appellee, the Louisville Trust Co. The assignee under the assignment became entitled for creditors to one-half the lot of ground and to the value of the three buildings placed upon the ground by Slevin.

The appellant, J. S. Graves, obtained, by purchase, the fee to the other undivided half of the lot. The title that each asserts is not controverted, so we find, when this action was instituted, that the appellee was entitled to the value of all the improvements and the fee to one undivided half of the ground, and the appellant the fee to the one-half the ground only.

It is conceded the property, with the buildings upon it, is indivisible, and that in fact no division can be made, and a resort has been had to the relief given in such cases by section 490 of

the Civil Code. With the buildings off the lot a division could doubtless be had, but it was never intended that these buildings should be detached from the ground, but, on the contrary, it was designed the buildings should form a part of the realty and pass to the original lessors upon the payment of their value.

The buildings are substantial brick structures, five stories high, and Slevin under the lease from the Martins, had an equitable lien for the value of his improvements at the termination of the lease, and could have held possession until he was paid. Both the appellee and the appellant had actual knowledge of the lease and its terms, and the manner of the holding by the original lessee, Slevin. Cornwall''s assignee stands in the shoes of Slevin and is entitled to all the equities that Slevin had.

The appellant, Gray, disclaims to own any part of the improvements, and in fact some of his deeds under which he holds confines, in express terms in the grant, his title to the ground, and not to the buildings, and as to the extent of his interest there seems to be no controversy.

It is alleged, and we must assume, the testimony shows (the depositions not being before us) a refusal by the appellant to refer the question of value to a referee, or to make any settlement in regard to the improvement, and that neither the Martins nor any one for them have complied with this provision of the lease. The buildings constitute a part of this realty, and the realty is held in fee by the appellant and the appellee. The appellant holds his half subject to the equitable lien for the improvement.

The assignee of Cornwall is required to sell his interest for creditor. He has a vested estate in possession, with a lien for the improvement. The appellant has a vested estate in fee to the one-half, subject to the lien for the one-half value of the improvements.

There is no reversion or remainder interest—the parties own the property jointly, one having a less interest than the other, or, rather, the appellee has a lien on the appellant's one half, which he may enforce. They have the possession, each receiving rents under the terms of the original lease. If the fee is in the appellee to the one-half of the lot and all the buildings, and the appellant the owner of one-half the ground only, it can make no difference. It is a vested estate in both, in possession, and indivisible.

Can it be sa'd that the appellant can retain his fee to the one-half the ground, receive rents, and demand that the lease shall continue forever, or the buildings removed from the premises? It is contended it was a mere privilege on the part of the lessors to pay for these improvements, with no obligation to do so that could be enforced in law or equity, and that all the relief the appellee is entitled to as against the appellant or the Martins is to remain in possession so long as the lessors fail to pay for the imporvements, or until some mutual agreement for settlement is entered into between the parties. We do not so construe the contract. It should have a reasonable construction, and the clause of the lease continuing its terms after the expiration of the first ten years was to give ample time to the lessors to make payment. This time must have some limit—that which is reasonable and contemplated by the parties—and the period of twenty-five years was certainly time enough to have enabled these parties to comply with their obligation.

The sale of this interest by the assignee, with a cloud upon the title, and the assertion of a perpetual lease by the appellant, would result in a sacrifice of the property, and no such judgment should be rendered.

There is no constitutional impediment to this sale as ordered, or to the proceedings directing it. It orders a sale of realty that is indivisible, and incidentally makes the vendee of Martin satisfy this equitable lien; and whether the buildings are personal or real estate is immaterial. We are satisfied, however, they constitute a part of the realty; were erected for that purpose, and that the appellant owns one-half the ground and buildings, subject to the lien.

In Kutter v. Smith, 2 Wallace, 491, the Supreme Court, through Mr. Justice Miller, in speaking of the legal title to the buildings as distinct from the lot, said: "The well-settled rule is that such erection as this becomes a part of the land as each stone and brick are added to the structure," etc.

Here are five-story brick buildings attached to and upon this ground, and they must be treated as a part of the realty on which they stand. The title is or was originally in the lessors, subject to the lien of Slevin; but if you make the title to the buildings distinct from the ground it avails nothing for the appellant, as in either case the chancellor has the jurisdiction to sell it.

It is argued the judgment below should have first ascertained the value of the improvements before ordering a sale of the whole estate. We do not think this would be equitable or just to the appellant. He may be, as is contended, unable to pay for the improvements, and, if their value should be ascertained regardless of their relative value to the ground upon which they stand, there might be danger of the appellant losing his fee if then sold to satisfy the value of the buildings.

The sale is ordered, as we understand, with a reservation on the part of the chancellor of determining in what manner the proceeds of sale should be apportioned. The relative value of the buildings to that of the lot upon which they stand would, in our opinion, be the equitable mode of adjustment. The Martins have no longer any interest in this property. The title is in the appellee as assignee, and in the appellant. They are each required to discharge one-half the lien for improvements. The entire property is sold and the chancellor is called upon to apportion the proceeds between the two vendees. It would be inequitable to take from either his fee to pay for his improvements, and the chancellor will doubtless be careful to protect all parties in interest in the apportionment. When you estimate the net rental value of the entire property, and capitalize it at—say five per cent., the result being the entire value, and then fix a value on the realty, and the difference between the value of the land and that of the whole being the value of the improvements, may in some cases be the proper mode of adjustment, and yet the location of the property will often be such as to cause a high rental value on a very indifferent building.

The chancellor, when he has the funds in his hands, bearing proof as to the character and condition of the buildings at the date of the sale, will be better able to fix a just basis of value than to fix the value of the improvements before the sale, and it being evident that a sale must be made in any event, we perceive no reason for anticipating the danger apprehended by counsel of a sale before the value of the improvements is ascertained.

The judgment below is affirmed.

MAGOWAN, &c. v. BRANHAM, &c.

(Filed May 19, 1894.)

1. Action to quiet title—It seems to the court that the allegations of the petition in this case, if sustained by proof, are sufficient to enable plaintiffs to maintain their action so far as it is in the nature of a bill of peace; but even if not, as defendants in their answer and counterclaim prayed for their title to be quieted, adverse to plaintiffs, and tendered an issue involving question of superior title, it was competent for the lower court to try and determine it.

2. Adverse possession—It is immaterial whether the deed under which the plaintiffs claim was effectual to pass a good title, as grantee, from the date of it, took possession of the land by tenants and held and claimed it adversely to extent of his boundary for a period long enough to give him a possessory title, and the deed is, therefore, now to be considered with reference simply to the extent of such boundary described and claimed by him.

3. The recital in the deed that the land conveyed is part of a certain survey must yield to calls, about the correctness of which there can be no question, and the deed will be held to embrace land included within such calls, although outside the survey referred to.

4. Construction of deed—By "upper cliffs on each side Glady creek," to which the land conveyed was stipulated to run, was manifestly meant cliffs of the tributary branches, as well as those of the main creek, because the cliffs, by reason of the peculiar formation of that particular region, constituted plain and in fact only practicable landmarks.

Wood & Day for appellants.

Thos. Turner and C. Cyrus Turner for appellees.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Lewis.

W. C. Magowan, and others, devisees of James P. Magowan, brought this action against William Branham, and others, alleging they were owners and in actual possession of a tract of land described in their petition; that defendants, all of whom are insolvent, unlawfully and without right, entered upon said land and cut and removed a large number of saw logs, and are giving out in speeches they own said land and claiming it adverse to plaintiffs, whose title is being thereby clouded.

The relief prayed for is an injunction restraining defendant's further cutting and removing timber, damages or value already cut and removed and judgment quieting their title.

On the same day they brought another action to recover possession of saw logs cut and not then removed from the land. In their answer, made a counterclaim, two of the defendants, Vanarsdale and Carter, allege they are owners and in possession of a large tract of land described, which includes the land sued for, and pray for judgment quieting their title. The two actions were consolidated and transferred to equity, and by the final judgment dismissed.

It seems to us, though argued by counsel for appellees otherwise, that the allegations of the petition, if sustained by proof, are sufficient to enable plaintiffs to maintain their action so far as it is in the nature of a bill of peace; but even if not, as defendants in their answer and counterclaim prayed for their own title to be quieted adverse to plaintiffs, and tendered an issue involving the question of superior title, it was competent for the lower court to try and determine it.

It appears that about the year 1786 the State of Virginia issued for patents for mountain land, situated in what is now Menifee county—one to John Carnan for about 20,000 acres, one south of and adjoining it to Dean Timmons for about 22,000 acres, one west of and adjoining it to Roberts for about 18,000 acres, and one south of the latter, and west of Timmons survey, to John Carnan four about 10,000 acres, each tract being in form a parallelogram.

The line dividing the two first-named surveys is s. 81 w., as is the one dividing the two last-named, though not an extension of the other, being further south. The line which divides the survey of John Carnan of 20,000 acres and Roberts' survey, and also the Timmons and John Carnan survey of 10,000 acres is s. 8 e. The two latter, being south of the others, extend beyond and are each bisected by Red river, the general course of which is perhaps west or a little south of west.

A tributary, called Glady creek, rises inside the John Carnan survey of 20,000 acres, and after flowing several miles through it, in a general course southwest, crosses the dividing lines. 81 w., and flows diagonally through the Timmons survey, finally intersecting Red river within limits of the John Carnan survey, of 10,000 acres, a litlte west of the line s. 8 e.

It appears from the map filed as evidence that all or nearly all the branches or tributaries of Glady creek rise north of it and inside the John Carnan survey of 20,000 acres. The tract in controversy, as well as the larger tract claimed by defendants, are situated on these tributaries, and the land is valuable principally for timber and minerals, for the valleys of Glady, as well as of its tributaries, are very narrow, and bounded by sandstone cliffs, from 100 to 150 feet high, having very few gaps or breaks.

There is flied in this case a deed from John McCalla, collector of internal revenue, to Thomas Duckham, executed in 1839, for the whole of the John Carnan survey of 20,000 acres, which, as recited in the instrument, was made in pursuance of a public sale in 1816, under act of Congress of the United States, by collector of direct taxes.

We need not determine as to validity of that deed, nor inquire how Duckham acquired title to the Dean Timmons survey, to which, as well as the John Carnan survey, he seems to have set up claim at an early day, and of which he continued to sell parcels to various persons without question until all was disposed of so far as this record shows.

There is evidence showing that more than sixty years before commencement of these actions James S. Magowan, father of James P. Magowan, set up claims to parts of the four surveys mentioned, taking possession thereof by tenants, but neither the precise locality of the tract or tracts claimed by him, nor evidence of paper title are shown in this record. But whatever claim he had was, about 1840, transferred to his son, James P. Magowan, and February 2, 1842, Thomas Duckham conveyed to him a described boundary of land by deed, the proper construction and meaning of which the lower court seems to have regarded as decisive of this case.

The land conveyed is described therein as follows: "All that boundary of land as follows, to wit: Beginning at Powell Rose's line on Glady creek, in the county of Montgomery (now Menifee), and running on each side of Glady creek, up the banks thereof, as far as the upper cliffs on each side of said creek, and up said creek to James Coch's line, the said land being a part of Dean Timmons' survey, of 22,000 acres. Said Duckham reserves

to himself all minerals and mines in the bowels of the earth in said boundary of land, and the use of the timber included in said boundary and a mill seat on said creek, the said tract of land lying and being in the county of Montgomery on the waters of Red river. The said Duckham hereby sells and conveys the same to said Magowan."

The lower court seems to be of opinion that the land thus conveyed was entirely within the boundary of the Dean Timmons survey, and to that extent restricted plaintiff's right of recovery. We think the court was correct in assuming that to all the land included within the boundary thus described, wherever it may be, plaintiffs have title; for without determining whether the deed was effectual to pass a good title, the evidence is satisfactory to us that James P. Magowan from the date of it took possession by tenants of the land and held and claimed it adversely to extent of his boundary for a period long enough to give him a possessory title. The deed is, therefore, to be now considered with reference simply to the extent of such boundary described and claimed by him.

The evidence shows that as early as 1849, he being on the land designated, claimed a boundary that included not only the land now in controversy, but very much more, and that he then had tenants on the land so claimed, as there had been for years previously, for he had, prior to that date, purchased other tracts from Duckham, and his father had held and claimed other tracts also.

In regard to the actual boundary intended by the parties to the deed of 1842 to be conveyed, it appears from the evidence that the Powell Rose line crosses Glady creek at or near, though below, the mouth of Salt creek, a tributary, and not very far south of the dividing line between John Carnan and Dean Timmons' survey; and that, continuing the call up and on each side of Glady creek to James Coch's line, necessarily located very much greater portion of the land inside the Carnan survey than inside the Timmons survey, which is comparatively little.

As such would be the result of following calls for objects, and, according to courses well-known to the parties, we are bound to conclude that the recital that the land was inside theTimmons survey was a mistake, if it be interpreted so as to mean wholly inside; and as the grantee had or claimed title to that part of the land conveyed which is inside the Carnan survey as well as that inside the Timmons survey, making such incorrect recital yield to calls about the correctness of which there can be no question, does not materially affect the right of either party, but, on the contrary, conforms the deed to their evident intention.

We think it is also clear that Magowan intended to buy and Duckham intended to convey all the land lying on Glady creek and branches west of Coch's line, north of Powell Rose's line and east of the line s. 81 e., between the Carnan and Roberts surveys, for two principal reasons: First, Duckham then neither owned nor claimed any other land in the southwestern corner of the Carnan survey except the boundary now claimed by plaintiffs, and it was not practicable or worth the expense of dividing it by running and marking a line across the cliffs; second, by "the upper cliffs on each side of Glady creek," to which the land conveyed was stipulated to run, was manifestly meant cliffs of the tributary branches, as well as those of the main creek, because the cliffs, by reason of the peculiar formation of that particular region, constituted plain and in fact only practicable landmarks.

It seems to us the evidence shows that James P. Magowan, in virtue of the deed made to him in 1842 by Thomas Duckham,

claimed to a well-defined boundary, including all the land in controversy, and by tenants had actual and adverse possession thereof from that date long enough to acquire title.

The defendants claim under a quitclaim deed from one Frisby, executed in 1874; but he had no paper title, nor does the evidence show he ever had actual possession of any part of the land in dispute long enough to acquire title; and as showing defendants had no faith in the title he attempted to convey, they procured patents to be thereafter issued for different parcels of the land, all of which were void because for land within the John Carnan survey. And in 1876 the various patentees, including wives of defendants, went through the farce of all uniting in one deed to the defendants for the land thus severally claimed under void patents.

In our opinion plaintiffs have shown a valid title to all the land in dispute and right to recover it, together with damage for the alleged trespasses.

Wherefore, the judgment of the lower court is reversed and cause remanded for judgment quieting plaintiffs title and for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

WESTERN DISTRICT WAREHOUSE CO. v. HAYES.

(Filed May 30, 1894.)

1. Custom—Duty of warehouseman to insure—In this action to recover the value of tobacco destroyed by fire while on storage in defendant's warehouse, the plaintiff's case being based upon an alleged custom which made it the duty of the defendant to keep the tobacco insured for the plaintiff's benefit, the plaintiff can not recover if he was notified that there was no insurance on his tobacco and that it was held subject to his risk, even if the custom might otherwise have applied, and the jury should have been so instructed, there being testimony tending to show such notice.

2. Stockholder may testify for corporation after corporation has introduced other testimony—Although a stockholder in a corporation can not testify for the corporation as to conversations and transactions with a dead man, there is no reason why he should not be permitted to testify for the corporation in chief after it has introduced other testimony in chief, as subsection 4 of section 606 of the Civil Code is nothing more than a rule of practice prescribing the order of introducing testimony, and should not be so applied as to exclude the testimony of those who are not parties to the suit or controllers and managers of it, and where the order of their testifying could not possibly prejudice the adverse party.

W. S. Bishop and W. D. Greer for appellant.

Smith, Robbins & Thomas for appellee.

Appeal from Graves Court of Common Pleas.

Opinoin of the court by Judge Barbour.

This action was instituted by the appellee to recover of the appellant the value of twelve hogsheads of tobacco destroyed by fire while on storage in appellant's warehouse. His case is based upon an alleged custom which made it the duty of the appellant, in consideration of the storage fees, etc., paid or agreed to be paid it, to keep the tobacco insured for his benefit. The appellants' contention is that the custom only applied where tobacco was placed in its warehouse for sale by it; that it did not apply where persons had purchased tobacco at its warehouse and had the right to withdraw it; that appellee's tobacco had been purchased by him at a sale at the warehouse and was thus subject to his right to withdraw it at any time. Appellant further claimed that the appellee was notified that there was no insurance on his tobacco, and that it was held subject to his risk, and that he had agreed to this condition. The appellant's evidence tended to support its contention, both as to the custom and the notification, that the tobacco was not insured and would be held at appellee's risk. Upon this evidence the appellant asked the court to instruct the jury that if its agent notified appellee that his tobacco was at the warehouse at his risk, and appellee acquiesced therein, they should find for it, although there was a custom that warehouses should cover tobacco with insurance. This instruction should have been given. It is claimed, however, that the instruction was given in substance in the latter part of instruction No. 29. We have examined this instruction carefully, but it is so involved and confused—perhaps on account of some omission in the drafting or some mistake in the copying of it into the record—that it is not easily to be understood. At any rate, as it appears in the record, it does not present this question to the jury.

But the judgment must be reversed for another reason. The appellant is a corporation. In its testimony in chief, after introducing several of its officers, it introduced a witness who was not connected with it as stockholder or otherwise, and then offered several witnesses, who were stockholders in the company, and proposed to prove by them facts material to its defense, but the court refused to allow them to testify, holding that they come within the inhibition of subsection 4 of section 606 of the Code, which provides that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief."

This court, in D. B. Bayless Stove Co. v. McCarthy, 15 Ky. Law Rep., 302, held that a stockholder in a corporation could not, in view of subsection 2 of section 606 of the Code, testify for the corporation as to a transaction or conversation with one who was dead when the testimony was offered.

But it does not follow that because a stockholder can not testify as to conversations and transactions with a dead man, he should not be permitted to testify for the corporation in chief after it had introduced other testimony in chief. A stockholder is as directly interested—though, perhaps, not always to the same extent—as one member of a partnership is in an action by or against the firm. And we could not see why, in the case of a corporation like the D. B. Bayless Stove Co., composed of two or three stockholders, the stockholders should be allowed to testify for themselves against a dead man, where, if they had been partners, having identically the same interest, they could not testify. We looked to the reason and spirit of the prohibition and held that the section was intended to apply as well to one who was interested in the result of the suit, though not nominally a party, as to one who was a party. That section

affects the substanial rights of the parties, whereas the section in regard to ones testifying in chief after introducing other testimony is nothing more than a rule of practice prescribing the order of introducing testimony, and should not be so applied as to exclude the testimony of those who are not parties to the suit, or controllers and managers of it, and where the order of their testifying could not possibly prejudice the adverse party. The reason for the strict application of the rule does not exist, and its rigid enforcement, instead of attaining the ends of justice, as was its purpose, would frequently work injustice and often inconvenience. Stockholders as a rule have no control of the corporate affairs, and can neither bring nor defend actions for the corporation. They speak and act through their chosen officers. The stockholders in this instance were not parties to the suit, and were not managing or controlling it, and had no authority to, and could not have made the defense. The identical question was decided in Smith v. Owenton, &c., Turnpike Co., 14 Ky. Law Rep., 924. There is no conflict between that case and the D. B. Bayless case.

For the reasons given the judgment is reversed and the cause is remanded for a new trial and for further proceedings.

SUPERIOR COURT ABSTRACTS.

BRADLEY v. KINKEAD, &c.

Filed September 26, 1894. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Barbour, reversing.

Suit for cancellation of note—In this action, by which the plaintiff sought to cancel a note which they alleged they had paid off by a lot of logs delivered to the payees through defendant, who obtained possession of the note, the evidence does not sustain the judgment cancelling the note, as it does not show that the note has been paid off in full. Defendant is entitled to judgment for the unpaid part of the note after giving plaintiffs a credit to which they are entitled.

J. S. Wortham for appellant; J. S. Lay for appellees.

ASHLEY v. COMMONWEALTH.

Filed September 26, 1894. Appeal from Spencer Circuit Court. Opinion of the court by Judge Barbour, dismissing appeal.

The appellate court has no jurisdiction of an appeal in a misdemeanor case unless the record is filed within sixty days after the judgment. The extension of time to prepare and tender a bill of exceptions does not extend the time for filing the record.

G. G. Gilbert for appellant; W. J. Hendrick for appellee.

MONTAGUE v. JAMISON, &c.

Filed September 26, 1894. Appeal from Carter Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Landlord and tenant—Fraud—Purchaser without notice—Although the fraud of lessees in obtaining an extension of a lease was such as to entitle

the lessor to a cancellation of the lease as against them, there can be no cancellation of the lease as against one to whom the lease has been assigned without notice of the fraud.

2. Assignment of lease—As the lease was for a term of more than two years, the lessees had the right to assign their term without the landlord's consent.

3. Allegation and proof—As no issue was made by the pleadings as to notice to the assignee of the fraud of the original lessees, evidence upon that subject can not be considered.

4. It was error to render judgment for the damages done to the premises by the lessees, as the lease requires the lessees to leave the premises in a stated condition, and the assignee, if he had been allowed to retain and work the leased mines for the specified term, might have left the property in the condition required by the lease; and if he had not, the plaintiff's remedy was for a breach of the contract.

Thos. W. Mitchell and R. D. Davis for appellant; E. B. Wilhoit for appellees.

OSBORNE & CO. v. REEVES.

Filed September 26, 1894. Appeal from Warren Circuit Court. Opinion of the court by Judge Yost, affirming.

Separation of conclusions of law and fact—As this was an ordinary action in which the law and facts were submitted to the court without the intervention of a jury, and there was no separation of the conclusions of law from the conclusions of fact found, the pleadings being sufficient to support the judgment, it must be affirmed.

W. W. Mansfield for appellants; Sims & Covington and Edward W. Hines for appellee.

PAYNE v. NELSON.

Filed September 26, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, reversing.

Law of the road—Contributory negligence—There is no provision in the law prescribing the direction in which horsemen shall turn when meeting vehicles or other horsemen on the highway. The provision of the statute that vehicles meeting on any turnpike, gravel or plank road shall give to each other one-half the road, each bearing to its right, applies to vehicles only. Therefore, the simple fact that a horseman in meeting a vehicle rode to the left instead of to the right does not constitute such negligence on his part as to bar a recovery by him for injury to his horse resulting from the negligence of the driver of the vehicle. Nor does the fact alone that the driver of the vehicle obeyed the rule and turned to the right of itself excuse him from the consequences of his acts, if the collision could have been avoided by the exercise of such prudence and skill on his part as a prudent and skillful person would have observed under the same or similar circumstances.

Thompson & McChord for appellant; W. E. & S. A. Russell for appellee.

CASH v. NEWPORT NEWS & MISSISSIPPI VALLEY CO.

Filed September 26, 1894. Appeal from Lyon Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Railroads—Killing of stock on track—In this action against a railroad company to recover damages for the negligent killing of plaintiff's stock while straying on defendant's track, it appearing that the stock had strayed into the field of plaintiff's neighbor and from there had strayed upon the track, the fact that defendant had fenced its right of way through the neighbor's land, and that the stock strayed upon the track through a gap which the defendant negligently left in the fence, does not affect defendant's liability to plaintiff, as it owed plaintiff no duty to erect or maintain the

fence; therefore, the court properly excluded the evidence touching the gap in the fence.

2. Same—The court properly instructed the jury that it was the duy of the engineer to use reasonable care and diligence to watch the tracks, and to use all means, consistent with the safety of the train, to avoid the accident after the discovery of the animal on the track.

T. J. Watkins for appellant; John G. Miller and P. H. Darby for appellee.

McMAKIN v. WICKLIFFE.

Filed September 26, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Practice—Presumptions—In an action by the wife for divorce in which the court fixed the fee of the wife's attorney, and directed that it be taxed as costs against the husband, as the husband at a subsequent term sought to set aside that judgment upon the ground that he was not present when the motion for an allowance was made, and had no notice of it, the evidence heard on that motion not being before the court, it must be assumed, as the order of allowance recites, that the defendant appeared by counsel and resisted the motion for an allowance.

2. Divorce—Liability of husband for wife's costs—If the husband seeks to be relieved of liability for the wife's costs the burden is on him and he must show that the wife was in fault, and also that she had ample estate to pay the fee.

3. Same—As the evidence heard as to the reasonableness of the fee allowed the wife's attorney is not in the record, this court must assume that it authorized the judgment.

4. Same—The fee may be fixed in the action for the divorce even after the death of the wife or the termination of the suit by a judgment.

5. Same—The fact that the parties became reconciled before a trial, and that the action was dismissed by direction of the wife, does not relieve the husband of liability for the fee of the wife's attorney. The husband is bound to pay the costs of both parties, including a reasonable compensation to the wife's attorney, no matter by what cause the action may have been terminated, unless the wife was in fault and had ample estate to pay the costs.

George S. Fulton and C. T. Atkinson for appellant; John D. Wickliffe for appellee.

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KENTUCKY COURT OF APPEALS.

BURNAM, &c. v. WHITE.

(Filed May 20, 1893—Not to be reported.)

Life insurance policy—Lien on same for money advanced to pay premiums—A having insured his life for $5,000 for the benefit of his wife and children, and failed to pay the premiums as they fell due, B advanced money in the way of premiums to keep the policy alive, and, for his security, the policy was delivered to him, with an assignment which was intended as a security for the money advanced. On the same day A mortgaged to B certain lands to secure a note of $2,800, as of that date, said note embracing all the indebtedness of A to B on account of the premiums paid up to that date. B also held a lien on the homestead of A for a claim of small amount. B having died, his executors proceeded to subject the mortgaged lands to the payment of the note. They also enforced the lien on A's homestead, and purchased it for $300. The executors then made a proposition to A that if he would raise $450, and pay $122.50 in addition, the amount of premiums they had paid since the death of B, they would release his homestead or deed it to anyone he might direct, and surrender the policy. The executors regarded the policy as valueless to them. A failed to raise the money in the manner expected, and C, one of the executors, arranged with him to raise it, and paid to his co executors the amount stipulated in the proposition. Without any other consideration C obtained an assignment to him by the wife and children of A, including the insured, of all their present and future interest in the policy. Upon A's death C claimed from the proceeds of the policy an amount covering all the advancements made by B in his lifetime. Held—That from the evidence not one cent was paid by C to his co executors for the claim which B s estate had on A's by reason of the advances in the way of premiums made by B to save the life of the policy; that the sole consideration for which the policy was assinged to him was the raising the money to relieve the homestead; and that only the sum which he actually paid for this purpose, with interest, should be refunded to him. The balance should be paid to the beneficiaries.

Fairleigh & Straus and A. M. Wallace for appellants.

Walter Evans and R. A. Burnett for appellee.

Appeal form Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This action below is in the nature of a bill of interpleader, filed by the Mutual Life Insurance Co. v. W. C. White and the widow and children of Benjamine F. Burnam, deceased. Burnam had insured his life with this company for $5,000, and, dying, the proceeds of the policy were claimed by W. C. White as against the claims of the widow and children.

The insurance was for the benefit of his wife, Rebecca, and her children, and, unless the appellee, White, has in some legal or equitable mode obtained the right to the amount due on the policy, the widow and children of the insured are entitled to it.

The amount due on the policy at the death of the insured was near $4,200, and the amount due, about which there is no contention, was brought into court by the company with the prayer in its petition that the amount be paid over to the party entitled.

The court below adjudged that the appellee, White, was entitled to $3,010 of the insurance money and some cost, and the balance, deducting certain costs, was directed to be paid over to the widow and children of the decedent. It appears after this policy had been obtained that Burnam, the husband, was unable to pay the premiums and that one Thomas H. Gunter had advanced in the way of premiums to keep this policy alive, the sum of $1,447.50, and to secure him, the policy had been delivered to him, with an assignment purporting to be absolute on its face but intended really as a security for the money advanced. This assignment was made to Gunter on the 27th of September, 1878, and on that same day Burnam, the husabnd, mortgaged certain tracts of land in Trigg couny to Gunter to secure him in a note of $2,800 as of that date, and that this $2,800 note embraced all the indebtedness of Burnam to Gunter on account of the premiums paid up to that date is, we think, manifest, and the policy with its assignment was retained as collateral—say for the payment of that note; but, whether so or not, the quesiton, when decided, does not affect the merits of this controversy.

Gunter died, and his executors are now proceeding to subject the mortgaged lands to the payment of the $2,800 note, with testimony showing that the lands when sold will not be sufficient to satisfy the claim.

Gunter also held another small claim against the decedent, Burnam, or his executors held it, that was a lien on a small tract of land which was the homestead of the insured. Gunter's executors enforced this lien and purchased the homestead for $300, and it was not worth exceeding $500.

D. L. Gunter, E. R. Street and W. C. White were the executors of Gunter, and Burnam, being then alive, but old and penniless, made an arrangement with these executors that if he would raise $450 and pay $122.50 in addition, the amount of premiums they had paid since the death of Gunter, they would release or deed to anybody he might direct this homestead, worth not exceeding $500, and surrender the policy. The executors regarded the policy as valueless to them, and so state, save the appellee, and were getting what they thought was the full value of Burnam's homestead. The insured failed to raise the money in the mode expected, and White agreed with him to raise it, and paid to his co-executors $450 and $122, making $577 for the insured, and the executors, upon the payment of this money, directed a deed to be made to the homestead as directed by the insured. In the month of July, 1889, without any other consider-

ation than the amount of money paid by the appellee to his coexecutors, the appellee obtained the assignment to him, by the wife and children of Burnam, including the insured, of all their right, title and interest and benefit to this policy, which they then had or might thereafter have, and when the same is due and payable we authorize and direct the company to pay the said White the amount which may be due and owing on said policy, etc. This assignment was executed by all the parties. The executors of Gunter made this assignment to White: "For value received we assign to W. C. White, without recourse, all interest in the within policy belonging to the estate of T. H. Gunter, deceased." signed by all three of the executors. In October, 1891, the insured died.

It is admitted by the pleadings, and if not it clearly appears from the testimony of the executors of Gunter, that not one cent was paid by the appellee, who was also one of the executors, for this claim Gunter's estate had on the Burnams by reason of the advances made by Gunter in his lifeitme, to save the life policy for the benelit of his (Burnam's) wife and children, and the appellee, White, one of the executors, is made the gratuitous recipient by the judgment in this case of all the premiums paid by Gunter in his lifetime, amounting, principal and interest, to near $2,500. He paid nothing for the claim, and no claim was, in fact, sold him by his co-executors, and the uncontroverted facts in this case show that old man Burnam and his family sold and assigned this policy to White in consideration that he would advance this five hundred and odd dollars so as to enable them to obtain their homestead, worth not exceeding $500. There was no other consideration, and, whether the amount advanced by Gunter was included in the $2,800 note or not, it at last was a sale or assignment to White for the money to relieve the homestead. Gunter, one of the executors, says: "We regarded the policy as valueless, and agreed with Burnam, if he would raise the $450 and the $122.50, we would release or transfer to anyone he might direct. and deed to anyone he might direct, and on that agreement, Mr. White paying the money to the executors, we transferred the policy to him."

Gunter says they never sold White anything, and the whole record shows that the appellee paid nothing whatever to the executors for the policy, or their interest in it, and the only consideration was the release of the homestead, worth $500, with the money advanced by White, and the assignment without recourse to White of the policy. He held no debt or claim against these beneficiaires, except the amount advanced for the purchase of the lot. The whole arrangement was a speculation by White on the life or death of the insured when he had no insurable interest whatever.

The doctrine of Bayse v. Adams, 81 Ky., 368, settles this case, and is the recognized rule on the subject. The executors of Gunter, except the appellee, come in and say they have no interest in the controversy. They hold no claim on the fund, and when consenting to receive the money from White under the arrangements made with Burnam, they intended by the assignment to relieve themselves or the estate of all interest in the policy, but made no transfer of the premiums paid by Gunter in his lifetime, or any part of the $2,800 note. That note is now being collected by a proceeding to foreclose the mortgage on the land and evidently includes the sums for which the premiums were advanced, but if mistaken in this the effort of one of these executors to speculate on the chances of life or death can not be sanctioned by a court of equity, and this executor made the sole beneficiary of a policy that all struggled to preserve. Gunter nor his co-ex-

ecutors are asking that this family pay over the money that their testator advanced, if so it would present a different question. They agreed with Burnam to surrender the policy or make any transfer he desired if he would raise the $570. This he did, and the co-executor who advanced the money is now claiming the entire proceeds because of the assignment of the policy to him by his co-executors, and the transfer or assigment by the family under the arrangement with the insured.

The appellee released the lien on the homestead, and the appellants derived the benfit of his generosity to that extent, and this sum paid the executors by White he should recover with the interest. All the money he actually paid with the interest should be refunded to him out of the fund and no more, and the balance paid over to the beneficiaries.

Judgment below reversed on the oirginal and affirmed on the cross appeal, with directions to enter a judgment as herein indicated.

O'CONNOR & McCULLOCH v. HENDERSON BRIDGE CO.
HENDERSON BRIDGE CO. v. O'CONNOR & McCULLOCH.

(Filed June 16, 1894.)

1. Burden of proof—Irregularity in introduction of evidence—Where the court ruled that the defendant had the burden of proof and should first produce its evidence, which was done, but at the conclusion of the whole evidence changed its ruling so as to give plaintiffs the concluding arguments to the jury, there was such an "irregularity in the proceedings of the court," in the meaning of section 340 of Civil Code, as prevented defendant having a fair trial. The burden of proof was on the plaintiffs and there could be no question of their right to conclude the argument if the court had ruled them to first produce their evidence; but, in view of the large amount of the complicated and contradictory testimony and the unusual length of the trial, to force the defendant to first produce its evidence, and yet deprive it of the concluding argument to the jury, was clearly prejudicial to defendant, and the court did not err in granting it a new trial.

2. Right of jury trial—Jurisdiction of court of equity—The right of the trial by jury can not be impaired by legislative enactment. Whether this action was properly transferred from the ordinary to equity docket depends not upon the amendment of April 29, 1890, to section 10 of the Civil Code of Practice, but upon the proper interpretation and application of section 7 of the Constitution. That clause was never intended to be so strictly construed or rigidly adhered to as to prevent, in any case, the due and proper administration of justice. A court of equity has concurrent jurisdiction in matters of account where they are of such a complex nature as to render the remedy at law inadequate, and this jurisdiction should be exercised where there is a serious doubt as to the true state of the accounts or there is a difficulty in adjusting them and safely striking a balance. Though this action was brought to recover damages, yet as the criterion of recovery, as fixed by this court on a former appeal, required the consideration of various items, about which there was controversy and much contradictory evidence, requiring prolix mathematical calculations in estimating values and amounts, the transfer to a court of equity should not be regarded as reversible error.

3. Bridge contract—Damages for annulment—In this action by contractors to recover of defendant bridge company damages for an illegal attempt to annul a contract made between the parties for building foundations and piers of a railroad bridge and forcibly driving plaintiffs from the work, this court having expressly held upon a former appeal from judgment on the verdict of a jury that plaintiffs were entitled, in any event, to recover

15 per cent. of amount of their earnings prior to November 30, 1883, retained by the company, the lower court erred in overruling the motion made upon the return of the case from this court to have judgment rendered therefor, the amount not being disputed; and, therefore, as the contractors were entitled to judgment for that sum, and interest from November 3, 1883, to December 1, 1889, when motion was made, judgment for the aggregate of principal and interest must, upon return of the case, be entered as of the latter date, with interest therefrom.

4. Right of annulment of contract—The defendant was not entitled to annul the contract under a clause which gave it the right to annul without notice in case the constractors did not well and truly, from time to time, comply with and perform all the terms stipulated, the defendant itself being in default by reason of failure to estimate and pay for work done and materials delivered, without which the contractors could not further comply with and perform all the terms of the contract. And certainly a chancellor would, under the circumstances, hold it liable for value of work done and materials and working plant.

5. The plaintiffs were not entitled to anything on account of prospective profits, as it is manifest, in view of the ascertained cost to the company of completing the work, that the contractors would not have made any profit.

6. The defendant has no cause of action against plaintiffs on account of their alleged failure to progress with the work according to an agreed programme, or failure to comply with the contract in any respect, as the remedy provided for the company in case of noncompliance with the contract by the contractors was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have unpaid part of earnings forfeited.

Humphrey & Davie for O'Connor & McCulloch.

Helm & Bruce for Bridge Co.

Appeal form Louisville Law & Equity Court.

Opinion of the court by Judge Lewis.

This aciton was institued in August, 1884, by O'Connor & McCulloch to recover of Henderson Bridge Co. damages for an illegal attempt to annul a contract made in December, 1881, between the parties for building foundations and piers of a railroad bridge across the Ohio river at Henderson, and forcibly driving plaintiffs from the work while engaged at it.

Upon the trial of the case in December, 1886, the jury found a verdict in favor of plaintiffs for $86,805.73, and interest thereon from April 9, 1884, when they were forced to quit the undertaking; but upon appeal this court, for erorrs of law alone and without determining issues of fact involved, reversed the judgment rendered in pursuance of that verdict and remanded the case for a new trial. (88 Ky., 303.)

January 24, 1890, another jury found a verdict in favor of plaintiffs for $148,633.61, being principal sum and interest thereon to that date; but upon motion and grounds filed the lower court, Spetember 29, 1890, set aside that verdict and ordered a new trial. On the same day, however, an order was made transferring the case to equity, and, subsequenlty the chancellor referred it to a special commissioner to inquire and report as to matters specifically mentioned in the order of reference, being governed by stenographic record of evidence heard and instructions given on the preceding jury trial.

November 30, 1891, the commissioner reported as his conclusion, from evidence and instructions, that plaintiffs were entitled to recover the principal sum of $104,427.88 and interest to that date, making aggregate of $153,168.51; but expections to the report

were sustained to extent of reducing the principal sum to $61,586.55, for which, with interest from April 7, 1892, judgment was, July 7, 1892. rendered.

Both plaintiffs and defendant have appealed from that judgment, the latter superseding it.

It is contended in behalf of the former that not only the judgment but also order setting aside the verdict of January 24, 1890, should be reversed, effect of which would be revival of the verdict and entry of judgment for amount of it; but it seems to us the lower court did not err in setting aside the verdict and granting a new trial, for, without referring to other grounds filed, the order of proceeding in the trial was directly contrary to subsection 3, section 317, Civil Code, which provides that "the party on whom rests the burden of proof in the whole action must first produce his evidence; the adverse party will then produce his evidence." For the court first ruled that defendant had the burden of proof and should first produce its evidence, which was done; but at conclusion of the whole evidence changed its ruling so as to give plaintiffs benefit of concluding the argument to the jury.

We think the burden of proof in the whole case was on plaintiffs, and there could be no question of their right to concude the argument, nor any ground of complaint by defendant, it was awarded to them, if the court had, as required by the Civil Code, ruled them to first produce their evidence; but in view of the very large amount of complicated and contradictory testimony produced by the respecitve parties, and unusual length of the trial, divers rulings mentioned must be regarded as, in meaning of section 340, such "irregularity in the proceedings of the court" as prevented defendant having a fair trial, for it appears that after defendant had produced its evidence, which required the time from December 12, when the trial began, to 19th, and two days had been used by plaintiffs, the court took a recess for about twenty-four days, the jury being in the meantime dispersed. So that on January 17, 1890, when plaintiffs' evidence, that had consumed the three preceding days, was concluded, it had been more than three weeks, and when the verdict was rendered, January 24th, it had been more than a month since any of defendant's evidence in chief was heard by the jury. To force a party, under such circumstances, to first produce his evidence, and yet deprive him of the benefit of concluding argument to the jury, which is of great advantage in such a case as this, is not giving him a fair trial.

Though counsel for plaintiffs below contend it was error to sustain exceptions to report of the special commissioner, the principal reason urged in argument for reversal of the judgment is that the chancellor has no jurisdiction, the order transferring the action to equity being in violation of section 8, article 13 of the old, which is the same as section 7 of the present Constitution, as follows: "The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

If the judgment should be reversed on that ground, the whole proceeding in equity would have to be disregarded and mandate go for another and third trial by jury. It is, therefore, necessary to now consider and determine the question of jurisdiction.

To sustain the order transferring the action to equity, counsel for defendant below refer to the following statute passed April 29, 1890: "That section 10 of the Civil Code of Practice be, and the same is here, amended as follows: The court may in its dis-

cretion, on motion of either party or without motion, order the transfer of an action from the ordinary to the equity docket, or from a court of purely common law to a court of purely equity jurisdiction whenever the court before which the action was pending shall be of the opinion that such transfer is necessary because of the peculiar questions involved or because the case involves accounts so complicated, or of such great detail of facts, as render it impracticable for a jury to intelligently try the case."

If the court was, at date of that satatute, without authority to transfer an action from the ordinary to equity docket under circumstances and for causes therein recited, it is still powerless in that respect; for the right of trial by jury can not be impaired or modified by legislative enactment; therefore, whether this action was properly transferred depends not upon that statute, but proper interpretation and application of the language of the clause of the Constitution quoted.

That clause never was intended to be so strictly construed or rigidly adhered as to prevent, in any case, due and porper administration of justice. Accordingly, as said in Story's Equity, volume 1, section 442, "courts of equity have for a long time exercised a general jurisdiction in all cases of mutual accounts upon the ground of the inadequacy of the remedy at law." And in section 451 is this language: "Lord Rosedale has justly said that in a complicated account a court of law would be incompetent to examine it at nisi prius, with all the necessary accuracy.

This is the principle on which courts of equity constantly act by taking cognizance of matters which, though cognizable at law, are yet so involved with complex accounts that it can not be porperly taken at law; and until the result of the account is known, the justice of the case can not appear."

This court has uniformly held that a court of equity has concurrent jurisdiction in matters of account, and "should be exercised when otherwise there may be serious doubt as to the true state of the accounts or difficulty in satisfactorily adjusting them, and safely striking a balance." (Breckinridge v. Brooks, 2 A. K. M., 335; Bruce v. Burdett, 1 J. J. M., 80; Power v. Reeder, 9 Dana. 6.)

But in every case of interposition of a court of equity in such actions there must exist a necessity arising from failure of remedy at law to afford justice; and extent of equitable jurisdictions in actions for an accounting, and when to be exercised, is thus stated in Pomeroy's Equity Jurisprudence, section 1421: "The instances in which the legal remedies are held to be inadequate, and, therefore, a suit in equity for an accounting proper are:

1st. "Where there are mutual accounts between the plaintiff and the defendant—that is, when each of the two parties has received and paid on account of the other.

2d. "When the accounts are all on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law.

3d. "Where a fiduciary relation exists between the parties, and a duty rests on the defendant to render an account."

Though this action was brought to recover damages, the criterion of recovery by the contractors was held in a former opinion to have been fixed in the contract as follows:

1st. "The value of such of their derrick, tools and other plant as were in use at the time, not already paid for.

2d. "The value of the materials then on hand or delivered, or ready for delivery subsequent to November 30, 1888.

3d. "The resonable value of unestimated work done after that date.

4th. "The amount of 15 per cent. earnings retained. The last two items to be paid for in any event.

5th. "Interest on whole amount from April 9, 1884.

6th. "Whatever profits it may be shown could have been made if appellees had been permitted to complete the work."

There is controversy between the parties as to each of these subjects, except amount of earnings retained, a great deal of evidence was produced, much of it contradictory, and prolix mathematical calculations made in estimating values and amounts, about which there was great difference between witnesses.

The special commissioner appears to have been engaged under the order of reference for the better part of nine months, and how tedious and difficult it was for him to reach a conclusion the following sworn statement he made shows: "I have been practicing as an attorney at law since 1866, and had considerable experience in settlement suits, but have never been engaged as attorney or commissioner in one with more complications, or which required greater labor to understand and report on intelligently than this."

Although, as it turned out, there was not, considering amount involved, a great difference between the principal sum found due the contractors by the special commissioner and what was found by the second jury, still transfer of the action to equity should not be regarded a reversible error.

The action being then properly in equity, the next inquiry is whether the chancellor rendered judgment for the correct amount. In the former opinion of this court it was expressly held that the contractors were, in any event, entitled to recover 15 per cent. of amount of their earnings prior to November 30, 1883, retained by the company, amount of which the record shows is $33,760.24, and the lower court erred in overruling the motion made upon return of the case from this court to have judgment rendered therefor; for as the amount was not disputed, and right to it had been determined, section 380, Civil Code, applied, being as follows: "If only a part of a claim be controverted, judgment may at any time be rendered for the part not controverted." As, therefore, the contractors were entitled to judgment for that sum, and interest from November 3, 1883, to December 1, 1889, when the motion was made, judgment for the aggregate of principal and interest must, upon return of the case, be entered as of the latter date therefor, and bearing interest therefrom.

According to the former opinion, recovery for value of derrick, tools and other plant, of materials on hand, and for whatever profit the contractors could have made, if permitted to complete the work, depends upon whether the annulment of the contract attempted by the company in February, 1884, and consummated by force April 9, 1884, was lawful. We will, therefore, first determine that question.

By the terms of the contract the company had the right to annul by giving the contractors one month's notice; but in that case the latter would have had the unconditional right to payment in full for all materials delivered, work done and derrick, tools or other working plant. But the company undertook to annul under that clause of the contract which authorized it arbitrarily done when it appeared to its engineer the work did not progress with sufficient speed or in a proper manner, to be followed by forfeiture of the unpaid part of the value of the work done by the contractors.

In the former opinion, however, it was held the forfeiture had

been waived and lost. The precise question now is whether the right to annul without notice existed under another clause which authorized it in case the contractors did not well and truly, from time to time, comply with and perform all the terms stipulated. As a question of fact, under instructions as to the law applicable, both juries and the special commissioner have found the right to annul at the time and in the manner attempted did not exist. Besides, upon reconsideration, we think that as the company was in default by reason of failure to estimate and pay for work done and materials delivered, without which the contractors could not further comply with and perform all the terms of the contract, it had no right to annul; certainly a chancellor would, under the circumstances, hold it liable for value of work done and materials and working plant.

The special commissioner reported the value of materials delivered and work done subsequent to Novemebr 30, 1883, that had not, as required by the contract, been estimated or paid for, including the plant at a stone quarry, to be $36,909.15. The chancellor valued the same at only $6,886. The commissioner reported amount of profit the contractors would have made if permitted to complete the work at $33,758. The chancellor was of opinion no profit would have been made. The commissioner reported the whole amount due to the contractors, including $33,760.24, amount of earnings retained by the company, to be $104,437.39, bearing interest from April 9, 1884. The chancellor fixed the principal sum, including percentage of earnings retained at $61,536.55, not bearing interest, however, until April 9, 1892.

In our opinion the evidence does not satisfactorily show the contractors would have made any profit, which, at best, is conjectural. The contract price of the whole work was $562,632. The entire outlay by the company that undertook to complete the bridge, after annuling the contract, was about $145,000 in excess of that sum, without including estimates for work done and materials furnished subsequent to November 30, 1883, which are subjects of the present litigation. It seems to us incredible, in view of the actual and ascertained cost to the company, that the contractors could or would have made any porfit if permitted to complete the work.

But leaving out of view the matter of profit, the principal sum found by the commissioner is less by about $15,000 than that found by the first jury that does not appear to have estimated any porfit, and about $8,000 less than what was found by the second jury that does appear to have estimated the profit. But considering the time fixed by the chancellor for interest to begin running, his judgment is for less than half what the verdict of either jury would now amount to, and about $45,000 less than the commissioner reported.

It is apparent only approximate value and amount of work and materials for which the company is required to pay the contractors can be ascertained, because witnesses differ not only in their estimates and calculations, but as to facts of which they profess to have personal knowledge. But without going into detail we are satisfied the chancellor underestimates the amount to which the contractors are entitled, and his conclusion can not be adopted unless, without good reason, we disgregard not only finding of each jury, but also report of the special commissioner, who has shown marked capacity as both accountant and lawyer, and devoted very much more time and attention to the investigation than can be expected or required of the judge of a court.

We, therefore, think his report ought to have been confirmed, except as respects amount allowed the contractors for possible

profit. In that he is in error. And upon return of the case judgment must be entered in favor of the contractors as of July 7, 1892, for $36,909.15, with interest from April 9, 1884, to that date, value of work and materials subsequent to November 30, 1883, as well as judgment for percentage of earnings retained as before and in the mode directed.

In our opinion Henderson Bridge Co. has no cause of action against O'Connor & McCulloch by reason of their alleged failure to progress with the work according to an agreed programme or failure to comply with the contract in any respect. The remedy provided for the company in case of noncompliance with the contract by the contractors, and manifestly the only remedy contemplated by the parties, was the right to annul the contract in either one of the three conditions stated therein, and in one of them to have unpaid part of the earnings forfeited.

Wherefore, on appeal by plainitffs below, the judgment is reversed and case remanded for proceedings consistent with this opinion; and, on appeal by defendant below, the judgment is affirmed with damages.

Judge Lewis delivered the following response to petition for rehearing:

It having been found by two juries and the special commissioner acting under instructions of court, and not only adjudged by the lower court at each trial by jury, and of exceptions to report of the commissoner, but finally determinded by this court that Henderson Bridge Co. had no right to annul the contract without notice, as it did forcibly do, the only subject for inquiry from beginning of this litigation has been as to amount of recovery the contractors were entitled to.

In the first opinion of this court it was distinctly determined the contractors were entitled unconditionally to amount of earnings retained, being 15 per cent.

In the opinion, which the company now seeks to have reconsidered or modified, it was determined the contractors were not entitled to recover any sum on account of possible and contemplated profits on the work, and to that extent judgment of the lower court was concurred in and finding of the commissioners disallowed.

It thus follows that the main question before this court, one of fact, is without value of tools and implements on hand April 9, 1884, not already paid for, of materials delivered or ready for delivery subsequent to November 30, 1883, and of unestimated work done after that date, as found and reported by the special commissioner, to be $36,909.15, should be accepted or discarded to the extent it was done by the lower court.

For the reasons stated in the opinion that estimate was adopted instead of the one made by the lower court. No argument or suggestion is made in the petition for rehearing that was not contained in the voluminous brief on the same subject that was duly considered.

There have been in this case two jury trials, the verdict in each being for more than the company will have to pay under mandate of this court, and not only upon its motion was each verdict set aside or new trial granted, but the action was transferred to equity. It should, therefore, now be required to stand by finding of the special commissioner, made upon a third trial of the same facts, at least to the extent determined in the opinion of this court, and thereby terminate litigation begun more than ten years ago.

As expressly decided by this court, the contractors were, November 30, 1888, entitled to the 15 per cent. of earnings retained by the company, and judgment ought to have been rendered for amount thereof, about which there was no dispute, including interest that had been running six years, when the motion was made December 4, 1889. There was no controversy on the subject at that time nor room for any. For the question of the company's right to maintain a counter claim had been previously determined against it, and the motion to file the same pleading was not then made, nor ought it to have been sustained when it was made.

Section 757, Civil Code, as amended March 24, 1888, provides that "when a party recovers judgment for only part of the demand or property he sues for, the enforcement of such judgment shall not prevent him from prosecuting an appeal therefrom as to so much of the demand or property sued for that he did not recover." So that the contractors were entitled to an execution upon the judgment of the lower court for $61,586.55, at the same time prosecuting an appeal therefrom as to so much of the demand sued for that they did not recover. But the company prevented them obtaining an execution and thereby collecting amount of the judgment by a separate appeal and execution of a supersedeas bond, whereby it covenanted to pay to the contractors, appellees, all costs and damages adjudged against appellants on that appeal, and also satisfy the judgment appealed from if affirmed.

The decision of this court was that on the appeal of the contractors they did not recover all the demand sued for they were entitled to, and that the judgment pro tanto be reversed. But upon appeal of the company the judgment had to be necessarily affirmed because it was not erroneous to its prejudice. And as a consequence, under section 764, 10 per cent. damages on amount of the judgment superseded has to be awarded.

Petition for rehearing overruled.

COMMONEWALTH v. WRIGHT.

(Filed September 29, 1894.)

Where a defendant, indicted for seduction of a female under sixteen years of age, under promise of marriage, when the case is called for trial, offers in open court in good faith to marry the female, which offer she refuses, he is entitled to have the prosecution dismissed.

W. J. Hendrick and Weed S. Chelf for appellant.

J. W. Lewis for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Chief Justice Quigley.

The defendant below, in January, 1894, was indicted by the grand jury of Meade county in the Meade Circuit Court for seducing a female under sixteen years of age under promise of marriage.

At the April term of said court, on the calling of the case for trial, the defendant in open court stated that it had always been his intention to marry the young lady, and that he had offered to do so theretofore, and she had refused to marry him, and that

he now again in good faith, in her presence and in the presence of her mother, her father being dead, in open court offered and proposed to marry her, which offer she and her mother in open court declined to accept. Thereupon, on motion of defendant, the prosecution was dismissed, and from the judgment of the court dismissing the prosecution the Commonwealth has appealed to this court for a construction of the statute in such cases made and provided.

The statute under which the indictment was found was enacted by the Kentucky legislature in 1886, and was approved the 12th of May of that year. That statute has been repealed and superseded by the present law on the subject of seduction, which is to be found in section 1214, subdivision 12 of chapter 36 of the Kentucky Statutes, and reads as follows: "Whoever shall, under promise of marriage, seduce and have carnal knowledge of any female under twenty-one years of age shall be guilty of a felony, and upon conviction thereof shall be confined in the penitentiary not less than one year nor more than five years. No prosecution shall be instituted when the person charged shall have married the girl seduced; and any prosecution instituted shall be discontinued if the party accused marry the girl seduced before final judgment. All prosecutions under this section shall be instituted within two years after the commission of the offense."

The only material difference between the present law and the statute of 1886 is that the former applied only to females under sixteen years of age, while the present law applies to any female under twenty-one years of age.

The words "seduce under promise of marriage," as used in the statute when applied to the conduct of a man towards a woman, mean any act, deception or influence used by him to induce her to surrender her chastity, all the elements of seduction to exist, finally to be accomplished under promise of marriage; and the words "any female under twenty-one years of age" mean any chaste unmarried female, for a woman can lose her virtue but once, though she may yield her person many times, and a married woman can not be seduced under promise of marriage.

The statute was enacted for the protection of the pure, innocent and inexperienced woman, who may be led astray from the paths of rectitude and virtue by the acts and wiles of the seducer under promise of marriage, by compelling him to marry her or suffer the penalty of the law. Its primary object is to compel the seducer to marry his victim, so that she be not further degraded and perhaps lost through her shame, but rather that she be saved by wifehood, and that the issue, if any born or to be born of the illicit intercourse, be made legitimate instead of being bastardized. It seeks to provide for the woman and her issue, if any. It cares not for the man except to punish him, and the punishment prescribed is to force him to keep his promise rather than go to the penitentiary.

The marriage of the parties is for the purpose, intent, hope and spirit of the statute. Within its keeping the past misery and shame may be forgotten, the future happiness of both secured.

So that the statute, being so construed, although the seducer be forced almost to the very doors of the penitentiary before offering to fulfill his promise of marriage, yet having done so in good faith, and his offer having been declined by his victim, he can do no more. The woman, and not the man, defeats the object and purposes of the law.

Wherefore, the judgment of the lower court is affirmed.

TRAVIS v. COMMONWEALTH.

(Filed October 6, 1894.)

1. Arrest of judgment—The only ground upon which a judgment in a criminal case can be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.
2. Indictment for larceny or embezzlement—Surplusage—In an indictment for larceny or embezzlement of money or United States currency or bank notes it is sufficient to allege the larceny or embezzlement of same, without specifying the coin, number, denomination or kind thereof. In the averment in the indictment that the money stolen was "in good and lawful currency of the United States of Kentucky," were the words "of Kentucky" were mere surplusage and meaningless, and, consequently, did not render the indictment bad.
3. Reversal of judgment—Evidence to sustain same—This court has no power to reverse a judgment of conviction in a criminal case upon the sole ground that there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry whether there was any evidence conducing to show the guilt of the accused. This court, having been convinced that there was some evidence tending to show the guilt of the defendant, declines to invade the province of the jury.
4. Perpetrators of a crime—Principals—Aiders and abettors—Two or more persons indicted as actual perpetrators of a crime may be convicted as principals, although some of them may have been merely aiders and abettors.

G. W. Whitesides and C. W. Milliken for appellant.

W. J. Hendrick and G. T. Finn for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Chief Justice Quigley.

Appellant, Hiram Travis, and Thomas Hendricks were jointly indicted in the Simpson Circuit Court for grand larceny. Travis demanded a separate trial, and on trial had was convicted and sentenced to confinement in the penitentiary for four years. The indictment reads as folows: "The said Travis and Hendricks heretofore, to wit, on the — day of December, A. D. 1893, in the county aforesaid, did unlawfully and feloniously take, steal and carry away, with intent to convert to their own use, from J. L. Ewell, thirty dollars ($30) in good and lawful currency of the United State of Kentucky, a better description of which is not here given, because the same is to the grand jury unknown, said $30 then and there belonging and was in the possession of said J. L. Ewell, and the said Travis and Hendricks did feloniously convert same to their own use and deprive the said Ewell of same," etc.

No demurrer was interposed to the indictment. Defendant's request for a peremptory instruction was overruled, also his motion in arrest of judgment, and for new trial, to all of which he excepted, as well as to the instructions given and refused by the court.

It appears from the evidence, and we quote it in full, because defendant is relying upon it mainly for a reversal of the judgment below, that some time in December, 1893, J. L. Ewell, accompanied by his half-brother, T. B. Brown, went to the town of Franklin, in Simpson county, to sell his tobacco. The purchaser of the tobacco gave him a check on the Simpson county bank for $34 and some cents. Ewell went into the bank to get the check cashed. He received $30 in currency and $4 and some cents in silver. He put the paper money in his vest pocket and the silver in his pants pocket. His brother, T. B. Brown, was

waiting on the pavement near the bank door, and near him was standing the co-defendant, Hendricks. Ewell and Brown went to the store of one Barner, followed by Hendricks. Ewell tried on some clothing, but not being suited he and Brown went to the store of defendant, Travis, still followed by Hendricks. They all went into Travis' store. Ewell pulled off his overcoat and laid it on the floor near the counter and took off and put on his dress coat and vest on the counter. He and Travis then moved some distance away and Ewell began trying on clothing. In the meantime Hendricks seated himself on the counter near the coat and vest. He was seen by one witness to move them a little away from him. Brown, Ewell's half brother, being near him. While Ewell was trying on the clothing Hendricks got off the counter and walked down to where Ewell and Travis were and whispered something to Travis, one witness testifying it looked to him like Travis was trying to hide something under the vests he was fingering on the counter, but that he couldn't see Hendrick's hands, and another witness testified that he heard the whispered conversation between Travis and Hendricks and Hendricks said sell him my overcoat, it is too small for me. Ewell failed to make a purchase. He put on his clothes and he and Brown went back to Barner's, this time not followed by Hendricks. There Ewell tried on more clothing and discovered that his $30 were gone. They made search for it at Barner's and then went to Travis'. He disclaimed all knowledge of it, and Brown said to him I know you didn't take it, you had no chance to. The money was not found.

It also appears from the evidence that three negro men were in the store at the time Ewell and Brown were there, and during the day they were talking in Travis' store about the theft, and one of them said, "if I don't get something out of this I will knock every spoke out of the wheel," and all said they would blow unless they got something. Travis said he knew nothing about it. That evening Hendricks came into the store. The negroes were there. Travis took Hendricks behind a curtain and came out directly with a $5 bill in his hand and said to the negroes, "here is $5 Tom Hendricks told me to give you all to keep quiet," and they divided the money between them. In a few minutes another negro came in and wanted some money for his silence, but he was denied. Travis saying that he had nothing to do with it, it is Tom Hendrick's money. The town marshal also testified that Travis promised to tell him if he learned anything, and that evening he told him he hadn't heard a word.

No testimony was introduced by defendant. This court is asked for a reversal because the court erred in overruling defendant's motion in arrest of judgment. The only ground upon which a judgment shall be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. (Section 276, Criminal Code.)

In an indictment for the larceny or embezzlement of money or United States currency or bank notes it is sufficient to allege the larceny or embezzlement of the same without specifying the coin, number, denominaiton or kind thereof. (Section 135, Criminal Code.)

The indictmnt meets all the requirements of the Code, and the offense is specific and complete; the words "of Kentucky" being mere surplusage and meaningless, and in no way calculated to mislead defendant to his prejudice.

Again, that the verdict is against the law and evidence. In case of Vowells v. Commonwealth, 83 Ky., 193, this court said: "As has been often held, this court has no power to reverse a

judgment of conviction in a cirminal case upon the sole ground there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused, and as in our opinion there was some evidence we do not feel authorized to invade the province of the jury."

The circumstances connecting Travis with the offense are: The whispered conversation with Hendricks, the talk behind the curtain, giving the negroes $5 to divide between them, and his statement to the town marshal. All this occurred after the theft, if any had been committed. Travis could not have taken the money out of Ewell's vest pocket, and if Hendricks took it the larceny was complete before he handed the money to Travis, assuming that he did so, and if Travis received the money after it was stolen in order to protect Hendricks from the risk of discovery, he was only an accessory after the fact and not a principal, unless he agreed with Hendricks to commit the offense, or knew he was going to commit it, and thus aided and abetted him in its consummation.

Mr. Blackstone, in the second volume of his Commentaries, page 34, says: "A man may be principal in an offense in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree, he who is present aiding and abetting the fact to be done."

The evidence is sufficient to prevent an invasion by this court of the province of the jury.

Again, that the court misinstructed the jury. We notice instruction No. 1, under which defendant was convicted. It reads as follws:

"The court instructs the jury that if they believe from the evidence, to the exclusion of a reasonable doubt, that the defendant, Hiram Travis, in Simpson county, and before the finding of this indictment, unlawfully and feloniously stole and carried away, with the intent to convert to his own use, currency of the United States of more than $20, the property of another, J. L. Ewell, without the consent or knowledge of the said Ewell, and converted same to his (the said Travis') own use; or if they believe from the evidence, to the exclusion of a reasonable doubt, that Thomas Hendricks, in Simpson county, and before the finding of this indictment, unlawfully and feloniously took, stole and carired away, with the intent to convert same to his own use, currency of the United States of the value of more than $20, the property of J. L. Ewell, without the consent of the said Ewell, and that the said Travis was then and there present, and aided and abetted the said Hendricks in the said felonious and unlawful taking, if any, as aforesaid, they should then, and in that event, find the defendant, Travis, guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for not less than one nor more than five years, in their discretion."

We find no error in this instruction. Defendant was jointly indicted with Hendricks as principal, and it is the well-settled doctrine of this court that two or more persons indicted as the actual perpetrators of a crime may be convicted as principals, although some of them were merely aiders and abettors. (Thompson v. Commonwealth, 1 Met., 13; Young v. Commonwealth, 8 Bush, 366; and Mulligan v. Commonwealth, 88 Ky., 229.)

It is unnecessary to consider the other errors assigned, as they are immaterial and in no way prejudicial to the substantial rights of the defendant.

The judgment of the lower court is affirmed.

SMITH AND GODDARD v. COMMONWEALTH.

(Filed October 9, 1894.)

1. Larceny—Where property comes lawfully into the hands of a person either as agent, bailee, part owner or otherwise, the subsequent appropriation of it is not larceny unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands.

2. Same—The defendant having come into the possession of a horse lawfully, and by virtue of a contract acquired a special property therein for a certain time, and afterwards appropriated same, it should have been left to the jury to determine whether the intention to appropriate the horse existed in the mind of the defendant at the time he came into possession of it. The court erred in failing to instruct the jury on this point.

C. A. Board for appellants.

W. J. Hendrick for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justic Quigley.

Appellants, Elmer Smith and Morgan Goddard, were indicted in the Harrison Circuit Court for horse stealing. They were tried, found guilty and sentenced to confinement in the penitentiary, each for four years. The allegations of the indictment under which they were found guilty read as follows: "The said Elmer Smith and Morgan Goddard, on the — day of November, 1893, in the county and State aforesaid, and before the finding of this indictment, did feloniously combine, confederate and conspire to and did feloniously steal, take and carry away a horse, to wit, a mare, the personal property of L. S. Burgess, with the felonious intent to convert the said mare to their own use and to deprive the said owner thereof."

It appears from the evidence that appellants resided in the town of Sadieville, Harrison county, Kentucky, and that L. S. Burgess, a farmer, resided near said town, and that during the summer and fall of 1893 both Goddard and Smith had been working for said Burgess; also that in August or September, 1893, appellant, Morgan Goddard, contracted with said Burgess to raise a crop for him on his (the said Burgess') farm, during the year 1894, and wanted the use of a horse. Burgess said to Goddard, "I have a horse that has the fistuia. You take it and use it as you please, pay for its pasture, keep it shod, treat it for the fistula and return it to me in the spring."

In November, 1893, Goddard procured a buggy, hitched the horse to it and drove to Cynthiana. It was county court day. Elmer Smith, a lad sixteen or seventeen years of age, also went to Cynthiana, where he met Goddard. They got drunk, concluded to go to Cincinnati, and put up the horse and buggy for sale on the public street and sold them for $21. They went to Cincinnati and returned to Sadieville the latter part of the same week.

Appellant's motion in arrest of judgment and for a new trial were overruled, to which they excepted, as well as to the instructions given and refused by the court.

Appellants asked the court to give to the jury the following instructions, which the court refused to do: "The court instructs the jury that to find the defendant guilty of larceny they must believe that at the time the defendant, Goddard, obtained possession of Burgess' horse he must then have had the purpose and

intent to convert the property to his own use and benefit, and to deprive the owner of his property feloniously; that unless the felonious intent was proven at the time of the taking of the horse the law is for the defendant and the jury will so find.

2d. "The court instructs the jury that the felonious intent must exist at the time of the taking, and that no felonious intent subsequent or wrongful conversion will amount to a felony."

The general and common law rule is that where property comes lawfully into the possession of a person, either as agent, bailee, part owner or otherwise, a subsequent appropriaton of it is not larceny unless the intent to appropriate it existed in the mind of the taker at the time it came into his hands; also that if the possession of the property is obtained by lawful means, there can be no larceny at comomn law, even though it is afterwards appropriated to the use of the taker. (American and English Encyclopædia of Law, pages 770 and 790; Snapp v. Commonwealth, 82 Ky., 173; Elliott v. Commonwealth, 12 Bush, 176.)

Mr. Bishop, on Criminal Law, in section 866, says: "If one hires a horse and sells it before the journey is performed, or sells it after but before it is returned, he commits no larceny in a case where the felonious intent came upon him subsequently to receiving it into his possession. And if one hiring a horse intends when he receives it to convert it to his own use, he thereby commits larceny. No subsequent act of sale or conversion is, in such a case, necessary to complete the offense."

And this court, in the case of Elliott v. Commonwealth, 12 Bush, 176, said: "The material ingredients to constitute the crime of larceny are that the goods must be taken animo furandi and against the will of the owner of them; hence in a class of cases where it appears that the goods were taken by the delivery or consent of the owner or of some one having authority to deliver them, and they are converted by the party to whom they are delivered, it is often a very difficult question to determine the nature of the offense."

Goddard came into possession of the horse lawfully, and by virtue of his contract with Burgess he acquired a special property in the horse, that of the right of user and the exercise of control and ownership over it from the fall of 1893 to the spring of 1894. He had resorted to no trick, artifice, fraud or deception to obtain its possession from the owner, and it should have been left to the jury to determine, as a question of fact, from all the circumstances of the case, under proper instructions of the court, whether or not the intent to appropriate the horse existed in the mind of Goddard at the time of the horse came into his possession.

The court erred in refusing to instruct the jury on this point. The substantial rights of the defendants having been prejudiced by failure so to do, the judgment of the lower court is reversed.

KENNEDY, &c. v. CRUM.

(Filed April 28, 1894—Not to be reported.)

1. Turnpike charter—Collection of tolls—Where the original charter of a turnpike company was amended, authorizing the purchaser to operate a certain part of the road, with the rights and privileges of the old road and also conferring additional rights, the original turnpike is severed and the amendment effects a new organization and amounts to a new incorporation. There can be no doubt of the power of the legislature to authorize the col-

lection of tolls and the erection of gates on this particular turnpike at a less distance than that provided by the original grant, where it was clearly shown that the pike was constantly used for several miles without toll being paid.

2. Same—Proceedings against—Proceedings against a chartered turnpike company, to enjoin the collection of tolls or to demand a forfeiture of the charter, must be by the State.

3. Same—Repairing—The failure of the company to keep the road in repair is subject to State control and the proceedings should be by indictment; and the appellants have no cause of action where the injury sustained by them is no greater than that pertaining to the entire public. A conviction for failure to keep road in repair, and allowing it to remain out of repair for thirty days, does not work a forfeiture in the absence of a judgment of forfeiture.

D. M. Rodman and Gardner & Moxley for appellant.

Humphrey & Davie for appellee.

Appeal form Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

The purpose of the appellants, as we find from the record, is to enjoin the appellee from demanding or collecting of them tolls on its turnpike, and to recover tolls previously paid, on the ground that no such rights and privileges have been granted to it by the legislature.

If a chartered turnpike, with authority to collect tolls at its tollgates, then the appellants have no right to the injunction, nor can they demand a forfeiture of its charter. The proceedings must be by the State, as was held in the case of the Commonwealth v. Lexington & Harrodsburg Turnpike, 6 B. M., 397, and in other cases. (Maysville & Mt. Sterling Turnpike Co. v. Ratliffe, 85 Ky., 244.)

There is much evidence introduced in the case as to the condition of the turnpike and the failure of its officers to keep it in repair which, when established by sufficient testimony, shows no injury to the appellants other than that pertaining to the entire public, and this also is the subject of State control, and the corporation must be proceeded against by indictment or by such proceedings in the name of the Commonwealth as is authorized by statute.

The sole question in this case is, has the appellee a charter authorizing it to erect tollgates and charge tolls? If not, there may be some reason for the interposition of the chancellor to prevent the exaction of tolls and the detention of these appellants at its tollgate until the toll is paid. The Louisville Turnpike Co. was chartered in the year 1833 and the road upon which these tolls are exacted is or was a part of that turnpike.

It was provided in the original charter that tollgates on the road should not exceed one for every five miles. The road for which the charter was obtained ran from Louisville to Nashville. The name of the road was afterwards changed to the Louisville & Salt River Turnpike Road Co. A part of this road was at or after this time abandoned, and in the year 1869 the company was authorized to execute a mortgage to secure its indebtedness. This mortgage was foreclosed and purchased by those who had the act of 1871 passed by the legislature, incorporating another corporation styled the Valley Turnpike & Gravel Road Co. This is the corporation of which the complaint is now being made, and was in effect a new organization.

The act is entitled an act "to amend the charter of the Louisville & Salt River Turnpike Road Co.," and after reciting the

purchase of the road, confirms the sale and gives to the corporation the privilege of holding, owning and enjoying the privileges and franchises of the old corporation, the road purchased extending from one of the streets (named) in the city of Louisville to the confluence of Salt river and the Ohio river, being all within the county of Jefferson. It is provided in the act that the company "may, in such manner as to the president and directors seems best, ascertain its travel between its gates and that does not pass through a gate and charge toll therefor, and collect the same, but the toll so charged shall not exceed in proportion the rates of toll allowed by law and this charter as for five miles of travel over said road."

To effectuate the purpose of the corporation, a tollgate was erected so as to catch this travel, that seems to have been constant to and from certain points, and still the travel would not pass the gates located within five miles of each other as provided by the original grant. In March, 1871, an amendment was passed, making more definite the legislative intent and expressly authorizing the company "to so arrange the collection of tolls at its several gates that it will charge and collect from all persons, vehicles and porperty passing its gates for the distance actually traveled."

There can be no doubt of the power of the legislature to authorize the collection of tolls by this particular turnpike for a less distance than that provided by the original grant. The testimony shows that the pike was being constantly used for several miles without toll being paid, and whether the legislative policy was or not wise is a question that does not belong to this court. This court held this view of the question in the case of the Maysville & Mt. Sterling Turnpike Co. v. Ratliffe, 85 Ky., 244. The title of the act, being an amendment to the original charter of 1833, was not misleading or foreign to the subject-matter.

It expresses by its title the subject-matter of the legislation and severed the original turpnike by an amendment authorizing the purchaser to operate that part of the road in Jefferson county, with the rights and privileges of the old company, and also conferring additional privileges. (Citizens Gaslight Co. v. Louisville Gas Co., 81 Ky., 263.)

It seems that this company was at one time indicted for failing to keep its road in repair, and to remain out of repair for thirty days, and upon the trial there was a verdict for the Commonwealth, but there never was any judgment of forfeiture. The appellant maintains the fact of conviction worked the forfeiture.

We do not so understand the statute. It provides that, if convicted of allowing its road to be out of repair for thirty days, the trurnpike company thus found guilty, its charter, with all its franchises, shall be adjudged forfeited.

The circuit court refused, as counsel admit, to adjudge a forfeiture, and the case is still pending. We can not concur with counsel that the chancellor has the power now to say that the charter is forfeited; and certailny not, when the matter is still being litigated. Under the former Constitution, the fact that gates are allowed to be erected for a less distance on some turnpikes than on others, was not open to constitutional objection, and, while a statute may have been passed to make the law uniform, it could not be departed from by subsequent legislation.

In this case the appellee having its charter and being entitled to erect its gates and charge toll, there was no reason for going into a court of equity, or any right to an injunction

Judgment affirmed.

ROHMEISER v. TONEY, JUDGE.

(Filed May 22, 1894—Not to be reported.)

Enforcement of judgment—Writ of mandamus—The lower court having suspended the enforcement of a judgment affirmed by this court because of the institution, after return of the case, of another suit against the parties affecting their interest in the matter in controversy, this court, being satisfied that the lower court suspended enforcemnt in good faith and in order that justice might be more certainly and properly done, will not issue a writ of mandamus requiring an immediate enforcement of the judgment, and, without first passing upon the merits of the action instituted, can not say that the lower court erred in making the order of suspension.

A. E. Willson, W. W. Thum and O'Neal, Phelps, Pryor & Selligman for plaintiff.

Lane and Burnett for defendant.

On motion for writ of mandamus.

Opinion of the court by Judge Lewis.

Elizabeth Rohmeiser, owning and residing on the lot fronting Thirteenth a street in the city of Louisville and extending back to an alley twenty feet wide, brought an action against Pat Bannon, obtaining an injunction restraining him from obstructing the alley, which he was proceeding to do by erecting thereon a building, and upon final hearing judgment was rendered perpetuating the injunction and for removal of the building from the alley.

That judgment was, March 22, 1890, affirmed by this court.

Upon return of the case, the lower court, after hearing supplemental pleadings and motions, rendered judgment for a fine against defendant Bannon, unless he, within five days thereafter, paid into court, for use and benefit of plaintiff, which she might withdraw in full satisfaction of her right to have said obstruction removed. But plaintiff refused to accept said sum, though paid into court for her by defendant, and appealed from that judgment, which was reversed by this court, leaving, as stated in the opinion, nothing to be done save enforcement of the judgment of 1888, affirmed by this court in 1890.

But after return of the case the second time an action was instituted by the city of Louisville against both parties to this case, and other owners of lots fronting Thirteenth street and extending back to said alley, to close and discontinue a forty-foot alley at right angles to the twenty-foot alley, and which would render that part of the latter alley in controversy of no use to the plaintiff, Rohmeiser. Said action was brought by the city of Louisville in pursuance of an ordinance of the city council directing the alley closed upon payment of due compensation to owners of lots affected thereby.

The lower court, upon having the institution and pendency of that action pleaded and brought to its attention by defendant Bannon, decided to suspend enforcement of the judgment in this action in order to await determination of it. And we are now to pass upon motion of plaintiff for writ of mandamus peremptorily requiring the judge of the law and equity court, where this action is now pending, to immediately enforce the judgment heretofore rendered and affirmed by this court.

We are satisfied the judge of the lower court suspended enforcement of the judgment in this case in good faith and in order that

justice might be more certainly and properly done, and are not prepared, without first passing upon the merits of the act on instituted by the city of Louisville, to say the court erred in making such order of suspension; nor can any other injury result to the plaintiff from the order of suspension than may result from delay, which we are satisfied will not be material; for we assume that, upon determination of the case referred to, the mandate of this court will, if then proper, be enforced.

The writ of mandamus is denied.

WILSON, &c. v. CREEKMORE, &c.

(Filed September 20, 1894—Not to be reported.)

Opening a road through an orchard—That section of the General Statutes which prohibits the opening of a road through "any orchard" contemplates ground specially set apart and used by owner for an orchard, and not an old bramble field which had once been an orchard, but at present contains only a few broken and decayed trees that the owner does not cultivate, protect or apparently care for.

Hill & Denham for appellants.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

The controversy in this case arose upon application by appellants for change of a public road which was by the county court finally adjudged to be made. But upon appeal that judgment was reversed by the circuit court.

Necessity for the proposed change is made to fully appear; and no omisison of any preliminary steps nor error in proceedings required by the statute in such cases appear upon the record or have been suggested. And the only ground upon which the circuit court bases its judgment reversing order of the county court is that the way viewed and fixed is through an orchard upon the land of the heirs of J. W. Davis.

Section 19, article 1, chapter 94, General Statutes, in terms provides that "no road shall be ordered to be opened through any lot of land in any town, or through any orchard or burying ground or buildings, or any yard, without the consent of the owner." And it seems to us, although argued otherwise by counsel, that provision was intended to apply as well to change of an existing road as to opening a new road. But the statute was made to prevent the establishment of a public road on ground specially set apart and used by the owner for an orchard; not to an old briar or bramble field upon which there may be a few old broken or decayed fruit trees that the owner does not cultivate, protect or apparently care for. The pretended orchard in this case is described by a witness as an old field in which, forty years ago, there was an orchard, but nearly all the trees are dead now, not more than six or eight living, none of which bear any fruit. The record does show some young apple trees had been recenlty planted, but it was done after the application for change of the road was made, and, it is not difficult to conclude, for the purpose of preventing the change.

In our opinion the evidence does not show the road has been located through an orchard, in meaning of the statute, and the judgment of the circuit court is reversed and cause remanded, with direcitons to affirm the judgment of the county court.

KENTUCKY SUPERIOR COURT.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. WILSON, &c.

(Filed October 3, 1894.)

1. Draining land into water course—Injury to lower proprietor—One may lawfully drain his land into a natural water course, even if by so doing a lower proprietor is injured by the increased flow.

2. Same—In this action against a railroad company to recover damages for injury to plaintiff's land alleged to have been caused by the acts of defendant in ditching and throwing debris, rock and other obstruction, in the channel of a creek, thus changing its course and causing it to run through and overflow and cut a channel upon plaintiff's land, the court properly gave an instruction authorizing a verdict for plaintiff if these combined influences caused the injury.

3 The opinions of witnesses, based upon their knowledge of the stream and the volume and force of the water in times of heavy rains, at the place in question, was competent. It is not necessary for a witness to be an expert to enable him to give his opinion as to a matter depending upon special knowledge, when he states the facts on which he bases his opinion. It is otherwise as to matters concerning which the jury can themselves form opinions, in which cases witnesses can not state opinions which do not themselves involve the facts from which they are drawn.

4. Same—The same rule required that the defendant should have been allowed to prove, as it offered to do, that trees, brush, etc., had been allowed to accumulate in the old channel of the creek below the washed place or new channel on plaintiff's land, and that this was the cause of the damage complained of.

P. H. Darby and H. P. Taylor for appellant.

E. D. Walker for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Barbour.

It seems to be the settled rule in this country that the owner of lands drained by a water course may change and control the natural flow of the surface water thereon, and by ditches or otherwise accelerate the flow or increase the volume of water which reaches the stream; and if he does this in a reasonable use of his own premises, he exercises only a legal right, and incurs no liability to a lower proprietor. (McCormack v. Horan, 81 N. Y., 86; 37 Am. Rep., 479.)

Or, as expressed by Mr. Lawson, one may lawfully drain his land into a natural water course even though by so doing a lower proprietor is injured by the increased flow. (6 Lawson's Rights and Remedies, section 2942.)

If the injuries of which the appellees complain grew out of the ditch which the appellant dug for the purpose of draining the surface water from its roadbed, there would be more force in the contention that they have manifested no right of recovery; but they do not base their complaint upon this ground alone; they charge in their petition that appellant, by ditching and by throwing debris, rock and other obstructions in the channel of Horse Branch creek at its bridge across said creek adjoining their

lands, changed the course of the creek and caused it to run through and overflow and cut a channel upon their land. There was evidence tending to support these allegations, and the first instruction which authorized a verdict for the plaintiffs, if these combined influences caused the injury, was correct. Instruction "A," asked for by the defendant, was rightly refused; it would have been proper if the complaint had been confined to the digging of the ditch; but under the issue it was not proper, as it required the jury to find for the defendant, although they might believe that the rock and debris placed by the defendant in the channel of the creek contributed to the injury. Instruction No. 5, given by the court, was, in our view of the law, erroneous, and should not have been given.

The opinions of witnesses, based upon their knowledge of the stream and the volume and force of the water in time of heavy rains, at the place in question, was competent. It is not necessary for a witness to be an expert to enable him to give his opinion as to a matter depending upon special knowledge, when he states the facts on which he bases his opinion. It is otherwise as to matters concerning which the jury can themselves form opinions, in which cases witnesses can not state opinions which do not themselves involve the facts from which they are drawn. (Wharton on Evidence, section 513; Greenleaf on Evidence, section 440.)

The same rule required that the defendant should have been allowed to prove, as it offered to do, that trees, brush, etc., had been allowed to accumulate in the old channel of the creek below the washed place or new channel on plaintiff's land, and that this was the cause of the damage complained of, or at least contributed to it.

The judgment is reversed and the cause is remanded for further proceedings.

WARREN CIRCUIT COURT.

KNOWLES, EX PARTE—PETITION FOR HABEAS CORPUS.

1. To authorize the extradition of one charged with a crime his corporeal presence in the demanding State at the time of the commission of the offense, or after its commission, must be shown.

2. Same—Case—The petitioner, a resident of Warren county, Ky., having been indicted in Alabama for receiving from parties in the latter State a certain sum of money "as a rebate, return commission, discount, drawback, gift or gratuity," requisition was issued by the governor of Alabama upon the governor of Kentucky for the extradition of said petitioner. The governor of Kentucky thereupon issued his warrant for the arrest of said petitioner, which came into the hands of the sheriff of Warren county, who, by virtue thereof, made the arrest. The petitioner filed with the judge of the Eighth Judicial District of Kentucky a petition for a writ of habeas corpus, which was issued and executed upon the sheriff. Held—That, although the person demanded was substantially charged with a crime against the laws of the demanding State by an indictment certified as authentic by the governor of that State, upon the introduction of evidence it was shown that the petitioner was not within the bounds of that State at the time he received the money, nor had he been within the State since that time, and, therefore, he was not a fugitive from justice, and, consequently, not subject to the extradition.

3. Same—Proceedings in habeas corpus—The proceedings in habeas corpus are not limited to a determination of the sufficiency of the extradition papers and the identification of the prisoner, but may determine the question whether the person demanded is a fugitive from justice.

McQuown & Rodes and D. W. Wright for petitioner.

Mitchell & DuBose and —— Faulkner for State of Alabama.

Opinion of the court by Judge Settle, Eighth Judicial District.

On September 18, 1894, the grand jury of Jefferson county, State of Alabama, returned in the criminal court of said county an indictment against the petitioner herein, R. S. Knowles, then and now a resident of Warren county, Ky., said indictment being in words and figures as follows, viz:

"THE STATE OF ALABAMA. } The Criminal Court of Jefferson County, September Term, 1894.
"JEFFERSON COUNTY. }

"The grand jury of said county charge that before the finding of this indictment R. S. Knowles, whose Christian name is to the grand jury otherwise unknown, who was at the time of the commission of the offense herein charged an agent of the L. & N. R. R. Co., a railroad corporation, and who was then and there by it authorized or empowered to buy lumber for such corporation, did take or receive from James D. Hand, Wm. T. Hand and David M. Hand, as executors of L. J. Hand, deceased, doing business as the Jemison Lumber Co. under the power contained in the will of said L. J. Hand, deceased, who were then and there the sellers of such lumber, the sum of $129.12 as a rebate, return commission, discount, drawback, gift or gratuity, against the peace and dignity of the State of Alabama.

"JAS. H. LITTLE, Solicitor."

On the day of the return of said indictment the affidavit of L. C. Bradley, assistant solicitor, was filed in the said criminal court, containing the application for the extradition of said Knowles and the grounds therefor, and on the day following the governor of Alabama issued in due form his requisition, addressed to the governor of Kentucky, for the apprehension of said Knowles and his removal to Jefferson county, Alabama, for trial upon the charge contained in said indictment and naming one C. W. Williams as the agent of Alabama to receive and convey him to that State. Upon receiving the requisition aforesaid, with copies of the said affidavit and indictment, the governor of Kentucky issued his warrant for the arrest of said Knowles, which came to the hands of W. S. Ragland, sheriff of Warren county, who, by virtue thereof, arrested said Knowles, and, as directed by said warrant, brought him before the judge of the Eighth Judicial District of Kentucky, at Bowling Green, for identification.

Before the hearing of the matters arising on said warrant of arrest, said Knowles filed with the said judge his petition for the writ of habeas corpus, which was issued and executed upon said sheriff, who, in obedience thereto, produced the said petitioner, Knowles, before the said judge and made his return to said writ, which return attempts to justify the arrest and detention of the petitioner upon the grounds furnished by the warrant of the governor of Kentucky, the requisition of the governor of Alabama, the affidavit therefor and the indictment, copies of

these last, properly authenticated, were made a part of the return, as was the warrant of the governor of Kentucky.

The petitioner filed response and exceptions to the sheriff's return, and the latter filed demurrer to the response, thus presenting in due form the questions involved in this hearing.

The petition for the writ, as well as the response to the return, attacks the legality and sufficiency of the warrant of the governor of Kentucky; denies that the requisition and accompanying papers present any legal evidence that the petitioner is legally charged with a crime committed in Alabama, or that he is a fugitive from justice; but, on the contrary, avers that he was not within the State of Alabama at the time of the alleged commission of the offense charged, and that he has not been within the bounds of said State since the commission of the said offense, and did not at any time flee therefrom.

It is to be regretted that there is no right of appeal in habeas corpus cases in Kentucky, as by reason thereof we are left without positive authority from our Court of Appeals upon questions arising in such cases, and must, therefore, be guided in the main by the decisions of courts of last resort other than our own, which, upon investigation, will be found to be, in many respects, inharmonious and conflicting.

Of all the cases of this nature that have been passed upon by the courts of our State but two have found their way into any law book or journal, viz.: The Taylor case, tried before Judge Geo. C. Drane, at that time judge of the Eleventh Judicial District, and the Arnold case, tried before the late Judge Stites, then judge of the Jefferson Court of Common Pleas, but who had previously served at least one term as judge of the Kentucky Court of Appeals and one term as circuit judge of the Hopkinsville district. Judges Drane and Stites both ranked deservedly high with the bench and bar of Kentucky, and it will be necessary later on in this opinion, to see to what extent their views are applicable to this case.

For convenience the two important questions in this case may be stated as in the case of Roberts v. Reiley, 116 U. S. Supreme Court Reps., 549:

1st. "Is the person demanded substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled by an indictment or affidavit certified as authentic by the governor of the State making the demand?

2d. "Is the person demanded a fugitive from justice of the State, the executive authority of which makes the demand?"

"The first of these prerequisites, say the court in the case supra (opinion by Justice Matthews), is a question of law, and is always open upon the face of the paper to judicial inquiry on an application for a discharge under a writ of habeas corpus.

"The second is a question of fact which the governor of the State, upon whom the demand is made, must decide upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court."

As to the first of these questions it is claimed by counsel for petitioner that upon the face of the requisition and accompanying papers the petitioner is not charged with the commission of a crime in the State of Alabama, and in proof of that it is urged that the indictment does not lay the venue of the alleged crime in

that State, and upon this point the opinion of Judge Stites, in the Arnold case, is confidently relied on.

The opinion of Judge Stites does not, in the particular claimed, fit this case, for in the case of Arnold the warrant of the governor of Kentucky was the only authority shown for the arrest, and it was insufficient, as it did not state that Arnold stood charged in California, by indictment or otherwise, with the commission of crime therein, nor did it state that a demand had been made for Arnold's delivery by the chief executive of the State of California, and these defects thus appearing on the face of the warrant of the governor of Kentucky, and not being cured by proof, the prisoner was discharged. (Arnold on Habeas Corpus, 1 Ky. Law Journal, 512.)

The Code of Alabama, read in evidence, section 4899, precribes the form of indictment in that State. Section 4373 provides that the time of committing the offense need not be stated. Section 4374 provides that "it is not necessary to allege where the offense was committed, but it must be proved on the trial to have been committed within the jurisdiction of the county in which the indictment is preferred."

Thus it will be seen that though the indictment in this case, tested by the laws of Kentucky, would be fatally defective, yet under the laws of Alabama it is good and sufficient, and, therefore, it does not contradict the recitals in the requisition of the governor of Alabama, the affidavit therefor, or the warrant of the governor of Kentucky, wherein the petitioner is charged with the commission of a crime in the State of Alabama, and the authorities support the view that if, by the laws of the demanding State, the indictment is good, it must be so regarded by the executive and courts of the State upon which the demand is made. (Const. U. S., article 4, section 2; Act of Congress, 1793; 116 U. S., 549; 2 Moore on Extradition, sections 3, 558, 559, 560, 549, 550.)

I am of the opinion, therefore, that the papers exhibited with the sheriff's return, and by virtue of which the petitioner is held in his custody, are properly authenticated, and that they show that he is substantially charged with a crime against the laws of Alabama, viz., the crime defined and denounced by section 3826 of the Code of said State.

We now come to the consideration of the remaining or second question in this case, viz.: Is the petitioner a fugitive from the justice of the State whose chief executive is demanding his return?

As said by Justice Matthews, in Roberts v. Reiley, supra, in discussing this point, "how far his (the governor's) decision may be reviewed judicially in proceeding in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court."

Though it seemed unnecessary in Roberts v. Reiley to decide whether the recital in the warrant of the governor of the State of asylum that the person demanded was a fugitive from justice could lie questioned, the learned judge practically admits that it can be questioned in saying, further on in the opinion, "it is conceded that the determination of the fact (i. e., that the person demanded is a fugitive from justice) by the executive of the State in issuing his warrant of arrest upon a demand made on that ground, whether the writ contains an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

The Constitution of the United States, article 4, section 2, clause 2, provides "that a person charged in any State with trea-

son, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to State having jurisdiction of the crime."

As this provision of the Constitution is not in its nature self-executing, Congress, by the act of 793, intended to and did provide the regulations necessary to carry this compact into execution, in order that all the States might observe a uniform rule in the matter of the extradition of criminals. Obviously the extradition clause of the Federal Constitution does not refer to all criminals, but only to a special class, viz., those charged with crime who shall flee from justice and be found in another State. This view is adopted by all the authorities, though, in considering what must be the exact nature of the flight on the part of the criminal, the authorities differ.

In ex parte Mohr the Sureme Court of Alabama (73 Ala., 503), in referring to the act of Congress, 1793, says: "It is an important feature of the law, throwing some light on its proper construction, that while it expressly prescribes the mode by which evidence of the crime charged shall be authenticated, it nowhere prescribes how the fact that the criminal is a fugitive from justice shall be established." * * * "The better view seems to be that one of the purposes of permitting express congressional legislation on this point was to refer the matter to executive determinatin, subject to review by habeas crpus in the courts in all the States."

Hence, in this case it was held that Mohr, who had been arrested on a warrant of the governor of Alabama upon a requisition of the governor of Pennsylvania, accompanied with a duly authenticated indictment charging the crime of obtaining goods by false pretenses, was properly permitted in the habeas corpus proceeding instituted by him to prove that he was not in the State of Pennsylvania at the time of the commission of the alleged crime nor since its commission, and that the goods were obtained by purchase from an agent of the prosecutor in New York, to whom, if any, the false representations had been made.

The latest and best considered cases, such as Wilcox v. Nolze, 34 Ohio, 520; Hartman v. Aveline, 63 Ind., 344; James v. Lenard 50 Iowa, 105; Hibben v. State, 43 Texas, 197, besides many other and older cases, all seem to sustain the rule in Mohr's case.

In this connection the Taylor case, decided by Circuit Judge Drane, of our own State, may be considered. In 1879 the grand jury of Cook county, Illinois, indicted E. H. Taylor, a wholesale liquor dealer of Frankfort, Ky., for obtaining money by false pretenses. The party procuring the indictment filed with the governor of Illinois an affidavit, making a certified copy of the indictment a part of the affidavit, stating in substance that Taylor was a fugitive from the justice of Illinois, and was then in the Satte of Kentucy. The governor of Illinois thereupon issued his requisition upon the governor of Kentucky for the extradition of Talyor, and the governor of Kentucky issued his warrant for the arrest of said Taylor, and for his delivery to the agent of the State of Illinois, to be carried to that State to answer said indictment.

After his arrest Taylor procured a writ of habeas corpus from Judge Drane, and, upon the trial of the writ before said judge, Taylor appeared to prove, and was permited to prove, that he was a resident and citizen of Kentucky, and that he had not been personally in the State of Illinois at the time of the commission of the alleged offense, and that the offense, if committed at all, was committed by statements in letters written by Taylor

in Frankfort, Ky., and there mailed to the parties aggrieved in Chicago. Upon this proof Taylor was discharged.

If Taylor's case is to be regarded as authority, it will readily be seen that the facts thereof, which were considered by the judge sufficient to justify Taylor's release, do not present such strong grounds for the interposition of the writ of habeas corpus as do the facts of this case, for the petitioner, Knowles, not only proves that he was not in Alabama at the time of the commission of the alleged crime, but he, in addition, proves that he has not been in that State since its commission, thereby bringing his case clearly within the rule in Mohr's case, and other cases aobve cited.

But what is the meaning of the term or expression "a fugitive form justice?" The authorities indicate that there is a difference of opinion as to what must be the exact nature of this flight on the part of the criminal. Thus in Roberts v. Reily it is said: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in wihch the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found in the territory of another."

In Cooley's Constitutional Limitations (5th ed., 17th note), it is said: "The offense must have been actualy committed within the State making the demand, and the accused must have fled therefrom."

Another law writer says: "That any person is a fugitive within the purview of the Constitution who goes into a State, commits a crime and returns home."

Another text-book says: "A fugitive in this sense is one who commits a crime in a State and withdraws himself from its jurisdiction."

It is not necessary, however, to discriminate here by deciding which of the foregoing definitions is the correct one, nor to adopt any one of them, as all manifestly exclude crimes that are only constructively committed within the jurisdiction of the demanding state. In other words, to authorize the extradition of one charged with crime, the authorities hold to the doctrine that his corporeal presence in the demanding State at the time of the commission of the crime, or after its commission, must be shown. (Constitution U. S., subsection 2, section 4, article 4; 3 Crim. Law Mag., 804, 806, 807, 808, 809; Ex parte Mohr, 73 Ala., 503; Wilcox v. Nolze, 34 Ohio, 520; 7 Am. and Eng. Ency., 645, 646, 647, 651, 651, 652, 656; 2 Moore on Extradition, sections 584, 939, 940, 941, 942, 943.)

The fact as to whether the accused committed the alleged offense while actually corporeally present in the demanding State, or that, after its commission, he went into such State and left it, is, therefore, jurisdictional.

It is contended by counsel for the State of Alabama that in this proceeding of habeas corpus the powers of the judge are limited to a determination of the sufficiency of the extradition papers and the identification of the prisoner, and it is also insisted that it was error to allow the introduction of evidence by parol or otherwise, for the purpose of showing the absence of the prisoner from the demanding State at the time of and since the alleged commission of the crime charged against him because it is

claimed the legislature of Kentucky, in the exercise of its sovereign power, has by legislative enactment provided for the extradition of fugitives from the justice of other States, and that by such enactment the only question left to the determination of the courts is the identification of the alleged fugitive. The cases cited in support of this position are overborne by the greater number of opposing authorities.

The power of the States to pass laws supplementary to and in aid of the Constitution and act of Congress touching fugitives from justice can not now be questioned. The Kentucky Statute in question is not in conflict with the act of Congress, but is auxiliary thereto. It imposes upon the State chief executive the duty of surrendering fugitive criminals "pursuant to the Constitution and laws of the United States," and as the act of Congress does not expressly declare that the fugitive shall be identified before his surrender to the agent of the demanding State, or prescribe the mode of his identification, the purpose of the Kentucky Statute in requiring the identification before some circuit judge, whether demanded by the fugitive or not, was to provide a safeguard the more effectually to protect the citizen in the right of personal liberty.

But we are asked to convert this shield of protection, thus afforded by the laws of Kentucky, into a sword of destruction by saying to the petitioner that the inquiry into his arrest can not be proceeded with because he does not deny that he is in fact the person for whom requisition has been made by the demanding State.

The writ of habeas corpus is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained. "Its power has been exercised to stay the encroachment of kings; it forces the secrets of every prison to be revealed; the cause of every commitment to be declared and the person of the accused to be produced, that he may claim his enlargement or his trial within a limited time;" and now that its aid has been invoked by the petitioner in this case, is its power less effective than in the days of old? If not, the investigation allowed was not improper, and by that investigation the petitioner must stand or fall.

The only witness introduced was the petitioner, Knowles. He states upon oath that the alleged offense with which he is charged was committed in Kentucky in April, 1894, at which time he received by check through the mail at Smith's Grove, in said State, from the Jemison Lumber Co., the $129.12, which it is charged in the indictment was paid or given him as a rebate, return commission, discount, gift or gratuity upon a sale of lumber made him as agent of the L. & N. R. R. Co. by said lumber company.

He further states that this is the only sum of that amount ever given or paid him by said lumber company in the manner or for the purpose charged in the indictment or otherwise; that it was not sent to or received by him by agreement or contract then or previously made in Alabama or elsewhere, but only as a present or gift, as he supposes; that he did not receive said sum within the State of Alabama, and that he has not been within the bounds of the State of Alabama at any time since said sum was received by him, and that he had not in fact been in the State of Alabama since the year 1888, except that he passed through said State on the cars in April or May, 1892, stopping at but one point, and then only long enough to get his dinner; that his recollection of the amount so received by him, and the date it was received, had been refreshed by an examination of the papers of a suit filed against him in the Warren Circuit Court by the L. & N. R. R.

Co. for the recovery of said $129.12, and numerous other sums which he is charged with improperly receiving while acting as agent of said company; that the papers of said suit contain a schedule which he exhibited, but which was not read in evidence, showing the various sums so received by him and the dates thereof.

If these statements be true the petitioner could not have actually been within the State of Alabama at the time of the commission of the alleged offense, nor has he been within that State since its commission.

Counsel for the State of Alabama insist that inasmuch as the indictment does not fix the time or place of the offense this testimony is incompetent. If this be correct the party accused, though having the right to testify, may be at all times excluded from doing so by leaving out of the indictment the date and venue of the offense, thus the very machinery of jusitce might be made to subserve a corrupt purpose or be put to a base use.

It is but fair to presume that the petitioner's statements are true, as no effort was made to contradict him, though witnesses for the State of Alabama were, in the beginning of the trial, sworn and put under the rule, and the charge made in argument by opposing counsel that they were from the State of Alabama was not denied.

It is not necessary or proper in this investigation to pass upon the guilt or innocence of the petitioner. That can only be done upon trial before the proper tribunal; but in the light of the facts of this case and the law applicable thereof, the conclusion is inevitable that the petitioner is not a fugitive from justice, and he is, therefore, ordered to be, and is hereby, discharged.

SUPERIOR COURT ABSTRACTS.

NUCKOLS v. KY. MUTUAL BENEFIT SOCIETY, &c.

Filed October 3, 1894. Appeal from Woodford Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Benefit societies—Rights of beneficiaries—Under the charter of a mutual benefit society, which declares that the widow and children of the members are to be the equal beneficiaries of the benefit fund, the word "children" includes grandchildren; and a member can not, by having his certificate issued designating one of several children as the sole beneficiary, exclude his other children.

2. Same—Where such a society was authorized by an amendment to its charter to issue certificates to a second class of members in which the annual dues and the amount to be paid upon the death of a member were both to be made denflite, the certificates of the members of the first class, created by the original charter, being indefinite in both of these respects, both amounts depending upon the number of deaths each year; and the members of a second class, created by the original charter, whose certicflates were definite as to the annual dues, were directed to return them and have them made definite also as to the amount to be paid upon the death of the member, and thus become members of the second class created by the amendment to the charter, a member who returned his certificate, and had it thus made definite as to the amount to be paid upon his death, did not thereby make effectual his designation in the certificate of one of his children as the sole beneficiary, to the exclusion of other children, for while

the amendment to the charter authorized the members of the second class thereby created to designate anyone of the charter beneficiaries as the sole beneficiary, a member who had, by his certificate issued under the original charter, made an ineffectual designation of one of his children as sole beneficiary, could not give effect to such designation by merely returning the certificate for the purpose of having it changed as to amount.

3. Same—The member having taken out a certificate under which the charter made his grandchild (the representative of a deceased child) a joint beneficiary with his only living child, he could not transfer his grandchild's interest without his consent except by will, that being the only way he was authorized by the charter to do so.

4. Same—Disposition of benefit fund by will—Such a benefit is no part of the member's estate, and while he is authorized to dispose of it by will, that is but a power of appointment, and a residuary clause, disposing of the testator's "estate" not otherwise disposed of, can not be construed as the exercise of such a power.

D. L. Thornton for appellant; Ed. M. Wallace for appellees.

JAMES v. COMMONWEALTH.

Filed October 3, 1894. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Self-defense—Where there is evidence tending to show that the accused acted in self defense, it is the duty of the court to give an instruction defining the law of self defense; it is not sufficient to instruct the jury to find against the accused if he did not act in self-defense.

2. Working at hard labor in lieu of imprisonment for nonpayment of fine—Under the statute which provides that if the penalty for a misdemeanor be a fine, "it shall be in the discretion of the jury fixing the amount of the fine to say in its verdict whether, if the fine and costs are not immediately paid or replevied, he shall work at hard labor in lieu of imprisonment for nonpayment of the fine." it is not sufficient for the court in instructing the jury to tell them that if they find the defendant guilty they may in their discretion say that he shall work at hard labor until the fine and costs shall be paid, but it is the duty of the court to instruct the jury as to the nature and meaning of the statute.

3. Evidence—Upon the trial of appellant for the offense of shooting and wounding in sudden heat and passion, there being evidence tending to show that when the shooting was done the prosecuting witness—the person who was shot—was following the accused up the road, the accused repeatedly telling him to go back, it was competent for the accused to show that the prosecuting witness was at the time under the influence of liquor and to what extent.

Blanton & Berry for appellant; W. J. Hendrick for appellee.

CRAVENS, &c. v. HARDESTY, &c.

Filed October 3, 1894. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. A judgment dismissing an action without prejudice is not a bar to a subsequent action for the same cause.

2. Burden of proof—As defendants voluntarily assumed the burden of proof they can not now be heard to complain that they were given the burden.

3. Fight of court to withdraw incompetent testimony from jury on its own motion—Although plaintiff and defendant were not competent witnesses under section 606 of the Civil Code, yet, as they testified without objection or exception on either side, the court had no right of its own motion to exclude their testimony from the jury upon the ground that it was incompetent; nor did a demurrer to the evidence raise the question, being nothing more than a motion for a peremptory instruction.

4. Peremptory instruction—Prejudicial error—As the plaintiffs were entitled to a peremptory instruction, even considering all the testimony, the defendants were not prejudiced by the action of the court in erroneously excluding upon its own motion testimony which had been admitted without objection and then giving the peremptory instruction.

H. P. Cooper for appellants; Thompson & McChord for appellees.

COMMONWEALTH v. GRAVES.

Filed October 8, 1894. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Yost, affirming.

Keeping tippling house—The selling in any quantity of spirituous liquors without license in a house, to be drunk therein or on or adjacent to the premises where sold, or which, after the sale, were so drunk, constitutes the offense of keeping a tippling house.

In this case the indictment for keeping a tippling house is defective in that it fails to allege that the liquors were sold in a house.

W. J. Hendrick for appellant.

The Kentucky Law Reporter.

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KENTUCKY COURT OF APPEALS.

WAGNER v. SWIFT'S IRON & STEEL WORKS.

(Filed May 24, 1894—Not to be reported.)

1. Trusts—Fraudulent mismanagement—This court will not sustain a judgment against appellant, who, in the performance of a trust, was charged with mismanagement of the business in furtherance of his own interests as a future purchaser, in view of the fact that appellant published and made known to all parties in interest his belief that the business was making a handsome profit, which was justified by the books, and thereby gave a tendency to the increase of the value of both personalty and realty.

2. Same—Interest of trustee—Though, in our opinion, the appellant acted in good faith when it became his purpose to purchase the property, he should have abandoned the receivership and notified the chancellor that he intended to make the purchase. A trustee has no right to become the purchaser of the trust funds, and when his management of the trust property is for his own interest, and with a view of becoming the owner at less than its real value, the chancellor should decline to let him have it. His bid should be rejected, and an order for his removal as trustee at once made.

Wm. Lindsay, Jacob Schroeder and Nelson & Desha for appellant.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

This is an appeal by Adam Wagner from a judgment rendered against him as receiver and general manager of the Swift Iron & Steel Works. The judgment is for near $90,000, based upon the alleged fraudulent mismanagement of the trust confided to him. The record is voluminous, involving many questions that have heretofore been settled by this court in the identical case, and we have been compelled to undergo much unnecessary labor in dissecting the record to ascertain what part of it bears upon the question at issue.

Counsel for the appellant, in a general way, refers to the testimony and the exceptions without reference to the page or volume, and counsel for the appellee has not even favored the court with a brief. The practice should be to set aside the order

of submission and decline to investigate the record until some aid is given the court in its investigation other than the discussion of the legal or equitable principles involved. As we have, however, examined the record, so as to arrive at what we deem to be the rights of the parties, we are not disposed to place such a burden on counsel.

The appellant was made the assignee of this insolvent corporation, the Swift Iron & Steel Works, and undertook the execution of the trust, and, after entering upon his duties, a suit in equity was filed by John Trapp, one of the creditors, to have the corporate control placed in the hands of a receiver, and in September 1887, by consent, the appellant Adam Wagner and Gus Altman were appointed receivers to manage and control the works and their operation.

By the consent of creditors as well as that of the chancellor the works were continued in operation, as it was no doubt deemed advisable to have the corporation or its property in working order, preparatory to and at the time of the sale. Much stock was on hand at the date of the assignment that had to be worked up and disposed of, and the purchase of other stock and supplies was made necessary by reason of the continued operation of the business.

The appellant had originally been engaged in hauling for the corporation, and seems to have had much experience as to its management. So far as this record shows he was not an expert accountant, or fitted for anything but a general superintendent of the business.

His co-receiver or trustee was the better informed man of the two in the science of bookkeeping, and, besides, the corporation had clerks competent for the positions assigned them, and in whom all parties confided. The books of the concern showed in a short time a profit of near $60,000, and this gave, no doubt, strong reasons for the chancellor directing a continuation of the business until a sale beneficial to the patries in interest could be effected.

It was a business of much magnitude, requiring much skilled labor and the employment of many laborers, and while the authority for conducting the work or continuing the operation of the business was at the instance of the appellee, it is manifest that it advanced the value of the property.

The chancellor, after the appointment of Altman as co-trustee, who was also the commissioner of the chancery court, directed Altman to sell the property. The operation of the works until the sale was made is justified by every fact in the case, and to have sold the property when idle and abandoned, would have resulted in a great sacrifice of the property.

Altman was not skilled in the business, nor was he appointed, doubtless, for any other reason than his experience with accounts and his business talent. Both of the receivers acted, we think, in the best of faith, and while the books of the concern, when properly examined, show a loss instead of a gain, it is conceded that the balance sheets, as made out, showed a handsome result. The old employes were kept in the business, and while the books and business of the concern under the supervision of a skilled accountant might have shown a loss instead of profit, Wagner was not the man to detect the error, and perhaps could not have discovered it if he had made the examination; and while there was a loss, it is equally plain that the running of the works caused the property to bring a large sum of money, and at last resulted in a benefit to the creditors.

It seems that Wagner became interested in the purchase of this property, or a stockholder in the new corporation after the purchase. We are inclined to believe that the appellant was looking to the fact of becoming a joint owner before the sale was

made, and, when such was his purpose, should have abandoned his receivership and notified the chancellor of his purpose to make the purchase.

A trustee has no right to become the purchaser of the trust funds, and when his management of the trust property is for his own interest, and with a view of becoming the owner at less than its real value, the chancellor should decline to let him have it. His bid should be rejected, and an order for his removal as trustee at once made.

In this case the property was sold as directed by the chancellor. The personal property brought $46,000. It consisted of horses, mules, wagons, iron and manufactured articles, etc.

Exceptions were filed to the report of sale of the personalty, and an offer made to increase the bid $10,000. This bid was not made good, and the sale confirmed.

The property was finally purchased by one Shrivner, with whom Wagner became associated as a partner, or otherwise, after the purchase. The creditors attacked the sale of the personalty as a sacrifice of the property, and asserted then that Wagner was interested, and yet the sale was confirmed.

The purchaser of the personlty was the original purchaser of the plant, for which he agreed to pay $153,500; failing to comply with the terms of sale, and faling to pay his sale bond, the realty was again sold and brought $70,000, after improvements had been made by him of the value of $20,000, and was finally sold for $67,000. The sale was confirmed by this court on both appeals, and in fact the entire proceedings, with reference to these sales, stand unaffected in any way.

The chancellor seems to have referred the matter involving the fidelity of the trust to his (appellant's) co-trustee for the purpose of taking proof, and, in disposing of the case upon the facts touching the charges against him, which are embodied in no specified form, but taken from the testimony, the chancellor finds that the personalty was worth $108,000, and takes from that what it was sold for and makes the appellant liable for $61,000 difference.

It is claimed, and upon this fact, the judgment against Wagner is based, that he purchased for the business more stock to run the plant than was necessary, and with the view of becoming the owner. Whether or not he overstocked the business does not appear. It does appear that after he became interested as a partner the stock was valued at $108,000. Whether this was or not speculative, and based upon values that would result from one being compelled to buy for his business, is not easily determined; but looking to the character of the business and the manner in which such sales of assigned property are made, it is not unreasonable in the new firm making such an estimate upon their purchase, and yet the property may have brought all it was worth.

The plant or realty brought a large sum, and, when adding to this the amount the personalty brought, the creditors have no right to complain. A business with hundreds of employes and personalty attached of much value when wrecked by financial trouble, its personalty will not usually bring one-half of its value, and the estimate placed upon it by the owners exceeds, in nearly every instance, greatly the amount realized.

We are of the opinion that the report of Special Commissioner Crawford should be adopted as the basis of settlement with Wagner, and that no liability exists by reason of his becoming connected with the firm now or at the time of the appeal.

We can not say that Wagner acted in bad faith;—in fact his be-

lief that the business was making a handsome profit, justified by the books, was published and made known to all the parties in interest and was calculated to increase instead of diminish the value of both the personalty and realty.

The allowance to the appellant for his services should not exceed $3,500 per annum. As to the amount he is entitled to for hauling and other matters involved, let the case be referred to the special comimssioner, who has once investigated this case. As the court holds he has not acted in bad faith as trustee, this ends his liability on that ground.

The judgment reversed and remanded for proceedings consistent with this opinion.

MANSFIELD, &c. v. WILKINSON.

(Filed September 20, 1894—Not to be reported.)

A surety, having satisfied an execution from the quarterly court against his principal and himself, can not subject the lands of the principal to sale for the debt in an equitable proceeding until after exhausting his legal remedies.

J. A. Mitchell for appellants.

Sims & Covington and Jos. G. Covington for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hazelrigg.

Upon the issual of an execution from a quarterly court merely, and a return thereon of nulla bona, the creditor cannot resort to his proeeding in rem to subjet to sale the real estate of his debtor. He must first exhaust his legal remedies.

An allegation that no transcript of the judgment had been lodged with the clerk of the circuit court, and no execution sued out thereon for the reason that the debtor had no other real estate than that sought to be sold in the equitable proceeding, does not meet the requirements of the law. (Weatherford v. Myers, 2 Duvall, 91.)

In the case under consideration the appellee, Wilkinson, was surety of the appellant, Mansfield, having satisfied the execution from the quarterly court against his principal and himself, may be entitled to recover a personal judgment against the principal debtor, but can not subject his lands to sale in an equitable proceeding for that purpose until after exhausting his remedies at law for the satisfaction of his judgment.

On a return of the cause, the sale must be set aside. It is not necessary to notice the other questions raised on the appeal.

For the reasons indicated, the judgment is reversed and cause remanded for proceedings in conformity with this opinion.

COMMONWEALTH v. SMITH.

(Filed September 22, 1894—Not to be reported.)

Indictment as set out in the opinion is not defective, and the lower court erred in sustaining demurrer thereto.

Wm. J. Hendrick for appellant.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

The court below sustained a demurrer to an indictment for hog stealing against the appellee, charged to have been committed as follows, viz.: "The said defendant, Ed. Smith, before the finding of this indictment on the — day of ——, 189--, in the said county of Daviess, did unlawfully steal, take and carry away two spotted sow hogs of the value of over four dollars, to-wit, of the value of thirty-five dollars, the personal property of Ben Mitchell (of color), with the felonious intent to appropriate the same to his own use and permanently deprive the said owner of their use and his property therein, contrary," etc.

Our attention has not been called to any defect in the indictment, and we perceive no reason for the judgment sustaining the demurrer. The defendant should have been put on trial.

The judgment is reversed for proceedings in conformity herewith.

MUSICK v. FISHER.

(Filed September 27, 1894.)

Setting aside conveyance on grounds of undue influence and temporary insanity—The appellant having made a voluntary conveyance to appellee a few days after his (appellant's) wife was killed by a railroad train, appellant being at the time eighty-two years of age, the court is of the opinion that, considering the short time, only fourteen days, after the death of appellant's wife, his age, grievous and lonely condition and the lack of any peculiar or excessive affection for appellee, the hasty transfer of his land and home must have been the result of weakness of mind and undue influence. The appellee not having paid anything for the land, nor incurred any expense or trouble by reason of the deed, the conveyance may be set aside without prejudice to his rights. The deed is, therefore, set aside.

B. F. Bennett for appellant.

Ben E. Roe for appellee.

Appeal from Greenup Circuit court.

Opinion of the court by Judge Lewis.

Appellant, Joseph Musick, brought this action to set aside a deed for a tract of land, worth between $2,000 and $3,000, that he had executed to appellee, George Fisher, and to recover possession held by appellee Alexander as tenant of Fisher.

In his petition he states the deed was executed under belief by him, induced through fraudulent representation of Fisher, it was a will; and in an amended petition he states that, owing to his sickness, extreme old age, being eighty-two years old, and shock to his nervous system, caused by recent and sudden killing of his wife by a railroad train, his mind was unbalanced, and he was wholly incapable of transacting business when the deed was executed.

It appears that in 1864 he purchased the land in dispute, which lies in Greenup county, on the Ohio river, opposite the city of Portsmouth, Ohio, paying therefor $3,500, and he and his wife

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A surety witnesses, including a notary public, testify
his princ (true several appellant) was informed of the nature of the paper, and
for the he acknowledged it as a deed; but, considering his mental condi-
reme tion at the time and that he is a German, not having full knowl-
edge or command of the English language, nor being accus-
tomed to the business of making wills and deeds, his statement
that he signed the paper believing it to be a will is not to be
wholly discredited, but may be accepted as true without im-
peaching the honesty of other witnesses who could not know
certainly what at the time was his belief or impression as to the
character of the paper.

His wife was killed under such distressing circumstances as to necessarily unbalance his mind for the time, or at least, to temporarily distract and divert it from his business affairs, and, as is made evident, render him temporarily indifferent about what became of his property; for it appears George Fisher, immediately after the distressing occurrence, removed from the land every article of personal property which was appropriated by him or his mother without accounting to appellant or being required by him to account for it.

If the contract for the sale of the land was only executory, appellant could resist enforcement upon the ground there was no consideration whatever, either good or valuable, for George Fisher is no blood relation of his, nor did he pay or agree to pay anything of value therefor.

If there had been an agreed consideration for the land which totally failed, the chancellor would not, as often held by this court, hesitate to adjudge a rescission and cancellation of the deed; or if there had been a consideration which was grossly inadequate, the circumstances of this case would be sufficient to require a rescission, for, considering the time, only fourteen days after death of appellant's wife, his age, grievous and lonely condition, and lack of any peculiar or excessive affection for George Fisher, the hasty and inconsiderate transfer of his land and home must have been the result of weakness of mind and undue influence, for it does not appear he had ever needed or received any aid or favor from George Fisher not fully paid for at the time, or that there had existed previously between them any peculiar intimacy, friendship or affection.

It seems to us that to permit the deed in question to stand would, under circumstances of this case, be unconscoinable and inequitable. George Fisher has not paid anything for the land, nor incurred any expense or trouble by reason of the deed, and as it can be set aside without prejudice to his rights, it should e done.

re, the judgment of the lower court dismissing appeln is reversed and the cause 14 remanded for judgment and necessary and proper proceedings consistent nion.

STINE v. BERRY.

Filed October 2, 1894.)

Where a mode of contest has been provided in a city ..sting the election of city officers, it excludes any other remakes from the courts all supervisory power over such contests; . it fraudulent votes have been cast in the election such fact must be asserted before the contesting board authorized by law to determine who is entitled to the certificate of election. The appellee being, so far as the record shows, constitutionally eligible to hold the office of mayor of Newport, and having received a certificate of election from the proper authorities, his election can not be collaterally questioned.

Nelson & Desha, L. J. Crawford and John S. Roebuck for appellant.

Chas. J. Helm for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

The appellant and appellee were candidates for the office of mayor of the city of Newport at an election held in October, 1890. The poll books show that the appellee (Berry) received 2,258 votes and the appellant 2,222 votes, and the board empowered by law to ascertain the result certified the number of votes received by each candidate, and the appellee receiving the largest number of votes was duly elected to the office. The appellee qualified according to law, and entered upon the discharge of his duties.

The appellee, in so far as appears from the record before us, was constitutionally eligilbe to hold the office of mayor, and had never committed any act by which his right to the office had been forfeited. This proceeding in the nature of an action by the appellant against the appellee for usurpation of the office of Mayor. was instituted under section 480 of the Civil Code, that provides: "In lieu of the writs of scire facias and quo warranto, or if on inforamtion in the nature of a quo warranto, ordinary actions may be brought to vacate or repeal charters and to prevent the usurpation of an office or franchise."

Section 486 provides: "A person who continues to exercise an office, after having committed an act or omitted to do an act, the commission or omission of which by law creates a forfeiture of his office, may be proceeded against for usurpation thereof."

Does this section apply to a contested election where the party out of office is claiming that the one in office, and who has qualified, received fraudulent and illegal votes which, when stricken from the poll books, would entitle the claimant of office? We think not.

The city council, in accordance with a provision of the city charter, passed an ordinance providing for the hearing and determining contested elections for city officers. After notice, the council constitutes itself a board to hear and determine the contest, "and shall determine whether the contestee or the contest-

had together resided there continuously, having no children, until her death, September 21, 1889; that her body was taken to Portsmouth for burial, and he went to the house of her sister, and mother of George Fisher, Catherine Fisher, who resided there, where he continued as a boarder, paying $5 per week, until about four weeks before January 18, 1890, when this action was commenced. Appellee Fisher was then about forty years of age, unmarried and residing also in house of his mother.

Appellant states that after death of his wife, and while boarding at the house of Catherine Fisher, he proposed to devise the land to George Fisher, and directed him to have a will for that purpose, and testifies distinctly that he believed that the instrument he executed was a will, and did not know it was a deed until a short time before this action was commenced, when, upon consulting a lawyer about Fisher's right to control and lease the land, he was informed the deed now in question had been recorded.

It is true several witnesses, including a notary public, testify that he (appellant) was informed of the nature of the paper, and acknowledged it as a deed; but, considering his mental condition at the time and that he is a German, not having full knowledge or command of the English language, nor being accustomed to the business of making wills and deeds, his statement that he signed the paper believing it to be a will is not to be wholly discredited, but may be accepted as true without impeaching the honesty of other witnesses who could not know certainly what at the time was his belief or impression as to the character of the paper.

His wife was killed under such distressing circumstances as to necessarily unbalance his mind for the time, or at least, to temporarily distract and divert it from his business affairs, and, as is made evident, render him temporarily indifferent about what became of his property; for it appears George Fisher, immediately after the distressing occurrence, removed from the land every article of personal property which was appropriated by him or his mother without accounting to appellant or being required by him to account for it.

If the contract for the sale of the land was only executory, appellant could resist enforcement upon the ground there was no consideration whatever, either good or valuable, for George Fisher is no blood relation of his, nor did he pay or agree to pay anything of value therefor.

If there had been an agreed consideration for the land which totally failed, the chancellor would not, as often held by this court, hesitate to adjudge a rescission and cancellation of the deed; or if there had been a consideration which was grossly inadequate, the circumstances of this case would be sufficient to require a rescission, for, considering the time, only fourteen days after death of appellant's wife, his age, grievous and lonely condition, and lack of any peculiar or excessive affection for George Fisher, the hasty and inconsiderate transfer of his land and home must have been the result of weakness of mind and undue influence, for it does not appear he had ever needed or received any aid or favor from George Fisher not fully paid for at the time, or that there had existed previously between them any peculiar intimacy, friendship or affection.

It seems to us that to permit the deed in question to stand would, under circumstances of this case, be unconscoinable and inequitable. George Fisher has not paid anything for the land, nor incurred any expense or trouble by reason of the deed, and as it can be set aside without prejudice to his rights, it should be done.

Wherefore, the judgment of the lower court dismissing appellant's action is reversed and the cause i4 remanded for judgment in his favor, and necessary and proper proceedings consistent with this opinion.

STINE v. BERRY.

(Filed October 2, 1894.)

Contested election—Where a mode of contest has been provided in a city charter for contesting the election of city officers, it excludes any other remedy, and takes from the courts all supervisory power over such contests; and if fraudulent votes have been cast in the election such fact must be asserted before the contesting board authorized by law to determine who is entitled to the certificate of election. The appellee being, so far as the record shows, constitutionally eligible to hold the office of mayor of Newport, and having received a certificate of election from the proper authorities, his election can not be collaterally questioned.

Nelson & Desha, L. J. Crawford and John S. Roebuck for appellant.

Chas. J. Helm for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Pryor.

The appellant and appellee were candidates for the office of mayor of the city of Newport at an election held in October, 1890. The poll books show that the appellee (Berry) received 2,258 votes and the appellant 2,222 votes, and the board empowered by law to ascertain the result certified tl.e number of votes received by each candidate, and the appellee receiving the largest number of votes was duly elected to the office. The appellee qualified according to law, and entered upon the discharge of his duties.

The appellee, in so far as appears from the record before us, was constitutionally eligilbe to hold the office of mayor, and had never committed any act by which his right to the office had been forfeited. This proceeding in the nature of an action by the appellant against the appellee for usurpation of the office of Mayor, was instituted under section 480 of the Civil Code, that provides: "In lieu of the writs of scire facias and quo warranto, or if on inforamtion in the nature of a quo warranto, ordinary actions may be brought to vacate or repeal charters and to prevent the usurpation of an office or franchise."

Section 486 provides: "A person who continues to exercise an office, after having committed an act or omitted to do an act, the commission or omission of which by law creates a forfeiture of his office, may be proceeded against for usurpation thereof."

Does this section apply to a contested election where the party out of office is claiming that the one in office, and who has qualified, received fraudulent and illegal votes which, when stricken from the poll books, would entitle the claimant of office? We think not.

The city council, in accordance with a provision of the city charter, passed an ordinance providing for the hearing and determining contested elections for city officers. After notice, the council constitutes itself a board to hear and determine the contest, "and shall determine whether the contestee or the contest-

ant be entitled to the office, and the board shall invest the party with the office whom it shall determine to be entitled thereto."

The appellant gave notice to the appellee of his purpose to contest the election before the council, but after this withdrew his notice of contest and instituted this action in ordinary against the appellee for the usurpation of an office of which the latter could not be deprived unless his vote was reduced by the contesting board so as to give him the minority vote.

It is insisted that the manner of contesting city elections provided by the city chrater is merely circumstantial, and the action in ordinary, in lieu of the writ of quo warranto, may be maintained. We understand and so adjudge that the statute in regard to contested elections for State and county offices is exclusive, and that where a mode of contest is provided in a city charter for contesting the election of city officers, it excludes any other remedy. Such statutes are enacted with remedies providing for the speedy determination of such questions, and to take from the courts all original supervisory power over such contest. That one entitled to an office may prevent a mere usurper from discharging the duties pertaining to it is unquestioned, but such a cause of action can not arise against one who has his certificate of election from the legally constituted authority, and has received, as appears from the poll books, the majority vote. The right, if fraudulent votes are cast, must be asserted by a contest before the board authorized by law to determine who is entitled to the certificate of election.

Where one is not eligible to an office under the Constitution a certificate of election can not make his election lawful and the right of such an incumbent to hold the office may be questioned at any time when he is asserting a right by reason of his official position. He may be regarded as an officer defacto, and his acts held to be lawful for the protection of others, but in so far as his acts as an officer affect him personally he can have no protection. Such was the ruling of this court in Patterson v. Miller, 2 Met., 493.

If constitutionally eligible, and he is given a certificate of election by the proper authorities, his right to the office can not be collaterally questioned or placed in issue upon the ground that fraudulent or illegal votes were cast for him. This must be determined by the contesting board, and if no contest, the acts of those authorized to compare the polls and give the certificate of election must be hold valid and conclusive.

The fact that the city charter fails to give either party the right of appeal from the decision of the contesting board can make no difference. It is the remedy provided by the city charter, and was deemed ample protection by the Legislature for those who were contesting a right of another to hold an office under the city government.

The court below held, the law and facts having been submitted to the court, that the appellant received a majorty of the legal votes cast, but was not entitled to the office, as he had never qualified. While we can not adopt this view of the court below, still we are satisfied the answer of the appellee setting forth his majority vote, his certificate of election that he had received from the board authorized to compare the polls, entitled him to the office in the absence of any contest as provided by the city charter, and was a complete defense to the action.

The judgment, for the reasons given, must be affirmed.

L. N. R. R. Co. v. RICKETTS.

(Filed October 2, 1894.)

1. Railroads—Injury to passengers—The plaintiff having alighted at night from a railroad train on the side of the track where there was no platform nor lights, and having been injured by the train running over one of his arms by reason of his stumbling over some obstruction and falling so that his arm extended across the track, the court is of the opinion that he has no cause of action against the defendant, in view of the fact that it had furnished on one side of the track a safe and commodious platform for the reception of passengers.

2. Same—Contributory neglect—It was negligence on the part of the plaintiff to attempt to leave the depot grounds by going so near as he did to the train that he knew would soon be in motion. The use of ordinary care would have enabled the plaintiff to discover on which side of the track the platform was situated, as it was well lighted, and the conductor, brakeman and all the passengers, including plaintiff's traveling companion, got out on that side.

W. J. Lisle, Thompson McChord and H. W. Bruce for appellant.

John D. Fogle, Sam Avritt and J. D. Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

Appellee brought this action to recover of appellant damages for personal injury, done under the following circumstances: being a passenger on a railroad train that arrived from Louisville at Lebanon, the place of ihs destination, about 11 p. m., he instead of getting from it upon the depot platform on the left, descended to the ground on the right side of the track, where there were no lights kept or other arrangements made for reception of passengers; and in going towards the street usually traveled to and from the depot, he stumbled over an unseen water box and, falling, he was so close to the railroad track his left arm extended across one of the rails, and was run over and badly injured by wheels of the train then moving away from the depot.

On the first trial the plaintiff received a verdict; but upon appeal to this court the judgment was reversed (14 Ky. Law Rep., 19), and the case is again before us for revision of a second verdict and judgment in favor of the plaintiff.

In the former opinion of this court it was held that when a railroad company "has a platform and other faciltiies for entering and leaving the cars with safety on the depot side of the track, the failure to have the opposite likewise prepared as a place for entering and leaving the cars can not be regarded as negligence. It may select and adhere to such arrangement of its depot and platforms as it may see fit, if those made are safe and commodious."

This further language was used in the opinion: "Here the company's platform was on the left-hand side of the track and it was safe and commodious and well lighted, and the appellee, by the use of ordinary prudence could have left the cars and depot grounds with reasonable safety had he taken the platform side but he preferred to leave the cars by the right-hand side of the track where there was no platform and no lights; and the company not being bound to erect such a platform on that side and keep it lighted in the night-time, having erected a safe and com-

modious platform on the other side, which was well lighted, his thus leaving the cars, was at his own risk and peril."

The facts shown by the present record are not materially different from those before us on the former appeal, and, consequently, what was there decided must be now adhered to.

The lower court on the last trial gave to the jury the following instruction: "If the preponderance of the evidence shows that by reason of the unknown, if unknown to plaintiff, adoption of the platform on the left-hand side, in lieu of that on the right-hand side, as the exclusive platform for use of passengers, and the inadequate lighting or illumination of the left-hand side of the track at the time of the injury to admonish plaintiff the left and not the right-hand side was the exclusive platform, for the use of the passengers, the law is for the plaintiff for any damages resulting to him by reason of such failure by defendant and so the jury should find; otherwise for the defendant."

That instruction, it seems to us, is not only a departure from the principles of law laid down in the former opinion, but misleading as to the facts proved.

It is true that the former as well as the present record shows, that there was formerly a platform for use of passengers on the right side of the railroad track, but several years prior to 1899, when plaintiff was injured, the one on the left side was substituted, and has since been the only one used; but whether, in language of the instruction, adoption of the platform on the left-hand side, in lieu of that on the right-hand side, was unknown to plaintiff is not material, the true inquiry for the jury being whether there was at the time a safe, commodious and well-lighted platform on the left side by which the plaintiff could, using ordinary prudence, have left the cars and depot grounds with reasonable safety

The plaintiff himself testifies there was no light at all upon the right side, and as soon as he touched the ground found, if unknown to him before, that there was no platform there; and, independent of other features of the case, it was negligence on his part to attempt to leave the depot ground by going so near as he did to the train that he knew would soon be in motion.

On the other hand the evidence makes it too plain for dispute that if plaintiff did not know, the exercise of ordinary care would have enabled him to discover the platform for use of passengers was on the left side of the train. All the passengers stopping at Lebanon got out on that side, including his traveling companion; the conductor and brakemen, with lanterns, were on that side; baggage was taken out on that side. Besides, the platform was unusually commodious, being in front of a railroad hotel, and not only was there a gas lamp at each end of it, but there was in one portion of the hotel a telegraph office and in the other baggage room.

It seems to us, as said substantially in the former opinion, that plaintiff's leaving the cars in the manner that he did, was at his own peril, and the evidence before us shows no cause of action against the defendant.

Wherefore, the judgment is reversed and remanded for new trial consistent with this opinion.

BOARD OF TRUSTEES PINEVILLE PUBLIC GRADED SCHOOLS v. BELL COUNTY COKE AND IMP. CO.

(Filed October 6, 1894.)

1. School tax—Exemption from same—The intent and spirit of an act of the general assembly, providing for a tax upon property owned by white persons in a designated territory for the purpose of maintaining a graded school for white pupils, is manifestly to tax all property save that of black persons; therefore, a corporation seeking an exemptiion from the tax must show that its corporators and stockholders, who are the real owners and are persons having color, are black persons.

2. Corporation—A corporation is an inhabitant within the meaning of an act taxing the property of inhabitants, and the property of corporations may be taxed under an act which authorizes the taxation of the property of persons.

Wm. Low and Wm. H. Holt for appellants.

Tinsley Faulkner for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The General Assembly, by an act approved April 22, 1890, provided for a tax of not over fifty cents on each $1 worth of property owned by white persons within a designated territory, including the city of Pineville, for the purpose of maintaining a graded school for white pupils.

By virtue of the provisions of the act the appellants were about to sell the property of the appellee, a corporation created under the laws of Kentucky, when this suit was instituted by the latter to enjoin the sale upon the sole ground that the act authorized only the taxation of property belonging to white persons and not that belonging to artificial persons. The appellants' demurrer to the petition was overruled, and upon their refusal to plead further the injunction was perpetuated, and the collection of the tax enjoined by the judgment of the court below.

In the appellee's petition it is insisted that as an artificial person has no color, it can not be said to be white, and to levy he tax on the property of any person other than white persons, is unauthorized by the act. Looking alone to the letter of the act it is difficult to escape this reasoning.

If the property only of white persons is to be taxed, and the property in question is not that of a white person but of one without color, it would follow that it must escape taxation; but unquestionably the Legislature never intended that the property of corporations should be exempt from the tax, and, looking to the manifest intent and spirit of the act, we are constrained to the conclusion that the burden was to fall on all the property within the district except that of the blacks. They alone are excluded from the benefits of the school, and it is their property only that the tax collector is forbidden to touch.

That a corporation is a person is well settled, and that the property of a corporation is taxable under an act which authorizes the taxation of the property of persons is also well settled. (L. & N. R. R. Co. v. Commonwealth, 1 Bush, 251.)

A corporation is also an inhabitant within the meaning of an act taxing the property of inhabitants. (Angell & Ames on Corporations, section 440.)

When we consider that the great bulk of all the property in the State belongs to the whites, it might not be at all violative of the legislative intent to say that presumptively the property of the corporations is to be regarded as that of white persons within the meaning of the act, at least until the contrary is made to appear. In other words, that the corporators and stockholders are presumably white persons, unless it is otherwise shown. Be that as it may, when an exemption from taxation is claimed in a case where the intent, as we have supposed, is to tax all property save that of black persons, the burthen of showing the exemption is on the one claiming it. Upon its being shown that the corporators and stockholders—who are at least the real owners and who are natural persons having color—are black persons, the courts may grant the relief sought, but not otherwise.

The demurrer must be sustained, and unless an amendment be filed, showing the real owners of the property to be black persons, the injunction must be dissolved and petition dismissed.

Judgment reversed for proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

LOUIS v. COMMONWEALTH.

Filed October 17, 1894. Appeal from Harrison Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Indictment for suffering gaming—The court properly overruled a demurrer to an indictment against appellant for suffering gaming on premises in his occupation and under his control, as the indictment plainly and specifically charged that the defendant kept the house; that the gaming was done therein and that he permitted it.

2. Change of defendant's name—The indictment having been returned against "S. J. Louis," when the true name of defendant was "Jo. Lewis," the defendant can not complain of the action of the court in sustaining a motion made by the Commonwealth's attorney before the beginning of the trial that the prosecution be continued against defendant under his true name, which was entered on the records with a reference to the fact of his having been indicted by the name mentioned in the indictment.

3. Introduction of testimony out of order—The court did not abuse its discretion in permitting the attorney for the Commonwealth, after the defendant had closed his testimony, to introduce evidence showing that the house where the gaming was alleged to have been done was situated on the street and numbered as described in the indictment.

W. S. Hardin for appellant; Wm. J. Hendrick for appellee.

BULLOCK v. COMMONWEALTH.

Filed October 17, 1894. Appeal from Hickman Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. In this proceeding for forfeiture of money deposited in lieu of bail, the accused having been admitted to bail by the county judge as an examining court, and the records of the examining court being lost after they were filed with the clerk of the circuit court, parol testimony showing that the accused waived an examination and was allowed to give bail in the sum of $500, and that this amount was deposited by appellant in lieu of bail, whereupon the prisoner was released, and that the county judge signed a judgment showing these facts, which judgment was filed with the circuit clerk, was sufficient to bring the case within the rule laid down in Morgan v. Commonwealth, 12 Bush, 84, and sustains the judgment of forfeiture.

2. Same—Married women—Appellant, who deposited the money in lieu of bail, can not resist the forfeiture upon the ground that she was a married woman, although if she had executed a bond for the appearance of the accused this plea would have been good.

J. D. White & Son and W. G. Bullitt for appellant; W. J. Hendrick for appellee.

JONES v. McCROCKLIN.

Filed October 17, 1894. Appeal from Spencer Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. New promise—Limitation—An acknowledgment or promise to pay a debt before it is barred merely operates to prolong the statutory limitation by cutting off the antecedent, and no action can be maintained on such new promise unless it was intended that it should take the place of the original liability and discharge the debtor from liability therein.

2. Same—In this action in which the plaintiff sought to recover money which he had paid for defendant as his surety, the payment by plaintiff being set up in the petition with the allegation that "no part of same has ever been paid this plaintiff," and that defendant has "all along" since the time of said payment, and within five years past, promised plaintiff to pay him said debt and interest, these allegations, considered in connection with the evidence showing promises made during the four or five years just succeeding the payment of the debt by plaintiff and repeated promises after that time, are sufficient to show that the action was upon the original liability, and that the continuous promises were relied upon in anticipation of the defense of limitation.

8. Exemptions—The original liability having been created prior to the exemption act of 1884, the exemption therein provided for does not apply.

Fairleigh & Straus for appellant; J. W. Reasor for appellee.

COMBS v. COMMONWEALTH.

WHITE v. SAME.

BURDETT v. SAME.

Filed October 17, 1894. Appeal from Boyle Circuit Court. Opinion of the court by Judge Barbour, affirming.

In appealing to the circuit court from a judgment of a lower court in a misdemeanor case it is necessary for the appellant to file in the clerk's office of the circuit court, within the sixty days allowed him to prosecute the appeal, a copy of the warrant or summons and a copy of the judgment of the court from which he appealed, and if he fails to file, these copies within that time the court has no jurisdiction of the appeal. The subsequent filing of the copies can not give jurisdiction.

Robert J. Breckinridge for appellants; Wm. J. Hendrick for appellee.

VILEY v. PETTIT.

Filed October 17, 1894. Appeal from Fayette Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

To entitle one to recover for services rendered it is not necessary that there should have been an express request for the services, as the facts may be such that the law will imply a request; and where that is true it is sufficient, and, in fact, proper, to merely allege in the petition the facts from which the request is implied, without using the word request or its equivalent in terms.

In this action to recover for services rendered by plaintiff as real estate agent in selling property for defendant, it was sufficient to allege that the services were rendered with defendant's consent and that he accepted the benefit of them.

Thornton & Kerr for appellant; F. C. Elkin and J. R. Morton for appellee.

COOK, &c. v. FARMERS BANK TRUST CO.

Filed October 17, 1894. Appeal from Garrard Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

Assignment of note by executor in payment of individual debt—Rights of heirs and creditors—In this action upon notes payable to an executor, by whom they were assigned to plaintiff, a devisee and creditor of the estate of the payee's testator was not entitled to be made a party, and the court properly dismissed an answer and petition filed by her setting up the fact that the notes sued on were assigned to plaintiff by the executor in payment of his individual debt, and praying that the administrator de bonis non, the successor of the executor, be required to assert his claim to the notes, and that he should administer the proceeds. The petitioner has a right, making the proper parties, to sue for a settlement of the estate; and if upon a settlement it should appear that by assigning these notes the executor was guilty of converting them to his own use, she may have a cause of action against him. Or if it should appear from such settlement that as devisee or heir or creditor she has a claim against the estate, and that the administrator de bonis non, with the will annexed, refuses to pursue any assets she shows, such as these notes would be if they were converted by fraudulent collusion between the executor and the plaintiff, she might, with proper parties and allegations showing these facts, maintain an action against the plaintiff; but the isolated transactions of an executor can not be attacked by devisees or creditors before a settlement, as was sought to be done by the petitioner in this case.

Wm. Herndon for appellants; J. S. Owsley, Jr., for appellee.

DEVOU v. COMMISSIONER OF PLEASANT RUN, &c., T. P. R. CO.

Filed October 17, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Appeals to circuit courts—Under an act of the general assembly conferring power upon the Kenton County Court to construct turnpikes in that county at the cost of certain of the taxpayers owning property contiguous to the road, and authorizing any property owner living in the district to apply to the county court to be exempted from the tax, upon which application the court to determine from the testimony offered whether the property of the applicant would be benefited by the road, one whose application for exemption was refused by the county court had the right to appeal from that judgment to the circuit court under the general law regulating appeals to that court, the amount of the applicant's tax, which was the amount in controversy, being as much as $25.

2. Taxation—Validity of levy—While the act provides that the application for exemption must be made before the levy of the tax, yet, as the commissioners, in ordering the levy in question, here left blank the amount which should be paid upon each $100 worth of property, the levy was invalid until that blank was filled, and the right to apply for an exemption was not affected by it, although, if the blanks had been filled before the application for exemption was made, it would have related back to the time the levy was ordered, and it would then have been too late to make the application.

3. Same—Where a levy is required to be made at a particular time the duty upon the authorized body is absolute, and if no levy be made at this time the power to make it is not lost, but may be afterward exercised.

R. C. Simmons and Charles H. Fisk for appellant; D. A. Glenn for appellee.

KOTHEIMER v. SCHWAB, &c.

Filed October 17, 1894. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Yost, affirming.

A married woman empowered by decree of court to trade as a feme sole is liable for the price of goods sold and delivered to her at her instance and request, and the fact that the goods were necessaries for herself and family, and that she is sued jointly with her husband for the price, does not deprive the plaintiff of the right to a judgment against her alone.

Campbell & Campbell for appellant; J. W. Bloomfield and W. D. Greer for appellees.

LEACH v. NEWPORT NEWS & MISSISSIPPI VALLEY CO.

Filed October 24, 1894. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Brent, affirming.

1. Objection to jurisdiction not waived by demurrer—In this action against a railroad company to recover damages for injury to plaintiff's horse, caused by the horse becoming frightened at one of defendant's trains and running against a fence, while the question of whether the court had jurisdiction of the action, which is local, was not directly raised by a general demurrer to the petition, yet it was not waived; but as the allegations of the petition are that all the facts on which plaintiff relies occurred in the county in which the suit was brought, they show the court had jurisdiction of the subject-matter.

2. Pleading negligence—In a suit for damages, founded upon defendant's negligence, the plaintiff may allege negligence as a fact, and if other than ordinary negligence is essential to a recovery, state the character or degree; or he may state the facts constituting the negligence. If he undertake to state the facts he must state all that are essential to his cause of action, and by that statement he is bound and can not on the trial prove negligence of any other kind than that alleged.

3. Same—As plaintiff alleges in his petition that defendant carelessly and negligently suffered its fence along its road to be down and a gap opened therein through which plaintiff's horse strayed into defendant's inclosure and near its track, and that defendant so negligently operated its trains that the same frightened said horse and caused it to run against defendant's fence, thus killing said horse, it is evident plaintiff relies on the alleged negligence of defendant in permitting its fence to be down and a gap to remain open in it as the proximate cause of the injury, the alleged negligence of defendant in operating its trains being but a link in the connection between the proximate cause and the injury.

4. Railroads—Negligently allowing fence to be out of repair—As the plaintiff does not allege any fact showing he had a right to rely, as between himself and the company, upon the fence being there and in good order, and, besides, does not show that the horse was in any more danger from

fright inside the inclosure than he would have been outside, the company is not liable.

5. Same—Proximate cause—Even if the company owed plaintiff the duty of keeping the fence in repair, the negligence was not the proximate cause of the injury, as the horse was not upon the track and was not struck by the train.

Guffy & Ringo for appellant; P. H. Darby for appellee.

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KENTUCKY COURT OF APPEALS.

HENDERSON v. COMMONWEALTH.

(Filed October 2, 1894—Not to be reported.)

Breaking into storehouse—Incompetent testimony—A person accused of breaking into a storehouse and stealing therefrom wearing apparel can not be convicted upon proof that such wearing apparel would fit him, in the absence of proof that the goods were ever found in his possession or on his person. The opinion of the owner that something not seen which the accused handed his mother upon his arrest was the store key was incompetent. The statement of the accused "that if placed in the penitentiary for everything that he did he would stay there 100 years" was not evidence of guilt, when connected with the facts relied upon by the Commonwealth to establish the charge.

Foster & Towles, W. E. & S. A. Russell and Lev. Russell for appellant.

W. J. Hendrick for appellee.

Appeal from Green Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was convicted of breaking into a storehouse with the intent to steal.

The testimony upon which the conviction is based is clearly incompetent. The merchandise of the owner that was stolen consisted of wearing apparel, hats, shoes, coats, etc. The Commonwealth was permitted to prove that hats of a certain number, shoes of a certain number, and coats missing, would fit the head, feet and body of the accused. The goods were never in his possession or shown to have been on his person, and a conclusion because such wearing apparel would fit him can not be sustained.

It is also shown that when arrested the accused handed to his mother something that was not visible or seen, and the opinion of the owner, to the effect that he thought it was his store key, was incompetent.

The goods were found in a field under an old house, about 300 yards from the house of the mother of the accused, with whom he lived. It does not appear that his mother owned the house or had any control over it, and the old building in which the goods were found was located nearer the residence of others than the house of the accused. That the party charged was seen near the store that night, and that he had in his possession a glass cutter, were facts admissible in the event other facts tended to establish guilt.

That the accused stated after his arrest "that if placed in the penitentiary for everything that he did he would stay there 100 years," was not evidence of guilt, when connected with the facts relied on by the Commonwealth to establish the charge. Facts conducing to establish guilt are competent, but such as create only a mere suspicion that the accused might be the guilty party are incompetent.

If the appellant had been found with the goods on his person or on premises under his control, his reckless statement as to the punishment he deserved would not at least be prejudicial, but from the bill of evidence in this record we see no testimony authorizing a conviction.

Judgment reversed and remanded for a new trial.

TANDY, TREASURER v. NORMAN, AUDITOR.

(Filed October 4, 1894—Not to be reported.)

Insane asylums—Warrants for expenses—Warrants on the State treasury for the payment of the expenses of insane asylums, as provided for in act of March 10, 1894, can not be issued before the expenses or liabilities are actually incurred.

Thomas H. Hines for appellant.

W. J. Hendrick for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, W. T. Tandy, treasurer of the Western Kentucky Asylum for the Insane, that is by statute made a body-politic and corporate, brought this action in the Franklin Circuit Court, September 26, 1894, for a mandamus requiring defendant, L. C. Norman, auditor of public accounts, to draw his warrant in favor of plaintiff on the treasurer of the State for $———, in payment of quarterly allowance for support of that institution, at beginning instead of ending of the quarter commencing July 1, 1894.

The authority for drawing warrants in such cases is conferred by "An act relating to the asylums for the insane and of the institution for feeble minded children supported by the State," approved March 10, 1894.

According to section 6, article 1 of that act the fiscal year of the institutions thereby provided for begins October 1st and closes September 30th; and a report by the superintendent and board of commissioners of each is required made during the month of October of each year to the governor of the condition of the institution under their charge, exhibiting amount of income and expenditure, from what source the income was received, and for what the expenditure was made, the number of inmates re-

ceived and discharged or left during the year, with such other facts and suggestions as they deem important, which report the governor shall communicate to the legislature at its next regular session.

By section 7 it is made the duty of the president of each board of commissioners and superintendent of each institution, every three months, to jointly certify under oath to the auditor of public accounts the number of inmates actually supported by the institution, specifying the number who do not pay anything, the number who pay in full and the number who pay in part, and amount so paid, as well as amount of unexpended balance of the State appropriation, over and above debts and liabilities, existing against the institution; and thereupon the auditor shall draw his warrant on the State treasurer in behalf of such institution for the amount allowed by law for each nonpaying inmate, and for so much in addition as will, when added to the sum paid by those partially dependent on the charity of the State, be equal to the amount allowed for each nonpaying inmate.

Out of the annual appropriation made the board of commissioners shall pay for all repairs to and expenses of the institution, and salary and wages of all officers and employes, but not expenses of conveying persons to the institution; and they shall incur no liability on behalf of the State, for any purpose, beyond the amount received from the treasury and from paying inmates. The auditor shall estimate any unexpended balance reported by the president and the superintendent of each institution as a part of its next quarterly allowance, and draw his warrant only for a sum sufficient, with said balance, to make complete th sum allowed by law for each quarter.

It seems to us, whether we look to the construction and meaning of language used or to the usual policy and purpose of such appropriation of public money, it is manifest it never was intended that t e treasurer of such institution should have possession and control of money allowed for support of the institution before expenses and liabilities therefor have been actually incurred and the amount thereof ascertained and reported at end of each quarter of the fiscal year—the treasurer to make report to the governor and the board of commissioners—for by section 7 the auditor is authorized to issue his warrant only for amount of debts and liabilities existing (not anticipated) against the institution at time the certificate of the board and superintendent is filed.

Judgment affirmed.

MACAULEY v. ELROD.

(Filed October 4, 1894—Not to be reported.)

1. Slander and libel—In an action for slander and libel the second count in the petition, which contained words charging plaintiff with cheating another out of money by chicanery and artifice, did not impute a felony, and could not have been so understood by those present. The demurrer to the count should have been sustained, as, in a case like this, words, to be actionable per se, should charge an offense, for the commission of which the party would be liable to indictment and punishment.

2. Same—An instruction was given to the effect that if the words set forth in the petition, and embraced in either count, were spoken or written with malice, etc., the jury should find for the plaintiff, and a verdict was found for the plaintiff. The second count failing to state a cause of action, and his court being unable to determine on which count the verdict was ren-

dered, the judgment should be reversed, although the other counts stated causes of action.

8. Same—Pleading—Averment in answer that the defendant has no recollection of speaking the words charged in the petition, or has no knowledge or information sufficient to form a belief that he ever spoke the words, and, therefore, denies that he ever spoke them, is not a denial of the charge, for he must make a positive denial that he ever made the charge or an admission of the facts will follow.

4. Same—Evidence—The trouble between the parties having originated in a former action for the settlement of their accounts, the entire record in this action was competent evidence for the jury.

C. B. Seymour and E. F. Trabue for appellant.

Kohn, Baird & Speckert and O'Neal, Phelps & Pryor for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellee, Elrod, was for many years the bookkeeper and assistant of the appellant, Macauley, in the business connected with his theatre in the city of Louisville.

In the settlement of that business the parties became hostile to each other and the product of this unfriendly feeling is the present action for slander and libel by the appellee against the appellant. The petition contains several counts, one of which was abandoned and a trial had on counts, two, three and four, with a verdict for the appellee.

The case went to the Superior Court, where the judgment was reversed, and this appeal is from the Superior Court to this court. In the second count it is alleged the defendant spoke of and concerning the plaintiff the following false and slanderous words: "He (meaning the plaintiff) beat Boulier out of a thousand dollars when he worked for Boulier at the Turf Exchange. He robbed you, Boulier, of a thousand dollars while he worked for you;" thereby intending to charge falsely the plaintiff had defrauded and robbed Boulier of one thousand dollars, and had committed the crime of larceny. It further alleged that the words were maliciously spoken of the plaintiff in the presence and hearing of divers persons.

In the third count he is alleged to have spoken the following slanderous words: "I discharged Elrod for stealing." In the fourth count it is alleged that the defendant caused to be published of the plaintiff in substance, that "I (the defendant) had placed implicit confidene in the integrity of my assistant, and had left almost wholly to him the financial management of my business. I knew my theatre was making from five to seventeen thousand dollars a year, and, therefore, borrowed no trouble in regard to my finances. At last, however, I became suspicious that my business had not been properly managed, and I began an investigation of my books, when, to my astonishment, while I had made large sums of money, yet I was yearly getting in debt. So I at once put an expert at my books, and up to the present time have found discrepancies to the amount of $17,000."

It is alleged that the plaintiff was his only assistant and the libelous matter had reference to the plaintiff. The malicious publication or its procurement to be published by the defendant is alleged, and all the requisites of a good petition are set forth in each count, in the event the words spoken are slanderous or those written libelous.

There was an instruction to the effect that if the words set forth in the petition and embraced in either count were spoken

or written with malice, etc., the jury should find for the plaintiff, and a general verdict was returned for $2,500.

The contention of counsel for the defense on the question raised by the demurrer should have been sustained as to the second count. The words spoken in reference to the plaintiff's connection with Boulier did not impute a felony, and could not have been so understood by those present.

"He beat Boulier out of a thousand dollars when he worked for Boulier at the Turf Exchange. He robbed you, Boulier, of a thousand dollars when he worked for you." The words used in the first sentence of the alleged slanderous charge explain to one of ordinary understanding the meaning of the defendant in speaking the words contained in the last sentence "He robbed you, Boulier, of a thousand dollars when he worked for you." In what manner did he rob Boulier? It was by beating him out of a thousand dollars, through chicanery or artifice. The idea that he forcibly took from the person of Boulier the money is not conveyed to the hearer by the words used, nor was such the intent of the defendant, if he did speak the words, nor would the words spoken naturally authorize one to conclude that such was the meaning of the defendant, or that he intended to charge the plaintiff with larceny. No special damage is alleged or any exterior fact by way of averment showing a purpose on the part of the defendant to charge the plaintiff with having committed a crime that would subject him to punishment. Words are actionable per se in a case like this where an offense is charged and the party charged liable to indictment and punishment for its commission. The demurrer should, therefore, have been sustained to the second count.

As to the third count, "I discharged Elrod for stealing," it is clearly actionable and within the rule.

As to the fourth count, in which the want of honesty and integrity is charged against the plaintiff, the demurrer was properly overruled. His personal as well as business integrity is not only questioned, but a charge of dishonesty necessarily follows from the language written.

The second count failing to state a cause of action, and this court being unable to determine on which count the verdict was rendered, necessitates a reversal of the judgment.

Any mitigating circumstances may be pleaded by way of reducing the damages, or such facts proven when pleaded as show that no crime was intended to be imputed to the plaintiff, and that those hearing the words alleged to have been spoken could not have understood the defendant as meaning to charge the plaintiff with being guilty of larceny, and, if so, it is a defense to the action, in the absence of an allegation of special damage. (Parker v. McQueen, 8 B. M., 16; Barnett v. Jackson, Sneed, 66; Civil Code, section 124.)

The third paragraph of the answer, as we construe that pleading, does not deny the speaking of the words mentioned in the third count of plaintiff's petition. The averment that defendant has no knowledge or information sufficient to form a belief that he ever spoke the words of and concerning the plaintiff, etc., "I dischargd Elrod for stealing," and has no recollection of speaking the words, and, therefore, denies he ever spoke such words, is not a denial of the charge made.

He is presumed to know whether or not he spoke the words, and must make a positive denial that he ever made the charge, or an admission of the facts will follow. No part, however, of the third count should have been stricken out.

The civil action, or a part of it, of Elrod v. Macauley was introduced as evidence, and while the judgment determining the rights of the parties in the settlement of their accounts must be held conclusive, the entire record should have gone to the jury, and the court erred in excluding it. Whether the facts there developed are in aggravation or mitigaton of the offense charged, if established, is a question for the jury.

The trouble between the parties originated from that litigation or the facts leading to it, and the record was competent.

Judgment reversed and remanded for a new trial consistent with this opinion.

MORRISON, &c. v. BECKHAM.

(Filed October 6, 1894.)

1. New trial—Appeal—Where a defendant, against whom there had been a verdict and judgment, instituted an independent action for a new trial, and a judgment granting him the relief asked for was upon appeal reversed upon the ground that the court had no power in an independent action to grant a new trial upon the grounds alleged, that decision is not a bar to an appeal from the original judgment.

2. As no affidavit or grounds were filed in support of a motion by defendants for continuance until after the jury had been sworn and evidence heard in part, and the court then offered to sustain the motion of defendants to withdraw the jury and continue the case upon condition of payment by them of plaintiffs' costs up to that time, which was refused, the court did not err in overruling the motion, the condition being reasonable.

3. Failure of warning order attorney to report—A judgment against a defendant constructively summoned can not be regarded as rendered prematurely, merely because the warning order attorney failed to file a report.

4. Report of guardian ad litem—Clerical misprision—It is a clerical misprision to render judgment against an infant until a defense or report has been filed by the guardian or guardian ad litem pursuant to the provisions of section 36 of the Civil Code, and, therefore, a judgment can not be reversed upon that ground until there has first been a motion in the lower court to set it aside.

5. It is error to render judgment against a defendant constructively summoned, and who has not appeared, unless a bond has been executed as required by section 410 of the Civil Code; and this is true as well where the judgment is for sale of real property as where it is for the sale of personal property.

Lafe S. Pence and Knott & Edelen for appellants.

John D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Lewis.

Julia W. Beckham brought this action to recover a tract of land in possession of T. J. Morrison, and others; but T. J. Sweets, being upon his petition made a defendant, filed separate answer denying plaintiff was, as alleged by her, owner and entitled to recover, and stating he was, in right of his deceased wife, Lucinda, owner of a life estate, his co-defendants being his tenants. He further stated that Josephine Powell, a daughter, and Powell, Charles and Mary Sweets, children of a deceased son of himself and Lucinda, were owners of the fee in remainder, and by an order made at October term of the court, 1890, plaintiff was

required to make them also parties defendants, which was by amended petition done.

At the February term, 1891, was a trial of the action which resulted in verdict and judgment for plaintiff; and motion for new trial having been overruled, defendants prayed an appeal to this court, which was granted, and time for preparing a bill of exceptions extended to October term of court. But, instead of tendering a bill of exceptions and then prosecuting the appeal, they instituted an independent action to have the judgment set aside and a new trial of the original action granted. And upon trial of the second action at October term, 1891, judgment was rendered giving the relief prayed for; but upon appeal to this court that judgment was reversed, and as a result the first judgment was left in force.

The appeal now before us is from the original judgment, which, if reversed at all, must be done for errors apparent on the record, there being no bill of exceptions.

The first question, then to be determined is whether the present is, as contended, barred by decision of this court on the former appeal. It seems to us not, because the question there presented and decided was not whether the lower court, on trial of the original action at the February term, 1891, committed any reversible error, but the real and only question was whether the second action could, for the cause stated in the petition, be maintained under the Civil Code. That cause was the refusal of the lower court to sustain motion of defendants for a continuance of the original action, upon the ground that one of their attorneys was absent and, on account of sickness, unable to be present at the trial. And in the opinion then delivered it was distinctly held that the lower court had no power for such cause at a subsequent term to set aside the judgment of February, 1891, and grant a new trial, but that the only remedy then left defendants was an appeal from that judgment direct to this court.

The record shows, in respect to the first error complained of, that although a motion for continuance was made February 18, 1891, no affidavit was then filed or grounds stated, nor was it in fact filed until the next day, after the jury had been sworn and evidence heard in part. And then the court did offer to sustain the motion of defendants to withdraw the jury and continue the case upon condition of payment by them of plaintiff's cost up to that time, which was refused. So that as, in our opinion, the condition was reasonable, no error was committed in then overruling the motion; but other alleged errors are complained of which we will consider.

It appears a warning order was made by the court at October term, 1890, against Josephine Powell, who is a nonresident of the State, and an attorney was duly appointed to defend for her; but counsel contends that as the attorney failed to file a report as required by the Civil Code, the judgment was premature.

Section 60 provides that a defendant against whom a warning order is made, and for whom an attorney has been appointed, shall be deemed to have been constructively summoned on the 30th day thereafter, and the action may proceed accordingly; and, construing that section, this court held in Ball v. Poor, 81 Ky., 26, that a judgment can not be regarded as rendered prematurely because the attorney failed to perform his duty.

No defense was made prior to the judgment by a guardian of either Powell, Charles, or Mary Sweets, who were infants, nor a report of a guardian filed, stating he was unable to make defense as required by subsection 3, section 36, Civil Code; but as section 516 provides that "a misprision of the clerk shall not be

ground for an appeal until the same shall have been presented and acted on in the circuit court," which was not done in this case, and section 517 in terms makes it a clerical misprision to render judgment against an infant until a defense or report is filed pursuant to provisions of section 36, it necessarily results that error can not be considered on this appeal.

Section 410 is as follows: "Before judgment is rendered against a defendant costructively summoned, and who has not appeared, a bond shall be executed with good security, approved by the court, to the effect that if the defendant shall procure a vacation or modification of the judgment, the person in whose favor it is rendered shall restore to the defendant any property or money obtained under such judgment, restoration of which shall be adjudged. If the judgment be in favor of persons having distinct interests, such bond may be executed for each according to his interest."

It has been distinctly and repeatedly decided by this court that a judgment against a nonresident, who has not appeared, before the bond required by that section is erroneous. It is true that the judgment in each of the cases heretofore decided by this court the judgment held erroneous was for recovery or sale of personal property; but the section makes no distinction between personal and real property, nor are we authorized to determine it was intended to apply alone to personal property, for subsection 10, section 732, expressly provides that the word "property," unless a different intention be expressed or shown by the context, includes any vested interest, legal or equitable, in real or personal property.

Besides, we see no reason why a restoration of real as well as of personal property, in cases provided for in that section, should not be secured to a nonresident constructivley summoned and not appearing.

In our opinion disregard by the lower court of the injunction of section 410 to require a bond executed for secuirty and protection of Josephine Powell was erroneous, and the judgment must, therefore, be reversed and cause remanded for a new trial consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. CONIFF'S ADM'R

(Filed October 6, 1894—Not to be reported.)

1. New trial—This court will not interfere with the action of the lower court in granting a new trial unless there has been a flagrant abuse of discretion.

2 While the general statement in grounds for new trial that the verdict is against the law and elvdence may not call the attention of the lower court to any particular error of law complained of, and would not authorize this court to interfere with the action of the lower court in refusing a new trial, yet where the lower court acts upon such a ground and grants a new trial, this court will not interfere upon the ground the errors assigned were too indefinite.

3. Willful neglect—Contributory negligence—It is only in actions under the statute for death resulting from willful neglect than contributory negligence constitutes no defense; therefore, where the action is for the pain and suffering intervening between the infliction of the injury and the death of the intestate, the plea of contributory neglect is good, although willful neglect is alleged and proved.

4. Same—Willful neglect is a creature of the statute, being unknown to the common law, and, as used in the statute, means intentional neglect or such recklessness as evidences a purpose to injure.

5. Same—While the defendant may have been guilty of gross neglect in running its train to the place or switch where the plaintiff was injured, still if the intestate was not ordered to open the switch, and was where he ought not to have been, the defendant can not be held liable unless its employes, being aware of the danger, failed to use reasonable precaution to prevent the injury.

6. Same—Ordinary neglect—The plaintiff's intestate, being an employe of the defendant, could not, if living, recover for an injury caused by the ordinary neglect of a superior, but could recover only for gross or willful neglect.

W. J. Lisle, H. W. Bruce and Thompson & McChord for appellant.

Edward J. McDermott, Sylvester Russell and Samuel Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

This case is here for the second time, and from a verdict and judgment rendered against the defendant for $6,000. After the return of the case from this court a second trial was had, resulting in a verdict for the defendant, and on grounds filed a new trial was granted, the case again heard and the verdict and judgment rendered from which this appeal is taken.

The appellant (defendant below) made out and filed its bill of exceptions, containing the proceedings had on the trial where the verdict was for the railroad company, and on the present appeal is insisitng that no grounds existed for setting aside the verdict for the defendant, and, therefore, the case should be reversed, with directions to enter judgment upon that verdict dismissing the plaintiff's petition.

While this court might have sustained such a judgment if rendered, it by no means follows that a reversal of the judgment should be had for that reason. The trial judge has before him the witnesses; heard the arguments of counsel; saw the effect upon the jury of what would be regarded immaterial errors by those not present, and with the broad legal discretion given him over the conduct of jury cases, this court ought to be well satisfied before interfering with the action of the court below in this particular that injustice has been done the party complaining.

It is not whether this court under like circumstances would have granted the new trial, but has the court below arbitrarily interferred with the verdict of the jury and abused the discretion given him by setting the verdict aside? The case has been tried again on its merits, and without discussing the facts or the reasons given by the court below for its action, we are not disposed to reverse the judgment for this alleged error.

There are eight grounds for a new trial found in the Code. One is: "Irregularity in the proceedings of the court, jury or prevailing party, or any order of court or abuse of discretion by which the party was prevented from having a fair trial."

"2d. Misconduct of the jury, of the prevailing party or of his attorney."

"6th. The verdict is not sustained by the evidence or is contrary to law."

These grounds for a new trial give the court not an arbitrary but a wide legal discretion. While the general statement that the verdict is against the law and the evidence may not call the

attention of the lower court to any particular error of law complained of, and would be held in this court to be insufficient, still, where the lower court acts upon such an assignment of errors, this court will not reverse for the reason only that the errors assigned were too indefinite.

In Caldwell v. Bright, 8 B. M., 525, this court said: "We should not, on the ground that a new trial had been granted after the first verdict, reverse a judgment rendered on a second verdict after a fair and full trial, and direct a judgment to be rendered on the first, unless there was a flagrant abuse of discretion in granting a new trial." (Ewing v. Price, 3 J. J. M., 520.)

The record of the second trial, resulting in a verdict for the defendant, shows that counsel for the defense read to the jury a portion of a deposition that had never been offered as evidence, and other irregularities occurred that led the trial judge to believe it was his duty to award a new trial.

When this case was heretofore before us it was reversed on the ground that the personal representative of the deceased could not recover for the loss of the life of the intestate, but could recover for his pain and suffering during the time intervening between the infliction of the injury and the death of the intestate.

The intestate, being an employe of the appellant, could not, if living, recover for an injury caused by the ordinary neglect of a superior, but could recover only for gross or willful neglect. The words gross and willful were used as synonymous terms in the opinion heretofore rendered, and no recovery could be had for the death of the intestate, as was said in the opinion, under the statute because of willful neglect, as the intestate left neither wife nor child surviving him. Jordan's Adm'r v. Cincinnati Southern R. R. Co., 89 Ky., 40, and other cases decided by this court, settle this question.

Willful neglect, used in this statute, is intentional neglect, or such recklessness as evidences a purpose to injure, and when a recovery is sought under the statute for willful neglect, causing death, contributory neglect constitutes no defense (Lou., Cin. & Lex. R. R. Co. v. Mahoney's Adm'r, 7 Bush, 235); but not so where the recovery is sought not under the statute but under the rule of the common law, for then, however high the degree of neglect, the plea of contributory neglect is good, and with evidence to support it the facts constituting the degree must go to the jury.

The defense in this case is that defendants' own neglect caused the injury, and but for that neglect he would not have been injured, and the injury was unavoidable on the part of the defendant.

After the testimony was all in the court said to the jury: "If they believed from the preponderance of the testimony that defendants' employes, superior in degree to decedent, were guilty of willful neglect, whereby plaintiff's intestate was injured, then defendant can not be released from responsibility on account of contributory negligence on the part of the intestate."

This court has in no case held, where the action for negligence was based on the common law or on a statute authorizing the personal representative to sue where the intestate could have sued if he had survived, that contributory neglect was not a good defense, and has applied the ruling contended for alone to cases arising under the statute for the loss of life where willful neglect must be shown in order to recover punitive damages.

In instruction No. 7 the court told the jury that "if Pat Coniff, by his own negligence, voluntarily contributed to such an extent to produce the injury to himself that but for his negligence it

would not have happened, then the plaintiff can not recover unless the defendant's agents in managing the train, superior in authority to Pat Coniff, knew, or by slight care could have known, of the peril in which Pat Coniff's negligence had placed him, and defendants' said agents failed to observe said care to avoid the injury to him."

This instruction, with the word voluntarily omitted, and in place of the words slight care insert ordinary care or reasonable precaution, embraces the law of the case as to contributory neglect, but this instruction being in conflict with instruction No. 4, was calculated to mislead the jury, and at last authorized a verdict based on the statute.

Willful neglect is a higher degree of neglect than gross neglect, and was unknown to the common law. It is a creature of the statute, and while it has been used as synonymous with gross neglect in opinions discussing the facts of a particular case, the doctrine is well settled that the statutory neglect is the only degree of neglect to which the plea of contributory neglect may not be relied on as a defense, and it will not be contended that an instruction to a jury to disregard the plea of contributory neglect would be good when gross neglect is charged, and there is proof conducing to sustain the plea.

The appellant may have been guilty of gross neglect in running its train to the place or switch where the intestate was injured, still if the intestate was not ordered to open or close the switch, and was where he ought not to have been, the appellant would not be held liable unless its employes, being aware of his danger, failed to use reasonable precaution to prevent the injury.

There should have been no instruction as to willful neglect, but even if this degree of neglect had been inserted in the instruction as meaning nothing more than gross neglect, this court would not have reversed the judgment but for instruction No. 4, that tells the jury the plea and proof of contributory neglect is no defense where willful neglect is shown. Instruction No. 4 should have been refused, and instruction No. 7 given as modified.

It seems that two instructions have been copied in the record that have no relation to this case, and how or why the clerk copied them is not necessary to determine. They have not been considered, and have no application to any fact in the case but belong to another record. The court below certifies that the bill contains all the instructions given and refused.

The judgment below is reversed and remanded for a new trial in conformity to this opinion.

EWELL v. PITMAN.

(Filed October 6, 1894—Not to be reported.)

Annulment of discharge in bankruptcy—Jurisdiction of court—The appellant having brought suit against the appellee for certain sums of money, and the appellee having pleaded his discharge in bankruptcy, the appellant assails this discharge on the ground that it was obtained by fraud. The provision in the bankrupt act allowing creditors who desire to contest the validity of the discharge to do so at any time within two years from the date thereof, by applying to the court granting the same, confers not only plenary but exclusive authority upon the court granting the discharge to annul it, and a State court can neither annul nor disregard a discharge granted by a court of bankruptcy for any cause that would authorize such court to set it aside.

Wm. H. Holt and R. L. Ewell for appellant.

J. W. Alcorn for appellee.

Appeal from Laurel Court of Common Pleas.

Opinion of the court by Judge Pryor.

This action was instituted in the Laurel Circuit Court in March, 1883, by the appellant to recover certain sums of money alleged to be owing by the defendant to the plaintiff. A part of the claim is for legal services rendered, and the balance for money paid by the plaintiff as the surety of the defendant. An attachment was obtained that was levied on land said to belong to the defendant. To this petition the defendant pleaded his discharge in bankruptcy, obtaind in the District Court of the United States of Kentucky, on May 22, 1882, about ten months prior to the bringing of this action.

The appellant, for reply to the answer of the defendant, states that the defendant fraudulently withheld his claims from the schedule of his indebtedness, and also the claim for which he was liable as surety; further, that defendant failed to list or make part of his estate the land attached, and that it was done with the fraudulent purpose of secreting his property from responsibility for debt, etc.

It is well settled that when one becomes a bankrupt, and his assignees are invested with title to his estate, the creditors can maintain no action unless the assignee refuses to sue, or is in collusion with the bankrupt in aiding him to avoid paying his debts. Cases may occur where the creditor may sue after the bankrupt has been discharged and the assignee surrenders the estate left, if any, to the bankrupt, yet creditors are interested and the assignee should at least be made a party to the proceeding.

Here was a suit brought while this case was pending in the district court and in less than a year after the discharge was granted, and the purpose of this action is to assail the proceedings in bankruptcy on the ground of fraud by reply to defendants' answer made seven years after the discharge had been granted. It is not pretended by the plaintiff that he did not know of the discharge after it had been given, and we perceive no reason for the State court to now interfere and hold that the discharge was impropely obtained.

This court, in the case of Laidley v. Cummins, 7 Ky. Law Rep., 616, and 83 Ky., 606, in discussing the question as to the jurisdiction of the district court to grant the discharge referred to, section 3110 of the bankrupt act, by which the creditors who desire to contest the validity of a discharge upon the ground of fraud may do so at any time within two years after the date thereof by applying to the court granting the same; and further, "it seems to us that the bankrupt act was intended to confer not only plenary but exclusive authority upon the court granting a discharge to annul it, and, as held by this court in Thurmond v. Andrews, 10 Bush, 400, a State court can neither annul nor disregard a discharge granted by a court of bankruptcy for any cause that would authorize such a court to set it aside."

The court below was asked to subject this property because of fraud on the part of the bankrupt in obtaining the discharge. The district court had complete jurisdiction over the subject-matter, not only to grant the discharge but to annul it if the facts showed fraud on the part of the bankrupt in obtaining it. It had exclusive jurisdiction, and has been open to the plaintiff since the discharge was obtained, and is the forum in which relief should be sought.

Judgment affirmed.

HAGERMAN v. SOUTHERLAND.

(Filed October 11, 1894—Not to be reported.)

1. Malicious prosecution—Allegations of petition—In an action for malicious prosecution the petition should allege specifically the facts showing the corrupt and improper motives of the judge or justice, and the mere allegation that the judgment was without cause and corrupt does not state a cause of action. Demurrer to petition in this case should have been sustained on these grounds.

2. Erroneous judgment—Liability of justice—A judge or justice is not liable because he renders an opinion not justified or authorized by the evidence. There must be corrupt action on his part before the liability exists, and this must be averred.

3. Same—The justice having jurisdiction of this case, it was his duty to hear the evidence and pass upon it, and, though the judgment was erroneous, he is not liable upon it as it was not malicious.

Hill & Hill for appellant.

Carrico & Miller for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

This is an action for malicious prosecution, in which the principal cause of complaint is that the magistrate having complete jurisdiction over the case he was called on to hear, without probable cause and with improper and corrupt motives, held the appellant for trial in the circuit court for forgery, or until the grand jury then in session could investigate the charge.

The appellant, on a proper affidavit presented to the magistrate, was charged with the crime of forgery, and a warrant demanded for his arrest. The justice issued the warrant. The appellee was arrested and the grand jury investigating the case refused to find an indictment. The appellant now maintains that the appellee should have discharged him, as there was not sufficient evidence to hold him over for further trial.

There is no pretense in this case that the justice acted without jurisdiction, but, on the contrary, it was his duty to hear the evidence, and from it determine whether or not reasonable grounds existed for an investigation by the grand jury. He was compelled under the law to decide the case upon the evidence before him, and, although rendering an erroneous judgment, no liability exists unless it appears that he acted from corrupt motives; and the facts, where he had the jurisdiction to try the case, showing such corrupt motives, should be alleged that the judge or justice may know the particular fact or facts upon which the charge of corruption is based.

It was his duty to decide the case. Having rendered the opinion, the mere allegation that it was without probable cause and corrupt is not sufficient to require an answer because no fact or circumstance is averred indicating corruption, but, on the contrary, the facts stated imposed on the appellee the duty of deciding his case.

A judge or justice is not liable because he renders an opinion not justified or authorized by the evidence. There must be corrupt action on his part before the liability exists, and this must be averred.

In this case it appears the appellant had sold a fire-proof safe to one Wright, and that Wright had signed a contract, the terms of which, or a part at least had been left blank and the

appellant, after the signing by Wright, filled up the blank with the terms of the contract and handed a copy to Wright. There was in fact no forgery committed, and no intention to commit any offense on the part of the appellant; but the justice, thinking, perhaps, the insertion of the terms of the contract after Wright had signed it, and in his absence, was a forgery, held the appellant for trial.

This character of officials are not generally learned in the law, and to hold them liable in an action for tort for every erroneous opinion would deter men who are disposed to do right from holding such an office, or any like office, where the rendition of erroneous judgments are made the foundation of a civil action against the judge or justice rendering them.

There may be difficulty in stating facts or circumstances in a petition from which a jury might infer the decision was not the result of an honest conviction of right, still it is better to require the pleader, when bringing such an action, to allege the facts than to require of the judge or justice to speculate as to the facts upon which such a serious charge is made.

In Caulfield v. Bullock, 18 B. M., 494, this court said: "To sustain the action it is necessary to allege and prove that the action of the judge of an election in refusing a vote was not according to an honest conviction of duty, but corrupt," etc.

We are aware that numerous reported decisions of the State, in passing upon similar questions, in general terms say that in the petition must appear the averment of a want of probable cause, and corrupt and impure motives on the part of the judge or justice; still where one is bound by the law to render a decision, and has full and complete jurisdiction to do so, we are satisfied the ends of justice and good pleading require more specific averments.

There can be no independent administration of the law if, when acting within the scope of his jurisdiction, the justice, upon the mere allegation of want of probable cause and malicious motives, must answer and place in issue the fact, "was the judgment rendered by him erroneous or malicious?"

The judgment below was erroneous but not malicious, as the evidence disclosed, and, therefore, the nonsuit was proper, and, besides, the demurrer should have been sustained to the petition, as it presented no cause of action.

Judgment affirmed.

BUTLER, SHERIFF v. WATKINS' EX'ORS.

(Filed October 13, 1894—Not to be reported.)

1. Taxes—Receipt bars subsequent proceeding—Where the auditor's agent had proceeded against the executors of the deceased for taxes upon property not listed by decedent in certain years, and the executors had compromised with the agent upon the amount of the taxes, had paid that amount and taken the agent's receipt in full of all taxes due on property failed to be listed by decedent, a subsequent proceeding by the sheriff of the county for taxes on property not listed for years within the period covered by the settlement with the auditor's agent can not be sustained.

2. Same—Institution of proceedings—Priority—A summons issued by the county judge on the 19th of the month upon information given by the auditor's agent on the 12th, that decedent had failed to list property for taxation on certain years, takes precedence of proceedings filed on the 18th of the same month by the sheriff for taxes due for years within the same period.

3. Same—Information in writing—Presumption—Conceding that the information should have been in writing, the person cited could appear and answer to the merits of the case and thus waive the informality of the information arising from its being verbal. There being, however, no clear proof that the information was not in writing, this court will assume that it was in writing, as the county judge acted upon it. It was at least sufficient for the purpose of obtaining the summons and setting on foot the proceedings of the agent, and certainly so in the absence of any objection to its form by the executors.

4. Same—Burden of proof—The sheriff having filed lists of property which he claimed had not been assessed by decedent, budren is on him to show proof that it had been omitted, for the statute, which provides that the complainant wishing to reduce the assessment must produce evidence to show that the property was assessed for more than its fair cash value, does not apply in this case, which does not involve the question of valuation but of omission to list at all. The statute was not intended to subvert the reasonable and well recognized rules of civil procedure, and the sheriff should at least show the existence of the property which he claims was not listed and the delinquent's ownership of it.

5. The lists furnished by the executors in the auditor's agent's proceeding can not be utilized by the sheriff for the purpose indicated, for these lists served their whole purpose when the executors paid the agent the taxes required on them, as they were made under an agreement of compromise and in settlement of that special proceeding.

6. This court can not say that because the executors found on hand an amount of property largely in excess of that given in by the testator in former years, therefore, he owned such property in those years.

Ben T. Perkins, jr., Ewdard W. Hines, J. E. Byars and W. J. Hendrick for appellant.

Forgy & Petrie for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Hazelrigg.

This is a proceeding by the sheriff of Todd county, acting on behalf of the Commonwealth, against the executors of Wm. Watkins, deceased, for the collection of taxes on bonds and credits of money at interest, etc., alleged to have been omitted for assessment by the decedent during the years from 1876 to 1890, inclusive.

From the years 1876 to 1878, inclusive, Watkins listed with the assessor of his county, under the head of "Value under the equalization law," the following amounts: For the year 1876, $55,100; for the year 1877, $44,500; for the year 1878, $42,100, and for the years 1882 and 1886, inclusive, as follows: For the year 1882, $80,000; for the year 1883, $40,000; for the years 1884, 1885, 1886, each, $40,000. Under the head of "Credits or money at interest, either in or out of the State," he listed for the year 1887, $40,000; and for the years 1888, 1889 and 1890, each, $100,000.

These lists were returned by the various assessors to the proper officer, when they were overlooked by the county board of supervisors for the years named, and the taxes collected accordingly in due season.

Upon the death of Watkins his executors listed for the year 1891, under the head of "Credits," etc., the sum of $83,000, and under the head of "Bonds of all kinds," etc., the sum of $618,750. Thereupon the sheriff, on June 17, 1891, listed against his executors, as property omitted to be listed by Watkins, the following amounts

under the head of "Bonds of all kinds, except U. S. government bonds exempt from taxation:" For the year 1886, $330,266; for the year 1887, $371,407; for the year 1888, $357,119; for the year 1889, $407,911; for the year 1890, $464,345.

On August 6, 1891, he filed with the county court clerk an additional list as property omitted by Watkins under the head of "Bonds of all kinds, except U. S. bonds exempt from State taxation, and credits of money at interest, either in or out of the State:" For the year 1876, $50,000; for the year 1877, $60,000; for the year 1878, $70,000; for the year 1882, $261,000; for the year 1883, $243,000; for the year 1884, $269,000; for the year 1885, $298,000.

The executors resisted the collection on various grounds. The county court adjudged the county entitled to some $600, but dismissed the proceedings as to the State. The circuit court dismissed the entire proceeding, and the Commonwealth has appealed.

It appears that on June 18, 1891, the county judge of Todd county caused process to be issued, directed to the sheriff, wherein he recited that information had been given him on June 12, 1891, by F. L. Wilkinson, auditor's agent for Todd county, that Wm. Watkins, deceased, had failed to give a proper list of his taxable personal property for the years 1870 to 1890, inclusive, and the sheriff was thereupon commanded to summon the executors to appear before him within ten days and list for taxation for the years aforesaid so much of the property of the said decedent as had not theretofore been listed.

In settlement of the amount claimed in this proceeding, and in compromise of it, the executors listed with the clerk of the county court the following amounts as property omitted to be listed by Watkins: For the year 1886, $125,000; for the year 1887, $175,000; for the year 1888, $225,000; for the year 1889, $275,000; for the year 1890, $347,000; and on July 22, 1891, they paid the required taxes, amounting to $6,752.49, and took the auditor's agent's receipt in full of all taxes due on the property omitted to be listed by the decedent.

The executors insist that they are not liable to further taxation, first, because they have settled in full, as is evidenced by this receipt. It is shown that the papers of the decedent do not indicate when he first became the owner of the bonds and the other personal estate in the possession of the executors, or how long he had owned them.

For some time prior to his death the testator had bought, sold and speculated in real estate in Nashville, Tenn., and the executors, after a careful examination, were not able to say whether or not Watkins had omitted to list any property whatever prior to 1886; but, from the best evidence obtainable and to avoid further litigation, the settlement indicated was made with the auditor's agent, who had visited Nashville, for the purpose of inspecting the dealings of the decedent there, and had also visited and consulted the auditor of the State in relation to his duties in the premises. There was no date from which it could be ascertained how much Watkins was worth at any given date, and the settlement was made not simply for amounts of property omitted for the years 1886 to 1890, but in full for all years since 1870.

The general power of the agent to thus settle the demands of the State, especially when, as in this case, his action was submitted to the supervision of the county court and the approval of the auditor is not questioned, but it is contended that proceedings for the collection of the taxes were first instituted by

the sheriff, and that thereafter the agent was powerless to act, and his receipt afforded no protection.

Without considering the limitations, if any, on his authority when exercised subsequently to the action of the sheriff, we are not convinced that the agent's proceedings were in fact instituted after those of the sheriff. The sheriff's list for the years 1886 to 1890 was filed June 18th, and the summons on the information of the agent issued on the 19th of the same month, but it was issued on information given on the 12th of the month.

It is claimed, however, that this information was not in writing, and can not be regarded, therefore, as the beginning of any legal steps by the agent. If we concede that the information should be in wrtiting, as appears to have been decided in Cassidy v. Young, 13 Ky. Law Rep., 513, yet can not the person cited appear and anwser to the merits of the case, and thus waive the supposed informality of the information? Besides, the information does not clearly appear to have been verbal.

As the county judge acted on it, we might fairly assume it to have been in writing. It was at least sufficient for the purpose of obtaining the summons, and was lodged with the judge according to his writ on the 12th of the month; and for the purpose in view, that of setting on foot the proceedings of the agent, we must regard the information given on the 12th as sufficient, and certainly so in the absence of any objection to its form on the part of the executors.

In the second place the executors contend that the sheriff has produced no proof whatever of any omission on the part of the alleged delinquent to list his property for the years in question, though ample opportunity to do so was given him in both the county and circuit courts.

This is met by the assertion that the lists returned by the sheriff are prima facie correct, and the burden is on the executors to show any error or overcharge in the assessment; that such is the ordinary rule, and the one contemplated by the statute, can not be denied.

The statute on the subject provides that the party complaining may "offer evidence in support of his complaint to the county court of the county in which the assessment was made; and if said court, after due consideration of the evidence, finds that the property has been assessed at more than its fair cash value, it may correct the same by reducing the assessment to the fair cash value." etc.

But the question here is not one of valuation, but of omission to list at all. Evidently the state of case likely provided for by the statute is one where the assessed value of certain designated property is sought to be reduced, and the complainant must, of course, present his proof of the erroneous valuation; but this statute was not intended to subvert the reasonable and well recognized rules of civil procedure.

In this case, as we have seen, the testator in his lifetime had given in his property "under the equalization law" as provided by the statute on the subject prior to 1886, and his "bonds and credit of money," etc., as provided by the Hewitt law since that date.

The various assessors had approved and reported this, acting on their official oaths. The respective county boards of supervisors had overlooked the lists. The county officers had collected the taxes without motion for further assessment. The auditor's agent, since the creation of such office, in 1880, had failed to detect any delinquency, and now the sheriff, after the death of the alleged delinquent, now claiming an undervaluation of any spec-

ified property, but claiming to have discovered a quantity of special property omitted from the lists theretofore given in by the taxpayer, institutes proceedings to assess the omitted property. We think he must at least show its existence and the delinquent's ownership of it, and, as far as may be under the circumstances, its kind and amount.

Ought the sheriff to list the property unless he has some proof at least that it has been omitted? and if he had such proof, shall he not be required to produce it? May he rest his case on the figures and lists he has made out—it may be in the privacy of his office—and which makes the taxpayer a violator of his oath, and the preceding county officials negligent of their duties? We think the rule is clearly otherwise.

In Bate, &c. v. Speed, &c., 10 Bush, 644, it was said that "in colateral proceedings the presumption may sometimes be indulged in that taxation has been legally imposed; but in such a case as this, where the action of the ministerial and judicial officers, whose duty it is to impose it, is called directly in question by the taxpayers, such a presumption does not, from the very nature of things, can not arise." This is not an assessment made in the ordinary course of things, the regularity and correctness of which may be presumed.

We do not think the lists furnished by the executors in the auditor's agent's proceeding can be utilized by the sheriff for the purpose indicated. These lists served their whole purpose when the executors paid the agent the taxes required on them, and they were in fact made under an agreement of compromise and in settlement of that special proceeding; nor can we say that because the executors found on hand an amount of property, in the form of bonds, etc., largely in excess of that given in by the testator in former years, he theretofore owned such property in those years, either in the form of "value under the equalization law" or of "bonds, credits," etc.

If it were shown that deceased had been the owner of bonds, notes, etc., in a given year, we might infer that he had them in the same form in succeeding years; we might with reason say that the burden of showing a disposal of them or their investment in real property or in nontaxable bonds, etc., would rest on the owner.

In this case the taxpayer had been an extensive dealer in real property in an adjoinigng State, and this property was taxable there. It would be the merest guess work to assume that the deceased was the owner of any given amount of personal property, taxable either as "value under the equalization law" or as "bonds," etc., in any given year because he owned certain bonds at his death. This might start an inquiry, but is proof of nothing tangible.

We think that the proceedings of the auditor's agent and his receipt to the executors are conclusive of the issues involved in the sheriff's proceedings, and, even if otherwise, that the State has not made out a case of omission to list on the part of the decedent.

The claims of the county do not appear to be involved here.

Wherefore, the judgemnt is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. ALEXANDER, &c.

(Filed October 11, 1894—Not to be reported.)

1. Feme sole—Liability for partnership debts—A marrid woman who has been empowered to trade as a single woman may form a partnership with her husband and is liable for the debts so contracted jointly with her husband.

2. Constitutional law—An act passed in 1866 creating a married woman a feme sole does not violate the provisions of the Constitution then in force. The beneficiary of the act, having procured it, can not impeach its constitutionality.

J. M. Chatterson, Wm. Lindsay, Lyttleton Cooke and Edward W. Hines for appellant.

Knott & Edelen for appelles.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The principal question involved on this appeal is whether or not a married woman, who has been empowered to trade as a single woman, may form a business partnership with her husband, by reason of which she may be made liable for the partnership debt.

It is insisted by the appellee that such a partnership can not be created; that the statute only enlarges the powers of married women as to others than her husband. The case of Kalfus v. Kalfus, 92 Ky., 542, is relied on as supporting this contention. It will be noticed, however, that that case was one in which only the rights of the husband and the wife, as between themselves, were involved, and it was held that the same reciprocal obligations, rights and duties pertaining to the marriage relation existed as if no such power had been conferred on the wife. But in the case at bar the wife deals with a stranger; and why is she less bound by her contract because she contracts jointly with her husband? She may become the surety of the husband (Sypert v. Harrison, &c., 88 Ky., 461; Hart v. Grigsby, 14 Bush, 542), and we perceive no reason why she may not become a joint obligor with her husband. She can not say to the world, "I am interested in this business venture with my husband, and my property is therefore pledged to the payment of partnership debts," and then escape liability on the plea that the peace and quiet of domestic life render it impolitic for husbands and wives to form such business relations. These considerations can not be allowed to affect strangers, and the property rights of the partners are not here involved.

It is also contended that the act of the general assembly, empowering the appellee to trade as a feme sole, etc., is unconstitutional, as it confers on her special privileges not common to all citizens of the same class.

The act in question was passed in 1866, and while it does not occur to us to violate the provisions of the old Constitution, it is enough to say that the beneficiary of the act and the one procuring it can not thus impeach it. The appellee can not take advantage of her own wrong, if wrong there was. (Ferguson, &c. v. Landram, &c., 5 Bush, 230; Stone, &c. v. Werts, &c., 3 Bush, 486.)

Judgment reversed for proceedings in conformity herewith.

TERRY v. JOHNSON, &c.

(Filed October 16, 1894.)

Title to land—Prior entry and survey—The appellant having entered and surveyed vacant and unappropriated land before the entry or survey of the appellee or patent therefor obtained by him, the entry, survey and patent of the appellee are void under the statute, which provides that "every entry, survey or patent made or issued under this act shall be void so far as it em-

braces land previously entered, surveyed or patented." As the appellee has no right to the land, he has no interest in the timber thereon, and, consequently, can not maintain this action for saw logs cut therefrom.

J. B. Marcum and Wm. H. Holt for appellant.

Samuel H. Patrick for appellees.

Appeal from Breathitt Court of Common Pleas.

Opinion of the court by Chief Justice Quigley.

This is a controversy between appellant, Isaac Terry, and appellee, Caloway Johnson, for title to nineteen and a quarter acres of land on the Lick branch of the middle fork of the Kentucky river, in Breathitt county, and for the recovery by appellant of certain saw logs cut therefrom by appellee, each claiming title to the land (and, therefore, the saw logs) by patent from the Commonwealth of Kentucky.

The patent under which appellant claims issued April 16, 1889, and contains a grant of seventy-five acres of land. That of appellee is for nineteen and a quarter acres of land and issued July 18, 1888. The entry and survey, under which appellant procured his patent, were made in 1871; the appellee's in 1888.

From 1854 up to the time the land was entered and surveyed by the surveyor of Breathitt county, in the name of Solomon Back, for the use and benefit of appellant, he had claimed the land, and believed, until the entry and survey were made in 1871, that it was embraced in other lands owned by him and lying on either side thereof. His claim was notorious in the neighborhood. Appellee was his neighbor and knew thereof, but whether or not he had knowledge of the entry and survey made in 1871 is immaterial, as the want thereof on his part, if any, is supplied by the statute.

It is alleged that appellant's patent was obtained by fraud. The allegations are not sustained by the evidence. The evidence is too voluminous to be recited in this opinion, but the court is satisfied therefrom that the entry, survey and patent to the land in question were obtained by the appellant in good faith, and that his transactions with the surveyor in relation thereto were absolutely free from fraud; besides, there is no evidence tending to establish the fact that the order of survey, alleged to have been issued by the county court to Solomon Back for seventy-five acres of land, and under which the entry and survey were made in 1871 for the use and benefit of appellant, as assignee of Solomon Back, was never issued by said court.

It is conceded by the parties and established by the record that the land granted in appellee's patent is embraced in and covered by the grant in appellee's patent. The question, then, in this case is, which one of the parties under his patent has the best title? All other questions raised by the record being merely incidental and collateral thereto.

The land in question was vacant and unappropriated land, lying in the county of Breathitt, on the Lick branch of the middle fork of the Kentucky river, and subject to the disposal of said county under chapter 109 of the General Statuts, entitled "Treasury Warrant Claims."

Section 3 of said chapter provides "that none but vacant land shall be subject to appropriation under this chapter. Every entry, survey or patent made or issued under this chapter shall be void, so far as it embraces land previously entered, surveyed or patented."

And this court said, in the case of Goosling, &c. v. Smith, 90 Ky., 157, "the language quoted precludes necessity of concurrence of entry, survey and patent by and for one party, in order to render void subsequent entry, survey or patent of the same land for another, but in express terms makes the existence of either sufficient. While, therefore, a party who makes the first entry of land, then subject to entry, may, if necessary, enforce by judicial proceedings his right to have survey first made, nevertheless, if there has been already either an entry or survey made of the same land by another, his entry, survey and patent are, in the meaning of the statute, void."

The land having been entered and surveyed in 1871 for the use and benefit of appellant as aforesaid, and before entry or survey thereof were made by appellee, or patent therefor obtained by him, the entry, survey and patent of appellee under the statute are void; and, being void, he can not, either in his name or that of the Commonwealth of Kentucky, for his use and benefit, maintain this action.

The land no longer being vacant, he was denied the right under the statute to either enter, survey or patent it. He is a mere trespasser. He can not rely for title on the weakness or infirmity of the title of his adversary. As he has no title to the land he has no interest therein or in the timber cut therefrom, and, therefore, no standing in court.

The court, in the case of Kirk v. Williamson, 82 Ky., 162, said: "The object of this provision of the statute is to discourage the nefarious practice of searching out defects in patents, and then knowingly entering the lands which had been honestly entered and surveyed and paid for by the patentee, and also to destroy the power of junior entries or surveys or patents (either or all) which had been honestly and legally made and returned as required by law.

If a person enters land and pays for it, and complies with the statute in having the entry and survey made in the time fixed by law, no other person has any right either to enter, survey or patent the same land; and whenever the Commonwealth lawfully patents the land once, it can not, for any cause, patent the same land again as vacant or unappropriated land, for that would breed confusion and contention."

The judgment is reversed, with instructions to the lower court to ascertain from the evidence the value of the "saw logs" in controversy, and render judgment therefor for appellant.

STANBERRY'S ADM'R v. ROBINSON, &c.

(Filed October 18, 1894—Not to be reported.)

1. Administrator—Excessive commission allowed—This court will not disturb the finding of a court of chancery which, upon appeal, reduced the commission of 5 per cent. on $240,000, the amount disbursed, allowed by the county court to the administrator of the decedent's estate, as the allowance of the county court was flagrantly excessive by reason of the fact that the administrator came into possession of the estate without trouble or litigation; that he turned over to the heirs the stocks, bonds, etc., of the decedent in bulk and in kind; that his attorney, to whom an allowance was made, prepared all necessary releases, and the whole transaction was of the simplest character.

2. Same—Allowance for services as agent of decedent—The administrator was not entitled to compensation for services rendered decedent as her agent

in collecting her rents, interest, etc., as she had paid him for those services before her death and died believing that he was satisfied and had no further claim.

3. Appeals—Time of appeals to circuit courts—A partial settlement having been made by the administrator, and the final settlement some months later, at which exceptions were filed by the heirs of the decedent and passed upon by the county court, an appeal taken to the circuit court sixty days from the final settlement is in compliance with the requirements of the statute regulating appeals in such cases. No exceptions were filed at the first settlement, which was a partial one. The administrator still had in his hands funds for the future disposition of the court, and the county court still retained control of the question of allowance to the administrator or of any other matter embraced in the settlement. At the first settlement the order approving the report of the county judge and ordering it to be recorded was not a final order.

4. Same—Circuit courts—In the statute providing for appeals to the circuit court in cases of this kind "the words 'circuit courts' shall be construed to mean any court of similar jurisdiction, either criminal, ordinary or equitable."

W. H. Mackoy, for appellant.

Root & Root fot appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Hazelrigg.

Mrs. Cecilia B. Stanberry died intestate in April, 1889, the owner of a large personal estate, and on May 13th following Geo. W. Neff was appointed by and qualified before the Campbell County Court as her administrator.

The estate was singularly free from complications, and on June 24, 1889, the administrator turned over in bonds, stocks, etc., to the heirs of the decedent more than $210,000, for which he took their joint receipt.

In a partial settlement made in the Campbell County Court on August 1, 1889, the total amount of disbursements was $213,924.28, and on this sum that court allowed the administrator 5 per cent. or $10,696.21 as his commission.

In June, 1891, a second and final settlement was made, and on the additional amount found to have been distributed, viz., $28,849.65, the county court allowed the administrator the same percentage, or $1,371.25, making the total amount allowed him as compensation the sum of $12,067.46. The county judge also allowed him the sum of $3,000 for services as agent for the decedent in collecting her rents, interest, etc., for a period of some eight years immediately preceding her death.

The first settlement was ex parte, but at the final settlement the heirs of Mrs. Stanberry appeared and filed a number of exceptions, none of which, however, need be noticed here, save those going to the amount of the allowance to the administrator and the charge for services as agent. These exceptions were overruled by the county court, but on appeal to the Campbell Chancery Courty the heirs the allowance to Neff as administrator was reduced by $6,000, and his demand as agent was rejected altogether. From that judgment Neff appealed to this court, where the appeal is being prosecuted by his administrator, he having since died.

It is insisted that the allowance of 5 percentum upon the amount received and distributed was reasonable and should not

have been disturbed; that the chancery court had no jurisdiction of the appeal because more than sixty days elapsed from the time of confirming the settlement allowing the commission complained of in the county court until the appeal was taken to the chancery court, and because the statute provides for appeals in cases of this kind to circuit courts only, and not to chancery courts; that the claim of $3,000 was reasonable and should have been allowed.

On the question of the administrator's compensation we are not disposed to disturb the finding of the lower court. He came into the possession of the entire estate without trouble or litigation. He turned over to the parties ready to receive them the stocks, bonds, etc., of the decedent in bulk and in kind. His attorney, to whom an allowance of $1,000 was made, prepared the necessary releases, and the whole transaction was of the simplest character. The promptness of the adimnistator is to be commended, but it is not thought that he earned more than the sum given him by the chancery court. It seems to us that the allowance by the county court was flagrantly excessive.

We do not think that the limitation of sixty days, within which an appeal may be prosecuted from the orders and judgments of county courts to circuit courts, is applicable to cases like the one under consideration.

The judge of the county court is given authority to settle the accounts of fiduciaries when called on for that purpose. His "report in writing shall be returned to the county court at its next regular term and noted of record. The report shall show the result, giving items of debit and credit, and he shall return therewith all vouchers and evidence adduced before him on the settlement." The clerk shall "indorse on the report the time of filing the same, and it shall lay over one term for exceptions to be filed by any person interested." "If no exceptions are filed by or at the succeeding term of the court, the report shall, if approved, be recorded." If the exceptions are taken the court shall, upon evidence heard on the whole case, "reject, confirm, alter or amend the report, and, if confirmed, order it to be recorded." "Settlements so made and recorded shall be prima facie evidence between the parties." (Subsections 1 to 10 inclusive, section 2, article 14, chapter 28, General Statutes.)

In this case there were no exceptions filed to the first settlement, which, as we have seen, was only a partial one. The administrator still retained in his hands some $40,000 for the future disposition of the court. We are of opinion that the county court still retained control of the question of allowance to the administrator, or of any other matter embraced in the settlement. The order approving the report of the county judge and ordering it to be recorded was not a final order. As said by this court in a case precisely similar to this:

1st. "There is in such a case no judicial contest and no judicial decision, but the order of confirmation" (approval in our present statute) "partakes rather of the character of a ministerial than of a judicial act.

2d. "There is no final adjudication or determination in favor of one person or against another, or upon any question of property or of personal rights.

3d. "The settlement and its confirmation are not conclusive either upon the parties who may have been interested in opposing them or upon the court itself, which may order another settlement in which errors in the first may be corrected." (Scott's heirs v. Kennedy's ex'or, 12 B. M., 510.)

Within sixty days from the judgment of the Campbell County

Court, passing on the exceptions of the heirs to the final settlement of the accounts of the administrator of Mrs. Stanberry, an appeal was taken to the Campbell Chancery Court, and this, we think, was in compliance with the requirements of the statutes. That such an appeal might go to the chancery as well as to the circuit court appears clear.

"The words 'circuit courts' shall be construed to mean any court of simliar jurisdiction, either criminal, ordinary or equitable." (Section 28, chapter 21, General Statutes; see also section 14, title 17, Civil Code.)

Of the demand of Neff as agent the chancellor said: "The appellee (Neff) was a friend of Mrs. Stanberry. She was his friend. She received a large estate upon the death of her husband in 1881. The appellee did assist her in the management of her business. It was not complicated or difficult. She paid him $50 for every month during the eight years in which she enjoyed the estate for his services. She did not agree to pay more, nor did he signify that he desired greater compensation. She died in the belief that he was satisfied and had no further claim. It did not occur to him to suggest this claim in August, 1889. He had received $4,800 in the lifetime of the intestate for these sevices. It did not occur to him to assert the claim until 1891. He might have been entitled to more than $600 per year upon a quantum meruit, if he had not allowed her to believe that she was paying him all that he claimed."

We approve these conclusions. The motion of the administrator de bonis non of Mrs. Stanberry to be made a party appellee here is overruled. The balance in the hands of the former administrator is not an unadministered asset.

Judgment affirmed.

HAYDON v. HAYDON, &c.

(Filed October 18, 1894—Not to be reported.)

Consideration for agreement—Weight of testimony—In this action for the specific performance of an agreement by defendant to convey to plaintiff 100 acres of land in consideration of the surrender to defendant of a note held against him by plaintiff, the defense that the note was without consideration and that defendant thought at the time of executing the title bonds that the note was an individual one is not sufficient, as the weight of testimony shows that the note was given by defendant for money paid by plaintiff as surety for him and his brother, who were a firm engaged in the sale of goods, and that the note was signed by defendant in the firm name, which created an obligation on which he was individually liable. The testimony having also shown that the defendant had recognized this claim of plaintiff as a valid one, and had stated that he was going to make the plaintiff a deed to the 100 acres of land, the facts of the case are inconsistent with the defense that the note was obtained by force or fraud. An amended petition having been filed treating the bond as a mortgage only, the defendant may elect whether the land shall be subjected to the payment of the note, or a specific performance of the agreement shall be had.

Hugh Rodman, Knott & Edelen and Thomas B. Ford for appellant.

John W. Rodman, Lindsay & Botts and D. W. Lindsay for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

This is an unfortunate controversy between father and son, and much testimony of a conflicting character as to the main fact in issue. The action is in equity for the specific performance of an agreement executed by the son to convey to the father a tract of 100 acres of land.

The consideration is the surrender by the father to the son of a note held by him on the latter for $1,360.40, dated in the year 1877, and the further consideration of a full settlement of all matters between them.

The writing sued on is a complete release of the father of all demands on the son, and must be regarded in the light of an executed agreement, and such is its legal import.

The note for $1,360.40 was executed on April 21, 1877, and the bond for title was executd on February 10, 1890, and is as follows:

"This agreement between Calvin Haydon and F. T. Haydon, witnesseth that we have this day settled all the differences between us, and in consideration of the said F. T. Haydon delivering to the said C. B. Haydon a note for $1,360.40 in favor of said F. T. Haydon v. C. B. Haydon, dated April 21, 1877, and in 'settlement in full of all claims of every kind whatsoever between said C. B. Haydon and F. T. Haydon,' the said C. B. Haydon hereby agrees and binds himself to convey to the said F. T. Haydon about 100 acres of land, it being the same land conveyed to C. B. Haydon by Wm. Cromwell, commissioner, of date November 20, 1886, except 80 acres thereof sold to Mansford, and 50 acres on the southeast side which C. B. Haydon has sold to Alexander Kring, and which is to be surveyed off and conveyed to said Kring, leaving about 100 acres as aforesaid, which the said C. B. Haydon is to convey to the said F. T. Haydon as soon as the 50 acres is laid off for Kring, which is to be in full and final settlement of all matters between them, and the said F. T. Haydon is to deliver possession of the said 50 acres to said Kring as soon as it is surveyed and laid off.

"Upon the execution of said deed for said 100 acres, the said C. B. Haydon is to surrender and give up all claims he has against F. T. Haydon, and F. T. Haydon is to give up and surrender all claims he has against C. B. Haydon.

"Witness our hands this the 10th day of February, 1890.

"C. B. HAYDON,
"FOR F. T. HAYDON, J. W. HAYDON."

The note, which seems to be the substantial consideration for the agreement, is claimed to be invalid for the want of consideration and a mistake by the defendants in its execution and fraud in obtaining it on the part of the parties, and the enforcement of the terms of the bond for title is resisted on those grounds.

It seems that the defendant and his brother were partners in the sale of goods, and, becoming involved, the firm went into bankruptcy and obtained a discharge. The plaintiff (appellant) had become the surety and endorser for the firm, and paid out as surety large sums of moeny. One Penn was his co-surety on some of the paper, and the appellant sued Penn to compel him to contribute.

It is claimed by the defense that the father, with a view of obtaining contribution from his co-surety (Penn) required or demanded that his son should give him his note for the $1,360.40, as evidence of the fact that he had paid as the surety of the firm of Haydon & Bro., and for no other purpose, the son, at the time

the note was executed, insisting that he owed the father nothing, and the latter assuring him that the note would be redelivered to him and would never be enforced, and that to prevent trouble with his father he gave the note and signed it Haydon & Bro.

The Penn suit was dismissed, and the facts of that case show that the appellant, in his action against Penn, asserted that this note was the obligation of the firm of Haydon & Bro., as upon its face it purports to be.

The son (appellee) now states that when he gave the bond for title he thought this note was his individual obligation and not that of Haydon & Bro., and under that impression he signed it, and also insisting that there was no consideration for its execution. Waiving the question as to the right of the son to make such a defense as the execution of this note for the purpose of defrauding some one else, or to enable his father to do so, even under compulsion, it is apparent from the testimony the defendant regarded this as a binding obligation, and for that reason executed the bond for tilte.

It is not necessary to look to the credibility of the witnesses or whether the note was signed in the firm name, or was the individual obligation of the son, he was liable to his father when executed, and the weight of the testimony conduces to show that the defendant regarded it as binding, and its execution to the father by reason of the payment by him of the debts of the firm, for which the son was individually liable to the father.

Some five or six witnesses show the recognition of this claim by the son long after its execution as a valid one, and all the facts are inconsistent with the idea that the execution of the note was obtained by mere persuasion or force, and without any consideration. When this case was argued, and after a hasty examination of the record, it seemed that both the note and bond for title were executed on the same day, but a careful inspection of the papers show that this bond for title was executed on February 10, 1890, more than twelve years after the note was executed, and containing stipulations so specific as to boundary, location and other particulars, etc., as evidences a well-considered business transaction.

Can it, therefore, be even probable that after this lapse of time, with an indebtedness asserted for such a large amount, that the defendant would have forgotten the circumstances under which the note was given? This bond is inconsistent with the entire theory of the defense, and, when considering the testimony showing that the appellee time and again recognized this indebtedness, and by one of his own witnesses, that, in the year 1891, he stated he was going to make the appellant a deed to the 100 acres of land, there can be little doubt as to the defendant's liability.

In the light of this writing it is rendered unnecessary to discuss or determine the nature and extent of the liabilities incurred by the father for his son, or the amount repaid him, as it is not pretended this note has been paid.

An amended petition was filed in this case, treating the bond as a mortgage only, and, therefore, on the return of the case the chancellor, at the election of the defendant, may either subject the land to the payment of the note or direct a specific performance, and in the event no election is made a conveyance should be ordered.

Remanded for proceedings consistent with this opinion.

NORTHWESTERN MUTUAL LIFE INS. CO. v. BARBOUR, &c.

SAME v. SAME.

(Filed November 4, 1894.)

1. Appeals from Superior Court to Court of Appeals—Six months' limitation—An appeal from the Superior Court to Court of Appeals having been granted more than six months after the opinion and mandate of the court in these cases had been rendered, but within six months from the time of the passing upon and overruling the petition for rehearing, a dismissal of the appeal can not be had on the ground that the motion was in noncompliance with section 7 of the act creating the Superior Court of Kentucky, which provided that no appeal should be granted from that court to the Court of Appeals after six months from the time the right to appeal accrued. The right to appeal did not accrue, and, as a consequence, limitation of six months did not begin to run until after the petition for rehearing had been passed upon and overruled by the Superior Court, for, as that court retained jurisdiction to grant a rehearing up to the time of the final decision of that petition, it can not be assumed that either the right to appeal had accrued or the power to grant it existed previously.

2. Same—The same opinion and mandate, as rendered in the case of Northwestern Mutual Life Ins. Co. v. Barbour, &c., 92 Ky., 427, must also be rendered in these cases, as the insurance policies sued upon in all the cases are similar and the same defense is made in all the actions.

Barnett, Miller & Barnett for appellant.

Dodd & Dodd for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

October 1, 1889, three actions were instituted in the Louisville Chancery Court by James P. Barbour and others to recover of the Nothwestern Mutual Life Ins. Co. on four distinct policies of insurance on his life.

One of the actions was on policies for $5,000 and $2,500, payable to Minnie R. Barbour, his wife, and to his children. The second action was on a policy for $2,500, payable to his wife only; and the third was on a policy for $10,000, payable to his children.

Judgment was rendered in favor of plaintiffs in each action, though not for full amount of either policy; but from the several judgments a separate appeal was prosecuted by defendant—to this court from that rendered in the first, and to the Superior Court from those rendered in the other actions.

December 1, 1891, the judgment in the first-mentioned action was by this court reversed and the case remanded, with directions to the lower court to overrule the general demurrer to the answer, which, unless the facts stated in that answer turn out to be untrue, involves ultimate dismissal of the action. (N. W. Life Ins. Co. v. Barbour, 92, Ky., 427.)

The Superior Court, however, affirmed the judgments rendered in the other two actions, but as the four policies are similar in character, and the same defense is made in each action, the same opinion, followed by the same mandate, will have to be rendered by this court in those cases, as was done in the other, unless the motion of plaintiffs to dismiss the two appeals from the Superior Court be sustained.

The ground of that motion is noncompliance with section 7 of the statute, approved April 22, 1882, creating the "Superior Court

of Kentucky," as follows: "All appeals from the Supreme Court to the Court of Appeals shall be prayed for and granted in the Superior Court; but no appeal shall be granted after six months from the time the right to appeal first accrued unless the party appealing therefrom was a defendant in the original action and an infant."

It appears that July 4, which was in due time after June 3, 1891, date of the opinion and mandate of the Superior Court in the two cases, defendant filed a petition for rehearing in each, but they were not passed on until Setember 11, 1891. Nor, though a motion therefor was made as early as September 7, 1891, was an appeal to this court in either case granted until January 6, 1892, more than six months after the opinion and mandate. So it is apparent the right of appeal, if gone, has not been lost by laches of defendant; and that the construction of the statute contended for by plaintiffs makes possible such wrong to a litigant is sufficient reason for not adopting it unless constrained to do so.

It seems to us the right to appeal in these cases did not, in meaning of the statute, accrue; and, as a consequence, limitation of six months did not begin to run until after the petition for rehearing had been passed on and overruled by the Superior Court, for as up to time of final decision of that petition the Superior Court, retained jurisdiction to grant a rehearing, and was bound to do so if, in its opinion, sufficient ground therefor existed, it can not be assumed that either the right to appeal had accrued or power to grant it existed previously.

Wherefore, in each case the motion to dismiss is overruled, judgment on cross appeal is affirmed and on appeal reversed and cases remanded, with directions to overrule the demurrer to each answer and for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

SUPERIOR COURT ABSTRACTS.

NEWPORT NEWS & MISSISSIPPI VALLY CO. v. TERRY.

Filed October 24, 1894. Appeal from Hardin Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Railroads—Liability for fires caused by escaping sparks—In this State railroad companies are not liable for injuries caused by the escape of sparks from their locomotives or cars except where they fail to use the appliances required by the statute for preventing the escape of sparks.

2. Same—In this action against a railroad company to recover damages for the burning of plaintiff's property adjacent to defendant's roadbed, alleged to have been caused by defendant's negligence, as the only question under the pleadings was whether the defendant ran the locomotive, which caused the fire, without the spark arrester or preventive required by the statute, testimony tending to show that there had been other fires along the railroad in the same vicinity about the time plaintiff's property was burned was incompetent, there being no effort to show the origin of those fires or that the company had ever failed to use the appliances required by the law.

P. H. Darby and Louis A. Faurest for appellant; S. H. Bush for appellee.

TOWN OF FALMOUTH v. WOODS.

Filed October 24, 1894. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Yost, affirming.

Where horses are frightened by an object in the streets of a town or city having a tendency to frighten horses of ordinary gentleness, if the object was not placed in the street by the corporation or by any one in privity with it, the corporation is not liable for the injury resulting unless it had notice thereof for a sufficient length of time to have enabled it, by the exercise of reasonable diligence, to remove the object; but this notice may be either actual or implied, and notice is implied where a sufficient length of time has elapsed between the placing of the object or obstruction and the accident for the corporation, using reasonable diligence, to have removed it, or when its being so placed and its nature are so notorious that the corporation should have known it.

In this case a town is held to be liable for injuries resulting from the frightening of horses by a canvass sign which the town had permitted to be stretched across one of its principal streets, the sign being so hung that when blown by the wind it made a noise calculated to, and which did on several occasions, frighten passing horses, these facts being so notorious as to cause general comment.

L. P. Fryer for appellant; Felix C. Newman for appellee.

BROWN, &c. v. BROWN.

Filed October 24, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Yost, affirming.

1. No appeal lies from a decree granting either an absolute divorce or a divorce from bed and board.

2. Alimony—An allowance of $160 per annum for the support of the wife and her infant child is not excessive, it matters not how poor the husband and father may be.

3. Fraudulent conveyance—The chancellor properly set aside as fraudulent a sale of personal property made by the husband the day before this suit for divorce and alimony was brought. While there was no direct proof of fraud, the circumstances attending the transaction were sufficient to authorize the judgment.

George S. Fulton for appellants; John S. Kelley for appellee.

DEPOSIT BANK OF OWENSBORO v. ROBERTSON, &c.

Filed October 24, 1894. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Usury—A payment made at the date of the renewal of a note, although regarded as a payment of usury and the note renewed for the principal, will be regarded as a payment on the principal, and, although the renewal may be signed by others than those originally bound, yet if the original obligor is still bound, all usury will be purged from the transaction so long as he remains liable.

2. Same—Where partners, upon closing up their partnership and ascertaining their loss and the share each had to bear, settled the balance due upon a partnership note by each partner giving his acceptance for his proportion of the amount, in this action upon one of those acceptances, it appearing that there was usury in the original note, for the balance of which these acceptances were given, the defendant is entitled to credit for only his pro rata part of the usury, and not for the whole usury.

3. Same—Conceding that the plaintiff bank had the right to take out legal interest in advance, yet as it did not do it, but chose to charge usurious interest in advance, it can not now ask the chancellor, in arriving at the amount of usury, to allow it legal interest in advance.

Weir & Weir for appellant; J. A. Dean for appellees.

WESTERFIELD v. BALDWIN & CO.

Filed October 24, 1894. Appeal from Jefferson Circuit Court, Common Pleas division. Opinion of the court by Judge Barbour, affirming.

1. Return of jury to ask information as to testimony—The jury may, after retiring to their room, return, and, in the presence of the court and of the parties and their attorneys, have read to them the answer made to a deposition read as evidence on the trial.

2. The court may instruct the jury orally unless it is requested to give instructions in writing; and while it appears in this case that appellant asked certain instructions in writing, yet as those instructions were refused and the court suggested that as the question was simply one of fact, it would insturct the jury orally, to which no objection was made, appellant must be regarded as acquiescing in the giving of the instructions orally.

3. Instructions to jury—As one of several instructions asked by appellant and refused by the court is missing from the record, this court can not say that the lower court erred in refusing any of them, is the omitted instruction may have so qualified the others as to make it improper for the court to give them.

4. Objection waived—Where it does not appear that the court acted upon an objection to the admission of testimony, or that there was any exception, the objection must be treated as waived.

E. S. Watts for appellant; Simrall, Bodley & Doolan for appellees.

COVINGTON STOCK YARDS CO. v. KEITH & WILSON.

Filed October 31, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

Res adjudicata—To this action instituted by appelles, live stock brokers, to recover of appellant a certain sum for fees illegally exacted by it of them for passing live stock through its yards, a judgment rendered by the United States Circuit Court, in a proceeding between the same parties, which purports to pass alone upon exactions made prior to its rendition, constitutes no bar, as all the charges complained of in this case were made after the rendition of that judgment; and even if it should be conceded that the court, after rendering a final judgment determining the rights of the parties as they then appeared, had the right to retain control of the case for the purpose of determining matters that might thereafter arise, this court is of opinion that the United States Circuit Court did not attempt in its judgment to do this.

Hallam & Myers for appellant; O'Hara & Rouse for appellees.

STROUD v. SIMPSON & CO.

Filed October 31, 1894. Appeal from Grant Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Exceptions—As appellant did not except to the action of the court in overruling his objection to oral testimony as to a matter of which an existing record was the best evidence, he waived the objection.

2. Verdict not against evidence—As plaintiff and defendant were the only witnesses to the real question in issue, and each sustains his contention, the verdict will not be set aside upon the ground that it is against the evidence.

3. Newly-discovered evidence—The court properly refused a new trial upon the ground of newly-discovered evidence, as the newly-discovered evidence upon which the appellant relies flatly contradicts his own pleading.

M. D. Gray for appellant; Collins & Fenley and James T. Willis for appellees.

HOLMES, &c. v. LOUISVILLE, &c., RY. CO.

Filed October 31, 1894. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Injury to abutting property from construction of road—When the construction and operation of a railroad on the street of a town unreasonably obstructs the ingress and egress of an abutting lot owner, the railroad company is liable to him for the damages sustained thereby, although the road was not improperly constructed or operated, and although it was constructed under a license from the town authorities. The lot owner has a peculiar private use in the street which is an incident of his title to the lot, and of which he can not be deprived without compensation.

2. Same—In an action to recover such damages it was error to allow defendant to prove that plaintiff's property, as well as all other property along the railroad, had increased in value since, and by reason of the construction of the road. In such cases the jury should ascertain what the value of the property was just before it became generally known that the defendant's road was to be located in front of it, and then determine what proportion of that value was taken from the property by the construction of the road, etc.

J. W. Lewis for appellants; Helm & Bruce for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. NIXON.

Filed October 24, 1894. Appeal from Graves Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Railroads—Injury to property in depot for shipment—In this action against a railroad company to recover the value of tobacco which plaintiff had delivered to defendant at its depot for shipment, but which was destroyed by fire before it was shipped, as defendant under its bill of lading is not liable unless it was guilty of negligence, and the only negligence complained of is defendant's failure to ship the tobacco before the fire occurred, it being shown that there was but one train upon which tobacco could be shipped between the delivery of plaintiff's tobacco for shipment and the time of the fire, and that this train was loaded with tobacco received for shipment before plaintiff's tobacco was received, it sufficiently appears that plaintiff's tobacco could not, in the regular course of business, have been shipped before the fire, and, therefore, defendant is exonerated from liability.

2. Recovery of damages by one of two joint owners—As plaintiff owned only one third of the tobacco, the other two-thirds belonging to his son, it was error to render judgment in his favor for the value of the whole, and this is true, whether the ownership was put in issue or not, as the action being one for damages the plaintiff can recover no more than he shows himself to be entitled to.

Smith, Robbins & Thomas for appellant; W. P. Lee for appellee.

LEWIS, &c. v. CITY OF SOMERSET.

Filed November 14, 1894. Appeal from Pulaski Circuit Court. Opinion of the court by Presiding Judge Brent, reversing.

1. Husband and wife must join in an action brought for the personal suffering or injury to the wife resulting from the negligence of another.

2. Misjoinder of actions—Waiver of objection—In this action against a city brought by husband and wife, to recover all the damage to which they were jointly and severally entitled on account of injuries to the wife resulting from defendant's failure to keep its sidewalks in repair, as the defendant answered without requiring plaintiff to elect which cause of action he would prosecute, the misjoinder was waived.

3. Either husband or wife can testify in such an action, but not both. The wrongdoer referred to in section 606 of the Code is only such a tortfeasor as is connected with the loss of baggage.

W. O. Bradley and J. W. Colyer for appellants; S. M. Boone and O. H. Waddle for appellee.

VANMETER v. TRUE, BY, &c.

Filed Noevmber 14, 1894. Appeal from Fayette Court of Common Pleas.

Opinion of the court by Judge Barbour, reversing.

1. Parent and child—A father has the right to give his child moderate and reasonable chastisement; and the mother also has a like right, especially in the absence of the father, and in doing so she may call in the assistance of a stranger to aid her in capturing her child when fleeing from her. And if one at her call does aid her in capturing her child and in the effort uses no more force than is necessary he incurs no liability.

2. Assault and battery—Evidence in mitigation—In this action by a boy fourteen years old suing by his next friend to recover damages for an assault and battery, the defendant had a right to show, not as a justification of the battery, but in mitigation of damages, that he pursued and captured the plaintiff at his mother's instance, as this was calculated to explain defendant's conduct and to mitigate any wrongful act done by him after capturing the boy. And the statements of witnesses as to the cries of the mother while in pursuit of her boy were competent as part of the res gestæ.

3. Oral instructions to jury—Where the parties require it, the court must give written instructions to the jury. And the court having erred in refusing defendant's request to instruct the jury in writing and in instructing them orally, that error was not cured by the giving of written instructions after the case was submitted to the jury and in the absence of defendant and his counsel, even though the written instructions then given may have been a correct exposition of the law of the case. And it is, therefore, immaterial that those instructions do not appear in the record.

Bronston & Allen for appellant; James A. Scott and Wm. H. Holt for appellees.

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KENTUCKY COURT OF APPEALS.

DARNABY v. WATTS.

(Filed June 16, 1894—Not to be reported.)

1. Violation of trust—Insolvent trustee—Liability of cotrustee—In this action W. D. Watts, as trustee, and he with Garnett Watts as next friend of an imbecile, is seeking a settlement of the accounts of former trustees of funds in their hands unaccounted for. It appears that the plaintiffs caused a loss to the imbecile by reason of their payment to the insolvent trustee of their notes amounting to $2,934, and they are now seeking to subject the solvent trustee to the payment of this amount. In view of the fact that plaintiffs suggested to the insolvent trustee the appropriation of the money which they owed on the trust account to the payment of his private debts and thus induced him to violate the trust, and also since the solvent trustee had nothing to do with the breach of trust and had no knowledge of the payment until months after, the present trustee must be held liable for the amount of the notes, and he may have his recourse against Garrett Watts for one-half the amount.

2. Same—Assuming that the conduct of the old trustees in the management of the trust was such as to make one liable for the acts of the other, still the plaintiffs caused the violation of the trust, are the parties indebted, and must account for the sum lost. If the former trustee can make them liable to him, there is no reason why their liability can not be adjudged on this, their own petition, as much so as if the old trustee had paid them the money, and was asking a credit for it.

3. Same—Plaintiffs being the next of kin to the imbecile and entitled to his estate if they survive him, and knowing the financial condition of the insolvent trustee at the time they paid him their debts due the trust estate, it would be inequitable to charge the solvent trustee on the ground that he has violated the trust reposed in him by the testator in not securing what was in the hands of his cotrustee.

Breckinridge & Shelby for appellant.

J. D. Hunt and Bronston & Allen for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor, Chief Justice Bennett dissenting.

The appellant, Darnaby, and one Weathers were appointed executors of the last will of Garrett Watts, deceased. They were also by the will made trustees for an imbecile son of the trustee, with the power to control and manage the trust fund. The two, Darnaby and Weathers, executed a joint bond as executors, but never executed a bond as trustees of the imbecile son.

They managed the trust by taking charge of the estate, renting it out, and each party seems to have retained the control and use of the proceeds of the trust fund that came to the hands of each, but there never was a joint liability unless it originates from the executorial bond or from the manner in which they permitted each other to use the trust funds. They were both, at the date of their qualification as executors, men of means and of business habits, and so continued until a short time before the bringing of this action, when Weathers, by reason of his liability for others as surety, became involved, and finally made an assignment for creditors. Darnaby remained solvent, and has made an account of his acts as trustee, and paid over the amount for which he is liable, except the amount now in controversy, and his liability for this sum of money, caused by the default of his co-trustee, Weathers, is the subject-matter of this litigation.

The court below held Darnaby liable, and from that judgment he appealed to the Superior Court, where the judgment below was reversed and an appeal granted to this court. Upon the failure of Weathers, the co-trustee of Darnaby, W. D. and Garrett Watts, as the next friend of the imbecile, instituted this action in equity to compel the trustees to settle their accounts and secure the beneficiary. The two trustees were removed, and W. D. and Garrett Watts, who instituted this action, appointed in their stead. In the settlement made of the accounts of the old trustees, the question arose whether or not Darnaby was liable for $2,934, the amount of two notes, that was owing the two trustees by W. D. and Garrett Watts, the parties who instituted the action as next friend, and who are now the trustees.

It is claimed by Daranby that the parties instituting the action, and who are now in a court of equity asking that he account for this money, caused the loss, if any, to the estate of the imbecile, and they are liable and not Darnaby.

The two notes making the $2,934 were in the possession of Weathers, and when the money was paid to him by the appellees he gave them his receipts for the amounts, the notes not being on his person at the time, and when Weathers failed he turned the notes over to those making the settlement without any credit, but conceding all the time their payment by the appellees. Darnaby knew that Weathers was in failing circumstances, and swears he had notified Weathers not to collect this money and the appellees not to pay it. This they, however, deny; but that the appellees knew as well as Darnaby that Weathers was in failing circumstances when this money was paid is manifest from the proof. The facts under which this money was paid to Weathers are these: Weathers was anxious to raise money to pay off a note he had in bank. He wanted the appellees to aid him in raising the money by becoming his endorsers or sureties on a note in bank for $3,000. They said to him they would aid him or try and do something for him. They, however (being in Winchester, where the bank is located), did not help him on that day, but returned, or met him, one of them at least, in Winchester, and suggested to him they would pay off their note they owed the trustees. Weathers had made no suggestion about their pay-

ing off the note; he knew the money did not belong to him; was a man of high order of integrity; but, being pressed by the bank for the money he owed, took the money and paid off the debt, it being paid to him for that purpose.

These appellees were the next of kin of the imbecile and entitled to the estate if they survive him. The estate left the imbecile was valuable, and they no doubt felt free to try and help their friend by paying him the amount of their notes, knowing the loss would come out of an estate they would likely inherit, or made the payment on the idea that if Weathers proved insolvent the appellant would be responsible for the amount. The one motive or the other must have prompted them to have suggested payment at this particular time. Weathers state he had no idea of their paying him this money; made no demand for it, and was making every effort up to the time he delivered these notes to collect a judgment with which to repay the trust fund. He wanted the appellees to take the judgment, but voluntarily, and without any expectation on the part of Weathers that they would do so, paid this money to him that he might appropriate it to the payment of the bank debt.

We are aware that a simple debtor to an executor or trustee is not bound to see to the application of the money, or to inquire what disposition the trustee is to make of it, or to refuse to pay for fear he may misapply it. The trustee holds his note; the debtor pays it off, and whether with or without demand is immaterial; the trustee can enforce the obligation and the debtor can pay it when he chosses if the trustee will accept it, and if there was nothing else in this case but the fact of payment, even with a knowledge that Weathers was going to use it for his own purposes, no liability would arise on the part of the appellees.

Nor is it necessary to adjudge in this case that the purpose of the appellees was to defraud Darnaby, but, on the contrary, as before suggested, they knew the character of the holding by the trustees, and while the unfortunate son was the beneficial owner they knew they stood as the parties who, at some future time, must acquire, in conjunction with another, the absolute estate, and for that reason not only consented to, but by their conduct suggested to Weathers, a violation of the trust. They may not at the time have been acting with a view of making Darnaby liable, but when Weathers failed to relieve the estate by the appropriation of the judgment he had as a compensation for the breach of trust committed by the parties, the chancellor is asked by these appellees, as the next friend, and finally as the trustees of the imbecile, to make Darnaby responsible for the $2,934.

The parties are all in a court of equity, with the appellees as the next friend, the trustees and the remote beneficiaries of the estate, seeking to hold Darnaby liable on the ground that he has violated the trust reposed in him by the testator in not securing what was in the hands of Weathers. Under such circumstances it would be inequitable to charge the appellant with this sum of money.

The commissioner in his report says that the appellees knew of Weather's financial condition, and it is evident the suggestion of payment by the appellees to Weathers was to enable him to pay the bank debt. Darnaby had nothing to do with the breach of trust on the part of Weathers, and was without any knowledge of the payment to him for months after.

It is said that the rights of the imbecile must be protected, and, the action being for his benefit, the connection the appellees have in the transaction with Weathers may give Darnaby a

cause of action against the appellees, but he must first account to them as trustees before such an issue can arise.

We will assume, for the purposes of this case, that the conduct of both the old trustees in the management of the trust was such as to make one liable for the acts of the other, and that Darnaby is liable to the imbecile for not taking the proper steps to secure the fund in the hands of Weathers; still it is these appellees seeking to enforce the liability, when, as between themselves and Darnaby, they are liable for the money and not Darnaby.

The chancellor can say to them: You caused this trust to be violated, and are the parties indebted, and this sum must be accounted for by you; for if Darnaby can make them liable to him there is no reason why their liability can not be adjudged on the petition of these appellees, who are seeking this settlement, as much so as if Darnaby had paid them the money and was asking a credit for it. The rights of the imbecile should be protected by the chancellor, and, while the solvency of the appellees is not questioned, before charging them and releasing appellant, an inquiry may be instituted as to their ability to pay, but we infer from the record that no such necessity exists.

Judgment reversed and remanded that the appellees may be charged with this money and not the appellant.

The judgment of affirmance is set aside, Chife Justice Bennett dissenting.

(Modified opinion—Filed November 27, 1894.)

W. D. Watts was the trustee of the imbecile and was seeking a settlement of the accounts of former trustees of funds in their hands unaccounted for.

It appeared that, by the joint action of W. D. and Garrett Watts who were the plaintiffs in the action, and who were seeking, as the next friend of the imbecile, to have the trust fund secured or surrendered, that they had caused a loss to the imbecile by reason of their payment to the insolvent trustee of their note, amounting to $2,934. W. D. Watts was, before the final settlement, made the trustee, and, therefore, the chancellor, instead of charging that sum to Darnaby, should charge it to the trustee; and if Garrett Watts was not a co-trustee, and it seems he was not, W. D. Watts must look to him for one-half the amount.

The court labored under the impression that the appellees were both trustees in lieu of Darnaby and Weathers, but as this was a mistake of fact, it is doubtful whether a judgment could be ordered against one who sues as the next friend only, and the opinion is so modified as to charge the entire amount to the trustee, and the latter has his recourse against Garrett Watts. It does not appear that Darnaby has been reimbursed in any way, but if he has received on this $2,934 its proportion of the insolvent trustee's (Weather's) estate, he should account for it, and is certainly entitled to no commission on it. These facts may be made to appear on the return of the case. What this court decides is that as to Darnaby he is not to be made liable for this $2,934.

The opinion is modified to the extent indicated and the petition overruled.

DOWELL v. WOODSIDES.

(Filed October 9, 1894—Not to be reported.)

1. Misapplication of funds by master commissioner—Subrogation of creditor to rights of sureties—Where a master commissioner mortgages his property to his sureties to indemnify them against loss, an owner whose funds have been appropriated by the commissioner may be subrogated to the rights of the sureties; and all subsequent conveyances of the property are made subject to these rights.
2. Same—Trust fund—It being manifest that the land in controversy was put in lien for the purpose of paying the money collected by the commissioner, the numerous provisions respecting the mortgage in the subsequent conveyances of the land create a trust fund in lieu of the mortgaged property itself for the purpose of extinguishing the debt.
3. Same—As the indemnity was out of the estate of the debtor, it operates as a security to the creditor for the payment of the debt, and it was not necessary for the creditor to be a party to the mortgage in order to become a beneficiary thereof.
4. Same—As the misappropriation of the fund and the failure to pay occurred during the last term of the commissioner, his sureties for that term are liable, although the money was collected by the commissioner prior to the execution of the bond by the sureties.

Blue & Blue for appellant.

Nunn & Cruce and C. S. Nunn for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Hazelrigg.

A controversy between J. K. and P. H. Woodsides over the ownership of a note for $1,000, secured by a lien on real estate, was pending in the Crittenden Circuit Court for many years, beginning in 1873. Pending this litigation the court ordered its master comimssioner to sell the real estate and collect the purchase money bonds when due. Accordingly, in May, 1876, the property was sold and the commissioner afterwards collected of the purchase money the sum of $670, the last sum paid him being $250, in April, 1879.

In June of that year, the same commissioner was re-appointed and executed bond. He then had in his hands the sum named above and was ready and able to pay it out as the court might direct. No order, however, was ever made in the case directing him to pay it into court or otherwise until in July, 1887, when Walker, then commissioner of the court, was directed to ascertain in whose hands the proceeds of the sale were. The sum reported to be in the former commissioner's hands in June, 1889, was $966.30, and this sum, in June, 1891, was adjudged to J. K. Woodsides, the present appellee. It appears that in June, 1879, when the commissioner gave bond as such officer, he executed to his sureties, Blue, Boaz and others, a mortgage on certain of his real and personal estate for the purpose of holding them harmless and to indemnify them against loss. The fact that the commissioner had in his hands this Woodsides money was well known to the sureties, and it is manifest from the proof that the property of the commissioner was thus put in mortgage for the express purpose of providing for its payment if the commissioner should not be able to pay it in some way. The evidence of the commissioner and the sureties, showing such to have been the intention of all the parties to the transaction, is uncontradicted.

In June, 1879, R. A. Dowell, the present appellant, obtained a personal judgment for $150 against the commissioner, upon which he procured an execution to issue and which was levied on a tract of land belonging to the commissioner. This land was embraced in the mortgage to the sureties. Dowell bought the land under his execution for something less than his debt, though it was worth much more. The levy of the execution and sale of the property, however, was made subject to the mortgage theretofore made to the sureties. Afterwards Dowell conveyed to his son, and the son in 1885 conveyed to Rochester & Walker, for the sum of $700, but in that deed it is said, that as Blue and others hold a lien on the land, the purchase price is not to be paid until this lien or pretended lien shall be released in some way satisfactory to the parties. Rochester & Walker then sold to Hurst, but before consenting to the sale, Blue and his co-sureties required that $800 of the purchase price should be held back by reason of their mortgage. Hurst then sold a portion of the tract to Ainsworth.

This suit was instituted in June, 1891, by the appellee, J. K. Woodsides, seeking to be subrogated to the rights of Blue and the other sureties of the commissioner in their mortgage and contracts with respect to the purchase money of the land. The appellant, Dowell, contends that the land belongs to Hurst and Ainsworth and is free from the mortgage of June, 1879; that the sureties have paid nothing, and the indemnity to them being a personal one, the doctrine of subrogation does not apply. The court sustained the contention of Woodsides, save that Dowell was given a lien for his purchase money under the execution. From this judgment Dowell appeals. As stated heretofore, it is manifest that the land in controversy was put in lien for the express purpose of paying this Woodsides debt. It is impossible to construe the numerous provisions respecting the mortgage in the subsequent conveyances of the land otherwise than as creating a trust fund in lieu of the mortgaged property itself for the purpose of extinguishing this debt whenever its ownership should be determined in the courts. Dowell had actual notice of the intent with which the mortgage was given and of the litigation between the Woodsides as to the ownership of the money then in the hands of the commissioner. He bought subject to the mortgage and when he sold he recognized the right of his vendees to hold back the purchase price until the lien was satisfied.

In Taylor v. Farmers Bank of Kentucky, 87 Ky., 398, the rule is thus stated: "The rule is well settled that where a security is given by a principal to his surety, it operates eo instanti as a security to the creditor for the payment of his debt," but "a different state of case is presented," said the court in the same case, "where the contract of indemnity is by a stranger to the debt, and for the personal benefit of the surety merely in opposition to the idea of a trust for the payment of the debt. In such case the indemnity is not out of the estate of the principal."

To the same effect is the case of Macklin, &c. v. Northern Bank of Ky., 83 Ky., 314. In the case under consideration the indemnity was out of the estate of the debtor, and the sureties have cautiously kept alive their right to apply the indemnity to the payment of the debt of the principal. They have not sought to so apply it, because no effort has been made to coerce the debt out of them. It was not necessary. The creditor had the indemnity to which he could more justly look. Nor was it necessary, as contended, that Woodsides should be a party to the mortgage in

order to become a beneficiary thereof. The doctrine of subrogation is said to be the creature not of contract but of natural equity.

It is contended that the sureties were not liable for the Woodsides money because it was collected by the commissioner prior to the execution of the bond of June, 1879. But there was no misappropriation of the fund and no failure to pay it over until after that. Just when and how the conversion of the money was made is explained by the testimony, and this occurred during the last term of the commissioner.

The plea of res adjudicata is also made by Dowell. It appears that toward the close of the Woodsides litigation J. K. Woodsides had a judgment entered in the old suit directing Rochester & Walker to pay over to him the money in their hands, and that, too, when they had never been made parties to that suit. Dowell enjoined enforcement of the judgment, and, on appeal by Woodsides to the Superior Court, the injunction was perpetuated on the sole ground that Rochester & Walker were not parties to the suit when the judgment was rendered. On a return of the case Dowell was given judgment for this money, but under an order that it was in nowise to prejudice Woodsides in his proceeding to collect the money of the commissioner or of Dowell.

It seems to us the judgment is right, and is, therefore, affirmed.

STANDARD OIL CO. v. TIERNEY.

(Filed October 13, 1894.)

1. Excessive damages—This being a case in which the jury is authorized to award the injured party compensation for the pain and suffering caused by the neglect of the defendant, his loss of time and for any permanent injury which lessens his capacity to make a living, and the verdict being, through sympathy for plaintiff and prejudice against defendant, in excess of the sums usually allowed in this State even as punitive damages in cases of willful neglect, it is the duty of this court to grant a new trial.

2. Competency of evidence—It was competent for the plaintiff to show, by those familiar with such matters, that one with ordinary prudence and care for his own safety had no reason to apprehend any danger from entering with a lighted lamp a car loaded with oil, ordinarily used for illuminating purposes, and for the defendant to show the danger, if any, attendant upon it.

3. Instructions—In instructing the jury as to the degree of care required of the defendant in shipping naptha, instead of the words "to notify all persons connected with its transportation," the instruction should have read that a mark or label on the barrel should have notified the plaintiff of its dangerous character.

Humphrey & Davie for appellant.

Wilson & Thum for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

This case is here for the second time, and the opinion reversing the judgment of the lower court is found reported in 92 Ky., 367.

The main ground of reversal was on account of the damages being excessive, and this court, without attempting to establish any fixed rule as to the amount of damages to be recovered for

compensation in this character of case, and had no power to do so, said in plain and unmistakable terms that a verdict for $25,000 would not be sustained, and, in discussing this branch of the case, made it equally as plain that a verdict of $20,000 would not be upheld. In cases of willful neglcet, where punitive damages are allowed for the loss of life caused by the highest degree of negligence, the verdicts in this State are for a much less sum in damages than the verdict in this case.

While corporations are the mere creatures of the law, the right to use and enjoy property in a corporate name is as sacred as that held in the name of the individual owner. This court can not sanction spoilation, although it comes in the form of a judicial mandate, and the ability to pay in a case involving the question of compensation only will not be considered in determining whether or not the damages are excessive. It is not claimed there was any intention on the part of the appellant to injure the appellee, and the wrong consists in doing that which has caused a serious injury to the person of the appellee, when it could have been avoided by the exercise of ordinary prudence and care on the part of the appellant. It is a case where the jury, by way of compensation, is authorized to award the appellee damages for the pain and suffering caused by the neglect, his loss of time, and any permanent injury that lessened his capacity to make a living.

This is not a case for inflicting punishment on the defendant, and where the verdict is evidently the result of sympathy for the injured man, and from its amount evincing prejudice against the corporation, it becomes the duty of this court, as it was that of the court below, to grant a new trial.

During the progress of the trial a question arose on the plea of contributory neglect, relied on by the defense. The question as to the danger of going into a car loaded with oil used ordinarily for illuminating purposes with a lighted lamp was made, and we think it was competent for the plaintiff to show by those familiar with that substance that one of ordinary prudence and care for his safety had no reason to apprehend danger, and by the defendant to show the damage, if any, attending it. We perceive no error in the instructions.

It would have been more proper, when fixing the degree of care required of the defendant in shipping naptha as in instruction No. 1, that a mark or label on the barrel should have been such as to have notified the plaintiff of its dangerous character, instead of the words "to notify all persons connected with its transportation," etc. While some of the instructions refused are perhaps unobjectionable, those given embrace, in a condensed form, the law of the case.

Reversed and remanded for a new trial.

STANLEY, &c. v. JONES.

(Filed October 27, 1894—Not to be reported.)

1. Title to land—Recovery of possession—In this action in equity to perfect the title to and recover the possession of land that had been allotted to plaintiff in an action for partition brought against the present defendants, the plaintiff is entitled to have her title perfected as against the defendants, as the evidence failed to show such an adverse holding by the defendants as would divest plaintiff of title, and as in the petition of the plaintiff there is the assertion of an equitable right as against defendants by

reason of the confirmation by the court of the commissioner's report of division and the omission to make her a deed.

2. The fact that this case was heard on the wrong docket affords no reason for denying to plaintiff the relief sought.

H. M. Stanley and Montgomery Merritt for appellants.

Philip B. Cheaney and John F. Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Quigley.

This action, although placed on the ordinary docket and tried as an action at law, was in fact an action in equity to perfect the title and recover the possession of land that had been allotted to the plaintiff in an action for partition brought against the present defendants and their privies in estate, who were entitled by descent, in conjunction with plaintiff, to the land now in controversy.

The action in which the partition was made was that of Jones v. Barret, &c., decided in the Henderson Circuit Court more than twenty years ago. In that action the commissioner's report of division was confirmed but no deed made, and the case was filed away many years since.

At the time of the partition allotting to the plaintiff a part of this land it was uncultivated and in a wild state, but after the partition the defendants, who were parties to the action as aforesaid. took possession of and are now claiming title to the land by adverse possession. This they can not do unless there has been such an adverse possession on their part as would divest the plaintiff of title, and such an adverse holding is not established by the evidence, as the court below adjudged, and in which opinion we concur.

The old case of Jones v. Barret, &c., settled the question of title and vested the plaintiff with an equitable right that the chancellor can enforce. The facts of partition and allotment of the land to the plaintiff, and confirmation of the commissioner's report, and that defendants were parties to the suit, are alleged in the present action. There was no motion to transfer this case to equity, and if there had been the facts entitled the plaintiff to relief.

If the plaintiff had brought her suit at law on a title bond, and claimed that she was entitled to a deed, the fact that the action was not on the equity docket would not have prevented the relief sought. While in an action of ejectment the legal title must be in the plaintiff, there is in this case, in the petition of the plaintiff, the assertion of an equitable right as against co-tenants by reason of the confirmation of the report of division, and the omission to make her a deed.

The old action having been filed away, and the fact that this case was heard on the wrong docket, affords no reason for denying to plaintiff the relief sought. The relief the plaintiff is entiltled to is to have her title perfected as against appellants, and that has been done by the judgment of the lower court.

Wherefore, the judgment is affirmed.

BROADDUS' EX'ORS v. BROADDUS.

(Filed October 30, 1894—Not to be reported.)

Gift by wife to husband—In this action by executors against the surviving husband of their testatrix to recover certain promissory notes in the possession of defendant which they allege constitute a part of the estate of the testatrix, the evidence is sufficient to sustain the defense of the husband that the notes were given to him by his wife, who, by an antenuptial contract, had reserved the power to control her estate, and who was also empowered by decree of court to trade in her own name.

A. R. Burnam and J. W. Caperton for appellants.

Smith & Moberly for appellee.

Appeal from Madison Circuit Court.

Opinon of the court by Judge Pryor.

The appellants, as the executors of the will of Nancy Broaddus, instituted this action below against the appellee (Broaddus) to recover certain promissory notes amounting to near $9,000, alleging a right of property in the executors, the custody of the notes by the appellee and his refusal to surrender the possession. The action was filed on the equity docket, and the case determined by the judgment of the chancellor in favor of the appellee.

The testatrix, Nancy Broaddus, was the first wife of Alexander Tribble, who died childless in the county of Madison in the year 1888. He left a last will by which he disposed of a large and valuable estate, giving one-half to his collateral kindred, with some special bequests, and the other half to his widow, vesting in her the absolute fee.

The widow not long after the death of her husband intermarried with the present appellee, H. C. Broaddus. At the time of this marriage she entered in to a marriage contract with her intended husband, by which she secured all of her estate against any claim of his by reason of the marriage and retained in express terms the power to control and manage all of her estate, with the power to dispose of it by gift, deed or will.

The testatrix, at the time of her second marriage, was past the age of seventy, and the appellee her junior by several years and without any estate.

From the testimony in the case she was doubtless a woman of much business capacity, as her life seems to have been devoted to the accumulation of property, and with the purpose of holding on to what she acquired.

Shortly after her marriage with the appellee she applied to a court of equity, asking to be empowered with the right to act as a feme sole, and evidently had but little confidence in the capacity of her husband to manage any part of her estate. She expressed often to her kindred the purpose to make them her sole devisees, and had a will prepared and executed to that effect, but subsequently annexed a codicil, by which she gave a house and lot to her husband that is not involved in this litigation.

The appellee claims that shortly prior to her death she gave him the notes in controversy, and the large note, exceeding $7,000, known as the Fair note, she assigned to him by writing her name on the back, the endorsement being filled up by him either shortly before or after his wife's death. As to the other notes he

states she gave them to him, directing him to take them from her bureau drawer into his custody; that he did so in the presence of others, and at her request.

Under the marriage agreement and the judgment making the wife a feme sole, the presumption necessarily arises that all the notes in the wifes' name, as well as other property purchased with her own means and on the premises, belonged to the wife, and the burden is on the appellee of showing a gift by his wife to him of these notes.

It appears from the deposition of Col. Estill, who was an intimate acquaintance of the testatrix, that some eight or ten months after her marriage with the appellee he called at her residence at her request, and she suggested to him that some persons thought she ought not to have married the appellee, and whatever others might say she intended to give to her husband what she thought proper, and fixed the sum at $20,000, to be made up of the house and lot she then occupied, and the balance in money.

She gave to him the house and lot by a codicil to her will, and whether or not she gave him the notes is the issue the chancellor has determined. The note known as the large note, or the Fair note, had upon it the blank endorsement of the wife. Her handwriting is not disputed, and Miss Nichols was in the room of the testatrix, when she saw the husband leaving her bed with something in his hand. There was a bottle of ink in testatrix's lap, and, when discovering it, she asked the testatrix what she had been doing, and her reply was, "she had just given the Fair note to Mr. Broaddus;" and a short time before she died heard testatrix say she had given more notes to her husband, but she did not know who the notes were on, nor did the witness see them. Other witnesses speak of statements made by the wife to the effect she had given the Irvin note (which was the Fair note) to her husband.

We are satisfied from the evidence that this gift was made, and equally so as to the remaining notes in controversy. The testimony as to those notes, while not certainly identifying them, conduces to show the same character of gift as the Fair note. One of the obligors in one of the notes, when wanting indulgence, was told that it was the husband's note, and the repeated declaration of the wife that she had given to the husband all her notes, and her manifest intention to clearly establish by the testimony of Col. Estill and an attorney of the city with whom she consulted, when added to the direct and positive testimony as to the gift, leaves but little doubt as to the correctness of the judgment below.

There is no conflicting testimony on the issue except such as arises from the natural inclination on the part of the wife to make all she could, and give nothing, and her frequent declarations that her estate was for her kindred. It does appear that no property was listed by her husband, and that when the interest was collected by him it was deposited to the credit of his wife, and it is apparent from the record that neither the husband nor the wife desired her kindred to know of these gifts to the husband, and while concealment may conduce to establish fraud, when done to prevent family disturbances and in a rational and, it may be said, a natural disposition of the property, there is no reason to imply fraud or to disregard a gift made doubtless from motives of real affection.

The husband was in an impecunious condition. He had no means, and liking, if not loving, him well enough to make him her husband, it was natural, when she knew her days were numbered, in making a disposition of her large estate, to realize her

husband's condition, and provide for his wants by gifts of property that were neither unreasonable nor more doubtless than, in her opinion, would compensate him and gratify her for his kindness, attention and affection shown her during their married life. The character and mental condition of the wife at the time these gifts were made forbid the conclusion that the husband's will dominated that of the wife; but, on the contrary, the superior intellect of the wife and her strong will could not, from the proof in this case, be said to be subordinated by any influences surrounding her. She had these gifts in contemplation long before they were made, and made inquiry of her attorney in the city in which she lived as to whether title could pass to notes by mere delivery.

The husband was not present when these interviews were held with Estill and Smith, and from their depositions the deliberative purpose on the part of the wife to make these gifts to the husband clearly appears, and that in execution of this purpose there was an actual delivery of the notes, and the intended gift made perfect. Conceding the testimony of the husband incompetent to show title in himself as against the executors, and still the decided weight of the testimony sustains the claim of the appellee.

This is really an action at law to recover the notes in the possession of the appellee, and the verdict of a jury for the appellee on the issue would have been sustained, and if regarded in equity the judgment of the chancellor is proper.

Judgment affirmed.

Judge Hazelrigg not sitting.

MURRAY v. MURRAY.

(Filed November 1, 1894—Not to be reported.)

1. Advancements to children in fraud of wife's rights—Equities between children—In an action by a widow against the children of her deceased husband by another wife to set aside conveyances by the husband to two of his sons, on the ground that they were in fraud of her marital rights, the court held that the conveyances were unreasonable, and increased the amount of her distributable portion of the estate over that previously allowed her. The extra allowance thus made to the widow reduced the funds in the hands of the executors so that they were able to pay to a third son only a portion of a legacy of $4,000 which the testator had by his will directed his other two sons as executors to set apart and pay over to him out of "stocks, bonds, cash, notes or money on hand." The appellant, the third son, now seeks by supplemental proceedings in the action by the widow to recover of appellee, the survivor of the two executors, his legacy of $4,000, and one-half of his deceased brother's share in the estate coming to him by reason of the brother's death without widow or issue. Held—That it was the intention of the testator that appellant should have his legacy in any event, and he should not bear any part of the burden of the extra allowance to the widow or of the costs of her suit, but the whole of that burden should be borne by the property advanced to the other two sons which, by the judgment of the chancellor, was in effect brought back into the estate, the only advancement made by the testator to appellant being manifestly not an unreasonable one. The same equitable principle applies to the half of the deceased brother's share coming to the appellant.

2. The claim asserted by appellant to the estate held by his father at the time of his death, and also to that advanced to his brothers, upon the ground that it was held by his father in trust for him under his mother's will, is

not sustained by the evidence, and, besides, is barred by limitation, as is also his claim against the estate growing out of a partnership between him and his father.

John L. Scott & Son and Thos. B. Ford for appellant.

Wm. Lindsay and John B. Lindsay for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

H. H. Murray died testate in 1886, leaving a widow, Jane C., and three children, to wit: The appellant, Wm. H., the appellee, Jas. A., and John W., since deceased. Wm. H. was his only surviving son, by his first wife, Louisa Iseminger, and Jas. A. and John W. were sons by his second wife, Margaret Whitehead. Jane C. was his third wife, and upon the death of her husband renounced the provisions of his will and instituted an action against the executors and the children in the Franklin Circuit Court for the settlement of the estate, and claiming that her husband, after his contract to marry her, and after the consummation of the marriage, had conveyed and assigned to his two sons, Jas. A. and John W., property of the value of many thousand dollars in fraud of her marital rights, and for the purpose of lessening her interest in his estate if she survived him.

The sons, and no one of them more so than the appellant, stoutly resisted any recovery by the widow, and maintained that the conveyance and gifts of the father were made in good faith and largely in consummation of promises by him to his former wife, Margaret, to convey what he had received by her to her children. The case went to the commissioner for settlement of the estate, and it appeared that after the payment of all claims there remained in the hands of the executors for distribution the sum of some $12,000, to one-third of which the widow was adjudged to be entitled. The transfers and conveyances were not disturbed.

On appeal to this court it was held that, as the amount of the estate given the children within a short time after the marriage was from $30,000 to $40,000, it was difficult to escape the conclusion that there was a purpose on the part of the husband to lessen the wife's interest in his estate in the event she survived him, and it was determined, after allowing for reasonable advancements to the children, that the widow ought to have $10,000 as her distributable portion of the estate.

The son, Wm. H., had been given only $4,000, and the balance of the advancement (some $30,000) had been made to the sons Jas. A. and John W. Pending that appeal John W. died, leaving his estate to his brother, Jas. A., save $50 each to his half-brother, Wm. H., and his stepmother, Jane C.

Upon a return of the case, and after notice of the filing of the opinion and mandate of this court, Jas. A., as executor and in his own right, in June, 1890, filed his amended and supplemental answer, setting up that upon the revival of the case by this court he had paid the widow the sum adjudged her, including certain costs and fees, and presented his final settlement for the approval of the court. By that settlement there was a balance in his hands of some $1,900, and he asked that of the attorney's fees incurred in defense of the widow's suit, viz., $1,500, Wm. H. should be charged $500, leaving some $1,400. This he asked to

be adjudged to Wm. H. in full of the legacy of $4,000 made to him in his father's will. The court adjudged accordingly, and thereupon filed the cause away.

Of this proceeding Wm. H. appears to have had no notice, though he did have notice that judgment would be asked in accordance with the opinion and mandate of this court.

In November following Wm. H. gave notice to Jas. A. that at the approaching February term of the court, he would move to redocket the case, and to set aside the order of June, 1890. In January following he filed his petition in equity against Jas. A., setting up claim to the whole estate owned by his father at the time of his death in 1886, and in the main all that which he had given in his lifetime to the other sons. He also set up a large claim against the estate, growing out of a partnership between his father, one Zeigler and himself in the lumber business in the years 1869-70-71-72 and up to February, 1873. In February, in accordance with his notice to that effect, he made his motion, and the proceedings on it and on the matters growing out of the petition were heard together. After an extended and tedious preparation, and the accumulation of many hundreds of pages of record, the chancellor overruled the one, dismissed the other and Wm. H. has appealed to this court.

Regarding the motion and the petition as in the nature of an application for a new trial upon grounds discovered after the term at which the judgment complained of was rendered, and, therefore, as not coming too late for consideration, we think the application ought to have prevailed.

The allegations of the supplemental answer of the appellee, filed only a day or two before the judgment, directly and vitally affected the interests of the appellant. In fact the judgment, based on this pleading and the settlement of the executor set up by it, took nearly the whole of his legacy under his father's will to pay the widow, and that, too, when the additional allowance to her by the appellate court over that made her by the circuit court was wholly by reason of gifts and advances made by the father to the sons, Jas. A. and John W.

Manifestly the sum advanced to the appellant shortly after the father's marriage was not regarded as an unreasonable advancement or as forming any part of the husband's estate held to have been fraudulently given away to lessen the wife's distributable share. As the judgment of the chancellor stood before the appeal of the widow, Wm. H.'s legacy of $4,000 was intact, as well as his own half of John W.s' share, or one-half of $2,500 remaining to the latter under the will of his father; but by reason of the gifts to Jas. A. and John W. the appellate court increased her allowance by some $6,000, leaving open for future settlement, however, in express terms, any equities existing between the other parties to the appeal.

It was easily seen by the court that the extra allowance to the widow would substantially consume the estate left in the executor's hands and leave unpaid the special legacy to Wm. H., hence these equities were left for the adjustment of the chancellor.

By his will H. H. Murray first provided that after payment of his debts his executors, Jas. A. and John W., from his stocks, bonds, cash, notes or money on hand, should set apart and pay over to his son, Wm. H., $4,000. Then all the balance of his estate he gave to Jas. A. and John W., to be divided equally between them; but at the first death among the three sons, without widow or issue, his portion was to go to the survivors, etc.

It is clear that the father intended this sum for his son, Wm.

H., in any event, and while he did not anticipate the assertion of this demand of his widow or provide against it, we think it inequitable and unjust and contrary to the intent of the testator that this legacy to him should be destroyed or reduced by reason of his generosity to the other two sons. They were the sole beneficiaries of the transactions, giving rise to the increased allowance to the widow, and the property brought back into the estate, so to speak, by this court for the purpose of making an additional allowance to the widow, should bear the additional burden.

This same equitable principle applies also to the moiety of the estate coming to Wm. H. by reason of John W.'s death without widow or issue.

The large estate conveyed by the father to John W. just after the marriage, and taken into the account by this court in adjusting the wife's portion, together with that given Jas. A. under like circumstances, should bear the entire loss to the estate growing out of the additional allowance to the widow, as well as the fees and costs of his suit. Estimated according to this plan the appellant is entitled to the sum of $4,000, the amount of the legacy, and the further sum of $1,375, the amount of his half of the residuary estate coming to John W., interest to be allowed from about July 1, 1890.

The chief contention of the appellant, however, and that to which the preparation of the case has been mainly directed, is the matter set up in his petition. He contends that his mother, Louisa, owned the Glen Willis and the I. Davis property; that with her means the eleven U. S. bonds were purchased; that his father was of unsound mind when he made the conveyances to Jas. A. and John W. in 1882 and 1883, and when he made the transfers to them of the railroad bonds, bank stock, etc., or was induced to do so by undue influence; that his father was indebted to him in the sum of some $5,000 or $6,000, growing out of the partnership of Murray, Zeigler & Co., and that the property indicated was held in trust by his father under the will of appellant's mother, made in 1855.

We think the testimony fails to show that his mother ever owned the Glen Willis place or that her means paid for it. It was bought of W. D. Reed, and the first payment was made by H. H. Murray, in stone and brick work. He afterwards paid his notes for the remaining purchase money. The mother of the appellant made no mention of any claim or interest in that place in her will, although she sets out specifically the property she owned at the time, even her furniture. The Davis place was obtained long after her death. There is no evidence whatever that the U. S. bonds were bought with the means of the mother of the appellant. The proof is conclusive that these bonds were bought by his father, and in his lifetime given to John W., nor can there be the slightest doubt of the soundness of his father's mind and his freedom from any undue influence at the time of the various gifts and conveyances to his sons.

The claim growing out of the partnership is not established by any competent proof, and is long since barred by the lapse of time, as indeed are the claims arising out of the alleged trust under his mother's will. Moreover, the allegations of the petition, in all those matters pertaining to the alleged trust, are inconsistent with the statements of the appellant's answer in the suit of the widow against him and his brothers. He there swore that the larger part of the estate alleged by Jane Murray to have been the property of H. H. Murray was the property of the mother of Jas. A. and John W., and bought with her means, and its conveyance to them was in accordance with his father's

promise to her, and that the transfers of the stocks, bonds, etc., were made in good faith and in fraud of no one.

There were in fact no issues, however, between the brothers in that suit, and we may concede the sincerity of the appellant in asserting these claims thereafter. This is shown in his refusal to accept the various sums tendered him in accordance with the first judgment of the chancellor, but his cause of action in all of them arose at least as early as 1867, when he reached his majority, and upon any day of the nineteen years, during which his father lived thereafter, he might have asserted his demands. If by his silence he has sacrified his pecuniary interests and subordinated his love of gain to his filial devotion, he has at least lost from no unworthy motive.

Judgment reversed for proceedings in accordance with this opinion, but the costs of this appeal, having accrued on the claims of the plainitff in the petition, are to be paid by the appellant.

SAPP v. COMMONWEALTH.

(Filed November 15, 1894—Not to be reported.)

Instructions—Shooting at without wounding in sudden heat and passion—At the appellant's trial, under an indictment for malicious shooting at without wounding, with intent to kill, there was much evidence to show that the shooting was done in sudden heat and passion, without malice; therefore, the accused was entitled to an instruction telling the jury that the shooting, if done without malice in sudden heat and passion, was a misdemeanor and not a felony. The error in failing to give such an instruction was not cured by an instruction that the offense was a misdemeanor if done "in a sudden affray."

W. E. & S. A. Russell and Leo Russell for appellant.

Wm. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

This is an indictment for malicious shooting at without wounding with the intent to kill.

It was no doubt the outrageous conduct of the appellant in his attempt to induce the young lady to marry against the consent of her relatives that induced the jury to send him to the State prison. He was armed with a shotgun and full of whisky; had made up his mind to exercise parental control over the girl and marry her to his friend, regardless of the wishes or advice of those who were really interested in her welfare.

It seems from the proof that he had abandoned the purpose of taking the girl, and was leaving the house of Smothers, when he was shot at by the latter, and the accused, turning his face towards Smothers, returned the fire, and this ended the trouble between them.

It does appear that the gun of the accused, or one of its barrels, went off accidentally when not pointed in the direction

of Smothers or his house, and the latter may have supposed he was firing at him, but every witness for the State, speaking on this point, say that the gun was pointed in an opposite direction when it fired, and the accused was then sixty or seventy yards from the house, or at least was going in an opposite direction from Smothers.

There was no previous malice existing between the two men, and if any did exist, it must be implied from the acts and conduct of the accused when at or near Smothers' premises. If there was no malice, but a shooting in sudden heat and passion, the offense is not a felony, but a fine and imprisonment in the county jail, or either, as the jury may see proper.

The jury was told that if the shooting was done in a sudden affray it was not a felony, but failed to say that if done in sudden heat and passion, and without malice, it was yet an offense less than a felony, and in failing to do so the entire law of the case was not presented by the instructions.

The statute is: "If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice," etc.

It results, therefore, that the court erred in not telling the jury "if the shooting was in sudden heat and passion, without previous malice, it was a misdemeanor and not a felony." Whether the shooting was or not in self-defense is for the jury, and it is needless to pass on that question.

The judgment is reversed, and remanded for a new trial and proceedings consistent with this opinion.

WRIGHT, &c. v. WOODS' ADM'R, &c.

(Filed September 2, 1894.)

Death through willful neglect—Distribution of recovery—In this case the administrator brought an action for judgment of court as to proper distribution of money recovered as damages for the death of his intestate, caused by the willful neglect of the servants of a railroad company. The widow was adjudged entitled, and the two heirs at law, the brother and sister of the deceased, appealed from that judgment on the grounds that for the determination of the controversy we must look alone to section 241 of the present Constitution, adopted prior to the decedent's death, which provides that in cases where damages are recovered for the death of a person caused by the willful neglect of another or others, the general assembly may provide how the recovery shall go and to whom belong, and until such provision is made the same shall form a part of the personal estate of the deceased. Held—That section 3, chapter 57, General Statutes, which provides that the widow and children alone are entitled to money recovered for the destruction of the life of a person through willful neglect, and under which the action for damaegs was brought, is not meant to be repealed by section 241 of the Constitution, as it is manifest that the said section was not intended to supersede or affect existing statutes that had already provided how damages recovered in particular cases should go and to whom belong, but to operate only in such other cases and for the benefit of such other persons as the general assembly had hitherto failed or refused to provide for. The widow is, therefore, entitled to the whole of the recovery.

Chapeze Wathen and J. A. Dean for appellants.

John D. Atchison and Powers & Atchison for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

John Feland, administrator, having received the sum of $3,500 on compromise of an action instituted by him in 1892, to recover damages for destruction of the life of his intestate, John Woods, a short time previously, through the willful neglect of servants of the Owensboro & Nashville R. R. Co., brought this action for judgment of court as to proper distribution of the fund, Mary Woods, widow, and Milton Woods and Betty Wright, brother and sister of deceased, who left no child, being defendants and claimants.

By the judgment appealed from by the two heirs at law the widow was found entitled, and the administrator directed to pay her the entire fund, after deducting amount of certain fees and costs.

John Feland alleges in his petition of this action, without denial, that he, as administrator, instituted said action against the Owensboro & Nashville R. R. Co., under and for the specific cause provided in section 3, chapter 57, General Statutes; and if that section, as heretofore construed by this court, is to govern, judgment of the lower court must be affirmed. It is as follows:

"If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of life aforesaid."

But it is contended by appellants that for determination of the controversy we must look alone to section 241 of the present Constitution, adopted prior to the death of John Woods, and is as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the corporation and persons so causing the same. Until otherwise provided by law the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person."

If that section operated to presently and absolutely repeal section 3, chapter 57, General Statutes, there did not exist during the period from adoption of the Constitution to enactment of necessary and contemplated legislation on the subject, any statutory provision whatever in regard to destruction of life of a person through willful neglect; and, as a consequence, the fund in question forms, in virtue of section 241, part of the personal estate of decedent, John Woods, and his widow is entitled according to the statute of distribution existing at the time to only half of it, after the payment of debts, the residue going to his brother and sister as heirs at law.

The decisive question then is whether such repeal was intended. Section 1 of the schedule is as follows: "That all laws of this Commonwealth in force at the time of the adoption of this Constitution, not inconsistent therewith, shall remain in full force until altered or repealed by the general assembly. * * * The provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions as require legislation to enforce them shall remain in force until such legislation is had, but not longer than six year after the adoption of this Constitution unless sooner amended or repealed by the general assembly."

There being no express declaration of intention by those who frame the Constitution to thereby repeal section 3, chapter 57, General Statutes, section 241 can not, according to a well-settled rule of construction, be regarded as having so operated unless there is absolute inconsistency beween the two. (Peyton v. Mosley, 3 Mo., 80; City of Henderson v. Lambert, 8 Bush, 607; Courtney v. Louisville, 12 Bush, 419.)

And though they may be seemingly incompatible or contradictory, still if they can be both enforced, the latter will not be held to repeal the former unless there is reason to conclude it was not intended. (E. & P. R. R. Co. v. Trustees of Elizabethtown, 12 Bush, 233.)

On the contrary, if section 241 can be fairly interpreted as merely giving cumulative or additional power, right or remedy, it is not, in meaning of the Constitution, inconsistent with section 3, chapter 57, General Statutes, and both may be upheld. (Gorham v. Luckett, 6 B. M., 146.)

The only part of the former section, even seemingly inconsistent with the latter, is the following: "The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person." But when the real purpose for which that section was engrafted in the Constitution is considered, it becomes manifest the clauses thereof just quoted were not intended to supersede or affect existing statutes that had already provided how damages recovered in particular cases should go and to whom belong; but to operate only in such other cases, and for benefit of such other persons as the general assembly had hitherto failed or refused to provide for.

For many years before the adoption of the present Constitution it had been the settled and approved policy of the Commonwealth to give to the widow and children, exclusively and solely, money recovered for destruction of the life of a person through negligence or wrongful act of another.

In 1851 was enacted a statute giving to the widow and minor child of a person killed in a duel exclusive right of action against the surviving principal, seconds and others aiding or promoting it. In 1860 exclusive right of action was given to the widow and minor child of a person killed by careless or wanton or malicious use of firearms or other deadly weapon; and section 3, chapter 57, as it now reads, was in 1873 made part of the general Statutes, by which, as construed by this court, the widow and children only were entitled to money recovered for destruction of the life of a person through willful neglect. And it was, moreover, decided that no others were under that section entitled to recover or receive any damages, even when there was left no widow or child of the person killed.

The former Constitution contained no provision in terms authorizing such statutory enactments, nor was it necessary there should have been in order to make the three statutes referred to valid; but the general assembly refused to enlarge the scope of either, and it is, therefore, plain that the only object of section 241 was to authorize recovery of damages for destruction of human life in cases and for benefit of classes of persons, where the general assembly, even if possessing the constitutional power, had not nor probably would make statutory provision; and with the single purpose of meeting the emergeny thus treated by section 241 the clauses in question, legislative in character and of merely temporary effect, were made parts of the Constitution.

To hold they were intended to repeal or affect section 3, chapter 57, or in fact either of the three statutes mentioned, is to as-

sume a wanton purpose on the part of the framers of the Constitution to take from the widow one-half she would be otherwise entitled to in such cases, and all from the infant and helpless children in case there were creditors of the estate of the husband and father whose life was destroyed.

The fact that section 241 conferred full authority and discretion upon the general assembly to continue in force the three statutes mentioned, or enact others giving the same power, if not exclusive right, and, as a consequence, the clauses quoted might and probably would become obsolete immediatley after such legislation by the next general assembly, shows conclusively they were not intended to have either permanent or temporary effect of so radically changing a policy long settled and according with the reason and purpose of laws of that character; and that the first general assembly after adoption of the Constitution, composed of many persons who were members of the Convention that framed that instrument, did by section 6 of chapter 1, Kentucky Statutes, give the same preference to widow and children of a person killed by willful negligence of another that already existed under section 3, chapter 57, General Statutes, is at least persuasive section 241 was not intended to deprive them of it in any case for any period of time.

In our opinion the judgment appealed from is correct and, therefore, affirmed.

WILSON, RECEIVER v. LINVILLE, &c.

(Filed September 2, 1894.)

1. Signing of surety's name by principal—Liability of surety—Where the sheriff in the presence and at the instance of a surety on the county levy bond signed the name of the surety to the said bond, the surety can not be held liable on the bond, as the authority to sign his name was not given in writing. The fact that the principal signed the name of the surety in his presence does not render it any less the act of an agent.

2. Same—Liability of cosureties—One surety having been released by reason of the fact that his name was signed without written direction, the cosureties are also released, as the contract entered into by each in the case was that he should be bound as cosurety along with the others signing the bond. The fact that the cosureties were present when the principal signed the name of the surety does not alter the case, as they had a right to presume that whatever authority the law required the principal to have in order to bind the surety had been procured.

Whitaker & Robertson, Ross & Owens, J. J. Osborne and Hanson Kennedy for appellant.

Cochran & Son and Winfield Buckler for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hazelrigg.

The county levy bond of Geo. L. Linville, sheriff of Robertson county, for the year 1890 was executed in the county court on December 16, 1889, in the following manner: Geo. L., the principal, signed his own name, and also at his instance and in his presence the name of Peter Linville as surety. Neal Ballingal, another surety, signed his own name. The name of Thomas G. Linville, the last of the sureties, was subscribed to the bond by

the clerk, Jett, at the instance and repuest of Thomas G, who then made his mark following the middle letter "G." of his name. Following all the signatures, and to the left, the clerk wrote the words: "Attest: M. B. Jett, Clerk Robertson County Court."

At the time of this transaction an order was made in court approving and accepting the bond, but this order was not signed by the county judge until some three years later, when, in pursuance of a nunc pro tunc order to that effect, it was signed by the same person who was on the bench when the order of acceptance and approval was made, but who was then holding a different term of the office of county judge.

The admitted and undischarged liability of the sheriff on the bond in question is some $3,600, and to prevent recovery against them in this action by the appellant, Wilson, receiver, etc., the sureties make various defenses:

1st. Peter Linville says that his name was subscribed as such surety by Geo. L. without written authority to do so.

2d. Ballingal and Thomas G. Linville plead the same thing, and say that this fact relieves them, as the actual as well as the implied contract was that they were to be co-sureties with Peter.

3d. Thomas G. also pleads that his name was subscribed by Jett as his agent without written authority to do so; and lastly, all the sureties rely on the failure of the county judge to sign the order approving the bond as set forth above.

We notice, first, the contention of Peter Linville that he is not bound on the bond by reason of the manner in which his name was signed. It is insisted for the county that as Peter was present in open court and made the request of Geo. L. to sign his name, it was his own act of signing, and not that of an agent. It seems to us that this exact point has been settled otherwise by this court.

In Billington v. Commonwealth, 79 Ky., 400, the appellants' name by his direction was subscribed to a bail bond by an attorney at law in the presence of the judge taking the bond, and the Commonwealth contended that this act should be construed to be the act of the appellant, and not that of his agent. This court sad: "Why a thing done in the presence of the one directing it is any the less an act of an agent for his principal than if the act was done in the absence of the principal, and by his previous direction, is difficult to conceive. In either case the thing done is but the peformance of a physical act which is in conformity to the will of the principal, and in all such cases the law seems to contemplate that the will of the principal shall not be made binding upon him unless it be expressed in writing."

To the same effect are the cases of Simpson v. Commonwealth, 89 Ky., 412; Ragan v. Chenault, 78 Ky., 545; Dickson's Adm'r v. Luman, 14 Ky. Law Rep., 884.

Peter Linville being released, we are next to determine what effect, if any, this has on the liability of the co-sureties; and this question also we find substantially determined by this court.

In English v. Dycus, &c., 9 Ky. Law Rep., 188, the county judge accepted the bond of the sheriff when two of the sureties had not in fact signed the bond or authorized by a writing any one else to sign it, and did so on the idea that a mere verbal authority from the surety to sign his name was sufficient. The other sureties were held to be released, the court saying: "It is the duty of the county judge to see that the bonds are executed properly. They are to be approved by him, and each surety has the right to rely on his vigilance to the extent at least of his

knowing that the signatures of their co-sureties are genuine, so as to create an obligation to pay in the event the principal is in default.

This duty of the judge to see that each surety is bound on the bond is due primarily to the county, but he owes it as well to those whose signatures to the bond make them co-sureties. The nature of the contract undertaken by each surety in this case is that he is to be bound as co-surety along with the others signing the bond. The judge appears to have acted on the mistaken belief that the verbal direction given in open court by the surety, Peter Linville, was sufficient; still his duty remained to so take the bond as to create an obligation on each surety to pay in the event the principal was in default. But it is insisted that the other sureties were present and heard Peter Linville give the direction to Geo. L. to sign the bond.

It must be admitted that if this can be regarded as notice or information to the other sureties that Peter was not bound, then they are bound; for they could bind themselves, regardless of whether he was liable or not, just as they might have bound themselves had they been told that Peters name was a forgery. It is not claimed, however, that they had such knowledge, only that they ought to have known that such signing was not sufficient, just as the county judge ought to have known it.

It seems to us that, relying on the vigilance of the court, the sureties might have presumed, and had the right to presume, that whatever authority the law required Geo. L. to have in order to bind Peter had certainly been procured, and was in the custody of those having the bond in custody. The judge of the court and not the sureties was taking the bond. In Chamberlain, &c. v. Brewer, 3 Bush, 561, it is said of cases where it is the duty of a court or officer to take official bonds: "The name appearing to the bond, it being in the custody of the court or officer who is to take it, he (referring to the surety) may presume that the signature is genuine, and common prudence does not require that he should inquire into this."

In Fletcher, &c. v. Leight, Barrett & Co., 4 Bush, 303, the court said: "The sureties who did sign the bond were under neither a legal nor moral duty to see that all the approved parties had signed it, nor to see that Peterson should execute another bond. They had a right to rely upon the legal discharge of official duty by those whose duty it was to see a proper bond executed, and to dismiss all oversight of it."

Cases have arisen and some of them are relied on by the appellant, where it is said that as surety, knowing of the withdrawal of his co-surety's name, and not objecting to it, should be held liable because he does not object to it or because he consents to it. He is held as though he was the only surety, and knew he was such when he signed it. (Bracken County Commissioners v. Daum, 80 Ky., 388.)

We conclude, therefore, that the appellees are not liable on the bond. It is useless to consider other questions raised by the appellees as further grounds for their release.

The judgment below is affirmed.

WILLARD v. COMMONWEALTH.

(Filed November 17, 1894.)

Punishment of persons under eighteen years of age—In this case the appellant seeks to have a judgment of conviction for housebreaking reversed on the ground that since the Constitution has provided for the establishment by the legislature of a house of reform for persons under eighteen years of age convicted of certain crimes designated by law, there can be no constitutional incarceration in the penitentiary of the class of offenders named. Held—That this court has no power to afford relief if the legislature fails to act in accordance with this provision, and, therefore, the judgment can not be reversed on the ground named.

Wm. F. Russell for appellant.

W. J. Hendrick for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, a lad of sixteen years, was tried and convicted of the crime of breakng in to a storehouse with intent to steal, and was sentenced to the State penitentiary for one year.

The bills of exceptions recites that the trial was regular and free from errors, and the evidene justified the finding; and this is conceded by counsel. But because the culprit is only sixteen years of age, and the Constitution (section 252) provides that the general assemby, as soon as practicable, shall provide "for the establishment and maintenance of an institution or institutions for the detention, correction, instruction and reformation of all persons under the age of eighteen years convicted of such felonies and misdemeanors as may be designated by law," that, therefore, no incarceration in the penitentiary can be constitutionally adjudged against those falling within the class of offenders named. The legislative department of the government, however, has failed to provide this "House of Reform," as it was to be styled, and however much we deplore this failure, there is no power vested, under the Constitution, in the judiciary department to compel the legislative department to act, or to afford relief if it does not act. If this appeal has been prosecuted to obtain from this court an endorsement of the legislation required by section 252, we unhesitatingly express the belief that the want of some such reformatory institution has long been a crying evil in our State.

We are powerless, however, on this appeal, to revise the action of the legislative department, and can reverse only for errors appearing in the record.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

GERMAN INSURANCE CO. v. HART.

(Filed November 21, 1894.)

1. Fire insurance—Change of use of property—The fact that insured property is described as devoted to a certain use or is in a given condition, does not amount to a warranty that it should so continue, but is merely a representation that it is so used or in such a condition at the time the application is made. Therefore, a change of use or condition, unless forbidden in the contract, does not operate to invalidate the policy unless the change increases the risk.

2. Same—Increase of risk—Although a policy of fire insurance on a barn provided that it should be void if the hazard should "be increased in any way whatever except with the company's consent and approval," the placing and use of a steam thresher near the barn did not vitiate the policy, but was merely such a temporary use of the property in the course of the business of the assured as would, from its nature and surroundings at the time the policy was issued, have been anticipated by the contracting parties. And the fact that the use of the steam thresher near the barn caused the fire does not necessarily bring it within the prohibited clause.

3. The powers of the agent are prima facie co extensive with the business intrusted to his care and the knowledge of the agent is the knowledge of the principal. And this rule applies as well to soliciting agents of insurance companies as to the general agents. Therefore, the knowledge of the soliciting agent in this case that the insured intended to use the thresher near the barn was the knowledge of the company and the company is estopped to claim a forfeiture on account of such use.

John Allen Murray for appellant.

Knott & Edelen and N. McC. Mercer for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Yost.

On the 20th of July, 1890, the appellee made an application to the appellant company for insurance on his barn, its contents and certain other property on the premises. On the 1st of August following the policy was issued and delivered to him, the insurance running for a period of three years.

The application contained the following question and answer, viz: "Are there any exposures other than ordinary out buildings within 100 feet?" "No."

The policy contained this clause: " * * * or if the hazard shall be increased in any way whatever, * * * except with the company's consent and approval, * * * then * * * this policy shall be absolutely void."

On the 7th of September 1892, the assured placed a threshing machine in close proximity to the barn, where his wheat stacks were situated, which was operated by steam power, the engine, however, being more than 100 feet from the building. This machinery had a straw carrier running from its separator into the barn, and sometime during the day the straw in the separator caught fire, which instantly communicated with the straw in the barn, and it with all of its contents was consumed.

The company failed and refused to pay the loss and this suit followed.

The defendant, in its answers and rejoinder, pleaded the question and answer given above as a warranty that no such exposure would be placed within that distance from the building insured; and further, that the thresher and engine brought about such a change in and increase of the risk as vitiated this policy, alleging that the fire was caused either by escaping sparks from the engine or by the friction of the machinery. Demurrers to so much of their pleadings as set up the designated part of the application as a warrany were sustained, and the case went to the jury upon the remaining issue.

The plaintiff testified that at the time the application was made he showed the defendant's soliciting agent where his wheat stacks were placed, and informed him that he had threshed his wheat there before and expected to do so again, to which the agent replied that there would be no impropriety in setting a steam thresher at that point and there threshing his wheat.

It was there, we may say, conclusively shown that the fire originated in the separator, and was caused by friction from a hot journal.

The court said to the jury that if they believed from the evidence that the hazard to the plaintiff's barn and other property insured was increased by reason of his suffering the machine to be used and operated near the building, and that by reason thereof it was burned, the law was for the defendant, and so they should find; or further, that if the plaintiff's so doing was such an act as would appear to an ordinarily prudent and discreet man to so increase the hazard, they should find for the defendant. They were further told that they could not consider the testimony touching the statements made to and by the agent as in anywise changing or modifying the policy of insurance, but could consider them only so far as they bore upon the question as to whether or not the acts of the plaintiff increased the risk.

It is useless to discuss the question of the answer in the application being a warranty unless the placing of the thresher was such an exposure as materially increased the hazard in carrying the insurance. Section 22, chapter 22 of the General Statutes, in force at the time this contract of insurance was made, provides that all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties.

The fact that the property insured is described as devoted to a certain use, or is in a given condition, does not amount to a warranty that it shall so continue, but is merely a misrepresentation that it is so used, or in such a condition at the time the application is made. It follows, therefore, that a change of use or condition, unless forbidden in the contract, does not operate to invalidate the policy unless the change increases the risk.

It seems to us that the placing and use of the steam thresher did not vitiate the policy, but was merely such a temporary use of the property in the course of the assured's business as would, from its nature and surroundings at the time the application was accepted and the policy issued, have been anticipated and intended by the contracting parties. That it caused the fire can not of course be questioned, but that does not necessarily bring it within the prohibited clause. A lighted lantern carefully carried by the insured might have caused the same disaster, as

might a number of other temporary matters which could not, by any process of reasoning, come within the prohibition, if it could be so considered "an exposure other than an ordinary outbuilding," or be regarded as an "increase of risk within the true meaning of the policy." The instructions under this view of the law were not only in every way favorable to the defendant, but were more than it was entitled to.

The plaintiff testified, and his statements were unquestioned, that at the time the application was made the company's agent tacitly, if not openly, consented that the property might be used as it was used when burned, and yet the full weight and bearing of this testimony was taken from the jury.

In Phœnix Ins. Co. v. Spiers & Thomas, 87 Ky., 285, it was held that if the company knew of the increased risk, fairness and good faith should estop it from insisting upon a forfeiture of the policy because its consent was not endorsed upon it according to its literal terms.

It is the settled doctrine in this State that the powers of the agent are prima facie co-extensive with the business entrusted to his care, and that the knowledge of the agent is the knowledge of the principal.

Said the court further, in the case above cited: "It seems to us, considering the amount of business entrusted to and done by soliciting agents of insurance companies, the circumstances under which and persons with whom it is generally done, the opportunities they have and the temptations put in their way by the company to overreach those desiring, or rather those whom they persuade, to insure, that the rule mentioned would be nearly inoperative if not made to apply to them as well as general agents."

It is urged that, as the evidence showed that if the company had known that this property would be so used it would have increased the rate of premium, this was proof positive of the increase of the risk, but this is by no means a decisive consideration. It is for the jury and not for the insurers to say whether the risk was increased, and while the fact that the company would have charged a greater rate for the risk as altered establishes the fact that it regarded the risk as greater, the jury may from the evidence believe that it was not increased.

Such terms as these are were to be considered or construed in their literal sense, but due regard must be given to the real meaning of the parties. To kindle a fire in an insured dwelling would increase the risk; to handle inflammable material in a store adds to the hazard; to bring matches upon premises; straw under carpets; lamps at night; all literally increase the risk, yet when the policy is issued it is anticipated, in fact known, that fires will be kindled, oils sold, matches used and lamps lighted, and none of these things can be looked upon or claimed as such an increase of risk as would vitiate a policy of insurance containing this clause.

In this case the jury, under the evidence before them that this company knew that this barn would be so used, declared that the appellee's acts were only such as were to be anticipated, and hence not an increase of the risk in the meaning of the policy.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

(Filed November 21, 1894.)

1. Nuisance—Every enjoyment by one of his own property which conflicts with the rights of another in an essential degree is a nuisance, and a use of property which was at common law a nuisance does not cease to be so because the same act is made an offense by statute and a different punishment provided. The party creating the nuisance may be pursued under either common law or statutory remedy.

2. Same—Indictment charging more than one offense—An indictment charging the railroad company with maintaining a public nuisance by the unlawful obstruction of a public highway, by causing disorderly persons to assemble together, permitting gaming and allowing its passengers to shoot firearms, curse, quarrel, and do many other disorderly acts, charges more than one offense, and a demurrer thereto should have been sustained.

3. Same—Obstruction of highway by railroad train—Excessive verdict—Where a railroad excursion train was detained at a station thirty-five minutes waiting the arrival of a regular train, which by reason of an unavoidable accident near the station was delayed twenty-five minutes, and the excursion train during the time it was thus detained could not safely be uncoupled so as to prevent the obstruction of the highway, a verdict against the railroad company for $800, under an indictment against it for nuisance based upon these facts, was downright spoliation.

4. Same—The railroad company can not be held responsible for the disorderly conduct of passengers who left the coaches and went upon the highway while the train was delayed at the station.

J. C. Beckham and A. P. Harcourt for appellant.

R. F. Peak and W. J. Hendrick for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Yost.

An excursion train run by the appellant was necessarily detained at a station on its road for thirty-five minutes, and while so delayed the coaches were left standing across a public highway, and thus obstructed its use for that length of time. Indicted for maintaining a public nuisance and found guilty as charged, it prosecutes this appeal.

We may say at the outset that we can not agree with counsel in his contention, that a person can not be indicted for maintaining a public nuisance when a statute has fixed a penalty for the offense constituting the nuisance. The one is meant to be made to punish for continual wrongful acts, while the other prescribes a penalty for a single violation of the law.

Every enjoyment by one of his own property which conflicts with the rights of another in an essential degree is a nuisance, and a use of property, which was at common law a nuisance, does not cease to be so because the same act is made an offense by statute, and a different punishment provided. The party creating the nuisance may be pursued under either the common law or statutory remedy.

Mr. Wood, in discussing this question in his work on Nuisances, section 12, says that when a certain act or thing is a nuisance at common law, and the statute law also imposes a penalty for the act unless the statute in express terms takes away the common law remedy, either may be pursued.

In Rennock v. Morris, 7 Hill, 575, it was announced as the law that the giving of a superadded penalty for acts constituting a

nuisance did not take away the common-law right of the public to have the offender indicted and the nuisance removed. And to this effect held our own Court of Appeals in C. R. R. Co. v. Commonwealth, 80 Ky., 137.

We, therefore, conclude that while it is true that a corporation, acting strictly within the scope of legislative power, can not be indicted for a public nuisance, it by no means follows, if the ates are in excess of the power given, that because they are done under such authority the offender can not be punished therefor if the acts create a public nuisance.

The appellant complains that the court erred in overruling its demurrer to the indictment, admitted improper testimony, and misinstructed the jury. The evidence now pointed out as incompetent was clearly so, but was not objected to at the time, and the instructions, although erroneous, were not copied in the bill of evidence or made part of the record by an order of court, hence we could not reverse for either of these errors.

There is enough in the record, however, to show that the appellant did no have a fair trial. The indictment was defective in that more than one offense was there named. The defendant was accused of maintaining a public nuisance by the unlawful obstruction of a public highway; of causing disorderly persons to assemble together; permitting gaming and allowing its passengers to shoot firearms; curse, quarrel and do and commit many other disorderly acts. Under section 165 of the Criminal Code the demurrer to the indictment should have been sustained.

The evidence showed that the excursion train arrived at the station ten minutes before the time for the arrival of the regular passenger train, which the conductor heard whistle at the next station. If this train had been on time the delay of the excursion train would have been only ten minutes. It was, however, owing to an unavoidable accident happening within a short distance of the station, twenty-five minutes late, and hence the excurison train was delayed thirty-five minutes. During this time it stood across the turnpike. It could not safely be uncoupled, so the officers of both trains testified, because it would take fully ten minutes to prepare the cars and flag the approaching train, and this was momentarily expected.

While it is true that some of the excursionists left the train and were boisterous, it is preposterous to argue that the company can be held responsible for the proper conduct of passengers after they leave its coaches.

The delay was necessary. The safety of the lives of the passengers of both trains depended upon the excursion train being kept at the station until the passenger train, which had the right of way, had passed. The verdict of the jury fixing the punishment of the accused at $800 was downright spoliation.

The judgment is, therefore, reversed and cause remanded for further proceedings consistent with this opinion.

SUPERIOR COURT ABSTRACTS.

SUPERIOR COURT ABSTRACTS.

STOUT, &c. v. HOPKINS, &c.

Filed November 14, 1894. Appeal from Woodford Circuit Court. Opinion of the court by Judge Yost, affirming.

Preference of creditors—In this action to have certain payments made by an insolvent debtor to creditors declared to operate as an assignment under the statute, the circumstances attending the transaction are sufficient to repel the presumption of an intention to prefer.

J. C. Beckham and Ed. M. Wallace for appellants; D. L. Thornton and J. M. Hoge for appellees.

KLEIN & CO. v. BENSENT & SEITZ.

Filed November 14, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, reversing.

Mortgages, though unrecorded, are valid against creditors with notice; and the holder of such a mortgage, where another creditor of the mortgagor has, subsequent to its execution, levied his fi. fa. on the mortgaged property, may at any time before sale under the writ give notice to the execution creditor of his mortgage, and, arresting the sale, enforce his lien in preference to the lien acquired by the levy of the execution.

Adair & Morton for appellants; Allen & Hughes for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. SURVANT.

Filed November 14, 1894. Appeal from Marion Circuit Court. Opinion of the court by Judge Yost, reversing.

1. Willful negligence—In an action against a railroad company to recover damages for personal injuries not resulting in death it was error to instruct the jury as to will full negligence, as the statute touching willful negligence applies only where death ensues from the injuries sued for.

2. Failure of railroad train to signal at private crossing—Railroad trains are not required to slow up and signal at private crossings along the road, and, therefore, the failure to signal is negligence only where the way is a public one.

3. To constitute a public crossing within the meaning of this rule the road must have been established as a public road in the manner prescribed by the statute, or must have been dedicated to the public, and that dedication accepted by the county court upon its records, or by the continued use and recognition of the ground as a public highway for such a length of time as will imply a public highway.

Under this rule the court in this case erred in permitting witnesses to testify that the road was a public road.

4. Excessive verdict—As the only testimony as to plaintiff's injuries is that he received a cut upon the head, that his left leg was hurt and that he was stiff and sore for two weeks, a verdict for $2,500 strikes the court at first blush as beyond all question excessive.

W. J. Lisle, H. W. Bruce and Thompson & McChord for appellant; W. E. & S. A. Russell for appellee.

SCHNEIDER v. ARTSMAN, &c.

Filed November 14, 1894. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, reversing.

Void judgment—Res adjudicata—Void execution—Even though an order confirming a report of sale may have been void as to the person reported as purchaser, yet as he did not appeal from an order overruling a motion made by him to set aside the confirmation, that order is conclusive and constitutes a bar to an action to enjoin the collection of the purchase money. But as no bond was executed by the purchaser, an execution issued against him for the amount of his bid is void, although issued pursuant to an order of the court, as an execution can only be issued upon a judgment or a bond placed by the law upon the footing of a judgment. And an order of the court overruling a motion to quash the execution added nothing to its validity and is not a bar to this action to enjoin its collection.

J. C. Wright for appellant; L. J. Crawford for appellees.

LOUISVILLE WATER CO. v. YOUNGSTOWN BRIDGE CO.

Filed November 14, 1894. Appeal from Jefferson Circuit Court, Common Pleas division. Opinion of the court by Judge Barbour, reversing.

Penalty in contract—Liquidated damages—Penalties are not favored, and the courts will not enforce the payment of a sum agreed upon as liquidated damages when it amounts to a penalty or forfeiture, or exceeds in a material degree the injury sustained by the breach of the contract. But when, at the time of making the contract, there is no established rule by which damages for its breach can be measured, it is legitimate for the parties to stipulate for compensation to either in case of a breach, and the amount fixed by them will be treated as liquidated damages unless it be unreasonable.

Appellant water company having in course of erection two large buildings to hold the boilers, machinery and engines for a new pumping station, entered into a written contract with appellee for two sets of steel and iron trusses for the two roofs. By the terms of the contract the work was to be finished on a certain day, it being further agreed that appellee was to receive as a bonus $100 for each day the work was finished before the contract time, and for each day its completion was delayed beyond the day named $100 was to be deducted from the contract price as liquidated damages. The work was not completed until eight days after the agreed time. Held—That appellant is entitled to the liquidated damages agreed upon, although no damages are shown, the amount stipulated not being unreasonable.

T. L. Burnett and Lane & Burnett for appellant; H. S. & M. S. Barker for appellee.

ALLEN-BRADLEY CO. v. ANDERSON & NELSON DISTILLING CO.

Filed November 21, 1894. Appeal from Jefferson Circuit Court, Chancery division. Opinion of the court by Judge Barbour, affirming.

1. Arbitration and award—Where an award covers the construction of a contract, and subsequent obligations arising under the same contract are sought to be enforced between the same parties, they will be bound by the award just as they would be bound by a judgment determining the same thing.

2. Same—If arbitrators act upon matters not submitted to them their action may that far be disregarded and the residue enforced.

In this case a majority of the court are of opinion that the only matters submitted to the arbitrators, whose award is in question, were those relating to the adjustment of the then "outstanding" accounts between the parties growing out of claims depending upon the peculiar facts and circumstances then existing and which controlled the rights of the parties, and that in

attempting to construe the contract out of which those claims arose and determining the future rights of the parties, the arbitrators exceeded their authority, and to that extent the award is void.

Grubbs & Morancy for appellant; Humphrey & Davie for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. STEWART'S ADM'R.

SAME v. STEWART.

SAME v. SAME.

SAME v. WYATT.

Filed November 21, 1894. Appeal from Graves Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Care required at exceptionally dangerous crossing—In these actions against a railroad company to recover damages for personal injuries caused by collision with a railroad train at a public crossing near a city, which was peculiarly dangerous by reason of the steep approaches to the track and the obstruction of the view by a cut, the court properly instructed the jury that if they believed from the evidence "that by reason of the proximity of the crossing to the city of Mayfield, and the number of the traveling public crossing there, or by reason of any obstruction of view of the approach of trains, said crossing was exceptionally or peculiarly dangerous, then it was the duty of the defendant to use ordinary care to discover such dangers, and if necessary, to avoid injury to travelers, to keep a flagman there to warn travelers of approaching trains, or to adopt and use some other reasonably safe and effectual mode of warning travelers of the approach of its trains."

2. Same—Instructions to jury—The court properly refused an instruction relieving the defendant if it gave the "proper and usual signals." The jury ought to have been told what was a proper signal.

Smith, Robbins & Thomas and P. H. Darby for appellant; R. C. Hester, H. J. Moorman and W. H. Hester for appellees.

COMMONWEALTH v. POOL.

Filed November 21, 1894. Appeal from Hancock Circuit Court. Opinion of the court by Judge Yost, reversing.

Local option—Where the voters of a civil district, by a vote under the general local option law, have prohibited the sale of liquors within the district, the voters of a town forming a part of the same district can not, by a separate vote under the same law, permit the sale of liquor within the town limits. And a license to sell liquor in the town issued pursuant to such a vote affords the licensee no protection.

W. J. Hendrick for appellant; Murray & Duncan for appellee.

RICKETTS v. HAMILTON, &c.

Filed November 21, 1894. Appeal from Montgomery Court of Common Pleas. Opinion of the court by Judge Yost, reversing.

1. Continuance—As the affidavit of the attorney for plaintiff showed that in the short time intervening between the taking of depositions by defendant, upon whom rested the burden of proof, and the calling of the case, he had been called away from home and kept so busily engaged that he could not prepare the plaintiff's case for trial, the court should have granted a continuance.

2. Conclusiveness of judgment—One who held a mortgage upon a tenant's interest in a corp was not bound by the judgment rendered in a proceeding between the tenant and his landlord, he not being a party to that action.

8. Mortgages—A mortgagor can not defeat the mortgagee's lien by a transfer of the mortgaged property or an assignment of the proceeds of its sale.

O'Rear & Bigstaff for appellant; Cornelison & McKee for appellees.

SPRINGFIELD FIRE & MARINE INS. CO. v. PHILLIPS, &c.

Filed November 21, 1894. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Fire insurance—False answer written by agent in application—Where an applicant for fire insurance discloses to the agent the existence of a mortgage on the property, but the agent filling up the application writes the answer "no" in response to the question, "is the property incumbered by mortgage or other liens?" the assured not knowing of the mistake, is not bound by the paper, although he signed it, and the company can not escape liability on the ground that the answer as written was false.

2. Failure to disclose existence of lien—Materiality to risk—Where there is no fraud and the assured answers incorrectly that there are no liens or mortgages the question arises whether the lien was material to the risk. And the question of materiality, the facts being admitted, is necessarily a question of law and not a question of fact for the jury. And if the lien upon the land compared with its value is so small that it can not possibly affect the interest in the house which is insured, the court will then say as matter of law that the lien was not material to the risk.

In this case the insured property, including the house, was not worth, at the highest estimate, more than $5,250. The land, at the highest valuation, was worth not more than $3,750. The mortgage was over $2,500, and was bearing interest. The insurance on the house was for $1,200 for a term of five years. Held—That the court can not say as matter of law that the lien was not material to the risk, and the question being one of law, the court erred in instructing the jury that though they should believe the plaintiff did not disclose the mortgage, still they should find for plaintiffs unless they believe that defendant would not have issued the policy if it had known of the existence of the mortgage.

3. The testimony of the agent that he would have still insured the property if he had been informed of the mortgage was incompetent, as the company was not bound by the agent's opinion as to what he might have done under different circumstances.

4. Insurance void as to one thing insured void as to all—While the policy insures the house for one sum and the furniture for another sum, still the insurance was procured by one contract, and any mistatement or concealment as to any material fact which would invalidate the insurance as to one of the subjects will vitiate it as to the other.

5. Effect of levy of execution and of suit to enforce mortgage lien—A provision in the policy that it shall be void "if an execution be levied on the property insured, or foreclosure of mortgage be begun," must be treated as contracting against any change in the title or possession of the property, as is shown by the additional words, "or if any change takes place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree." Therefore, the policy was not rendered void by the levy of an execution upon the property or by judgment for the sale of the property in a suit to enforce the mortgage lien, there being no change of possession. Nor did a sale of the property under the judgment invalidate the policy, the sale proving abortive by the failure of the purchaser to execute bond, and another sale being ordered.

Dulaney & Mitchell for appellant; Wright & McElroy, T. W. Thomas and Edward W. Hines for appellees.

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KENTUCKY COURT OF APPEALS.

SMITH, &C. V. SNOWDEN, &C.

(*Filed September 25, 1894.*)

1. *Setting aside conveyance on ground of fraud—Burden of proof*—In this case two old people, husband and wife, who were ignorant, illiterate and enfeebled by old age and disease, and who were dependent to a great extent upon two of their sons for the management of their affairs, conveyed to these two sons all the lands belonging to the mother. The mother dying in a short time, the father, a third son and a married daughter instituted an action to set aside the conveyance by reason of the imbecility and incompetency of the grantors, and the fraud, deception and controlling influence of the two grantees. *Held*—That the burden is on the grantees to show that the transaction was freely and voluntarily entered into and devoid of inequitable incidents. The false recital in the deeds of a pecuniary consideration is the highest evidence of a fraudulent intent on the part of the grantees, and readily opens the way for equitable interposition.

2. *The grantees can find no relief in assuming the position*, after the attack on the deeds was made, that the real consideration was love and affection and an agreement to care for the grantors during the remainder of their lives. The intent in the procurement of writings must be gathered from the recitals of the writings themselves.

3. *Incompetency of grantor*—The vacillating conduct of the surviving grantor, the father, in having the action dismissed so far as he was concerned, and afterwards moving to set aside that motion, and upon appeal having the appeal dismissed as to him, is evidence of his want of mind and capacity.

Riddell & Riddell and Hugh Rodman for appellants.

H. L. Wheeler and J. B. White for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hazelrigg.

In November, 1889, Lucy Snowden was the owner of certain tracts of land in Lee county, Ky., of the value of some $6,000 or $7,000. Her husband James had recently sold some $3,000 worth of realty, a

portion of the proceeds of which sale he still had, together with some stock and other personalty.

These old people, the husband being some seventy-odd years of age and the wife a few years younger, were living on the wife's land. They were illiterate, ignorant, enfeebled by old age and disease, and greatly dependent in the management of their affairs on their sons, Arch and David P., who lived with and cared for them. Besides these two sons there was another, Asa, whose mental condition was below the average. There was only one other child, a married daughter, Margaret Smith, who had been a cripple since her girlhood, and who lived with her husband and seven children at some distance from her father and mother.

A few days before the date named above the sons, Arch and David, procured a surveyor and had the lands of the mother run out and deeds prepared, conveying the whole of them to themselves, Arch getting about two-thirds and David the balance.

Their mother may have had some knowledge of this proceeding, but the father, who at least had a life estate in the land, had no notice whatever of what was being done. Mrs. Smith and her husband were kept in ignorance of it. The old people, however, unhesitatingly, and apparently voluntarily, signed and acknowledged the deeds, the recited consideration in one of them being $500, another $300, and a third $500—all cash in hand paid, the receipt of which was acknowledged. The old lady, then affected with heart disease, died in a few months thereafter.

This action was then instituted by the old man, James Snowden, Asa and the daughter, Margaret, and her husband to set aside the deeds, by reason of the imbecility and incompetency of the grantors, and the fraud, deception and controlling influence of the two grantees. After the case was prepared an order was entered dismissing the action so far as James Snowden was concerned. This was on July 13, 1890.

On July 16, 1892, James Snowden offered to file his affidavit, and moved to set aside the order of dismissal. He tendered an amended petition, which appears to have been sworn to on July 13, 1892, in which he again seeks to be made a party plaintiff, and claims the relief he had originally claimed. His affidavit was to the effect that he had been persuaded by his son Arch to withdraw from the suit. The amendment was rejected and, the case being submitted, the court dismissed the petition.

The amended petition was made a part of the record, and James Snowden, together with the Smiths and Asa Snowden, have appealed to this court. In this connection we notice the verified plea of James Snowden, filed October 28, 1893, directing the appeal to be dismissed so far as he is concerned, and this order has been made.

Whether if living the old lady would have followed her husband in his rapidly changing and contradicting positions in this action we have no means of knowing. We do not know that after making the conveyances she denied having done so, and represented herself as in a position to still distribute her estate equally among all of her children. She appeared willing enough to shift her position according to the company she was in.

In the consideration of this case the learned chancellor was doubtless guided by the general rule that the plaintiff who seeks to set aside a deed of the character here involved must take the burden, and make out affirmatively a case of fraud or the existence of undue influence.

As we have seen, so far as the proof of any witness goes, there is

nothing to show otherwise than that the deeds were executed and acknowledged freely and voluntarily. The conduct of the officer reading them and taking the acknowledgment is such as is usual, and is entirely free from suspicion; nor does any witness testify to unsoundness of mind on the part of the grantors, or to the active operation of any hurtful or undue influence. But does this case fall within the class of cases in which the burden is on the plaintiffs? It is not the case of a gift from parent to child. No such consideration as love and affection is hinted at. On the contrary, the recited consideration is a pecuniary one solely, and the falsehood, for such we find it to be, is pushed to the extent of an assertion that the sum named is "cash paid in hand," etc., when the proof discloses that not a dollar was paid or promised, nor is this the case of the executor of a will requiring the exercise of no contractual capacity.

It seems to us that the relation of the parties is such, and the false recitations of the deeds emphasize this opinion, as to throw on the parties seeking to uphold the transaction the burden of showing the absence of all inequitable features, as well as that the parties acted voluntarily, deliberately and with full knowledge of the nature and effects of their acts. Mr. Pomeroy and Mr. Story so state the rule.

The former says of such transactions: "When the accompanying incidents are inequitable and show bad faith, such as concealments, misrepresentations, undue advantage, oppression on the part of the one who obtains the benfits, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other, these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative."

In the case under consideration the grantors were old, ignorant and enfeebled by disease; the grantees were vigorous, aggressive and already in charge of the persons and the property of the grantors. We may say in general that when such a relation exists the person obtaining the benefit must show by the clearest evidence that the transaction was freely and voluntarily entered into, and devoid of inequitable incidents.

A most important feature in this case is the false recital of the consideration. These old people were themselves as clay in the hands of the potter; as to them the question of consideration was immaterial; but it appeared important to the grantees to show to those equally and naturally interested in the partition about to be made of the estate that a bona fide sale had been consummated for a valuable consideration. The recital of the false consideration carries with it the thought and purpose of a designing and intentional concealment of the truth; and this falsehood and concealment are the highest evidences of the fraudulent intent with which the writings were procured, not necessarily of actual but of constructive fraud, assumed in view of the relation of the superior contracting with the inferior, the independent with the dependent, the strong with the weak.

The grantees, it seems to us, can find no relief in assuming the position, after the attack on the deeds was made, that the real consideration was love and affection, and an agreement to care for the grantors during the remainder of their lives. The intent in the procurement of the writings must be gathered from the recitals of the writings themselves, and the beneficiary will not be relieved of the necessary inference of intentional deceit on his part by asserting a consideration inconsistent with the one named in the writing.

We may say, generally, that when the parties to a deed sustain fiduciary and confidential relations toward each other, or when one of the parties is subject to the influence of the other, the writing should contain a fair and truthful statement of the transaction. (Notes to section 928, Pomeroy's Equity.)

The learned author last referred to says in such connection: "If the statement of the consideration is untrue the instrument can not be upheld. The party seeking to uphold it can not prove, in order to sustain it, that the actual consideration was partly that represented in the deed and partly something else, since this would be inconsistent with the consideration stated in the face of the instrument."

And authorities are cited to the effect that "if a pecuniary consideration is stated in the deed and is impeached the party can not show and rely on the consideration of blood or love and affection (Clarkson v. Hanway, 2 P. Wms., 203; Willan v. Willan, 2 Dow., 274), though "if the recitals state a pecuniary consideration, and the operative part mentions love and affection as being in part the consideration of the deed, this discrepancy is not sufficient to raise a presumption of fraud." (Filmer v. Gott, 4 Bro. P. C., 230.)

Without fully approving the doctrine quoted to the extent announced by these authorities, we may safely say that the existence of misrepresentation, concealment and falsehood is material and important particulars in writings betweens parties occupying these delicate relationships towards each other affords the strongest evidence of fraudulent intent on the part of the superior contractor, and readily opens the way for equitable interposition.

The vacillating conduct of the former complainant, James Snowden, does not merit, as it would under ordinary circumsances, a refusal to hear his pleas, but is of itself evidence of want of mind and capacity.

In order that the deeds may be set aside, so far as they may affect the present appellants, Asa Snowden and the Smiths, the judgment below is reversed for proceedings consistent herewith.

BROOKS V. COMMONWEALTH.

(*Filed Nov.* 15, 1894—*Not to be reported.*)

Instructions—In view of the fact that the proof on the trial of this case established that the accused was guilty of a most foul murder, and of the further fact that the question here is not one of accurate pleading, the defendant was not prejudiced in his substantial rights by the omission from the instructions of the word "feloniously," and by the use only of the words "willfully and with malice aforethought."

A. K. Bradley, E. D. Morrow and Waddill & Nunn for appellant.

Wm. J. Hendrick and C. J. Waddill for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Hazelrigg.

In Kaelin v. Commonwealth, 84 Ky., 354, the technical requisites of an indictment for a common law felony were under consideration, and it was held that in an indictment for murder the use of the word

"feloniously" was indispensable. It was said, however, to be a technical term or term of art.

In the case at hand, while the indictment charges that the accused did willfully, feloniously and with malice aforethought, kill, slay and murder the deceased, Briant, the court omitted the word "feloniously," when it came to give the instructions, and used only the words "willfully and with malice aforethought." It is, therefore, contended for the appellant, on the strength of the Kaelin case, that the omission was erroneous and prejudicial to the accused. Logically this criticism of the instruction may be just, for if an alleged homicide can not be denominated a murder unless the act of killing has been done feloniously, the jury should not be left to so find unless they believe the killing was feloniously done.

Nevertheless, as the question here is not one of accurate pleading, and the court is not called on, as in the Kaelin case, to lay down "the true test of a good indictment for a felony," the question remains, has there been, through the omission of this "term of art" and technical word from the instruction, an error of law, on account of which, "upon a consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby?"

The recognized rule is said to be that "every improper instruction should be taken as prima facie prejudicial to the accused, subject, of course, to be shown otherwise by the evidence in the case." The rule is not applicable to merely technical defects, arising out of the omission to use strictly accurate terms of art. (Barnett v. Commonwealth, 84 Ky., 449.)

It is true we may not speculate as to the effect of a defective instruction on the minds of the jury; but yet, before we are authorized to reverse, we are enjoined by the law to be satisfied that the substantial rights of the accused have been prejudiced. (Section 340, Criminal Code; also section 353 of same, where a like injunction is repeated.)

It does not follow, necessarily, from the omission of this word in the instruction complained of, that the error was prejudicial to the accused. If he killed the deceased in the manner shown by the State, it was a most foul murder. The proof established that the accused was stationed within the door of his house, with the muzzle only of his gun protruding, awaiting the expected coming of the deceased and his father; that when they, unsuspicious of danger and heavily encumbered with a load of timber on their shoulders, came near, he shot first at the father and then at the son, killing the latter almost instantly.

The accused testified to a state of case tending to show that he acted in self-defense. The issue was fairly put, and the conclusion of the jury rested solely on their acceptance or rejection on the plea of self-defense interposed by the defendant. They rejected his story. Certainly, in a case like this, to upturn the finding because of the failure of the court to define accurately the crime of murder or designate the character of the act of killing by the most accurate nomenclature possible, would be highly technical.

A homicide can not legally be called a murder unless the act of killing be done feloniously and with malice aforethought; but if an assassin from ambush shoots his victim for purposes of robbery, it would be the height of legal folly to say that the substantial rights of the murderer are prejudiced by a defective definition of the words "malice aforethought" or the mere omission from an instruction to

the jury of the "words of art" technically required in law to designate a murder.

We are not satisfied that the substantial rights of the appellant were prejudiced by the use only of the words "willfully and with malice aforethought," as descriptive of the act of killing. On the contrary we are convinced, from a careful examination of the record, that he has had a fair and impartial trial. There was no error committed in overruling the motion for a continuance or in admitting or rejecting testimony.

Judgment affirmed.

AMOS V. COMMONWEALTH.

(*Filed Nov.* 15, 1894—*Not to be reported.*)

1. *Instruction in case of self-defense*—In a case in which the accused had, in a quarrel with another person, shot and wounded him, and on the trial had pleaded self-defense, the question is not whether the means used by the defendant to protect himself from impending danger were, in the opinion of the jury, necessary, but whether they appeared at the time to the defendant himself to be necessary for that purpose. The instruction given did not make this distinction clear, and the defendant's cause being probably prejudiced thereby, the judgment of conviction is reversed.

2. *Rejection of evidence*—The defendant having been permitted to prove that the general reputation of the wounded man "for peace or the contrary was bad," and also that he was "a violent, quarrelsome man," defendant was not prejudiced by the court sustaining the objection to the interrogatory whether he was a "determined, dangerous man," as the jury could not have had a reasonable doubt as to that fact in view of what had already been permitted to be proved in respect to his reputation and his conduct to the accused on that occasion.

J. P. Norvell for appellant.

W. J. Hendrick for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Lewis.

The offense of which appellant has been convicted and sentenced to confinement in the penitentiary two years is maliciously shooting and wounding one John Parker.

It appears from the evidence that Parker came to an open lot where appellant and others were, and seeing in possession of one Elijah Banta a bottle of whisky, asked for a drink from it; but being told appellant had an interest in it, he got his permission and took the drink, throwing upon the ground in front of him two nickles.

Subsequently Parker demanded the return of the nickels, but appellant, having put them in his pocket, refused his request. Thereupon Parker took hold of appellant's coat collar, drawing and opening a knife, with the handle of which he struck; but appellant got loose and ran through the fence into another lot, and in attempting to jump across a branch fell back into the water, and then Parker, who had closely pursued, having the knife opened, got upon him; but as appellant beseeched him not to cut him, and agreed to give up the nickels, which was done, he got off him without using the knife.

They then started back towards the lot, Parker being in front, and when near to the division fence appellant drew a pistol, previously concealed, and shot him in the back. Though it is proper to observe that after leaving the branch, and before being shot, Parker told appellant he could get his shotgun and his friends, which, under the circumstances, must be regarded as a challenge to continue the difficulty, or at least as a taunt.

The court, on trial of the case, permitted appellant to prove that the general reputation of Parker "for peace, or the contrary, was bad;" also that he was "a violent, quarrelsome man;" but sustained objection to the interrogatory whether he was "a determined, dangerous man," which it was avowed the witness, if permitted, would have answered in the affirmative; and that action of the court is made one ground for reversal.

It seems to us the jury, in view of what was permitted to be proven in respect to the general reputation of Parker and of his conduct to appellant on that occasion, could not have had a reasonable doubt of his being "a determined, dangerous man;" and, consequently, appellant was not prejudiced by the court sustaining objection to interrogatory referred to in the form it was put to the witness, even if the court did err in that respect.

Instruction 4 is as follows: "If the jury believe from the evidence that at the time the defendant, Horace Amos, shot and wounded John Parker, that he (defendant) in good faith believed, and had reasonable ground to believe, that he was then and there in danger of suffering loss of life or of great bodily harm at the hands of said Parker, then he (defendant) had the right to use such means as were necessary, or apparently necessary, to protect himself from such impending danger, and if in so doing he shot and wounded Parker, he is excusable, and should be acquitted."

The question in this and similar cases is not whether the means used by a defendant to protect himself from impending danger were, in opinion of the jury, necessary, but whether they appeared at the time to the defendant himself to be necessary for that purpose, and the instruction on that subject should be so clear and explicit there can be no doubt in the minds of the jury.

The above-quoted instruction is not, in our opinion, so written as to make such distinction clear, and the jury might, and probably did, interpret it to authorize and require them to then determine whether the means used by defendant were actually necessary to protect himself. A proper understanding by the jury of the true import and meaning of such instruction is especially important in this case, for appellant, at that time only twenty years of age, was evidently no match of Parker in either physical strength or courage, and was afraid of him.

Judgment reversed for a new trial and proceedings consistent with this opinion.

MALLICOAT V. COMMONWEALTH.

(Filed Nov. 22, 1894—Not to be reported.)

Self-defense—Instructions—The accused, in protecting a woman from the assault of a dangerous and violent man, killed the deceased, as he alleges, in self-defense. The court having properly instructed the jury on the law of self-defense, it was error to add to the instruction "that if the jury believed that the defendant had other safe, apparent and available means of preventing the danger, he is not excusable."

Crawford & Mason for appellant.

Wm. J. Hendrick for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Pryor.

It is not necessary to discuss the facts of this case farther than to say that the accused, when endeavoring to protect a woman, however lewd and unchaste she may have been, from the indecent and degrading assault made upon her by the deceased, shot and killed the deceased, as he alleges, and with proof conducing to show that fact, in self-defense.

The court properly instructed the jury as to the law of self-defense, but added to that instruction "that if they (the jury) believed the defendant had other safe, apparent and available means of preventing the danger, he is not excusable." This addenda to the instruction should not have been made. The accused was being attacked by a dangerous and violent man; was protecting the woman from an assault the deceased was making upon her, and, under the circumstances, the doctrine of self-defense was properly placed before the jury, without the language used at the close of the instruction, that was certainly prejudicial to his substantial rights.

Reversed and remanded for a new trial.

COMMONWEALTH V. FOWLER.

(*Filed Nov.* 22, 1894.)

Druggists' liquor license—Constitutionality of law requiring same—That section of the law which provides that druggists, desiring to sell spirituous and vinous liquors for medicinal purposes only, shall procure a license and pay a tax thereon of $50, and shall sell only on the prescription of a regular practicing physician, being an exercise of the police power of the State, is held to be constitutional.

W. J. Hendrick for appellant.

Knott & Edelen for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, Fowler, was indicted for selling whisky without license, and found not guilty by the court upon the following agreed statement of facts: The defendant, a legally registered pharmacist, regularly engaged in business as a retail and prescription druggist in good faith in Louisville, Ky., sold as a medicine at his drug store one pint of whisky to R. H. Thompson, at the time and in the manner charged in the indictment; that the whisky was bought in good faith to be used as a medicine; that the defendant had not procured any license to sell liquors in any quantity, except as required by the statutes of the United States to sell such liquors by retail; that the whisky so sold had not been prescribed as a medicine by any regular practicing physician; and that spirituous liquors, including whisky and the various kinds of wines, are useful and necessary medicines in the treatment of disease, and described and recom-

mended as such by all standard authorities on pharmacology and the materia medica, and kept, sold and dispensed by druggists everywhere as officinal medicines.

The provisions of the law alleged to have been violated are as follows: "Before engaging in any occupation or selling any article named in this and section 4225 (relating to peddlers) the person desiring to do so shall procure license and pay the tax thereon as follows." * * * To persons who are druggists in good faith, to retail spirituous and vinous liquors at the drug store, in quantities not less than a quart, the liquor not to be drunk on the premises or adjacent thereto, and to sell in quantities less than a quart, for medicinal purposes only, on the prescription of a regular practicing physician, $50." (Kentucky Statutes, section 4224.)

So much of the Constitution as is supposed to affect the question consists of a portion of section 181, and reads as follows: "The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock for breeding purposes, the various trades, occupations and professions or a special or excise tax."

The learned judge below, in determining the question, said: "It is evident that under the constitutional provision aforesaid the Legislature would have the power to provide a license fee upon druggists as a profession, or a special tax upon them as a class, or an excise tax upon their sales of commodity, but if we follow the interpretation given to a certain provision of the old Constitution, then it is clear that the Legislature would not have the power to select one special commodity sold by a druggist and legislate in regard thereto by imposing conditions upon a sale of that commodity, when made by a druggist, different from what it imposed upon any one else who sells the same commodity. In other words, section 181 defines and limits the power of the General Assembly, and by mentioning what powers it may exercise in regard to license fees, special and excise tax, it inhibits and excludes the exercise of all other powers."

And the conclusion was reached that as the General Assembly, in the statute in question, had not followed either of the methods prescribed in section 181 of the Constitution—in other words, had not taxed the occupation of the druggists or imposed on them a special or excise tax—the statute was, therefore, unconstitutional.

It must be admitted that if this statute is to be regarded as a revenue statute, and as an effort to single out for the purposes of taxation proper and particular commodity in the line of articles which the druggist may handle as such in the prosecution of his calling, or encumber with a specific tax any part or parcel, so to speak, of the druggist's trade, properly embraced in the conduct of his business as a whole, then the learned judge is right in saying that this court has condemned such a process of taxation.

The Legislature, after taxing the whole, can not again tax the parts. It could not tax the occupation of the pharmacist and then tax him for filling each prescription any more than it could tax the profession of the lawyer, and then tax him for each case he might engage in. This would be such an arbitrary method of taxation as to be in violation of the bill of rights; so with respect to the legal principle expressio unius, exclusio alterius. The Constitution having designated the subjects of taxation and the methods to be adopted in the imposition and collection of the taxes, no constitutional authority for the exercise of the power of taxation can be found outside of that instrument.

The former Constitution, it will be remembered, made no provis-

ion as to taxation eo nomine, but as the power to tax is inherent to sovereignty, no difficulty was experienced on that account. The present instrument has provided in sections preceding section 181 a system for the imposition and collection of an ad valorem tax only, and in that section, under the guise of license fees, it provides for a tax on franchise, etc.; but to no constitutional provision on the subject of taxation does the act imposing this alleged tax on druggists for selling a particular commodity conform. If regarded, therefore, as a revenue statute it must be held inoperative and invalid.

We are convinced, however, that the act under consideration was not intended as a revenue measure, and its passage was in no sense in virtue of the constitutional power of levying taxes. It is simply the exercise of the ordinary police power of the government. This power is not defined in the Constitution or its extent in terms limited. It could not well be the subject of inflexible legal definition or restriction. Certainly is the extent of its exercise left unaffected by those sections of the Constitution providing ways and means for the subsistence of the State by process of taxation. It is not above or beyond the Constitution, however, and the question is, in what respect, if in any, does the act under consideration violate any right guaranteed to the druggist under the Constitution?

Every one has the right to follow an innocent calling without permission from the government. He may do with his own whatsoever he pleases so that he injure no one else. We agree with learned counsel that "the doctrine of legislative permission as a condition precedent to the conduct of any useful or harmless business is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men." So, then, without government interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their profession, and the druggist and pharmacist compound their medicines; and if by reason of shysters and quacks an injured people demand protection, or if because ill-behaved druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings can not be prohibited. The innocent and honest druggist can not be restrained of his liberty by reason of the dishonest practices of others. His pursuit being in itself harmless and indeed useful, and capable of being conducted without harm to the public, can not be prohibited, and this is true of every legitimate act going to make up and constitute his trade or profession. It is as true of his right to fill a prescription for whisky as a medicine as it is of his right to fill one calling for calomel. As said by this court, in Sarris v. Commonwealth, 83 Ky., 327, "the power of the Legislature to prohibit the prescription and sale of liquors to be used as a medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of their sale and use for religious purposes." But to prevent or lessen the abuses which experience has demonstrated will likely follow the traffic in whisky in any form, the State may place watches over it, may enact all sorts of police regulations; may require license and establish strict official inspection and police surveillance.

The efficiency of the license system, as fairly attaining the supervision aimed at, is attested by common experience. The officers of the law, by a mere inspection of the records, may at once know where the business is followed as to which their supervision and oversight is needed. We are concerned, however, not with the wisdom of the plan, but rather with the exercise of the power.

The power to enact the present statute with respect to druggists, so far as requiring them to obtain a license and pay therefor the sum indicated before they may sell spirituous and vinous liquors by the quart, and, therefore, as a beverage, will probably not be denied. At least there is no discussion of this phrase of the question in the exhaustive brief of counsel, nor was there in oral argument.

The contention is that as the sale of whisky as a medicine is harmless, and indeed often useful and necessary, it is not within the legislative competency to prohibit it; that to do so is in violation of natural right. We may readily concede these premises, but it does not follow that the law in question violates any natural right. It does not prohibit the sale as a medicine except on the condition that it be made on the prescription of a regular practicing physician, a condition we think entirely reasonable and clearly within the power of the Legislature to impose. May the patient who wants the whisky diagnosé in his case, or may the tradesman who has the goods to sell prescribe the medicine? Certainly in such event the effort to restrain at all the use of intoxicants would be rendered entirely futile. It has long been the settled policy of this State, and indeed of every State in the Union, to confine the sale of intoxicants, when made in small quantities, to druggists and physicians, to be used as a medicine. (Commonwealth v. Reynolds, 89 Ky., 147).

It is in the line of the physician's profession to prescribe medicines —not in that of the druggist or pharmacist. It is no interference with the business of the latter that the right to so prescribe is confined to the physician. It is true the agreement in the case at hand recites that spirituous liquors, including whisky, are kept, sold and dispensed by druggists in good faith everywhere as officinal medicines.

But if a druggist may sell off his stock in trade, of which whisky is a part, merely because his customer calls for it as an officinal medicine, why may not the grocer sell his whiskies and wines for culinary purposes? It is certainly as harmless if not as benevolent to furnish the necessary ingredients of a palatable mince pie as to administer to the wants of the indisposed. Counsel may say, however, that while the power to prohibit is not in terms conceded to the Legislature under the principles announced, yet if the obtainment of the license and payment of the required fee therefor are made conditions precedent to the sale of whisky for the purposes named, it is in effect the power to destroy or prohibit.

The answer is, however, that it does not in fact prohibit save on legitimate and reasonable conditions. It restrains only, and that is precisely the end aimed at by such legislation. The imposition of a license fee in this case does not differ from all license laws which confer special privileges on fit and competent persons making application therefor.

Druggists and physicians are deemed suitable persons to intrust with this power, harmless in itself and useful to mankind, but dangerous when exercised without restraint and proper supervision. So may an engineer be prohibited from running his engine save upon the condition that he obtain a license after examination; an attorney may not practice his profession until his knowledge touching the law may be known of all men through the certifications of his license; likewise a physician must exhibit his diploma as the evidence of his fitness to follow his profession. Has it ever been argued that this requirement—one, too, in the nature of a condition precedent to the pursuit of the calling—is an abridgement of the natural right of the engineer or lawyer or doctor to follow the

calling of his choice? But by the law in question no man is prohibited from following the occupation of a druggist, or selling whisky as a medicine as the law requires. His personal liberty is in no true sense restrained by the demands of the statute. Whether under the guise of a license tax, but which is laid in the exercise of the power of taxation and for revenue purposes, the right of these necessary factors in society to continue their respective callings can be made to depend on the payment of the levy, is a question not necessary to decide. Should such a license fee (we mean one exacted as a means of police regulation) be imposed as would be so outrageously unreasonable as to amount to prohibition, and go beyond the probable cost of regulation, the courts could interpose on the principle announced.

The conduct of an innocent and useful business is not made criminal by the statute imposing a fine on the druggist for violating the law requiring a license before making sales of spirituous liquors. It is this feature of his business which brings him within the oversight and under the control of the police power of the State, and which power may be thus exercised as a means of preventing or reducing to a minimum the threatened harm to public morals. Much has been written, and this feature is urged with warmth by distinguished counsel, on the hardships liable to be inflicted in particular instances by reason of the requirement of a prescription.

A man is stricken down in the street by a falling timber, and whisky will relieve him; a woman is seized with convulsions, and brandy will save her; a child is bitten by the deadly copperhead, and alcohol in some form is a specific. These harrowing incidents, if they prove anything, would require that intoxicants should be free for all, and kept in convenient places for such emergencies.

We might answer that these individual hardships are indeed rare, and that the greatest good to greatest number is the controlling principle of the law; but the old illustration given by Mr. Blackstone affords the better answer. An old law provided "that whosoever drew blood in the street should be punished with the utmost severity." A person fell in a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this it has never been considered as a violation of the spirit of the law.

The statutes of the various States on the subject under discussion are not similar, and it is, therefore, difficult to find cases directly in point. Very few, if any, however, are repugnant to the views we have expressed, and the great bulk of them fortify our position.

In Wright v. The People, 101 Ill., 126, it was held, under a statute somewhat similar to ours, that "the sale of intoxicating liquor in less quantity than one gallon by a regular druggist, even if it be in good faith for medical purposes, without a license to do so from the proper municipal authorities, is prohibited by the statute, and any druggist * * who shall so sell the same without license is liable to indictment, though the liquor is bought and sold, and in fact used solely for medicinal purposes."

The words of the statute, "whoever, not having a license, etc., shall sell," were unqualified and without any exception or limitation whatever as to any class of persons or cases. The same argument made here as to the violation of natural right and the probable hardships was made in that case. The court said: "But let it be once understood that the druggist or other tradesman, merely because his chief business is confined to traffic in other classes of merchandise, may retail intoxicating liquors ad libitum so long as he in

good faith sell for some legitimate purpose other than as a mere beverage, the chief safeguard which the law, as now understood, throws around the subject will soon be frittered away, and the doors thrown wide open to all manner of frauds and evasions of the law, which would bid defiance to the highest degree of watchfulness and diligence the officers of the law could possibly bring to bear to the official discharge of their duties in endeavoring to enforce the law on the subject." To the same effect is the case of Noeker v. The People, 91 Ill., 494.

In the Intoxicating liquor cases, 25 Kansas, 751 (Brewer, judge), the syllabus is: "A statute prohibited the sale of intoxicating liquors save by licensed druggists for certain excepted purposes. *Held*—Constitutional."

In re Ruth, 32 Iowa, 253, the court says: "It has been found that the health and lives of the people demand that a few licensed persons be empowered to sell these liquors for lawful purposes, and that all others be forbidden to deal in them. Of those who are authorized, the law requires satisfactory proof of good moral character. In this respect it differs not from all license law which bestows privileges upon fit and proper persons making application therefor. These laws have always been sustained."

In Woods v. State, 36 Ark., 36, the statute considered provided that it should be unlawful for any person to sell intoxicating liquors "in any quantity or for any purpose whatever without first procuring a license from the county court of the county in which such sale is to be made authorizing such person to exercise such privilege," etc.

It was agreed that the defendant, Woods, "was a druggist, and sold as a medicine, upon the prescription of a practicing physician, to one T. C. Miller, a half-pint of whisky; that the same was bought for and used as a medicine; that whisky is often prescribed by physicians and used with beneficial effect in the treatment of disease; and that the defendant did not have a license from the county court to sell liquors." The court held that the defendant, though a druggist, could not lawfully sell such spirits even as a medicine upon the prescription of a physician."

Mr. Tiedman, in his work on Limitations of Police Power, section 102, lays down in substance that when the occupation or business is not inherently harmful, or, in other words, where it is possible to conduct it without harm to the public, its prosecution can not rightfully be prohibited, but licenses may be required and the most rigid system of police inspection be established.

We need hardly add, in conclusion, that we can not hold this or any law invalid for the reason simply that it violates our notions of justice or is oppressive, or, in the opinion of many, is not required or authorized by public necessity. The remedy for unwise or unjust legislation is not to be provided by the judiciary.

In the language of Chief Justice Robertson, in the City of Louisville v. Hyatt, 2 B. M., 177, "it seems to us that we should be justly chargeable with wandering from the appropriate sphere of the judiciary department, were we, by a subtle elaboration of abstract principles and metaphysical doubts and difficulties, to endeavor to show that such power may be questionable, and, on such unstable and unjudicial ground, to defy and overrule the public will, as clearly announced by the legislative organ."

The agreed facts in this case are sufficient to sustain a conviction, and the judgment is reversed for proceedings consistent with this opinion.

WILLIS' ADM'R v. ROBERTS, &C.

(*Filed October* 18, 1894—*Not to be reported.*)

Limitation of actions—In this case an action brought by an administrator for the recovery of funds of the deceased distributed by the guardian without administration is barred by section 6 of article 8 of chapter 71 of the General Statutes, which provides that in such actions for relief for fraud "no such action shall be brought ten years after the * * perpetration of the fraud."

The action accrued against the guardian at the death of the ward, but could not be maintained until the appointment of an administrator, and, more than ten years having elapsed before his appointment, the action can not be maintained.

Chas. H. Fisk and H. Clay White for appellant.

J. W. Bryan for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Quigley.

On the 21st day of April, 1873, S. F. Roberts was appointed by the Scott County Court guardian of Wm. A. Willis, a minor over fourteen years of age, and qualified as such. On the 15th day of October, 1873, on an inquest of lunacy held by the Scott Quarterly Court, said minor was adjudged a lunatic, and sent to the lunatic asylum at Lexington, Kentucky, where he remained until a month or two before his death, when he was removed to the home of his guardian in Kenton county, Kentucky, where he died on the——day of May, 1877, leaving as his only heirs at law his mother, Jane A. Willis, and his brothers and sisters, to-wit: Richard P. Willis, Mary E. Roberts, Kate Powell, H. Clay Willis, Robt. L. Willis, Benton E. Willis, Nannie R. Eals, Laura B. Chessman, Will R. Bucher and B. E. Willis.

There were no debts existing against the decedent's estate other than for funeral expenses and commissions due his guardian. On the 27th day of November, 1876, the guardian received from the general goverment for his ward pension money amounting to the sum of $4,274. Under the statute of descent and distribution, after payment of debts, the mother was entitled to one-half of the money remaining, the ten brothers and sisters to the balance in equal proportions. No administration was had upon the estate, but during the years 1877, 1878 and 1879 Roberts paid to seven of the brothers and sisters certain amounts, and took from each a receipt in full of his or her interest in the fund and an assignment respectively thereof to himself. He also partially paid to the mother her half of the fund by selling to her a house and ground in Kenton county, valued by them at $1,600, which his heirs afterwards conveyed to her. S. F. Roberts died in Kenton county, November 28, 1881, intestate, leaving a widow, Mary E. Roberts, and two children, Nellie Van Patten and Rebecca Armstrong. John Armstrong, Jr., was appointed by the Kenton County Court administrator of his estate December 7, 1881, and on June 19, 1882, he settled the accounts of Roberts' guardian with the Scott County Court, paying to the mother the balance due her, and to the other two children, who seem to have been infants during Roberts' lifetime, the amounts due them out of the fund, and took receipts therefor. Mollie E. Roberts being the wife of said S. F. Roberts and one of the heirs of said Wm.

A. Willis, nothing was paid to her. On October 1, 1883, Armstrong, administrator as aforesaid, filed his suit in the Kenton Chancery Court against the creditors and heirs of said decedent, Roberts, to settle his estate, and also his accounts as administrator; none of the claimants of the fund in question, however, were made parties. The estate was settled, final judgment was rendered on the 28th day of February, 1884, and the estate was divided between the widow and the two children. On the 19th day of November, 1888, appellant, H. Clay White, on his own motion, was appointed administrator of the estate of Wm. A. Willis, deceased, by the county court of Scott county, qualified as such, and on the 15th day of July, 1889, brought his suit in the Kenton Circuit Court against the administrator, widow and heirs of decedent, S. F. Roberts, for the sum of $8,191.66, being the alleged amount of said pension fund, with interest, seeking thereby to subject assets in the possession of the widow and heirs to the payment thereof, because of alleged fraud on the part of Roberts in the distribution of the pension fund among the heirs of Willis.

Section 6 of article 3, chapter 71 of the General Statutes, entitled "Limitation of Action," is relied upon by appellees as one of the defenses to this action, and is plead by them in bar thereof. It reads as follows:

"In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud."

This statute is conclusive of the right of appellant to bring and maintain this suit. It was enacted to prevent claims from growing stale, and parties from sleeping on their rights. Appellant contends that this fund was a continuing and subsisting trust in the hands of Roberts, and that, therefore, the statute quoted does not apply.

This court, in the case of Hargis, &c. v. Sewell's adm'r, 87 Ky., 63, said: "The reason the statute does not run in such a case is that the cestui que trust has no right to sue the trustee and recover the trust fund. But whenever the right of action exists there is no reason why the trustee may not rely upon the statute, if the time has run, as a bar to the recovery, for when the right of action accrues the trust terminates."

As against Roberts a cause of action accrued at once upon the death of his ward, but it could not be maintained until the appointment of an administrator, the right of action existing in the heirs to be asserted only through the administrator, because from the nature of the estate it vested in the personal representatives of Willis and not the heirs; and they, having preferred to have the fund distributed without administration being granted, did so at their own risk, and can not at this late day be heard to complain. More than ten years having elapsed since the alleged fraud is charged to have been committed the statute relied upon constitutes a complete bar to this action.

Wherefore, the judgment of the lower court is affirmed.

BUCKLER'S ADM'R, &C. V. BREWER'S ADM'R.

(*Filed October 27, 1894—Not to be reported.*)

Bankruptcy—Jurisdiction of State court—In this action to have lands sold to satisfy the creditors of one who had been adjudged a bankrupt on the ground that a sale made of these lands by the assignee in bankruptcy was not ordered by the bankrupt court nor confirmed by it, there being a failure to show that the assignee in bankruptcy had not reported this action to the district court, a State court has no jurisdiction over the subject-matter.

Winfield Buckler for appellants.

Kennedy & Son and W. H. Holt for appellee.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Pryor.

In the year 1893 the appellant, as the personal representative of Robert Buckler and Winfield Buckler, both creditors of the estate of Robert Brewer, filed this petition for a settlement of his (Robert Brewer's) estate, alleging that his administrator and heir had refused to unite in the petition, and making them defendants. In the year 1878 Brewer, the debtor, was adjudged a bankrupt, and Walter Cleary, who is also a defendant, was the assignee in bankruptcy. Brewer, when declared a bankrupt, owned a tract of land the title to which passed to his assignee, and this land is now the subject of the controversy between the appellants and the real appellee, Bogers, who purchased it from the assignee in bankruptcy and obtained a deed therefor. There was a purchase money note for $600 due by Brewer on the land, and Rogers, the purchaser, held a mortgage upon it for about $1,500. He paid off the purchase money lien, and his lien by mortgage for $1,500 made near $2,200 he paid for the land. The creditor is now seeking to have the land sold to satisfy first the liens and then the creditors of Brewer. He alleges that the sale to Rogers was not ordered by the bankrupt court nor confirmed by it; that there was an agreement between Brewer and Rogers by which the latter was to pay off the liens and hold the land in trust for Brewer; that the assignee had abandoned the claim as worthless to creditors, and, therefore, the State court had the jurisdiction to sell the land, that was worth, when sold to Rogers, $3,000.

This land was sold in the year 1878, and Brewer died in the year 1881. A demurrer was sustained to the petition, and no amendment being tendered it was dismissed.

There is an averment in the petition that the land in controversy was listed in the bankrupt proceedings as a part of the estate of Brewer and the deed made to Rogers in September, 1881. Although it is alleged that the sale was not made under an order of court or confirmed, there is a failure to allege the assignee had not reported his sale to the bankrupt court, or that the appellant's claim had never been proven as a debt against the bankrupt, for, if proven, the creditor was before the court and has no right to complain in a State court of the want of confirmation of the sale by the district court, nor will the alleged agreement to hold the property in trust be enforced upon the idea that the assignee had abandoned the claim because the averments of the petition show that the assignee had not abandoned it, but sold the land as a part of the bankrupt estate, and made him a deed in pursuance of the sale.

If he made the deed to Rogers, knowing of this parol agreement, he was guilty of fraud as well as Rogers; but it is not pretended that he had any such knowledge, and it, therefore, results that a State court is being asked to cancel this conveyance or subject the land to the payment of debts, when the fact may exist, and doubtless does, that the assignee reported his action to the district court. A State court has no jurisdiction over the subject-matter.

Judgment affirmed.

L. & N. R. R. Co. v. Popp, by, &c.

(Filed October 23, 1894.)

1. *Railroads—Negligence*—Where a railroad company was backing a train for the purpose of coupling it to two cars standing on the railroad track near to the platform of the depot, which was unenclosed, it was gross negligence in the company in failing to have a servant near to warn persons of the danger, and the company is liable in damages to an infant between five and six years old who, while standing on the rear platform of the hindmost car, had his leg caught between the car and a bumper and crushed so as to necessitate amputation.

2. *Same—Trespassers*—When an injury is the result of nonperformance or violation of a plain and manifest duty for protection of human life and safety, the party thus acting will not be heard to say in justification that the person thus injured was merely a trespasser.

3. *Same—Damages*—Where the injury was such that amputation of the leg was necessary a verdict for $10 000 is not excessive.

4. *Same—Instructions*—In an instruction given, which directed the jury to find for the plaintiff, if they believed from the evidence that the agents or employes of the defendant or any of them knew, or "*had cause to believe*," that plaintiff was on either of the two cars, or was standing on the track and failed to use ordinary care to protect him from harm, and that plaintiff was injured by reason of the failure of these employes to use ordinary care, the words "had cause" could not have been understood by the jury to mean other than reasonable grounds to believe, and was, therefore, not prejudicial to defendant.

Lyttleton Cooke and Helm & Bruce for appellant.

Burton Vance, Augustus E. Willson and W. W. Thum for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis..

Appellee, an infant between five and six years old, brought this action by his father and next friend to recover damages for injury to his leg, necessitating amputation above the knee, which was caught between a passenger car in motion and what is called a bumper placed at the end of a railroad track in Louisville owned by appellant.

The injury was done, according to a map filed, about 5 feet from Second street and 155 feet from the west end of the passenger depot building, which is about 200 feet long by 20 feet wide, and situated north of Water, between First and Second streets. A passenger platform extends from First to Second street that at its eastern end is about 35 and on each side of the depot building 7½ feet wide. To a line distant from the west end of the building 25 feet the platform is

also 35 feet wide, but from there to Second street only 10, the remaining space north of and between it and the track, at end of which is the bumper mentioned, being used for an open roadway that extends from Second street to the line referred to.

On the south as well as north side of the depot building is a railway track, at usual distance from edge of the platform, and used exclusively for passenger traffic. There are five other tracts further north, likewise extending to Second street or very near it, one of which, the most northern, runs directly into or through a freight depot building situated east of First street. The others intersect the two passenger tracks at unequal distances east of that street, and on them are put idle passenger cars, though neither one of those tracks is adapted or used for transportation of passengers.

The evidence shows that two cars had been placed and left stationary on that passenger track north of the depot building, the west end of one of them being near to the bumper. But precisely how long it had been done before appellee was hurt does not appear, though they were there when a Shelbyville train was backed to the depot building on that track, and remained there after it left. It, however, appears they were put there for the purpose of being attached to and forming part of an excursion train that left the station about 4 p. m. on a Sunday; and it was in the process of making up or completing that train, by coupling to the two stationary cars four others backed on the track by a switch engine, when appellee, at the time on the platform of that one nearest the bumper, received the injury complained of, and for which the jury returned a verdict in his favor for $10,000.

The ground relied on for reversal is error of the lower court in giving and refusing instructions. The first of them given which we we will consider is as follows: "If the jury shall believe from the evidence that the agents and employes of the defendant, or any of them, knew or had cause to believe that plaintiff, or the children who were with him, was on either of the two cars which were standing on defendant's track near Second street and failed to exercise ordinary care to protect them from harm when said cars were coupled with the train, and that by reason of the failure of said agents or employes to observe ordinary care the plaintiff sustained the injury of which he complains, then the law is for the plaintiff, and the jury should so find."

It seems to us that instruction involves no more than the simple proposition, often approved by this court, that it is the duty of those operating a railway train to use reasonable effort to avoid injuring even a trespasser when his peril is imminent, or, by diligent attention to and proper conduct of the business they are engaged at, might have been discovered in time to prevent it; and such diligence and attention is especially imperative in a case like this; for, though ordinarily a person of matured experience and capacity might safely remain on the platform of a car while being coupled to others, it would be extremely perilous for a child five or six years old to attempt doing it, or even to go near them. It is true the evidence does show that the engine and four cars were backed at the rate of only two miles per hour; but however slow may have been their movement, it was inevitable the two stationary cars would be jarred and pushed suddenly back, as did occur, with the result of crushing appellee's leg.

The phase "had cause," used in the instruction, we think, could not have been understood by the jury as meaning other than reasonable grounds to believe, and was, therefore, not prejudicial to appel-

lant. But it is contended there was no evidence tending to show that those in charge of the train either knew or had cause to believe appellee was then on or near to either car.

It appears he, accompanied by three other boys about his age, except one, who was nine years old, on their way (though not by the most direct route) home from some place east of First street, stopped on the platform at the eastern end of the depot building, whence they were driven by the baggage master. A passenger for the Shelbyville train, before leaving, also tried to induce them to go off, and another employe, probably engineer of that train, endeavored to frighten them away by threat to carry them to the country. But instead of leaving the premises they went to west end of the platform, and finally into the car, for the purpose of ge ting ice water, which was given to them by two men who, there is some reason to believe, though not satisfactorily shown, were employes of appellant. After getting the water they loitered about the car, appellee remaining on the platform of it, until the engine and four cars attached were backed on the track in order to m ke the coupling.

The proof is the bell was ringing as the train backed, and thereby is afforded some confirmation of the statement of a witness, who was at that time on opposite side of Second street, that appellee, seemingly frightened at the coming collision, called some person to help him off the platform, and to escape the danger endeavored to get on the bumper.

There is no direct evidence that those in charge of the backing train, or any other employe, actually saw him on the car platform in time to avoid injuring him; and whether they had reasonable grounds to believe he was there we will consider in connection with the following instruction:

"The fact that the said two cars were standing upon the track unenclosed, and that the plaintiff was injured upon one of them, are not sufficient of themselves to render the defendant liable in this action. But it was the duty of the defendant to exercise ordinary care with regard to said cars to prevent injury to any one by them, and if the jury shall believe, from all the facts and circumstances admitted in evidence, that the defendant or its agents or employes failed to exercise ordinary care to prevent injury to others by said car, and that the injury which plaintiff sustained would not have been received by him but for the failure of said employes to observe ordinary care with respect to said cars for the safety of others, then the law is for plaintiff, and so should the jury find."

There is, in our opinion, no difficulty in determining whether, as a question of law, the servants of appellant exercised due care to prevent injury to appellee; for the legal rights and duties of railroad companies have been heretofore, in analogous cases, fully and clearly defined.

A railroad company has the right to exclusive use and occupation of its private yard and tracks except at crossings, and is not bound at such places to look out for intruders and trespassers, otherwise it could not properly perform its duty to the public. (K. C. R. R. Co. v. Gastineau, 83 Ky., 119; Conley v. C., N. O. T. R. R. Co., 89 Ky., 402; McDermott v. K. C. R. R. Co., 93 Ky., 408; L. & N. R. R. Co. v. Hunt, 11 KY. LAW REP., 825.)

But the place where appellee was injured is not, in meaning of the cases cited, the private yard of appellant, where others than employes have no right nor can be reasonably expected to go, and where, as a legal consequence, there is no obligation to look out for them. It is not a place where turntables are placed and used as in

the McDermott case, nor where trains are usually and can be safely made up or cars coupled as in the Gastineau case, nor where switching trains and changing cars are properly done as in the Hunt case. On the contrary, the track in question is near enough to the depot platform for passengers to step off and on cars; within less than eight feet of the depot building, where the traveling public, composed of men, women and children, resort, and actually contiguous to and parallel with the open roadway from Second street, so that where appellee was injured children or adults might go without obstruction upon the track or even into the cars left standing thereon; and that children of all sizes were in the habit of going about the depot building and ground for pastime and amusement was known to servants of appellant, as they testified. Moreover, the fact that appellee and companions went into the car on their own motion to get ice water shows they were familiar with the premises. Therefore, while, as the lower court substantially instructed the jury, appellant was not legally bound to enclose its depot building and grounds, and leaving the two cars standing upon that track was not of itself negligence, still it was so manifestly dangerous to couple them at that place and under existing circumstances to the backing train that active vigilance on the part of the employes was required in order to prevent injury to others; and failure to exercise it must, consistently with decisions of this court in other cases, be treated as gross negligence. For it has been held that to move or permit to be moved either a train or single car on a side track in a city or town where the public may go by license or custom, without a servant being in position to give warning of its approach and to control its movement, is, where death results, willful negligence in meaning of the statute on that subject. (Shelby's adm'r v. C., N. O. & T. R. R. Co., 85 Ky., 224; Conley v. Same, 89 Ky., 402; L. & N. R. R. Co. v. Potts, 92 Ky., 30.)

And we see no reason why that rule should not apply in this case, for the employes undertook not merely to back the train upon a track near the passenger platform, which is always dangerous when the premises are unenclosed, but to make up or complete the train by coupling it to two stationary cars within a few feet of the depot building, which at best is very narrow and contracted for a city like Louisville. It is true there was a brakeman on the western end of the moving train, but he was there simply to make the coupling, and could not see whether there were persons on either of the two stationary cars or near to them.

The company had employed at that time a station master and watchman, both of whose services it must be presumed it deemed, and, in our opinion, was, necessary on such occasion, but neither of them was present to give warning of the peril of the appellee and his companions, or aid in preventing injury to them. So while the evidence conduces to show no employe of appellant was aware of the presence of the appellee, it can not be assumed they did not have reasonable grounds to believe he or some other person, infant or adult, might be in peril, much less can it be assumed it was not the legal duty of appellant to have some employe in a position on the platform or train to see to it there was no person in danger of being injured by the collision.

Technically appellee was a trespasser, but, as said in the Conley case, when an injury is the result of nonperformance or violation of a plain and manifest duty for protection of human life and safety, the party thus acting will not be heard to say, in justification, that the person thus injured was merely a trespasser. We do not doubt

applicability of that principle to this case, for obviously to attempt backing a train and coupling cars at the place and under circumstances it was done when appellee was injured is violation and disregard of a plain duty.

There is another aspect in which the conduct of appellant's employes shows negligence of a reprehensible character. It was known to them that children of all ages were in the habit of resorting to the depot premises, yet not only were the two cars coupled to the backing train without any servant being in a position to warn appellee of his danger, but one of the cars, if not both, was left open so as to invite and tempt children to enter, as appellee and his companions did do, and if the two men who gave them water were not actually employes, the fact is thus made apparent that the cars were left so open and exposed that any one, child or adult, might enter at will, no employe being present to prevent or warn them of the coupling process that would and did shortly take place.

In Bransom v. Labrot, 81 Ky., 638, it was held that conduct which towards the general public might be up to the standard of due care may be gross or willful negligence when considered in reference to children of tender age and immature experience. And a case in 9 East., 277, was cited in support of the doctrine, where this language was used: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instinct, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine so that his neighbor's child, attracted to it and tempted to intermeddle by instincts equally as strong, might thereby be killed or maimed for life. Such is not the law."

In our opinion, if appellant elected to keep unenclosed its passenger depot and adjacent premises, so that children might go there, and, tempted by curiosity or thirst, wander upon its railway tracks and into its cars, it was the duty of its employes to know appellee's position and danger, and to be in a position at the proper time to protect him from injury by its moving trains and cars, especially as it was improper to couple cars on that track and at that place.

The only case in which this court is authorized to reverse a judgment on account of excessive damages is when, as provided by the Civil Code, the verdict appears to have been rendered under influence of passion or prejudice. In cases heretofore decided by this court, where the injury was not greater than that received by appellee, verdicts for as great amount have been sustained, and we see no reason for now departing from such precedents.

Judgment affirmed.

C. & O. R. R. Co. v. Cowherd.

(*Filed October* 27, 1892.)

1. *An action for an injury done without the State may be maintained* against a nonresident corporation and common carrier, which passes into the State, under section 78 of the Civil Code, in a county into which the carrier does not pass and in which the plaintiff does not reside. Section 73 of the Code does not apply to this case.

2. *Same—Service of summons.* Service of summons upon the local ticket agent of the corporation in a county into which it did not pass was a suffi-

cient summons of the corporation, as the ticket agent was the only agent of the carrier in the county, and was its chief officer or agent within the meaning of subsection 3 of section 51 of the Civil Code.

3. *It was not an abuse of discretion* on the part of the court below in holding the jury together after they had declared a number of times that they could not agree.

Helm & Bruce and W. H. Jackson for appellant.

Fairleigh & Straus for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The appellee, a citizen of Shelby county, Ky., was injured in the State of West Virginia through the negligence of the appellant, a nonresident corporation and common carrier.

He brought his action for damages arising out of the injury in the Jefferson Court of Common Pleas, and process was executed on a ticket agent of the corporation stationed at Louisville.

The carrier has no chief office or place of business in this State, and no chief officer or agent residing in this State. It does not pass into or through the counties of Jefferson or Shelby, but does run from Lexington eastwardly through a number of counties in this State. The question of jurisdiction as well as of the sufficiency of the service of process was made by appropriate plea and motion to quash, and both plea and motion having been determined adversely to the appellant, a trial was had, resulting in a verdict for the appellee for the sum of $1,500.

The appellant's chief contention is that the Jefferson Court of Common Pleas had no jurisdiction of the action, and this is the first question we will consider.

It is argued by appellant's counsel, and such is the view adopted by the majority of the Superior Court, that while actions of this kind are transitory in their nature and were so at the common law, they have been made local and not transitory actions by the provisions of our Civil Code, section 73 of which is relied on to sustain this contention. That section is as follows: "Excepting the actions mentioned in section 75 (which section relates solely to actions against persons constructively summoned) an action against a common carrier, whether a corporation or not, * * * for an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff or his property is injured, or in which he resides, if he reside in a county into which the carrier passes."

Applying this section to the case at hand, the Jefferson Court of Common Pleas had no jurisdiction because Jefferson county was not the county of the defendant's residence, or that in which the plaintiff was injured, or that in which he resided and into which the carrier passed.

Moreover, if this action is to control, the plaintiff is wholly without remedy so far as the courts of his State are concerned. The corporation has established itself in business within the jurisdiction of the courts of the State, but because the injury was inflicted beyond the territorial limits the plaintiff is not allowed to sue in any of her courts; and so long as the carrier fails to run its road through Shelby county, or fails to establish its chief office or place of business

in Kentucky, the complainant is without remedy so far as this statute gives him relief, even though the managing agents of the carrier might be found doing business in every county in the State.

We do not believe this construction of the law to be sound. No attempt was made to localize actions where the jurisdictional facts contemplated in the statute were wholly wanting. In the very nature of things it would seem impossible to localize an action for a personal injury inflicted by a nonresident beyond the limits of the State.

The existence of the localizing facts can be only accidental, and in most cases would be wanting, as they are here. It seems to us the law was intended to apply only in cases where the defendant, or one of them, resides in the State, or when the plaintiff is injured in the State, or resides in a county in the State into which the carrier passes. In the absence of these jurisdictional facts in any given case we must conclude, not that the plaintiff is without remedy, but that the localizing statute is not applicable. The state of fact which would limit or confine the plaintiff to certain designated counties in the institution of his action does not exist in the case at hand. It was impossible for the plaintiff to bring this action in any of the counties designated in the section relied on to localize the action, hence section 78 of the Code applies, and this provides that "an action which is not required by the foregoing sections of this article to be brought in some other county may be brought in the county in which the defendant, or in which one of several defendants, who may be properly joined as such in the action, resides or is summoned."

It seems to us that the application of this section to this case is entirely free from objection. The nonresident common carrier is thus put on the same footing with other nonresident litigants. When found doing business in the State it is presumably with the consent of the State, and that consent must be assumed to have been on the condition that it subject itself to the same legal environments that encompass other litigants, and it may, therefore, be sued as other litigants when properly summoned.

It may be true, indeed is true, that formerly a corporation could not be sued in an action for the recovery of a personal demand outside of the State by which it was created, the old principle being that the corporation must dwell in the place of its creation, and that it could not migrate to another sovereignty. Under the legal fiction it may be true that the corporation could not be sued away from its sovereignty without its permission; but when it comes within another sovereignty to transact business it comes, as we have said, as other litigants.

But the question recurs, was the corporation properly summoned? Subsection 3 of section 51 of the Civil Code provides that "in an action against a private corporation the summons may be served in any county upon the defendant's chief officer or agent who may be found in the State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

And the chief officer or agent of a corporation is defined to be: "First, its president; second, its vice-president; third, its secretary or librarian; fourth, its cashier or treasurer; fifth, its clerk; sixth, its managing agent."

Here the summons was served on the ticket or passenger agent, and that he was the highest officer and agent of the corporation in the county where the action was brought is shown by the return on the summons. He was the only agent of the carrier in the county,

and was its chief and managing agent in the department of which he had control.

We think he was the chief officer or agent of the corporation within the meaning of the law. Formerly in an action against a railroad company, brought pursuant to section 73, and now in all actions against such company, the summons may be served upon the defendant's passenger or freight agent stationed at or nearest to the county seat of the county in which the action is brought. Bacon, the agent served in this case, says he was not the general agent of the corporation, nor does the statute require him to be such in order to enforce the appearance of his principal by service of process on him. He does not say he is not the managing agent or chief agent in the county. He styles himself "the local ticket agent stationed at Louisville for the C. & O. R. R. Co.," a position, we must assume, involving the chief superintendency and management of the affairs of the company in this department of its service.

We perceive no abuse of discretion on the part of the court below in holding the jury together after they had declared a number of times that they could not agree, nor was there any error in the instructions which could have possibly affected or prejudiced the substantial rights of the defendant.

Judgment affirmed.

NEWCOMB'S EX'TX V. NEWCOMB.

(*Filed October* 30, 1894.)

1. *Opinions as to sanity of testator—Evidence*— The opinions of non-experts as to the sanity or insanity of the testator are competent without a statement of the facts upon which the opinions are based if by association and observation an opportunity to form such opinions has been had.

2. *Will contest—Instructions*— In a will contest an instruction which provides that the jury shall find for the will, if at the time he executed the instrument the testator had the capacity to know his wife and children and his estate, and "to dispose of the same in a rational manner according to a fixed purpose on his part," is not misleading.

3. *Weight of evidence*—Though the preponderance of the proof for the will was manifest, as the finding against the paper was not so palpably against the weight of evidence as to indicate passion or prejudice, the court will not set it aside on that ground.

4. *Evidence*—Provisions in a will which are unnatural and unreasonable may be relied upon to show want of testamentary capacity.

5. *The fact that the crowd applauded* the efforts of one of the counsel for the appellee upon the trial of the case below does not afford grounds for reversal, as no motion was made to discharge the jury, nor objection in any form to the incident.

Yeaman & Lockett and Knott & Edelen for appellant.

John Young Brown, S. B. & R. D. Vance and James F. Clay for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The finding of the jury in the court below, to the effect that a paper purporting to be the will of E. B. Newcomb, deceased, was not his will, is sought to be set aside on this appeal by his widow and sole devisee on the following grounds:

1st. That the opinions of nonexperts against the sanity of the alleged testator were taken without a statement of facts upon which the opinions were based.

It is conceded that the witnesses thus permitted to express their opinions of the incompetency of Newcomb to make the will in contest had opportunities more or less ample to form opinions of his mental condition, through long acquaintance and association with him. But on the authority of the McDaniel will case, 2 J. J. M., 332, and of the case of Hunt's heirs v. Hunt, &c., 3 B. M., 575, it is insisted that the correct rule and true doctrine is that "the opinions of witnesses other than the subscribing witnesses as to the competency of a testator, without stating facts on which they are predicated, are not evidence."

We put the contention of counsel in the very language of the Hunt case, and yet it is evident that just what facts must be stated to entitle the witness to give his opinion is left undetermined by the court. Unquestionably the opinion of a nonexpert, who has had no opportunity to form an opinion of the sanity or insanity of a testator from acquaintance, association, observation or the like, should not be taken. We think the true rule, after a thorough research, was reached in Brown v. Commonwealth, 14 Bush, 398 (Hines, judge), where it was held that before admitting the opinion of a nonprofessional witness as to the sanity or insanity of the person of whom he is to speak, the court must be satisfied that the witness has had an opportunity, by association and observation, to form such an opinion, and when such opportunity is shown the opinion is competent and its admissibility is not dependent on whether or not the witness is able to detail certain specific facts of themselves showing sanity or insanity. The ability of the witness to detail such facts may add very greatly to the weight of the opinion given, but they will not of necessity affect the question of the admissibility of the testimony. What is sought is the precise mental condition of the subject, and when we come to compare the merit of the evidence given by the expert, which is admitted to be competent, who testifies upon a given hypothesis, often confusing and misleading, with the evidence of the neighbor and associate who speaks from actual observation, however unsubstantial and indefinite his facts may appear, we are not prepared to give preference to the former, certainly not to the exclusion of the latter. (Wise v. Foote, 81 Ky., 10; Carlin v. Baird, 11 Ky. LAW REP., 932.)

2d. That this instruction was misleading to the jury, viz.: "If at the time said Newcomb executed said paper he had the capacity to know his wife and children and his estate, and to dispose of the same in a rational manner, according to a fixed purpose on his part, then he was of sound mind according to law, and they will find said paper to be his will."

It is argued, and not without some force, that when told that the capacity of the testator must be such as would enable him to dispose of his estate in a rational manner the jury might conclude that if, according to their opinions, the disposition was not made "in a rational manner," then they might find against the paper. When we remember, however, that on all sides it is admitted that the provisions of a will, when reasonable, provident and natural, are in themselves high evidences of testamentary capacity and may be submitted to the jury for the purpose of sustaining the paper, we are forced to conclude that provisions of a contrary character may be relied on to show want of capacity.

Irrational, unreasonable and unnatural provisions in a will may

be shown as elements of testamentary incapacity and mental imbecility; and this is all on a critical analysis that is suggested by the objectionable words in the instruction. The manner of the disposition was not to be regarded as rational according to the opinion of the jury, but the disposition was to be in a rational manner according to the fixed purpose of the testator.

It is not contended that the instruction submits to the jury what is or is not in their opinion a rational disposition of the estate, but the sole question submitted is as to the capacity of the testator to make such a disposition. But the discussion of the question need not be prolonged. It is not an open one in this State.

In Tudor v. Tudor, 17 B. M., 383, the court said of a similar instruction: "We do not perceive any valid objection to the instruction on this subject, which was given by the court to the jury. It requires the testator to have sufficient capacity to know in what his estate consists, and to dispose of it in a rational manner according to a fixed purpose of his own. If he had sufficient capacity to know his estate, the presumption would be that he did know it; and if he did not know it, proof of that fact would tend strongly to evince his want of capacity to know it, unless his ignorance on the subject was satisfactorily accounted for. And if he had sufficient capacity to dispose of his estate in a rational manner, he must necessarily have had capacity enough not only to know his children, but also to understand his obligations to them as a parent. We do not, therefore, consider any of the objections which have been made to this instruction as entitled to any weight." (Also to the same effect the case of Best v. Best's ex'or, 11 KY. LAW REP., 215.)

It is urged that this instruction has only been approved when the contestants have objected to it, and they were not in an attitude to object to the test of capacity required by it because of its being greater than the law authorized. This is not true, however, of the case of Phillips' ex'or v. Phillips' adm'r, 81 Ky., 328. There the administrator, representing the will of 1869, was the appellant, and had the right to complain of any test greater than the true one. The court approved this instruction, "that soundness of mind in making a will is capacity to know by the testator his legal heirs and his estate, and to dispose of same in a rational manner, according to a fixed purpose of his own," and said that it had been so long and so repeatedly indorsed by this court that it would not be disturbed, although it was possible to get an instruction with more technical accuracy. "It was not calculated," said the court, "to mislead the jury, and that is reason enough for allowing it to remain as it is." Many later cases in the same line might be cited.

3d. That the court should have sustained a peremptory instruction to the jury to find for the will.

Without citing the evidence in detail, we are of the opinion, after a careful examination of it, that there was abundant testimony in behalf of the contestants to require its submission to the jury. Prather testified that he had known the testator for many years. In the last years of his life his mind had been failing, he was childish, there was a considerable change in his mind, and he hardly thought him capable of transacting ordinary business properly, or competent to make a will.

Tugg had known him long, and thought him incompetent. He employed a quack doctor, a humbug, and that was reason enough, he thought, to show incompetency.

E. Henry testified to his incompetency, and detailed circumstances showing loss of memory and lack of former business capacity.

Dr. Dixon thought his mind likely affected by a sunstroke, and never thought him very sound mentally after that, though he couldn't say he was incompetent to make a will.

Dr. Kitchell noticed a failure of mind and body in 1887 and 1888 (the will was made in 1890), and he would bid recklessly on tobacco. At these times witness did not think him competent to make a will, or competent in 1890.

Robards had known him many years; saw a decided change in his mental condition in the fall of 1889, and detailed circumstances indicating childishness and loss of memory; didn't think him competent when he saw him last in 1889.

B. Hill, R. C. Soaper, N. E. Mitcherson and Wm. Elliott each testified substantially as the others named, and with more or less detail.

Other evidence of a corroborative character was introduced by the contestants showing feebleness of mind and body. We think the court properly submitted it to the jury. The testimony for the will was also by those who had known the testator long and well, and made out a strong case for the propounder, the preponderance of the proof for the paper being manifest. But we can not say that the finding was so palpably against the weight of the evidence as to indicate passion or prejudice. Nor do we think that because the crowd applauded the efforts of one of the distinguished counsel for the appellee, when addressing the jury, the substantial rights of the appellant were affected. The court promptly suppressed it, and counsel asked them to desist; no motion was then made to discharge the jury or objection in any form taken to the incident.

On the whole case we think the issue submitted was fairly tried out, and the judgment is, therefore, affirmed.

REED V. COVINGTON & CINCINNATI BRIDGE CO.

(*Filed November* 17, 1894—*Not to be reported.*)

Negligence—Peremptory instruction—In this action to recover damages for personal injuries to plaintiff, alleged to have been caused by the negligence of defendant in carelessly and negligently landing its ferryboat at the time and place named in the petition, the evidence failing to show any negligence on the part of defendant the court properly gave a peremptory instruction to find for defendant.

Hallam & Myers for appellant.

Chas. H. Fisk for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Quigley.

This is a suit to recover damages for personal injuries to the plaintiff, alleged to have been caused by the negligence of defendant in carelessly and negligently landing its ferryboat at the time and place complained of in the petition, by reason of which plaintiff, who was a passenger thereon, instead of leaving the boat by the usual and customary way, attempted to disembark over the bow end of the boat, and in so doing he fell into the Ohio river, between the ferry and the float, soiling and damaging his clothes, and in falling striking the side of the float, cutting a gash over one of his eyes, and

shocking his nervous system from the fright he received from fear of being drowned.

The defendant denies all negligence, and pleads contributory negligence on the part of the plaintiff. On trial had, at the conclusion of plaintiff's testimony, he being the only witness, the court, on defendant's motion, instructed the jury to find for the defendant, and thereupon the jury returned a verdict for defendant, and the court adjudged that plaintiff's petition be dismis-ed. Plaintiff entered a motion and filed the following reasons for a new trial: 1st, the verdict is contrary to law; 2d, the verdict is not sustained by sufficient evidence; 3d, the court erred in peremptorily instructing the jury to find for defendant. The motion having been overruled, the plaintiff prosecutes this appeal to reverse the judgment and have a new trial awarded.

It appears from the evidence that the defendant, at the time of the injury complained of, was running and operating a ferryboat across the Ohio river, between Covington and Cincinnati. Its landing place at Covington was a float, stationed in the river at the foot of Main street. The width of the float does not appear, but its length was about that of the boat, which was eighty or ninety feet. At the sides, near the east and west ends of the float, and connecting it with the shore, were aprons over which passengers, animals and vehicles could pass to and from the ferry. The plaintiff resided in Covington and had known of the ferry all his life, frequently using it in going to and from Covington to Cincinnati and back again. He was thoroughly acquainted with the landing place at Covington, the manner in which it was constructed and the customary and usual way in which the boat landed at the float, and the way of ingress and egress to and from the ferry by passengers. On the rear end of the boat there was a cabin for passengers. The front part of the boat was used for the accommodation of animals and vehicles. On the sides of the ferry, near the rear end, there were gates or movable guard rails by which passageways were formed for the ingress and egress of passengers, and similar passageways on the sides near the front end for animals and vehicles. The customary and usual way for the boat to land at the float was with her bow up stream, the bow first striking the float as she rounded to, which was fastened by means of ropes to bits on the float, and then so soon as her rear end worked in close enough to the float a rope, having a clamp on the end of it, and fastened to a windlass on the float, was thrown and fastened to an eye on the side of the boat, and by means of the windlass she was brought in and moored jam up against the side of the float so that there was no space between them, and no aprons were used at any time between the boat and the float, and none were needed. The plaintiff was cognizant of these facts. On Sunday, the 15th day of February, 1891, the plaintiff, being at Cincinnati, boarded the ferry about 6 o'clock in the evening to go to Covington. He went aboard of her through the rear gate, entered the cabin and remained there until the bow of the boat struck her float at Covington, and just so soon as he heard or felt the bump he jumped up and walked through the engine room, following a passenger who preceded him, on to the bow of the boat, and, without stopping or looking to see whether or not the boat was against the float, he walked into the river. He did not wait for the boat to be moored against the float so that he could use the customary passageway from the ferry to the float in safety, but voluntarily, and without invitation on the part of any officer or employe of defendant in charge of said boat, he undertook at his own risk to leave the boat and get onto the float

at a place other than that provided for the disembarkment of passengers.

There is no evidence of incompetency or mismanagement on the part of the crew of the boat or any member thereof in effecting its landing at the time, or that the boat was out of repair or her machinery disordered, or that the passageway provided for passengers was insecure or unsafe from any cause, or that the boat failed to make her landing in the usual and ordinary way.

The well-settled doctrine of this court is that a peremptory instruction to the jury to find for the defendant is proper, and should be given where the evidence fails to show any negligence on the part of defendant, or negligence tending to connect the defendant with the injury complained of.

The instruction was properly given in this case. Wherefore, the judgment of the lower court is affirmed.

BROWN, &C. V. SWANGO, &C.

(*Filed Nov.* 17, 1894—*Not to be reported.*)

Limitation—The purchaser of a tract of land having held adverse possession for more than thirty years, the heirs of the vendor can not recover the land on the ground that only the dower was meant to be conveyed. The vendor's disability of coverture did not serve to extend the period of limitation beyond thirty years.

Wood & Day and W. H. Holt for appellants.

Wm. Lindsay, Edward W. Hines, J. M. Kash and Robt. Riddell for appellees.

Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Lewis.

Appellants brought this action to recover of appellee one-seventh of a tract of land inherited from her father, John Nickell, by Lovinda Hughes, whose heirs at law they are.

June 10, 1839, Gabriel Hughes and wife, said Lovinda Hughes, executed a deed to Samuel Hardwick, by terms of which they conveyed all their part of said land and covenanted to wrrrant the title, John Nickell being then dead, and she having inherited that fractional part of the land. But according to the certificate of two justices of the peace, before whom the deed was acknowledged, she simply relinquished her dower, and consequently the deed did not operate to divest her of title. Hardwick, however, as shown by the evidence, immediately took possession, and it has been since continuously held and claimed adversely under and in virtue of that deed by him and Little, to whom he conveyed, and by appellee Swango, claiming under Little. It thus results that, although Lovinda Hughes was not simply and alone by that deed divested of title, she manifestly did undertake to sell and convey absolute estate in the land, and as Hardwick then entered, claiming adversely not not merely the life interest of Gabriel Hughes, but hers as well, the statute of limitation, according to the case of Medlock v. Suter, 80 Ky., 101, and others since decided by this court, then began to run notwithstanding her coverture; and such possession having since

been continuous and uninterrupted for more than thirty years, it results that appellee had, long before the institution of this action in 1880, acquired an indefeasible title. For, according to ruling in these cases, her right of action accrued at date of the deed, or as soon as Hardwick entered, claiming the absolute title in virtue of his purchase, and her disability of coverture did not serve to extend the period of limitation beyond thirty years.

Judgment affirmed.

TAPP, &C. V. TODD.

(*Filed November 22, 1894—Not to be reported.*)

Payment in fraud of creditors—Antenuptial contract—The payment of a sum of money to the wife by the husband, who is on the verge of insolvency, on the ground that it is in right of the wife's claim upon the husband by reason of an alleged antenuptial parol contract by which the husband promised to take care of and invest the wife's distributable share of her father's estate, is in fraud of creditors, and no such agreement, after the lapse of thirty-five years, should be enforced as against creditors.

Richards, Weissenger & Baskin for appellants.

Bullitt & Shield and Barnett, Miller & Barnett for appellee.

Appeal from Jefferson Circuit Court, chancery division.

Opinion of the court by Judge Pryor.

This is an appeal by W. J. Tapp and wife from a judgment against the wife, requiring her to pay a certain sum of money into court in the equity actions numbered 45,914 and 45,915.

The husband, W. J. Tapp, was president of the Louisville Bagging Manufacturing Co. In the month of February (25), 1892, that company drew its draft on J. C. Todd, the appellee, for $5,000, payable to the order of W. J. Tapp. Todd accepted the order at the instance of Tapp and for his accommodation.

On April 1, 1892, a draft for a like sum, and payable in the same way, was accepted by Todd, and both papers discounted by Tapp, the latter using the proceeds. The paper was payable in five months. On the 5th of July, 1892, before either bill matured, Tapp and wife gave a mortgage to one E. C. Bohne, trustee, for $10,000 borrowed money. The money was paid to Tapp by the attorney of Bohne, and the former deposited the money to the credit of the Louisville Bagging Co., of which he was president, in the Kentucky National Bank.

This deposit, it is proven, was made by Tapp, through a mistake of some sort, and on the 12th of July this money was checked out by Tapp and handed over to his wife. On the 21st of July of the same year, and before the bills or either of them fell due the bagging company made an assignment for the benefit of creditors, and at that date and for sometime prior thereto all the parties to the paper had become insolvent except the accommodation acceptor, Todd. He took up the paper, obtained an attachment, and in the effort to secure his debt found that the husband and wife, on the 5th of July, 1892, the day on which the mortgage to Bohne was executed, had entered into a written agreement by which the wife, in consideration of $9,750, agreed to sign and did execute the mortgage to Bohne on their resi-

dence, the house and lot then occupied by them on Fourth street, and to give up her potential right of dower in the same, and the wife further to convey three lots in Kansas City to the husband, and to surrender all claim on the husband for money and property which descended to the wife from her father, and which her husband received in trust for her use and benefit, the money to be held by the wife, and used for her own separate use and benefit. This is the substance of the agreement between husband and wife, and under which the wife claims to hold this money against the creditors of the husband. It is not pretended that the value of appellant's potential right of dower and the deed to the Kansas City property was an equivalent for the money paid to the wife and obtained by the execution of the mortgage to Bohne, but the wife is asserting her right to the money by reason of what is claimed to have been an antenuptial parol contract between the wife and husband, made in the month of December, 1857, by which he promised the wife, before their marriage, to take care of and invest for her the money she derived or might obtain from her father's estate, there having been no distribution made at that time, the sum amounting to about $12,000. The chancellor below held the transaction between the husband and wife fraudulent, and directed the wife to pay into court the money received under the Bohne mortgage. It seems to us the bare statement of the facts is sufficient to sustain the judgment below without any further comment upon the testimony.

In this case the husband reduced to his possession the money of the wife under a promise to keep it for her and invest it, as is alleged, and instead of complying with his promise made in the year 1857 uses the money in his own business for a period of over thirty years, and when he became insolvent in the year 1892 he proposes to discharge the obligation he is under to the wife at the expense of creditors, who had the right to rely upon what the husband then owned and the property to which he had title as a security for his liabilities to them.

When the creditor seeks to make his debt he is met with a secret parol trust, said to have been made more than thirty-five years prior to the recital in the agreement of 1892, as an obstacle in the way of his recovery. Besides, if the proof of this character of trust makes such a claim superior to that of creditors, there is scarcely an instance where the marital relation exists that proof as to what the husband said to the wife or to others as to his purpose to protect the wife in her estate could not be obtained. Here the husband invested and used the money in purchasing real estate and selling it by regular conveyances, the wife signing the deeds, and no claims asserted against the husband until after a lapse of more than a quarter of a century, and not then until the husband had met with pecuniary losses involving him in financial ruin.

It seems to us the cases of Anderson v. Anderson, 80 Ky., 638; Mead v. Stairs, 88 Ky., 66; Davis v. Justice, 14 Ky. Law Rep., 741, and other cases, are decisive of this question.

In our opinion no such agreement should be enforced as against creditors after such a lapse of time. The court below reserves the question as to the security of the wife in her potential right of dower released in the mortgage to Bohne. That question is not before us.

Judgment affirmed.

AVERY & SONS V. MEEK.

(*Filed November* 24, 1894.)

1. *Injury to an employe—Instructions*—In this action for damages for an injury sustained by an employe while oiling a machine which was under the management and control of a co-employe of a superior authority, who was temporarily absent, an instruction given to the jury was erroneous and prejudicial to the defendant, as it assumed that plaintiff may not have known that the machine was dangerous, when he had seen it in operation daily for the preceding six months, and must have known that it was dangerous to oil it in the manner in which he attempted to do so. The instruction was also erroneous in informing the jury that if the machine was defective the defendant was liable for full measure of damages, for the injury may not have been caused directly or indirectly by that defect.

2. *Same—Negligence*—It was error in the lower court in failing to instruct the jury as to the law that one servant can not for any less degree than gross negligence of a co-employe, superior in authority, recover for an injury.

3. *Same—The rule that where a defect in or omission from an instruction* is cured or supplied elsewhere in the series of instructions, it is not to be treated as reversible error, does not apply, as the court fails to find the defective instruction qualified or explained.

Dodd & Dodd and Pirtle, Speed & Trabue for appellants.

Kirby & Smith and O'Neal, Phelps & Pryor for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Lewis.

Robert Meek, an infant, suing by his father and next friend, brought this action to recover for a personal injury received while employed by B. F. Avery & Sons, a corporation owning and operating a plow factory, he being then about fourteen years of age.

It seems to be admitted that the special and only service he was at that time engaged to perform was carrying iron plates to and from a shearing machine under immediate control and management of Simmons, another employe. But it is alleged in the petition that, obeying an order of Simmons, who was then temporarily absent, plaintiff undertook to oil that machine, and in doing so a rag he had for the purpose of cleaning it was caught between cogs of an upper and nether wheel in motion, and endeavoring to withdraw it he got his hand crushed so as to require amputation.

The only error of the lower court relied on by defendant for reversal of the judgment in this case we need to consider relates to instructions given the jury, which it may be said at the outset are so numerous, being eleven in number, as to some extent perplex the jury. But the one particularly objected to is No. 2, as follows: "It was the duty of the defendant to provide reasonably safe machinery for the use of its employes and to keep it in reasonably safe repair, and if the jury believe from the evidence that the machine at which the plaintiff was employed to assist Reuben Simpson was defective and dangerous, and that the plaintiff did not know thereof, but the defendant or its employe in control of the plaintiff knew it was defective and dangerous, or might have known it by exercise of ordinary care, then the law is for the plaintiff, and the jury should so find, unless they further believe from the evidence that the injury which plaintiff received from said machine was caused by his own negligence."

That instruction is obviously erroneous, and must have prejudiced the defendant.

1st. It assumes plaintiff may not have known the machine was dangerous, when he had seen it in operation daily during six preceding months, and must have certainly been aware it was dangerous to oil it in the manner and where he attempted to do so.

2d. The jury was informed that if the machine was defective defendant was legally liable for full measure of damages, that being the plain meaning of the phrase "the law is for plaintiff," even though the injury may not have been caused directly or indirectly by that defect.

The defect was first complained of and set up in an amended petition filed sometime after commencement of the action, and as described therein, was lack of a covering for the cog-wheels, which, it was stated, had been in proper position but was broken off and never replaced. But the evidence shows, and indeed an inspection of the machine would render it obvious, that by reason of the direction in which the cog-wheels revolved it was dangerous, with or without the covering, to oil the machine on that side plaintiff attempted to do it, while it could have been done in comparative safety on the opposite side.

Simpson testifies he did not order plaintiff to oil the machine at all; another advised him to keep away from it, and there is evidence which not only tends to show plaintiff was injured by his own negligence, but renders it doubtful whether he was, when hurt, engaged in oiling the machine. But the jury was, by the instruction in question, relieved from the duty of considering these exculpatory facts and required to find for plaintiff upon the bare hypothesis of the machine being defective and dangerous, whether the injury was the effect thereof or not. It is true they were in general terms instructed not to so find if the injury was caused by plaintiff's own negligence. But the court having failed either to give in that connection a true and full definition of contributory negligence, or to permit the jury to inquire and determine whether the alleged defect was proximate cause of the injury, it can be readily perceived defendant was deprived of benefit of what the jury might have regarded available defenses.

The rule is, as argued for appellee, that an apparent omission from or defect of a particular instruction should not be treated as reversible error if elsewhere in the series of instructions, which must be considered together, the omission is supplied or defect cured. But we have looked at all the instructions singly and collectively, and failed to find the misleading and illegal proposition in second instruction qualified or explained.

It has been often and uniformly held by this court that one servant can not, for any less degree than gross negligence of a coemploye superior in authority, recover for an injury. But the lower court failed to so instruct the jury in this case, and therein is another error affecting substantial rights of the defendant, now appellant.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

WARE v. MCCORMACK.

(*Filed Nov.* 17, 1894.)

1. *Assignment of note—Genuineness of signatures—Grounds of recovery*—The assignee of a note, sold without recourse, may recover from the assignor either upon the ground of a warranty that the signatures were genuine or of the want of consideration after bringing suit against the obligor, who pleaded *non est factum*.

2. *An assignment of a note without recourse* only relieves the assignee of responsibility by reason of the insolvency of the obligors, but there is an implid warranty that the signatures are genuine, and the assignee is not required to use the same diligence in testing the genuineness of the paper as is required in testing the solvency of the obligors in case of a mere assignment for value.

G. G. Gilbert for appellant.

Pryor J. Foree and W. H. Anderson for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

In the month of January, 1888, the appellee, McCormack, held a note payable to himself on H. Clay Figg and E. M. Figg for $600, dated March 1, 1886, and due in twelve months. He sold this note to his niece, the appellant, for $642.65, for which she gave him her check, and he assigned the note to her without recourse. She held the note until March, 1890, when she instituted her action upon it against both the obligors. H. Clay Figg was insolvent when the note was executed, and known to be by all the parties to the transaction. He left the State and was a nonresident when the action on the note was instituted. The solvent obligor, E. M. Figg, when served with process, appeared and pleaded non est factum, and upon that issue it was held by the judgment of the court that he had never executed the paper. At the time the appellee sold the note to the appellant she believed the note was genuine, and had no reason to think otherwise until the defense was made.

After judgment against her, and in favor of the solvent obligor, she instituted the present action against her assignor, McCormack, alleging that the signature of E. M. Figg to the note was a forgery, and in the action against him on that paper he made that defense and defeated the recovery, and sought to recover upon an express warranty by the assignor as to its validity or the implied warranty that it contained the genuine signature of the obligors. There was also a second paragraph seeking a recovery back of the money paid for the want of consideration.

On the trial of this action a judgment was rendered against the assignor, McCormack, from which he appealed to the Superior Court, and the judgment of the court below was reversed on the ground that as assignee she had failed to prosecute the action against the obligors with that diligence required by the law, the Superior Court basing its decision on the case of Wynn v. Poynter, 3 Bush, 54.

When the case was first tried in the court below the plaintiff was required, over the objection of her counsel, to elect whether she would proceed on the first or second count of the petition, and, electing to try on the first count, recovered the judgment that was reversed. In the reversal of that judgment it was in effect held by the Superior Court that on the return of the case the plaintiff should be allowed to amend, and could recover upon the ground of a want of consideration for the money had and received by the defendant. On the return of the case the court below refused the offer to file such an amendment, and a judgment was entered for the defendant, and from that judgment the plaintiff appeals. It is now insisted that the effect of the first judgment was to determine that the second count of the petition contained no cause of action, and, being res adjudicata, the plaintiff could file no such amendment. The plaintiff had been compelled to elect to proceed on the first paragraph of the petition, and

the dismissal of the second paragraph was, in its effect, a dismissal without prejudice. It was not involved in the issue tried by the Superior Court, nor could the question have been raised by a cross appeal, because the plaintiff had obtained by the judgment reversed all that she had asked for, and so when the case returned to the lower court the case stood with the right on the part of that court to permit the second count to be reinstated, or an amended pleading setting forth a cause of action arising by reason of the payment of this money without consideration. In fact there was no reason for requiring an election, and the plaintiff was entitled to recover on either ground.

Every transference of a note or bill transferable by delivery warrants that it is not fictitious, forged or altered. (4 Lawson's Rights and Remedies, &c., section 1593; 2 Parson's Notes and Bills, 589.)

When a note is assigned without recourse it means only that the assignor is not to be responsible by reason of the insolvency of the obligors, but there is an implied warranty that the paper is genuine that is broken in the event the signatures to the note are forgeries. An assignment of a note for value is a guaranty of the solvency of the obligors at the time of the assignment, and the assignor binds himself to make the note good in the event the assignee uses the proper diligence by suit to test the solvency of the payors, but this diligence is not required in order to test the genuineness of the signature, for if the obligee parts with the note by mere delivery for value and without any assignment, he becomes liable to return the consideration in the event the paper he sells is a forgery. His liability in this regard does not depend upon the assignment, but arises from the sale and delivery of the paper, the law implying that the note is what it purports to be—the genuine signature of the parties to it.

The rule is well settled in Emerson v. Claywell, 14 B. M., 15: "If an absolute and unconditional assignment be made of a bond, either for money or land, the assignor, where there is no express stipulation to that effect, undertakes by implication that he is the absolute and unconditional owner of the bond, and has an indefeasible right to demand what the bond calls for, and if he has no such right there is a breach of the implied undertaking the moment the bond is assigned."

Here the assignee, by the contract of assignment, had agreed to risk the solvency of the obligors, and there was no necessity for any suit to test their ability to pay, and certainly none to test the genuineness of the signature. The note was made payable to the assignor. He is presumed to know whether the signatures were or not forgeries, and it was not necessary for the assignee to bring an action that the assignor might be informed as to the validity of the obligation. She has paid full value for a note that was worthless; that was not, in fact or in law, the note of the solvent obligor, and if even required to institute legal proceedings, that the issue of non est factum might be determined, it then appears that, by a proper legal proceeding not questioned by the appellee, it was adjudged that the name of E. M. Figg was a forgery.

What is the legal as well as rational meaning of the language without recourse used in the assignment of a note? In making the sale and transfer of this note did the mind of either party conceive the necessity of testing by action the validity of any signature to the paper? Did the law impose such an undertaking on the part of the appellant when she made the purchase, and, when accepting the assignment by which she risked the solvency of the parties to it, im-

pose the duty of requiring an action on the paper at the first term of court after the assignment in order to have determined by a judicial tribunal whether or not the signatures of this note executed to her assignor were or not genuine? We think not. H. C. Figg was insolvent at the time, and so continued. The appellee has lost nothing, but has received from the plaintiff the amount of the note and interest, exceeding $600, without any consideration whatever.

The doctrine of the case of Wynn v. Poynter, 3 Bush, 54, is overruled, and the judgment below reversed, with directions to permit the amended pleading to be filed, and for proceedings consistent with this opinion.

Judge Pryor delivered the following response to petition for rehearing:

The only question in this case necessary to be considered is, is the holder of a note assigned without recourse required to bring a suit at the first term of the court after the assignment in order to hold the assignor bound for the genuineness of the signature? We think the question is too plain for argument, and that the assignee may sue at any time within five years on the implied warranty of genuineness that arises not from the assignment but from the sale and delivery of the note.

In the case of Wynn v. Poynter there was no trial on the plea of non est factum, or proof that the note was a forgery, as the able judge in his response to the petition for a rehearing states; and while that case is correctly decided on the facts, the objection to the principle announced in that case is, the court held "the action must be prosecuted with the same legal diligence to ascertain the genuineness of the paper required by the assignee to test the solvency of the obligor before you can make the assignor responsible." This we hold not to be the law, and that, as in case of the sale of a chattel, passing by delivery or by written transfer, whenever there is no legal title in the vendor, or a burden of the implied warranty, the vendee may sue at once to recover damages, and the measure of recovery usual in such cases, where there is a total failure of consideration, is a recovery of the money back with the interest; and if a partial loss by reason of the breach, then a recovery to that extent. The appellant in this case had agreed, by accepting the assignment without recourse, to risk the solvency of the parties to the notes, and, as the facts alleged show, because there was no doubt as to the solvency of the appellee, all the parties knowing the insolvency of his obligor. Now this note was made payable to the appellant, and he is required to know when he sells the note whether or not the paper is genuine, and it would be absurd to say that it was the duty of the holder to sue that he might ascertain the genuineness of the signature. If there had been an assignment in the ordinary form there might be some reason for holding the assignee bound to sue at the first term, as it is admitted that one of the obligors signed the paper; but if he had not sued, and it appeared that he had relied on the solvency of one whose signature was a forgery, and that the other was insolvent, and had been from the date of the assignment, still he could recover because it would have been fraud in fact as well as in law to sell a forged note, the liability arising from the sale and delivery of the paper; and having been executed to him, it must be conclusively presumed, in an action against him to recover back the money, that he knew the paper, if a forgery, was not genuine.

It is argued the Superior Court has decided that the case of Wynn v. Poynter settles the question, and, therefore, the case is res

adjudicata when the court expressly authorized the filing of an amended petition construing the first action as being on the implied warranty of assignment, where there was no such warranty except such as arose from the fraud of the party selling the paper and the want of consideration.

If, therefore, the opinion of that court is res adjudicata as to the one question, it must be so as to all others; and, authorizing the amended pleading and sustaining it when it was offered, we have clearly before us what that court did decide. The amended petition should have been filed, and the specific objection made here that the petition or the amendment was not sworn to will not avail.

Petition overruled.

MURRAY V. COMMONWEALTH.

(Filed December 4, 1894—Not to be reported.)

Corroborative testimony—Appellant was convicted of burglary chiefly on the testimony of an accomplice, but in view of the fact that testimony was shown that accused had been to the house broken into about a week before inquiring for work, and had been afterwards seen in earnest conversation with the accomplice and another, the court will not interfere with the finding of the jury, who heard the whole case, and under proper instructions believed beyond a reasonable doubt that the accused was guilty.

B. R. Jouett for appellant.

W. J. Hendrick for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted of the crime of burglary chiefly on the testimony of an accomplice, and whether there is any proof corroborating that testimony tending to connect the accused with the commission of the offense is the sole question on this appeal.

On the night of the burglary one Holiday, who lived some miles from Winchester, Ky., was aroused from sleep by some one trying to open his bed-room door, which was propped with a board. He seized his gun, and when the thieves had prized open the door a few inches he thrust the gun out and fired. The parties returned the fire and filed. Holiday found an outer door broken as well as a window, and also discovered blood spattered over the wall and floor near the door, and for some distance on the grass. About 8 or 9 o'clock on the following morning the appellant was seen in a spring wagon with Asa Murray, the negro who, as it appears afterwards, had been shot the night before by Holiday. Zack Murray, a son of Asa, was with them, but was walking. They came on to Winchester, and by Dr. Holmes it was shown that Zack came to his office and had him go up to Highland street to see a man who had been shot. He found Asa with his hand shot to pieces, and was given to understand that he was to do the doctoring without asking any questions as to how the "accident" occurred. Although Asa objected to going out, he prevailed on him to go to his office, where he became so violent during the operation on his hand that he informed his son that he must get some one to help hold his father, or he would himself call in some assistance. Zack left at once and soon returned with the appellant. After the amputation of the hand the negroes left, and it

appears went at once to the depot and took the train to Cincinnati, the accused testifying that he returned on the following Monday.

It was shown that about a week before the attempted robbery the appellant and another person came to Holiday's making inquiry as to work; that he and Asa and another had been seen in earnest conversation together prior to the night in question. The father-in-law of the accused, who attempted to prove an alibi for him, was shown to have said just after the occurrence, on hearing that Allen was suspected, that he might have been there—meaning at Holiday's—as he didn't see him until the following Sunday.

The circumstances do not connect the accused with Asa at the precise time when the crime was committed, but if they tend to do so they are sufficient. "A conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense." (Section 241, Criminal Code.)

We can not say that these circumstances do not so tend. It is probable that the sufficiency of this corroborating proof would not have been questioned but for the unsatisfactory testimony of the accomplice, Asa Murray. This witness was either crazy or pretended to be so when testifying, and gave absurd and silly answers to the questions propounded to him. He swore, however, that the accused was with him on the night of the burglary, although he swore on cross-examination to the contrary, and finally refused to answer further.

The jury, however, heard the whole case, and under proper instructions believed beyond a a reasonable doubt that the accused was guilty. We can not interfere with their finding.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

SPRINGFIELD FIRE & MARINE INSURANCE CO. V. PHILLIPS, &C.

(*Filed November* 21, 1894.)

1. *Fire insurance—False answer written by agent in application*—Where an applicant for fire insurance discloses to the agent the existence of a mortgage on the property, but the agent filling up the application writes the answer "no" in response to the question, "is the property encumbered by mortgage or other liens?" the assured not knowing of the mistake, is not bound by the paper, although he signed it, and the company can not escape liability on the ground that the answer as written was false.

2. *Failure to disclose existence of lien—Materiality to risk*—Where there is no fraud, and the assured answers incorrectly that there are no liens or mortgages, the question arises whether the lien was material to the risk. And the question of materiality, the facts being admitted, is necessarily a question of law and not a question of fact for the jury. And if the lien upon the land compared with its value is so small that it can not possibly affect the interest in the house which is insured, the court will then say, as matter of law, that the lien was not material to the risk.

In this case the insured property, including the house, was not worth, at the highest estimate, more than $5,250. The land, at the highest valuation, was worth not more than $3,750. The mortgage was over $2,500, and was bearing interest. The insurance on the house was for $1,200 for a term of five years. *Held*—That the court can not say, as matter of law, that the lien was not material to the risk, and the question being one of law, the court erred in instructing the jury that though they should believe the plaintiff did not disclose the mortgage, still they should find for the plaintiffs unless they believe that defendant would not have issued the policy if it had known of the existence of the mortgage.

3. *The testimony of the agent* that he would have still insured the property if he had been informed of the mortgage was incompetent, as the company was not bound by the agent's opinion as to what he might have done under different circumstances.

4. *Insurance void as to one thing insured void as to all*—While the policy insures the house for one sum and the furniture for another sum, still the insurance was procured by one contract, and any mistatement or concealment as to any material fact which would invalidate the insurance as to one of the subjects will vitiate it as to the other.

5. *Effect of levy of execution and of suit to enforce mortgage lien*—A provision in the policy that it shall be void "if an execution be levied on the property insured, or foreclosure of mortgage be begun," must be treated as contracting against any change in the title or possession of the property, as is shown by the additional words, "or if any change takes place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree." Therefore, the policy was not rendered void by the levy of an execution upon the property or by judgment for the sale of the property in a suit to enforce the mortgage lien, there being no change of possession. Nor did a sale of the property under the judgment invalidate the policy, the sale proving abortive by the failure of the purchaser to execute bond, and another sale being ordered.

Dulaney & Mitchell for appellant.

Wright & McElroy and T. W. Thomas for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barbour.

The appellant, by its policy, insured appellee's house and furniture against loss by fire—the house for $1,200 and the furniture for $400.

The property having been destroyed by fire, the appellant resists any recovery against it upon the ground that, in violation of the provisions of its policy, there was, at the time the application was made and the policy issued, a mortgage upon the property, which fact the assured failed to disclose; and further, that after the delivery of the policy, proceeding had been instituted for the enforcement of the mortgage lien and a sale of the property, and judgment rendered therefor, which was in process of execution when the property burned; and also that an execution in favor of another creditor had been levied upon the property, and proceedings were pending for the enforcement of the lien when the property was destroyed.

The provisions of the policy bearing on these defenses are these: "If an application * * * is referred to in this policy, such application * * * shall be considered a part of this policy and a warranty by assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, or if the insured shall have or

hereafter make any other insurance on the property hereby insured without the consent of the company written hereon, or if the risk be increased by any means within the control of the assured, or if it be a manufacturing establishment, running in whole or in part over an extra time, or running at night, or if it shall cease to be operated without special agreement endorsed on this policy, or if an execution be levied on the property insured, or foreclosure of mortgage be begun, or the property be sold under a deed of trust, or if the assured shall be adjudged a bankrupt, or if the property insured be assigned under any bankrupt or insolvent laws, whether by sale, transfer or conveyance, legal process or judicial decress, * * * or if the assured is not the sole, absolute and unconditional owner of the property insured, * * * then in every such case this policy shall be void."

In the application this question was asked: "Is the property encumbered by mortgage or other liens?" The answer, as written in the application, is "no."

The contention of the appellee is that the existence of the mortgage was made known to the agent, who applied for and took the application, and that he filled out the application, and the answer, as it appears, was his mistake or oversight. If this was so (as has been repeatedly held) the assured, who did not know of the mistake, was not bound by the paper, although he signed it,. He was not in fault, and the company can not escape liability on the ground that the answer as written was false. This was a question of fact for the jury, and we will not undertake to disturb their finding upon this point.

The land, including that upon which the house stood, at the highest valuation—that fixed by the assured—was worth not exceeding $3,750. The mortgage was for over $2,500, and was bearing interest. The insurance on the house was for $1,200 for a term of five years. In the Phœnix Insurance Co. v. Coomes, 14 Ky. Law Rep., 603, the insured house stood on a tract of 140 acres of land, upon which there was a vendor's lien for only $600.

In the Kenton Insurance Co. v. Wigginton, 89 Ky., 330, the insured house was on a large tract of land. Persons other than the insured had a one-fourth interest in the land, but had no interest in the house, as it was built by the insured himself. In each of those cases the insured innocently represented in his application that there were no mortgages, liens or other encumbrances on the land. There was no fraud or attempt to deceive, and the court held that the lien in the one case and the undivided interest in the other could not, considering the smallness of the encumbrance as compared with the assured's interest, have been material to the risk, the court in the Coomes case saying: "It is evident that if the fact of the lien had been disclosed it would not have been material to the risk, and that any prudent agent or company would have made the insurance."

In the Meschendorf cases (14 Ky. Law Rep., 75), the mortgage on insured personal property was undisclosed. The cases went off on the pleadings, which made it appear that the mortgage was greater in the one case than in the other. There was in neither case any application, written or verbal, and the court said: "The rule is that where no inquiries are made the intention of the insured becomes material, and to avoid the policy it must be found not only that the matter was material, but also that it was intentionally and fraudulently concealed," and the cases were decided upon that point. Thus it will be seen that where there is no fraud—for fraud vitiates everything—and the insured answers incorrectly that there are no liens

or mortgages, the question arises whether the lien was material to the risk.

If the lien upon the land, compared with its value, is so small that it can not possibly affect the interest in the house which is insured, the court will then say, as matter of law, that the lien was not material to the risk, and would not have prevented any prudent underwriter from making the insurance. The question of materiality—the facts being admitted—is necessarily a question of law and not a question of fact for the jury. Here the mortgage was for $2,500, bearing interest. The property, including the house, at the highest estimate, was not worth more than $5,250. The house was insured for five years for $1,200. In such case the court can not say, as matter of law, that the lien was not material to the risk. The question being one of law, the court erred in giving instruction No. 5, which told the jury that though the plaintiffs did not disclose the mortgage, still they should find for the plaintiffs unless they believed "that the defendant would not have issued said policy at all, or would not have issued it for the amount it did issue it if it had been known at the time of the existence of said mortgage."

This instruction was based on the statement of the agent in response to the plaintiff's question that he would have still insured the property if he had been informed of the mortgage. This evidence was incompetent. The company was not bound by the agent's opinion. The inquiry was as to what the agent did do; not what, under different circumstances he might have done. The instruction, besides, was in direct conflict with instruction A, which told the jury unless the assured informed the agent of the existence of the mortgage when he took the application they should find for the defendant.

There was but one contract for insurance. While the policy insures the house for one sum and the furniture for another sum, and the contract must be treated as separate, in the sense that the loss on each is limited to the amount for which it is insured, and while, as we have held in a similar case, the company, satisfied as to the value of one thing insured, may settle for it without losing the right to contest the claim for the other, still the insurance was procured by one contract, and any misstatement or concealment as to any material fact which would invalidate the insurance as to one of the subjects of insurance will vitiate it as to the other. The court, therefore, erred in peremptorily instructing the jury to find for the plaintiffs the value of the furniture lost not exceeding $400.

Did the judgment ordering the sale of the property to satisfy the mortgage debt or the levy of the execution invalidate the policy? There is no provision against the voluntary creation of future liens upon the property. As to the execution levy, a case in point is the Corinth Insurance Co. v. Berger, 42 Penn. St., 285; 82 Am. Dec., 504. There the policy stipulated that it should cease at and from the time the property thereby insured should be levied on or taken into possession or custody under any proceeding in law or equity. The court said: "Was it the understanding of the parties that the policy should cease on the occurrence of an act done by a third party, which could not increase the hazard of the insurers, nor take away either his power or his motives for preserving the property from destruction by fire? We think not. * * * Giving, then, to the condition a reasonable construction, such as it may be supposed was intended by the parties, the phrases 'levied on' and 'taken into possession or custody' have the same meaning. The latter defines the former. Unless it be so, the latter expression is superfluous. Certainly the

language of the policy admits of such a construction. It is consonant with what may be supposed to have been the intention of the parties, and even if the construction contended for by the plaintiffs in error were equally reasonable, that must be adopted which is most favorable to the assured."

That case was summarized and followed in Insurance Co. v. O'Maley, 82 Penn. St., 400; 22 Am. Rep., 769. Under the letter of the contract the provision that "if an execution be levied on the property insured, or foreclosure of mortgage be begun," has been violated, but that is not the reason and spirit of the contract. As we have said, there was no provision against the insured creating a lien, and it is not reasonable to suppose that it was intended to provide for a forfeiture on account of a lien created without his consent. So far as that question is concerned, we assume that the company knew of the mortgage. The institution of a suit to enforce the lien and sell the property to pay the debts does not increase the company's risk. The purpose of all the provisions quoted is to require the assured to retain the same interest in the preservation of the property that he had when he insured it, and they should, as in the case of a levy of an execution, be construed as relating to and affecting the provision in the same sentence, "or if any change takes place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree." In other words, they should be treated as contracting against any change in the title or possession of the property.

In Kean v. Hibernia Insurance Co., 9 Vroom (N. J.), 441; 20 Am. Rep., 409, the policy provided "or if the said property shall be sold or conveyed, * * * this policy shall be null and void. A judgment in foreclosure proceedings or sale under execution shall be deemed an alienation of the property." The meaning of this was, of course, that "a judgment in foreclosure proceedings" should render the policy void. The court said "the fair deduction from the language of the policy is that the alienation intended was such as would amount to an actual transfer of the title, and that by the phrase 'a judgment in foreclosure proceedings' was meant some proceeding which, of itself, would effect such a transfer. This result a strict foreclosure would accomplish."

In this State a judgment foreclosing a mortgage, as commonly expressed, does not divest title or confer possession. Our Code, section 375, says that "foreclosure of a mortgage is forbidden." A foreclosure is defined by Bouvier to be "a proceeding in chancery by which the mortgagor's right of redemption of the mortgaged property is barred forever. This takes place when the mortgagor has forfeited his estate by nonpayment of the money due on the mortgage at the time appointed, but still retains the equity of redemption. In such case the mortgagee may file a bill calling on the mortgagor in a court of equity to redeem his estate presently, or in default thereof to be forever barred from any right of redemption."

We are of opinion that the court below properly held that the judgment in the mortgage case and the levy of the execution did not invalidate the policy. There was, however, a sale under the judgment foreclosing the mortgage, and the plaintiff, Mrs. Phillips, bid at the sale and the property was knocked off to her, but she not being able to comply with the terms of the sale, another sale was ordered, and before it could be had the property was burned. The attempt to sell to Mrs. Phillips was abortive. It amounted to nothing; changed neither the title nor possession.

The case of the Niagara Insurance Co. v. Scammon, 32 North Eas-

tern Reporter, 914-916, seems to be in point. We have, however, only seen the syllabus in the American Digest of 1893. We have not been able to get the case as reported in full.

The only questions in the case for the jury to try, other than the value of the property, is, did the assured communicate the fact of the existence of the mortgage to the agent when he made the application, and did the agent, without his knowledge, write the answer as it appears in the application?

The judgment is reversed and the cause remanded for further proceedings.

SUPERIOR COURT ABSTRACTS.

BOLLINGER v. COMMONWEALTH.

SHARP v. SAME.

Filed November 28, 1894. Appeals from Kenton Circuit Court. Opinion of the court by Judge Yost, affirming in part and reversing in part.

1. *Right to amend judgment*—The trial courts have full power over their judgments during the term at which they were rendered, and can add to, modify or alter them at will; therefore, where, under an indictment for a nuisance, judgment has been rendered for a fine, pursuant to the verdict of a jury, the court has power at a subsequent day of the same term to enter an order directing the abatement of the nuisance, as the order of abatement is to be considered as merely an addition to the judgment.

2. *Courts have the power to order the abatement of a moral as well as of a physical nuisance*, and are not limited to repeated indictments and fines; therefore, it was within the power of the court in this case to order the abatement of a nuisance, consisting in the operation of a poolroom.

3. *In ordering the abatement of a nuisance* the court has no power to direct the commitment of the offender to jail until the order is obeyed. The court should first merely order the nuisance abated, and then, on the defendant's failure to obey the order, should bring him before the court for contempt, and inflict such punishment as will, in the opinion of the court, enforce the judgment. Nor has the court the right, in the first place, to direct the sheriff to execute the order of abatement. This can only be done in the subsequent proceedings.

Hallam & Myers and O'Neal, Phelps & Pryor for appellants; W. J. Hendrick and W. W. Cleary for appellee.

MILLER, &C. v. CROPPER, &C.

Filed December 5, 1894. Appeal from Jefferson Circuit Court, chancery division. Opinion of the court by Judge Barbour, affirming.

1. *Right to charge board*—An orphan girl having been received by her uncle into his home, and allowed to remain there without any intention upon his part to charge her board, he can not now elect to do so and hold her liable.

2. *Guardian and ward—Set-off*—Where the estate of two wards consisted in part of a note against their guardian, upon which suit was brought after the termination of the guardianship and after the death of one of the wards, the guardian had the right to set-off against the interest of the deceased ward in the note his claim for expenditures made on her account, but he had no right to set-off any part of that claim against the interest of the other

ward in the note, although she had received estate from the deceased ward to the full amount of the balance of the guardian's claim, the pleadings not authorizing such relief.

3. *Mortgage of married woman's separate estate*—Under the act of 1868, enlarging the powers of married women in regard to their separate estate as well as under the General Statutes, a married woman might, in conjunction with her husband, mortgage her separate estate to secure a debt created by her, but could not mortgage it to secure her husband's debt: and the fact that the debt for which the mortgage was executed was created upon the faith of the mortgage does not make it the debt of the wife. Nor is the averment that the mortgage note was executed for money loaned to the husband and wife sufficient to show that the debt was a debt of the wife, and one for which she could mortgage her estate.

Muir, Heyman & Muir for appellants; F. Hagan for appellees.

ELLIOTT, &c. v. ALLEN.

Filed December 5, 1894. Appeal from Floyd Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Sureties of deputy sheriff—Application of payments*—Where one served as deputy sheriff for the years 1889 and 1890, and money collected by him in 1890 was by his direction applied to the payment of his indebtedness to his principal on account of his failure to pay over taxes collected for 1889, the sureties in the deputy's bond for the year 1890 have no right in this action by the sheriff on the bond to disturb the application thus made by the parties; but even if the sureties could follow the money received by the deputy for 1890 taxes, and paid over to his principal, and insist upon its application to the 1890 taxes, notwithstanding the application made by the parties, the evidence in the case does not enable them to do so, the burden of proof as to the misapplication being upon the deputy and his sureties.

2. *Same—Execution sales—Appraisement*—Personal property owned jointly by the deputy with another having been levied on under an attachment sued out by the sheriff, and the deputy having executed a bond obligating himself to perform the judgment of the court or have the property forthcoming, and then sold the property and paid to the sheriff on account thereof an amount greater than that at which his interest was appraised, the deputy's sureties can not claim that they are released by reason of these facts, for, assuming that the release of the levy released the sureties to the extent of the value of the property attached, the property was not worth more than the amount at which it was appraised; and even though the appraisement was a nullity by reason of the fact that only two instead of three appraisers were selected, the deputy's sureties can not complain, for, in the first place, they got the benefit of the property, and in the second place the plaintiff can not lose his right by the misjudgment of the officers, though he may himself have thought two appraisers were sufficient.

James Goble for appellants; Thomas H. Hines for appellee.

CALDWELL v. STEVENS.

Filed December 5, 1894. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, reversing.

Reversal of judgment which has been enforced—Restitution—Amendment of petition—When pending appeal from a judgment dissolving an injunction restraining defendant from prosecuting a suit in another State in which he had siezed plaintiff's property, defendant, the judgment not having been suspended, renewed the prosecution of his suit and sold the property siezed in the action, the lower court should, upon the reversal by this court of the judgment dissolving the injunction, and the filing of the mandate in that court, have permitted plaintiff to file an amended petition setting up these facts, and asking for a judgment for the value of the property seized and sold. The plaintiff's remedy was in this action and not by a separate action.

M. R. Lockhart for appellant; L. J. Crawford for appellee.

COYNE v. COSGROVE.

Filed December 5, 1894. Appeal from Bell Circuit Court. Opinion of the court by Judge Barbour affirming.

1. *Railroad contractors—Mistake in estimates*—Where a contract between a railroad contractor and a subcontractor provides that "the engineer of the railroad company shall decide on the quantity and quality of all work done and his decision shall be final and conclusive," if the decision of the engineer is the result of a clear mistake, or is procured by the fraud of one of the contracting parties, it may be disregarded.

2. *Questions for jury*—The question as to the amount of work done as well as the question whether or not the engineer's estimate was the result of fraud or mistake, were questions of fact which were properly submitted to the jury.

C. W. Metcalfe for appellant; Thomas H. Hines for appelle.

WILLIAMS v. WILLIAMS.

Filed December 5, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Yost, reversing.

Divorce and alimony—Where a judgment for alimony was rendered in an action brought by the wife for that purpose alone, a subsequent judgment of absolute divorce obtained by her merged the judgment for alimony and rendered it inoperative. But the wife is not without remedy, as the court may, under section 2123 of the Kentucky Statutes, make suitable orders touching the maintenance of the children and an allotment in her favor upon her petition.

B. F. Graziani for appellant; Tisdale & Gray and F. J. Hanlon for appellee.

OIL CITY LAND AND IMPROVEMENT CO. v. PORTER.

Filed December 5, 1894. Appeal from Barren Circuit Court. Opinion of the court by Judge Yost, reversing.

A subscriber for shares of stock in a corporation must, at his peril, inform himself with regard to the provisions of its charter or of its articles of incorporation. Therefore, one who verbally subscribed for shares in a corporation, the general business of which it was represented to him by the agent was to be the purchasing, leasing, selling and improving of lands and acquiring timber, mineral, oil and natural gas privileges and rights, can not avoid payment of his subscription upon the ground that the fact was concealed from him that the corporation proposed to donate land to another corporation and to subscribe for one thousand shares of its capital stock, as he was bound to take notice of a provision in the articles of incorporation, conferring upon the corporation power "to buy or subscribe for stock in other companies or corporations." Nor is it material that the proposal to take the one thousand shares of stock in another corporation was set forth in a subscription paper which he never saw, and to which his name was signed without his knowledge or authority.

Stone & Sudduth for appellant; Lewis McQuown and Edward W. Hines for appellee.

GIBBS, &C. v. ANDERSON, &C.

Filed December 5, 1894. Appeal from Jefferson Circuit Court, Law and Equity division. Opinion of the court by Judge Yost, affirming.

Benefit societies—Beneficiary of insurance—Under the charter and general laws of the Knights of Honor a member can not designate as beneficiary in the certificate of insurance on his life any person who is neither a member of his family, a blood relative nor dependent on him. And as the person named as beneficiary in the certificate in question in this case did not belong to any one of these classes, but was merely designated in the certificate

as "foster mother" of the member. the appointment failed, and as the father of the member was the only other claimant and he belonged to a class from which the member might have selected his beneficiary. the court properly adjudged the fund to him.

Lane & Burnett for appellants; Blain & Kinkead for appellees.

SEALE v. LANGDON, &c.

Filed December 5, 1894. Appeal from Owsley Circuit Court. Opinion of the court by Judge Yost, reversing.

Reversal of judgment—Title of purchaser not affected—Where an attachment was sustained, and land levied on under the attachment was sold under order of court, the plaintiff becoming the purchaser, the subsequent reversal of the judgment sustaining the attachment and ordering the sale of the land did not affect the plaintiff's title, and one to whom he sold his bid can not recover of him the amount paid him therefor upon an allegation that he agreed to refund the money in the event the "judgment of the court and the commissioner's sale and his purchase of the land was reversed," as the condition precedent to the right to recover the money did not happen.

W. H. Holt and Riddell & Riddell for appellant; Hogg & White for appellees.

UNION CENTRAL LIFE INS. CO. v. DUVALL.

Filed December 5, 1894. Appeal from Boone Circuit Court. Opinion of the court by Judge Yost, reversing.

Life insurance—Failure to pay premium note at maturity—Where a life insurance policy provides that if a note received for any premium be not paid the policy shall be forfeited, it is forfeited, and the insurance dies if the note is not paid at its maturity. And when the insured, instead of paying the first premium in cash, executed his note therefor payable to the agent in his representative capacity and not individually, he being described therein as "agent," the note being accepted by the company must be regarded as a note given to the company within the meaning of a provision in the policy that the policy should be void upon the failure to pay at maturity "notes given the company for premiums." And the insured failing to pay the note at maturity the policy was forfeited, and the delivery of a receipt to the assured, acknowledging payment of the cash premium, can avail him nothing, he being bound by the provision in the policy for a forfeiture upon the nonpayment of the note.

Ramsey, Maxwell & Ramsey and G. M. Lassing for appellant; C. Y. Dyas and M. D. Gray for appellee.

MOSS, &c. v. WOLF.

Filed December 5, 1894. Appeal from Hickman Circuit Court. Opinion of the court by Judge Barbour, reversing.

Appeals—Clerical misprision—The rendition of judgment against defendants when no cause of action was set up was not a clerical misprision, but judicial error, nor was the judgment void, the relief granted being prayed for in the petition, and the court having jurisdiction of the subject-matter and the parties; therefore, an appeal lies without a motion in the lower court to set aside the judgment.

Thomas G. Poore for appellants; W. G. Bullitt for appellee.

FRENCH, &c. v. TROUTMAN.

Filed December 12, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

Contract treated as obligation of corporation and not of directors—A contract which recites that it is made and entered into "between the president and

directors of the Boston and Rolling Fork Turnpike Co., for and in behalf of the said turnpike road company, party of the first part," and certain other persons, parties of the second part, when considered in connection with an averment that the persons whose names are signed to the writing were the directors of the company, must be regarded as the obligation of the corporation and not of the individuals signing it.

John A. Fulton for appellants.

DEMMIEN v. BOWLER.

BOWLER v. DEMMIEN.

Filed December 12, 1894. Appeals from Kenton Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *In an action by a landlord to recover rent*, in which the defendant asserted a counterclaim for improvements which he alleged he had placed upon the land under a verbal contract with the owner, the evidence was sufficient to authorize a judgment for plaintiff for the amount sued for, and dismissing the counterclaim.

2. *The defendant is bound by his pleading*, and the court can not consider a defense which he failed to set up in his answer.

3. *The evidence authorized the chancellor's judgment* dismissing the landlord's petition seeking to enjoin the tenant from committing waste.

B. F. Graziani and N. L. Bennett for appellant; O'Hara & Rouse far appellee.

MIZE v. GODSEY.

Filed December 12, 1894. Appeal from Wolfe Circuit Court. Opinion of the court by Judge Yost, reversing.

1. *Delay in preparing check for payment*—The drawer of a check has the right to expect it to be presented for payment within a reasonable time, this depending upon the location of the bank and the residence of the parties, and a failure on the part of the holder to do this discharges the drawer, when, by reason of the delay, he has suffered actual damage; therefore, the holder of a check, in order to recover of the drawer, must allege and prove due presentment and nonpayment.

In this action upon an account in which defendant pleaded payment, it appearing from the evidence that defendant had given plaintiff in payment a check which was never paid, by reason of the suspension of the bank on which it was drawn, and that plaintiff's failure to receive the money on the check was due to his delay in presenting it for payment, which he had ample time to do before the bank suspended, the defendant was released from liability on the debt to pay which the check was drawn and delivered.

2. *New promise*—It was error to permit plaintiff to introduce evidence touching defendant's promise to pay the debt after he had been released, as the new promise to pay was not set up either in the petition or reply.

Thomas H. Hines for appellant; James Andrew Scott for appellee.

GRAND LODGE OF A. O. U. W. v. HAYNES, &c.

Filed December 12, 1894. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Yost, affirming.

1. *Benefit societies—False representations*—Where the charter of a mutual benefit society provided that if an applicant for membership should "willfully" make any false statement material to the risk, his benefit certificate should be void, in an action upon such a certificate the jury having found that certain statements of the applicant complained of were not, even if false, willfully made, this court will not interfere with their verdict, there being no testimony before them to show that the statements were so made.

2. *Confirmed drunkenness of insured as defense to action on insurance policy*—Where the charter of a mutual benefit association (Ancient Order of United Workmen) provided for the trial and expulsion of members for "immoral or unbecoming conduct," and a member charged with drunkenness was tried by his lodge and merely reprimanded, this lenient course being commended by the grand master of the order, in an action upon the benefit certificate of the member after his death the defense that the death of the member was caused by drunkenness comes in bad faith; and this is true, although it was provided in the application signed by the member that if he should become an habitual drunkard, or his death be caused by the use of intoxicating liquors, his benefit certificate should be void, the subordinate lodge having no right under the constitution to require of applicants for membership any such pledge.

3. *The failure of a member to pay an assessment constitutes no defense*, as it does not appear that notice of the assessment was ever delivered or mailed to him as required by the laws of the order, and he was recognized as a member after the assessment was due and payable.

4. *Reversible errors*—This court can not consider error of the lower court in admitting testimony which was not made ground for new trial.

John Feland & Son for appellant; Waddill & Nunn and Cruce & Nunn for appellees.

MILLER v. MAHONEY.

Filed December 12, 1894. Appeal from Nelson Circuit Court. Opinion of the court by Judge Yost, affirming.

Exemptions—Prior to June 1, 1884, the exemption laws of this State allowed a debtor nothing in lieu of exempted articles not on hand. The act of 1884 allowed in such cases other personal property to be set apart to the debtor.

In this action upon a debt, a part of which was contracted prior to June 1, 1884, and a part subsequent to that date, in which the plaintiff sought to subject, by process of garnishment, certain debts owing defendant which defendant claimed as exempt in lieu of exempted articles not on hand, while the testimony of defendant that he had paid on the debt sufficient sums not credited to extinguish all of the debt contracted prior to June 1, 1884, is unsatisfactory to this court, yet the finding of the chancellor in his favor on this question of fact is not so glaringly against the weight of the testimony as to authorize this court to interfere.

C. T. Atkinson for appellant; Nat W. Halstead for appellee.

1st. It assumes plaintiff may not have known the machine was dangerous, when he had seen it in operation daily during six preceding months, and must have certainly been aware it was dangerous to oil it in the manner and where he attempted to do so.

2d. The jury was informed that if the machine was defective defendant was legally liable for full measure of damages, that being the plain meaning of the phrase "the law is for plaintiff," even though the injury may not have been caused directly or indirectly by that defect.

The defect was first complained of and set up in an amended petition filed sometime after commencement of the action, and as described therein, was lack of a covering for the cog-wheels, which, it was stated, had been in proper position but was broken off and never replaced. But the evidence shows, and indeed an inspection of the machine would render it obvious, that by reason of the direction in which the cog-wheels revolved it was dangerous, with or without the covering, to oil the machine on that side plaintiff attempted to do it, while it could have been done in comparative safety on the opposite side.

Simpson testifies he did not order plaintiff to oil the machine at all; another advised him to keep away from it, and there is evidence which not only tends to show plaintiff was injured by his own negligence, but renders it doubtful whether he was, when hurt, engaged in oiling the machine. But the jury was, by the instruction in question, relieved from the duty of considering these exculpatory facts and required to find for plaintiff upon the bare hypothesis of the machine being defective and dangerous, whether the injury was the effect thereof or not. It is true they were in general terms instructed not to so find if the injury was caused by plaintiff's own negligence. But the court having failed either to give in that connection a true and full definition of contributory negligence, or to permit the jury to inquire and determine whether the alleged defect was proximate cause of the injury, it can be readily perceived defendant was deprived of benefit of what the jury might have regarded available defenses.

The rule is, as argued for appellee, that an apparent omission from or defect of a particular instruction should not be treated as reversible error if elsewhere in the series of instructions, which must be considered together, the omission is supplied or defect cured. But we have looked at all the instructions singly and collectively, and failed to find the misleading and illegal proposition in second instruction qualified or explained.

It has been often and uniformly held by this court that one servant can not, for any less degree than gross negligence of a coemploye superior in authority, recover for an injury. But the lower court failed to so instruct the jury in this case, and therein is another error affecting substantial rights of the defendant, now appellant.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

WARE v. MCCORMACK.

(*Filed Nov.* 17, 1894.)

1. *Assignment of note—Genuineness of signatures—Grounds of recovery*—The assignee of a note, sold without recourse, may recover from the assignor either upon the ground of a warranty that the signatures were genuine or of the want of consideration after bringing suit against the obligor, who pleaded *non est factum*.

2. *An assignment of a note without recourse* only relieves the assignee of responsibility by reason of the insolvency of the obligors, but there is an implid warranty that the signatures are genuine, and the assignee is not required to use the same diligence in testing the genuineness of the paper as is required in testing the solvency of the obligors in case of a mere assignment for value.

G. G. Gilbert for appellant.

Pryor J. Foree and W. H. Anderson for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

In the month of January, 1888, the appellee, McCormack, held a note payable to himself on H. Clay Figg and E. M. Figg for $600, dated March 1, 1886, and due in twelve months. He sold this note to his niece, the appellant, for $642.65, for which she gave him her check, and he assigned the note to her without recourse. She held the note until March, 1890, when she instituted her action upon it against both the obligors. H. Clay Figg was insolvent when the note was executed, and known to be by all the parties to the transaction. He left the State and was a nonresident when the action on the note was instituted. The solvent obligor, E. M. Figg, when served with process, appeared and pleaded non est factum, and upon that issue it was held by the judgment of the court that he had never executed the paper. At the time the appellee sold the note to the appellant she believed the note was genuine, and had no reason to think otherwise until the defense was made.

After judgment against her, and in favor of the solvent obligor, she instituted the present action against her assignor, McCormack, alleging that the signature of E. M. Figg to the note was a forgery, and in the action against him on that paper he made that defense and defeated the recovery, and sought to recover upon an express warranty by the assignor as to its validity or the implied warranty that it contained the genuine signature of the obligors. There was also a second paragraph seeking a recovery back of the money paid for the want of consideration.

On the trial of this action a judgment was rendered against the assignor, McCormack, from which he appealed to the Superior Court, and the judgment of the court below was reversed on the ground that as assignee she had failed to prosecute the action against the obligors with that diligence required by the law, the Superior Court basing its decision on the case of Wynn v. Poynter, 3 Bush, 54.

When the case was first tried in the court below the plaintiff was required, over the objection of her counsel, to elect whether she would proceed on the first or second count of the petition, and, electing to try on the first count, recovered the judgment that was reversed. In the reversal of that judgment it was in effect held by the Superior Court that on the return of the case the plaintiff should be allowed to amend, and could recover upon the ground of a want of consideration for the money had and received by the defendant. On the return of the case the court below refused the offer to file such an amendment, and a judgment was entered for the defendant, and from that judgment the plaintiff appeals. It is now insisted that the effect of the first judgment was to determine that the second count of the petition contained no cause of action, and, being res adjudicata, the plaintiff could file no such amendment. The plaintiff had been compelled to elect to proceed on the first paragraph of the petition, and

the dismissal of the second paragraph was, in its effect, a dismissal without prejudice. It was not involved in the issue tried by the Superior Court, nor could the question have been raised by a cross appeal, because the plaintiff had obtained by the judgment reversed all that she had asked for, and so when the case returned to the lower court the case stood with the right on the part of that court to permit the second count to be reinstated, or an amended pleading setting forth a cause of action arising by reason of the payment of this money without consideration. In fact there was no reason for requiring an election, and the plaintiff was entitled to recover on either ground.

Every transference of a note or bill transferable by delivery warrants that it is not fictitious, forged or altered. (4 Lawson's Rights and Remedies, &c., section 1593; 2 Parson's Notes and Bills, 589.)

When a note is assigned without recourse it means only that the assignor is not to be responsible by reason of the insolvency of the obligors, but there is an implied warranty that the paper is genuine that is broken in the event the signatures to the note are forgeries. An assignment of a note for value is a guaranty of the solvency of the obligors at the time of the assignment, and the assignor binds himself to make the note good in the event the assignee uses the proper diligence by suit to test the solvency of the payors, but this diligence is not required in order to test the genuineness of the signature, for if the obligee parts with the note by mere delivery for value and without any assignment, he becomes liable to return the consideration in the event the paper he sells is a forgery. His liability in this regard does not depend upon the assignment, but arises from the sale and delivery of the paper, the law implying that the note is what it purports to be—the genuine signature of the parties to it.

The rule is well settled in Emerson v. Claywell, 14 B. M., 15: "If an absolute and unconditional assignment be made of a bond, either for money or land, the assignor, where there is no express stipulation to that effect, undertakes by implication that he is the absolute and unconditional owner of the bond, and has an indefeasible right to demand what the bond calls for, and if he has no such right there is a breach of the implied undertaking the moment the bond is assigned."

Here the assignee, by the contract of assignment, had agreed to risk the solvency of the obligors, and there was no necessity for any suit to test their ability to pay, and certainly none to test the genuineness of the signature. The note was made payable to the assignor. He is presumed to know whether the signatures were or not forgeries, and it was not necessary for the assignee to bring an action that the assignor might be informed as to the validity of the obligation. She has paid full value for a note that was worthless; that was not, in fact or in law, the note of the solvent obligor, and if even required to institute legal proceedings, that the issue of non est factum might be determined, it then appears that, by a proper legal proceeding not questioned by the appellee, it was adjudged that the name of E. M. Figg was a forgery.

What is the legal as well as rational meaning of the language without recourse used in the assignment of a note? In making the sale and transfer of this note did the mind of either party conceive the necessity of testing by action the validity of any signature to the paper? Did the law impose such an undertaking on the part of the appellant when she made the purchase, and, when accepting the assignment by which she risked the solvency of the parties to it, im-

days, to the beneficiary or proper representative of the deceased member a sum equal," etc.

This section was repealed by section 5 of the act of 1880, which provides: "Upon the death of any member of the society, the beneficiary or proper representative of the deceased member shall receive a benefit not to exceed $3.000, payable within sixty days from date of satisfactory proof of death," etc.

The original act was further amended February 2, 1884, so as to provide "that the business of said society was to be done in either or both of two departments to be known as the 'special department' and the 'general department.'" In the general department there were two distinct funds: "The fund for paying death losses" and "the expense fund."

Section 10 of the act of 1884 provides: "Said society may issue and deliver to each accepted applicant for membership in said general department a certificate of membership, the terms of which shall be prescribed in the by-laws of said society, and which shall obligate said society, within sixty days after due notice and proof to it in writing of the death of such member, to pay to the beneficiary or beneficiaries named in said certificate such sum as may be agreed upon between said society and applicant, which sum shall constitute a basis of calculating the amount of the contribution of such applicant to the 'fund for paying death losses' mentioned in the fourth section of the act. But said society shall not issue certificates of membership to any applicant who designates any one as a beneficiary thereof who has not an insurable interest in the life of said applicant."

Charles F. Weigelman, deceased, became a member of the general department of said society, and on the 28th day of May, 1886, said society issued to him a certificate of membership, which in part provides: "The American Mutual Aid Society, witihn sixty days after the receipt of satisfactory proof thereof and a surrender of this certificate properly receipted, do hereby covenant and promise to pay out of the mortuary fund of this department to such person or persons as the said member, with the consent in writing of the society, may have designated by assignment, or, if no assignment has been made, to Henry F. Bronger, as his interest may appear, or to his legal representatives, at its office in Louisivlle, Ky., an amount as provided in No. 14 of the rules, regulations and conditions of this certificate, but in no case shall there be paid an amount exceeding $2,000."

In the application for insurance Henry F. Bronger is the name of the person for whose benefit the insurance is proposed, and his relationship to Weigelman is stated to be that of creditor. Weigelman died a member of said society in good standing. In March, 1887, Bronger brought suit in the Jefferson Court of Common Pleas against said society to recover the face value of said ceritficate. Judgment was rendered in his favor, which afterwards was affirmed by the Court of Appeals. Pending these proceedings the society brought suit in the Louisville Chancery Court, to which Bronger was made a defendant, to have the funds of the society in the general department distributed pro rata among several claimants of death losses, there not being enough funds on hand to pay each of said claimants in full, and by a judgment of that court it was ascertained that the distributable share of Bronger would be $961.68, which was to be held in the custody of the court until the final determination of the suit between Bronger and said society. Before an order of court was made directing the payment of this fund to Bronger, Minnie Weigelman filed her petition in the suit and asked that it be made

her answer and counterclaim against the society, and a cross petition over against Bronger. She alleges that Bronger had no insurable interest in the life of her husband; that he was not a creditor of her husband at any time, and that the notes which he claimed to hold against him were without consideration and void; that they had been executed for money lost and won at gaming, etc.; that her husabnd died without children, and that she, as his widow, is entitled to said fund, and the benefit of said certificate and insurance. Defendant Bronger demurred generally to the petition of Minnie Weigelman, which was overruled, but the defendant having replied, on rejoinder thereto by plaintff, the defendant demurred generally to the rejoinder, which, being carried back to the petition, the court sustained; and the plaintiff declining to plead further, the petition was dismissed. She prosecuted an appeal to the Superior Court, which reversed the judgment of the lower court, and from said judgment an appeal has been certified to this court.

It is manifest from the act of incorporation of the society, and of the acts amendatory thereof, that it was never contemplated or intended that a third person should have the benefit of any insurance taken out by a member unless he had an insurable interest in his life, and was named as the beneficiary in the certificate, or held the same by proper transfer or assignment from the insured. If no beneficiary was named in the certificate, or one named who had no insurable interest in the life of the insured, the loss was to be paid to the proper representative of decedent, who, by the construction of this court, is meant to be the widow and children, if any, and not the personal representative of the decedent. If the member desired he could divert the fund from his widow and children to a third person having an insurable interest in his life, but if he failed to do so it went to the widow and children, if any, and not to his estate for the payment of debts.

As Minnie Weigelman was not a party to the suit of Bronger against said society, nor a privy of either of the parties thereto, she was not bound by the judgment rendered therein, nor estopped in this action to assert her claim by reason thereof.

Wherefore, the judgment of the lower court is reversed, with directions to overrule the demurrer to the answer, counterclaim and cross petition of Minnie Weigelman, and for further proceedings consistent with this opinion.

WORD v. WHIPPS, &c.

(Filed November 15, 1894—Not to be reported.)

1. The testator signed his name to his will "A. J. Whpps," instead of "A. J. Whipps," but this mistake by him does not render the will void, as not subscribed in the manner required by statute.

2. Where there is no conflict in the evidence concerning the manner of the execution of the will the question as to the regularity of its execution is one of law for the court and not for the jury. But the submission, without objection, of the question to a jury was not a prejudicial error, the jury having decided the question correctly.

W. Showalter and Hallam & Myers for appellant.

J. W. Bryan and Chas. H. Fisk for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellanti s a niece of A. J. Whipps, who died childless in Kenton county in December, 1891. A paper purporting to be the last will of the decedent was, shortly after his death, probated without contest in the county court. An appeal from the order of that court was taken to the circuit court by the appellant, where, on a trial of the questions raised, viz., whether or not the decedent had the necessary testamentary capacity to dispose of his estate, or was unduly influenced to execute the paper or did in fact subcribe his name thereto, the finding was for the will.

The proof of capacity is overwhelming, and there is no hint of under influence. The contention is that the name of the testator was not subscribed to his will as the statute requires, for the reason that when he attempted to write his name thereto he wrote "A. J. Whipps," instead of "A. J. Whipps." There is no intimation of fraud or any circumstance attending the execution of the paper casting a suspicion on the transaction. It is manifest that the omission of the letter "i" was merely an oversight, and we do not think that because there is some difficulty in pronouncing the name as written the due execution of the paper is in anywise affected. Counsel contends, however, that as there were no facts in issue as to how the testator subscribed his name, the question was one of law and should not have been submitted to the jury. In this we concur. But when the issue was in fact submitted to the jury as to whether or not the paper was subscribed with his name by A. J. Whipps, the verdict was to the effect that it was so subscribed. This finding was proper, and accords with the conclusion to which the court must have come as a matter of law.

The court did not err in failing to give an instruction on the subject of undue influence. It was not asked, and there was no testimony on which to base it.

Judgment affirmed.

SEBREE DEPOSIT BANK v. MORELAND, &c.

(Filed November 17, 1894.)

1. Bills and notes—Notice—Defects of answer cured by reply—The endorser and the drawer of a bill of exchange presumptively have personal knowledge as to whether due notice of nonpayment was given by the holder, therefore, a denial, upon information and belief, of the giving of due notice is bad; but the holder, having filed a reply putting in issue such facts, thereby cured the defect in the answer.

2. The holder of a bill may make the acceptor his agent to give notice of nonpayment to the drawer and the endorser; and such notice, if given in due time, is sufficient.

3. Same—Where the holder of a bill undertakes to give notice of nonpayment by a special messenger, or in any way other than through the regular mails, he must distinctly show when such notice was delivered to the parties entitled to it in order to hold them liable

4. Same—An averment that upon nonpayment the holder mailed notices thereof and of protest to the acceptor, the maker and the endorser, all in one envelope, addressed to the acceptor at his postoffice, and that he (holder) "believes and charges that said acceptor at once duly notified said drawer and endorser of the dishonor of the bill," is not sufficient to show that no-

tice of dishonor and protest was given to the drawer and endorser in due time to bind them.

5. Same—Pleading—In an action upon a bill an averment of the giving of due demand, protest and notice is sufficient; but if plaintiff undertakes to set out the manner of giving due notice, and avers facts not sufficient to charge defendants with notice, the pleading must be held bad on demurrer.

6. After the drawer and the endorser of a bill have been released through the failure of the holder to give due notice of dishonor and protest, a subsequent verbal promise by them to pay the bill will not bind them unless based on a valuable consideration. But where the giving of such notice is a matter in issue, proof of such subsequent promise to pay is competent as tending to show that notice was given.

Reuben A. Miller and Yeaman & Lockett for appellant.

C. S. Walker for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

This case went off on the pleadings, the court below sustaining a demurrer to the reply of the plaintiff, and the latter failing to amend or plead further, a judgment was rendered for the defendants.

The action is based on a negotiable note for $4,000, drawn by the appellee, J. P. Moreland, on S. P. Walden in favor of J. H. Hickman, another appellee, and made payable at the Sebree Deposit Bank. The paper was endorsed by Hickman and discounted by the bank, and the proceeds placed to the credit of the acceptor, Walden, the paper having been made, as is alleged, for his benefit.

The note was protested for nonpayment, and the defense made by Moreland, the drawer, and Hickman, the endorser, is the failure of the bank (the holder) to give them notice of the paper's dishonor, and other defenses not necessary to be considered.

It is insisted by counsel for the bank that the averments of the answer, made on information and belief of facts that must, if they exist, be within the personal knowledge of the defendants, is bad pleading, and the demurrer to the reply should have been carried back to the answer and sustained to that pleading. There was no demurrer to the answer, and the reply of the plaintiff placed directly in issue the fact of the want of notice to the defendants of the dishonor of the paper, and cured the defect, if any existed.

It is allegd in the reply that the notary, in behalf of the holder (the bank), "mailed notices of the nonpayment and protest of the bill to each of the defendants on July 12, 1892, to the acceptor, drawer and endorser of the bill in an envelope addressed to S. P. Walden, at Owensboro, Ky., which was his postoffice, and believes and charges that the said Walden at once duly notified said drawer and endorser, Moreland and Hickman, of the dishonor of the bill, and that the defendants knew before the maturity of the paper it would not be paid, and knew that it had not been paid; and with full knowledge of these facts did repeatedly promise to pay the bill, and, relying on these promises, forbore to sue for several months."

It appears from this pleading the party not entitled to the notice of dishonor, and without a request even to do so, had been entrusted with the duty of giving this notice to the drawer and endorser, so as to continue their liability, and with that view it is alleged in the reply that when notices of the protest were received by the acceptor, he at once delivered them to the drawer and endorser.

When the notice of protest was received by Walden is not

alleged, and while it must be inferred, as a matter of law, that he received the notices in due time, as the notice was placed in the postoffice as soon as it could be done, if it had been necessary to hold him bound, no such inference will be indulged as to the drawer and endorser of the paper. As they were each entitled to notice, and the time it was received by the acceptor, as well as the time it was handed them by him, should have been distinctly alleged, and the averments that it was received in due time by the acceptor and at once delivered to the drawer and endorser by him, are mere conclusions of the pleader, and will not authorize the court to say that such diligence had been exercised by the holder of the paper as to continue the liability of the drawer and endorser.

It was a matter of doubt for a long time whether the acceptor of a bill, who had permitted his paper to go to protest, could give a valid notice, but Mr. Daniel, in his Treaties on Negotiable Instruments, says it is now "a principle of the law merchant, however unphilosophical it may seem." (2 Daniel, section 990.)

Where notice is delivered by a special messenger, other than through the regular mail, it must distinctly appear when it was delivered, so as to enable the court to say that it was delivered as soon as it could have reached the party sought to be charged by due course of mail.

In this case the bank made the acceptor its agent to deliver the notice of protest, and enclosed the notices to the acceptor by mail. They were not sent directly to either the endorser or drawer, and it is, therefore, manifest the averments of the reply should present a state of fact showing that the appellees received this notice as soon as it could have reached them by the regular mail.

That they were sent by due course of mail to the payor, and when received delivered at once to the drawer and endorser, are not such facts as would authorize the inference that due diligence had been exercised by the holder, or that the drawer and endorser received the notices as soon as they should have received them, if the notices had been deposited in the regular mail in due time, addressed to each of the appellees.

The envelope in which the notices were enclosed, addressed to the acceptor, might have remained in the postoffice for days before its reception by him, and while the personal service or delivery of the notice by the acceptor to the appellees would have been good if delivered in due time, it must appear, where the postoffice may be used as a means of giving the notice, that a deposit of the notice in the office within due time was made, addressed to the party affected by the dishonor of the paper, or that notice was given by the holder or his agent to the party sought to be made liable by a delivery made as soon as it could have been received by due course of mail.

There is no pretense that any notice was enclosed to the address of these parties and sent by mail, and no state of fact alleged showing that diligence on the part of the holder, so as to hold these appellees liable on the paper unless it arises from the promise to pay alleged to have been made after they had known of the protest, and the failure of the acceptor to pay and his inability long before the note matured to make payment.

It is insisted by counsel for the bank that the promises to pay by the drawer and endorser amounted to such an acknowledgment of continued liability by the drawer and endorser as absolutely fixed their liability; that the promises were made with a full knowledge of all the facts, and the purpose of the notice to the parties to the bill being to prevent any loss by those who are

not primarily liable or liable upon certain conditions and intended for their protection, they may affirm their liability by a recognition of their obligation to pay, and dispensed with the conditions upon which the endorsement was made, the obligation of the endorser being voidable only, therefore, the demurrer to the reply should have been overruled.

This view of the question is sustained by the decided preponderance of authority both in the text-books and the reported cases. Mr. Daniel says that "the condition upon which the endorser becomes liable is not a strict and absolute condition precedent as conditions in contracts construed by the common law. The obligation of the endorser is regarded rather as voidable by nonfulfillment of these conditions than as actually avoided. If he chooses to affirm rather than disaffirm his liability, it can injure no one to leave him to the exercise of his discretion." (Section 1147.)

Again: "It makes no difference when the promise to pay is made with knowledge of the laches, that the party making it did not know of its legal effect as a waiver, or that he had a legal defense to the bill or note, for it is a maxim that ignorance of the law excuses no one," etc. (Section 1148.)

The Supreme Court of the United States, following the doctrine of the text books, held the endorsers liable upon their promise to pay where neither protest nor demand of payment had been made.

Yeager & Co., of St. Louis, had endorsed the paper of Herchoff for $13,000, and the paper was held by Farwell & Co., of Boston, who had advanced the money and were the payees. On October 18, 1867, the last day of grace, Yeager & Co. wrote a letter to Farrell & Co. to the effect that Herchoff would be unable to meet the paper at its maturity, but they (Yeager & Co.) would hold themselves "responsible for the payment of the note, and will see that it is done at an early day."

This letter was not received in Boston by the payees until after the time for protest had passed, and Yeager & Co., refusing to pay, were sued as endorsers by Farwell & Co., and the court, through Mr. Justice Davis, held that Yeager & Co. were estopped from alleging a want of demand and notice of nonpayment.

That case could be distinguished from the one before us in many of its features, but the court, in its opinion, referred to the case of Sigerson v. Matthews, 20 Howard, 496, in which it is said: "If the endorser, with full knowledge of the fact that no demand has been made or notice given, makes a subsequent promise, he is liable and can not when sued set up as a defense the want of such demand and notice; and to the same effect are the decisions of the courts in this country generally. Applying the principles of these decisions to the admitted facts of this case there is no difficulty in charging the endorsers."

While this court recognizes the importance of uniformity in judicial utterances affecting the liability of parties to commercial paper we are not disposed to follow these authorities on the question before us. The tendency of legislation in this State, as well as the decisions of this court, is to relieve parties who stand in the light of mere sureties on written obligations and to release them from continued liability based upon verbal promises subsequently made.

There is no doctrine more firmly established than that negotiable paper when dishonored requires demand, protest and notice to those who are the mere accommodation endorsers or drawers in order to hold them responsible. This is the rule of the law merchant and applicable to notes discounted in bank and placed on the footing of foreign bills by our statute; and to recognize a

doctrine that in effect dispenses with the performance of conditions by the holder upon which the endorser agrees to become bound and hold him liable upon a subsequent promise to pay, although released destroys the virtue of commercial paper, and places the endorser at the mercy of those who, in great commercial transactions, are seeking to hold those liable, who have been once released, upon the plea that the laches of the holder redounds at last to his benefit, if he can establish a promise on the part of the endorser, although released from the payment of the dishonored paper.

There is no rule of commercial law more rigidly applied than that requiring notice of protest to those who are the mere endorsers of negotiable paper, and there is but little reason, it seems to us, for dispensing with this rule or nullifying the conditions upon which the endorser becomes, and is to remain bound for the purpose of relieving the holder from the effect of his own laches.

Where the question of a want of notice is in issue, it would be competent to show a subsequent promise to pay as a consideration, showing that the party had received notice; but to make such a promise conclusive or a waiver of the right to a notice, is a doctrine in which we can not concur.

In this case the reply alleges the manner in which the notice was given, and conceding the doctrine to be that the general averment of due demand, protest and notice is sufficient, when the pleader attempts to set forth the mode in which notice was given, and the facts stated are not sufficient to charge the endorser, the pleading should be held bad on demurrer. And the averment of a subsequent promise to pay, being a mere matter of evidence, will not be considered only to the extent that it revives the original obligation to pay--and to this doctrine we can not assent.

If the promise had been made upon the consideration that no suit would be instituted against the parties to the bill, the promise would be binding, and upon this promise an independent action could be maintained. No such fact is alleged in the reply, or any facts connected with the promise that would work an estopple. It is alleged only that the promise having been made, the plaintiff forbore to sue. No loss or injury is alleged by reason of the promise. There is no allegation that the promise was made in consideration that no suit would be brought on the paper. The payer, Walden, was insolvent, and the appellants have a judgment against him for the debt.

A promise to pay after the maturity of the paper is presumptive evidence that demand was made and notice duly given, and would support a recovery if there was no evidence to the contrary, or rather the question would go to the jury upon the issue made; but in this case the notice was not duly given, as appears from the reply of the plaintiff.

This court, in the case of Lawrence v. Ralston, 3 Bibb, 104, decided the question involved here. In that case it appeared that Aaron Burr, while on a visit to the present capital of the State on December 19, 1806, drew a bill of exchange on George W. Ogden, a merchant of New York, requesting him, at 120 days, to pay Charles Lynch, or order, $700. That paper was endorsed by Ralston to Sebastian, and by Sebastian to Lawrence, the plaintiff in the action. Ralston, after the bill was drawn, and before maturity, descended the Ohio and Mississippi rivers, and before his return the bill was protested. After Ralston's return he was sought to be made liable as endorser of the paper, and

defended on the ground that notice had not been given him of the protest or nonpayment. There being no sufficient evidence of notice, it was then attempted to fasten liability upon him on the ground of his promise to pay.

This court, in reference to that issue, said: "We think a promise made under such circumstances, not being founded on any valid consideration, induces no legal obligation, and can not, therefore, form a sufficient cause of action. It is not denied but that a promise to pay a bill by an endorser, unless accompanied by circumstances repelling the presumption, is an implied admission of due notice having been given." (3 Bibb, 104.)

This is the extent to which the authorities in this State go, and, we think, the correct rule on the subject.

In the cases of the Bank of Tennessee v. Smith, 9 B. M., 609, and Landum v. Trowbridge, &c., 2 Met., 281, a distinction is attempted to be drawn between a promise made after protest for nonacceptance and a protest made for nonpayment after maturity.

In the case of Landrum v. Trowbridge, 2 Met., 281, there was a protest for nonpayment, as well as nonacceptance, and while the distinction between the character of the two cases may exist, in so far as it affects the liability of the endorser, we think, and so adjudge, that the subsequent promise to pay is not binding on the endorsers unless supported by a consideration; but that on the issue as to whether notice of protest had been given, it is competent to go to the jury to establish that fact, and to this extent only we are disposed to go; but as the pleadings in this case show that due notice was not given, the promise, if proven, would not avail the appellant.

The obligation of the endorser is known to the holder of the bill. This relation to the bill requires the highest degree of diligence on the part of the holder for the protection of the endorsers, and when released from liability, having occupied the position of a mere surety, something more than a verbal promise, so easily established when large commercial interests are involved, should be established before that which is dead is brought to life, and the liability continued without any consideration whatever.

The judgment below must be affirmed.

BAIN, &c. v. VANSANT.

(Filed November 22, 1894—Not to be reported.)

1. Conveyances—Forged deed—In this action, in which the contention of the appellants is that the tract of land in controversy was conveyed to them by their father and that the prior deed to the same held by their brother, under whom the appellee claims, was a forgery, the evidence does not establish the charges of criminal conduct.

2. Same—The father having prior to the conveyance to the appellants covenanted for a valuable consideration to convey to his son the tract of land in question, and afterwards executed a deed to the same, it makes no difference whether or not he intended to include same in the subsequent conveyance to appellants.

3. The tract in question, being two miles distant from the other tract conveyed and situated upon different waters, can not be included in the lands described as lying on "Left Hand and Syms Fork of Straight creek."

John T. Hays and Knott & Edelen for appellants.

W. J. Hendrick for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Judge Lewis.

December 22, 1881, James Culton conveyed to his son, T. J. Culton, daughter, Martha J. Bain, and daughter-in-law, A. L. Culton, real property thus described: "The following boundary or tract of land lying in the county of Bell and State of Kentucky on the Left Hand and Syms Fork of Straight creek, known as the old homestead, lying and being and known as the old Culton farm, including all the lands I own on the waters of Straight creek, and in the county of Bell, State of Kentucky. For boundary, etc., reference is made to all my deeds and patents."

February 15, 1882, they sold and executed a covenant for conveyance to John W. Culton, another son of James Culton, of property described as "a certain tract or tracts and parcels of land lying on Syms Fork of Left Hand Fork of Straight creek, and known as the old James Culton homestead, and adjoining lands, being the same lands deeded by James Culton to the parties of the first part on the 22d day of December, 1891."

It appears that James Culton owned a tract conveyed to him October 7, 1859, by James Farmer, and described in the deed "as all that tract or parcel of land lying and being in the county of Harlan (now Bell) on the waters of the Stoney Fork, containing 600 acres, be the same more or less," and that tract is the subject of this litigation between appellee Vansant, claiming under a deed made to him in July 1882, by J. W. Culton, and appellants, Bain and others, who claim under the deed mentioned of December 22, 1881.

For appellee it is alleged and attempted to be shown that in March, 1880, James Culton sold for a valuable consideration and covenanted to convey to his son, J. W. Culton, said tract of land, and in June, 1882, did execute, acknowledge and deliver to him a deed therefor. But appellants allege James Culton, who died before this litigation began, never did in fact execute either the title bond or deed to J. W. Culton, but that both instruments were forged, as was also the clerk's certificate of acknowledgment. On the other hand, J. W. Culton alleges James Culton did not intend to convey to appellants the tract of 600 acres, but that after the deed was signed and acknowledged by him, a blank space left for inserting a description of the lands agreed to be conveyed was without his knowledge or consent filled by the grantees so as to include the tract of 600 acres.

Through failure of the respective parties to file for inspection the two original deeds of December, 1881, and June, 1882, is calculated to create some suspicion, it is proper to say the evidence does not satisfactorily establish either of the charges of criminal conduct.

So, assuming James Culton intended to convey by the deed of December, 1881, the lands just as they are therein described, we will first consider whether the tract of 600 acres is in fact, or was intended by the parties, to be included. As appears from the title bond of February 18, 1882, from T. J. Culton and others to J. W. Culton, what is called the old James Culton homestead and other tracts adjoining were sold to him, all being described as lying on Syms Fork of Left Hand Fork of Straight creek, and it seems to us those tracts are the identical lands James Culton intended to give and convey by the deed of December, 1881. For the tract of 600 acres does not adjoin any one of those tracts, but is about two miles away and situated upon another water course. And if it had been intended by James Culton to give and convey that tract also, a more precise and definite description of it

would have been set out than was done. But waiving that question, it seems to us, without resorting to incompetent testimony, a great deal of which was offered, it is shown that in March, 1880, long prior to the deed of December, 1881, James Culton sold for a valuable consideration and gave a bond for conveyance of the tract of 600 acres to his son, J. W. Culton; and, therefore, whether he intended to include in the voluntary conveyance of December, 1881, that tract or not, makes no difference. It is true appellants in their pleadings allege that bond to be a forgery. But genuineness of the signature thereto of James Culton is shown by the uncontradicted testimony of one witness at least, and, though not necessary, the same witness testified he, as deputy clerk, took and certified acknowledgment of James Culton and wife to the deed of June, 1882.

The purchase of the land by J. W. Culton for a valuable consideration prior to the voluntary conveyance of December, 1881, and subsequent execution of the deed by James Culton in compliance with his covenant to convey being shown, it seems to us the lower court properly adjudged appellee Vansant entitled to the land.

Judgment affirmed.

RATCHFROD v. COMMONWEALTH.

(Filed November 27, 1894—Not to be reported.)

Criminal law—Circumstantial evidence—Instructions—In the absence of proof showing the facts attending the killing of which the accused was charged, and where conviction is sought solely upon circumstantial evidence, the jury should have been instructed as to the law applicable to murder, manslaughter and self defense.

Weden O'Neal and R. K. Smith for appellant.

W. J. Hendrick for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Hazelrigg.

On the night of December 23, 1893, the dead body of Bud Finn, with two gun-shot wounds in the left thigh and head crushed in and brains knocked out, was found near the city of Falmouth. A number of loose and bloody rocks were lying about, and that there had been a fierce struggle between the deceased and his antagonist was evident. A necktie, shown to have been that of the deceased, was found torn into two pieces, and lying on opposite sides of the body.

The appellant, who lived with his father in the neighborhood, and was known to be unfriendly with the deceased, was at once arrested, charged with the murder, and at the following January term of the circuit court was indicted therefor. His motions for a change of venue and continuance were each overruled, and, upon trial at once had, he was convicted of murder and sentenced to the penitentiary for life. He complains on this appeal of the orders overruling his motions, as well as of the admission of incompetent testimony and of the misconduct of the attorney for the Commonwealth in his argument to the jury, but his chief ground for reversal and the only one of significance or necessary to notice is that the court refused to instruct the jury on the law of manslaughter.

His counsel argue that the conviction is confessedly one based solely on circumstantial evidence; that there was no eye wit-

ness to the transaction, but because certain tracks near the body of the deceased resembled those leading toward or into the house of the accused, and because of his supposed ownership of the necktie found near the body, the jury found a verdict of guilty.

This contention is based on the authority of Rutherford v. Commonwealth, 13 Bush, 608. That was a case where the facts attending the killing were to be asertained, as the court said, "wholly from circumstances." No witness saw the killing, and it was said that, therefore, the homicide might have been excusable self-defense, manslaughter or murder, and as it was the province of the jury to ascertain to which category the killing belonged, it was the duty of the court to instruct on the law applicable to murder, manslaughter and self-defense in order to meet any state of fact the jury might find from the evidence to have existed.

We have been referred to no opposing authority, and we know of no reason for departing from the law as laid down in that case. The defense of the accused is that he is not guilty, and the presumption of innocence goes with him at every step of the proceeding. It is true he testifies that he was not at the place of the killing and did not commit the act; but the jury disbelieved his testimony. They entirely ingored it, and, therefore, all the facts and circumstances surrounding the mystery are placed in evidence in order that the jury might determine who committed the homicide and in what manner.

Should the State introduce proof that the body of a person was found with mortal wounds upon it, and, after connecting some one with the act by circumstances alone, close its testimony, might not the accused show the evidence of a struggle; that the combatants grappled with each as if in sudden or unexpected affray, or show any circumstance to rebut the supposition that the act was one of lying in wait or deliberate killing? And if so, for what purpose, save that the jury may grade the crime; and how grade it, unless the law be given to them applicable to the state of case they may find to have existed?

How can it be said that the jury are the sole judges of the facts if the law leavs them to conclude only that the accused committed the homicide with malice aforethought? Ordinarily, the instructions must conform to the proof and be suggested by the proof, but where there is none showing the facts attending the killing, the law applicable to murder, manslaughter and self-defense must be given.

Judgment reversed, with directions to grant the appellant a new trial on principles consistent with this opinion.

McDONALD, &c. v. McDONALD'S ADM'R, &c.

(Filed December 1, 1894.)

1. Death by willful negligence—Distribution of recovery—Money recovered in one State for the negligent destruction of life in another should be distributed according to the law of the State where the action accrued.

2. Same—Case—The deceased having been killed in the State of Illinois by the willful negligence of the Illinois Central Railroad, and damages therefor recovered in this State in a county into which the road ran, the recovery should go to the widow according to the law of Illinois, which provides that in such recoveries the whole shall go to the widow, in case there are no children.

J. E. Conley, J. D. White and W. G. Bullitt for appellants.

J. M. Nichols for appellees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Hazelrigg.

Oscar McDonald, a resident of Ballard county, Ky., was killed in Illinois while in the service of the Illinois Central Railroad. The appellee, Shelton, qualified as his administrator in the county named, and basing his suit upon an Illinois statute authorizing the personal representative of a person whose death has been caused by the willful negligence of another to recover damages therefor, he sued and recovered of the company in the Ballard Circuit Court (the road running into that county) the sum of $2,500.

The sole question now before us is, to whom does this money belong? The deceased left a widow but no issue, and the appellants, his mother, brother and sisters, claim that the fund is to be disposed of under the Kentucky statute of distribution, and, therefore, that they are entitled to one-half of it and the widow the other.

The appellees, the administrator and widow, say it is to go exclusivley to the widow, as the Illinois statute directs. The Superior Court affirmed the judgment below, dismissing the appellant's petition. Under the Illinois statute the amount recovered "shall be for the exclusive benefit of the widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate," and looking to the law fixing this proportion, we find that where there is a widow and no issue the whole of the personal estate goes to the widow.

The appellants contend that we can not inquire as to how the fund came to the hands of the Kentucky administrator, but finding it there we must distribute it as our statute distributes other personal estate of persons dying intestate. We think differently. While the naked right of action, under the Illinois statute, is in the personal representative, the property right in the thing recovered is in the widow. The fund is not an asset of the decedent's estate. It never belonged to him. The company did not owe it to him but to the widow.

The doctrine that the succession to personal property is governed by the law of the intestate's domicil has no application in this case. The personal representative succeeds to no property, because the intestate died leaving none.

In the case of Dennick v. Railroad Co., 103 U. S., 17, the Supreme Court, after announcing what is now the well-settled doctrine that an action may be maintained in one State for the negligent destruction of life in another State, pursuant to the statute of the latter, held that in such event the sum received should be distributed, and the courts had full power to do so according to the law of the State where the cause of action accrued. These views accord with the principles we have stated, and settle conclusively that the appellants are entitled to no part of the fund in controversy.

But if distribution of the fund were made under the laws of this State the widow would get it. It has been determined time and again that where there is no widow or child no suit can be maintained in cases like the one under consideration. There would be no beneficiary under the statute. The acts providing for a recovery in such cases fare for the exclusive benefit of the widow and children of the deceased.

As said in Henderson's Adm'r v. K. C. R. R. Co., 86 Ky., 389, and in Jordan's Adm'r v. C., N. O. & T. P. R. R. Co., 89 Ky., 42, and in a number of later cases, the widow and children of a person whose life is destroyed by willful neglect have the prior right to sue and the exclusive right to receive what may be recovered in such actions. Collaterals take nothing.

Wherefore, the judgment is affirmed.

AVENT-BEATTYVILLE COAL CO. v. COMMONWEALTH.

(Filed December 1, 1894.)

1. Failure of corporation to pay miner in lawful currency—Evidence—A corporation can not be convicted of the crime of failing to pay one of its wage earners, employed in its mine, in lawful currency, unless the evidence of the Commonwealth proves or conduces to prove that the defendant is a corporation, and also fixes the time when the wages were paid in other than lawful currency.

2. Same—The statute requiring such payment of wages in lawful currency was intended to secure the wage-earner against imposition and oppression at the hands of his employer, and to give him the right to demand his wages, when due, in lawful currency, and to prevent the employer from resorting to any device or exacting from the employe any contract whereby the latter was compelled to accept payment in other than lawful currency.

But the parties have a right to agree that the wages shall not become due except at fixed periods, provided the periods so fixed are not unreasonable, and if the employe wishes to receive aid from his employer before his wages become due, and voluntarily solicits and receives checks or orders for merchandise in the employer's store, the latter may charge him with the checks or orders so received, and on the fixed pay day pay to him in lawful currency only the balance due; and this is not a violation of the statute requiring the payment of wages to certain employes in lawful currency.

Ed. M. Wallace, Robert Riddell and G. W. Gourley for appellant.

Wm. J. Hendrick for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Hazelrigg.

For failing to pay one of its wage-earners in lawful money the appellant was indicted in the Lee Circuit Court, tried, found guilty and fined $100.

Its chief ground of complaint on this appeal is that the proof of the State does not sustain the finding of the jury, and, therefore, the peremptory instruction asked by it should have been given by the court.

The statute alleged to have been violated provides as follows: "That any corporation or person or persons having the ownership or control of any factory, mine or workshop in this Commonwealth, who shall violate the provisions of section 244 of the Constitution, reading as follows, 'All wage-earners in this State employed in factories, mines, workshops or by corporations, shall be paid for their labor in lawful money,' shall be guilty of a misdemeanor, and, on trial and conviction had in any court of competent jurisdiction, shall be fined not exceeding $500 for each violation thereof." (Kentucky Statutes, section 1350.)

The only competent testimony offered by the State was that of

Henry Couch, who was the laborer whose wages were not paid in lawfuly money, according to the allegations of the indictment.

He testified that he worked for the defendant in its coal mines in December, 1893, and in January, 1894, under a contract that on a fixed day he was to be paid all the wages due him for the work done by him during the previous month; that day was the Saturday nearest the 15th of each month; that on that day the defendant always paid him in lawful money all that was due him; that he voluntarily applied to the defendant's clerk and obtained from him "checks," or round coin-like metals, stamped with the company's name, and having on them the figures 5, 10 and so on up to 100, meaning 5 cents or 10 cents, and also the words "payable in merchandise;" that he was never asked to take any of these checks, but applied for them himself, always before his wages were due under his contract, and used them at the company's store, where he got goods, etc., as cheaply as he could at any other store in the town; that these checks were a convenience to him and to the miners.

On pay days the amounts he had gotten in checks were deducted from the amount of his earnings, and he was paid the balance in money. The defendant did not pay money for these checks on pay day. On this proof it is insisted that no case is made out:

1st. Because no time is fixed by the witness when the checks were delivered to him. As the statute was not in force until October 3, 1893, it is urged that a failure to pay the witness in lawful money or deliver him checks for his wages prior to that date was not in violation of law.

2d. Because, though indicted as a corporation, there was no proof conducing to show that the defendant was such. If those violating the statute were not incorporated, they were liable as individuals and not as the "Avent Beattyville Coal Co."

That the omission to prove these facts is fatal to the prosecution seems clear enough, but, even with the omitted proof in the peremptory instruction, should have been given. The legislation in question is wholly new to our State. If its letter is to control, then the delivery of these checks, as payments on the wages earned prior to the regular pay day of the company, is in violation of law. A miner works a week and has earned a certain sum. His wages are not due, but he is in need of provisions for his family. He applies to the company for relief, and it, in part payment of his wages, delivers to him not lawful money but oders or checks on its store for the provisions he needs.

This is confessedly a great convenience to the workman, and we can not believe that it is in violation of a reasonable construction of the law.

The object of the legislation was to protect the weak against the strong, and the wage-earner is regarded as liable to imposition and oppression at the hands of his employer. The statute gives him the right to demand his wages in money whenever it is due him, and any device resorted to by the employer, or any contract exacted of the employe requiring the acceptance of other than lawful money for labor, is prohibited.

If the time between the pay days were unreasonably extended, or if, before employing laborers, agreements were exacted of them that they were to take even a part of their earnings in merchandise, the offense against the law would be complete.

It may be claimed that this is an abridgement of the rights of those laboring under no disability to contract for themselves, and the legislation is arbitrary and opposed to the spirit at least

of the Bill of Rights; but so may the usurer complain of the laws denying him the right to enforce ageements to pay more than a specified rate of interest for the use of money. The object in view is the same in all such legislation—to prevent oppression and overreaching.

The law says, however, that the wage earner shall be paid for his labor in lawful money; but when? It does not say every day or every week; hence we conclude that contracts fixing pay days at reasonable periods may be made, on which, and not before, the laborer may demand his pay in money. If such periods be fixed even by consent of the laborer, so that the effect is to force him by reason of his necessities to apply for and accept his pay in checks for merchandise, the contract is in violation of law, and the enforced delivery and payments are unlawful; but if fixed at reasonable periods, and the necessities of the workman demand it, he may, of his own choice, obtain relief of his employer through the use of checks for merchandise without subjecting the latter to the penalty denounced in the statute. Any other construction would in the end disastrously affect the wage-earner, for whose benefit the law was enacted.

There has been no suggestion of oppression in the argument and none in the testimony growing out of the regulation of the pay days in this case, and we have assumed it to be reasonable.

We think the proof fails to show any violation of the Const tution or the statute, and the judgment is reversed, with directions to dismiss the indictment.

BYRNE v. COMMONWEALTH.

(Filed December 4, 1894—Not to be reported.)

Criminal law—Instructions—Self-defense—On a trial for murder, if the accused killed the deceased after having been merely slapped or kicked by him, and in the absence of evidence of any previous relations between the parties showing any reason for belief by accused that his life or limb was in danger, an instruction that the defendant had a right to use only the force necessary to repel the assault of the deceased would doubtless embrace the law of the case; but if the deceased had previously assaulted the defendant with a deadly weapon, repeatedly heaped insults upon him and entertained a feeling of intense hostility towards him, an instruction ought to have been given to the effect that if accused, at the time he was assaulted, had reasonable grounds to believe, and did believe, that he was then, etc., in immediate danger of life or great bodily harm, then he had a right to use such force as at the time seemed to him necessary to repel the assault, even to the taking of the life of deceased.

Reuben A. Miller and Hill & Hill for appellant.

W. J. Hendrick for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

M. B. Byrne and Fisher Beard were neighbors, and owned adjoining farms. The farm of Beard was so located as to be entirely cut off from the public road by the farm of Byrne, and Beard, for that reason and by the consent of Byrne, passed over the latter's land to the highway.

This friendly relation was disturbed by the refusal of Byrne to give to Beard a different passway over his farm than the one

used, and also bad feeling originated between the two in regard to some fencing in which each claimed to have an interest.

After this Beard leased eighty acres of his farm adjoining Byrne to his son, Thomas Beard, who obtained a passway from another neighbor, and then notified Byrne and his sons not to come upon his land for any purpose except to visit a tenant on his (Beard's) place. After this notice the sons of the two men became as hostile towards each other as the fathers of each, and the repeated quarrels finally terminated in the killing of Thos. Beard by J. J. Byrne.

Frequent demonstrations of this hostile feeling were made by the deceased, and on one occasion was evidenced by an assault with a pistol, and forcing young Byrne to leave a fence that had been built by him and his brother, and, after leaving, had pulled the fence down. The appellant was engaged in hauling wood, and when in a lane claimed by the deceased forced the appellant, in order to reach his home, to leave the beaten path and return home through his father's field. Other indignities were offered, and such was the feeling of bitterness on the part of the deceased that his friends interferred and attempted to persuade him to abandon his purpose to assert what he claimed to be his rights by force, but he declined to listen to their suggestions.

The appellant was about sixteen years of age, while the deceased was in the vigor of manhood, and one of the most daring and dangerous men, when aroused, in his neighborhood. On Sunday, the morning of the shooting, the appellant and two of his young friends started for Green river for the purpose of bathing, and their path led them by the house of one Jones, the father of one of the boys, and who was also a tenant of Beard's. One of the young men had a pistol in his possession when at young Byrne's house and proposed to leave it there, when the appellant offered to take it with him, and did place it in his pocket.

On reaching the house of Jones they saw Beard and Jones under the shade of a tree, and on reaching them Beard said to the appellant: "Why do you trespass on me?" And appellant responded: "Why do you trespass on us?" Beard then called him a damn liar as often as twice, and the appellant responded by using the same language, when Beard arose and slapped him on the side of the head, and as the boy turned to walk off kicked him, when he (appellant) turned, drawing the pistol from his bosom, and fired three shots at the deceased, taking his life. The jury, on these facts, returned a verdict of manslaughter, and fixed his punishment at five years in the State prison.

If there was nothing more in this case than the mere slap on the jaws, or the kick upon the body of the defendant, there might be much force in the suggestion that the appellant had no reason to believe he was in danger of great bodily harm, such as would justify the taking of the life of his assailant, and, therefore, the verdict for manslaughter would have been proper; but it appears that a deadly enmity existed on the part of deceased towards the family of which the appellant was a member, and that appellant had been subjected to repeated insults and assailed with deadly a weapon by the deceased, for no other reason than his passing over the land of the deceased on two or more occasions; and with this evidence it was proper for the court to say to the jury that if they believed from the evidence the defendant was assaulted by the deceased, and they further believed from the evidence the accused at the time had reasonable grounds to believe, and did believe, he was then in immediate danger of loss of life or of great bodily harm, he had the right to use such

force as may have reasonably appeared to him at the time to be necessary to repel said assault, even to the taking of the life of the deceased; and if the shooting was done under such circumstances the accused is entitled to an acquittal.

The instructions given the jury fail to embody the law of self-defense. The appellant by the instructions could use no more force than was necessary to repel the assault; and while for an ordinary assault, and in the absence of any other reason for the belief of danger to life or limb, such an instruction would doubtless embrace the law of the case, or at least would not affect the substantial rights of the accused, there is presented here facts establishing previous threats as well as an attack with a deadly weapon by the deceased on the appellant, connected also with the disparity in years and strength as compared the one with the other, and the jury, placing themselves in the position of the accused with the assault as made, should have been told if they believe from the evidence the accused used such force, and no more, as reasonably appeared to him at the time to be necessary to repel the assault, it was their duty to acquit.

It is not necessary to determine the other questions raised except to say that the offense of manslaughter should have been defined.

The judgment is reversed and remanded for a new trial in accordance with this opinion. (Oder v. Commonwealth, 80 Ky., 32; Estop v. Commonwealth, 86 Ky., —; Stanly v. Commonwealth, 86 Ky., 39; Holloway v. Commonwealth, 11 Bush, 344; Amos v. Commonwealth, ante, 358.)

SMITH, &c. v. MATTINGLY.

(Filed December 4, 1894.)

1. A tenant for life or a term of years is guilty of voluntary waste when he committs some act destructive to the tenement, and of permissive waste when he omits to keep the estate in proper repair.

2. A remainderman or reversioner can not maintain an ordinary action in the nature of trespass on the case against a life tenant to recover damages for permissive waste; his remedy is by suit in equity.

3. Treble damages done by voluntary or wanton waste by a tenant may be recovered by the person entitled, in an action at law, under the provisions of article 5, chapter 75, Kentucky Statutes.

4. Same—Pleadings—Where the remainderman in his petition, after alleging acts of permissive waste by the life tenant, avers that said life tenant "has destroyed and removed from said land a large portion of the fencing that was around it," the petition states a cause of action for voluntary waste, and it is, therefore, error to sustain a demurrer to it.

5. Plaintiffs in an action at law to recover for voluntary waste, having averred acts of permissive waste by defendants, were entitled to a transfer to equity of their cause.

6. A tenant committing voluntary waste does not, under the statute, forfeit the entire tract of land in which his estate exists, but the forfeiture affects only the thing wasted, whether it be fences, dwelling house other part of the land.

W. S. Morrison and Eli H. Brown for appellant.

Reuben A. Miller and G. D. Chambers for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Lewis.

Walter Smith and others, owning in right of their mother the remainder in fee of a tract of land, brought this action against George D. Mattingly, purchaser under execuiton and owner of the life estate of their father, to recover damages and also the land for alleged waste.

Plaintiffs state substantially in their petition, as cause of action, that in 1887, when defendant acquired title to the life estate and possession of said land, it was enclosed by a substantial fence, dwelling houses and other buildings thereon were in good repair and the soil in a good state for cultivation; but that he has since "willfully and wantonly committed and permitted" said dwelling house to become untenantable, other buildings to become dilapidated and useless, and a large portion of the farm to be thrown open and trampled upon by cattle, and to grow up in shrubs and briars. It is further stated that he has destroyed and removed from said land a large portion of the fencing that was around it.

The amount of damage done, as alleged, is $1,500, treble the amount of which they seek to recover under provisions of article 3, chapter 66, General Statutes, which is the same as article 5, chapter 75 of Kentucky Statutes. The sections necessary to quote are as follows:

"Section 1. If any tenant for life or years shall commit waste during his estate or term of anything belonging to the tenement so held without special license, in writing, so to do, he shall be subject to an action of waste, shall lose the thing wasted and pay treble the amount at which the waste shall be assessed.

"Section 2. The action may be maintained by one who has the remainder or reversion in fee after an intervening estate for life or years, and also by one who has a remainder or reversion for life or years only; and each of them shall recover such damages as it shall appear that he has suffered by the waste complained of.

"Section 7. If in any action for waste the jury find that the waste was wantonly committed, judgment shall be entered for three times the amount of the damages assessed."

There is an obvious and well-recognized distinction between voluntary waste, which consists in the commission of some destructive act, and permissive waste, consisting in omission by a tenant for life or years to keep the land and tenements in proper repair; and that the statute quoted was intended to authorize an action for voluntary waste only, not for permissive waste, is made by the language used too clear for discussion.

The question then arises whether an action ordinary, in the nature of trespass on the case, can be maintained at all in this State by a reversioner or remainderman against the tenant for permissive waste. That question has never been presented to or decided by this court. Indeed, although the statute we are now considering has been in existence substantially since 1798, though modified in the manner to be hereafter noticed, the action thereby authorized has been seldom instituted.

The reason therefor is thus stated in section 917, Story's Equity: "From this very brief view of some of the more important cases of equitable interference in cases of waste the inadequacy of the remedy at common law, as well as to prevent waste as to give redress for waste already committed, is so unquestionable that there is no wonder that the resort to the courts of law has in a great measure fallen into disuse. The action of waste is of rare occurrence in modern times, an action on the case for waste being generally substituted in its place whenever any remedy is sought at law. The remedy by bill in equity is so much more easy, expeditious and complete that it is almost invariably re-

sorted to. By such a bill not only may future waste be prevented, but, as we have already seen, an account may be decreed and compensation given for past waste. Besides, an action on the case will not lie at law for permissive waste."

In the case of Loudon v. Warfield, 5 J. J. M., 197, decided by this court as early as 1830, this language was used: "Indeed the proceeding by bill in chancery seems, according to the modern practice, not only to have superseded the writ of estrepement, but to supply to a certain extent the place of the action of waste, for it is said that when a bill is filed for an injunction to stay waste, and waste has already been committed, the court, to prevent multiplicity of suits, will not oblige the party to bring an action at law, but will decree an account and satisfaction for what is past."

The statement in Story's Equity that an action on the case will not lie at law for permissive waste, although supported by respectable authority, it is proper to say, is not generally concurred in by other text-writers; but we need not inquire what was the ancient rule of practice in that respect, because examination of the history of legislation on the subject of waste in this State has satisfied us that action on the case for permissive waste, if it ever was a proper action therefor, was intended to be and has been abolished by statute.

"An act concerning waste," passed in 1798, the same already referred to, contains this section: "The process in action of waste shall be by summons, attachment and distress; and if the defendant appears not upon the distress, the waste shall, nevertheless, be inquired of by a verdict of the jury, and the court proceed to judgment according to the directions of this act."

The intention was thereby to still adhere to the old common-law procedure, but that section was not retained in the Revised Statutes adopted in 1852, but instead was adopted section 7, as follows: "Any person who is entitled to such action of waste may, instead thereof, bring an action on the case in the nature of waste, in which he shall recover such damages as it shall appear that he has suffered by the waste complained of."

The action thereby provided for was in addition to the remedy described in section 1 of article 7, chapter 56, Revised Statutes, authorizing recovery of treble damages for voluntary waste, being the same as now authorized by Kentucky Statutes, as had been also done by the General Statutes; and if that section of the Revised Statutes had been retained in the General Statutes, or was a part of the Kentucky Statutes, it would be a practical question whether an action on the case would lie for permissive waste. But it has been omitted from both, which is tantamount to a repeal of it, and we must, therefore, conclude that the legislature, becoming convinced, as had the court, that the remedy by equitable proceeding is more easy, expeditious and complete than by an action ordinary, intended to restrict the right to sue at law to the action for voluntary waste provided for in section 1, quoted, whereby, in case the jury finds the waste was wantonly committed, treble damages may be assessed, leaving exclusive jurisdiction of cases of permissive waste to courts of equity.

It seems to us the lower court erred in sustaining a general demurrer to plaintiff's petition, because it is therein distinctly stated defendant had destroyed and removed from said land a large portion of the fencing that was around it, which amounted to an averment of voluntary waste for which an action may be maintained under the statute.

It is, however, not true, as argued by counsel, that in case of voluntary waste of a portion, the entire tract of land in which a

tenant may have an estate for life or years is forfeited, for the statute provides that the particular thing wasted only shall be forfeited, whether it be timber, fence rails, a building or other thing appurtenant to the land.

It is perhaps proper to further say that as there is a cause of action for permissive waste, stated cognizable in equity, plaintiffs were entitled to have the case transferred to the equity docket.

For the error indicated the judgment is reversed and cause remanded for overruling the demurrer and other procedings consistent with this opinion.

WHITE v. COMMONWEALTH.

(Filed November 24, 1894.)

1. A judgment of conviction in a criminal case can not be reversed on appeal because not supported by sufficient evidence, if there was any evidence before the jury conducing to show the guilt of the accused.

2. The competency of an infant to testify as a witness is determined by her intelligence, and of this the trial court must be the judge. Ignorance of God or of the evil of lying does not render the infant incompetent.

3. Carnal knowledge of infant—Instructions—The crime of carnally knowing an infant under twelve years of age is not committed unless there has been some penetration, however slight.

Therefore, it was highly prejudicial to a defendant to instruct the jury that to constitute the crime "there must have been some penetration, however slight, if the parts of the infant were sufficiently developed to admit of it; but if not so developed, then the pressing or rubbing his private parts against her private parts, for the purpose of producing an emission, was sufficient to constitute carnal knowledge."

4. Carnal knowledge of an infant under twelve years of age, even with her nominal consent, is, in legal contemplation, forcible and against her will, although by statute not punishable with the same severity, as if in fact forcible and against her consent.

5. Same—Evidence—Evidence that the place was a bawdyhouse where the alleged carnal knowledge of the prosecuting witness, an infant under twelve years of age, was had, was incompetent. The infant's reputation must be proven by the direct and positive evidence of her reputation among her neighbors.

J. L. Dorsey for appellant.

W. J. Hendrick and J. H. Powell for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Quigley.

At the September term, 1894, of the Henderson Circuit Court, the grand jury of Henderson county found an indictment against appellant for rape, commited in manner and form as follows: "The said Samuel White, on the 29th day of July, 1894, and before the finding of this indictment in the said county of Henderson, did unlawfully, violently and feloniously make an assault upon the body of one Lilly Ann Lewis, a female infant under twelve years of age, and her, the said Lilly Ann Lewis, then and there forcibly and against her will, feloniously did ravish and carnally know against the peace and dignity of the Commonwealth of Kentucky."

To this indictment the defendant entered the plea of "not guilty," and, on trial had, the jury returned into court the fol-

lowing verdict: "We, the jury, find the within-named defendant not guilty as charged, but guilty of having carnal knowledge with the infant, Lilly Ann Lewis, and fix his punishment at confinement in the penitentiary for ten years."

The defendant entered a motion for a new trial, and in support thereof filed the following reasons: The verdict of the jury is against the law and evidence; the court erred in permitting the prosecuting witness, Lilly Ann Lewis, to testify; the court erred in refusing to permit defendant's witnesses to state that the house where the infant is charged to have been raped was a bawdy house, and had the reputation of being such in the neighborhood; the court erred in giving to the jury instructions 1, 2, 3 and 4, and in refusing to give to the jury instructions A and B, asked to be given by defendants, to all of which the defendant objected and excepted. The motion for a new trial having been overruled, and judgment having been pronounced against the defendant, he prosecutes this appeal to reverse the judgment of the lower court.

This court has held repeatedly that it has no power to reverse a judgment of conviction in a criminal prosecution upon the ground that the evidence is not sufficient to support the verdict, being restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused, and in this case we think there was. There is no error in the admission or nonadmission of testimony, either as to relevancy or competency. The intelligence of the witness is the true test of competency, and that must be determined by the court, while the weight to be given to the evidence is for the jury. A child may be ignorant of "God" and of the evil of lying and of the punishment prescribed therefor, both here and hereafter, and yet have sufficient intelligence to truthfully narrate facts to which its attention is directed.

Mr. Blackstone, in his Commentaries, book 4, page 213, third edition thereof, says "Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale that she ought to be heard without oath to give the court information; and others have held that what the child told her mother or other relations may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath, and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place and circumstances in order to make out the fact, and that the conviction should not be prosecuted singly on the unsupported accusation of an infant under years of discretion. There may be, therefore, in many cases of this nature, witnesses who are competent—that is, who may be admitted to be heard—and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe; for one excellence of the trial by jury is that the jury are triers of the credit of the witnesses as well as of the truth of the fact. It is true, says this learned judge, that rape is a most detestable crime, and, therefore, ought severely and impartially to be punished with death. But it must be remembered that it is an accusation easy to make, hard to be

proved, but harder to be defended by the party accused, though innocent." Also Wharton's Criminal Evidence, sections 352, 366 and 368, and the case of Bush v. Commonwealth, 80 Ky., 244, in which it was held, Judge Hines delivering the opinion, "that the Constitution changes the common-law rule, and that all persons are competent as witnesses, so far as any religious test is concerned."

The evidence rejected, if admitted, would only have gone to the reputation of the place generally. The method of impeaching the character of witnesses for truth and veracity, virtue and morality, is well settled by the law, and it should always be done by direct, positive testimony of those who are acquainted with the reputation of the witness for either, among his or her neighbors and acquaintances, and not inferentially by proving that a certain house in the neighborhood has the reputation of being a bawdy house.

As to the instructions given by the court, it is only necessary, for the purposes of this appeal, to consider instruction No. 2, which reads as follows: "If they have a reasonable doubt as to whether or not the defendant is guilty of rape, as above defined, but believe to the exclusion of a reasonable doubt that he had carnal knowledge of said female with her consent, they will find him not guilty of rape, but guilty of having carnal knowledge with an infant female under twelve years of age, and fix his confinement in the penitentiary from ten to twenty years, in their discretion.

"To have carnal knowledge, with the infant's consent, there must have been some penetration, however slight, if the parts of the infant were sufficiently developed to admit it, but if not so developed then the pressing or rubbing his private parts against her private parts for the purpose of producing an emission was sufficient to constitute carnal knowledge."

The question raised being whether or not penetration, however slight, is necessary to constitute carnal knowledge. In Beck's Medical Jurisprudence, volume 1, page 224, we find this language: "Rape is the carnal knowledge of a female forcibly and against her will. It has been a subject of legal discussion as to what constitutes this carnal knowledge. Some judges have supposed that a penetration alone was sufficient, while others have contended that penetration and emission are both necessary."

But on page 226 of the same book Mr. Chitty observes: "It is certain that no direct evidence need be given to the emission, but that will be presumed on proof of penetration until rebutted by the prisoner, and it will suffice to prove the least degree of penetration, so that it is not necessary that the marks of virginity should be taken from the sufferer."

Mr. Wharton, in his work on Criminal Law, eighth edition, volume 1, sections 554 and 555, says: "A very considerable doubt," remarks Mr. East, "having arisen as to what shall be considered sufficient evidence of the actual commission of this offense—that is, in what carnal knowledge consists—it is necessary to enter into an inquiry which would otherwise be offensive to decency. Considering the nature of the crime, that it is a brutal and violent attack upon the honor and chastity of the weaker sex, it seems more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offense among felonies, if all further inquiry were unnecessary after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honor, the pride of virtue, which nature, to render the sex amiable, hath implanted in the female

heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete." Upon what principle, and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace. The doubts, however, that existed in England have been put to rest by (9 George IV, chapter 31) making the least penetration enough, and in this country the proof of emission seems never to have been required. In several instances, in fact it has been held, that as the essence of the crime is the violence done to the person and feelings of the woman, which is completed by penetration without emission, it will be sufficient to prove penetration. But while the slightest penetration is sufficient, there must be specific proof of same, though the proof of this may be inferred from circumstances aside from the statement of the party injured. It must be shown, to adopt the phraseology of Tindal, chief justice, and afterwards of Williams, justice, that the private parts of the male entered, at least to some extent, in those of the female. At one time it was even thought that there must be proof that the hymen was ruptured, though this is no longer considered necessary.

The law may now indeed be considered as settled, that while the injuring of the hymen is not considered indispensable to a conviction, there must be proof of some degree of entrance of the male organ "within the labia of the pudendum;" and the practice seems to be, to judge from the cases just cited, not to permit a conviction in which it is alleged violence was done, without medical proof of the fact, whenever such proof is attainable. It seems but right, both in order to rectify mistakes and to supply the information necessary to convict, that the prosecutrix should be advised of this so that she can take the necessary steps to secure such examination in due time. If this test be generally insisted upon there is no danger of any conviction failing because of noncompliance with it, and, on the other hand, many mistaken prosecutions will be stopped at the outset.

In the case of Branen v. State, 25 Wis., 413, the case being very similar to this in that the little girl was but eight years of age, the defendant being discovered in supposed criminal connection with her, but different in that the child did not testify as a witness.

It appeared from the evidence of the surgeon that the parts were very much inflamed, but the hymen was not ruptured nor the vagina entered. The court says: "It will be seen from this statement of the testimony that the objection to the proof is that it was not direct and positive to the fact of penetration. It is conceded that any, the slightest, penetration will suffice to constitute the offense, and that rupturing the hymen is not indispensable to a conviction. But it is insisted that penetration, to some extent, must be positively proven, and that it can not be found by the jury from circumstances. We are of the opposite opinion, and such we believe to be the clear weight of authority. In a case of this kind, where the offense is committed upon a child of tender years, and who, from want of knowledge and inexperience, may be incapable of giving testimony, it often happens, as in this instance, that direct and positive proof of penetration can not be made, and if proof by circumstances were excluded or held insufficient, the offender must go unpunished, and we accordingly find in such cases that the utmost reliance is placed on the testimony of medical witnesses, who, from their professional skill and understanding, are able to guide to pretty unerring results. The marks of violence left after such an at-

tempt upon a child, the inflamed, swoolen and unnatural condition of the parts, together with the pains and soreness complained of, are considered quite as sure indications of what has been done as if the child herself were able to testify, and even more sure than her positive statement would be unsustained by such corroborating facts and circumstances"

And in the case of Reginer v. Lewis, reported in the English Common Law Reports, volume 47, page 393, on an indictment for carnally knowing and abusing a child under the age of ten years, it appeared from the cross-examination of the surgeon, with respect to the penetration, that the hymen of the child was not ruptured, but that upon the hymen there was a venerial sore, which must have arisen from actual contact with the viral member of a man. Counsel for the prisoner submitted that all these appearances were consistent with the fact of the private parts of the prisoner being in actual contact with the private parts of the child, and yet no penetration, sufficient to constitute the whole offense, may have taken place. The court said: "I shall leave it to the jury to say whether at any time any part of the virile member of the prisoner was within the 'labia of the pudendum' of the prosecutrix; for if ever it was, no matter how little, that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offense."

Section 340 of the Criminal Code provides that a judgment of conviction shall be reversed for any error of law appearing on the record, when, upon the consideration of the whole case, the court is satisfied the susbtantial rights of the defendant have been prejudiced. So that we are constrained to hold, in the light of these eminent authorities, that there must be a penetration, however slight it may be, to constitute carnal knowledge. In this case the instruction complained of was extremley prejudicial to the substantial rights of the defendant, in that it authorized the jury to find him guilty of carnally knowing the child, whether penetration was shown from the evidence or not.

It appears from the evidence that within an hour or so after the offense is said to have been committed a doctor examined the child. He testified that her parts were not bruised, the hymen was not broken; that he could not penetrate her parts with his little finger, and that she had not been raped, and that although it was possible for a slight penetration to have been made, yet the condition of the parts did not indicate that such was the case. The little girl, however, testified that defendant did penetrate her parts a little, and that it hurt her, and it was established by the testimony of one of the witnesses that she looked through the window into the room where the child and defendant were, and that the child was on the bed and defendant on top of her, and that she was crying when defendant got up and opened the door.

The instruction asked to be given by the Commonwealth's attorney and refused by the court raised the question as to whether or not an infant under ten years of age could consent to carnal knowledge of her person. The statute reads as follows:

Section 1122 Whoever shall be guilty of the crime of rape upon the body of an infant under twelve years of age shall be punished with death or with confinement in the penitentiary for life, in the discretion of the jury.

Section 1155. Whoever shall carnally know a female under the age of twelve years, or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years.

This court held, in the case of Fenston v. Commonwealth, 82

Ky., 550, opinion by Judge Lewis, that "a female under that age is presumed to be, as an idoit in fact is, without capacity and discretion to comprehend fully the consequences of yielding to the ravisher, or strength of will to resist his influences and importunities. Hence carnal knowledge of her, even with her nominal consent, is, in legal contemplation, forcible and against her will. And though it is not deemed of as heinous nature, nor punished with the same severity, as where in fact forcible and against her consent is nevertheless, in the meaning of the statute, rape, and punished as such.

Because of error in instruction No. 2. the judgment is reversed, and this case is remanded for proceedings consistent with this opinion.

BARLOW, &c. v. WATERS, &c.

(Filed December 18, 1834—Not to be reported.)

1. The burden of proof is on the propounders of a will to show its due execution, and on the contestants to show unsoundness of mind of the testator or the exercise of undue influence upon him.
2. The instructions as set out in the opinion correctly defined the undue influence condemned by law.
3. Although it may be a sound principal of law that a testator has a right to dispose of his property as he pleases, if of sound mind and not unduly influenced, yet an instruction to that effect may be objectionable in some cases, and ought not to be given; but in this case such an instruction was not misleading or prejudicial.
4. The court can not give, and is not expected to give, in one instruction all the law arising upon the evidence in a contested will case; but it may give, in different instructions, the law relating to different branches of the evidence.
5. Former wills executed and revoked by the testator are competent evidence to show a fixed purpose on his part.

S. M. Payton and Thos. H. Hines for appellants.

Lewis McQuown for appellees.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hazelrigg.

From an order of the Hart County Court, probating a paper purporting to be the last will and testament of Butler H. Waters, the contestants appealed to the circuit court, where, after a protracted trial, the jury found for the paper but rejected an alleged codicil thereto.

On appeal here, the contestants complain chiefly of the instructions of the court to the jury.

The subscription of the testator, the attestation of two witnesses, and the soundness of the testator's mind, are the sole issue submitted in the first instruction. It is complained that the question of undue influence is ignored, and so it was; but the court could not give the whole law of the case in one instruction. In the first one given the court properly submitted to the consideration of the jury only the statutory requirements of a valid will.

In No. 2 the soundness of mind, essential to the making of a will, is properly defined.

No. 8 is as follows: The court instructs the jury that a testator, if of sound mind and not unduly influenced, has the right to dispose of his property as he pleases, although it may be contrary to the dictates of natural or moral obligations.

This instruction is sound law in the abstract, but in a case where a testator does, in fact, violate his natural and moral obligations, it might be objectionable. So in Sherley v. Sherley, 81 Ky., 246, where a will made an unequal distribution among the children of the testator, an instruction that a testator had the right to make such distinction, if he chose to do so, was condemned. In this case, however, Waters, who was childless, gave one-half of his estate to his wife, and the balance he distributed among his brothers and sisters and the kin of his second and last wife.

We are convinced that the instruction was in no way misleading or prejudicial to the rights of the contestants.

The fourth instruction is as follows, and is to be considered in connection with No. 8½, given at the instance of contestants:

4th. The court instructs the jury that influence, obtained by modest persuasion and arguments addressed to the understanding, or by mere appeals to the affection, do not constitute undue influence.

8½. By undue influence, as mentioned in above instructions, is meant an influence obtained by flattery, importunity, threats, superiority of will, mind or character, which gives dominion over the will of the testator to such an extent as to destroy free agency or constrain him to do against his will what he is unable to refuse.

When taken together, these instructions fairly define the influence condemned by the law. (Wise v. Foot, 81 Ky., 10; Bush v. Lisle, 89 Ky., 393.)

Nos. 5 and 6 are not objected to specially and are not, in fact, objectionable.

No. 7 places the burden of proof as to the execution of the paper in the manner defined in No. 1 on the propounders, and the burden of showing undue influence or unsoundness of mind on the contestants. This conforms to the rule laid down by this court in Fee v. Taylor, 88 Ky., 259; Johnson v. Stevens, 15 Ky. Law Rep., 477.

We think, on the whole, the instructions fairly give the law applicable to the case.

The testimony of the widow of the testator was not objected to, and hence, if incompetent, furnishes no ground of complaint. (Williams v. Williams, 90 Ky., 28.)

The only question raised was whether she was a competent witness. The production of proof of the execution of former wills afford evidences of the fixed purposes of the testator and illustrate his cherished intentions with respect to his property. (Harrison's will, 1 B. M., 351; Carrico v. Neal, 1 Dana, 162.)

It was not error to allow such proof; nor was it error to permit the cross-examination of the witness, Farris, as to his dealings with the testator.

There is no ruling of the court as to the deposition of Mrs. Maddox, and nothing is before us to review.

The judgment below requires each party to pay its own costs, and this we will not disturb.

The codicil containing merely certain directions to the executor as to the time when the estate might be distributed was rejected by the jury probably because it was not signed by the attesting witnesses in the presence of the testator. The will was established by the appellees, and the apportionment of the costs was as favorable to the appellants as they could ask.

Affirmed on both the original and on cross appeal.

WILHELM v. COMMONWEALTH.

(Filed December 20, 1894—Not to be reported.)

1. Malicious shooting at without wounding—Instructions—A defendant on trial for maliciously shooting at another, with intent to kill him, without having wounded said person, is entitled to an instruction as to the law of shooting at without wounding in a sudden affray when the evidence conduces to show that the shooting was done in sudden heat and passion.

The evidence shows that appellant shot at G. when the latter was on horseback at appellant's house and had angrily refused to leave when requested to do so. The shooting seems to have been done in sudden heat and passion, therefore, accused was entitled to an instruction as to law of shooting at without wounding in sudden affray.

2. Same—An instruction that defendant had no right to shoot or shoot at G. unless G. was so conducting himself as to indicate to defendant that he was intending to do him or his family personal violence, etc., was erroneous; it ought, if given at all, to have been qualified so as to limit the words "shoot at" with the words "with intent to kill him," especially in view of the evidence, which conduces to show that defendant shot at G. with no intention of hitting him, but merely for the purpose of frightening him so as to make him leave defendant's home, which he had refused to do.

3. Criminal law—Time of giving instructions—It was prejudicial to defendant's rights, and a practice not to be approved, for the court, after giving its instructions, and after defendant's attorney had made his argument to the jury and left the courtroom, to "hand in" or give, at the request of the attorney for the Commonwealth, during that attorney's argument, an additional instruction to the jury; and the error was not cured by offering to let defendant's attorney argue the new instruction to the jury after the conclusion of the speech of the Commonwealth's attorney.

W. R. Haynes for appellant.

W. J. Hendrick for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

Upon an indictment for maliciously shooting at John H. Goodman, with intent to kill him, the appellant was tried, convicted and sentenced to the penitentiary for one year.

When the difficulty occurred Goodman was on horseback at the appellant's house, and though requested to leave replied angrily that he would do so only when he got ready. The appellant finally threw a club at him, then an axe, missing him each time. He finally fired his pistol off when within eight feet of him, and, as he says, to scare him away and with no intention to harm him. Other witnesses say that there was nothing to hinder the appellant from hitting Goodman had he aimed to shoot him.

1st. The law of the section under which the indictment was framed (section 1166, Kentucky Statutes) was properly given to the jury, and, as they were the judges of the intent with which it was fired, we can not reverse, even if convinced that the shot was fired only for the purpose of driving the obnoxious visitor away. There was a quarrel, however, and an angry altercation. The affray seems to have been the result of sudden heat and passion, and the law applicable to such affray should have been give. (Section 1242, Kentucky Statutes.)

2d. After giving the law as to maliciously shooting at another, the court gave an instruction to the effect that if Goodman was

on the defendant's premises, and when ordered off refused to go, the defendant had the right to use such force and no more as was necessary to eject him from the premises.

The case was then argued before the jury by counsel for the defendant, who, after concluding his argument, left the court-room. During his absence an instruction was "handed in" at the request of the attorney for the State to the effect that the defendant "had no right to shoot, or to shoot at Goodman, if he did so, unless Goodman at the time was so conducting himself as to indicate to defendant that he was intending to do him or his family personal violence," etc.

Upon the return of the defendant's counsel he objected to the instruction and the time and manner in which it was given. The court then offered to allow defendant's counsel to argue this instruction after counsel for the State should finish. This offer does not seem to have been accepted, but the irregularity is complained of as depriving the defendant of a fair and impartial trial. It is evident that such a practice would be a dangerous one to the rights of the accused. It is the duty of the court to give the whole law of the case to the jury, and counsel are entitled to have it for the purposes of the discussion. An intelligent and consistent argument could hardly be made otherwise. The offer to permit the attorney to discuss the additional instruction after the conclusion of the case for the State might not, in all cases, afford full redress. In other instances the opportunity might be highly advantageous to the defendant. No general rule can be laid down. We are relieved, however, of further consideration of the question here, because the new instruction was cleary erroneous.

The denial of the right "to shoot at Goodman," especially in view of the testimony as to the manner of the shooting, ought to have been qualified by the words "with intent to kill him."

With these words in, the instruction is not prejudicial, although from some intimations in the record as to the purpose of Goodman's visit it might not have been altogether improper to have left the appellant untrammeled in the exercise of his right to free his home from the presence of his unwelcome visitor.

The judgment is reversed, with directions to grant the appellant a new trial on principles consistent with this opinion.

WATERS, &c. v. WATERS' EX'OR, &c.

(Filed December 20, 1894—Not to be reported.)

Certain will construed—Testator by his will directed, first, that his debts and burial expenses be paid; second, that certain bank stock be set apart to pay premiums on a certain life insurance policy; third, that his wife take one-half of his estate, personal, real and mixed, in fee simple; fourth, that a nephew have in fee simple a certain farm: fifth, that the proceeds of said life insurance policy, when collected, as well as said bank stock set aside to pay premiums thereon, should become a part of the estate, to be divided as the remainder thereof hereinafter directed to be divided; sixth, seventh and eighth, that the residue of said estate be divided in forty-third parts, and that certain parties take twenty-five forty-thirds thereof; ninth, that a sister-in-law take $1,000 in addition to the provision hereinafter made for her; tenth, that eighteen forty-thirds of said residue be divided among certain designated persons, including said sister-in-law. Held—

First. Testator disposed of his entire estate by his will.

Second. The debts and funeral expenses are to be first paid, then the farm and the bank stock are to be disposed of as directed; then the widow is to take one-half the remainder, but the bank stock and the proceeds of said policy are not a part of the estate of which the widow takes one-half; then the sister-in law is to take $1,(00; and the residue, including said bank stock and policy, is to be divided and distributed into forty-third parts.

S. M. Payton and Thomas H. Hines for appellants.

Lewis McQuown for appellees.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Hazelrigg.

The sole question on this appeal is the construction of the will of Butler H. Waters, who died in Hart county, Kentucky, in June, 1890.

So much of the instrument as is necessary to be considered for the purposes involved is as follows:

1st. It is my will and desire that all my just debts and burial expenses shall be paid by my executor. * * *

2d. It is my will and desire that my said executor hereinafter named shall retain in his hands four shares of the stock owned by me in the Merchants Banking Company at Horse Cave, Kentucky, of the face value of $100 each, and that he shall apply the dividends accruing upon said stock to the payment of the annual premiums that shall accrue and become due upon the life insurance policy issued for my benefit by the Southern Mutual Life Insurance Company upon the life of my niece, Mrs. Sarah C. Stokes, and to keep the said policy in force during her life. * * *

3d. I will and bequeath to my present wife, Marietta Waters, one-half ($^1_2$) of my estate, personal, real and mixed, in fee simple.

4th. I will and bequeath to my nephew, Millard F. Mustain, the farm of about 106 acres in Warren county, Ky., known as the Craig farm, and occupied this year by W. H. Smith, the same farm which I have already deeded to H. F. Mustain in trust. This is not to interfere in any way with the provisions of the deed to said property given by me to H. F. Mustain, trustee, except that I yield to H. F. Mustain, trustee, my part of the rental or proceeds, if sold, for the benefit of said Millard F. Mustain and family.

5th. I will and desire that at the death of my niece, Sarah C. Stokes, the proceeds of said life insurance policy upon her life for my benefit as aforesaid, together with the four shares of bank stock retained in the hands of my executor to pay premiums thereon, shall become a part of my estate, to be divided as the remainder thereof as hereinafter directed to be divided.

6th. It is my will and desire that of all the residue of my estate, of whatsoever kind, after fulfilling the foregoing provisions, a share of three forty-thirds (3-43) shall be placed in the Merchants Banking Company at Horse Cave, Kentucky, to be held in trust for the use and benefit of the infant children of my deceased brother, L. T. Waters. * * *

7th. I give to my niece, Marietta Rhodes, a share of one forty-third (1-43) of said residue of my estate.

8th. I bequeath of the said residue of my estate three forty-thirds (3-43) each to my brothers, P. B. Waters, O. D. Waters, Ben H. Waters, T. H. Waters, M. L. Waters, John H. Waters, and to my brother-in-law, John W. Mustain, three forty-thirds (3-43.)

9th. I will and bequeath to my sister-in-law, Mrs. M. J. Burton, $1,000 in addition to the provisions hereinafter made for her.

10th. I will and bequeath of the said residue of my estate three forty-thirds (3-43) each to the following named persons: Thomas H. Mustain, James M. Mustain, Jesse B. Mustain, Mrs. Martha J. Burton, Mrs. Mary Maddox, and Mrs. Emily French.

11th. I hereby appoint my nephew, H. F. Mustain, executor, etc.

The contention of the appellants is that after setting apart the four shares of bank stock and life policy, the specific devise of the farm to Millard F. Mustain and paying the debts, funeral expenses and costs of administration, the widow takes one-half the balance, then the residue is to be divided into forty-three parts, one of which parts is to go to the infant children of L. T. Waters, one to Marietta Rhodes, and three parts each to P. B., O. D., Ben H., T. H., M. L. and John H. Waters, and John H. Mustain. This disposes of twenty-five forty-thirds of the residue; that then the devise to Martha J. Burton is to be paid out of the remaining eighteen forty-thirds; that this residue is then to be treated as a new whole and again divided into forty-thirds, eighteen of which only are thereafter disposed of in the will, leaving undisposed of twenty-five forty-thirds of this new residue. This the appellants, as heirs at law of the decedent, say they are entitled to, the amount of which is some $5,000.

We need hardly say that this is a highly strained construction. The confusion results from the displacement of the clause giving Mrs. Burton the $1,000. It naturally belongs immediately after the devise to the wife, or, at least, before any division of the estate into forty-thirds. When so considered, the will is easily understood. The twenty-five forty-thirds disposed of down to the ninth clause, together with the eighteen forty-thirds disposed of by the tenth clause, make up the entire residue of the estate disposed of by division into forty-thirds. Nothing is clearer than the testator intended to dispose of his entire estate, and such also is the legal presumption. This was the conclusion of the learned judge below. In reaching the point when the estate is to be divided into forty-thirds, the court deducts, first, the debts, funeral expenses and costs of administration; second, one-half the remainder for the widow; third, the farm theretofore deeded to Mustain, trustee, and any interest therein theretofore reserved; fourth, the devise of $1,000 to Mrs. Burton; then follows the division into forty-thirds.

As we understand this constuction, the four shares of bank stock left for the payment of premiums as well as the life policy on the life of Mrs. Stokes is treated as a part of the estate, to one-half of which the widow is held to be entitled. And such would be the import of the language of the devise to her in the third clause, but in the fifth clause this stock and policy theretofore set apart, as it were, from his estate, is brought back and becomes a part of his estate. "to be divided as the remainder thereof as hereinafter directed to be divided—that is, to the persons thereinafter named, and these are found in the sixth, seventh, eighth and tenth clauses. Under this construction the widow is to have no part of this stock or policy. This is true of the interest of the testator in Millard F. Mustain's farm. He evidently regarded that interest as no part of his estate to be divided among or affect the interest of any of the distributees. In ascertaining the widow's share, therefore, the estate is to be estimated as if it did not embrace these four shares of stock, or this policy of insurance, or any interest in the Craig farm. We

understand the judgment below to fix her interest in the estate as if it embraced these items of property.

For this reason alone it is erroneous, and is reversed for proceedings consistent with this opinion.

GOLDSMITH, &c. v. FLETCHEIMER & CO.

SAME v. SAME.

(Filed November 1, 1894—Not to be reported.)

Appointment of receiver authorized by evidence—Appellant having made a deed of assignment for the benefit of his creditors, appellee filed a petition alleging a fraudulent combination on the part of the assignor and assignee to defraud the creditors, and asking that a receiver be appointed for the assigned estate, and that the deed of assignment be cancelled as fraudulent, etc. The court, after having heard oral evidence, appointed the receiver, but on final judgment found that there was no fraudulent combination between the assignor and assignee, and held the deed of assignment a valid one. Held—The evidence shows that the appointment of a receiver was proper, and the court had jurisdiction to make such appointment, although the appellee's petition was defective to the extent that it sought a cancellation of the deed of assignment.

C. S. Walker for appellants.

Powers & Atchison for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

These two appeals are brought to this court, the one from the final judgment and the other from an order appointing a receiver. Goldsmith, the owner of a large stock of merchandise in the city of Owensboro, made an assignment for the benefit of creditors to his co-appellant, Hirsch. Shortly after the assignment the appellees, Fletcheimer & Co., in conjunction with other creditors of the assignor, filed their petition in equity alleging a fraudulent combination on the part of the assignor and the assignee to cheat the creditors, and the mismanagement of the trust fund by the assignee. They asked that the conveyance or assignment be cancelled and held for naught, and that a receiver be appointed to take charge of the goods, etc.

There was neither a return of nullla bona nor an attachment obtained by the creditors, but a petition, based on the allegations of fraud alone, in the effort to annul the assignment. A demurrer was filed to the petition and overruled, and then an application made to this court by the appellants for a writ of prohibition preventing the chancellor from proceeding furtner with the case. (15 Ky. Law Rep., 806.)

It was held by this court that a court of equity had jurisdiction of the subject-matter, and if an error had been committed in overruling the demurrer the remedy was by appeal after final judgment. The proceedings were conducted to a final judgment below, and there being no proof of any fraudulent combination on the part of the assignor and the assignee, there was a distribution ordered for creditors out of the proceeds of the sale of

the goods. The creditors seem to have abandoned their claim to priority, and the assignment given full force and effect by the judgment. It is claimed, however, by the appellants the chancellor erred in not determining the question as to the appointment of receiver in his final judgment, or rather, as the creditors had abandoned their action for fraud, that the order appointing a receiver went with it.

There was a motion made for the appointment of a receiver after notice as well as the prayer for his appointment in the petition. The chancellor below heard oral testimony on the motion that is embodied in the bill of exceptions, and in his final judgment recites the fact of the appointment of the receiver and the necessity therefor upon the oral testimony theretofore heard.

While the motion to appoint a receiver is ordinarily incidental to the principal ground of relief, still by our Code of Practice an appeal may be prosecuted from such an order, and the evidence, whether oral or by deposition, may be embodied in a bill of exceptions to be considered on the appeal, and in cases like this the chancellor may, by his judgment, deny the substantial relief sought, and yet the facts may sustain the order taking the funds from the control of the assignee.

Although the petition may be and is defective to the extent it seeks to cancel the assignment, the plaintiffs (appellees) ask for the appointment of a receiver, and it may be regarded as a petition for that purpose. The creditors were the beneficial owners of the fund and had the right to come into a court of equity and have their interests protected. The motion for the receiver was heard and passed on, both parties introducing testimony, and the order taking the goods from the custody of the assignee should not be disturbed.

The creditors are not complaining, and the goods have been sold and the proceeds distributed equally between them, or a judgment to that effect. The chancellor has ordered done what the assignor by the assignment empowered the assignee to do, and the only question in this case is, did the chancellor err in taking the goods from the possession of the assignee and place them in the hands of another? While courts of equity are reluctant to afford relief by taking from those who have the title and custody of funds or property, whether in their own right or as trustees, and placing them in the hands of a receiver, it is a jurisdiction or power often exercised for the purpose of protecting the real parties in interest, and, as said in High on Receivers, "where an assignment is made to trustees for the benefit of creditors, a judgment creditor who files his bill in behalf of himself and other creditors in interest, is entitled to a receiver to take charge of the property assigned, upon showing gross mismanagement on the part of the trustees and a failure to comply with the requirements of the trust and there is danger of the assets being wasted and diverted from the purpose for which they were assigned." (High on Receivers, 383.)

While the assignee was perfectly solvent, it is apparent from the record that Goldsmith, the assignor, had made false statements as to the amount of his liabilities, and equally apparent that he was underestimating the value of his stock of goods with a view of compromising with his creditors. He was left in possession of the goods by his assignee, and engaged in retailing them, having as much control of the money and goods as he had prior to the assignment.

The assignee was engaged in the control of his own business, and the creditors denied the right of inspecting the goods or the inventory. They offered in cash for the goods the amount or

value as fixed by the appraisement, and this was refused on the ground, as stated by a creditor, that Hirsch, in making the refusal, said he had to look to the interest of Goldsmith, who wanted a settlement with his creditors, and that he intended to sell the stock at retail. While Hirsch denies this, it appears the witnesses were before the chancellor upon the oral examination. He knew the parties in interest, and was more capable of determining the object in view than this court by an examination only of their statements as spread on the record, and a careful reading of the testimony, as we find it, conduces to sustain the chancellor in appointing a receiver.

The judgments on each appeal are affirmed.

CLARK v. ELLIS, EX'OR, &c.

(Filed November 20, 1894—Not to be reported.)

The evidence sustains the judgment determining that the alleged will was a forgery.

D. A. Glenn and Chas. H. Fish for appellant.

M. H. McLean, J. W. Bryan and J. O'Hara for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Hazelrigg.

The sole question in this case is, was the paper of June 5, 1886, in fact executed by Mary A. Gregg, whose last will it purports to be, or was her name thereto a forgery?

The judgment below was against the integrity of the paper, and we think properly so.

1st. The original paper is before us, together with a number of exhibits, showing genuine signatures of the decedent. From them and the testimony of a number of experts, including the banker and attorney of the decedent, we have no difficulty in reaching the conclusion that the judgment of the court below in rejecting the paper is fully sustained by the evidence.

2d. A circumstance in connection with the execution of the paper and its subsequent history strongly discredits it. It purports to be witnessed by the son of the beneficiary, and Frances, the sister of the testatrix. Frances lived for four and one-half years after the alleged date of the paper, yet it never came to light until after her death, when it was first offered for proabte in the county court. It would seem that as long as Frances was alive to denounce it as a forgery the existence of the paper was kept a secret.

3d. The paper purports to devise the house and lots on East Third street as though the testatrix owned them. She was, in fact, only the owner of an undivided four-ninths thereof. This marks very strongly the draftsman's ignorance of a fact which Mary herself must have known; yet she is herself the draftsman of the instrument according to the testimony of the appellant's son.

Frances Gregg's name is signed by the son of appellant as a witness to the paper, her cross mark being attached, and yet when Frances came to make her will long afterwards, she then being the owner of the property by inheritance (unless this paper interferes), she made a disposition of it without the slightest reference to the fact that her sister, years before, had disposed of

it by a will, to which she was an attesting witness. This is wholly improbable, and is strong evidence that Frances was not, in fact, a witness to the paper, or ever knew of its existence.

There is some testimony sustaining the contention of the appellant, but it is needless to review it. The preponderance is strongly with the appellees.

Judgment affirmed.

NEAL v. ROBINSON.

(Filed November 24, 1894—Not to be reported.)

Sale of decedent's land to pay lien debts—Equity—Estoppel—Decedent, after charging his land with certain debts, then in suit, devised it to his son, with the proviso that a daughter then in an insane asylum, was to have one-third of it, if her mind was restored. The son, to secure additional time, agreed that plaintiffs in the suits might take judgments, with the understanding that executions should not issue for six months, when, in default of payment, levy of execution might be made and the land sold. No payments being made, executions were issued and the land sold. The son now seeks to recover the land from one claiming under the sheriff's sale because the sale was made on a credit of six months, instead of three months as agreed upon. Held—

First. The son can not recover in equity without offering to do equity by repaying the lien debts that the purchaser has satisfied.

Second. The insane sister's interest was not affected by the sale, only the son's interest having been conveyed by the sheriff.

The son is estopped to complain that the sale was made on a six months' credit, he having stood by at the sale without then objecting, and having subsequently remained silent when he saw the purchaser making valuable improvements on the property.

Thomas H. Hines, W. L. Brown and W. R. Ramsey for appellant.

H. C. Eversole and John L. Scott & Son for apppellee.

Appeal from Laurel Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The land in controversy in this action formerly belonged to Wm. Robinson, who died testate in Laurel county in 1883. The testator specifically charged his estate, which appears to have consisted only of this land, with the payment of certain debts then in suit in the Laurel Circuit Court, and devised the residue, after payment of debts, to his son, J. W., the present appellee, whom he appointed his executor.

A daughter of the decedent, however, then in an asylum for the insane, was to have one-third of this residue in the event her mind was restored.

In order to obtain time within which to pay off the debts of the plaintiff in these suits, the executor agreed that judgments might go in the actions, then consolidated, with suspension of executions for six months, when, in default of payment thereof, executions might issue and be levied on the land. Having paid nothing within the time fixed, the executions were issued, levied according to the agreement and the land sold in 1884 by the sheriff. One Cottingion bid it in at the price of $650, but transferred

his bid to Neal, the appellant, who was a plaintiff in one of the executions. Neal paid off the other executions, amounting to some $550, and at the proper time obtained a conveyance from the sheriff.

In 1891 the appellee brought this action against the appellant to set aside the sheriff's deed and recover the land, first, because there had been no appriseement of the land before its sale, and second, because the lunatic had a contingent interest in it. After filing two amended petitions, in a third amendment, filed in 1892, over the appellant's objection, he set up, for the first time, that the land had been sold on a credit of six instead of three months. In none of his pleadings does he offer to pay the debts with which the land was charged in the will of his father, and with which it was encumbered by the execution liens levied by his consent and direction. He sues for the land, relying for title on the will which he files with his petition, without an offer or expression of willingness to pay off these liens or have the lands again sold for that purpose. The title filed shows he is not entitled to the land, and it seems to us that the chancellor, even had the petition and amendments remained unanswered, might more justly have dismissed his action that adjudged him the land. Without doing or offering to do equity the appellee is in no attitude to ask equity. But the averments were all controverted, and the record does not show the appellee entitled to have the sale or deed vitiated. While the sheriff does not show by his return on the executions that he had the land appraised, the original paper showing the appraisement was produced and is shown by the sheriff to have been, in fact, returned by him to the proper officer. One of the appraisers also proves the fact of appraisement.

As to the second objection it is manifest that the daughter's contingent interest is in no way affected by the sale or deed. The executions placed in lien only the interest of the defendant therein, and the sheriff's deed conveyed that only to the purchaser.

The third contention of the appellee is equally without merit. Not until in 1892 did he complain of this irregularity in the sale. He stood silently by, though in the county, and saw the purchaser pay of the lien debts, obtain his deed in a year thereafter, and make valuable improvements on the land, enhancing its value to the extent of about $1,000. We must conclude that he did so because he had consented to the sale as made. It is true he denied giving consent, but though present at the sale he did not object on account of the extension of the credit. He also denied giving his consent to the levy of the executions, but the records and the testimony showed consent in open court. If he objected to the sale at all, it was because of his sister's supposed interest. In any event, his acquiescence and long silence, under the circumstances, conclude him.

There is no equity in his case, and the judgment is reversed, with directions to dismiss his petition.

OUERBACKER, GILMORE & CO. v. CLAFFLIN & CO., &c.

(Filed December 6, 1894.)

1. Assignment by operation of law—Evidence—One payment of a creditor by an insolvent debtor, where the amount paid is so small as to be insignificant, may not evidence clearly a design to prefer, in contemplation of insolvency; but where the general purpose of the insolvent to defraud his creditors is otherwise clearly apparent, even a small payment to one creditor will operate as an assignment under the statute.

In this case the debtor was carrying on a business fraudulently in such a manner as to render himself apparently insolvent, and for the purpose of defrauding his creditors. He contracted a large indebtedness, and to pay one creditor the sum of $236 assigned to him a solvent note for $325. Held—Such payment of the creditor, although a small one, considered in the light of the fraudulent transactions of the debtor, evidenced a design to prefer in contemplation of insolvency, and, under the statute, operated as an assignment for the benefit of creditors.

2. Where the clerk grants the order of attachment, to secure a debt not due, under section 238, Civil Code, as amended, it is not necessary that he should first enter an independent order of attachment directing himself to issue the attachment. The practice is the same as where the clerk issues the attachment under section 196, Civil Code.

Thos. H. Hines, D. B. Logan and A. K. Cook for appellants.

Unthank & Montfort for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellees, the H. B. Clafflin Co. and others, are attaching creditors of R. Miller & Co., a firm of retail merchants, lately engaged in business in Pineville, Ky. They obtained their attachments from the clerk, without an independent order granting them, on debts not due.

The appellants are unsecured creditors of that firm, who seek to vitiate the lien of the appellees:

1st. By showing that prior to the issual of the attachments the members of the firm, in contemplation of insolvency and with the design to prefer one of their creditors to the exclusion of others, assigned a part of their assets, to wit: An account on one of their customers, J. W. Johnson, for some $325 to appellee, J. M. Purcifull, to whom they were indebted in the sum of $236.

2d. Because there was no order granting the attachment independent of the order of attachment itself.

The chancellor sustained the attachments and gave priority to the appellees in the distribution of the funds in controversy.

1st. At the time of the assignment of the claim on Johnson to Purcifull, which was on October 1, 1892, the firm was hopelessly insolvent and had become so by a course of systematic fraud, practiced with the express intention of failing in business. In August and September, 1892, they bought large quantities of goods in New York and elsewhere on a credit, which they sold at once for cash at a large discount and shipped secretly to parties in Memphis and Bowling Green. They also had their clerk to ship to friends in Cincinnati trunks of fine merchandise, with instructions to him to keep the transaction a secret.

Every act, therefore, of these debtors is tainted with suspicion, and the assignment of a claim on a customer who was solvent and able to pay in a few weeks at most, and who did very shortly pay the claim to Purcifull, must be regarded as having been done in contemplation of the coming failure and with a design to favor their friend and creditor to whom they appear to have been under some obligation.

The integrity of the creditor, Purcifull, which is not doubted or in any way assailed, does not enter into the transaction. Nor does the smallness of the demand secured to him affect the principal involved.

Where the transaction is insignificant, the design to prefer in contemplation of insolvency may not be so clearly perceptible; but if the general purpose of the debtor be otherwise clear, as it is in this case, the transaction more easily falls within the provisions of the statue.

We are convinced that the act of transferring his claim to Purcifull in discharge of this antecedent debt operated as an assignment and transfer of all the property and effects of the debtors and must inure to the benefit of all the creditors. To the extent Purcifull may have paid cash on the claim, he will be protected.

2d. In an action brought before the maturity of the debt sued on, the clerk of the court in which it is pending may grant an attachment against the property of the defendant if the petition shows the existence of certain grounds enumerated in the Code. (Sections 237 and 238 and amendment of April 5, 1888.)

This jurisdictional power is not dependent on the absence of the presiding judge of the county court or any circuit judge, but in this respect is unlimited. Precisely the same power is conferred on him by this amendment as is conferred on him in section 196 of the Code in actions where the debt is due. It is impossible to detect any difference in the import of the language used in the section giving him power to make the order of attachment where the debt is due and that given him in cases where the debt is not due.

There is no more reason, when the language of the section is considered, for the contention that in actions brought pursuant to sections 237-8 the clerk should make an independent order granting the attachment than that he should do so when the action is brought under section 196, and certainly, if the language of the sections does not require it, we can conceive of no reason why the clerk shall make an order to himself directing himself to do that which the statute empowers him to do in plain terms.

Under the conditions named in section 238 the clerk "may grant an attachment against the property of the defendant."

Under section 196, under certain conditions, "an order of attachment shall be made by the clerk."

In both classes of cases the writ issued by the clerk is the "order of attachment," and is so designated in the sections of the Code applying to actions for debt due and not due.

Before the amendment of April, 1888, the clerk was without the power to make the order of attachment until permitted to do so by the order of another officer. There is now no reason conceivable why he may not make such order, as permission from another officer is no longer required.

Such a construction would be purely technical, is not demanded by the letter or spirit of the law, and certainly there is no intelligent reason for requiring the clerk to direct an order to himself.

For the reasons indicated herein, the judgment is reversed, with directions to distribute the funds in the hands of the receiver on principles consistent with this opinion.

CITY OF LOUISVILLE v. NEVIN.

(Filed December 6, 1894.)

Street improvement—Erroneous apportionment—Interest—Where the ordinance passed by the council of Louisville erroneously apportions the burden of paying for street improvement between the taxpayers owning property

fronting on the improvement, so that after protracted litigation between such taxpayers and the contractor, it is necessary for the council to enact a second ordinance apportioning such burden, and by reason of such erroneous apportionment the contractor is allowed to collect interest from the taxpayers on the sums due by them only from the date of the second apportionment, then the contractor can not hold the city liable for interest on said sums between the dates of the first and second apportionments, since the city charter expressly provides that the city shall not be liable to the contractor, even if it fails to take the steps required to render the owners of the abutting property responsible.

H. S. Barker for appellant.

Lane & Burnett for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

In the matter of a street improvement in the city of Louisville there was an erroneous apportionment of the burden of payment as between the tax payers owning property fronting the improvement, and who, by the terms of the city charter, were liable to the contractor.

Cooper, one of the lot owners, refused to pay on the ground that the apportionment was wrong, and in a litigation between himself and the contractor, Nevin, this court held that he was improperly charged, and that a part of the sum assessed against him should be paid by the other owners of lots bordering on the improvement. This necessitated another apportionment that was subsequently made as directed by this court. (14 Ky. Law Rep., 203.)

The city charter provides that the contractor shall have interest from the time the apportionment is made. It then becomes a debt due, and interest runs.

Cooper was ready and offered to pay what he justly owed, and, therefore, was only charged interest from the last apportionment, as well as the other lot owners, whose burden had been increased. Nevin, claiming he was entitled to interest from the first apportionment, recovered of the city of Louisville the interest from the first apportionment until the last was made, on the ground that the city, through its council, had committed the error by which this interest was lost to him, and the city is now complaining, and we think rightfully. By an express provision of the charter of the city, if the council had failed to take the proper steps to hold the lot owner liable, the city is not to be responsible, and, if so, we perceive no reason why, when the work is complete, a failure to make such an apportionment as the law requires would make the city liable to the contractor for the improvement, or for the interest upon the principal sum from the date of the erroneous apportionment. It was, in fact, no apportionment, and to hold the city liable for the delay in making the apportionment, for either the principal or interest, would not only involve the city in interminable litigation, but establish a precedent by which the city could in all cases be liable for an error committed by legislation affecting the property rights of the citizen.

Cases may be found, and such was the law applicable to the city of Louisville, prior to its amended charter, making the city liable to the contractor for the improvement, where, by reason of the action of its council, the property owner avoided responsibility.

The object of the charter provision requiring the contractor to look alone to the property owner, although errors of city legisla-

tion released him, was to prevent such heavy burdens upon the city, and to insure that vigilance in reference to such contracts as would require the contractor to know the law had been complied with before undertaking the work. Under the former rule the contractor was independent as to whether his contract was or not binding on the lot owner, for if not the city became liable, and in this way those directly benefited by the improvement paid no more and sometimes less than the taxpayer living remote from the improvement. No such error can make the city liable, and interest runs from the time the owners of lots knew the amount for which they are liable.

Reversed and remanded, with directions to dismiss the petition.

GRAHAM, &c. v. KING, &c.

(Filed December 12, 1893.)

1. The evidence clearly shows that the son-in-law, acting as agent of his mother in law, led her to believe that the title to the real estate bought with her money had been secured to her, when in fact he had the title to the property conveyed to his own wife without the consent of the mother in law; therefore, the chancellor ought to have adjudged that the property belonged to the mother in law.

2. The wife in this case, in legal contemplation, holds title for her mother, not by reason of a resulting trust but by a constructive trust, which trust equity will invoke "for the purpose of circumventing fraud." "Constructive trusts include those * * raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title. * * They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership."

Kohn, Baird & Speckert for appellants.

Barnett, Miller & Barnett and Jas. P. Gregory for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

The appellants, Robert A. and M. E. Graham, husband and wife, lived in Mobile, Ala., until in November, 1890. They had two daughters, Birdie H. and Ella May, the former of whom, in October of that year, married her co-appellee, Edward F. King, whose former home was in Louisville, Ky., but who was then living at Mobile. The young people came at once to Louisville and stopped with King's mother. In some ten days, in pursuance of an agreemnt to that effect, Mrs. Graham followed with her younger daughter on a visit, and perhaps to board with her son-in-law and daughter. They rented a house, which the mother furnished. The appellees had no means, but Mrs. Graham brought with her some $2,200 in cash, also some Mobile & Ohio railroad bonds of the value of $5,000, and Alabama State bonds of the value of $6,000. This was her whole estate, and it had been given her by her father. Her husband was engaged in the sewing machine trade in some way, was at home but little, and was left in Alabama. He appears to have been substantially without any estate.

Very soon after coming to Louisville Mrs. Graham was induced to invest the larger portion of her means in real estate in that city, where the prospects were good of making a profit by speculation in that market, and of increasing her income by the rents if the property were not sold at an advance.

After looking at several pieces of property, King's judgment being mainly relied on, she selected and bought a vacant lot on the northeast corner of Floyd and Ormsby avenue, at the price of $2,570.50, and it was decided to build thereon two houses—a dwelling house and a storehouse. King transacted all the business connected with the purchase of the lot and the erection of the houses, the total cost being nearly $8,000. The title of the property was taken to the appellee, Birdie H. King, and this was done, as now contended by Mrs. Graham, without her consent and in fraud of her rights; that not until she began to assert her right to collect the rents from the storehouse when completed, and the refusal of the appellees to concede that right to her, was she apprised of the nature of the transaction by which more than half of her estate had been transferred to her daughter by the fraud of her son-in-law; that when the lot was bought she was informed by King that as her husband was away, and his whereabouts uncertain, he would so fix the title to it that she could sell and convey it to any purchaser who might be found, without having to send to Alabama for her husband; that such delay might lose the chance of a desirable sale, etc.

The appellees contend that Mrs. Graham made a gift of the property to her daughter, the appellee, and built the improvements thereon as an advancement to her; that she was apprised of how the title was taken, and there was no fraud practiced on her.

The chancellor dismissed the petition of Mrs. Graham and her husband, seeking to have the property adjudged to be the wife's, and they have appealed.

During the course of the litigation much bitter feeling has been exhibited between those whose relations are ordinarily supposed to be so close as to preclude the possibility of severance by mere greed of money. We do not deem it necessary to review the testimony at length. Upon a careful examination of it, we are led to the irresitible conclusion that Mrs. Graham has been deceived, imposed on, defrauded, and did not voluntarily deprive herself of this substantial portion of her estate. Manifestly she was misled as to the nature of the arrangement by which the title was placed in her daughter. She was assured that it was her own property, and that she could sell it whenever she pleased. She seemed utterly unable to consider it otherwise, even after the astounding news was broken to her that her son-in-law declined to let her have the rents, and when, upon inquiry and consultation with her attorneys, she learned of the true condition of the title.

After the suit was brought, and against her lawyer's advice, she paid the builder, to whom she was personally bound, the sum of $1,000 as the balance due on the improvements. "He was poor," she said, and had built her houses. She "knew they were hers."

She is corroborated in the essential elements of her contention by her daughter, Ella May, and by disinterested witnesses. The trust under which Mrs. King holds the title is not a resulting trust, now inhibited by the statute, as contended by counsel for appellees, but a constructive trust which may be "invoked," as Mr. Pomeroy puts it, "for the purpose of circumventing fraud," etc. He says: "Constructive trusts include all those instances in which a trust is raised by doctrines of equity for the purpose

of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title. * * * They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership." (Volume 2, sections 1030-1044.)

He further says: "Whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means, or under any other similar circumstances, which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitalby entitled to the same, although he may never, perhaps, have had any legal estate therein." (Section 1053.)

These great and fundamental principles are not affected by any statute. They are as eternal as truth itself, and are worth remembering, not by jurist alone, but by all who deal with their fellow man.

The property described belongs to the appellant, M. E. Graham, and the judgment dismissing her petition is reversed, that it may be so adjudged.

SCHULTEN v. BAVARIAN BREWING CO.

(Filed December 4, 1894.)

1. A petition to recover damages for slander or libel states no cause of action unless it sets out the alleged slanderous or libelous words.

2. Persons engaged in the same trade have a right to combine and confederate to protect themselves by lawful means from dishonest debtors. A combination by brewers to protect themselves against delinquent debtors, by means of a refusal of all to sell beer to any one justly indebted to any member of the combination who refused to pay his debt, was not unlawful.

3. Same—Pleadings—A petition to recover damages alleged to have been caused by a criminal conspiracy must allege facts showing a combination or confederation on the part of defendants to do an unlawful act, whereby some civil right of the plaintiff has been infringed and an injury to his person, property or reputation has been sustained.

The unlawful act set out by the plaintiff, a saloon keeper, was a combination by defendants (brewers) to coerce plaintiff into paying one of the defendants the sum of $84 50, "then falsely alleged to be owing by him to said defendant," by refusing to sell him beer unless said alleged debt was paid. Held—The petition ought to have specifically alleged that plaintiff was not indebted to said defendant in said sum, and a mere denial by inference of such indebtedness was not sufficient. If plaintiff was not so indebted the act of defendants was unlawful; if he was so indebted they all had a right to refuse to deal with him until the debt was paid.

Hallam & Myers for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Quigley.

The petition of plaintiff, filed in the Kenton Circuit Court, reads as follows: The plaintiff, Clem Schulten, says that at the

time of the doing of the wrongs and injuries hereinafter set forth, and for many years thereafter, the defendan, the Bavarian Brewing Company, was a corporation duly organized under the general statute laws of Kentucky, and the defendant, the John Hauck Brewing Company, was a corporation duly organized under the statute laws of Ohio, both for the sole purpose of brewing and selling malt liquors, and were members of a certain unlawful combination, consisting of all the brewers of the city of Cincinnati, Ohio, and Covington and Newport, Ky., and the vicinity; all the members whereof were and are in conspiracy with each other, and other persons to the plaintiff unknown, to prevent the obtaining of any malt liquor by any retail dealer therein who might be in debt or alleged to be in debt to any member of said combination, and thereby to injure and destroy his business, and unlawfully compel him to pay such debt or alleged debt without judicial ascertainment or due process of law; and plaintiff says that at the same time he was a retail vendor of malt liquors in the city of Covington, Kentucky, duly licensed as such, and carrying on said business as the sole means of susbsistence for himself and his wife and five children, and was therein wholly dependent for his supplies of such liquors upon the defendants and other members of said combination, and was able, ready and willing to pay for such supplies, and tendering and offering to purchase the same for cash of the defendants and other members of said combination; yet on the 27th day of November, 1891, the defendants and other members of the said combination, to the plaintiff unknown, intending to injure the plaintiff and destroy his said business, and to prevent his earning a subsistence for himself or his family, and to unlawfully and oppressively coerce him into paying to the said Bavarian Brewing Company the sum of $184.50, then falsely alleged to be owing by him to it, did wrongfully and maliciously combine, conspire and confederate together so to do, and therein to and they then did wrongfully, falsely, libelously and maliciously write, utter and publish to each other, and to all the members of said combination, and others to plantiff unknown, that plaintiff was indebted as aforesaid, and so to prevent and they did thereby prevent the plaintiff from obtaining any supplies of malt liquors, and from carrying on his said business, and by means of the premises, the plaintiff's said business then was and remains injured and wholly destroyed, to his damage in the sum of $10,000, wherefor he prays judgment for $10,000 damages and for costs and all proper relief."

A general demurrer having been sustained to the petition, and plaintiff declining to plead further, his petition was dismissed, and from the judgment so doing he prosecutes this appeal.

Admitting on demurrer the allegations of the petition to be true, do they constitute a cause of action against the defendants? The petition is threefold in its nature, in that by intendment at least there are three causes of action stated—slander, libel and criminal conspiracy. The slanderous, libelous words of the alleged false statement are not set out, and, therefore, the petition states no cause of action for slander or libel. To have constituted a criminal conspiracy on the part of the defendants, it is necessary that the petition should have stated facts showing a combination or confederation on their part to do an unlawful act, by reason of which a civil right of the plaintiff was infringed, and an injury to his person, property, reputation or business sustained. (Carew v. Rutherford, 106 Mass., 1; Bohn Mfg. Co. v. Hollis, &c., 54 Minn., 223; Cooley on Torts, pages 278, 279, 280.)

The alleged unlawful act of defendants is that they and others, to the plaintiff unknown, combined together to coerce plaintiff into paying to defendant, the Bavarian Brewing Company, the sum of one hundred and eighty-four dollars and fifty cents, then falsely alleged to be owing by him to it. This allegation by inference denies that plaintiff owed defendant said sum, and assumes, therefore, that defendants were trying to cheat or defraud him out of it by refusiing to sell him beer. It is pleading a mere conclusion of the plaintiff and not a fact. The petition should have averred specifically that the plaintiff was not indebted to the defendant in said sum. If he was not indebted to the defendant, the Bavarian Brewing Company, then the defendants were guilty of an unlawful act in trying to make him pay something he did not owe by refusing to sell him beer. But if he was so indebted and refused to pay or whether he paid or not, the defendants had the right at any time, not being public agents and owing no common duty to the public, to sever the relationship of creditor and debtor, and to refuse to deal with him further.

It is not unlawful for several persons in trade to confederate together to protect themselves by lawful acts from dishonest debtors. The petition as a whole fails to state any cause of action showing an infringement or privation of any right of plaintiff by defendants.

The judgment of the lower court is affirmed.

SUPERIOR COURT ABSTRACTS.

CINCINNATI, &c., R. R. Co. v. HOGAN.

Filed December 12, 1894. Appeal from Grant Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Carriers—Measure of damages for injury to trotting horses in transit—Evidence—In an action against a railroad company to recover damages for injuries to trotting horses while being transported by it under a contract with plaintiff, testimony as to the value of the horses at the time of the trial was competent, not only as a test of the worth of the witnesses' opinion as to the value at the time of the injury, but as bearing upon the question of the extent and the permanency of the injuries. That horses of the kind of those injured had depreciated in value in the market since the injury could be and was clearly shown by the evidence, and no intelligent jury could have estimated this difference as a part of the damage, especially when instructed not to do so.

2. Same—One who raised and trained horses for racing, and who had trained one of the injured horses for the purpose of racing, was competent to express an opinion as to the time in which he could have trotted a mile at the time of his shipment

3. Same—The defendant was not prejudiced by the action of the court in permitting plaintiff to give his opinion as to the market value of the horse at the time of trial in view not only of the injuries complained of in this action, but in view of a prior injury and of the vicious habits of the horse, as an intelligent jury could not have held the company liable for the depreciation in value on account of the prior injury and the vicious habits of the horse.

4. Same—The court did not err in instructing the jury that in estimating the damage they should not consider the evidence as to fluctuation or change

in market values since the date of the injury, as when the whole instruction, of which this forms a part, is read, it can not be understood as meaning anything else than that the jury can not hold the company responsible for the general depreciation in values.

C. B. Simrall and A. G. De Jarnette for appellant; Dickerson & Willis for appellee.

OHIO VALLEY RY. CO. v. McKINLEY.

Filed December 12, 1894. Appeal from Crittenden Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Peremptory instruction—As a motion by defendantt for a peremptory instruction was not made until both plaintiff's and defendant's evidence had been heard, plaintiff is entitled to the benefit of facts developed by defendant's evidence for the purpose of sustaining the ruling of the court refusing a peremptory instruction.

2. Master and servant—In connection with the assumption by the servant of the ordinary risks incident to his employment, it is the duty of the employer to furnish the employe with proper and reasonably safe tools with which to perform the labor he is employed to do, and the employe is not required to exercise care and diligence to see that the tools furnished are proper and reasonably safe for use, but has the right to rely on the superior judgment of his employer, and to presume that he will furnish proper tools.

3. Same—It was the duty of defendant to furnish its employes in a stone quarry with wooden instead of iron rods with which to load dynamite, and in its failure in this respect it was negligent, but this does not render it liable to an employe for injuries resulting from the use of an iron rod, if, with a knowledge of the danger, he continued to use the iron.

4. Same—Question for jury—The court can not assume as matter of law that a person who knows that dynamite will not ordinarily explode when exposed to fire in the open air, and that it can be exploded by the use of a fuse and cap, must know that a concussion or a blow with an iron rod will also produce an explosion, but the question is one of fact for a jury. And whether from the assumed knowledge the other should follow depends largely upon the person, and of this the jury, who see and hear this person testify, are the proper judges.

Blue & Blue and P. H. Darby for appellant; Waddill & Nunn, Cruce & Nunn and E. C. Flanary for appellee.

JAMES v. COMMONWEALTH.

Filed December 12, 1894. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, reversing.

License to firm to sell liquor—Withdrawal of one partner—Where a license to sell liquor is issued to a firm, the withdrawal of one member of the firm does not deprive the other of the right to sell under the license.

W. G. Welch for appellant; W. J. Hendrick for appellee.

MONTGOMERY, &c. v. CITIZENS NATIONAL BANK.

Filed December 12, 1894. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, affirming.

The holder of negotiable paper is not chargeable with notice of fraud on the part of the payee in its procurement, although he may have been negligent or even grossly negligent in taking the note or bill, and may have omitted to make inquiries that common prudence dictated.

In this action upon a negotiable note discounted by the plaintiff, a chartered bank, the evidence utterly fails to sustain the allegation of the answer that plaintiff had notice at the time it took the note that it was obtained by fraud of the payee.

W. W. Holt and James A. Violett for appellants; W. E. Settle and Edward W. Hines for appellee.

COMMONWEALTH, FOR USE, &c. v. WOOD, &c.

Filed December 19, 1894. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Right of action on commissioner's bond—An action does not lie against a commissioner and his sureties to recover money of him which he holds in his hands under the order of court, unless the court has directed him to pay it over to the plaintiff. A general order made upon his resignation from office requiring him to settle with the court gives to no particular individual the right to sue for what he may imagine is due him; nor does the allegation that the commissioner is insolvent, and that after plaintiff has received his pro rata of the amount paid into court by the commissioner, there is still due him the amount sued for, dispense with the necessity of an order of court directing the payment to plaintiff of the amount sought to be recovered.

2. Dismissal without prejudice—While a demurrer to the petition was properly sustained, there should have been a dismissal without prejudice, and not an absolute dismissal.

J. W. McPherson and E. W. Hines for appellants; James Breathitt for appellees.

LANNIS, ADM'R v. LOUISVILLE, &c. RY. CO.

Filed December 19, 1894. Appeal from Mercer Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Negligence—Evidence as to habit or custom—In an action against a railroad company to recover damages for personal injuries, in which the negligence complained of consisted in running a train at night with the engine reversed and without any light on the tender, the defendant's witnesses, in testifying that the light was upon the tender on the occasion in question, having stated that they knew that fact from their universal habit of putting the light there each night, it was competent for the plaintiff, for the purpose of contradicting these witnesses, to show that defendant's employes were in the habit of running the train at this point with the engine reversed and without any light on the tender. Besides, this testimony as to the habit or custom of the employes became relevant when a conflict in the testimony arose as to whether there was a light on the tender on the occasion in question.

2. Same—There being a conflict in the testimony as to the speed of the train on the occasion in question, evidence as to the usual manner in which that particular train was run was competent.

3. Contributory negligence—In all actions to recover damages resulting from negligence, contributory negligence may be relied on as a defense, except in cases under the General Statutes, for loss of life by willful neglect, and in cases where one sees the peril another has placed himself in and fails to use proper care to prevent injuring him.

Bell & Bell and Gaither & Vanarsdell for appellant; Charles A. Hardin, Sr., for appellee.

THE ROMAN CATHOLIC GERMAN CHURCH v. WEIGHAUS & BROS.

Filed December 19, 1894. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. A church had no power to engage in the construction of streets or the making of brick, and, therefore, a contract made by its trustees with the trustees of the town to grade a street for nothing, in consideration of the right of the church to use for the purpose of making brick the earth excavated from the street, was a nullity and bound the church for nothing. Whether if the church, on account of the acts of the trustees, has received an actual benefit, it should be made to account correspondingly to the extent of the cost of the improvement is a question not presented, and, therefore, not decided.

2. Street improvement—A town ordinance ordering the street to be graded at the cost of the church, which was only one of a number of owners of

property fronting on the improvement, was void, the town charter providing that such improvements are "to be made at the expense of the lots or parts of lots fronting thereon." Nor was the ordinance made valid by the further provision therein that the work was to be done in accordance with the provisions of the charter of the town, as the specification that the church shall pay the cost excludes all others.

3. Same—An ordinance adopted after the work was completed ordering the work to be done which had already been done, and apportioning the costs, etc., was an absolute nullity.

4. Same—The church has no claim against the town for alleged damage growing out of the grade.

William Goebel for appellant; W A. Byrne and Orlando P. Schmidt for appelles.

WORKMAN v. COMMONWEALTH.

Filed December 19, 1894. Appeal from Graves Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Bail bond—After the term at which the defendant has been indicted, when the bail has been fixed, the bail may be taken by the clerk of the court in which the defendant has been held to appear. And the regular deputy of the clerk has the same power in this regard that his principal has.

2. The failure of the clerk to attest the bond at the time it was taken will not relieve the obligors, especially when they admit that they did in fact execute the bond before the deputy clerk.

Robbins & Thomas for appellant; W. J. Hendrick for appellee.

CASON v. GRANT COUNTY DEPOSIT BANK.

Filed December 19, 1894. Appeal from Grant Circuit Court. Opinion of the court by Judge Yost, reversing.

Res adjudicata—In this action upon a promissory note which had been placed upon the footing of a foreign bill of exchange, in which the defense was that the paper had, without defendant's knowledge or consent, been materially altered after its delivery by him to the payee, this court having held upon a former appeal that the defense was good and that it was not material whether the plaintiff had notice of the alteration at the time it discounted the paper, the opinion then delivered became the law of the case, and the lower court erred in overruling a demurrer to a reply filed by plaintiff upon the return of the case tendering the issue that plaintiff, at the time of its purchase, had no notice of the alteration.

W. W. Dickerson for appellant; George C. Drane for appellee.

WEBB v. REED, &c.

Filed December 19, 1894. Appeal from Henderson Circuit Court. Opinion of the court by Judge Yost, affirming.

A purchaser of property subject to a mortgage debt does not, without words expressly importing a promise by the vendee to pay off the lien, subject him to any personal liability to do so. But where, as a part of the consideration for the property, the vendee assumes to pay the mortgage debt he becomes personally bound therefor.

R. H. Cunningham for appellant; Yeaman & Lockett for appellees.

GUENTHER & BRO. v. SANDERS.

Filed December 19, 1894. Appeal from Jefferson Circuit Court, Law and Equity division.

1. Verbal promise to pay for goods sold to another—Where goods are sold and delivered to one person upon the faith of another's promise to pay for them, such a promise is not a collateral but an original undertaking and is enforcible, though not in writing.

2. Same—Where the same person was a member of two different firms doing business in a town and a father said to him in the store of one of the firms of which he was a member that he would pay for such goods as were furnished his son by his firm, even conceding that this promise was enforcible as to debts contracted by the son with the firm in whose store the promise was made, it was certainly not elastic enough to cover an account for goods sold by the other firm doing a different business at another place.

O'Neal, Phelps, Pryor & Seligman for appellants; Dodd & Dodd for appellee.

DONALDSON, &c. v. BYRD & CO., &c.

Filed December 19, 1894. Appeal from Bath Circuit Court. Opinion of the court by Judge Yost, affirming.

1. Where a vendee obtains possession of personal property, even through fraud, the title vests in him until the vendor has done some act to disaffirm the contract; and if, before the disaffirmance, the fraudulent vendee has transferred the property to an innocent purchaser withot notice of the fraud, his title is good as against the vendor.

2. In this action to recover goods fraudulently obtained from plaintiffs by one of the defendants and alleged to have been fraudulently transferred by him to his codefendant, the evidence was sufficient to authorize the finding of the chancellor that the transfer was fraudulent, which was the only issue in the case.

3. The chancellor did not abuse his discretion in refusing to transfer the case to the ordinary docket and grant defendants a trial by jury. This is always addressed to the discretion of the chancellor, and the appellate court can not control his action in that regard unless there has been a palpable abuse of that discretion.

Smoot & Gudgell and Thomas H. Hines for appellants; R. Gudgell & Son and C. W. Goodpaster for appellees.

REYNOLDS v. POWERS.

Filed December 19, 1894. Appeal from Jefferson Circuit Court, Law and Equity division. Opinion of the court by Judge Barbour, affirming.

1. In this action upon a judgment rendered in another State in which the defendant denied having had any transaction of any character with the plaintiff, and further denied that he had been served with process in the suit in which judgment was rendered, it was competent for plaintiff to show that defendant contracted the debt upon which the judgment sued on was rendered, as this tended to show that he was the person sued and served with process in the action in which that judgment was rendered.

2 Same—It was proper to give an instruction submitting to the jury the identity of the defendant with the party sued and the party served with process in the action in which the judgment was rendered.

3. Same—Limitation—In the statute providing that when by the law of any other State or country an action upon a judgment or decree rendered in such a State or country can not be "maintained" there by reason of the lapse of time, an action upon the same can not be "maintained" in this State, the word "maintained" is synonymous with instituted or commenced, and it is immaterial whether the action is tried within the period of limitation prescribed, provided it is commenced within that period.

C. B. Seymour and Barnett, Miller & Barnett for appellant; Mat O'Doherty for appellee.

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KENTUCKY COURT OF APPEALS.

PARKER v. COMMONWEALTH.

(Filed December 1, 1894.)

1. Criminal law—Evidence—On a trial for murder the statement of the father of the deceased that his son was not in the habit of carrying pistols was incompetent and, under the circumstances of this case, prejudicial to accused. Testimony of two witnesses that they never saw deceased have a pistol was also incompetent.

2. Same—There was no eye witness to the homicide except the accused, who stated that the deceased, a constable, was approaching him with a drawn pistol when he took his life. The evidence of the wife of deceased that he (deceased) "didn't carry this pistol (exhibiting it to the jury) during the week he was looking for accused," to serve a warrant upon him, was incompetent and misleading because evidence that deceased did not have, at the time of the homicide, the pistol exhibited to the jury proved no fact relevant to the case.

Owens & Finnell for appellant.

W. J. Hendrick and C. J. Bronston for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Lewis.

Appellant was convicted of the crime of murder and sentenced to death.

Besides himself and the deceased no person was present when the homicide with which he is charged took place, and the Commonwealth seemed to rely for proof of his guilt principally upon confession made to the officer who arrested him, which does not differ materially from his own account of the occurrence as a witness upon the trial.

It appears that in 1876 he removed from Scott county, Kentucky, where he was born and raised, to the State of Kansas, and in June, 1888, returned to visit the family of his father and brothers and sisters. On Sunday night next before Monday, when

the killing was done, he heard from relatives who had attended church that deceased, S. T. Connellee, Jr., who was a constable, had some sort of legal process against him, which he seemed to suppose was a warrant of arrest; and the next day before noon he had an interview with his brother-in-law, Pen, during which he asked whether Cornellee was a man who would likely shoot him if he ran in order to avoid arrest, and was told he had better not attempt it; but Pen, at the same time, suggested it was not a warrant of arrest Connellee had, but simply a summons in a civil action brought by a cetain firm against him for debt, whereupon he replied if that was all he did not care about the process, as he was able and would, upon his return to Kentucky in August, settle the debt.

His version of the homicide, as stated on the witness stand, is that after parting from his sister, who left their father's house for her own home, he took an old shotgun, supposed, from the caps being in place, to be loaded, for the purpose of killing a squirrel on his way for his father, who was an invalid, and started to the house of Pen, his brother-in-law, in order to get him to carry accused to Georgetown next day on his route home in Kansas; that when he got beyond the barn—about 150 yards from his father's house—he heard a man say to him to hault, at the same time walking rapidly down a hill toward him, and also asking if his name was Parker. To that question accused answered yes, and then asked his name; but instead of answering Connellee ordered him to lay down his gun. Accused then commenced backing toward his father's house, when he was again ordered to lay down his gun; and just as Connellee got to a drain at foot of a hill, where his body was subsequently found, he the third time ordered the gun laid down, and being asked by what authority he ordered it down, he placed his hand behind him, drew his pistol, and bringing it on line with accused said: "This is my authority." Accused having his gun grasped by the barrel, and, as he swore, believing Connellee was going to shoot, raised it quickly and just as he pulled the trigger, but too late, deceased said his name was Connellee. As the gun was fired Connellee fell, and accused, seeing he was dead, took the pistol, went to his father's house and told those present he had killed a man at the place described, he supposed was Connellee, and in a few minutes left and went to house of his brother-in-law, where he made the same statement. He did not at either place relate the circumstances under which the killing occurred, but after remaining a short time left the latter place and was not arrested until 1890, being then found in Chicago, and brought to Scott county for trial.

The principal ground for reversal is incompetent testimony, which, at instance of the Commonwealth, and over objection of defendant, the lower court permitted to go to the jury.

The particular testimony complained of is that of Mrs. Connellee, widow of the man killed, who stated her husband had, while hunting for accused, a pistol at home, a small pistol, and, in her words, "he didn't carry this pistol (exhibiting it to the jury) during the week he was looking for Parker;" also that of S. T. Connellee, Sr., his father, who stated his son was not in the habit of carrying pistols.

Besides the testimony of these two witnesses, which was given in chief, two others were permitted to state in rebuttal that they never saw deceased have a pistol.

If deceased did have a pistol at the time and place he was killed, the testimony of accused is consistent and reasonable. Besides, there are circumstances tending to corroborate it.

Although deceased had the summons in his hands a week, there appears no satisfactory reason why he did not or could not sooner execute it, for there is no evidence accused attempted to conceal himself or otherwise prevent service. Indeed he did not know, nor, so far as the evidence shows, have any reason to believe, deceased had the summons until his relatives returned from church and informed him Sunday night. It appears that deceased was twice, during Friday or Saturday prior to the homicide, at the home of the father of accused, and actually took dinner there, yet made no inquiry about him or effort to serve the summons; and on Monday, instead of going direct to the place where it appears to have been well known accused was and could be found, he secreted his horse in the woods a mile away, where the animal remained for two or three days before found, and was thence approaching the rear part of the premises when he encountered accused on his way to the house of Pen. The conduct of deceased in keeping the summons in his possession a week without making proper effort to serve it, though apparently anxious to do so, and in making public the fact he had the summons while acting as if hunting a fleeing felon, show a lack of address, experience and knowledge of the duties of the office, not inconsistent with his peremptory order to accused to halt and lay down his gun, when all required was for him to quietly deliver or offer to deliver the summons.

But if deceased did not draw or have a pistol when shot the testimony of accused was false, and the killing inexcusable. Therefore, if the evidence in question be incompetent, he was substantially prejudiced thereby.

As the record stands, the testimony of Mrs. Connellee was incompetent and misleading, because she stated simply her husband did not have the particular pistol she exhibited to the jury, which proved nothing.

The statement of S. T. Connellee, Sr., if treated as evidence, bearing upon the question of fact whether deceased had a pistol when killed, is too remote to be admitted, serving only to mislead. And the same objection applies to the testimony in question of the other two witnesses.

It seems to us, if such indefinite statements could be regarded pertinent or proper for any purpose, it would be as evidence of general character of deceased. But that was not attacked or put in issue by accused, and, consequently, the Commonwealth, as is well settled, had no right to introduce testimony to sustain it, and especially was it error to admit as evidence of general character a statement of a witness that deceased was not in the habit of carrying pistols, and of two others they never knew of his doing so.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

PACKARD v. BEAVER VALLEY LAND & MINING CO.

(Filed December 8, 1894.)

1. Plaintiff must allege that he has both title and actual possession to maintain an action quia timet.
2. But a plaintiff, not in possession, may maintain an action to cancel a conveyance, whereby, through fraud or other questionable contrivance, his legal title to land has been wrested from him and converted to the use of another.
3. Same—Pleading—Plaintiff seeks to cancel a deed from R. to defendant,

and alleges that R. derived title from H. He does not allege how H. derives title, but says that H., auditor of Kentucky, "conveyed the land * * to R. upon an assessment of 18,750 acres," etc. The pleading is defective in that it does not show the derivation of H.'s title, nor is this defect cured by alleging a void assessment, levy and sale of the land.

4. Same—Limitation—Section 16 of act of May, 1880, providing that actions to recover real property sold for nonpayment of taxes shall not lie unless brought within five years after the date of sale for taxes, applies by its terms only to sales for taxes made under that act.

5. Taxation of lands of nonresidents—Forfeiture—Constitutional law—So much of section 1, article 16, chapter 92 of General Statutes (old edition), as declares that the failure of a nonresident to list his lands for taxation within the length of time therein fixed shall operate as a forfeiture of his lands to the Commonwealth, without judicial or other proceedings to declare the forfeiture, is unconstitutional and void.

6. Limitation—An action to cancel a deed for fraud or mistake is barred by the lapse of five years from the discovery of the fraud or mistake, and in any event after ten years from the act complained of.

7. Same—One is presumed to have knowledge of deeds of conveyance from the time when they were acknowledged and recorded.

W. S. Harkins for appellant.

W. J. Hendrick for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant instituted this action in ordinary in the Floyd Circuit Court for the recovery of an undivided one-fourth interest in 67,600 acres of land, situated on the waters of Beaver creek, in the counties of Floyd and Knott, and of which the appellee was alleged to be in the wrongful possession.

By an amended petition, filed before answer, the plaintiff retracted the allegation that the defendant was in possession of the land, and averred that it was wild and unenclosed land. He does not assert possession in himself, and, in fact, the averments of his pleading preclude that state of case. He avers, however, that one James H. Rice, by deed of January 8, 1883, attempted to convey the lands in controversy to the defendant, who is now by speech giving out that it is the owner of it; that on October 21, 1882, Fayette Hewitt, auditor of the Commonwealth of Kentucky, undertook, by a deed of conveyance, to convey to Rice the title of plaintiff in and to the land in dispute, "upon an assessment of 18,750 acres of land, listed in the name of the plaintiff for the year 1877 at the value of $9,375, the taxes thereon amounting to $40.25; that he did not list 18,750 acres of land or authorize anyone else to do so; that he had no notice of his land having been listed for taxation and no demand was made of him for the same; that his land was not levied on or described in the alleged levy; that for these reasons the assessment levy and sale by the sheriff were void and of no effect, and the State of Kentucky acquired no title or interest in the plaintiff's land by reason thereof; that this deed from Rice to the company was a cloud upon his title and greatly affected the enjoyment of his property. He prayed for its cancellation and that his title be quieted. To that end the case was transferred to the equity docket. There was demurrer to the petition, but as the plaintiff afterwards filed a demurrer to the answer, counterclaim and cross petition of the company, it is proper to consider the palintiff's case as set

up in his own pleadings; and, first, can the plaintiff maintain his action without being in possession of the land?

The general rule, and one well settled in this State, is that in order to maintain an action quia timet the plaintiff must have both title and actual possession. (12 B. M., 494; Campbell v. Disney, 93 Ky., 41.)

This action, however, is not one to quiet title. That relief is asked it is true, but only incidentally to the relief chiefly sought which is to cancel the deed, alleged to be of record, of Rice to the defendant company. It can not be doubted that when, by fraud or questionable contrivance or irregularity, the title of the owner of land has been wrested from him and converted to the use of another, he may bring his suit to cancel the conveyance, and it is no obstacle to the obtention of relief that the plaintiff is not in the actual possession of the land. That fact does not make less real the cloud on his title and prevent the value of his property from being affected by the obnoxious deed. In such a case courts of equity will afford relief, as otherwise a wrong would be remedyless. To this effect are the cases of Herr, &c. v. Mastin, 90 Ky., 379; National Bank Com., &c. v. Licking, &c., Mining Co., 15 Ky. Law Rep., 211; Kant v. Hall, idem. 511.

A second and more serious objection to the petition presents itself when we examine the grounds upon which the plaintiff seeks the cancellation of the deeds. While the plaintiff's prayer seeks only to cancel the deed of Rice to the company, it is manifest that the body of his petition is aimed at the means by which Hewitt obtained his title, and when we look for Hewitt's derivation of title we find the allegations of the pleader remarkably vague and uncertain. On October 2, 1882, one Fayette Hewitt, who is described as the auditor of the Commonwealth of Kentucky, conveyed the land in dispute to Rice "upon an assessment of 18,750 acres," etc. How does this explanation, if it be such, of Hewitt's conveyance to Rice illustrate Hewitt's own tilte? From whom did he purchase? So far as the pleading goes he may have done so from the plaintiff himself. It does not matter that plaintiff, as alleged by him, did not list his land for taxation, or that some levy on it or sale of it by the sheriff was void. Hewitt is not alleged to have had any connection with any levy or sale by any sheriff, nor is it anywhere alleged that there was, in fact, a sale of the land by the sheriff or other officer for taxes or otherwise, or that Hewitt bought it at any such sale. It is alleged that "the whole of said proceedings were and are void, upon and under which the defendant claims title, * * * and the State of Kentucky, by said alleged act, acquired no title to plaintiff's land; that the auditor had no power or authority to sell the same or to make a deed of conveyance thereof; that he had no description of said land nor of the excluded tracts therefrom," etc.

In the main these are mere conclusions of law, from which we may infer, rather than know, that by some fraud or device connected with the collection of taxes due on his land, the plaintiff was wrongfully divested of title, and that, in some way equally irregular and wrongful, the auditor for himself or the Commonweath became seized of title, or supposed he was, and conveyed the land in October, 1882, to the purchaser, Rice. It may not be in such cases that a paintiff coud know the exact process by which he was disseized, and we are, therefore, disposed to treat the petition as sufficient, notwithstanding its indefinite disclosure of the grounds upon which the deeds are sought to be cancelled.

For answer to the plaintiff's petition, the defendant says, first,

that it is true it bought the plaintiff's lands from Rice, in 1883, who got it from the auditor in 1882, and that more than five years elapsed from the date of the deeds to the institution of this suit, and it, therefore, relies on the statute of limitation in bar of the action.

In its second paragraph the defendant alleged that the plaintiff was a nonresident of this State, and, though claiming to own the land in contest, failed for more than five years before the institution of this suit, and in fact for more than fifteen years before, to list it for taxation in the county of Floyd or Knott or to furnish the county clerk of either of those counties with a written description of the land verified by affidavit; that he never did list it or pay or offer to pay any taxes thereon, and it pleads and relies on the plaintiff's said failure in bar of his action. The other paragraphs are in the nature of a counterclaim and cross-petition and will be noticed further along.

The statute relied on in the first paragraph is found in chapter 1565 of the act of May, 1880, known as the Auditor's Agent Act, and reads as follows:

Section 16: "No action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same be brought within five years after the date of the sale thereof for taxes as aforesaid, anything in the statute to the contrary notwithstanding," etc.

The action which is barred under the statute, it is manifest, is one brought to recover land when there has been a sale of it under the provisions of the act of May, 1880. And there is nothing in the plaintiff's petition and still less in the answer which brings the case within the reach of this statute.

By reference to the case of National Bank of Commerce, &c. v. Beaver Valley, &c., Co. (the present appellee), then pending in the Floyd Circuit Court, it was intended, no doubt, to show the title of Hewitt and Rice to this land as one obtained under the act of 1880, and thus authorize the application of the limitation provided for in the section quoted above. But Packard was no party to that suit, and the pleadings and exhibits therein can not be taken in lieu of the necessary pleading in this action.

The failure of a nonresident to list his lands for taxation for the length of time set up in the second paragraph of the anwser worked a forfeiture to the land to the Commonwealth without any proceeding to declare the fact under section 1, article 16, chapter 92, General Statutes, old edition.

A law similar to this, however, was held unconstitutional and void in Marshall, &c. v. McDaniel, 12 Bush, 378, the court saying, through Chief Justice Lindsay: "We conclude without hesitation that so much of the act of 1825 as provided for a mere failure to list lands for taxation the title should be forfeited, and should ipso facto without inquiry or trial, and without opportunity to the party supposed to be in default, even to manifest his innocence, be vested in the Commonwealth, is unconstitutional and void."

Whether there are other clauses of this statute now long since repealed, which relieve it of its repugnant and self-executing features, we deem it unnecessary to determine. The defendant's title is not based on any forfeiture to the Commonwealth and no such state of case is pleaded as would work a forfeiture of the plaintiff's lands. But while the pleas of the defendant, so far as they are found on the particular statutes invoked are unavailing, the plea in the first paragarph is a general one and avers the lapse of five years between the procurement of the deeds sought to be cancelled and the institution of the action. As we have seen, this is an action solely to cancel certain deeds procured by

fraud or mistake. The limitation in such case is five years, though the cause of action is not deemed to have accrued until the discovery of the fraud or mistake, but in no event can such an action be brought ten years after the act complained of. (Sections 2 and 6, article 3, chapter 71, General Statutes.)

The presumption is that the plaintiff knew of these deeds when they were executed and recorded in the clerk's office, but whether he did or not, more than ten years has elapsed since their execution and the institution of his action.

By its counterclaim and cross action the appellee alleges that it is the owner of the land in contest, claiming under the conveyance of Rice in 1883, and has erected improvements on the land, paid the taxes since the date of the deed and made other and larger expenditures of money thereon; that the plaintiff claims it also, as is shown by the petition, and it asks that its title be quieted. A demurrer was filed to the appellee's pleading, and, upon its being overruled, the plaintiff declined to plead further. The chancellor then dismissed the petition as amended, and entered judgment quieting the title to the company.

From the conclusions we have reached during the consideration of the pleadings, it is evident that no other judgment could have been rendered.

Even had the plaintiff presented his case more fully in his pleadings, and shown that he was divested of title by a fraudulent and irregular sale of his land by the sheriff for taxes under the provisions of the Auditor's Agents' Act of 1880, as we infer was done from the old record of the National Bank of Commerce, &c. v. Beaver Valley L. & M. Co., above referred to, yet he would have been met by the limitation provided in that statute, and we can see no reason to prevent its application. His action, in any event, is barred by time.

The judgment is affirmed.

FOX v. MIDDLESBOROUGH TOWN CO., &c.

SAME v. SAME.

SAME v. SAME.

FOX & DAVIDSON v. SAME.

(Filed December 11, 1894.)

1. Where a city charter fixes the mode in which the cost of street improvement shall be apportioned between the abutting lot owners, it is not necessary, in order to preserve to the contractor his lien on such property for the cost of the improvement, that the ordinance authorizing such improvement should designate the mode of apportioning the cost or name the persons liable therefor; and a failure of the ordinance to set out these facts or a setting out of the facts incorrectly, but not so as to mislead the abutting lot owners, will not deprive the contractor of his right to a lien. The citizens must take notice of their liability as fixed by the charter.

2. Same—Publication of ordinance—Where the charter requires a publication of an ordinance authorizing street improvement for a certain period, in order to create a lien for the cost thereof, one claiming such lien must show a substantial compliance with the provisions of the charter.

A charter providing that an ordinance for street improvement shall not take effect until passed in a particular manner at two meetings of the board of council, the meetings to be two weeks apart, and until the ordinance as

first passed shall have been published at least one week in some newspaper in said city, was not intended to and does not require such publication after the first meeting of the council at which the ordinance is passed and before the second. It requires the ordinance as first passed to be published for one week after its second passage before coming effective.

3. Same—Partial completion of street improvement—Where the ordinance gives the council authority to cause any street to be "graded, paved, macadamized, curbed or guttered," the council may order a street graded and macadamized only, and not curbed and guttered as well; and where the grading and macadamizing alone was authorized, and the contractor agreed to do that work only, he is entitled to his lien upon the abutting property, and the abutting owners can not complain because the contractor did not curb and gutter the street.

4. Same—Estoppel—Where publication of an ordinance for street improvement is required in order to create a lien on property liable therefor, the publication must be made, and a lot owner is not estopped to deny his liability because of a failure to give such publication merely by witnessing in silence the beginning and progress and completion of the improvement.

W. O. Bradley, Z. H. Crutcher and J. G. Fitzpatrick for appellants.

Chapman & Nicoll for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Juge Pryor.

The appellants, who were the plaintiffs below, constructed certain streets in the city of Middlesborough by virtue of ordinances passed for their original construction, and, having obtained their warrants upon the completion of the work, sought to enforce their liens on the lots bordering on the improvements in satisfaction of their contracts with the city.

The streets improved were Ashbury avenue, Nineteenth street, Englewood road and Salisbury avenue.

There were four actions instituted against the lot owners and a demurrer filed to each upon the ground that the city, in passing the ordinances and entering into the contracts, had failed to comply with the provisions of the charter, so as to create a lien upon the lots bordering on these streets. By the provisions of the charter of the city, ample power is given the board of council "to cause any of the public ways to be graded, paved, macadamized, curbed or guttered in such manner as it may by ordinance prescribe." (Section 101 city charter.)

By section 106 of the charter it is provided: "A lien shall exist for the cost of the original construction of public ways, and payments may be enforced on the property bound therefor by suit in equity, and no error in the proceedings of the board of council shall exempt from payment, or defeat said lien after the work has been done as required by the ordinance, but the board of council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned."

This same section further provides, "but no ordinance for any original improvement mentioned in this charter shall take effect until it is passed by a yea and nay vote at two meetings of the board of council, at least two weeks apart, at least four councilmen voting in the affirmative, and until the ordinance, as first passed, shall have been published at least one week in some newspaper in said city, unless said improvement be asked by a

petition signed by persons owning a majority of the property liable therefor, when the ordinance may be passed at one meeting of said board by a majority yea and nay vote."

The several ordinances for the original construction of these streets were passed by the affirmative vote of four of the coucilmen at two meetings of the board, two weeks apart, by a yea and nay vote, but no publication of the ordinance was made between the vote upon the ordinance the first time and the vote on it the last time, and it is, therefore, insisted the ordinance is invalid and no lien exists on the lots fronting the streets for that reason.

It may be proper to consider first the point raised by counsel, that the ordinances as enacted, even if there had been a publication, were not such as created any lien on the ground fronting the improvements.

The 102d section of the charter provides that the cost of this original construction "shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the council, except as to corner lots," etc.

The council, in framing the ordinance for the improvement of Ashbury avenue and Salisbury avenue, recited (after specifying the territory to be improved) that the cost should be apportioned on the lots fronting the improvement, as provided by the city charter. As to Nineteenth street, it was recited only that the property fronting the improvement should be liable for cost; and as to Englewood road, provided that the owners of lots in each fourth of a square should pay for the improvements.

It seems to us it would be extremely technical to hold that the council, in failing to designate the manner of apportionment, or, when designating the mode, did nothing to mislead the owner of the realty fronting the imrovement, as to the nature of the improvement or the manner of his liability, has released any lien the contractor would otherwise have had for his work and labor, leaving him altogether remediless, as the charter forbids the assertion of any claim against the city, however erroneous the proceedings of the council may be.

The council has ordered this improvement to be made, and provided the costs should be apportioned as provided by the charter as to two of the streets, following the provisions of the charter as to Englewood road; but as to Nineteenth street, providing the property fronting the street should pay for that improvement.

There was no necessity for the ordinance designating what property was liable to be subjected to the cost of this work, for the charter, of which the citizens of the city were required to take notice, fixed the liability for the cost of this original construction, and each ordinance in effect said to the property owners these improvements have been ordered, and your liability is fixed by the law empowering the council to have these improvements made.

It was not essential that the council should say in the ordinance who was liable and the mode of enforcing their liability, and, when undertaking to do so, if they have not misled the parties who are to be charged with the expenditure, can not, for such a reason, claim exemption from payment.

This court as held, in the City of Henderson v. Lambert, 14 Bush, 24, and Harris v. Zable, 5 Ky. Law Rep., 114, in substance, that where this power given to such bodies is purely statutory, it must be strictly followed in order to create such a lien as is asked to be enforced here; and, therefore, when publication is to be made or notice given, and the statute is not at least substan-

tially complied with, no lien can be enforced, and the question of publication raised in these cases is entitled to more consideration than any other presented.

The lot owner upon whom this burden is attempted to be placed must have some notice of the intention to charge him, and when publication is required in a newspaper for a fixed period of time, the notice must be given in that mode; and the mere fact that he has witnessed the progress of the work from its beginning to its completion, can not work an estopple, but the charter in this respect must be complied with.

There is a provision in section 7 of the charter providing that every ordinance or resolution shall be published at least once in some newspaper published at Middlesborough immediately after the adjournment of each meeting; but in section 106, when directing the manner in which a lien for these improvements shall be created, the charter provides that before an ordinance for any original improvement shall take effect it shall be passed at two meetings of the board, the meetings to be two weeks apart, with the affirmative vote of four members, and until the ordinances as first passed shall have been published at least one week in some newspaper in said city, etc.

Instead, therefore, of a publication once only in a newspaper, the ordinance must be published, as first passed, in some newspaper one week before the ordinance becomes effectual; but it is contended by counsel for the lot owners that this weekly publication must be made after the first passgage of the ordinance, and before its second passage, to enable the lot owners to appear and assign their reasons, if any, why such improvements should not be made. If the second passage of the ordinance made it effectual, there might be some reason for assuming that such a construction should be given this provision of the charter, for then the lot owner would have no opportunity to be heard.

If a publication of the ordinance on its second passage was only required, the lot owner would have no means of knowing whether the last vote taken was upon the ordinance as first passed or not, and to prevent amendments and insure an affirmative vote twice in favor of the ordinance, as first passed, that ordinance (the first) is required to be published, and published after the last vote is taken.

If the second vote is upon an ordinance differing in substance from the first, then no lien is created, as the charter has not been pursued. Suppose the publication is made after the first vote is taken, and before the second passage of the ordinance, in what way is the lot owner to ascertain whether or not the votes at the two meetings are in favor of the same ordinance? But when you construe the charter as requiring the ordinance to be published one week after its second passage as first passed, you then have the same ordinance twice voted for by the council, and the lot owner given the opportunity to make his defense, as the ordinance does not become effectual until this publication has been made one week. Publication is required that the property holder may know that an ordinance has been passed, and having one week to make known his objections before the ordinance can be enforced. He has his day in court, and the charter is complied with.

It is again urged that the work or street has not been completed, and no lien exists until this has been done. We infer from the petition that the contract between the appellant and the city has been fully complied with and the streets graded and macadamized, but it is argued that there is no curbing or guttering, and until this has been done the contractor has no remedy.

If the appellant under the ordinance and contract had agreed not only to grade and macadamize these highways, but with it the curbing and guttering, and he had failed to perform his undertaking, then no lien would arise; but in this case the appellant undertook to grade and macadamize the streets, and this has been done and his work accepted, and we see no reason why, under such an ordinance, the city may not have several contracts, and certainly the power to authorize the grading and macadamizing, that makes the street, in one sense, complete and fit for use as a street. It benefits the owners of the lots, for they have a broad and well constructed street where before they were without any such improvement.

The council may not have desired to impose the whole burden of the improvement at any one time upon the lot owner, or for other reasons deemed it inexpedient to have the curbing and guttering done at the same time; but whether so or not the appellant has complied with his contract, conceding the facts alleged to be true on the demurrer, and should have his pay.

We do not mean to say that the appellant could have enforced his lien upon a partial performance, but for a well graded and macadamized street under this contract (and the acceptance of the engineer shows this to be the case), he should be allowed to enforce his lien, and the power to make such a contract is expressly authorized by section 101 of the city charter. (Embry v. San Francisco Gas Co., 28 Cal., 375.)

By the provisions of the charter the engineer is to fix the grade of all the public ways, and the grades and width of the streets as fixed by both the enigneer and council are set forth in the petition. The advertisments were proper for bids, and upon the face of the petition the appellants were entitled to recover, and if any valid defense exists, it must be made to appear by answer.

The several petitions and amendments presenting causes of action, the demurrer should have been overruled and the case disposed of on its merits.

Reversed and remanded for proceedings consistent with this opinion.

EDMONDSON v. KENTUCKY CENTRAL RAILWAY CO.

(Filed December 11, 1894—Not to be reported.)

1. The Constitution of 1891 did not repeal section 3 of chapter 57 of the General Statutes, authorizing the widow, heir or personal representative to maintain an action for loss of a decedent's life through the willful neglect of another.

2. Section 241 of the Constitution is not retroactive, and applies only to cases arising since its adoption.

Tisdale & Gray, W. T. Lafferty and C. M. Striger for appellant.

G. C. Lockhart for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Quigley.

On October 16, 1891, the appellant, Mary Edmondson, filed her petition in the Harrison Circuit Court against appellee, the K. C. Ry. Co., which reads as follows: "The plaintiff states that the defendant is a corporation duly organized under the laws of the State of Kentucky, with the right to own and operate a line

of railway in the State of Kentucky, and the power to sue and be sued, and with all the other rights and powers, and subject to the laws of the State to the same extent that other corporations are; that said company was, on October 19, 1890, and for a long time prior thereto and now, the owners of and operating a line of railway running through Harrison county, Kentucky; that on said October 19, 1890, John C. Edmondson, now deceased, was in the employment of the defendant as conductor of a freight train, and that, while so employed for hire and reward, he lost his life by the willful neglect and gross carelessness of the defendant, its servants, agents and employes, in this: That a locomotive engine and tender of said company was, by the willful neglect and gross carelessness of the persons in charge thereof, run over said John C. Edmondson, thereby injuring him to such an extent that he presently thereafter died from, and on account of, said injuries so inflicted; and further, by the willful neglect and gross carelessness of the defendant, its agents, servants and employes, said locomotive engine was, at the time it ran over and killed said Edmondson, operated and run without having any brake wherewith to stop or check same; that said Edmondson lost his life in the manner above stated while in the discharge of his duties as a freight conductor upon the railway track of defendant in Cynthiana, Harrison county, Kentucky, on October 19, 1890. Plaintiff states that she is the widow of John C. Edmondson, the person who lost his life as above stated; that said decedent left no children, and that no one has qualified as his personal representative. The plaintiff states that by the wrongful acts of the defendant, as above set forth, she has been damaged in the sum of $25,000. Wherefore, she prays judgment," etc.

To this petition a general demurrer was filed and sustained. The plaintiff offered to file several amended petitions which were refused by the court. She declined to plead further, and thereupon the court dismissed the petition, and from the judgment of the court so doing she prosecutes this appeal.

It appears from the briefs of counsel that the general demurrer to plaintiff's petition was sustained by the court solely upon the ground that section 3 of chapter 57 of the General Statutes was repealed by section 241 of the new Constitution by virtue of the first section of the schedule of said Constitution. It was expressly decided by this court in the case of Wright, &c. v. Wood's Adm'r, &c., 16 Ky. Law Rep., 337, opinion of the court by Judge Lewis, rendered October 2, 1894, that said section of the new Constitution did not repeal section 3 of chapter 57 of the General Statutes, and it is unnecessary to further argue, by way of construction, the effect of said section of the Constitution upon said section of the statute. The statute gives to the widow not only a cause of action, but also the right to the recovery, if any, had thereunder, if there be no issue.

The section of the Constitution above referred to was not intended to be retroactive, but to apply only to cases arising after the adoption of the new Constitution. Upon this ground the court erred in sustaining the demurrer to the plaintiff's petition.

Wherefore, the judgment of the lower court is reversed, and the cause is remanded for proceedings consistent with this opinion.

FIDELITY TRUST AND SAFETY VAULT CO. v. PRESTON, &c.

(Filed December 13, 1894.)

Residence—Probate of will—One having a fixed residence in this State can not change such legal residence merely by declarations that she has changed her residence or by an intent to change. There must be an actual bodily removal to the new residence, accompanied by an intention to remain there for an indefinite period, without any purpose to return to the old residence, except for temporary purposes of pleasure or business, in order to effect a change of residence.

In this case the preponderance of evidence shows that the testatrix did not actually change her residence from the country to the city of Louisville, although it is quite clear that she wished to make such change in so far as it was necessary in order to secure the right to probate her will in Jefferson county.

Barnett, Miller & Barnett, Muir, Heyman & Muir and Byron Bacon for appellant.

Wm. Lindsay and Humphrey & Davie for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Pryor.

A paper purporting to be the last will and testament of Mrs. Mary Howard Preston was offered for probate in the Jefferson County Court by her executor. The probate was denied upon the ground that the legal residence of the testatrix, at the time of her decease, was on her farm, called Norfolk, in the county of Trimble.

An appeal was taken from the judgment of that court to the Jefferson Court of Common Pleas, and the judgment of the county court affirmed. The case is now here on the appeal of the executor from the judgment of the common pleas court, and the sole question presented is one of fact, and that is: "Was the domicile of the testatrix at the date of her death in the city of Louisville, Jefferson county, or in the county of Trimble?"

There is much testimony on the issue, and some that would indicate a purpose on the part of the testatrix to change her residence from the county of Trimble to the city of Louisville, but the decided weight of the evidence favors the conclusion that she regarded Norfolk, in the county of Trimble, as her fixed and permanent home.

There seems to be but little if any difference in the views of counsel as to what constitutes a legal residence as well as the right of every one sui juris to change his domicile at pleasure. The home of Mrs. Preston has been at Norfolk for many years, and if she had changed her residence to Louisville her bodily presence was not only necessary, but the present intention to remain for an indefinite period and not to return to the previous residence unless temporarily or for purposes of business or pleasure.

One may have a summer residence at Pewee and he may call it his home, and his actual legal residence is the city of Louisville, where he votes and conducts his business, or he may conduct his business at Louisville and have his actual domicile at Pewee. The location, therefore, of his legal residence—his actual domicile—must often be determined from testimony, and none more effectual or convincing than the acts of the person whose place of domicile is questioned.

It is conceded the testatrix had lived upon her farm in Trimble for many years, and that nothing had ever been said by her

or an act done indicating her purpose to abandon her home until the writing of her will by counsel, when, apprehending a contest on the part of her kindred, it was suggested by him that the probate in Trimble could be avoided by changing her place of residence, and often after that time she stated to her friends that her residence had been changed to the city of Louisville; and in making a conveyance to some of her realty there was the recital that she was of the county of Jefferson, State of Kentucky. She also rented a pew a year or two before her death in the cathedral, but did no act or acts other than these mentioned that could conduce to show she had in fact abandoned her home in Trimble for one in Louisville.

While living on her farm in Trimble she spent many of her winters at the Galt House in Louisville, and, from the testimony in this case, always hailed with delight the approach of spring, that she might return to her home.

She left Norfolk in October of the year she died for Louisville, in company with her physician, who had advised her to go to St. Joseph's Infirmary, where she could have better treatment and be made more comfortable in her diseased condition; but when leaving her home and on the way to the city she said to her physician and to her domestics she would return in the spring, and directed certain improvements made to her dwelling, that she might make more comfortable her visitors whom she intended to bring with her. She wrote to her tenant a short time before her death to aid in killing her hogs and salting the meat, saying in the letter she unexpectedly "left home Saturday a week ago on account of my health," and in almost every instance, when speaking of home, Norfolk was the place designated.

The declaration of a party, where the evidence is otherwise evenly balanced as to the place of his domicile, would be entitled to much weight; but when, as in his case, the testatrix was only temporarily at the infirmary, with the knowledge that she must leave as soon as she recovered—with no house or home in the city or place of business she could call her own, when contrasted with the lovely and attractive home called Norfolk, with its comfortable dwelling; her stock and tenants on her 3,000 acre farm; the domestics on the place; her chapel in which she worshiped; and, as said by the learned judge below, "with the marble statue of her father, the portrait of her husband and son, and all she most prized"—it can not well be said that Norfolk was only a place of sojourn or a resort for pleasure, and the city of Louisville her legal residence.

If the effect of the declarations of the testatrix that she had changed her residence had not been destroyed by her more frequent declarations made during the same period that Norfolk was her home, it would still be difficult to conclude that she had changed her home, or to reconcile such declarations with her acts and conduct up to the date of her death, evidencing her love for Norfolk and showing that she regarded it as her permanent home.

That this good woman desired her will probated in Jefferson county is unquestioned, and what caused her anxiety in reference to the probate is not the subject of inquiry here, but it is manifest that her residence was in the county of Trimble, and by reason of our statute her will must be offered for probate in that county.

Judgment affirmed. (Tipton v. Tipton, 87 Ky., 243.)

JELLICO COAL MINING CO. v. COMMONWEALTH.

(Filed January 15, 1895.)

In criminal prosecutions the maxim that "ignorance of the law excuses no one" must be strictly applied in all cases; therefore, a corporation failing to comply with the provisions of the Kentucky Statutes requiring it to file certain statements in the office of the secretary of State is liable to the penalty denounced by the statute, even though the law had not been published at the time of the failure to comply with it, and the corporation was ignorant of its existence.

R. D. Hill for appellant.

W. J. Hendrick for appellee.

Appeal from Whitley Circut Court.

Opinion of the court by Judge Grace.

This is an appeal by the Jellico Coal Mining Co. from a judgment of $100, rendered against it by the Whitley Circuit Court upon an indictment found in said court on May 18, 1893, charging that said corporation, though doing business in Kentucky, had not, on May 8, 1893, nor for some time prior thereto, filed a statement, by either its president or secretary, in the office of secretary of state at Frankfort, Ky., giving the location of its principal office and its agent at said place upon whom service of process might be made.

The chief ground relied upon by said appellant for failing to file such a statement is that it did not know of the existence of the law requiring same to be so filed. The law of the State, taking effect April 5, 1893, as found in section 571 of Kentucky Statutes, under title "Corporations," requires such a statement to be filed.

The case was submitted to the jury upon an agreed state of fact, whereby it was agreed "that this law on corporations, having been passed long enough to take effect April 5, 1893, was, by order of the legislature, printed about April 25, 1893, and then distributed by the secretary of state as fast as possible to clerks of the county courts, banks, lawyers and corporations, but that no copy was sent to appellant; and further, that in fact said corporation, its agents and employes were in fact ignorant of the existence of such statute until May 24, 1893, when they were informed of same by their attorney, R. D. Hill, and that thereupon said defendant immediately, on May 29, 1893, filed in the office of the secretary of state, at Frankfort, the necessary statement; that defendant was, at and before the passage of said law, a corporation, created by the laws of Kentucky, doing business in Whitley county, Ky., where it had an office and an agent upon whom process could have been served. It was further agreed by the parties that a synopsis of this coproration law was published by some of the daily papers in Louisville about the 6th or 7th of April, 1893, and that said paper circulated in Whitley county, but was not called to the attention of the defendant."

Upon the agreed statement of fact the court instructed the jury to find for the Commonwealth, the usual exceptions were taken and the case brought up.

The counsel for appellant, while conceding the general doctrine "that every person is presumed to know the law," yet insists that this is not an absolute, conclusive presumption, but only one that may be rebutted by evidence; and surely that the Commonwealth may agree absolutely and unconditionally, as she did

in this case, that appellant was ignorant of the law, and thus agree herself out of court.

We can not view the matter in this light. The maxim, slightly changed and as applicable to all criminal prosecutions, being "that ignorance of the law excuses no one," is one of the oldest and most valuable maxims of criminal procedure—it lies at the very basis of all successful criminal prosecutions. It is not so much a presumption of fact as a fact, as it is a conclusion or presumption of the law indispensably necessary to be made by the courts alike applicable to all criminal prosecutions. Without it the court would be powerless to maintain any effective and valuable administration of the Criminal Code. In point of antiquity it dates back to a time whereof the memory of man runneth not to the contrary; and while it may be possible that now and then, in isolated cases, there may be apparent hardships, yet we are unable to conceive or formulate any modification of the rule whereby appellant, in this case, can be relieved from the operation of the general principle without utterly destroying same, and such a ruling is not to be thought of.

Let the judgment of the lower court be affirmed.

HELTON v. COMMONWEALTH.

(Filed January 16, 1895—Not to be reported.)

1. Criminal law—Evidence—The appellant will not be heard to complain on appeal because of the admission of oral evidence to prove facts that ought to have been shown by record evidence, when he did not except or object to the oral testimony when offered and introduced.

On a trial for perjury, alleged to have been committed by defendant during the trial of a certain indictment against him, the pendency of such indictment and the facts of the trial were proven orally, without objection on the part of defendant; therefore, the failure to introduce the indictment, and to read the order of court to prove the former trial, can not be considered on appeal.

2. A reversal can not be granted because of the refusal of the trial court to grant a new trial on the ground that one of the jurors had, previous to the trial, formed and expressed an opinion unfavorable to the accused.

A. H. Howard for appellant.

W. J. Hendrick for appellee.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Grace.

This is an appeal by Smith Helton from a judgment of the Magoffin Circuit Court whereby, upon a verdict of guilty by a jury, he was sentenced to confinement in the State penitentiary for a term of one year upon a charge of perjury.

The indictment is in the usual form, containing, among other necessary averments, one that the false oath charged to have been given and made by said Helton was in the Magoffin court at a previous term, and upon the trial of accused the said court, upon an indictment theretofore pending in said court against said Helton for carrying concealed upon his person a deadly weapon, being on said trial duly sworn by the judge of said court. The instructions were in the usual form in perjury prosecutions, warn-

ing the jury that a conviction could only be had on the testimony of two witnesses, or of one, and stong corroborating circumstances that the oath formerly made by said Helton on said trial was knowingly and corruptly false, and such testimony appears upon the trial.

The original indictment for carrying the concealed weapon was not read in evidence to the jury on this trial, neither the orders of court showing its pendency and the trial of accused under same. All these matters were testified to orally, and while the accused, in his motion for a new trial, makes one of his grounds for same the admission of improper testiomny against him, yet the bill of exceptions on file fails to show any objection to this testimony on the trial, or any exceptions by accused to the ruling of the court on the same, and without this appearing in the bill the uniform practice of this court is to disregard it.

It apears that on the calling of the case for trial accused filed an affidavit for continuance on the ground of absent witnesses who lived in another county. This motion was overruled by the court and exceptions taken doubtless on the ground that due diligence was not shown to procure the attendance of said witnesses. In this view we concur with the court below. A motion for a new trial was also made, and one of the grounds for same being that one of the jurors trying the cause had previously formed and expressed an opinion unfavorable to the innocence of the prisoner, supporting said exception by the affidavits of two witnesses to that effect; this, however, being on a motion for a new trial, and any error appearing therein only for the first time can not be made the subject of reversal on appeal.

The appellant has filed no brief pointing out to the court the errors of which he complains, and on examination we perceive none to the prejudice of the substantial rights of the appellant which authorizes a reversal of his cause.

Wherefore, the judgment is affirmed.

GRATZ v. COMMONWEALTH.

(Filed November 20, 1894.)

1. Criminal law—Indictment—Although the indictment describes the offense charged as "malicious cutting and wounding with intent to kill, committed as follows," etc., yet it so sets forth the facts constituting the offense charged as to show clearly that it is that of willfully and maliciously cutting another with a knife with intent to kill; and since only a "brief general description" of a crime having no general name is all that is required in an indictment by the Code, this one must be held sufficient in law.

2. A charge that the offense was committed on the day before the indictment was found imports the charge of the commission of the offense before the finding of the indictment.

3. The question of the authority of the person shot to act as a deputy marshal at the time of the shooting ought to have been decided by the court and not submitted to the jury, the evidence clearly showing that he was so authorized; but this error was favorable rather than prejudicial to the accused.

L. T. Moore for appellant.

W J. Hendrick for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Lewis.

The indictment under which appellant was convicted is as follows: "The grand jury of Clark county, in the name and by the authority of the Commnowealth of Kentucky, accuse David Gratz of the crime of malicious cutting and wounding with intent to kill, committed as follows, viz.: That said David Gratz, on the 25th day of September, 1884, in the counry aforesaid, did unlawfully, willfully, feloniously and maliciously cut and wound T. M. Newton with a knife with intent to kill him (the said Newton), of which cutting and wounding he did not die, against the peace and dignity of the Commonwealth of Kentucky."

The statute, section 1166, provides that if "any person shall willfully and maliciously cut * * * another with a knife * * * with intention to kill, if the person so cut * * * die not thereby, he shall be confined in the penitentiary not less than one nor more than five years."

It will be observed that two words, "willfully" and "another," used in the statute, are omitted from description of the offense charged in the indictment, which counsel now contend is a fatal defect.

All the Criminal Code requires, when an offense charged has "no general name, is a brief general description as given by law." (Section 123.)

And "the words used in a statute to define an offense need not be strictly pursued in an indictment, but other words conveying the same meaning may be used." (Section 126.)

It seems to us that the offense of which appellant is accused is so fully and clearly described in the indictment as to leave no reasonable doubt it is the same as that defined and denounced in section 1166 of the statutes. For a charge or accusation that a defendant cut and wounded maliciously and with intent to kill necessarily means he did the act willfully; and in that connection of the word "another" was not at all necessary to convey the idea the subject of such malicious cutting was a human being." Besides, the statement of acts constituting the offense is made "in such manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to rights of the case."

The language used imports that the offense charged was committed before the indictment was found, and it was not, as counsel argues, necessary to state the facts in terms. It is distinctly averred the offense was committed September 25, though it turned out on trial it had been done as early as July, while the transcript shows the indictment was not found until September 26, 1894.

There is direct evidence that the defendant severely cut Newton willfully and maliciously and not in his necessary self-defense, and, consequently, it is not in the province or power of this court to reverse the judgment upon the ground the verdict was contrary to the evidence.

It appears that Newton, acting as policeman, heard, about 11 o'clock at night, a cry of distress from a woman, and immediately proceeded, as it was his duty, to the house of defendant, who, after being several times told to do so, came oustside of his premises to where the officer was and without legal excuse seized and commenced to stab him with a knife, inflicting as many as seven wounds. There is no question of the woman who made the outcry being the wife of the accused, and evidence of the

officer and attending circumstances tends strongly to show the cause of it was her husband. He, on the contrary, testifies the cry of distress was made because she supposed he had fallen into the well, and two witnesses, who were at that time in the house, her mother and sister, stated on the trial Newton fired a pistol at and wounded the accused before the knife was used. But the jury seems to have discredited that testimony, accepting instead as true the theory that his conduct caused his wife to cry out, and statement of Newton that he did not fire his pistol until he was stabbed.

The court instructed the jury fully and clearly as to questions of guilt of the accused, the degrees of the offense charged, and as to the law of self-defense. And the only error committed in that connection was in giving instruction 9 in the form it now appears, which was favorable rather than prejudicial to defendant; for the court, instead of deciding, as was its duty, and as the evidence fully authorized that Newton was at that time deputy policeman of Winchester, where the crime occurred, by that instruction, improperly permitted the jury to decide that question, thereby making Newton's authority to arrest accused; and his right to resist to the extent of taking the life of the officer depends upon decision of the jury of a legal question.

As in our opinion no error of law to prejudice of appellant occurred on the trial, the judgment is affirmed.

CITY OF LEXINGTON ON APPEAL.

(Filed December 11, 1894.)

1. Where a municipal corporation, before the adoption of the present Constitution, had been especially authorized to incur a certain indebtedness for public improvements, it has a right to make obligatory contracts for such improvements, in pursuance of such authority, even after the adoption of the Constitution, at least until the time when the general assembly, by general laws, made provision for its government.

2. Same—Case—The city of Lexington, by amendment to its charter, passed in April, 1890, was authorized to construct brick streets and issue its bonds for $150,000 to pay for same. Ordinances for construction of such streets were enacted from time to time after July, 1890, and in October, 1894, an ordinance authoring the issuance of $150,000 to pay for the improvement was passed. The charter to govern cities of its class became a law March, 1894, and gave such cities "power to issue bonds for an amount to contruct, complete and pay for sewers * * * or other public improvement authorized to be constructed under laws heretofore enacted, or for completing and carrying out any contract made for the construction of any such sewer, building or improvement." Held—Under the construction given the Constitution of 1891 and under the provisions of this charter, such bonds so authorized are valid.

Bronston & Allen for appellant.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

The charter of the cities of the second class provides that the validity of city ordinances and by-laws may be tried by writ of prohibition from the circuit court, or upon ex parte petition of the city, or of any bona fide citizen and resident thereof, to the circuit court, with right of appeal in any event to this court.

In this case, the city of Lexington, a city of the second class, by its ex parte petition to the Fayette Circuit Court, seeks to try the validity of an ordinance of its general council, passed in October, 1894, providing for the issual of the bonds of the city for the sum of $150,000 in payment of a debt, the contraction of which was specifically authorized by an act of the general assembly in April, 1890.

The act was in the form of an amendment to the charter, and authorized the city to reconstruct its streets in brick, requiring it to pay one-third of the cost thereof and the abutting property owners the residue.

The first ordinance providing for such reconstruction, in pursuance of the amendment of April, 1890, was adopted in July of that year, and successive ordinances were adopted from time to time for other parts of the work until the one in question providing for the issual of bonds in payment for the work. Its validity is questioned on the ground that the indebtedness for which it provides payment was, in fact, contracted since the adoption of the Constitution, and is in excess of that authorized by section 157 and 158 thereof.

There was no submission of the question to the voters of the city, whether or not the indebtedness should be contracted, and none was required under the amendment of 1890. Without going into a discussion of the objects of those sections of the Constitution limiting the power of city governments to contract debts, it seems to us that the question involved here in effect has been determined by this court in at least three cases. In Byrne, solicitor v. City of Covington, 15 Ky. Law Rep., 33; Aydelett v. Town of South Louisville, ante, 166, and in Holtzhauer v. City of Newport, 15 Ky. Law Rep., 188, it was held that in cases where cities had been specially authorized, prior to the adoption of the Constitution, to contract an indebtedness for public improvements by amendments to their charters, or acts in the nature of amendments, they might lawfully make such contracts in pursuance of this previous authority, even after the adoption of the Constitution, at any rate until such time as the general assembly should provide, by general laws, for their government.

The general assembly, in March, 1894, did provide a charter for cities of the second class, and on the question involved here said: "The general council shall have power to issue city bonds for an amount sufficient to construct, complete and pay for any sewer, building or other public improvement authorized to be constructed under laws heretofore enacted, or for the completing and carrying out any contract made for the construction of any such sewer, building or improvement." (Kentucky Statutes, section 3072.

It seems to us that the construction given by this court to the sections of the Constitution supposed to be violated, and the subsequent legislation adopted in accord with that construction, leave nothing further to be desired on the point involved in this case. It is argued with confidence that the aggregate indebtedness of the city, when its existing and proposed indebtedness shall have been added, will not exceed the constitutional limit. We need not consider this contention.

For the reasons indicated, the ordinance in question is valid, as are the bonds issued in pursuance thereof.

Judgment affirmed.

COOK v. JONES.

(Filed December 15, 1824.)

1. Where a lessee sublets his entire interest in a part of the premises, it is an assignment pro tanto, and not a subletting.

2. Landlord and tenant—Right of assignee of lessee to exercise option to renew—A lease for ten years granted lessee an option to renew for five years, and obligated him to sublet certain parts of the premises to tenants already occupying such parts. The lessee sublet the part of the premises in controversy to the assignor of defendant for a term of ten years, with an option to renew for five years, as set out in the original lease. Subsequently the lessee assigned to H., with consent of landlord, his entire interest in the contract of lease. Before expiration of lease the original lessee notified the landlord that he would not renew the lease for five years; but H. claimed the right to renew, and so notified the landlord, and the agent of the landlord assured the defendant that he would be permitted to renew his lease for five years. At the expiration of the ten years the landlord seeks to obtain possession from defendant, who claims the right to renew. Held—

First. Defendant holds by assignment of a part of the original contract of lease, and not as subtenant.

Second. As assignee, defendant had a right to exercise the option to renew for five years as to the premises occupied by him.

Third. Even if the defendant did not have a right to exercise the option to renew the lease as to the premises claimed by him, which was only a part of the estate leased, yet he did as assignee have a right to require his assignor to so renew in his behalf.

Fourth. Where the landlord, through his agent, by assuring defendant that he would be permitted to renew, caused defendant not to expressly demand of his assignor the exercise of the option to renew, the landlord will not be permitted to profit by his own wrong and obtain possession of the premises because notice of the option to renew was not given him.

Fifth. The evidence sufficiently established the authority of the agent to renew the lease in behalf of the landlord.

Marc Mundy for appellant.

Humphrey & Davie for appellee.

Appeal from Jefferson Circuit Court, law and equity division.

Opinion of the court by Judge Hazelrigg.

Samuel H. Jones and his son, Samuel H., Jr., were the owners of a lot of ground in Louisville, situated in the square bound by Third, Chestnut, Fourth and Walnut streets, its frontage on Fourth being about 190 feet and extending back some 250 feet; the frontage on Walnut was about 33 feet, with a depth of 180 feet.

Prior to the rental contract, out of which this controversy grows, the premises fronting on Fourth street were occupied by a number of tenants, who had built their own improvements, under an arrangement by which they paid a ground rent to their landlord, based on the value of the lot occupied by them. The precise terms of their rental contracts are not shown here, and we do not know upon what conditions, if any, the tenants might remove their improvements in the event their leases were terminated.

We find the premises occupied by those who had erected valuable improvements thereon under an arrangement, as we assume, which demanded some consideration and protection at the hands of the landlord, as a provision for their benefit was inserted in the lease we are about to consider. These prior leases were

about to expire, and on May 5, 1881, the Joneses leased the entire premises to the Louisville Coffin Co. for a term of ten years from and after January 1, 1883, with the privilege of renewal for a term of five years upon the same conditions, at the option of the company.

The business needs of the company, as we suppose, not requiring the whole of the property, it secured the right to sublet any part of it, but the following stipulations were inserted in behalf of the Fourth street tenants: "And, whereas, a portion of said ground fronting on Fourth street is occupied by divers persons, therefore, in order to protect their interests, said second parties, the coffin company, covenant to sublet to said persons for a term not exceeding the term of this lease the lots respectively occupied by them. And in estimating the rent to be charged to and paid by said subtenants to said second parties, the ground occupied by them shall be appraised as aforesaid, and as of the depth of 250 feet, or to the east boundary of the ground hereby leased, and said subtenants shall pay three-fourths of six per cent. per annum of the value of the lots appraised as aforesaid, and upon the same terms and conditions as are reserved and made in this lease."

On the 1st of January, 1883, the coffin company, in pursuance of its covenant, did lease to Chas. Godshaw, one of the Fourth street tenants, the premises occupied by him "for and during the term of ten years from and after January 1, A. D. 1883, with option to the said Chas. Godshaw to renew said lease for a term of five years, as specified in said lease to said Louisville Coffin Co., on the same terms and conditions as are specified in said lease to said Louisville Coffin Co. aforesaid for subtenants."

On February 7, 1883, Godshaw, in consideration of the sum of $1,300, sold his house and all other improvements and appurtenances thereto belonging, situated on the lot in question, to the appellant, Cook, who took possession of the premises and thereafter paid the ground rent to the company.

In 1884 the appellee, Samuel H. Jones, Jr., theretofore a minor, became of age and ratified the lease to the coffin company. His father died before this litigation began, and the son became the sole owner.

In 1888 the coffin company sold out its improvements on the property to the Hegan Mantel Co., known in the record also as Hegan Bros. The appellee joined in this contract, which was a transfer not only of the improvements, but of the remainder of the coffin company's unexpired leasehold, "together with the privilege of renewal for five years, as set out in the lease of 1881."

All the tenants on the premises, including the Hegan Mantel Co., prior to January 1, 1893, the termination of the original lease, applied to Pope, agent of Jones, as well as to the Louisville Coffin Co., for a renewal of their leases for five years.

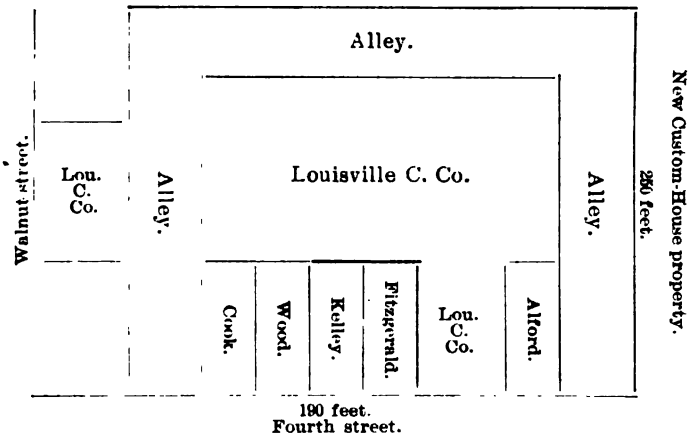
On December 12, 1892, the coffin company wrote to Jones: "We notify you that we will not exercise our option to renew the same for a further period of five years except the Hegan Bros. lease, concerning which there is a special obligation in case they desire a continuance."

On January 23, 1893, no contract of renewal having been executed, the appellee sought to oust the appellant by a writ of forcibe detainer.

A judgment of restitution was obtained from a magistrate's court which Cook traversed, and on a trial before a special judge of the Jefferson Circuit Court, a jury being waived, judgment was rendered for Cook, but a new trial was subsequently granted

by the regular judge, and, on a trial thereafter had before a jury, the court peremptorily instructed a finding for the appellee. From that judgment on that finding Cook appeals.

The rights of other Fourth street tenants appear to be dependent on the determination of this appeal, and the following map will explain their respective holdings:



For the appellee it is contended that the Louisville Coffin Co. alone had the right to exercise the option to renew or extend the lease, and it having declined to exercise it, the appellee was entitled to the possession of the premises; that even if, as contended by the appellant, Pope, as agent for Jones, had given assurances to the tenants that their leases would be renewed, yet he (Pope) had no authority to make an agreement to renew, and in fact made no such agreement or gave such assurances; that the coffin company alone had the right to remove improvements, and was to do that the last year of the lease, and all proof or showing as to the improvements erected and owned by these tenants was irrelevant to the issue, and properly excluded from consideration by the lower court; that under the lease there was but one right of renewal, and that was a right to renew for the entire property and not for a fragment of it. "By no species of ingenious jugglery," says counsel, "can it be worked out that any subtenant had the right to renew for his own fragment of land only, and no subtenant has ever sought to renew for anything else but his own fragment."

These contentions of counsel appear plausible, it seems to us, only upon a very strict and technical construction of the lease of the coffin company. It may be true that as the lessee might not elect to renew for a part of the premises, its assignees could not do so. But when the coffin company sold and transferred its entire interest in the premises to others, as was contemplated it might do under the lease, and which it might do without an expressed contract, its right to exercise the option of renewal also passed by the sale and transfer, and it would seem strange if the assignees, representing the entire right of the coffin company, might not do what their assignor might do.

The rights of the landlord could be in nowise affected by the exercise of the option to renew on the part of the assignees of

the company any more than if the option was exercised by the company itself. The right of renewal was one claimed by the assignees under their purchase of the leasehold from the company, and hence subordinate to the demands of the rental contract between the landlord and the company. This contract gave to the landlord "a lien for the rent on all buildings and improvements now on said ground, or that may be erected thereon by said second party (coffin company), or any subtenant, and all insurance held or to be held by said second party or said subtenants; and also a lien for said rent on this lease and leasehold thereof, and on the respective leases and leaseholds of said subtenants." Thus, while the contract of May 5, 1881, provided for a parceling out of the ground and a renting to different persons in severalty, there was no severance of the obligation on the part of the tenants and subtenants to their landlord. Each one's building, improvements, insurance, leasehold, etc., was liable to the landlord for the entire rent.

It is said, however, that no subtenant or assignee of the coffin company offered to renew for the entire premises, or undertook the obligation to pay the entire rent. This, we think, makes no difference. The legal rights of the landlord were fixed under the contract, and when the subtenants demanded a renewal the law of the contract imposed the obligation. The letter of the coffin company, written after it had sold out all interest in the leasehold and no longer occupied any portion of the ground, could not affect the rights of its assignees. The landlord had ample notice of the sale and transfer made by its original tenant to these subtenants or assignees. He had joined in the sale to the Hegan Mantel Co., and knew of its right to renew, and Mr. Pope, his agent, is shown to have known of the claims of the other assignees in the spring of 1892. The contracts of the company with the subtenants and with the Hegan Mantel Co. were not mere sublettings. They were assignments of its entire right and interest in and to the leasehold. "The distinction between an assignment and a lease depends upon the quantity of interest that passes and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years devises a part of it to another for the whole of his term, this is not an underlease but an assignment pro tanto." (Wood's Landlord and Tenant, section 65, and Taylor's Landlord and Tenant, section 426.)

If, however, the contract of May, 1881, is to be so strictly construed as that these assignees, not being parties to it, are not entitled to demand a renewal of the landlord, though they all make the application, yet it is hardly to be denied that they could have required the coffin company to make such demand. This they might not be entitled to do, if they had been mere subtenants, but as assignees they clearly had such right. They insist they did not exercise it because of the assurances given them by the landlord through his agent, as early as in the spring of 1892, that their leases would be promptly renewed. If such assurances were in fact given, we do not see how the landlord is to profit by his own wrong and obtain possession of his property by violating his pledges to renew the lease. The question is, then, were any such assurances given?

The trial judge was of the opinion that testimony on this question was incompetent, and we get the proof only in the form of an avowal of counsel while the witness was on the stand. The avowal is that the appellant had quite a number of interviews in the latter part of the spring and in the fall of 1892 on the subject of a renewal of his lease with Dr. Pope, and insisted on knowing whether or not the extension of his lease would be made, because

of the importance to him to provide a home and to sell his property, which he valued at $5,000, and that Dr. Pope assured him that the lease would be extended, and that he need have no apprehension to the contrary, and to give himself no uneasiness; that the first time he received any information from Dr. Pope that the lease would not be renewed was on the 7th day of January, 1893. By B. F. Alford also it was proposed to be shown that at the solicitation of the appellant he went to see Dr. Pope in the spring of 1892 about having the lease extended for the five years, and Dr. Pope assured him that the lease would be extended, and for him to say to Dr. Cook he need be under no apprehension about it; that he reported to Dr. Cook as directed by Dr. Pope that the lease would be renewed, and that he need have no apprehension and give himself no uneasiness; that whether the lease was extended by the coffin company or not, Jones, the owner, would extend it for him for five years from January 1, 1893; that witness testified that he went to Dr. Pope as the agent of all the Fourth street tenants, and so informed him. Dr. Pope testifies that beginning about April and May, 1892, the appellant applied to him for a renewal of his lease, but that he never at any time told him or Alford that the lease would be renewed, or that he would advise Jones to renew it; that in fact he had no authority to renew the lease; that he gave all the tenants the sterotyped answer that he was in consultation with his attorneys.

We think the preponderance of the proof is that these assurances were given. Whether Dr. Pope had the authority to conclude the lease or execute the necessary writings is not material. It is evident that he was the owner's general agent in control of the property. He in substance so swears and says he declined to furnish the address of Jones to the appellant because he "had been requested by Mr. Jones not allow any of his small fry to communicate with him;" as his agent, he "wanted to stand between him and protect him." He consulted his attorneys as to what he should do under the lease of the coffin company and the Hegan Mantel Co., and took such steps as he was advised by the attorneys to take. We think Dr. Pope stood in the place of Jones in all the transactions leading up to the litigation, and that his assurances and agreements that the leases would be renewed are to be given the same effect as if made by Jones himself.

The views we have expressed are also in accord at least, with the spirit of the contract of 1881 in giving protection to the tenants in possession of the Fourth street improvements. We can not believe that this long delay in giving an answer to the tenants, and lulling them into a sense of security until after the termination of the lease, was for the purpose of effecting a confiscation of their improvements or a sale of them to the land owner at a ruinous sacrifice.

It is true that prior to January 1, 1893, the agent appears to have consulted his attorneys on this subject, and that his doubts were not dissolved until after the leases were ended, when he notified Alford "not to move the improvements, as the owner claimed them as his own." Alford's reply was that "that was not business; it was robbery." And so it would have been.

In our opinion the appellant is entitled to hold the premises under his exercise of the option provided for in the lease of 1881, and occupies the same relation to his landlord as the coffin company would have occupied had it exercised the option instead of selling it to another. The new trial should not have been granted.

The judgment of restitution is reversed, with directions to dismiss the proceeding.

FITZGERALD v. JONES.

(Filed December 15, 1894.)

The facts of this case are substantially the same as in Cook v. Jones, ante, 469, and the opinion in that case is followed in this one.

Matt O'Doherty for appellant.

Humphrey & Davie for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

The principles governing this case have just been determined by this court in the case of Cook v. Jones (ante, 469.)

The appellant was in possession of a lot of ground under a lease of the Louisville Coffin Co. from the appellant, Jones. She was one of the Fourth street tenants.

Besides some additional proof of the assurance and agreement of the agent, Pope, to renew the leases for the Fourth street tenants, the written authority of Dr. Pope, executed in 1891, to act as agent for Jones, is produced in this case and reads as follows:

"Thursday, October 29.

"This is to certify that Dr. Curran Pope, of Louisville, Kentucky, is my agent, and has full powers to act in my behalf, the same as his late father, Judge Alford T. Pope.

"Signed:

"SAMUEL H. JONES AND ELIZABETH D. JONES."

The opinion in the case named is referred to and adopted as the opinion in this case.

The appellant is entitled to hold the premises occupied by her in virtue of the option deemed to have been exercised by her by which the lease was renewed for five years from January 1, 1893.

The judgment is reversed, with directions to dismiss the proceeding.

McKENSEY v. McKENSEY'S EX'OR.

(Filed December 15, 1894—Not to be reported.)

Construction of devise—Descent and distribution—Testator devised his entire estate to his widow "to hold and handle," and provided that if she married she was to have one-third of the estate for life, and testator's only child to have the remainder. Held—The widow took the entire estate during life or widowhood, with a vested remainder to the son, with the proviso that if she married she was to take only a one third interest.

Therefore, when the son died without issue and unmarried before the widow, who never married again, she took his remainder in fee by inheritance from him, and had a right to dispose of the same by will.

J. H. Dorman and H. Clay White for appellant.

W. C. G. Hobbs and A. M. Baker for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor.

Thomas McKensey died in the county of Owen, leaving a last will by which he devised his entire estate, real and personal, to his widow to hold and handle during her widowhood, and provided, in case she married, she was to have one-third of his estate, and his only child, Allen McKensey, to have the remainder. His widow never married, and his son and only child, Allen, died at the age of thrty-five, and before his mother, intestate, and without children. After his death the mother of Allen and widow of the testator died, leaving a will by which she devised the estate, including the land in controversy, to certain of her kindred, claiming to have inherited the land from her son. The next of kin of the testator claim that no estate passed to the son by the will of his father, and they inherited the land from the testator.

They base their right of recovery on the ground that no estate vested in Allen, he dying before his mother, and there being no devise of the remainder interest until the termination of the estate in the widow, the land passed to the next of kin of the testator. We construe this devise as one to the widow during life or widowhood, remainder to his son, Allen, with the proviso that if the widow married she took a one-third interest. The estate vested in Allen, subject to the deivse of one-third to his mother on the contingency of her again marrying, and even if there was no devise of the remainder interest it then passed to the son, Allen, by descent; so in any event Allen owned the fee, subject to the devise to the mother, and at his death his mother inherited the whole estate from him, and, it, therefore, passed under her will.

We are, saisfied, however, that a vested estate passed to Allen, subject to the particular estate in his mother.

The judgment below is affirmed.

GIBSON v. GAINES.

(Filed December 13, 1894—Not to be reported.)

Construction of deed of trust—Land was conveyed to a trustee for the benefit of two infants, B. and F., the trustee was directed to take possession and apply the profits to the benefit of the infants; and if either beneficiary died without children, his interest was to go to the survivor, and if both died without children the estate to go to a third party. When both infants arrive at the age of twenty-one years the trustee was to sell the land and pay the proceeds to them. They both arrived at the age of twenty-one, and the trustee, instead of selling the land, conveyed it to them as directed. B. conveyed to F. one-half of such land, but F. did not convey to B., and the latter having sold his interest, and the purchaser objecting to the title offered, Held—The conveyance by the trustee to the beneficiaries was in full execution of the trust, and divested him of all title, and F. having been made a party to the suit and her title conveyed by a commissioner, the purchaser from B. has acquired a perfect legal title to his land.

D. T. Edwards and Field McLeod for appellant.

D. L. Thornton for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Pryor.

Mrs. Fannie Gibson, by her deed executed on the 26h of January, 1861, conveyed to her grandchildren, Bernard Gaines and Fannie

Gaines, or rather to Wm. Gibson, as trustee for them, an undivided interest of one-third in two tracts of land the grantor then owned in Woodford county.

The deed provided that after the death of the grantor the trustee, Wm. Gibson, was to take possession of this one-third interest in the land and apply the profits to the benefit of the two grandchildren. and in the event of the death of either of the beneficiaries without children the interest of the one dying was to pass to the survivor, and if both died without children the interests conveyed to pass to Wm. and Fannie Gibson.

There is also a clause in this conveyance authorizing and empowering the trustee to sell this one-third interest when Fannie and Bernard arrive at age, and shall pay over the proceeds to them.

After the death of the grantor, and when Fannie and Bernard had arrived at their majority (twenty-one years of age), a partition was made of the two tracts of land, and seventy acres was conevyed by the trustee directly to Fannie and Bernard Gaines as their share in the two tracts. There was then a division of the seventy acres between the two beneficiaries, Bernard receiving thirty-seven acres and Fannie thirty-three acres. Bernard conveyed to Fannie her interest, but Fannie and her husband, she having married one Fogg, failed to convey to Bernard or to relinquish their interest in his portion of the land. Bernard then conveyed to Wm Gibson the thirty-seven acres received by him in the division, and took notes for the purchase money, and these notes, or some of them, were assigned to J. B. Gaines. The assignee of the notes sued Gibson in equity to enforce the lien making Fannie Fogg and her husband parties defendants, and the land being ordered sold Gaines purchased it and obtained a conveyance from the commissioner in behalf of the parties in interest, including Fogg and wife, and thereby perfected the title.

The conveyance of Bernard Gaines to Gibson, dated April 1, 1872, vested in Gibson all of Gaines' title, and the only defect in the title, if any, consisted in the failure of Fannie Gaines to convey to Bernard, as the latter had conveyed to her in the original partition.

This, however, was unnecessary. The trustee was expressly authorized to sell this land and pay over the entire proceeds to the two, Bernard and Fannie, and they having arrived at age, and doubtless preferring the land, the trustee conveyed directly to them. This was in execution of the trust, and divested the trustee of all title, passing to Bernard and Fannie the fee to the interests conveyed. The trust then ended, and the limitation placed upon the right of the two beneficiaries to hold in fee having been removed by their arrival at age, the contingency no longer existed upon which they could be divested of title.

Instead of selling to third parties or strangers, the trustee sold to the beneficiaries, they electing to take the land instead of the proceeds.

The judgment of the chancellor below is affirmed.

PACO v. COMMONWEALTH.

(Filed January 12, 1895—Not to be reported.)

The evidence authorized the verdict convicting appellant of robbery, and no error of law occurred on the trial.

John C. Eversole for appellant.

Wm. J. Hendrick for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was tried and convicted in the Owsley Circuit Court of the crime of robbery and sentenced to the penitentiary for the terms of four years.

The proof introduced for the State leaves no room for doubting the guilt of the accused. His crime consisted in obtaining a watch of one Cooper by putting him in fear. There was no diligence shown in obtaining the testimony or the affidavit of the witness by whom it is alleged it could have been shown that the prosecuting witness stated that he had sold his watch to the accused, or that he was not "badly scared" when he gave it up.

Our attention has not been called by brief or otherwise to any error in the record, and perceiving none the judgment of conviction is affirmed.

COUCH v. COMMONWEALTH.

(Filed January 16, 1895—Not to be reported.)

1. One unlawfully "takes" a woman against her will, with intent to have carnal knowledge with her, within the meaning of section 1158 of chapter 36, Kentucky Statutes, who seizes or lays hold upon or catches her with such intent against her will.

2. Same—Case—A man just before daylight went to the bed of a girl in her twelfth year, and who was asleep, and awakening her by putting his hand under the bed clothes, placed his hand upon her hip and tried to unbutton her drawers, all these acts being done against her will. Held—This was an unlawful taking of a woman against her will, with intent to have carnal knowledge with her.

3. Same—The word woman, as used in the statute denouncing this offense, embraces every female of the human race, girls as well as fully developed women.

John T. Hays for appellant.

Wm. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Paynter.

Chapter 36, section 1158, Kentucky Statutes, is as follows: "Whosoever shall unlawfully take or detain any woman against her will, with intent to marry such woman or have her married to another, or with intent to have carnal knowledge with her himself, or that another shall have such knowledge, shall be confined in the penitentiary not less than two nor more than seven years."

The indictment was based on this statute, and the prosecution resulted in a conviction of the accused.

The evidence shows that the appellant had been living at the house of the father of Myrtle Stubblefield for about three years in the capacity of farm laborer; that Myrtle was in her twelfth year; that while she was asleep in her bed just after daylight

the accused approached it and awoke her by putting his hand under the bed clothes, placed his hands on her hip and tried to unbutton her drawers, all of which was done against her will.

Counsel for appellant, at the close of the evidence for the Commonwealth, moved the court to instruct the jury to find him not guilty. The court overruled the motion, and refused to so instruct the jury, to which action of the court an exception was taken.

Appellant admitted he did all the complainant said he had done except trying to unbutton her drawers.

During the progress of the examining trial the appellant was asked why he put his hand under the bed clothes and on her hip. He replied, "you ought to know by me going there." It is contended that the evidence was not sufficient to warrant a conviction of the accused under the statute.

The evident purpose of the statute was to punish those who take or detain females against their will for the purpose of having sexual intercourse with them. It creates a greater offense than an assault and a lesser one than rape or an attempt to commit rape.

The facts proven constitute an offense under the statute. The word take, as used in the statute, means to seize, lay hold upon, to catch. The proof shows there was "a taking" against her will, and that his intent was to have carnal knowledge with her was shown by his acts, but his admission on the trial, before the justice would make clear such purpose, were a doubt entertained as to what it was. At any rate, the jury had all the facts before it, found him guilty, and the court will not disturb the finding. It is contended that appellant could not be convicted under the statute because the complainant was not a woman, as she was only in her twelfth year.

We do not think there is any merit in the contention. The word "woman" is used generically in the statute and embraces every female of the human race. We can not believe the legislature intended by this statute to protect mature women from the wanton conduct of brutish men and allow females of tender years to be subjected to their assaults and lascivious carriage.

In the case of Malone v. Commonwealth, 91 Ky., 307, the complainant was, when the offense was committed, between thirteen and fourteen years of age. The accused was convicted, and the question was not raised that she was not a "woman."

In Howell v. Commonwealth, 5 Ky. Law Rep., 174, the complainant was under fourteen years of age. The question was raised that she was not a woman in the contemplation of the statute. The court held the word "woman," as used in the statute, was synonymous with the word "female."

We perceive no reversible error in the record.

Judgment affirmed.

COMMONWEALTH v. NORTON.

(Filed January 17, 1895.)

Criminal law—Forfeiture of supersedeas bond—Effect of payment of bond—A judgment for imprisonment for crime can be satisfied only by imprisonment of the defendant for the period fixed in the judgment unless he is pardoned. Therefore, a defendant sentenced to imprisonment for crime does not satisfy such judgment by paying the full penalty of a supersedeas bond which he executed at the time he took an appeal from the judgment, the appeal never having been prosecuted, and the bond having been forfeited.

W. J. Hendrick for appellant.

Kohn, Baird & Speckert for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Lewis.

It appears that April 7, 1894, Martin Norton was tried and found guilty of the offense of involuntary manslaughter, and judgment rendered in pursuance of verdict of the jury "that the Commonwealth of Kentucky recover of him $1,000 for fine assessed, also costs, and that he be confined in the jail of Jefferson county for the period of one year, and when said period shall have terminated, he be retained in such confinement until payment or replevy of said fine and costs, the period not, however, to exceed one day for each $2 of said fine."

Defendant having prayed an appeal from that judgment to the Superior Court, then in existence, executed a supersedeas bond of the same date as that of the judgment, wherby he and his surety covenanted that in case said judgment be affirmed they would pay said fine, costs and all damages thereon and costs of appeal; and that the defendant would surrender himself in execution of the judgment of imprisonment; or, failing to do so, he and his surety would pay the Commonwealth the sum of $2 for each day of the imprisonment adjudged.

Defendant did not, however, prosecute the appeal. Accordingly, June 8, 1894, a writ was duly issued, commanding the sheriff to take his body and deliver him at the jail of Jefferson county, there to be confined for the period of one year, and until he satisfies $1,000 recovered by the Commonwealth. Upon that writ was made the sheriffs following return: "The within-named not found. I am reliably informed that he has left the State."

September 17, 1894, on motion of the Commonwealth's attorney, the supersedeas bond was adjudged forfeited, and a summons directed issued against the surety, who, September 22, 1894, appeared in court, when the following order was made: "By consent it is ordered and adjudged by the court that the Commonwealth of Kentucky recover of the defendant, Michael Norton, the sum of $1,765.80, for forfeited supersedeas bond aforesaid; also its costs herein expended, and may have execution; and came said Michael Norton and paid into court the sum of $1,770.80, in full satisfaction of the judgment hereon."

On the same day, September 22, 1894, another capious was issued against defendant, Martin Norton, which, on motion of his attorney, was by judgment of court, September 29, 1894, quashed; and from that judgment this appeal is prosecuted.

The ground upon which the lower court quashed the capias, as appears from an opinion then delivered and made part of the record, is that payment by the surety satisfied not merely the fine of $1,000, but also the judgment of imprisonment.

The simple and only process by which defendant could satisfy the fine was by paying the amount in money, which his surety has done for him; and it appears to us equally plain that the simple and only process by which he can satisfy the judgment for imprisonment is by being put in jail and kept there for the period of one year, or until pardoned. Otherwise, there is no reason for inflicting, in any case, a double punishment of fine and imprisonment.

It is very certain that if defendant had, immediately after the

judgment of conviction was rendered, tendered $1,000, amount of the fine, and $750, the sum equal to $2 for every day of imprisonment adjudged, and thereupon moved the court for an entry of record, showing the judgment for both fine and imprisonment had been satisfied, and he was free to go thence, his motion would have been treated as preposterous. Yet if the judgment now appealed from be affirmed, that is just what he has accomplished by the shallow device of praying an appeal, it is manifest he never intended to prosecute, and with his surety executing a supersedeas bond, covenanting to pay the aggregate of these two sums, and a small amount of costs, resulting from prearranged forfeiture of the bond.

Section 349, Criminal Code, relating to appeals in cases of misdemeanor, is as follows: "The appeal shall not suspend the execution of the judgment unless the defendant cause to be executed before the clerk of the circuit court a covenant by good surety, to be approved by said clerk, for the payment, in case the judgment is affirmed, of the fine and costs, and costs of the appeal, and all damages thereon, and for the surrender of the defendant in execution of the judgment, if the judgment be for imprisonment, or on his failure so to surrender himself, for the payment of a sum equal to $2 for every day of imprisonment adjudged, and cause said covenant to be copied into the transcript. Upon being lodged with the clerk of the Court of Appeals, he shall issue a certificate that execution of the judgment is suspended."

We think payment of a sum equal to $2 for every day of imprisonment adjudged, provided for in that section, was intended as a penalty for failure of a defendant to surrender himself in case the judgment be affirmed. If not, then he might, by merely having an appeal granted and executing a supersedeas bond, acquire the right, not before existing, to elect whether he would pay that sum or go to jail.

Section 304 provides that "the defendant shall not be held in confinement under an execution for a fine for a longer period than at the rate one day for each $2 of the fine; such confinement shall not discharge the fine which thereafter can only be collected by proceeding against the debtor's property."

And counsel, referring to the proviso in that section, argues it is a fair inference that if the legislature had not intended payment of a sum equal to $2 for every day of imprisonment adjudged should be full satisfaction of such judgment, section 349 would have contained a similar proviso, but the two conditions are not alike. In one the debtor might at common law, and may now by statute, be taken in execution for a fine, and section 304 being enacted in order to fix a limit of his imprisonment for that cause, it was appropriate and necessary to provide in that connection such imprisonment should not discharge the fine. In the other a defendant enters into a contract with the Commonwealth whereby, in consideration of a stay of execution and his release from custody pending an appeal, he covenants, in case the judgment is affirmed, to surrender himself, or, as penalty for violating his contract to do so, pay a sum equal to $2 for every day of imprisonment adjudged; and that payment of such sum was intended to be an addition to and not commutation of the punishment by imprisonment seems to us too plain for discussion.

In our opinion the judgment of imprisonment against Martin Norton is still in force. Wherefore, the judgment quashing the capias in question is reversed and cause remanded for further proceedings consistent with this opinion.

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KENTUCKY COURT OF APPEALS.

COMMONWEALTH v. CHESAPEAKE & OHIO RY. CO.

(Filed January 17, 1895—Not to be reported.)

The indictment against appellee for failing to bring its trains to a full stop at least fifty feet before getting to its crossing with another railway sets out the acts constituting the offense in such a manner as to enable a person of common understanding to know the offense charged. Although the indictment alleges a failure of appellee to stop any of its trains on the day set out, a conviction could not have been had thereunder for more than one such offense, and the language used is not misleading or prejudicial to appellee.

W. J. Hendrick for appellant.

Wadsworth & Cochran for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Lewis.

Section 775, Kentucky Statutes, under which the indictment in this case was found, provides that "wherever railroads cross each other in this State the trains shall be brought to a full stop at least fifty feet before getting to the crossing: provided, however, That the provisions of this act shall not be applicable where the crossings of such roads are regulated by derailing switches or other safety appliances which prevent collisions at crossings, nor where a flagman or watchman is stationed at such crossings and signals that the trains may cross in safety;" and section 793 makes a failure to comply with or violation of such provision a misdemeanor, in addition to giving a right of action to a person injured.

The indictment in this case, to which a demurrer was sustained by the lower court, is as follows: "The grand jury * * * accuse the Chesapeake & Ohio Ry. Co., a corporation, of the offense of failing to bring its trains to a full stop at least fifty feet before reaching the railway crossing of the Ohio & Big Sandy Railroad in Catlettsburg, Ky., and failing to bring its trains to a full stop at said crossing, committed in manner and

form as follows, to wit: The said Chesapeake & Ohio Ry. Co., a corporation in the said county of Boyd, on the 31st day of January, 1893, did unlawfully fail to bring its trains running upon said road in this State to a full stop at least fifty feet before getting to the point of its cossing the Ohio & Big Sandy Railway in Catlettsburg, Ky., and failed to bring its trains to a full stop where the Chesapeake & Ohio Railway crosses the Ohio & Big Sandy Railway in Catlettsburg, Ky., and that where it (defendant) had not provided and the crossings of said roads and railways were not regulated by derailing switches or other safety appliances which prevent collisions at railway crossings, and where a flagman or watchman was not stationed at said crossings and did not signal that the trains might cross in safety.

"Said Chesapeake & Ohio Ry. Co. was, at the time, a corporation created and authorized, under the laws of the States of New York, New Jersey, Virginia and Kentucky, to own and operate a railroad, and do a general railroad business, such as running trains on its roads under the regulation of the laws of Kentucky, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky."

It seems to us that indictment contains a statement of the acts constituting the offense in question in such manner as to enable a person of common understanding to know that at the place mentioned the two railroads referred to crossed each other, and that defendant committed the offense of failing to stop its own train on the day mentioned, within fifty feet of said crossing. And though it is alleged that defendant failed to stop any of its trains on that particular day as required by statute, a conviction could not be had under the indictment for more than one such offense, and defendant was not prejudiced nor misled by the language used, which means simply that none of its trains were stopped on that day as required.

The indictment, it seems to us, is so drawn as to leave no reasonable doubt as to its meaning, and so as to enable the court, on conviction, to pronounce judgment according to the right of the case, and it was error to sustain the demurrer.

Wherefore, the judgment is reversed and case remanded for overruling the demurrer, and for further proceedings consistent with this opinion.

COMMONWEALTH v. TAYLOR.

(Filed January 18, 1895.)

1. An indictment for willfully and knowingly swearing to that which is false should follow the precise words of the statute, since these words are descriptive of the offense, and it seems impossible to find other words to supply the place of those of the statute.

An averment that defendant did "unlawfully and feloniously and falsely swear and state that he did not know D.," etc., does not charge the statutory offense of false swearing, since none of the words used convey the same meaning as the words willfully and knowingly as used in said statute.

2. An indictment against one for false swearing before a grand jury must set out the "matter" being investigated by the grand jury, when the alleged offense was committed, so definitly as to apprise defendant of the nature of the charge against him, and to enable the court to determine whether the grand jury had the authority to investigate such matter.

W. J. Hendrick for appellant.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Paynter.

This appeal is prosecuted by the Commonwealth from a judgment of the Simpson Circuit Court dismissing the indictment on demurrer.

The question is as to the sufficiency of its averments to constitute an offense under the statute, which is as follows: "If any person in any matter which is or may be judicially pending, or which is being investigated by a grand jury, or on any subject in which he can legally be sworn, or on which he is required to be sworn, when sworn by a person authorized by law to administer an oath, shall willfully and knowingly swear, depose or give in evidence that which is false, he shall be confined in the penitentiary not less than one nor more than five years."

Counsel for appellee has filed no brief, and the court has no suggestion as to the reasons which influenced the action of the court below. The indictment is defective. It makes this among other averments: That the defendant did "unlawfully and feloniously and falsely swear and state that he did not know Dan Milliken, when he well did know Dan Milliken." It will be observed that the indictment does not employ the words of the statute descriptive of the offense. It does not charge that the defendant did willfully and knowingly swear, depose or give in evidence before the grand jury that which was false.

The word unlawfully has no place in the statute, and does not in any sense have the meaning of either the word willfully or knowingly independent of or as used in the statute.

The word "feloniously" does not have the legal significance of either the word willfully or knowingly or of both. Neither of these words are necessary to be used in the indictment. The offense charged is not a common law but a statutory one. It is wholly unnecessary in an indictment charging false swearing under the foregoing section of the statute to charge that it was "unlawfully" or "feloniously" done. The use of either of the words would be surplusage. Shorn of this surplusage, the indictment simply charges the defendant did "falsely swear," etc.

This averment is not sufficient. The defendant could have sworn falsely before the grand jury, yet in order that he might commit the offense under the statute, he would have to give the false evidence willfully and knowingly.

In the case of the Commonwealth v. Turner, 8 Bush, 2, the prosecution was under a statute which denounced a penalty against any person who should "willfully kill, disfigure or maim any horse," etc. The indictment charged that the defendant did "unlawfully shoot and kill a bay mare," etc. A demurrer to the indictment was sustained. The court said: "The defendant here is charged with having unlawfully killed the mare of Crutcher. This he may have done and yet may not have done it willfully."

It has been held by this court in Taylor v. Commonwealth, 8 Bush, 511, and Conner v. Commonwealth, 13 Bush, 721, that although an offense is not charged in the precise words used in the statute defining it, yet if charged in words conveying the same meaning the indictment is good. But in prosecutions under this statute, when it is difficult if not impossible to find other words to or by circumlocution supply the place of those used in the statute, the indictment should follow the precise words of the statute.

In Commonwealth v. Tanner, 5 Bush, 318, the court said: "When the words of the statute are descriptive of the offense,

the indictment should follow the language, and expressly charge the described offense on the defendant, or it will be defective."

The indictment was defective because it did not explicitly describe the "matter" which was being investigated by the grand jury, about which the defendant was testifying when he gave the evidence which is charged to be false.

This should have been done to have fully apprised him of the nature of the charge against him, and that the court might be enabled to determine whether or not the grand jury had authority to make such investigation, and through its foreman administer the oath. The charge is that the false evidence consisted in defendant saying he did not know Dan Milliken, and inferentially stating that the purpose of the grand jury was to ascertain if he had seen Dan Milliken gaming.

The indictment should have charged that the matter under investigation was the charge of gaming against Dan Milliken.

For the foregoing reasons the demurrer to the indictment was properly sustained.

Judgment affirmed.

COMMONWEALTH v. LOUISVILLE & NASHVILE R. R. CO.

SAME v. SAME.

SAME v. SAME.

(Filed January 19, 1895—Not to be reported.)

An order sustaining a demurrer to a petition and granting an appeal is not a final order from which an appeal can be taken, even though it recites that the plaintiff elected to stand by his petition.

W. J. Hendrick, W. H. Sweeney and F. W. Rives for appellant.

W. C. McChord and H. W. Bruce for appellee.

Appeals from Washington Circuit Court.

Opinion of the court by Judge Guffy.

These three actions involve the same questions, hence were heard together. These actions were instituted by the Commonwealth and county attorney in the Washington Circuit Court against the appellee, the Louisville & Nashville R. R. Co., to recover a penalty prescribed by section 10 of article 17, chapter 29, of the General Statutes, which provides: "That no work or business shall be done on the Sabbath day except the ordinary household offices or other work of necessity or charity. Any person, on the Sabbath day, who shall himself be found at his or any other trade or calling, or shall employ his apprentices or other persons in labor or business, whether the same be for profit or amusement, unless such as permitted above, shall be fined not less than $2 nor more than $50 for each offense. Every person or apprentice so employed shall be deemed a separate offense."

On the 6th of October, 1893, and on the 21st of September, 1893, the appellant filed these petitions in the Washington Circuit Court charging and averring that appellee had violated the statute aforesaid by running and operating a train of cars on its

road from Springfield to Louisville on the Sabbath day, and employing for that purpose an engineer, a fireman, a flagman and one conductor, and also alleged that the trains were so run for pay and reward. The appellee filed demurrers to each of the petitions, which demurrers were sustained by the court.

The following is substantially the judgment or order of the court in each case on the demurrer: "The court, advised as to the demurrer filed in the foregoing, sustains same. The plaintiff elected to stand by the petition in said case, and prays an appeal to Superior Court, which is granted."

The appellee insists that these appeals should be dismissed because there has been no judgment or final order in the actions from which an appeal can be taken.

It seems to us that no judgment or final order has been taken or rendered in these actions that can be appealed from. The appeal in each case is dismissed, and the several cases remanded for appropriate proceedings in the lower court.

COMMONWEALTH v. HILLENBRAND.

SAME v. GIBBS.

(Filed January 19, 1895.)

1. Authority of board of aldermen to investigate charges of bribery against councilmen of Louisville—The section of the charter of cities of the first class (Louisville), providing that each board of the general council "shall judge the eligibility and the election of its members, adopt rules for its proceedings and punish its members for disorderly conduct," and that "two-thirds of the members elect concurring, either board may expel a member," by implication at least authorized each board to investigate, with a view to appropriate punishment, charges of corruption against its own members; but the board of aldermen has no authority by a committee, authorized by ordinance of the general council, to investigate charges of bribery against members of the board of councilmen, and the proceedings of such a committee are a mere nullity.

2. Same—Perjury—The proceedings of such a committee being wholly unauthorized and void, one can not be convicted of perjury on account of evidence given under oath before it.

3. Same—Where the ordinance authorizing a committee to act did not become effective until the 28th day of February, proceedings of such committee on the 27th day of February were wholly unauthorized and void; therefore, one can not be convicted of perjury for testimony given before the committee on the 27th of February.

4. Indictment for perjury—An indictment for perjury alleged to have been committed before a committee of the general council of Louisville, authorized to investigate charges of bribery against members of the board of council of Louisville, concerning the election of sealer of weights and measures, must allege that an election for such an office had been or was about to be held, at which the alleged bribery was committed.

W. J. Hedrick for appellant.

Kirby & Smith and O'Neal, Phelps, Pryor & Selligman for Hillenbrand.

Thos. F. Hargis for Gibbs.

Appeals from Jefferson Circuit Court, criminal division.

Opinion of the court by Judge Hazelrigg.

These cases involve the same legal questions and will be determined together.

The indictments are for false swearing, and are alike in form save as to the matter alleged to have been sworn to by each appellee. Demurrers thereto were sustained by the lower court and the Commonwealth has appealed.

The charge in each indictment is that the defendant therein "did willfully, falsely and feloniously swear, state and depose before a committee of the board of aldermen of the city of Louisville, said committee having been appointed by the president of the board of aldermen in pursuance of a resolution passed by the general council of the city of Louisville, authorizing the appointment of a committee for the purpose of investigating and reporting upon the charges of corruption against the members of the general council of the city of Louisville; that said committee was organized by the election of E. R. Palmer as chairman, and was composed of five members of the board of aldermen, and said Hillenbrand (and Gibbs) having then and there been duly sworn by Honorable Henry S. Tyler, mayor of the city of Louisville, a person legally authorized by law to administer an oath before said committee, and at said investigation said Hillenbrad (and Gibbs) did feloniously and falsely and willfully swear, state and depose as follows:" (Here follows the matters alleged to have been sworn to by each, and averments of their falsity.) "That said Hillenbrand (and Gibbs) did so willfully, falsely and feloniously swear, state and depose as aforesaid, well knowing at the time that each and every one of said statements were false; contrary to the form," etc.

As explanatory of the allegations of the indictments, the resolution of the general council raising the committee of aldermen, before which the alleged false swearing was done, was read and considered on the trial of the demurrers.

The resolution recites in substance that, whereas, a publication in one of the city newspapers was to the effect that members of the board of councilmen had accepted money and bribes for their votes for the election of a candidate for sealer of weights and measures, which had a tendency to impeach the character of said board, it was, therefore, resolved, that a committee of five from the board of aldermen be appointed to investigate the said charge and to take testimony on said subject, with authority to send for persons and papers, and make a full investigation as to who and what members, if any, of this board of councilmen had accepted money or bribes or had agreed to do so for their votes for the election of a candidate for sealer of weights and measures, and to make report of such investigation with the names of the offending members and the names of the persons approaching them or offering them money or bribes for their votes.

This resolution was approved and became obligatory or effective on February 28, 1894.

It will be observed that according to the indictments the matters to be investigated by the committee of five were "the charges of corruption against the members of the general council of the city of Louisville."

According to the resolution, the accusation made was "that members of the board of councilmen had accepted and received money and bribes for their votes for the election of a candidate for sealer of weights and measures;" and the committee of alder-

men were "appointed to investigate and to take testimony as to who and what members of the board of councilmen had taken bribes for their votes for said election of sealer of weigts and measures for the city of Louisville."

It is important to understand the subject-matter of the investigation thus placed in the hands of the committee, as well as the victims thereof, in order to ascertain whether or not the law creating these boards of councilmen and aldermen cast the duty or imposed the authority upon the investigating committee of five aldermen, thus raised by the resolution of the general council to do that which the terms of the resolution demanded. If such a duty did not devolve on the general council as the appointment of this committee, or, rather, if there was no authority of law for such action, the committee manifestly could not legally investigate, and would, therefore, be without authority to swear witnesses or have them sworn before it. Under such circumstances no one could be lawfully convicted of swearing falsely before it. If the committee was illegally constituted it was without authority of law to hear the testimony offered, and the accused could not be "legally sworn," or required to be sworn at all.

The law creating these boards and determining their authority is found in the Kentucky Statutes, as follows:

Section 2765. "The legislative power of said cities" (meaning cities of the first class) "shall be in a board of twenty-four councilmen, and in a board of twelve aldermen, which shall be styled the general council."

A succeeding section provides for the separate organization of each of these boards; and section 2771 provides that "each board shall judge the eligibility and the election of its members, adopt rules for its proceedings and punish its members for disorderly conduct. Two-thirds of the members elect concurring, either board may expel a member; but not twice for the same cause. Vacancies in either board shall be filled by the general council in joint session."

These are the only provisions in the subject of the punishment or the expulsion of members of either board, and it would seem that authority to punish or expel a member is lodged in that particular board of which he may be a member.

It is true all the members of the general council, but the general council is nowhere given any authority to punish or expel a member. That right is conferred on each board, and as every member of the council is necessarily a member of one of the boards, ample provision would seem to exist for the punishment or expulsion of each and every offending member.

The law does not in terms authorize any investigation, but punishment for disorderly conduct could not be imposed or expulsion for cause be enforced without it. Investigation is, therefore, authorized by necessary implication; but it must be one looking to the punishment or expulsion of a member, and as the penalty can be inflicted only by each board on its own members, the investigation of a member which is authorized by law must be carried on by the board to which he belongs.

Can the board of aldermen investigate, in any legal way or under any legal sanction, the members of the board of councilmen? Or can the general council, itself without authority to punish or expel a member, authorize the board of aldermen, or raise a committee of aldermen, to carry on an investigation looking to the punishment or expulsion of members of the board of councilmen. We think not; and yet this is the tribunal charged

with the trial of certain offending members, when the appellees, Hillenbrand and Gibbs, were called on to testify, and before which body they are charged with testifying falsely.

We think the subject-matter under investigation before this tribunal was not one in which the accused could be legally sworn or on which they could be required to be sworn; nor were the persons to be investigated triable by such a committee. Moreover, as we have seen, the resolution became effective for the first time on February 28, 1894. The indictment in the Gibbs case gives the date of the investigation at which the accused is charged to have sworn falsely as to the purchase of a member of the council, as of February 27, 1894, and the judgment of the lower court rendered in both cases recites, as an agreed fact, "that the investigation at which it is claimed that the accused swore falsely was held on February 27, 1894, or the night before the resolution became obligatory." The whole proceeding was, therefore, a nullity.

The learned judge below properly asked "how could one be legally sworn upon a subject which was being illegally investigated, and by a forum without authority to investigate?"

Again, we have seen that the charges upon which the investigation was to be had by the committee were those of bribery in the election of a sealer of weights and measures. We should expect to find, therefore, some statement in the indictment showing that an election for this office, if there be such an office, had been or was about to be held, at which the bribery occurred. In other words, the occasion or purpose of the investigation must appear, and it must be shown to have been one authorized by law; and how shall we know the lawfulness of the purpose unless the facts are stated?

The indictment says the purpose was to investigate "the charges of corruption," which is too indefinite. The resolution, which is to be read as if a part of the indictment, makes the charge more specific—that of "bribery at an election for a sealer of weights," etc. Was there any such election authorized under the law? If so, before whom, etc.

These inquiries are important, because we must know whether or not the matters about which the witnesses had been interrogated could be made the subject of a lawful investigation.

Other defects fatal to the indictment are urged by counsel, but those mentioned are sufficient to indicate the correctness of the ruling below.

Judgment affirmed.

COMMONWEALTH v. PETTY.

(Filed January 22, 1895.)

License—Sale of patent right—Constitutional law—The act requiring persons selling or offering to sell patent rights or territory for the use, manufacture and sale of patent rights to first pay a license tax before making such sale is unconstitutional and void. The State has no right to regulate in any manner the right to make such sale, congress alone having control of the subject-matter.

W. J. Hendrick for appellant.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Paynter.

The grand jury of Christian county returned an indictment against the appellee, Ebenezer Petty, charging that he did unlawfully sell and offer for sale the patent right to make and use a certain machine or contrivance called a post and pile driver, and did sell territory for the use, sale and manufacture of the post and pile driver without first having obtained a license as required by law, and that at the time he was an itinerant person selling and offering to sell the patent right and territory as stated.

This indictment is under the statute which imposes a penalty on all itinerant persons who vend patent rights or territory for the sale, use or manufacture of patent rights without procuring and paying for a license authorizing such sale. The law fixes the fee for the license that shall be paid.

The appeal is taken from a judgment of the court below sustaining a demurrer to and dismissing the indictment.

The sole question is as to the validity of the statute which requires a patentee or his vendee or assignee to first procure and pay for a license before he is authorized to vend his patent right or territory for the sale, use or manufacture of his patent rights.

This statute in effect declares unlawful the sale of any patent right, or the sale of any part of the territory which is covered by such patent right, to any one unless the vendor first procure from the officials as provided in the statute a license authorizing the sale.

The eighth clause of section 8, article 8 of the Constitution of the United States confers authority upon Congress "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The power thus given to Congress has been exercised by it since the organization of the government. Statutes have been enacted relating to the subject, and the provisions thereof fully prescribes the circumstances and the manner of the issual of patents; how they may be transferred and the character and extent of the rights which they confer on the patentee or his vendee or assignees. The moment the patent is granted the rights of the patentee are complete. Even his property rights can not be destroyed or impaired by Congress subsequently repealing the law which authorized the granting of it. (McClurg v. Kingsland, 1 Howard, 206.)

A patent right is not a tangible property. It is an incorporeal right. The patent secures to the patentee the exclusive right in the discovery.

The Supreme Court, in the case of Patterson v. Kentucky, 97 U. S., 501, said: "The right of property in the physical substance, which is the fruit of the discovery, is, although distinct from the right in the discovery itself, just as the property in the instruments or plates by which copies of a map are multiplied is distinct from the copyright of the map itself." (Stephens v. Cady, 14 How., 528; Stevens v. Gladding, &c., 17 Id., 447.)

The incorporeal right, or the right in the discovery, Congress has full and complete authority to secure to the inventor and protect him in its enjoyment and against all interference.

Justice Field, in delivering the opinion of the Supreme Court of the United States in Webber v. Virginia, 103 U. S., 344, said: "It is only the right to the invention or discovery—the incorporeal right—which the State can not interfere with."

It is proper that this authority should be exercised that the efforts of genius may be rewarded, thus stimulating and encouraging the production of useful inventions.

When the property is brought into existence by the application of the discovery, and is brought into or produced in the State, the use of it is not beyond the control of its legislation. The question as to the use of the property thus produced is not involved here.

In Gayler v. Wilder, 10 How., 494, Taney, chief justice, said: "The monopoly granted to the patentee is for one entire thing; it is the exclusive right of making, using and vending to others to be used the improvement he has invented, and for which the patent is granted. The monopoly did not exist at common law, and the right, therefore, which may be exercised under it can not be regulated by rules of the common law. It is created by the act of Congress."

In Illinois a statute required vendors of patent rights to procure a certificate from the county clerk, and provided further that every note given for a patent right should contain words "given for a patent right," and that such obligation should be subject to all defenses as if owned by the payee.

The Supreme Court of Illinois, in the case of Hollida v. Hunt, 70 Ill., 109, 22 American Reports, 63, held that the law was unconstitutional because it was an attempt to regulate and control by enactments of the legislature of Illinois a matter of which Congress had sole jurisdiction.

Part of the Illinois statute was similar to the one in question. It was an effort to regulate or control the sale of a patent right by first requiring a permission from the county clerk.

In Cranson v. Smith, 26 American Reports, 516, the Supreme Court of Michigan decided that a statute of that State requiring obligations given for patent rights to contain words "given for a patent right" and making them subject to defenses in the hand of innocent holders, the same as in the hand of the original payee, was an unconstitutional interference with the prerogative of Congress and void.

The court said: "When any right or privilege is subject to the regulation of Congress, it is not competent for State laws to impose any conditions which shall interfere with the rights or diminish their value. In those cases where the congressional power is lawfully exercised it is supreme."

Patterson v. Commonwealth, 11 Bush, 311, arose under a statute prohibiting the sale within the State of all illuminating oils which did not ignite at a certain named temperature, and imposing a fine for its violation. The same act imposed a penalty on all who should sell such fluid after it had been condemned by the State inpector, and the barrels or packages were branded by him "unsafe for illuminating purposes."

The defendant was selling an oil which had been condemned by the inspector. The court held that the legislation was within the jurisdiction of the State, and that when the article is made by reason of the application of the principle discovered, and is sold or attempted to be sold or used within the jurisdiction of the State, it is subject to its law the same as other property.

Judge Pryor, delivering the opinion of the court, said: "There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent.

"A State has no power to say, through its legislature, that the patentee shall not sell his patent, or that its use shall be common to all of its citizens, for this would be in direct conflict with the law of Congress, and that portion of the opinion referred to giving the patentee an unrestricted power to sell has

allusion alone to his right of property in the patent right, as that was the only question involved in the case. The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of Congress, and no State legislation can deprive him of this right; but when the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a State, it is subject to its laws like other property, and such has been the uniform decision of all the courts, State and Federal, upon this question."

This opinion most clearly states the distinction between the right of property in the patent and the right in the article which has been produced by the application of the principle discovered.

Patterson v. Commonwealth, supra, was appealed to the Supreme Court of the United Stats, and that court affirmed the judgment.

National authority only can grant patents and regulate the sale of the right of the inventor in his discovery, and the manner of the disposition of such rights.

While the States have jurisdiction to legislate on the matter of the use or sale of the article which it brought into existence by virtue of the application of the patented process, it is an invasion of national authority for the legislature of a State to make a law which requires the patentee or his vendee to first procure and pay for a license to sell his right in his discovery—his intangible right—or the territory in which such right is granted. In so far as the statute attempts this it is in conflict with the law of Congress. If the legislature has authority to require the patentee or his assignees to procure and pay for this privilege, then there is no limit to the extent of such requirement. The legislature could fix the license fee so high that the patentee could not afford to pay it, as it might exceed the commercial value of his right. By this means the legislature of a State could utterly destroy the power which is in Congress by the Federal Constitution "to promote the progress of science and useful arts."

The right to protect the inventor is necessarily with the authority which constitutionally and lawfully granted such right.

It was said by Marshall, chief justice, in McCulloch v. the State of Maryland, 4 Wheat., 426:

"1st. That a power to create implies a power to preserve.

"2d. That a power to destroy if weilded by a different hand is hostile and incompatable with the power to create and preserve.

"3d. That when the repugnance exists, that authority which is supreme must control; not yield to that over which it is supreme."

For the foregoing reasons the judgment is affirmed.

Judge Grace not sitting.

COMMONWEALTH v. ROOT.

(Filed February 2, 1895.)

1. The term "election," used in the statute imposing a penalty for bribery at an election, refers to and includes elections by city councils and other legislative bodies, as well as elections by the people.

2. Indictment—Bribery—An indictment alleging that the defendant gave the bribe not to the party whose vote was to be influenced, but to his brother, is sufficient under the statute.

W. J. Hendrick for appellant.

Appeal from Jefferson Circuit Court, criminal division

Opinion of the court by Judge Lewis.

The indictment against appellee is for the offense of bribery charged to have been committed as follows: "The said O. C. Root, in said county of Jefferson, * * * at an election then and there about to be held under the Constitution and laws of Kentucky, in which election the office of president of the board of councilmen of the city of Louisville was to be held, and was held, and candidates for said office were to be voted for, and were voted for, at which said election L. T. Davidson and C. L. Nelson were candidates for said office, did then and there unlawfully, willfully and corruptly promise and agree and offer to one Edward Garvey the sum of$200 and a place on the police force of the city of Louisville if his brother, J. J. Garvey, who was then a councilmen for the Tenth ward of said city, and entitled to vote on the matter aforesaid, would vote for C. L. Nelson for said office aforesaid, which said promise, offer and proposition were conveyed to said J. J. Garvey by the said Ed. Garvey, and which said promise, agreement and offer was intended unlawfully and willfully and corruptly to influence and did influence and control the said Garvey in his vote in said election, and then and there to bribe him to do the same," etc.

If the particular offense charged is punishable it is so under chapter 41, Kentucky Statutes, title "Elections," and the parts thereof relating to it are as follows:

"Section 1586: Any person guilty of receiving a bribe for his vote at an election, or for services or influences in procuring a vote or votes at an election shall be fined from $50 to $500, and be excluded from office or suffrage."

"Bribe" or "Bribery" means any reward, benefit or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit or advantage.

"Section 1587: Whoever shall bribe another shall, on conviction, be fined from $50 to $100, or imprisonment from ten to twenty days, or both so fined and imprisoned, and be excluded from office and suffrage."

It will be observed that the offense charged is not a reward, benefit or advantage given or promised directly to J. J. Garvey, whose vote as councilman it was intended to influence or control; but the money and place on the force were offered and agreed to be given to his brother, Ed. Garvey. Nevertheless, plain lanugage of the statute makes the offense of bribing another complete if any reward, benefit or advantage is agreed or promised to be given another, at the instance of the person whose vote is intended to be influenced.

The indictment, though not charging in express terms that the reward, benefit and advantage was offered or promised to Ed. Garvey at the instance of J. J. Garvey, does charge it was done to influence and control and did influence and control the latter in his vote, which is equivalent to a statement it was done at his instance.

But it is contended, and, from the opinion of the judge of the lower court made part of the record, the demurrer seems to have been sustained upon the idea that the offense of bribery, provided against in chapter 41, has relation alone to an election by the people. If the scope of that chapter be thus restricted it results that a person may, without fear of punishment, influence and control by bribery the vote of any member of a city council

for there is not elsewhere in the statute any provision against offenses like that with which appellee is charged.

The term "an election" is not, according to its true meaning, necessarily confined to the process by which "the people" indicate their choice for officers, but may properly and appropriately be applied to the process by which members of city councils or other legislative bodies choose or elect officers.

The alternative thus presented in this case is between giving an arbitrary meaning to the phrase "an election," whereby an offense, extremely hurtful to society and getting to be alarmingly common, goes unpunished, and making a permissible and appropriate application of it, whereby the evident intention is carried out, and public policy is subserved; and no court should hesitate which to choose.

Section 1437 is, however, referred to for the purpose of showing the phrase was intended to have a restricted meaning, and is as follows: "Whenever in this chapter the word 'election,' or an equivalent expression, is used in reference to a State, district or municipal election, it shall be deemed to include the decision of questions submitted to the qualified voters as well as the choice of officers by them."

But it seems to us the purpose of that section was simply to provide for the same regulation and safeguards, when a question of local or general concern, such as taxation, local option and the like, is submitted to a vote of the people, as when they choose or elect officers, and instead of confining rather enlarges the meaning and application of the term election.

In our opinion it was error to sustain the demurrer to the indictment, and the judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. REESE.

(Filed February 2, 1895—Not to be reported.)

One can not bribe another at an election, within the meaning of the statute, when the office to be filled at such election had ceased to exist at the time of the commission of the alleged offense.

Under the charter for cities of the first class the office of "sealer of weights and measures" does not exist; therefore, one can not be convicted of the offense of bribing one to vote for a candidate at an election to be held for that office after the adoption of said charter.

W. J. Hendrick for appellant.

Appeal from Jefferson Circuit Court, criminal division.

Opinion of the court by Judge Lewis.

The indictment against appellee, J. Ed. Reese, charges that at an election about to be held by the general council of the city of Louisville for choosing a person to fill the office of "sealer of weights and measures," George W. Newman and Philip Hoffman being candidates, said Reese did then and there unlawfully, willfully and corruptly promise and agree and offer to pay one O. C. Root, a councilman from eleventh ward of said city, the sum of $200 if he (said Root) would vote for Philip Hoffman for said office aforesaid, which said promise, agreement and offer was intended unlawfully, willfully and corruptly to influence and

control the said Root in his vote in said election, and then and there to bribe him to do the same.

The demurrer to the indictment was sustained upon two grounds. But in the case of Commonwealth v. Root, page 494, this day decided by this court, it was held the statute did provide and authorize punishment for such an offense as this, and, consequently, the first ground for sustaining the demurrer is not tenable.

But it appears that by section 2755 of Kentucky Statutes the office of "inspector of weights and measures" was created, and, as a consequence, the office of "sealer of weights and measures" ceased to exist, and a candidate could not be legally voted for or elected by the general council of the city of Louisville; and if there was no office of the name mentioned in the indictment to be filled or candidate therefor to be voted for by said Root as councilmen, he could not, in meaning of the statute, be bribed to so vote.

The judgment is, therefore, affirmed.

COMMONWEALTH v. SCALLEY.

(Filed February 2, 1895—Not to be reported.)

W. J. Hendrick for appellant.

Appeal from Jefferson Circuit Court, criminal division.

Opinion of the court by Judge Lewis.

Appellee, Scalley, was indicted for the same offense as that charged against J. Ed. Reese, and for the same reason given in the case on appeal of Commonwealth against him, this day decided by this court, demurrer to indictment was properly sustained by the lower court and the judgment is affirmed.

ARMSTRONG v. COMMONWEALTH.

(Filed February 6, 1895—Not to be reported.)

1. An allegation in an indictment that the offense was committed "in the county and circuit aforesaid" sufficiently sets out the county where the offense was committed, since a person of ordinary intelligence would not fail to understand where the language used intended to allege the crime was committed.

2. Criminal law conspiracy—Evidence—On a separate trial of one of several persons indicted as conspirators, a witness for the Commonwealth on cross-examination admitted that he had made an affidavit stating that his testimony before the grand jury in the case was false. On re-examination by the Commonwealth the witness was permitted to explain that he made such affidavit because one of the alleged conspirators (not in defendant's presence) had threatened to kill him if he testified as a witness for the Commonwealth. Held—While the rule is that what was done by one member of a conspiracy, after the accomplishment of its purpose, is incompetent against the other conspirators, yet the witness had a right to thus explain his reason for making the affidavit which he admitted to be false.

3. Same—Testimony that another one of the alleged conspirators was at home in bed the day after the night on which the alleged crime was committed was competent against defendant, as it tended to prove the presence of such conspirator at the commission of the offense on the night before.

W. W. Vaughn for appellant.

W. J. Hendrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Lewis.

In the indictment under which appellant was separately tried and convicted, he and others are charged with the offense of arson, committed as follows: "Said defendants, James Collins, Manford Armstrong, Rufus Armstrong, Robert Jordan, Nancy Ann Collins and Martha Jordan, on November 8, 1894, in the county and circuit aforesaid, did unlawfully conspire and confederate together, for the purpose of burning the dwelling house of Reuben McGuire, and while said banding, conspiring and confederating existed the said defendants did unlawfully, willfully and feloniously set fire to and burn the dwelling house of said Reuben McGuire, against the peace and dignity of the Commonwealth of Kentucky."

One ground for reversal urged is that the indictment does not charge in what county the offense was committed. The Criminal Code requries an indictment to be direct and certain as regards the county in which the offense is committed; but no formal language need be used, it being sufficient to indicate the county so directly and certainly as to leave no reasonable doubt on that subject. In the indictment under consideration the county and circuit where the conspiracy was formed to commit the offense are stated, and a person of ordinary intelligence would naturally understand the offense was charged to have been committed in Breathitt county. Indeed such is the proper interpretation and meaning of the language used.

The next error complained of is that Sam Collins, a witness for the Commonwealth, was permitted, over defendants' objection, to testify that his mother, one of the alleged conspirators, and her brother had threatened to kill him if he testified as a witness for the Commonwealth. He, as stated by him, went with those indicted to the house of McGuire at night, and aided in stealing meat therefrom; and after they had gone some distance away two of them, Rufus Armstrong and defendant, Manford Armstrong, said they were going back for the purpose of burning the house, and did go in that direction; but upon cross-examination by defendant the witness, a boy about fifteen years old, admitted he had made an affidavit, in substance, that his previous testimony before the grand jury, implicating Rufus and Manford Armstrong in the offense of arson, was untrue; and further, that he did not know who stole the meat. And thereupon the Commonwealth interrogated him, and he was permitted by the court to state his mother and another made the threat mentioned.

The general rule is that "evidence of what was said and done by other conspirators must be limited to their acts and declarations made and done while the conspiracy was pending and in furtherance of the design; what was said or done by them before or afterwards not being within the principle of admissibility."

And, accordingly, the Commonwealth would not have been permitted to show by the witness, as evidence in chief, that his mother, indicted as one of the conspirators, made the threat in question; but after defendant had thus, on cross-examination, impeached him, the witness had a right to explain, and it was competent for the Commonwealth to show by him why the false affidavit was made; and if, in the course of such investigation,

the fact of the threat by his mother was necessarily or incidentally developed, defendant can not fairly complain.

The court permitted a witness to testify that he saw James Collins, one of the alleged conspirators, at home the next day after the house was burned in bed asleep; from which circumstance it might be inferred he was present when the crime was committed the night before. Appellant was also at the house of Collins on that occasion, but whether his presence makes evidence of the fact Collins was in bed asleep competent against him, if not otherwise so, we need not consider, because, in our opinion, the conspiracy having been shown, the Commonwealth had the right to prove the fact in question.

Strictly the conspiracy was not then pending, nor could the fact of Collins going to bed at that time of day be regarded as in furtherance of the original design, but it was a circumstance tending to show he was present when the house was burned, and, therefore, fit to be proved, just as it would have been proper to prove he went to bed on account of a gunshot wound if McGuire had fired at the conspirators in the act of burning his house.

It is also objected that the Commonwealth was permitted to prove by the wife of Rufus Armstrong that he was at time of the trial, a fugitive from justice. That evidence was incompetent. But as the witness stated he was hiding to avoid answering for the crime of bigamy, not for arson, appellant was not, it seems to us, substantially prejudiced.

In our opinion there was sufficient evidence of the conspiracy charged in this case to justify excluding testimony of those indicted jointly with appellant, and as there does not appear to have been error of law at the trial prejudicial to appellant's substantial rights, the judgment is affirmed.

YOUNG v. COMMONWEALTH.

(Filed February 8, 1895.)

One indicted for rape upon the body of an infant under twelve years of age is entitled to have the law applicable to all the degrees of the offense, to which the evidence may be applicable, given to the jury.

Therefore, on the trial for such offense, where the jury from the evidence, or at least without doing violence to it, might infer that the offense charged was committed with the nominal consent of the victim, an instruction giving the law relating to unlawful carnal knowledge of an infant under the age of twelve years ought to be given.

Walter Darby for appellant.

W. J. Hendrick for appellee.

Appeal from Jefferson Circuit Court, criminal division.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted of the crime of rape, committed on the body of an infant under twelve years of age, and his punishment fixed at death.

He was living in the family of his victim's parents on Green street, in Louisville, and in their absence from home committed the crime, which, however, was kept a secret by the little girl until her mother discovered her injured parts several days there-

after. She then told who injured her, only after being threatened with punishment, and we may infer she had made no disclosure before that because of the threat of the appellant, after the crime had been committed, that he would kill her if she told anything. There was no outcry at the time, and the accused continued to live in the family.

The complaint of counsel, appointed by the court to defend the accused, is that the court failed to submit the whole law of the case to the jury.

After giving proper instructions on the subject of rape and attempted rape, it is contended that the law embraced in section 1155, Kentucky Statutes, should have been given. This reads as follows: "Whoever shall carnally know a female under the age of twelve years, or an idiot, shall be confined in the penitentiary not less than ten nor more than twenty years."

It is urged that as this court, in Bethel v. Commonwealth, 80 Ky., 526, held a defendant charged with rape to be entitled to have the jury instructed as to the whole law applicable to that offense and any of its degrees; and, as in Fenston v. Commonwealth, 82 Ky., 549, the offense described in the section quoted was held to be included in the higher crime of rape, therefore, the jury should have been instructed in accordance with the law on that section.

It is difficult to escape this reasoning, however much the nature of the crime might repel a dispassionate consideration of the claims of the offender. It does not, of course, follow that this law is applicable in all cases of rape. The facts of a given case may be so fully shown by testimony as to preclude its application. Just as in some homicides, the murder may be so completely established as to render it needless to instruct on the law of voluntary manslaughter.

In the case at hand, however, the jury, from the testimony, or at least without doing violence to it, might have inferred the existence of nominal consent at least on the part of the victim, and while the carnal knowledge with such consent is still a felony, it is not punishable with death.

Moreover, to commit a rape upon an adult female is punishable with confinement in the penitentiary for not less than ten nor more than twenty years, or by death, in the discretion of the jury. And so, we may suppose, the lawmakers intended a like discretion to be vested in juries in dealing with offenses such as we are considering.

Under the proof in this case there was no mere attempt at rape. The crime, by whomsoever committed, was complete, and so the instruction on that subject, while not improperly given, did not afford the jury the exercise of any discretion, or the opportunity to fix the punishment at less than confinement for life or death. The verdict was necessarily the one or the other under the law as given by the court.

Under the express terms of the section relied on, and the decisions of this court in the cases referred to, we are of opinion that the appellant is entitled to the benefit of the instruction indicated.

Judgment reversed, with directions to grant the accused a new trial, and for proceedings consistent herewith.

LEE v. SMYSER.

(Filed January 12, 1895.)

1. An order of attachment against a nonresident defendant, issued by mistake of the clerk of the court for too great a sum, is not void, and the plain-

tiff, by reason of such mistake, will not be denied his right to a lien on the property seized by the officer under the attachment, but the court in its order sustaining the attachment ought to correct the error.

The clerk by mistake in calculating the amount of a debt for $3,990.64, with interest from a certain date, issued the attachment for $81.84 too much. The court, in its order sustaining the attachment, corrected the error. Held—The mistake of the clerk did not render the order of attachment so erroneous as to deprive plaintiff of his right to a lien under it.

2. Same—Judgment against nonresidents—Bond—It is not erroneous to sustain an attachment against a nonresident defendant before the execution of the bond by plaintiff required by section 410 of the Civil Code. Such a bond must be executed before a final judgment or order of sale of the attached property against defendant, but not before an order sustaining an attachment.

Charles Carroll for appellant.

Fairleigh & Straus for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Grace.

This is an appeal by John A. Lee, who was defendant in the court below, in the suit of J. L. Smyser against him in the Bullitt Circuit Court, from an order of said court refusing to quash the attachment issued by the clerk of said court in said action, and is made upon the ground that said attachment, which issued for $4,700, was for a greater amount by $81.84 than was then due upon plaintiff's debt, as stated by him in his affidavit, or, rather, than the amount ascertained by calculation from the data given by plaintiff of his debt in his affidavit; said affidavit stating "that the amount due him and which he believed he ought to recover of defendant was the sum of $3,990.64, with interest on same from the 14th day of December, 1889, to that date," which was July 28, 1892.

It appears from the record in this cause that plaintiff's suit, with attachment, was filed in the Bullitt Circuit Court July 28, 1892, with warning order made against the defendant, Lee, to the November term of court, 1892, and that at that term of court and before the entry of the appearance in person by defendant the court made an order sustaining said attachment for the sum of $3,990.64, the amount named in plaintiff's attachment, with interest from the 28th of July, 1889, the time named in said attachment, thus of its own motion correcting any error that may have been made by the clerk in the amount for which the attachment was issued. The said defendant not appearing and entering his motion to quash said attachment until the following spring term of said court, we think the court below ruled correctly. It thereby said that a creditor who had a valid debt unpaid, and who was proceeding against a nonresident defendant, and whose proceedings were in all other respects valid, should not have his debt imperiled, or rather should not lose his lien secured on the property of his debtor, simply by an error of the clerk, a ministerial officer of the court, in making a calculation of the amount due plaintiff under his affidavit. This excess of the amount named in the attachment was by no fault error or misconduct of the plaintiff, but only an error of an officer of the court, and this, too, had been corrected by an order of the court made at a previous term of said court to the time of making the motion by defendant to correct same.

We think this case is widely different from those cases cited

by appellant, where the property of the debtor had been sold by the creditor on final execution and for a greater amount than was actually due at the time of the sale. In the latter case the property of the debtor would be wrongfully taken. Under the record in this case it can not be done.

Again, appellant complains of the ruling of the court below in entering an oder at the fall term of court sustaining the attachment, though for the correct amount, and in declaring that said creditor had a lien by reason of said attachment and the levy of same on an undivided third of certain real estate named in said levy; and complains that this order was made by the court before the filing by plaintiff in said court of the affidavit, required by the Code in such cases, that defendant has no personal estate subject to the payment of said debt.

On this question we think the court below also ruled correctly.

It will be observed that the order made by the court (before recited) was not the final order of sale of the defendant's property, and it is only the final judgment or order of sale of the realty of a nonresident that by the Code is forbidden before the filing of the affidavit that defendant has no personal estate. But in this case, and in the order complained of, the court refused to make this order of sale, but declared by same that it appearing to the court that the interest owned by defendant was only an undivided third interest in the land levied on, that the other owners should first be made parties before the sale would be ordered, and thus the case stands on the record.

The judgment of the court on both motions of appellant should be affirmed, and appellees are adjudged their costs in this appeal.

EVANS' ADM'R v. CLEAVER.

(Filed January 12, 1895—Not to be reported.)

1. Forcible detainer—Damages on traverse bond—Where it appears that the traverse bond was executed by the tenant March 10th, and that under a writ of restitution the landlord was restored to possession on March 28th, the latter can recover on the bond damages for the unlawful detention of possession for only eighteen days.

2. Same—Pleadings—Where the landlord in an action on a traverse bond alleges that he was deprived of possession for two years by reason of the execution of the bond, and defendants deny these allegations and aver that possession was restored to the landlord by writ of restitution eighteen days after the execution of the bond, the landlord must traverse the allegation of the answer as to the length of the unlawful detention, otherwise the answer is taken as confessed.

3. Same—Appeals—Where the face of the pleadings show that plaintiff is entitled to recover in damages an amount less than that of which this court has jurisdiction, his appeal must be dismissed, notwithstanding he claims damages for $200 in his petition.

Winfield Buckler for appellant.

Ross & Owens for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action is on a traverse bond to recover damages from the appellee, who was the surety of the tenant, for withholding the

possession by reason of the traverse. The appellant in his petition claims damages for the use of the land for two years—1891, 1892—at $75 a year.

It is alleged that the plaintiff was kept out of possession for that length of time by virtue of a supersedeas bond executed with a view of taking an appeal to this court from the verdict and judgment in the circuit court finding the inquest in the country to be true. The surety filed an answer, in which it is averred that the trial in the circuit court entitled the appellant to the possession, and that a writ of restitution issued and was placed in the hands of the sheriff, who, on the 28th of March, 1891, executed the writ by ousting the tenant and placing the appellant, Mrs. Evans, in the actual possession. This answer stands undenied, and the traverse bond having been executed on the 10th of March, 1891, and the possession restored on the 28th of March of the same year, the possession was withheld only eighteen days, and, therefore, the refusal of the court to instruct the jury that a recovery could be had for the use of the farm for either one or two years was not error.

Section 464 of the Code provides the mode of assessing the damages in such a case, or rather fixes the liability of the surety. He is liable for withholding the possession during the pendency of the traverse in either the circuit court or Court of Appeals, and the reasonable expenses of the traversee in defending the traverse. The appellant has recovered her attorney's fee and the value of the use of the land during the time the tenant held the possession. This is all she claims or seeks to recover. It was necessary to reply to the answer of the defendant. He not only negatived the averments of the petition as to the length of possession by the tenant after the execution of the bond, but pleaded as a defense that by a writ of restitution issued from the circuit court the tenant was turned out and the landlord placed in the actual possession.

The plaintiff being entitled to recover by her own concession less than the amount, giving to either court jurisdiction of the appeal, the appeal must be dismissed.

The claim for damages amounting to $200 will not give the jurisdiction if upon the face of the pleadings it clearly appears the amount in controversy is less than the amount, giving to the appellate court jurisdiction.

The appeal is, therefore, dismissed.

PELTIER v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 12, 1895—Not to be reported.)

1. It is an act of gross negligence for a railroad company to "kick" a car across a crowded thoroughfare of a city at which no watchman is stationed, with out sounding a bell or whistle or otherwise giving some danger signal.
2. The question of defendant's contributory neglect is for the jury, unless there is no uncertainty from the evidence that but for it the injury would not have occurred, and this is true whether the uncertainty arises from a conflict of evidence or because from the undisputed facts diverse conclusions could be reasonably drawn.

Gardner & Moxley, Barnett, Miller & Barnett for appellant.

Lyttleton Cook for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

At about nightfall on December 12, 1890, the appellant, while attempting to drive a covered wagon across the track of the appellee on First street, in Louisville, Ky., was run over and permanently injured by a passenger coach which had been "kicked" on to the street by an engine of the appellee.

This action was brought for damages, and upon the conclusion of the testimony for the plaintiff the court held that "the railroad company was guilty of negligence, but the plaintiff was estopped from complaining of that negligence when his own act contributed to his personal injury."

The negligence of the company consisted in the act of kicking in these cars across a crowded thoroughfare. There was no watchman to give warning of danger, and no whistle or bell used as danger signals.

Under somewhat similar circumstances this court has held the offending company guilty of gross negligence. (K. & I. Bridge Co. v. Cecil, 14 Ky. Law Rep., 477; L. & N. R. R. Co. v. Morris, 14 Ky. Law Rep., 468; K. C. R. R. Co. v. Smith, 14 Ky. Law Rep., 458.)

The estoppel suggested by the learned judge arises, it is alleged, out of the fact that the appellant drove his horse and wagon along a road parallel to that of the railroad for some distance and ought to have seen the moving cars after they were kicked in, although they were unaccompanied by an engine or other noise usually accompanying moving cars.

It seems to us wholly improbable that these moving cars were running parallel with the appellant as he drove to the point of crossing. It seems more likely from the proof that they were kicked back after appellant had driven west from his starting point, rolled upon him comparatively noiselessly, and unobserved by him at the time he was driving along the road, and when he attempted to cross. Be this as it may, it is far from certain, according to the proof, that the appellee so far contributed to the injury by his own negligence that but for it the injury would not have occurred. The question of contriubtory negligence is one for the jury, unless there is no uncertainty as to its existence in such form as to preclude recovery; and this is true, whether the uncertainty arises from a conflict of testimony, or because from the undisputed facts diverse conclusions could be reasonably drawn. Our own deductions from the proof differ materially from those of the learned judge below, but in view of the uncertainty it is not the province of that court nor of this to determine the existence or nonexistence of negligence on the part of the appellant, but it is the province of the jury.

As said in Wright v. C., N. O. & T. P. Ry. Co., 93 Ky., — (14 Ky. Law Rep., 778), "where there is any uncertainty as to the facts establishing negligence, such as if found to exist would bar a recovery, it becomes a question for the jury."

Reversed for proceedings consistent with this opinion.

SEBASTIAN, &c. v. KEETON, &c.

(Filed January 12, 1895—Not to be reported.)

Judicial sales—Boundary—Laches—At a sale to pay a decedent's debts the purchaser agreed to pay the debts for the entire tract of land, less thirty-two

acres to be stricken off the northwest boundary. Appellees claim under the purchaser, to whom a commissioner's deed was made. More than fifteen years after the sale and ten years after the execution of the deed, the decedent's descendants, in this action of ejectment, claim that appellees are in possession of the entire tract, including the thirty-two acres. Held—It clearly appears that at the time of sale all parties believed that the boundary of the tract of decedent was so located as to leave the thirty-two acres outside of the land held by defendants and their vendors, and there is much evidence to show that such is the true boundary. It would, therefore, be unjust at this day to dispossess innocent purchasers in order to correct the mistake, if any was made, as to the boundary.

John W. Howard for appellants.

John P. Salyers for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Chief Justice Pryor.

The ancestor of the appellant, W. S. Sebastian, died many years since, the owner of a tract of land, the greater portion of which was sold under a judgment in equity for the payment of debts, the personal estate being insufficient for that purpose.

The sale was made on the petition of his executor, and the appellants, his heirs and devisees, made defendants. The commissioner was directed to sell so much of the tract of land as would satisfy the claims of creditors, the amount having been first ascertained.

The commissioner making the sale reported that the entire tract was sold, less 32 acres to be stricken off of the northwest boundary of the tract.

The report of sale was confirmed, and a deed made to the purchaser or his vendee, and the parties placed in possession, and since that date, which was in the year ——, the land has been sold to others, the title and possession being now in the appellees. The appellants instituted this action of ejectment against Mrs. Keeton, the present owner, claiming that she had possession of the entire tract, including the 32 acres, and sought to recover the possession. The case, upon an answer filed by the appellees, went to the equity docket, and if the appellants are entitled to the 32 acres, a division should be directed and that much of the land allotted to the appellants.

It is apparent, however, from the facts before us, that when this tract of land was sold it was understood the line or the northwest boundary of the tract was with or on what is called Joe Bailey's branch, and the purchaser agreed to pay the debts for the boundary up to that line, less the 32 acres. The fact is well established that Sebastian, in his lifetime, claimed to the boundary, as contended by the appellees, and there is no satisfactory proof that such is not now the real line; but whether so or not the purchaser looked to the line on Bailey's branch as that of the tract he purchased, and regarding that as the line, there was more than the 32 acres left of the tract, and to which the appellees are entitled; or, if not, the purchaser bought in that way, and it is now too late, after the lapse of more than fifteen years from the purchase, and more than ten years from the execution of the deed, to correct a mistake that would deprive innocent parties or purchasers under the judgment of a title made under the judgment of a court of competent jurisdiction, and with all the parties interested defendants to the action.

If the chancellor, however, was disposed to fix the line or boundary of the Sebastian tract, there is much testimony conducing to show that the boundary claimed by the appellees is the true one.

It is argued that the appellee, or those from whom she derived title, had this land surveyed without an order of court, and failed to follow the terms of the judgment as originally rendered, or the report of sale made by the commissioner, and while this irregularity may appear as to the survey, yet the chancellor directed this deed made in pursuance of the sale and the questions to be settled are, first, where is the true boundary line of the Sebastian deed? and if it is fixed as contended for by the appellant, the appellees having agreed to pay the debt of the intestate for the tract of land, less 32 acres, upon the belief that the boundary claimed by Sebastian was the true boundary, the question again arises, who is to suffer, if any mistake exists, the vendee of the land, who acted in good faith, or these appellants? It is plain, it seems to us, that the purchaser at the decretal sale obtained only the land he purchased and no more.

It is said that the charge of fraud against those obtaining the deed had been made in the reply to the defendants' answer, and after the cause had been submitted the order of submission was set aside that the averment of fraud might be traversed upon the record and then resubmitted over the objection of the appellants without giving them time to prove the fraud. In answer to this it is said by the appellees that the reply of the appellants was filed in the clerk's office without notice, and if not the case was ready for trial, and there was no abuse of discretion in ordering the case heard. The case had been pending for some time. The evidence was all of record. The fact of the sale of the land was not controverted, or the manner of the sale. The purchase money was paid, and there existed no reason for withholding a deed from the purchaser.

The judgment below is affirmed.

SWART, &c. v. REVEAL.

(Filed January 12, 1895—Not to be reported.)

1. A cause of action for use and occupation of land upon the death of the owner survives to his personal representative; the devisees or heirs can not maintain the action.
2. An action to recover damages for an injury done to land must be brought in the county where the land lies.
3. A personal representative, when indebted to the decedent, must charge himself with the amount of the indebtedness in the settlement of his accounts.

Winfield Buckler for appellants.

J. J. Osborne and Hanson Kennedy for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Paynter.

From the petition in this case it appears that George Swart was a citizen of Robertson county, in this State, and died testate in that county on the 14h day of March, 1891, the owner of a tract of land situated therein, containing 150 acres, which he devised to the appellants.

It is alleged in the petition that before the death of Swart, to wit, on the 15th day of April, 1889, appellee, while Swart was the owner and in possession of the land, without right entered upon

and took possession of it, held, used and cultivated it until the 18th of March, 1892; that the use and occupation of the land during that time was worth $600, and by reason of the entry and occupation of the land appellants were damaged in that sum, appellants seek to recover that amount of appellee.

Appellee entered a motion to make the petition more specific. The court overruled the motion. Thereupon the appellee filed a demurrer to so much of the petition as sought a recovery from the date of the entry until the death of George Swart, March 14, 1891. The court sustained the demurrer. Appellants filed an amended petition, alleging that the appellee, on the 18th of March, 1891, as appointed by the Robertson County Court administrator, with the will annexed, of the estate of George Swart, deceased. To this amended petition a demurrer was sustained.

Appellee filed an answer to so much of the petition as sought a recovery or the use and occupation of the land from the time of the death of Swart until March 18, 1892. On motion of appellants, all claim against appellee for use and occupation of the land from the 14th of March, 1891, was withdrawn. The appellants failing to plead further, their petition was dismissed. The question to be determined is, did the court err in sustaining the demurrer to the petition? This involves the question as to the right of appellants to recover for appellee's entry upon the land and for the use and occupation thereof during the lifetime of the testator. Appellants do not claim that the entry of appellee upon the land, and his use and occupation thereof, injured it.

This action was brought in the Nicholas Circuit Court, and had the action been for an injury to the land, or so intended to be, it would have been brought in Robertson county, where the land is situated. The venue of such an action would have been there. This is an action for the use and occupation of the land. For such use and occupation appellee is liable to the personal representative of the decedent, and the right of action survives to the personal representative and not the devisees.

By filing the amended petition, in which it is simply charged that the appellee is the administrator, with the will annexed, of the estate of George Swart, deceased, and from the contention in his brief, counsel for appellant is under the impression that no relief can be had for such use and occupation of the land by appellee, because he is the personal representative of the estate, unless it is obtained by this action.

If, as a matter of fact, appellee owed the estate anything for the use and occupation of the land, then it is his duty to charge himself as personal representative therewith in the settlement of the estate. If he fails to do this, by appropriate proceedings he can be charged therewith.

In other words, for the use and occupation of the land by appellee in the lifetime of decedent, the value thereof is of the assets of the estate.

Had this action been for an injury to the land, or for cutting and carrying away timber from the land, the right of action would not have been in the appellants but in the personal representative. Such an action survives to the personal representative under a statute of the Commonwealth. (Chapter 10, General Statutes.)

The court did not err in sustaining the demurrer.

The judgment is affirmed.

CITIZENS SAVINGS BANK v. HAYES, &c.

(Filed January 12, 1895.)

1. It is not necessary to protest an inland bill for nonpayment in order to hold the drawer and endorser liable, but the parties to the bill are entitled to some notice of nonpayment.
A notary's protest for nonpayment of an inland bill is not evidence of nonpayment against the drawer and endorser.
2. A notice of nonpayment of a bill given to one member of a firm is notice to the firm.
3. A cashier of a bank, by which an inland bill is held and protested for nonpayment, is presumed to have notice of such nonpayment, where he is a member of the partnership that drew the bill, and notice to him is notice to the firm, so that all the partners are bound thereby.
4. Case—A cashier of a bank and H. were partners, doing business in the individual name of H. They drew an inland bill made by and payable to H. (for benefit of firm), which was discounted at the bank and was not paid at maturity. No notice of nonpayment was given to H. Held—The cashier must be charged with notice of the nonpayment, and notice to him also binds H., his partner.

R. S. Todd for appellant.

Powers & Atchison for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

The Citizens Savings Bank of Owensboro, Ky., discounted a bill of exchange for $545.35, dated February 21, 1890, and due in six months, drawn by J. D. Hays on Samuel B. Howard, who accepted the paper and endorsed by Hays, to whom the bill was made payable. On the 24th of September, 1890, one month after the paper had matured, it was protested by W. H. Moore, a notary public, and at the time cashier of the bank. The bank instituted its action on the bill against Howard, the acceptor, and Hays, the drawer, obtained judgment against Howard, but Hays defended upon the ground that no notice had been given of the dishonor of the paper, the only evidence of that fact being the protest exhibited with the petition and dated one month after the maturity of the bill.

It is contended by the appellant, a demurrer having been sustained to the petition, that as the paper is a domestic or inland bill, it was not required that it should be protested for nonpayment, and while we concur in this view of the case it is plain the drawer was entitled to notice of the nonpayment of the paper, and there being no diligence on the part of the bank, or at least nothing upon the face of the original petition that would excuse this want of diligence, a demurrer, if it had been filed in time, should have been sustained to that pleading. The appellant, the bank, amended its petition, and the court below sustaining a demurrer to the petition as amended, the sole inquiry here is, did the petition as amended present a cause of action?

It is alleged in the amended petition that the defendant, Hays, the drawer of the bill, was the agent of the mutual Life Ins. Co., and that company, under an agreement with him, allowed as compensation 65 per cent. on the amount of the first premium paid on each life policy solicited and secured by him. It is then alleged that Moore, the cashier of the plaintiff, formed a partnership with Hays, by which the two were to solicit patronage

for their principal, or for the company, of which Hays was the agent, and divide the profits; that they were to pay the discount on acceptances taken for first premiums, and divide the brokerage earned in the business equally between them, the business to be conducted in the name of J. S. Hays alone, as he was the commissioned agent.

It is further averred that where a life policy was about to be issued, and the party unable to pay the premium, the two, Moore and Hays, would take the acceptances of the parties and discount the paper, and when paying the discount divide the commission between them; that they procured Howard to obtain a policy, the cash premium being the amount of the bill in controversy, and for the payment of which the bill was accepted by Howard and discounted by Hays, who divided the commission with Moore.

Moore is made a defendant by this amended petition, and sought to be made liable with Hays on this paper on the ground that its endorsement by Hays was in execution of the joint business, and although in his individual name was done in pursuance of an agreement that the business should be conducted in that manner.

The facts appearing in the amended petition, if true, and must be so regarded on demurrer, it is plain to us that Moore and Hays are liable on this bill, and as Moore was the cashier of the bank at the time the bill was discounted and when it matured, the law will presume he had notice at once of the nonpayment. A notice of dishonor, says Mr. Daniel in his work on Negotiable Instruments, "to any one partner is notice to the firm." (Section 999.)

The bank, if the facts alleged are established, must have relied on Moore, the partner of Hays, to take such steps as would hold the parties to the bill bound for its payment, and, under the impression that a protest would be evidence sufficient to charge the endorser, had the paper protested one month after it became due; and while as to mere inland or domestic bills the protest could not be regarded as evidence, even if protested at the proper time, still the drawer and endorser were entitled to notice, and Moore being cashier of the bank, it was his duty to give it; but Moore himself being the drawer of the paper as well as Hays, and interested as a partner in the business of soliciting premiums, and authorized to discount paper for the two in the name of J. S. Hays, there was no reason for a notice, as Moore knew the date the paper matured and the fact of its nonpayment.

The petition as amended presented a cause of action, and the demurrer should have been overruled.

Reversed and remanded that this may be done.

MEYER v. ZOTEL'S AD'MR.

(Filed January 12, 1895.)

1. An allegation of an "agreement and promise by defendant to pay plaintiff a pre-existing debt that never was discharged" is insufficient to maintain a cause of action. To recover on a promise to pay a pre-existing debt, plaintiff must allege facts showing a consideration for such promise. If the pre-existing debt was valid and enforcible when the promise to pay it was made, then the action must be brought on the original liability. But if no action can be maintained on the original liability, then to recover on a promise to pay it plaintiff should allege every fact essential to a recovery on the original debt and also the subsequent promise to pay.

2. An action by a creditor to settle the estate of a decedent can not be maintained unless the petition alleges a valid claim against decedent and also sets out the amount of decedent's debts and the nature and value of his estate, or states a valid reason for a failure to allege these facts.

J. Creutz for appellant.

L. J. Crawford for appellee.

Appeal from Campbell Circut Court.

Opinion of the court by Judge Paynter.

The appellant filed his petition in equity against the administrator of Mathias Zotel, deceased, and the unknown heirs and creditors of the decedent, by which he sought to receive of the estate of Mathias Zotel, deceased, the sum of $457, alleging that his cause of action was on "an agreement and promise of said M. Zotel to plaintiff to pay a pre-existing debt that never was discharged."

He further alleges that the personalty is insufficient to pay all the debts for which the estate is liable; that decedent left a certain parcel of real estate, situate in Campbell county, Ky., and that the administrator had failed to institute a suit to settle the estate. He concludes with a prayer for a judgment against the estate for $457, for an allowance to his attorney as a fee for bringing the suit for a settlement of the estate, and for a sale of the real estate left by decedent to pay the debts of the estate.

The administrator filed a general demurrer to the petition, which was overruled. The demurrer should have been sustained.

The petition states no cause of action against the estate. Appellant could not maintain an action on a promise to pay a pre-existing debt unless he alleged a state of facts which would show a consideration to uphold the promise. If the alleged pre-existing debt was a valid one against the decedent, and was enforcible when the promise was made, then the action could only be maintained on the original liability.

If the statute of limitation had intervened and no action could have been maintained on the original liability, then an action could be maintained on the promise to pay the debt. If the debtor had received a discharge in bankruptcy when the promise to pay the debt was made, a cause of action would exist. (Ogden v. Redd, 13 Bush, 581; Gilman v. Green, 14 Bush, 772.)

No facts are alleged from which the court can determine whether or not there was any moral or legal liability on the decedent to pay appellant the amount claimed for which the alleged promise was made.

When the action can not be maintained on the original liability, and a creditor seeks to recover on a promise to pay the debt, the petition should allege ever fact essential to a recovery on the original liability, and in addition thereto the promise to pay; all of which appellant failed to do except the promise to pay.

Had the appellant stated facts to show he had a valid claim against the estate, the petition was insufficient in this, that it failed to state the amount of the debts or the nature or value of the real or personal property of the decedent, and to give any reason for not doing so. The demurrer should have been sustained for this failure.

To enable a creditor to maintain an action to settle a decedent's estate he must state facts which show he has a valid demand against the estate as well as the facts required by section

429, Civil Code of Practice. Neither party moved that the case be referred to a commission, and the court made no such order. Appellant took a deposition to sustain his claim. On his motion the cause was submitted. Upon the hearing the court dismissed his petition.

Judgment affirmed.

LOGAN v. COMMONWEALTH.

(Filed February 9, 1895—Not to be reported.)

1. Malicious shooting at without wounding—Evidence—Where the evidence shows that the crime was committed in the nighttime by parties who were at a tree where the chickens of the prosecuting witness were roosting, statements of witnesses conducing to show that defendant, a short time before that night, was seen wearing a hat found next morning under the tree, were competent against accused.

2. Same—Where it appeared from the evidence that the prosecuting witness shot at the persons who were under the tree and shooting at him, and that accused was seen next morning before daylight limping and wounded with small shot, evidence of the account he then gave as to the manner in which he received his injuries, was competent to contradict statements made by him on the witness stand.

W. H. Miller for appellant.

Wm. J. Hendrick for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Ike Logan, was indicted, tried, convicted and sentenced in the Lincoln Circuit Court to the penitentiary on the charge of maliciously and willfully shooting at Wm. Ammons with a gun or pistol with the intention of killing him, but without wounding him. The indictment is sufficient. Every essential fact to constitute the offense under the statute was alleged. The evidence in the case conducing to prove the guilt of the accused is entirely circumstantial.

It appears from the record that on the night of July 14, 1894, at 2 o'clock, William Ammons was awakened by the barking of his dog, which was soon followed by the squalling of his chickens which were roosting in an apple tree back of his house. He arose, went out with his gun, and as he got behind his house some one commenced shooting at him from the apple tree. There were two persons, and Ammons was under the impression that both shot at him from the flash of the shots. Ammons returned the fire with a shotgun loaded with shot. The next morning a hat was found under the apple tree, and there was the testimony of two witnesses conducing to show that they had seen the accused wearing it a short time before the shooting took place. The accused was seen the next morning in Stanford, just after daylight, and he was limping. Being asked what was the matter, replied that he had fallen off a train. The testimony for the Commonwealth tended to show that he had made contradictory statements as to how he received his injury. The testimony showed that he had been wounded with small shot. Some other facts were proven tending to show the guilt of the accused. He

introduced himself as a witness, as well as others, with the view of showing that he was not guilty of the charge.

The jury heard all the evidence, were the judges of its credibility and weight, found the accused guilty, and we will not disturb their verdict. The court gave the jury all the instructions which were necessary. There were no questions raised by the evidence requiring instructions other than those given by the court. It is, however, insisted that it was an error prejudicial to the rights of the accused to have allowed the witnesses who gave testimnoy conducing to prove that the hat found under the apple tree the morning after the shooting belonged to the accused. We do not think it was an error to admit this testimony. It was the province of the jury to give such weight to it as the facts detailed entitled it. If the testimony convinced the jury that it was the hat of the accused it was a potential circumstance in the case conducing to connect the accused with the commission of the offense, unless he could account in a satisfactory way for its being there. The testimony of Samuel M. Owens was competent. The accused was endeavoring to account for his wounds by showing that he received them elsewhere than at Ammons', and were detailing the circumstances under which they were inflicted. The testimony of Owens was for the purpose of contradicting the accused by showing that he had accounted for them in a different way, on an occasion of a conversation with him. This testimony was proper in rebuttal. Upon consideration of the whole case the court is satisfied that the substantial rights of the accused have not been prejudiced thereby.

Judgment affirmed.

COMMONWEALTH v. DELANEY.

(Filed February 13, 1895—Not to be reported.)

1. Criminal law—Conspiracy to murder—Evidence—On the separate trial of appellee for murder, alleged to have been committed in pursuance of a conspiracy with others jointly indicted with him, evidence that some of the alleged conspirators, a week or ten days before the comimssion of the crime, on several occasions were seen armed with pistols in and about appellee's place of business, was copmetent.

2. Same—Evidence that certain of the alleged conspirators on the night of the cirme went to the boarding house of another of the conspirators and had a conversation with him in a low tone, and that said conspirator left his boarding house, giving his keys to one at the house, was competent.

3. Same—Evidence that one of the conspirators handed to another of the alleged conspirators a pistol shortly after the commission of the offense, saying to him "here is your pistol," and evidence of the make and size of the pistol owned by the last-named conspirator, was competent.

4. Same—Evidence that appellee at the time of the commission of the offense was engaged to be married to a sister of one of his alleged co conspirators was competent under all the circumstances surrounding this case.

5. Same—Instructions—When any member of a party shoots and kills any member of another party, in pursuance of a conspiracy and common understanding formed to unlawfully assault, wound or kill with deadly weapons, all the members of such conspiracy are guilty of murder, whether the identity of the one firing the fatal shot can be fixed or not; and an instruction to that effect is proper.

6. Same—The relatives and friends of one who has been forcibly abducted have a right to associate themselves together to release him, and if such attempted release is resisted by the abductors they may use such force as is

necessary to accomplish the release. If, when the effort to make the rescue is being made the abductors, or any of them, fire upon the releasing party, the latter may make use of all necessary or apparently necessary means for their own defense, and if in using such means a person in the company of the abductors is accidentally shot and killed, then the rescuing party is excusable under the law for such killing.

7. Same—The court should not instruct the jury that they are not to try certain issues, as such instructions are misleading.

J. H. Powell and Wm. J. Hendrick for appellant.

E. W. Hines and Allen Hughes for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Grace.

This cause being under an indictment for conspiracy and murder against the defendant, Henry Delaney and others, in the Union Circuit Court, same being still pending in that court, a mistrial having heretofore resulted, the same is now brought here by the Commonwealth, seeking the opinion of this court upon some of the rulings and instructions given by the lower court, and, as now claimed, prejudicial to the rights and interests of the Commonwealth in the former trial, and wherein exceptions were duly taken at the time. (Delaney v. Commonwealth, 15 Ky. Law Rep., 797; Omer v. Commonwealth, Id., 694.)

On the trial the Commonwealth offered to prove by Dennis Onan, Albert Noe and others "that for a week or ten days before the Ollivers captured and carried away Henry Delaney, that said Henry Delaney, Geo. Delaney, Wm. Omer, Frank Holt and J. L. Tate, all persons embraced in the indictment, were seen, some of them around with pistols, on several occasions in and about Geo. Henry's drug store, that being the place where Henry Delaney was engaged in business."

The Commonwealth also offered to prove by Geo. Gill "that Frank Holt and other men came to his house about 1 o'clock on the night that Abbie Olliver was killed and knocked on Geo. Delaney's door and had with him a conversation in a low tone, and that Geo. Delaney left and gave him his keys and asked him to feed for him, and they all went in the direction of Sturgus."

The Commonwealth also having proved by Alex Thompson that on the night of the killing and soon after it happened "Albert Curits handed J. L. Tate a pistol, saying here is your pistol," then offered to prove by Thompson "that Tate owned a pistol, and the make and size of same," Carter and Tate being two of the parties embraced in said indictment.

The Commonwealth also offered to prove by Henry Delaney, on cross-examination, that at the time of his capture by the Ollivers and of the marriage he was then engaged to be married to Miss Tate; and to the proving of these several matters herein recited the defendant, by his counsel, objected, and the court sustained said objection and refused to permit the Commonwealth to prove said statements or either of them, and to which ruling the Commowealth excepted at the time.

Of the testimony in cases of conspiracy we may say generally that it is seldom possible to establish same by direct positive tstimony; that in the very nature of the case it must finally be but an inference of the jury, and can only be established by circumstantial testimony, often by isolated facts and particular cir-

cumstances gathered here and there along the line of the investigation from time to time and place to place, things done and said by the respective parties charged with such an offense, and that finaly it is only by a combination of the whole of same that the jury may be able to come to an intelligent and correct verdict, whereby they determined whether or not the conspiracy charged has been fully proven.

In our opinion the facts herein before recited, taken into connection with all other facts and circumstances given in evidence by the Commonwealth, were and are competent evidence to go to the jury on the trial of accused, Henry Delaney, under said charge, not that we intend to express any opinion as to the weight or sufficiency of said testimony, further than to say that it tended to establish the charge made by the Commonwealth, and was, therefore, competent.

On this same line we may now also notice the ruling of the court in refusing the following instruction asked by the Commonwealth, viz: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendants, Henry Delaney, George Delaney, Frank Holt, Wm. Holt, Albert Carter, Louis Land, Wm. Omer and J. L. Tate, or any of them, conspired or agreed together to arm themselves with guns, pistols or other deadly weapons for the purpose of unlawfully assaulting, wounding or killing Abbie Olliver, Taylor Olliver or Mrs. Olliver, or any of them, and if they further believe beyond a reasonable doubt that in pursuance of such conspiracy and agreement in furtherance of the common design and object, pistols and guns were discharged by all or any of the defendants, members of said conspiracy, in Union county at the time and place mentioned by the witness, whereby Abbie Olliver was shot and killed, then if the jury believe beyond a reasonable doubt that Henry Delaney was a party to such conspiracy and agreement, they will find him guilty of murder, whether the identity of the person killing Abbie Oliver is established or not, and fix the punishment of said defendant, Henry Delaney, as stated in the instructions."

It is sufficient to say of this instruction that there was evidence before the jury on the state of case submitted by same sufficient to authorize the same to be given to the jury. In this connection, however, we deem it proper to say that on the retrial of this cause and the giving of this instruction as indicated, it will be proper for the court to instruct the jury in behalf of said defendant, Henry Delaney, that he, the said Delaney, his brother and brother-in-law, and the others embraced in this indictment and charged with this conspiracy, had the right to associate themselves together and to agree and undertake the release of the said Henry Delaney from the forcible cutody and detention of Taylor Olliver and Mrs. Olliver, and that in such rescue or attempted rescue, recognizing the right of the defendant, Henry Delaney, to co-operate with his kinspeople and friends for said purpose, and that said parties, if restricted in said effort to so release and rescue Henry Delaney, might use, and the said Henry Delaney himself might use, such force as was necessary to accomplish same, and that if in such effort to so rescue him they or either of them were fired upon by Taylor Olliver or his wife, either or both of them, said parties or either of them might use such means as was necessary or apparently necessary for his own defense, and that if thereby and without intending to shoot or kill Abbie Olliver, she was, nevertheless, shot and killed by accident, then the party or parties would be excusable for said killing under the law. This is in conformity with the views of the law of the case as announced by this court on the appeal

to George Delaney from judgment of conviction against him under the same indictment. (Delaney v. Commonwealth, 15 Ky. Law Rep., 797.)

This court is further of opinion that instruction No. 3, as given by the court, viz., if a brother commit a crime another brother may lawfully keep him concealed and aid him to avoid prosecution, provided he does not release the brother from an officer or person, was error, and should, in any subsequent trial, be withheld. Same is not applicable to the charge contained in this indictment, and may have tended to confuse and mislead the jury, though, of course, not so intended.

Instruction No. 1, as given by the court, is also objectionable, and the following part of same should be omitted on another trial, viz: "The court instructs the jury that the question as to whether or not Henry Delaney was or not guilty of seducing Abbie Olliver, or as to whether or not Taylor Olliver and wife did wrong in forcing him to marry Abbie Olliver, are not questions for inquiry by this court or jury, but the sole question of inquiry is, did Henry Delaney shoot and kill Abbie Olliver?" Therefore, the remaining part of the instruction is in the usual form and unobjectionable.

This court has often held that the appropriate instructions in criminal cases is the submission of the state of fact to the jury, which, if believed by them to the exclusion of a reasonable doubt to be true, would authorize a verdict of guilty, to which it is necessary to indicate the punishment that may be inflicted, but that it is not proper for the court to point out, call attention to or emphasize any particular fact to the jury, or to indicate its importance or weight.

On this line we may add that it would be a still wider departure from the rule to indicate, as in this instruction, the several things that the jury were not to try.

Wherefore, for the reasons indicated, the ruling of the court on the points of evidence and on the insturctions as herein indicated are reversed, and this will be duly certified to said court.

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KENTUCKY COURT OF APPEALS.

THOMPSON, &c. v. THOMPSON, &c.

(Filed January 12, 1895—Not to be reported.)

Mortgage to securities, who paid debts of principal, void for uncertainty—The debtors of a decedent, who claim to have paid certain debts for him, set out in their pleading, will not be permitted to subject to payment of their debts land claimed as a homestead by his widow and children, on the ground that it is embraced in a mortgage executed by decedent to them ten years ago "in consideration and as security to them for the payment of my (decedent's) debts." The mortgage is void for uncertainty because it fails to name the debts paid by the mortgagees, or the amount of such debts or the names of the creditors. It is now too late to supply these defects by pleadings and evidence offered in court.

J. P. Thompson for appellants.

S. A. Russell for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Grace.

This is a suit by J. E. Thompson, administrator of C. W. Thompson, deceased, and some of the creditors of said decedent, to subject to the payment of their demands a small tract of land, a homestead owned and occupied by said decedent in his lifetime (worth less than $1,000) as against the protest of nine infant children of said decedent.

The claim of said creditors rests upon the sufficiency or insufficiency of the following paper, viz.:

"This deed of mortgage, made the 3d day of December, 1881, between C. W. Thompson and Mary E. Thompson, his wife, party of the first part, and J. H. Mattingly, G. G. Thompson and Thomas A. Thompson, party of the second part, witnesseth, that the party of the first part, in consideration of the matters here-

inafter stated, do hereby sell and convey to the party of the second part, their heirs and assigns, the following described property, viz.: One tract of land, the farm on which I now live, together with all my taxable property, homestead and dower included, to the said party of the second part, their heirs and assigns, in consideration and as security to them for the payment of my debts. The said C. W. Thompson, the party of the second part, to have the right to trade and sell all his produce and stock, as it may seem best to him to enable him to pay his debts and satisfy his creditors; to have and to hold the said described property unto the said party of the second part, their heirs and assigns, forever: Provided always, And these presents are upon the following conditions: That whereas, —— ——————. Now should the said party well and truly pay to the said parties of the second part said debt, together with all interests and costs which may accrue thereon, then this mortgage to be null and void; otherwise to be and remain in full force and effect. And said grantors especially waive and release all right or claim which they have which arises out of or is given by the exemption or homestead laws of Kentucky in and to the property hereby conveyed, and these covenants and conveyances are especially made a part of this mortgage, and said Mary F. Thompson hereby releases all right of dower in said property.

"In testimony whereof we have hereunto signed our names the day and year first above mentioned.

(Signed) "C. W. THOMPSON,
"MARY F. THOMPSON."

Which paper being set up and relied upon by the creditors, Jas. H. Mattingly, T. A. Thompson and others, by answers and amended answers, setting up in substance that they were securities for deceased, C. W. Thompson, to the Marion National Bank, of Lebanon, in the sum of $849.35, by note of date September 22, 1891, at four months; that this note grew out of a former indebtedness of said deceased, and by various renewals for a number of years finally amounted to said sum; that they had taken up said note. Said Mattingly and T. A. Thompson set up one other demand, saying they also became the sureties of said C. W. Thompson to one F. H. O'Bryan (now dead) for same amount (which they call on the administrator of said O'Bryan to state), said creditors saying said mortgage was given to secure them as sureties on this debt also.

To this answer and amended answer of said Mattingly and T. A. Thompson, the guardian ad litem of the nine infant defendants, children and heirs of said C. W. Thompson, deceased, filed his demurrers, and same were sustained by the court, and from that order or judgment the said creditors, having excepted, take this appeal.

We think the chancellor below ruled correctly; that said paper is materially defective and void for uncertainty, and especially in failing to name the debts outstanding and on which said Mattingly and T. A. Thompson were bound as such sureties, not naming either the creditor or creditors to whom they were bound, nor the amounts of any such debts nor any approximation of same. That these things should have appeared, with some reasonable degree of certainty on said mortgage, we think essential to its validity, and we feel disinclined, at this length of time after the making of said paper (ten years or more before suit filed) and after the death of the decedent, C. W. Thompson, to permit all these matters to be supplied by allegation and evidence outside and apart from said mortgage, and to subject the homestead to sale for the payment of any and all such debts as may then be established.

Wherefore, the judgment of the court below, in sustaining said demurrer to said claims, is affirmed.

This suit seems to be still pending in the court below, and some other minor matters of rent of the premises are still undetermined. Neither does the judgment of the court below nor the affirmance of same by this court prevent the sale of said homestead, subject, however, to the right of occupancy by the widow and infant heirs at law in the manner prescribed by law to the payment of any debts of testator that may finally be established before the court.

The appellees will recover of appellants their costs herein expended.

JAMES, &c. v. CARTER.

(Filed January 15, 1895.)

Navigable streams—Injury to dam by negligent floating of logs—One who has, in connection with his predecessors in the right, continuously, since 1836, maintained, as a matter of right, a dam across a stream which in its natural condition is capable of floating vessels, rafts, logs, etc., has thereby acquired a vested right to maintain it, which others using the stream as a highway to transport their commodities must recognize. Others must use the stream with care and due regard to the rights of the owner of the dam, and if by failing to do so they injure it, its owner may recover damages

The evidence showed that appellants injured appellee's dam by negligently permitting their logs to float against it, when they could not safely be turned adrift, or by dislodging them from the dam in a negligent manner, and in either event appellee was entitled to recover damages.

Husbands & Husbands for appellants.

Webb & Johnson for appellee.

Appeal from Graves Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

This was an action by the appellee against the appellants for damages growing out of the negligence of the latter in running their saw logs over and injuring the mill dam of the former, built across the West Fork of Clark's river, in Graves county.

It appears that the appellee's dam was erected in 1836, and has remained continuously since then in its present form, enabling the appellee and the former owner to operate a grist mill and carding machine, of great convenience to the public.

The proof conduces to show that the logs of the appellants were not tied up and held ready for setting them afloat when the freshet should be sufficient to float them over the dam, in accordance with the custom and the instructions of the appellee, or if so tied it was insecurely done, and they were prematurely cast afloat and lodged or hung on the dam. In pulling them loose with ox teams and ropes the dam was injured.

We assume from the proof, as it accords with the finding of the jury, that the appellants were guilty of negligence, either in not securing their logs until a time when they could safely be turned adrift, or in the manner in which they were dislodged from the dam.

The defense is that the stream is a navigable one in law under the facts established, and, therefore, the dam is a public nuis-

ance, and might be abated by those entitled to this outlet for their logs, or at any rate that the dam owner would not be entitled to protection or to damages for injury to the obstruction.

Conceding that the stream had been used by the public for many years in floating logs down its channel in high water to the market below, and was inherently capable of such use by reason of its size and natural condition, or, in other words, that it is practically a navigable stream, yet it seems to us at least manifest that the vested rights of the appellee, acquired by this long occupancy and originally it appears by condemnation proceedings in the county court, can not be disregarded by even those who are engaged in the lawful use of the stream. In other words, those lawfully using the stream as a highway for transporting their commodities to market must do so with care and due regard for those whose rights are at least of equal dignity with their own. In this way all may fully enjoy the benefits offered by this highway of nature.

The instructions to the jury properly submitted the question of negligence in turning the logs loose prematurely, or in dislodging them from the dam, which was the real issue in the case. The court also submitted the question of the navigability of the stream to the jury, but this was not prejudicial to the appellants.

If the jury answered that it was navigable, we have seen it did not relieve the appellants from responsibility; and if they answered that it was not a navigable stream, the rights of the appellants were the more restricted, and their liability the more certain.

In Goodwin's Ex'ors v. Ky. Lumber Co., 90 Ky., 625, it was held that if a stream in its natural condition is capable of being used for floating vessels, rafts, logs, etc., and has in fact been used for that purpose, the public has an easement in it, and one who uses the stream for floating logs is not liable for an injury resulting therefrom unless it was due to his negligence in handling the logs, or in placing them in the stream at a time when he might have anticipated the injury.

Judgment affirmed.

RUSSELL, &c. v. DURHAM, &c.

(Filed January 15, 1895—Not to be reported.)

1. Authority of coroner to execute summons—Where the return of a summons shows that it was executed by a coroner, it will be presumed that the sheriff was a party to or interested in the suit, or that the party in whose behalf it was issued requested it to be issued to the coroner, and that, therefore, he was authorized to execute it.

2. Where a coroner failed to sign his return of a summons officially, but came into court and asked permission to amend the return by signing it officially, instead of individually, his motion and offer will be treated as an actual amendment of the return, when the lower court did not permit him to so amend it.

W. J. Lisle and Samuel Avritt for appellants.

J. P. Thompson for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Lewis.

No defense was made to this action nor exception filed to report of sale of the mortgaged property, though it is recited in the

order of confirmation the parties were present in court; but at the next term of court after the sale was confirmed, and the purchaser had paid part of the purchase price, defendants and mortgagors first object to and seek to set aside the original judgment for sale of the property and all proceedings under it. Still it they were not legally summoned the judgment must be treated as void; and whether they were so summoned is the only question for us to decide.

It is first objected that the coroner was not, under the Civil Code, authorized to execute the summons, even if he had done so in due form. It is true the sheriff is the proper officer to execute a summons in such case; but the Code authorizes it to be directed to and executed by the coroner in a case either where the sheriff is a party to or has an interest in the action, or when the party in whose behalf it is issued requests it to be issued to him.

In our opinion the lower court was required to presume that one or the other of such conditions existed, and, consequently, the summons was properly directed to the coroner. But it appears that the coroner did not sign the return on the back of the summons officially, his individual name being merely affixed; but that defect was cured by motion of plaintiffs to permit the coroner to amend the return, who was present in court and offered to do so. For though the lower court did not permit the amendment, the motion and offer should be treated as if it had been done.

Judgment affirmed.

STEELE v. STEELE.

(Filed January 15, 1895.)

1. A wife may maintain an action for alimony, although the abandonment by the husband has not continued long enough to entitle her to a divorce.

2. Divorce—Pregnancy of wife at time of marriage—Evidence—The husband in this case married and cohabited with his wife after he knew she was pregnant, as she claimed by him, and after he had heard reports that she had been unchaste with other men, and had been requested by her father to investigate such reports. Having married her with all this knowledge of her previous lewdness, he can not claim a divorce therefor, or on the ground that through fraud by her he was deceived as to her bad conduct prior to marriage.

Wm. H. Holt for appellant.

Ewell & Smith for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

Nannie Steele brought this action against her husband, Craig Steele, for alimony for herself and infant child upon the ground of abandonment and refusal to support them.

His answer was made a counterclaim, in which he prayed for absolute divorce, because, as alleged, their marriage was brought about by fraud of plaintiff and her friends, she being at the time, without defendant's knowledge, pregnant by another man.

The lower court rendered judgment dismissing his counterclaim, and for $500 in her favor for alimony.

The evidence shows she was at the time pregnant, but he knew

it, and we are satisfied is the father of the child for whose benefit the judgment was in part rendered.

It appears that the father of plaintiff, when her condition was found out by him, had a personal interview with Craig Steele and his father on the subject, in which he stated that he believed defendant was the author of his daughter's misfortune, and, if so, he ought to marry her. Craig Steele did not then deny, but admitted he was, and both he and his father agreed it was his duty to marry her, and they were married; but before the marriage took place there was another interview between plaintiff's father and Craig Steele and his father in reference to reports of her lewdness and unchastity previous to any sexual intercourse between her and Craig Steele.

In that interview her father stated that if these reports, which he requested them to investigate, turned out to be true, he did not ask or expect him to marry her. To what extent they did institute inquiry on that subject does not clearly appear. At all events they professed to believe the reports were untrue, and not an obstacle to the marriage.

About seven months after the marriage she gave birth to a child, proved to be mature and fully developed; but her husband was not then, nor had for a month or more been, with his wife, though they resided at the house of his father from time of the marriage, and the child was born there. There is enough in the record to show that Craig Steele had, prior to birth of the child, determined to abandon his wife, and the malignancy and pertinacity with which he and his relatives have, during this litigation, hunted testimony to destroy and degrade her, shows she could not remain at the house of his father; so the only place she had to go was the house of her father, who is very poor, though, according to this record, a just and upright man.

And though when this action was brought the husband had not abandoned his wife long enough (one year before) to entitle her to divorce for that specific cause, he was guilty of abandonment in meaning of the statute, and, therefore, as heretofore held by this court in analogous cases, she can maintain this independent action for alimony; and it may as well be said, in this connection, that, in our opinion, the allowance to her by the judgment appealed from of $500 was not, in our opinion, excessive.

Section 2120, Kentucky Statutes, provides that "cohabitation as man and wife, after a knowledge of adultery or lewdness complained of, shall take away the right of divorce therefor;" and it seems to us, looking to the language used and reason of that statute, the right of defendant to divorce for adultery or lewdness of plaintiff, his wife, must be now and here regarded as taken away. For whatever may have been her previous conduct or relation to other men, he knew she had been lewd and unchaste with himself, and there having thereafter been cohabitation between them as man and wife, his right to divorce can not be maintained. In fact, it is not by any means clear that concealment by her of such previous acts of adultery or lewdness, if she had been guilty of them, should be now treated as fraud of that character or degree entitling him, under the circumstances, to annulment of the marriage tie.

In the first place he had knowledge before the marriage that there were reports affecting her character for chastity, and was not only entirely free to investigate the truthfulness of such reports, but distinctly told by plaintiff's father not to marry her if they turned out to be true. Having in such case elected to marry

her, he can not be now heard to say he was induced by fraud of his wife and friends to marry her.

Second. Though declining to make the investigation at the proper time, and professing to be satisfied the reports were untrue, defendant, on this question of alimony, seems to have spared no expense or time to procure testimony which, if true, shows his wife, though only sixteen years old when she married him, to have been a creature of almost unexampled and notorious lewdness.

Indeed it is seldom a court is called on to consider such a filthy batch of depositions; and, in our opinion, it is incredible that what he has procured men to testify against her could be true and be at the time of the marriage uninformed on the subject, for most of those who came forward, or were induced to so testify, are his near relatives.

It is not, therefore, necessary to determine whether the testimony is true; but if it was we should be slow to give credence to witnesses who have shown themselves to be so shameless, vile and filthy as defendant's witnesses have done.

Judgment affirmed.

FICENER v. BOTT, &c.

(Filed January 15, 1895—Not to be reported.)

1. Sale as a whole of two separate city lots to pay lien debts—Where the realty of the debtor consists of two separate city lots, and some of the debts are liens upon both lots and some upon only one, it is error to sell the two lots as a whole without offering each lot separately and without attempting to ascertain wheher anyone would pay all the lien debts for one of the lots. Such lots are clearly divisible, and a sale of the two as a whole would often, and did in this case, result in a sacrifice.

2. Pleadings—Feme sole—Where the petition seeks a sale of real property of a married woman to pay lien debts created by her, if the allegations that she was authorized to trade as a feme sole are too general, the error is available on demurrer, but it is too late to complain on that account after answer filed by her and her husband, and after a judgment and order of sale against her.

D. M. Rodman for appellant.

O'Neal, Phelps, Pryor & Selligman for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

In this case one of the appellees, Mrs. Ficener, being a married woman, created by mortgage and by contract liens upon certain real estate in the city of Louisville, consisting of two lots, separate and distinct the one from the other. She was authorized to trade, sell, etc., as a feme sole by the judgment of a court of equity, and this being the case, her contracts were binding and can be enforced. The mortgage to Martin Seng was executed by both husband and wife and embraced both lots.

The mechanic's lien of John Bott for the construction of a two-story frame store and dwelling on one of the lots can be enforced as to that lot only. The execution in favor of Fuchs for $100 and interest was levied on both lots. The chancellor adjudged the sale of both lots to pay these liens, and his commissioner offered

the entire property for sale, without offering each lot separately, or without attempting to ascertain whether any one would pay the lien debts for the one lot or the other. The property was clearly divisible, and in a city or town it is plain that sales of such property, as a whole, would often result in a sacrifice of the debtor's interest, and, in fact, the affidavit filed in support of the exceptions to the report of sale made in this case show that such has been the result.

By section 694 of the Code it is made the duty of the chancellor to ascertain whether or not the property can be divided without materially impairing its value, and this provision certainly applies, and it can not be disregarded in a case like this. The attention of the court was called to the manner of the sale at the time the exceptions were filed, and it should have set the sale aside and ordered the lots sold separately.

There is some question made as to the right of the court to appoint a receiver. This was done, and the proceeds or rental of the property can now be applied to the payment of these debts, and as the matter of appointment was within the discretion of the court, we are not disposed to disturb it.

The objection to the petition might have availed if a demurrer had been filed at the proper time, but it is too late after judgment to complain of the failure to allege in proper terms that the feme covert had been made a feme sole under the statute to enable her to contract and to manage her own estate. The answers of husband and wife were filed, and the general averment that the wife was made a feme sole under the law of the State stands undenied. The appellant also brings the parties into court who had liens on the property other than Bott, who instituted the original action, and now complains she was not made a defendant to the petition of Fuchs. The appellant owes these debts. They are, in fact, undisputed. Her defenses will not avail, and the only error is the one connected with the judgment of sale.

The judgment is reversed, with directions to set the sale aside and order a resale of the property as herein indicated. As the mortgage is the oldest lien, and covers both lots, that upon which she is not claiming or living as a homestead should be first offered.

DOWIS' HEIRS v. ELLIOTT.

(Filed January 15, 1895—Not to be reported.)

1. The evidence authorized the judgment finding that appellee had paid appellant's ancestor all the purchase money for the land in controversy except $35, and holding that he was entitled to a conveyance upon payment of that sum.

2. Although the appellant's ancestor died before the deed executed by her was delivered to appellee they tendered that deed to appellee in their answer, and it was sufficient to pass title under judgment of the court. Appellants can not complain in this regard.

J. N. Brafford and Wilson & Rawlings for appellant.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Guffy.

On the 11th day of February, 1892, James M. Elliott instituted suit in the Knox Court of Common Pleas against Nancy Dowis,

averring that he had purchased from her a tract of land in said county at the agreed price of $275, and had paid her $240 thereof, and had tendered to her the residue and asking that she convey the land to him, or upon her failure to do so that he have judgment against her for the $240. The sale was not evidenced by any writing. The defendant died in November, after the suit was filed, and without answering. The action was revived against her heirs, and they answered and agreed to convey the land or perform the contract made by their ancestor, but denied that appellee had paid any part of the purchase price of the land except $40. The appellants tendered to appellee a deed that had been executed by Nancy Dowis in her lifetime, retaining a lien for $235.

The court below, on final hearing, adjudged that appellee only owed $35, with some interest, balance on the purchase price of the land, and adjudged that he pay same to the clerk for defendant, and that he accept the deed tendered, and plaintiff was adjudged his costs against defendants. Defendants prayed an appeal to the Court of Appeals, which was granted.

Appellants suggest that the deed from Nancy Dowis, executed before her death, but not delivered during her life, could not pass the title; but as the heirs by answer agreed to comply with her contract, and also tendered the deed, we think the title passed to appellee under the judgment of the court below.

Appellants insist that appellee was not a competent witness and excepted to his deposition.

It seems the court below did not pass on the question of the competency of appellee's testimony. Some of the heirs testified in their behalf, and it may well be claimed that under the Code appellee then could also testify, but in addition to that the testimony, independent of appellee's statement, establishes the fact that Nancy Dowis agreed with appellee to take or look to her grandson, Robert Bengy, for the $200 in dispute.

It is clear that Robert Bengy received at least part of the timber from appellee, in consideration of which appellee claims that he was to pay Nancy Dowis $200.

We think, taking all the evidence together, that it fully authorized the judgment of the court below, and the judgment is affirmed.

CHILDERS v. LITTLE, &c.

(Filed January 15, 1895.)

A special judge, elected at a March term of the circuit court, had no authority to try cases at the following September term of the court.

D. B. Redwine and J. M. Sebastian for appellant.

W. M. Beckner for appellees.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Guffy.

Some time prior to February, 1888, Marion Childers instituted suit in the Breathitt Court of Common Pleas against C. J. Little for the recovery of three Breathitt county bonds of $500 each or their value, $1,500, and $500 damages for failure to return or ac-

count for the bonds. The defendant made defense, and the cause was finally transferred to equity. Some time before the March term, 1891, of the Breathitt Court of Common Pleas, Patrick, defendant's attorney, became judge of said court, and at said March term, 1891, J. P. Gillum was elected special judge of the court, and at the September term, 1891, of the court McGuire was elected special judge to try such case, as the regular judge could not properly try, and at the September term, 1891, on the calling of the cause, the defendant insisted that J. P. Gillum should try the case and render judgment, to which appellant objected, but the court permitted Mr. Gillum to render and enter upon the order book of the court a judgment dismissing plaintiff's petition and adjudging that defendant receive of plaintiff his cost, to all of which plaintiff objected and excepted, and prayed an appeal to the Court of Appeals, which was granted.

Appellant insists that the cause could not properly be tried by Gillum at the September term. The General Statutes, chapter 28, article 7, and the act amending same approved April 17, 1882, provides for the election of a special judge at any term of court when the regular judge is absent, or when he can not properly preside in one or more cases.

It appears that McGuire was the special judge at the September term, 1891, and it does not appear that J. P. Gillum had been elected, or agreed upon, as special judge at that term.

We are, therefore, of opinion that it was error to allow Gillum to render or have entered any judgment in this action.

The judgment appealed from is reversed and cause remanded for further proceedings not inconsistent with this opinion. All other questions involved in the cause are left to the further adjudcation of the Breathitt Circuit Court.

DIXON, BY, &c. v. LABRY.

(Filed January 15, 1895—Not to be reported.)

1. Evidence—Competency of statements made by a deceased witness to third parties—Plaintiff claimed a horse by gift from his grandfather. Defendant, who claimed by subsequent purchase from the grandfather, denied the gift to plaintiff. The grandfather was dead at the time of trial. After plaintiff had introduced evidence conducing to show the gift of the horse to him by his grandfather, it was error to permit defendant to prove by third parties statements made by the grandfather to them, not in presence of plaintiff, to the effect that he had not given the horse to him.

2. Same—Instructions—Where the evidence showed that plaintiff had for several years retained absolute and unqualified possession of the horse, it was error to instruct the jury to find for plaintiff "if the grandfather was owner of the horse when a colt, and gave or sold same to plaintiff, and placed same in the exclusive possession of the plaintiff," etc. The word exclusive should have been omitted from the instruction, as its use was improper and misleading.

R. H. Cunningham and T. B. Cheaney for appellants.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

Wm. E. Dixon, an infant, suing by his next friend, brought this action January 4, 1891, to recover a horse then in possession

of and claimed by W. E. Labry as remote purchaser from John Dixon, grandfather of plaintiff.

The evidence shows that in the fall of 1885, John Dixon, having a mare and young colt, made an agreement with Wm. E. Dixon, then about twelve years old, that if he would take care of both during the coming winter he should have the colt. Wm. E. Dixon complied with his part of the contract by taking care of the mare and colt at his father's farm, where he resided, and the following spring John Dixon carried out his part of it by taking the mare away to his place of residence, leaving the colt in possession of Wm. E. Dixon, who continued to hold, keep and use him undisturbed until December, 1890, having in the meantime broken him to ride and drive. At the latter date John Dixon went to reside at the house of his son, John R. Dixon, father of Wm. E. Dixon, and while there took the colt, then a horse five years old, and traded him to one Green, from whom Labry purchased.

Upon the trial verdict of the jury was for defendant, and the question before us is whether there occurred errors of law prejudicial to substantial rights of plaintiff.

It appears John Dixon died not long after trading the horse to Green, and before this action was commenced; and the principal ground relied on for reversal is error of the lower court in permitting witnesses to prove declarations or statements made by John Dixon, without presence of Wm. E. Dixon, which indicated claim by him of ownership and denial he had ever given the colt to the latter.

If the contract between them mentioned was actually made and carried out, Wm. E. Dixon thereby, and independent of five years' possession, acquired title to the horse and a right to recover him of Labry, unless he did some act by which he is now estopped to deny validity of the sale by John Dixon.

There is, however, no evidence in this case tending to show he consented to such sale. It is true he did not immediately nor while his grandfather lived demand or sue for the property. But if he had a right to the horse it was not lost or impaired by such delay.

The single issue of fact, then, is whether the contract referred to was made. Plaintiff attempted to show by competent evidence it was. The lower court permitted defendant to attempt to disprove it, and as a consequence to show title to the horse never passed from John Dixon, by testimony of third parties, he had made to them statements or declarations to that effect. It seems to us that evidence is clearly "of the kind which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person," consequently is hearsay. And as the statements or declarations in question were made by John Dixon, if at all, in his own favor and without presence of Wm. E. Dixon, we think the lower court erred in admitting any evidence in regard to them.

Instruction No. 1, given to the jury, is as follows: "If the jury find from all the evidence in the case that John Dixon, grandfather of the plaintiff, was owner of the horse in contest when a colt, and gave or sold the same to the plaintiff, and placed the same in the exclusive possession of the plaintiff, and if John Dixon afterwards sold or transferred said horse to another without the consent of the plaintiff, then they will find for the plaintiff said horse, if to be had; if not to be had, then his value at the time, with reasonable value for the use of said horse from the bringing of this suit till the present time, which value and use will be fixed by the jury."

That instruction presents the issue fully and fairly, except that the word "exclusive" is improper and misleading, and ought not to have been inserted; for there is no competent evidence in the record before us tending to show that possession of the colt was qualified or conditional, or that any other person than plaintiff had or claimed possession from the fall of 1885 until December, 1890, when John Dixon went to reside with plaintiff's father.

The second instruction is entirely wrong because there is no competent evidence John Dixon retained any interest in or control of said horse whatever.

For the errors indicated the judgment is reversed and cause remanded for new trial consistent with this opinion.

SEMON, &c. v. FREITAY.

(Filed January 16, 1895—Not to be reported.)

Judgment authorized by pleadings and evidence—The allegations of appellee that the alleged patent, issued to appellant in 1889, embraced the same land as that included in a patent issued in 1830, under which appellee claims by regular conveyances from the patentee, being undenied, are to be taken as true; and, therefore, appellant's patent must be held void, and he had no right to cut timber on the land in controversy. The judgment was proper.

James Sparks for appellants.

Thos. H. Hines for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Hazelrigg.

This action in equity was brought by the appellee to recover certain cross-ties and damages for their detention, alleged to have been cut and removed by the appellants from off the land of appellee, on the waters of Laurel river, in Laurel county. Upon proper allegation an injunction was asked for and obtained staying further trespass.

The appellee exhibits in his petition his deed for the land made to him by his vendors, J. C. Jackson and wife, in 1885, as well as an abstract of title, beginning with a patent from the Commonwealth in 1830.

The appellants admit the removal of the ties, but allege that the appellant, Semon, is the owner of the land where they were cut, in virtue of a patent issued to him by the Commonwealth in 1889. In his reply the appellee alleges that the land embraced in the alleged patent of 1889 is the same as is embraced in the patent of 1830, and which, by regular conveyances, became the property of appellee in 1885; that it was not vacant land in 1889, the appellee being the owner and in the possession of it continuously since 1885, and that it had theretofore been patented to Smith in 1830.

These allegations were not denied, and the proof having been taken showing the value of the ties and the damages to the appellee by reason of their removal, the case was submitted and judgment rendered for the appellee.

We are not able to perceive any error in this judgment. If there was in fact any patent issued to the appellant, Semon, which is denied and of which we have no proof, it is shown by the undisputed allegations of the reply to have been void. None

but vacant lands can be the subject of such appropriation as is claimed, and every entry, survey or patent embracing lands previously entered, surveyed or patented is void.

It is suggested for the first time that a jury and not the chancellor should have assessed the damages. This suit, moreover, was properly brought in equity, and there is no reason why the court might not fix the value of the ties removed and ascertain the extent of the injury complained of.

Judgment affirmed.

HANNING v. HANNING.

(Filed January 17, 1895—Not to be reported.)

The appellant was entitled to a divorce from her husband upon the evidence in this case, and the judgment refusing it to her is reversed.

Cochran & Son for appellant.

E. L. Worthington and Geo. R. Gill for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Guffy.

In August, 1891, the appellant, Julia B. Hanning, brought this suit in the Mason Circuit Court against Charles Hanning for divorce and alimony, and for the custody of their infant daughter, Marietta.

The cause for divorce was alleged cruel treatment for more than six months, indicating a settled aversion, and thus destroying her peace and happiness; also injuring and attempted injury to plaintiff, showing that she was in danger of losing her life or suffering great bodily harm if she remained with defendant. The court, upon final hearing, dismissed plaintiff's petition and discharged the attachment which appellant had caused to be issued. From that judgment appellant has appealed to this court, and insists that the judgment is erroneous, and that she should be divorced from the appellee.

The proof in the cause is voluminous and somewhat conflicting. Much of the proof was excepted to in the court below. We deem it unnecessary to recite the evidence or pass upon the various execeptions taken thereto by the parties. Taking all the proof together, and all the facts and circumstances proven in the cause, we are of opinion that the plaintiff is entitled to a divorce from the bonds of matrimony.

The judgment of the circuit court refusing the divorce is reversed and cause remanded, with directions to the circuit court to grant appellant an absolute divorce from the defendant and restoring her to all the rights and privileges of an unmarried woman, but the judgment dismissing plaintiff's attachment is affirmed.

The question of alimony and maintenance and the custody of the child, Marietta, is left to the circuit court for further adjudication.

EAST TENNESSEE COAL CO. v. HARSHAW.

(Filed January 19, 1895—Not to be reported.)

1. The failure of those in charge of a railway train to give warning of its approach to a street crossing or a public road in a city or town is negligence of the greatest degree, and for injury caused thereby the railroad company is liable even to a trespasser on its tracks.

2. Same—A railway company is liable for injury done to a trespasser as well as to a person lawfully upon its tracks, if his peril was, or by the exercise of the character and degree of care required in operating its trains might have been, discovered in time to avoid or prevent the injury.

3. Same—Contributory neglect of child—The doctrine that contributory neglect to his injury by an adult will prevent a recovery by him will not be so applied as to exempt a railroad company from legal liability for injury to a thoughtless child, resulting from neglect of those in charge of a train to give warning by whistle or bell of its passage through a city or town.

In this case a child about ten years old, in attempting to cross a track in a town, ran heedlessly against one of the cars of a moving train, of the approach of which no warning by sounding the bell or whistle had been given. The child was a trespasser upon the track; his contributory neglect if committed by an adult, would have precluded him from recovering damages, but the doctrine of contributory neglect will not be applied to a child of his years so as to prevent his recovery when the railway company has been guilty of such neglect as is shown in this case.

Hill & Denham for appellant.

C. W. Lester for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, the East Tennessee Coal Co., owns a coal mine in Whitley county, whence to the Louisville & Knoxville railroad is a narrow-guage railroad upon which is carried coal; and in attempting to cross that road appellee, David Harshaw, then about eight years old, was knocked down by a coal train and his arm so injured as to require amputation.

The coal road runs through a village of about 400 inhabitants, all the houses of which belong to the company and are occupied by its employes and their families. There is a wagon road north of and for some distance parallel with the narrow-guage railroad, one branch of which, however, crosses it and leads to what is designated on the map as "commissary building."

It appears that on the day he was hurt David was sent by some person to the dwelling house of Mrs. Lacy, situated north of both the railroad and wagon road, and a short distance east of the fork of the latter mentioned, for the purpose of getting money changed; but, failing, he left there, running, to go to the commissary building for the same purpose. But instead of going back west along the wagon road to the fork and thence straight across the railroad, he went direct to the latter, and about twenty feet from where it is crossed by the branch wagon road leading to the commissary building was struck and injured by the train.

He had not gotten upon the track when the collision took place, nor was he struck by the engine, but apparently unconscious of the presence of the moving train, and, without stopping to look or listen, ran heedlessly against one of the cars; according to eye witnesses, the third or fourth from the engine.

The evidence shows the engineer of that coal train did not signal its approach to the crossing by either whistle or bell; and that the railroad was, for about 200 yards beyond, straight enough to enable the engineer to see a person at or near that point.

The failure of those in charge to give warning of a railroad train passing through a city or town, or approaching a crossing of a street or public road, has been held by this court negligence of the greatest degree, and will render the company owning it liable for injury caused by such failure, even to a trespasser.

It is also well settled that such company is liable for injury done as well to a trespasser as to a person lawfully upon its track, if his peril was, or by exercise of that character and degree of care required in operating railroad trains might have been, discovered in time to prevent or avoid injuring him.

But notwithstanding failure of those in charge of the train in question to give the required signal, still appellee was guilty of such contributory negligence that but for it the collision would not have occurred; and if he had been an adult of ordinary sense and experience, this action could not be maintained upon the sole ground of such failure. But the rule of contributory negligence has never been so applied by this court as to exempt a railroad company from legal liability for injury to a thoughtless child resulting from neglect of those in charge of a train to give warning, by bell or whistle, of its passage through a city or town. And there could be no better illustration of the reason and justice of making such exception to the rule than this case affords. For while a person of matured mind and experience would, by listening or looking, have discovered the train was passing in front of him, or at least the law would, under similar circumstances, have held him to the duty of doing so, the little boy was so absorbed by the trust of getting the money changed that he evidently regarded very important, and in such haste to perform it that, hearing no bell or whistle, he did not realize the presence of the train until struck by one of the cars. It, therefore, seems to us the instruction given to the jury on that subject was quite as favorable to defendant as he was entitled to. Besides, there was evidence tending to support the hypothesis that the boy's peril was, or by the exercise of due care might have been, discovered in time to avoid injuring him.

Perceiving no error of law to the prejudice of appellant the judgment is affirmed.

DUNN v. COMMONWEALTH.

(Filed January 23, 1895—Not to be reported.)

Local option—Repeal of statutes—The repeal of a local option statute after the offense against it was committed and the indictment was found, but before the trial of defendant, constitutes no defense.

F. W. Darby for appellant.

W. J. Hendrick for appellee.

Appeal from Caldwell Circuit Court.

Opinion of the court by Chief Justice Pryor.

Under an act of the general assembly, in force at the time the

alleged offense was committed, the appellant was indicted for unlawfully selling intoxicating liquor in the county of Caldwell, it being made an offense by the act of May 18, 1886. The indictment was returned into court in May, 1892.

In the year 1893 the law was repealed as to the town of Princeton, where the liquor was sold, and this is offered as a defense to the charge. The offense was complete, and the indictment returned before the law was repealed and constitutes no defense.

The statute existed when this law was changed, and liquor allowed to be sold, provided that no new law shall be construed as repealing a former law, nor as to any act done, any penalty or punishment incurred, etc., under the former law, etc.

Judgment affirmed.

FORD v. COMMONWEALTH.

(Filed February 8, 1895—Not to be reported.)

Indictment for false swearing—Although one can be indicted and convicted of false swearing before a grand jury, although his false statements were not material to the crime being investigated by that body, yet such false statements will not authorize a conviction unless it appears that they had some connection with an investigation concerning some specific public offense that has been committed.

Therefore, an indictment for false swearing, which alleges that accused falsely stated before a grand jury that he did not on a certain day drive a surry to a specified place when certain persons were in it, does not charge a public offense, there being nothing in the indictment showing the relation or connection of the alleged false statements to any investigation by the grand jury of any specific crime.

Chas. H. Sanford for appellant.

W. J. Hendrick for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Chief Justice Pryor.

The accused was indicted, tried and convicted for false swearing, his punishment being fixed at confinement in the State prison for one year.

His counsel relies on two grounds for a reversal of the judgment: First, the court erred in overruling the demurrer to the indictment; second, there was no evidence to support the verdict.

The charge is for making a false statement, willfully and knowingly, in response to a question propounded to him by the foreman of the grand jury that had been empanelled at the September term of the Henry Circuit Court

The formation of the grand jury, the oath administered to the accused, and all other averments of fact requisite to authorize the examination of the accused as a witness, appears in the indictment.

The prosecution is based on these averments: "The accused was sworn to tell the truth, the whole truth, and nothing but the truth, touching his knowledge of any violation of the criminal or penal laws of the State, of which matters the grand jury had the legal right to inquire; and the said George Ford did then and there under oath, among other things, knowingly, willfully, falsely, corruptly and feloniously swear and state that he did

not drive a surrey from New Castle on Tuesday, September 4, when Newton Morris, Wm. Clark and others were in it; that he was too drunk; which statements were false and untrue, as the said George Ford well knew, and in truth and in fact he had driven a surrey from New Castle on that day with Newton Morris and others in it," etc.

The crime of perjury, under the rule of the common law, as now, is confined to false statements made under oath in judicial investigations or proceedings as to facts material to the issue, and the law-making power, seeing the evil resulting from false statements made in reference to the subject-matter in dispute, or involved in a judicial inquiry, enacted the statute punishing false swearing, whether the false statement was or not material to the issue involved or to the investigation of the subject-matter, in regard to which an oath could properly be administered, and the witness compelled to testify.

It was no indictable offense to drive a buggy from New Castle on the day mentioned, or such a subject of investigation—unless connected with an inquiry as to facts relating to some offense of which the grand jury had cognizance—as would subject the accused to punishment under the statute for making the false statement. If with a view of showing that the parties in the surrey had been carried to a place for gaming, or to identify them or any one of them as persons who had violated the penal or criminal laws, and it had been so alleged and the witness had made the false statement in reference to that matter, the indictment would have been good. It would have been a subject about which the witness could have been legally sworn and one the proper subject of inquiry for the grand jury.

While statements are not required to be material to the investigation, they must have some connection with it before a conviction can be had under the statutes.

This statute provides: "If any person in any matter which is or may be judicially pending, or on any subject in which he can be legally sworn, or on which he is required to be sworn, when sworn by a person authorized by law to administer an oath, shall willfully and knowingly swear, depose or give in evidence that which is false, he shall be confined," etc.

The verbiage of this statute shows the necessity of charging that the inquiry of the grand jury was for the purpose of ascertaining whether or not a specific public offense had been committed, and that in reference to that matter and for the purpose of the investigation the accused was asked the question. In the case of Kerfoot v. Commonwealth, 89 Ky., 174, the accused was charged with false swearing by stating on oath before a police judge that he had purchased whisky of John Jones, which statement was untrue, etc., the court held that the indictment was fatally defective because it failed to state that the sale by Jones was a public offense, for if not the police judge had no power to administer the oath.

In the case of Richey v. Commonwealth, 81 Ky., 524, relied on by the State, it is expressly charged in the indictment that the grand jury was investigating as to a difficulty between the appellant and one Chenault, when the appellant swore falsely, willfully, etc., he had no pistol at the time of the difficulty. The subject of the investigation in that case was one about which the grand jury had the right to inquire, and is an authority in favor of the point raised by the defense.

Suppose the grand jury was investigating a charge against others for a breach of the peace, and had asked the accused if

he remained at home on the 4th of September, and his response to the question was knowingly and corruptly false, would an indictment charging him with making the false statement be good unless in some manner connected with the offense, in regard to which the grand jury had the right to inquire, and at the time the subject of the investigation? We think not. The offense charged and the particular circumstances of the offense must be stated—an offense the grand jury has the right to investigate, and when examined with reference to the offense, that fact being alleged, the false statement, if made knowingly and corruptly, subjects the party to punishment.

Nor did the testimony, that merely followed the indictment, authorize the verdict.

The judgment is reversed and remanded, with directions to set aside the verdict and sustain the demurrer to the indictment.

THROCKMORTON v. COMMONWEALTH.

(Filed January 16, 1895—Not to be reported.)

The evidence does not show whether the money was taken with or without the consent of its owner, or where or in what county or State it was taken; therefore, the judgment convicting defendant of petit larceny will be reversed because not sustained by any evidence.

Complaining witness testified that he had $13 or $14 of money in his trunk, and that accused told him he had his money and would pay it back; that he had $7.75, and that this conversation occurred three or four weeks after the money was taken from his trunk. Held—The evidence did not authorize conviction of defendant for petit larceny.

Samuel Holmes for appellant.

Wm. J. Hendrick for appellee.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Paynter.

The only witness introduced was the complainant, who proved he had $13 or $14 of certain kind of money in his trunk. At this point he was asked if the accused had ever said anything about the money. His answer was, "The accused told me at Mr. Linville's store that he had my money and would pay it back to me; that he had $7.75. * * * The conversation was about three or four weeks after the money was taken out of my trunk."

The proof in the record fails to disclose the circumstances of the taking of the money—whether or not it was with or without the knowledge or consent of the owner or where it was done or in what county or State the alleged offense was committed.

The indictment charges that the accused committed the offense of petit larceny in the county of Robertson, in this State, and within twelve months before the finding of the indictment.

The jury empanelled to try the case found him guilty; but when the proof, as appears in the record, fails to disclose a state of facts which show the offense of petit larceny had been committed, the date of its alleged commission, and the name of the county and State wherein it is alleged to have been committed, the verdict of the jury and the judgment of the court below can not be approved.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

MOORE v. CHENAULT.

(Filed January 16, 1895—Not to be reported.)

Statute of frauds—Contract for sale of land—A written contract for the sale of land is enforcible against both parties to it if signed by the vendor. The vendor holding the title is "the party to be charged" by such contract within the meaning of the statute of frauds. An action against the vendee for the purchase money may be maintained, although he did not sign the written contract.

Grant E. Lilly and Wm. H. Holt for appellant.

Riddell & Riddell for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Paynter.

As appears from the petition (and we take as true all of its averments on a question of demurrer) on the 3d day of March, 1890, appellant, by her agent and attorney in fact, sold to appellee and put him in possession of a house and lot in Irvine, Kentucky, the consideration being $3,000, to be paid when appellant made appellee a deed for the property, which she was to do no demand; that more than a reasonable time has elapsed since the sale, and appellee has not asked that a deed be made him, though appellant has been able, ready and willing to make such deed as the contract requires, and frequently so informed appellee, and she tenders such deed. Demand was made for the payment of the purchase money. Appellee was placed in possession of the property on the day of sale. The writing which appellant, by her agent and attorney in fact, executed is as follows:

"March 3, 1890.

"This writing, between Mrs. Mary D. Moore by John Bennett, her agent and attorney in fact, witnesseth, that the party of the first part hereby bargains and sells to the second party a house and lot on Main street, in Irvine, Kentucky, situated between the Methodist Church and Dr. Embry's property, including the whole of said lot and all the improvements thereon, and binds herself to make a deed conveying her title to the same when called for. The second party agrees to pay therefor the sum of $3,000 when the deed is made, with a covenant of special warranty. Witness our signatures this, the 3d day of March, 1890.

"MARY D. MOORE,
"By JOHN BENNETT, Attorney."

A demurrer was filed to the petition, and the court sustained it. Appellant failing to plead further, her petition was dismissed. This appeal is from that action of the court.

The demurrer admits appellant executed the foregoing writing by her authorized agent.

The contention by counsel for appellee is that as appellee did not also sign his name to the writing the action can not be maintained, as it comes within the inhibition of section 1, article 22, General Statutes, which reads as follows: "No action shall be brought to charge any person * * * upon any contract for the sale of real estate * * * unless the * * * contract * * * or some memorandum or note thereof be in writing and signed by the party to be charged therewith or by his authorized agent."

The application of the statute of frauds and perjuries is the only matter presented to the court for revision, and this is so narrowed that the only question to be determined is, is this action equivalent to an action on a parol contract for the sale of real estate?

The writing fully describes the property sold, the character of deed to be made, and when it is to be done. It shows the consideration of the sale and when to be paid. It is signed by the attorney in fact of the owner of the land. It was not necessary for appellee to sign the contract of sale. His signature to the writing alone could not impose any liability on vendor to dispose of her title to the land, nor could it enable him to maintain an action to enforce a conveyance. The vendor is the party vested with title. It is he who can assume a liability which will compel him to convey the title to the property to the vendee. It is he alone who can sign such writing as will divest him of title. The law intended him to be protected in his right to his property until he voluntarily disposed of it by a writing. It did not intend that he should be placed in the power of perjurers to take it from him by proving a parol sale. It is the vendor "to be charged" with the contract of sale.

To make the vendee liable for the purchase money when the contract of sale is in writing it is not necessary for him to sign any obligation to pay the price of the land. The only contract the vendee could be expected to sign in such a transaction would be an obligation to pay the price of the land. Suppose the vendee in this case has signed the writing exhibited, it would simply be evidencing by a writing a liability which the law had imposed the instant the contract of sale was made and the necessary writing executed by vendor. Such signing would not have lessened or increased his liability. Neither would it have added to or diminished that of the vendor. To do so was wholly unnecessary to take the case out of the statute.

In the case of Ellis v. Deadman's Heirs, 4 Bibb, 466, this court held that a receipt for part of the purchase money, signed by the vendor, specifying the terms of sale, would have been such a memorandum of the agreement as would have taken the case out of the provision of the statute.

In the more recent case of Tyler v. Ouzts, 14 Ky. Law Rep., 321, this court announced the same doctrine, holding that either party could maintain an action on a receipt for purchase money, signed by the vendor alone, specifying the terms of the contract.

In the case of Lewis v. Grimes, 7 J. J. M., 336, the vendor, Lewis, alone had signed writing evidencing the sale. The contract price was $2,000, but for which the vendee, Grimes, had executed no obligation. The action was to recover the purchase money. Vendee relied upon the statute.

The court held that the vendor was entitled to recover, and among other things said (Sanders on Pleading, volume 2, page 903, and such seems to have been virtually the decision of this court in the case of McDowell v. Delap, 2 Marshall, 33): "That was an action of assumpsit by a vendor of land against his vendee for the price. The defendant succeeded, as he ought to have done, because there was no written memorial of the sale, and because, therefore, there was no legal consideration for the promise to pay the stipulated price. But in the opinion delivered this court said that as the contract of sale was not obligatory on the plaintiff such an agreement was, consequently, not a sufficient or valid consideration for the possession on the part of the defendant;" and also "that it was actually necessary to pro-

duce in evidence some memorandum in writing of the agreement, signed by the plaintiff or some one duly authorized by him."

Here is a plain intimation that if the plaintiff, who was the vendor, had been bound by a proper memorandum in writing he could have maintained assumpsit against the vendee for the promised price, even though the defendant had signed no memorandum in writing; and the record, in the case of Hopkins v. Alvis, 2 Marshall, 374, shows that the same point was involved, and was necessarily decided judicially and expressly in the same way."

The court should have overruled the demurrer to the petition.

The case is reversed and remanded for further proceedings consistent with this opinion.

C., N. O. & T. P. RY. CO. v. BAGBY.

(Filed January 17, 1895—Not to be reported.)

Extent of duty of engineer to look out for stock straying on sides of track—Neglect—An engineer's first duty is to persons in his train, and to secure their safety it is necessary for him to keep sight of the track ahead of him. It is not his duty to look out for or see animals straying at all distances on each side of the track, or to give a danger signal or stop his train in order to prevent injury to such animals unless they are actually on the track or in such attitude as would induce a person of ordinary care and prudence to believe there was danger of a collision.

A horse straying near the track on a private passway over it went upon the track and was killed by collision with a train. The track at the point of collision could be seen for a distance of 1,500 feet north of the passway by those on the train, except that the view was somewhat obstructed by a bridge over the track 100 yards from said passway. The horse was not seen by the engineer until just before he jumped upon the track, when it was too late to prevent the collision. Held—It was error to render judgment against the railway company.

J. M. Lassing and C. B. Simrall for appellant.

C. Y. Dyas for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Lewis.

Appellee's residence is north of appellant's railroad, across which he has a private passway to his barn on the south side. He rode his horse up to his gate, about 100 feet from the railroad, and leaving it unhitched, the animal started along the passway toward the barn, but about the time it got upon the railroad was struck by the engine of a freight train going south, at the rate of about fifteen miles an hour, and killed.

The evidence shows that for a distance of about 500 yards north from appellee's passway an animal on the track at that place can be distinctly seen; and there is some evidence tending to show the horse might have been seen by the engineer that distance anywhere between the gate and railroad. But there is a bridge over the railroad about 100 yards north of the private passway which must necessarily to some extent obstruct view of an animal or man not immediately upon the railroad track.

Those in charge of a railroad train owe the first duty to persons on it, and to assure their safety it is necessary the engineer

should not lose sight of the track ahead of him; nor can the company be held liable for injury to animals unless those in charge could have avoided it, having due care for safety of those on the train.

It would, therefore, seem to follow that an engineer can not be reasonably expected or required to look out for or see animals at all distances on each side of a railroad track, nor give the danger signal and stop the train to prevent injury to those straying, unless such animal is actually on the track or else so near or in such attitude as would induce a person of ordinary care and prudence to believe there was danger of a collision.

In this case the engineer did not discover appellee's horse until the train was too near to the private crossing to be checked in time to prevent the collision. When first discovered by him the animal was, he testifies, upon a bank and jumped upon the track when the train was so near a collision was unavoidable.

Conceding the horse might have been seen by the engineer at any point between appellee's gate and the crossing, still he was not required to stop the train unless he had reasonable grounds to believe the horse would be permitted by its owner to go upon the track in front of the train.

It seems to us the engineer was not in this case guilty of actionable negligence, for it does not appear that he saw the horse or had reasonable grounds to believe it would go upon the track in front of the train until it was about to jump on it.

It, therefore, seems to us the court, to whom the law and facts were submitted, a jury being waived, erred in rendering judgment for plaintiff, and it is reversed for a new trial consistent with this opinion.

FIELDS v. FIELDS.

(Filed January 18, 1895—Not to be reported.)

1. The expiration of fifteen years before institution of suit on the note does not bar a recovery thereon when it appears that payments have been made on it from time to time within the statutory period.
2. Appellant was entitled to credits on the note sued on, which were denied him by the court below.
3. Vendor and vendee—Eviction of vendee from part of boundary sold—In the absence from the record of the original writing evidencing the sale of the land it must be assumed that the vendee can not recover of the vendor for a part of the boundary lost by him unless there was an eviction by a paramount title.

J. B. Marcum and John L. Scott & Son for appellant.

Appeal from Perry Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was to enforce a lien for the purchase money for land; the obligation was executed and became due more than fifteen years prior to the bringing of the action.

The statute of limitations and payment constitute the defenses made. As to the statute it appears that a credit was placed on the debt for a small sum within the fifteen years, and the defense is by proof showing payments from time to time that must prolong the running of the statute, and hence time is no bar to the recovery.

It is apparent, however, that the appellant has made payments for which no credit was given below, and the laches of the appellee has caused him to forget the amount of money paid him on the first payment. The cash payment was to be made by one Hall, and this witness says he made the payment at the date of the contract or shortly after, and as corroborative of his statement no demand was ever made on him for the payment during a period of seventeen years.

The appellant shows other payments made in the delivery of corn, of hogs, for labor and work done, and the payment of money amounting to $80, but when or the exact time these payments were made does not appear.

There was also a claim set up against the appellee for the value of land lost included in the boundary sold, and for which the obligation was executed. Whether or not there was an eviction or a recovery by a better title is not made out, and we must, therefore, in the absence of the original writing, assume that before a recovery could be had for this lost land an eviction must be shown by a paramount title. We think, however, under all the circumstances of this case, with the writing lost upon which the recovery is sought and not in the record, that this sum of $80 should be credited as paid on the 1st of January, 1881. This will about equalize the time at which the various payments were made.

Reversed and remanded that this may be done.

CAMBPELL, &c. v. POTTER.

(Filed January 18, 1895—Not to be reported.)

Where a housekeeper removes from his homestead temporarily, with a fixed purpose of returning to it and occupying it as his home, his homestead right therein is not forfeited; but if his removal was with the intent to make a permanent change of residence, then the right of homestead is lost.

The fact that the housekeeper, while temporarily residing away from his homestead, registered or voted in a ward other than that in which the homestead is located, is not conclusive evidence of an abandonment of the homestead, but it is merely one circumstance to be considered in connection with all the other circumstances of the case by the court in determining whether the homestead was left by its owner for temporary purposes or permanently.

Clark & Clark for appellants.

W. E. Garth for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

Some time between the years of 1869 and 1871 the appellee, Ephraim Potter, purchased the house and lot in controversy, which is situated near the fair grounds in Bowling Green, and in 1872 moved on it with his family, and so remained on it, claiming it as his homestead, until the middle of November, 1890, when he leased it to another, but the possession to be restored to him whenever he desired it.

On the property W. G. Daugherty held a mortgage lien for something over $100, including interest. In the fall of 1891 the appellant and one Oliver had executions issued on judgments which they held against the appellee, had them levied on the

house and lot, and on the 23d of November, 1891, the property was sold to satisfy the execution debts. The appellant became the purchaser. The property is worth less than $1,000. There being a mortgage lien on the property, he instituted this action to have his supposed lien under his purchase satisfied by a sale of the property.

The Campbell and Oliver debts did not exist prior to appellee's purchase of his homestead and the erection of improvements thereon. Appellee was not living on the property at the date of the levy and sale under the execution, and was not when this suit was brought.

The sole question in the case is as to whether or not the appellee's residence was permanently or temporarily located elsewhere when the levy and sale took place. If permanent, the sale under the executions was valid; if temporary, then the sale was void, because appellee's homestead right in the property could not be affected thereby.

The proof shows that about the middle of November, 1890, appellee with his family moved to another part of the city for the purpose of boarding students, who were attending the Cumberland Presbyterian Colored School. This was to continue until about the 1st of May following. After the school closed those in charge made an arrangement with appellee to remain in the property for some months longer, which he did.

After leaving this property at the earnest solicitation of a son, who had lost his wife, leaving seven small children to be cared for, appellee and his wife went to live with him. The appellee expected to return to his property (being all he had) the spring following his departure from it, and constantly expressed a purpose to return to it. The proof is satisfactory that his absence from the property was temporary, and that he had an actual purpose and intention to return to it and to make it his home.

Appellant endeavored to show that appellee had abandoned all purpose to return to the property, and that his residence had been permanently located elsewhere, by proving that appellee had registered and voted in other wards in Bowling Green other than the one in which his homestead was situated.

The proof shows that appellee did this. This act of appellee is not conclusive of the question, but is simply a fact in connection with the other facts proven to aid the court to determine whether or not the removal of appellee from the premises was permanent or temporary. The court holds that the act of registration and voting are not sufficient to overcome the weight of the testimony which conduces to prove that the removal was temporary.

This court has held that the homestead right is never forfeited when there has been an occupancy and then a temporary removal, with an intention to return and make the premises a home. (Faut v. Tabot, &c., 81 Ky., 23; Hansford v. Holden, 14 Bush, 210; Davis v. Prichard, 9 Ky. Law Rep., 914; Black v. Black's Adm'r, &c., 11 Ky. Law Rep., 378; McFarland v. Washington, 12 Ky. Law Rep., 376.)

In McFarland v. Washington it appeared that the debtor with his family, after occupying his homestead for several years, in 1884 removed temporarily to the country for the purpose of raising a crop of tobacco on the land of another during that year. For the years of 1885 and 1886 he remained on the same land for a similar purpose. In January, 1887, he returned to the premises. During his absence it had been sold, and deed made to the

purchaser. As the debtor did not have a purpose to abandon his homestead, but left it temporarily, the court held that he was entitled to hold it. The other cases cited are equally as decisive of the question involved in this case.

The statute should be liberally construed, so as to carry out the beneficent purpose and wise public policy of its enactment.

Judgment affirmed.

BOOKER, &c. v. KENNERLY, &c.

(Filed January 19, 1895.)

1. Service of summons on guardian ad litem of infant—Affidavit—The affidavit filed by plaintiff showed that the infant defendant, under fourteen years of age, had no father or guardian, and that her mother was the plaintiff in the action; therefore, the appointment by the clerk of a guardian ad litem for defendant and service of summons on him brought the infant before the court, and the judgment against her was not void.

2. Motion to file answer by infant and vacate judgment against her—The court ought to have permitted the infant defendant to file her answer, which was made a cross petition in the action in which the judgment was rendered against her, due notice having been given of the motion to file said answer, and it having been offered before the expiration of twelve months after she attained the age of twenty one years.

Jonson & Wickliffe for appellants.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Lewis.

An action was instituted by R. J. Kennerly and her husband, H. C. Kennerly, to set aside a deed for about seventy acres of land made to W. R. Booker, now deceased, who was at that time husband of R. J. Kennerly, upon the ground the consideration for the land was paid out of the estate of the wife, derived from her father. To that action the vendor of the land, Staples, and Mary Belle Booker, child of W. R. Booker and R. J. Kennerly, then Booker, were the only defendants. Judgment was rendered in 1884 in that action setting aside the deed, whereby R. J. Kennerly was invested with title and possession of the land, and, being now dead, her children by H. C. Kennerly, jointly with Mary Belle Booker, have inherited it as her heirs at law, subject to his tenancy by courtesy.

Mary Belle Booker, by her statutory guardian, has appeared in this action, and upon notice moved to set aside the judgment of 1884, the effect of which, if done, would be to leave title to the land solely in her.

The ground upon which she bases that motion is that upon an insufficient affidavit clerk of the court appointed a guardian ad litem to defend for her, and the court did not, consequently, acquire jurisdiction to render judgment divesting her of title and investing her mother therewith.

According to section 52 of the Civil Code, as amended January 16, 1882, in an action against an infant under fourteen years of age, where such infant has no father or guardian, as was her condition, or having a mother who is plaintiff in an action against her, as was so, it was made the duty of the clerk, upon an affidavit being filed showing such state of case, to appoint a guardian ad litem for the infant, upon whom summons might be served.

There can be no controversy about the condition existing in which the clerk was authorized to make the appointment, nor whatever be the form of it, that there was an affidavit showing such condition. So that as Mary Belle Booker was before the court it had jurisdiction to render the judgment, and it is not consequently void; but the record shows the proceeding, as far as any proper protection or defense of the rights of the helpless infant was concerned, to have been farcical. For the guardian ad litem, as is generally the case, did not make or attempt to make any effort in behalf of the infant, and as to any benefit she derived from the appointment it had as well never have been made.

But the Civil Code has, by section 391, provided that an infant in the condition of Mary Belle Booker may at any time after judgment against her, within a period terminating twelve months after attaining the age of twenty-one, show cause against such judgment. And as due notice was given, her motion to file an answer to the original petition, made by her a cross petition, ought to have been sustained by the lower court, for she is now certainly entitled to make whatever defense to the original action she may have and to recover the land as though no judgment had ever been rendered divesting her of the title.

The judgment is, therefore, reversed for further proceedings consistent with this opinion.

TILTON v. TILTON.

(Filed January 22, 1895—Not to be reported.)

1. Pleadings—Alimony and divorce—Where the wife is entitled to a divorce, the right to alimony follows as a matter of course. Therefore, alimony will not be denied the wife in an action where her prayer for divorce ought to be granted, on the ground that her petition claims no specific amount of alimony, or that it does not allege facts sufficient to enable the chancellor to fix the amount of alimony if it had been taken pro confesso.

2. While a judgment granting the husband a divorce on his cross petition can not be reversed on appeal, yet if he was not entitled to it the judgment below dismissing the wife's claim to alimony may and will be reversed if she was entitled to alimony.

3. The evidence in this case does not authorize the finding below that the husband was entitled to a divorce by reason of adultery committed by his wife; for even if the charges were shown to be true, as they are not, his cohabitation with her after learning all about her alleged offense took away his right to a divorce.

Thomas Owens and Wm. H. Holt for appellant.

Hanson Kennedy, Knott & Edelen and Kennedy & Son for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Chief Justice Pryor.

On the 13th of September, in the year 1892, the appellant, Mrs. May Tilton, instituted this action below for a divorce and alimony from her husband, Robert Tilton.

The grounds relied on were a confirmed habit of drunkenness; a failure to provide for the wife any means of support; and lastly, behaving towards her in such a cruel and inhuman manner as

indicated a settled aversion to her and to destroy permanently her peace and happiness.

The appellee, the husband, denies the existence of any and all the grounds for relief, and asks that he be granted a divorce on the ground that his wife, the plaintiff, had been guilty of adultery.

The chancellor refused any relief to the wife, and granted the husband a divorce a vinculo matrimonii.

The wife is now claiming the husband was not entitled to a divorce, and that she should have been allowed alimony, and this is the question involved on the appeal.

It is claimed by counsel for the appellee that as an action for permanent alimony may be independent of the action for a divorce, that no alimony can be allowed in this case because there is no specific amount claimed or other facts alleged to enable the chancellor to render a judgment pro confesso, or upon the facts alleged in the petition.

We understand the rule to be that, in an action for a divorce, the right to alimony will follow if the wife is granted the divorce, and that while the facts proven may not justify a divorce, alimony may, nevertheless, be allowed, and while this court has no power to reverse a judgment of divorce, if the husband was not entitled to it, alimony will be given the wife if otherwise entitled. If she is entitled to a separation from bed and board, or to an absolute divorce, the right to alimony follows under the prayer for general relief if the wife is the plaintiff in the action. It is an incident to the main relief sought. (Wilmore v. Wilmore, 15 B. M., 49.)

These parties were married in November, 1885, and lived together until July, 1892. The testimony shows that the appellee was a slave to whisky and morphine, and that he failed to provide for the wife as he should have done. His conduct otherwise was kind and affectionate, and when the plaintiff married him she knew his faults, and, regardless of the entreaties and persuasion of his relatives, resolved to consummate the marriage and risk the consequences. In a short time she was engaged in sewing for her friends and neighbors, at which she earned as much as $1.25 per week. Their parents seem to have furnished them often with supplies, and for the greater part of their married life they lived at the home of Dr. Tilton, the father of her husband. She was not destitute of food or clothing, and the distress of mind on her part and the cruelty of the husband consisted in his persistent purpose to lead a life of dissipation, and this the unfortunate woman was apprised of and assumed to risk when taking him as her husband, and upon this state of fact the chancellor would have been justified in dismissing her petition and certainly denying to her such relief as an absolute divorce.

We infer from the testimony that the appellant and her family did not occupy as high a position in social life as that of the appellee, but her character as an honest, pure and confiding woman, so far as this record shows, seems never to have been questioned until it was rumored in some way that this young wife had committed the crime of adultery with one Harvey Horne, the uncle of the husband, the brother of her husband's mother; that this man, with children and grandchildren, had invaded the sanctity of the nephew's home, destroyed his peace and happiness, blasted the character of the young wife by having an adulterous connection with her in March, 1892.

The appellee, the husband, makes his answer a cross petition against the wife, in which this charge of adultery is alleged, and during the progress of the case this uncle declined to respond to the question by the defense, when asked "if he had ever had

sexual intercourse with this young woman" by saying, "I decline to answer." There is no fact or circumstance in this entire proof showing any act or conduct on the part of the appellant to or with this seemingly unwilling witness that would indicate her affection for him or a desire upon her part to gratify his animal passion.

It is shown that she was sitting on the steps or a bench in the yard of her father-in-law with this uncle, and that the two finally left the bench and walked into the house together, and in a short time returned and took their seats at the same place. It was at the house of the father-in-law where she then lived, and where the uncle was in the habit of visiting in broad daylight, and no evidence whatever excluding the idea that all the family were not absent from home. Another circumstance is that in company with other ladies of high respectability she visited Cincinnati, and this uncle by marriage being along, for the purpose of buying goods, being a merchant, the appellant wishing to purchase some chinaware, proposed to go with her uncle to buy the china, saying that he being a merchant could get it cheaper than she could. These circumstances are regarded as suspicious, and led up to a revelation made by the wife to the father of her husband that she and Horne had illicit connection at one time, and she feared she was pregnant by him. This was in June, 1892, and she said to her father-in-law she had told her husband of her shame in the month of May of the same year. They were then living together as husband and wife in the home of his father and sleeping in the same bed, and in a short time went to housekeeping, perhaps the same week, when these remarkable developments were made.

In a few days after the husband came after his father, who was a physician, to see his wife, who was suffering much pain, and on examination found considerable flooding, with very little relaxation at the mouth of the womb; recommended an injection of morphine, and in the morning returned, when Bob, the husband, told him the fœtus and afterbirth had passed off early in the morning. The doctor does not pretend to say that the statements of the husband were true, or that the appellant was pregnant when he was called in. On the contrary, the proof shows the appellant would suffer great pain in some of her monthly periods, the result of irregularities in this regard, and that in a few days she was walking about the town as usual, and visited her mother with her husband the same week, and the Wednesday before the separation the wife and husband slept at the home of her mother in the same bed, with no evidence of a want of affection on the part of either.

The appellee had been so much addicted to the morphine habit and the use of liquor that he had been sent to Dwight, with a view of having him cured of this desire for stimulants. One theory of this case is, assuming the wife was pregnant, that the husband, by reason of this morphine habit, had lost all of the power of procreation, and, therefore, the condition of the wife was caused by an improper connection with Horne. When the husband returned from Dwight it is shown that he had reformed and was greatly improved, and while the vigor of manhood had been lost, the cessation of the use of morphine for months restored, no doubt, his procreative powers, for he returned in March and in June the miscarriage took place, and it is preposterous to assume, the husband having constant access to the bed of his wife, and, in fact, sleeping with her from night to night, with his manhood restored, was not the cause of his wife's condition, but that her uncle, whose friendship he seems not to have abandoned, was; nor can it be supposed, that the husband, with

a knowledge of the fact that improper relations existed between his wife and his uncle, would have lived with a woman so bad as to forget her marriage vows and submit to the embraces of the aged uncle, whose vital powers are doubtless nearer extinct than those of the appellee.

It seems that the appellee has but little estate, and what is really involved in this case is the character of this humble woman. The judgment in this case against her establishing a want of chastity has taken from her a hitherto pure and spotless character that took her as a welcome guest to her neighbors, that she might ply her needle from day to day and enjoy the association of the best and purest women of the village.

The facts of this record show the husband to have made a merciless assault upon innocence and virtue, and brands the appellant with infamy and disgrace, when it is apparent, even if the wife was guilty, that the husband sustained his relations with her with a full knowledge of what he claimed to be the facts evidencing her guilt, and, therefore, the chancellor should have dismissed his petition.

If the chancellor below or this court had clear and convincing evidence of the criminal conduct of the wife, the judgment against her would go; but after a careful consideration of this record our conclusion is that no foundation exists for such a shameful and degrading charge.

The judgment dismissing the appellant's petition for alimony is reversed and the cause remanded that alimony may be awarded her.

GRAHAM, &c. v. DYER.

(Filed January 22, 1895—Not to be reported.)

1. Breach of warranty of title—Evidence—A vendor, who was given notice by his vendee of the pendency of a suit to recover the land conveyed, and called upon to aid in the defense of such suit, is concluded by the judgment of eviction against his vendee; therefore, in an action against him by the vendee to recover on the breach of warranty of title, the vendor can not introduce evidence to show that the vendee was not in fact evicted by a paramount title.

2. Same—It is no defense to such action that the vendee might have taken possession of the land conveyed as s on as the deed was made to him, and have held it for fifteen years before the filing of the suit by the party holding the paramount title, and thus have acquired a valid possessory title. The vendee owed the vendor no duty of acquiring a possessory title, but had a right to rely upon the title conveyed by the vendor.

3. Same—Measure of damages—The vendee was entitled to recover the purchase money paid by him, with interest from date of payment, also the legal costs recovered of him in defending his title, and his reasonable attorney's fee for making such defense.

H. T. Kendall and S. H. Bush for appellants.

Hacyraft & Hobson for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Paynter.

This action is on the warranty contained in a deed executed by appellants to appellee on the 6th of April, 1872, for a tract of land

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situated in Hardin county, in this State, for which appellee paid appellants $289.50.

On December 6, 1880, Wm. J. Shoptaw executed and delivered a deed to Margaret C. Rollins and others for the same boundary of land. It was woodland. Some time in 1884 the appellee sold a portion of the land to some parties, who took possession of the part which they purchased. Before this date, neither by himself nor tenants, had the appellee the actual possession of the land. His vendees failing to pay the purchase money, the appellee instituted an action to recover it.

On May 31, 1887, Wm. J. Shoptaw's vendees, Margaret C. Rollins and others, interpleaded in that action, were made parties thereto, and sought to recover possession of the tract of land, claiming that they were the owners of the land by virtue of the conveyance from Shoptaw, alleging that Shoptaw had acquired the ownership of the land by his actual, adverse possession of it, claiming it as his own to a well-defined boundary for fifteen years before 1864, at which time he had left it, and that there had been no one in the actual possession of it from that time until 1884, when appellee's vendees took possession of a part of it. When the action was commenced to recover the land appellee notified appellants in writing that such action was pending and asked them to defend it, and informed them that he would look to them on their warranty in the event there was a recovery against him. Appellants assisted in the defense.

In 1892 the action was tried, and Shoptaw's vendee recovered the land, and appellee was evicted. This record shows that the recovery was had by virtue of the possessory title of Shoptaw, with which the plaintiffs had been vested by the deed which he had made them.

Appellee seeks to recover the amount he had paid appellants for the land, with interest from date of purchase, his costs expended in defense of the action to recover the land, the costs recovered against him, and an attorney's fee of $100.

Appellants filed an answer in which they denied that the Shoptaw title was paramount to that which they had conveyed appellee; that the amount of costs claimed was too much, as part had been expended in defense of appellee's title to another tract of land which was involved in the same action, and that the attorney fee claimed was excessive. They further claimed that more than fifteen years had elapsed from the date of the sale to appellee until the suit was brought to recover possession, and that by his carelessness and negligence, in not taking and holding actual possession of the land, he had lost it.

It is contended that the court erred in not allowing appellants to prove that the land they had sold Dyer was embraced in the patent to one Shanks, and the same land they purchased in 1861, and got a deed for in 1867, and that more than fifteen years had elapsed from the time they sold it before any claim was set up to it by Rollings, etc.; and that if appellee had taken it into actual possession he could have held it, and that he thus lost the land by his own carelessness, and that no one was ever in the possession of the land after their purchase in 1861 except the plaintiff and defendants.

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In 1892 the action was tried, and Shoptaw's vendee recovered the land, and appellee was evicted. This record shows that the recovery was had by virtue of the possessory title of Shoptaw, with which the plaintiffs had been vested by the deed which he had made them.

Appellee seeks to recover the amount he had paid appellants for the land, with interest from date of purchase, his costs expended in defense of the action to recover the land, the costs recovered against him, and an attorney's fee of $100.

Appellants filed an answer in which they denied that the Shoptaw title was paramount to that which they had conveyed appellee; that the amount of costs claimed was too much, as part had been expended in defense of appellee's title to another tract of land which was involved in the same action, and that the attorney fee claimed was excessive. They further claimed that more than fifteen years had elapsed from the date of the sale to appellee until the suit was brought to recover possession, and that by his carelessness and negligence, in not taking and holding actual possession of the land, he had lost it.

It is contended that the court erred in not allowing appellants to prove that the land they had sold Dyer was embraced in the patent to one Shanks, and the same land they purchased in 1861, and got a deed for in 1867, and that more than fifteen years had elapsed from the time they sold it before any claim was set up to it by Rollings, etc.; and that if appellee had taken it into actual possession he could have held it, and that he thus lost the land by his own carelessness, and that no one was ever in the possession of the land after their purchase in 1861 except the plaintiff and defendants.

This offer of evidence raised two questions: The first as to the paramount title of Shoptaw, which he held when appellants conveyed the land to appellee; the second, that it was the duty of appellee to have taken actual possession of the land when he purchased it, and thus to have acquired a possessory title to the land before the suit was instituted to recover it.

As to the first proposition the court did right in excluding the evidence, as the question to which the proposed evidence related was conclusively settled by the judgment of the court awarding the land to Shoptaw's vendees.

The very question involved in that case was as to their right to recover the land. The effect of the judgment was to declare that the paramount title was in Shoptaw's vendees.

When the suit was instituted to recover the land appellee gave appellants notice of its pendency, and notified them that he would look to them on their warranty. Appellants are concluded by the judgment.

This court, in Jones v. Jones, 87 Ky., 82, held, in suing on a warranty, that the vendee must allege the eviction was by a paramount title to that derived from the vendor unless vendee had given notice to the vendor of the adverse claim and pendency of the action. When this is done it dispenses with further averment of a recovery by a paramount title.

It was held in Elliott v. Saufley, 89 Ky., 52, all that was necessary for vendee to recover on the warranty is to show eviction, and that vendor was a party to the action or had notice of its pendency.

The court said, in Underwood v. Allen, 3 Dana, 166, "as the defendant had notice of the pendency of the ejectment, the judgment concluded him as to the title, and, therefore, no other proof of the adverse title was necessary on the trial."

When the vendor is notified of the pendency of the action he is bound by the recovery. (Cummins v. Kennedy, 3 Litt., 124.)

As to the second question the court holds that it was not necessary for appellee to have entered upon and taken the actual possession of the land in order to give him a cause of action against the appellants on their warranty. Appellants convenanted that they had a good and sufficient title to the land, and that they would protect him in its enjoyment. He was not required to either live on the land himself or to hold the actual possession by tenants.

It was not required of appellee to acquire after his purchase a possessory title to the land in order to release appellants from liability on their warranty.

Had appellants held the paramount title to the land when they made the deed to appellee and delivered him possession of the land, then should some one have entered upon the land, held the actual possession of the land in such a way as would give him a possessory title at the end of fifteen years, certainly no action could be maintained on the warranty.

This is no such case. Appellee not having obtained the title to the land by his deed from appellants, he never was in the constructive possession of it. From this view of the case it remained only for the court to instruct the jury as to the criterion of recovery. This the court properly did in instruction No. 1.

In that instruction the court told the jury to find for the appellee the purchase money paid for the land, with interest thereon from the date of the deed (the money being then paid), and also the legal costs recovered against appellee in the action to recover the land, and such costs as he had paid in defense of that action, and a reasonable attorney fee to his attorney therein. (Mercantile Trust Co. v. South Park Residence Co., 15 Ky. Law Rep., 73.)

In the second instruction given the court properly guarded the jury against finding for appellee any of the legal costs incurred in defending that branch of the action which sought to recover land not embraced in the deed of appellants to him.

It is insisted that the court should not have allowed the jury to give interest on the amount paid for the land. The appellee never used or occupied the land. It yielded him nothing in rents. It was woodland. The fact that appellee's vendees used a large quantity of timber from the land, for which appellee got no benefit, does not release appellants from their liability for interest.

The case of Thompson v. Jones, 11 B. M., 365, is not applicable to the facts of this case. In view of the principles announced in this case the court below did not err in refusing instructions offered by counsel for appellants, and in overruling motion for new trial.

Judgment affirmed.

SAPP v. STURGEON.

(Filed January 22, 1895—Not to be reported.)

Deeds—Mistake—Evidence—The evidence is sufficient to authorize the finding of the chancellor that appellee agreed to sell and convey, in conjunction with his tract of land, a right of way over only Settle's land and not over Thompson's land also, and the judgment correcting the ambiguous clause in the deed of conveyance so as to have this effect was proper.

W. E. & S. A. Russell for appellant.

H. Philip Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

This is an action in equity to correct a mistake in the deed which appellee made appellant for land, and to enforce the payment of the balance of the purchase money.

Appellee purchased the land of W. J. Lisle, trustee of John Schooling, etc., who made him a deed therefor. There is in the deed language as follows: "This also covers right of way over Joshua Settles' land to land of Zilla Thompson."

Appellant did not acquire the right of way over the land of Zilla Thompson by the terms of this deed, nor does he claim in this action that he owned such right of way.

Appellant claims that appellee was to convey him the right of way over Zilla Thompson's land, and his failure to get it had damaged him more than the $200 and interest which remained unpaid of the purchase money, and pleads it as a set-off and counterclaim.

The deed from appellee to appellant, with reference to the matter of right of way, contains this language: "This deed also conveys the right of way over the land of Joshua Settles' land of Zilla Thompson."

This language is ambiguous in so far as it refers to the land of Zilla Thompson. Appellee claims that he did not intend to convey the right of way over the land of Zilla Thompson, but only over the land of Joshua Settles, being the right of way over Settles' land which he obtained by the Lisle deed.

The county court clerk, who prepared the deed of appellee to appellant, says that he was directed to prepare the deed from the one which Lisle had made appellee, and he fully explains the circumstances under which the mistake was made by him in its preparation.

The court below held that there was a mistake in the execution of the deed, and that it was not intended to convey a right of way over the lands of Zilla Thompson. The judgment corrected the deed by supplying the word "to," where omitted, between the name Joshua Settles and the word land in the 39th line of the deed. This would make the deed convey the right of way over the land of Joshua Settles to the land of Zilla Thompson.

There being a conflict in the testimony, and the chancellor being presumed to know the parties and witnesses, and having determined there was a mistake in the deed and corrected it, this court will not disturb his conclusion.

It necessarily follows from that conclusion that appellee was entitled to recover of the appellant the balance of the purchase money and have his lien enforced. This makes it unnecessary to notice the other questions in the case.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SURVANT.

(Filed November 1, 1894.)

1. An instruction concerning willful negligence is proper only when the action is one to cover damages under the statute, where the injury resulted in death.

In this case, where plaintiff sues to recover for personal injuries to herself, resulting from the alleged negligence of defendant, it was error to give an instruction defining willful neglect.

2. Railroads are not required to lower the rate of speed of trains when approaching private crossings in the country, nor are they required to give signals of their approach to private crossings.

3. A public crossing exists only where the road crossing the railway is a public one. Such a public road can be created in only two ways: First, in the manner prescribed by statute; second, by a dedication by the owner to the public use and by an acceptance by the county.

In a case where the evidence fails to show that the road was made a public one in either mode stated above, evidence of witness that the road or crossing was a public one was incompetent.

4. The failure of the train to whistle on approaching a public crossing, even if plaintiff, who was on a private road near such public crossing, could have heard such signal, was not the cause of the accident in this case in such a sense as renders the railroad company liable for the injury, since plaintiff was not injured by a collision with a train at the private crossing, but was injured by her horse becoming frightened after she had passed the crossing.

5. Same—Excessive damages—A verdict of $6,000 damages is excessive when plaintiffs' injuries are not shown to be permanent and appear to be slight, no bones having been broken.

W. J. Lisle, Thompson & McChord and H. W. Bruce for appellant.

Wm. E. & S. A. Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Quigley.

This suit was brought to recover damages for personal injuries to the plaintiff, Jennie Survant, and for damage to a buggy, alleged to have been caused by the negligence of defendant in running a freight train upon a crossing over which, at the time,

said plaintiff and her two children were passing in a buggy, whereby the mare hitched thereto was frightened and ran away, running the buggy against a telegraph pole, and throwing plaintiff and her children out upon the ground, the plaintiff falling upon her shoulder.

Defendant denies all negligence upon its part, and pleads contributory negligence on the part of plaintiff. Defendant also alleges in its answer that the crossing where the accident occurred was a private crossing, which is denied by plaintiffs in their reply; and the fact as to whether or not the road she was traveling, at the time of the accident, and the crossing was a public or private road, or a public or private crossing, is in issue.

Upon the trial of the case the jury found a verdict for plaintiff for $6,000. Defendant's motion for a new trial having been overruled, it prosecutes this appeal to reverse the judgment of the lower court and have a new trial granted, and assigns the following reasons therefor:

1st. The damages are excessive, appearing to have been given under the influence of passion or prejudice.

2d. The verdict is not sustained by sufficient evidence, and is contrary to law.

3d. Error in the court in giving to the jury instructions A, B and C; and

4th. Error in the court in permitting improper testimony to go to the jury.

We find no error in instructions A and B, but instruction C is clearly improper, and should not have been given. It reads as follows: "Willful negligence is an intentional failure to perform a known or manifest duty in which the public has an interest, or which was important to plaintiff in avoiding the injury to her if she sustained any injury."

Such an instruction is proper only under the statute in cases where death ensues from the willful negligence of another, and in which punitive damages may be awarded; and in such actions contributory neglect can not be relied upon as a defense. In all other cases contributory negligence may be pleaded as a defense, but in this case this instruction was not prejudicial to defendant, the court, at defendant's instance, having instructed the jury as to contributory negligence on the part of plaintiff.

The other reasons assigned grow out of and are based entirely upon the evidence, so that, for the purposes of this appeal, it is necessary only to consider the facts. It appears from the evidence that Northfork and Gravel Switch are two railroad sections on the Knoxville branch of defendant's road in Marion county, Ky., about one mile apart. There are two roads from Northfork to Gravel Switch—one by the old pike or county road; the other the land of Al. Pipes. The distance between the stations by the county road is about three miles, and by the Pipes road about one mile. The railroad does not cross the county road between these stations, nor does it appear that there is a public crossing of the said road at Northfork, but about midway between them on the Pipes road there is a railroad crossing. Between Northfork and this crossing on the Pipes road there are three or four gates, and before this road reaches the crossing it runs parallel with the railroad track for 300 or 400 yards, and within about that distance of it. After the road gets to the crossing it runs the balance of the way over the right of way of defendant and parallel with its track to Gravel Switch.

On the Pipes road, beginning at a point about 300 yards from the crossing and up to within a hundred yards thereof, a traveler

thereon can not be seen by the engineer of a train approaching the crossing from Northfork because of a cut in defendant's roadbed, but from the crossing, and at any point within 100 yards thereof on the Pipes road, this view of the track towards Northfork is unobstructed for 700 or 800 yards; from thence on to the station it makes several curves and runs through two or three cuts. From Northfork to Gravel Switch the track is down grade.

At the time of the accident plaintiff lived in Northfork, and was familiar with the running of trains over defendant's road between these stations, as well as with defendant's track and roadbed and the crossing where the accident occurred, and knew which one of the two roads could best be traveled with safety and convenience. There is no evidence that the county road was out of repair and unfit for travel, and the evidence being silent on that point, we assume that it was in good repair.

On December 11, 1892, between 1 and 2 o'clock in the afternoon, plaintiff, Jennie Survant, with her two children, the eldest being a lad fourteen years of age, started in a buggy, drawn by a mare, from Northfork to Gravel Switch over the Pipes road to visit a relative. The day was cold, but the buggy top was thrown back. After they had passed through all the gates, with the exception perhaps of the last one, and were upon that part of the road running parallel with the track, and at a distance of about 300 yards from the crossing, she stopped and looked and listened to ascertain whether or not a train was approaching, and not seeing or hearing any, and without further effort on her part so to do before reaching the crossing, the buggy was drawn upon it, and then, for the first time, she saw a train rapidly approaching from the direction of Northfork, and within a short distance of her. The alarm whistle was sounded; the crossing was made; but the mare got frightened and ran away, causing the buggy to strike a telegraph pole, thereby throwing its occupants out.

The train was a through freight, containing about twenty cars, loaded with coal. It was running between twenty and thirty miles an hour, the usual speed of such trains between these stations because of the down grade and the grade to be climbed.

There is no evidence that the mare was frightened before the crossing was reached or after she got upon it, but rather that she got frightened after the crossing was made and while she was on this parallel road over the defendant's right of way; nor does the evidence indicate that after the perilous condition of plaintiff was discovered by the engineer in charge of said train he, or any of the other employes thereon, did that which they should not have done, or omitted to do that which they ought to have done, within the line of their duty to avoid the danger, if any, to the plaintiff.

The contention of appellees, that the Pipes road was a public road, and the crossing thereon a public crossing, is not sustained by the evidence. It was never created a public road by the county court, or dedicated as such by any of the owners of the land over which it passes. The county court of Marion county never at any time exercised in any way the least control over it. Pipes the owner of the land, states that the road is a private passway; that he bought and paid for the land over which it runs and pays taxes upon it.

A public road can only be established in two ways: One is in the manner prescribed by the statute; the other by dedication; and in the latter case it must be accepted by the county court.

In the case of Wilkins v. Barnes, 79 Ky., 323, this court said: "Both a dedication and an acceptance must concur. The former

may be made by deed or result from such use and lapse of time as would constitute a right in an individual by prescription;" and again: "A road or street dedicated to the public must be accepted by the county court or town, either upon their records or by the continued use and recognition of the ground as a highway for such a length of time as would imply an acceptance. The continued use of a road by the public for fifteen years or more, with the exercise of possession on the part of the county court over it by appointing overseers, etc., would constitute it a highway." (Gedger v. Commonwealth, 9 Bush, 61.)

This is not the case here. Besides it is not in keeping with the intelligence and common sense of any community to assume that the people or the county court would either construct, maintain or accept as a public road a road only a mile in length, one-half of it being upon the land of an individual, and the other half upon the right of way of defendant's railroad and parallel with its track, over which freight and passenger trains were being operated daily.

No dedication of said road or acceptance thereof by the county court having been shown, or right by prescription in the public to use the same as a public road, all that portion of the testimony of witnesses who testified that the road was a public road, and the length of time it had been used as such, and to which the defendant objected, should have been excluded from the jury on defendant's motion so to do. So that, this court holding as it does under the evidence that the crossing where the accident occurred was a private crossing, the question is whether or not defendant was negligent in the running of its train along and over said crossing at the time and in the manner complained of.

We find this language in Sherman & Redfield on Negligence, 3d edition, section 478: "Frequent attempts have been made to convict railroad companies of negligence on the mere ground of the speed at which their trains have been run; but it never has been, and we trust never will be, established as a rule of law that any conceivable rate of speed is per se evidence of negligence. The whole object of the railroad system is to attain a high speed of travel, and the vast saving of time which the community makes by every increase in the rapidity of travel, with the corresponding increase in the productive power of nations, should make courts and juries cautious lest they hinder the progress of the world by an unwise timidity. If the track is decayed or loosely laid, a high rate of speed is no doubt dangerous. There are many railroads upon which it would be more dangerous to travel thirty miles an hour than to move at double the speed over a well built and equipped road. So when the road passes through a village, town or city the speed of its trains should obviously be diminished in proportion to the liability of meeting persons on the track; but in crossing an ordinary rural highway no diminution of speed is required unless very special circumstances make it necessary."

And again, in section 481: "An engineer is not bound to lower his speed on approaching the ordinary highways in the country, where travelers only pass occasionally."

And this court, in the case of Hucker's Adm'r v. K. C. R. R. Co., 7 Ky. Law Rep., 761, held "that railroads are not required to slow up and signal at all points along their road where people are in the habit of crossing; that it is only where the way is a public one that reckless speed or the failure to signal amounts to neglect upon the part of the railroad company."

And in the case of Shackelford's Adm'r v. L. & N. R. R. Co., 7 Ky. Law Rep., 729: "Railroad trains must give the customary

signals at public places or public crossings. The failure so to do is negligence, but this is required for the safety of passengers, trainmen and the public using, and who have the right to use, the track at such public ways, and not for the purpose of protecting those who, as trespassers, may be crossing or using the track elsewhere."

Appellee, however, contends that it was the duty of the engineer to sound the whistle and signal the approach of the train to Northfork, and by failure so to do she was not apprised of its coming at Pipes' crossing. Granting this to be true, and that under the evidence she had a right to rely upon and expect such signals to be given, because the proof conduces to show that she was not in fact a trespasser, but by implied permission and license of the company had the right to use the crossing and the road as a neighborhood road, yet this case differs in principle from the case of Cahill v. Cincinnati, &c., Ry. Co., 13 Ky. Law Rep., 714, in this, that in the Cahill case the injury was caused by the railroad company, and in this case it was caused by the fright of plaintiff's mare after the crossing had been made and after plaintiff had voluntarily placed herself in a position of danger, from which the use of ordinary care and prudence of the defendant's employes in charge of said train could not relieve her.

The plaintiff states that she was looking out for trains, as it was about time for the passenger train, and if it had been the passenger she would have had time to have gotten to Gravel Switch.

While negligence, contributory negligence, and the question as to whether or not, after the discovery of the danger, the defendant used ordinary care and prudence to prevent the injury, are questions of fact for the jury, yet they are all predicated upon the idea that before the plaintiff can recover there must be evidence of some positive actual negligence on the part of defendant, and but for which the injury would not have happened, which is not established under the evidence in this case.

Finally, as to the verdict of the jury, plaintiff's injuries appear to have been slight. No bones were broken, and no permanent injury shown.

This court, in the case of Louisville Southern R. R. Co. v. Minogue, 90 Ky., 369, held the verdict excessive because it was not shown with reasonable certainty that there was permanent injury, the medical testimony being as unsatisfactory in that case as in the one before us.

Wherefore, the judgment of the lower court is reversed, with directions to grant defendant a new trial.

MACAULEY v. ELROD.

(Filed December 15, 1894—Not to be reported.)

The general rule is that an agent who undertakes to act as bookkeeper and treasurer for his principal will be required to show a correct statement of the accounts and held responsible for his failure to do so. But if the carelessness and neglect of the principal causes a discrepancy or aids in bringing about a state of things that renders a true accounting impracticable, this strict rule of responsibility of the agent does not apply.

In this case the agent who acted as bookkeeper and treasurer of the prinal at his theatre was not a bookkeeper, and this the principal, who was experienced bookkeeper, well knew. The accounts cover a period of sev-

eral years, and the principal's business methods rendered it impracticable to keep them accurately. Neither of the parties seem to know accurately how the accounts between them stand, and the court finds it impossible to adjust their claims from the evidence, and the judgment denying the claim of each against the other was proper.

E. F. Trabue for appellant.

John Speed and O'Neal, Phelps & Pryor for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This action originated at law, and finally transferred to a court of equity, involves the settlement of the accounts between the appellant and the appellee, and particularly the accounts of the appellee while agent and bookkeeper of the appellant at his theatre in the city of Louisville.

The settlement runs through a period of several years, and it is insisted by the appellant that the appellee, by failing to make proper entries, and omitting to make others, shows the loss of appellant's money to a large amount, and for which he should be held to account.

Many books of accounts, orders, checks, etc., are found with the record, and a system of bookkeeping shown that renders it impossible to arrive at any accurate result, and, in fact, many checks in number given by appellant for his own purposes that have been attempted to be charged to the appellee having no connection with the business, or, if so, were not properly chargeable to him. The claim of $15,000 asserted against the appellee has been reduced by the admission of the appellant to less than one-third of the amount, and that not properly chargeable to him. The entire proceeds of the theatre belonged to the appellant, and he used them, as he had the right to do, in such a manner as to prevent anything like system in the statement of the accounts.

The case was referred to an experienced commissioner below, fully competent to state the accounts, and after a careful examination of the books and accounts, together with the proof offered by each party, reported an indebtedness by the appellant to the appellee. The chancellor, who seems to have considered the case more than once, at first rendered a judgment for the appellee, and upon a re-argument took back that judgment and dismissed the original action by the appellee and the set-off and counterclaim by the appellant, and in so doing we think determined the equities of the parties. Ordinarily one undertaking to act as bookkeeper and treasurer for another will be held to show a correct statement of the accounts and made responsible for his failure to do so, but in a case like this, where the neglect and carelessness of the employer causes the discrepancy or aids in bringing about a state of things that renders a true accounting impracticable, this strict rule of responsibility does not apply. The large claim asserted by the appellant, who had constant access to the books, after such a lapse of time, tends to show that he knew the books gave no accurate statement of the accounts, and that he was the recipient of all the proceeds of the theatre, to which he was entitled.

His own estimate of the receipts of the theatre, and the indebtedness of the appellee to him, are so wide of the mark as to show that his own mistakes are greater than those alleged against the appellee. His constant access to the cash drawer

and his withdrawal of the money, and often without even making a memorandum of the date or amount, shows the loose manner in which the business was conducted, and the loss, if any, is to be attributed as much to the carelessness of the appellant as to the want of capacity on the part of the appellee.

The latter was not, in fact, a bookkeeper, and this the appellant knew. The only experience the appellee had originated from the attempt to keep the books of Macauley, and no bookkeeper, however expert, could have kept an accurate account of the business as conducted by the appellant, and he having the sole right to the proceeds, the appellee had no power, even if he knew how, to require him to submit to any regulation that he might prescribe for the proper conduct of the business. Appellant had experience as a bookkeeper, but with his knowledge of the manner in which accounts should be kept was as careless as he alleges the appellee was, and no one reading the deposition of the appellant ought to fix liability upon his subordinate, who was, in fact, the mere custodian of appellant's treasury, and not one to receive and expend the moneys received as if he had the superior control of the funds.

This court is asked to examine a list of accounts of items too numerous to mention, with a view of testing the accuracy of the commissioner, who is an able and expert accountant, and who has investigated these accounts upon more than one reference, and under the guide of the chancellor reported an indebtedness to the appellee of $800. It is now maintained that the appellant is at least entitled to a judgment for $900, when it is apparent that, if a discrepancy in the accounts, it is as much the fault of the appellant as that of the appellee.

The chancellor, in our opinion, took the only equitable view of these claims, and dismissed both the original petition and the claim for settlement.

Judgment affirmed on original and cross appeal.

Chief Justice Pryor delivered the following response to petition for rehearing.

In the opinion delivered in this case the court found itself in the condition of the chancellor below, which was that no one could take the books and accounts of these parties and make anything like an accurate adjustment of the claims on the part of one against the other, and, as before suggested, when the appellant asserts a claim of such magnitude, based upon items too numerous to mention, and then concedes he is claiming four or five times as much as he is entitled to, and finally reduced to a difference of $600 or $700, it must be apparent that the parties are altogether ignorant of the condition of their accounts, and the fault may be attributable as much to the one side as to the other.

Macauley says he does not know how the appellee could have kept the cash account correctly, and no one could have done so under the circumstances. Entries were not made for months after the transactions occurred, by which Macauley was to be either credited or charged with the particular items connected with them, and from the condition of the books it is as easy to bring one in debt as the other. We are not disposed to reconsider the case.

Petition overruled.

LOUISVILLE, ST. LOUIS & TEXAS RY. CO. v. STEPHENS, &c.

(Filed January 18, 1895.)

1. A railroad can not acquire a right of way through private property by a parol dedication; for while a dedication of real estate to a public use may be made by parol, there is no such thing as a parol dedication of real estate to a private use, and a railroad corporation is a private and not a public institution.

Therefore, the act of a husband and wife in permitting, without objection, the building of a railway over the land of the wife did not amount to a parol dedication of the right of way to the railroad. The title thereto remains in the wife.

2. A deed conveying a wife's property, attested by two witnesses and executed by the husband and wife, but not acknowledged before any officer or recorded, does not convey the wife's title.

* 3. Void conveyance of right of way to railroad—Acquiesence in construction—Estopped—A husband and wife executed a conveyance of a right of way through the wife's land to a railroad, which conveyance was void because not executed in the manner required by statute. The grantors stood by and remained silent while the road was being constructed through the wife's farm. They now unite with the wife's trustee, who held the legal title for her, in an action to recover compensation for the right of way taken. Held—Plaintiffs are not estopped to claim damages since a married woman can be estopped to claim her land only by fraud. Plaintiffs can not demand a removal of the track from their land but are entitled to recover compensation for the way taken.

Helm & Bruce for appellant.

Fairleigh & Straus and James W. Lewis for appellees.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hazelrigg.

By a writing of April, 1886, the appellees, W. E. and Amanda S. Minor, in consideration of the benefits to be derived from the building of the appellant's road, undertook to release, grant and convey to the appellant a strip of ground sixty feet in width through the farm of the appellee, Amanda S., situated on the Ohio river in Breckinridge county.

The conditions of the grant were that the road should run between the dwelling house and the river, and not be nearer than 300 feet from it. This deed of conveyance was signed by the appellees, who are husband and wife, and attested by two witnesses, but was not acknowledged before any officer or attempted to be put of record. The title of this land was then held under the following provision of the will of David J. Stephens, the father of Amanda: "I will and devise the same to my son, James G. Stephens, in trust, for the use and benefit of my said daughter, Amanda, her heirs, etc, forever, to be held by the said trustee for the sole, separate and exclusive use of my said daughter, free from the debts and other liabilities, control or disposition of any husband she may hereafter have. The said trustee is to permit the said Amanda to occupy or lease said land as she may think proper, and she is to direct and control the use and enjoyment of said land; the rents and profits of said land to be held as the land is held, for the separate use and benefit of said Amanda. The said James G. Stephens is to incur no responsibility nor be in anywise liable on account of his trusteeship aforesaid, as it is my desire that my daughter shall have the

beneficial use of the land aforesaid devised in trust, and the control thereof for her own use as aforesaid."

Shortly after the execution of the writing named the appellant entered on the land and built the road, as required by it, between the dwelling house and the river, but within about 100 feet of the former.

This action was thereupon brought by Stephens, trustee, the Minors uniting, for damages by reason of the construction of the road. Upon the trial, the sole question submitted to the jury was how much, if any, was the market value of the farm reduced because of that construction. The appellees recovered the sum of $1,000. The appellant insists, on this appeal, that the appellees were entitled to recover nothing, first, because the acts of the Minors in executing the writing and consenting or acquiescing in having the road built nearer than 300 feet to the house, as is alleged they did do, constituted an estoppel; and, second, because their acts constituted a dedication to the railroad company of the right of way; that while the title did not pass, yet an easement was acquired.

As to the first question we are aware of no case in which it has been held that a married woman is estopped from asserting title to her land except on the ground of fraud. She can be divested of her interest only in the mode pointed out by the statute. She is supposed to be under the dominion of the husband, and incapable of contracting. When executing conveyances, she must acknowledge them separate and apart from the husband. In any point of view, the writing or so-called deed of conveyance in this case must be regarded as ineffectual for any purpose. It not only does not divest her of title, but it is not binding on her for any purpose, and it would be singular if a void contract for writing could work an estoppel.

The case is to be determined as if she never signed the instrument. We may conclude that she stood by and without objection acquiesced in the subjection of the land to the uses of the road, and for obvious reasons she can not require the company to tear up its track and quit the occupancy of the premises. This she is not asking. She is not charged with the perpetration of any fraud or misrepresentation. If she has attempted to convey her land and failed to do so in the manner required by the statute, it is as if she had not made the attempt.

If by reason of her signing this writing the company was induced to build its road along the route taken, rather than along some other route, as is alleged and as is probable, still no fraud is chargeable to the wife, or concealment of any fact.

She has not legally parted with any right, and is not estopped in the assertion of any by her void contract or by her conduct. (Kennedy v. Ten Broeke, 11 Bush, 241; Bigelow on Estoppel, 3d edition, 484.)

The second question is thus disposed of by the Superior Court in a well considered opinion:

"A dedication of real estate to a public use may be made by parol, but there is no such thing as a parol dedication of real estate to a private use. A railroad corporation is not a public institution. It is true that it serves a public purpose, and for that reason the law has conferred upon it the right to condemn land for its use, and makes it in many particulars subject to the control of the courts, but it is, nevertheless, a private institution created and operated for the purpose of private gain." (14 Ky. Law Rep., 919.)

This position is supported by the case of Todd v. Pittsburg, &c., Ry. Co., 19 Ohio St., 514, where, in speaking of this subject,

the court said: "Its road, its right of way, its depots, its offices, its rolling stock, etc., are all not public but private property. They are owned by the defendant. But among the various methods by which private property may be acquired, dedication is not one. The statute provides that railroad companies may acquire sites for depots, etc., by donation, by purchase or by appropriation. In the case of a donation or purchase a formal conveyance is necessary to pass title; * * * but no provision is made for acquisition by dedication. It is but a fallacy to suppose that there is a dedication in the case, merely because the defendant, for its own gain, has assumed, toward the public, the relation of a common carrier."

The fact that the legal title to the land in controversy was not in the Minors makes still less probable the company's contention that the writing vested it with any title to or right of way over the disputed premises.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. TRUSTEES SCHOOL DISTRICT NO 108.

(Filed January 19, 1895—Not to be reported.)

1. School tax—Advancement of funds by trustees to make repairs—Where trustees of a common school advance funds from their individual means to make necessary repairs upon a schoolhouse which has been condemned by the county superintendent of schools, the sums advanced become a debt of the school district, for payment of which the trustees may levy a tax upon the district.

2. Same—Verbal condemnation of schoolhouse—A school superintendent verbally condemned or ordered to be repaired a schoolhouse; the trustees for the district reduced to writing an order for the levy of a tax to pay for such repairs, but failed to spread it on their record book. The following year, to make such previous levy good, if it was defective, an order, duly recorded, was made by the trustees, reciting the previous order for the tax and again directing that the same tax be imposed and collected. Held—The tax was a valid one and must be paid by the persons assessed. The verbal condemnation by the superintendent was sufficient.

W. H. Marriott for appellant.

Hobson & O'Meara and W. J. Hendrick for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Pryor.

In August, 1891, the trustees of School District No. 108, in the county of Hardin, ordered that a property tax of twenty-five cents on each $100 of property be levied for the purpose of repairing the school building.

The school building had been condemned in the year 1886, and the repairs made out of the individual means of some of the trustees until a tax could be levied. This debt for repairs was unpaid when the order for another tax was made for additional repairs in the year 1891.

The order of condemnation or for the repairs was verbal on the part of the school superintendent, but the latter reduced the order for the levy to writing, but this was omitted to be recorded or rather spread on the books of the trustees.

In 1892, in order to make good the order of 1891, if such a proceeding was necessary, an order was made reciting the levy of

1891 and it was again ordered that the same tax be imposed and collected as and for the year 1891.

There was no double tax imposed, but the object of the trustee was to make valid the order of August 3, 1891, the efficacy of which was doubted because the county superintendent had made a verbal condemnation; but this he could have done, as was in effect held in Trustees v. Jameson, 12 Ky. Law Rep., 719. The assessment was made pursuant to law, as was held in Trustees v. Macklin, 88 Ky., 592. The State assessment was adopted in this case, and was the only way in which the assessment of tax due could be well ascertained.

It often happens, or at least may occur, that repairs may be required to be made without the delay attending the collection of tax or before even condemnation, and it seems to us the trustees who, on the faith of the levy and condemnation, advanced the money, that it becomes a debt of the district, if there is a subsequent condemnation and levy for that purpose. The one advancing the money must risk not only the necessity for making the repairs, but there must be a condemnation by the superintendent and a levy by the trustees, and this must be not to pay the debt, but for the repairs.

It would be unjust to appropriate the repairs to the use of the school, and then repudiate the value. In this case the condemnation of Stith, the superintendent, was never revoked, and the taxpayer should not escape liability.

It is claimed that other taxpayers were not assessed. This can not be, and the court must assume the proceedings being regular and valid, that all taxpayers assumed their share of the burden. There is some question raised as to the failure of the record to contain all the evidence, but this point has not been considered, as the appellant is liable upon the facts before us.

Judgment affirmed.

N. N. & M. V. R. R. CO. v. MERCER & WARFIELD.

(Filed January 23, 1895.)

1. Carriers—Failure to furnish cars—It is the duty of a railroad to use reasonable diligence to furnish the necessary cars to ship live stock on a particular day when a request to do so has in due time been made by a shipper to its station agent.

2. Same—Wreck on road excuses failure to furnish cars—Where the railroad has used reasonable diligence in arranging to furnish the cars at the time requested, but is prevented from doing so by a wreck on its road, whereby free movement of its cars is temporarily prevented, it is not liable to the shipper for the delay in transportation occasioned by the failure to furnish the cars as requested.

3 Same—Burden of proof—In an action where the railroad by its answer admits its failure to furnish the cars as requested, and pleads a wreck on its road as a legal excuse for the failure, the burden of proof is on the defendant, even though the answer also denied plaintiff's allegation of a contract to furnish the cars at the time requested, it being the duty of the defendant to furnish such cars when requested, even in the absence of any contract.

4. Same—Instructions—Where the proof showed that defendant had the cars plaintiff desired at his station on the day before they were to have been furnished, but removed them to another place on its road, an instruction was misleading which declared "it was the duty of the train dispatcher to control defendant's cars, and to assign them in the order in which they were called for by the shippers." Defendant had a right to remove the cars that

were at such station the day before they were needed, if it had made arrangements and used reasonable diligence to furnish other cars at the time they were needed.

5. Same—Measure of damages—The measure of damages for the failure to furnish the cars at the time requested, where the stock was intended for sale in a particular market, is the difference, if any, between the market value of the stock at the time it should have reached its destination and its market value at the time it did arrive; and if no difference or depreciation in such market value be shown, plaintiff can recover only the additional cost of feeding and caring for the stock and its loss in weight or fitness for the market that resulted from the delay.

L. A. Taurest and P. H. Darby for appellant.

W. R. Haynes and Hobson & O'Meara for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

Mercer & Warfield, a firm dealing in live stock, purchased forty-seven fat cattle, to be delivered by November 1, 1892, at Princeton, a station on the road of the Newport News & Mississippi Valley Railroad Co., for shipment to market, which they allege was at Cincinnati, O. They state and show that the person from whom they purchased was requested and authorized to engage two empty rack cars whereon to ship the cattle, Saturday morning, October 29, and the local agent of the company agreed to have them ready at that place and time. Friday, October 28, Mercer, a member of the firm, arrived at Princeton from his home in Hardin county, and, being told by the agent the cars would be on hand, and indeed two empty cars being then there, on Saturday morning received from the seller and had weighed the cattle, which were put in the company's stock pen preparatory to loading. But no cars were, at the time agreed, nor until Sunday evening, October 30, furnished, the two mentioned having, by order of the train dispatcher at Paducah, superior in authority to the local agent, been removed away from Princeton.

Mercer & Warfield brought this action to recover of the company $250 in damages, which they state resulted to them by reason of said delay of twenty-four hours, as follows: Extra expense for guarding, feeding and watering, and loss of weight and injury in appearance of the cattle, so that in sale of them in New York market their value was greatly depreciated.

In an amended petition the damages are thus laid: "Because of the failure of defendant to furnish the rack cars at the time agreed, plaintiffs failed to reach Cincinnati market or the Louisville market in the time for a sale of their live stock, as there are and were days in Cincinnati and Louisville at the time plaintiffs could have reached the market when bidders for such stock were numerous, and this time was Monday, October 31, 1892, a fact well known to plaintiffs at the time they contracted with defendant for the cars, and if defendant had complied with its contract in furnishing cars to plaintiffs, they could have reached said market by Monday, October 31; but plaintiffs were, by reason of said delay, forced to ship said stock to New York market and sell at great sacrifice," etc.

It is admitted in the answer the cars were not furnished at the time requested, but stated that defendant was hindered and prevented by wreck of a train upon its road, which occurred a few hours before said time, at a place called Gordon, about forty

miles east of Princeton, whereby it became impossible to get two cars to Princeton by the time mentioned, as defendant had arranged to do, or to then obtain them elsewhere earlier than afternoon of the next day, October 30.

A verdict and judgment having been rendered in favor of plaintiffs for $125, defendant appealed.

It seems to us, according to the pleadings in this case, the burden of proof was upon defendant, and the lower court erred in ruling otherwise. The failure to furnish the cars was admitted in the answer, and to escape a verdict against it defendant was bound to prove the averment, denied in plaintiffs' reply, that reasonable diligence was used to have the two cars at the place and time agreed, which was prevented by the wreck. It is true the answer contains a denial there was any other contract to furnish the cars than such as arose from the notice or request by plaintiffs. But as it was the duty of defendant, as a common carrier, independent of statutory obligation, to provide reasonable facilities and appliances to transport, when requested, such goods as it held out ready to carry, the law implies an agreement to furnish necessary cars on a particular day, where a request has been in due time made by the shipper of a station agent, who, for that purpose, has authority of a general agent.

But it seems to us as a railroad company is not nor should be generally held to more than reasonable diligence and care in furnishing cars for transportation of freight, the wreck of a train, whereby free movement of cars is temporarily prevented, ought to be treated as legal excuse for delay in having them under special agreement at a particular time and place. Hence the following instruction given in this case is proper: "If the jury believe from the evidence defendant used reasonable diligence to furnish said cars at the time required, but was prevented from doing so by the accident to its train and track at Gordon, then the law is for the defendant and the jury should so find."

But the following, unexplained, was misleading: "It was the duty of the train dispatcher to control defendant's cars and to assign them in the order in which they were called for by the shipper."

The jury might very well have inferred from that instruction, and probably did, that the two empty cars at Princeton, Friday, 28th, when Mercer arrived, were wrongfully removed. Consequently the following, asked by defendant, ought to have been given: "If the cars which were at Princeton October 28th were required elsewhere upon defendant's road, and defendant reasonably expected and arranged to bring other cars to Princeton for plaintiffs' use within the time required by them, but was unable to do so by reason of the accident which occurred to one of its trains, they should find for the defendant."

Defendant was not bound to keep those two cars stationary from Friday to Saturday evening, but had the right to remove them whenever proper and safe conduct of its business required, of which its managing agent was alone authorized to judge, provide timely arrangement was made for others to be there at proper time, which was prevented by the unforseen accident.

As to the measure of damages, if plaintiffs are entitled to recover at all, the rule applicable in a case like this is thus correctly stated in Hutchison on Carriers: "If the goods are intended for sale on the market at destination, and the carrier unreasonably and negligently delay their transportation, it is now universally agreed, whatever doubts may have been at one time entertained upon the subject, that the general rule by which the damages are to be computed, if goods of the particular kind have

fallen in market value during the delay, or if they have depreciated in quality because of the delay, is difference between the market value when the goods should have arrived and the value at the time of their delivery, the carrier being liable for extent of depreciation."

Accordingly, if there was no difference at Cincinnati, which, the evidence shows, was the place of destination, in the market value of plaintiffs' cattle on the day they would have arrived, if shipped Saturday, October 29, and the next day, there was not nor could be loss on that account, and damages sustained, if any, consist of additional cost of feeding and caring for the cattle and injury in weight or fitness for market that may have resulted from delay of one day in shipping. And as the instruction given on the subject of damages conform substantially to that rule it was not erroneous.

But for the error indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

COMMONWEALTH v. ROBINSON, &c.

(Filed February 6, 1895.)

1. A mortgage executed prior to the issuance and levy of an execution, but recorded before a sale under the execution, creates a lien prior and superior to that required by the levy.

2. Failure of one lienholder to make other lienholders party to suit—The mortgagees, knowing of the existence of the execution lien upon the land involved, brought their action to enforce their lien without making the holders of the execution lien parties to the suit. A sale was made and the land bought by one of the plaintiffs for an inadequate price. Held—In a suit brought by the holders of the execution lien for that purpose, the prior sale ought to be set aside and a resale ordered to satisfy all the liens.

Wm. J. Hendrick, N. H. W. Aarons, J. C. Muncie and Wm. Herndon for appellant.

J. F. Montgomery for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Lewis.

At the May term, 1890, of the Russell Circuit Court a judgment was rendered in favor of the Commonwealth of Kentucky against E. Robinson for a fine, and in June an execution was issued and levied upon three acres of land and a mill. A motion was made for a new trial, which was continued until the next term, though an order was by consent made that continuance of the motion should not affect right of the Commonwealth to cause the execution issued and levied.

It appears that in March, prior to the judgment, Robinson had executed a mortgage upon the same land and mill to Stone and J. W. Rexroat to secure payment of a debt, amounting to about $60, though the mortgage was not recorded until after the execution in favor of the Commonwealth had been issued and levied. Still, as seems now to be well settled by this court, the mortgage lien was prior, superior, to that acquired by the Commonwealth.

In September, 1891, the mortgagees instituted an action to enforce their lien, Robinson being sole defendant, and obtained

judgment for sale of the land and mill to satisfy their debt, which took place in May, 1892, when H. P. Rexroat became purchaser at the sum of $40, less than half value.

December 24, 1892, the Commonwealth of Kentucky brought this action against Robinson, the two mortgagees, and H. P. Rexroat, the purchaser, seeking to annul proceedings had in the action by the mortgagees, and a resale of the property.

Subsection 3, section 694, Civil Code, is as follows: "The plaintiff, in an action to enforce a lien on real property, shall state in his petition the liens, if any, which are held thereon by others and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens."

That provision was, it seems to us, intended to apply to a lien acquired by issue and levy of an execution, and held by another than the plaintiff in such action as is therein mentioned as well as any other lien, for the language used comprehends all liens. It is true the property might have been sold under the execution, subject to the mortgage, before the action was instituted by the mortgagees, or the equity of redemption might have been levied on and sold after the judgment sale in May, 1892. But although no sale under execution was made or attempted, nor any reason for non-action by the Commonwealth appears, still there is nothing in this record to show the lien acquired in June, 1890, has been waived or lost, and the Commonwealth had a right to be and ought to have been made a party defendant to the action instituted in September, 1891, and should not now be prejudiced by failure of the plaintiff in that action to make it a party; for if the holder of a lien can, by an action, subject encumbered property wholly to satisfaction of his debt, without making other lienholders parties defendant, that section is without any meaning or force.

What may be the attitude and rights of an innocent purchaser under such judicial sale as that made in the action by the mortgagees we need not now determine; for not only did the plaintiffs have notice of the execution lien of the Commonwealth when they instituted their action, but the evidence clearly shows the purchaser, H. P. Rexroat, had notice before the sale took place. There is, in our opinion, no reason why that sale should not be now set aside and judgment rendered for a resale and applications of whatever of proceeds may be left after satisfying the mortgage debt to the demand of the Commonwealth of Kentucky.

Wherefore, the judgment dismissing this action is reversed, and cause remanded for proceedings consistent with this opinion.

KREMER, &c. v. FIDELITY TRUST & SAFETY VAULT CO.

(Filed February 14, 1895—Not to be reported.)

Trusts—Sale of realty to pay annuity charged upon it—Under the will of John Bull the annuity devised to his widow is a charge upon certain property. The trustee having advanced the amount of the annuity to the widow, it was proper for the chancellor to order part of the realty charged with its payment sold to reimburse his. The court had the authority to order the sale, and the proceedings were not erroneous. The purchaser at the sale acquired a good title, and should be compelled to accept a conveyance.

Bacon & Macpherson for appellants.

John C. Russell for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

This is an appeal by Henry L. Kremer and others, who were purchasers of certain lots in the city of Louisville under a judgment in equity in favor of the Fidelity Trust and Safety Vault Co., trustee of John Bull, deceased, and in their own right, against the widow, children and devisees under the will of John Bull.

These appellants, as purchasers, refused to comply with the terms of sale or accept the title, such as is exhibited by the proceedings and judgment selling the property. The action was not instituted under the provisions of the Code for the sale of infants' real estate or the sale of those having a remainder interest, but was sold to enforce the trust in favor of the widow of John Bull created by his will and to subject the lots to sale in order to satisfy the annuity devised the widow, and for which the corpus of the estate is in plain terms made liable. The appellee, as was held in a former appeal, has a lien on the realty that was sold in this action in order to reimburse them for the advancements made to the widow in discharge of her annuity. (Also Meddis v. Bull, 13 Ky. Law Rep., 767.)

There is an express devise to the widow of $1,000 per month, and the property subject to the payment of this annuity is particularly pointed out by the will of the testator, and the appellee having in good faith and at the instance of the widow advanced this annuity for and to her, there is no reason why they should not be reimbursed, and out of the same property upon which this trust was made a charge by the testator.

The widow admits the advancements made, and the testimony leaves no doubt on that subject, and so the chancellor acquired the jurisdiction to sell this property by reason of the will and in execution of its provisions.

The property sold was liable for this annuity, and the testimony is convincing that no personal estate or money is in the hands of the trustee with which to discharge the claim, and the necessity for selling this realty is apparent. The parties interested are all before the court—the life tenants, the infants, the widow, etc. The infants are represented by a guardian ad litem, and the nonresidents by counsel under proper warning orders.

When this case was heretofore in this court there was not sufficient testimony as to the condition of the estate left by the testator, and in reversing the judgment it was intimated by the court that some arrangement ought to be made by which the estate could be saved the expense of continued law suits to pay this annuity and to relieve the estate of this heavy burden on the corpus, its value having been greatly lessened by reason of the great decline in values as to all sorts of property. It was more advisory than mandatory, but still it is apparent the testator never contemplated this vast waste of his estate, and it ought to be checked in some manner. The warning orders as to the nonresidents on the amended petition cure any defect that might otherwise have existed, and the infants are before the court by proper service. This land brought its value, and the judgment should not be reversed on the question raised as to the appraisements.

The judgment requiring the purchasers to comply with the terms of sale is affirmed.

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KENTUCKY COURT OF APPEALS.

JONES, &c. v. MOORE.

(Filed December 11, 1894.)

Construction of devise—testator, who left surviving him a widow and an only son a few months old, appointed certain persons as trustees for his widow during her life, and as trustees and guardians for his son until he should arrive at the age of twenty-one years. By the third clause of his will $6,000 was given to the trustees for the wife, the interest thereon to be paid her annually, and at her death said sum was to go to the son, if living; and if not, then to testator's brothers and sisters. By the seventh clause the residue of the estate, consisting of lands, slaves, cash and cash notes, was placed in the hands of the trustees and guardians for the benefit of the son, with power given them to invest any portion thereof in real estate, as they might think proper. If the son died without issue, the estate bequeathed him to come back to and be divided among the testators brothers and sisters on the same terms and principles as provided by the third clause of the will concerning the $6,000. Held—The words "dying without issue," used in the seventh clause of the will, related to a dying without issue by the son before attaining the age of twenty-one years. Having lived until he was twenty-one years of age, the son took the estate devised by the seventh clause absolutely, and not subject to be defeated by his thereafter dying without issue.

Bell & Bell and Gaither & Vanarsdale for appellants.

Poston & Jacobs for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

Cyrus Jones died testate in Mercer county, Ky., in 1850. His son and principal devisee reached his majority in 1871, and died without issue in 1891.

The land the son took under his father's will is the subject-matter of this litigation.

The question is, did the son take it in fee, subject to be defeated upon his dying at any time without issue, or the fee to be

defeated only upon his dying without issue before reaching his majority? If the former, the appellants, the collateral kindred of the testator, will recover it. If the latter, the appellees, the purchasers under the son, will retain it.

After providing for the payment of his debts the testator named his brother and another as trustees for his wife during her life, and also as trustees and guardians for his only son until he should arrive at the age of twenty-one years.

By the third clause he placed $6,000 in the hands of the wife's trustees, the interest of which was to be paid to her annually, and at her death the principal was to go to his son, if living, and if not then to the living brothers and sisters of the testator, and the issue of such as were dead.

By other clauses he made further provision for his wife, and in the seventh clause provided as follows: "I give and bequeath to my son and only child all the rest of my estate, consisting of lands, slaves, cash or cash notes, to be placed in the hands of his trustees and guardians for his benefit, hereby empowering them to invest any additional portion thereof in real estate as they shall think proper; and should my son die leaving no issue, then and in that case the estate hereby bequathed to him, whatever it may be, to come back to and be divided among my brothers and sisters or their issue on the same terms and principles as is provided in the third clause of this my will in relation to the $6,000 bequeathed to the use and benefit of my wife herein."

When the will was made the son was only a few months old. The father had in mind the long lapse of time during which these trustees or guardians were to have the control, of the estate, and he enlarged their powers so that they might take the accumulated personalty and invest it in real estate, if they saw proper, and, if the son died during their management and control, the estate, whatever it happened to consist by reason of their investments, was to go to the testator's brothers and sisters. This is not the case of a devise to A in fee, and if he die without issue remainder over to B. It is in effect a devise to the trustees and guardians of A until a particular time, at which A., if living, becomes entitled to the estate, and if he died without issue before that time, then over to B.

The lands, slaves, cash and cash notes—all—are devised and bequeathed under the same limitation, and it is wholly improbable that a rational testator would make such a provision as to cash as looked to its distribution upon an indefinite failure of issue on the death of the first taken. But while this cash and these cash notes were in the hands of the trustees and guardians, or if portions thereof had been invested in real estate, "whatever it may be," the whole must be turned over to the remaindermen if the son died without issue. While the estate was thus under the control of the trustees and guardians, this provision was rational and feasible, but wholly impracticable as to the personalty if the time of distribution be extended to an indefinite and uncertain future event.

As said above, this provision as to the trustees has the elements of a devise of a particular estate to them, and "in such a case the law will not incline to any other conclusion than that the death must be during the particular estate unless the letter or context of the will plainly shows that the testator intended a death either in his own lifetime or at any time whenever it might occur." (Bisner v. Richardson, 5 Dana, 424.)

"In the absence of such a disposing intent appearing from the will, it will not be presumed that the testator intended that the

property should be distributed to the devisee, and that he should enter upon the enjoyment of it, and yet his interest therein be liable to be defeated by his subsequent death, however remote." (Ferguson, &c. v. Thomason, &c., 87 Ky., 519.)

The time fixed for the ultimate disposition of the $6,000 was at the death of the widow, and the son, if living, then took it. There was no further limitation as to his taking, because, as we suppose, the time for his taking—that is, the death of the widow—might occur after he had reached his majority.

We think the construction adopted gives effect to the manifest intent of the testator, and the general rules of construction, useful only as they may aid in arriving at the intention of a testator, are in accord with the one adopted in this case.

Judgment affirmed.

SEALE v. SHEPHERD.

(Filed January 18, 1895—Not to be reported.)

1. Trespass to try title—Instructions—In an action of trespass to try title, in which each party claimed title in himself and a right to recover damages from his adversary, the court in its instructions first correctly instructed the jury as to what evidence plaintiff must produce to show title to the land by derivation from the Commonwealth, and the extent and nature of adverse possession required of him to acquire title by prescription, and then instructed the jury that it could find damages for defendant if it found that "defendant owned by title or possession the land on which the plaintiff cut timber," and that they must find for defendant "if plaintiff went upon defendant's land and committed trespasses," etc. Held—The instructions concerning defendant's right of recovery were imperfect and erroneous in that they failed to state how defendant must require and show title, and what nature or extent of possession was required of him to show a possessory title.

2. Same—Boundary—Agreed line—Champerty—In this action of trespass to try title, the verdict finding damages for defendant against plaintiff "by confirming the line N. 85 E. was erroneous for these reasons: "The natural objects called for at the corners of plaintiff's patent are well established, and must fix the boundary of his tract, even though the course N. 85 E. will not run to such corners. Plaintiff and defendant's predecessors in the title claimed by him agreed upon a division line different from that fixed by the jury. Plaintiff was in possession of the land claimed by him when defendant acquired his deed to the land between the agreed line and the course N. 85 E., and, therefore, defendant's deed was champertous and void.

Riddell & Riddell and E. E. Hogg for appellant.

W. H. Holt and J. M. Sebastian for appellee.

Appeal from Owsley Circuit Court.

Opinion of the court by Judge Grace.

This controversy was commenced in the Owsley Circuit Court by J. W. Seale filing suit therein against S. B. Shepherd, claiming damages in the sum of $350 for certain trespasses alleged to have been committed on his lands by said S. B. Shepherd. After responding to this, denying the trespass and claiming title in himself to the lands, whereon the trespass was charged, said Shepherd makes in his answer countercharges of trespass and damages against said Seale, making same a set-off or counter claim against said Seale, and claiming judgment over against him for damages.

On the trial of the cause the jury found against plaintiff, Seale, on his petition, and in favor of defendant, Shepherd, on his set-off or counterclaim by the following verdict:

"We, of the jury, agree and find for the defendant, S. B. Shepherd, by confirming the line N. 85 E., also damages, $500.

Signed: "A. J. BAKER,
"Foreman."

And on this verdict a judgment was rendered, and plaintiff, J. W. Seale, appeals to this court, and relies for error, so far as the action of the court below was concerned, on the giving by said court of instructions Nos. 6 and 7, to which he then and now excepts and objects, same being declaratory of the right of defendant, Shepherd, to recover against said Seale.

It will be observed, in examining the entire instrutions given by the court from 1 to 8 inclusive, that by the first instruction the court stated in the usual form, and correctly, the law and facts on which plaintiff had the right to recover against defendant, Shepherd. As first, that it must be by title, regularly derived from the Commonwealth of Kentucky, reciting in said instructions the general conveyances from the patentee, Craig, under whom plaintiff, Seale, claimed to marked boundary lines, corners, etc.; or, secondly, that said Seale might recover for any trespass by Shepherd, provided he (said Seale) and those under whom he claimed had been in the peaceable, uninterrupted, adverse possession of said land for fifteen years next before said trespass, claiming to a known, well-defined, marked boundary line.

Then, further on, giving an instruction substantially correct in reference to any change or modification of the original lines and corners by a compromise line made between their several vendors while owning and in possession of said lands, and after this, when the court came to instruct the jury in behalf of defendant and to submit the facts and to declare the law whereon said defendant, Shepherd, could recover on his counterclaim for damages, the court gave instructions Nos. 6 and 7.

No. 6 is as follows: "If the jury believe from the evidence that the plaintiff, Seale, went upon the lands of the defendant, Shepherd, and committed the trespasses, or any of them complained of by the defendant, they will find for him such damages as they believe from the evidence he has sustained, not exceeding the amount claimed by him in his pleading."

And No. 7 is as follows: "If the jury believe from the evidence that Shepherd owned by title or possession the land on which the plaintiff, Seale, cut timber and committed the trespass complained of by the defendant, Shepherd, they should find for him the damages which they believe from the evidence he has sustained, not exceeding the amount claimed in his pleading."

It will be observed that in these instructions, which plaintiff complains of, the first or No. 6 only says: "If the jury believed from the evidence that plaintiff, Seale, went upon the lands of defendant, Shepherd, committing," etc.

And in the seventh instruction "that if the jury believe from the evidence that defendant, Shepherd, owned by title or possession the lands on which plaintiff cut timber," etc.

Then neither instruciton undertakes to define or state to the jury how they were to ascertain or determine what lands were owned by the said Shepherd, as in the sixth instruction; neither explains or states how said Shepherd could acquire title; nor the

character or length of time he must have held by possession in order to enable him to maintain his action.

Then it will be observed, as matter of fact, that a material difference was made by the court, unintentionally, we think, between the title upon which Seale might recover and that upon which defendant, Shepherd, might recover over against Seale; and a material change, too, in requiring plaintiff, Seale, to have fifteen years actual continuous, adverse possession, claiming to a well-defined, marked boundary next before the commission of the trespasses by Shepherd in order to entitle him to recover, but only requiring defendant, Shepherd, to have possession to enable him to recover. This, we take it, was an oversight by the court. The judge, having defined in the same series of instructions what it meant by a valid title and what it meant by a possessory title that would authorize recovery, may have supposed the jury, when it came to considering the adverse side, would consider said limitations as implied and as applicable to both parties alike, and a lawyer might have so understood, but is it clear, or can it be made reasonably certain, that the jury trying the case did so understand? Courts are usually satisfied if they get the jury to understand what has been told them, even when consistent for both sides of the case, without expecting them to go beyond, and always choose the right where unlike states of case are submitted to them, though the same principle may be involved.

We think instructions Nos. 6 and 7, as given by the court in favor of defendant and against the plaintiff, and under which they must have found their verdict for defendant, are imperfect expositions of the law and prejudicial to the rights of the plaintiff, who is excepting to same.

It will be also observed that though this suit was not in ejectment, nor yet a chancery proceeding to settle and locate a disputed line, but only an action in damages for a trespass at a particular place, yet the jury went further, and by their verdict undertook to establish the line between these parties as they say, "we find for defendant by confirming the line N. 85 E." This was error and prejudicial to plainitff in this case. This line, as indicated by the jury, doubtless refers to the line running by the calls of the Craig deed, who was the patentee, to Elijah Bowman, in N. 85 E. from the two sugar trees and white walnuts at the mouth of Meadow creek to a hickory and beech on a ridge at 221 poles.

This deed was made in 1804, and this corner appears in this controversy to be now clearly established by the testimony, and yet this line has in this controversy been thrice run, if not oftener, and by all the surveys, a line run at this day by the compass N. 85 E. runs at the eastern end of said line more than three poles north of this corner, the hickory and beech, plaintiff, Seale, owning and claiming by regular derivation of title on the north side of this line. Baker, the surveyor, who ran this line both in 1890 and 1891 so testifies, and on his first running, after finding himself three poles north of this corner, then went to it, reversed the course and ran back to the two sugar trees and white walnut at the mouth of Meadow creek, on a degree S. 86 W., nearly striking same, thus showing clearly and conclusivley that a line N. 85 E. from the corner at the mouth of meadow creek would run three poles or more north of plaintiff's clearly established corner by his title papers, and yet plaintiff and those under whom he claims have been in the actual adverse possession of the lands covered by said deed for more than fifty years. The compromise line with the Mores, who owned the land on the south side of this line, wherever it is, and made between

Seale and those in possession, and from whom Shepherd claims, and made prior to 1857, runs yet further south than this line from the mouth of the creek to the hickory and beech. The exact location may be uncertain, but it is south of the above line as indicated and not north of it. These same parties, as shown in this record, had in 1885 or 1886 a previous damage suit about timber cut along this compromise line as now claimed by plaintiff, and in which plaintiff, being sued by Shepherd for cutting two trees south of this same compromise line, conceded his liability; said they were cut by mistake and offered to pay for same.

A jury was empanneled and found on this basis a verdict against said Seale, both parties recognizing the same line. After this and in 1890 defendant, Shepherd, undertook to purchase and did obtain a deed from one of the Mores, his former vendor, for the land lying between this compromise line, and to which he had originally purchased, and up to this line of N. 85 E. from the two sugar trees and walnut at the mouth of Meadow creek, and which land was then clearly in the possession of plaintiff, and the deed to Shepherd necessarily champertous and void.

This fact, however, the jury, though clearly instructed by the court, ignored and practically found Shepherd to be the owner of the land up to a line of N. 85 E. from the mouth of Meadow creek. But as this cause must go back for further proceedings by reason of the error in the instructions Nos. 6 and 7, as indicated, we do not care to comment further on the evidence. We only noticed, as above, because it appeared to be such a flagrant disregard by the jury of the law and evidence as given on the former trial.

For the reasons indicated the judgment in the lower court is reversed and this cause remanded for further proceedings not inconsistent with this opinion.

WOODBURY v. TURNER, DAY & WOOLWORTH MF. CO.

(Filed Janauary 22, 1895.)

Deposit of sum to guarantee performance of contract—Liquidated damages—Forfeiture—Where a purchaser makes a deposit of a specific sum of money which is to be paid to the seller "in full satisfaction of all claims against the purchaser for any damages arising from a breach of the contract of purchase by him," and it appears that the damages arising to the seller from a breach of the contract are uncertain and not capable of ascertainment or admeasurement by any known rule of law, or where it appears that said sum has been fixed upon by the parties after an actual and fair calculation as the damages arising from the breach, such deposit will be regarded as liquidated damages due the seller, where the purchaser fails to comply with the contract, and not as a penalty or a sum forfeited.

The appellant agreed to buy at a time fixed from appellee property valued at $351,000, and to guarantee his performance of the contract made a cash deposit of $25,000 with a trust company, which appellee was to accept in full satisfaction of all claims to damages if the purchaser did not comply with his contract. At the expiration of the time agreed upon appellant was given an extension of time to comply with his contract, and the sum deposited was paid to appellee to be credited on the purchase price in the event the contract was complied with. Appellant failed to comply with his contract, and sued to recover the $25,000, less the actual damages sustained by appellee by reason of the breach of the contract. Held—Said sum is to be regarded as liquidated damages and appellant can not recover any part of it.

Rozel Weissinger and Humphrey & Davie for appellant.

Jas. S. Pirtle and Muir, Heyman & Muir for appellee.

Appeal from Jefferson Circuit Court, chancery division.

Opinion of the court by Judge Hazlerigg.

In the latter part of the year 1888 the appellant, Woodbury, then chief manager of a handle manufactory at Knoxville, Tenn., conceived the design of securing control of the business and property of all the handle manufactories in the United States, of which there were some six or eight, and selling the whole as one concern to a company of English capitalists.

The largest and perhaps the most prosperous of these companies was that of the appellee, a corporation doing business at Louisville, Ky., to the managers of which the appellant, in November, 1888, applied for a statement of the price at which they would sell their entire business.

He was met with the statement that it was not for sale; but upon further conference a written contract was entered into, by which the appellee agreed to sell and the appellant to buy the entire plant. The time fixed, however, for the payment of the purchase price was in the future, and at the demand of the appellee the sum of $25,000 was deposited by the appellant in the hands of the Fidelity Trust & Safety Vault Company, of Louisville, the ultimate disposition of which fund was provided for in the contract.

Upon the approach of the time when the trade was to be fully consummated, the appellant, still confident, as he had all along been, of bringing the pending negotiations with his English associates to a successful close, found that he required longer time within which to raise the necessary funds to purchase the large properties indicated. Upon application to the appellee, further time was given, but on somwhat different terms; and a second contract was entered into between the parties, in which the $25,000 heretofore on deposit was paid to the appellee.

When the time finally arrived under the extension contract for the completion of the purchase the appellant failed to comply with his undertaking. Thereafter he demanded of the appellee a return of the $25,000, and that being denied him, he brought this action. No grievances against the appellee worthy of consideration are set out in the petition. After giving a history of the transaction and setting forth the contents of the two contracts, the appellant in effect admits substantial performance on the part of the appellee and his own inability, after a hard and fruitless struggle, to complete his agreements under either contract.

He charges, however, "that said $25,000 was a penalty, and was paid without any consideration; that the actual loss or damage suffered by defendant does not exceed the sum of $1,000;" and he prays "that the defendant be compelled to state the amount of its actual loss and damage by reason of the plaintiff's failure to complete said contract, and for judgment for $25,000, less such loss or damage as the same may be established," etc.

Manifestly, the rights of the parties are controlled by the contracts, and omitting the descriptive parts and other matters not in issue, section 1 of the first contract, dated March 16, 1889, reads as follows:

1st. The party of the first part hereby agrees to sell to the party of the second part all its lands, leases, mills, milling property, buildings, machinery patterns, stocks, raw and wrought, and in process of manufacture, and all its other property of every description on hand at the time hereinafter mentioned (except

cash, contracts, book and ledger accounts, and other debts and demands due the party of the first part), the same constituting its entire plant and materials of manufacture, and also the good will of its business, which real estat is described as follows: * * * (a) For plant and good will, the sum of two hundred and forty-six thousand dollars (246,000) in cash to be paid on the 1st day of August, 1889, or sooner, on notice as hereinafter provided, at 12 o'clock noon at the office of the Farmers Loan and Trust Co., in the city of New York, at which time and place the conveyances and other documents necessary to tarnsfer title to the property will be ready for delivery. (b) All stock, raw, wrought and in process of manufacture, etc., it agrees to sell to the party of the second part, for cash, at the time of the transfer, on a basis of the cost thereof to the said party of the first part, as shown by its inventory of January, 1888, etc.

2d. The party of the second part hereby agrees to buy the said property of the party of the first part, and to pay therefor the sums above provided, at the times and in the manner above set forth; and that if he shall desire to close the said sale and acquire the said property before the 1st day of August, 1889, he will give the party of the first part thirty days' notice of his intention so to do, with the time of closing, the place to remain as aforesaid.

3d. (a) The party of the first part agrees to furnish the party of the second part, within ten days after the execution of this agreement, with a true inventory of the several parcels of real porperty now owned by the party of the first part, fully describing the same, and will at all times before closing facilitate the examination of titles by the attorneys of the party of the second part, by permitting the inspection of title deeds, and in any other manner reasonably to be required by him or them.

(b) This provides for an inventory of the personalty to be made in the presence of a person to be named by the second party, and concludes thus: "And it is further agreed that whatever may be the amount of such stock, and of such other property on hand at the time of the transfer, the party of the second part shall not be required to pay on account thereof any greater sum than one hundred thousand dollars ($100,000).

Item e provided for clearing the property of all liens, taxes, etc., and for tranfserring unexpired insurances.

Item d provided that covenants were to be incorporated in the documents of transfer that the first party or its stockholders would not again engage in the manufacture of handles, etc.

(e) The party of the first part agrees that it will not deviate from the usual course in the management of its business, pending the completion of this contract, and that the party of the second part may, at any time after the execution thereof, have free accesss to the books of the party of the first part, by any accountant he may select, for the purpose of ascertaining the earning capacity of the business of the party of the first part for a period of ten years last past.

Section 4 is important, and reads as follows:

4th. The party of the second part has, at the time of the execution of this contract, deposited with the Fidelity Trust & Safety Vault Co., of Louisville, Ky., the sum of twenty-five thousand dollars ($25,000), and it is agreed that the same is deposited as a guaranty for the performance of this contract by the party of the second part or his assigns; and in the event of the failure to complete this contract by him or them, the said sum is to be paid by the said Fidelity Trust & Safety Vault Co., to the party of the first part, by whom it is to be received in full satisfaction of all claims against said party of the second part, or his

assigns, for any damages arising from such breach of contract. In the event of the due completion of this contract by both of the parties hereto, the said sum is to be paid to the party of the first part by the said trust company, and it is to be deducted (together with interest thereon at the rate of six per cent. per annum from the date of this contract until the date of the transfer herein provided for) from the purchase money of the property hereby agreed to be sold: Provided, however, that the party of the first part shall not be required to allow interest on said sum in the settlement for any time beyond the 1st day of August, 1889; and provided also, that said party of the first part shall be entitled to any interest upon said sum so deposited that the said trust company may allow. And in the event of the failure of the party of the first part to carry out the provisions of this agreement, the said sum shall be repaid by the said trust company to the party of the second part, without prejudice, however, to any claim he or his assigns may have for damages by reason of such breach on the part of said party of the first part.

The second contract, made July 25, 1889, was as follows: The above contract (just referred to), entered into on March 16, 1889, between Turner, Day & Woolworth Mfg. Co. and C. M. Woodbury, is now modified by the parties is as follows:

1st. The time for the completion of the contract is extended to January 15, 1890, but said time may be made to mature prior to said date by the second party, giving sixty days' notice instead of thirty days' notice as provided in this contract. In consideration of this extension the second party has paid to said first party $25,000 by an order upon the Fidelity Trust & Safety Vault Co., of Louisville, Ky., for the guaranty fund deposited under this contract, which $25,000 are to be credited upon the purchase price if this contract be completed.

2d. In the event of the failure of the party of the first part to carry out the provisions of this contract, the party of the first part agrees to repay said sum of $25,000 to the party of the second part, without prejudice, however, to any claim he or his assigns may have for damages by reason of such breach on the part of the party of the first part, and in nowise to cover such damages.

3. The said C. M. Woodbury agrees to pay, in addition to said $25,000, the sum of $226,000, in cash, for said plant and good will.

The limit of $100,000 in subsection (b) of section 3 of this contract is changed to $125,000. The inventory shall be made as of January 1, 1890, if prior notice be not given, and, if prior notice be given, the prior notice shall be made as of date fifteen days before the time thus fixed by the notice for the completion of the contract. The notice shall be given by calendar months.

4th. The increase of the consideration from $246,000, as stated in section 1 (a) to $251,000, as stated above, is $5,000, which is allowed the party of the first part for improvements and betterments to be put on the property above described, and for keeping up the plant until January 15, 1890, and to cover any loss or damage which may happen to the first party by reason of continuing its obligation under this contract as provided herein.

Looking to these two contracts as one whole, we inquire: What were the rights of the parties upon the termination of the time within which the deal was to have been consummated? And first what ought the seller do? The appellant says it might have filed a bill to specially enforce the contract and sell the property under its vendor's lien, crediting the $25,000 already received.

Had the property sold for less than the contract price it could have recovered the balance from Woodbury. Had it sold for more than the contract price Woodbury would have been entitled to it; or it might have tendered the deeds, kept the $25,000 and sued appellant for the balance of the purchase price as damages on the contract.

It seems to us, however, that when appellee had agreed in express terms to accept $25,000 as the price of the appellant's failure to perform the contract, it would be in no condition to demand additional or other damages for such failure.

Whatever else may be said of these contracts, it is absolutely certain that at all events the limit of the damages to appellee by the appellant's failure to perform his agreement was fixed at the sum of $25,000. This sum was to be received "in full satisfaction of all claims against said party of the second part or his assigns, for any damages arising from such breach of contract."

The value of the properties put under the control of the appellant was some $351,000 or perhaps $376,000. The average annual sales of the product of appellee's factories amounted to some $350,000. This vast business was put into the hands of the manager of a rival enterprise and its extent and detail laid open to his inspection. Yet in no state of case, as we understand the contract, could the appellee recover a greater sum in damages to their business for the risks incurred than the sum of $25,000.

If the appellee had instituted its suit for specific performance the answer would have been that the contract has already been performed, because it provides that if the sale is not consummated the sum of $25,000, already paid to the seller, is to be the price of that failure.

To any suit for damages, in whatever form it might come, the appellant's defense would have been unanswerable that the damages fixed by the contract had already been paid over; or, say counsel for appellant, the appellee might have elected to rescind the contract and retain the possession of its property; in which event it must have paid back to the appellant the $25,000, less the actual damage suffered; and this election and retention, it is contended, are the things which the appellee did do.

It follows from what we have said, however, that there was no election left to the appellee. It had no cause of action against the appellant. The latter had paid in full for that which he had contracted to pay, and he had guarded against the payment of further damages by unmistakable language. Under these circumstances the appellee did all it could do. In other words, it did nothing. It had no lien for purchase money on any property. It had in fact sold no property to the appellant. No title to any passed from it to the appellant, and when the appellant failed to buy, as he had agreed to do, no remedy was left the appellee save to be contented with the provisions of the contract.

In contemplation of the parties, when looking to the completion of the contract, this fund was regarded as a partial payment of the purchase price; but when looking to the appellant's breach of the contract it was regarded as the compensation due to the appellee for the rights it parted with in and to the control of its business. If this compensation were the subject of ready admeasurement by the court, or if the sum agreed on were excessive, there might be some excuse for equitable interference. But it is possible for no one to estimate with any degree of certainty what damage the appellee sustained or might have sustained by reason of the exercise of the rights given the appellant

under the contract and his failure to consummate the agreement.

The learned chancellor aptly put the case thus: "The $25,000 was not paid to the defendant for the mere consideration for the extension of the contract, nor was it a mere partial payment. The parties provided for its disposition in every contingency, and in only one was the money to be returned to the plaintiff, and that was the failure to complete the contract caused by the default of the defendant. No such contingency happened. It can not be said that the sum paid is so excessive in amount as liquidated damages, when the nature of the transaction is considered in all its parts, and the impossibility of estimating the damages to defendant by reason of the default of plaintiff by any known rule of the law is fully considered, as to require the court to disregard the terms of the contract in order to relieve plaintiff from a hardship. The deposit or payment of the money, and its appropriation as the parties directed, can not be regarded, upon the facts of this case, as the enforcement of a penalty or forfeiture."

Appellant's counsel cites a number of cases supposed to be in support of their contention. In many of them there was an absolute sale, and the vendor, without the consent of the vendee, retook possession. It was held that the vendor elected to rescind the contract, and he was not allowed to hold his land and also that part of the purchase money which had been paid by the vendee. The vendor having elected to rescind the contract, the parties were placed in statu quo.

The cases of Gailbreth v. Grewell, 13 Ind., 485, and Dotzeiser v. Cook, 40 Ind., 66, are of this character. Other cases are cited where the actual damages were readily ascertainable; but who can estimate them in a case like this one?

As put by counsel, how much is it worth to surrender the owner's right to dispose of a large manufacturing establishment and its good will for ten months; or open its books and business secrets to the inspection of a smart and energetic rival; or have the public know that its property is on the market and its business of uncertain continuance? Where is the rule of law which determines the criterion of admeasurement?

Abundant authority exists in support of this construction. Mr. Sedgwick, in his work on Damages, section 416, eighth edition, uses these words: "Where, independently of the stipulation, the damages would be wholly uncertain and incapable or very difficult of being ascertained, except by mere conjecture, there the damages will be usually considered liquidated."

Mr. Wharton, in his Law of Contracts, section 743, volume 2, says: "Whether a deposit paid on a contract for the purchase of real estate can be recovered back on the purchase falling through, depends upon the terms of the contract. Where the purchaser refuses to comply with the terms assented to by him he can not recover back the deposit as such, unless the agreement gives him that right, though he might have an action against the vendor for damages if the vendor be the party primarily responsible for the failure of the negotiations. The return of the deposit also may be excluded by the terms of the contracts. But ordinarily, when the sale is not perfected through the vendor's fault or the contract is rescinded by the parties, the deposit may be recovered back as money had and received."

In Gobble v. Luder, 76 Ill., 157, there was a contract to exchange farms, and in case either party failed to make the deed at the appointed time he would forfeit to the other the sum of

$1,500. The court said: "Where the parties to an agreement have expressly declared the sum to be intended as a forfeiture or penalty, and no other intent is to be collected from the instrument, it will generally be so treated, and the recovery will be limited to the damages sustained. * * * On the other hand it will be inferred the parties intended the sum named as liquidated damages where the damages arising from the breach are uncertain and are not capable of being ascertained by any satisfactory and known rule, or where, from the nature of the case and the tenor of the agreement, it is apparent the damages have already been the subject of actual and fair calculation and adjustment. Of the latter sort, Greenleaf says:, 'are agreements to convey land, or instead thereof to pay a certain sum.'" (2 Greenleaf on Evidence, sections 258-9.)

See also Stillwell v. Temple, 28 Md., 156; Matthews v. Sharp, 99 Pa. St. R., 560; Eakin v. Scott, 70 Texas, 442.

In Hansbrough v. Peck, 5 Wallace, 497, Justice Nelson said: "No rule in respect to the contract is better settled than this: That the party who has advanced money or done an act in part performance of the agreement and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

In Haynes v. Hart, 42 Barb., 58, the learned judge said: "I think no case can be found where a purchaser has been allowed to recover back partial payments after a default in making further payments when the vendor has merely kept the property agreed to be sold, or sold it to another in consequence of such default. * * * There is no promise for paying back, and there can be no recovery without, in such a case."

In the case at hand there can be no room for misunderstanding if the simple language of the contract is to control. It was entirely reasonable and natural that before placing its business in the hands of the purchaser or stipulating for its sale the appellee should have demanded a cash payment or deposit, taking care, as it was placed in the form of a deposit, to control its ultimate destination in case of appellants' failure to complete the contract by the stipulation that the deposit should be paid to it. When, under the terms of the contract, the failure was demonstrated, and the deposit was, in fact, due to the vendor, because the purchase money was not ready on August 1, 1889, the seller demanded the unconditional and absolute payment of the fund to it, and this was done. It is true the option was continued, but not on any terms in anywise inconsistent with the original contract. The deposit was turned over to the parties entitled to it, not in pursuance of some new contract, but in plain fulfillment of the old one.

We know of no rule of law giving the party in default a right of action for its recovery.

The judgment dismissing the petition is affirmed.

THE CAMPBELLSVILLE LUMBER CO. v. BRADLEE & WIGGINS, &c.

(Filed January 29, 1895.)

1. Contracts by a partnership enforcible against members of firm after its dissolution—One who has sold chattles to a partnership can not excuse his failure to deliver according to contract on the ground that the partnership

was dissolved after the contract of sale was made and before the time of delivery, and that one partner assigned his interest in the contract of purchase to the other partner. The contract of purchase and sale was binding on both members of the firm, notwithstanding the dissolution of partnership, and was enforcible by or against the member of the firm.

2. Failure to deliver chattels according to contract of sale—Measure of damages—When the vendor knows, at the time of sale of chattels, that the purchaser is buying them for resale in a distant market, he should be considered in law as having contemplated, as the probable result of his failure to deliver according to contract, the recovery by the purchaser of the difference between the contract price and the market value of such goods at the place of resale, less the cost of transportation; and this is the measure of damages for his failure or refusal to deliver the goods according to contract.

Wm. E. & S. A. Russell for appellant.

Patterson, Montague & Collins and G. W. Towles for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Lewis.

January 31, 1889, was executed a contract between Bradlee & Wiggins, a firm in Boston, Mass., doing business of buying and selling lumber, and the Campbellsville Lumber Co., a corporation, whereby the former agreed to purchase and the latter to sell twelve cars of dressed poplar door framing during that year, at the rate of two cars per month, beginning with June, at $20 per 1,000 feet, free on board cars at Campbellsville, Ky., terms "spot cash." There is on the back of the paper a written transfer and assignment by Bradlee of all his right, title and interest in the contract to Wiggins, made April 25, 1889, for expressed consideration of $1.

This action was brought January 22, 1892, by Bradlee & Wiggins, suing for the benefit of H. D. Wiggins and by the latter in his own right to recover damages of the Campbellsville Lumber Co. for breach of that contract, it being stated in the petition that defendant had delivered one car load only of the lumber, which was paid for, and refused to deliver any more, though plaintiffs demanded and were ready and offered to pay therefor on delivery.

Verdict and judgment were rendered in favor of plaintiff for $500, and defendant has appealed.

It appears there was executed on the same day, January 31, 1889, a contract of sale and delivery of another lot of lumber of a different kind, and recovery for alleged breach of it was also sought in this action; but the court instructed the jury that no recovery could be had on that contract, plaintiff having abated as to it. Nevertheless, one of the grounds for new trial is that the lower court refused to permit defendant to prove the damages sustained by reason of plaintiff's refusal to receive the lumber described in that contract; but it does not seem to us the court erred in that respect, because there was no violation of either contract by plaintiffs, nor does counsel now contend in his brief that ruling was erroneous.

The main, in fact only, excuse pleaded by defendant for refusal to carry out the contract was the transfer by Bradlee of his interest in it to Wiggins without consent of defendant, whereby, as argued, it became unenforcible.

It seems the tranfser was made upon dissolution of the firm of Bradlee & Wiggins, the benefit of that contract falling to the latter in division of assets; but as Bradlee did not nor could, in virtue of either the dissolution or transfer to Wiggins, release,

himself from the undertaking by the firm to pay defendant for the lumber on delivery, we do not see how the latter was affected nor upon what principle he could be released from its undertaking. If he was, then dissolution of a partnership would in all cases put an end to each mutual or reciprocal contract the firm may have entered into, however profitable or advantageous; but it does really no more take away the rights of individual members under such contract than it releases him from obligations to perform.

It is true the written assignment did not have effect to divest the firm of Bradlee & Wiggins of the legal title, but that does not prevent a recovery in this action brought by proper parties plaintiff.

The only question about which there need be any discussion is whether the following instruction was properly given: "The court instructs the jury that in arriving at the amount of damages, if any, they will take into consideration the difference between the contract price and the value of such lumber in the markets where plaintiffs traded, less costs of transportation."

In Sedgwick on Damages, section 734, it is said: "When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time when and place where it should have been delivered, with interest."

And this court has often sanctioned that general rule, but it does not govern where its application would change the contract actually made or contravene intention of the parties; therefore, when the vendor knows his chattels are being purchased for resale at a particular place, he should be held to have contemplated, as a probable result of his failure or refusal to deliver according to the contract, a recovery by the purchaser of the difference between the contract price and the market value at such place of resale, less cost of transportation. For generally he gets the advantage of a ready sale, at a cash and probably enhanced price, which the purchaser agrees to give upon faith, he may, in case of a breach of the contract, recover something more than the difference between the contract price and the market value of the property at place of delivery, which, in a case like this, is manifestly no more than mere nominal damages.

It being manifest that to make a difference between a contract price and market value at place of delivery the measure of damages practically operates to deprive the purchaser of any redress in very many and probably majority of cases, the general rule has been so far relaxed that inquiry may be made, in fixing damages, as to price of such property at a neighboring market. But that criterion does not always result in complete justice, and should not be adopted if there is evidence showing the parties intended and contemplated a different mode of measuring the damage actually sustained by the purchaser by reason of the failure of the seller to deliver.

In section 734, Sedgwick on Damages, is this language: "If the goods were purchased for resale at another place, and there is no market at which others can be procured to send to that place, the difference between the market price at the place of resale and the contract price, plus the cost of transportation, may be recovered. It would seem that, if the place of resale is not the nearest market, knowledge of the destination of the goods on the part of the seller should be proved, as otherwise the loss of the price at the place of resale would not be a natural consequence."

Modification of the general rule thus stated is sustained by

cases cited, and this court, in Moore v. Brown, 7 Dana, 380, relaxed it upon the ground the seller knew the corn was purchased for transportation to a distant market.

The evidence in this case is entirely satisfactory that the seller knew the purchaser was a firm engaged in dealing in lumber in Boston, Mass., and that it was to be shipped direct to that place for resale. There was then at Campbellsville no market value of such lumber, in proper sense of that term, because defendant was alone engaged in manufacturing and selling it; and, to measure the damages justly and fairly, inquiry of the price at a neighborhood market would have to be resorted to. But we see no reason for even thus restricting the investigation, much less right of the court to do so, if the parties to the contract intended the damages should be measured by the difference between contract price and place of resale. The instruction does not in terms designate a particular place as the one contemplated by the parties, but the jury was not misled nor defendant prejudiced, because Boston was manifestly the place of resale which the parties to the contract had in view, and evidence was heard as to the market value of the lumber there.

Judgment affirmed.

GILLUM v. CATRON.

(Filed January 29, 1895—Not to be reported.)

Conflicting patents—Notice—Appellant was owner of a tract of land on which he resided, when he had surveyed and patented 100 acres, described as adjoining the tract on which he resided, but the courses and distances set out in the survey and patent do not make said 100 acres adjoin appellant's residence tract but leave a strip of land between the two tracts. Appellant was in possession and claiming 100 acres adjoining the tract on which he resided when appellee obtained a patent embracing the same land. Appellee had notice of appellant's possession and claim. Held—Appellant is entitled to the 100 acre tract adjoining the tract on which he resides, even if the calls of his patent do not embrace all of such tract.

D. K. Rawlings, Wm. H. Holt and A. K. Cook for appellant.

Jas. D. Black for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Guffy.

This action was borught by Isaac C. Catron in the Knox Court of Common Pleas against P. Beets to recover for timber alleged to have been cut and converted by Beets to his own use on a 100-acre tract of land claimed by plaintiff. C. C. Gillum, by proper proceedings, was made a party defendant, he having sold the timber to Beets as his, and as being on his land.

By agreement the case was transferred to equity, and judgment was finally rendered against Gillum for $122.06, with interest and costs. From that judgment Gillum has appealed to this court.

Appellant asks a reversal upon several grounds: Claims that the judgment is too large, even if any judgment should have been rendered ; insists that part of the timber which he has been required to pay for was really on the land of one Tresper, and that the proof in the case showed that one Sprale was part owner of the land claimed and described by plaintiff in his petition, and being the same upon which the timber sued for was cut.

But these questions need not be decided. The principal question in the case is as to whether plaintiff had title to the land from which the timber sued for was taken.

It appears that appellant was the owner of 150 acres of land, and had resided on it for twenty years, and that there was a considerable amount of vacant land in that vicinity, some of which adjoined his land. Some years ago he decided to enter or appropriate and take up 100 acres thereof, and accordingly procured a warrant and had one Dean, said to be a deputy surveyor, to survey same; but it appears that Dean only made an actual survey by actual running or marking lines or corners of a part of the tract. The proof clearly shows that appellant intended to procure the land adjoining his home place, known as the McCartney tract or patent. The deputy surveyor intended to so survey and to return a plat, etc., for the 100 acres so as to include the 100 acres of vacant land adjoining the McCartney 158 acres.

The patent issued to appellant calls to adjoin the land that appellant lives on, but the calls of the patent will not include any of said land, but leaves a strip of land between appellant's residence and the land actually included by the corners and distances given in the plat; and upon that strip of land some of the timber sued for was cut.

It seems that appellant had been claiming and believing that he owned said strip. The date of appellant's patent is 1883, the date of survey being September, 1881. A few years after this the plaintiff surveyed and obtained patent for, as it says, 100 acres, but embracing a large amount of land in what is sometimes called a blanket patent, his purpose evidently being to obtain title to all the different parcels of vacant land within the boundary, whether connected or not.

It is not necessary now to decide whether such patents are valid or not. It is pretty evident that appellee had notice of appellant's claim and possession of the land in dispute before his entry and survey.

Taking all the proof into consideration, we are of opinion that appellant is entitled to 100 acres of such land as was vacant at the time of the issual of his patent, to be laid off adjoining his home place, known as the McCartney 150 acres. And the plaintiff having failed to show perfect title to any of the land from which the timber in controversy was taken, he was not entitled to recover any judgment in this action.

The judgment of the lower court is reversed and cause remanded, with directions to dismiss the petition of plaintiff.

FULLER, &c. v. MARTIN, &c.

(Filed January 29, 1895.)

Construction of will—A testator when he made his will and when he died had one brother and five sisters living, and two brothers and one sister dead, all of whom left children surviving them. After providing for the payment of his debts and funeral expenses he devised his entire estate to his "brothers and sisters, to be divided equally between them." Since the word brothers, used by the testator, can not accurately be applied to one living brother, the court construes the will to include the dead brothers and sisters, as well as the living, among the devisees, and the children of the dead persons take the estate devised to their parents.

E. L. Worthington and Sallee & Sallee for appellants.

Cochran & Son, Geo. Doniphan and Galbraith & Johnson for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hazelrigg.

The will of George W. Robinson is as follows:

1st. "It is my will and desire that so much of my personal property as may be necessary be immediately sold after my decease, and the proceeds thereof be applied to the payment of all my just debts and funeral expenses.

2d. "After the payment of my debts and funeral expenses, as above provided for, I give and bequeath to my brothers and sisters all my real and personal property to be divided equally between them."

And lastly: "I do hereby constitute my brother-in-law, Joseph Galbraith, of the county of Bracken, Ky., and my friend D. E. Bullock, of Mason county, Ky., executors of this my last will and testament. In testimony." etc.

The will was dated October 1, 1890, and at that time and in February, 1893, when he died, the testator had one living brother and five living sisters. He also had two brothers dead, who left children, and one sister dead, who also left children. The question on this appeal is who are to take the estate.

The appellees contend that by the use of the plural word "brothers," when there was in fact only one brother living, the testator clearly meant to include all his brothers living and dead as well as the sisters living and dead; that, therefore, the estate is to be divided into nine equal shares.

The appellant say that as the testator knew he had only one living brother, he did not mean to include the descendants of the dead one, or he would have used language to that effect; that the estate, therefore, should go to the living brother and living sisters.

As is apparent, there are no other clauses of the instrument throwing any light on the question, and we are left to this clause alone to gather the intent of the testator.

The statutes in force at the time are invoked by the appellees, which provide as follows: "When a devise is made to several as a class, or as tenants in common, or as joint tenants, and one or more of the devisees shall die before the testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any," etc. (General Statutes, section 1, article 2, chapter 50.)

And "if a devisee or legatee dies before the testotor, or is dead at the making of the will, leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made as required by the will." (General Statutes, section 18, chapter 113.)

These statutes, however, can not aid us until we first determine who are the devisees or legatees meant to be described by the words in question. The words of the first statute, "when a devise is made to several as a class," require the ascertainment of the class before we can say that descendants of a member of the class shall be substituted as a devisee; and so with the words "if a devisee or legatee dies before the testator, or is dead at the

making of the will," etc., the question must first be determined who is the devisee or legatee under the will before we can substitute the issue.

The statutes in effect leave the question where we found it. It is conceded that if the testator meant to include his dead brothers and sisters by the words "brothers and sisters," then these children take what their parents would have taken.

It sees to us that as the words used can not be applied as a descripiton of living objects, the testator must have meant to describe all his brothers. He could not properly describe his living brother as "brothers," and if effect be given the language used, we must suppose that the testator, knowing that the issue of the dead brothers and sisters took by substitution, meant to include all his brothers and sisters as a class, the dead as well as the living. By this construction all those who are the natural objects of the testator's love partake of his bounty, and not a part only.

In the case of Huntress v. Place, 137 Mass., 409, the clause in dispute was as follows:"The residence and remainder of the property left by my said wife shall be equally divided among my brothers and sisters and their heirs."

At the date of the will the testator had three brothers and one sister living and two sisters dead, leaving issue. The court, while saying that the question was one of difficulty, held that the use of the plural word "sisters" indicated an intention on the part of the testator to include not only his sister who was living, but his sisters who were dead, and cited the case of Gowling v. Thompson, L. R., 11 Eq., 363, where a testator gave his residuary estate to his brothers and sisters or their issue, having at the date of the will two sisters, but no brother living. It was held in that case that the children of three brothers and a sister, who had theretofore died, were entitled to share; for that if the testator spoke of his brothers and sisters at a time when he must be taken to have known that all his brothers and one of his sisters were dead, the only rational inference was that he named the brothers and sisters for the purpose of showing how the property was to be divided."

It is manifest that the use of the words "heirs" and "issue" in these cases did not induce the construction determined on, because these words might easily and appropriately be used to designate the heirs or issue of the living brothers or sisters, and not those of the dead ones.

Mr. Jarman says: "Even where there is no original and independent gift to the issue, but their claim is founded on a clause apparently of mere substitution, the courts anxiously lay hold of slight expressions as a ground for avoiding a construction which, in all probability, defeats the actual intention by excluding the issue of a deceased child from participation in a general family provision." (Jarman on Wills, sixth edition, volume 2, page 713.)

The construction adopted may not be altogether free from doubt, but it at least accords with what may be supposed to have been the natural desire of the testator to provide alike for all his brothers and sisters, and the issue of those who were dead.

Judgment affirmed.

LOUISVILLE, ST. LOUIS & TEXAS RY. CO. v. TAYLOR.

(Filed December 8, 1894.)

1. Appellee can not recover the right of way conveyed by him to appellant, over which the railroad was constructed and put in operation, with his knowledge and without objection from him, although the railroad company has failed and refused to build the fences along the way or to build the depot and switch near appellee's land, or to give him and his family a right to travel over the road free, all of which it promised and agreed to do as consideration for the right of way.

2. Same—Conveyance—Acceptance—Where the railway company, by its authorized agents, receives and retains for six months a deed, duly executed, conveying a right of way through the grantor's land, and the grantor permits it to enter upon his land and complete the grading of the roadbed under the belief, and induced by the conduct of the railroad company to believe, that the deed had been accepted, such conveyance must be treated as an accepted deed evidencing a binding contract, and not as a mere proposition on the part of the grantor to convey.

3. A report made by a commissioner pursuant to an order referring the case to him, from which order an appeal was taken, ought to be disregarded by the court when the matter involved was investigated and the report was made by the commissioner while the appeal was pending.

4. Damages for right of way found by chancellor—The amount of damages the landowner was entitled to recover for the right of way taken might have been referred to a jury on motion of either party; and as neither moved to submit the question to a jury, the finding of the chancellor will be treated as the verdict of a properly instructed jury; and as there is evidence conducing to sustain the finding, it will not be reversed on this appeal.

Helm & Bruce, R. A. Miller and Fairleigh and Straus for appellant.

C. S. Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

May 17, 1887, E. P. Taylor conveyed to L., St. L. T. Ry. Co. a right of way over a strip of land through three adjacent tracts of 197, 130 and 93 acres, upon which its railroad, extending from Louisville to Henderson, was located. But May, 1891, he brought an action to recover said strip, although the entire line of road had then been completed and was in operation.

In his petition he stated substantially that the consideration for the conveyance expressed in the writing was that defendant agreed to build and keep in repair a fence through his land on both sides of the railroad, made of slats and wire; to build and keep in good repair stock gaps at reasonable distances apart; to build within a reasonable time and keep in repair a good substantial depot and switch on his land where the railroad intersects the Iceland road, at which all passing trains should stop when flagged or signaled; and that he and his family were to have the right to travel on the line of road free of charge; but that though defendant, in virtue alone of that conveyance, entered and built upon said strip and has since used the railroad, it has refused to perform either undertaking, which constituted consideration of the conveyance.

As the railroad was completed and put ino operation from one terminal point to the other, with knowledge of and without objection by plaintiff, it is manifest the action for recovery of the

strip of land could not have been maintained; and he, abandoning it in the form it was originallly brought, filed an amended petition in which, after setting up the same alleged facts, he asked judgment for specific performance of the contract, but if that could not be rendered and enforced, then judgment for damages for the alleged breach; and on his motion the action was transferred to equity, where, May 2, 1891, judgment was rendered, which, in substance, gave defendant until August 1, 1891, in which to perform the undertakings stipulated in the contract, and the master commissioner was directed, in case of its continued failure, to ascertain and report the damages sustained by the plaintiff by reason thereof.

From that judgment an appeal was prosecuted to this court, but dismissed because prematurely taken.

Upon return of the case an order was made directing the commissioner to take further proof as to amount of damages sustained by the plaintiff, and upon the whole evidence a final judgment was rendered in favor of plaintiff for $6,406.55.

It appears that the conveyance of May, 1887, was signed by E. P. Taylor and R. R. Pierce and A. D. Powers as attesting witnesses. But it was averred in answer of defendant and attempted to be proved that though it was, after being so signed, left by plaintiff in possession of Powers, it was a mere proposition, never accepted by the company, and, consqeuently, not binding on it. Both Pierce and Powers were agents of the company to procure release by land owners of right of way for the railroad, and it seems to us the evidence shows they were general agents, authorized to make contracts like the one in question. But whether they were or not we are satisfied plaintiff (Taylor) permitted the company to enter upon and appropriate the strip of land, which was done soon after he made the conveyance, believing and induced by conduct of the company and its agents to believe the conveyance was accepted and would be treated as a completed contract, binding upon both parties; for it was, after being signed, kept in possession of the company for about six months and until the road had been graded over the entire strip of land without any notice whatever to Taylor that it was not accepted. It seems to us, therefore, the company was stopped to disapprove the contract or evade its own undertakings, which constituted the consideration.

Whether specific performance might have been enforced by the chancellor is not now necessary to decide, because neither party asks for such decision, and the only question before us, or about which there could, as the record stands, be any serious discussion, is as to amount of damages found and adjudged by the lower court.

It appears that in pursuance of the judgment of May, 1891, the master commissioner, September 15, 1891, filed a report showing amount of damages sustained by plaintiff to be $6,000, differing from the sum finally adjudged only $406,55.

In the estimate of the master commissinoner was included the sum of $2,700 damages to the three tracts of land, and counsel now argue that the amount finally adjudged by the court was made up partly of the same items, and, notwithstanding they were held in L. St. & T. Ry. Co. v. Neafus, &c., 13 Ky. Law Rep., 951, to be proper elements of damages in such case as this, the judgment appealed from is erroneous in that respect and ought to be reversed and that case overruled. As the report of the commissioner mentioned was made pending appeal to this court from the judgment of May, 1891, it ought to have been and was, in fact, disregarded by the lower court. So upon return of the case from this court it was re-referred to the commissioner to

hear and report additional evidence, which he did, without undertaking to estimate amount of damages sustained by plaintiff, and upon the whole evidence the lower court rendered the judgment now appealed from.

It does not, therefore, follow the sum of damages to the three tracts were included in or forms a part of the amount so adjudged; for the evidence shows that independent to those elements plaintiff was damaged by failure of defendant to perform its undertaking more than the sum actually found and adjudged by the court. Only a portion of the fence the company agreed to build and keep in repair was ever made; it rfeused to transport the plaintiff and his family over the road free of charge; and all that has been done in compliance of its undertaking to erect and keep in repair a good, substantial depot and switch at the place mentioned has been the building of a short, uncovered platform, costing not exceeding $25. It is true a side track has been made there. but that is of no advantage to plaintiff without a permanent depot for passengers and freight; and the conduct of the company gives no assurance there ever will be a depot permanently established; for not only has it denied its obligation to do so, but, when given by the lower court an election to comply with the contract, it either stubbornly or with intention to retain the right to abandon the place as a station refused to erect a depot building, which might have been done at a cost not exceeding $800. It seems to us this can not be regarded otherwise than a case where the owner is deprived of his land for use of a railroad track by means of deliberate promises and undertakings by a company which it never intended to perform, unless compelled to do so after tedious and useless litigation.

We do not think we are authorized to disregard the judgment of the chancellor and reverse, because the aomunt found is too little, nor because it is too much, even if the elements of damage in question were included in his estimate; for either party might have had the issue tried by a jury, and as neither never moved for such trial, the finding of the court must be treated in accordance with previous decisions of this court construing section 10, Civil Code, as finding of a properly instructed jury.

Judgment affirmed.

NINETEENTH AND JEFFERSON STREET PRESBYTERIAN CHURCH v. FITHIAN, &c.

(Filed January 23, 1895—Not to be reported.)

1. The burden of paying for public improvements abutting on a city lot must be apportioned between the estate of the life tenant and the remaindermen therein. The life tenant can not charge the entire burden on the remaindermen.

2. Same—Improvements by life tenant—Where a life tenant permits a city lot to be sold to pay a lien for street improvement thereon, and then acquires an assingment of the rights of the purchaser at the sale, and subsequently erects improvements upon the property under the belief that she has thus acquired a fee simple title to the lot, her devisees, after her death, will not be given a lien on the lot for the amount paid on account of the street improvement or for the value of the improvements erected on the lot. The street improvement cost must be borne by both the life estate and the remainder interest, and the life tenant will not be permitted to charge to the remainder estate the amount expended in erecting improvements.

Grubbs & Morancy for appellant.

Morton & Joyes and Pirtle, Speed & Trabue for applelees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

Louisa Howell was the owner for life, remainder to certain contingent remaindermen, of an unimproved lot on Oak street in Louisville. The city of Louisville, by proper ordinance, required the construction of a public way, upon which the one-quarter square containing the lot in question adjoined, and apportionment warrants were issued in favor of the contractor, Nevin, for the proportionate amount assessed against this lot. No one paying it, Nevin filed his suit, making Louisa Howell a defendant to his action, and in December, 1886, obtained a judgment of sale. At the sale Rogers became the purchaser at the price of the assessment and costs, and then assigned and transferred the benefit of his bid and purchase to the life tenant, Howell. She then, under the belief, as is alleged, that she owned the lot in fee, erected three cottages thereon at a cost of some $8,000. Upon her death in 1892 she devised her individual property, save some specific legacies, to the appellant, who, in this suit, to settle the estate of Louisa Howell, claims to own the lot and three houses thereon as devisee of Howell; or if this claim is not sustained it contends it has an interest in and lien upon the lot to the extent and for the amount which the improvements enhanced its value.

The chancellor sustained a demurrer to the pleading of the appellant, and, we think, properly so. The charge upon the lot for the public improvement was at least in part the debt of the life tenant. She could not throw the whole burden of its payment on the remainder people, and under the circumstances her purchase of the property or of the bid of Rogers must enure to the benefit of all the owners. (Daviess v. Myers, 13 B. M., 511.)

Besides, she appears not to have had the sale to Rogers reported to court, or any deed made in consequence of the transfer to her of his bid. She knew the nature of her title, or is presumed to have known it.

The general rule is that a tenant for life can not lay out money in building on the land and charge it on the estate in remainder, and the mere fact that the life tenant may have supposed that she had the absolute title to the property, does not prevent the application of the rule. (Johnson, &c. v. Stewart, &c., 8 Ky. Law Rep., 857; Pomeroy's Equity Jurisprudence, volume 3, section 1242.)

There is nothing to take this case out of the general rule.

Judgment affirmed.

DOYSHER v. ADAMS, &c.

(Filed January 24, 1895—Not to be reported.)

1. A demand for unliquidated damages resulting from the breach of a contract can not be pleaded as a set-off by defendant where there is no allegation of the insolvency or nonresidency of the plaintiffs.

2. Contract—Evidence—Instructions—The owner of land and stock claimed that he was damaged by the failure of his tenants to cultivate the land and care for the cows and produce according to their contract. Settlements were to be and were made monthly. Where the owner admits that he did receive certain sums monthly from the tenants, but fails to state how much he re-

ceived, he is not entitled to an instruction authorizing the recovery by him of the difference between what he would have received if the tenants had complied with their contract and what he actually did receive, as the evidence wholly fails to show what the latter sum was.

3. Same—Pleadings—Where the tenants alleged that settlements of the accounts were to be and were made each month and relied on such settlements as a bar to the landlord's claim, and the latter failed to deny these averments, the court ought to have instructed the jury that the landlord was concluded by the settlements as to all items embraced in them.

J. P. Thompson for appellant.

H. W. Rives for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Panyter.

This action was brought to recover on a note dated February 19, 1891, which was executed by appellee, Richard Adams, payable to the order of the appellant, Frank Doysher. The execution of the note was admitted. Adams filed a pleading, which he called answer, set-off and counterclaim.

He alleged that on December 20, 1890, he entered into a written contract with the appellant, Frank Doysher, Austin Doysher and Jacob Klauser, by which he rented his farm to them for the ensuing year; that he let them have the use of certain cows and garden; that they were to milk the cows, make butter, sell the milk and butter and the vegetables, and at the end of each month they were to settle with him and give him one-half of the proceeds. He alleges other matters which they had agreed to do by the terms of the contract. He alleges that they had violated their contract, specifying wherein they had done so, and claimed damages in the sum of $305, and asked that it be set-off against the note.

This claim is for unliquidated damages. He neither alleges the insolvency nor nonresidency of the parties to the contract upon which his alleged set-off arises. Unless this is done unliquidated damages can not be pleaded as a set-off, although it arises on a contract. (Taylor v. Stowell, 4 Met., 175; Shropshire v. Conrad, 3 Met., 143; Forbes & Bro. v. Cooper & Co., 88 Ky., 285.)

Appellant filed a demurrer to the answer which the court overruled. The demurrer should have been sustained. For this reason a new trial should be granted, and the demurrer to the answer sustained.

Although the error of the court in overruling the demurrer sends the case back, entitling the appellant to a new trial, yet in view of the fact there were two trials, and that applelee may amend and allege such facts as will authorize the question of damages to be tried in this case, the court will consider the question as to one of the instructions which was given at the request of appellees.

The court erred in giving instruction "D," which is as follows: "If the jury believe from a preponderance of the evidence that plaintiff Doysher or his co-defendants failed to give reasonable care to the cultivation of the garden or to the cows or to the marketing of the milk, butter and vegetables, they should find for defendant on the set-off, one-half of what plaintiff and his co-tenants could, by reasonable care and work, have received from the garden and cows, after deducting the amounts paid Adams on that account."

The court based this instruction as to the measure of damages on the testimony of defendant, Richard Adams, who alone at-

tempted to prove the amounts paid monthly by appellant and his co-tenants. He testified that at the end of each month they would come to him and count out two piles of money on the table, which they said they had taken in that month, and handed him one. He had no record of the amounts turned over each month, but it was sometimes as low as $10, ranging from that to $25 as the maximum.

This testimony was insufficient upon which to base the instruction. The defendant said he had no record of the amounts turned over each month. He did not say how many months the amount was $10, nor how many months it was $25 which they paid. If he kept no record, and could not give this important information to the jury, how could the jury from the evidence estimate the damages? Under the instruction they had this to ascertain before they could make the deduction which they were required to do.

It may be said that the defendant testified that the difference between his part of $3 per day and what they actually paid him would be at least $214.

This opinion should have been of no value to the jury, nor could it have enabled them to make the calculation because he had kept no record of the amount paid him, and could make no reliable estimate of it.

The instruction related to the damages claimed for their alleged failure to produce and sell the proper quantity of milk, butter and vegetables. For another reason the instruction should not have been given. Appellant in his reply alleged that under the contract the milk, butter and vegetable account was to be settled at the end of each month, and it was so settled. He pleaded and relied on such settlement in bar of defendant's claim for damages on that account.

These allegations were not denied, and there was no issue on that question to submit to the jury. Instead of this instruction the court should have in substance told the jury that if they found anything for defendant on his claim for damages that they should not take into their account the milk, butter and vegetable items, as the plaintiff and defendant Adams had settled them monthly.

It is not deemed necessary to consider the action of the court in giving other instructions or in overruling instructions offered by appellant. No opinion is expressed on this question.

For the foregoing reasons the case is reversed, with directions that appellant be granted a new tiral, that the court maintain the demurrer to the answer, and for further proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. COUNTY OF PENDLETON.

(Filed January 29, 1895.)

The fiscal court of a county had no authority to levy an ad valorem tax for pauper purposes under the provisions of the General Statutes. The Kentucky Statutes, which do not apply to this case, confer power on fiscal courts of the several counties to levy ad valorem taxes for general purposes.

L. T. Applegate and Geo. C. Lockhart for appellant.

John H. Barker for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Guffy.

This action was brought by Pendleton county against the Louisville & Nashville Railroad Company to recover $1,109.69 and $920.21, taxes alleged to be due from the said defendant on account of levies made by the fiscal court of Pendleton county for the years 1891 and 1892, levied for pauper purposes on the property of said defendant in said county. Appellant filed a demurrer to the petition, which demurrer was overruled by the court. Appellant then answered, denying the power of the fiscal court of Pendleton county to levy an ad valorem tax for pauper purposes. Appellee demurrred to appellant's answer, which demurrer was sustained by the court; and appellant failing to plead further, judgment was rendered against it for the sums claimed, with interest and costs. From that judgment appellant has appealed to this court, and insists that the judgment is erroneous.

The principal question in the case is: Did the court of Pendleton county have authority to levy an ad valorem tax for pauper purposes? The provisions of the Geneарl Statutes were in force at the time the levies in controversy were made. Section, 1, article 16, chapter 28 (page 384), provides that county courts have jurisdiction to levy and superintend the collection of the county levy, make provision for the maintenance of the poor, etc. Chapter 28, article 7 (page 384), provides for the justices sitting with the county judge for the transaction of business which shall be confined to levying the county levy, appropriating money, etc.

These sections do not authorize any ad valorem tax.

Chapter 27 (page 335) provides that the county levy shall not exceed $3 on each tithable in any one year. Section 4, chapter 86 (page 1009), is relied on by appellee as giving the power claimed. That section simply gives the court power to purchase land for poorhouse purposes, and to levy a sum sufficient to pay for the land, improvements, etc.

This provision must be held to mean only that the court can levy such taxes as it is authorized by law to levy for general purposes. Otherwise the power to tax would be unlimited.

Section 6, chapter 89 (page 1015) of General Statutes authorizes the levy of an ad valorem tax for purposes of courthouse, jail and clerk's office. It is not claimed that the fiscal court of Pendleton county had any power other than that conferred on the county court or court of claims generally.

We are of opinion that the levies in question, made by the fiscal court of Pendleton county, were unauthorized by law, and the judgment of the lower court is reversed and cause remanded, with directions to sustain the demurrer of the defendant, and for further proceedings consistent with this opinion.

The Kentucky Statutes now confer power on the fiscal courts of the several counties to levy ad valorem taxes for general purposes, but these statutes do not apply to this case.

LOUISVILLE WATER CO. v. CLARK.

(Filed January 29, 1895—Not to be reported.)

Order requiring payment of taxes into court—Interest—In an action by appellant to enjoin the sheriff from selling its property for taxes, alleged by it not to be due, the court holding that the taxes were due as a condition upon which it would grant the injunction, ordered appellant to do equity

by paying into court the amount of such taxes. And the order further recited that appellant refused to do this and appoint a receiver to take charge of and operate appellant's water works until "from the net revenues he realizes sufficient to pay the amount aforesaid into court," with costs. Held —While a judgment for taxes may, like other judgments, draw interest, this order, fairly construed, does not require the payment of interest on the amount of the taxes ordered to be paid into court.

Lane & Burnett and T. L. Burnett for appellant.

Helm & Bruce and W. J. Hendrick for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

The sole question in this case is whether the amount of taxes ordered by the chancellor to be paid into court, as shown by the following judgment, shall bear interest: "It is considered that the property of the plaintiff, the water company, is liable to the taxes mentioned in the petition, and the plaintiff having come into court seeking equity, is required to do equity, and the plaintiff is, therefore, required, on or before the 27th day of Novemebr, 1890, to pay into court the amount of said taxes, to wit, ($12,513.78) twelve thousand five hundred and thirteen dollars and seventy-eight cents. Thereupon came the plaintiff and waived the time within which to pay said money into court, and announced in open court that it would not pay said amount or any part thereof into court; and thereupon it is ordered that the Fidelity Trust & Safety Vault Co. be, and it is hereby, appointed receiver of this court and directed to take charge of and operate the works and property of the plaintiff until from the net revenue is realized sufficient to pay the amount aforesaid into court, together with the costs of the proceeding."

This order was entered on November 20, 1890, and upon the subsequent affirmance of the judgment by the United States Supreme Court, in the case involving the liability of the company for the taxes in question, the company paid into court the sum designated in the order. Thereupon the State demanded interest on this sum from November 20, 1890, until its payment into court, which was on March 14, 1892. The court below so adjudged, and the company has appealed.

Without regard to the contention of the appellant that the amount ordered to be paid into court is for taxes, and so not an interest bearing debt, it seems to us that the terms of the order itself are conclusive of the question; for while a judgment may bear interest, as a matter of law, without so providing in terms, yet this order is to pay into court a sum certain, and in default thereof the receiver is to control the property of the defaulting company for such a length of time, and no longer, as will enable it, the receiver, to realize therefrom that sum and the costs of the proceeding and no more.

We think a fair construction of the order is that the sum adjudged to be paid over as taxes was not intended to bear interest. Adopting this construction, it follows that as it is a final order it can be corrected only by an appeal or modified in the manner provided by law. Moreover, the proceeding was not originally instituted by the Commonwealth or the sheriff for the collection of the taxes, but the order for their payment into court was made as the condition on which the company was adjudged entitled to a stay of an enforced sale of its property.

The State might still have enforced the penalties provided by

statute for nonpayment of taxes, which are said to be in lieu of damages by way of interest, and may have done so for aught the record shows to the contrary.

Where the Commonwealth by appropriate proceedings reduces its demand for taxes to a judgment, we perceive no reason why the judgment does not, like all other judgments, bear interest as provided by the statute on that subject. The case at hand is not of that kind.

Wherefore, the judgment is reversed, with directions to overrule the motion of the apepllee and dismiss the proceeding.

MOCERF v. STIRMAN, &c.

(Filed January 29, 1895—Not to be reported.)

Pleadings—Suit on attachment bonds—Where the pleadings and circumstances show that plaintiff intended to sue for damages growing out of the willful suing out of the attachment against him by defendant, and the court held the petition stated a cause of action on the attachment bond, plaintiffs' amended petition stating a cause of action for the malicious suing out of the attachment ought to have been filed. The refusal to permit it to be filed was error.

In a suit on an attachment bond, evidence of injury to plaintiff's business and credit is inadmissible.

Wilfred Carrico for appellant.

Sweeney, Ellis & Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Daviess Circuit Court by the appellant, Jacob Mocerf, against W. D. Stirman, etc., seeking to recover judgment for $5,000 damages on account of appellees having sued out an attachment and caused the levy of same on plaintiff's store, etc.

A trial resulted in a verdict and judgment in favor of plaintiff for $46. Plaintiff filed grounds and moved for a new trial, which was overruled by the court, and plaintiff has appealed. The grounds relied on for a new trial are as follows: Error of the court in overruling plaintiff's motion to file an amended petition, and error of the court in refusing to allow plaintiff to prove the injury to his credit and the damages generally to his business by reason of the attachment, and in limiting plaintiff's recovery as indicated in the instructions. It appears that plaintiff intends to sue for damages upon the grounds of the attachment having been issued and levied maliciously and without probable cause.

It also appears that the court regarded and treated the suit as a suit on the attachment bond. If the suit was upon the attachment bond, the ruling of the court as to the admission of evidence was correct; but if the suit was for maliciously suing out the attachment, then the rejected evidence was admissible.

Taking the pleadings and all the facts and circumstances in the cause into consideration, it seems to us that the court erred in refusing to allow the plaintiff to file the amended petition offered.

The judgment is, therefore, reversed, with directions to set aside the verdict and judgment and award a new trial, and to

allow appellant to amend his petition, and for further proceedings consistent with this opinion.

KEITH, &c. v. FEDER, SILBERBERG & CO.

(Filed January 30, 1895—Not to be reported.)

Married women—Collateral attack of certificate of acknowledgment—An allegation that the deputy clerk took the wife's acknowledgment to the mortgage in the presence of the husband, and without explaining its contents and effect to her, presents no defense to an action to enforce the mortgage lien, where the officer's certificate on its face is regular and proper. Section 17 of chapter 81 of General Statutes forbids such a collateral attack of the officer's certificate without an allegation of fraud or mistake.

Leslie T. Applegate for appellants. Jno. H. Barker for appellees.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Paynter.

Appellants executed a mortgage to appellees on certain real estate in Pendleton county, and which embraced their homestead. By the terms of the mortgage the homestead right was conveyed. Upon the same property, including the homestead, Chas G. Wallace held a prior mortgage.

This action was instituted to enforce appellees' lien on the property, to which action Wallace was made a defendant. He filed his answer and cross petition, asserting claim under his mortgage. After the issues had been joined under the mortgage claims, and the case prepared for trial, the appellants filed an answer claiming as against the mortgage of appellees they were entitled to a homestead, because the acknowledgment of the mortgage before the deputy county clerk was not done in accordance with the statute, inasmuch as the officer did not explain to the wife, Lidia A. Keith, the contents and effect of the mortgage, and there was no privy examination of her. At the same term of court an order was entered to sell the property to pay the Wallace debt, interest and costs, and the balance coming from the sale was to be held to await the further action of the court.

Afterwards the cause was submitted on the remaining issues. From the judgment then rendered this appeal is prosecuted. The answer charged neither fraud nor mistake on the part of anyone in procuring or taking the acknowledgment. It is simply alleged that the husband was present when the wife's acknowledgment was taken, and that the officer taking it failed to explain the contents and effect of the mortgage to her. Admitting every fact alleged to be true, it presented no defense to the mortgage, or rather presented no cause for treating as invalid the mortgage. It raised no issue upon which testimony could be properly taken. The certificate was in due and proper form, from which the conclusive presumption arises that the deputy clerk did all the law required of him in taking the acknowledgment.

It was wholly immaterial whether the court did or did not sustain exception to the deposition of Mrs. Keith or Rinsman, as their tesitmony was irrelevant under the then state of case,

or as to any issue that could be raised on this branch of the case. This being true the suppression of Mrs. Keith's deposition did not nor could it prejudice the rights of appellants.

Under the provision of seciton 17, chapter 81, General Statutes, "no fact officially stated by an officer in respect of a matter about which he is required by law to make a statement in writing, either in the form of a certificate, return or otherwise, shall be called in question, except upon the allegation of fraud in the party benefitted thereby, or mistake on the part of the officer, unless in a direct proceeding against the officer or his sureties."

This provision has been interpreted by this court in a number of cases, and the decisions are uniform in holding that the certificate of the officer can not be contradicted by parol evidence.

It is of immeasurable importance that protection should be given to purchasers in the transmission of title to realty. If the details of the manner in which the officer took acknowledgment of the feme covert can be inquired into and its validity questioned and the certificate destroyed by parol evidence proving there was not a privy examination, or that he did not explain the contents and effect of the instrument, it would make doubtful and insecure the titles to a vast amount of realty. It would invite litigation, destroy the confidence in the verity of the records of conveyances of realty and rob innocent purchasers. It would be opening a rich mine of fraud and perjury. It would produce a feeling of insecurity and unsafety in many peaceful and happy homes in the country.

In Cox, &c. v. Gill, 85 Ky., 669, this court held that when the certificate was regular and proper on its face, and admitted to be signed, and the deed acknowledged before an officer who is authorized to take the acknowledgment, then the statements of the officer as to the date of acknowledgment, and the manner in which it was done, can not be assailed on the idea that the officer made a mistake. In such case parol evidence is not permissible to contradict the legal effect of the certificate by showing that the husband was present when the deed was acknowledged by the wife, or that the officer failed to explain the contents and effect of the instrument to her.

In that case it was said by the court that the original answer of the appellants, nor the amendments thereto, constituted a defense to the action. Such is this case.

In the case of Tichenor v. Yankee, 11 Ky. Law Rep., 712, this court said: "It is not a question of mistake on the part of the officer, but whether he did his duty, and as to it, the certiefiate, by virtue of the statute, imports absolute verity." Other cases could be cited sustaining the views expressed in this opinion, but we deem it unnecessary to do so.

The judgment from which this appeal is taken held that the answer claiming the homestead is insufficient to constitute a defense. Counsel for appellants insist that it was error to do so, without allowing appellants to amend. If there was no other reason why this action of the court in this respect was not an error, the fact that appellant did not ask leave to amend is a sufficient answer to this complaint.

Judgment affirmed.

WELCH v. CORNETT, &c.

(Filed January 30, 1895—Not to be reported.)

Limitation—Trusts—Stale claims—Plaintiff claims that his mother in 1859 or 1860, jointly with C., purchased a tract of land, and that she died in 1860, after having paid $400 of the purchase money; that C. in 1865 paid the

balance (200) of the purchase price, and had a deed for the land, conveying title to himself, made; that C. remained in possession until 1871, when he sold and conveyed to N., who held possession until 1889, when she sold to F., who was in possession when plaintiff filed this suit to recover the interest therein he claims to have inherited as sole heir at law of his mother. Plaintiff was born in 1855. Held—

First. Plaintiff's right of action accrued in 1865, and is now barred by limitation.

Second. Even if limitation did not bar plaintiff's claim, his long delay in waiting fourteen years, after becoming of full age, before asserting his claim, would induce the chancellor to hold his claim to be a stale one, which it would be inequitable to now enforce against innocent purchasers of the land.

James M. Sebastian for appellant.

G. W. Gourley and Riddell & Riddell for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Grace.

The appellant's right to recover in this action, if any he has, rests on the following claim: That he is the son and only surviving heir at law of Martha Welch, who, after a separation from her husband, C. N. Welch, came to Kentucky from Virginia, and lived with one F. C. Cornett as his wife, some question, however, being made as to whether they were ever legally married; that while she and said Cornett were so living together, and soon after they came to Kentucky, and in 1859 or 1860, they bought jointly of one Isaac Congleton a small tract of land, of say 100 acres, for the price of $600, and plaintiff claiming that of this purchase money $400 was paid by his mother with certain stock and a wagon that she brought from Virginia, and which had been given her by her father, James Cornett; that his mother sickened and died in 1860, she and F. C. Cornett then living on the land; that said Cornett continued to hold possession and control of said land until in 1865, when having paid the balance of the purchase money to said Isaac Congleton, he took a deed to himself, and since that time until the sale made by said Cornett, which was in 1871, to Belle Norman, sometimes called Belle Cornett, had control and possession of said land; that since this sale to Belle Norman, she being at that time an infant, she has by herself and tenants had substantially possession and control of said land until 1889, when, having sold same to the defendant, Wm. Freeman, jr., he was in possession at the time of the filing of this action.

No possession is ever shown to have been held by any one other than under the Cornett title, and while plaintiff makes some charges that said Belle Norman and Wm. Freeman, jr., had knowledge of his title and claim to this land before they purchased, yet the evidence is insufficient to establish any such notice. It further appears from the evidence that plaintiff, K. B. Welch, was born in January, 1855; that this suit was not filed until February, 1890, so that plaintiff was over thirty-five years of age at the time of filing same.

The defendant, F. C. Cornett, had been absent from Kentucky for some fifteen or sixteen years before the filing of plaintiff's suit, and is now only before the court by warning order. On the hearing in the court below the chancellor dismissed the petition of appellant, and he appeals.

It will be observed from the foregoing statement of the facts

that whatever was paid on the purchase of this land by Martha Welch was paid in 1858 or 1859; that she died in 1860, and that F. C. Cornett took the deed to himself in 1865; that, therefore, on that date the wrong or fraud, if any, was committed by said Cornett; and said Cornett, then and ever since, claiming title in himself, plaintiff's right then accrued; that this suit was not filed until 1890, so that more than thirty years had elapsed since the payment of any of the purchase money by said Martha Welch; that more than twenty-five years had elapsed since the fraud committed by Cornett on the rights of plaintiff, if any, and that more than fourteen years had elapsed after plaintiff, K. B. Welch, became of age before the filing of this suit.

Plaintiff claims that this case falls under the class of a continuing and subsisting trust, and that, therefore, the statute of limitation does not apply. We do not so understand the transaction. We think the statutes of limitation applicable, but even were they not so the chancellor would feel constrained, under the facts of this case, to say that plaintiff's was a stale claim; that by his long laches, and by the interposition and acquisition of rights by the several purchasers of Cornett, without notice, his claim is, and of right ought to be, barred by the chancellor.

Wherefore, the judgment of the court below is affirmed.

COBB'S ADM'R v. WOLF.

(Filed January 30, 1895.)

1. An agent who acts for one of the contracting parties in the making of the contract is a competent witness against the other party, who is dead at the time the evidence is offered, concerning the verbal statements of or the transactions with or the acts done by the decedent at the time of the making of the contract.

2. Expert evidence—The evidence of a witness, who does not state that he is an expert in such matters or state facts showing that he is an expert and competent to testify in relation thereto, is not competent concerning differences existing between two life insurance policies, where the question in issue is as to whether said policies are different.

E. E. Settle for appellant.

Lindsay & Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Paynter.

This action is upon a note executed by the appellee to Wm. Cobb, now deceased, for premiums on a policy of life insurance in the New York Life Insurance Co., he then being the agent of the company. As a defense to the note it is claimed that the appellee held a policy on his life for $5,000 in the Mutual Life Insurance Co. of New York, upon which he had paid one premium. To induce him to surrender that policy the decedent agreed to deliver to him a policy in the New York Life Insurance Co. exactly like the policy which he then held in the Mutual Life Insurance Co. of New York; and further, to prevent any loss in consequence of the premium paid to that company, appellee was to be released from certain payments of premiums.

The decedent did deliver to appellee a policy in the New York

Life Insurance Co., but it is claimed that it was accepted on condition that it was to be like the policy which he held in the other company named, and if it proved not to be, on examination, it was to be returned to him. It was tendered back to the decedent as well as to the company, but both refused to receive it.

It is claimed in many material respects it is unlike the policy which appellee held in the Mutual Life Insurance Co. of New York, the pleadings filed by appellee pointing out particularly wherein the policies differed.

The policy which appellee held in the Mutual Life Co., as well as the one in the New York Life, were in evidence before the jury. On the trial of the case the jury found a verdict for appellee. A number of errors are claimed to have been committed on the trial of the case.

It was an error for the court to admit the testimony of H. F. Duncan in relation to certain differences existing between the policy which appellee held in the Mutual Life and the policy in the New York Life which was delivered to appellee. The witness did not testify that he was an expert in such matters, nor to any facts which would enable the court to determine as to his competency to testify in relation to such matters. His testimony was prejudicial to appellant. For this error the case should be reversed.

It is very questionable if the proof was sufficient to authorize the jury in finding a verdict for appellee because of the meagerness of the evidence touching the contract, growing out of which the note was executed; but as the case goes back for a trial for the reason given above, it is unnecessary to pass upon this question.

There is another question, which is important, to be determined: Is A. Wolf competent to testify as to such facts as are known to him in relation to the contract? It is admitted that he was the agent of appellee in making the contract with the decedent. The court below ruled that as he was such agent and Wm. Cobb being dead, he was not competent to testify as to any conversation he may have had with the decedent, Wm. Cobb, or as to any conversation which Cobb may have had in his presence in regard to the contract or note at such times as he, the witness, A. Wolf, was agent or acting for appellee.

It was an error in the court to so rule. The court evidently proceeded upon the idea that while the witness was acting as the agent of appellee, he occupied the position with reference to testifying as though he were a principal, thus not being competent to testify concerning any verbal statement of or any transaction with or any act done by decedent.

Under section 606, Civil Code of Practice, the appellee could not so testify, but there is nothing in the section or in any of the subsections which prevented the admission of the testimony of his agent. It is competent for an agent, who acted for a party in a transaction with one afterwards dying, to testify for his principal concerning any verbal statement of or any transaction with or any act done by the decedent.

There is no reason why there should be such rule as would preclude him from doing so. The agent has no pecuniary interest is the result of the litigation. He incurs no financial loss, nor gains any material benefit by the result. The purpose of the law was to protect the estates of dead men by not allowing the one who is to profit by the litigation to testify concerning any verbal statements of or any act done by the decedent, nor as to any transaction with him. The wisdom of this provision is evident.

Were it otherwise, the estates of dead men would become the prey to the rapacity of perjurers.

The agent being free from the motive of profit which his principal possesses, has not been declared incompetent as a witness as to the acts of a decedent.

Judgment reversed, with directions that a new trial be granted appellant and for further proceedings consistent with this opinion.

ASHBROOK v. ASHBROOK, &c.

(Filed December 11, 1894—Not to be reported.)

1. Executors and administrators—Partnership—A partner who owned a half interest in the partnership estate purchased and paid for materials to make certain improvements on the partnership property, but died before the improvements were made. He made his surviving partners his executors, and in his will gave them the privilege of buying his interest in the partnership at a designated price. The surviving partners and executors did not charge themselves as executors with the value of the materials so purchased by decedent, but paid for them with the assets of the partnership. Held—The testator knew when he authorized the executors to buy his interest in the partnership at a fixed price that the cost of the material was a debt due him by the partnership, and the executors, having bought his interest as authorized by his will, were not required to charge themselves as executors with the value of such materials.

2. Same—In the settlement of the accounts of the executors they were charged with the true amount of money that had been furnished by the deceased partner to carry on the firm business.

3. Same—Interest—A partner who furnishes the capital to conduct the partnership business can not charge the firm or the other members of the partnership with interest on the sums so furnished, in the absence of a special agreement between the parties to that effect; and after a dissolution of the partnership and prior to a settlement of the partnership accounts interest can not be allowed to one of the partners on the unascertained balance due him for sums advanced by him to the firm unless there is an agreement to that effect or conditions raising an equity in his favor.

4. Same—The mere fact that the surviving partners and executors in the new partnership books charged themselves with a certain item, which they failed to charge themselves with in the settlements as executors, does not show that as executors they should be made to account for such item, when they claim that the charge in their partnership books was made by mistake, and there is no evidence to show that they ever in fact received said sum.

H. D. Peck and J. T. Simon for appellant.

A. H. Ward for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Lewis.

August, 1873, T. V. Ashbrook, being sole owner of what was known as the "Keller Distillery" property, sold a half interest to each of his two brothers, F. G. and S. J. Ashbrook, at the price of $6,500, for which they gave their respective notes, bearing interest at the rate of 10 per cent. per annum until paid, and thereupon they commenced the business of making and selling whisky, under firm name of T. V. Ashbrook & Bros.; but it was continued during only one distilling season, T. V. Ashbrook having died September 30, 1874, whereby the partnership ended.

Deceased left a will, admitted to record October 30, 1874, when

F. G. and S. J. Ashbrook qualified as executors, no security being required. To testator's widow was devised a dwelling house and certain personal property, to be held for use of herself and children until arrival of his eldest son at the age of twenty one years, which occurred February 27, 1883, and thereafter she was to have, in lieu of dower, said real and personal porperty together with interest on bank stock, amounting to $10,000.

The executors were directed to sell all other personal property, including partnership whisky and a designated parcel of land, either publicly or privately, as in their opinion was best. Also to collect all debts, and invest in bank stock or in real estate, or loan amounts collected from year to year; and out of dividends and rents pay to his wife semi-annually until February 27, 1883, such amount as was necessary to support her and educate and support his children. They were then to divide all his estate, except $10,000 invested for the widow, equally among his children.

By clause 4 of the will privilege was given to F. G. and S. J. Ashbrook of purchasing testator's interest, being a half, in the distillery property at the price of $12,500, payment of which, and interest at the rate of 10 per cent. per annum, they were given the election to defer until February 27, 1883.

It appears the executors made five different settlements of their transactions with the county court, the first being on February 22d to 27th, 1877, and the last beginning in June and concluded September 4, 1883, when the balance of the estate in their hands was divided and paid over as directed by the will.

This action was brought November 13, 1885, by the devisees to surcharge these settlements and recover of the executors a considerable amount, composed of various items, which they state has not been accounted for or included in the settlements.

Upon final hearing judgment was rendered against the executors for $1,217.06, and interest from October 27, 1875, being aggregate amount found and reported by the special commissioner.

From that judgment they have appealed, and devisees prayed a cross appeal.

We will first consider and determine whether, as contended for appellees, the special commissioner has failed to charge the executors with any sum with which they ought to be charged.

It appears that prior to death of T. V. Ashbrook the firm projected certain repairs of the distillery property, which had been determined necessary and were begun, and for that purpose materials had been purchased and paid for by him; but the surviving partners, instead of charging themselves as executors therefor, paid the amount with assets of the firm. In that we think they were right, because T. V. Ashbrook gave to them the privilege of buying his half of the distillery property at the price fixed in his will, knowing and manifestly having in view that the amount so advanced by him was a subsisting demand against the firm of which he was a member.

The distillery was operated by the firm of T. V. Ashbrook & Bros., with money furnished almost exclusively by T. V. Ashbrook, and there is a dispute as to the actual amount his estate is entitled to credit for on that account. The two surviving partners fixed the sum at $19,724.75, and were charged therewith in their settlement with the county court; and as the special commissioner, after thorough examination of the books and consideration of the evidence, states it in his report, which was confirmed, to be the true amount, we are not inclined, in absence of satisfactory reason therefor, to determine differently.

In that connection it is contended that whatever may be the amount, T. V. Ashbrook was and his devisees are now entitled in a settlement of the partnership to interest thereon, not only during the existence of the firm, but for the period between his death and final settlement of the partnership.

The evidence does not show any agreement between the partners that the money so furnished should bear interest. On the contrary there is evidence tending to show it was understood and agreed otherwise; and in the absence of a special agreement the well-settled rule is that partners are not entitled to interest on money voluntarily furnished to carry on the business. And we think it equally clear and well settled that after dissolution and prior to settlement of a partnership, interest is not payable between partners on undetermined balance going to one. But to entitle one partner to interest during a settlement of the partnership there must be either an agreement therefor or conditions raising an equity.

In this case the surviving partners have shown neither unnecessary delay in settling the partnership and ascertaining balances, nor disposition to withhold what was fairly due the estate of their deceased partner. On the contrary they have exhibited a desire to be both just and generous, and did, during the eight years the estate of the testator was in their hands, account for and actually pay individually to the estate interest amounting in the aggregate to more than $20,000.

Although there were large sales of whisky that had to be made, and debts due the firm to collect in order to settle the partnership, it was done by October, 1875, but a few days more than one year after death of the testator, and less than one year after the executors qualified, and they accounted in their settlement with the county court for interest from that date upon the balance then found due from the firm to the estate of T. V. Ashbrook. Moreover, although they need not have so soon signified their election to buy the half interest of the distillery property at the price fixed in the will, they did do so Novemebr 26, 1874, and thereafter paid interest at the rate of 10 per cent. per annum until 1883.

It further appears that on the balance found against them at each settlement they accounted for and paid interest up to the next settlement, and so on to the last one. Upon what principle of justice or equity the devisees can claim more interest than they have received we are utterly unable to see. We are satisfied the special commissioner reported and the lower court adjudged against the executors all the devisees were entitled to recover, and the only question is whether the amount was not too much.

The sum of $1,217.06 so adjudged was found by deducting a credit of $245.75, not previously allowed the executors, from the sum of $1,462.81, composed of four different items, with which the executors had omitted to charge themselves in settlements with the county court. Of these there is only one, amounting to $902.90, purporting to have been collected from Moore, about which there is any room for controversy.

It appears an entry of that item of credit to the estate of T. V. Ashbrook was made after his death upon books of the new firm, but the executors failed to charge themselves with it in the county court settlement.

The evidence shows testator died owner of several valuable farms, and these the executors continued to control and lease for the benefit of the estate during the period of eight years from the time they qualified till their final settlement. Of two of those

farms one was leased from year to year to a man named Conner, and the other to Moore, the rent of each being the same and paid in corn, with which the executors charged themselves.

In the county court settlement they charged themselves with rent paid by Conner for nine years, which was a mistake, as is admitted, but with only seven years rent paid by Moore; therefore, looking at the county court settlement alone, it would be manifest the executors had charged themselves with all the rent collected from the two men. But it is contended that the item of $902.90 was for rent paid by Moore for the year beginning March 1, 1874, during life of the testator, and ending March 1, 1875, after he died; but there came into the hands of the executors a note given March 1, 1874, by Moore, to the testator which was never collected, he being insolvent.

Whether that note was for rent for the farm from March 1, 1874, to March 1, 1875, does not clearly appear. If it was, then the executors ought not to be charged with the sum of $902.06, which we are satisfied, if collected at all, was not in money, but in corn, for Moore was insolvent. The executors deny they did collect it, and say the entry was made by mistake. And it seems to us if Moore did on that occasion pay the sum in question, either in money or corn, it would have been in the power of the devisees to have proved it, which they made no other effort to do than by referring to the firm books. A very large amount of money belonging to testator's estate was collected and accounted for by the executors during the period mentioned.

In addition to large sales of personal porperty, including partnership whisky, the executors had control and management of several farms, were required to collect large sums due the estate, and from time to time loan out and otherwise invest money in their hands, and at intervals distribute among those entitled money in their hands. Yet from beginning to end they were prompt, faithful and unusually fair, generous towards beneficiaries of the estate, and we, therefore, think it not to be at all presumed they would have, either by mistake or design, omitted to charge themselves with so large a sum as the one in question, if it really ought to have been done.

In our opinion, therefore, it was error to adjudge that sum against the executors, and the judgment is reversed on appeal and affirmed on cross appeal, and remanded for proceedings consistent with this opinion.

LIVEZEY v. SCHMIDT.

(Filed January 16, 1895.)

1. Flow of water from land of one to land of neighbor—Nuisance—The natural flow or drainage or sweepage of water from the land of one upon or through the land of another, however injurious it may be, does not constitute an injury for which an action for damages may be maintained. A legal nuisance, for which damages may be recovered, does not arise from the failure of one to change the natural flow or seepage of water so that it may not injure his neighbor.

But if the owner makes a noxious deposit on his land which, by being carried by rains upon the surface, or by percolation through the soil to or upon the premises of another, produces an injury to the waters of a well or to his crop or otherwise, then this is an actionable nuisance for which damages are recoverable.

2. Same—Instructions—Where plaintiffs' evidence conduced to show that his premises were injured by the drainage from noxious deposits of manure,

etc., made by defendant upon his (defendant's) premises, and defendant's evidence conduced to show that the injury to plaintiff was caused alone by the natural flow or seepage of water and not by said deposit, the court should have instructed the jury that defendant was liable for the injury done to plaintiff's premises to the extent that the injury resulted from the act of defendant in making the deposit on his premises, but not for said injury if it was caused by the natural flow of water from defendant's premises.

L. J. Crawford for appellant.

Thos. P. Carrothers for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant and the appellee own and live upon adjoining lots, and the stables of the appellant being near the dwelling of the appellee, it is alleged by the latter in this action that the appellant placed heaps of manure from his stable and the offal from his premises in such a position, with reference to appellee's dwelling, as caused the drainage in wet weather to pass through this filth and into the cellar of the house in which the appellee and his tenants lived, making the water impure and injuring the health and comfort of himself and family, etc.

The facts alleged present a cause of action, and the evidence on the part of the appellee conduces strongly to show that the deposit of filth was of such a character as to make it a nuisance, resulting in injury to the plaintiff and his premises, and for which an action could be maintained.

It is laid down in Woods' Law of Nuisances that it is "an actionable nuisance for a person to deposit anything of a noxious character upon his land, which either by being carried by rains upon the surface or by percolation through the soil upon the premises of another, producing injury to the waters of a well or to his crops, or otherwise."

To the same effect is the decision of this court in the case of Kinnaird v. Standard Oil Co., 13 Ky. Law Rep., 269.

If, therefore, the only testimony in this case was that introduced by the plaintiff, there would be no reason for disturbing the judgment below, but on the side of the defendant there is testimony tending to show that this water flowing or draining into the cellar of the appellee is the result of natural causes, and not from the act of the appellant, and that the drainage of water is not through or from this manure pile into appellee's premises.

The theory of the defense is that the peculiar location of the ground or dwelling of the appellee, with reference to that of the appellant, is such that the natural flow of the water leads it from the premises of one to the premises of the other, and evidence was introduced to show that other dwellings located on the same character of ground, and in the same neighborhood, were affected in like manner after heavy rains.

The testimony being conflicting, the issue of fact was with the jury, and the only question proper to be considered arises upon the instructions given for the plaintiff. This seepage or drainage, when the result of the peculiar location of the ground, and resulting alone from natural causes, the act of the party charged contributing in no wise to the creation of the nuisance, can not be made the subject of an action, or, as expressed in the text-books,

"in order to create a legal nuisance the act of man must have contributed to its existence."

Under the state of case presented the court told the jury that "if from the evidence some part of the falling water from defendant's stable, or some part of the surface or falling water upon defendant's premises, flowed or seeped upon, against, through, or to or into any part of plaintiff's premises, in any way or to any extent, and find that some part of his said premises were injured thereby, made damp, unwholsesome or uncomfortable, the jury should find for the plainitff in such damages as he sustained thereby, as the natural and proximate consequence thereof, not exceeding the amount claimed in the petition."

The mere converse of the propositions presented for the plaintiff were given as the instructions for the defendant. These instructions make the appellant liable, whether the injury to the plaintiffs resulted from natural or artificial causes, and required the jury to find for the plaintiff if the water flowed from the barn or premises of the defendant onto the premises of the plaintiff, causing an injury. The fact that the defendant must have committed some act causing the nuisance seems to have been overlooked, for if he did not, either by himself or his employes, do that which created the nuisance, no responsibility exists.

However injurious the natural flow or drainage from the land of one upon or through the land of another may be, there is no action for the injury, as a nuisance can not be said to exist in a legal sense from the failure of one to change the flow of water that springs from nature itself, and not from the act of the owner.

For the reasons indicatetd the judgment is reversed and remanded, with directions to award a new tiral and for proceedings consistent with this opinion.

McGENNIS, &c. v. McGENNIS, &c.

(Filed January 30, 1895—Not to be reported.)

Conveyance to grantor's daughter and "body" heirs construed—A conveyance of land by a father to his daughter "and her body heirs, if any, and in the event she has no children then the land * * * to revert" to the grantor's estate, and containing also this clause, "to have and to hold unto the party of the second part and her heirs," conveys to the daughter an estate tail which, by the statute of this State, is converted into a fee simple, subject to be defeated in default of the birth of children to the daughter. And since the daughter, at the time of the institution of this suit, had four children, she has an absolute fee simple title to the land.

G. H. Galloway for appellants.

W. B. Gaines and Galloway & Gaines for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Grace.

This record presents a question as to the ownership of a certain tract of land in Warren county, Ky., betwen Mrs. Mattie McGennis and her infant children, Rufus McGennis and others, and is to be settled by the construction of the court to be given to the deed from Robert Johnson and wife to said Mattie McGennis, of date September 16, 1879, said Robert Johnson being the

father of said Mattie McGennis and the grandfather of the infants, appellants in this case. Said deed, after naming the parties and reciting the consideration paid and to be paid, in the usual form recites that for and in consideration of same "the party of the first part, Robert Johnson, has bargained and sold under the party of the second part, Mattie McGennis, and her body heirs, if any; and in the event she has no children, then the land hereinafter described is to revert back to my estate." Said land is bounded, etc., * * * and adding in the final clause "to have and to hold unto the party of the second part and her heirs, with general warranty."

Appellants, the infants, are contending, by guardian ad litem, that said instrument only creates a life estate in said Mattie McGennis, with remainder over to her children, while counsel for the appellee, Mrs. McGennis, contend that she now takes the absolute estate. The expression in said deed conveying said land "to said Mattie McGennis and her bodily heirs" has often been construed by this court to mean an estate tail, and which, by our statute in Kentucky, now of long standing, is converted into a fee. (Prescott v. Greavitt's Heirs, 10 B. M., 56.)

And the further expression in said deed, providing that if said grantee have no children, then the land to revert back to my estate, is such a condition as converts the original estate into a defeasible fee, and which may be made perfect and absolute in the grantee, Mattie McGennis, should she bear children, and not on the condition that she should die leaving children surviving her. So that by reason of the statute converting estates, when ever estates tail, into fee sipmple estates, and, by reason of the happening of that event, in default of which only was the land to revert to the estate of the grantor, the title becomes perfect and absolute in Mrs. Mattie McGennis, the evidence and plead ing showing that at the time of filing her suit she was the mother of four children, same being made defendants in her suit.

This being the view taken by the chancellor below, said judgment is affirmed.

ANDREW, BY, &c. v. HURT'S ADM'R.

(Filed January 30, 1895—Not to be reported.)

Deed of trust construed—A deed of trust executed by a guardian for appellant recited that $1,000 had been invested in general merchandise, and that grantor "gives, grants, etc., to H. the sum of $1,000. * * now in the hands of H., as aforesaid, to be held by him in trust for" appellant. H. was a merchant. Held—The purpose of the deed was clearly to impress the stock of merchandise of H. with a trust for payment of the $1,000, and whether the whole stock of H. was purchased with said $1,000, or part of it only was so purchased, the whole of it is charged by the deed of trust with a lien to secure said debt of $1,000.

Sam. C. Hardin and J. F. Montgomery for appellants.

J. A. Brents for appellee.

Appeal from Clinton Circuit Court.

Opinion of the court by Judge Paynter.

Laura Andrew, by her next friend, J. L. Warriner, brings this suit to recover of J. C. Hurt, since deceased, the sum of $1,000,

which he assumed to pay her by the terms of a deed of trust executed by Y. L. Warriner to him, which he accepted.

Appellant obtained an order of general attachment against the property of Hurt, alleging as the ground for the attachment that he was about to sell or convey or otherwise dispose of his property with a fraudulent intent to cheat, hinder or delay his creditors. These grounds are controverted by the affidavit of the defendant, and on the trial of the question the court discharged the attachment. We think the court did right, as there was not sufficient evidence to justify the court in sustaining the attachment.

Pending the action, and before the attachment was discharged, appellant filed an amended petition by which she claimed an equitable lien upon the stock of merchandise or its proceeds then being held under several orders of attachment which had been sued out by the creditors of Hurt. In the meantime, Hurt died, and the action was revived against his personal representative.

The petition as amended substantially sets forth the terms of the deed of trust which was filed: It is alleged that the $1,000 had been invested in a stock of dry goods and groceries in the town of Albany, Ky., at which place Hurt was carrying on the business of retail merchant; that this sum constituted the principal part of the cash capital used by him in the business, which he continued until the levy of the attachment, being the same goods attached in this action; that the proceeds of the goods are in the hands of the court's receiver, and that Hurt was insolvent.

Appellant alleges she has an equitable lien on the proceeds of the merchandise, and that it is prior to that of the attaching creditors, because the trust fund was invested in the stock of merchandise. To so much of the amended petition as asserted this equitable lien on the proceeds of the merchandise, the administrator demurred. The court sustained the demurrer and dismissed her petition. From that action of the court this appeal is prosecuted.

The deed of trust recites that the $1,000 is invested in general merchandise in the town of Albany, Ky., and that he "gives, grants and donates to John C. Hurt, of Albany, Clinton county, Ky., the sum of $1,000, which is now in the hands of John C. Hurt, as aforesaid, to be held by him in trust for my said granddaughter, Laura Andrew." The deed of trust was accepted by Hurt, duly acknowledged by both and placed upon record.

It was the expressed purpose in the deed that Hurt should act as trustee for Laura Andrew, and was the evident purpose of both parties to charge the stock of merchandise with the payment of the debt of the cestui que trust. It was converted from an ordinary obligation to the grantee to a deed of trust, by which the obligor was changed from an ordinary debtor to a trustee. If it was not the purpose of the parties to charge the merchandise with the payment, why did the deed particularly state how the trust fund thus created was invested If it was to remain an ordinary debt, why the necessity of a deed of trust? The deed provided that in certain contingencies the fund was to be collected and taken charge of by the county judge of the county, the grantee trying to make absolutely certain that the fund should be preserved for the cestui que trust. We can not believe the deed of trust was intended to be purposeless, and it would be practically so was not the property in which the fund was invested charged with its payment. The personal representative can not, no more than Hurt could if he were living, divest the stock of merchandise of the trust, covering it by the terms of the deed.

The cestui que trust can follow it into the hands of the personal representative. If the merchandise was purchased partly with the money of the cestui que trust and partly with that of Hurt it could not be said that any particular part of the property was purchased with the money of the cestui que trust; but there is a lien on the whole fund for the amount of the trust fund employed.

For the foregoing reasons the cause is reversed, with directions that the demurrer be overruled, and that further proceedings be had consistent with this opinion.

GERMAN INSURANCE CO. v. BROWN.

(Filed January 30, 1895—Not to be reported.)

Fire insurance—The failure of the assured to give proof of loss within thirty days after the fire, as required by the stipulations of the policy, does not bar his right to recover when even defendant's evidence shows that such proof was given within thirty-five or thirty-six days after the fire, and three months before the institution of the suit.

McCain & Jackson for appellant.

Peak & Zerfoss for appellee.

Appeal from Trimble Circuit Court.

Opinion of the court by Judge Paynter.

The appellee's house and certain personal property, consisting of household goods, clothing, etc., was insured against loss or damage by fire or lightning by a policy of insurance which had been delivered to him by the appellant, German Insurance Co. The amount of insurance was $400 on the house and $400 on the prersonal property.

On the first of April, 1892, the house and much of the personal property was destroyed by fire, in nowise resulting from any negligence of appellee.

As he was required to do by the terms of the policy, he notified appellant of his loss. Afterwards he furnished appellant the neessary proofs of loss in the manner required by the policy, except there is a question as to whether it was done within the thirty days after the loss, it being specified in the policy that such proof was to be furnished within that time, and that no action should be maintained if it was not done. At any rate the proof as furnished the appellant three months before the suit was brought, appellant admitting it as done within thirty-five or thirty-six days after the fire. Appellant failing to pay the loss occasioned by the fire, this action was instituted.

At the conclusion of the testimony of appellee appellant asked the court to instruct the jury to find for it. This the court refused to do. The jury found a verdict for the applelee for $625, upon which the court rendered a judgment. The appellant filed ground for a new trial, which the court overruled.

In the ground for a new trial appellant did not complain because of any instruction which had been given by the court to the jury, but only complained that the court erred in refusing to give the peremptory instruction which it asked. The court did not err in refusing this instruction.

The execution of the policy and the destruction of the property

insured by fire and the proofs of the loss were admitted. Besides this, appellee had made all necessary proof before the jury which authorized the finding of a verdict for him. This instruction was evidently asked upon the hypothesis that the appellee had failed to show that the proofs of loss had not been furnished within thirty days after the fire. Had the action of the court been an error, it was corrected by the second instruction given to the jury by the court, which substantially told the jury to find for appellant, unless they believed that a notice of the loss had been forthwith given after it occurred, and that the proof thereof had been furnished as required by the policy within thirty days thereafter. It was erroneous for the court to have given this instruction. The fact that the proofs of loss did not bar appellee's right to recover in this action. It was sufficient to have done so before the action was brought.

In the case of Kenton Insurance Company v. Downs, &c., 12 Ky. Law Rep., 115, it appeared that the policy of fire insurance provided that the proof of the loss should be furnished the company within thirty days after the loss occurred, and that no action should be maintained against the company after the expiration of six months after the fire occurred. The defense relied upon by the company was that the proofs of the loss were not furnished it within thirty days. The court held that such provision did not forfeit or bar the action, but that it was a requirement to be complied with before the action could have been maintained.

The jury heard the evidence, passed upon its character and the credibility of the witnesses, and the court will not disturb the verdict.

Judgment affirmed.

ERWIN v. COMMONWEALTH.

(Filed January 31, 1895.)

The offense of striking one with a wooden club, however deadly a weapon it may be, is not embraced within the provisions of section 1, article 17, chapter 29 of the General Statutes, imposing a penalty upon one who shall in sudden affray, etc., without previous malice and not in self-defense, * * * cut, thrust or stab any other person with a knife, dirk, sword or other deadly weapon without killing such person.

Sweeney, Ellis & Sweeney and Lawrence P. Tanner for appellant.

W. J. Hendrick for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted and his punishment fixed at a fine of $375 and imprisonment in the county jail for the term of nine months upon trial under an indictment for maliciously striking and wounding Alex. McMurtry with a large wooden club.

After giving an instruction in the usual form under the statute under which the indictment was found, section, 2, article 6, chapter 29, General Statutes, the court gave to the jury an instruction based on the provisions of section 1, article 17, chapter 29 of the General Statutes. That statute reads as follows: "If any person shall, in a sudden affray, or in sudden heat and passion, without previous malice and not in self-defense, shoot and

wound another with a gun or other instrument, loaded with ball or other hard substance, without killing such person, or shall in like manner cut, thrust or stab any other person with a knife, dirk, sword or other deadly weapon, without killing such person, he shall be fined not less than $50 nor more than $500, or confined in the jail not less than six months nor more than one year, or both, in the discretion of the jury."

The instruction authorized a conviction and the imposition of the fine and penalty fixed by the statute if the defendant struck McMurtry with a club, and it was, in their opinion, a deadly weapon, etc. And the sole question presented on this appeal is, can a person, by striking another with a wooden club, be guilty of the cutting, thrusting or stabbing with a knife, dirk, sword or other deadly weapon, within the meaning of the statute? In other words, is the offense of striking another with a wooden club, it matters not how deadly it may be, one that is embraced or described by this statute?

Of the correctness of the first instruction, framed as it was under the first statute referred to, there can be no question, because that statute uses the words "cut, strike or stab," etc. And hence this court has held that "the language has reference to any instrument capable of being used for the purpose of striking a person and which may be dangerous to his life if used by the assailant for that purpose." (Philpot v. Commonwealth, 86 Ky., 595; Commonwealth v. Duncan, 91 Ky., 592.)

It is clear, however, that the second statute, which is evidently the one under which the appellant was convicted, only applies to wounds inflicted by shooting, cutting, thrusting or stabbing, and does not embrace a wound inflicted by striking with a wooden club.

A striking with blacksmith's tongs was held to be an offense not embraced by this statute. (Commonwealth v. Hawkins, 11 Bush, 603; Gosh v. Commonwealth, 4 Ky. Law Rep., 254.)

In lieu of this instruction the court should have submitted one embracing the offense of assault and battery.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

CRAIG'S EX'OR v. ANDERSON.

(Filed January 31, 1895.)

The absence from the State of a husband and wife suspends the running of the statute of limitation against the maintenance of an action by a creditor of the husband to subject the interest in the wife's realty the husband acquired by the erection, with his own means, of valuable improvements thereon.

W. H. Miller and H. Helm for appellant.

Hill & McRoberts for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Guffy.

This action was brought in the Lincoln Circuit Court, June 23, 1893, by H. Helm, executor of R. G. Craig, against Wm. H. Anderson and Julia L. Andesron, his wife, and others, seeking to obtain judgment on a note executed to said Craig by Wm. H. Anderson and others for $1,597.50, dated September 10, 1879, due

in twelve months; also seeking to subject the interest of Wm. H. Anderson in a lot of land conveyed to his wife by Little, on the ground that the husband had erected and placed on the land valuable improvements.

It appears that the appellees, Wm. H. and Julia L. Anderson, are residents of the State of Kansas, and have resided there since 1880. It is admitted that the land conveyed to appellee was worth, at most, only a few hundred dollars, perhaps $150, and that prior to the removal of appellees to Kansas, and after the execution of said note, that the husband, Wm. H. Anderson, of his own money and means, erected, or caused to be erected and built upon said parcel of land, a brick dwelling house and other buildings and valuable improvements, of the value of $2,800.

It appears that appellees were proceeded against as nonresidents, and attachment issued and levied on the land. The appellee, Julia L. Anderson, appeared and demurred to plaintiff's petition, which demurrer was overruled. She then answered and also filed an amended answer, pleading the statute of limitation as a bar to plaintiff's suit.

Plaintiff demurred to the answer and amended answers, which demurrer was overruled; thereupon appellant replied, pleading the asbence and removal of appellees from the State ever since 1880 or 1881, and to this reply appellee, Julia L. Anderson, demurred, which demurrer was sustained, and plainitff failing to plead further, the court dismissed his petition and rendered judgment against him for cost, and from this judgment plaintiff has appealed to this court. Appellee insist that the claim is barred by the statute of limitation, and relies on the statute of limitation in regard to fraud or mistake, and claim that, inasmuch as there was no personal liability on the part of the wife for the debt, her removal and that of her husabnd from this State did not obstruct the prosecution of the suit nor have the effect of suspending the statute of limitation, insisting that plaintiff could at any time have proceeded against the property.

The appellant claims the removal from and continued absence from the State of the appellees suspended the statute, hence he claims that his cause of action is not barred.

We are of the opinion that the statute in reference to obtaining relief from fraud or mistake does not apply to this action. Appellee, by putting the improvements upon the land, acquired such an interest in the same as might be subjected to the payment of the note sued on, and so long as he had not been divested of that interest it was liable for the debt sued on, and the statute of limitation would not and did not run in his favor from the time he removed to Kansas; but be that as it may, it seems to us that the removal of appellees to Kansas, and their continued residence there from 1880 to the bringing of this suit, suspended any statute of limitation as to this suit, and that the statute of limitation constitutes no bar to plaintiff's right to recover.

It is true that plaintiff or his testator might have proceeded by attachment and constructive service against the land at any time after 1880 but that fact does not defeat their right to do so now.

Article 3, chapter 71 of the General Statutes embraces the statute of limitation applicable to this suit, and actions of the kind or class in question. Section 9, article 4, chapter 71, provides that where a cause of action mentioned in article 3, this chapter, accrues against a resident of this State, and he, by departing therefrom, or by absconding or concealing himself, or by any other their indirect means, obstructs the prosecution of the

action, the time of the continuance of such absence from the State or obstruction shall not be computed as any part of the period within which the action may be commenced.

It is evident that the removal and absence of appellees from this State was to some extent an obstruction to the prosecution of this suit. No personal judgment could be obtained on the note. Nothing could be taken for confessed against either appellee. The appellant could not proceed at all against appellees, except by obtaining attachment and constructive service, and to do this he must give bond and security, and then before he could obtain a judgment in rem another bond and security must be given, with opportunity to defendants for five years to appear and show cause against the proceedings, and perhaps involve plaintiff and his surety in cost and trouble.

It may be that the precise question raised in this cause has not been passed on by this court, but we think the language of the statute settles this question.

The case of Seldon v. Preston, 11 Bush, 191, in effect decides the principle involved in this case. That was an action in which Preston relied on the statute of limitation as a bar to Seldon's suit. Seldon replied that Preston was in Virginia, inside the lines and territory of the Southern Confederacy for years, and that while he was there that the statutes did not run in his favor. Preston responded that during that time he owned land in Kentucky which Seldon could have proceeded against by attachment against him (Preston) and thus have made his debt, but this court held that fact did not prevent the suspension of the statute as to Seldon's cause of action. The court, in deciding the case, uses this language: "The creditor was not required to pursue this imperfect remedy in order to avail himself of the exceptions expressed in the statute of limitation."

We are satisfied that the statute of limitation constitutes no bar to a recovery in this action.

The judgment of the court below is reversed and cause remanded, with directions to sustain plaintiff's demurrer to the answer of appellee, and to overrule appellee's demurrer to the reply of plaintiff and for further proceedings consistent with this opinion.

TAYLOR v. FULKS' ADM'R, &c.

(Filed February 1, 1895—Not to be reported.)

Rescission of contract of sale of personal property—Fraud—Tender—M. sold a mare in foal to F. for $149, taking in payment a note signed by F., with C. as security, due in six months. F., to secure C., as surety, executed to him a mortgage on said mare. Before the note became due F. exchanged said mare and her colt, which had been foaled since his purchase, with T. for a sorrel horse, without giving T. notice of the mortgage on the mare and colt. T. having learned of the mortgage, all the parties to the transaction came together, and upon T.'s representation that said sorrel horse was "sound and all right," agreed as follows: M. agreed to take possession of and sell the sorrel horse and apply the proceeds to payment of the $149 note, and to pay the balance, if any, to F.; he further agreed to and did release C. as surety on the note, and C. agreed to and did release the mortgage he held on the mare and colt, T. retaining them. C. was solvent and F. insolvent. In this action by M. against the other parties, in which he claims that the representations made by T. to him were false and fraudulent, and

that said sorrel horse was not "sound and all right," etc., and was of but little value, and in which he seeks to have said agreement made by all the parties annulled and to be restored to his original rights against C., Held—

First. Plaintiff had a right to maintain the action without tendering the sorrel horse to T.

Second. Even if a tender of the horse to T. was required, his failure to demur to the petition or to complain in his answer of the failure to make the tender waived his right to complain in that regard.

Third. The judgment dismissing the action as to C., but adjudging the mare and her colt was liable to plaintiff for his $149 debt, and further ordering a return of the sorrel horse to T., was proper.

L. S. Pence, S. A. Russel and Knott & Edelen for appellant.

J. P. Thompson for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Grace.

James Miller, being the administrator of Harriet Fulks, deceased, on April 8, 1891, at a public sale of the personal estate of his decedent, sold to Jack Fulks a bay mare, then in foal and being six years old, at the price of $149, on six months' time, with interest from date until paid, taking as security on said note one C. W. Cowherd, and said Jack Fulks at the same time executing a mortgage on said mare to secure said Cowherd and save him harmless by reason of his suretyship.

Subsequently, in August, Jack Fulks, without the knowledge or consent of either Miller or Cowherd, swaps this mare, with her suckling mule colt, to Robert Taylor for a young sorrel horse, four years old, and, as claimed by said Jack Fulks, represented and warranted by said Taylor at said time to be sound and all right; said Jack Fulks, however, not informing said Taylor that Cowherd held a mortgage on said mare. This fact, however, coming to the knowledge of said Taylor in a few days, he goes to see Fulks and Miller about the matter and to get it arranged, and finally Miller, Taylor, Cowherd and Fulks being together, and consulting about said transaction, and Miller being appealed to, said that he was only an administrator, that Cowherd, who was solvent, was on his note, and that he proposed to take no risk in the matter. Finally, however, it was agreed, as charged by Miller in his petition, at the instance of Taylor and upon his representation to Miller, that the sorrel horse traded by him, to Jack Fulks was sound and all right and worth $150; and, as Miller says, relying on said representation of Taylor as true, he did then agree with said Taylor and the other defendants, Cowherd and Fulks, that the sorrel horse might be placed in his (Miller's) possession; that he would take him, sell him, and apply the proceeds to the payment of his note, and turn any balance over to Jack Fulks; and that, relying on said representations of said Taylor, he agreed to release said Cowherd on his note, and that Cowherd released said mortgage from Fulks on the mare and her mule colt, then owned by the said Taylor; and that all parties going to town, he said Miller did erase the name of said Cowherd as surety on said note, and that Cowherd then released to said Taylor the mortgage on the mare and colt.

So after this, in November, Miller files this suit, alleging the foregoing facts, and stating said release of said Cowherd by him, and the release by Cowherd of said mortgage was procured by the false and fraudulent statements made by said Taylor "that said

horse was sound and all right and worth $150," when in truth and fact said horse was not sound and all right; that he was unsound; that he had weak eyes, was nearly blind and of but little value, while the mare and mule colt obtained by Taylor was amply worth his (Miller's) debt. He says further, that Fulks is insolvent, and prays that said trade be annulled, and that the parties be placed in statu quo. Miller also prays for a judgment for his debt, interest and cost, and for all proper and general relief.

Cowherd files his demurrer and is released by the court.

Taylor files his answer denying the material allegations charged by Miller against him, and denying specifically that he either warranted or represented said horse to be sound. He denies that he made any false statements about the horse, his soundness or his eyes, and affirms that the horse was sound when the said transaction took place, and prays to be dismissed, with his costs.

Jack Fulks files his answer making no defense, but making same a cross action against Taylor, saying that Taylor warranted the sorrel horse, when he exchanged with him, to be sound and all right, and charging that the horse was not sound; that his eyes were bad, and that he was of no value, and asking a rescission.

Taylor filed answer to this, denying any warranty, and alleging the horse was sound when he traded him to Fulks.

On hearing, the chancellor decreed a cancellation of said contracts, and held as to Taylor that the mare and mule were liable to the payment of the debt of Miller against Fulks; but decreeing that Taylor might pay same if he chose to do so, and decreeing a return of the horse to Taylor; and also providing that Taylor might, if he elected to do so, accept $25 as the value of the horse, and have same deducted from the debt due to Miller.

Taylor has appealed from the judgment, and by counsel urges chiefly that plaintiff Miller's petition was defective in not formaly tendering a return of the sorrel horse at the time of filing his petition; and further, that Miller would not be entitled to any rescision unless the horse had been returned in a reasonable time; counsel for appellant citing quite a number of authorities in support of said propositions. On examination we are inclined to the opinion that a tender back of the property received and offered to rescind must be made in a reasonable time after the discovery of the fraud.

In this case, however, it will be observed that no objection, either by demurrer or in the answer, is taken on this ground, the only issue tendered being that Taylor denied every warranty and denied any fraud.

This matter of a tender within a reasonable time being a mixed question of law and fact, and always dependent on the particular circumstances of each case, we think a defendant who seeks to rely on the want of same as a defense, should tender the issue, either by demurrer or by answer, that he can not, after trial had and a judgment against him on the issue made, going to the real merits of the case, be now heard in this court, for the first time, by brief, to raise such an issue.

Again, it may be observed that the exchange of horses was not made between Miller and Taylor. Miller is not relying on any fraud or breach of warranty committed by Taylor in his trade with Fulks, Miller not being the owner of the horse, but Miller's complaint against Taylor is that Taylor perpetrated a fraud upon him by false representations as to the condition and soundness of the horse, whereby he (Miller) was induced to release Cowherd as Fulks' security on his note for the $149, and whereby Cow-

herd, as part of the same transaction, released to Taylor the mortgage on the mare and her foal, and it is this contract, in its several parts, that Miller seeks to have cancelled, and that he be reinstated to his rights, if not against Cowherd certainly as against Taylor, as to the mortgage on the mare and her foal.

Miller was making no claim for a rescission of the exchange of animals as between Fulks and Taylor. So it will be seen that on analysis of the pleadings the contract set up by Miller and sought to be cancelled in his suit was not that of the cancellation of the horse trade between Fulks and Taylor, but of his own agreement with Taylor, whereby he lost his security for his debt. Consequently no tender was obligatory on him.

Again, while it is true that by the agreement between Miller and Taylor and Fulks the horse was to be left in the control of Miller as a pledge, that he might sell same and pay his debt, thus necessarily implying a reasonable time to do that thing, his debt was not due until October, so that, had this question of a tender in a reasonable time been made by the pleadings, this state of case would have entered largely into its soluton; but it was not made.

Again, counsel for appellant complain and say that, as a matter of fact, the horse being sound when Taylor traded him to Fulks, and his eyes good, that Fulks abused and mistreated him, and he became injured thereby. It may be answered that, as between Fulks and Taylor in any suit between them (but not as to Miller), this issue might have been made in the answer by Taylor, but it was not, and it is only presented by counsel in their brief, and of course in that shape can not be considered by the court.

While it may be true that (if the issue had been presented) Fulks may have been guilty of laches in not tendering back the horse to Taylor within a reasonable time, yet the court below having, as to Miller, held Taylor liable for the amount of the debt against the mare and foal, then it must necessarily, not as a judgment against Taylor and of which he can complain, but as in his favor and to his advantage, adjudge a return to him of the horse.

Taylor being held responsible to Miller, and Fulks being insolvent, out of whom nothing could be made for either his breach of warranty or fraud in trading to Taylor an animal to which he had no title, the court must necessarily decree the horse back to Taylor, but this surely can not prejudice him as between him and Fulks.

We do not care to comment on the evidence in this case, which was conflicting, further than to say that the case is not within the line adopted by the court, wherein they will reverse the findings of a jury or of the chancellor on questions of fact.

Judgment affirmed.

The Kentucky Law Reporter.

EDITOR:

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KENTUCKY COURT OF APPEALS.

SMITH, &c. v. LEAVILL, GD'N.

(Filed January 30, 1895—Not to be reported.)

Judicial sales—Sale of infants' real estate—Pleadings—In an action pursuant to section 490 of the Civil Code, for the sale of real estate owned jointly with an infant, where the statutory guardian of the infant is plaintiff, the appointment of a guardian ad litem for the infant and defense by him is unnecessary.

In such an action it is sufficient if the petition sets out the source of the owner's title, without filing the title papers.

R. C. Warren for appellants.

R. H. Tomlinson for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, Sallie Leavill, as statutory guardian of her children, brought this action under the provisions of section 490 of the Civil Code for the sale of certain lands belonging to her wards. The appellants are the purchasers of the land at decretal sale, and by this appeal question the validity of the proceedings under which the sale was ordered.

In actions brought pursuant to this section the statutory guardian may prosecute the action for his ward, and the appointment of a guardian ad litem and a defense by him is not necessary. (Power v. Power, 12 Ky. Law Rep., 793; Shelby v. Harrison, 84 Ky., 144.)

In this case, however, the infants were made defendants, and a guardian ad litem appointed, who made defense for them. The title papers were not in fact filed, though the source of the title is set out in the petition. This is sufficient in proceedings like this.

We find no provision, as contended by counsel, requiring the depositions to be taken upon interrogatories.

Perceiving no error in the proceedings or order overruling the exceptions of the appellants to the sale, the judgment below is affirmed.

BROWN, &c. v. BROWN, &c.

(Filed January 30, 1895.)

An order finding that defendants have not been guilty of civil contempt can not be reviewed or reversed on appeal; but the finding of the lower court that the failure of the defendants to pay money into court when ordered to do so, was caused by their inability to pay, and that they were not guilty of contempt of court seems to have been entirely proper under the facts disclosed by the record.

Wm. Marble and Blue & Blue for appellants.

F. W. Darby for appellees.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Hazelrigg.

After a protracted litigation the appellants succeeded in obtaining a judgment in the court below against the appellees for some $4,000, which was ordered by the chancellor to be paid to his master commissioner on or before a date named in the order. Failing to comply with the order, attachments for contempt were granted, and written responses filed by each recusant, showing that the sole reason why the money had not been paid was because of financial inability so to do. Upon proof heard in open court the learned judge below was of opinion that the delinquents were, in fact, unable to comply with the order, and discharged the attachments against their persons. From this order of discharge this appeal is prosecuted.

The exercise of the power to punish for contempt is not generally subject to revision; but judgments and sentences for civil contempts especially have been the subject of review by this court, to the extent, at least, of seeing that the sum required to be paid is in fact due, and the conditions on which the contemnor should be discharged.

Our attention has not been called, however, to any case in this or any other court in which the finding below, to the effect that there is no contempt, has been reviewed or reversed. From the very nature of the case the order is not final, and, moreover, does not affect the property rights of the appellants. We may say, however, that order of discharge seems to have been entirely proper under the facts disclosed by this record, and would not, in any event, be disturbed.

The appeal is dismissed for the reason indicated.

NANTZ v. COMMONWEALTH.

(Filed January 31, 1895—Not to be reported.)

The verdict convicting appellant of manslaughter can not be reversed, as there was evidence before the jury conducing to show his guilt, and this is the second verdict finding him guilty.

James Eversole for appellant.

Wm. J. Hendrick for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Lewis.

Joseph Nantz is prosecuting this second appeal from a judgment convicting him of manslaughter under a joint indictment against him and J. W. Bowline (14 Ky. Law Rep., 592.) The circumstances under which the homicide was done were recited in the former opinion and need not be repeated. The evidence now before us, as was the case on the former appeal, though not showing his guilt conclusively, does conduce to support the verdict. And as the jury has the exclusive right to judge whether it is sufficient, this court can not interfere on that ground.

The instructions have been given so as to conform to the view expressed by us in the former opinion, and are now, we think, free from error. In fact there was committed at the trial no error of law prejudicial to the rights of appellant, so far as the record shows, and, consequently, the judgment is affirmed.

CHESAPEAKE & OHIO R. R. CO. v. THIERMAN.

(Filed January 31, 1895.)

1. A verdict alone does not cure defects in a petition which fails to state facts sufficient to constitute a cause of action.

2. Defects in a petition which would have been fatal on demurrer are cured by an answer and verdict where the issue made required on the trial proof of the facts omitted from or defectively stated in the petition, and without proof of which it can not be presumed that the judge would have directed the jury to find, or that the jury would have found, a verdict for the plaintiff.

3. It may sometimes occur that facts or acts pleaded as contributory negligence do not in any case cure defects of the petition, but where all the pleadings of a case raise issues requiring proof of every fact necessary to constitute a cause of action, allegation of some of which facts were omitted from the petition, it is immaterial whether such necessary facts upon which the issues were raised were stated affirmatively or negatively in the answer or pleaded in bar or in avoidance. In any event the defects of the petition are cured.

4. Case—The petition, after stating that it was plaintiff's duty to clean out ash pans of the locomotives of the defendant railway, alleged that he went under a certain locomotive to clean out its ash pan, which needed cleaning, and that while he was so engaged the defendant, with gross and wanton negligence and carelessness, started said locomotive engine, thereby injuring plaintiff, etc. A general demurrer to the petition was overruled. Defendant pleaded contributory negligence of plaintiff, and alleged that he, without being directed or required, and without knowledge or consent of defendant, went under the engine, and thereupon it was moved by some person to defendant unknown and not employed by it. Issues were made on these allegations and there was a verdict for plaintiff. Held—

First. The petition was defective in failing to allege that plaintiff went under the engine at the proper time or place, or that he was required or directed to do so, or that he gave notice to those in charge of the engine or that they knew of his being under the engine.

Second. The verdict upon the issues found in the case cured the defects in the petition.

C. B. Simrall and Hallam & Myers for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

Appellee states in his petition the cause of action as follows: "On January 25, 1891, plaintiff was the servant of defendant, employed for reward as a laborer in and about the Covington yard of defendant. In his said employment it was plaintiff's duty to clean out the ash pans of defendant's locomotive engines. At said time there was at said place where plaintiff was, as aforesaid, employed, a locomotive engine of the defendant, known as No. 9, the ash pan of which needed cleaning, and thereupon the plaintiff then and there went under said locomotive engine to clean out the ash pan thereof, and did then and there engage in the work of cleaning out said pan, and while he was under said locomotive engine, engaged in the work of cleaning out said pan, the defendant, with gross and wanton negligence and carelessness, started and moved said locomotive engine upon and over plaintiff, and thereby he was ruptured and otherwise severely and permanently injured," etc.

To the petition a general demurrer was filed, but being overruled defendant filed answer, which was followed by reply of plaintiff, in whose favor verdict was rendered. But defendant moved for judgment of court, notwithstanding verdict of the jury, and that motion having been overruled, this appeal is prosecuted. (15 Ky. Law Rep., 655.)

Section 386, Civil Code, provides that "judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."

But that section has uniformly been so applied and construed by this court as to harmonize with the following well settled rule of practice: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict." (Riggs v. Malthy, 2 Met., 88; Fible v. Caplinger, 13 B. M., 464; L. & P. Canal v. Murphy, 9 Bush, 522; Drake v. Semonin & Dixon, 82 Ky., 291.)

We are satisfied the petition in this case does not state facts sufficient to constitute a cause of action, and if defendant had stood by the general demurrer, pleading no further, it would have been entitled at least to have the verdict set aside if not to judgment non obstante veredicts; for a verdict alone does not cure the defect of a petition from which has been omitted the statement of facts sufficient to constitute a cause of action. (Drake v. Semonin & Dixon; Bogenschutz v. Smith, 84 Ky., 341.)

It, therefore, becomes necessary to determine whether the petition, being defective, there was made by the answer such an issue as, in language of the rule referred to, "required on the trial proof of the facts so defectively stated or omitted."

The defects of the petition are as follows: First, there is no averment that plaintiff went under the engine at the proper time and place for cleaning the ash pan; or, second, that he was directed or required to do so; or, third, that he gave notice to those in charge of the engine, or they knew he was under it.

Paragraph 2 of the answer, wherein is pleaded contributory negligence on part of plaintiff, contains statements that he, without being required or directed, and without knowledge or consent of defendant, and of his own negligence, went under

the engine and thereupon it was moved by some person to defendant unknown, and not thereto employed by defendant.

It seems to us that when those statements were traversed in the reply, as was substantially done, there was an issue joined as to every fact necessary to be stated, in order to constitute plaintiff's cause of action. For, first, whether he went under the engine at the proper time and place is not material if it be a fact, about which there was an issue made in the pleadings that he was required and directed to do so. Second, if those in charge of the engine knew he was under it at the time it was moved, about which there was likewise an issue made, that single fact, if true, would constitute a cause of action without regard to the question when he went or why he was there.

Another defect of the petition suggested is omission of a statement that the engine was moved by an authorized agent of defendant.

But that was rendered unnecessary by the comprehensive one distinctly made that defendant started and moved the engine upon and over plaintiff, in virtue of which it was competent to prove the act was done by its agent or servant.

It is contended by counsel, however, that allegations in the answer of contributory negligence on part of the plaintiff do not in any case cure defects of the petition. It may sometime occur that facts or acts properly pleaded as contributory negligence do not necessarily supply omissions or cure defects of the petition. But where an issue has, by subsequent pleadings, been joined and tried as to all facts necessary to constitute the cause of action, but omitted from or defectively stated in the petition, it does not, in our opinion, make any difference whether such facts were stated in the answer affirmatively or negatively, or pleaded in bar or avoidance.

We think the issue in this case was joined as to all facts necessary to be stated in order to constitute a cause of action, and as there is in the transcript before us neither a bill of evidence nor instructions, we must presume the verdict was rendered upon sufficient evidence and under proper instructions.

Judgment affirmed.

BACK, &c. v. COMBS, &c.

(Filed February 1, 1895.)

1. An action by the infant defendants to set aside, on the ground of fraud, a judgment ordering a sale of their ancestor's land to pay his debts, which fraud was committed by their guardian, who became the purchaser of the land, and for an accounting for rents by him, must be instituted within twelve months next after they attain the age of twenty-one years, and it must affirmatively appear from their petition, by proper averments, that it has been instituted within that time.

2. The right to maintain an action to reveiw a judgment against infant defendants within twelve months after the infants become twenty-one years of age exists only in those who were infants who, at the time of the rendition of the judgment, were interested in it, and not to such as thereafter became interested in the subject-matter of the suit by reason of the death of one of the parties to it.

J. B. Marcum and J. J. C. Bach for appellants.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Grace.

Appellee states in his petition t ack and six others claiming "On January 25, 1891, plaintiff w . of one Isaac Back, who died ployed for reward as a labore in Breathitt county; that H. D. of defendant. In his said c uly appointed the administrator of clean out the ash pans o . Combs was, by the county court of said time there was at nted guardian for six of said heirs, then said, employed, a loc E. Back, W. J. Back, Joseph Lee Back, No. 9, the ash pan san Clemons, and Cora Alice Back; that plaintiff then ar nsolvent, suit was duly filed for settlement of clean out the that the debts being ascertained to be some the work of principal part of the lands of said decedent was locomotiv me, leaving, however, twelve acres unsold; that the defe ant, Wm. Combs, bought up some debts on said ness, t defendant and had that also sold; that Wm. Combs became the purplair tracts of land; that said land first sold (which and decree of date prior to September 15, 1879) was sold under the price of $1,392.78; that same was then worth $6,000, and that said Combs also bought the small twelve-acre piece for $25, and that same was then worth $500; that said Combs, besides being the guardian of the six infant heirs of said estate, and thus disqualified under the law from buying said lands, fraudulently combined with the administrator, H. D. Back, to slander the title to said lands, which they did, and thereby Combs bought it for much less than its real value; that they also fraudulently combined with the appraisers appointed by the court to value said land, and had it valued at greatly less than its true value.

Plaintiffs make the other heirs at law of said Isaac Back, deceased, defendants, and pray for a recovery of said lands, or for a judgment against Wm. Combs for its value, $6,000, and for $6,500, the value of the rents and profits, for costs and for all proper relief. It may be stated that plaintiffs embrace five of the six infant heirs for whom Wm. Combs was guardian, viz., W. J. Back, Joseph Lee Back, Evaline Clemons, Susan Clemons and Cora Alice Back, omitting the name of Mathew Back, who died some years since unmarried and without issue.

Giving to the suit the most liberal construction possible for plaintiffs, it is a suit for a review or retrial of the original suit under which the lands of their father, Isaac Back, were sold, to set aside said sale as fraudulently made and for an accounting for rents, etc.

By section 391 of the Civil Code this right is secured to infants, and fraud as charged in this case is one of the grounds on which they may rely. The important limitation on this right, however, is that any suit brought for that purpose must be brought within one year next after said infant arrives at the age of twenty-one years. This right of suit applies to those only who were infants at the time of the rendition of the decree, and not to such as may thereafter become interested in the suit or the subject-matter of same by reason of the death of any other heir or of their ancestor, who may have been a party to said cause.

This court has heretofore held that in suits of this character the parties plaintiff must, by proper averments, show themselves to be within the limitation fixed by the law at the time of filing their petition, otherwise the same is subject to demurrer.

We have examined this petition carefully, and while the statement is clearly made that as to five of the plaintiffs they were infants at the time of taking the decree against them, there is no allegation by or as to any one of them being an infant, or that this suit is filed within one year after they or either of them attained their majority, save and except as to plaintiff, Cora

o sues by her next friend, Abner Miller. The
she is an infant at the time of filing this suit.
' record in this case that the petition of plain-
was not filed until 1893, more than thirteen years
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ling of the court as to the same is approved. But for the error
indicated, and that Cora Alice Back may prosecute her suit, the
judgment is reversed and cause remanded for further proceedings
consistent with this opinion.

SMITH v. PHILLIPS, JR.

(Filed February 1, 1895—Not to be reported.)

1. The damages recoverable for a refusal of the landlord to deliver possession of the farm to the tenant, according to the contract of lease, are the actual damages sustained as the direct and proximate result of the breach. Conjectural profits that might have been derived from the crop expected to be grown upon the farm can not be recovered. If the tenant desires to do so he may waive his right to recover his actual damages and recover from the landlord the difference between the contract price of the lease and its actual value on the day the possession was to have been delivered.

2. Same—Tender—The refusal of the landlord to deliver possession according to the contract of lease, unless the tenant will sign a new contract materially different from that already entered into, makes it unnecessary for the tenant to tender his note for the rent to the landlord, as required by the old contract, before he can maintain an action to recover damages for the refusal of the landlord to deliver possession.

H. W. Rives for appellant.

Samuel Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

At a public renting of the farm of appellee on the 15th day of November, 1892, appellant bid the sum of $900, for which he, by the terms of renting, was to execute his note, with such peronal security as would be acceptabe to one of the banks in Lebanon, Ky. Appellant was to have the farm for one year, the term to commence on the 1st of January, 1893, and end on 1st of January, 1894. Nothing was said at the time the bidding was done as to the time at which the note was to be executed.

In a few days after the renting the son of appellant, who was looking after the matter for appellee, asked appellant to get ready the note, and handed appellant a writing, which he wanted him to take and have it examined, as appellant could not read. This writing purported to be a lease of the premises, containing some provisions materially different from the terms of the renting announced by the auctioneer. In a day or so the appellant went to appellee and asked him if he intended to let him have the farm on the terms upon which he had rented it, and also if it would do to execute the note in Lebanon on the first Monday in December, being county court day. Appellee

This suit was filed by Catherine Back and six others claiming to be the children and heirs at law of one Isaac Back, who died in 1878, owning some real estate in Breathitt county; that H. D. Back, one of said heirs, was duly appointed the administrator of said estate, and that Wm. Combs was, by the county court of Breathitt county, appointed guardian for six of said heirs, then infants, viz., Mathew E. Back, W. J. Back, Joseph Lee Back, Evaline Clemons, Susan Clemons, and Cora Alice Back; that said estate being insolvent, suit was duly filed for settlement of same as such, and that the debts being ascertained to be some $1,392.78, the principal part of the lands of said decedent was sold to pay same, leaving, however, twelve acres unsold; that after this defendant, Wm. Combs, bought up some debts on said estate and had that also sold; that Wm. Combs became the purchaser of both tracts of land; that said land first sold (which was under decree of date prior to September 15, 1879) was sold for the price of $1,392.78; that same was then worth $6,000, and that said Combs also bought the small twelve-acre piece for $25, and that same was then worth $500; that said Combs, besides being the guardian of the six infant heirs of said estate, and thus disqualified under the law from buying said lands, fraudulently combined with the administrator, H. D. Back, to slander the title to said lands, which they did, and thereby Combs bought it for much less than its real value; that they also fraudulently combined with the appraisers appointed by the court to value said land, and had it valued at greatly less than its true value.

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This court has heretofore held that in suits of this character the parties plaintiff must, by proper averments, show themselves to be within the limitation fixed by the law at the time of filing their petition, otherwise the same is subject to demurrer.

We have examined this petition carefully, and while the statement is clearly made that as to five of the plaintiffs they were infants at the time of taking the decree against them, there is no allegation by or as to any one of them being an infant, or that this suit is filed within one year after they or either of them attained their majority, save and except as to plaintiff, Cora

Alice Back, who sues by her next friend, Abner Miller. The statement is that she is an infant at the time of filing this suit.

It appears by the record in this case that the petition of plaintiffs in this case was not filed until 1893, more than thirteen years after the original judgment. This statement brings her within the saving clause of the statute; and consequently the action of the court below in sustaining the demurrer as to her right of action was erroneous and must be reversed. As to all the other parties plaintiff we think the demurrer well taken, and the ruling of the court as to the same is approved. But for the error indicated, and that Cora Alice Back may prosecute her suit, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

SMITH v. PHILLIPS, JR.

(Filed February 1, 1895—Not to be reported.)

1. The damages recoverable for a refusal of the landlord to deliver possession of the farm to the tenant, according to the contract of lease, are the actual damages sustained as the direct and proximate result of the breach. Conjectural profits that might have been derived from the crop expected to be grown upon the farm can not be recovered. If the tenant desires to do so he may waive his right to recover his actual damages and recover from the landlord the difference between the contract price of the lease and its actual value on the day the possession was to have been delivered.

2. Same—Tender—The refusal of the landlord to deliver possession according to the contract of lease, unless the tenant will sign a new contract materially different from that already entered into, makes it unnecessary for the tenant to tender his note for the rent to the landlord, as required by the old contract, before he can maintain an action to recover damages for the refusal of the landlord to deliver possession.

H. W. Rives for appellant.

Samuel Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

At a public renting of the farm of appellee on the 15th day of November, 1892, appellant bid the sum of $900, for which he, by the terms of renting, was to execute his note, with such peronal security as would be acceptabe to one of the banks in Lebanon, Ky. Appellant was to have the farm for one year, the term to commence on the 1st of January, 1893, and end on 1st of January, 1894. Nothing was said at the time the bidding was done as to the time at which the note was to be executed.

In a few days after the renting the son of appellant, who was looking after the matter for appellee, asked appellant to get ready the note, and handed appellant a writing, which he wanted him to take and have it examined, as appellant could not read. This writing purported to be a lease of the premises, containing some provisions materially different from the terms of the renting announced by the auctioneer. In a day or so the appellant went to appellee and asked him if he intended to let him have the farm on the terms upon which he had rented it. and also if it would do to execute the note in Lebanon on the first Monday in December. being county court day. Appellee

told appellant to see his son Joe, and that whatever he did would be all right. On the day named appellant was ready to execute the kind of note which the terms of the contract required, and he so informed the son. Thereupon the son said that appellant could not get the farm unless he signed the contract which had been given him. This, appellant refused to do, because it did not contain the contract which the parties had made. Afterwards appellee rented the farm to his sons, and refused to let appellant enter upon and cultivate it.

This action was brought to recover damages, because appellee refused to place appellant in possession of the farm. Appellant alleged that by appellee's refusal to let him have the farm he had been prevented from renting other places or farms, and he was thereby deprived of a home for his family and the use of a farm to cultivate that year; that appellee knew he was dependent upon renting a farm for a home, and relying upon his contract with him, lost all opportunities of procuring a suitable place for the year. Thus he was deprived of a home and the opportunity of carrying on his business for the year. He alleges that he would have realized a large amount from the use of the farm in excess of the rent to be paid, and which was well known to appellee. Appellee answered, denying that damages were sustained, and that there was a tender of the note as required by the contract, and alleged that in consequence of appellant's failing to do so and take the farm, he was damaged in the sum of $500, which he pleads as a counterclaim.

Thus were the issues found when the parties went to trial before a jury. At the close of appellant's testimony appellee moved the court to instruct the jury to find for him, which the court did. The case comes here on that question for revision. In the ground for a new trial no error of the court in excluding testimony is complained of. Had testimony been offered and improperly excluded, which conduced to prove that appellant had sustained any damages as a result of appellee's violation of his contract, this court could not review the case and order a new trial, because no such error is stated as a ground for a new trial.

The sole question now for the determination of this court is, did the appellant have any relevant testimony before the jury which would authorize a verdict against appellee? Over the objection of appellee, appellant and others gave testimony conducing to prove what his profits would have been had he been allowed to take possession of the farm and cultivate it, and they were estimated to be from $500 to $1,000. This was arrived at by estimating the probable amount of corn, wheat, oats, hay, pasture, etc., and the probable value of the crops. If the appellant had a cause of action in damages for appellee's violation of the contract, it was for such damages as would flow directly and naturally from the breach of the contract. He had the right to allege and prove any damages proximately resulting therefrom.

Section 987, volume 3, Sedgwick on Damages, says: "In England, however, the true principle has been finally adopted and the actual loss is recovered. * * * And the same rule now prevails in America, both in case of eviction and of refusal by the landlord, to deliver possession."

Appellant's testimony did not show actual damages, but conjectural profits. Conjectural profits expected from the use of the premises can not be recovered. This is not the criterion of damages. (Section 987, last part, volume 3, Sedgwick on Damages.)

Koch v. Godshaw, 12 Bush, 319, was an action to recover on a

breach of contract in refusing to deliver to the vendee a bakery establishment. The court below, against objection, permitted the vendee to prove the prospective profits which could probably be realized by running the business. This court held this was not the criterion by which to fix the amount of damages.

In the case of Elizabethtown & Paducah Railroad Co. v. Pottinger & Bro., 10 Bush, 185, the court held that the rule forbidding the estimation of damages upon the basis of a calculation of profits is not of universal application. Upon the trial of that case the plaintiff was allowed to state the loss he sustained and estimate it by the profits on the work if he had been allowed to complete the contract. This court held that it was proper to admit the testimony upon the ground that the damages were the natural and proximate consequence of the breach of the contract, being damages that could be readily determined and were such as may be reasonably inferred to have been contemplated by the parties. The court said: "Profits, which are the direct and immediate fruits of the contract alleged to have been violated, are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into."

A contract for building a bridge or a house would come within this rule.

In such case the price to be paid is fixed in the contract. The cost of the material and labor necessary to complete the work can be determined with direct mathematical certainty, thus enabling the parties to calculate with great certainty the profits which would arise from the completion of the work.

It is quite different in a case where you seek to estimate the profits in cultivating a farm as in this case. The season is an important factor in the calculation. The crop may be large or small, dependent largely upon the season. The price of the products of the farm may be high or low, not within the power of man to tell. There is no basis from which any calculation can be made as to the profits, if any, that may be realized on such an undertaking. An estimate must necessarily be conjectural. The amount of profits, if there should be any realized, can not even be approximated. On the failure or refusal of the lessor to give possession of the premises, a rule which would allow the lessee to recover as damages the difference between the amount he ageed to pay and the value of the lease on the day possession was to be given, would be a simple and certain method of ascertainment of damages.

The courts in some States have announced this to be the correct rule. It should not be of universal application, as manifestly in some cases it would work a great hardship on a lessee. He may have agreed to pay the full value of the lease, yet he may have sustained great damages by the act of the lessor in refusing to give him possession of the premises. If this rule was applied, he could not recover any except nominal damages.

In an action on the breach of contract for the delivery of personal property the rule fixing damages at the difference between the contract price and the value at the time and place of delivery is not inexorable and of universal application, as cases might arise in which the circumstances attending them would be calculated to enhance them. (Miles v. Miller, 5 Bush, 134.)

We think the rule should be to allow the lessee to recover the actual damages which proximately flow from the breach. However, if the lessee desires to do so, he may waive any claim he may have for special damages, and recover the difference be-

tween the contract price and the value of the lease on the day possession should be given under the contract. To follow this rule in this case the lessee could not recover, as the testimony conduced to prove that he had agreed to pay a fair price for the rent of the farm.

The court is of the opinion that appellee's refusal through his son to allow appellant to have the farm unless he signed the writing which contained terms materially different from the contract excused appellant from making a formal tender of the note. (Tibbs & Clark v. Timberlake, 4 Litt., 16; Dorsey v. Barbee, Litt. Sel. Cases, 204.)

Had there been any testimony before the jury authorizing a recovery of damages we would hold that the court erred in not allowing the amended petition to be filed.

Judgment affirmed.

SYDNER, &c. v. MT. STERLING NATIONAL BANK.

(Filed February 2, 1895—Not to be reported.)

Action to recover usury from national bank—Pleading—Limitation—Where the petition in an action to recover from a national bank double the amount of usurious and unlawful interest received and retained by it, by setting out the dates of the transactions, shows that the right of recovery is barred by the lapse of more than two years since the usurious transaction occurred, it is bad on demurrer and the defect in the petition is not cured by an amended petition which alleges that the transaction or payment of the usurious interest occurred within two years next before the institution of the action.

Z. T. Young and Stone & Sudduth for appellants.

Tyler & Apperson for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

On the 2d dayof April, 1892, T. J. Sydner and others filed their petition in the Montgomery Circuit Court against the Mt. Sterling National Bank, charging and alleging that said bank had willfully and knowingly charged, received and retained usurious or unlawful interest, amounting to $3,178.84, and asking judgment against said defendant for the sum of $6,588.84, being double the amount of the interest so alleged to have been received by appellee. It appears that said sum had been so retained prior to September 28, 1887. Appellee demurred to the petition of plaintiffs, which demurrer was sustained by the court. Thereupon plaintiffs amended their petition and alleged that the usurious interest received by defendant, etc., set out in original petition, was paid by plaintiffs to defendant within two years next before the bringing of their original action. The defendant insisted on the demurrer to the petition as amended, and the court sustained the demurrer, and plaintiffs failing to amend or plead further, the court dismissed the petition and rendered judgment against plaintiff for defendant's cost. To reverse that judgment this appeal is prosecuted.

It seems to us that plaintiff's cause of action was barred by the statute of limitation, and the petition manifested that fact. Under the United States statute the statute of limitation begins to run from the time the usurious transaction occurred. (Henderson National Bank v. Alves, &c., 12 Ky. Law Rep., 723.)

It is true that appellants in the amended petition state that the transaction or payment had occurred within two years next before the bringing of this suit, but no date or time of payment was named or fixed in the amended petition, hence the amendment can not be held to cure the defect in the original petition, which, by giving dates at which the transaction, etc., occured, showing that the action was barred by the statute of limitation.

The judgment is, therefore, affirmed.

LOUISVILLE, St. LOUIS & TEXAS RY. Co. v. WILHITE.

(Filed February 2, 1895—Not to be reported.)

Railroads—Married women—Damages—Where a railroad company entered upon and constructed a railway over a married woman's land, under a conveyance signed by herself and husband, which was void, she may recover in damages the value of the way taken in an action against the railroad in which the husband unites with her as plaintiff.

Helm & Bruce for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was brought in equity to enjoin the railroad company from constructing its road over the land of Annie Wilhite, a feme covert, her husband uniting with her as plaintiff. An amended pleading was filed, alleging the defendant had already appropriated the land and completed its road, and seeking to recover the land and damages for the wrongful entry.

The defendant appeared by answer, and set up as a defense a writing signed by the husband and wife, but not acknowledged, giving the right of way, and averred the entry was made by the consent of the plaintiffs.

To this a reply was filed, and the effect of the writing under which the entry was made attempted to be avoided on the ground of fraud in obtaining it, and upon an issue formed the court below awarded damages to the plaintiffs, not for the wrongful entry, but for the land appropriated by the defendant for its use as a roadbed.

Without discussing the testimony, it is sufficient to say that the writing signed by the feme covert passed no title to the defendant, and the court below having awarded damages for the land taken and the easement secured to the defendant, we perceive no reason for disturbing the judgment below, awarding to the appellee $240 in damages.

In the case of Stephens against the same defendant (16 Ky. Law Rep., 552), decided at the present term, this court held, under a similar writing, that no title passed from the married woman to the railroad company.

Judgment affirmed.

MEADORS v. BROWN.

(Filed February 2, 1895—Not to be reported.)

1. Appeals—In an action to obtain a conveyance from the heirs of a decedent for land sold by him to plaintiff, for which decedent executed a conveyance which was lost before being recorded, one who on his own motion was made a defendant to the suit for the purpose of claiming the land himself can not, on appeal, be heard to complain of errors in the proceedings committed against the heirs of the decedent, none of whom have appealed.

2. Lost deed—Pleadings—Burden of proof—One who, by answer, makes himself a defendant to such suit, and denies that either plaintiff or his vendor ever had title or possession of the land in controversy, and alleges that he (said defendant) has held and owned said land for at least twenty-one years, has the burden of proof to establish his title as alleged.

3. Same—Such a defendant, claiming the land against plaintiff and his vendor, may demur to plaintiff's petition against the vendor's heirs when it fails to allege that the vendor was the owner of the land when he sold it, or that plaintiff is or ever was the owner of it, or that plaintiff or his vendor ever had possession of it.

4. Same—A judgment awarding possession of the land to plaintiff against a defendant, who claims to have title and possession, is erroneous where plaintiff did not pray for the recovery of the land, but merely sought to have a new deed of conveyance executed in lieu of one that has been lost.

Hill & Denham for appellant.

K. D. Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, in October, 1888, instituted this action in equity against the heirs of John Frederick, Sr., for the purpose of obtaining a conveyance from them to a tract of land alleged to have been sold to the appellee by said Frederick, and the deed to which, after its execution in due form, had been lost before being recorded. Pending the action, and in November, 1889, the appellant, Meadors, upon his motion, was made a party defendant, but filed no pleading at that time.

In April, 1890, the case was submitted and the judgment rendered to the effect that the appellee recover of the heirs of Frederick the land in question, and appointing a commissioner to convey it to the appellee, the judgment reciting, however, that it was not to prejudice the rights of Meadors in any manner.

The appellant then filed his answer denying that Frederick, Sr., had ever owned the land or sold it to the appellee or executed a deed to him therefor. He averred that he was the owner and in the possession of it, and that he and those under whom he held had owned and had been in possession of it for at least twenty-five years. A demurrer was filed to the answer and subsequently overruled. This answer was filed in April, 1890. An order of May, 1893, recites that a reply to the defendant's answer was filed, but this pleading is not in the record.

In August, 1893, a judgment was rendered to the effect that the appellee, Meadors, recover the land of the appellant; and awarding a writ of possession from this judgment, Meadors appeals.

His counsel urge a number of reasons affecting the proceedings against Frederick's heirs, but they are not appealing, and no irregularity of the judgment against them, if there be any, can

be considered on this appeal. It is urged also that the burden was on the appellee of establishing his title after the issue of ownership was raised by the answer of the appellant, and that he has failed to do so. It seems to us, however, that as the appellant came into the suit voluntarily and claimed the land, it was incumbent on him to make out his title. He is not in the attitude of one who is in possession and, being sued, may set up his claim and title without assuming the burden, as provided in subsection 2 of section 125 of the Civil Code.

However, the appellee filed a demurrer to the appellant's answer, and this reaches back to the petition, which we find to be materially defective. He does not allege that Frederick was the owner of the land when he made the alleged conveyance to him, nor does he allege that he is himself the owner of it, or ever was, or that he or Frederick ever had the possession of it, or was entitled to the possession. Neither in the original nor amended petition does he pray for the recovery of the land, either of the Fredericks or of the appellant, although the judgment gives him this relief. So far as the record discloses, the issue of ownership between the appellant and the appellee has not been made in the case or tried out.

For the purpose of perfecting the issues, the parties may, if they desire, file additional pleadings, or, if not, the petition will be dismissed.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

BULLOCK v. COMMONWEALTH.

(Filed February 5, 1895.)

1. Money earned and received by a married woman as compensation for her own labor is her separate estate.

2. A married woman has the legal capacity to make a deposit of money in lieu of bail to secure the release of one held in custody and awaiting trial for the commission of a public offense.

Said sum so deposited by the married woman may be forfeited if the defendant fails to appear to answer the charge.

3. The forfeiture of money deposited in lieu of bail is not in violation of the bill of rights when the defendant fails to appear to answer the charges against him.

4. Same—Lost records—Evidence—In a proceeding to forfeit money deposited in lieu of bail for nonappearance of the defendant, where it appears that the record of the preliminary trial, made out by the county judge and by him filed with the clerk of the circuit court, to which defendant was held for trial, has been lost, oral evidence of the proceedings before the county judge, in which the deposit in lieu of bail was made, is competent. The Commonwealth, to maintain the proceeding, is not required to take steps to supply the lost record provided by the General Statutes for supplying lost records in certain cases.

J. D. White & Son and W. G. Bullitt for appellant.

W. J. Hendrick for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Grace.

This is an appeal by Mrs. Della Bullock from a judgment of the Hickman Circuit Court, forfeiting to the Commonwealth of Kentucky the sum of $500, deposited by her in lieu of bail for the

appearance of one Thos. Bullock in said court to answer any indictment that the grand jury might find against him for malicious striking and wounding with a deadly weapon and with intent to kill.

It appears that said Thos. Bullock, being in custody under said charge, was brought before the county judge of said county as an examining officer, and that said defendant, waiving an examination, was admitted to bail by said county judge in the sum of $500, and that, being thus in custody and unable to give the bail, the appellant, a married woman, came and, in the presence and with the knowledge and implied consent of her husband, Thos. Bullock, Sr., the father of the accused, deposited with said county judge in lieu of bail the sum of $500, and thereupon said Bullock, Jr., was released from custody, and this fund deposited with the trustee of the jury fund in and for said county, taking his receipt for same. Afterwards said defendant, being indicted for said offense by the grand jury of said county, failed to appear, and thereupon, on and pending the motion of the Commonwealth's attorney to forfeit said bond, came the appellant and filed her answer, objecting and making defense to said motion, setting up that the money so deposited by her was her individual estate or property; that her husband had no interest or control over same; that same was the proceeds of her personal labor, and denying the right of said court to so forfeit said money, because that it belonged to her, and that, being a married woman, she was not bound by said deposit.

The first question presented is whether, on this proceeding, the action of the county judge in the premises, and his record and entry of said proceedings, in holding said Thos. Bullock over to the circuit court, can be supplied by parol testimony, the papers in said cause being lost.

It appears clearly in evidence by the county judge, county attorney and others that the said county judge, holding an examining court, with said Bullock actually in custody and before him on said charge and waivng an examination of same, he (the said county judge) did make an order admitting said Bullock to bail in the sum of $500, and that said Bullock being still in custody, unable to give said bail, thereupon came appellant, Mrs. Della Bullock, the wife of Thos. Bullock, Sr., and deposited with the said county judge the said sum of $500 in lieu of bail for said prisoner, and that thereupon said Thos. Bullock, Jr., was released.

And it is further in evidence that the county judge then made out in writing, duly signed by him as such officer, a record of all said proceedings, as hereinbefore recited, and signed same, and took said papers over and deposited same with the circuit court clerk, and paid the funds so deposited with him to the trustee of the jury fund in and for said county. The clerk of the court testifies that he handed the same papers delivered to him by the county judge (without special examination) to the foreman of the next grand jury, to whom said cause was submitted, and who found the bill in this case, and that he had never seen them since. And upon this state of case the court permitted parol testimony to be introduced, showing all the facts as hereinbefore recited. To this objection was made, but overruled by the court.

We are cited to provision of the General Statutes under which these proceedings took place (pages 890, 909-912) for provisions setting out how lost records may be supplied. After having examined same carefully and noting the various states of case in which lost records may be supplied and power and authority conferred on various courts of record to supply, on notice or by

suit or by its commissioners, certain lost papers, judgments or records, we find none of said provisions prohibitory or inconsistent with the right of the court, on a state of fact as represented by the eveidence in this cause, to hear oral testimony of the record made out by the county judge in this case and delivered to the circuit court clerk.

We think the ruling of the lower court on said question was correct and in accordance with the right and practice and well recognized rules of evidence in such cases. The oral evidence, when heard, establishes the fact of the making and signing of such a record by said county judge clearly, and brings the case up to the requirements of the Criminal Code, and of any previous decision of this court requiring such a record to be made and signed by the committing officer.

Second. As to the defense that this money belonged to and was deposited by a married woman, and that she can not bind herself nor be deprived of her property in that way, it may be noticed that she says in her defense "that this money was her individual money or property, the result of her own labor, her own earnings; that her husband had no right to or interest in or claim over it." This statement her husband verifies by his testimony, and disclaims any interest in said funds. Counsel for appellant call it her separate estate, and in this we apprehend they are quite right. The statute of 1873 makes the earnings of a married woman (her own labor) free from the debts or control of her husband, and authorizes her to collect and receipt for the same.

This declaration of the statute contains all the essential requisites of separate estate, and impresses same on the property so acquired by the wife; and being such separate personal estate, this court has often held that the wife might with such estate contract, trade, sue and be sued and dispose of same in any way and manner that she saw proper and as an unmarried woman. (Johnson and Wife v. Jones, 12 B. M., 330; Lillard v. Turner, &c., 16 B. M., 375; Hackett, &c. v. Metcalf, &c., 6 Bush, 354.)

So that under the authority of these cases the power of the wife over her personal separate estate seems full and clear, and she may dispose of same as she may see proper, the court making in these cases a distinction between separate estates of this kind and the general estate of the wife, and saying that as to her general estate she can only be bound in the manner and form as prescribed by the statute.

We may add, however, that were this only the general estate of the wife, and so deposited by her as in this case, with the knowledge and consent of her husband, and thus securing the release of one held under a criminal charge, we should be very much disinclined to say that the deposit was not made well.

It seems to us that the statutes, undertaking, for the protection of a married woman in her marital rights, to secure her from liability on divers and sundry contracts, did not undertake to confer on her this extraordinary power and exemption, whereby she might, by such an interference, release one under a criminal charge from custody, and then plead her coverture and thus recover back the money so deposited by her. We have been cited by counsel to no case in Kentucky or in any sister State carrying this doctrine of exemption, by reason of coverture, to such an extraordinary extent.

One other objection made by counsel for appellant is that all this proceeding, whereby this fund has been declared forfeited to the Commonwealth of Kentucky, by reason of the nonappearance of the accused for trial in said court, is in violation of the Bill of Rights adopted as a part and parcel of our Constitution.

We do not so understand the merits of this case. The present Bill of Rights, in so far as it could affect any question arising upon this record, is substantially the same as that under our former Constitution, and provisions similar to this have often been made under the former without giving rise to any apprehension of a violation of same.

Judgment affirmed.

VALZ v. FIRST NATIONAL BANK OF BIRMINGHAM.

(Filed February 5, 1895.)

1. Submission of law and facts to court—In this common law action, wherein the law and facts were submitted to the court, the finding of the court that one partner had authority to make the overdrafts in bank for which appellant, the other member of the firm, is sued, being sustained by some evidence, can not be disturbed by this court on appeal.

2. Partnership—Res adjudicata—When one member of a firm, without the authority of the other partner, executes a note to a bank in the firm name for a partnership debt, and in a suit on the note the plea of non est factum of the partner, who did not authorize its execution, is sustained, while a judgment is rendered on it against the partner who did execute it, the judgment will not bar an action by the bank on the original partnership debt against the partner not executing the note. He is still liable for the debt.

Ira Julian for appellant.

Bullitt & Shields and John W. Rodman for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, Valz, and one Commotto were partners under the firm name of Commotto & Valz in a single venture, the erection of the masonry for a bridge at a point in Alabama, near the city of Birmingham.

To perform the work under the contract required the expenditure in materials and labor of several thousand dollars. As managing partner, Commotto opened an account in the firm name with the appellee. The work began in the fall of 1886. Commotto & Valz were paid monthly, but in order to meet the weekly pay rolls and to carry on the enterprise it was necessary to overdraw their account at the bank. Their account was overdrawn in January, 1887, $689.89. On the 1st day of March, 1887, there was paid on the overdraft the sum of $69.39, leaving a balance due of $619.50, for which Commotto, after the completion of the work, executed to the appellee the firm's note. Suit was brought on the note against Commotto and appellant. Appellant pleaded non est factum, and the judgment of the court sustained the plea. Judgment was taken against Commotto on the note. This action is brought against appellant on accout of the overdraft. A number of pleas were interposed: First, that the partner, Commotto, had no authority to make the overdraft; second, former adjudication; third, estoppel; fourth, limitation.

We will consider these pleas in the order stated. The proof conduced to show that Commotto had authority to do whatever was necessary to carry on the work, and that to carry it on it was necessary to overdraw the firm's bank account, and that the appellant had access to and did examine the bank account of the firm with appellee, and made no objection to nor raised any

question as to the correctness thereof or as to the right of his partner to overdraw. The proof shows that the money obtained was used for the benefit of the firm.

The law and facts having been submitted to the court, and the court having found that the partner, Commotto, had authority to make the overdraft, we could not disturb his judgment on that account.

It is insisted that the prosecution of the action on the note to a conclusion under appellant's plea of non est factum waived its right of action on the account for the overdraft, and, therefore, there has been a former adjudication which is relied upon as an estoppel against appellee's right to recover on the account.

In arguing this question counsel insists that the doctrine of election of remedies is applicable. We do not agree with counsel on this question, or that the authorites which he cites on this point are applicable to the question in this case. We do not feel it necessary to notice in this opinion all the authorities thus cited. Morris v. Rexford, 18 N. Y., 556, is cited. In that case there was a bargain and sale of goods for cash; the vendee took possession but failed to pay. The vendor obtained a redelivery of his goods by a writ of repievin. This was held to be a disaffirmance of the sale and a bar to a subsequent action for the purchase money. Certainly the court did right in holding that an action by which a redelivery of the goods was obtained was a bar to an action for the purchase money. When the vendor disaffirmed the contract and obtained a judgment of the court sustaining his action, he could not be permitted to re-affirm it and recover the purchase money. To have held otherwise the vendor would have engaged in a very beneficial contract, the result of which would have been to give him the goods and also the purchase money.

In that case the vendor had two causes of action—the one to affirm the sale and sue for the purchase money, or to disaffirm it and sue for the goods. Of course where he made the election and recovered on the one cause of action, the judgment thus obtained was a bar to the other cause of action. In the case at bar the appellee had but one cause of action, which was upon the account for the overdraft, and that cause was not merged by the execution of the note, as the partner could not bind appellant by a note which was executed without appellant's consent after the completion of the work undertaken by the firm.

The case of the First National Bank of Covington v. Gaines, 87 Ky., 598, does not sustain appellant's contention. That was an action to recover on a note which purported to have been executed by all the parties, based on the original notes, of which the notes in suit were intended to be in renewal, where some of the sureties on the original notes pleaded non est factum to the renewal notes. The court held in that case that, as the plaintiff had gone to trial to recover on the notes purporting to be renewal notes, they could not recover on the original notes because the action was not based on them and there was no prayer to recover thereon.

This court has held in a number of cases that where one partner, after the dissolution of the partnership, executed a note in the firm name for a partnership debt, and the other partner interposing a plea of non est factum, in an action to recover on the note, the plea being sustained that, although a judgment having been taken against the partner executing the note, the partner who pleaded non est factum is still liable on the partnership debt for which the note was executed, and a recovery can be had against such partner thereon. The execution of the note by

Commotto, and the recovery against him thereon, does not bar appellee's right to recover on the account for overdraft. (Brozee v. Poyntz, 3 B. M., 178; Clark v. Orear, 2 B. M., 420 Doniphan, &c. v. Gill, 1 B. M., 190; Daniel v. Toney, 2 Met., 523.)

The appellant attempts to plead the statute of limitation of the State of Alabama, which is not sufficiently done. It is alleged that the overdraft, if made, was in Alabama, and more than three years have elapsed since plaintiff's alleged cause of action accrued, and he pleads and relies upon the statute of limitation of that State in such cases made and provided. There is no allegation as to the terms and provisions of the statute of Alabama; there are no allegations which authorize the court to conclude that the plaintiff's right of action was barred because the action was not instituted within three years after the cause of action accrued.

In the absence of a plea which shows the action is barred by the laws of Alabama, we hold that it is governed by the laws of this State. As there is no plea that the statute of this State would bar the right to recovery, it could not be made available. Besides, the record shows the action was brought within five years after the cause of action accrued.

Judgment affirmed.

CINCINNATI COOPERAGE CO. v. BATE.

(Filed May 8, 1894.)

1. Corporation—Partnership—Where the directors of a corporation, having acquired the entire stock, change the name of the corporation and thereafter conduct the business under the new name without taking the steps provided by law in such cases, the company is no longer a corporation, but a partnership.

2. Same—Change of name—The name of a corporation is the very being of its constitution, the knot of its combination, without which it can not perform its corporate functions. To change the corporate name is to abandon the corporation; the identity of the creature authorized by statute to do business is destroyed by an abandonment of its name and an attempted substitution of a new name without the authority of law.

3. Parties assuming to act in a corporate capacity, without a legal organization as a corporate body, are liable as partners to those with whom they contract.

The corporate existence begins only after the terms of the law are substantially complied with.

Fairleigh & Straus for appellant.

Jas. S. Pirtle for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Hazelrigg.

The conclusions of fact certified by the court below in this case are that "the New Albany Brewing Co." was a corporation duly created and organized under the laws of the State of Indiana for the purpose of manufacturing and vending beer. It was incorporated under the corporate name of the "New Albany Brewing Co."

Afterwards the defendants, E. R. Bate, J. Gebhart and another, acquired the entire stock of the New Albany Brewing Co., and became its directors. Bate, Gebhart and another, as directors and stockholders, without taking any steps required by the law of Indiana in such cases provided, changed the

name of "New Albany Brewing Co." to the "Gebhart & Bate Brewing Co.," and thereafter the business of the New Albany Brewing Co. was conducted under the name of the Gebhart & Bate Brewing Co., and the business under the latter name was conducted at the same place, and in its conduct was used the same property, appliances and machinery. The draft sued on was drawn and accepted after the change of name of said corporation as aforesaid, and whilst the defendant, E. R. Bate, was a holder and owner of stock and a director of the corporation.

The court found, as a matter of law, that Bate was not liable individually on the draft, nor liable thereon as a partner. The contention of the appellant is that Bate and the other owners of the old concern, having abandoned the corporate name and adopted a new name which gave special prominence to the names of the individuals composing the concern, are individually liable as partners in a new venture, for the reason that no legal steps were taken to change the corporate name as might have been done under the easy mode provided by the Indiana statute.

It is evident at the outset that if there are any adjudications in point by the Indiana court, they must be given a controlling influence, and we are referred to the case of Coleman v. Coleman, 78 Ind., 344. The court says: "Waiving all consideration of the doctrine of estoppel contended for, and conceding that there was no corporate body for which the appellees were authorized to act, * * still, if the company was not a corporate body, then it was a partnership, composed not merely of the directors, but of all of the subscribers to the articles of incorporation."

That the Gebhart & Bate Brewing Co. was a corporate body can not be maintained in the face of the record to the contrary. The parties assuming to do business as such company did not take a single step required by the statute for the purpose of creating a corporation or of changing the name of the old corporation.

The name of a corporation is "the very being of its constitution, the knot of its combination, without which it could not perform its corporate functions." (Smith's Mercantile Law, 3d edition, 141.)

"Where a corporation is created a name must be given to it, and by that name alone must it sue and be sued, and do all legal acts." (1 Blackstone Com., 474.)

"The law knows a corporation only by its corporate name." (Walker's American Law, 9th edition 232.)

"A corporation has no right or power of itself to change or alter the name originally selected by it without recourse to such formal proceedings as are prescribed by law." (Beach on Private Corporations, section 275.)

The effect of such change of name is an abandonment not only of the corporate name, but the corporation itself. The identity of the creature authorized by the statute to do business is destroyed; it is in no sense like the case where an individual changes his name; the very being of its constitution is destroyed by an abandonment of its name and an attempted substitution of a new name without authority of law.

In the case of Fuller v. Rowe, 57 N. Y., 26, it was said "that parties assuming to act in a corporate capacity, without a legal organization as a corporate body, are liable as partners to those with whom they contract."

In Robinson v. Harris, 5 Ky. Law Rep., 928, it was held that the corporate existence of associations provided for in chapter 56

General Statutes, depends upon and begins only after the terms of the law are substantially complied with; and until the notice required by section 5 has been published the association has no right to begin business as a corporation; and because such notice had not been published, the members were held liable as individuals.

We concur in the conclusion reached by the Superior Court in this case, that "the Gebhart & Bate Brewing Co. had no right to do business as a corporation until the members had complied with the law. Until they did so no corporation existed. The stockholders were merely doing business as partners, and as such are individually liable for the debts." (14 Ky. Law Rep., 469.)

Judgment reversed and cause remanded for proceedings conformable to this opinion.

BIRDEYE COAL CO. v. JONES, &c.

(Filed February 5, 1895—Not to be reported.)

1. Pleadings—Vendor and vendee—J. sold a part of his land to H., who sold to B. J. subsequently sold remainder of his tract to B., and having executed no deed to H., by agreement of all parties executed a deed to B. for both parts of the tract sold, reserving a vendor's lien to himself and to H. J. and H. recovered judgment against B. for the sums due them for the land. T., who claimed part of the land by a prior purchase from J., brought suit against J. and B. and H., asking that the deed to H. be cancelled, and that a deed be made to him. B. by answer and cross petition paid into court the money he owed J., and asked that J. and T. be required to litigate between themselves as to the right to said sum. The parties agreed that if T. recovered the land from J. he was to accept from the fund paid into court so much per acre for the part recovered. Held - It was error to strike from the record the answer and counterclaim of B., as he had a very material interest in the subject-matter of the litigation between J. and T.

2. Same—The court having adjudged that T. was entitled to be paid a certain sum out of the purchase money deposited in court by B., and that J., the vendor of B., was to have the remainder of said deposit, ought to have awarded the possession of the land to B., and it was error not to do so, it appearing that T. is in possession.

3. Plea of statute of another State—A plea of statute of limitations of another State must set out the terms and provisions of the statute of that State.

In a suit on an overdraft in a bank in Alabama it is not sufficient to allege that said overdraft was made in Alabama, and that more than three years have elapsed since plaintiff's alleged cause of action accrued, and that defendant pleads and relies upon the statute of limitation of that State made and provided.

Hill & Denham for appellant.

K. D. Perkins for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Paynter.

Appellee Jones owned a large boundary of land in Whitley county. He sold some of it to Hill, who sold to the appellant. He also sold some of it to the appellant. He had not made a deed to Hill for the boundary he had purchased, and in making the deed to appellant, by agreement of all concerned, he included in it that part which had been purchased by Hill, as no deed had been previously made to him. In this deed a lien for

over $3,000 was reserved for Hill, being the balance due him, and also a lien was reserved for balance due himself, amounting to $910. The sum due Hill not being paid at maturity, action was instituted in the Whitley Common Pleas Court to recover it, to which appellee Jones was made a defendant. He answered, and by cross petition asserted his claim against appellant for the sum due him. A judgment was recovered against appellant for these claims, and an order to sell the land to pay them was entered. The appellee Jones, had become a nonresident of the State. In the meantime the appellee, John S. Tye, had sued appellee Jones to obtain a deed from him for sixty acres embraced in the boundary which Jones had sold and conveyed appellant, claiming that at a time previous to the date of the sale to appellant, Jones had sold this sixty acres to him and placed him in possession of it. He claimed that he had paid the sum of $34 for it, at that time being its full value. The sale was denied, but on the trial of the case the court adjudged that he was entitled to have the land conveyed to him. From that judgment an appeal was taken, and this court reversed the judgment because the transaction was within the statute against frauds and perjuries. (Jones v. Tye, 14 Ky. Law Rep., 448.)

On a return of the case Tye filed an amended petition, alleging other facts which it was claimed would release the transaction from the operation of the statute of frauds and perjuries, to which action he made appellant a defendant, and asked that the deed which Jones made appellant should be canceled.

Appellant filed his answer, making it a counterclaim against Tye, and a cross petition against Jones, with a prayer that it be permitted to pay the amount it owed Jones into court in discharge of the judgment which he had recovered against it, and that Tye and Jones be required to litigate the matter, and if Jones succeeded, the money to go to him; if not, then for an equitable disposition to be made of it. He asked that the cause which was then pending in the court of Jones against it be consolidated with this case.

To the petition of Tye, as amended, a demurrer was sustained. Thereupon he dismissed his petition against Jones without prejudice, leaving pending the counterclaim and cross petition of the appellant. Appellant filed an amended answer, counterclaim and cross petition, alleging the facts substantially as stated, together with the fact that Jones is a nonresident, and that he has no property in this State, and prays to recover the land, etc. To this Tye filed a reply, stating the facts he alleged in this petition and amended petition, with a prayer that the deed to appellant be canceled and that the land be conveyed to him. The appellee, Jones, moved to strike from the files the answer, counterclaim and cross petition of appellant, which motion the court sustained, giving as a reason that it had no interest in the controversy between Jones and Tye, and dismissing its counterclaim and cross petition. On the day appellant filed its answer the parties had entered an agreed judgment by which appellant did pay to the master commissioner of the court the debt, interests and costs due on the judgment which Jones had obtained against it and cancelling that judgment, Tye agreeing that if he received the land he was to let the appellant have it for $15 per acre, and $900 was left in the hands of the commissioner to pay Tye or Jones, as the court might determine. Both Tye and Jones had made the appellant parties to their respective actions which had been consolidated. It certainly was proper for appellant to file the pleadings, which it did, seeking such relief as the facts in the case entitle it.

The appellees having brought appellant into court, and the

General Statutes, c... of the subject-matter involved in of the law are su...ined all parties before the court who required by sec...lt of the action. Appellant had a most no right to be ... matter. It was not liable for the pur- notice had no... if the land belonged to Tye, and if it be- individuals ... he was not entitled to it under his war- We conc... obligation of the agreed judgment, unless this cas... in possession of the land. We are unable to do b... desired the pleadings stricken from the files of with ... he wanted the $900, and at the same time stock ... possession of the land.

are ... in striking appellant's pleadings from the rec- ... from which the appeal is taken treated the f ... the land as being invalid, and properly so, as the ... which he alleged on a return of the case did not ... transaction without the statutes of frauds and perjuries. ... properly adjudged that Tye should be paid, out of the ... court which was adjudged Jones, the sum which he paid ... land, being $34.

The court properly adjudged the fund in court to Jones, and he should have such interest as has accumulated from the loan of the money under the order of court. The court failed to adjudge the possesion of the land to the appellant, Tye being in possession, as appears from the record. When the court adjudged the fund to Jones, less the amount which was ordered to be paid to Tye in repayment of that which he had paid Jones for the land, the court should have adjudged that appellant was entitled to the land, and made the necessary order to have placed it in possession thereof.

The cause is reversed, with directions for the court to overrule the motion of Jones to strike from the files the pleadings of appellant and to enter a judgment in accordance with this opinion.

SUDDUTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 6, 1895—Not to be reported.)

The verdict of the jury, under proper instructions of the court, that the appellant's injuries, which were severe, were not caused by the negligence or carelessness of the appellee, will not be set aside upon the evidence of this case.

Thomas H. Hines and James A. Violett for appellant.

John W. Rodman for appellee.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Guffy.

This suit was instituted in the Common Pleas Court of Franklin county by S. Sudduth against the Louisville & Nashville R. R. Co., seeking to recover $25,000 damages on account of negligence of the defendant in the running or operation of cars on its road.

It is claimed by plaintiff that the cars on said road were so negligently run on said road that his horse became frightened, and in order to save himself from harm and injury he got out of his buggy to hold his horse, and as he was getting out his horse turned and caught him between the wheels and severely and permanently injured him. A trial resulted in a verdict and

.ient for the defendant. Afterwards plaintiff filed grounds . moved for a new trial, which motion was overruled by the ›urt, and plaintiff has appealed to this court, and insists that the court erred in refusing instructions offered by plaintiff, and in giving instructions offered by defendant, and in giving instructions on its own motion, and because the court erred in refusing to admit evidence that was competent, offered by plaintiff, and because the verdict was not sustained by sufficient evidence and was contrary to law.

It appears that the plaintiff was severely injured, but the question as to whether it was the fault of defendant was under the proof and proper instructions by the court submitted to the jury, and the jury found for the defendant, and we do not feel authorized to set aside that verdict.

The judgment is, therefore, affirmed.

TABLER v. FARMERS & TRADERS BANK OF SHELBYVILLE, &c.

(Filed February 6, 1895—Not to be reported.)

Contract between husband and wife as to wife's separate estate—Wife's equity as to husband's creditors—A wife, by agreement with her husband, invested the proceeds of bonds held by her as her separate estate under the will of her father in stock owned by her husband in a corporation, the husband being paid a fair consideration therefor. At the time of the sale of the stock the husband was indebted to appellee. The stock was not immediately tranferred to the wife by the husband, but this was the intention of the parties at the time of the sale. Eight months before the appellee sued the husband for the debt due it the husband indorsed the stock over to the wife as her separate estate and placed it in the hands of a trustee to be held for her benefit. In this proceeding the chancellor allowed the wife only a lien on the stock to secure the amount paid by her to the husband for it. Held—The transaction between the husband and wife was made in good faith with no design to defraud any one, and the wife having paid an adequate consideration for the stock, and the appellee not having credited the husband upon the faith of his ownership of the stock, the wife was entitled to it absolutely as her separate estate. It was error to allow her only a lien upon it.

Gaither & Vanarsdall and Helm & Bruce for appellant.

L. A. Weakley for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Susie Tabler, formerly Susie Biggs, was the owner in her own right and as her separate estate of certain bonds secured by mortgage on real estate, amounting in the aggregate to near $6,500.

These bonds were given her by the will of her father, Andrew Biggs, and by that instrument the separate estate was created.

In the year 1890 she married M. Tabler, and in a short time after the marriage, her husband being in need of money, by an agreement with him, she invested this money, or the proceeds of the bonds devised to her, in certain shares of stock he owned in a corporation known as the Brooklyn Hills Improvement Co. Her husband owned 150 shares of this stock, that had cost him fifteen or twenty cents on the dollar, and sold them to his wife,

chancellor having jurisdiction of the subject-matter involved in the actions, should have retained all parties before the court who had an interest in the result of the action. Appellant had a most important interest in the matter. It was not liable for the purchase money to Jones if the land belonged to Tye, and if it belonged to Jones, then he was not entitled to it under his warranty and the implied obligation of the agreed judgment, unless appellant was placed in possession of the land. We are unable to see why Jones desired the pleadings stricken from the files of the record unless he wanted the $900, and at the same time leave Tye in the possession of the land.

The court erred in striking appellant's pleadings from the record. The judgment from which the appeal is taken treated the claim of Tye to the land as being invalid, and properly so, as the additional facts which he alleged on a return of the case did not take the transaction without the statutes of frauds and perjuries. The court properly adjudged that Tye should be paid, out of the fund in court which was adjudged Jones, the sum which he paid for the land, being $84.

The court properly adjudged the fund in court to Jones, and he should have such interest as has accumulated from the loan of the money under the order of court. The court failed to adjudge the possesion of the land to the appellant, Tye being in possession, as appears from the record. When the court adjudged the fund to Jones, less the amount which was ordered to be paid to Tye in repayment of that which he had paid Jones for the land, the court should have adjudged that appellant was entitled to the land, and made the necessary order to have placed it in possession thereof.

The cause is reversed, with directions for the court to overrule the motion of Jones to strike from the files the pleadings of appellant and to enter a judgment in accordance with this opinion.

SUDDUTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 6, 1895—Not to be reported.)

The verdict of the jury, under proper instructions of the court, that the appellant's injuries, which were severe, were not caused by the negligence or carelessness of the appellee, will not be set aside upon the evidence of this case.

Thomas H. Hines and James A. Violett for appellant.

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Opinion of the court by Judge Guffy.

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It is claimed by plaintiff that the cars on said road were so negligently run on said road that his horse became frightened, and in order to save himself from harm and injury he got out of his buggy to hold his horse, and as he was getting out his horse turned and caught him between the wheels and severely and permanently injured him. A trial resulted in a verdict and

judgment for the defendant. Afterwards plaintiff filed grounds and moved for a new trial, which motion was overruled by the court, and plaintiff has appealed to this court, and insists that the court erred in refusing instructions offered by plaintiff, and in giving instructions offered by defendant, and in giving instructions on its own motion, and because the court erred in refusing to admit evidence that was competent, offered by plaintiff, and because the verdict was not sustained by sufficient evidence and was contrary to law.

It appears that the plaintiff was severely injured, but the question as to whether it was the fault of defendant was under the proof and proper instructions by the court submitted to the jury, and the jury found for the defendant, and we do not feel authorized to set aside that verdict.

The judgment is, therefore, affirmed.

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Contract between husband and wife as to wife's separate estate—Wife's equity as to husband's creditors—A wife, by agreement with her husband, invested the proceeds of bonds held by her as her separate estate under the will of her father in stock owned by her husband in a corporation, the husband being paid a fair consideration therefor. At the time of the sale of the stock the husband was indebted to appellee. The stock was not immediately tranferred to the wife by the husband, but this was the intention of the parties at the time of the sale. Eight months before the appellee sued the husband for the debt due it the husband indorsed the stock over to the wife as her separate estate and placed it in the hands of a trustee to be held for her benefit. In this proceeding the chancellor allowed the wife only a lien on the stock to secure the amount paid by her to the husband for it. Held—The transaction between the husband and wife was made in good faith with no design to defraud any one, and the wife having paid an adequate consideration for the stock, and the appellee not having credited the husband upon the faith of his ownership of the stock, the wife was entitled to it absolutely as her separate estate. It was error to allow her only a lien upon it.

Gaither & Vanarsdall and Helm & Bruce for appellant.

L. A. Weakley for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Susie Tabler, formerly Susie Biggs, was the owner in her own right and as her separate estate of certain bonds secured by mortgage on real estate, amounting in the aggregate to near $6,500.

These bonds were given her by the will of her father, Andrew Biggs, and by that instrument the separate estate was created.

In the year 1890 she married M. Tabler, and in a short time after the marriage, her husband being in need of money, by an agreement with him, she invested this money, or the proceeds of the bonds devised to her, in certain shares of stock he owned in a corporation known as the Brooklyn Hills Improvement Co. Her husband owned 150 shares of this stock, that had cost him fifteen or twenty cents on the dollar, and sold them to his wife,

the appellant, for her bonds, by which he realized exceeding forty cents on the dollar for his Brooklyn stock. There is no doubt as to his collecting the bonds given in exchange for the stock, and that such an arrangement was made by which this stock was to be transferred to the wife, not as an indemnity for any loan by the wife to him, but to be held by her as her own property and for her separate use. The certificates of stock, when obtained by the husband, were not transferred to the wife, but, as she swears, it was his purpose to do so, and from neglect alone the transfer was not made.

In December, 1890, the stock was indorsed by the husband to his wife, and delivered by him to the Fidelity Trust Co., to be held for her separate use.

About the date of the sale of this stock to his wife the husband borrowed of the appellant, the Farmers & Traders Bank of Shelbyille, $4,000, and executed his note to the bank, payable in four months, with H. C. Williams and J. E. Cogar as his sureties, and to make the note more secure pledged as a collateral $4,000 of stock in the Mercer Coal and Grain Co.

At that date, as the proof conduces to show, the husband was regarded as a man of means, and from the evidence in the record there was no fact known to his wife that was calculated to induce her to believe he was on the verge of bankruptcy.

This note to the bank was not paid when it matured, and in about a year after his wife had agreed to take this stock, and after it had been deposited with the Fidelity Trust Co., to be held in trust for the wife, the bank instituted this action against the husband on the note, taking out an attachment, based on the ground of no property in this State belonging to the husband subject to execution to satisfy the debt.

On the 5th of September, 1891, Tabler made an assignment for creditors, and the corporation, known as Brooklyn Hills Improvement Co. having been summoned as garnishee, by an answer stated the books of the corporation showed that the husband owned 150 shares of the stock, and Tabler replying that he had sold this stock to his wife, and he had no interest in it, the appellant, the wife, and the Fidelity Trust Co. were made defendants and an issue formed as to who was the real owner.

The appellee claimed, by proper pleading, that the transaction between the husband and wife was not in good faith, or if so, the transfer of the stock was only for the purpose of securing the wife in the amount of money obtained from her, and when that was repaid the balance, if any, from the sale of the stock should be paid to the bank. The court below held that Mrs. Tabler was not the owner of the stock, but was entitled to a lien upon it for the money obtained.

We have examined this record carefully, and if it was competent for the husband and wife to make a contract by which her money invested in these bonds should be appropriated by the husband to his own use, and his stock in the Brooklyn Hills Improvement Co. substituted in its stead, then the wife was invested with the absolute right to the stock as against this creditor. This stock was transferred to Mrs. Tabler and placed in the hands of the trust company, to be held by her some eight or nine months before the attachment issued, and, as the proof clearly shows, was a bona fide transaction, and for a full and fair consideration.

There is no attempt, in fact, on the part of the bank to establish fraud on the part of the husband or the wife, unless the effort of the bank to show that the inadequacy of price paid for the

stock would authorize the chancellor either to infer fraud or to adjudge the stock was only delivered to the trust company as a security for this money obtained from the appellant.

Many enterprising business men were engaged in the Brooklyn speculation. They had purchased a quantity of land adjacent to the city of Brooklyn, and had divided it into lots after the formation of the corporation. Estimates were made and published in anticipation of what they expected to realize from the enterprise, showing upon their face a surplus of $600,000, when, in fact, nothing had been realized, and the estimated surplus was only made upon the basis of future sales. The stock had no market value, and while some of the stockholders, looking upon this speculation as a realization, would not, as they say, have sold their shares of stock, by all the stockholders, save, perhaps, one, the price paid was regarded as a fair consideration. It is in fact doubtful whether it could have been sold at all, the entire enterprise being merely speculative and its success depending upon the contingency of selling the lots at fabulous prices.

From the testimony before us, if one of the stockholders had purchased this stock, could there be any doubt of the validity of the sale and the adequacy of the consideration? It is true that transactions between husband and wife affecting the rights of others, whether creditors or purchasers, should be clearly scrutinized by the chancellor, and submitting the claim of the wife to such a test, there seems to us to be no reason in law or equity for depriving the wife of her title to this stock. The delivery to a trustee for her benefit was made before these attachments issued, and if not, the sale to the wife being established if the stock was still in her possession, the chancellor, in the absence of fraud, would protect her. There is no bona fide purchaser seeking to enforce this title as against the wife, but a creditor who has parted with nothing intervening for th epurpose of affecting the equity right of the wife to this stock obtained in good faith and for a fair value. The disabilty of coverture did not prevent the wife from making such a disposition of her separate estate, and, besides, the appellee, in loaning its money to the husband, had required personal security and a pledge of stock in another corporation to secure its payment, and was doubtless ignorant of the fact that the husband of the appellant owned any stock in this improvement company. The loan had not been made on this stock, and no credit given on the faith of it, and while all the property of the debtor is liable for his debts except such as is exempt by law, the question here is, is this legal or equitable right of the wife to be subordinated to the claims of creditors? The rule is that equity will protect the wife, and in cases like this, as Mr. Justice Story says, "the creditor takes only such rights in the premises as the judgment debtor rightfully possessed." (Story's Equity, volume 2, page 828.)

It is immaterial whether there was a transfer of this stock on the books of the corporation; the equity of the wife, with the stock in the possession of the trustee, is sufficient to defeat any other equity created by the act of the husband or obtained by a third person unless caused by her fraudulent conduct. The chancellor should not, on the facts of the case, have converted the wife's right of property into a mere lien. She subjected herself to the risk of loss or gain when investing her means in this way. Any other purchaser under like circumstances would hold it, and, therefore, the wife's right must be maintained.

The judgment is reversed, with directions to adjudge this stock to be the property of the wife, and for proceedings consistent with this opinion.

ALLEN, &c. v. FROMAN.

(Filed December 6, 1894.)

Right to probate will barred by limitation—A will must be offered for probate within ten years after the right of probate accrued, as section 9, article 3 of chapter 71 of the General Statutes, providing that "an action for relief not provided for in this or some other chapter can only be commenced within ten years next after the cause of action accrued," applies to proceedings to probate a will.

J. Q. Ward, E. M. Dickson and George C. Lockhart for appellants.

McMillan & Talbott for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Lewis.

The controversy in this case is about probating what is alleged to be the will of George Coil, who died in the State of Alabama, place of his domicile, May, 1868. The original paper was not produced, but what purports to be, and the evidence satisfactorily shows, is a substantial copy, was, in lieu of it, on October 14, 1890, filed in the Bourbon County Court, and motion made to admit it to record as the true last will of said Coil. But the county court overruled that motion and refused to permit the paper recorded as such will, whereupon Elijah Froman, claiming to be devisee, appealed to the Bourbon Circuit Court, where, after hearing evidence and receiving instructions as to the law, the jury returned a verdict that said paper, a copy of which they had before them, was the true last will of George Coil, and judgment of court having been rendered in pursuance of that verdict the heirs at law of George Coil appealed to this court

The original paper, dated in 1858, purports to have been written and signed by Coil and attesting witnesses in Bourbon county, where he then resided, but about 1866 he removed to Alabama, and, as before said, died there.

The grounds for reversal are, first, want of jurisdiction of the Bourbon County Court to probate the paper as the will of George Coil, the probate court of Alabama having, as argued, orginal and exclusive jurisdiction; second, error of the court in rejecting certain testimony tending to show that one of the attesting witnesses, both being dead, did not, in fact, sign his name in presence of the testator; third, that the statute of limitation, which was pleaded and relied on, is a bar to the proceeding and ought to have been sustained.

It does not appear the paper was ever probated in any court of Alabama, nor that there was, after satisfying creditors, any available estate left there for the devisees. But Coil owned, when he removed from Kentucky, and also at his death, a valuable tract of land in Bourbon county still claimed by his devisee, Elijah Froman, though whether that fact gave the Bourbon County Court jurisdiction we need not here decide, nor is it necessary to pass upon the question presented as to evidence rejected by the lower court. We shall, therefore, proceed directly to consider whether the statute of limitation has application.

Section 2, article 2, chapter 39, General Statutes, provides that "original administration shall not be granted after the expiration of twenty years from the death of the testator or intestate. If so made it shall be void."

But it seems to us that section does not, in terms or reason, apply to probating and admitting wills to record. Indeed there is no provision in chapter 71, the title of which is "limitation of actions," that in terms does fix the limit of time within which wills may be probated, and if done at all it is by section 9, article 3, as follows: "An action for relief, not provided for in this or some other chapter, can only be commenced within ten years next after the cause of action accrued."

The language of that section does in fact, and we must, consequently, hold was intended to comprehend every case of relief not elsewhere in the General Statutes directly provided for, whether sought by action or proceeding. For section 27, chapter 21, General Statutes, provides that "the term action, when used in this revision, shall be construed to include all proceedings in any court of this Commonwealth."

We can see no reason why a period of time should not be fixed for probating wills as well as for instituting or commencing any other action or proceeding for relief. For fraud may be perpetrated in the matter of probating wills by reason of death of witnesses to the transaction and innocent purchasers disturbed and deprived of property honestly acquired by setting up false wills after a long lapse of time, as can occur in any other case. So, as held by this court in Hoffert v. Miller, 86 Ky. 572, it has become legislative policy of this State to fix in every case a limit of time for beginning every action or proceeding for relief, and section 9, article 3, was intended for that purpose.

Probating and recording the will in question is necessary to enable appellee to maintain an action for recovery of the land from the heirs at law of George Coil, who, or their vendees, have been in actual possession and claiming it as their own since 1870; and to permit appellee, now thirty-nine years old, to institute and maintain this proceeding twenty-two years after death of George Coil, under whose will he claims, would, it seems to us, be contrary to the reason of the statute of limitation as well as the direct provision thereof.

In our opinion the proceeding to probate the will in contest is barred by the statute of limitation, and, consequently, the judgment must be reversed and cause remanded for affirmance of the order of the Bourbon County Court.

M. & B. S. R. R. CO. v. CONNOR, &c.

(Filed February 6, 1895—Not to be reported.)

1. Railroads—Damage to abutting property—Evidence—In an action to recover the damages to abutting property, caused by the improper and unreasonable manner of constructing and operating a railroad in the street of a city, it is competent to prove the value of the property immediately before it became generally known that the road was to be located and built in said street, and its value immediately after the road was completed, and that the diminution in value was caused by the trouble and danger in getting to and from the property, and by the noise, smoke, inconvenience, and also by the overflow of the property.

2. Same—Instructions—It is proper to instruct the jury to find for plaintiff if the railroad obstructed the street adjacent to plaintiff's property so as to deprive him of the reasonable use of said street as a means of ingress and egress for foot passengers and wheeled vehicles.

3. Same—It is proper to instruct the jury to ascertain plaintiff's damages by first fixing the value of her property before it became generally known that the railroad was to be located in front of it, and what its value was immediately after the road was constructed and operated, and then determining what proportion of the diminution in value was caused by the obstruction of the street by the railroad, so as to deprive plaintiff of its reasonable use as a means of ingress and egress, etc.

4. Same—An instruction was proper that plaintiff could not recover for depreciation in value of her property on account of its liability to overflow or upon any other account than the unreasonable obstruction of ingress and egress. This instruction certainly was not prejudicial to the railroad.

Wadsworth & Cochran for appellant.

Samuel J. Pugh for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Guffy.

This is an appeal taken by the Maysville & Big Sandy R. R. Co. from a judgment rendered in the Lewis Circuit Court in favor of P. Conner, &c., against the appellant for the sum of $450. The suit was instituted by appellees to recover of defendant for damages to his property on Third street, in Vanceburg, Ky., caused by the improper and unreasonable manner of the building and operating defendant's road in and along said street.

Appellant insists that the court erred in allowing appellee to testify as to the value of his property immediately before it became generally known that the road was to be located and built in said street, and as to its value immediately after the road was completed, and that the diminution in value was caused by the trouble and danger in getting to and from the property; the overflowing of the property; the noise and smoke and inconvenience. On cross-examination he testified that one-half the damages ($300) was due to the overflow, and $300 for other damages. Appellant also complains that Mrs. Clark was allowed to testify that, in her judgment, the property was diminished in value one-half by the building of the road. Appellant also objects to instructions Nos. 1, 2 and 3, given on appellee's motion, and objects to the modification of No. 4, asked by appellant. The instructions are as follows:

No. 1. The court instructs the jury that it is admitted that the real estate of the plaintiffs abuts upon Third street, in the city of Vanceburg; and further, that if they believe from the evidence that the defendant appropriated and obstructed the street adjacent to the lot of plaintiffs so as to have deprived the plaintiffs of the reasonable use of said street as a means of ingress and egress by foot passengers and wheeled vehicles, and the ordinary means of travel to and from the said lot by the building and operating of its road at the point mentioned, they will find for the plaintiffs, and determine the damages as instructed in instruction No. 2.

No. 2. If the jury find for the plaintiffs' in determining the damages, they should first ascertain what the value of plaintiffs' lot was just before it became generally known that the defendant's railroad was to be located in front of it, and what was the value of said property immediately after said road was located, constructed and operated, and then determine what proportion of that value was taken from the houses and lot of plaintiffs by the obstruction of the street, depriving plaintiffs of the reasonable use of same as their means of ingress and egress to and from said lot

for foot passengers and wheeled vehicles and the ordinary mode of travel, and the damage incident to the reasonable and proper movement of trains of cars along, over and upon the road not to exceed $1,000; and if the jury do not believe, and find as indicated in the first instruction, they will find for the defendant.

No. 3. The court instructs the jury that the owners of lots abutting on Third street, in Vanceburg, have a right to the reasonable use, occupation and enjoyment of said street as a means of ingress and egress to and from their respective lots by ordinary vehicles, and usual means of travel for street purposes; and if the jury further believes from the evidence, by the building and operation of the defendant's railroad, they have been deprived of such reasonable use, occupation or enjoyment of said street, and have suffered damages to their said house and lot by reason thereof, they will find for plaintiffs, and be governed in their finding by instruction No. 2, and in all not exceeding $1,000.

Instruction No. 4, as modified, is as follows: The jury are instructed that they can not find for plaintiffs for any depreciation in the value of their property on account of its liability to overflow, or upon any other account than unreasonable obstruction of egress and ingress to and from said property by way of Third street; and unless they believe from the evidence that said egress and ingress has been unreasonably obstructed by the location, construction and operation of the railroad in Third street, they will find for the defendant. If, however, they believe from all the evidence said egress and ingress has been unreasonably obstructed, they will find for the plaintiffs the amount of the depreciation in their property, caused by such obstructions, and by these only.

It seems to us that the instructions were quite as favorable to appellant as the law authorized. Some items of damage were excluded by the instructions which this court held, in the case of J., M. &. I. R. R. Co. v. Esterle, 13 Bush, 667, might be recovered. We do not think that the court erred to the prejudice of appellant in the admission of testimony.

Taking the evidence altogether, it was sufficient to authorize the verdict of the jury. The amount found was much less than the damage placed by some of the witnesses.

The judgment is, therefore, affirmed.

LEWIS v. TAYLOR, &c.

(Filed February 7, 1895.)

1. Investment of wife's money in land of husband—Trusts—In 1857, by virtue of an order of a chancellor, land belonging to a wife and her children was sold and the proceeds directed to be invested for the beneficiaries in land then owned by the husband. The husband received the proceeds of the sale but neglected to transfer the legal title to his land from himself to the wife and children. From that time, however (1857), until the year 1880, when he removed with his family from the State, he ceased to claim the land as his own, but at all times claimed to hold only as trustee for his wife and children; he listed it for taxation, insured it, and also leased it to tenants as property held for his wife and children, and when he left the State appointed an agent to manage and care for it for the benefit of the wife and children. His holding in trust was notorious. Certain creditors of the husband having levied on and sold this land for the husband's debts. Held—The equity of the wife and children is superior to that acquired by pur-

chasers at the execution sale, who bought it after receiving actual notice of the claim of the wife and children.

2. Same—Judgment creditors not innocent purchasers—Judgment creditors of a husband, who cause to be sold under execution and who purchase for their own benefit land held by the debtor in trust for his wife and children, are not entitled to be protected as bona fide purchasers for value and without notice, although the debtor held the legal title to the land.

3. Same—Executors, who purchase land at an execution sale made in their behalf, purchase and hold for the benefit of the estate of their testator; and where they have notice that the debtor in the execution is not the beneficial owner of the land sold, to which he has legal title, those for whose benefit (the devisees) the sale and purchase was made are charged with that notice.

One devisee who buys the interest of the other devisees in the land so purchased by the executors is charged with, and in fact had, the knowledge of the trust charged upon the land that the executors had at the time of their purchase.

E. E. McKay for appellant.

Jno. S. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the year 1857 J. H. Taylor became the owner of a tract of land in the county of Nelson by a regular conveyance from one Samuel Ross. In the year 1884 this land was levied upon and sold to satisfy an execution upon a judgment rendered in the Nelson Circuit Court in favor of the executors of B. B. Summers, deceased, against Taylor, and purchased by the executors for the benefit of the estate they represented.

After this the appellant, Sarah A. Lewis, one of the devisees of Summers, purchased out the other devisees, or their interest in the land, and in that way derived title, as she claims, the entire tract. Mrs. Lewis then sold and conveyed the land to one Sherman, and placed him in possession, she or her vendor having obtained possession under and by virtue of the sheriff's deed.

The wife and children of J. H. Taylor, who are the appellees in this appeal, claim that the land purchased by the executors of Summers was held by J. H. Taylor in trust for them, the existence of which the executors of Summers had notice when they made their purchase under the execution for the benefit of the devisees of Summers. They filed their petition in equity to enforce the trust and make Sherman and his vendor, Mrs. Lewis, defendants to the action, and upon the hearing the chancellor adjudged in favor of the appellees, the wife and children of J. H. Taylor.

The trust is alleged to have been created in this manner: In the year 1857 the father of Mrs. Taylor (H. S. Cochran) conveyed to her husband, J. H. Taylor, in trust for herself and children, the one-half of a tract of land lying in the county of Bullitt. In March, 1857, J. H. Taylor, the husband, filed his petition as trustee, etc., in the Bullitt Circuit Court, making his wife and the donor of the land defendants, asking for the sale of this fifty acres of land held in trust, that the proceeds might be invested in the land purchased by J. H. Taylor (the husband) of Ross, and the same levied on and sold under the Summers execution, by virtue of which Mrs. Lewis, who sold to Sherman, obtained the title.

Cochran, the father of Mrs. Taylor, and the latter filed answers consenting to the sale, on condition that the Nelson county land

was conveyed in the same way she held the Bullitt county land. Commissioners were appointed to value the Bullitt county land and also the Nelson county land, and made their report as to the values, and also advising the re-investment. Mrs. Taylor's land was then decreed to be sold, and Taylor, the husband and trustee, was ordered to make the sale, which was done, and his report stated that the title as to the one hundred and seventy-six acre tract of land in Nelson was perfect.

The Bullitt land of the wife sold for $1,750. The sale was approved, but no deed was ever made to Taylor's wife and children or the title perfected by any order of the Bullitt Circuit Court.

Taylor was in possession of the Nelson county land at the time he sold his wife's land as commissioner under his purchase from Ross, and while no deed was made to his wife and children from the date of the sale of his wife's land, in the year 1858, up to the year of 1880, when he removed with his family to Texas, he held and claimed this one hundred and seventy-six acres of land in Nelson as trustee for his wife and children. The manner of his holding was open and notorious, and seems to have been known to the residents of the neighborhood in which Taylor lived and the land was located.

He received the money from the proceeds of his wife's land, and discharged the liens upon it held by Ross, of whom he purchased, the purchase price being about $1,330, and at no time after the year 1858 asserted and claimed to the land in his own right. He listed the land for taxation as trust property, insured the buildings upon it for the use and benefit of the wife and children, and rented the land out as trustee.

When Taylor left Nelson county for Texas in the year 1880 this land was then in the possession of a tenant to whom he had leased it for a term of years. He leased it as trustee, and appointed, when leaving, J. D. Elliott agent and attorney for his wife and children, to protect their interest.

When this land was sold under execution by the executors of Summers, and before the purchase by the executors, Elliott, the agent and attorney, announced publicly, at the courthouse door, that the land was not the property of Taylor, but was held in trust by him for his wife and children. The creditor was not only selling trust property, but was notified by Elliott that Taylor had no title, and the executors, disregarding the claim of these appellees, made the purchase with the full knowledge of appellees' equity.

The husband and father had held the possession for his wife and children as trustee from the date of the sale of his wife's land up to the year 1880, when he left the State, a period of twenty-two years, and when leaving his tenant holding under him as trustee was in possession.

The levy and sale of this land under the Summers execution was made in the year 1884, near twenty-six years after this trust was created, and by reason of an equity in the wife and children that can not be questioned.

There can be no doubt but this land in controversy was affected with this trust, and that the trust funds derived from the sale of the wife's land was invested in it, and in every such case, says Mr. Justice Story, in his work on Equity Jurisprudence, section 1210: "In every such case, where the trust money can be distinctly traced, a court of equity will fasten a trust upon the land in favor of the person beneficially entitled to the money."

Here the trust property was the land itself. It was invested by the original trustee under the sanction of the chancellor, but

from neglect or oversight the conveyance to the wife was not executed. There was no wrongful appropriation of the money by the husband, but the act of investment by him was what the chancellor required and what equity compelled him to do.

Can, then, the appellant, Mrs. Lewis, assert her right because her father, the devisor, was a ceditor of J. H. Taylor who, upon the face of the record, was the holder of the legal title, or does she occupy the position of an innocent purchaser without notice, having paid a valuable consideration for the land?

It is true she purchased the interest of the other devisees in this land, and acquired all the title that could pass under the purchase by the executors under the execution sale, but it appears from the record, and in fact such was the necessary result of the purchase by the executors, that it was purchased for the benefit of the estate, and one of the executors was a devisee under the will of the testator.

The purchasers had direct and express notice of this trust when the execution sale was had, and the mere sale and transfer from the one devisee to the other after the sale did not make them bona fide purchasers for value without notice, so as to effect this trust. It also appears that these parties, as well as their testator, lived in a short distance of this land for years, and the manner of the holding of Taylor being so open and notorious, it is manifest that all these parties knew of the existence of the trust.

The executors and devisees of Summers occupied the same position with reference to the trust property that their testator did. They were creditors of the trustee, with the executors in fact acting as the mere agents of those entitled under the will.

"Judgment creditors," says Bishham's Principles of Equity, "deriving title under an execution are not purchasers entitled to avail themselves of this plea;" that is, the want of notice.

The same doctrine is announced by Mr. Justice Story in his Equity Jurisprudence, section 1903: "The substance of the rule established is that a judgment creditor of the trustee is not a purchaser for value in a case like this, so as to affect the equity of the beneficiaries of the trust."

The distinction between a bona fide purchaser for value without notice and that of a mere creditor, as recognized by the text-books, is that one parts with his money upon the faith of what appears to be a perfect title, and as to the creditor he loses nothing, and the effort to enforce the purchase against as pure and long-continued equity as is established in this case can not prevail.

Sherman, who purchased of Mrs. Lewis, is not appealing, and for the reason, doubtless, he has not, as the record shows, paid the purchase money, and, therefore, his purchase can not affect the trust property.

The judgment below finds that the appellees are entitled to the money invested in the land, and fixes that amount at $1,330, directing the land sold to satisfy this claim of the appellees.

There is no cross appeal, and perceiving no error in the judgment affecting the rights of apellants, it is affirmed.

LARUE'S ASS'EE v. LARUE, &c.
YOUNG, &c. v. LARUE'S ADM'R.

(Filed December 13, 1894.)

1. Assignment for benefit of creditors—Life insurance policies—A debtor held two life insurance policies, payable to his order or creditors, and obtained credit upon the faith of his statements to his creditors that he had his life insured for their benefit. He made a general deed of assignment for the benefit of his creditors, wherein, after giving a schedule of his real and personal property (which did not include the life insurance policies), it is provided: "It is understood that if I have omitted to name any property, accounts or claims not herein mentioned in this deed, the same is hereby assigned and transferred to my said assignee for the purposes aforesaid." The assignor did not deliver the policies to the assignee, but subsequently assigned them to certain of his creditors, and by his will thereafter made he bequeathed the balance due on said policies, left after paying the creditors holding them, to his children. In this controversy between the assignee for creditors, the creditors to whom the policies were assigned and the children, Held—The intention of the assignor at the time he executed the deed of assignment for the benefit of creditors was to transfer the policies to his assignee, and the right to them having passed to the assignee under the deed, the subsequent assignment of them to the creditors and children passes nothing.

2. Same—Pleadings—In this cause, heard on demurrer to the assignees' petition, the allegations of the petition as to the provisions of the life insurance policies must be taken as true, the policies themselves not being contained in the record.

3. It is the duty of an assignee for the benefit of creditors to sue for and recover assets belonging to the assigned estate, and he is responsible for any laches on his part in not doing so.

J. P. Hobson and I. W. Twyman for appellant, LaRue's assignee, and appellee in second case.

D. H. Smith and E. E. McKay for appellee in first case and appellant in second case.

Appeal from LaRue Circuit Court.

Opinion of the court by Chief Justice Quigley.

On the 28th day of August, 1891, L. L. LaRue made an assignment to C. F. Syrgley for the benefit of his creditors, reserving homestead and personal exemptions. The property assigned consisted of twelve or fifteen pieces of land, upon some of which there were liens and but little personalty. It appears that his liabilities amount to about $25,000 and that his assets will realize less than $5,000. At the date of the assignment he held two policies of insurance on his life for $5,000 each, one in the Equitable Life Insurance Society of New York, the other in the Mutual Insurance Company of Kentucky, numbered 17,371. It is alleged in the petition that the premiums upon these two policies were paid and kept paid by the assignor up to the date of the assignment. There is nothing showing when the policies issued, except, it appears from the will of the assignor, that the latter policy bore date February 2, 1891. The deed of assignment is general in its nature, and after giving a schedule of the real and personal property assigned, it provides: "It is understood if I have omitted to name any property, accounts or claims not herein mentioned in this deed, the same is hereby assigned and transferred to my said assignee for the purposes aforesaid." It is also

alleged that on the — day of September, 1891, the assignor assigned the policy in the Equitable Life Insurance Society of New York to two of his creditors, O. M. Barbour and William Daugherty, and the policy in the Mutual Life Insurance Company to H. A. Hays, J. R. Hays and Jodiah Hays.

On November 8, 1891, the assignor made a will in which he directed his executor to apply the proceeds collected on the policy in the Equitable Life Insurance Society of New York to the payment of the lien of O. M. Barbour thereon; then to the payment of $1,000 to Miss Lizzie Dorsey, amount of her lien debt on his homestead, and after the payment of the debts due by the firm of L. L. LaRue & Son, the balance thereof to be divided between his two children. There is a codicil to this will dated November 4, 1891, in which he recognizes the transfer of the policy in the Mutual Life Insurance Company, of Kentucky, to H. A. Hays, J. R. Hays and Jodiah Hays, and by which he bequeaths the same absolutely to them.

On the — day of February, 1892, the assignor died in LaRue county, Ky., testate, leaving a widow and two children, one of them being a minor, the eldest, H. D. LaRue, being made his executor under the will. He declined to qualify, and at the March term, 1892, of the LaRue County Court C. D. Miller was appointed administrator, with the will annexed, of said decedent's estate. On the 8th day of March, 1892, the assignee brought suit in the LaRue Circuit Court against the creditors, widow, children, and administrator of said decedent to settle his estate under the deed of assignment. He alleges that the assignor failed to deliver to him said two policies of insurance; that he was entitled thereto under the deed of assignment for the benefit of the creditors; that the defendants, the three Hayses, had collected the $5,000 due on the policy assigned to them, and that Barbour and Daugherty were trying to collect for their use and benefit the other policy, setting out the insolvency of the estate, its large liabilities and meager assets as aforesaid. He also alleges that said policies of insurance were made payable to the assignor, his order or creditors, and that the transfers thereof were made in contemplation of insolvency with the view and purpose of preferring these several creditors to his other creditors, in whole or in part, and asks that the transfer of said policies operate as a general assignment for the benefit of all the creditors under the act of 1856. These several transferees were made parties to the suit. They are called upon to surrender into court said policies of insurance, or the proceeds thereof collected by them. It is also alleged in the petition and amended petition that the assignor had stated to his creditors that he had his life insured for their benefit, and upon the faith of his statements obtained credit from them. Said transferees, as defendants, demurred to all that part of the petition and amended petition which sought from them the recovery of said policies or the proceeds thereof, and which sought to make the transfers thereof operate as a general assignment of decedent's estate for the benefit of creditors under the act of 1856. The court sustained the demurrer, and the plaintiff declining to plead further, the court adjudged that the petitions be dismissed, and from that judgment this appeal is prosecuted.

The case of J. M. Young v. L. L. LaRue's adm'r, &c., was submitted on appeal to be heard with this case, because virtually the same questions are involved and the same relief sought by the parties thereto. The only question to be determined in this case is whether or not the policies of insurance passed under the deed of assignment to the assignee for the benefit of creditors, and

that necessarily depends upon the intention of the assignor in taking out said policies of insurance on his life and as expressed in said deed of assignment. The policies are not before us nor copies of them. Their terms and conditions and the beneficiaries thereof are unknown to us, save and except as stated in the petition and amended petition. Whether or not they were valuable as assets would depend upon the number of premiums that have been paid, the length of time they have run and their cash surrender value, if any, assuming that they had passed under the general deed of assignment to the assignee for the benefit of creditors, and that the assignor was still living. Like other choses in action they are subjects of assignment. They are used daily in commercial transactions as a basis for credit, often being pledged as collateral securities for debt. They are not such assets as may be attached during the life of the assured or sold under execution.

We must, however, for the purposes of the demurrer, assume that the facts stated in the petition and amended petition are true. The allegations therein, that these policies were made payable to the assignor, his order or creditors, and that he used them as a basis for credit, stating that he had his life insured for the benefit of his creditors, coupled with the language used by him in the deed of assignment, clearly indicates that he intended them to pass to his assignee for their benefit. It would be unjust and inequitable if these policies of insurance were taken out by the assignor for the benefit of his creditors generally to permit him, after he had made a general deed of assignment, clearly with the intention of passing same to his assignee as assets of his estate, to withhold them, and subsequently assign them to four or five of his creditors for their exclusive use and benefit. The allegations of the pleadings are such as to indicate that the assignor knew of his insolvent condition for a long time previous to the execution of the deed of assignment. It does not appear from the pleadings that either of the creditors to whom he subsequently assigned the policies of insurance were named as beneficiaries therein, or that they had paid any portion of the premiums thereon, or that there was any reason for their preferment over the other creditors. If it should appear from the facts in the case on issue joined and trial had that the allegations of the petition and amended petition are true, it is unquestionable from the language used in the deed of assignment, that the policies of insurance passed to the assignee for the benefit of the assignor's creditors generally, and, having once been assigned, a subsequent assignment thereof by the assignor was void. It is the duty of the assignee to sue for and recover assets belonging to the estate assigned, and he is responsible for any laches on his part in not doing so. The death of the assignor within so short a time after he made his general deed of assignment made these policies of insurance valuable assets, while if he had continued to live they might have been valueless and worthless.

Under the conditions and circumstances of this case, as stated in the pleadings, this court, upon principles of equity, hold that the court below erred in sustaining the demurrers. It is unnecessary to consider any of the questions raised by the appeal in the case of J. M. Young, &c. v. L. T. LaRue's adm'r, &c., for the reason that the application of the funds arising from these two policies of insurance must be determined as a question of fact from the evidence, under the general issue, and the rights and priorities, if any, of all the parties thereto adjusted accordingly.

Under the general assignment laws of this State it is provided

in section 75 of the Kentucky Statutes "that the intent of the assignor in making the assignment, whether appearing upon the face of the deed or otherwise, shall not invalidate the deed, unless he be solvent and it appear that the assignment was made to hinder or delay creditors." So that whether policies of insurance are intended to pass under such deeds or not will be a question of fact to be determined from the language of the deed and the intention of the assignor in the purposes of their procurement.

In support of this opinion reference is made to section 391 of May on Insurance, 3d edition; Rhode Island National Bank v. Chase, &c., 16 R. I., 37; Burton, adm'r v. Farinholt, &c., 86 N. C., 260; Day v. New England Life Insurance Co., 111 Pa., 507; Hurlbut v. Hurlbut, 56 Hun., 189; Appeal of Ellicott's ex'ors, 50 Pa., 75.

The judgment of the lower court in each case is reversed and cause remanded for proceedings consistent with this opinion.

WILLIAMS v. WILLIAMS.

(Filed January 18, 1895.)

An order granting a wife alimony on her petition is not merged or annulled by a subsequent order in the same case, granted on her amended petition, awarding her a divorce but making no provision for her maintenance.

B. F Graziani for appellant.

Tisdale & Gray and F. J. Hanlon for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Grace,

This case is brought to this court by a petition by appellee, Emma Williams, for a rehearing of this cause on a judgment rendered by the Superior Court of Kentucky, on December 5, 1894 (ante, 397), reversing a judgment in her favor rendered by the Kenton Circuit Court on April 3, 1893, which court, proceeding then by rule, required appellant, Norman Williams, to pay to said Emma Williams the $16.25 per month for support of herself and two infant children, same having been, on her petition in that court, adjudged to her by decree of date February 12, 1892, she being then the wife of said Norman Williams.

The chief objection and contention by appellant is that the same court, by subsequent order of June 8, 1892, decreed a final separation between himself and said Emma as husband and wife, and in said final decree made no order for support or maintenance of the said Emma and her two children, the argument being that the latter judgment merged and thus rendered inoperative and void the former orders recited therein, and this was the view of the Superior Court. This, we think, was error, and because thereof this petition for a rehearing is granted.

It is shown by the record that appellee's original petition was filed in said court in December, 1891, and that in said petition she makes every allegation necessary to give her a divorce, if shown to be true on the trial—that is, the abandonment of herself and her two infant children by said Norman Williams without any fault on her part; failing and neglecting to make any provision for her or their support; her destitute condition; the

tender years of her infant children; with the usual statutory averments as to residence in the State, etc., but not in that petition praying for a divorce, but only for some provision for her support and maintenance, as well as of her infant children.

Summons being duly served and proof taken, amply sustaining every allegation, the first judgment of February 12, 1892, before recited, was rendered, the court adjudging her the custody and care of the children, and fixing the amount to be paid by the husband at $16.25 per month, and by order reserving the cause on the docket for further orders.

After this, and on March 25, 1892, no answer ever having been filed by defendant, plaintiff, Emma Williams, filed in sa d cause her amended petition, in which she says that, re-affirming each and every allegation made in her original petition, she prays the court to grant her a divorce from said Norman Williams.

Summons was issued on this amended petition and served, but no answer filed, and on June 8, 1892, the court heard the case on this amended petition, granting plaintiff the divorce prayed for and still confirming to her the custody of the infant children, with the usual order restoring the property under the statute provided, and making no other or further order in reference to the previous allowance of $16.25 per month as fixed in the order of February 12, 1892.

It seems to us that the legal effect of all this was to leave both orders in full force and effect—the latter one granting the divorce, and the former one fixing the allowance for maintenance, rendered by the same court, on the same petition (as amended), in the same cause and between the same parties, and on subjects whereof the chancellor had jurisdiction.

We can not see that one order in any way merges, annuls or sets aside or destroys the other. It was competent for the court either by its original order to make the allowance for maintenance before the divorce was granted or to engraft same on the final order for divorce; but for the reasons indicated we think it unnecessary that he should have done this. He did not understand then, nor subsequently when she entered the suit against said appellant to pay the $16.25 per month, that the one order revoked or annulled the other; he could not have forgotten nor so soon overlooked the previous order granting the maintenance; and both orders being made in one and the same cause then pending, each order making appropriate provisions for the matter in hand, and both being within the jurisdiction of the chancellor, and both being amply supported by the evidence, we are at loss to see any valid legal objection thereto.

The judgment of the lower court of April 3, 1893, on the rule against appellant is affirmed.

FRAILEY, USE, &c. v. WINCHESTER & BEATTYVILLE R R. Co.

BAKER, USE, &c. v. SAME.

(Filed February 7, 1895.)

Lien on railroad for labor furnished in construction—One who purchases from the laborers employed by a subcontractor in constructing a railroad certain "labor tickets," issued to them by the subcontractor to evidence the amount due each laborer for work done by him, can not acquire or claim a lien on the railroad and its franchise to secure the payment to him of money due on such "labor tickets" under the act of 1888, Appendix General Statutes, page 88.

The lien can exist only in favor of those who "perform labor or who furnish labor, materials or teams for the construction or improvement of a railroad," and the purchaser of the "labor tickets" falls under none of these classes.

J. M. Beatty and H. L. Wheeler for appellants.

Ed. M. Wallace for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Paynter.

The appellee entered into a contract with the Beattyville Construction Co. to build a certain part of its road. The Beattyville Construction Co. sublet to Thompson Bros., Collier & Co. Pryse & Robinson entered into a contract with the last-named company, undertaking a portion of the work in the construction of the railroad.

During the progress of the work Pryse & Robinson gave laborers, whom they employed on the work, what were known as labor tickets. Certain ones of these laborers disposed of these tickets to David Pryse until they amounted to $878.68. In the same way Thomas Pryse acquired labor tickets amounting to $146.80.

Each of the Pryses filed their separate statements and affidavits with the county clerk, giving the names of the persons from whom each obtained the labor tickets, and in which it was stated that the liens were being asserted for the use of the Pryses for their respective claims. Each proceeded upon the idea that he was entitled to a lien on the property and franchise of the Winchester & Beattyville R. R. Co.

In proceedings had below the court held that they did not have liens on the property and franchise of appellee. From that judgment this appeal is prosecuted for the use of Thomas and David Pryse.

The liens are asserted under an act, entitled "An act to create a lien on canals, railroads or other public improvements in favor of persons furnishing labor or materials for the construction or improvement thereof," found on page 88, appendix to General Statutes.

Neither of the Pryses performed labor or furnished labor, materials or teams for the construction or improvement of the railroad. Not having performed labor or furnished labor, materials or teams for the construction of the railroad under a contract, express or implied, with the owner, or by a sub-contract thereunder, they were not entitled to a lien upon the property and franchises of the appellee. By the express terms of the statute none except those so situated can assert a lien under the act supra.

None but those who performed the labor, furnished labor, materials or teams, can make the necessary statements and affidavits to cause the lien to attach, as section 8 of the act says "no lien provided for in this act shall attach unless the person who performs the labor or furnishes the labor, materials or teams, shall, within sixty days after the last day of the last month in which any labor was performed or materials or teams furnished, file in the county clerk's office of each county in which the labor was performed or materials or teams were furnished, a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad or other public impovement upon which it is claimed."

None of the laborers who disposed of their tickets to the Pryses filed such statement and affidavit. It is not contended that any

materials which entered into the construction of the road was furnished by the Pryses. No claim is made that they employed laborers to aid in its construction. It is not even suggested that they furnished teams to be used in the prosecution of the work.

They simply obtained the tickets which the subcontractors gave laborers, which authorized the holder to draw the money which they represented. The laborers not having done that which the law required as a prerequisite to the attachment of a lien, no lien followed the debt into the hands of the Pryses.

The lien being a statutory right dependent upon a substantial compliance with its terms, no rule of equity can be invoked in this case to give that relief which the statute denies or fails to furnish.

Judgment affirmed.

FIDELITY TRUST & SAFETY VAULT CO. v. MAYOR AND CITY COUNCIL OF MORGANFIELD.

(Filed February 7, 1895.)

1. Election concerning incurring of indebtedness by municipal corporation—The election to determine whether the city of Morganfield should incur an indebtedness of $20,000 for the construction of waterworks was held in conformity with the constitutional and statutory requirements, and the indebtedness thereby authorized to be incurred is a valid and obligatory indebtedness of the city.

2. Same—Officers of election—The officers to hold such election concerning a proposed municipal indebtedness may be appointed by the city council in cities of the fifth class. It is not necessary that the officers holding such election should be those appointed by the county court at its regular August term next preceding the holding of the election.

3. Same—Even if the officers holding the election had not in fact been the identical ones designated by law for that purpose, the election would not have been thereby rendered illegal and void, when it was free from fraud and all the other provisions of law were fully complied with.

Thomas W. Bullitt for appellant.

Cromwell Adair for appellee.

Appeal from Jefferson Circuit Court, law and equity division.

Opinion of the court by Judge Grace.

This is an appeal from the judgment of the Jefferson Circuit Court, of date January 25, 1895, adjudging that a certain election, held in the city of Morganfield, on April 30, 1894, whereby it was determined and authority given to incur an indebtedness on behalf of the city of Morganfield of $20,000, for the purpose of constructing waterworks in and for said city, was a valid and legal election under the Constitution and laws of Kentucky; also affirming the validity of the $20,000 in bonds of the city of Morganfield, issued in payment of the indebtedness so created, and affirming the contract of sale and purchase of the bonds by said city authorities to appellant, the Fidelity Trust & Safety Vault Co., of Louisville, Ky.

It appears by the pleadings and exhibits filed herein that this election was held by the authority and direction of the mayor and city council of the city of Morganfield, and in pursuance of that clause in the Constitution of Kentucky which authorizes a vote to be taken when, in the opinion of the mayor and council of cities of the fifth class, it is deemed right and proper so to do

to obtain authority to contract an indebtedness beyond the annual revenues of cities within the class of the city of Morganfield, which was and is the fifth class, and of the several provisions of the charter in the Statutes of Kentucky for cities of this class.

All the preliminary steps necessary to this election had been regularly taken, as provided by section 3637 of the Kentucky Statutes, and particularly pointed out by subsection 3 thereof, such as notice of said election, specifying the amount of indebtedness proposed to be incurred, the purposes of same, and the amount of money necessary to be raised annually by taxation for an interest and sinking fund as therein provided, said notice being duly published in a newspaper of general circulation in the city of Morganfield. And further, under subsection 7 of section 3637, authorizing the city council to do and perform all things necessary to carry out the provisions of this chapter on and in reference to cities of the fifth class, the city council appointed officers to hold said election. Thereupon said election being duly held, a canvass duly made of the vote of the city, it was ascertained and determined that more than two-thirds of all the legal, qualified voters within the city had voted in favor of incurring said indebtedness, report of which was duly made and entered on the records of the city council. Thereupon the city council made the appropriate orders providing for the creation of said indebtedness in the construction of waterworks as contemplated, making other provisions for the annual levy and collection of taxes for the payment of the annual interest on said debt and to create a sinking fund, looking to the final extinguishment of same.

All the constitutional requirements were strictly observed in said election, as that it was held by secret official ballot; that more than two-thirds of all the legal voters in said city voted in favor of incurring the indebtedness, and that the amount of the indebtedness voted did not exceed 3 per centum of the assessed value of the property in said city, as duly found and shown by the appraisement designated by law for that purpose. So that no objection is made by the appellee in his answer or brief to any of these things. One thing of which he complains is that the election was not held by the proper officers, being those appointed by the city council for that purpose, but contending that the election should have been held by the officers appointed by the county court of Union county at its regular August term next preceding the holding thereof.

We do not so understand the law. While it is true that both the Constitution and the Kentucky Statutes declare this taking the sense of the qualified voters on any subject submitted to the people was an election within the meaning of that term, as used in section 147 of the Constitution, and in section 1437 of the Statutes, under title of "Elections," yet the Constitution further notices a distinction between the elections provided for the selection of the several officers of the cities of the several classes, and those elections provided to ascertain the sense of the people on any given proposition; as section 148 provides that all elections of State, county, city, town or district officers shall be held on the first Tuesday after the first Monday in November under the provisions of the election laws. And section 157, under title of "Municipalities," wherein the limitation of indebtedness and taxation occurs, and being the subject now under consideration, provides that the sense of the people shall be taken at an election held for that purpose; and then the act of incorporation or charters for cities of the fifth class provides that when it is deemed desirable by the city council, they may give notice and hold an election for that purpose, which they have done in this

case; and also that they may make all needful rules and do such things as may be necessary to carry out and perfect all the provisions of their charter, including necessarily the appointment of officers to conduct the election.

While section 3658, being part of the same charter for cities of the fifth class, says that all municipal elections shall be held under the general election laws, it refers only to the election of the officers of the city government, and not to the election on this question of creating an indebtedness that had already been fully and amply provided for by section 3637 of the same charter and the subsections thereunder. Should, however, the court be wrong in this construction, yet the validity of the election may be clearly maintained on other grounds: As that the directions of the statutes in reference to the particular officers who shall hold an election are but directory; that it pertains but to the manner and form of same, and does not go to the essence thereof; that in this case all the essential elements provided by the Constitution were strictly observed; the sense of the legal voters of the city on the questions submitted was taken fairly, without fraud; that it was taken by secret official ballot; that on said election largely over two-thirds of the voters voted in favor of creating said indebtedness, and that the indebtedness voted was within the constitutional limitation of 3 per centum of the taxable property for cities of this class; that in this election no legal voter had been deprived of the right to vote, nor had any illegal vote been received; neither was the result of said election rendered doubtful or uncertain by reason of the officers who acted; that both the city council and the people believed this to be a lawful election, and both have acquiesced in the result of same; that acting under this authority, the city council did contract for and have constructed a system of waterworks for said city, same being now completed and turned over or ready to be turned over to the city.

All these things concurring, the authorities are quite clear that, though the officers holding said election were not appointed by the proper authority, and were not in fact the identical officers who should have held said election, yet an irregularity of this kind in its matter would not render illegal or invalid said election, nor the indebtedness created under the same.

In support of this view we cite Cooley on Const. Lim., page 98; same, section 618; Sutherland on Construction of Statutes, section 452; Mr. Lawson holds the same doctrine, section 452. And this court, relying on said authorities, held the same doctrine in the case of Trustees of School District No. 88 v. Garvey, 80 Ky., 159. So that on this question we entertain no doubt of the validity and legality of said election or of the indebtedness created under same.

The issuance of the bonds of said city in payment of said indebtedness was but an incident of same, some form of evidence of such indebtedness being necessary, showing to the respective creditors the amounts severally due them, when due and where payable, by whom and the annual rate of interest of same until maturity. All this is most conveniently and properly done by the execution of the bonds of said city, with interest coupons attached, all being duly attested by the proper authority to bind said city. We see no objection to the bonds as tendered appellee.

For the reasons indicated it appears to us that the judgment of the Jefferson Circuit Court, adjudging said election of April 30, 1894, a legal election, that under and by it the city of Morganfield was authorized to incur an indebtedness of $20,000, and that the

bonds of said city tendered appellant are valid, legal and binding on said city under the Constitution and laws of Kentucky, and that appellant must accept and pay for same, was correct.

Wherefore, said judgment is affirmed.

VILEY v. PETTIT.

(Filed February 8, 1895.)

1. Pleadings—Real estate agent—Commissions—A petition alleging in substance that through the services of plaintiff, a real estate agent, a sale of defendant's farm was made; that defendant accepted and availed himself of said services, and in consideration thereof promised to pay plaintiff the sum sued for, states a cause of action.

2. Implied promise to pay for services rendered—Where one voluntarily and without solicitation renders services in connection with the business of another, the law will not imply a request for the performance of the services or a promise to pay therefor unless the relation between the parties and the circumstances under which the services were performed are such as to show that they were for the benefit of the party receiving them, and that he knew, or had reasonable grounds for believing, that the person rendering them expected to be paid therefor by him.

Volunteer services by a real estate agent, whereby a sale of a farm was made, although rendered with the knowledge and consent of the vendor of the land, do not raise a presumption of a request for their performance by the vendor or a promise on his part to pay.

Thornton & Kerr for appellant.

J. R. Morton and F. C. Elkin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lewis.

The petition to which a general demurrer was sustained by the lower court is as follows:

"Plaintiff Willa Viley says that prior to and on February 9, 1893, he was engaged in the city of Lexington in conducting a general real estate business, including the buying and selling for others of real estate in that city and county of Fayette and elsewhere, upon commission, which facts were then known to the defendant, William Pettit; that while engaged in said business he performed services for the defendant with his consent in endeavoring to effect a sale for him of his farm, situated in the county of Fayette, containing 347 acres, 1 rood and 1.4 poles of land, being the same upon which defendant lately resided; that through his said services and efforts a sale of the said farm was made, and the defendant, accepting plaintiff's said services, consummated said sale, and on February 9, 1893, through the said services and efforts of plaintiff, said farm was sold for the sum of $43,407.34.

Plaintiff says that his said services were reasonably worth the sum of $868.14, and by reason of the facts aforesaid the defendant, on February 9, 1893, became indebted to plaintiff in said sum, which he then undertook and promised to pay, but no part thereof of has been paid, although payment has been demanded.

It seems to be substantially stated in the petition that through services of plaintiff as a real estate agent a sale of the farm was

made; that defendant accepted and availed himself of the services, and in consideration thereof promised to pay the amount sued for; upon proving each of these facts plaintiff will be entitled to recover. For if sale of the farm was effected by services and efforts of plaintiff and defendant, accepting the services, consummated the trade, there existed a sufficient consideration to support his promise to pay.

But we do not agree with counsel that from the facts stated there arises a legal implication that defendant requested plaintiff to perform the services in question for him, and as a consequence became bound by an implied undertaking to pay therefor. As argued, it is a general rule, founded upon common sense and common justice, that the law will imply both a request and promise by one who, knowing all the facts, stands by consenting, when it is his duty to object to services rendered for his benefit and advantage by another. But in order to create liability in absence of an express request and promise to pay, relation of the parties and circumstances under which the services are rendered must be such as to show not only the services were for benefit of the person receiving them, but that he knew or had reasonable grounds to believe the person rendering them expected to be paid therefor; and no better illustration of the danger and injustice of implying a request and promise to pay for services rendered, simply because no objection is made, could be afforded than is done by this case; for the very business appellant is engaged in, that of buyer as well as seller on commission of real estate, may exact of him allegiance and devotion to the exclusive interest of the vendor or purchaser, as he may be employed by one or the other, and there is nothing in appellant's petition repelling the idea he may not, in this instance, have been in the service of both buyer and seller of the land.

It seems to us mere consent by one that another may render unsolicited services in relation to his business affairs is not enough to raise an implication of request and promise to pay. There must be a distinct allegation of benefit, and such condition and relation of the parties as to show an understanding or expectation by them the services would be paid for.

In our opinion, whatever cause of action the petition states is based upon the express promise alleged, and as plaintiff may recover upon proof of it, the lower court erred in sustaining the general demurrer.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

MOUSER v. HARMON, &c.

SAME v. HARMON, &c.

(Filed February 9, 1895.)

New trial—Accident and surprise—One who permitted a judgment to be rendered against him by default is not entitled to a new trial by reason of the fact that he suffered the default judgment to be entered because he was advised by his attorney that his defense to the action was insufficient, when in fact the defense was good in law, as he has learned since the rendition of the judgment. Erroneous advice given by counsel and accepted by the client is not a ground for a new trial.

In this case a defendant suffered a judgment to go against him for the recovery of land, of which he was in possession, because his attorney advised

him he was not entitled to a homestead therein. He has since learned that he was entitled to such homestead, and filed a petition for a new trial. Held —He was not entitled to the new trial.

S. A. Russell and Lafe S. Pence for appellant.

Robert Harding and H. W. Rives for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, Mouser, married Mary A. Overstreet, a widow, in October, 1891. The latter was the owner for life in her own right of several small tracts of land in Marion county, upon which she and her husband lived until January, 1892, when she died. The husband continued to live on the lands after his wife's death until some time in 1892, when, at the suit of the appellees, he surrendered the lands to them by reason of a judgment rendered against him to that effect in the Marion Circuit Court.

The petition of the appellees in that suit averred that the plaintiff, Lizzie, whose husband was her co-plaintiff, was the only child of Mary A. Overstreet, and was the owner and entitled to the immediate possession of the lands then wrongfully held by the defendant, Mouser, the present appellant, and that Mouser, after the death of Mary A., his wife, remained on the lands, and was still claiming some kind of right thereto, but that they did not know the extent of his claim, though they averred he had no valid claim whatever to the possession, use or occupation of any of the lands; that he had refused to vacate the premises to the plaintiffs, though possession had often been demanded. To this suit Mouser, though duly summoned, made no answer, and a judgment to the effect that the plaintiffs were entitled to the immediate possession of the lands described was rendered in March, 1892, and a writ of possession ordered. Mouser then surrendered the possession to the plaintiffs. On July 29 and 31, 1893, he brought these suits setting up in substance the facts we have recited, and averring that, notwithstanding the judgment in the former action against him, the petition and judgment in which he made part of his petitions, he was entitled to a homestead in the lands of his wife; that at and prior to her death he, was a bona fide housekeeper with a family residing on said land; that by accident and surprise, which prudence could not guard against, and by mistake of his attorney and of his own, he was prevented from defending that suit; that he was advised by his attorney that there was no homestead in his favor in the property, and acting on the advice of his attorney, he had made no defense; that he had discovered since the last term of the Marion Circuit Court that he was entitled to a homestead, and no term of that court had intervened since he had made the discovery. His prayer was that the judgment in that suit be set aside; that he be awarded a new trial and be adjudged entitled to a homestead. To the petition last filed the appellees filed a demurrer and a plea in abatement; to the first petition they filed a demurrer.

The court sustained each of the demurrers and the plea as well, and from the judgments dismissing his petitions he has appealed.

The only ground relied on by the appellant to vacate or modify the former judgment is that he was prevented from making a defense by reason of the advice of his attorney. He calls this accident or surprise, which prudence could not have guarded against, but the fact remains the same, that the only "accident

or surprise" set up is that he was advised, during the pendency of the suit, that he had no homestead in the lands in question, but that he has been advised differently since.

Without determining whether the first or last advice is right, it seems to us that the former judgment can not be disturbed on the allegations of the petition. The most careful attorneys and the most learned judges often make mistakes, by which the rights of litigants are determined erroneously in the light of further research. Indeed in this very case, learned counsel for the appellees, while insisting on the finalty of the judgment determining the rights of the parties, are contending that the principles of law announced by this court in Ellis v. Davis, 90 Ky., 183, by which the appellant would seem to be entitled to a homestead in his wife's land, are in conflict with other decisions of this court. And were we to so adjudge, would it be contended that the rights of litigants which have been adjusted in and out of court, in virtue of such erroneous adjudication, should become unsettled and open to further judicial action?

The Code of Practice provides the grounds upon which a judgment may be vacated, and among them it is not to be found that of erroneous advice given by counsel and accepted by the client. Such a practice would result in endless confusion and most disastrous results.

The appeals are heard together and the judgments are affirmed.

GOODLOE v. FOX, &c.

(Filed February 15, 1895.)

1. Constitutional law—Incompatibility of offices—A person holding the office of master commissioner of a circuit court may also hold the office of city attorney of a municipal corporation, the two offices not being incompatible under section 165 of the Constitution. The master commissioner of a circuit court is not a "State officer or deputy officer" within the meaning of section 165 of the Constitution.

2. Same—A person holding one office is not rendered ineligible to another office by the provisions of the Constitution; but the acceptance of a second office, incompatible with the one already held, operates as a vacation of the office already held.

3. Same—Mode of electing municipal officers—All municipal officers elected before the November election, 1893, and before the legislature had provided a charter for the municipality in accordance with the Constitution of 1891, should have been elected at the time and in the mode provided in the charter of the municipality existing at the time of the adoption of that Constitution.

Therefore, an election in April, 1893, by secret ballot, of a city attorney by the council of Danville was valid, said election being authorized by its old charter, and no charter for government of cities of the class to which it belonged having been enacted by the general assembly at the time.

4. Municipal corporations—Time of election of city attorney—A city charter provided that councilmen for the town should be elected annually on the first Saturday in April, and that on the Saturday following their election the councilmen elected, after qualifying, should meet and organize by electing one of their number mayor. At this same meeting, or at some adjourned meeting, if they saw fit to postpone same, they were annually to elect for a term of one year a city attorney, "who may be sworn into office on the third Saturday in April in each year." By a subsequent amendment the term of office of councilmen was increased to two years. Held—The city council had a right to elect for a term of one year a city attorney at a meeting held on the 4th of April in the year during which they were not elected

themselves. The charter not fixing any day for said election in such year, the council were authorized to elect at a meeting held in April prior to the third Saturday of the month, when the term of office of city attorney commenced.

Robert J. Breckinridge, W. O. Goodloe and W. G. Welch for appellant.

Robert Harding and John W. Yerkes for appellees.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Paynter.

On the 4th of April, 1893, the appellee, Chas. C. Fox, was elected, by the board of council of the town of Danville, Ky., city attorney for the ensuing year, and was to qualify as such attorney on the third Saturday in that month.

The appellant, W. O. Goodloe, had, on the 9th of April, 1892, been elected city attorney for the town of Danville for the period of one year.

By the provisions of the charter of the town one year is the length of the term of the office of city attorney, but he holds it until his successor is elected and qualified.

This action is brought by the appellant to enjoin and restrain appellee, Fox, from taking the oath of office and entering upon its duties.

In the petition it is alleged, first, that appellee was not eligible to the office of city attorney, because he was then master commissioner of the Boyle Circuit Court; second, that the election at which appellee was chosen city attorney was invalid, because it was not held on the day fixed by the charter and amendments thereto for holding such election; third, that the voting by the board of council was by secret ballot, when it should have been viva voce.

A demurrer was sustained to the petition as amended, and appellant, failing to plead further, his petition was dismissed. To review that action of the court this appeal is prosecuted.

Section 165, Constitution, provides that no person shall, at the same time, be a State officer or a deputy officer, or a member of the general assembly, and an officer of any city or town, etc. The office of master commissioner is not one that comes within the inhibition of the Constitution. The master commissioner is not a State officer or a deputy State officer. One who holds that position is not ineligible to an election to or to hold the office of city attorney for the town of Danville.

Had appellee, Fox, been ineligible to hold the office of city attorney while acting as master commissioner, then, under section 5, chapter 81, General Statutes, which reads as follows, "the acceptance by one in office of another office or employment incompatible with the one he holds, operates to vacate the first," he would have vacated the office of master commissioner by accepting that of city attorney. This we deem a sufficient answer to the question raised that Fox could not accept the office of city attorney while holding the office of master commissioner.

To determine the question of the validity of the election on the 4th of April, involves the construction of the charter of the town of Danville and the amendments thereto.

Under the third section of the act, approved February 12, 1890, Acts 1889-90, volume 1, pages 321-332, amendatory of the various acts governing the town of Danville, the election of councilmen

for the town were to be from the wards on the first Saturday in April. On the Saturday following their election, after taking the oath of office, they are to meet and organize by electing one of their number mayor of the town.

Under this act the councilmen hold their office twelve months, which necessitated an annual election. By an act amendatory of the act supra, approved February 17, 1890, Acts 1889-90, page 759, the term of the office of councilmen is increased to two years. The act did not change the time of their election or the time when they should meet and organize.

By the terms of section 4 of the act of February 12, 1890, the board of council, at their first meeting after having elected a mayor, or at some adjourned meeting, if they saw fit to postpone the same, shall annually elect for a term of one year a city attorney, who may be sworn into office the third Saturday in April in each year.

The time when the councilmen are to be elected is certain. When the board of council are to meet and organize by electing a mayor is equally definite and certain.

The city attorney "may be sworn into office the third Saturday in April of each year," but the terms of the act does not make it imperative that he should be inducted into office on that day. Instead of a biennial election, as in the case of councilmen, city attorney is to be elected annually. The council elected in 1892 were to elect a city attorney at the first meeting after the mayor was elected or at some adjourned meeting, which left uncertain and indefinite the day for his election.

The organization of the board of council, which was elected in 1892, was complete when they elected the mayor. Then they had no organization to perfect in 1893, as the councilman who had been elected mayor held his office two years, as no organization of the board of council was to be perfected in 1893, no day was named upon which, or adjourned meeting provided for at which, the election should take place in the odd year. As the city attorney could take the oath of office on the third Saturday in April, it is reasonable to infer that the election should take place in April in the odd years on a day anterior to the third Saturday in that month.

The purpose of the act was to limit the term of the city attorney to one year, and that the council should not hold the election to fill that office until it was fully organized, by having a mayor to preside over their deliberations.

If the act had provided that the city attorney should be elected on a certain day in April, for instance, the first Saturday, and annually thereafter, then we would hold that the council should have held the election on that day.

In the absence of such a provision of the charter we are constrained to hold the election of the appellee, Fox, on the 4th of April, was valid. It is not claimed that it was not a free and fair election, or that a majority of the board did not participate in it. It is not claimed that Fox was attempting to interfere with the appellant in the discharge of his duties as city attorney during the term for which he had been elected. The complaint was that he would take the oath of office on the third Saturday in April, 1893, and enter upon the duties of the office of city attorney, which we think he had the right to do.

It is insisted that the election of the appellee, Fox, was invalid because the voting was by secret ballot and not viva voce. There is nothing in the charter which requires that the voting shall be viva voce or prescribing how the voting shall be done. The con-

tention is that section 147 of the Constitution was applicable to this election, and the election being by persons in their representative capacity, the voting should have been viva voce.

Section 166 of the Constitution provides that "all acts of incorporation of cities and towns heretofore granted, and all amendments thereto, except as provided in section 167, shall continue in force under this Constitution, * * * but not longer than four years from and after the first day of January, 1891, within which time the general assembly shall provide by general laws for the government of towns and cities and the officers and courts thereof as provided in this Constitution."

Section 167 provides that "all city and town officers in this State shall be elected or appointed as provided in the charter of each respective town and city, until the general election in November, 1893, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire." * * *

When the election of appellee occurred the charter and amendments were in force and were continued in force by the express terms of section 166, until the general assembly should provide by general laws for the government of towns and cities. By section 167 the officers of all cities and towns were to be elected or appointed as provided in the charter of such respective town and city, until the general election in November, 1893, and until their successors are elected and qualified.

The general assembly had not, when this election took place, passed general laws for the government of towns and cities. At the time of this election the general assembly had not passed any law relating to the election or appointment of officers of towns and cities, and could not pass any law to go into operation before the November election of 1893, that would change the method provided in the charters of towns and cities and amendments thereto of electing or appointing officers of cities and towns. This election was, and correctly so, regulated by the charter and its amendments of the town of Danville, and it was not necessary to make appellee's election to the office of city attorney valid that the voting should be viva voce.

Judgment affirmed.

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KENTUCKY COURT OF APPEALS.

IRVIN v. IRVIN.

(Filed December 8, 1894.)

1. Divorce—Evidence—In this action by the wife for a divorce evidence concerning the standing of the husband, whether good or bad, in his profession, and concerning the husband's treatment of his first wife, is incompetent.

2. The discretion conferred upon the chancellor to grant a divorce from bed and board for any of the causes for which a divorce a vinculo may be granted, and "for such other cause as the court in its discretion may deem sufficient," is not an arbitrary or unlimited one, but is to be exercised only where the facts show that a separation of the parties is demanded for the interest and protection of the life, health or happiness of the party complaining, by reason of the conduct and treatment of the party in fault.

3. Same—Custody of infant children—The want of sympathy and affection on the part of the husband for the wife, and the introduction into the case by him of evidence concerning her which, if true, would lessen her claim to the love and respect of her friends, presented a state of facts authorizing the granting of a divorce a mensa to her, and the awarding of the custody of the two children of the marriage to her.

4. Same—Where a separation from bed and board is ordered the chancellor will look to the comfort and happiness of the children of the parties, and award the custody of them to the parent whose time and attention can best be devoted to their care and welfare; and, as a general rule, their custody should be given to the mother when her ability and fitness to care for them is unquestioned.

In this case it was proper to commit the children to the care of the mother, but the father should be allowed to see them once a week.

Humphrey & Davie and Dodd & Dodd for appellant.

Abbott & Rutlege and O'Neal, Phelps, Pryor & Selligman for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Pryor.

This suit in equity was instituted in the court below by Carrie B. Irvin against her husband, Joseph W. Irvin, in which she

sought an absolute divorce, and was granted by the judgment a divorce only from bed and board, and given the custody of her two children, with certain allowances made to her in the way of alimony and the payment of the fees of counsel. The husband takes the original appeal, and the wife asks a cross appeal, and insists that the prayer of her petition should have been granted.

This is a voluminous record, made up mostly of irrelevant and incompetent testimony for which both parties seem to be responsible, and in which no light is thrown upon the history of their married life. Neither the treatment by the appellant of his first wife and the sad ending of her existence, for which he seems to have been in nowise responsible, nor the standing, whether good or bad, of the appellant in the profession to which he belongs, can be considered in the determination of this case, and the record should not have been encumbered by such collateral issues.

These parties were married February 22, 1882, and the precise time at which their domestic troubles began the testimony fails to disclose, but it is manifest that soon after their removal from Evansville to the city of Louisville, which was in the month of April of the year 1884, the wife, who, prior to that time, always evidenced a cheerful and contended disposition, became melancholy and unhappy in her married relation, and whether from a nervous and anxious condition, often the result of a married life, or from the indifference of her husband to her comfort and happiness, is one of the the questions of fact involved.

The testimonials to the refined and pure character of Mrs. Irvin from those who were her intimate friends conduce strongly to show that the statements of the servants employed about the house of the defendant as to acts and confessions on the part of the wife, tending, if true, to degrade her in the estimation of her friends, are entitled to but little credence, and when the husband in his defense resorts to the evidence of domestics, who, to say the least, are not of the most reputable character, for the purpose of showing on the part of the wife a course of conduct towards both himself and children at total variance with her whole life, it creates at least a suspicion that her wrecked condition, physically and mentally, is to be attributed to a want of affection on the part of her husband.

That the plaintiff was a devoted wife and mother this record abundantly shows, and even from the testimony of the principal witnesses for the defense it is evident that if the husband, who must have known the physical condition of the wife, had exhibited to her some evidence of his affection this unfortunate litigation would never have arisen.

In the course of their married life the plaintiff became enceinte seven or eight times during a period of nine years, and her nervous system was in such a condition as required, on the part of the husband, the most careful nursing and tender care. She was sacrificing her health and even her life in giving evidence of her affection for him, and the indifference on his part as to her condition, and an absence of consideration for her happiness, was calculated not only to aggravate her normal condition, but made her married life anything but pleasant.

There never was any actual violence committed by the husband upon the wife nor any threats of violence made, but such cruelty may be inflicted on the wife by exhibitions of a want of affection and a disregard of the marital relations as, in its results or effect on the wife, would exceed in punishment any blow that might be inflicted upon her person.

It must be conceded that the defendant in this case is devoted to his children, and we are not satisfied the evidence before us presents such a state of case as would authorize a judgment a vinculo matrimonii, and thus destroy all hope of reconciliation between these parties, and the statute designed to meet such a case as the one before us provides that "a judgment from bed and board may also be rendered for any of the causes which allow a divorce, or for such other cause as the court in its discretion may deem sufficient."

This discretion is neither arbritrary nor unlimited, but must arise from a state of fact showing that a separation is demanded for the interest and protection of the life, health or happiness of the party complaining, on account of the conduct and treatment of the one in default.

The wife not being entitled to a divorce a vinculo, it is proper to inquire upon what ground the separation from bed and board has been granted, for if such a judgment is not authorized it will affect the question as to which of the two is entitled to the custody of the infant children.

In the case of Evans v. Evans, 14 Ky. Law Rep., 628, it was held by this court that no appeal could be granted from a judgment of divorce, whether absolute in its character or from bed and board, and if this opinion is adhered to the appeal of the husband can only present the question as to the custody of the children; but if the views of counsel are to prevail and the right of appeal exists, it is plain, from the facts before us, the judgment for the wife should be sustained.

The coldness and indifference on the part of the appellant towards his wife for several years succeeding the separation was such as to render her life almost intolerable, and while his conduct can not be said to be inhuman, it bordered on a degree of cruelty that must have tended to destroy her peace of mind and rendered her an unhappy woman.

It is not necessary to allude to the particular facts or acts evidencing the want of sympathy and solicitude upon the part of the defendant for his wife in her unfortunate condition, but it may be said that when the defendant brought into this case testimony that, if true, must lessen the wife's claim to the respect and love of her friends, it strengthened her claims for relief, and demanded at the hands of the chancellor such a judgment as was rendered below. He has confided the custody of the children to their mother, who, above all others, should be permitted to care for her own offspring, when her ability and fitness to do so is unquestioned, and this part of the judgment will not be disturbed.

The absolute dominion on the part of the husband over the person of the wife, and his right to custody of the children when separation takes place, recognized by the rule of the common law, is neither sanctioned nor approved by the enlightened jurisprudence of the present day; and the chancellor, where a separation has been ordered, will look to the comfort and happiness of the children, and confide their keeping to that parent whose time and attention can best be devoted to their care and welfare. This the chancellor has done, and retained the case on the docket that he may make such changes as to the care of the children as circumstances require.

The father and the children should be permitted to see each other once a week, and as they are advancing in years he should be consulted as to their education, and in reference to any matter of moment affecting their interests.

The judgment is affirmed on the original and cross appeal as to all the questions made.

Judge Pryor delivered the following response to a petition for rehearing:

In the petition for rehearing there is no reason assigned or argument made for a reversal that was not fully considered on the original hearing.

In the opinion below the appellant was permitted to see his children certain hours on each day. This we thought not only inconvenient to both parties, but unnecessary, and supposed the chancellor below would fix the time and place where, at least once a week, the appellant could see his children, and certainly not at the house of the wife's father.

The petition now asks this court to give the custody of the son to the appellant. This we are not inclined to do. The nervous condition of the wife, augmented in its effect upon her by the treatment of the husband, is such that a separation from the child might produce disastrous results. The boy is quite young, and from the proof in this record is being well taken care of, and while we recognize, as counsel suggests, that the husband has feeling as well as the wife, we know the affection of the mother for her offspring is more intense than that of the father, and we are not disposed to sunder ties that would but add to the misfortune of the wife, whose condition, to a great extent, has been caused by the want of affection on the part of the appellant.

The chancellor below has retained the full power and control over the judgment in this case as to the custody of the children and their welfare, and if the son is old enough to go to school, and the father desires it, he ought to be sent to school.

Petition overruled.

JOHNSON v. JOHNSON.

(Filed January 17, 1895.)

Divorce—Restitution of property acquired by reason of the marriage—A judgment granting a husband a divorce a vinculo which contained a general order for a restoration of any property not disposed of at the commencement of the action, which either party had obtained directly or indirectly from or through the other during the marriage, in consideration or by reason thereof, did restore to the husband real or personal property that had been settled upon the wife, in lieu of alimony, by an order of court in a previous suit between the husband and wife wherein the wife was granted a divorce a mensa.

O'Neal, Phelps, Pryor & Selligman for appellant.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

In a former action between the appellant and the appellee there was a judgment rendered in October, 1885, granting the appellant a divorce a mensa et thoro from the appellee, and in lieu of alimony awarding her certain personal property and household goods then in her possession, and also settling on her for life a house and lot situated on Lampton street, in Louisville, Ky., theretofore belonging to her husband. On appeal to this court that judgment was affirmed.

Thereafter, in 1887, the husband brought a suit for absolute divorce, and obtained the relief sought in 1891. This latter judgment provided in general terms for a restitution of any property not

disposed of at the commencement of the action, which either party may have obtained directly or indirectly from or through the other during marriage in consideration or by reason thereof. Thereupon the appellee instituted this action against the appellant, seeking to recover the personal property which had been given her under the former judgment, and to have restored to him the possession of the house and lot formerly adjudged to the wife for life. Judgment to that effect was rendered by the chancellor, and the wife has appealed. We are of opinion that the property theretofore adjudged to the wife in the judgment of 1885 is unaffected by the general and fomal order of restitution in the judgment of 1891. The law (section 425. Civil Code) povides that every judgment for a divorce from the bond of matrimony shall contain such an order of restitution, but the order is merely a formal one, and is not intended to settle any controversy concerning the title of property, certainly not to set aside a former final judgment of the court between the divorced parties. That judgment finally disposed of the property in controversy before the commencement of the action for divorce brought by the husband in 1891. The wife did not obtain the property in consideration or by reason of the marriage.

In Flood v. Flood, 5 Bush, 167, the husband conveyed to certain trustees for the use of his wife a tract of land in lieu of alimony pending divorce proceedings, in which the wife was granted, as in this case, a separation from bed and board. The husband subsequently obtained, in an action therefor, an absolute divorce on the ground of the judgment. His petition thereafter filed to have the trust deed set aside was held to have been properly dismissed, the property not having been received in consideration of or by reason of marriage.

So in Williams v. Gooch, 3 Met., 486, it was held that this order of restoration was a formal one, and not designed to settle any controversy with reference to any specific property between the divorced parties. To the same effect is the case of Bennett v. Bennett, 16 Ky. Law Rep., 72.

The judgment restoring the property to the appellee is reversed, with directions to dismiss the petition.

GARR, &c. v. ELBLE, &c.

(Filed January 30, 1895—Not to be reported.)

1. Devise—Vested remainder—A devise of land to one of testator's grandchildren for life, remainder to his issue and if he dies without issue, remainder over to other, creates a vested remainder in the children of the grandchild, subject to be defeated by their death, without leaving issue before the death of the life tenant, their father.

2. Same—Power of chancellor to order sale of land under terms of will—Where a will authorizes the chancellor in a certain contingency to decree a sale of land devised to one for life, remainder to others, the chancellor has the authority to order the sale where the contingencies mentioned in the will arise, and the sale being one made under the terms of the will, the proceedings need not conform to provision of the Code providing for sales of estates in remainder, etc.

3. The appearance of an infant defendant under the age of fourteen years by his statutory guardian, who filed an answer for him, in the suit to sell land in which he had a contingent remainder interest, brought him before the court, so as to make the order of sale conclusive as to him.

L. L. Parks for appellants.

T. L. Burnett and Lane & Burnett for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This is a familiar record, and presents for the third time the right of the devisees and the power of the chancellor to sell the land held under the will of David Blankenbaker.

The devisor owned a tract of land adjoining the city of Louisville that, at the date of this will, was unproductive, but, anticipating the growth of that city and an extension of its boundary, by a provision of his will took from his immediate devisees the power of sale.

The devise of the land was to his wife for life, with the direction that the land should be divided at her death in a particular mode, that seems to have been followed, and that portion of it, composed of the western part of the parcel on the south side of Broadway, he devised to his seven grandchildren for life, with remainder over.

By proper proceedings in the court below a petition in severalty was had among the devisees, and in that division there was conveyed to Silas Blankenbaker, a grandchild, for his natural life, a small parcel of this land, remainder in fee to his issue; and if he died without leaving issue then the one-half of the remainder in fee to the surviving grandchildren, etc.—in other words, the conveyance to Silas followed the language of the will. The devise was to his grandchildren for life, remainder to their issue, and if dying without issue the one's portion thus dying to pass (one-half) to the surviving grandchildren or their issue, and the other half to the two sons of the testator. It is plain, we think, there was a vested estate in the children of the grandchildren by the terms of this will, if any living, subject to be divested in the event they were dead without children at the death of the life tenant.

Silas, however, had no children, and was somewhat advanced in years when he instituted this action to have the parcel of eight acres allotted him sold under the will of his grandfather. To this petition he made the two sons of the testator defendants, and also made all the grandchildren, or all those who would have taken and owned the estate if his life had then terminated, parties defendants, and in this way the owner of the life estate, and all those who would have taken the remainder interest were before the court. The will prohibited the grandchildren from selling their life estate, and also their heirs or children, until they arrived at twenty-one years of age, but provided "should the taxes and other expenses or liabilities growing immediately out of said land at any time amount to a greater sum than can be realized from the cultivation or rent of the land, then the land may be sold by decree of the chancery court or other court of competent jurisdiction, upon its being made to appear that the expenses arising from the land were more than the income derived from it." The proceeds of sale, after deducting the charge upon it, to be invested and held in the manner provided by the will.

In this action the eight acres of land allotted to Silas were sold, and the appellee, Elble, became the purchaser. The facts showing a want of income to defray or discharge the burden then existing on the land were made to appear, and the necessity for

the sale as contemplated by the testator, so there can be no reason for disturbing the judgment if the proper parties were before the court. The land sold for $1,200, and $200 of that sum was applied to the charge upon the land, and the remaining sum invested in realty, to be held in the same manner as the land sold.

It is insisted that this question has heretofore been decided upon like facts adverse to the appellee in an action in equity by some of the beneficiaries for a sale of a part of this land. A casual reading of the opinion in that case will show that this court was not satisfied the state of case existed for a sale as required by the devisor, and for that reason denied the right to a disposition of the land in opposition to the will of the testator.

It is also contended that this proceeding should have been under the Code providing for the sale of estates in remainder, etc., and for that reason the judgment is void. This was unnecessary, and while the chancellor could have decreed a sale under the Code if, in addition to the facts necessary to be adjudged in such cases, it had been further alleged that the facts existed upon which the testator had conferred the right to sell, yet this is an independent action, calling on the chancellor to sell by reason alone of the provisions of the will; in fact to execute the wishes of the testator and release the life tenant from liability for taxes and encumbrances on this land when producing no income, or not enough to discharge such lien.

It is said that Edward Garr, an infant under the age of fourteen years, was not before the court. It appears that he had a statutory guardian, and that guardian entered his appearance and filed an answer. (Shelby v. Harrison, 84 Ky., 144.)

It results, therefore, that all the necessary parties being before the court, and the chancellor having the power to sell under the provisions of the will of Blankenbaker, the purchaser acquired the title, and the judgment is affirmed.

AMERICAN WIRE NAIL CO. v. GEDGE.

(Filed February 1, 1895.)

1. Corporations—Contracts—Stockholders—An understanding between the stockholders of a corporation, arrived at in informal meetings when its affairs were being discussed, that a bonus received by it in consideration of the removal of its plant to a certain town was to be declared as a dividend on the stock then existing, which understanding was never ratified or approved at any directors' meeting, is not obligatory upon the corporation, especially when the financial condition of the corporation was such that it could not declare a dividend of any character without impairing its capital.

2. Same—In this case the stockholder, who is seeking to enforce against the corporation such understanding, sold his stock absolutely before any dividends of any character were declared, and without reserving any interest in any dividends, and, therefore, he must be held to have parted with every interest in the corporation, including his interest in dividends.

J. W. Bryan, Thompson, Richards & Park and Richard P. Ernst for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, Burton H. Gedge, was at one time the holder and owner of 275 shares of stock in a corporation known as the American Wire Nail Co. He sold this stock on February 6, 1891, to W. B. Thomas, C. H. Garvey, C. P. Garvey and E. J. Buffington, and these parties sold or transferred it to Landon Thomas.

After the sale of this stock the appellee instituted this action in equity in the Kenton Circuit Court against the American Wire Nail Co., uniting with that corporation the parties to whom he sold his stock and Landon Thomas as defendants, claiming the right to certain earned dividends on his stock that had never been paid him.

His claim is based on the following state of facts: The chief office and manufacturing establishment of the corporation (defendant) was at one time located in the city of Covington, and in the year 1888 a proposition was made to the corporation by the board of trade of Anderson, in the State of Indiana, to remove its plant to that place, and as an inducement agreed to give the corporation ten acres of ground, the use of a natural gas well, and a part of the proceeds of the sale of numerous town lots. This proposition was accepted, and the plant removed from Covington to Anderson.

This bonus was estimated in value at $20,000 or $25,000, and the stockholders in the corporation at the time the plant was removed contemplated declaring the value of this bonus as earned dividends on the then existing stock, so as that no future stockholders, or others than the stock in existence at that time, should enjoy the benefits to be derived from the acceptance of the liberal offer made by the Anderson Board of Trade.

It is alleged in his petition that at the time plaintiff sold his stock this dividend or indebtedness to him by the corporation was not included, and he insists that he is entitled to his pro rata share of the value of this bonus with the other shareholders, whose stock existed when the donation was made, and asks for judgment accordingly.

The defense is that no dividend had been earned or declared by the corporation, and that its financial condition was such as that no dividend could have been declared, and that instead of making its plant at Anderson or its value so much earned dividends, either in money or stock, its constant effort was to raise money to prevent a financial wreck; that no such agreement as alleged had been entered into or consummated.

It is further claimed that when the sale of the appellee's stock was made all the right, title and interest in this plant or the bonus passed to the purchasers. The writing evidencing the sale reads:

"February 6, 1891.

"B. H. Gedge hereby agrees to sell and W. B. Thomas, C. H. Garvey, C. P. Garvey and E. J. Buffington, jointly and severally, agree to buy B. H. Gedge's 275 shares of capital stock of the American Wire Nail Co., of Covington, Ky., at its par vale of $100 per share, to be paid for as follows: $2,500 cash, on or before February 16, 1891, the balance to be paid in about weekly cash payments, the entire purchase money to be paid on or before April 1, 1891."

This writing was signed by all the parties, and when executed there was no reservation of any interest on the part of the original stockholder to the ground upon which the plant was located, or to any part of the bonus or any claim asserted by the appellee, directly or indirectly, that would indicate a purpose on his part to share in that which, from the proof in this case, was neither a cash nor a stock dividend.

That the stockholders, or some of them at least and perhaps all, sometime after this bonus had been accepted expressed an intention to appropriate its benefits to the shares then in existence is no doubt true, but that intention was never carried into effect; but, on the contrary, the subsequent financial troubles of the corporation afforded a strong reason for withholding any action that would perfect this original purpose of the stockholders.

It does appear that one Garvey, connected in some way with the business, after an engine had been purchased for the rod mill and proved to be unfit for use, and on account of which the company sustained considerable loss, was authorized to negotiate with one of the defendants, W. B. Thomas, and induce him to take new stock, with the reservation on the part of the then stockholders of $20,000 as the value of this bonus, giving to this extent the old stock preference over the new stock. Thomas, under his arrangement, took $30,000 of the stock at par, and we may assume from the testimony that he became a stockholder under that arrangement.

After the money derived from the sale of stock to Thomas had been expended in repairs and the purchase of a new engine, the works were again put in full operation, but in a short time the mill was destroyed by fire, and this loss necessitated additional capital or a cessation of the corporate business.

The stockholders, after unsuccessful efforts to raise money, again applied to Thomas for relief, and it was then understood by the stockholders, or several of them, that in securing more money or selling more stock the distribution of the bonus between the original stockholders should be abandoned, if necessary, in order to obtain the requisite means for conducting the business. Landon Thomas, a brother of the defendant, W. B. Thomas, the latter being inexperienced in business, was the one with whom the trade was made, and $25,000 additional stock taken, with the understanding his brother was to share in the bonus as well as all other assets of the company.

We think it manifest from the record before us that the stockholders, or several of them at least when this appeal was made to Thomas through their agent, did so with the agreement that his stock was to participate in all the assets of the company, and equally certain that the negotiations between Garvey, who was representing the corporation, and Landon Thomas, the adviser of his brother, led the latter to believe that all of his stock was to share in the bonus, and no preference given.

If this was the settlement of a mere partnership upon the character of proof here, the incoming partner advancing as much as $55,000 to save the firm from financial ruin, and investing his money in a business that proved for the time so discouraging, the chancellor would not fail to recognize the claim of Thomas to a perfect equality in the assets of the corporation with the original stockholders. No rational business man would invest his money with a view of relieving others in pecuniary trouble, and at the same time agree that his own stock should be of less value than the stock of those calling on him for aid, and, to use the language of a witness in this case, it would be unjust to make such a distinction.

The whole of this case, however, as to the division of the bonus and the taking of the stock by Thomas is based upon an understanding the parties had that never constituted an agreement that could be enforced as to this bonus. There was not a time from the acceptance of the Anderson proposition the stockholders

would have agreed to have the board of directors declare the value of this bonus a stock or cash dividend, and this the entire proof shows.

There was no surplus fund of the corporation to be divided, and it is apparent that such an agreement, if evidenced by the board of directors making such an order, would have impaired the capital of the company and lessened the chances for obtaining new stock or additional loans. If the informal suggestions or understandings made between stockholders of a corporation as to what should be done is to create a liability on the corporation, then the existence of a board of directors could only be regarded as a matter of convenience, and not, as is well settled, for the purpose of spreading on the records of their meeting that which is to bind the corporation or evidence its action.

Here stockholders undertake to declare dividend when none exists, and it is evident that at no time, if they had such power, would any such dividend have been declared.

From the time this plant was removed, in the year 1888, up to the sale by the appellee of his stock on the 6th of February, at no meeting of the board of directors was it contended or intimated that such an order as declaring this dividend in stock should be made, but in the meantime it was, by resolution, declared "that it was not expedient to declare a dividend," and while this resolution had no reference to this bonus, there was entered on the records of the corporation only a short time before the sale to these defendants a resolution reciting "that large sums of money had been expended far in excess of the company's earnings," showing the reason why the stockholders had declined to convert, we might say, the plant itself into stock for the benefit of the original stockholders.

Nothing was said to Thomas after he had taken the last stock to the effect that a part of the company's property was not to be regarded as assets, nor was it intimated by appellee when he sold that the corporation was in any manner indebted to him.

The first stock taken by Thomas was under the suggestion that the corporation would do what was right by him; and in taking the last stock it was certainly his brother's understanding, from the agent sent by the other stockholders to make the negotiation, that this bonus belonged to all the stock—old and new alike.

We have been considering the claim of the appellee in this case as if the stockholders at informal meetings could regulate and control the affairs of the corporation by declaring dividends and determining what shall be dividends and the mode of disposing of its stock without regard to the action of the president and directors, who represent the body-corporate.

The individual stockholders, says Mr. Marowetz in his work on Corporations, as such have no power to represent the body-corporate, nor in any manner to interfere in its management. (Marowetz on Private Corporations, page 388.)

These agents are elected by the stockholders, and when acting within the scope of their authority can not be interfered with, except to be removed by the stockholders, when an election is held for that purpose. If dividends are declared, and the agents of the corporation refuse to pay them to the stockholder, equity will interfere and require payment, for when declared they belong to the stockholder; but in this case the stockholders are attempting to declare dividends in the discussion of matters pertaining to the corporation at informal meetings, without reference to the preservation of the capital stock, and to convert into earnings or profits this Anderson bonus without any corporate action

whatever, and when the testimony shows that at no time could the consent of all the stockholders have been obtained, their entire action exemplifying the wisdom of the rule that "the board of directors can only bind the company when acting as a body, and no understanding or agreement among individual members of the board is binding on the corporation." (Beach on Private Corporations, section 224.)

The appellee was an active participant in the management of the corporation from the early part of 1889 up to the date of the sale of his stock to the appellants on February 6, 1891, and while corporate meetings were held of a business character from time to time, no mention seems to have been made of the disposition of this bonus, for the reason, doubtless, of the abandonment of such a purpose on the part of the board of directors, caused by the financial condition of the corporation.

The sale by the plaintiff vested the purchaser with all his interests in the enterprise. There was then no dividend declared of any kind or description, and we perceive no reason for granting the relief sought.

Judgment is, therefore, reversed, with directions to dismiss the petition.

LOUISVILLE & NASHVILLE R. R. CO. v. GREER.

(Filed February 7, 1895—Not to be reported.)

1. The instruction concerning willful negligence ought not to have been given in this action by appellee to recover damages for personal injuries sustained by him, while in the employ of appellant, through its gross neglect; but such instruction was not prejudicial to appellant, and, manifestly, had no effect with the jury to appellant's injury.

2. Instructions concerning right to recover for damages sustained by neglect of a railroad—The instructions in this case concerning the right of an employe to recover compensatory and punitive damages from a railway company for injuries received through alleged gross neglect, and concerning the measure of damages, and contributory neglect and the duty of the railroad to furnish its employes safe appliances for work, were unusually clear and free from error, and are approved.

3. Same—An instruction authorizing the jury to find compensatory damages for plaintiff, and in addition thereto "punitive damages to any amount in their discretion, not exceeding $25,000 in all," can not be construed to authorize a finding of $5,000 punitive damages, and then, in addition to this, such sum as the jury found proper.

4. Punitive damages are recoverable by an employe of a railroad who has sustained injuries through the gross neglect of the railroad company; and the failure of the company to use the diligence in the management and care of its road and trains that careless and inattentive persons usually exercise in the prosecution of the same, or business of like character, is gross neglect.

H. W. Bruce, W. J. Lisle and Thompson & McChord for appellant.

Hugh P. Cooper and Thomas H. Hines for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The facts of this case are reported in Greer v. L. & N. R. R. Co., 94 Ky., 169 [14 Ky. Law Rep., 476], and need not be again recited. Upon a return of the case a trial again resulted in a

verdict for Greer, this time for $7,500, and from the judgment thereon the company has appealed. The instructions of the court were as follows:

1st. The jury are instructed that plaintiff, when he engaged in the employment of defendant as brakeman, took the ordinary risk incident to his business; but if they believe from a preponderance of the evidence that the injury to plaintiff was occasioned by the gross or willful negligence of defendant's agents or employes, superior in authority to plaintiff, either in operating its train or in failing to keep its track in the switch yard and coupling apparatus in a reasonable safe condition, then the law is for plaintiff, and the jury should so find.

2d. If the jury find for plaintiff, they shall award such damages that the proof shows he has sustained, and in estimating the amount of damages they should take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury received, and they may, in addition to such compensatory damages, give punitive damages to any amount in their discretion not exceeding $25,000 in all.

3d. Gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to the plaintiff on the occasion under consideration.

4th. Willful negligence is the intentional failure to perform a known or manifest duty in which the public has an interest, or which was important to the plaintiff on the occasion complained of in preventing or avoiding the injury to himself.

At the defendant's instance it also gave the following instructions:

A. Defendant was required by law to keep its train and coupling pin and track where the injuries to plaintiff occurred in a reasonable safe condition for the use of its employes, using the same in a reasonable prudent manner, and if said train and coupling pin and track were in such a reasonable safe condition, and plaintiff received his injuries by reason of the condition of said train and coupling pin and track, the jury should find for defendant.

C. If the jury believe from the evidence that the plaintiff, without being required to do so by the duties of his position, or by the orders of those superior to him in controlling the movements of the train, exposed his body between the cars when they were in motion to uncouple them, and his ankle was thereby crushed, the jury should find for defendant unless they further believe from the evidence that those operating the train, superior in authority to plaintiff, knew he was exposing himself to injury by going between the cars when in motion, and failed to take means to spare him from injury.

D. The jury are instructed that on entering defendant's service as brakeman plaintiff assumed the risks ordinarily incident to the prosecution of his business, and this includes risks arising from the negligent acts of those in the same grade of service with plaintiff, and if the jury believe from the evidence that the injuries to plaintiff resulted from the risks ordinarily incident to his business, or from the negligent acts or omissions of his fellow brakemen, the jury should find for defendant.

E. If the plaintiff, by the use of ordinary care, could have prevented the injury, the jury should find for defendant.

F. If the jury believe said train or coupling pin or track where the accident occurred was not in a reasonable safe condition, yet if they believe plaintiff knew of their condition and continued without objection to work with and use them, and his injuries therein resulted to him, the jury should find for defendant.

We have thus quoted the instructions in full because they seem to us to be unusually well put and free from error. It is true that the question of willful negligence ought not to have been submitted because such degree of negligence was not required to exist in order for plaintiff to recover. It was not prejudicial to the appellant, however, and manifestly had no effect with the jury to the hurt of the appellant.

It is insisted that under instruction No. 2 the jury were authorized to find as much as $25,000 for punitive damages, and then in addition to this any sum whatever, whether less or more than $25,000. We think it unreasonable to so construe the instruction, or that the jury so construed it. The damages were not to exceed "$25,000 in all."

The contention that this is not a case for punitive damages may be answered in the language of this court in Maysville & Lexington R. R. Co. v. Herrick, 13 Bush, 127, where it was said: "This is a common law proceeding to recover damages for a personal injury not resulting in death, and punitive damages were recoverable if the proof showed that the company failed to use such diligence in keeping its railroad bridge in repair as careless and inattentive persons usually exercise in the prosecution of the same, or of business of like character. The absence of slight care in the management of a railroad train or in keeping a railroad track in repair is gross negligence," etc.

The appellant also complains that instruction "B" was not given, which is as follows: "If the risk and danger of going between the cars was apparent, open and visible to plaintiff when he went in to do the uncoupling of the cars, the jury should find for defendant unless the jury believe that those superior to plaintiff in operating the train knew of the plaintiff's peril and danger, and negligently failed to take means to prevent the injuries to plaintiff."

This instruction seems to leave out of consideration the dangerous condition of the track, and the defect in the coupling pin, as well as the careless handling of the train, and appears to be embraced, so far as it correctly states the law, in instructions C D and E, given at the defendant's instance.

Judgment affirmed.

WATSON LODGE NO. 32, I. O. O. F. v. DRAKE, &c.

(Filed February 8, 1895—Not to be reported.)

Injury to adjoining property by excavation—Peremptory instruction—The evidence showed that appellant's house had been injured by the excavation made by some one on appellees' lot, in pursuance of appellees' desire and determination to erect a building upon their property. Whether the injury was caused by a negligent and careless making of such excavations was for the jury to determine. Since there was some evidence conducing to show that the appellees, the owners of the property, controlled and directed the manner in which the workmen and contractors did the work, it was error to give a peremptory instruction to find for them because, if the work was done under their direction carelessly and negligently, they are liable for the damages thereby done to appellant's buildings.

White & Brooks and J. J. Cornelison for appellant.

O'Rear & Bigstaff for appellees.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Guffy.

The appellant, the Watson Lodge No. 32, Independent Order of Odd Fellows, and the appellees, J. M. Bigstaff and R. Q. Drake, were the owners of adjoining lots in Mt. Sterling, Ky., and appellees desired to have certain improvements made upon their lot which required considerable excavation, and, as they allege, hired J. W. McKenas to erect the desired building, and he in turn employed John Carlet to do certain portions of the work. Appellant was the owner of a building on its lot near to or upon the dividing line between it and appellees' lot. It appears that the excavations made by the workmen for the purpose of making the desired improvements caused the destruction in whole or in part of appellant's building, and appellant brought this suit in the Montgomery Court of Common Pleas, seeking to recover of appellees and McKenas and Carlet the damages sustained by it on account of the falling and destruction of the said building, alleging that the excavations and the work so done by appellees, or caused to be done, was unskillfully, negligently and unreasonably performed. All the defendants answered and denied appellant's allegations of unskillfulness and carelessness. After the introduction of evidence of all parties the court gave the jury a peremptory instruction to find for appellees, which was done by the jury, and the jury disagreed as to the other defendants. Judgment was rendered for appellees upon the verdict. Appellant's motion for new trial was overruled, and it has appealed to this court. Appellant sets up eleven different grounds for new trial. We deem it unnecessary to notice any except the first-named, viz., the peremptory instructions given to the jury to find for appellees. It is not necessary to go into a general discussion of all the evidence. The evidence tends to show that appellant suffered a severe loss, and that it was caused by the excavations made by some one in pursuance of appellees' desire and determination to erect on their lot a certain building.

Whether the injury was caused by the negligent or careless manner in which the work was done was a question for the jury, and if so caused it was the province of the jury to find against the party or parties so causing the damage. There was some proof tending to show that some one was in fault. The failure of the jury to agree as to McKenas and Carlet show that at least part of the jury deemed them not free from blame.

There was some evidence tending to prove that appellees, especially Bigstaff, directed and controlled the way and the manner of doing the work. If in fact appellees did do so, and if it was done carelessly and negligently, and if such negligence and carelessness caused the destruction of appellant's building, appellees would be liable for the damage so resulting to appellant. It may be that the jury believed that appellees had controlled the workmen and had caused them to so dig, excavate, etc., in such a careless, negligent and unreasonable manner as to destroy appellant's property, and if they did so believe it would have been their province to find for appellant against appellees, whether or not they also found for appellant against the other defendants.

We are of opinion that the court erred to the prejudice of appellant in giving the peremptory instructions complained of.

The judgment is, therefore, reversed and cause remanded, with directions to award the plaintiff a new trial and for further proceedings consistent with this opinion.

Judge Hazelrigg not sitting.

RAISON'S ADM'R v. STEELE.

(Filed February 8, 1895—Not to be reported.)

1. Issue out of chancery—Jury trial—In an action in equity to foreclose a vendor's lien on land, where the only issue of fact in the case is whether or not the defendant executed a certain writing in 1875 obligating him to pay 10 per cent. interest on the balance of the purchase money then due and unpaid, either party is entitled to have that issue tried by a jury.

2. Evidence as to transaction with deceased person—Where the party is dead to whom the defendant promised, by the alleged written contract, to pay 10 per cent. interest on unpaid debt, and the suit is brought by his administratrix, the defendant was not a competent witness to testify that the signature of his name to the alleged written contract was not his, as this evidence related to a transaction had by him with one who was dead.

L. T. Everett, John T. Hager and C. L. Raison, Jr., for appellant.

Brown & Brown for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Guffy.

It appears that in 1868 the appellee, D. W. Steele, executed a sale bond for certain land purchased by him for the sum of $1,587.29, payable to C. L. Raison, upon which land he made divers payments from time to time.

It is alleged that on the 20th of April, 1875, appellee and said C. L. Raison had a settlement or casting up as to payments made and balance due upon said land, and that it was thus agreed by them that there was still due $1,637.08, and appellee, in consideration of obtaining further indulgence, agreed in writing to pay interest on said sum at the rate of 10 per cent. per annum until paid. Some payments were afterwards made. C. L. Raison finally departed this life, and the appellant, Amanda Raison, was duly appointed and qualified as the executrix, with the will annexed, of said decedent. Appellee having failed to fully pay off said lien, the appellant instituted this action in the Boyd Circuit Court, seeking a sale of the land, for the purchase of which this sale bond was executed. Appellee answered and denied that he ever agreed in writing to pay the 10 per cent. interest claimed by plaintiff. It seems that the cause was submitted on defendant's motion, which motion the plaintiff resisted. Plaintiff then asked and moved that the issue of fact as to the agreement be submitted to a jury, which motion was overruled by the court, and the law and facts were heard and tried by the court, and plaintiff's petition was dismissed, and judgment rendered against her for cost. Appellant filed grounds for new trial, and moved the court to set aside the judgment and grant a new trial, which motion was overruled by the court and plaintiff has appealed to this court. Several grounds for new trial are relied on, but we need not notice all of them.

Appellant insists that the court erred in overruling her motion to submit the issue as to the agreement to a jury. We are not disposed to hold that such refusal is, under the circumstances of this case, sufficient cause for reversal, but upon the return of this case a jury trial should be awarded either party if they so desire. Appellant also insists that the court erred in allowing the defendant to testify as to the execution of said writing. The real question at issue was as to whether the defendant had executed to the decedent the writing in question, hence defendant could not, under the provisions of the Civil Code of Practice, testify as to the transaction. He had a right to testify as to the transaction between him and plaintiff and plaintiff's son. He was allowed by the court to testify that that was not his signature to the writing relied on, which was testifying as to the transaction set up and alleged to have been made by him with decedent. Appellee's testimony was material in this action. Without it the proof was overwhelmingly in plaintiff's favor.

The judgment below is reversed and cause remanded, with directions to set the judgment aside and award plaintiff a new trial and for further proceedings consistent with this opinion.

LAWRENCE v. CITY OF LOUISVILLE.

(Filed February 9, 1895.)

1. A statute will not be construed to act retrospectively unless its terms are so clear, strong and imperative that no other meaning can be given it, or unless the intent of the legislature can not be otherwise satisfied.

2. Constitutional law—Limitation—The first subdivision of the schedule of the Constitution of 1891, continuing as valid all rights, actions, etc., not inconsistent therewith, was intended to and does continue as valid the right already accrued to a defendant of pleading the bar of a statute of limitation as a defense to an action.

3. Same—A right to plead the bar of the statute of limitation as a defense to an action, when once accrued, is a vested right which can not, by subsequent legislation, be taken away or destroyed, except by the consent of the holder of the right.

Thos. F. Hargis, Oscar Turner, Jr., and Matt O'Doherty for appellant.

H. S. Barker for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Paynter.

On January 20, 1891, this action was brought by the appellant, Mary L. G. Lawrence, against the city of Louisville, for damages for personal injury alleged to have been caused by the neglect of the city in the erection and use of its bridge at the east terminus of Breckinridge street; and that the bridge was defective and perilous, which could be and was discerned by the city; that on June 2, 1890, she was run over on the bridge, by reason of the defects in the construction and condition of the bridge, and her leg was so mangled and injured that it became necessary to amputate it.

Among other defenses made by the city was that more than six months had elapsed from the time the cause of action accrued before the action was instituted, and it pleaded the statute of limitation as a bar to the action.

The statute relied upon is an amendment to the charter of the city of Louisville, approved March 20, 1882, and reads as follows: "No action for damages of any character whatever, to either person or property, shall be instituted or maintained against the city unless such action be commenced within six months after the accrual of the cause of action." * * *

A demurrer was filed to the paragraph of the answer pleading this statute as a bar to the action. The court overruled the demurrer, and plaintiff declining to plead further the petition was dismissed. To review this action of the court the cause is before this court. The demurrer was overruled in January, 1892.

The statute of limitation supra was held by this court to be constitutional in the case of Preston v. City of Louisville, 84 Ky., 118. This court held a similar statute in relation to the city of Covington to be constitutional. (City of Covington v. Hoadley, 83 Ky., 444.)

It is insisted by counsel for appellant that the statute supra, which barred the action because it was not brought within six months, was not in force when the demurrer was overruled by the court, but that the general limitation law of the State was then applicable, which did not bar an action for such injuries for one year after the cause of action accrued.

The present Constitution was adopted September 28, 1891. It is contended that by the schedule of the Constitution all laws not inconsistent therewith shall remain in force until altered or repealed by the general assembly; that all actions not inconsistent with it are continued as valid, and all laws inconsistent with the Constitution shall cease upon its adoption; and that as by section 59 of the Constitution the general assembly is prohibited from passing any local or special acts "to regulate the limitation of civil or criminal causes," the special statute supra ceased because it is inconsistent with that constitutional provision.

It is claimed, as the special statute ceased, the general law then in force became applicable, and as the action was brought within one year from the time the cause accrued the action was not barred. In other words, that the general law became retroactive and restored her right to maintain her action, and destroyed the complete defense which the city had to it.

The question as to whether or not the special act is inconsistent with the Constitution, and ceased on its adoption, is not decided, although the court may consider the question involved apparently from that point of view. To reach the conclusion which the court announces in the case it is not necessary to determine that the special statute has ceased.

It is no longer an open question as to the power of the legislative branch of the government to pass limitation laws, and to alter or change them by extending the time for its enforcement, or it may shorten the time by giving a reasonable time for asserting the right. The power to do this before the bar takes place is conceded.

In some cases retrospective legislation may be upheld. However, words of a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied. (Mr. Justice Patterson in U. S. v. Heath, 3 Cranch, 399; Harvey v. Tyler, 2 Wall., 347; Lohn v. Waterson, 17 Wall., 596.)

While the first subdivision of schedule of the Constitution continues as valid all actions not inconsistent therewith, the same subdivision continues as valid all rights not inconsistent there-

with. It reads as follows: * * * "All rights, actions, * * * not inconsistent therewith, shall continue as valid as if this Constitution had not been adopted." * * *

At the time of the adoption of the Constitution the right to plead the statute of limitation had accrued. It was a complete bar to the action. The language of the Constitution shows an intention to preserve that "right" as fully as the "action." The second subdivision provides that "actions and causes of actions, except as herein provided, shall continue and remain unaffected by the adoption of the Constitution."

It follows that the action was unaffected by the adoption of the Constitution. The right to recover or the cause of action having been extinguished by the lapse of time, the adoption of the Constitution did not revive the right or cause of action. Evidently it was not intended that it should be done.

The law-making branch of the government has no more power to destroy a defense that has accrued than it has to take the citizens' property "without due process of law." When one is released from a demand by the statute of limitation his right to defense is as valuable as the right to institute the action.

When the defense has accrued the right to maintain the action is destroyed. When one has occupied land adversely for a given number of years the statute of limitation destroys the remedy which the owner possessed to recover it. His right was extinguished by the destruction of his remedy. The defense is in the nature of a vested right. In the application of the statute of limitation it is the same, whether the suits are in ex contractu or ex delicto. (Moore v. State, 43 N. J. Law, 203.)

Though a debt has never been paid, the statute of limitation bars it after a certain lapse of time, and no legislative authority can reimpose the obligation. The obligation can only be reimposed by the debtor's will and consent.

Where one is guilty of a tort, and immunity from suit has arisen by operation of the statute of limitation, the legislature can not deprive him of it any more than it can the debtor who has been exempted from a demand by operation of the statute of limitation.

Naught v. O'Neal, 1 Ill., 36, was an action for slander, and the court said: "If the cause of action accrued one year or more before the repeal of the statute of limitation, still the old statute of limitation is a good bar to the action. It is a complete bar before the repeal, and the repeal of the statute does not affect the rights acquired under the repealed statute."

In Moore v. Luce, 29 Penn. St., 262, the court said: "It is a mistake to suppose that the person barred by the statute loses nothing but his remedy. The law never deliberately takes away all remedy without an intention to destroy the right. Remedies are frequently changed. One is withdrawn and others remain, or one is substituted for another; but when all remedies are taken away after a specified period of neglect in asserting rights, and when this is done for the purpose of promoting the best interests of society, the right itself is destroyed."

In Von Hoffman v. City of Quincy, 4 Wall., 554, the court said: "A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."

In Specker v. Wakely, 11 Wis., 440, the court said: "And although it is generally true that the statute only bars the remedy, and does not destroy the right, yet when the defense has been vested no subsequent revival of the right to sue, as by repeal of

the statute or other act, without the consent of the party entitled to the defense, could take away or destroy such defense."

Kent, Chief Justice, in Dash v. VanKleeck, 7 Johnson, 477, quotes with approval the declaration, as follows: "A law can be repealed by the law givers, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it produced."

In Kinsman v. City of Cambridge, 121 Mass., 558, it was decided that the statute of 1874, extending the time for filing a petition for damages for land taken to widen a street, did not revive an action already barred by the statute existing before the new act was passed.

Sutherland on Statutory Construction, section 480, holds that there is a vested right in a defense to an action, even in the statute of limitation, when thereby the bar has attached.

Mr. Cooley, in his work on Constitutional Limitation, page 445, says: "Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand can not have it revived against him, and he who has become released from a demand by the operation of the statute of limitation is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation."

In Davis v. Miller, 28 Am. Dec., 325, the High Court of Errors and Appeals of Mississippi decided that a law reviving the right of action barred by the statute of limitation is void. The chief justice, in delivering the opinion of the court, said: "To my mind it is clear that the moment the remedy was gone by the running of the statute the right was gone also, and a right to set this lapse of time up as a defense vested in the opposite party, and he could not be deprived of the privilege, without his consent, by subsequent legislation. This must be the rule if a defense may form the subject of a right, and that it may seems to me to be clear."

It was decided in Thompson v. Read, 41 Iowa, 48, that the repeal of the statute of limitation can not act retrospectively so as to disturb rights acquired thereunder, and deprive parties of protection to which they were fully entitled under the prior enactment.

The current of decisions in other States treat as a vested right the privilege to plead the statute of limitation when it has run, and become a bar to a demand arising either ex contractu or ex delicto. We believe the right of defense is just as important as the right to bring an action.

When the right to recover property has been extinguished because of the statute of limitation, we say that the one who thus holds has a vested right. He acquired it not by a moral but a legal remedy. He is then beyond the power of the legislature to divest him of his rights therein, except by his consent or due process of law

From a wise public policy the legislature has declared that a cause of action is destroyed by certain neglect, and thus secures a party a right to withhold his property from subjection to a demand. The legislature has no more right in the one than in the other case by retrospective legislation to destroy the right to property, each being held by virtue of the statute of limitation.

The right to a defense should be held as inviolate as the right of action. When the remedy is destroyed the right to maintain the action is extinguished.

From the foregoing views it will be seen that the court is of the opinion that the demurrer was properly sustained, although, when the Constitution was adopted the six months' statute of limitation may have ceased and the one year statute become operative as to the city of Louisville (however, this point is not decided).

Judgment affirmed.

ADAMS' EX'OR, &c. v. BEMENT, &c.

(Filed December 13, 1894.)

1. Appeals—Time of filing of schedule—If the appellant, to whom an appeal is granted by the clerk of the Court of Appeals, chooses to file a transcript of a part only of the record he must file his schedule of the parts of the record he wishes to have copied in the clerk's office of the lower court within ninety days after the appeal is granted by the clerk of the Court of Appeals.

2. An appellant who prosecutes an appeal upon a partial transcript does so at his peril, and where a part of the testimony relating to the matter to be decided on appeal is omitted from the transcript, it will be presumed that a complete transcript would sustain the judgment.

3. An appellee who prosecutes a cross appeal upon a partial transcript does so at his peril, the rule above mentioned applying to his appeal, since he has a right to have copied into the transcript any parts of it omitted from the schedule of appellant.

4. It is improper to charge an administrator with interest on the amount of real estate in his hands during litigation concerning the estate, when he promptly brought suit to settle the estate, all the time held the property subject to the order of the court, and does not appear to have used or made profit out of it.

R. H. Cunningham and S. B. Vance for appellants.

H. F. Turner and Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

Joseph Adams having died July 19, 1884, intestate, J. C. Adams, his son, was appointed administrator, and August 3, 1885, brought this action to settle his estate, alleged to be insolvent. July 10, 1888, C. R. Bement, being upon his petition made party defendant, filed an answer and cross petition, in which he stated that May 7, 1885, E. S. Adams, widow, recovered of him judgment for her dower interest, of value about $6,500, in a tract of land sold and conveyed to him by Joseph Adams in 1880, whereby and for which amount there existed a demand in his favor against the estate. He further stated J. C. Adams had not, as administrator, caused to be made and reported a true and correct inventory and appraisement of the estate, but that Joseph Adams had, a short time before his death, fraudulently conveyed policies of life insurance and a claim against the United States to J. C. Adams, since collected and appropriated by him, amounting to at least $15,000, that were properly parts of said estate, and subject to payment of demands against it.

Judgment was rendered dismissing the cross petition of Bement, but allowing his demand paid pro rata out of estate found in hands of the administrator other than the proceeds of said claim and policies of insurance. It was further adjudged that the pol-

icies were transferred in part to indemnify J. C. Adams against loss by reason of payments he had made or was bound to make as surety or otherwise for his father, Joseph Adams, and, therefore, the estate then in his hands as adminstrator was not liable for any such debt due or paid by him.

From that judgment J. C. Adams has appealed, and C. R. Bement prosecuted a cross appeal; but before considering the main questions involved it is necessary to decide a motion of appellee Bement to dismiss the appeal upon the ground the schedule was not filed in time required by the Civil Code.

The final judgment was rendered February 9, 1892, but the schedule was not filed until June 6, 1892, and if this appeal had been granted by the inferior court the motion would have to be sustained under subsection 4, section 737, as follows: "The appellant, within ninety days after the granting of the appeal, shall file in the office of the clerk of the inferior court a schedule showing concisely what parts of the record he wishes to have copied. His failure to file said schedule within the time prescribed shall be cause for dismissal of his appeal."

It was, however, not granted by the inferior court, but by the clerk of the Court of Appeals. Consequently the rule of practice by which we are to be now governed is prescribed in subsection 7, as follows: "If the appellant, to whom an appeal is granted by the clerk of the Court of Appeals, chooses to file a transcript of a part only of the record he shall file in the office of the clerk of the inferior court a schedule similar to that above described, and shall cause notice of the filing thereof to be served on the appellee, and to be returned to said office as a summons is directed to be served and returned." Though no special time is mentioned within which the schedule shall be filed after an appeal is thus granted, we think it was intended it should be likewise done within ninety days, not after the appeal was granted by the inferior court, which must, if at all, be done during the term at which the judgment was rendered, but after the appeal was granted by the clerk of the Court of Appeals, which may be done at any time within two years from rendition of the judgment.

In this case the schedule was filed June 6, 1892, less than ninety days after the appeal was granted by the clerk of the Court of Appeals, and consequently the motion must be overruled.

It seems to us, as the record stands, the lower court properly adjudged the estate of Joseph Adams, now in the hands of J. C. Adams as administrator, not liable for his individual demands, which are in question. Besides, as argued by counsel of appellee Bement, it is well settled that an appellant who prosecutes an appeal upon a partial transcript does so at his peril, and if it appear, as does in this case, that part of the testimony relating to the matter in controversy has been omitted from the transcript, it will be presumed a complete record would sustain the judgment.

We also think the court did not err in dismissing the cross petition of appellee Bement, for the evidence before us is not sufficient to authorize the conclusion the policies of insurance and claim against the United States were fraudulently or illegally transferred by Joseph Adams to his son, J. C. Adams. Moreover, the rule just referred to is equally applicable to the cross appeal, for appellee had the right to file an additional schedule and cause the entire record copied, which he failed to do.

In our opinion it was error to charge the administrator with interest on amount of the real estate in his hands during the litiga-

tion, for as he in due time brought the action for settlement of the estate, and held the proceeds subject to judgment and order of court, he should not be made to pay interest in absence of evidence that he used or made profit out of it.

For the error indicated the judgment is, on appeal of J. C. Adams and Cunningham, each, reversed and cause remanded for further proceedings consistent with this opinion, and on cross appeal of Bement affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. HARRISON COUNTY, &c.

(Filed January 15, 1895—Not to be reported.)

The county court of Harrison county has authority to levy the tax sued for in this action.

J. I. Blanton and G. C. Lockhart for appellant.

M. C. Swinford and W. T. Lafferty for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Guffy.

In this action the appellee, Harrison county and the Harrison County Court, sued the appellant, the L. & N. R. R. Co., in the Harrison Circuit Court to recover $193.56, taxes claimed to be due the county for the year 1892. The appellant demurred to plaintiff's petition, which demurrer was overruled. Appellant then answered, and denied that the county court or court of claims could legally levy the tax sued for. To this answer the appellees filed a demurrer, which was sustained by the court. Appellant declining to plead further, judgment was rendered against it for $193.56, with interest thereon at 6 per cent. per annum from the 3d of May, 1893, and cost, to all of which defendant excepted and prayed an appeal to the Court of Appeals, which was granted. The contention of appellant is that the tax was levied without authority of law.

The acts of the general assembly of 1883-84, volume 2, page 969, and acts of 1887-88, volume 1, page 854, confer upon the appellee power to levy the tax in question.

Judgment affirmed, with damages.

ADAM ROTH GROCERY CO. v. HOPKINS, &c.

SAME v. SAME.

(Filed January 22, 1895—Not to be reported.)

1. **Clerical misprision—Judgment—Interest—In a suit for damages on an attachment bond against plaintiff in the attachment and his surety it is a clerical misprision to render judgment against the principal in the bond and not against the surety also; and it is also a clerical misprision to fail to set out in the judgment that it draws interest from the day it is rendered.**

2. **Infants—Contracts—Pleading—Burden of proof—In an action to hold an infant defendant personally liable for goods purchased by him, and to attach so much of the goods as still remained in his possession, plaintiff alleged that at the time of sale defendant had the appearance of, and held himself out as a man of full age, and that he concealed his infancy from**

plaintiff, and thereby fraudulently obtained the goods. The answer pleaded infancy, denied concealment of nonage and alleged that agent of plaintiff knew of defendant's infancy at the time of the sale. This knowledge of the agent was denied by the reply, and the case being submitted on the pleadings, and without evidence, a judgment for the defendant was rendered. Held—

First. The denial by defendant that he concealed his infancy at the time of sale was not a good plea. If he notified plaintiff of his infancy he should have pleaded such notice affirmatively.

Second. The burden of proof was on the defendant, and it was error to dismiss the plaintiff's petition.

3. Same—Pleadings—Tender—The answer averred that "some of the goods (without other description) bought of plaintiffs were still on hand, undisposed of, and that they could come and get them if they chose." Held—This was not a good tender of the goods by the infant, and the judgment which dismissed the petition, but allowed plaintiff "to go and get" the goods still on hand, was erroneous, as it simply followed the answer.

4. Same—Suit on attachment bond—The judgment awarding the infant defendant damages in a suit brought by him on the attachment bond must be reversed, where the judgment dismissing the attachment has been held erroneous by this court and reversed.

5. Same—Where an attachment is discharged by the court because the defendant does not owe the debt sued on, and the defendant in an independent suit is awarded damages on the attachment bond for the wrongful suing out of the attachment, it is erroneous for the judgment to order the amount awarded as damages credited by the amount claimed by the plaintiff in the original suit in which the bond was executed.

Rhey Boyd for appellant.

Husbands & Husbands for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Grace.

These two causes, growing out of the same original transactions, the one being dependent on the other, will be considered together.

The first suit, No. 138 in court below, was instituted by appellants to recover of appellee the sum of $351.50 for groceries, goods, wares, etc., sold and delivered by them to the said appellee.

This suit being filed in equity and alleging that since the sale and delivery of said goods, and recently, plaintiffs had discovered that said appellee was an infant, and saying that at the time of said sale they were ignorant of said fact; that appellee was in business on his own account, holding himself out to the world as of full age, and that he concealed from said appellants the fact of his infancy; that said appellee, being then in his twentieth year, had the appearance of a man of full age; that thereby said appellee was guilty of a fraud on appellants in the purchase of said goods; stating further that some of the goods so sold appellee were still on hand undisposed of by him, and praying the interposition of the chancellor to grant them, first, a judgment for their debt, or such other general and proper relief as the facts authorized. To this petition appellee, by guardian ad litem, filed answer, pleading his infancy at the time of the purchase of said goods. Failing to deny that he was to all appearances a man of full age, he denied that he concealed his nonage from said appellants, and pleading further that the agent of appellants at the time of the sale of the goods knew appellee was an infant. To this allegation appellants replied, denying that their agent had any such knowledge. Appellants, at the time of filing their petition, also sued out a general attachment and had same levied upon the stock of groceries then in the pos-

session of appellee. In appellee's answer he also stated that "some of the goods (without other description) bought of appellants were still on hand undisposed of, and that they could come and get them if they chose." Appellee also denied the grounds of the attachment.

On this state of pleadings the case was, without evidence by either party, submitted to the chancellor, who thereupon dismissed the appellant's petition with cost, and also discharged the attachment, adding, however, at the bottom of the judgment, "that it appearing that appellee had some of the goods bought of appellant still on hand, that they might go and get them," and from this judgment appellants bring their first appeal, No. 138.

We think the judgment as rendered was error. It seems to us that on the facts as stated by appellants and admitted by appellee it was not a good plea by appellee to deny that he concealed his age or infancy from appellants. His defense, if any he had, was an affirmative defense, and he should have stated that he did communicate to appellants the fact of his minority. Further along in his pleading he does allege knowledge of his nonage on the part of said appellants at the time of the sale of the goods, and this by reply they deny. On this state of pleading we think the burden of proof was on the appellee, and none being offered, it was error to dismiss the petition of appellants; and especially was this error when appellee stated that he had some of the goods on hand, which appellants might come and get. This was not a good tender by appellee, by which, on that theory, he might have avoided responsibility for the goods so on hand and so offered to be returned. The judgment was in that respect erroneous, as it simply followed the answer, and, after dismissing appellant's petition with costs, adjudged that they might go and get what they could find.

The suit being properly in equity presented to the chancellor the question whether the sale and purchase of these goods was made by appellants to appellee with knowledge of his minority at the time thereof; if so, the cause of action was hopeless as to the goods disposed of by said infant; or whether appellee, at the time of the purchase, having the appearance of one of full age and concealing his minority from appellants, was thereby guilty of such fraud in obtention of said goods as would, in the eye of the chancellor, take the case out line of contract and place it within the list of fraudulent obtention of goods, whereby the chancellor would hold the infant estopped to plead his infancy and to deny his liability for the goods so obtained.

The petition being dismissed by the chancellor, the attachment was also dismissed, there being no debt to support it. No evidence by appellants of any fraudulent intent in the disposition of his goods could support it.

For the errors indicated the judgment dismissing the petition of appellants, No. 138, and that discharging their attachment must both be set aside for further proceedings not inconsistent with this opinion.

Appeal No. 137 may be more speedily disposed of. It was a suit in the court below by appellee, Hopkins, on the attachment bond given by appellants, Adam Roth Grocery Co., at the time of suing out their attachment, same having been dismissed by the court. The right to prosecute an action on said bond being dependent on the dismissal of same, the court refused to hear any evidence on that trial in support of same, but the judgment dismissing same being now reversed, appellee's suit and recovery

on the attachment bond must be now held as error, and the judgment in favor of appellee in said suit, No. 137, against appellants for $600 is reversed, set aside and held for naught. It will be noted in this record that after the trial of the damage suit on the attachment bond and judgment for appellee for the $600, the court then relying, we suppose, from the bill of exceptions, on the evidence offered by appellants on said trial, but ruled out by the court, yet entered a credit on the judgment of $249, reciting that that was the amount due appellants for the goods sold appellee, less $60 for goods returned, and less also $40 for damage to goods while in possession of appellee after his purchase and before the suing out of the attachment. This whole credit was error on the record as it then stood in the court below. Appellants, having been barred of this right of action in the original suit, could not again set it up by way of counterclaim or set-off in the subsequent suit on the bound. The deduction of the $40 item, as above set out, would have been error in any event, provided the court held appellee responsible for the goods bought by him of appellants. So that on this cross appeal, in suit No. 137, appellee must recover of appellants his cost. Said judgment allowing any credits in this second suit, except of the $60 for goods returned, must be reversed. It is also noticed, but only as a clerical misprison, that the judgment in favor of appellee in suit for damages was against the Adam Roth Grocery Co., leaving out the name of defendant, Farley, security on the attachment bond, who was jointly liable, if any liability attaches to anyone, and that the judgment also failed to affirm that interest was to be paid after its rendition.

On the return of these causes, if appellants obtain judgment in their suit against appellee for goods sold and delivered, they will then be permitted by the court to introduce evidence in support of their attachment. But should the attachment be again dismissed, yet a new assessment of damages on appropriate averments will have to be made.

Wherefore, it is adjudged by the court that the judgment on appeal No. 138 be reversed, and that the judgment on the original appeal in suit No. 137 be reversed, and that on the cross appeal in this latter case the judgment is reversed.

CLARK'S RUN & SALT RIVER TURNPIKE CO. v. COMMONWEALTH.

(Filed February 1, 1895.)

Right of turnpike company to maintain tollgates—Contemporaneous construction of charter—Where the charter of a turnpike company, concerning the number of tollgates that may be erected and maintained along the road, is of doubtful meaning, the practical interpretation given it for more than thirty years by its stockholders, who secured the charter, which interpretation has for that length of time been continuously adopted and acquiesced in by the public and the State and county officers, will be adopted as the proper interpretation, and given effect by the courts.

R. P. Jacobs for appellant.

W. J. Hendrick, Felix G. Fox and Robt. J. Breckinridge for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hazelrigg.

This action, in the nature of a quo warranto, was brought by the Commonwealth to prevent the exercise of a right claimed by the appellant to maintain certain toll gates on its road at a distance less than five miles apart.

By its answer the appellant justified the erection and maintenance of the gates upon the ground that it had the right to do so by virtue of the provisions of its charter. Or if upon a strict construction of that language it might not have such right, yet that this right has been exercised continuously for more than thirty years, and had been acquiesced in by the State and the public for that length of time without complaint, and, that this construction of the provisions of the charter asserted continuously and uninterruptedly for so long a time itself fixed a practical interpretation of these provisions and established a right in the company, in the nature of a right by prescription, now too late to call in question. A demurrer to this answer was sustained by the lower court, and the company declining to plead further, a judgment of ouster was rendered.

We learn from the record that one end of the company's road begins on the line between Marion and Boyle counties, and thence running eastwardly through the latter county for some sixteen miles, passing through the village of Parksville to the city of Danville; that a gate was erected at or near the beginning point indicated, another about six miles distant therefrom at a point one mile west of the village named, another about three-fourths of a mile east of that village, and another about a mile west of Danville, the last one being about six miles from the gate east of Parksville; that the two gates immediately east and west of Parksville were established in the year 1860 and had been maintained continuously at the same place since that time, and that each of them was what is generally known as a half gate, and only half toll was collected thereat, the other two gates being full or whole gates; that there were, therefore, practically but three whole gates on the sixteen miles of road.

There is no complaint that too much toll is charged at any gate, but the maintenance of the two near the village is alleged to be greatly to the annoyance and bother of the citizens and traveling public generally.

Upon the subject of the erection of toll gates section 5 of the charter of the appellant, adopted in 1848, provides as follows: "When the gate or gates shall be erected it shall and may be lawful for the president and directors to appoint as many toll gatherers as they may deem requisite, and to collect and receive of every person or persons using said road, at each tollgate, for each and every five miles they may use or travel on said road, the same rate of tolls as is collected on the Danville, Lancaster, &c., turnpike road."

This is the only reference to toll gates in the appellant's charter, though, as we shall presently see, certain sections of another charter are referred to and made part of the act of incorporation by this provision it can not be said that the gates are required to be five miles apart. When erected, as many toll gatherers as might be deemed requisite were to be appointed to collect, at each gate, from every person, the same rate of toll for each and every five miles of road used or traveled over as was collectible by a certain other company.

It is, at least, an admissible construction to say that under the language used the gates might be erected at any points, provided that tolls were to be collected of each person at a designated rate for each five miles of the road used, and this could be done without regard to the distance the gates were apart.

This was the construction of the provisions of the charter adopted by the incorporators and officers of the company some thirty-four years before this suit was brought, questioning, for the first time, the correctness of the interpretation. And this construction was acquiesced in and in effect adopted by the public and the officers of the State and county for the length of time mentioned. We say acquiesced in and adopted by these because there are ample provisions punishing the company and its agents and employes for collecting illegal tolls, both under the charter and under the general law, and it is not to be supposed that the public and the officers cognizant of the facts would have remained inactive save for the belief that the right to so maintain the gates in question was authorized under the company's charter.

We have, therefore, a construction adopted and continuously acquiesced in for more than thirty years by the incorporators and officers of the company, who procured the law, and who were charged with its proper execution, and by the public, who were largely interested in the question, and by the officials of the State and county, who were charged with the duty of preventing a violation of the law, including the illegal collection of the tolls.

We are referred, however, to the charter of the Danville & Hustonville Turnpike Road Co., adopted in 1844, and referred to as part of appellant's charter. This charter provides that "so soon as five miles of said road, continuously, shall be completed, three justices of the peace * * * shall be called on to examine the work; and if they shall certify that said road is made in conformity with the provisions of this act, the certificate shall be recorded in the office of the county court of said county, and the president and directors may cause a toll gate to be erected across said road, and may collect tolls and duties hereinafter granted," etc. In case such disinterested justices could not be found, then commissioners should make the examination, "and if it shall be their opinion that the road, or any five miles of it, at any one part, is completed according to the provisions of this act, their report shall be recorded in said circuit or county court, and the judge or court shall enter of record how many gates the company may erect. Whereupon it shall be lawful for the company to erect a toll gate for every five miles of turnpike road they have so completed at any one time, and at such places as to them may seem most eligible."

This is hardly more explicit than the provisions of the appellant's charter proper. Of course five miles of the road must have been completed before any gate could be erected, but when the road, or "any five miles of it," at any one part, was completed according to the provisions of the act, the judge or court was directed to enter of record "how many gates the company may erect," and it was lawful for the company to erect a toll gate for every five miles of completed road "at such places as to them may seem most eligible."

The petition alleges that "said highway extends in length fifteen or more consecutive miles in the county of Boyle," etc. So, for aught we learn from the pleader, there are four gates on fifteen or more miles, and this may not be in violation of the charter even as construed by the appellee.

If we were called on to construe these acts without regard to the construction adopted by all concerned some thirty odd years ago, we might readily agree with the appellee. What we conclude is that the construction contended for by the appellant is not an inadmissible one, and in view of this contemporaneous interpretation of the meaning of the acts, and the long and con-

tinued usage under the law by those claiming a right under it, we think their construction given to the statute by the public officers of the State and acted upon by the people thereof is to be considered, and is, perhaps, decisive in cases of doubt." (Note to Sedgwick, page 227.)

In United States v. Pugh, 99 U. S. 269, it is said: "It is a familiar rule of interpretation that in the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

In Barbour v. City of Louisville, 83 Ky., 95, this rule is fully recognized, and the meaning of language hardly to be deemed ambiguous was controlled by the construction put on it by those who procured the law under consideration and who were charged with its execution.

In Collins v. Henderson, &c., 11 Bush, 74, considerable stress was laid upon the light in which a law was received and held by the contemporary members of the profession.

It is not necessary to notice minor errors in the judgment complained of.

For the errors indicated the judgment is reversed for proceedings consistent with this opinion.

JACKSON v. MORRIS.

(Filed February 13, 1895—Not to be reported.)

Contract of lease with privilege of purchase—Usury—A contract whereby a tenant agreed to pay his landlord as rent 10 per cent. per annum of the cost price of the premises, with the privilege of buying the property by paying its cost price in installments, is not usurious. The 10 per centum rent on the investment paid as rent was in no sense a payment in consideration of the loan or forbearance of money.

Morris & Peak for appellant.

John D. Carroll for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee set apart to the appellant a lot of two acres of ground and built him a house thereon, the latter agreeing to pay the cost price of the property in such installments and at such times as he might be able to spare the money. There was no writing of any kind between them, the appellee continuing to hold the legal title to the premises and pay the taxes thereon.

The appellant, however, agreed to pay as rent 15 per cent. per annum interest on the cost price or investment. This per cent. was afterward changed to 10 per cent. When the property should be paid for the appellant was to have a conveyance of it.

Certain questions of fact have been settled by the chancellor, and the only question left in the record for us to consider is, was the contract usurious? The chancellor held it was not, and in this we think he was right. It was not a contract for the loan or forbearance of money or other thing of value. In effect the tenant (for the appellant was nothing more than that) agreed to

pay an amount as rent for the use and occupation of the premises equivalent to 10 per cent. on the amount of the landlord's investment. This was by no means an unreasonable rental. The fact that the tenant had the right to terminate his tenancy at any time by paying the cost price of the property or continue his occupancy indefinitely, paying the per cent. as rent, does not make the contract one for the loan or forbearance of money. The appellee at no time could have enforced the contract as one for the sale of the property, and this was never contemplated by the parties. The appellee continued to own and pay the taxes on the house and lot, and the appellant continued to pay what he could spare, knowing that all he paid over the rental or per cent. agreed on would go towards the payment of the cost price and secure to him the conveyance he had in view.

It was in effect, and substantially in terms, a rental, with the privilege to the tenant of buying whenever he was able. We see nothing in the contract in contravention to the statute.

Judgment affirmed.

SUTTON, &c. v. POLLARD, &c.

(Filed February 16, 1895.)

1. It is well settled that actual, adverse, peaceable possession of land for thirty years gives the holder a perfect title: and title by possession, having once vested in a party, can be taken from him only by due process of law.

2. Judgment in ejectment—Res adjudicata—A judgment binds only the parties to a suit and their privies, therefore, a judgment in an action of ejectment against a life tenant does not, after the death of the life tenant, bind the remaindermen, who were not parties to the suit.

Robert Harding and R. P. Jacobs for appellants.

W. O. Bradley for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Garrard Circuit Court by B. D. Sutton and others against Elizabeth Pollard and others for the recovery of 105 acres of land in said county.

Plaintiffs averred that they were the owners of and entitled to the immediate possession of the land, and asserted claims under paper title and also claimed title by reason of more than thirty years' adverse possession prior to the bringing of this action. Defendants answered, and in the first paragraph thereof denied plaintiffs' title and right to possession of the land. In the second paragraph they plead and rely upon a judgment rendered in a suit brought in September, 1889, by the defendant, Pollard, against Eliza J. Sutton and the plaintiff, W. M. Sutton, for the recovery of the land in contest, which judgment was against the defendants therein for the recovery of the land, from which judgment the defendants therein appealed to this court and the judgment was affirmed. The appellants demurred to both paragraphs of the answer, which demurrers were overruled by the court. Plaintiffs filed a reply and also an amended reply, to which defendants filed demurrer, which demurrer was sustained by the court, and plaintiffs failing to plead further, the petition was dismissed by the court and judgment rendered against appellant for cost. From that judgment plaintiffs have appealed to this court.

On motion of defendants a considerable portion of plainriffs'

petition was stricken out, which was error. If the allegations of plaintiffs are true as to the actual, adverse possession held by them and those under whom they claim, they were entitled to recover the land sued for unless the judgment pleaded by defendants is a bar to plaintiffs' right to recover. It is clear that a vendee who enters under a deed, whether defective or not, can hold and claim adverse to all the world, including his own vendors. (Wintock v. Hardy, 4 Litt., 274; Gossom v. Donaldson, 18 B. M., 239; Croxall v. Sherrod, 5 Wallace, 468.)

It is well settled law that actual, adverse, peaceable possession of land for thirty years gives perfect title. (Marshall, &c. v. McDaniel, 12 Bush, 378; Logan and wife v. Ball, &c., 78 Ky., 607; 4 Dana, 483; Am. & Eng. Ency., volume 13, page 694.)

After title is acquired by adverse possession, the holder thereof, if from choice or by force or fraud loses the actual possession, may recover the same by suit in the same manner as if he had perfect paper title. Having once acquired the title, he can only be divested of it by due process of law. If it be conceded that the statute did not run against Mrs. Dole until the death of her husband, which defendants aver was in 1852, yet more than thirty years had elapsed before the institution of the suit of Pollard v. Sutton, &c. So that if the possession of Goins and Sutton had been actual and adverse during all of that time the devisees of Charity Goins had a perfect title to the land.

Appellees, however, insist that the judgment of Pollard v. Sutton divested these appellants of all title. It may be that under the ancient common law that a judgment against the life tenant would bind the remaindermen, and in some of the States it may be so held now, for in some States ejectment suits may be brought to settle the title to land whether or not the defendant is in possession. In such cases, if the remaindermen were parties to the suit, the judgment would bar their claims; but under the law of this State ejectment suits only lie against those in possession. The right of possession is the real issue in such actions, and does not always involve the question of fee simple title.

It is a familiar rule of law that no one can be deprived of his property without due process of law. A judgment is only conclusive of the question involved, and binds only parties and their privies. Eliza J. Sutton had only a life estate in the land in contest, holding under the will of Charity Goins, and was entitled to the possession thereof during her life and was in the actual possession. The effect of the judgment relied on was to divest the defendants therein of the possession, and perhaps of the life estate of Eliza J. Sutton. Nothing else was legally in issue in this suit, hence after the death of Mrs. Sutton the right to the possession of the land accrued to these appellants the same as if no such suit had ever been instituted. The right of entry and possession alone are in issue in such a suit. (Chiles v. Jones, 4 Dana, 483.)

By the common law a judgment in ejectment was no bar to another suit between the same parties for the same land. (Speed v. Brandell, 7 Monroe, 570.)

This rule has been to some extent modified by the act of 1825, but that modification does not affect the rights of appellants in this action.

It seems to us that the court below erred in overruling appellants' demurrer to the second paragraph of defendants' answer, and also erred in sustaining defendants' demurrer to appellants' reply, hence the judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion.

STEINREIDE v. TEGGE.

(Filed February 19, 1895—Not to be reported.)

Trusts—Liens—Substitution—A mother, who was guardian for her daughter, held the legal title to realty that was in equity, chargeable with a lien to secure the payment of the funds held by the mother as guardian for her daughter. The mother married and resigned her guardianship, which was assumed by the husband. In consideration of the conveyance of certain other property to the husband that belonged to the wife he paid, out of his own means, the money due the daughter which had been received by the mother. In this action, wherein the husband's creditors claim that he was entitled to a lien on the realty held by the wife to reimburse him for the money paid the daughter, Held—The husband having received an adequate consideration from the wife for his payment of the trust funds to the ward, held no lien on the realty originally charged with the lien to secure the trust funds, and since he held no such lien his creditors could not assert a right to such lien.

Orlando P. Schmidt and Collins & Fenley for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

This action in equity was instituted to subject an alleged equitable interest of the appellee, John H. Tegge, in certain real estate in the city of Covington that had been conveyed by Tegge and wife in September, 1884, to Joseph Huesman, their son-in-law, and to Joseph H. Tegge, the son of the grantor, J. H. Tegge, by his first wife.

The facts out of which this equitable interest of J. H. Tegge is claimed to have originated are these: "The plaintiff in the action is a creditor of J. H. Tegge, and having reduced his debt to a judgment, upon a return of nulla bona, alleges that in the year 1860 one Joseph Schweetman died intestate, leaving his widow, Catherine, and Mary Schweetman, now Huesman, his only child, surviving him; that Henry Hortman, the father of Mrs. Schweetman, the widow, administered on her husband's estate, and the widow became the guardian of her infant daughter, Mary; that the administrator, Hortman, upon a settlement of his accounts as administrator, had in his hands about $3,000, one-third of which belonged to the widow, and the balance to Mary, her daughter. Hortman, being unable to pay over the money, executed a mortgage to the widow to secure the indebtedness, and finally, as a full settlement of this indebtedness, made an absolute conveyance to the widow in the year 1863 of the lot of ground for the benefit of the widow and her ward. The deed was a plain conveyance to the widow, failing to recite the purpose or the consideration upon which it was based, but it is conceded the object was to secure the money due the widow and her infant child. It is manifest, therefore, that this child had an interest in the lot to the extent of her means invested in it, and upon her arrival at age could have elected either to enforce her equitable lien or compel her guardian to pay her over the money to which she was entitled.

In the year 1864 the widow, Catherine, married the appellee, J. H. Tegge, resigning her trust as guardian of Mary, and her husband, Tegge, qualifying in her stead. She made a settlement of her accounts and showed an indebtedness to her ward of $2,156.

This liability her husband assumed, and in the settlement she was credited by the amount of her indebtedness, and her husband charged with it as so much received by him as guardian. Tegge, the husband, received no money from his wife, or any property belonging to his ward, but his wife still held the conveyance of 1863 to the lot in which the ward had this equitable interest, and the settlement with the county court by the mother as guardian in nowise affected the right of her ward to the trust property, the lot in which her money had been invested, and, in fact, Tegge, as her guardian, could have subjected it to the payment of the debt his wife as guardian owed her daughter, or he could have had his ward's interest allotted to her, subject to her approval upon her arrival at age. When the ward arrived at age in December, 1880, she had a settlement of her accounts with her guardian, and the indebtedness being $2,477, she accepted from her guardian a conveyance of two lots from him in full for the debt. One of the lots was conveyed to Tegge by Hortman, the father of his wife, and the other conveyed to him by one Miller. It is, therefore, claimed as the guardian, Tegge, paid off this debt due the ward he was subrogated to the rights of the ward in the lot held by her mother to secure this indebtedness, and, therefore, his creditor, the plaintiff in the action, can subject this equity to the payment of her debt, and, but for other facts in this case, we would be disposed to adjudge as Tegge, the guardian, paid off the debt, he was entitled to be substituted to the rights of his ward.

It appears from the facts before us that Henry Hortman, who had administered upon the estate of the father of the ward, and who had made the conveyance to secure the ward in the year 1871, and before plaintiff's debt existed, conveyed to John H. Tegge some real estate in the county of Kenton, known as the Buena Vista property, the consideration expressed being $4,000. This property came from the father of Mrs. Tegge. She says, however, she paid for it, and as her husband had agreed to pay Mary the money she was entitled to, she had the conveyance made to him, as it was agreed he was to pay Mary when she became of age. The husband testified to the same state of facts.

If this was the agreement of the parties, and we see no reason to doubt it, we are then unable to see any right to substitution in this case. The equity, if Tegge had any, ended when he accepted the deed of 1871. He had been paid to discharge the debt due his ward, and now, to permit him or his creditor to enforce an equity against the lot conveyed to the children of Tegge and wife, although voluntarily, would be to pay him twice in consideration of his assuming to pay this debt of the ward. He has no lien, and, therefore, his creditor can have none. While the ward might have elected to take her interest in the lot originally conveyed to her mother, this she declined to do, and Tegge conveyed to the ward his own realty to satisfy the debt. He settled with the ward and paid her out of his own means, because he had agreed to do so, and in consideration of the absolute conveyance made to him of the Buena Vista property in the year 1871. He had been paid to assume this debt, or in consideration that he had assumed it, and no right of subrogation exists.

The judgment below is affirmed.

LOUISVILLE DRIVING & FAIR ASSOCIATION v. LOUISVILLE TRUST CO., TRUSTEE, &c.

(Filed March 5, 1895—Not to be reported.)

1. The word "survivor," when used in a will concerning a devise to a class, is to be interpreted according to its strict and literal meaning, if unexplained by other parts of the will.

2. Same—Construction of devise—A devise by a testator, after making provision for his living children, of land to three grandchildren, with the condition that if either grandchild died without lawful issue then living, his estate is to go to the survivor or survivors of them; 'and if all three grandchildren died without lawful issue living at the time of their decease," then the estate to go to testator's children, creates a contingent remainder in testator's children that can take effect only in the event that all the grandchildren die without lawful issue living at the time of their death.

If two of the grandchildren died leaving lawful issue, and then the third grandchild dies without leaving lawful issue, the estate of the latter does not go to the testator's children, but the issue of the other two grandchildren take as heirs of the third grandchild.

Humphrey & Davie and Charles M. Lindsay for appellant.

John C. Russell and James H. Bowden for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Pryor.

This court, in the case of the Coleman-Bush Investment Co. v. Figg, 15 Ky. Law Rep., 817, construed the will of Thomas Phillips, and our opinion then, as it now is, that no other rational interpretation can be given the sixth clause of the testator's will, so as to effectuate his plain intent, than to adjudge the purchaser is invested with a perfect title, unless the three grandchildren, Mrs. Kellar, Mrs. Christmas and Thomas J. Phillips, should all die without issue living at their death.

The testator, Thomas Phillips, left several children, and to each child he made specific devises of land and slaves, and having three grandchildren, the children of his son David, who was dead, he made a specific devise to them of land and slaves, the land their father was in possession of at his death. He was making a disposition of his estate between his children and grandchildren, and gave to the latter their part of the estate which he designed for their father David, if he had been living.

In the clause of the will by which the devise to the children of his son David is made there is this provision: "But should either of my said grandchildren die without lawful issue then living, the rights and interests in the property hereby given such grandchild is then to become the right and property of the survivor or survivors of them; and should they all depart this life without lawful issue living at the time of their decease, the property is then to vest in and become the right and property of my surviving children, and the issue of such of them as now are, or may then be, dead, to be divided among them according to the laws of distribution of the estate of those dying intestate."

It is contended by counsel for the purchaser another contingency than that of all three of the grandchildren dying without issue may arise, and that is: If Mrs. Kellar and Mrs. Christmas should die before their brother Thomas, leaving children, and then Thomas should die without children, his interest would then

pass, under the clause referred to, to the children of the testator and their issue, as there would be no survivors of the three grandchildren to take from Thomas, his two sisters being dead; and Thomas dying childless, there could be no survivorship; and quotes Mr. Jarman on Wills to the effect the word survivor, like any other term when unexplained by other parts of the will, is to be interpreted according to its strict and literal meaning.

This is certainly a sound rule of contention, and was recognized as such in the former opinion, but counsel seems to have kept his eye on the word survivor, and failed to notice other parts of the same clause in which the testator interprets the meaning to be given those words, survivor or survivors, and the contingency upon which his children were to take the property devised to his three grandchildren, "and should they all depart this life without lawful issue living at the time of their decease," then to go to my surviving children and the issue of such as are dead.

If, therefore, two of the grandchildren should die leaving children, and after their death the surviving grandchild should die without children, the children of the testator or their issue could not take because the contingency upon which they were to take (all dying without children) had not happened. This, it seems to us, is so plain that he who runs may read.

Then what becomes of Thomas Phillips' interest, both of his sisters being dead leaving children? There being no survivor, it passes by descent from Thomas to the children of his deceased sister. The fee had passed out of the grantor and vested in the children of his son David, and the line of descent from one to the other and to their issue (where there was no survivor to take) was not to be disturbed unless all died without issue living at their death; if otherwise, you have the testator taking the devised estate from the issue of these grandchildren and returning the interest Thomas had not only to the children of the testator but to their issue, if any child happened to be dead.

This would defeat the obvious meaning of the devisor, his purpose being to vest them (his grandchildren) with the title, the fee in them to be defeated only on the contingency that all three should die without leaving issue at their death.

Judgment affirmed.

MAYNARD v. MAY.

(Filed March 17, 1894—Not to be reported.)

Erroneous judicial sale of land—Damages—A plaintiff caused a defendant's house and lot to be sold when it was not liable for his debt. The judgment ordering the sale, although erroneous, passed title to the purchaser. Defendant appealed without executing a supersedeas bond, and the sale was held to be erroneous. Defendant sues plaintiff to recover damages for the unauthorized sale. Held—He is entitled to recover as damages the value of his property at the date of sale, with interest, and not merely what it sold for at the sale, which was less than its real value.

James E. Stewart and James Goble for appellant.

R. T. Burns for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Pryor.

This judgment must be reversed. The appellee had the house and lot of the appellant sold when it was not liable for his debt. Judgment was rendered by the court below, and the property purchased by one Jones. That judgment subjecting the property, although erroneous, by the sale under it passed the title to the purchaser.

There was no supersedeas, and this court having determined the land not liable and the judgment below erroneous, the party (who was the appellee) having the house and lot sold is liable to the appellant for its value at that date, with interest. The court below only gave what the purchaser paid for it, which was less than its value. It is conceded that it was worth $400.

The judgment is reversed and remanded, with directions to render a judgment for that amount, with interest from the time the appellant was divested of possession.

LOUISVILLE & NASHVILLE R. R. CO. v. BRANTLEY'S ADM'R.

(Filed November 24, 1894.)

1. An administrator appointed in a foreign State can not maintain an action in this State in his representative capacity unless authorized to do so by statute of this State.

2. Same—The authority given by statute to a foreign personal representative to prosecute actions for the recovery of debts due his decedent in this State, by executing bond with resident surety, etc., does not authorize him to maintain an action to recover for a tort done to decedent in this State through the intentional or willful negligence of a defendant.

3. Same—Willful neglect—Pleadings—Where the petition shows on its face that the plaintiff has neither a legal nor a beneficial interest in the cause of action, either in his own right or in a representative capacity, the defect can be reached by a general demurrer.

4. Same—The petition of a foreign administrator, suing for a personal injury to his intestate, committed in this State, by the alleged negligence of defendant, is bad on general demurrer, the foreign administrator having under our statute no interest in the cause of action.

5. Same—Section 93 of the Civil Code, requiring a special demurrer to be filed where the plaintiff has no legal capacity to sue, applies only when the petition discloses some interest in the subject-matter of the action in the plaintiff, and also a want of legal capacity in him to sue.

6. Master and servant—Death caused by neglect—Where the death of an employe of a railroad company is caused by the ordinary negligence of another employe of the same, or of a higher grade of service, the company is not liable in damages therefor.

7. Same—Verdict and judgment not authorized by pleadings—Where the petition seeks to recover damages for the death of an employe of a railroad company through its alleged gross and willful neglect, and the verdict of the jury is that the death was caused by the ordinary negligence of defendant, it is error to enter a judgment for plaintiff on the verdict, since no recovery can be had in such case for ordinary neglect.

8. In the absence of a bill of evidence and a motion for a new trial the instructions given can not be considered on appeal.

Joe McCarroll for appellant.

Edward W. Hines, John S. Bays, W. A. Cullock and James Breathitt for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Pryor.

Bluford B. Brantley, as the administrator of John L. Brantley, deceased, states in substance that the decedent departed this life in July of the year 1891; that he was appointed and qualified as the administrator of his estate by order of a court of competent jurisdiction in the State of Indiana, it being the State where the decedent resided at his death, and where the plaintiff now resides.

He then files what purports to be a copy of the letters of administration, etc. He further alleges that the decedent lost his life while in the service of the appellant, the L. & N. R. R. Co., and when in its employ as brakeman, running its trains between certain terminal points in this State; that he was seriously injured (his legs cut off) and he suffered for days great bodily and mental suffering, and for this suffering and loss of time he is seeking to recover. It is further alleged that the injury resulted from the gross and willful negligence of one of its employes, superior in authority to the decedent.

There was a general demurrer to the petition, and overruled.

An issue was then formed on the pleadings and the case went to trial, with a verdict returned by the jury as follows: "We, the jury, find the defendant guilty of ordinary negligence, and assess the damages at $5,000.

"ALEX. GARLAND,
"One of the jury."

There is no bill of evidence in the record, and we have before us only the instructions given by the court, and the latter's reasons for refusing to grant a new trial.

Only so much of the petition is given as presents, in our opinion, the question raised by the demurrer, as the specific facts alleged constitute a cause of action, if the appellee can maintain it, and the only question is, can a foreign administrator sue in this State for a personal injury to his intestate, committed in this State, as is alleged, by the negligence of the defendant; and if he can not sue, must the objection be taken advantage of by special demurrer; and if not, is the objection waived?

There was a general demurrer only, and it is urged that the provision of the Code, requiring, where the want of legal capacity to sue appears on the face of the petition, the objection to be raised by a special demurrer, applies here.

We think such a view is an entire misconception of the law. The doctrine is elementary that an action must be brought in the name of a party in interest, and at common law the legal right to sue must appear. Where one has neither a legal nor beneficial interest in the controversy, either in his own right or as the representative of another, and this appears on the face of the petition, the objection can be, and is, properly raised by a general demurrer.

His legal capacity to sue is not involved, but his right to maintain the action either in his own right or as a personal representative. The provision of the Code requiring a special demurrer to be filed, where the legal capacity to sue is wanting, has no application to a case like this.

An infant has no legal capacity to sue, and must bring the action by his prochein ami or guardian, but having a legal or beneficial interest in the subject-matter of the action and the right of recovery, the defense will not be allowed to plead or demur generally, and then after verdict or judgment take advantage of the infancy of the plaintiff or the want of legal capacity on the part of the plaintiff to sue.

It is in cases where the petition on its face discloses an interest in the subject-matter of the action, and also discloses a want of capacity to sue, that the question of a want of legal capacity arises; but where the petition shows that the party plaintiff is not interested in any way in the litigation, or, in other words, can maintain no such action, the objection can be made by a general demurrer.

The doctrine, I believe, is universal that an administrator appointed in a foreign State can maintain no action in another State unless authorized by statute; and if there is no authority given the foreign administrator to sue here in such a case as the one presented, the general demurrer should have been sustained.

The appellant admits by his demurrer that the appellee qualified as the administrator of the decedent in the State of Indiana, and that all the facts alleged in the petition are true, and then the question arises, is the appellee, the foreign administrator, entitled to recover?

It is insisted that this court, in the case of Warfield v. Gardner's Adm'r, 79 Ky., 583, and in previous cases, has decided this question. That action was by the administrator of Gardner upon a note given by the appellant to his intestate. There was a general demurrer to the petition, and overruled.

It was averred in the petition that the appellee was appointed, by an order of the Hardin County Court, administrator of the decedent, and had qualified as such. The court held that this was a substantial compliance with the Code, and all that was necessary for the appellee to allege as to his appointment; and the objection that the petition failed to state facts showing the county court of Hardin had jurisdiction to appoint him administrator involved his legal capacity to sue, and must be taken advantage of by special demurrer; and as no special demurrer was filed the objection as to the want of the averment failed. This is sound law and court practice. It is conceded that where one can not sue by reason of some personal disability or want of capacity to sue, that under the Code the question must be raised by a special demurrer or by a special plea.

Suppose the plaintiff had alleged his qualification as administrator and his appointment by the properly-constituted authorities without alleging where he had qualified, and the defendant, instead of demurring to the defective petition, had pleaded in bar of his recovery that he had been appointed and qualified in a foreign State, would not the plea have been good unless the statute was so construed as to prevent a recovery by the foreign administrator for a mere tort? We think so. Nor would it be a bar to the recovery by one authorized to sue, but it would be a bar to an action by the plaintiff as the representative of the decedent under his appointment from the State of Indiana. If a bar to the recovery by the foreign administrator upon the facts being proven when pleaded, why, when those same facts appear in the petition, may not the defense demur generally when, from the plaintiff's own showing, he has no standing in court?

The plaintiff must so connect himself with the subject-matter of the action as to show a right of recovery, either in his own right or the legally qualified representative of another, and where he fails to do so the petition is bad on demurrer.

In Langdon, &c. v. Potter, 11 Mass., 315, a case very similar to the one before us, there was nothing in the declaration showing that administration had not been granted in the State of Massachusetts, and the legal inference, the court said, was that it had been so granted. The right of the plaintiff to prosecute the action was not questioned, and after several pleas to the merits the

objection was for the first time raised, and the court said it was too late, but also said it was "a plea in disability of the plaintiffs, and did not touch the merits of the action;" and the court proceeded further to say: "We have no doubt the objection relied on in this case is pleadable in bar, and in the present stage of the action it must be so pleaded."

In Fenwick v. Sears' adm'r, 1 Cranch, 259, and in Davis' Ex'or v. Ramsey's Ex'ors, 3 Cranch, 319, a special plea in bar was sustained, and in Norman v. Bradley, 9 Wallace, 394, the Massachusetts case is referred to as settling the conflicting decisions, and yet it is held in that case a plea in bar is the proper remedy.

Why the necessity of a plea in bar when the petition discloses what the plea must state? The appellee sues as a foreign administrator, and makes proffers of his title, and, as said in Norman v. Bradley, "it is only in virtue of his representative character that the plaintiff is entitled to the matters in controversy, and a plea which denies to him that character is, in its nature, a plea in bar to the action."

Where the petition discloses a defense that defeats the action, such as a want of title, legal or equitable, or any other defense that can be pleaded in bar, except such defense as are priviliged and do not affect the cause of action, as infancy or limitation, a general demurrer will be sustained.

The case of Adams v. The Terre Tenants of Savage, 6 Mod., 134, "the plaintiff recited in the proceeding the manner and place he had obtained letters of administration, which showed a want of jurisdiction, and the defendants pleaded alone to the merits. After verdict the defendants moved in arrest of judgment, because the administration committed to the plaintiff was void. The plaintiff insisted the plea to the merits was a waiver of the objection, and the chief justice remarked: "If the administrator had not set up what kind of administration he claimed by, but only alleged that he was the administrator of the goods and chattels of the intestate, and the defendants had not craved oyer as he might have done, but pleaded oyer, that would have been an admission of his right to sue as administrator; but when you yourself affirm this to be your title, how can we intend you have another, and of your own showing your title is manifestly bad. There is a vast difference where the title does not appear fully for the plaintiff, and the defendant will not controvert with him about that, and where the plaintiff himself shows he has no title, for then the court has no room for intendment. The authority of the case cited," says the court, "in Norman v. Bradley has never been doubted."

If a nonsuit was proper where the proof failed to show title, why is not a demurrer proper when the declaration shows the same state of fact? The character of the plaintiff's title is set out in the petition, and the court will not assume that he has the authority to sue in this State. He is not known in our courts as an administrator, with an appointment and qualification only in the State of Indiana. There is no privity of representation appearing, and his right to sue in his individual name for a tort to the decedent is as great as his right to sue by reason of his foreign appointment.

In the case of Debolt v. Carter, 31 Ind., 355, the court, in treating of the legal capacity to sue, says: "A demurrer for the want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, coverture, etc., and not to the fact that the complaint on its face fails to show a right of action in the plaintiff." (Devows v. Gray, 22 Ohio State, 159; Winfield Town Co. v. Marys, 2 Kansas, 147.)

A special demurrer is also required by the Code where there is a defect of parties plaintiff or defendants, and yet it has been held that where plaintiffs unite in bringing a joint action, and the facts alleged show an absence of any joint liability, the defective pleading can be reached by a general demurrer upon the ground that it fails to state a joint cause of action. (Berkshire v. Shultz, 25 Ind., —.)

This court held, in Gossom v. Bodgett, 6 Bush, —, that in an action against two upon an alleged joint undertaking, a judgment against one upon proof that the contract was made alone with him can not be sustained. If the defect had appeared upon the face of the petition in Gossom v. Bodgett, it could have been reached by general demurrer because it involved the right of recovery on an alleged joint undertaking, when the contract was with one only.

The argument that the facts alleged constitute the cause of action without reference to the party bringing it, although in a representative capacity, is both illogical and fallacious.

Facts stated connecting the plaintiff with the cause of action are as essential as any other fact necessary to make the complaint good. The plaintiff's interest or right to sue must appear. It is a matter of substance, and a special demurrer is only in the nature of a plea in abatement that gives a better writ, and saying to the plaintiff he may recover on the merits if he sues in a particular way. Can the Indiana administrator bring this action? The only authoirty is found in section 43 of article 2 of chapter 39, General Statutes, which provides: "By giving bond with surety resident of the county in which the action is brought, nonresident executors or administrators of persons who, at the time of their death, were nonresidents of this Commonwealth, may prosecute actions for the recovery of debts due to such decedents."

It can scarcely be contended that the language would embrace actions for a tort caused by negligence or intentional wrong. While a liberal construction should be given this provision and apply it to all contracts or obligations where the liability can be certainly fixed, it would be a strained construction to hold that the word debts embraced every character of action that a resident administrator could institute, for if such was the legislative intention, instead of confining the right to suits for debts, they would have said that when no resident administrator had qualified a foreign administrator should have the same right upon executing bond to bring all actions he could have instituted if he had qualified as such in this State. The statute is in effect an inhibition of this right, and in departing from the common-law doctrine recognizes the right of the foreign administrator to sue for debts by complying with the provisions of the statute. The construction of this statute of the right to sue given the foreign administrator does not militate against the doctrine that the representative qualifying in the county or place of domicile of the deceased may receive or collect debts due the intestate in another State for the reason that it is his personal incapacity to sue is only involved, and not his title to the thing received, as held by the Supreme Court in Wilkins v. Elliot, 108 U. S., 256.

The mere right to recover for a tort is not, and can not, be regarded as assets to which the foreign administrator has title or the right to convert into a debt by a judgment. This right is denied him by the statute in the case of the Maysville Street Railroad Co. v. Marvin, appealed from this district (Ky.) to the Circuit Court of Appeals by Mr. Justice Lurton in a well considered opinion, that a general demurrer to a petition by a foreign administrator

to recover for the death of his intestate, caused by the tort of the defendant, should have been sustained, and, upon the ground there was no privity of representation, no cause of action in the plaintiff. (59 Fed. Rep., 91.)

This court has also decided the identical question involved here. William Robb died at his domicile in the State of Massachusetts leaving a will, by which his executor was authorized to dispose of land in Jefferson county, Ky. The executor sold the land and brought an action to enforce the contract. There was a general demurrer to the petition, based on two grounds: First, the executor had no power to sell; second, if such a power existed he could not as executor maintain the action without complying with the provisions of the statute. It was held by this court, through Mr. Justice Holt, that the power to sell existed, but the executor could not maintain the action because he had not complied with the statute, and for that reason the general demurrer should have been sustained, the court, after citing the statute, saying "his qualification in a sister State does not authorize him to administer the assets here or act otherwise in our courts as such representative." (12 Ky. Law Rep., 652; 91 Ky., 88.)

There is still another question raised by counsel that requires a reversal of the judgment below. After a judgment had been entered on the verdict a motion for a new trial was made by the defense that for some reason was afterwards withdrawn.

The court instructed the jury as to the measure of damages in the event the injury was caused by the gross negligence of the defendant, and also instructed the jury what to find if the defendant was guilty of ordinary neglect. The jury, therefore, had two distinct issues presented by the instructions as to their finding: First, if gross neglect exist you may find punitive damages; second, if ordinary neglect, you will find only the actual damage sustained; and the jury, under the instructions, returned a finding for ordinary neglect. If the instructions are to be considered it is manifest the court below erred in instructing the jury they could find damages for the injury caused by ordinary neglect, as this court has decided that where one employe enters into a service, such as that pertaining to railroad corporations, and is injured by the negligence of another employe in the same service of a higher grade, in order to recover gross negligence must be alleged and shown, as the ordinary risks belonging to such an employment he assumes when entering the service. But it is said there is no bill of evidence, and the instructions alone being here they can not be considered, and the error committed being that of the court, it can not be corrected without a motion for a new trial.

If the instructions are here for the purpose of enabling this court to know that the court below committed the error, they must also be here for the purpose of enabling the court to correct the error.

It was held in Roberts v. Wolfe, 1 Dana, 196, that although the bill of evidence was not before the court the instruction was erroneous under any state of case, and, therefore, the judgment was reversed. Here, however, there was no motion for a new trial, as there doubtless was in Roberts v. Wolfe, and the sole question is, was the verdict and judgment authorized by the pleadings? The appellant moved to set aside the judgment and render a judgment for the defendant.

If the plaintiff in this case, having alleged gross negligence, could recover for any less degree of neglect, then this verdict should stand, if otherwise proper; but, as has already been stated, gross negligence must be shown before a recovery in this class of

cases can be had. The plaintiff must recover upon proof of the cause of action alleged in his petition, and in this case it is manifest that a recovery has been permitted, not upon the cause of action alleged but for that degree of negligence for which no action could be maintained. If the verdict had read "we of the jury find for the plaintiff 5,000," and nothing more, then this court could not tell whether it was for the gross or ordinary neglect of the defendant, and in the absence of a bill of evidence would assume that the verdict was based on the cause of action alleged. Here, however, is a true verdict returned, saying: "We of the jury find the defendant guilty of ordinary negligence, and assess the damages at $5,000."

A motion then to set aside the verdict or the judgment rendered upon it was proper because it was not responsive to the cause of action alleged in the petition. The pleadings no more authorized the verdict than a verdict for one species of property when the plaintiff, in his petition, claimed another and different kind of property. Suppose the jury had returned into court and said to the judge, "we find this defendant guilty of ordinary neglect; can we give to the plaintiff damages?" The response in writing would have been: You can not award damages for ordinary neglect. This is in substance what the jury said to the court by their verdict—a verdict not sustained by the pleadings or authorized by law, even if ordinary neglect had been alleged.

Special findings were had at the common law, and although none were asked in this case by either party, the jury of its own volition returned a verdict for ordinary neglect. With the instructions, therefore, out of the case, and they have no place here, as there is no bill of exception, the finding of the jury is for that degree of neglect for which the law in this character of case will not permit a recovery. The degree of neglect causing the injury was for the jury and not the court to determine. As to special verdicts at common law see Stephen on Pleading, 91, 92; 1 Robinson's Practice, 378, 406; Proffert on Jury Trials, 434, 439, 440.

It is maintained the jury had no right to return a special verdict. It was nevertheless returned, and no judgment should have been entered upon it. Whether or not, under the state of case presented, the defendant is entitled to a verdict is now immaterial, as it would constitute no bar to a recovery by a rightful administrator, or one entitled to bring the action.

The judgment is reversed, with directions to set aside the verdict, and judgment and sustain the demurrer to the petition.

BROWN v. TODD'S ADM'R., &c.

(Filed February 12, 1895—Not to be reported.)

1. Contracts—Lex loci contractus—The law of the place where a contract is made and is to be performed is that by which its validity is to be determined.

A note bearing a certain rate of interest and requiring the maker to pay attorney's fees, made and payable in the State of Indiana, is governed by the laws of that State, and if valid there is treated as valid here.

2. Same—During the pendency of a suit in this State on a note and mortgage the plaintiff may sue and obtain judgment on the note in another State, and the judgment so obtained will be enforced in this State.

While a suit on a note and mortgage executed in Indiana was pending in the county in this State where the land lies, the plaintiff sued and obtained judgment in Indiana on the note. By amendment he set up this judgment

in his suit in this State, and, having elected to prosecute his cause of action on the judgment, was granted an order of sale of the mortgaged property to satisfy it. Held—The defendant is precluded by the judgment in Indiana from asserting that it contains usury, and it was proper to order a sale of the mortgaged land to satisfy the judgment.

Marc Mundy and W. F. Peak for appellant.

D. W. Lindsey and Leland & Leland for appellees.

Appeal from Trimble Circuit Court.

Opinion of the court by Judge Guffy.

On the 20th day of February, 1891, Simeon E. Leland, administrator of Louisa Todd, filed his petition in the Trimble Circuit Court against Perry Brown and others, seeking to obtain judgment against said Brown for the amount due upon a note executed to said Todd by defendant Brown for $2,500, 13th of October, 1879, due two months thereafter, bearing eight per cent. interest from date and agreeing to pay attorney's fee, subject to certain credits; also asserting a lien on certain real estate in Trimble county to secure the payment of said note. It also appears that the note and mortgage were executed in the State of Indiana, and that the note was made negotiable and payable in a bank in Indiana. Plaintiff averred that the rate of interest and the stipulation as to attorney's fee were authorized by the laws of the State of Indiana. The defendant, Brown, answered, and denied the averments as to the interest and attorney's fee, and claimed that the various payments made on the note should go to the payment of interest at 6 per cent. per annum and the residue be applied to the discharge of the principal so far as it would so pay it, and offering to confess judgment for the residue. During the pendency of this suit the plaintiff brought suit on said note in Jefferson Circuit Court of Indiana and obtained judgment against the defendant, Perry Brown, for the sum of $3,349.20, with interest at 6 per cent. from date of rendition of judgment and cost of suit, after which plaintiff, by supplemental pleading, set up the foregoing judgment in this action and prayed judgment thereon and for sale of enough of the mortgaged property to pay same. Appellant made various defenses to same, and plaintiff, being required to elect whether he would prosecute the original action or the cause of action set up in the supplemental petition, elected to prosecute the latter action, and upon final hearing the court rendered judgment against appellant for amount of plaintiff's claims, interest and cost and adjudged that plaintiff had a lien on the mortgaged property to secure the payment of same and adjudged a sale of enough of said land to pay same, as well as the other liens admitted to be due thereon.

From this judgment appellant Brown has appealed, and asks a reversal upon several grounds, among which is his claim that 8 per cent. interest in usurious under our statutes, and the same objection is made to the allowance for attorney's fee. He also insists that no lien existed on the land for the payment of the judgment rendered in Indiana and sued on in the Trimble Circuit Court.

We are of the opinion that no grounds for reversal exist. The law of the place where the contract was made and where it was to be performed must govern in this case, and the proof in the cause establishes the fact that such a contract as to interest and attorney's fee was enforcible under the laws of the State of Indiana. It seems to be well settled that plaintiff had the right to

sue and obtoin judgment in the State of Indiana during the pendency of the suit in Kentucky, and, besides, defendant did not plead the pendency of the suit in this State when sued in Indiana. The judgment in Indiana being for the same debt mentioned in the mortgage. it seems clear that a lien on the mortgaged property still existed therefor, hence the court porperly adjudged a sale of the mortgaged property to pay said debt.

We perceive no error to the prejudice of the substantial rights of the appellant in the procdings of the court below.

The judgment in affirmed, with damages.

COMBS v. COMMONWEALTH.

(Filed February 26, 1895.)

1. Appeals—Weight of verdict in criminal case—Where there is competent evidence conducing to authorize the verdict of guilty in a criminal case the verdict can be reversed on appeal only for some error of law occurring on the trial prejudicial to the accused.
2. Evidence—Impeaching of witness—The general reputation of a witness for veracity can be impeached only by persons who know what the general reputation of the witness is among his neighbors, or what is generally said of him by those among whom he dwells or with whom he is chiefly conversant.
3. The time to be allowed for argument of a criminal case before the jury is left to the sound discretion of the trial court, and unless it is manifest that this discretion has been abused a reversal will not be granted because more time for argument was not allowed.

A. T. Wood for appellant.

Wm. J. Hendrick for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, under an indictment for conspiring with Jim Combs, Jesse Barnett and Charles Wall to murder John A. Rose, who was actually killed by Combs and Barnett, has been twice convicted and sentenced to confinement in the penitentiary for life, this being the second appeal.

We need not state in detail facts proved on the last trial as they were substantially stated in the opinion of this court on the first appeal. (Combs v. Commonwealth, 15 Ky. Law Rep., 660.)

Two accomplices, Wall and Barnett, though already convicted of the offense, testified as witnesses for the Commonwealth at the last, as did one of them at the first, trial, and as the question of their competency was made and decided on the former appeal it need not be again discussed.

The court below instructed the jury in the manner required by the Criminal Code in respect to necessity for corroboration of testimony of accomplices, and as there was competent evidence conducing to establish appellant's guilt, the verdict can be now disturbed, if at all, only upon ground of some reversible error of law occurring at the trial.

Although one of the jury may have been incompetent because not at the time twenty-one years of age, that fact, as expressly

provided by section 2253, Kentucky Statutes, is not cause for setting the verdict aside, nor could exception have been taken therefor after the jury was sworn. Another error to which our attention been called is refusal of the court below to permit witnsses to has prove, as accused averred they, if allowed, would do, that they were acquainted with the general reputation for veracity in Breathitt county of a witness previously introduced by the Commonwealth, and that it was bad.

Before impeaching by general evidence the credit for veracity of a witness it must be shown by the impeaching witness that he knows the general reputation of the person in question among his neighbors, or what is generally said of him by those among whom he dwells, or with whom he is chiefly conversant. (Greenleaf on Evidence, volume 1, section 461.)

And the policy and justice of that rule is too manifest to disregard, even if it had not been uniformly recognized by this court. Breathitt county was not then, nor had been prior to trial of accused, the residence of the witness whose reputation for veracity was attempted to be impeached, nor did the impeaching witnesses know or undertake to testify what was his general reputation among his neighbors. Consequently the evidence in question was properly rejected.

What length of time the ends of justice and rights of an accused party require should be allowed for argument to the jury on a criminal trial must, from necessity, be generally left to sound discretion of the trial court, otherwise an undue portion of the term of a court might be needlessly consumed in trial of one cause to the detriment of other business and rights of other parties. Therefore, this court will not reverse upon the ground that too short time was allowed unless satisfied that discretion has been abused. Counsel were allowed in this case three hours to each side, which, the contrary not appearing, we must conclude was not so short time as to prejudice substantial rights of appellant.

Judgment affirmed.

COMMONWEALTH v. STEELE.

(Filed February 28, 1895.)

1. Criminal law—Bribery—An election concerning a local option law is within the purview of the statute denouncing as a crime the receiving of a bribe for a vote or the bribing of another.

2 Same—Indictment—An averment in an indictment for bribery that the defendant did unlawfully and willfully bribe C. to vote in an election by paying said C. $1, which he received, and voted as required by said defendant in consideration of said $1," does not allege the commission of a complete offense under the Kentucky Statutes. The averment means no more than that C. was bribed to do his legal and moral duty—that is, to vote. The offense of bribing another, within the meaning of the statute, is not committed unless the person receiving the bribe was influenced, or intended to be influenced, thereby to vote for a particular candidate or a particular ticket or upon a particular side of some question submitted to the people.

Wm. J. Hendricks for appellant.

R. C. Warren for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Lewis.

Appellee was indicted for bribing another to vote at an election, the particular circumstances of the offense being stated as folows: "That said J. F. Steele * * * did unlawfully and willfully bribe G. W. Carpenter to vote in an election by paying said Carpenter one dollar, which he received, and voted as requested by said Steele in consideration of said dollar."

It is further stated that the election was held at a time and place mentioned for taking sense of the legally qualified voters of a precinct named upon the proposition whether spirituous, vinous or malt liquors should be sold therein, and that said G. W. Carpenter at the time was a legal voter in that precinct.

Section 1586, being of chapter 41, title "Elections," Kentucky Statutes, provides that "any person guilty of receiving a bribe for his vote at an election, or for services or influence in procuring a vote or votes at an election, shall be fined from $50 to $500, and be excluded from office and suffrage."

Section 1587 is as follows: "Whoever shall bribe another shall, on conviction, be fined from $50 to $100, or imprisoned from one to ninety days, or both so fined and imprisoned, and be excluded from office and suffrage."

According to subsection 1, section 1586, "bribe" or "bribery" means "any reward, benefit or advantage, present or future, to the party influenced or intended to be influenced, or to another at his instance, or the promise of such reward, benefit or advantage." And section 1437, same chapter, provides that "the word election, whenever used therein, in reference to State, district, county or municipal election, shall be deemed to include the decision of questions submitted to the qualified voters as well as the choice of officers by them."

In our opinion the election referred to is within purview of that chapter, and there is stated in the indictment the essential facts that election was legally held and said Carpenter was then a qualified voter, and entitled to vote at it.

But it seems to us the acts as stated in the indictment do not constitute a complete offense under the statute, for the mere statement that accused did bribe G. W. Carpenter to vote in an election, by paying $1, fairly and properly means no more than that he was bribed to do what he had the legal and moral right and it was his duty as a citizen to do. Nor do the concluding words of the sentence, "and voted as requested by said Steele in consideration of said dollar," convey an additional or other idea than he was influenced by the consideration paid to simply exercise his right of suffrage. Manifestly to constitute the offense of bribing another, in meaning of the statute, the fact must be stated in the indictment that the party receiving the reward, benefit or advantage was influenced or intended to be influenced thereby, not merely to vote at an election, but to vote for a particular candidate, or ticket of candidates for offices named, or upon a particular side of a named question submitted to qualified voters.

It perhaps might be reasonably inferred from what is stated in the indictment that G. W. Carpenter was influenced by the money paid and received to vote on one side or the other of the proposition submitted, though whether in the affirmative or negative is not stated. But the particular circumstances of an offense charged can not be left for inference, for an indictment is required by Criminal Code to be in that respect direct and certain.

Wherefore, the judgment sustaining demurrer to the indictment is affirmed.

SCOTT v. COMMONWEALTH.

(Filed March 8, 1895—Not to be reported.)

1. The instruction limiting defendant's right to avail himself of the plea of self-defense, if the defendant commenced the difficulty with the intent of taking the life of the deceased, was not erroneous or prejudicial to defendant in this case.

2. Criminal law—Right to eject trespasser from premises—Self-defense—The owner of a house and lot has a right to order from his premises an intruder who comes uninvited to an entertainment being given by the owner, especially when the intruder is breaking the peace and disturbing the guests, and if he refuses to go the owner of the premises has a right to use reasonable force to compel him to leave; and if the intruder, in resisting the owner, who is lawfully attempting to eject him by force, shoots and kills the owner, he can not avail himself of the plea of self defense.

D. H. Smith, G. A. Taylor and Gore & Friend for appellant.

Wm. J. Hendrick for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Judge Lewis.

There had been at the residence of deceased on day of the homicide a wood chopping, followed at night by a dance, deceased being the fiddler.

The evidence does not show appellant was at the wood chopping or invited to or participated in the dance. But he and two companions having been supplied with whisky carried in bottles, and armed with pistols, came to the home of deceased, and while dancing was going on took position at a window, where they had out their pistols, appellant, according to testimony of a daughter of deceased, who was dancing, pointing his pistol in the room where the dancing was.

The three rufflans had not been there long before, as might have been expected, a difficulty occnrred between another person and appellant, resulting in the latter going some distance away from the house, and the evidence shows pistol firing was heard in a field towards which he went. He, however, subsequently returned and was standing in front of the house when deceased came out of it, and, after speaking to persons standing at corner of the house, approached him, saying: "Are you back here again? You get out of my yard." to which appellant replied: "By God, I will when I get ready." Deceased then said: "You will go now," advancing on him. Deceased continued to advance, appellant backing until they had gotten about ten feet, when appellant said: "If you don't stop I will shoot you." After a distance of about sixteen feet had been thus covered, deceased still advancing, appellant commenced and continued shooting until he had put five bullets in body of deceased, resulting in his death; and now we have an appeal from judgment convicting him of manslaughter and sentencing him to confinement in the penitentiary for six years.

Though it is contended there was permitted to go to the jury incompetent evidence, we do not perceive any error in that respect. The only action of the court, the correctness of which there is any necessity for discussing, is the following qualification of the instruction as to appellant's right of self-defense: "Unless they shall believe from the evidence, to the exclusion of

a reasonable doubt, that defendant sought and commenced the difficulty with Alvey, in which Alvey was shot, and so sought and commenced said difficulty with the intention to take Alvey's life, or inflict great bodily injury upon him, in such event defendant can not avail himself of the plea of self-defense and apparent necessity, unless the jury believe from the evidence he withdrew, or in good faith attepmted to withdraw, from the difficulty with Alvey before Alvey was shot."

If appellant went to the house of deceased without invitation, or, if having invitation, he, after getting there, behaved in a manner to disturb and prevent others enjoying the dance, or broke the peace, Alvey had the right to order him off his premises and it was his duty to go, and upon his refusal to go Alvey had the right to use reasonable force to compel him to leave. This was not fully explained to the jury, and that omission was prejudicial to the Commonwealth and not to appellant. Therefore, in our, and we think a proper, view appellant did seek and commence the difficulty by unlawfully refusing to leave premises of deceased when requested to do so, and in resisting when deceased, as he had a right to do, attempted to forcibly remove him; and if he thus refused and resisted with intention to take the life of Alvey, or inflict great bodily harm upon him rather than to leave the premises, he could not be excusable upon the ground of self-defense. In our opinion appellant's substantial rights were not prejudiced by that qualification, nor by any other error of law occurring on the trial.

Judgment affirmed.

CLARK v. COMMONWEALTH.

(Filed March 8, 1895.)

Embezzlement—Evidence—Where the evidence conduces to show that defendant was an agent in the employment of a corporation, and received a commission of 5 per cent. on money collected by him for the corporation, and that he as such agent collected money for the corporation which he converted to his own use, a verdict convicting him of embezzlement will not be reversed.

The fact that such defendant was entitled to a commissin on money collected by him as agent does not render his offense any the less embezzlement. It is true that one who follows the collecting of debts on commission as a business can not be convicted of embezzlement on account of his failure to pay over sums collected, but in this case there is no evidence tending to show that defendant was engaged in the business of collecting on commission as an independent occupation.

Alfred Selligman and Charles G. Richie for appellant.

Wm. J. Hendrick, Ernest Macpherson and H. H. Nettleroth for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Guffy.

In November, 1894, an indictment was returned by the grand jury of Jefferson county against the appellant, S. M. Clark, accusing him of the crime of embezzlement, averring in substance that he, being an agent and servant of the Singer Manufacturing Co., a corporation existing under the laws of the State of New Jersey, and at the time doing business in Kentucky, did feloni-

ously, willfully, etc., convert to his own use $271.25 in lawful money, the personal property of said corporation, which had come to his hands, etc., as such agent, and had wholly failed to pay over or account for the same. A demurrer to the indictment was overruled by the court, and a trial in the Jefferson Circuit Court resulted in a verdict of guilty and fixing the punishment of appellant at confinement in the penitentiary for a term of three years. Defendant filed grounds and moved the court for a new trial, which motion was overruled by the court and judgment entered in accordance with the verdict, and defendant has appealed to this court and asks a reversal upon the following grounds, viz.: First, that the verdict is contrary to law; second, because the verdict is contrary to the evidence; third, because the court erred in the instructions given; fourth, because the court erred in not giving the full law of the case.

Appellant also insists that the court should have given a peremptory instruction to find for defendant, and that it was not shown that the Singer Manufacturing Co. was legally organized, and that the dmurrer should have been sustained; that as defendant was entitled to a commission of 5 per cent. for collecting, etc., on the money that he could not be guilty of embezzlement.

It seems to us that the organization of the company was sufficiently proven, and that the demurrer was properly overruled. There was some proof introduced conducing to show that defendant had converted to his own use some of the money which, as agent for the corporation, he had collected. The written contract filed, together with other writings, seems to show that defendant was the agent of said company. If the defendant was the agent or servant of the corporation the fact he was entitled to 5 per cent. for collecting would not protect him if he in fact embezzled the money so collected. (Am. and Eng. Ency. of Law, section 4, pages 475-6, and numerous cases there cited.)

It is true that where one follows collecting as a business on commission he can not be found guilty of the crime of embezzlement on account of failure to pay over. Numerous decisions might be cited to this effect, but the above reference is deemed sufficient. No proof at all was introduced by defendant tending or attempting to show that collecting was an independent business in which he was or had been engaged, nor any proof contradicting or explaining the evidence adduced by the prosecution.

Although the punishment may be severe or seem harsh, yet this court has no legal right to interfere. The jury were the judges of the evidence, and also of the punishment to be inflicted within the limits prescribed by law.

The judgment is, therefore, affirmed.

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KENTUCKY COURT OF APPEALS.

OWEN v. KAMER.

(Filed February 12, 1895—Not to be reported.)

Damages for sale of intoxicating liquor to an inebriate—Jury—The judgment in an action by a wife to recover damages from a defendant because of a sale of liquor to her husband, who was in the habit of becoming intoxicated, will not be reversed because a wholesale liquor dealer was permitted to serve on the jury; there is no law making such a person an incompetent juror.

A. C. Rucker, Pirtle, Speed & Trabue for appellant.

Kohn & Baird for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Guffy.

This suit was brought by Perinna S. Owen against Anton Kamer in the Jefferson Court of Common Pleas, seeking to recover $10,000 in damages of defendant on account of the sale of liquor by defendant to her husband, W. M. Owen, who, as alleged, was in the habit of becoming intoxicated.

The petition shows proper notice to defendant. The answer of defendant denies the selling, etc. A trial resulted in a verdict and judgment for one cent. Plaintiff moved for a new trial and filed grounds, six in number, in support of the motion, and the motion having been overruled plaintiff has appealed to this court. It seems to us that the instructions given, when properly understood and construed, were proper in this cause, and were substantially the same asked for by plaintiff. Appellant complains that Neville Bedlett, a wholesale liquor dealer, was permitted to serve on the jury. We are not aware of any statute rendering him incompetent, hence his acceptance can not be held to be error of law. It might be well to excuse liquor dealers from serving on juries who were trying such cases, but it does not appear in this case the plaintiff could not have challenged the objectionable juror peremptorily. The admission and

rejection of evidence in the action does not seem to have been prejudicial to the plaintiff.

Taking the evidence and instructions all into consideration, we do not feel authorized to set aside the verdict and judgment of the court below.

Judgment affirmed.

NEWPORT NEWS & MISSISSIPPI VALLEY R. R. CO. v. THOMAS.

(Filed February 12, 1895.)

1. A motion to quash the return of the officer on a summons must state the grounds on which it is based, and it must point out to the plaintiff, if within defendant's knowledge, the proper person upon whom service of summons may be made.

2. A motion to quash the officer's return of a summons is waived by filing an answer to the merits before the court has decided the motion to quash: and the filing of the answer to the merits operates as a waiver, although the order filing it recites that the motion to quash is not waived.

3. Time for filing motion for new trial—In an action to recover damages for the killing of live stock by a railroad, where the verdict was rendered on Wednesday, the motion for a new trial comes too late when filed on Saturday.

But where the plaintiff, who recovered judgment in such action, moved on Friday that he be allowed 25 per cent. damages on his verdict, as authorized by section 7, chapter 57 of the General Statutes, and the motion for a new trial is filed on the Saturday following, the motion comes in time to authorize a review on appeal of the court's action on said motion.

8. Killing of stock on railroad track—Right to 25 per cent. damages—Where the notice given the railroad for the appointment of appraisers to assess the value of stock killed on its track is insufficient, and does not state when the application for the appointment of appraisers will be made, and the company does not appear, the owner of the stock, who recovers in an action for that purpose damages as great as that awarded by the appraisers, is not entitled to 25 per cent. in addition to the verdict.

4. Appeals—Bill of exception—A bill of exception is filed in sufficient time if filed on or before the day allowed by the court for its filing.

P. H. Darby and John C. Gates for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The motion of the appellant in this case to quash the return of the officer on the summons does not state the grounds of the motion. It was the duty of the defendant to have done this, and not only so, but he must have pointed out to the plaintiff, if within his knowledge, the proper person upon whom service could be so had. (Wait's Actions and Defenses, pages 393-4, volume 6.)

Moreover, without having the court to pass on its motion to quash it the defendant filed its answer to the merits and thereby waived the question of jurisdiction over its person. The mere fact that in the order filing the answer the motion to quash is recited as not waived does not alter the legal effect of filing the answer, which is to waive this preliminary motion.

In Sheppard v. Graves, 14 Howard, 505, the defendants filed several pleas in abatement, objecting to the service of the summons, and at the same time pleaded to the merits, of the case.

Judgment was obtained for the plaintiff, and on appeal the defendants relied on their plea in abatement. The court said: "And by one of these rules (rules of common law), believed to be without an exception, it is ordained that objections to the jurisdiction of the court or to the competency of the parties, are matters pleadable in abatement only, and that if, after such matters relied on, a defense be interposed in bar and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived."

This is the universal practice in all courts so far as we are informed. Any other rule would allow a defendant to experiment with the court and his opponent as to the merits of the case to no purpose. When his motion is acted on, if overruled, he may answer on compulsion, as it were, and in this event he may rely on any error committed to his prejudice with respect to the motion. (C., O. & S. W. R. R. Co. v. Heath's Adm'r, 87 Ky., 651.)

The verdict in this case for killing the appellee's stock was rendered on Wednesday, October 26, 1892, and the motion for a new trial was made on Saturday thereafter, which was too late. The motion, however, for a judgment for the 25 per cent. damages under the statute (section 7, chapter 57, General Statutes), the finding of the jury being for as much as the appraisement in the country, was made and disposed of on Friday, the 28th, and hence the motion and grounds for a new trial, filed on the succeeding day, calling in question, as they did, the action of the court on the motion for damages, were filed in time, and the judgment of the court thereon may be reviewed by this court.

It is said in opposition to this view that there is no bill of exceptions on this motion for damages. But there is a bill of exceptions showing all the evidence heard on this motion, and which was filed within the time allowed by the court. When time is given until a day certain to file a bill, if it is filed on or before that day it is in time. (L. & N. R. R. Co. v. Turner, 81 Ky., 489.)

The bill of exceptions recites that there was no proof or evidence heard on the motion for 25 per cent. damages other than that contained in the bill on file.

It is apparent that the notice to the company, required by the statute to be given by the owner of stock killed, for the appointment of appraisers, was not sufficient in this case, and the court should not have rendered the judgment for damages. The notice did not fix the time when the application for the appointment was to be made, and it is not shown that the company did appear. In fact it was not addressed to the company alleged to have done the killing.

The judgment on the verdict can not be disturbed for the reason indicaed, but to the extent that damages were awarded the judgment is reversed for proceedings consistent with this opinion.

MARKS (ALIAS CRUME) v. CRUME.

(Filed February 12, 1895—Not to be reported.)

A husband is entitled to a divorce on the ground that his marriage was procured through duress, although the threats and duress that caused him to marry were not made by the wife, but by her friends and relatives.

Geo. S. Fulton for appellant.

John S. Kelly for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Guffy.

On the 12th of December, 1890, H. A. Crume instituted this action in the Nelson Circuit Court against the appellant, Lulie Marks, alias Lulie Crume, seeking to annul and set aside a marriage of the plaintiff to the defendant, consummated or performed in October, 1888, upon the ground of force, fraud and duress.

The defendant answered and denied all fraud, force and duress, and pleaded a counterclaim, asking for a divorce and alimony and maintenance, on the ground that plaintiff had, without her fault, abandoned her more than one year last past.

A trial resulted in a judgment in favor of the plaintiff, adjudging that the marriage was procured and obtained by force, fraud and duress, and adjudging that the same was invalid, void and of no effect. From that judgment the defendant has appealed to this court.

It does not appear the appellant was guilty of any force or duress, but the proof does conduce to show that friends or relatives of appellant did, by threats and duress, compel appellee to enter into the contract of marriage complained of. It is worthy of note, too, that the person who, from the proof, used most of the force complained of did not testify in contradiction of plaintiff's evidence.

The judgment of the court below seems to be in accordance with the evidence, and is, therefore, affirmed.

ELLIOTT v. GIBSON, &c.

(Filed February 18, 1895—Not to be reported.)

Patents—Conflict between calls and natural objects—Where the course, and distances set out in the patent as the third line of the boundary granted and described as running from a well identified natural object along the division line between two counties, can not be run so as to coincide with said division line, and the patent is thus irreconcilable with itself, the material thing to determine, if possible, is which of the two courses called for was actually run and surveyed by the county surveyor when he made his plat and certificate; and in the absence of other evidence the plat made out and returned by him, upon which the patent was issued, will control in determining the question of location of boundary.

In this case the plat is followed, which shows that the courses and distances set out constitute the true boundary rather than the county line called for.

Weller & Hays and N. J. Weller for appellant.

Wm. H. Holt and Wm. Low for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Grace.

This was a suit instituted in the Bell Circuit Court by the Gibsons against John Elliott for trespass on their lands, and for damages for the cutting, carrying away and conversion by said Elliott of certain timber of plaintiffs, resulting in a judgment in favor of plaintiffs.

The agreed facts in the case leave the main question to be determined—the location and proper boundary lines of the James and Kelton Renfro patent for 1,500 acres of land, of date August 25, 1851, under which plaintiffs claim and to which it is agreed they have title. And by like agreement the boundary of this survey is again made to depend chiefly on the location and proper running of the third line of same. This line, as called for in the patent, "begins on two beech trees near the meeting house on the line between Knox and Harlan (counties); thence with same N. 1150 poles to a chestnut and chestnut oak." The next line runs "thence S. 33 E. 710 poles to a stake; thence S. 45 W. 180 poles to the beginning." The parties agreed that the two beech trees are the third corner, and the evidence shows that they do not stand in the line between the two counties of Harlan and Knox, but stands six poles or more east of said line. This corner is clearly identified.

It is further agreed that the line between Harlan and Knox counties, as it existed at the date of the patent, is correctly laid down on the surveyer's map filed in this case. As also that the red line on said map, running N. 1,150 poles from the two beech, is correctly laid down on same as it would have run at the date of said patent.

It appears from an inspection of this map that the due north line claimed by the Gibsons runs nealry parallel with the division line between the two counties for a few poles; that it there touches and runs just a little west of said division line for a short distance; that after this the division line bears materially to the west, then comes nearly back again and runs nearly parallel some distance, and then again bears materially and permanently to the west of the due north line, so that at the end of the 1,150 poles the call of this line in the patent, as run on this division line, has varied to the west some 200 or more poles from the due north line.

The next call of the patent is S. 33 E. 710 poles, would run from this point on the division line southwest of and miss the lands of defendant Elliott where the timber was cut, while if the 1,150 poles is run due north from the two beech as called, and then the patent call S. 33 E. 710 poles, it will run northeast of and embrace the lands claimed by Elliott, where the timber was cut. So that it is manifest that the calls of the patent for this line running from the two beech north with the Harlan and Knox counties' line can not be so run as to comply with both requirements of the patent.

If you run north as called you leave the division line first slightly, but soon materially, to the left or west; and if you run from the two beech with the county division line you leave the straight line division mark first slightly, and then materially, to the right or east of you, this division line being located on the dividing ridge, and with the water divide of same between the waters of Straight creek on the east, and of several other small streams on the west, and presents an exceedingly irregular, zigzag, insightly course (though clearly ascertainable and identified), making nearly one hundred different courses and corners.

In running out the 1,150 poles called for, and of course by the irregular, crooked course, verging materially as it does to the left or west, the distance so run by Mr. Means extends so far north as a straight line due N. 1,150 poles from the two beech.

We take it that, as the patent calls can not both be true, the material thing to determines, if possible, by any legitimate evidence, is which line was actually run or designated at the time of the running by the surveyor.

On this question the Gibsons take the testimony of one B. A. Rice, now an old man, who says that he made out the plat of their survey for the surveyor, who made same in 1850, and that the surveyor told him that he had not actually run the line from the two beech, but that he simply laid it down due north, the 1,1550 poles; that he (said surveyor) knew the county division line run north, and, so he said, with the county line north, 1,150 poles to the chestnut and chestnut oak.

Waiving this oral testimony, we think there is one thing apparent in this case which does clearly indicate and show what the surveyor actually did at that time, or what he certified that he did (which has the same legal effect), and that is, the plat made out and returned by him with the certificate of survey and warrant under which the land was entered to the land office, and on which the patent issued. This plat is filed in this case, and an examination of it shows conclusively that this line from the two beech trees was, and is, laid down as running due north a straight line 1,150 poles, as called for by the patent, and that it does not indicate the irregular, zig-zag line, verging from time to time to the west, and having on same nearly one hundred lines and corners, as it would have done, and must have done, had the surveyor run on or intended to lay down the division line between the two counties.

Plats of this kind, made by the surveyor at the time of the survey and returned by him to the office, have been often used by this court for the purpose of determining the actual survey as laid, and have always been regarded as a high degree of evidence. We regard it as conclusive in this case. The judge who tried this case (without a jury) in the court below doubtless so held same, and based his decision in favor of plaintiffs on same.

There are other well-defined rules applicable to a determination of this survey, and to determine the location of a missing corner, as the chestnut and chestnut oak, at the north end of the 1,150 poles, that applied to this case, which would as certainly give the land in dispute to the plaintiffs, the Gibsons, even though they were required to run on the division county line, instead of the straight line due north from the two beech, but this view was not presented or relied on by counsel, and need not be noticed.

The judgment is affirmed.

NEUENBERGER v. NEUENBERGER, JR.

(Filed February 13, 1895—Not to be reported.)

1. Reformation of contract—Evidence—The evidence shows that a father, who was an ignorant, illiterate German, advanced in years, signed a contract leasing his farm to his son in consideration, as the lease expressed it, that the son would supply his father and mother with vegetables for their own use during the term, when in fact he believed he was signing a contract setting out the terms previously agreed upon between them, whereby the son was to furnish his parents not only with their vegetables, but all other necessaries, such as food and fuel for their comfort, and everything they needed except clothing, and that these stipulations were omitted from the contract by mistake of the draughtsman, therefore, the father was entitled to have the contract reformed so as to express the true intent of the parties; or, if the son will not consent to this, the contract of lease should be cancelled and the son not charged with rent for the premises and the father not charged for improvements made by the son.

2. Same—Pleadings—Estoppel—In this suit by the son to compel the father to so execute the lease that he may have it put to record, in which the father by answer seeks a reformation of the contract, the latter is not estopped to claim that there was any other consideration for the contract than a promise by the son to furnish him vegetables by the fact that he had previously filed suit against the son on the contract, in which he alleged this was the consideration for its execution, and that the son had failed to comply with its terms.

3. Same—Pleadings—After the suit by the father against the son for breach of the contract is consolidated with the suit by the son, who seeks to have the lease so executed that he may have it recorded, the father should set out the grounds on which he seeks a cancellation of the contract, because of mistakes therein, by an amended petition and not by answer.

Root & Root for appellant.

L. J. Crawford for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Pryor.

The petition below was filed by the appellee to compel the appellant to so execute a lease in proper form as to enable him to have it recorded as evidence of title.

The appellant, the father of the appellee, leased to the latter thirty acres of land near the city of Newport in consideration, as the lease expresses it, the appellee would provide his father and mother what vegetables they would need for their own use during the term. The term was for and during the life of the lessor and his wife.

The appellant reserved one room for himself and wife, and all lived in the same dwelling. The appellant, the father, filed his answer, in which he alleges the writing failed to express the terms of the contract, and the obligation of the son was to support the father and mother during their lives.

The draftsman of the instrument, who was examined as a witness for the son, testifies to facts, making it manifest that he omitted from the writing essential parts of the agreement, and that the son was to furnish his father and mother not only with the vegetables they might need for their table, but to furnish everything else necessary for their comfort—in other words, he was to supply their table, fuel for their room, such as he would furnish boarders, who had agreed to live in the same manner that the son himself lived. This, perhaps, would not include clothing or such expenses as might be necessary for luxuries in the way of living. The father had some means, and doubtless intended to clothe himself and wife, but that John was to furnish his table is evident.

A petition was filed by the appellant prior to the filing of the petition by the appellee, in which it is alleged the appellee had failed to furnish him with vegetables for his necessary use, and as no statement was made in that petition as to any other consideration, it is claimed that this worked an estoppel. The two petitions were consolidated, and in the answer to the petition of the son the issue as to the failure of the draftsman to insert the terms of the contract was raised, and while it should have been made by an amended petition, the answer makes the issue and ask for a rescission of the contract of leasing.

It is claimed in this answer that furnishing the vegetables was only a part consideration for the lease, and the proof, as already stated, shows such to have been the case. The father was ad-

vanced in years, is an ignorant and illiterate German, can not speak the English language so as to be understood, and when signing the lease believed all the stipulations of the agreement had been inserted by the draftsman, who seems to have concluded that the essential part of the lease was a mere private agreement between the parties, and, therefore, not necessary to be reduced to writing.

We are of the opinion, however, that the lease ought not to be cancelled, but the stipulations should be inserted as herein indicated, reforming its terms so as to express the true intent and meaning of the parties; that in consideration of the lease the lessee binds himself to furnish the table of the father and mother with food, such as is suited to their condition during their lives, including not only vegetables, but their meat, bread and groceries; also fuel for their room.

If the appellee is not willing to accept the terms indicated, the chancellor will cancel the lease, and in doing so will charge the appellee with no rent or the appellant with any improvements. An amended petition should be filed by the appellant to meet the proof offered.

Judgment reversed and remanded for proceedings consistent with this opinion.

SULLIVAN v. EVANS, &c.

(Filed February 14, 1895—Not to be reported.)

Title bond—Adverse possession—The purchaser of a boundary of ninety-five acres, bearing date in 1860, took possession of his boundary about 1865, and held it up to his death in 1871; his widow held possession from his death until 1882, when she conveyed by writing her dower interest in the entire tract to the appellee, who has held possession of the entire tract, thereby acquired, ever since. In this action, begun in 1891 by the heirs of the purchaser of the title bond, to recover possession from appellee, the evidence shows that the vendor, appellee's ancestor, cultivated about 12 acres of the land up to the time of his death, but did not reside on it or any part of the tract. Appellee claims to be in possession of about twenty-eight acres by consent of the heirs of the vendor. Held—

First. Appellee failed to show adverse possession for any period that would bar appellant's claim to any part of the tract.

Second. Appellee, having acquired possession under the writing from the widow, holds by a title friendly to appellant's claim, an attitude that he has not changed by any act of his prior to institution of this suit.

Appellants were entitled to recover possession of the entire tract and to a conveyance to same, it appearing that the twenty-eight acres claimed by appellee did not have any marked boundary at any time.

Hill & Denham for appellant.

Golden & Davis and Wm. H. Holt for appellees.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Judge Lewis.

February 26, 1891, appellants, children and heirs at law of John R. Evans, who died in 1871, brought this action against heirs at law of Joseph Evans, who died in 1876, seeking conveyance of title and to recover possession of a tract of land ascertained by survey to contain 95 acres. They file as evidence of their claim a title bond, bearing date July 6, 1860, which, if fully proved to

have been executed by Joseph Evans to his son, John R. Evans, for the recited consideration of $300, which, in absence of competent proof to the contrary, must be treated as having been, as recited in the instrument, actually paid.

The lower court rendered judgment in favor of plaintiffs for 67 acres of the tract, but against them as to 28 acres, and from that judgment they have appealed, a cross appeal having been granted to defendants, who contend it was error to adjudge any part of the land to plaintiffs.

The evidence shows satisfactorily that about 1865 John R. Evans took possession of the land and cultivated and controlled it up to his death. And that those claiming under him have had possession ever since, at least to extent of 68 acres, there can, it seems to us, be no serious question. Consequently, according to both the statute and decision of this court, limitation of neither thirty nor fifteen years is a bar to the recovery of the legal title to any part of the land unless it be the 28 acres; and we do not see why plaintiff, if entitled to any part, should not recover the entire tract.

There is some proof that Joseph Evans continued up to his death to cultivate about 12 acres, within what the lower court seems to have recognized as boundary of the 28 acres, and used timber at will. But he did not reside within the boundary of the 95 acres, and it can not be inferred or assumed, from the fact of his cultivating a part that the claim of ownership or possession by John R. Evans was in fact or law restricted to less than the entire boundary of the tract he had purchased. In fact there is no evidence that the 28 acres was ever identified or separated from residue of the tract by any marked and recognized boundary.

It appears from her testimony that the widow of John R. Evans had possession of the land from date of her husband's death until 1882, when, by a writing filed in this action, she conveyed her dower right in the entire tract to G. W. Evans, one of the defendants, and he has had possession, thereby acquired, ever since.

It is true he states he obtained possession of the 28 acres by consent of the other heirs of Joseph Evans, but he does not show what were the terms or consideration of such consent, nor the more important fact, they had any right to consent. At all events that transaction could not change the attitude he occupied in virtue of the written contract with the widow of John R. Evans of an amicable to an adverse holder of the possession.

It seems to us sufficiently established that John R. Evans and those claiming under him have had possession, in law and fact, of the tract of 95 acres from 1865 to bringing of this action, and are entitled to the conveyance sought for.

There is an attempt to show the sale by Joseph Evans to John R. Evans was fraudulent and void, and that the title bond was voluntarily surrendered; but there is no evidence of either fact.

Wherefore, the judgment on appeal is reversed and on cross appeal affirmed, and the case is remanded for further proceedings consistent with this opinion.

GORDON v. LOUISVILLE, ST. LOUIS & TEXAS RY. CO.

(Filed January 17, 1895—Not to be reported.)

1. Railroads—Killing of stock on track—In an action to recover damages for the alleged negligent killing of a colt by a railroad train, the court prop-

erly instructed the jury that it was not the duty of the engineer in charge of the train to stop or check the train before the colt got upon the track, an instruction being also given that the plaintiff was liable unless the engineer used all proper and reasonable effort to prevent the killing of the colt, and under the circumstances the accident was unavoidable.

2. A new trial will not be granted on account of the alleged intoxication of one of the jurors where it does not appear that the juror was so drunk as to be incapable of properly deciding the cause and where it does not seem probable that the jury was or would be controlled by one drunken juror.

C. S. Walker for appellant.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

In December, 1890, the appellant, H. B. Gordon, brought this action in the Daviess Quarterly Court against the L., S. L. & T. Ry. Co. to recover the alleged value of a colt negligently killed by defendant, as claimed by plaintiff. Appellant obtained judgment in the quarterly court, and defendant appealed to the circuit court. A trial at the September term, 1892, resulted in a verdict and judgment for the defendant. Plaintiff in due time filed grounds for and moved for a new trial, which motion was overruled by the court and appellant has appealed to this court.

The appellant complains of instructions Nos. 2 and 3 given by the court, and insists that instruction A asked by appellant should have been given. The instructions given are as follows:

"1st. If the defendant by its locomotive, in charge of its agents, carelessly or negligently ran over and killed plaintiff's colt, the jury will find for the plaintiff the damages he sustained. The measure of damages will be the value of the colt.

"2d. If the defendant's locomotive was in charge of competent persons, and if the engineer used all proper and reasonable effort to prevent the killing of the colt, and under the circumstances the accident was unavoidable, the jury should find for the defendant.

"3d. It was not the duty of the defendant's engineer to stop or check the train before the colt got upon the track, and failure to do so was not negligence."

The instruction asked by appellant and refused by the court is in these words: "The court instructs the jury that it was the duty of the engineer to stop the train when the colt got on the track; and if he could have done so and failed, they must find for the plaintiff the value of the colt."

It seems to us that the instructions given correctly present the law of the case, hence it was not error to refuse the instruction asked by appellant. The appellant also insists that a new trial should have been granted on account of the intoxication of one of the jurors. It does not sufficiently appear that the juror was so drunk as to be incapable of properly deciding the case, and, besides, it is not likely that the jury were controlled, or would be controlled, by one drunken juror, if such a juror was among their number.

The jury were the judges of the evidence, and having found for the defendant, we are not authorized to set aside the verdict.

The judgment is affirmed.

BEAN, &c. v. MEGUIAR, HELM & CO.

(Filed February 6, 1895—Not to be reported.)

Partial transcript—Presumption—Where the judgment appealed from ordered a sale of a judgment debtor's interest in certain real estate acquired by him under a will, which was filed with the pleadings of the case, and a copy of said will is not contained in the transcript of the record filed on appeal, it will be presumed that the will authorized the sale of the land devised to appellant for the purpose of paying his debts.

O'Rear & Bigstaff for appellants.

Tyler & Apperson for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

This suit was brought in the Montgomery Circuit Court by appellees to recover a tract of land alleged to be in the possession of appellants, and which appellees had purchased at execution sale, made in virtue of an execution in favor of R. Reid Rogers against Ann E. Bean, who was, as charged by plaintiffs, the owner of a life estate in said land.

Appellants resisted the recovery upon the ground that the execution sale was defective, and that the sheriff's deed to appellees conferred no title, and because appellants acquired title under the will of Jas. Bean, deceased, and that Ann E. Bean did not acquire any interest in the land that could be subjected to the payment of her debts, and pleaded and filed copy of the will with their answer.

The cause was finally transferred to equity, and upon final hearing the court adjudged that the execution sale was invalid, and set aside the same and cancelled the sheriff's deed made to appellees, and also adjudged that appellant, Ann E. Bean, had a life estate in said land, subject to sale for her debts, less a homestead right of $1,000; that the levy of the execution thereon was valid, and that appellees were entitled to a lien on said estate for the sum bid for the land at the said sale, viz., $501.97, besides interest and cost, and adjudged a sale of enough of said interest as operated to pay same. Appellants have appealed to this court. The copy of the will is not copied in the record, hence it must be presumed by this court that the will authorized the judgment of the court below. (13 Bush, 644; case of Bowman v. Holloway, 14 Bush, 426.)

This being true, and it appearing that the execution was valid and that appellees had paid the amount bid for the life estate in the land, the judgment of the court below seems to be in accordance with the law andf acts, and is, therefore, affirmed.

BOARD, &c. v. COMMONWEALTH.

(Filed February 12, 1895—Not to be reported.)

1. The Franklin Circuit Court has jurisdiction of an action by the Commonwealth on the official bond of the trustee of the jury fund for Breckinridge county, although the defendants reside and were served with summons in Breckinridge county.

2. Official bonds—Sureties—The surties on the official bond of a trustee of the jury fund are liable for the wrongful misappropriation by him of money turned over to him as such trustee by order of the circuit court, although the court may have ordered a larger sum paid over to him than was necessary to pay its jurors for the term when the order was entered.

John L. Scott & Son and David R. Murray for appellants.

Wm. J. Hendrick and Ira Julian for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Guffy.

At the January term, 1893, the Commonwealth of Kentucky obtained judgment in the Franklin Circuit Court against the appellants, Elijah Board, &c., sureties of Wm. H. Bell, late trustee of the jury fund of Breckinridge county, for the sum of $1,562.77, with 10 per cent. interest thereon from that date until paid, and cost. From that judgment defendants have appealed.

Their answer in the court below alleged that the sum received, and which was averred to be due from said trustee, was unlawfully received by him; that the circuit court of Breckinridge county, in April, 1892, ordered the county clerk of said county to pay over to said sureties the amount of public money or funds shown by his report to be in his hands, which was $2,156.08.

Appellants insist that not more than $754 of money was required at the April term, 1892, to pay the jurors, and that no greater sum could be lawfully ordered into said trustee's hands, and that he paid out that sum. A demurrer was sustained to appellant's answer, and defendant failing to plead further, judgment was rendered for the sum claimed.

It seems to be conceded by appellants that the Breckinridge Circuit Court could lawfully order into the hands of the trustee sufficient money to pay the jurors, yet they insist that the court exceeded its authority, and, therefore, the judgment is void, hence that they are not liable for the money so illegally received by the trustee. It seems to us that inasumch as the circuit court had jurisdiction of the subject-matter, and in the exercise of that jurisdiction ordered said sum to be paid over to said trustee, that the order was valid and binding on all parties until reversed or suspended, as provided by law.

The conditions of Wm. H. Bell's bond is that he will faithfully discharge all the duties of trustee of the jury fund of Breckinridge county, and pay over and account for all public moneys which may come to his hands, etc.

Beyond all question this was public money that was paid to him, and received by him as trustee aforesaid. If he was not entitled to receive it he should have declined to do so. The order or judgment of the Breckinridge Circuit Court must be held to authorize and make legal the payment of the money in question to Wm. H. Bell, trustee as aforesaid.

Appellants objected to the jurisdiction of the Franklin Fiscal Court because summons was served on them in Breckinridge county, which objection was properly overruled.

The judgment of the court below is affirmed, with damages.

SEIVERS v. PROCTOR COAL CO., &c.

(Filed February 14, 1895—Not to be reported.)

Judicial sales—Assignment for benefit of creditors—Pleadings—After land on which one, who made an assignment for the benefit of creditors, held a lien at the time he made his assignment, has been judicially sold to satisfy said lien, and a deed made to the purchaser therefor, and after the trustee has settled the assigned estate, a creditor of the assignor, who alleges that his debt alone remains unpaid, and that the trustee did not pay plaintiff's debt or collect money owing to the assignor and secured by said lien, and that the assignor had no other assets in this State but said lien debt, or its proceeds, can not charge the land with the amount of his claim against the assignor or have the sale of the land set aside.

N. A. Richardson for appellant.

Hill & Denham for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by C. J. Seivers from a judgment of the Whitley Circuit Court dismissing the petition of appellant to be made a party defendant in the suit of Vanwinkle v. Phillips, &c., then pending in the Whitley Circuit Court.

Appellant claimed that Jas. M. Bryant had, years before the filing or offer to file, appellant's petition, made a deed of assignment to W. O. Dodd for the benefit of his (Bryant's) creditors; that at the time of the assignment Bryant held two notes on McBrayer for land mentioned in said suit of Vanwinkle v. Phillips, and that a lien executed on same to secure the payment thereof, and that Dodd had died before the rendition of the judgment and never was a party as trustee to said suit; that all other creditors except appellant had been paid or settled with, and that no other assets except this realty remained in this State, hence the appellant claimed that the sale of the land should be set aside, or, if that could not be done, then that the sale bond for the said land, which he averred was still uncollected and proceeds applied to payment of appellant's claims.

Quite a number of motions, demurrers and amended petitions were filed and entered. We deem it unnecessary to notice all the claims made by appellants. It appears that the land had been sold, sale confirmed and deed made before appellant's petition was offered. It also appears that the trustee had made an assignment of all his interest in the lands mentioned to Vanwinkle, saying that the trust was settled up sometime before the filing of appellant's petition.

We do not mean to say that the assignment by Dodd necessarily bars appellant's cause of action against Bryant, if any he has, but mention it as one of the facts appearing in the record. We are of opinion that the demurrer to appellants' petition was properly sustained.

The judgment of the court below is affirmed.

UNDERHILL v. UNDERHILL'S ADM'R &c.

(Filed February 16, 1895—Not to be reported.)

1. Wills—Time when contested will should be read to the jury—It was not a reversible error for the court to permit the propounders of a will to call as

a witness in rebuttal the draughtsman of it, and permit him to identify it and then read it to the jury, although the contestants had moved for a peremptory instruction at the close of the propounder's evidence in chief, because the will had not been read in evidence by the witnesses in chief who proved its execution and who later identified it. The omission to read it as evidence in chief was due to an oversight of counsel for the propounders, which the court, in the exercise of its discretion concerning the order of introduction of testimony, could permit the propounders to cure in the evidence in rebuttal, notwithstanding section 604 of the Civil Code.

2. Same—Instructions—Where the only issue on trial was whether the whole paper offered was "a will or no will," it was not error for the court to fail to authorize the jury to sustain or reject a part of the paper offered as testator's last will.

S. W. Tolin and J. M. Lassing for appellant.

O'Hara & Rouse for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Chief Justice Pryor.

This appeal is from a verdict and judgment of the Boone Circuit Court sustaining the last will and testament of Thomas Underhill.

It was assailed by reason of the alleged mental incapacity of the testator to execute such a paper, and the exercise of an undue influence over him by the parties in interest at the date of its execution. At the close of the testimony for the propounders as to the execution of the paper by the attesting witness, and the competency of the testator at the time of its signing, the appellants (contestants) asked for a peremptory instruction in behalf of the contestants, but failed to state or give any reason for such a motion.

It was doubtless based on section 604 of the Code, that provides: "A writing shown to a witness may be inspected by the adverse party, and if proved by the witnesses it must be read to the jury before his testimony is closed, otherwise it can not be read unless the witness be recalled."

The court overruled the motion, and after the testimony of the contestants had ended the propounders offered the draftsman of the instrument as a witness in rebuttal. He testified as to his having written the will, and it was then offered to be read to the jury for the first time, and was the same paper the succeding witness had testified to as having been signed by them in testator's presence and at his request.

It was a mere oversight on the part of counsel, and a matter resting entirely within the discretion of the trial court as to whether the paper should or not be allowed to be read; in fact under the circumstances it would have been an abuse of discretion to have denied this right, as the testimony for the propounders in rebuttal was at the time being heard. It was evidence in chief, and while this court would not have reversed the judgment if the peremptory instruction had been given, no offer to read the will appearing in the bill of evidence, still if an omission of that sort is allowed to be cured by reading the paper proven, when its identity is not questioned, although not in strict compliance with the rule for the admission of such testimony, this court, when seeing it is in aid of justice and the exercise of a sound discretion by the trial court, will not interfere.

We have read the instructions carefully, and the court, in telling the jury what constituted a sound mind in a legal sense, and

also what constituted undue influence, followed the law as approved by this court in many cases.

The question was will or no will. If for the contestants, the entire paper would have been rejected; and if for the propounders, the whole paper was entitled to probate. There was no question as to a part of the will being properly executed, and, therefore, as to the point raised, no instruction should have been given in the language of the statute in that particular.

The judgment below is affirmed.

FAIN, &c. v. TURNER'S ADM'R, &c.

(Filed February 16, 1895.)

1. Contract between distributees—Consideration—Where two distributees, who were each entitled to $1,000 more of their father's estate than the other distributees, by reason of advancements made to the other distributees, at the request of their mother and upon the faith of her promise to pay each of them $1,000, with interest, so as to make them equal with the others, forbear to sue for or claim said amount from their father's estate and thereby lose it, the contract made by the mother is obligatory and based on a valuable consideration, to wit, on detriment and inconvenience sustained by said distributees in consideration of her promise.

2. Same—Statute of frauds—The promise of the mother was not a promise to pay the debt of another, within the meaning of the statute of frauds, but was an independent promise by her to pay absolutely and without reference to any default or misdoing on the part of another.

3. Same—The promise of the mother was not one that "was not to be performed within one year," within the meaning of the statute of frauds, since it is well settled that the statute applies only to contracts that will necessarily not be performed within a year, and the contract of the mother might have been performed within that period or immediately, no time for payment by her being fixed.

4. Claim against decedent's estate—Proof—The affidavits concerning their claims by such distributees against the estate of their mother in this case were sufficient proof of the claims to authorize payment of them, even within the rule concerning proof of such claims announced in the case of Leach v. Kendall, 18 Bush, 424.

R. P. Jacobs and R. H. Tomlinson for appellants.

W. O. Bradley and Edward W. Hines for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Lewis.

W. H. Fain, administrator, brought an action to settle and distribute the estate of Rolinda Turner, making her heirs at law defendants, two of whom, Eliza J. McDonald and Mary E. Fain, filed claims which were for the same amount and of the same character. Neither of the claims were formally pleaded, but there was a statement of the nature and cause of each, and a prayer that they be filed and allowed. It was, therefore, probbly not improper to determine on the demurrer filed by the other heirs, as the lower court did so, whether the statements, accompanied as they were by affidavits, are sufficient to support the respective claims.

Each statement is substantially as follows: William Turner, father of Mrs. McDonald and Mrs. Fain, gave and advanced to

his other children and heirs money, property and other things, of the value of $1,000, over and above what he had given and advanced at the time of his death to either of the two claimants; that he died so suddenly as to prevent disposal of his property by will, but stated he had advanced to his other children the excess mentioned, and desired said sum be given out of his estate to make the two claimants equal; that after his death they demanded of the administrator of his estate and other heirs to make them equal, but were refused; that they were about to institute suit to recover said claims, when their mother, Rolinda Turner, desiring to prevent litigation between her children, and also to have the two made equal with the others, agreed and promised that if they would not bring suit, and would consent for the estate of their father to be settled and distributed, so as to allow each child and heir to retain an equal share, without reference to previous advancements, she, Rolinda Turner, would pay them each $1,000 and interest, thereby making equality; and that, relying upon and in consideration of said promise, they forbore bringing suit for the purpose mentioned, and consented to equal distribution of the father's estate without reference to any advancements.

The grounds upon which was rendered the judgment sustaining demurrer to and dismissing each claim are that the alleged promise is without consideration, and within the statute of frauds and perjuries.

According to the statement of facts by Mrs. Fain and Mrs. McDonald, which on trial of the demurrer must be taken as true, they were each entitled to $1,000 of their father's estate in excess of shares of other distributees, but at the request of their mother, and upon faith of her promise, they forbore to sue for or claim, and thereby lost the amount.

It seems to us if detriment or inconvenience sustained by plaintiff at request of defendant can in any case constitute consideration for a promise, it does in this case.

The statute, which it is argued prohibits enforcement of the promise or agreement in question provides that no action shall be brought to charge any person, first, upon a promise to answer for the debt, default or misdoing of another; nor, second, upon any agreement which is not to be performed within one year from the making thereof, unless the promise or agreement, or some memorandum or note thereof be in writing, and signed by the party to be charged therewith. Mrs. Rolinda Turner did not promise to answer for the debt, default or misdoing of another in meaning of the statute, nor according to any other proper meaning of those terms. The father of claimants was not indebted, nor bound while living to pay either of them $1,000, consequently was not in default nor guilty of any misdoing in failing to give or advance that sum; but after his death they became entitled to it, not as a debt which another owed, but in their own right under operation of the statute of descent and distribution, and lost it by failure to claim or sue for it.

If, however, it could have been regarded as a debt due from any person, still, according to uniform construction of the statute by this court, the promise by Mrs. Rolinda Turner would not be inhibited, because whoever, if any person, may have owed them were released, and hers was an independent promise to pay absolutely, not on condition of default or misdoing of another. (Wagner v. Bell, 4 Mo., 8; Day v. Cloe, 4 Bush, 563; Myer v. Myers, 6 Bush, 237.)

Nor does the promise come within that part of the statute inhibiting an action upon verbal agreement which is not to be per-

formed within one year from the making thereof; for, as equally well settled by this court, a contract to be within that statute must, in language of Howard's Adm'r v. Burgin, 4 Dana, 137, be one "which is necessarily not to be performed within a year." There was no time fixed for performance of the agreement here in question, and, therefore, it was not necessarily to be postponed beyond a year, but might have been within that period or even immediately.

It is, however, contended that, applying the rule stated in 13 Bush, 424, the claims ought to have been disallowed because not supported by sufficient proof. In that case it was held that "every fact touching the validity of the claim which, in a suit thereon, it would be necessary to aver in the petition, should be proved by the evidence tendered to the personal representative, and if it is not done he will not only be justified in refusing payment, but it is his duty to refuse. He is not bound to tax himself, and has no right to tax the estate, with the cost of obtaining records or other evidence to complete evidence of the claim."

It seems to us there does accompany statement of each claim proof of all essential facts touching validity of it, and to give to the claimants a prima facie right to judgment for amount each claims; for not only do they state and prove their father said he had made advancements to his other children in excess of what had been advanced to the two claimants, and desired them made equal out of his estate, but it is substantially and sufficiently stated and proved that Mrs. Rolinda Turner was cognizant of the fact when she made the promise in question.

It is further argued that the phrase "other things," used in the statement of the claimants, excludes the idea the other heirs had received as much as $1,000 as advancements more than they had gotten; but even if that was sufficient to invalidate the entire claim, the statement was amended so as to show there had been advanced such excess in money and property.

Wherefore, the judgment disallowing and dismissing the claims of appellants is overruled and cause remanded for furthr proceedings consistent with this opinion.

DUNNING v. LACEY.

(Filed February 12, 1895.)

Jurisdiction of appeal from quarterly court—Amount in controversy—On an appeal by a defendant to the circuit court from a judgment in favor of plaintiff in a quarterly court the amount in controversy is the sum recovered by the plaintiff in the quarterly court, there being no set-off or counterclaim sought to be recovered by defendant.

The plaintiff recovered judgment for $25 in a quarterly court, and defendant appealed to the circuit court, where his appeal was dismissed because the amount in controversy on appeal was not sufficient to give the circuit court jurisdiction; defendant appeals to this court from the circuit court. Held—The appeal must be dismissed, the amount in controversy being too small to give this court jurisdiction.

Fenton Sims and E. W. Hines for appellant.

W. G. Bullitt for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Dunning, was sued in the quarterly court of Trigg county by the appellee, Lacey, for work and labor and for damages resulting from a breach of contract in regard to the rent of a farm. The amount sought to be recovered was $164. The claim of the appellee, Lacey, was controverted, and on the trial in the quarterly court a judgment for $25 was rendered against Dunning. He appealed to the circuit court, and that court regarding the matter in controversy at being only $25, dismissed the appeal for want of jurisdiction. The statute provided that appeals might be taken to the circuit court where the amount in controversy, excluding interest and costs, is over $25. It is insisted that as the case, when appealed to the circuit court, had to be tried de novo, the amount in controversy is the sum claimed in the petition, and if so it must follow that an appeal to this court would not, and ought not, to change the rule.

The case of Donahue v. Murphy, 2 Bush, 194, is relied on as giving this court jurisdiction of the appeal, and is similar in its features to the case before us, in fact settles the question if adhered to.

The case of Tipton v. Chambers, 1 Met., 967, established a contrary ruling, and, while decided prior to Donahue v. Murphy, was followed by this court in the case of the Railway Co. v. Wade, 89 Ky., 255, holding that, in the absence of a counterclaim or set-off by the defendant asserting the right to a recovery for an amount giving this court jurisdiction, the amount of judgment against the defendant for the plaintiff (and from which the defendant alone appeals) is the sum in controversy.

In this case there was no set-off or counterclaim that had been disregarded or reduced by the judgment. The amount involved on this appeal was $25 only. The plaintiff was willing to abide by it, and the defendant unwilling to pay it. There is nothing else in controversy, and this court has no jurisdiction of the appeal.

The case of Donahue v. Murphy is overruled, and this appeal dismissed for want of jurisdiction.

LOUISVILLE & NASHVILLE R. R. CO. v. BERRY, ADM'X.

(Filed February 12, 1895.)

1. There was sufficient evidence in this case to authorize the submission to the jury of the question as to whether plaintiff's intestate lost his life through the willful negligence of defendant, and it was not error to refuse a peremptory instruction for defendant.

2. Practice in civil cases—Taking of model to jury room—After a jury has retired it is not error to permit one of them to return to the court room and take to the jury room a model of the trestle where plaintiff's intestate lost his life by the alleged wrongful act of the defendant, said model having been introduced as evidence on the trial.

3. Death by negligence of railroad—Instruction as to compensatory damages—In an action to recover damages for the death of the plaintiff's intestate by the wrongful act of defendant, it is a prejudicial error to instruct the jury that in fixing compensatory damages they may "take into consideration the power of deceased to earn money, the probable duration of his life, etc.," since the single criterion in such case is the power of deceased to earn money, inquiry as to probable duration of life being merely incidental;

and the jury probably understood from the insertion of the word or phrase "etc." that they could consider other elements of damage.

4. Same—Evidence—It is competent for defendant to prove by its witness that a witness of plaintiff, who has previously testified, was discharged from defendant's service.

Helm & Bruce and D. H. French for appellant.

Jas. A. Scott and Wm. H. Holt for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge Lewis.

This action was brought by appellee to recover for destruction of the life of her husband, C. C. Berry, by alleged willful negligence of the foreman of a gang of bridge-builders, he being one of them, in service of appellant, which occurred under these circumstances: It became necessary to replace, upon a trestle across Beargrass creek, a stick of green timber about 28 feet long, 8 inches thick and 11 inches wide, to be used as a chord or stringer that had the day before fallen therefrom to the ground, about 15 feet, to effect which two ropes were put around the stick nearly its length apart, one end of each being fastened to a cross-tie on top of the trestle, and the other held by men, some of whom were standing upon the cross-ties, and others lower down upon girders that rested upon posts of the trestle, to pull up the timber. But in order to aid them it appears the foreman got another rope, one end of which he tied to a loose plank about 16 feet long lying across the girders and upon which he stood while pulling. After the timber had been lifted as high as the girders, ends of which extended beyond the trestle posts and obstructed it, the foreman let go the rope he had been using and went to another place for the purpose of shoving the timber beyond the ends of the girders so it could be gotten upon them.

It appears that Berry remained upon the ground to help raise the timber until it got out of his reach, when he went upon the trestle and took hold of the rope dropped by the foreman, and while pulling it, the loose plank was either pushed by pressure of the force of himself and of others against it, or pulled off the girders by the rope to the gronud, he falling at the same time and receiving an injury from which he died in a few days.

Upon a trial a verdict and judgment were rendered in favor of plaintiff in the action for $10,000, and we are now required on this appeal to consider the various errors complained of.

1st. There is not, in our opinion, such failure of proof to sustain allegations of the petition as requires reversal, because the lower court refused to give a peremptory instruction to the jury to find for defendant. None of the witnesses appear to have been looking at Berry when he fell, all being engaged pulling the ropes except the foreman, who was pushing or prizing the timber from under the girders. But it seems to us very evident his injury was connected with and resulted from the falling of the plank, for the foreman and another hand lost footing at the same time and from the same cause and saved themselves from falling to the ground by seizing some of the trestle timbers.

The rope might, thus tied to the loose plank, have been pulled in comparative safety while the stick of timber was nearer the ground, as was done by the foreman; but it was when Berry took hold of the rope so nearly on a level with the plank as to render it dangerous to do so. And while he might, by closely examin-

ing the actual situation, have discovered that to pull the rope would probably cause the plank to move towards the end of the girders, especially when the pressure of his and the feet of others was added; still considering that he had seen the foreman adjust the rope and pull it in safety, standing at the same place, and that others, instead of warning him of danger, remained upon the plank, it was, in our opinion, proper to permit the jury to determine, under correct instructions, whether his failure to make the examination was such negligence as should defeat the action.

2d. There was a model of the trestle made and exhibited on the trial for the purpose of showing the situation of Berry at the time he fell, and the process by which the timber was raised; and it is now urged as ground for reversal that after the jury retired one of them returned and, without permission of the court, carried that model to their room. There is no provision of the Civil Code directly applicable to the question raised; but section 821 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel."

Under that section a jury, after retiring, has no right, without consent of court, to re-examine a witness at all (Lettrall v. M. & L. R. R. Co., 18 B. M., 291); nor does it seem to have been intended there should be an examination as to any new matter, the inquiry being restricted to what had been actually testified by the witness and without cross-examination; but inspection and examination by a jury, after retiring, of a diagram, map, model, and the like, exhibited on the trial, is not prohibited; and we see no reason why, in case of disagreement or misunderstanding by the jury as to what was indicated or shown by them on the trial, they may not, with permission of court, be made, as well as a living witness, to give the correct information; for no fact testified to is thereby falsified or perverted, nor any new matter brought to the attention of the jury.

Section 248, Criminal Code, provides that "upon retiring for deliberation the jury may take with them all papers and other things which have been received in evidence on the trial."

And such being authorized procedure on trials of criminal cases, it seems to us it would not be contrary to the policy of the law, nor prejudicial to rights of litigants, for the court, in exercise of sound discretion, to permit the jury to take with them, on retiring for deliberation, things that were used as evidence on trial of a civil action.

3d. By instruction No. 1 the lower court indicated the amount of damages the jury might find in the following language: "Then they should find for the plaintiff in such sum as will reasonably compensate her for the loss thus sustained, not exceeding $40,000; and in fixing the amount of compensation the jury may take into consideration the power of the deceased to earn money, the probable duration of his life, ect."

According to well-settled doctrine the single criterion by which to measure compensatory damages in a case like this is the power of the deceased to earn money, inquiry as to probable duration of his life being merely incidental. But by that instruction the jury was not thus restricted, but given the right to consider and reckon, in arriving at the sum of damages, every possible circumstance or condition which might cause or aggravate loss, inconvenience

or suffering, mental or physical, of his surviving widow and children, for the abbreviated word or phrase "et cetera," or "and so forth," which signifies the same thing, was certainly intended by the lower court to have some force and meaning, or it would not have been used; and doubtless the jury did understand it, as they had a right, to give them the right of unlimited inquiry about every possible source or cause of damage to the widow and children; and we, therefore, think the instruction was prejudicial to the substantial rights of the defendant, and erroneous.

4th. Another error complained of is refusal of the court to permit defendant to prove by one witness that another called by plaintiff had been dismissed from the service of the company. Such fact is always proper for a jury to consider in determining credibility of a witness, and we see no reason why it may not be proved by a witness other than the one affected by it as well as himself.

For the errors indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

BUTTON v. DEHONEY, &c.

(Filed February 12, 1895—Not to be reported.)

1. Damages awarded for detention of personal property excessive—New trial—In this action to recover personal property and damages for its detention, the damages allowed by the verdict are so excessive that a new trial should be granted.

Where the damages awarded are excessive, and this is made a ground of the motion for a new trial, the motion should be granted. It is not necessary that the grounds for a new trial should aver that the excessive damages was the result of passion or prejudice on the part of the jury.

2. Same—Judgment must conform to verdict—In an action by a husband and wife, where the wife is awarded damages by the verdict for the unlawful detention of her personal property by the defendant, which verdict was also in favor of defendant on his counterclaim for $188.40 against the plaintiffs, it was error to render judgment in favor of the wife against defendant, and in favor of defendant on his counterclaim against the husband only; the judgment on the counterclaim should have been deducted from the sum recovered by the wife.

J. C. Clemmons for appellant.

Samuel S. Blitz, J. M. Chatterson and Speckert & Richie for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Pryor.

This action was brought below by Herbert Dehoney and his wife Emma to recover certain personal property alleged to be in the possession of the defendant, Button, and wrongfully detained.

The substance of the defense is that the wife, Emma, while a single woman, owned a restaurant and having an agent to run it, and becoming dissatisfied with its management placed the defendant, Button, in possession, with full power to control and settle up the business.

The agent in charge of the business, and who was discharged, was the present husband of the plaintiff, Emma, and the principal purpose, as developed by the testimony, in placing the de-

fendant in charge was to alienate the affection Emma had for her co-plaintiff and prevent the marriage, and this feature of the case no doubt caused the somewhat remarkable verdict and judgment that was rendered below.

The property sued for consisted of a horse, wagon and harness, lap robes and whip, and a cash register. The defendant, Button (appellant), only had possession of the restaurant for three or four days before Emma and her co-plaintiff married, but in the meantime had paid for Emma, out of his own means, about $188, as the jury said in their verdict, the greater part of which was in discharge of a debt that was owing Herbert, the husband, for services rendered in the restaurant as the agent of Emma, who at the time was single.

Button refused to deliver up this property until he was reimbursed or paid back the money he had advanced, and this caused the bringing of the action.

The jury fixed the value of the horse at $150, and $100 damages for the taking and detention; fixed the value of the wagon at $65; the value of the harness at $22 and $5 damages for the detention; the value of the cash register at $175, and for detention $15 in damages; cash in register $25.

On the counterclaim of the defendant the jury said he was entitled to recover against the plaintiffs $188.40.

A judgment was rendered in favor of the plaintiff, Emma, for the property mentioned, if to be had; if not, its value, and also the damages for the detention; and also adjudged that the defendant on his counterclaim recover of the husband, Herbert, the $188.40. While Emma, the wife, insists that no authority was given by her to Button to take charge of this property, it is shown that the defendant did have charge of it, and that he advanced these moneys for the plaintiff, and the jury by their verdict have so adjudged.

The testimony is conclusive as to the payment of these moneys for Emma, and there could be no reason for the defendant making these payments unless he had been placed in charge of the business, and in fact all the testimony but that of the plaintiff is to the effect she placed him in control of the business.

The jury, by their verdict, said the plaintiffs (and not Herbert Dehoney, the husband, alone) owed the defendant $188.40, and the court had no power to render judgment against the husband only for that amount. He really did not owe it, but the debt was that of the wife, contracted before the marriage, and for which she was liable, therefore, the $188.40 should have been deducted from the amount recovered by the wife. Besides, the daamges are excessive, both as to the horse, harness and the cash register.

This is made a ground for a new trial, and a statement that it was the result of passion and prejudice was not necessary to enable the court to consider the question and to see the damages were for greatly more than should have been allowed or the proof authorized. The bill of exceptions contain all the evidence, and we find no such proof of damage. There was no exception to the instructions, or any objection made to the manner in which the case was conducted, still the judgment was erroneous upon its face. It failed to follow the verdict, and the damages were excessive.

From the latitude given this case it may have been converted into an action of trespass or a conspiracy to prevent the plaintiffs from marrying, yet with the facts before us, it was a matter of account only, and must be reversed for the reasons indicated and a new trial awarded.

Remanded that this may be done.

PRATHER, &c. v. PRATHER.

(Filed February 13, 1895—Not to be reported.)

Res adjudicata—Partition—In a suit begun in 1860 by all the devisees entitled to a certain tract of land, certain parts of the land were allotted to appellants by an order of partition, and deeds were made to them and they were put in possession. The appellee, a devisee, purchased the interests of all the devisees to whom allotments had not been made, and the court adjudged that he was entitled to all the land not theretofore allotted by its commissioners, and had a deed made to him for such boundary. From this last order an appeal was taken, and it was affirmed by this court. In this action by appellee to recover from appellants a portion of the land so conveyed to him by the court, wherein appellants claimed that the apportionment of the several interests was unequal and to their prejudice, Held—Whether or not appellants were allotted a fraction less of the entire tract than they were entitled to, they are concluded by the judgments of partition entered in the action to which they were parties, by which their rights were fixed. It is now too late, twenty years after the judgment of partition, to set same aside or read just the apportionment so as to cure alleged errors in the partition.

E. L. Worthington, Cochran & Son, J. G. Hickman, G. W. Adair and G. S. Wall for appellants.

A. E. Cole & Son and Wm. H. Holt for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

Nearly fifty years ago Ross Prather died testate. By the terms of his will a farm of about 300 acres was bequeathed his widow in trust for twelve of his children, to be so held until the youngest children became twenty-one years of age, which occurred in 1865. Among them were the appellants and the appellees. The widow died in 1851.

In 1860 a suit was instituted, all parties in interest joining, to sell the farm, for the benefit of the devisees. An order of sale was made, but never executed for the want of bidders. During the proceedings in that action the right of the children of Mrs. Dye and Mrs. Gault, the deceased daughters of the testator, to take their mother's share was questioned. The circuit court decided that they are entitled to their respective interests, and this court affirmed the judgment.

Some of the devisees dying, increased the interest of the survivors in the farm. The farm was never partitioned among the devisees, but the court from time to time sent out commissioners to lay off to certain devisees in severalty their respective interests. The Gault and Dye heirs were thus given their interests, and deeds made to them.

In 1870 the appellants, Moses P., Jas. S., Joseph C. Prather, and the appellee, W. S. Prather, filed an amended petition, in which it is said "they now ask that their respective interests in said land may be set aside to each of them in severalty, according to quantity and quality. * * * To each of the plaintiffs the one-twelfth and two two-hundred-and-sixteenths of the whole tract of land of about 300 acres, of which plaintiffs' ancestor, Ross Prather, died owning and possessed."

The court adjudged that each of them was entitled to the interest which they claimed in their amended pleading. The commissioners appointed to allot their respective interests acted and

reported that they had allotted to Joseph C., Jas. S. and W. S. Prather certain parts of the farm under order of court. The commissioners did not then set apart Moses P. Prather's interest for reason assigned. The report was filed in April, 1871, confirmed at that term of the court, and deeds made of Joseph C. and James S. Prather for the interests assigned them, which they accepted.

Afterward the commissioners allotted to Moses Prather his interest, as had been fixed under former order in the action, and a deed was made him therefor by the commissioner of the court.

After making allotments to certain devisees a certain part of the farm remained unallotted, out of which the remaining devisees were to have their respective shares. The quantity of land is estimated at 98 acres.

The appellee, W. S. Prather, purchased out the interest of the remaining devisees, to whom no allotments had been made, and from whom he obtained deeds conveying him the land. Upon presentation of these deeds the court adjudged he was entitled to the land unallotted, and by its commissioner made him a deed for the boundary thus remaining. From that action an appeal was taken to this court, which affirmed the judgment.

In doing so (in February, 1881) the court said: "At the request of the appellants and W. S., J. C. and M. P. Prather, the court, on October 29, 1870, appointed commissioners to allot them in severalty their respective shares of the 300-acre tract. The commissioners made the allotment, except as to M. P. Prather, and filed their report, which was confirmed as to the appellant, and the land allotted was conveyed to him. That judgment is unreversed and is not appealed from, and conclusively settles the fact that appellant has received his full share of the whole tract."

This action is brought by the appellee to recover of appellant, Jas. S. Prather, 28 acres which is embraced in appellee's purchase from the devisees, to whom no allotment had been made. Appellant, Jas. S. Prather, was the appellant in the case when the opinion was given from which the above is quoted.

The court in that case held that the judgment making the allotment to the appellants "conclusively settles the fact that appellant has received his full share of the whole tract." His co-appellants are in the same situation, as their rights are fixed by the same judgment. It is an interpretation of the judgment fixing their right in the land.

The appellants alleged in their pleading that they are respectively entitled to certain fractional interests in the tract of land. They asked that their respective interests be set aside to them in severalty according to quality and quantity.

The appellants may have been entitled to a small fractional interest more than they declared in their pleading they were entitled to receive. They elected to proceed in the manner in which they did; had their interest fixed by a judgment of the court, their lands allotted themselves and deed made to them therefor.

While appellants had each a small fractional interest more than they claimed in their pleading, but as they chose to claim less, and obtain a judgment of the court determining that their interests were as they claimed them, we are of the opinion that they are concluded by that judgment. The quantity in the parcel alloted to the several devisees by the commissioner varies, which indicates that the land is not all of the same quality.

There is testimony in the record conducing to prove that the quality of the land in the 98-acre boundary is very inferior to

that which was assigned to the appellants. Probably the value of the unalloted land was not of greater value than the devisees, unprovided for by allotment, are entitled to recover. Some devisees received about 25 acres, while the appellant, Moses P., received 42 acres, and the most of the 98-acre tract was of still less value than that allotted him.

Perhaps the parcels which have been allotted have changed hands—some have been improved, others deteriorated in value, and a just and proper re-allotment at this time could hardly be made; and more than twenty years having elapsed since the judgment was entered fixing appellant's rights in the land, and for which the vendors of appellee were in nowise responsible, and especially as the testimony tends to show that, as a matter of fact, appellants received land about equal in value to their full share, we will not disturb the judgment of the court below.

Judgment affirmed.

FARRIS, &c. v. FARRIS, &c.

(Filed February 14, 1895—Not to be reported.)

Purchase of decedent's land, when sold for debt, by one heir for benefit of all—Right of others to redeem—Fraud—At a judicial sale of an intestate's land to pay debts, one of the three heirs purchased the land at less than two-thirds of its appraised value under an expectation and belief on the part of the three that the purchase was for the benefit of all, although there was no express contract to that effect. The purchaser refused to recognize the right of the other two to any interest in his purchase, and by artifice baffled their efforts to redeem their two-thirds interest of the land within the year allowed for that purpose. Held—A court of equity will not hesitate to permit the two heirs to redeem their interests after the expiration of the year; since they were able and ready to redeem within the year, and were prevented from tendering the money to do so by reason of refusal of the purchaser to take less than amount necessary to redeem the entire tract, their failure to tender the necessary sum does not affect their rights.

Crawford & Mason and H. F. Finley for appellants.

C. W. Lester for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

Mary Farris died intestate, leaving J. G. Farris, J. S. G. Farris and Samantha Wilder her only children and heirs at law; and July 21, 1890, under judgment for sale of sufficient quantity of land belonging to her estate to satisfy a debt of $600 against it, J. S. G. Farris, being highest bidder, became purchaser of 250 acres at that amount, being less than two-thirds of the appraised value, and gave bond therefor, due in six months.

This action was brought April 25, 1892, more than one year from date of sale by J. G. Farris and Samantha Wilder, her husband uniting, to have deed to J. S. G. Farris set aside, and the land divided equally between the three children upon payment by each of the plaintiffs of one-third the purchase price, interest and cost, which they asked permission to do; but the action was dismissed, and they have appealed.

J. G. Farris, J. S. G. Farris and the husband of Samantha Wilder were all present at the public sale of the land, and though

there was not provided in this case an express agreement between them for J. S. G. Farris to bid for and buy the land for joint benefit of all the heirs, it is manifest not only that J. G. Farris and Wilder permitted J. S. G. Farris to do so without competition under that belief, but he knew such was their expectation and belief. Nevertheless after the sale he refused to permit them to aid in making the required bond, or to recognize their claim of joint interest in the land.

When the bond fell due he was unable to meet it, and undertook to convey the land to one Siler, who advanced or loaned the amount of the purchase money, though agreeing in writing to reconvey to J. S. G. Farris upon payment of the amount loaned and interest at the rate of 8 per cent. per annum.

On the day before the expiration of the time for redeeming, J. G. Farris and Wilder went to the county seat for the purpose of paying the amount required of them, being two-thirds, in order to redeem their shares of the land, and it appears they had made arrangement to get the money; but though making diligent search for J. S. G. Farris, who was in the town that day, they were unable to find him. And the evidence strongly tends to show not only that he avoided them for the purpose of preventing the redemption, but Siler, of whom they inquired, could, if he had desired, have put them on his track. However, after he left the town Wilder followed him to his home in the country, and induced him to return next day, though his conduct and conversation show he came back believing the time for redeeming had expired, and his return would be no advantage to appellants. As before said, they had made arrangements to get and pay the required amount of money, of which fact they informed both Siler and J. S. G. Farris, but the former refused to receive less than the whole amount of the purchase money advanced by him and interest, and the latter refused to then pay one-third thereof, or any at all, having the right under his contract with Siler to defer payment beyond one year from date of the sale. So, though willing and able to pay the amount necessary to redeem two-thirds of the land, as they were entitled to do, appellants could not safely pay to J. S. G. Farris, the original purchaser, nor probably compel Siler to receive it. Plainly J. S. G. Farris intended to baffle the efforts of the appellants to redeem their two-thirds of the land within the statutory period, and with the aid and co-operation of Siler succeeded in doing so; and, therefore, a court of equity should not hesitate to permit them to now redeem and have that quantity allotted. Siler says in his answer he has no interest, having received the money loaned to J. S. G. Farris, and reconveyed the land; and the latter can not complain because on account of his wrongdoing, not fault of appellants, they failed to redeem in due time.

No actual tender of the money was necessary because they were informed by Siler, to whom only they could safely pay it, that he could not receive it.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

(Extended opinion—Filed March 12, 1895.)

Opinion of the court by Judge Lewis.

Upon return of this case the lower court will have unquestionable power to prescribe a reasonable time within which appellants shall pay into court or to J. S. G. Farris the amount of money and interest required, in order to redeem their respective

shares of the land, or upon failure to lose right of redemption; and that power might have been exercised without further direction than was given in the original opinion.

VANMETER v. VANMETER, &c.

(Filed February 15, 1895—Not to be reported.)

Liens—Fraudulent conveyance—Unrecorded mortgage—A creditor of C. sued to subject land conveyed by its owner to V., on the ground that C. had paid the purchase money, and the court granted the relief sought and ordered a sale of the land to satisfy the debt. The sale was made, and before its confirmation a brother of V. sued to foreclose a mortgage held by him on the land sold, and also filed exceptions to the report of sale on the ground that his mortgage lien was superior to that of the creditor. The brother knew of the pendency of the suit to subject the land to the debt of C.'s creditor, retained his mortgage two years and a half after its execution, and a year after the filing of the creditor's suit, before recording it. There is much evidence to show collusion between the brother and V. Held—The sale should be set aside; the creditor should be given the superior lien; another sale should be made to satisfy, first, the creditor's debt, and then to satisfy the brother's debt.

Wright & McElroy and Wm. H. Holt for appellant.

E. W. Hines, W. E. Settle and James S. Lay for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Hazelrigg.

In August, 1890, R. S. Ward, as administrator of C. J. Ward, brought his action to set aside a conveyance of certain lands in Edmonson county, made from one Montadier to Thomas G. Vanmeter, for the reason that while the conveyance was made to Vanmeter, the purchase price was in fact paid with the money of one Carroll, who was the father-in-law of Vanmeter and the judgment debtor of Ward.

The success of the plaintiff in that suit meant not only financial loss to Vanmeter, if he had in fact paid for the property with means of his own, but fastened on the parties concerned the perpetration of a grave fraud, if not in fact a crime.

The effort of the plaintiff was to show that Carroll, having bought the saw logs of his neighbors upon a promise to pay for them when he returned from the market, had carried them to Evansville, sold them for cash, and, pretending to have been robbed, had, on his return, refused to pay his creditors; and had fraudulently placed his money at the disposal of his son-in-law, who had bought the land in question with knowledge of the fraud.

J. C. Vanmeter, the present appellant, was not a party to that suit, but he is the brother of Thomas G.; lived in the same vicinity; was on intimate terms with him and with Carroll, and saw them both frequently. His contention, therefore, that he was ignorant of the purpose of that suit, involving, as it did, his brother's and his friend's integrity, to say nothing of their financial interests, is entirely improbable.

After a protracted litigation of evident bitterness, the chancellor, in September, 1891, adjudged that the land was purchased with the money and property of Carroll, and was conveyed to

Vanmeter for the purpose of defrauding the creditors of Carroll. A sale was accordingly ordered to satisfy the plaintiff's debt.

From that judgment Carroll and Vanmeter appealed, and this court affirmed the judgment below, saying that "though the deed was made to Vanmeter, it is evident that the consideration money was paid by his father-in-law, Carroll, who is the judgment debtor. The former is shown to have been a day laborer, and while he may have been ordinarily industrious, was intemperate and wasteful, and we are satisfied did not, at the date of the purchase, have money with which to pay the large sum he pretends to have paid. On the other hand, Carroll is shown to have sold at Evansville a large lot of saw logs, from which he realized a coniderable sum of money; yet immediately thereafter became insolvent, refusing to pay any of his debts, giving the flimsy excuse that he had been robbed of that money." (Carroll, &c. v. Ward's Adm'r, 15 Ky. Law Rep., 699.)

At the sale of the land in November, 1891, Ward, as administrator, became the purchaser. On January 6, 1892, J. C. Vanmeter brought this action to foreclose a mortgage, alleged to have been executed to him by his brother, Thomas G. Vanmeter, on February 12, 1889, on the land which, as we have seen, had been sold under a former judgment, but which sale, as it appears, had not then been confirmed. To this suit he made his brother and Ward defendants. At the succeeding term of the court J. C. Vanmeter, for the first time, appeared in the Ward-Carroll action, and objected to a confirmation of the sale, alleging that he was an interested party, and referring to his action then pending to foreclose his mortgage. The two actions were then consolidated, and to the petition of J. C. Vanmeter, Ward answered that when the alleged mortgage was executed J. C. Vanmeter had notice of the fraud by which his brother had obtained the title, and was in fact a party to it; that the plaintiff did not have his mortgage recorded until on August 25, 1891, more than two and one-half years after its execution, and a year after his (Ward's) suit to subject the land to his debt, and was, therefore, a lis pendens purchaser; and further, that plaintiff, having notice of the action and failing to assert his lien therein, he was estopped to do so.

Upon final hearing the court set aside the sale theretofore made of the land, but adjudged another to satisfy, first, Ward's debt, and then J. C. Vanmeter's mortgage lien. From that judgment J. C. Vanmeter prosecutes this appeal, Ward prosecuting a cross appeal.

As intimated theretofore, we are convinced that the old suit of Ward against Carroll and Thomas G. Vanmeter, affecting the very land on which J. C. Vanmeter had taken his mortgage, did not progress without the latter having knowledge of its object. Yet he carried his contract of security in his pocket for two and one-half years before he put it to record, and nearly three years elapsed before he brought suit on it.

Moreover, while a most important circumstance, indeed a controlling one, in the old suit operating to the disadvantage of his brother, was that he was "only a day laborer," and unable to buy the land, the appellant did not bring forward his alleged mortgage and show at least where $700 of the $1,400 needed to buy the property came from. We may suppose he was not compelled to do this, but it is so altogether natural and just for him to have done so, on the hypothesis that his debt was a real one, and one, therefore, which he would not be disposed to jeopardize by mere indifference in presenting it, that by his not doing so the chan-

cellor was doubtless led at the outset to regard his claim with suspicion and distrust. When we add to this that the testimony conduces strongly to show want of financial ability on his part to make this loan, we are prepared to appreciate the reasons which controlled the chancellor in reaching a conclusion adverse to his claim.

This unreasonable delay and failure to assert his demand, if an honest one, when to do so was of the utmost importance to his brother, as well as to himself, conduced largely, no doubt, to discredit his personal statements when coming in conflict with others. Thus when the deputy county court clerk testified that his judgment was that, when the appellant handed him the mortgage in 1891 to have it recorded he said there was a small balance on it yet unpaid, the denial of the appellant of having made the statement to the deputy, is necessarily to be regarded with less favor than if the conduct of the appellant had been free from suspicion. So with his contradictory statements as to where he got the money to loan his brother. He is also shown to have said that he had no money, and was only making enough out of his business to live on. He denies this, but the chancellor evidently weighed the conflicting statements to his disadvantage.

The legal propositions of learned counsel for the appellant appear to be sound enough.

Upon a different state of fact the unrecorded mortgage liens prior in point of time of execution would be prior in point of lien to the creditor of Carroll. Ward's intestate did not credit Carroll or Thomas G. Vanmeter on the strength of the latter holding the lands in dispute as unencumbered; but upon the facts presented we think there is sufficient proof to sustain the finding of the chancellor.

If the appellant be held to have had notice of the fraudulent purpose of the mortgagor, yet it would seem to follow that his lien should go unrecognized, but we are not disposed to disturb the finding below in any particular.

Judgment on the original and cross appeal affirmed.

McCHORD v. CALDWELL'S EX'OR.

(Filed February 15, 1895.)

1. Construction of will—Apparently conflicting clauses to be reconciled if possible—Where a testator by the first clause of his will devises all his property, real and personal, to his wife for life, and then, in the second clause, devises all his land to another, without making any reference to the first clause, the two clauses should be so construed as to give effect to both, which will be done by holding that the wife takes a life estate in all the lands, with remainder to the devisee named in the second clause.

2. Same—Where the first clause of the will devises all testator's property, real, personal and mixed, to his wife for life, with "full and ample power" to dispose of the personal estate by deed, will or otherwise, and the third clause makes a specific bequest of $1,000 to each of two nephews, it is held that the wife took a life estate in the personalty, with a right to the specific bequest accruing to the legatees at her death.

3. Same—Intervention by chancellor to preserve decedent's estate for one having a remote interest—One who claims a remote interest in an estate, which interest is to vest in him in the event a certain devisee dies without descendants and intestate, is not entitled to an interposition by the chancellor to preserve the estate, which is in the hands of the immediate devisees, in the absence of allegation showing any probability of the remote contingencies occurring that will vest an interest in the estate in him.

4. Same—Receipts—The person claiming such remote interest is not entitled to any relief on the alleged ground that the executors, when they paid him a specific legacy of $1,000 bequeathed to him by the testator, fraudulently obtained from him a receipt not only for said $1,000, but for all interest he may have in said testator's estate, when the executors do not claim that the receipt is an acquittance of the estate of any claim plaintiff had against it, except the $1,000 specific bequest. Should the contingencies ever occur by which plaintiff's remote interest in the estate becomes an immediate one, said receipt would not be a bar to the recovery of his interest.

5. Same—Limitation—The lapse of more than ten years since a devisee gave the executors of an estate a receipt in full for his interest therein, during which time the devisee was under no disability, is a bar to the maintenance of an action to cancel the receipt on the ground that it was obtained by fraud. The executors, at the time the receipt was executed, which was when the devisee became twenty-one years of age, having waived their right to hold the fund for which the receipt was given as trustees until the devisee became thirty years of age, no continuing express trust existed to prevent the running of the statute of limitation.

Edward W. Hines, John W. Lewis, C. R. McDowell and C. C. McChord for appellant.

R. P. Jacobs for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Grace.

This cause arises on an appeal from the Boyle Circuit Court by Charles C. McChord from a judgment sustaining a demurrer to his petition, McChord claiming that interest should have been allowed him for a greater length of time than was calculated on the settlement by the executor of the estate of Charles Caldwell, deceased, on payment of a legacy of $1,000 given him by said testator.

The material provisions of the will of Charles Caldwell, in reference to this legacy, are as follows:

"1st. I will and devise the whole of my estate, real, personal and mixed, to my beloved wife, Elizabeth Caldwell, to have and to hold during her natural life, subject, however, to the annual support and education of my grandchild, Jeremiah Clemmens Caldwell, and my two grand nephews, William Caldwell McChord and Charles Caldwell McChord. * * * I invest my wife with full and ample power to dispose of the personal estate, including slaves and debts due me, by deed, will or otherwise, as she may deem best.

"2d. I devise to my grandchild, Jeremiah Clemmens Caldwell, all of my lands in this and other States. I request him that in any disposition he make of said property herein devised to him, in case he has no descendant, by will, he will devise to Charles Caldwell McChord the lands, including my residence in Boyle county, lying west of the present site of the railroad, and including the Cowan and Brassfield places, but this is to be entirely discretionary with him.

"3d. I bequeath to my two nephews, Charles Caldwell McChord and Wm. Caldwell McChord, each one the sum of $1,000." * * *

Passing the fourth, fifth, sixth seventh and eighth clauses of said will as not important in this connection, the ninth item reads as follows:

"If any of my property be undisposed of by this my will, I bequeath the same to my said grandchild, Jeremiah Clemmens Caldwell, and make him my residuary devisee and legatee, subject to the restriction above named."

This will was made and probated in 1864. Mrs. Caldwell, the widow of the testator, died in the spring of 1878, and in December, 1879, the day after appellant, Charles C. McChord, became of age, the executor, W. L. Caldwell, paid to him this legacy of $1,000, and interest on same from the death of Mrs. Caldwell to that date, being $90.85, and took his receipt for same in full satisfaction and discharge of said estate and of said legacy.

By this suit, filed in 1893, appellant questions the correctness of said interest, and says that under the will of his uncle this legacy of $1,000 should have borne interest, compounded every ten years from the death of said testator; that this receipt was procured by fraud, the executor taking advantage of his youth and inexperience, and telling him that the sum so paid him was all to which he was entitled under said will.

It may be observed that the several provisions of this will leave much to construction in determining what was the real intent and meaning of said testator, as that by the first clause he gave the whole of his personal estate to his wife for and during her natural life, and authorizes her to dispose of same as she may see proper; and then, by the third clause, and without any reference to the fact that he had so disposed of the whole of his personal estate for the life of his wife, he gives to appellant the sum of $1,000, making no provision for its payment, nor naming any time when it should be payable.

The same necessity for construction occurs in reference to his realty. By the first clause, giving the whole of same to his wife for life, and by the second clause, and without any reference to the first clause, he gave all of his lands in this and in other States to his grandson, Jeremiah Clemmens Caldwell.

The courts hold it to be a governing rule of construction to give effect, if possible, to every clause in testamentary papers by reconciling, if possible, the one each with the others, and finally ascertaining the true meaning of the testator.

In this case we think it manifest, in reference to the real estate, that the wife took a life estate in same under the first clause and this being carved out of the estate in fee, there was nothing left for the grandchild to take in these lands except a remainder interest, thus harmonizing the two apparently contradictory clauses.

The same may be said of her personal estate. Testator could not give the whole of it to his wife and at the same time give to appellant this legacy of $1,000, and both to take effect immediately on his death, but he could give the whole of his personal estate to his wife for life, and then give to appellant $1,000, without fixing any time for its payment. That event, like the interest of his grandson in his lands, might be postponed until the termination of the life estate and then become payable, and thus give the same effect to both those interests in the land and personalty, giving effect to each clause of the testator's will, and doing violence to neither. This was the construction given to said clause in reference to the legacy by the executor, and in which appellant acquiesced for some thirteen years after receiving the legacy and interest on that basis.

This view is also strengthened by the fact that testator had in this same first clause of his will made provision for the support and education of his nephew, the appellant, and had said in and by this first clause, wherein he gave the whole of his personal estate to his wife for life, subject, however, to the annual charges for support and maintenance and education of appellant, but not making the life estate chargeable with the payment of these two legacies of $1,000 each to his two nephews. So that we

conclude that the payment of this $1,000 legacy was lawfully postponed until the termination of the life estate of Mrs. Caldwell; and that when it became due and payable, and taking precedence over the residuary legatee of all the estate of testator, viz., his grandson, as fixed in the ninth clause of his will.

Appellant claims yet further interest in said estate under the eleventh clause of said will, which reads as follows:

"11th. In the event of the death of my grandchild, Jeremiah Clemmens Caldwell, without descendant and intestate, the estate herein devised to him will pass in accordance with the directions of a paper which I have signed at the same time with the execution of this will and sealed and left in the hands of my trustees. This paper is to be kept by said trustees or their successors, and if the event above named should happen, then to be opened by them. This paper is a part of my will, to be opened and to take effect if the said event should occur."

Appellant says "that he is informed, believes and alleges that the paper referred to in said clause, which he avers is a part of said testator's will, bequeaths to this plaintiff the whole of said estate devised to Jeremiah Clemmens Caldwell upon the occurrence of the event set out in said eleventh clause." And thereupon appellant makes complaint of the management of the Caldwell estate; charges that same was a large and valuable estate; says the settlements made by the executor of the personalty were but partial and imperfect settlements, surcharges same, prays for a full disclosure of said estate, for reference to a master commissioner to settle same; and that his right therein be protected; and all this appellant alleges and claims without in any way alleging the death of the grandchild, Jeremiah Clemmens Caldwell, or that he is without descendants, or that he is intestate.

We think on this branch of the case that plaintiff' interest is too remote and uncertain; that it is subject to too many contingencies to demand presently the immediate interposition of the chancellor. Certainly on no greater possibility of appellant's ever becoming interested in said estate than his petition and the will of the testator now shows.

We would be disinclined to invade the privacy, the sacred trust (whatever it may be) confided by testator to his trustees, and embraced in that sealed paper. It will be quite sufficient should these several contingencies ever arise then to look into this matter.

On this line of appellants' claim he also charges that the receipt he gave W. L. Caldwell, the executor of Charles Caldwell, intending only to be for the $1.091.85 paid him on said legacy, yet that said executor fraudulently, and for the purpose of excluding him from any possibility of any benefit in said estate by reason of the eleventh clause of the testator's will, inserted in said receipt this clause: "And the payment of this sum ($1,091.85), together with the support and education which has been supplied and given to me in accordance with the provisions of said will, fully satisfied all claims I have under said will, and I hereby acquit the estate of said Caldwell and the executor of his will of any and all further claim or demand."

This receipt taken altogether, we think, refers solely to the payment of the legacy before mentioned, and not to the possibility of any interest that might accrue to appellant under the eleventh clause of the will before quoted. At any rate appellees so insist in their brief, and protest that it has no other meaning, and that it was not intended, nor is it claimed, that same is any

bar to any other demand or interest in favor of appellant than to the $1,000 legacy. By these concessions they will be bound in any future possible litigation that may arise, should the event ever happen, that confers any possible interest on appellant in and to any part of said estate; and the judgment of this court in sustaining the judgment of the court below, whereby a demurrer was sustained to appellant's petition, is now based upon this concession and distinct understanding.

Had there been no other valid reason against appellant's claim on or by reason of the $1,000 legacy, yet the statute of limitation would have barred his recovery, more than ten years having elapsed after giving said receipt before the filing of his suit, during which time appellant was under no disability.

The trustee never having insisted on or sought to shield himself behind the power given him by the executor to look after and prevent the disposition of this fund by appellant until he was thirty years of age, as he had authority and power to do under another clause in said will, so that as to this item there was no continuing express trust to take it out of the statute of limitation.

Judgment affirmed.

McILVOY, &c. v. RUSSELL & AVRITT.

(Filed February 17, 1895—Not to be reported.)

1. Although the time for filing a petition for a rehearing has expired, the Court of Appeals will hear and determine a motion to set aside a judgment entered by it when the motion is based on the ground that the brief of the unsuccessful party, or record attached to it, had, before the hearing of the cause, been in some way tampered with or mutilated or fraudulently abstracted.

The part of the record detached from appellees' brief on the hearing of the appeal, if any was detached, was immaterial, and would not have changed the judgment on the appeal.

2. The Court of Appeals has jurisdiction of an appeal from an order of a lower court refusing to obey a rule issued by the appellate court, directing the lower court to enforce a mandate of this court in a case appealed from the lower court, although the amount in controversy on the appeal was less than that of which the Court of Appeals has original jurisdiction, the original appeal having been prosecuted to the Superior Court, and coming to the Court of Appeals by appeal from that court.

W. C. McChord for appellants.

Wm. H. Holt for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is a motion by the appellees, Russell & Avritt, to set aside a judgment, based principally on the ground that their brief, or a record attached to it, had been in some manner tampered with, and an intimation, if not a direct charge, that counsel for the appellant is in some manner responsible for the failure of the court to have before it the question, raised by the appellees that, if considered, would have necessitated an affirmance of the judgment in their favor.

It is conceded the time for filing a petition for rehearing has passed, and that several terms of the court have been held since the original judgment was reversed, and while these objections could ordinarily be interposed as a defense to the motion, the

charge is so grave in its character and coming as it does from distinguished counsel, who are litigants in this case, this court can not summarily dispose of the motion made for such reasons or regard the relief as beyond the jurisdiction of this court, if by fraud or concealment the record or the brief have either been abstracted or intentionally mutilated for the purpose of preventing a proper investigation of the points made by counsel on either side; and in fact this court would go further and set aside a judgment, for the time being at least, if that part of the record fraudulently abstracted had any material bearing on the issue involved. It has the inherent power to protect itself from imposition and fraud, and to relieve those w o are affected by the fraudulent conduct of litigants or their counsel in matters pertaining to the records of the court, over which it has the supreme control.

It is therefore, necessary to review this original case from its inception on the appeal to the Superior Court by the appellants, Robert McIlvoy, &c. v. Russell & Avritt, appellees.

An appeal was taken from the Marion Circuit Court to the Superior Court by Robert McIlvoy and others, from an allowance made by that court for legal services rendered by Russell & Avritt to the distributees of Daniel McIlvoy, deceased, under and by virtue of the following contract: "We employed Russell & Avritt at $5 per day, and an amount equal to 5 per cent. of all they might save or make the estate of Daniel McIlvoy by excepting to the settlement of the estate as made by the master, said sum to be paid out of the estate or to be a lien on the estate. This contract was made by us on their entry into service in the case, and now reduced to writing. This was made with us, and James McIlvoy and said firm, this September 15, 1880."

When the estate was settled the attorneys, Russell & Avritt, asked for an allowance to be paid out of the assets, based upon the contract referred to, and the court made an allowance to the attorneys of $1,464.92, crediting the amount by $750 paid under an order of court by the commissioner. The claim for services was made up of the $5 per day when attending to the settlement. This was forty days, making $200; and 5 per cent. on $25,498.48, making $1,264.92. Of the items upon which commission of 5 per cent. was allowed was an item of $23,173.79.

The appellants contended that under the contract no commission should be allowed on this sum; and, on the other hand, the appellees maintained they were entitled to it, and this was the issue raised on the appeal.

McIlvoy, whose distributees had employed the appellees, had administered on the estate of his son-in-law, Miller, and when he (McIlvoy) died he had not settled his accounts as administrator. Bosley administered upon McIlvoy's estate, and then instituted a suit for the settlement of the accounts of his intestate as the administrator of Miller, and also a settlement of his intestate's estate, all of which was embraced in the same action.

Mrs. Miller, the widow of Miller, deceased, was a daughter of McIlvoy, deceased, and had, after the death of Miller, married Thos. Reid. Reid and wife and her children were parties to the action.

Bosley, administrator of McIlvoy, claimed that McIlvoy had paid over large portions of the Miller estate to Reid, the second husband of Mrs. Miller; that Reid, in right of his wife, was entitled to a part of the money paid over to him, and had qualified as guardian for her children by Miller, and as such was entitled to what was coming to them. Reid answered, as also his wife not denying he had received the money he was charged to have received, and alleged in substance "that his wife was entitled, as

widow, to one-third of Millers' estate, and if the sum paid him exceeded what she was entitled to, he was willing to account for the balance. His wife was entitled to $9.068, and the balance Reid was charged with as guardian of Miller's children, making the $23,173.

The master reported what Reid had received, and the Superior Court held, in an opinion delivered by Judge Ward, that there was no saving to the estate of what was admitted to be due.

There was no contest as to what Reid received, although exceptions were filed by the attorneys. There was nothing saved to the estate, the contract between the client and his attorneys being "to pay 5 per cent. of all they might save or make the estate of Daniel McIlvoy by excepting to the settlement of the estate as made by the master," etc.

The right to the allowance depended on the construction given the agreement by the court. The Superior Court, on the 28th of September, 1887, in an opinion held that this $23,000 was not made or saved to the estate within the meaning of the contract, and on an appeal from the Superior Court to this court a similar opinion was delivered on the 13th of February, 1890, giving a like construction to the agreement. (9 Ky. Law Rep., 359; 11 Ky. Law Rep., 888.)

The appellees filed a petition for a rehearing in the Superior Court and a rehearing was granted, the case reargued, and a reversal still followed, with another petition for rehearing that was overruled, and then, on motion of the appellees, an appeal was granted to this court and again argued and reversed, this court following the Superior Court. Petition for rehearing was filed and overruled and the mandate issued, and a rule awarded to enforce it; and the court below declining to enforce the rule, an apeal was again taken to this court, and on this last appeal a record, or a part of a record, was attached to the brief of counsel that is claimed was abstracted and not considered by the court on the hearing. On this last appeal the court held the mandate must be enforced, and again reversed the case. (15 Ky. Law Rep., 741.)

It is now maintained the appeal should have gone to the Superior Court as the amount in controversy was less than that within the jurisdiction of this court. The amount in controversy and the right to recover had been fully adjudicated, this court having complete jurisdiction by reason of the appeal from the Superior Court, and retained that for all the purposes of enforcing its mandate.

The record attached to the brief of counsel on this last appeal, a part of which was in this and the Superior Court upon the hearing of the case on its merits, was made part of the brief of counsel for the purpose, as is argued, of showing the extent of the labor and kind of service rendered by the appellees, and to remove from the minds of the court the impression that Hays & Thurman, who filed the original petition for McIlvoy's administrator, had performed the principal part of the labor, the court having in its opinion alluded to the fact that Hays & Thurman were the original counsel in the case.

This record, filed on the last appeal, shows that Russell & Avritt entered into the case in the year 1878 and ended in 1884, and that the case progressed several years after the death of both Hays & Thurman. The court, in the opinion rendered on the last appeal, said: "While the service of counsel deserve full compensation, the contract in this case made with their clients speaks for itself. The mandate must be enforced."

It seems to the court it must occur to counsel that after a case has passed through both the Superior Court and this court to a

final judgment and returned to the lower court, in which the mandate is directed to be complied with, that an additional record, or parts of the same record appended to the brief of counsel or embraced in a bill of exceptions, can afford no excuse or reason for setting aside the judgment or for refusing to execute the mandate. It is saying, in effect, if this record had been before you the judgment would have been different, and when, too, the only question either court had to determine arose on the construction to be given the written contract.

The record attached to the brief is now in the papers of this case. It is not attached to the brief. It is much larger than the brief itself. It may have been unintentionally severed by the clerk or by the judge having the record or by counsel examining it.

There is no proof of intentional wrong or any testimony showing that counsel for the appellants ever saw the brief of counsel. An affidavit appears in the record to the effect that counsel for the appellants had made conflicting statements as to the time he saw the brief of appellees, and this court, upon an entire absence of testimony as to any intentional mutilation or abstraction of the record from counsels' brief, is asked to question the personal and professional integrity of counsel for appellants, and for that reason to set aside a judgment that has long since become final.

Counsel for McIlvoy's administrator may not have been paid all their serivces were worth, but if not, it has resulted from the nature of the contract with their clients.

Motion to set aside the judgment is overruled.

LILLY, &c. v. NORTHERN BANK, &c.

(Filed February 19, 1895—Not to be reported.)

Judicial sales—Liens—Subrogation—Pleadings—A purchaser of property at judicial sale paid the purchase money to the master commissioner of the court, and the latter being ordered by the court to loan said money, the purchaser borrowed it, executing his note, with personal security to the commissioner therefor. The purchaser became insolvent and his surety paid said note. In this action, wherein holders of liens created upon the property purchased by mortgages executed by the purchaser are seeking an enforcement of their liens, it is held that the surety who paid said note for the purchaser has no lien upon or other interest in the said property entitling him to be made a party to the suit, because the master commissioner had no lien on said property to secure payment of said note, and, therefore, the surety by paying it acquired none.

Grant E. Lilly, H. C. Lilly and Wm. H. Holt for appellants.

G. C. Lockhart and Riddell & Riddell for appellees.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Paynter.

Estill Springs property was sold under an order of the Estill Circuit Court in an action brought by the owners for that purpose. At the sale W. H. Lilly became the purchaser, at a sum exceeding $9,000, and paid the purchase money to the master commissioner of the court, who distributed all of it, except $1,245, under the orders of the court.

The parties to whom this sum was coming failed to appear and receive it. The court directed it to be loaned. W. H. Lilly borrowed it, and executed a note therefor, with his brother, P. A. Lilly, as security. W. H. Lilly borrowed of David Pryse $9,750, and to secure the payment of which executed a mortgage to Pryse on the Estill Springs property.

Under some kind of an arrangement (which does not fully appear in the record) between W. H. Lilly and J. M. Thomas, Thomas had an interest in the property, and Lilly recognized it to be a one-half interest, as Thomas conveyed to W. H. Lilly one-half interest in the property in consideration of $15,000—$2,500 of it was cash in hand paid, and for the balance he executed two promissory notes for $6,250 each. Thomas assigned one of the notes to the Northern Bank of Kentucky, and the other one to the Citizens Bank of Paris.

At about the time W. H. Lilly bought Thomas' interest in the property he borrowed of one Jas. F. McKinney $2,500, for which he executed his note, with Grant E. and P. A. Lilly as his sureties. This action was instituted by the Northern Bank of Kentucky to enforce its lien on the half interest in the Estill Springs property. The Citizens Bank of Paris and David Pryse were made parties, and asserted their respective liens against the property.

P. A. Lilly died, and the appellant, H. C. Lilly, qualified as administrator of his estate. He tendered a petition, asked that it be filed, and to be made a party defendant in the action. He alleges that W. H. Lilly is insolvent, and failed to pay the debt due the master commissioner and the Jas. F. McKinney debt; that he has been compelled to pay part of the $1,245 debt due the master commissioner, and will have the balance of it to pay; that he has a prior lien on the Estill Springs property for this money which he has thus paid and that for which he is liable; that McKinney has sued the payors of his note and received a judgment against them, including himself, as administrator; that he has paid $1,800 of the judgment and took an assignment thereof; that execution was issued on it and levied on twenty-four town lots in Irvine, which are included in the Estill Springs property; that Pryse had released his lien upon them at the time the $2,500 was borrowed of McKinney.

The court refused to allow the petition of H. C. Lilly to be filed, and rendered judgment on the claims enforcing the lien upon the property as asserted by the second lien holders.

The appellant, H. C. Lilly, complains because the court refused to allow his petition to be filed. We are of opinion that the court did not err in refusing to allow it to be filed. He shows no such interest in the subject of the litigation as entitled him to be made a party. The levy of the McKinney execution on the lots was preceding this suit, and no sale had been made thereunder.

He contends that Pryse released his mortgage lien upon the twenty-four town lots. We do not agree with this view. The writing which Pryse signed, while not aptly drawn, has the effect of simply allowing W. H. Lilly to sell certain town lots, not exceeding thirty-two in number. It does not have the effect of releasing his lien except on such lots as W. H. Lilly might sell. Lilly having failed to sell the lots, Pryse's lien still existed thereon under his mortgage. On such of the lots embraced in the release as were sold by W. H. Lilly, Pryse's lien no longer exists.

When W. H. Lilly paid the purchase money on the Estill Springs property to the master commissioner, under the order of the court, the lien for purchase money on the property was

satisfied. The court took charge of it, and W. H. Lilly had no further control of or liability for it except as a borrower from the officer of the court. There was no connection between this transaction and the purchase of the property. The master commissioner had no more lien upon the property to recover the payment of the money loaned W. H. Lilly than any other creditor would have had for a debt evidenced by note upon which personal security had been taken. It follows, if the master commissioner had no lien upon the property to secure the payment of the debt, the payment of it by H. C. Lilly would not vest him with a lien therefor.

We conclude that the allegations of the petition did not entitle appellant, H. C. Lilly, to be made a party to the action. As to the appellants, other than H. C. Lilly, there has been no judgment rendered on the issues formed by their pleadings, but the court expressly reserved that question for future adjudication.

The appeal as to appellants, other than H. C. Lilly, is dismissed, and as to him the judgment is affirmed.

COUDELL, &c. v. WOODWARD.

(Filed February 19, 1895.)

1. The beneficiary named in a life insurance policy must have an insurable interest in the life of the insured in order to take under the policy, even though the insured voluntarily took out the policy in favor of such person as beneficiary.

A mere friend has no insurable interest in the one insured, and a policy voluntarily taken out by one for the benefit of a mere friend would be void.

2. Benefit societies—Classes that may be beneficiaries—The order of Golden Cross, a benevolent organization, has for its objects, among other things as set out in its charter, to "give moral and material aid to its members," and to "establish a benefit fund, from which a sum not exceeding $2,000 shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct," and its constitution recites that one of its objects is "to establish a benefit fund," from which, on death of a member, "a sum not exceeding $2.000 shall be paid as he or she may direct while living, and as contained in the benefit certificate." Held--A member can take out benefit policies only for the benefit of a member of his family or of some one dependent upon him.

3. Same—Where a policy is payable one-half to the son of the person insured and one-half to a mere friend, having no insurable interest, it is not void, but since the provision for payment of one-half to the friend is unauthorized, the proceeds of the whole policy must be paid to the son.

Jno. W. Barr, Jr., for appellants.

M. A., D. A. & J. G. Sachs for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hazelrigg.

Mrs. Matilda Woodward, deceased, was a member of the United Order of the Golden Cross, a benevolent institution organized under the laws of the State of Tennessee, but a subordinate commandery of which had been organized at Louisville.

The purpose of the order was to unite fraternally persons of every honorable profession, business, etc., to give moral and material aid to the members, and to establish a benefit fund, out of which, upon the death of a member, a sum of not exceeding

$2,000 should be paid in accordance with the provisions of the charter and constitution to be hereafter considered.

The certificate of Mrs. Woodward was payable one-half to her son, James Woodward, and one-half to her friend, Catherine Coudell.

In the contest over this fund the court below adjudged the whole of it to the son, and Coudell has appealed.

It is agreed by both sides that the charter of the incorporation and the constitution of the commanderies contain the law by which the fund is to be controlled and the case determined.

The former provides that the objects of the order are:

"1. To unite fraternally all acceptable men and women. * * *

"2. To give all moral and material aid in its power to members. * * * *

"3. To establish a benefit fund from which a sum not to exceed $2,000 shall be paid at the death of each member to his or her family, or to be disposed of as he or she may direct.

"4. To establish a fund for the relief of sick and distressed members," etc.

The constitution provides among the objects of the order as follows:

"3. To establish a benefit fund from which unsatisfactory evidence of the death of a beneficiary member of the order, who has complied with all its lawful requirements, a sum not exceeding $2,000, in each class, shall be paid, as he or she may have directed while living and as contained in the benefit certificate." Section 2, of General Law No. II, under the head of Benefit Certificates, provides thus:

"Applicants shall enter upon the medical examiner's blank the name or names of the members of their family, or those dependent upon them, to whom they desire their benefit paid, and the same shall be entered in the benefit certificate by the Supreme Keeper of Records."

Further, in an exhibit purporting to have been filed with Mrs. Coudell's answer, which is a circular issued by the order, we find among the objects of the order this significant provision:

"3. To establish a benefit fund from which, on the satisfactory evidence of the death of a member, who has complied with all lawful requirements of the order, a sum not to exceed $2,000 shall be paid to the beneficiaries (members of his or her family), and as contained in the benefit certificate."

We have thus quoted at length these various provisions with respect to the benefit fund of the order, because it seems to us they clearly convey but one meaning, and that is, that the beneficiary of the certificate must be one of the member's family or one dependent on him. In this respect the objects of the order are in accord with those of the numerous benevolent associations in our country, and which have the support and hearty countenance of the law. Any other construction would open the floodgates of speculative insurance and at once frustrate the humane and generous purposes of the order. The member may direct, but he must do so within the restrictions evidently contemplated by the organic law of the society, and confine his choice to some member or members of his family or to some one or more of those dependent on him.

We construe the organic law of the order, therefore, as limiting the choice or direction of the applicant as provided in the constitution, and which requires him to name the member of his family or some one dependent on him as the beneficiary of the certificate. Moreover, if the law of the order is to be so construed as to allow the member to name a stranger, the certificate would be void as to the stranger, and under the policy of

our law the appellant, the mere friend of Mrs. Woodward, could not take, for nothing is better settled in this State than that one obtaining a policy of insurance on the life of another must have an insurable interest in the life of that other.

It is said, however, that the appellant did not in fact obtain, the insurance; that the insured voluntarily did so for the others benefit. It may be that in this case all the dangerous features are, as a matter of fact, wanting, nevertheless the dangerous principle remains.

If the law denouncing speculative insurance may be avoided by simply having the insured voluntarily take out on his life a policy of insurance payable to his friend, we may soon witness a similar state of case in our criminal courts as is now being heralded by the daily press in States where the courts have been more liberal in construing the law of insurable interests.

As has been well said, such a sytem of insurance "is an incitement to murder that is irresistible by persons of large greed and small conscientiousness." The cases of Boyse v. Adams, 81 Ky., 368; Leaf v. Leaf, 92 Ky., 166, are corroborative of these views.

The contract of insurance, however, is not invalidated by the designation of a person prohibited by law to be a beneficiary. The appellee, a member of the deceased member's family, is entitled to the fund. (Cook on Life Ins. & Benefit Societies (1891), page 106; Wiegelman v. Bronger, 14 Ky. Law Rep., 576.)

Judgment affirmed.

COLLINS v. CLOYD, &c.

(Filed February 20, 1895—Not to be reported.)

Construction of will—Specific devise—Testator devised his home farm to his wife, and then made special devises for the purpose of equalizing advancements to his three childen; then, after providing for payments of debts and costs of administration, the will provided as follows: "I will * * * one-third part of my estate * * * for the benefit of my daughter," the appellant. The wife renounced the provisions of the will in her favor and claimed her distributable share. Held—The distributable share of the wife is first to be paid her, and the daughter then takes one-third of the residue under the will. She does not take one-third before the distributable share is paid the widow, nor is her devise a specific one.

Montague & Collins for appellant.

J. R. Robinson and Samuel Avritt for appellees.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Guffy.

This is an appeal taken by Harriet E. Collins from a judgment rendered by the Taylor Circuit Court in an action brought in said court by Francis M. Cloyd against J. N. Glemer, executor of Wm. Cloyd, and others, for the settlement of the estate of Wm. Cloyd. The executor also obtained a cross appeal, which can only be allowed against the appellant, and it appearing to us that no erroneous judgment or otder has been taken or rendered against him in favor of appellant, the judgment is affirmed on the cross appeal.

The appellant insists that the judgment rendered in the settlement of the estate is erroneous. The contention is as to the construction of the will of Wm. Cloyd. The will devised the home

farm to his wife, and after making a few special devises to some of his heirs, in order to make them all equal as to advancements, he directs a sale of all his property except the farm devised to his wife; and then he further provided that after the payment of his debts, cost of administration, funeral expenses, as follows: "I will and direct that one-third part of my estate be for the benefit of my daughter, Harriet E. Collins."

The widow of the testator renounced the provisions of the will and claimed her statutory interest in the estate, which, of course, was adjudged to her.

Appellant's contention is that she was entitled to one-third of the entire estate left after paying the debts, etc., directed to be paid by the testator, and that the distributable share of the testator's widow should be made up out of the undivided part of estate. The court below adjudged that the intention of the testator was to make all his heirs equal, or, in other words, he intended each child or its descendant to have one-third of his estate, and adjudged to the widow one-third of the net proceeds of the personal estate, and then adjudged that one-third of the residue be paid to appellant. The widow of decedent was in law entitled to the one-third adjudged to her, hence the remainder was all of his estate left for distribution, and as there were but three shares in the estate, the appellant received one-third of the estate as directed in the will. We do not think that the devise to appellant falls within the rule of law applicable to specific devises.

Judgment of the circuit court seems to us to be correct, and is, therefore, affirmed both on the appeal and cross appeal.

LOGAN v. EVANS.

(Filed February 20, 1895—Not to be reported.)

Division line—Natural objects called for control location—Where adjoining land owners, to settle a disputed division line, agreed that the line began at a cretain "dead black gum," and ran thence N. 77 W. to a "double chestnut and dogwood;" and thence, reversing said line from the gum, "to the river which will be S. 77 E.," and a survey shows that the line from the "dead black gum" to the "double chestnut and dogwood" runs N. 73¼ W., which line being reversed from the "gum" to the river is, of course, S. 73¼ E., the lines must be run according to the natural objects called for; that is, at an angle of 73¼ in the direction named in each instance.

A. K. Cook and Thos. H. Hines for appellant.

Jas. D. Black and H. C. Faulkner for appellee.

Appeal from Knox Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

The appellant and the appellee being desirous of settling the boundary of their respective lands, entered into this agreement: "We, the undersigned, agree and bind themselves to start and run and survey a conditional line between Cogar Logan and A. E. Evans, and to run by the calls of the old Charles Gatliff deed to Aaron Gatliff, to begin at a dead black gum standing in the old fence row; running thence N. 77 W. to a double chestnut and dogwood and reversing said line from the gum to the river, which will be S. 77 E., and we, the undersigned, bind ourselves to make this the line between us. Signed:

"COGAR LOGAN,
"A. E. EVANS."

The appellant, Logan, as is alleged by the appellee, has gone over the line from the black gum to the river onto the land of the appellee, and hence this action. There was a verdict and judgment for the appellee, and the case is here without a bill of evidence or instructions.

The appellant is claiming, however, that upon the face of the pleadings the judgment is erroneous, because, he says, by the agreement which both sides concede determines the true boundary, the line beginning at the black gum was to run N. 77 W. to a double chestnut and dogwood, and reversing the line from the gum to the river would be S. 77 E., when by the judgment it is said: "It appearing from the survey made that the old Gatliff line from the gum to the double chestnut and dogwood is 73 1-4 W., and reversing that line from the gum to the river is S. 73 1-4 E., the land in controversy is the property of the appellee."

If the degree N. 77 W. will take you in a direct line to the object which is recognized as the real corner, the double chestnut and dogwood, then the contention of the appellant would doubtless be correct. The degree from the gum to the object agreed upon is the proper survey, and the same degree must prevail from the gum to the river.

When this old Gatliff line was surveyed does not appear, but, either from mistake or the variation of the needle, it is evident that the degree called for will not take the surveyor to the object where the parties propose to run. It is not the degree, however, stated in the agreement that is to govern, but the direct line from the one object to the other is what the parties agreed on. The meaning of the parties is apparent from the proper construction of their agreement. It explains itself. They were to run from the gum to the chestnut and dogwood, whether 73 or 77 degrees is immaterial, and then from the gum to the river, reversing the line.

The degree called for must give way to that which will run to the objects in the old Gatliff line. They were running the line from one point to another, and the degree called for was merely descriptive, and the variation from the old survey as to the degree, or from what the parties supposed the true degree would be, can not affect the question involved.

Judgment affirmed.

HENDRIX v. NESBITT, ADM'R, &c.

(Filed February 20, 1895.)

1. Jurisdiction—Mortgages—Where the lands embraced in a mortgage lie in two counties the circuit court of either county has jurisdiction of an action for the sale of the land in both counties to pay the mortgage debt; this jurisdiction being expressly conferred by section 62 of the Civil Code, it is immaterial that only one of the mortgagees lives in the county where the suit is instituted.

2. Same—Personal judgment—Where one of the defendants lives and was served with process in the county where a suit to foreclose a mortgage was instituted, the court of that county has jurisdiction to render personal judgments against all the defendants although some of them reside and were served with process in other counties.

3. Mortgages—Premature submission of case—In a suit to foreclose a mortgage, where the defendant by answer claims credits for certain payments on the mortgage debt, which payments are denied by plaintiff in his reply, it s error to submit the case for final judgment at the same term at which the

reply is filed, the defendant being entitled to time to take depositions on the issue made as to the credits he claims.

4. Judicial sales—Exceptions to commissioner's report—Where the commissioner advertised the sale of the land to take place on a county court day on the 12th of October, and made the sale on the county court day, which was the 10th of October, and the owner of the land was not present at the sale, having been misled by the mistake in the advertisement, and the land sold for a very low and inadequate price, exceptions to the report of sale should be sustained and a new sale ordered.

Reuben Gudgell & Son and Wm. H. Holt for appellant.

J. J. Nesbitt, C. W. Nesbitt and Alex. Conner for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Lewis.

In 1886 T. J. Hendrix, to secure payment of various debts he owed J. M. Nesbitt, executed a mortgage on a tract of land containing 75 acres, and on his half interest in a tract of 370 acres, both being situated in the county.

In 1877, to indemnify J. M. Nesbitt as surety in certain sale bonds he subsequently paid off, T. J. Hendrix executed another mortgage on a lot of land situated in Nicholas county, and on his half interest in the tract of 370 acres, J. N. Hendrix, joint owner, uniting in the deed and mortgaging his half of the same tract for the same purpose.

After death of J. M. Nesbitt, J. J. Nesbitt, administrator of his estate, brought this action to recover on his demands and enforce his two mortgage liens to satisfy them, T. J. Hendrix, J. N. Hendrix and others being made defendants. The plaintiffs obtained personal judgment against T. J. Hendrix for amount of each demand, and at the same time judgment for sale of the Nicholas county land, and also of the tract of 75 acres.

The first-mentioned property did not bring at the sale two-thirds of appraised value, nor enough to satisfy the debt for which it was mortgaged. The other brought two-thirds of its appraised value, though not enough to satisfy the debts for which it was mortgaged. Subsequently a judgment was rendered for sale of the half interest of T. J. Hendrix in the tract of 370 acres, fixed by division at 205 acres, to satisfy the residue of plaintiff's demands against him, and a debt of J. H. Richart, likewise secured by mortgage lien thereon. At the sale under that judgment the two creditors bid for and jointly purchased the entire tract of 205 acres at the precise sum of their aggregate demands and costs, and at little more than two-thirds of appraised value. From both judgments and orders confirming sales T. J. Hendrix has appealed.

It is contended the first ought to be reversed upon the ground that the Bath Circuit Court, where the action was instituted, had no jurisdiction to sell the Nicholas county property.

Section 62, Civil Code, concerning real property, provides: "Actions must be brought in the county in which the subject of the action, or some part thereof, is situated, * * * for the sale of real property under * * a mortgage lien or other encumbrance or charge except for debts of a decedent."

As some of those properly joined as defendants to the action resided in Bath county, the Bath Circuit Court acquired under section 78 jurisdiction of the person of T. J. Hendrix, although he resided and was served with summons in Nicholas county;

but jurisdiction of that court to enforce the mortgage lien on the Nicholas county land did not depend on the fact of jurisdiction of the person of T. J. Hendrix, its owner, having been previously acquired, but existed in virtue of both the letter and reason of section 62.

The subject of one branch of this action is the mortgage lien upon land, part of which lies in Bath and part in Nicholas county, and the circuit court of either had complete jurisdiction to enforce that lien upon both lots or tracts mentioned in the second mortgage to Nesbitt. Otherwise there would have to be a distinct action about the same subject in each county, where one of numerous tracts included in the same mortgage might be situated.

We perceive no error in judgment for sale nor order confirming commisioner's report of sale of either the lot of land in Nicholas county or the tract of 75 acres; but it seems to us there was error in both judgment for sale of the tract of 205 acres and order confirming the commissioner's report of that sale.

It appears that in his answer T. J. Hendrix stated that J. H. Richart had failed to give him credit on his debt for about $300, which was denied in reply of the latter, filed during the same term at which the judgment for sale of the 205 acres was rendered. As there was an issue formed, the onus of which was upon Hendrix, he was entitled to a continuance; but the court ignored his answer, and adjudged sale of the land for the entire amount claimed by Richart.

It is proved that the commissioner made a mistake in the advertisement of the sale as to the date it would be made, fixing it as of October 12th, when he intended it to be, and did make it, October 10th, two days before. It is true he recited in the advertisement it was to be made on county court day, which is usually Monday, and was on October 10th; but Hendrx, owner of the land, was not present at the sale, and there is evidence tending to show he was misled by mistake in the advertisement. In our opinion that circumstance was sufficient to require exceptions to report of sale to be sustained, in view of the very low and inadequate price at which the land was sold.

For the errors indicated the judgment for sale of the tract of 205 acres of land is reversed and cause remanded for further proceedings consistent with this opinion.

MEMPHIS & CINCINNATI PACKET CO. v. NAGEL.

(Filed February 21, 1895.)

1. A corporation is liable in punitive damages in the same manner and to the same extent as a natural person for injuries inflicted through the willful or tortious acts of its employes, committed within the scope of their authority. Where the tortious act was within the scope of employment of the servant, the corporation is liable, and it is not necessary to show that it expressly authorized the act as it was performed, or ratified it, or was negligent in employing or retaining the servant.

2. Same—Punitive damages may be recovered by a passenger from a common carrier or steamboat where it willfully, or as a result of gross or wanton or intentional neglect, refuses to put her off at her destination and carries her beyond the same and puts her off at a strange place, and accompanies this tortious conduct with words and conduct on the part of its employes that are insulting in manner, form or tone.

Campbell & Campbell for appellant.

W. D. Greer and Chas. K. Wheeler for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Grace.

The appellee was a passenger on the steamer Buckeye State belonging to the Memphis & Cincinnati Packet Co., and employed by them in the passenger trade as a common carrier between Memphis, Tenn., and Cincinnati, Ohio, appellee taking passage at Paducah, Ky., for New Albany, Ind., paying the fare demanded, and securing her ticket for that place. These facts are admitted by the pleadings.

The captain of the steamer refused to land at New Albany and permit appellee to get off his boat, but against her earnest protest and entreaty carried her, against her will and consent, beyond New Albany, Ind., and put her ashore on the Kentucky side of the river at the mouth of the canal, in or near Portland, Ky., a place wherein she had neither relative nor friend nor acquaintance, in the outskirts of a city unknown to her.

The facts of the case are fully and correctly recited in the opinion of the Superior Court of Kentucky, that tried this appeal from the McCracken Court of Common Pleas, and may be found in 15 Ky. Law Rep., 742, to which reference is made, and need not be more specifically recited here. The Superior Court affirmed the judgment of the lower court, which was for $900, in favor of appellee, based on the finding of the jury that tried the cause, same being certified to this court on further appeal by appellant.

The court below gave to the jury two instructions, one in the usual form, defining a state of case wherein plaintiff might recover the actual damages sustained; the other, wherein she might, if the jury found the state of case as submitted, recover exemplary or punitive damages, and it is of this last-named instruction that appellant specially complains, its contention being this: That this suit being founded on contract and not in tort, the law does not authorize any verdict against appellant beyond actual damages; that is, compensation for the injury actually sustained.

It may be said of all cases of this kind that they belong to that class of cases that sound in damages. Such is plaintiff's contention, clearly stated, reciting the acts of defendant on which she bases her claim; that is, the wrongful and unlawful carrying of her person, against her will and protest, beyond her destination, accompanying same with rough language, insulting in its tone and manner. Issue being joined on these averments, plaintiff placing her damages at $1,995, of course not intending to say that her actual damages sustained, as estimated by courts and juries under the law, amounted to so much, but relying not only on the wrongful act done and committed against her person, but upon the manner as well, as also the time and place and the circumstance thereof, saying same was willfully and wantonly done, done recklessly, disregarding her rights, thus clearly indicating to appellant her claim for punitive damages. Her case was thus properly stated, and issue duly joined thereon.

It may be said that while the contract between the plaintiff and defendant for passage on their steamer from Paducah, Ky., to New Albany, Ind., was necessary to be stated, and must have been proven if denied (which it was not), it served chiefly and primarily to fix the status of the parties, the one to the

other—plaintiff as the passenger, and defendant as the common carrier—this being all that was actually done in this case; no special contract being made, but the whole matter being thus left to the law to imply, or rather to fix and declare, what were the respective rights of the parties under the relations they created, as thus to transport her as a passenger, with the highest practical degree of care used by prudent and careful persons engaged in such business, expeditiously as the mode of travel permitted; to protect her during the voyage from injury and insult, even from obscenity, from strangers as well as from the servants of the company; and finally, to land the steamer at the usual place of landing at New Albany, Ind., and to give her a reasonable and safe opportunity to leave said boat.

In all this contract, implied by law from this relation established, there is nothing inconsistent with the reservation of every other personal right that the law, in all places and at all times, accords to every person—as the freedom of the person from assault, from injury, from unlawful detention, from every species of violence, unlawfully and wrongfully inflicted; and thus it is that cases of this character against common carriers pass so easily from the usual limitations and restrictions of ordinary contracts and range themselves under the law of torts. So that while the common carrier is under an implied contract to do certain things, he may yet easily go beyond the limitations and duties of his contract and become at once and the same time, and by one and the same act, a violator of his contract and a trespasser; and if passing the limits of or making default in his contracts he accompanies his wrongful action by willful and wanton oppression, or uses violence or unlawful personal restraint, or accompanies his wrongful act towards his passenger with conduct insulting in word, tone or manner, he becomes liable to all the remedies of the law against tort feasors, including this liability to pay punitive damages in cases where same may be lawfully adjudged.

All this results from sound considerations of public policy, from the high degree of protection necessary to be thrown around persons who, for the time being, are so completely within the power and control of common carriers, especially by railway or by steamboat. For the time being the captain of the steamer is all powerful; his word is the law; there is none to resist him; but he must exercise this power for good, not for evil. He must exercise it lawfully, and if he fails to do so his master, the company whose servant he is, must answer in damages. They must answer through an artificial person, a corporation, in the same way and manner and to the same extent as a private individual who may be a common carrier. This was well said by the Superior Court in this case. Hence it is that in all these cases the common carriers are held responsible for punitive damages in cases falling within the line above designated as in actions of tort. This instruction complained of, after submitting to the jury that they must find the actual damages sustained by reason of plaintiff being carried beyond her destination, said further: "And if they believe from the evidence that the failure of defendant's employes in charge of said boat to put plaintiff off at New Albany was willful, or the result of gross or wanton or intentional neglect on the part of the defendant's employes in the discharge of their duties to carry her and her trunk and put them off, or that the conduct of defendant's employes was insulting towards plaintiff, either in manner, words or tone they may assess the damages at any sum which they may believe from all

the evidence, in the exercise of a sound discretion, the plaintiff ought to recover, not exceeding the amount claimed."

This, we think, is a fair statement of the law which, if supported by the facts upon which it is based, authorize the awarding of exemplary damages by the jury.

Appellant contends further, that exemplary damages should not be awarded against a corporation for the act of its servants unless it expressly authorized the act as it was performed, or afterwards ratified it or was neglectful in employing its servant or in retaining him in its employ, and in support of this he quotes Mr. Sedgwick on Damages, volume 1, section 380. True the learned author says such rule obtains in many jurisdictions. Fortunately it has never obtained in Kentucky, and we are not now so impressed with its soundness or authority as to undertake to engraft it on our jurisprudence—of little value to the injured and outraged passenger would all other declarations of law be if this rule obtained as stated.

The later and better rule seems to be that corporations are liable for the acts of their servants, committed within the scope of their employment, as by the master of a steamboat or the conductor of a railway, with reference to their passengers. This rule has often been applied in Kentucky.

As to the evidence submitted by plaintiff to the jury on this trial it is sufficient to say that it tended to establish the allegations made in plaintiff's petition, and, if so, the court was authorized to submit the case to the jury. They were then the sole judges of its value and sufficiency.

As to the bodily and mental suffering and the spell of sickness resulting to plaintiff, by reason of the wrongful act of the defendant in taking her beyond her destination, this was submitted to the jury for consideration, only on the condition that it was true in point of fact, and that it was proximately caused by said acts of defendant. The attending physician was of this opinion, and so testified, as well as plaintiff and other members of the family. Neither do we think the confusion in the argument by the several counsel of this case in the court below is, on the facts as stated in the bill of exceptions, of sufficient importance to set aside a verdict, just and proper, under all the facts of the case.

In support of the general doctrines announced herein we refer to L. &. N. R. R. Co. v. Bullard, 85 Ky., 307; and Same v. Same, on a second appeal, 10 Ky. Law Rep., 735; Dawson v. L. &. N. R. R. Co., 6 Ky. Law Rep., 668; Samuels v. Richmond & Danville R. R. Co., 28 Am. State Rep., 883; Spellman v. Richmond & Danville R. R. Co., 28 Am. State Rep., 858.

Judgment affirmed.

WILLIS v. BAKER.

(Filed March 2, 1895—Not to be reported.)

1. The evidence shows so clearly that appellant and appellee were partners that the judgment below, finding otherwise, is reversed.

2. Contracts—Commissioner to let contract partner with contractor—The act of the general assembly appointing commissioners to let contracts for the construction of a turnpike in Kenton county did not prohibit one of the commissioners from becoming a partner with one who obtained the contract to do the work; and the contractor will not be heard to say that the copartnership with one of the commissioners was fraudulent or void.

J. W. Bryan for appellant.

D. A. Glenn for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Guffy.

Some time prior to January, 1892, Samuel Baker undertook to build one mile of a turnpike road in Kenton county, which contract was let by commissioners appointed under an act of the General Assembly, approved May 13, 1890, appellant being one of the commissioners.

On the 18th of January, 1892, B. E. Willis, the appellant, instituted this action in the Kenton Circuit Court, claiming to be a partner in said contract of building, entitled to bear half the losses, if any, and to be entitled to half the profits, and alleging that his part of the profits was $252.44. Appellee denied the existence of the partnership. A trial resulted in a judgment dismissing plaintiff's petition, and a judgment in defendant's favor. From that judgment plaintiff has appealed.

It is true that the proof shows that the work had not been completed before the institution of this suit, and if that defense had been relied on by appellee it may be that the petition should have been dismissed without prejudice, but it seems that the sole issue was as to whether or not there was a partnership.

It is urged in argument that appellant, being a commissioner, ought not, or could not, properly be a partner in this contract.

It may be that he placed himself in a position to be criticised or condemned for so doing, but it is not contended that the act of assembly, under which he was acting, prohibited him from becoming a partner in such contract.

It does not appear that the county or the other commissioners, who were made parties hereto, and who, it seems, are to pay out or control the payment for the work, are claiming that appellant acted fraudulently, or in any way wronged or cheated the county. It, therefore, results that the sole question is, was appellant and appellee partners in the building of said mile of turnpike? It seems to us that, taking all the evidence together in the case, the partnership was well proven.

The statements of the different witnesses and the actual facts and circumstances introduced by the appellant preponderate so largely in his favor that we feel constrained to reverse the judgment of the lower court.

The judgment below is, therefore, reversed and cause remanded, with directions to audit and settle the business of the partnership and for further proceedings consistent with this opinion.

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KENTUCKY COURT OF APPEALS.

CUMMINS v. BRADFORD'S ADM'R.

(Filed February 23, 1895—Not to be reported.)

Injunction to prevent collection of judgment in favor of administrator—A defendant is not entitled to an injunction to prevent the collection of a judgment against him in favor of an administrator on the ground that the administrator is insolvent, and that if the judgment is paid to him it will be lost to the distributees of the estate, and that defendant's right to the shares of certain distributees, which have been assigned to him, and his right to his claim for certain damages against the distributees of the estate, who are alleged to be insolvent, will be lost to him if he is compelled to pay the judgment to the administrator.

J. W. Bryan and O'Hara & Rouse for appellant.

Leslie T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Paynter.

John Bradford, domiciled in Pendleton county, Ky., died intestate in 1868. His widow qualified as his administratrix in 1869, and settled the estate entirely, except some stock in the Covington & Lexington R. R. Co., which, at the time of the administratrix's final settlement and the partition of the land among the heirs, was regarded as worthless by her and the heirs of the decedent.

The administratrix having died, and this stock becoming valuable, the plaintiff, H. N. Bradford, qualified as administrator de bonis non of John Bradford, and sold part of the stock to the appellant, Cummins, for $1,160, for which he executed his note on the 3d day of August, 1881. Failing to pay all of the note, this action was instituted against apppellant to recover the balance due them.

Appellant filed a pleading which was styled answer, set-off and cross petition, by which he claimed that he was entitled to a credit thereon for various sums which he (Cummins), while the note was temporarily in his possession, placed on it. Among oth-

ers was one for $230, which the plaintiff, in his personal character, owed him, and the principal credit was one for $644.45, which he claimed certain of the children of John Bradford owed him, on account of a warranty in a deed for certain lands conveyed to their ancestor, from which he was evicted by a paramount title.

The court below, on the 2d day of April, 1888, rendered judgment against the appellant for the amount of the note, with certain credits, which were payments made by the appellant on the note. The court held that the other credits which appellant had placed on the note, and about which the controversy arose, were not proper, and the court refused to allow them.

The court, in rendering judgment, ordered that no executions should be issued until an order was entered in the case directing it to be done. At a subsequent term of the court, on the 15th day of April, 1891, the court entered an order directing an execution be issued upon the judgment. In each of the judgments, supra, the court allowed appellant to make further preparation of his cross petition.

Appellant appealed from the judgment to the Superior Court, and superseded it. That court affirmed the judgment, with damages, which amounted to $138.85, and issued a mandate, directing the court below to enter a judgment against the appellant for that amount. (15 Ky. Law Rep., 155.)

On a return of the case appellant amended his pleading, making all persons interested in the estate of John Bradford parties, and more especially set out his claim resulting from the eviction, and alleging that certain ones of the children of John Bradford, who were entitled to shares in the estate arising from the collection of the judgment which was rendered against him on the note, had assigned their interest to him and claimed that he should be permitted to retain in his hands the shares of certain other children of John Bradford to pay their part of the alleged indebtedness resulting from the eviction. He alleged that they were insolvent, and that they had received as heirs from the estate of John Bradford much more than their respective liabilities to him.

Appellant alleges that the plaintiff is insolvent, and that if he is compelled to pay the judgment and the ten per cent. damages adjudged by the Superior Court on the affirmance of the judgment, it will be lost to him and the distributees. He prays that he be permitted to retain so much of the amount in his hands as is necessary to pay him his debts against the certain heirs and the shares of certain heirs who have made transfer of their interests to him.

Appellant procuerd an order of injunction from the clerk of the Pendleton Circuit Court, enjoining Henry H. Bradford, administrator de bonis non of John Bradford, from taking any steps to collect the judgment rendered in the case or the 10 per cent. damages awarded by the Superior Court, by execution or otherwise.

The court below, upon motion during the term of court, but without appellant having notice that such motion would be made, dissolved the injunction and rendered judgment against appellant for $138.85, the damages awarded by the Superior Court. From that action of the court this appeal is prosecuted.

The order of injunction is not to restrain the certain heirs, whose shares appellant seeks to subject to the payment of his debt, from assigning or transferring their interests in the estate, nor to restrain the administrator from making payments to them. It is to restrain the administrator from taking steps to collect the judgment or damages awarded by the Superior Court, by execution or otherwise.

While there are allegations of insolvency of the heirs, who are claimed to be indebted to appellant, and to the plaintiff as one of them, yet there is no allegation that the sureties upon the bond of Henry N. Bradford, administrator de bonis non, are insolvent.

The record shows the estate is solvent and owes no debts, unless the expenses of this litigation have not been paid. The appellant could not have aided his cause by alleging that the estate was insolvent. If it were, that would imply that there were debts against it to share in a pro rata distribution, and there was nothing to distribute.

If the sureties on the bond were not good, it is within the power of the Pendleton County Court to compel the administrator to give a bond with sufficient sureties, and appellant being interested, can have the court to act in the matter and thus protect himself. It is true that it is alleged that if the administrator collects the judgment and damages, it will be lost to appellant and the distributees. No facts are alleged from which such a result can be inferred. Only one condition could arise that would produce that result, which would be for the administrator to collect the money, fail to distribute it according to the rights of the parties, then the insolvency of his sureties defeat the realization of the amounts due them.

It appears there are no debts against the estate, and as there seems to be no question but what appellant has acquired by assignment the shares of certain of the heirs in the estate, fair dealing on the part of the administrator requires that he should make some adjustment with the appellant which would allow him to retain the approximate amount due on such assigned shares until there is a final settlement of the estate, but as a judgment has been obtained against the appellant for the amount which he owes the estate, and there being no law or rule in equity known to us in the present state of case which allows appellant to offset the interest thus held against the judgment, we can not see a way to give such relief.

The appellant was evicted in 1874. He has never proven his claim against the estate of John Bradford, nor does he seek a recovery against the estate by this action. He has endeavored to collect it by negotiations with the heirs and by a recovery in this action against some of them, by having their interests in the amount he owes the estate appropriated to the payment of his debt against them.

As the allegation of the amended cross petition did not authorize the granting of the injunction restraining the administrator from collecting the judgment and damages awarded by the Superior Court, we are of the opinion the court did not err in dissolving the injunction.

From this view of the case the necessity of discussing the question as to the right of the clerk or the court to issue an order of injunction, which would prevent the court from executing the mandate of the Superior Court, is obviated. We will simply say that the court did not err in rendering the judgment for damages, as directed by the mandate.

Judgment affirmed.

HUMBER'S TRUSTEE v. CENTRAL KENTUCKY LUNATIC ASYLUM.

(Filed March 6, 1885—Not to be reported.)

Lunatics—Liability to asylum for board—The estate of one found by the verdict of a jury to be a lunatic is liable to the asylum in which he is confined for his board, lodging and medical attention unless the verdict of the jury also finds that he has no estate sufficient for his support.

Neither the board of commissioners of an asylum nor its superintendent nor the general assembly can declare a lunatic to be a pauper as to relieve his estate from liability for his board at a State asylum, a jury alone having power to do so.

W. O. Bradley for appellant.

R. P. Jacobs and W. J. Landram for appellee.

Appeal from Garrad Circuit Court.

Opinion of the court by Judge Lewis.

Central Kentucky Lunatic Asylum, created by statute a corporation, with power to sue and other powers usually given, brought this action to recover judgment for and subject real estate to pay amount of board, lodging and medical attention for eight years, at rate of $200 per year, furnished by plaintiff to James C. Humber, adjudged April 21, 1884, by proper authority, a lunatic, and to be taken to a lunatic asylum, L. F. Hubble, trustee, and wife and children of the lunatic being made defendants.

To the petition answer was filed, in which it was in substance stated, that in 1885 L. C. Hubble, trustee, applied to the general assembly to pass a special statute placing James C. Humber on the pauper list, and thereby exempt him and his estate from paying anything to the State for lodging, board and medical attention at the asylum; but he ceased to press the application upon suggestion of H. K. Pusey, superintendent of the asylum, that he instead apply to the board of commissioners to place said lunatic upon the pauper list; and that he was afterwards informed by Pusey the board had done so.

To that answer a general demurrer was sustained, followed by judgment for amount of the demand sued for that had accrued within five years next before institution of the action, plea of limitation to the residue being sustained; and to satisfy the debt it was adjudged that a tract of 176 acres of land belonging to the lunatic, after taking out of it $1,000, value of homestead for wife and children, be annually leased and rent arising be applied.

We agree with the court below that the answer contained no statement amounting to a defense to the action, except as to that part of the demand accrued more than five years before the action was brought. If Hubble, the trustee, had succeeded in procuring passage of the special act putting Humber, the lunatic, on the pauper list, it would have been manifestly invalid, as was the order to the same effect which he states in his answer Pusey informed him the board of commissioners had made; for, according to a statute general in application, then existing, no person was deemed or could be treated as a pauper, idiot or lunatic who had not been found by verdict of a jury to be an idiot or lunatic, and that he had no estate sufficient for his support.

So far from James C. Humber being, when found a lunatic or at any time since, without sufficient estate for his support, the jury of inquest found he had property of near $10,000 in value, and he now has a life estate in a valuable tract of land, containing 176 acres, remainder interest belonging to his children. So that even if it be true Hubble, trustee, was induced to cease application for passage of the act mentioned by suggestion of Pusey to apply to the board of commissioners to have the lunatic illegally put on the pauper list, no available defense to this action is thereby constituted. Moreover, it was alleged in plain

tiff's petition, and not denied, that the lunatic was taken into the asylum with consent and request of the trustee.

Judgment affirmed.

(Extension of opinion—Filed April 10, 1895.)

Opinion of the court by Judge Lewis.

We think the lower court has power and should keep this case on the docket so as to require the trustee to properly collect the rents of the land and apply them to pay installments due the Central Kentucky Lunatic Asylum for board and lodging of the lunatic, thereby saving costs and expenses of further litigation on the subject.

DURHAM v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 20, 1895—Not to be reported.)

Pleadings—Injury through neglect of railroad—Alighting of passenger at night in unsafe place—The petition alleged that one of defendant's conductors, in charge of a passenger train, promised to put plaintiff, a passenger, off at a certain place where the train usually stopped, and which was a safe place to alight; that after the train passed said place some distance, having slowed up a little, and while it was in motion, one of the railroad's employes directed plaintiff to get off; that it was very dark, and plaintiff being led to believe that he was at said place and a safe place, did get off, and in so doing fell and the cars passed over his foot; that the employe, who directed him to get off, knew it was unsafe for him to do so. Held—The petition did not state a cause of action.

Hobson & O'Meara and J. D. Irwin for appellant.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant avers that he was a passenger on the appellee's road bound for Louisville, and requested the conductor to stop his train at Seventh street, it being a point where the appellee usually put passengers off when requested; that when the train reached Seventh street, which is a safe place to get off, it slowed up a little, and, after passing the street some distance, and while the train was in motion, one of the employes of the appellee, either the conductor or a brakeman, appellant does not know which, directed him to get off; that it was very dark, and being led to believe that the train was at Seventh street, and that it was safe for him to get off, he did get off; that in so doing he fell, and the cars ran over his foot, etc.

He avers further, that the employe who directed him to get off knew that they had passed that street, and knew that it was unsafe for him to get off where he did.

The court below sustained a demurrer to the petition, and of this the appellant complains. We assume from the averments of the petition that it was the duty of the appellee to have stopped its train at Seventh street so that the appellant might have safely alighted. In not doing so, it was guilty of negligence. Nevertheless, if the danger of getting off the moving train was obvious or apparent, the appellant ought not to have made the attempt. He ought not to have weighed life and limb against inconvenience and loss of time.

Unless the danger, however, was obvious and apparent, he was justified in making the attempt on the invitation and advice of the servant. His petition, therefore, must preclude the hypothesis that when he made the attempt the danger was obvious or apparent, for otherwise he would fail to state facts sufficient to support a cause of action. When so tested it seems to us the petition is defective in that, first, we may fairly infer that the speed of the train was such as to render the danger imminent and obvious. He does not at least show the contrary. He says that when they reached Seventh street, at the usual rate of speed as we may fairly infer, "they did slow up a little," and this is the ony allegation on that subject. From a speed of thirty miles an hour they may have reduced it to ten or fifteen, and yet it can not be said that a passenger might, under such circumstances, jump from the moving train simply because the servant of the company told him to do so.

In the second place, the averment is that "it was very dark," and hence his leap was out into the dark at a place which he only supposes was Seventh street. He inferred it was at Seventh street, although the agreement with the conductor was that when he reached Seventh, he would stop for him. He could appreciate by the use of his own senses that it was very dark, and could not have relied on the servant in that particular.

In the third place, it is not shown that the place where he alighted was to any extent different in point of safety from the place at which he supposed he was alighting. So far as he alleges the places were equally safe. The averment that the servant knew that the place was an unsafe one for getting off the train is not one to the effect that it was in fact an unsafe or dangerous place for such purpose. Moreover, we do not know how recklessly or carelessly the appellant may have left the steps or platform of the car to reach the ground. We are merely told that the appellee, by its agents and servants, did certain negligent and, for that matter, highly reprehensible things, and that after that the appellant fell.

It may be said that by reason of the direction of the servant to the appellant to get off, he had the right to assume it to have been a safe place for such purpose, and so we may concede; but suppose it was in fact a safe place, and yet the passenger fell, would the road be liable merely because the place was not in fact Seventh street?

While we think the appellant stated certain facts from which we might impute negligence to the company, yet he fails to show that the injury was caused by reason of his alighting from the train at an unsafe or dangerous place, or that his getting off in the dark, and under the circumstances surrounding him, was not obviously dangerous, and his own conduct reckless and imprudent.

Judgment affirmed.

FINNELL, &c. v. HIGGINBOTHAM, TRUSTEE, &c.

(Filed February 28, 1895.)

1. Equitable lien on land of trustee to secure cestui que trust—Where a court directs the proceeds arising out of the sale of certain land to be invested by a trustee for her ward in real or personal estate, and directs a conveyance of said land to the trustee, the land so conveyed is charged with the trust funds until the trustee invests such funds in other real or personal property for the benefit of the ward.

2. Same—Priorities—Where the trustee fails to invest the trust funds in other real or personal property, a lien exists on the land conveyed to her to

secure said funds, prior and superior to the claim of the trustees creditors, who have acquired no specific lien thereon.

3. Same—Where the property of the trustee goes into the hands of an assignee or trustee for the benefit of his creditors, the ward can not charge his debt upon the estate of his trustee as a preferred one under section 7 of article 2 of chapter 44 of general Statutes, since the trust was not created by deed or will.

4. Same—Under a prayer for general relief the ward is entitled to have the land declared to be charged with an equitable lien, although the claim is presented in her petition as a preferred one under the general statutes.

5. Appeals—Partial transcript—Homestead—Where the pleadings and the evidence concerning appellant's claim to a homestead are not contained in the record, the refusal of the court to allow such claim can not be reviewed on appeal.

6. Same—Where an appellant's claim to certain exemptions was denied by an order entered on March 22d and not appealed from, her right to such exemptions will not be determined on her appeal from a judgment subsequently entered in the case, which merely confirms the previous final judgment as to the exemptions.

W. J. Landram and R. H. Tomlinson for appellants.

W. O. Bradley for appellees.

Appeal form Garrard Circuit Court.

Opinion of the court by Judge Paynter.

Ann M. Broaddus, by a judgment of the Madison Common Pleas Court, was made trustee for the appellant, Mattie E. Finnell, and her children for the investment of $195, arising out of the sale of certain land, including a 21-acre tract in Garrard county.

The court by its commissioner conveyed her the land, but directed this fund of $195 should be invested by her in real or personal property for the benefit of the appellant, Mattie E. Finnell, and her children. This 21 acres of land was impressed with trust and an equitable lien existed on it until the trustee executed the trust by investing the fund in either real or personal property for the benefit of her cestui que trust. The trustee having failed to so invest the fund, the cestui que trust can assert a lien in this action as a superior claim to that of her general creditors, and as there were no valid mortgage liens on the 21 acres of land, the appellant and her children are entitled to have it enforced. It is insisted by counsel for appellant that this is a preferred claim under chapter 44, article 2, section 7, General Statutes. This contention is not sustained because the debt is not created by deed or will. Neither is it a lien for purchase money. It is an equitable lien which followed the land into the hands of the trustee.

While appellant, Mrs. Finnell, asserted it as a preferred claim against the trust estate, yet in the prayer for general relief the equitable lien can be enforced. The court erred in refusing to enforce this lien for the $195, with interest from the 7th day of June, 1887, and in holding that the debt should be classed with the general claims against the estate.

Ann M. Broaddus appeals and asks a reversal of the judgment, because she was not allowed a homestead and certain exempt personal property. It appears from the judgment that there were four mortgages on her land, out of which it is claimed a homestead should be assigned. One to J. B. Carter; one to C. C. Stormes; one to Berea College; and one to J. B. Sweeney.

None of the pleadings filed in the case by either of the mortgagees are copied into the record and the judgment is that she is not entitled to a homestead against these mortgages. The judgment shows that by consent of the parties oral proof was introduced on the question of her right to a homestead. No bill of exceptions is made part of the record. With the record as it appears before us, we can not revise the judgment.

It is claimed that the court below erred in refusing to have set apart to Ann M. Broaddus certain personal property as exempt. The judgment of March 31, 1893, from which the appeal is taken, does not determine the question as to her right to the exemption, except it confirms a previous judgment of the court which was final. By that judgment, rendered on the 22d of March, 1893, her exempt property was adjudged to be for the benefit of Sweeney, except such as was embraced by prior mortgages.

There is no appeal from the judgment of March 22, 1893, which determined the question as to her right to the exemption in her personal property. However, if there was an appeal from it we could not hold that the court erred because none of the pleadings relating to the question have been made part of the record; in the absence of which we could not determine as to the propriety of the action of the court in giving the exempt personal property to Sweeney.

The pleading of Ann M. Broaddus, which counsel refers to as having been filed on the 16th of March, 1893, in which she claims a homestead and personal property as exempt, does not appear from the record to have been filed. It is simply marked offered, and there is no order filing it. It is not part of the record and can not be considered on this appeal.

The judgment as to Ann M. Broaddus is affirmed, and reversed as to Mattie E. Finnell, with directions for further proceedings consistent with this opinion.

ESKRIDGE, &c. v. CARTER BROS. & CO.

(Filed February 23, 1895—Not to be reported.)

1. Constitutional law—Special act—Feme sole—Under the Constitution of 1849 the legislature was not prohibited from enacting a special act conferring upon a married woman the power of a feme sole, and such an act was not invalid.

2. Fraudulent conveyance—Improvement of wife's property by husband—Creditors of an insolvent husband can not subject improvements erected upon his wife's property to the payment of their debt because the husband, a carpenter, worked on the building during its construction or afterwards acted as salesman for her in a store kept by her therein, nor can they subject same to the extent of the value of his services, his wages as a workman even for a stranger being exempt from execution.

3. Same—Pleadings—Plaintiff alleged that the defendant husband was the equitable owner of certain property and that the wife held the legal title without payment of a valuable consideration: that the husband procured a conveyance to the wife and she held it for the fraudulent purpose of preventing its sale for his debts. The answer of the husband traversed the allegations of the petition and the answer of the wife exhibited a deed to her from N., executed in 1882, under which she claimed she held, and for which she alleged she had paid full consideration out of her own means. The reply denied the latter averment but did not attack the deed exhibited by the wife. Held—The petition ought to have set out specifically what conveyance it was that it assailed as fraudulent, and when and from whom it was procured, and stated facts showing the fraud. The reply ought to have assailed the deed exhibited by the wife if plaintiff sought to set it aside. The judgment setting aside said deed as fraudulent was not authorized by the pleadings.

J. S. Wortham and Thos. H. Hines for appellants.

Geo. W. Stone for appellees.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The petition alleged that the defendant, J. N. Eskridge, was the equitable owner of a certain house and lot and that his wife held the legal title thereto without lawful consideration as against the plaintiff and other creditors of the husband; that the latter procured a conveyance of the property to the wife, and she held it for the fraudulent purpose of preventing its sale in satisfaction of the husband's debts.

It will be seen that we are not told from whom the husband procured a conveyance to the wife, or when he did so, or whether or not it was one of record, or any facts costi uting the alleged fraud. No circumstannces are stated from which we may even infer fraud. Eskridge denied only the allegations of the petition, and his answer supplied none of the omitted and material facts.

The wife, in addition to a similar denial, averred that she was the owner of the house and lot by deed of August 1, 1882, made to her by one John T. Neal and of record in the proper office. She files her deed and relies on it for title. She also avers that she paid for the property with her own means. This latter averment is controverted by the reply, but there is no attack on this deed and no averment affecting its validity, or any charge of fraud in its procurement. We do not know that this is the conveyance to which reference is made by the plaintiffs in their petition, and clearly it was incumbent on them to have set out more specifically the particular transaction which they wished to assail as fraudulent, and to have pointed out the conveyance they sought to set aside. Certainly, when the wife filed her evidence of title and relied on it, they should have pleaded that this was the deed that had been procured by fraud, if the purpose of the action was to cancel it.

The defendants were entitled to know what transaction was assailed. If, without assailing the transfer of the lot from Neal to the wife, the purpose of the plaintiffs was to sell the improvements on it because the husband had paid for them, and was therefore the equitable owner of them, appropriate averments to that effect should have been made. The pleadings, therefore, do not seem to authorize the judgment below setting aside the conveyance of August 1, 1882.

In support of her contention that she had, in fact, paid for the property with her own means, the wife pleaded that by an act of the general assembly, approved March 27, 1880, she had been empowered to trade as a feme sole, and acquire and hold by purchase real estate and other property free from the debts and liabilties of her husband. The court below held this act to be unconstitutional. We are cited, however, to no authority in support of this ruling. We know that very many such acts have been passed by the legislature and their validity appears not to have been questioned.

In one case the wife attempted to avoid her own contract made while trading under such a special act, and this court said "the act in question was passed in 1866, and while it does not occur to us to violate the provisions of the old Constitution, it is enough to say that the beneficiary of the act and the one procuring it can not thus impeach it." (Louisville & Nashville R.

R. Co. v. Alexander, ante, 306.) The old Constitution provided that the general assembly should have no power to grant divorces, to change the names of individuals or direct the sales of estate belonging to infants (section 32, article 2); and these provisions are found in the new Constitution, and in addition thereto, we find an express inhibition against the removal of the disabilities of feme covert by special legislation (subsection 7, section 59.)

This strongly supports the contention that under the old instrument the act was regarded as constitutional, and we are not disposed at this late day to hold otherwise.

The proof in this case conduces to show that the wife had several hundred dollars which she inherited from her father's estate and which she had preserved intact from her husband's control. This she had when empowered to trade as a feme sole, and with the assistance of her brother-in-law she engaged in business with fair success for some two years, when she bought the property in dispute for $500. The lot had formed a small part of the homestead allotted to her husband, upon his failure in 1878, and which he had sold to one Neal for $571.

The house on it only cost a few hundred dollars, and at the time the wife made the purchase, she seems to have been able to do so with her own means—provided she is to have the benefit, as we conclude she should have—of her business venture under the powers conferred by the legislative act in question. The only contribution shown to have been made by the husband toward the purchase of the property, or toward the accumulation of the means with which the purchase was made, was his work as a carpenter on the building erected on the lot, and his services as a salesman in the store. If he had performed this work and service for a stranger his wages would have been exempt. (Turner v. Short, 9 Ky. Law Rep., 866.)

In Carter Bros. v. Martin, 91 Ky., 297, this court said: "The mere fact that the husband has had an agency in improving or increasing the wife's estate by rendering personal service in its control will not authorize the chancellor to appropriate it to pay his debts."

The judgment subjecting the wife's property to sale for the debts of the husband is reversed, with directions to dismiss the petition.

RICKETS v. HAMILTON, &c.

(Filed February 28, 1895—Not to be reported.)

1. Continuance—Where the defendant, upon whom was the burden of proof, took his depositions only a short time before the beginning of the term, and the attorney for the plaintiff was unable thereafter to prepare for trial, owing to his absence from home, a continuance should have been granted plaintiff, these facts being made to appear by affidavit.

2. Landlord's lien—Mortgage by tenant—The lien created by a tenant by a mortgage on his part of the crop is superior to the landlord's lien for money due him by the tenant, except as to money advanced by him to the tenant to enable him to raise the crop.

3. Appeals—Mortgages—Jurisdiction—Where the mortgagor is seeking to enforce a mortgage lien on the proceeds of the mortgaged property for an amount greater than that necessary to give the appellate court jurisdiction on appeal, that jurisdiction is not defeated by the fact that several defendants have received the proceeds of such mortgaged property, and the amount received by and sought to be recovered from each is less than the jurisdictional amount for an appeal.

O'Rear & Bigstaff for appellant.

Cornelison & McKee for appellees.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

We must concur in the opinion rendered by the Superior Court in this case. (Ante, 351.)

The debtor owned a half interest in a crop of tobacco that he mortgaged to the appellant. This tobacco was sold by the landlord, and, refusing to pay over to the tenant his half, the latter sued him and obtained a judgment for $70, the proceeds of the tobacco to which the tenant was entitled. This judgment was assigned by the tenant to his attorneys. Before it was paid over the mortgagee (appellant) asserted her lien to the proceeds of the tobacco by reason of her mortgage, and also claimed that Oldham, the landlord, owed the tenant more than the $70, the proceeds of the tobacco, as found in his hands by the jury in the case against him by the tenant; that she was no party to that suit and not bound by it, and that her lien was superior to that of Oldham's except for a small amount. The lien secured by the mortgage followed the proceeds of the tobacco, and the appellant was entitled to recover those proceeds as against each of the appellees save as to advances made by Oldham to enable the tenant to raise his crop. It was error, therefore, to turn the appellant out of court without giving her the relief sought. Besides, the case should have been continued upon the affidavit of appellants attorney.

The defendant had taken depositions but a short time before court, and the attorney for the plaintiff (appellant) stated in his affidavit his inability to prepare the case for trial, owing to his absence and the short time intervening between the taking of defendant's depositions and the term of the court, the burden being on the defendant.

The Superior Court had jurisdiction of the appeal. The claim of the appellant largely exceeds the minimum sum over which that court has jurisdiction. She says that $70 are in the hands of Hamilton's attorneys, and a larger sum in the hands of Oldham. The appellant was not a party to the suit of Hamilton v. Oldham, and the fact that the attorneys had only $70 of the proceeds of the tobacco can make no difference.

The lien sought to be enforced greatly exceeds $100, and the debtor, by applying $70 to one creditor and the same to another, can not in that manner affect the recovery or oust this court or the Superior Court of jurisdiction.

Reversed and remanded for proceedings consistent with this opinion.

Judge Hazelrigg not sitting.

WESTERN DISTRICT WAREHOUSE CO. v. HAYES.

(Filed February 23, 1895.)

1. A stockholder of a corporation, which is a party to an ordinary suit, may testify in chief for it after it has introduced, in its own behalf, other witnesses who are not stockholders.

2. Liability of warehouseman for failure to insure goods in warehouse—Custom—Although the custom of a particular market may make it the duty

of a warehouseman to insure tobacco of his customers, he is not liable for his failure to insure tobacco subsequently destroyed by fire if he notified its owner, before the fire, that he had not insured it, but held it at the owner's risk, and if the owner made no objection but acquiesced in that action of the warehouseman.

W. S. Bishop and W. D. Greer for appellant.

Smith, Robbins & Thomas for appellee.

Appeal from Graves Court of Common Pleas.

Opinion of the court by Judge Grace.

The appellant complains of the action of the lower court in refusing to hear the testimony of three witnesses offered by it in chief on the trial, viz, R. H. Gardner, W. L. Hunt and N. C. Taylor, it being shown that each one was a stockholder in the defendant corporation, and that their testimony was not offered until after it had introduced in chief a witness by the name of Blalock, who was not a stockholder. The materiality of the evidence offered is shown and exceptions duly taken.

We think this ruling of the lower court was error. Stockholders of a corporation, who may be offered as witnesses in behalf of the corporation, do not come within the inhibition against persons testifying in chief after other testimony in chief has been offered, supposed to be contained in subsection 4 of section 606, Civil Code. This section reads: "No person shall testify for himself in chief in an ordinary action after introducting other testimony for himself in chief." * * *

The word person, as used in this subsection, is manifestly synonymous with party to the action. The whole section indicates and refers to what a party may and what a party may not do—as that he shall not testify for himself in chief after introducing other testimony for himself in chief. Of course the warehouse company, being but an artificial person (a fiction of the law), had not testified; could not testify.

Who can control this order of testimony other than a party to a suit? It is not within the power or authority of witnesses, nor of persons not parties, to suggest or control this matter. Neither of these witnesses offered to be introduced was a party. They had not introduced anybody to testify in the case, neither could they do this simply because they were stockholders in the corporation. They were not parties to the suit, neither indeed could they be. This right of suit or defense is in the body-corporate, the artificial person created under the law by the act of incorporation, and that corporation, managed by its board of directors and officers selected for that purpose, was and is the only party sued in this case.

By their charter they are known as the Western District Warehouse Co., and by that name they are authorized to sue and may be sued. The record in this case shows that defendant, before offering these three witnesses, had introduced the president, the vice-president and the chief clerk of said corporation. To refuse the defendant the benefit of the testimony of the witness offered, being stockholder, simply because the said corporation had introduced some one else not a stockholder, is not supported either by the letter or spirit of the section in question, and there is no necessity of extending the provisions of the Code beyond the lines indicated.

Another error of which appellant complains is that the court refused instruction B offered by it. Same is as follows: "The

court instructs the jury that if they believe from the evidence that the defendant's agent notified plaintiff or apprized him that his tobacco, turned over and sued for in this case, was at the warehouse at his (the plaintiff's) risk, and the plaintiff acquiesced therein, or made no objection thereto, then the law is for the defendant and the jury should so find, although you may believe that there was a custom of the trade in the Mayfield market that the warehouse should cover said tobacco by insurance."

This instruction contains a sound principle of law. This suit being filed to make defendant liable for certain tobacco destroyed by fire while held in its warehouse, and upon the allegation that there was a custom in said trade at Mayfield that the warehousemen should insure the tobacco of their customers, and that this tobacco had been deposited and stored with the appellant under and with reference to said custom; this allegation was made by plainitff in an amended petition and pending a demurrer, which was then overruled. It required this allegation to make his petition good; that the contract under which defendant held the tobacco was made with reference to said custom. So then, although such a custom did exist, yet if the parties made another contract without reference to the same and different from said custom; or if defendant, before the burning of the tobacco, notified plaintiff that it was not insuring said tobacco, but was holding same at his (plaintiff's) risk, and thereupon plaintiff made no objection but acquiesced in same, then he ought not to recover.

The defendant gave in evidence this notice or statement to plainitff, and it should be entitled to this defense. We do not find, however, that the defendant had set out said notice or agreement in its answer, and this was doubtless the reason of the refusal by the court of the instruction B asked for. On return of this cause defendant should have leave to amend its answer, if it desires to do so, and set out this matter as shown in evidence.

Instruction No. 1, given by the court, contains a fair exposition of the law relied upon by plaintiff. We would suggest, however, that instruction No. 2, intended to embrace the law for defendant, should be redrafted, setting forth clearly, as it should do, that plaintiff can not recover unless the custom established and proven covers the state of case under which his tobacco was held by the defendant at the time it was burned.

And again, submitting as a part of same or separately to the jury, that if side by side with the custom by which warehousemen were required to keep tobacco deposited with them for sale insured, whether there was yet another custom in said trade, and between the warehouse proprietors and their customers, whereby tobacco held by them, after a first sale to brokers or others, was not required to be issued by the warehouse proprietors, but was held at the risk of the purchasers, then submitting both propositions, that claimed by plaintiff and that claimed by defendant, to the jury, within the evidence offered as to the existence of said custom of course; and then let the jury from the evidence say whether the tobacco held for defendant at the time of the fire was held under one or the other of said customs, and decide accordingly.

Judgment reversed for further proceedinsg as herein indicated.

HOCKER, &c. v. MONTAGUE'S ADMR.

(Filed February 26, 1895—Not to be reported.)

Infants—Judgments—It is erroneous to render a judgment against infant defendants under the age of fourteen years without the appointment of a guardian ad litem to make defense for them.

Guffy & Ringo and E. D. Guffy for appellant.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Guffy.

The appellants, J. D. Hocker and others, prosecute this appeal from a judgment of the Ohio Circuit Court, rendered in the suit of S. P. Taylor, administrator of A. P. Montague, against J. W. Hocker and others, adjudging that a lien existed on the 137 acres of land mentioned in the petition to secure the payment of several notes sued on, and adjudging a sale of the land to pay same.

J. W. Hocker made no defense in the court below, and has not appealed. The wife, L. C. Hocker, was made party on her own petition, and claims the land in part in her own right and the residue as a homestead, claiming that she and her family had continuously resided on same as a homestead from 1852. Before the judgment was entered L. C. Hocker died, and the suit was revived against her heirs, the appellants herein—Birdie and Lizzie Hocker, being infants under fourteen years of age, answering by their next friend.

Appellants insist that the pleadings of plaintiff will not support the judgment, and that it was error to render judgment without the appointment of a guardian ad litem for the infants. It is true that appellee claimed that he had a lien upon the land, but the facts stated are not sufficient to show that any lien existed on the land for the payment of the notes sued on.

It was also erorr to render the judgment without the appointment of a guardian ad litem for the infant defendants. The judgment of the lower court is, therefore, reversed, and the sale of the land set aside, but upon the return of the case either party may amend their pleadings.

The cause is, therefore, remanded for further proceedings consistent with this opinion.

WARE v. FARMERS TOBACCO WAREHOUSE CO.

(Filed February 26, 1895—Not to be reported.)

Chancellor's finding authorized by evidence—On the issues raised in this case as to whether appellee sold appellant's tobacco, which had been sent to it to sell on commission, in violation of appellant's order and for an inadequate price, and whether appellee had authority to sell the tobacco at the time and for the price obtained, the finding of the court below for appellee is affirmed.

Tyler & Apperson for appellant.

A. B. White for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

In 1891 the appellee instituted this action in the Montgomery Circuit Court against the appellant to recover the balance alleged to be due on a note executed to it by appellant for the sum of $1,200 and interest, and subject to a credit of $758.60, and also seeking to enforce a mortgage lien on certain property.

Appellant filed his answer and counterclaim, alleging that he had shipped to appellee 12,600 pounds of tobacco, to be sold as he might direct, and that he directed appellee to offer the tobacco for sale about the 10th of September, 1890. and if it brought ten cents per pound on an average, to sell; otherwise to reject the bids; and that it was worth that price at that time, but that appellees sold it and only realized $758.60, or about six cents per pound, and also sought to hold appellee responsible for the difference between ten and six cents per pound, and asked judgment against appellee for — dollars, the excess over payment of the note sued on.

Appellee in its reply denied having received any such order from appellant, and claimed authority to use its own best judgment as to the selling, alleging that it had done so, and had obtained the best prices to be had, and all that the tobaco was worth.

The court below adjudged in favor of appellee, and the defendant, Ware, has appealed to this court, and asks a reversal upon the ground that the judgment is contrary to law and not sustained by the evidence. Appellant contends that appellee failed to show authority to sell, while appellee insists that appellant has not shown that he gave any directions as to the selling.

There is some conflict in the proof introduced. One witness testified that such authority was given, while appellant testifies to the reverse. It seems to be admitted that apppellee was a commission merchant, receiving and selling tobacco, and that apellant had shipped the tobacco there to be sold. There is no evidence of actual fraud on the part of appellee. It would seem, too, that appellee would desire to realize the best possible price for the tobacco, for the reason that the proceeds would go in payment on the debt held by it on defendant, and a good price would help to incerase its business.

Taking the evidence. introduced, together with all the facts and circumstances, into consideration, it seems to us that the judgment of the court below is sustained by a preponderance of the evidence.

The judgment is, therefore, affirmed.

YOUNG, &c. v. WOOLETT.

(Filed February 26, 1895—Not to be reported.)

Agreed division line—Estoppel—Where adjoining land owners, to settle a disputed division line, agreed that a certain line is the true one, and bulid the division fence upon said agreed line and acquiesce in it for years, the parties to the agreement are thereafter estopped to deny that such line is the true one.

O'Neal, Phelps, Pryor & Selligman for appellants.

Wm. Mix and C. B. Seymour for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Guffy.

The judgmet appealed from was rendered by the Jefferson Circuit Court, chancery division, in the suit of Emily Young, &c. v. Woolett. The plaintiff claimed to be the owner of and in possession of a certain tract or boundary of land in Jefferson county and alleged that defendant wrongfully and without right was claiming a portion of said land, and was about to take possession thereof, etc., and plaintiffs prayed that he be enjoined from so doing, and for judgment, etc.

The defendant by answer denied plaintiff's title to the land in contest, and asserted title to a certain tract of land, and made his answer a counter claim against plaintiffs. The action may be fairly called an action of quia timet between the parties.

The court below adjudged in favor of defendant, in effect adjudging to him the land in contest, and dismissed plaintiff's petition. From that judgment plaintiffs have appealed.

It appears that both parties and their vendors had for many years been the owners and occupants of adjoining farms. It is claimed, and some proof conduces to show, that a line known as the Wilson and Mitchell line was the true dividing line between the two farms. It appears that E. G. Young, and those claiming jointly with him and those holding under him, had been in possession of the Young land for more than thirty years before the commencement of this suit, holding the same adversely to all the world. Defendant had in like manner been in the possession of his tract nearly, if not quite, as long.

The true dividing line between the two farms was the real question in issue. The proof seems to establish the fact that about ten or eleven years ago a dispute arose between appellee and E. G. Young (now dead) as to the true dividing line. Young sued appellee in a justice's court for trespass. Appellee moved his fence back some distance, and the jury found for him. It also appears that E. G. Young and appellee about that time agreed upon a certain line as the true dividing line between them, and that appellee built his fence upon or along said line, and all parties accepted and acted upon that compromise until after Young's death, and until shortly before the commencement of this action.

It seems to us the proof, and the long acquiescence of appellee in the compromise and adjustment of the dispute, establishes the fact that defendant did agree that the line or place where he built his fence was and should forever remain the true division line between him and Young, and that being true, he is now estopped to deny the agreed line. Such an agreement is conclusive as to the claim of appellee. (Jamison v. Petit, 6 Bush, 670; Singleton v. Whitesides, 5 Yerger, 18; Green v. Smith, 57 Vermont, 268; Kerr v. Holt, 75 Ill., 51.)

It might now be very difficult to ascertain beyond question where the original Wilson and Mitchell line really is. For the purpose of this action it must be held to be where appellee set his fence under the agreement aforesaid.

The judgment of the lower court is reversed and cause remanded, with directions to render a judgment in favor of appellants, quieting their title to the land described in their petition, and enjoining appellee from claiming or taking possession of any part thereof and from in any manner interfering with the same.

HENDRICK v. ROBERT MITCHELL FURNITURE CO., &c.

(Filed February 26, 1895—Not to be reported.)

1. Pleadings—A denial by the defendant that on a certain day he was indebted to the plaintiff in the sum sued for, or that the debt was due and unpaid, are mere conclusions of law.
2. Same—An averment, in the answer to a suit on a contract, that "the plaintiff did not, as it agreed, paint in oil the walls and ceiling of the vestibule in oil color No. 780," is insufficient; it should state the particulars wherein plaintiff failed to comply with said contract.
3. Sale of land to pay liens—Premature order of sale—In a suit to foreclose a mortgage lien, where it appears that there is a prior mortgage lien on the land not yet due, and the land is not susceptible of advantageous division, a sale should not be ordered until all the mortgages become due; an order of sale, when some of the lien debts are not due, is premature under subsection 3 of section 694, Civil Code.

Ira Julian and John D. Carroll for appellant.

John B. Lindsey and John W. Rodman for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The denials of the appellant that on the 26th of July, 1892, he was indebted to the appellee company in the sum sued on, or that the debt was due or unpaid, are mere conclusions of law, and, when we look to the reasons given why the debt was not owing and was not due, we find that no issue is in fact made, by the appellant's pleadings. He filed a copy of the contract, and alleges "that the plaintiff did not, as it agreed, paint in oil the walls and ceiling of the vestibule in oil color No. 780."

We may conclude from this averment that the plaintiff did paint in oil the walls, but not the ceiling of the vestibule in the color named, or the ceiling and not the walls, or both in oil color, but not of the number named. So of the allegation that "plaintiff did not, as it agreed, furnish for front hall one screen for side entrance with one door 4 x 7 x 6."

The plaintiff may have complied fully with the requirements of the contract, save that in some immaterial or insignificant respect the dimensions of the door may have been altered.

This criticism applies to each of the items as to which the pleader attempts to show some lack of performance on the part of the company under the requirements of the contract. There are no specifications of the particulars in which the materials or services are lacking when measured by the terms of the contract, and no claim any where that by reason of any failure on the company's part to comply with the contract the appellant was injured or damaged in any sum whatever.

It is contended further, that under subsection 3, section 694 of the Civil Code, as construed in the case of Leopold v. Furber, 84 Ky., 214, the judgment was prematurely rendered. That section provides that when several debts are secured by one lien, or by liens of equal rank, and are owned by different persons and be not all due, the court shall not order a sale of the property until they all mature.

The case cited was an action to enforce a vendor's lien when some of the purchase money notes were not due, and the property, as in this case, was not susceptible of advantageous divis-

ion, and it was held that the court should not have ordered a sale of it, or any part of it, unti the maturity of all notes, although all were held by the same person.

In this cae the liens sought to be enforced are secured by mortgages, and are not of equal rank, yet the Buchannan debt, which is secured by a mortgage first in point of execution and priority, was none of it due when this suit was instituted. The plaintiff company and the other lien holders, therefore, took their mortgages with a knowledge that the Buchannan debt would not mature until March 24, 1895. This debt is evidenced by four notes of $1,000 each, and owned by different persons.

The principles announced, therefore, in the Leopold-Furber case and that of Fraught v. Henry, 13 Bush, 471, would seem to forbid a sale of the property until the maturity of this first mortgage lien. This lien stands in the same relation to subsequent liens as a purchase monney lien, and in this case was in effect the first payment of purchase money on the property. The appellant, however, is not seeking to disturb the sale under the judgment, and this would be the necessary consequence if a reversal is had, on the ground that the order of sale was prematurely entered. As we have seen there is no other reason to disturb the judgment.

The appellant has agreed that the sale should not be set aside, and, as the judgment can not be disturbed without affecting the sale, it must be affirmed.

SIMRALL v. CITY OF COVINGTON.

MACKOY v. SAME.

(Filed February 26, 1895—Not to be reported.)

1. Contracts—Municipal corporations—An act appointing a board of trustees to construct waterworks for a city, and empowering said board to "contract and be contracted with, to sue and be sued," and to appoint, employ and pay officers, agents and employes, and to do all things necessary for the completion of the work, by necessary implication authorized it to employ attorneys to make defense to a suit against it by the contractor engaged to construct the reservoirs; and the contract of employment made by said board with attorneys is valid and binding on the city.

2. Same—A contract by said board with the attorneys employed by it, that the compensation to be paid them for their services shall be fixed by a member of the board after the services were rendered, is not a delegation of its power by the board to make contracts to one member thereof; but such stipulation in the contract is valid and the fee fixed by said member of the board is conclusive in the absence of fraud.

3. Same—Where the act creating the board of trustees provided that it should control the waterworks until their completion, when they were to be turned over to the city and the board's duties ended, and the suits in which the attorneys were engaged were not terminated until after the board ceased to control the works and had turned same over to the city, the attorneys still had the right, under thier contract with the board, to have the member of the board designated in the contract fix the fee they were entitled to for their services.

4. Same—Defect of parties waived—In a suit against the city by the attorneys to recover their fee, where it is conceded that the liability, if any, is that of the city, the failure to make the members of the board of trustees defendants to the suit was at most a formal defect, which was waived by the failure to file a special demurrer.

Wm. Goebel and W. W. Cleary for appellants.

W. A. Byrne for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

These two cases come from the Kenton Circuit Court, and as they involve similar questions, will be considered together.

The two appellants, Mackoy and Simrall, had been employed, as they allege, by the trustees of the Covington reservoir to conduct the defense on the part of the board of trustees in actions instituted against that board by Casparis & Co., arising out of a contract between the parties to the action for the construction of water reservoirs and all things necesssary, mentioned in the contract, to supply the city of Covington with water. Caspairs claimed a breach of contract on the part of the board, abandoned the contract and suits were instituted by him, involving large sums of money, exceeding in amount $300,000.

The board of trustees having completed the waterworks, turned them over to the city of Covington, and thus ended their right to longer control them.

The liability of the city is alleged to exist for the following reasons: An amendment was had to the charter of the city by which its council was authorized to appoint a board of trustees, five in number, who were to have these water reservoirs constructed, and their management and control until completed was committed to this board under the name and style of the "Trustees of Covington Reservoir." This board was "authorized to sue and be sued; to contract and be contracted with;" to purchase and condemn land necessary for the improvement; to issue and sell bonds of the city; to appoint, employ and pay officers, agents and employes, and to do all acts necessary for the completion of the work.

The act also provided that this board should continue in office until the work or improvements were completed and in operation, and for not longer than two months thereafter.

The trustees were duly apppointed and qualified, and, as before stated, had completed the improvement and ceased to have any further control. Bonds of the city had been issued and sold for the purpose of this work, exceeding $1,000,000, under various legislative enactments.

The trustees, anticipating trouble with Casparis & Co., the contractors, at a called meeting of their board, in July, 1889, by an order of the board directed Judge O'Hara, who was a member of the board, to contract for the employment of the appellants.

At a meeting of the board, held on August 7, 1889, Judge O'Hara made a written report to the board, as follows:

"Covington, Ky., August 7, 1889.

"To Trustees Covington Reservoir:

"The undersigned, appointed by a resolution of the board at the extra session held July 31, 1889, to employ C. B. Simrall and W. H. Mackoy to represent the trustees in any litigation they may have with Casparis & Co., begs to report that he has agreed with these gentlemen that they shall render services as may be required of them in such litigation, and that the undersigned is to fix the fee for such services to be paid each of them by this board after the services shall have been performed.

J. O'HARA."

This report was adopted, and in April, 1890, Judge O'Hara requested of the attorneys to sign an agreement, by which he was to fix their compensation. They each signed an agreement to that effect, as follows:

"Covington, Ky., April 15, 1890.

"I have heretofore been employed by Judge O'Hara as one of the attorneys of the trustees of Covington reservoir in their litigation with Casparis & Co., contractors with them for the construction of Covington reservoir, and then and now agree that the compensation for my services to them in this behalf shall be fixed by said O'Hara when the service is rendered."

The writings, signed by the attorneys, were reported back to the board, and concurred in. It is alleged that a protracted litigation followed, and ending the litigation, or when the work was completed, the trustees turned over to the city the balance of cash in their hands, and no longer acted as agents or trustees for the city.

When the litigation terminated, which was after the waterworks had been constructed, Judge O'Hara was applied to by the appellants to fix their compensation, as provided by the agreement and approved by the board of trustees, and in the month of November, 1892, determined the compensation to be paid each of the attorneys in writing:

"Being called upon by C. B. Simrall, Esq., to fix the amount of his fee for services rendered by him in defense of the action of Casparis & Co. against the trustees of the Covington reservoirs in the U. S. Circuit Court at this place, and for such services as he rendered them in the controversy between said parties, arising out of the contract between them and said Casparis & Co. for the construction of the reservoirs, in association with W. H. Mackoy, Esq., pursuant to an agreement between him and said trustees, I have fully considered his own statement and the opinions of attorneys submitted by him, and those submitted by Mr. Byrne, the solicitor of the city of Covington, and have included in my consideration my own knowledge of the services and the rate of charges for attorney's services prevailing in Kentucky, within the range of my practice as an attorney for more than thirty years past, and am of opinion, and so decide, that $11,500 is a fair and reasonable compensation to Mr. Simrall for his said services, and fix his fee at that amount, from which is to be deducted any sum or sums already received by him, if any, in that behalf. J. O'HARA."

A similar writing fixed the compensation of Mackoy at $6,000.

A copy of each writing was handed to the city of Covington or its representative, and to Simrall and Mackoy. The city refused to pay the fees, and these actions having been instituted upon the state of facts presented, a general demurrer was sustained to the petition of each of the appellants, and the actions dismissed.

It seems to us the only question in this case arising on the demurrer is as to the power of the trustees to enter into the contract for the services of these attorneys. If the right to employ counsel exists, then the contract entered into is binding and should be enforced. The legislature saw proper to confide to this board of trustees the duty of having the waterworks constructed, and made them in effect the agents of the city of Covington for that purpose, and clothed them with all the powers necessary to discharge the duties imposed on them. They had the power to contract and be contracted with, to sue and be sued, to select their agents and employes, and in fact were invested with all the powers the city would have had if the board.

of council had been selected instead of this board of trustees. It was an agent invested with all the powers of a principal, in so far as the improvement was concerned.

Having the power to sue, and the right of others to sue them as trustees when acting within the scope of their authority, it necessarily follows they had the right to employ counsel to bring this action, or if sued to employ counsel to make their defense, and to make such contracts with reference to the employments as they could have made if contracting for their own benefit.

The mode of contracting for the services of counsel is not provided for by the charter, and in this case, as the character of services or their extent could not well be ascertained at the time the appellants were retained as counsel, we perceive no reason why an agreement to pay such a sum as one of their own board should deem reasonable and just should not be upheld. The nature of the contract was reported to the board, and by that body was ratified and approved and the services rendered.

There is no defense of bad faith alleged in the pleading, but an admission by the demurrer that the contract was made and the services performed. It was, however, insisted by counsel for the city on the oral agreement that the authority given one member of the board to determine these fees was a delegation of a power that could be exercised by the board alone, and unless the fees were fixed by a majority of that body, the agreement to that extent is void.

It was, as we see from the records before us, the action of the entire board (save one) by which the parties to the contract were to be bound by the sum fixed as compensation by Judge O'Hara. It was not one member of the board agreeing to the contract, but a decisive majority approving and directing its execution; and having entered into the agreement they can not now claim the right of determining for themselves as a board, or the city council for them, whether or not the sum fixed by the umpire is or not reasonable.

The trustees had the discretion to settle questions of dispute, in reference to the subject-matter under their control by agreeing that the judgment of a third party should determine the controversy, and instead of being a delegation of power conferred on them in this case, it was an exercise of the authority given them to select one of their board to adjust and determine the claims of these appellants. This contract was made before their agreement terminated and during the progress of the work and in the exercise of a discretion that certainly belonged to them.

The fact that one of the board was selected as the arbiter or the person to determine the compensation can make no difference. The right to do so originated from the contract between the trustees, O'Hara being one of them, on the one side, and these appellants on the other; and although the trustees had turned the waterworks over to the city and ended their connection with them before the services of the attorneys had ended, and before O'Hara determined what the fees should be, and this he could not do until the litigation was over, still this did not affect the contract, nor can these parties, in their corporate capacity, be regarded as legally dead until their contracts are complied with.

Such a satisfaction of a legal or equitable demand is unknown to the law. They might and perhaps should have been made parties to this litigation, but there was no special demurrer, and as the liability, if any, is to be discharged by the city, it is at best a formal objection, as both sides concede that the work is done and the means of the agent passed over to the principal.

Counsel for the appellants refer to two cases conducing to remove the principal objection urged by counsel to the petitions. The mayor, aldermen and burgesses of Liverpool, on behalf of the city, entered into an agreement with one Scott, that provided, among other stipulations, "that disputes between the parties should be referred to the engineer of the corporation of Liverpool, and his decision should be binding" (3 De. G. & J., 334). Also in the case of Hartripee v. City of Pittsburg, 97 Pa. St., 107, where the council of that city made a contract containing a similar provision, and in neither case was the objection raised that such contracts were nullities.

Numerous cases might be cited to the same effect and are of constant occurrence, and it may be said that where the power to contract exists, the price to be paid and the mode and kind of payment may be determined by a third party, if such is the agreement, and not beyond the scope of the authority given, if the contract is made by an agent or one clothed with similar authority, as the trustees were in this case. In our opinion the demurrer should have been overruled.

Reversed and remanded for that purpose, and for proceedings consistent with this opinion. (Sweeney v. U. S., 109 U. S., 618; R. R. Co. v. Northcutt, 15 Ill., 49; C. S. Ry. v. Cummins, 6 Ky. Law Rep., 441, 443; Santa Fe & Cal. R. R. Co. v. Price, 138 U. S., 185.)

McCALLISTER v. BETHEL.

(Filed February 21, 1895.)

Construction of devise—Defeasible fee—Life estate—A devise of land to a trustee for benefit of J., the trustee to rent out same and pay proceeds for support and maintenance of J., or, if he thought best, the trustee to rent same to J., said rent or proceeds not to be liable for debts of J., and said farm to go, after the death of J. to his children; but if he has none, then to any person said J. shall devise it to, creates a defeasible fee in J., subject to be defeated by his death, leaving heirs of his body.

Yeaman & Lockett for appellant.

Montgomery Merritt and A. T. Dudley for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

Ben Talbot owned a large estate, and the appellee, Marie Bethel, is his only child. Joseph McCallister was his wife's nephew, and a very improvident and intemperate man. Joseph McCallister owned three good farms of about 150 acres each. He became involved principally by security debts, in amount approximating $7,000.

On the 2d day of August, 1877, in consideration of $7,000, all of which, except $4,002.98, was to be applied to the payment of his debts, Joseph McCallister conveyed to Ben Talbot his three farms, together with a large amount of personal property. He surrendered possession of two of the farms but retained, with the consent of the grantee, possession of one of them known as the "Warfield farm." He occupied and used it as his own from the date of the deed until the death of Ben Talbot, which occurred in 1884. The record shows that the property which

Talbot obtained under his deed from Jospeh McCallister outside of the Warfield farm, fully reimbursed him for the money he had paid. The evident purpose of Ben Talbot was not to profit by the misfortunes of his wife's nephew but to assist him in retaining a part of his estate for his use and enjoyment.

On the 6th of September, one month and four days after Joseph McCallister made him the deed, Ben Talbot made his will, containing three clauses. By the first, after the payment of his funeral expenses, debts, etc., he gave the appellee, Maria Bethel, his money and the proceeds of his personal property which was to be sold by his executor. By the third clause he gave the residue of his estate, of whatever kind, to her during her natural life and then to the children of her body.

The interpretation of the second clause of the will is involved in this action. It reads as follows: "I will and devise to John E. McCallister my Warfield farm lying on the point above the mouth of Green river, in Henderson county, Ky., next adjoining the lands of John E. McCallister, containing about 150 acres, more or less, in trust for Joseph McCallister. He shall have power to rent out the farm and collect the rents and pay them out for the support and maintenance of said Joseph McCallister, or he may, if he thinks best, rent the fram to said Joseph; but I wish and order that the farm or its proceeds shall never be liable for any debt of said Joseph's contracting without the consent of said trustee, and if any creditor of said Joseph shall garnishee or attempt to stop the rent or money so that it will not go to the maintenance of said Joseph, I will and order the trustee to stop the payment of such creditor, and I order him to pay it out for the support and maintenance of said Joseph accordingly as Joseph may need it. I further will and devise the farm, after the death of Jospeh McCallister, to the children of Joseph McCallister, if he has any, but if he has no heirs of his body it shall pass or go to any person said Joseph may will and devise it to, and it shall be theirs forever."

Joseph McCallister died intestate and without children. The question is whether the farm goes to the appellee, Maria Bethel and her children under the will of Ben Talbot, or to the nearest of kin of Joseph McAllister, who are the appellant and the appellee, Maria Bethel. If the will of Ben Talbot had simply carved out of the fee a life estate for Joseph McCallister, and he having died without children and having made no will, then the farm would go to the residuary legatees of the will of Ben Talbot.

In construing a will we should always have in mind the purpose and intention of the testator and effectuate that. The testator, having the right of disposition of the estate he has accumulated, his desires should be followed as far as the law will allow.

Out of his abundance Ben Talbot has munificently provided for his daughter and her children. His kindly interest in his wife's unfortunate nephew lingered with him until the last, as is evidenced by his will. He was evidently a just man, because when he found himself repayed the sums he had expended for Joseph by the acquisition of two of his farms, he permits Joseph to retain the use of the third and secured it to him by the terms of his will. Who can doubt that Ben Talbot had the desire to be just as well as benevolent with Joseph McCallister when he thought of disposing of his estate? However, it is not necessary to consider any of the facts surrounding the previous ownership of the farm in order to determine what was the intention of the testator.

The farm is willed to John E. McCallister in trust for Joseph. There is no word or phrase in the language creating the trust to show that he was taking a life interest in the land. It was given in trust to him generally—in fee.

There seems to be no term that can be employed which expresses the character of the estate which he took so well as to say it was a defeasible fee; that is to say he was vested with the fee and his right thereto could only be defeated upon the happening of the event of having bodily heirs. The event never having transpired, he retained the fee.

There is no expression or word used which requires the trustee to give Joseph the rents during his life, so as to indicate an intention upon the part of the testator that he was to have only a life estate in the land. It is perfectly manifest from the will that the testator knew how to create a life estate in a devisee, as in the first clause of the will he gives his daughter absolutely his money and proceeds of his personal property ordered to be sold, and in the third clause he gives her a life estate in his realty, and the remainder to her children.

Had he intended that Joseph should only take a life estate in the farm, he would have said so, as he did in the case of his daughter. Had he intended that his daughter and her children should take the Warfield farm as his residuary legatees, he would have said that, in the event of Joseph having no bodily heirs, then it was to go to his daughter and her children. As a further evidence of the fact he did not so intend that they should take the Warfield farm as such legatees, he provided, in case the event did not happen which would divest Joseph of the fee, that the farm should pass "to any person said Joseph may will and devise it to, and it shall be theirs forever."

Having given Joseph the fee, it was wholly unnecessary for the testator to emphasize the fact by trying to confer upon him the right to will the farm to whomsoever he pleased. The right to so dispose of the farm was incident to the estate which the testator gave him, and no further words were necessary to be employed to enable him to do so unless he had bodily heirs.

It is quite unusual for opposing counsel to cite the same cases decided by this court to sustain their respective positions. The cases which they cite are uniform, and certain in announcing the same doctrine. We will refer to some of them to show the facts are quite different from what they appear to be in this case, and that the conclusions reached are in harmony with the principles therein announced.

In McCullough's Adm'r v. Anderson, 90 Ky., 127, the testator willed to his wife, during her life, all his estate, with ample authority to dispose of the whole of it as she pleased. If at her death she had made no testamentary disposition of it, then the remainder was to go to certain persons. The testator's wife was given the life estate, with the right, if she chose to exercise it, to defeat the remainder. She did not chose to exercise it, and the court held that the estate went to those to whom it was given in remainder, and not to her heirs.

In the case of Coats' Ex'or v. L. & N. R. R. Co., 13 Ky. Law Rep., 557, it appears that Mathew H. Coats devised his estate to his wife, Beulah Coats, with absolute power to sell during her life. At the death of his wife such of his estate as remained unexpended was specifically devised to various persons. The court hled that the wife only took a life estate.

In Pate v. Barret, 2 Dana, 427, the testator devised to his sister, Janet Crawford, a mulatto girl (Nelly) during her life,

and at her death the devisee to leave Nelly to any of her children she saw proper, or to free her by emancipation, as she pleased. The court held that she only took a life estate in Nelly, with power to dispose of her; but, as it was never exercised, Nelly reverted to the testator.

We do not deem it necessary to make any reference to other cases cited by counsel. The cases to which attention is called herein in effect decides that when the testator devises his estate to one for life, with power to dispose of it by will or deed, and that power is not exercised, the estate in remainder (if one has been created by the will) has not been defeated; or if there is no estate in remainder created by the will, and the life tenant fails to exercise the power of disposition, then it reverts to the estate of the testator.

But the court, in the case of Herbert's Gd'n v. Herbert's Ex'or, 85 Ky., 149, said: "It might be well argued that a devise to a stranger for life, with such an unlimited power of disposition, would pass the fee."

In McCullough's Adm'r v. Anderson, supra, Judge Pryor, in delivering the opinion of the court, said: "After a careful review of all the authorities to which our attention has been called, the rule sanctioned and followed is this: If the estate is given or devised generally or indefinitely with a power of disposition it passes a fee, but when the devisor or grantor owning the fee gives to the first taker an estate for life, with the power to dispose of the fee, no greater estate is vested in the first taker than that carved out of the fee and vested in him by the devisor or grantor. He is given a life estate in express terms, and the failure to exercise the power gives to the remainderman the fee because no disposition having been made of it by the life tenant, he takes under the will or conveyance."

It is said "if an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives the first taker an estate for life only and annexes to it a power of disposition. In that case the express limitation for life will control the operation of the power and prevent it enlarging the estate into a fee." (4 Kent's Commentaries, 535, 536.)

We are of the opinion that the legal estate in fee was held in trust for the immediate devisee, Joseph McCallister, with the power of disposition annexed in the event he died without bodily heirs. The devisor reserves no interest to himself or to his heirs in the realty devised, and there is no contingency upon which it is to revert; but, on the contrary, his plain intent was to divest himself of title, passing it to the trustee, with a limitation upon the power of disposition by the beneficiary in the event he died leaving children.

The distinguishing feature between a life estate, with the power of disposition, and an estate where the fee passes to the immediate devisee, subject to be divested upon the happening of a contingency, is that when an estate for life is expressly given, and the power of disposition not exercised by the life tenant, all his interest in the estate ceases at his death; but when the fee is given in the first instance, as in this case, and the contingency upon which the title is to be divested or restricted never happens, then at the death of the person holding the fee the estate devised passes by descent to his heirs at law if not disposed of by will, and the attempt to limit the power of disposition by will only becomes nugatory. Joseph McCallister dying without children, the farm passes by descent to his heirs at law.

Judgment reversed, with directions that further proceedings be had consistent with this opinion.

GARDNER, &c. v. LETCHER, ASS'EE.

(Filed February 27, 1895—Not to be reported.)

1. Assignment for benefit of creditors—Death of assignor—The death of an insolvent debtor, after he has by deed conveyed all his propety to an assignee for the benefit of his creditors, does not destroy or suspend the right of the assignee to maintain actions to collect debts due the estate or to appropriate them as required by the deed.
2. Sale of infants' real estate—Appointment of guardian ad litem—In an action to subject the interest of infant defendants under the age of fourteen years, where their statutory guardians are made defendants, the court may appoint a guardian ad litem to make defense for the infants when the statutory guardian fails to do so; and such appointment may be made without the filing of any affidavit therefor in behalf of the infants.
3. Same—Report of guardian ad litem—A report by a guardian ad litem that "he has examined the record and that there is no defense he can make for said infants," is sufficient, being a substantial conmpliance with section 86 of the Civl Code.

J. B. White for appellants.

John Bennett for appellee.

Appeal from Estill Court of Common Pleas.

Opinion of the Court by Judge Paynter.

The appellee, as the assignee of one Curtis in a litigation with M. P. Gardner, administratrix of the estate of J. H. Gardner, deceased, recovered a judgment in the Madison Court of Common Pleas against the administratrix, to be levied of assets of the estate, the sum of $629.71, with interest thereon at the rate of 6 per cent. per annum from the 12th of June, 1886, and the costs of the action, amounting to $199.89. An execution was issued, directed to the proper officer, and returned no property found.

This suit was instituted by the appellee against the appellants to compel the payment of that judgment. It is alleged that J. H. Gardner left a large and valuable estate, consisting of real and personal property; that pending the litigation, as a result of which the judgment was obtained, the estate was settled, the personalty distributed to and the realty partitioned among his widow and heirs at law; that the widow, over and above the exempt property coming to her, she and each of the heirs had received in property and money from the estate more than the judgment in suit; that they are now in possession of certain parts of the realty thus descended to them, and it is asked that enough of it be sold to pay the judgment. In short, if the facts alleged are true, the petition shows a right to recover and have the land sold to pay the judgment.

The decedent left the appellant, M. P. Gardner, his widow, and children as follows: H. W. Gardner, H. R. Gardner, Laura Thompson, T. Park Gardner, Joseph S. Gardner, the two last named being infants over fourteen years of age when the suit was filed, but before the judgment was entered the appellee, T. Park Gardner, became twenty-one years of age

M. P. Gardner is the statutory guardian of Jospeh S. Gardner, and as such was made a defendant in the action. H. W. Gardner died, leaving three infant children as his heirs at law, to wit: Henry, William and Cora Lee Gardner. H. G. Whitt is their statutory guardian, and was, as such, made a defendant to the action. All were duly summoned, and the adults, M. P. Gardner,

Laura Thompson and T. Park Gardner, failed to answer. Judgment was taken against them for the amount of the judgment in suit and costs of the action.

The petition stated a cause of action against them. Judgment against them was taken by default. It is insisted that as A. A. Curtis died after the assignment of his propery for the benefit of his creditors, that the rights and powers of the assignee ceased at his death, and that he can not, for that reason, maintain this action.

The deed of assignment of Curtis passed all his interest in the property assigned to his assignee for his crditors. The creditors were entitled to all of it if necessary to pay their demands. His death did not have the effect of depriving his creditors of the rights which they had acquired by the deed of assignment, nor did it suspend the rights of the assignee to maintain actions to collect debts due the estate or to appropriate them as required by the deed of assignment.

It is insisted that the proceedings as to the infants were irregular and for that reason the case should be reversed. As stated, their statutory guardians were made defendants. They failed to make any defense to the action. No affidavit was filed for the purpose, but the court appointed a guardian ad litem to defend for the infant defendants.

It was not necessary that an affidavit should be filed when there is a statutory guardian, as in this case. Indeed the affidavit could not be made as required by section 38 of the Civil Code, because the purpose of the affidavit is to make it appear that the infant has no guardian residing in the State. A plaintiff could not well be required to make such affidavit when it appeared by his petition that they had a statutory guardian.

The regular guardian having failed to make defense, the court, desiring to protect the interests of the infants, appoinnted a guardian ad litem to make defense to the action for them if, in the language of section 36, Civil Code, they "have a defense." (McMakin v. Stratton, 82 Ky., 228.)

The record, as corrected, shows that the guardian ad litem made a report for all the infants, including T. Park Gardner, who attained his majority pending suit. He examined the record in the action and reported that he could make no defense for the infants, and that their interests were in common with their co-defendants.

The report of the guardian ad litem is claimed to be defective because it does not use the exact language of the Code, to wit: "That after a careful examination of the case he is unable to make a defense." The report of the guardian ad litem is that "he has examined the record in the action, and that there is no defense he can make for said infants," is a substantial compliance with the Code.

There was a judgment against the administrator of the estate of Joseph H. Gardner, and a return of no property found. M. P. Gardner, who was administratrix, was made a defendant to the action. The adult children were parties to this action, as well as the statutory guardians of the infants. The property sought to be sold was held by all the defendants, none of whom made any defense. The court appointed a guardian ad litem for the infants, who, after examining the record, made a report that he could make no defense for them.

In view of this condition of the record we do not think the court erred in rendering judgment directing the sale of the infants' interest in the land, together with that of the other defendants, to satisfy the judgment against the personal representative of the estate of J. H. Gardner, deceased.

Judgment affirmed.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. CAPITAL GAS & ELECTRIC LIGHT CO.

(Filed February 27, 1895—Not to be reported.)

Contracts—Sale of gas works by city—Agreement not to tax plant in hands of purchaser—Where a city as part consideration for the sale of gas works sold by it, and to induce the purchaser to agree to pay a certain price for the works, and also to supply gas to it and its citizens at a certain rate, agrees that the original plant purchased, and additions and extensions thereto, shall be exempt from payment of city tax, and that if such exemption shall be held invalid the city will pay for gas furnished it, in addition to the rates agreed upon, whatever taxes the purchaser shall be compelled to pay, such exemption from taxation forms a part of the consideration for the contract of the purchaser, and is not opposed to public morals or public policy, and is enforcible against the city.

Wm. C. Herndon, Knott & Edelen, Wm. H. Julian and Hugh Rodman for appellant.

Wm. Lindsay, John B. Lindsey and John W. Rodman for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Pryor.

The city of Frankfort, being the owner of a gas plant with which it lighted its streets and furnished lights to the inhabitant, concluded to make a disposition of the entire plant to a corporation known as the Southern Gas Works Co.

The city council being authorized to dispose of this property by the provisions of its charter, and to make such contracts as would supply gas to its citizens and for the public use, on the 6th of May, in the year 1882, entered into an agreement with the Southern Gas Co., by which the company was to enlarge the plant, furnish the public and private citizens with gas at certain rates, and do all other things necessary for the successful operation of the works, and execute to the city forty bonds of $1,000 each, bearing interest at 6 per cent., and to become due and payable forty years from the first of July, 1882, the interest on the bonds payable semi-annually, on the 1st of January and the 1st of July in each year, with a lien reserved on all the realty, franchises, fixtures, etc., pertaining to the works, and upon all improvements and extensions of the plant, etc.

The company also agreed to light each street of the city at a cost of $24 for each street, and to supply consumers of gas at the rate of not exceeding $2 per thousand cubic feet; and if, after July, 1887, and every five years thereafter, it shall be ascertained that gas is furnished to private consumers at a less or greater price than in cities or towns of the State at a less or greater price, then the rate charged private consumers shall not exceed the average price, etc.

Many other stipulations and covenants are found in the contract, evidencing a careful consideration of the rights of both parties to the instrument, and the purpose that each should be fully protected in its rights under it.

It was further provided that all the property sold this corporation by the city, and all additions and extensions thereof, acquired and used in the operation of the works and the furnishing and sale of gas and other illuminating light, "shall, from and after the execution of this contract, be exempt from the payment of all city taxes to the city of Frankfort; and if it be determined that the party of the first part has not the power to

make such exemption from city taxes, then any and all sums which the second party or its assigns shall have to pay for city taxes upon the said property herein attempted to be exempted shall be added to the sum herein stipulated to be paid for lighting the streets of the first party.'

The contract was fully executed betwen the parties, and the gas company placed in the possession. This company sold and transferred its contract to the present appellee, the Capital Gas & Electric Light Co., in June, 1882. The transfer was approved of and ratified by the city council, and all of the plant, rights, privileges, extensions, etc., passed by a conveyance executed by the mayor of the city under proper ordinances or resolutions passed by the council.

The appellee, the Capital Gas & Electric Light Co., entered upon the performance of its obligations to the city, and, so far as this record shows, complied fully on its part with all the terms of the original agreement entered into between the city and the Southern Gas Co.; and the city refusing, through its council, to pay for lighting the streets, etc., instituted the present action against the city to recover the price agreed to be paid for this service under the agreement already referred to.

The city filed an answer, in which it set up the amount of municipal taxes alleged to be due and owing by the plaintiff on this gas plant, and the failure of the appellee to make payment, and offered to plead the same as a set-off to the demand of the appellee. To that answer the appellee replied, setting forth the terms of the original agreement, by which the property of the gas company, used in operating the plant, as well as the plant itself, was exempt from municipal taxation; and if made liable, then the amount paid in the way of taxes was to be added to the sum agreed to be paid by the city for lighting the streets, thus increasing the liability of the city.

To this reply was a rejoinder to the effect that the municipality had no right or power, in imposing the burden of taxation, to make any discrimination by exempting any of the property within the corporate limits from its share of the burden.

It is further pleaded that this clause of the contract, making the city liable in the event there could be no exemption, was inserted to evade or conceal the fact that those making the contract were exceeding their authority, and they well knew at the time they had no such power. They also state they have no information sufficient to form a belief whether the exemption from taxation was a material consideration for the execution of the contract, the appellees having alleged that it formed a part of the consideration. A demurrer was sustained to the rejoinder.

We have given only the substance of the pleadings, and only so much as will enable us to consider the questions raised by the city. It is contended by counsel for the city that the contract, in so far as it attempt to exempt the property of the appellee from taxation, is a nullity, and, therefore, the right of the municipality to collect the taxes upon it is unquestioned.

It is not necessary, in the light in which we are disposed to consider this case, to determine whether or not the manufacture and distribution of gas within a city, for not only the comfort and convenience of the citizens but for the use of the public in lighting its streets and public places, is such a consideration as would authorize an exemption from taxation or the exercise of exclusive privileges, as in this case there is no such exemption. Nor are we authorized to determine, from the pleadings before

ANDERSON, &c. v. BARNE'S ADM'R.

(Filed March 1, 1895—Not to be reported.)

Appeals—Claim against decedent's estate—Where the record does not contain the account presented by appellant against the appellee's decedent, or the affidavit that accompanied said account or the set-off against the claim presented by the appellee, this court can not review the judgment rejecting the appellant's claim.

John D. Wickliffe for appellants.

Nat W. Halstead for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Hazelrigg.

In an action by the appellee to settle the estate of his intestate, the appellants filed two claims against the decedent, one of which was evidenced by the written obligation of the decedent, and the other was an account, against which, it was said in the affidavit, "there was a set-off, the amount of which was unknown."

The note was admitted to be correct, but against the other claim various defenses were interposed, among which was the objection that the affidavit in support of the account was insufficient. The court adjudged that the demand was set-off and paid by the account filed against it by the administrator, and hence rejected it.

Neither the account of the appellant nor the affidavit accompanying it are copied into the record, nor indeed the administrator's set-off thereto. There is nothing before this court for review.

The appellant has not even favored us with a brief, and the appellee has substantially followed his example.

Judgment affirmed.

HESTER v. COMMONWEALTH.

(Filed March 1, 1895—Not to be reported.)

Larceny—Instructions—On a trial for larceny, where the defendant claimed she found the property, and the evidence conduced to show that even if she found it she knew to whom it belonged and did not return or attempt to return it to its owner but retained it, and where the court instructed the jury that defendant was not guilty unless she wilfully and feloniously took, stole and carried away the property mentioned, it was not an error prejudicial to defendant for the court to fail to instruct the jury to acquit her if she found the property, since such an instruction would have been qualified by a further one to the effect that if she did find the property, and knew to whom it belonged, or had reasonable grounds for so knowing, and fraudulently appropriated and converted it to her own use, she was guilty of larceny.

W. T. Cole for appellant.

Wm. J. Hendrick for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

The accused, Carrie Hester, was indicted, tried and convicted in the Mason Circuit Court on the charge of grand larceny. The

allegation is that the offense was committed by the accused in stealing from Frank Johnson $35.

It is insisted by counsel that the case should be reversed because the court failed to properly instruct the jury. The court instructed the jury in substance that they could not convict the accused unless they believed beyond a reasonable doubt that she did, in Mason county, Ky., before finding the indictment, willfully and feloniously take, steal and carry away the $35, lawful money, the personal property of Frank Johnson. The defense is the accused found the money.

If the jury believed that she did find the money they could not have found her guilty under the instructions of the court. The truthfulness of this defense could have been, and we must presume was, considered by the jury under the instructions of the court. Had the court instructed specially on the defense of the accused, then the jury would have been told in substance that, although she may have found the money, yet if she knew to whom it belonged, or had reasonable grounds of knowing the owner, and fraudulently appropriated or converted it, then she was guilty of the larceny.

It seems to us that the accused should not complain because the court did not give an instruction on the question of finding the money, as the jury would then have been authorized to have found her guilty, although they might not have believed she took the money from the pocket of Frank Johnson. Under the instruction of the court the jury must have believed that she did this or they could not have found her guilty.

The accused knew to whom the money belonged. She did not return or attempt to return it to the owner, but carried it to another and deposited with that one, to be he held until she called for it. From the instructions of the court there was but one point of view from which her guilt could be determined. Had the other instruction been given, then there would have been two points of view, from either of which the jury might have reached the conclusion that she was guilty of larceny.

It seems to this court, from the record, that it would have been easier for the jury to have found her guilty under the instruction we have suggested would have been proper to give the jury than under the one which was given. The accused had her defense fully considered under the instruction given by the court without running the risk of a conviction for acts which the jury might have believed constituted larceny, although she may have found the money. Upon the whole case we do not think the substantial rights of the accused have been prejudiced thereby.

Judgment affirmed.

PAYNE, &c., BY GD'N v. ARTHUR, TRUSTEE.

(Filed March 1, 1895—Not to be reported.)

1. Where land of a decedent, who left a widow and children, is listed for taxation as the property of the widow, those who buy it at a sheriff's sale to pay the taxes so assessed against it acquire, at most, only the widow's interest therein. Under such sale and purchase they can not claim title against the decedent's heirs at law.

2. Same—Since the heirs at law claimed under their deceased ancestor's title, and the defendants, by their answer, claimed under the same title, through the listing of decedent's land for taxation in the name of the widow

and under the sheriff's sale for taxes, no proof of their ancestor's title was required of plaintiffs in order to entitle them to a cancellation of the deeds under which the defendants claim.

Weller & Hayes and W. H. Holt for appellants.

Chapman & Sampson for appellee.

Appeal from Bell Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

This action is to cancel certain deeds made by virtue of a tax sale. L. F. Payne died in Bell county, the owner and in possession of a tract of fifty acres of land. He left his widow surviving him and six children, some of whom were infants and had not attained their majority when this suit was instituted.

In 1876 the widow listed the property in her own name, and also one house—the land and house valued at $90. The tax was forty-six cents, and the sheriff's costs fifty cents for the levy and sale. The land was sold by the sheriff for this tax and the cost on the 13th of August, 1877, and purchased by J. C. Colson for ninety-six cents. The widow and children had removed from Bell county to the county of Fayette before this sale was made.

The sheriff, in his certificate or return of sale, states that the land sold by him was the same land owned by L. F. Payne at his death, and listed by his widow in her name for taxes due the State for the year 1876.

Colson assigned the benefit of his purchase to Edward Turner, and the sheriff, on the 14th of May, 1881, conveyed the land to Turner, containing fifty acres, and the same owned by L. F. Payne at the time of his death. On the 7th of September, 1886, Edward Turner and his wife and Levi Turner sold to Alex. Arthur, trustee, two tracts of land, the one tract being the fifty acres conveyed by the sheriff to Edward Turner. They made to Arthur a deed as trustee, in which they described the one tract as fifty acres, the same conveyed by the sheriff of Bell county to Edward Turner, as assignee of Colson, the deed being recorded in book 4, page 82.

The American Association, Limited, was made a defendant to the action, and asserted its right to the land, alleging that Arthur, who obtained the land from the Turners, held the land as its trustee, and they were the real owners. Further, that the land was listed as the land of the widow and the heirs of the husband. In this condition, after evidence of the fact that plaintiffs were the children of L. F. Payne, the chancellor dismissed their petition and denied them relief.

This action is not an ejectment, but an action to vacate the deed under which these appellees claim, and return to them the possession and title. The defendants claim to hold under the title of appellants, and their derivation of title begins with the tax deed to Edward Turner, as assignee of Colson, in May, 1881, all parties having notice from the levy and certificate of sale that this land belonged to the ancestor of the appellants, and it was not incumbent on the appellants to exhibit any other title than such as appears from the sale made by the sheriff and his deed to the purchaser or his assignee.

It clearly appears that this land was listed as the property of the widow, and all the purchaser obtained, if anything, was her dower interest. There was nothing else for the sheriff to sell, and if there had been this court would be reluctant in holding

that, under such a levy and sale as this tract of land for ninety-six cents, the purchaser was invested with title.

The judgment is reversed, with directions to set aside the conveyances made to these vendees, in so far as it affects the title to this fifty acres of land, and restore to the plaintiffs the possession upon their paying the ninety-six cents, with the statutory interest given where land is redeemed, and for proceedings consistent with this opinion.

MARTIN, &c. v. CITY OF LOUISVILLE.

REED, &c. v. SAME.

SAME v. SAME.

SAME v. SAME.

(Filed March 1, 1895.)

1. A city has no power either to condemn or to close up streets or alleys unless authorized by the Legislature to do so.
2. A city can not close up one of its alleys under an act authorizing it to close any of its alleys in a suit to which all the lot owners in the square are made parties, if the closing is consented to by them all or if a court shall be satisfied by evidence that the closing will be beneficial to the city and not injurious to any lot owner refusing to consent, where several lot owners refuse to consent, and the evidence shows that the closing up of the alley would injure their property and a jury finds that the damage to each one amounts to a certain amount.

Proceedings to close up an alley under said act can not be regarded as proceedings to condemn property for municipal purposes.

W. W. Thum, A. E. Willson, J. C. Poston and N. A. Crutchfield for appellants.

H. S. Barker for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Pryor.

This proceeding was instituted in the Louisville Chancery Court by the city of Louisville, as the plaintiff, against the owners of certain lots, Martin and others, for the purpose of discontinuing an alley running from Fourth street west to a point where it intersects another alley in the center of the square.

The provision of the charter under which the action was brought is as follows: "That the city may at any time institute suit in the Louisville Chancery Court for the purpose of closing up any of its streets or alleys, dividing any of the squares or lots thereon, and to such suit all the owners of ground in the square or lot shall be made defendants; and if all such defendants are competent to act for themselves, and shall consent to the closing up prayed for, then the court shall render a decree accordingly; but, without such consent, said court shall hear the proof made by the parties, and, if satisfied that the closing up would be beneficial to said city, and not injurious to any party not consenting, shall render a decree closing up said street or alley."

A resolution was passed by both boards of the council and signed by the mayor, authorizing the attorney for the city to

bring the action, a large majority of those owning real estate within the square having presented a petition to the council asking that this alley be closed.

The alley was directed to be closed, and three of the owners of lots or parts of lots are appealing from the order of the chancellor. These appellants claim their respective lots were lessened in value by reason of the closing of this alley, and that much inconvenience would result to them in passing from their houses to Fourth street, causing them to travel a much greater distance than the usual passway through this alley.

It appearing from all the testimony that some damage would result to these property owners, the chancellor, in order to assess the damages to the lot of Mrs. Martin and that of Buffemeyer, had a jury empanneled, who awarded to Mrs. Martin $125, and as to the heirs of Buffemeyer a like sum, or rather they accepted a sum equal to that given Martin.

The proceeding to award damages, and all steps taken for that purpose, were objected and excepted to by the appellants upon the ground that no proceedings could be had, in the nature of a writ of ad quod damnum, when the closing of the alley depended only upon its being beneficial to the city, and not injurious to the lot owners; and, besides, that no such ordinance had been passed as authorized the assessment of damages in the event the city as attempting to take from the property owner his right of property in this easement, that it might be devoted to a municipal or public use.

The only provision of the city charter to which our attention has been called in reference to the condemnation of property for city purposes provides: "Whenever, in the opinion of the general council, property shall be needed for municipal purposes, either within the boundary of said city or the county of Jefferson, said council may by ordinance order the condemnation of such property."

It is not pretended that this is a condemnation proceeding, or that the closing of the alley is such a municipal use as could deprive the owner of his right of property in the easement by condemnatory proceeding. If the city desired to appropriate this alley to some municipal or public use, then the right of property in it could be condemned, but not otherwise.

The charter contains the organic law of the city, and when property is to be condemned for public use the way is pointed out by an express provision, and when the existence of a street or alley is no longer beneficial to the city, although not needed for municipal use, it may be closed up when not injuring the property owner on the square, whose right of property in the easement is undoubted, and this proceeding is also authorized by a special clause of the charter.

Without some legislative authority a city has no power either to condemn or close streets or alleys, and the city of Louisville, deriving its sole power from its charter provisions, the mode pointed out for closing streets and alleys must be regarded as exclusive.

In the case of Gagan v. The Louisville, New Albany & Chicago R. R. Co., 89 Ky., 212, this court, in discussing the right of the city to close streets, said: "A corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of ad quod damnum, and under it compensate the owner for the injury sustained."

As to two of the appellants, Reed and Hermany, it appears that before the case stood for trial, athough judgment by default had been entered against them, they gave reasons for asserting their claim to damages, and denying the right of the city to close the

alley. They ought to have been permitted to make defense. It is not necessary, however, to consider these questions, as the judgment must be reversed; and if the alley is open to use, it is for all those on the square.

Judgment reversed, with directions to dismiss the petition.

MATHEWS, &c. v. MATHEWS.

(Filed March 1, 1895—Not to be reported.)

1. Appeals—Where the order sustaining a demurrer to the answer in a suit in equity and the order refusing to permit an amended answer to be filed were both excepted to by the defendant, the action of the lower court can be reviewed on appeal, although there was no exception to the order submitting the case or to the final judgment.

2. Pleadings—Set-off and counterclaim—Unliquidated damages—L. obtained land for T., who was indebted to him, and agreed to convey same to S. when T. paid the debt, with interest. In a suit by T. and S. against L. it was adjudged that the debt due L. by T. amounted to a certain sum, and upon payment by T. of that sum L. was directed to make a conveyance of the land to S. Four years later L. sued T. and S. to recover the sum so found to be due him, and asked that the land to be sold to pay same. T. and S. filed answer and amended answer and pleaded that L. had continued in possession of the land for four years since the first judgment was rendered, and was liable to them for so much rent per year for same, and that he had taken from the land trees and rails of a certain value. They pleaded the amount due as rent and for the trees and rails by way of set-off and counterclaim. Held—It was error to sustain a demurrer to the answer. The matter alleged as a set-off was not for unliquidated damages, but was upon the same contract or transaction out of which plaintiff's demand arose.

W. S. Cason for appellants.

W. T. Lafferty for appellee.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Paynter.

The appellee, Lewis Mathews, instituted this action against Thos. Mathews and heirs of Sallie Mathews to recover $83.25, with interest thereon from the 15th day of November, 1889, and asked to have sold 59 acres of land in Harrison county, Ky., to pay the debt, interest and costs.

The action is on a judgment rendered in the Harrison Chancery Court on the 28th day of May, 1889, by which appellant, Thos. Mathews, is directed to pay the appellee, Lewis Mathews, the sum named; upon doing which, by the terms of the judgment, a deed was to be made to appellant for the 59 acres of land, but by a subsequent order the deed was to be made to appellant, Sallie Mathews. The appellants filed an answer, alleging that appellee had been in possssion of the land for four years; that he owed appellants rent on the land, of the value of $118 per annum; that the appellee had taken from the land trees and rails of a certain value. These several amounts were pleaded as a set-off and counterclaim.

The court sustained a demurrer to this pleading, and appellants then offered an amendment, in which it is alleged that the appellant, Thos. Mathews, and appellee entered into a certain

agreement, evidenced by a writing which is filed as part of the pleading, by which it is recognized that appellee had paid for appellant, Thos. Mathews, certain sums of money, amounting to several hundred dollars; that appellant, Thos. Mathews, had made appellee a deed for certain land, and the sheriff of Harrison county had executed a deed to appellee for certain other land; that by the terms of the contract, upon the payment to appellee of the sums thus expended and interest, the lands were to be conveyed by appellee to the appellant, Sallie Mathews, and her bodily heirs.

It is further alleged that under the contract the appellee took possession of the land and held the same for the purpose of paying off by the use and rents thereof the debts described in the writing; that afterwards the appellants instituted an action, the result of which was that appellee recovered the judgment upon which this action is brought; that the $83.28 is the balance found by the court to be due the appellee, of date November 15, 1887, upon the settlement of accounts, and in which settlement the rents of the 59-acre tract of land were applied as credits on the debts described in the writing; that from the 15th of November, 1887, until the spring of 1892 the appellee continued in possession and use of the land.

The court refused to allow the pleading to be filed, and rendered judgment against the appellants for the $83.28, interest and costs. It is insisted that this court can not review the action of the court below, because no exception was taken to the order submitting the cause.

There was an exception to the action of the court in sustaining a demurrer to the answer, and to the action of the court in refusing to allow the amended answer to be filed. It was not necessary that there should be an exception to the order submitting the case, nor to the final judgment.

This is a proceeding in equity. Counsel for appellee insists that the appellants, by their answer, seek to plead unliquidated damages as a set-off, claiming that it can not be done under the Civil Code unless insolvency or nonresidency of appellee is charged. The claim is not for unliquidated damages.

The defense to the action arises upon contract, and it arises out of the contract and transaction stated in the petition as the foundation of the claim, and is connected with the subject of the action. It is properly pleaded as a set-off and counterclaim.

The judgment upon which this action is brought simply fixed the amount which the appellant, Thos. Mathews, owed the appellee on the contract under which appellee obtained a deed to the land.

It is not a judgment upon which an execution can be issued. It does not change the character of appellee's claim against appellant, Thos. Mathews. The appellee so considered it, and the court thus regarded it because the appellee was given a personal judgment against appellants for the amount thereof. The effect was to simply adjust the claims between the parties, and make certain the amount which appellant, Thos. Mathews, owed appellee under the contract. This judgment provides that a deed shall be made to Thos. Mathews upon the payment of the judgment. It does not change the nature of the appellee's holding of the land. He simply continued in possession thereof under the former agreement. The court had held he should pay rents under that contract for the land, and that they should go as a credit on his debts. That judgment construed the contract, fixed the status of the parties in the transaction, and is conclusive.

If appellee choose to continue in the possession and use of the

land after the court had fixed the amount that was due him, then there is no valid reason in law or equity why he should not pay the reasonable rents for the land.

If, since the judgment of 1889, the appellee has paid any taxes on the land or expended any money to preserve the property, then such sums so expended should be deducted from the rents. The sum thus remaining should be applied on the judgment, and if there remains anything due appellants after the payment of the judgment upon which this action is brought, then a judgment should be rendered against appellee for such balance.

Appellants seek to recover for the value of the trees and rails which it is alleged appellee took from the land. If it should be shown that appellee did take trees and rails from the land, then he should be charged with their reasonable value. The court erred in refusing to allow appellants' amended answer to be filed.

Judgment reversed, with directions that appellants be allowed to file the amended answer and for further proceedings consistent with this opinion.

MASSIE v. COMMONWEALTH.

(Filed March 2, 1895—Not to be reported.)

1. Although judgments convicting appellant of the homicide charged against him have twice been reversed, his right to appeal from a third judgment of conviction has not been lost, and it is still the duty of this court to reverse the judgment against him for errors of law during his trial, prejudicial to his substantial rights.

2. Criminal law—Continuance—Although the defendant was not entitled to a continuance on account of the absence of the witness named by him in his affidavit, not having used due diligence to secure his attendance, yet the court ought to have permitted said affidavit to be read to the jury as the deposition of the absent witness, when the defendant had been confined in jail in a county other than the one where he was being tried, and had not a full opportunity to procure attendance of his witnesses, and when the affidavit showed that the witness had been prevented from attending the trial by the threats of relatives of the deceased, and when the bill of evidence, made on a former trial, showed that the witness was present and testified to the facts stated in the affidavit.

3. Same—Manslaughter—A slanderous charge by deceased that defendant had sexual intercourse with two unmarried cousins, who were members of his family, and that defendant was keeping a whorehouse and that his wife was assisting him, was sufficient provocation to excite such ungovernable anger and passion on the part of defendant as to reduce the killing of deceased from the crime of murder to that of manslaughter.

4. Same—Evidence—After proof that the person to whom deceased made the slanderous charges had repeated same to defendant, it was not competent or proper to permit evidence to go to the jury to show that such person acquiesced in the charges at the time they were made by deceased.

5. Same—The exclamation made by deceased about his children, after defendant left the place of the homicide, was incompetent evidence, since it did not relate to or illustrate the manner in which the deed was done, nor was it a part of the res gestæ.

6. Improper argument by Commonwealth's attorney—The court ought not to have permitted the attorney for the Commonwealth to argue to the jury that the degrading charges made by deceased, concerning defendant and his family, were true, when there was no competent evidence to sustain such charge.

7. Instructions—Self-defense—Where the evidence showed that defendant went in search of deceased as soon as the degrading charges made by de-

ceased were reported to him, and that after meeting deceased on the highway they rode a short distance together, when the killing occurred, it was prejudicial to defendant, in the instructions, to qualify his right to rely on the plea of self-defense, in the event defendant, "by his own wrongful act," made the danger to himself necessary upon the part of the deceased, etc. The court ought to have explained that the words "wrongful act" meant in connection with the facts in this particular case.

E. E. Settle, J. C. S. Blackburn, Lindsay & Botts and J. A. Scott for appellant.

Wm. J. Hendrick for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Lewis.

This is the third appeal by J. L. Massie from a judgment of conviction for the murder of Jesse E. Honaker. (Massie v. Commonwealth, 14 Ky. Law Rep., 564; 15 Ky. Law Rep., 562.)

After the jury had been sworn appellant moved for a continuance on account of absence of a witness who, if present, would, as stated in the affidavit filed, testify that not long before the homicide deceased endeavored to hire witness, offering him money, to assassinate appellant.

Although that evidence was material and important for the defense, appellant had not used proper diligence either to procure attendance of the witness or ascertain before going to trial his absence, and was, therefore, not entitled to a continuance, but he further stated in the affidavit the witness had promised and would have been present except for threats of violence to his person if he did attend, made by relatives of deceased, and there was some evidence tending to support that statement. Besides, he had been confined in jail of another county, and did not have full opportunity to procure attendance of his witnesses.

It seems to us, therefore, the lower court, having refused continuance, ought to have sustained the motion of appellant to read his affidavit as a deposition, especially as the bill of exceptions and evidence made and enrolled at the previous trial showed the witness, being then present, had testified to the same facts.

It appears that prior to the homicide two unmarried females, cousins of appellant, had boarded at his house while teaching school in the neighborhood, and he, expecting arrival of one of them at Frankfort, on return from her home in Indiana to again engage in that occupation, sent James Hanna, his tenant, with a vehicle to meet and bring her to his house. After Hanna came back, and on the day of killing, he informed appellant that on his way to Frankfort he was met by Honaker, who, upon being told the object of the journey, took the occasion to voluntarily introduce the subject and say that appellant had sexual intercourse with his cousin; was keeping a whore house, and his wife was assisting him.

Immediately after hearing that communication appellant, seizing his gun, got on his horse, and, in a state of great rage and excitement, went in search of Honaker, riding at a rapid rate of speed, first to his house, a short distance from his own, thence several miles beyond before meeting him. Though, after meeting, they rode together about five hundred yards before the fatal shot was fired, their conversation was, on part of appellant, excited and angry, and by Honaker defiant and altogether un-

satisfactory in regard to the charge, for he did not explicitly deny making it to Hanna, nor withdraw or explain it.

The evidence further shows that Honaker, though appellant was his family physician, had, without apparent cause, been hostile to him, and more than once spoke of him threateningly and abusingly.

According to the testimony of appellant the killing was done in self-defense; but whether it was or not, if he was informed by Hanna, as they both tesify, and believed, as evidently he did, that Honaker had spoken of him, his cousin and wife in the manner mentioned, it is plain he was guilty, if at all, of manslaughter, not murder. For not only is it hard to conceive of a charge more likely to provoke ungovernable passion and anger, but the evidence is convincing that appellant was, from the moment Hanna made the communication continuously to the time of the homicide, excited to a degree bordering on frenzy.

It is true the wife of Honaker testified that when he came to her house in search of her husband he announced his purpose to kill him, but the fact he did not do so when they first met, nor until, after riding together five hundred yards, Honaker, as he testifies, made a demonstration to shoot him, whereby he was induced to believe his own life was in danger, shows he did not start in search of him with a deliberate purpose to murder; or, if he did, that he abandoned it.

On the last appeal we decided contrary to previous ruling of the lower court, that it was competent for appellant to show by Hanna that Honaker had made the slanderous aspersion mentioned, and he had communicated the information to appellant.

At the trial we are now considering that evidence was permitted to go to the jury; but the Commonwealth's attorney was improperly allowed to first ask Hanna, on cross-examination, whether, being interrogated by Honaker, he at that time assented to truthfulness of the charge; and the witness having answered in the negative, another and greater error was committed by the court in permitting a witness named Williams to testify in rebuttal that he was present, and Hanna, when asked the question by Honaker, signified an affirmative response by nodding his head.

It was competent to prove that Honaker made the charge and Hanna communicated the fact to appellant, because bearing materially upon the question whether he was guilty, if at all, of murder or manslaughter; but it was wholly immaterial whether the charge was true or false, or whether Hanna assented to the truth of it, and no inquiry as to either fact should have been permitted by the court, for it is easy to perceive how introduction of such irrelevant testimony would prejudice minds of the jury, and induct them to disregard and forget the true issue involved. In fact it is made a just cause of complaint on this appeal by appellant that an attorney for the Commonwealth was permitted to argue to the jury, without any competent evidence to sustain him, that the charge was true.

It was also error to permit proved exclamation of Honaker about his children, made after appellant had left the place of killing, because it did not relate to or illustrate the manner in which the deed was done, nor was it properly part of the res gestæ.

Appended to the instruction on the right of self-defense is the following qualification: "Unless the jury should further believe that the defendant, by his own wrongful act towards the deceased, made such danger of loss of life or great bodily harm necessary upon the part of the deceased to save himself from immediate death or great bodily harm at the hands of the de-

fendant, in which event the jury can not acquit the defendant on the grounds of self-defense."

On the former appeal of this case the following language was used in the opinion delivered: "If his purpose in sending Hanna home was that he might bring Honaker before him, in order that this foul blot upon his own character and that of his wife and family—his cousins being in effect members of his own family—might be cleared up and the circulation of the slander stopped upon assurance of its falsity, then the purpose was a lawful one, and the meeting between himself and Honaker, though of his own seeking, was not with intention of harming the deceased. It could not, in such event, be said that by his own wrongful act in bringing on the fatal meeting he had deprived himself of the right of self-defense." (Massie v. Commonwealth, 15 Ky. Law Rep., 562.)

It is not often necessary or proper to thus qualify an instruction about the right of self-defense, because a jury of ordinary intelligence and power of discrimination can generally, without such aid, truly interpret and apply it. Certainly it should never be done without such explanation as may be necessary to prevent the jury being misled, but by the qualification in question the jury had full license to treat the meeting sought by appellant, whatever may have been his purpose, as a wrongful act that practically took away his right of self-defense, notwithstanding it had been held by this court that it was lawful for him to seek Honaker in order to have the charge cleared up and the circulation of it stopped.

Appellant's right of self-defense being thus qualified and restricted, an explanation to the jury of the meaning and application of the phrase "wrongful act," as used, was indispensible to a fair trial; and in our opinion the lower court ought to have distinctly instructed the jury that wrongful act, in meaning of the qualification in question, related alone to what was done after the meeting took place, not to the fact appellant sought the meeting, which was not wrongful or unlawful.

In fact, under the circumstances of this case, the qualification would serve only to mislead and confuse the jury, if not made wholly applicable to a conflict commenced or assault or demonstration of violence first made by appellant after the parties met; and if there was such wrongful act, then appellant was entitled to another instruction asked and refused, to the effect that though he commenced the conflict his right to defend himself survived, if he ceased and withdrew from it in good faith.

Although we have twice reversed judgment against appellant, his right to appeal has not been lost, nor our duty ceased to reverse for errors of law occurring on his trial prejudicial to his substanital rights; and, satisfied such errors were committed whereby he was deprived of a fair trial, we are constrained to reverse the judgment appealed from, and remand the cause for a new trial.

HAMILTON v. HAMILTON, &c.

(Filed March 5, 1895—Not to be reported.)

1. Plaintiffs, in an action to recover possession of land, are entitled to recover by proof of a perfect possessory title in their vendor, even though they show no "paper title" in him.

2. Same—Limitation—Plaintiffs' right to maintain an action to recover possession of land is not barred by limitation when the evidence shows that

the order directing the payment to the attaching creditor, who was not a party to this suit, was erroneous in the absence of any evidence that any judgment against appellants in favor of the attaching creditor had ever been rendered, or that said attachment had in fact ever been served or executed.

Stone & Sudduth for appellants.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Guffy.

A number of the creditors of Charles A. Allen instituted suits against him and caused attachments to be issued and levied upon his property, which suits were afterwards consolidated, and the appellants, Williams & Hamilton, by appropriate proceedings, were made parties thereto, and asserted a prior lien on a certain lot of tobacco, which had been levied on under said attachment. A. M. Hamilton was appointed receiver to take charge of and sell the tobacco.

It appears from the report of the receiver that the net proceeds of the tobacco amounted to $508.55, and the court adjudged that appellants, Williams & Hamilton, had a lien upon the same superior to either of the plaintiffs, subject to $44.50 allowed the receiver for his services as receiver, and the remainder of said fund, $464.05, the receiver was ordered to pay to said Williams & Hamilton, subject to a superior lien of M. S. Tyler on same for his fee of $50 as fixed by the court.

The judgment, however, proceeds to recite as follows: "G. G. Hamilton, administrator of J. C. Hamilton, having sued out an attachment in the suit of G. G. Hamilton, adm'r, &c. v. Williams & Hamilton pending in this court and caused said attachment to be executed on the clerk of this court, seeking to attach said fund in court, said order of attachment, with the return thereon, having been filed herein by the plaintiff in said attachment suit, and a motion made by him in open court, that said receiver be directed to pay to him so much of said fund as should be coming to Williams & Hamilton or A. W. Hamilton under this judgment, and the court, being advised, adjudges that the whole of said $558.55, less $50 allowed to said M. S. Tyler, is subject to said attachment, and said receiver is ordered and directed to pay to M. S. Tyler the sum of $50, and the remainder of said fund, viz., $485.55 to said G. G. Hamilton, administrator of J. C. Hamilton, within thirty days," and further providing that execution might issue upon failure to pay, and these cases transferred to the Montgomery Circuit Court, reserving the right to enforce payment by sale.

These appellants excepted to the judgment directing said payment to G. G. Hamilton's adm'r, &c. They afterwards moved the circuit court to set aside the said judgment, which motion was overruled, and they have appealed to this court and ask a reversal on several grounds.

It does not appear that G. G. Hamilton had ever been made a party to this suit or that any judgment had theretofore been rendered in his behalf against these appellants. This record fails to show that in fact any attachment had been served or executed, but even admitting that one had been served and filed in this suit, yet that would not authorize the rendering of the judgment appealed from. It seems to us that the court erred in adjudging the payment of the said sum in the receiver's hands to G. G. Hamilton's administrator.

The judgment is therefore reversed and cause remanded for further proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. CITY OF LOUISVILLE.

(Filed March 5, 1895—Not to be reported.)

1. The legislature has the right to provide for the assessment and collection of municipal taxes from railroad corporations by a different system cr mode from that by which such taxes are assessed and collected on other property, the rate of taxation imposed being the same.
2. The amendment to the charter of Louisville, allowing a discount of 8 per cent. upon tax bills paid within a certain period, does not apply to taxes due from railroad corporations, a different method of securing prompt payment of taxes being provided as to them.
3. It is not an illegal or unconstitutional discrimination to deny such discount for prompt payment of municipal taxes to railroad corporations.

Helm & Bruce for appellant.

Laf Joseph for appellee.

Appeal from Jefferson Circuit Court, chancery division.

Opinion of the court by Chief Justice Pryor.

The appellant, the L. & N. R. R. Co., claims it is entitled to a discount upon its tax bills due the city of Louisville by reason of an act of the legislature revising and amending the tax laws of the city, by which, when the tax bills are listed for collction with the receiver of city taxes, a discount of 7 per cent. is allowed the taxpayer who pays his taxes in January, or the first ten days in February, next succeeding the assessment, and a less per cent. if paid after that time, if paid within the month of March, but not later.

This system of assessment, the levy and collection of taxes applicable to the city, is contended applies to the property of railroad companies whose property is within the city and subject to municipal taxes. The assessments are made in September of one year for the succeeding year, for instance, in the month of September, 1890, the assessments are made; levied in December, 1890, and the taxes collected in the ensuing year, 1891; and if paid in January, February and Macrh are subject to the discounts mentioned in the act.

The only object in making the discount, as we must assume, is to have the taxes promptly paid in order to meet the municipal expenses for the year in which payment can be collected.

The property of railroad corporations within the city is not assessed by any officer of the municipal government, or any levy made by an officer to coerce payment.

Under the title of Revenue and Taxation, General Statutes, chapter 1042, this property is assessed by railroad commissioners, and the tax imposed is at the same rate of taxation as that levied on real estate by the city for municipal purposes. The assessed value of the corporate property, as fixed by the commissioners, is reported to the county clerk, and from this report the assesor of the city ascertains the value and applies the rate of taxation as fixed by the city on the real estate within its boundary.

The taxes due by railroads are payable in the month of October, and are assessed in the month of July preceding. If not paid, the president of the company may be indicted for its delinquency, and the taxes recovered by action in courts of competent jurisdiction in the respective counties.

All laws permitting the cities, towns, etc., to assess the property of railroads were repealed, and what is known as the Hewitt law substituted. As the law stood prior to the date at which all control was taken from cities, towns, districts, etc., over the

assessment of railroad property, there was no regularity as to the time in which such local taxes were to be paid or the assessment made; and, besides, with these local divisions entrusted with the power to fix value on the property of such corporations, its exercise was liable to abuse, and hence the system of taxing this corporate property was changed, both as to the time and mode of assessment and the time of payment, as well as the remedy for enforcing the payment. To secure prompt payment penalties were annexed, not only against the corporation, but its president was subject to indictment upon failure to pay at the date fixed by the statute, or after notice of the assessment had been given.

The same rate of taxation is imposed on the citizen that is required to be paid by the railroad company. The city, under its charter, adopts another mode of enabling the city to collect of the corporation. The system of levy, collection and procedure are entirely different the one from the other, and resulting to the benefit of the corporation. The city is not allowed to fix any value on appellant's property.

The penalty on those failing to pay taxes to the city is not made to apply to the appellants, and it is plain, we think, that the charter provision, or the law in regard to the assessment, collection and payment of the taxes of the citizen within the municipality does not include railroads or such corporate property, and equally apparent that the legislature, in regard to these corporations, can enact a different system or mode of assessment and collection from that under which taxes are ordinarily collected, and the discount allowed the citizen to encourage the prompt payment of taxes is not a dicrimination in his favor as against appellant, nor is it open to constitutional objection.

Judgment affirmed. (Ky. Railroad Tax Cases, 115 U. S., 321.)

LOUISVILLE & NASHVILLE R. R. CO. v. KREY.

(Filed March 5, 1895—Not to be reported.)

1. Railroad—Neglect—Instructions—A person who has been injured by a railway train on its track in a much used street of a city can not recover therefor if the injury would not have occurred except for his contributory neglect, unless the railway employes, after discovering his danger or after an opportunity by the use of ordinary care to discover it, fail to use ordinary care to prevent the injury.

2. Same—Instructions—Where the instructions have stated that plaintiff can not recover if she failed to exercise ordinary care and caution in going upon the track where she was injured, it is not proper to further instruct the jury that if those operating a railroad train see a grown person on or near the track, and they give or already have given reasonable signal of their approach, either by blowing the whistle or ringing the bell, in time for the person to get out or keep out of danger, they have a right to presume that such person will do so, and they are not bound to stop the train on account of such person. This may be a correct statement of the law applicable to some cases, but in this case such an instruction would have given undue prominence to the particular state of case under which defendant would not be liable.

Helm & Bruce for appellant.

Lane & Burnett and O'Neal & Pryor for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Grace.

In this case appellee was awarded damages against appellant by the jury in the sum of $2,500, whereon judgment was rendered by the Jefferson Court of Common Pleas, for injuries sustained by her by reason of being knocked down by an engine and car of appellant on Mary street, in the city of Louisville, in September, 1891, said engine being engaged at the time in the local transfer of cars in the city, the plaintiff charging that at the place she was injured, viz: where defendant's line of railway crosses Mary street was in a densely populated part of the city of Louisville, and one of the main thoroughfares leading to and from the center of the city; and that it was used as a common thoroughfare, and by many of the citizens both day and night; and that at this place of intersection of defendant's railroad and Mary street there were not at that time, nor ever had been previous thereto, any safety guards or gong or watch to give notice to persons passing on said street of the approach of the trains on the railroad. She says further, that the buildings on Mary street approach near to the line of railway and obstruct the view for any considerable distance, and that her injuries were caused by the carelessness and negligence of the defendant company and its agents in these respects, as also that they did not, at the time of her injury, give any or timely or sufficient notice of the approach of the train, by ringing its bell, blowing its whistle or otherwise, whereby to notify plaintiff of the approach of its train, so that she might have avoided same; that said train was, at the time of her injury, being run backwards, pushing the car that struck and injured her while attempting to cross its line of road on Mary street; that her injuries so received were of a serious charcater, causing her great pain and suffering, and permanently impairing her health.

These charges of negligence were denied by the defendant, who affirmed the faithful discharge of its duty to the plaintiff by its agents by giving the usual signals by both whistle and bell, and say that her injuires were attributable to her own negligence and carelessness in attempting to cross the track of its line of railway so near the engine while in motion.

On the trial of these issues, while the evidence was conflicting, it may be said that it was and is sufficient to sustain the verdict of the jury, provided they were properly instructed by the court.

The court, rejecting the number of instructions offered by both plaintiff and defendant, gave seven instructions of its own motion, intending to embrace the whole law of the case.

Without copying same in this opinion, it may be said that they made the liability of defendant depend, primarily, on the negligence of the defendant's agents, adding the usual limitation that, though the jury found under the evidence that plaintiff by her own negligence so contributed to said injury that without same she would not have been injured, that then it would not be liable, adding only one exception; that is, if defendant, notwithstanding the contributory negligence of plaintiff to her own injury, yet if they further believe from the evidence that after defendant discovered, or by the exercise of ordinary care could hav discovered plaintiff's danger they then failed to use ordinary care for her protection, then it would still be liable.

Other instructions were given, correctly defining ordinary care

as well as negligence, and finally fixing correctly the basis of asessment of damages to actual compensation for the injury sustained, if the jury found for plaintiff at all.

These instrctions, we think, fairly submitted the law of the case to the jury, and along the line of negligence and contriubutory negligence that this court has so often announced as the correct line. Same seems now to be fairly well understood by the trial courts in the country, and we do not think it needs any material change or modification.

The defendant complains that the court refused to give the following instruction:

"H. The jury are instructed that when those operating a railroad train see a person on or near the track, and they give or have already given reasonable signal of their approach, either by blowing the whistle or ringing the bell, in time for the person to get out or keep out of danger, they have a right to prsume that such person will do so, and they are not bound to stop the train on account of such person."

While this, in substance, may have been said by this court in some cases, we have expressly declined to make it of universal applicaton, and have declined to say that it is sufficient and a true exposition of the law applicable to the running of trains through populous cities.

The jury had been told in general terms that if plaintiff failed to exercise that care and caution in going on or approaching defendant's track that a person of ordinary prudence and care usually observes under like circumstances, then she could not recover. We think it unnecessary to further point out and set prominently forward other specific declarations or states of case wherein the company would or would not be liable.

We think the law fairly embraced in the general terms of ordinary care and ordinary negligence as defined, and especially would we be disinclined to make further specification in this case, whereby same would be reversed, considering, as we do, that on the whole facts of this case the law has been laid down very favorably for the defendant.

The facts of the case very nearly approach, if they do not bring the case within the principles laid down by this court in several cases, that in cities where the travel is extensive, participated in by many persons, that it is the duty of the railroads to use other precautions at the crossings of streets than merely blowing the whistle or ringing of the bell, these acts, in many cases, proving insufficient to give the necessary warning for the safety of the public.

The cases to which we refer are Ky. Central Ry. Co. v. Smith, 93 Ky., 449; Central Passenger Ry. Co., &c. v. Kuhn, 86 Ky., 578, 584; L. C. & L. R. R. Co. v. Goetz, Adm'x, 79 Ky., 442; all these cases requiring a higher degree of care and diligence of the railroads than has been required by the court in this case, though under circumstances substantially similar to those surrounding plaintiff and defendant at the time of her injury. (Ante, 64.)

The judgment must be affirmed.

MILLER v. MAHONEY.

(Filed March 6, 1895—Not to be reported.)

1. Exemptions—Notes and accounts belonging to a debtor, but found in the hands of another, are exempt to the debtor under the act of April 8, 1884,

allowing a bona fide housekeeper, with a family, "other personal property" in lieu of exempted articles not on hand.

2. Same—Evidence—In an action where the debtor is claiming such notes and accounts as exempt property, on the ground that he did not have such exempted articles on hand allowed by the act of 1884, the plaintiff has a right on cross-examination of defendant to inquiries if he has any money on hand in addition to such notes and accounts.

C. T. Atkinson for appellant.

Nat W. Halstead for appellee.

Appeal from Neslon Circuit Court.

Opinion of the court by Judge Lewis.

In September, 1892, T. J. Miller brought an action on a note given by T. J. Mahoney for $689.93, to secure payment of which a mortgage on land had been executed; but after satisfying debts of others having prior liens there was left of proceeds arising from judicial sale of this land only about $172.60, to be applied to Miller's debt. So he, after the judgment was rendered and sale took place, but before confirmation of it, filed during vacation an amended petition, and upon grounds stated therein an attachment was issued and levied upon choses in action in hands of another person, amounting to about $125.

At the next term motions were made to strike from the files that amended petition and discharge the attachment, both of which were overruled; and as no exception was taken to that action of the court, the question for us to consider on this appeal is whether the notes and accounts attached are exempt from the attachment in virtue of the statute of April 22, 1884, which allowed to a bona fide housekepeer, with a family, "other personal property" in lieu of exempted articles not on hand.

It seems to us the choses in action attached in this case fairly come within operation of that statute, as "other personal property" than those articles specifically enumerated therein; and, consequently, the principal inquiry here is whether an amount of the original note executed prior to the act of 1884, equal to the value of the property attached or any part of it, remains unpaid, the note sued on being the last of a series of renewals.

The defendant testified he had paid more than enough to satisfy the original note, and judgment was accordingly rendered in his favor. Plaintiff, however, exhibited a ledger account of their transactions from date of first to last note, showing items of additional indebtedness, as well as credits, from which it might, it seems to us, be determined certainly whether there had been altogether sufficient payments to satisfy the original note.

We need not, however, now decide that issue of fact because, in our opinion, the court below erred to prejudice of plaintiff in refusing to permit full inquiry of defendant when cross-examined as a witness whether he had money in addition to the choses in action attached; for whether he did have money or other personal property, and how much, is material in determining whether the choses in action attached be in fact exempt.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

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EDITOR:

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KENTUCKY COURT OF APPEALS.

PERKINS, &c. v. McCARLEY, &c.

(Filed March 5, 1895.)

1. Venue of action to sell indivisible land jointly owned by devisees—An action by the devisees to sell land of a testator and distribute the proceeds, on the ground that it can not be partitioned among those entitled without materially impairing its value, and where all of testator's debts have been paid, must be brought in the county where the land lies, subsection 3 of section 62 of the Civil Code fixing the venue.

Section 66, Civil Code, requiring a suit for distribution of an estate of a deceased person to be brought in the county where his personal representative qualified, has reference to a distribution of personalty and not realty.

2. Failure to prove allegations against nonresidents—Right of purchaser at judicial sale—In an action by some joint devisees of land for its sale against nonresident devisees, the allegation that it could not be divided without materially impairing its value, ought to have been shown by competent evidence to be true before an order of sale was made. But where the order of sale was entered without such evidence and the sale duly made, and the purchaser has paid for the land and received a deed, his right will not be disturbed on account of the absence of such proof. The title has passed to him.

3. Affidavit for warning order against nonresident defendants—An affidavit which states that each defendant is a nonresident of Kentucky, and which sets out the postoffice address of each, substantially complies with subsection 2 of section 58, Civil Code.

W. O. Bradley for appellants.

Robert Harding for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Paynter.

John Perkins, domiciled in Lincoln county, Ky., died testate, bequeathing to certain of his children a tract of land in Garrard county, Ky., containing about 150 acres. An action was instituted in the Garrard Circuit Court by part against the other de-

visees to sell the land and distribute the proceeds of the sale among the devisees, for the reason, as is alleged, that it would materially impair the value of the land to partition it among them.

The action is under subsection 2, section 490, Civil Code. The court ordered a sale of the property, and at the sale the appellee, McCarley, became the purchaser, but transferred a half interest to Lawson. The defendants were all nonresidents, and were before the court by warning order.

After the sale and payment of the purchase money to the commissioner of the court by the purchasers and deed made, the appellants gave notice and entered a motion to have the judgment and various orders made in the action set aside. The court overruled the motion, and from that action of the court this appeal is prosecuted.

It is contended that as John Perkins' personal representative qualified in Lincoln county, the Garrard Circuit Court had no jurisdiction to order a sale of the land. If the Garrard Circuit Court was without jurisdiction then the order would be void, and the purchasers would have acquired no rights under their purchase.

Certain sections of the Civil Code read as follows:

"Section 62. Actions must be brought in the county in which the subject of the action, or some part thereof, is situated. * * Second, for the partition of real property, except as is provided in section 66; third, for the sale of real property under title 10, chapter 14, or under a mortgage, lien or other encumbrance or charge, except for debts of a decedent.

"Sec. 65. An action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified.

"Sec. 66. An action for the distribution of the estate of a deceased person, or for its partition among his heirs, or for the sale, for payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative was qualified."

This is not an action to settle a decedent's estate. It is alleged that the estate had been settled and all the real estate, other than the tract of land sought to be sold, had been disposed of by the devisees. It is not an action to distribute the estate of the decedent. The clause in section 66, supra, relating to the distribution of an estate, has reference not to real but personal estate. It is not an action to have property sold to pay the debts of the estate, as contemplated by section 66, because it is alleged there are no debts against the estate.

The clause in the section providing for a partition of the estate has reference particularly to the realty belonging to the estate. This is not an action seeking to have the realty partitioned as contemplated by the section, because it is alleged that it will materially impair its value to have it partitioned, hence they seek a sale of it.

The parties to the action were the owners of the land by virtue of the will of their ancestor. An action to sell the land and distribute the proceeds is not the equivalent or of the same nature as an action to partition the land. In the one case it is to convert the realty into personalty; in the other it is to retain it, but to assign it in severalty to the owners.

The action being under subsection 2, section 490, title 10, chapter 14, Civil Code the venue is fixed by subsection 3, section 62, Civil Code. It was properly brought in the Garrard Circuit Court.

It is insisted that the court erred in not requiring the pla n-

tiffs tc prove the material allegations in the petition, as the defendants were before the court on constructive service. It was alleged that the land could not be partitioned without materially impairing its value, and we think the court should have required proof showing this to be true, but, as the court had jurisdiction in the matter, ordered the land sold, and, it being sold, the purchaser can not now be disturbed.

In the case of Friddle v. Kohn, 14 Ky. Law Rep., 312, in passing upon the question of the absence of evidence or the sufficiency thereof and as to the rights of the purchaser of the land, this court said: "Conceding that the proof is wanting or not sufficient, the title nevertheless passes to the purchaser."

The petition was verified substantially as required by the Civil Code, and the statements therein are that the defendants are nonresidents of the State of Kentucky, and absent therefrom. Their names and several postoffice addresses are given. It is claimed that to give the postoffice address of each defendant was not sufficient, but that there should have been a literal compliance with subsection 2 of section 58, Civil Code, which reads as follows: "Nor shall the clerk make such order on any of the grounds mentioned in subsections 1, 2 and 4 of section 57 unless the affidavit also state in what country the defendant * * * resides or may be found, and the name of the place wherein a postoffice is kept, nearest to the place where the defendant resides or may be found."

We are of the opinion that there was a substantial compliance with the Code. The evident purpose of the provision of the Code, which required the statements as to where the defendant resides or may be found, and the name of the place wherein a postoffice is kept nearest to the place where he resides or may be found, was that such information should be given that the attorney appointed to defend for him might be enabled to give him notice through the mail of the pendency of the suit, etc.

To give the defendant's postoffice address is to give more definite information as to how he can be reached by letter than to simply give the name of the place wherein a postoffice is kept, nearest to the place where the defendant resides or may be found. If the defendant secure his mail at a given place, it necessarily follows that is the place where he resides or may be found.

Judgment affirmed.

PEACOCK, &c. v. SPITZELBERGER, &c.

(Filed March 6, 1895—Not to be reported.)

Nuisance—Injunction—The owner of a residence, in a residence part of a city, is entitled to an injunction restraining a neighbor from so operating a blacksmith shop at night as to prevent plaintiff from sleeping, and from so operating it by day as to cause smoke and cinders from the shop to enter plaintiff's house, and thus injure her health and property, when the evidence shows that such operation of the shop will greatly lessen the value of plaintiff's property, and will work irreparable injury to plaintiff's health.

Nelson & Desha for appellants.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Guffy.

Sarah Peacock and Elizabeth Peacock instituted this action in the chancery court of Campbell county against Michael Spitz-

elberger and Michael Spitzelberger, Jr., seeking to enjoin them from operating a blacksmith shop, etc., located near plaintiff's residence, and which plaintiffs alleged was so operated by the use of large sledge hammers, beating and striking iron on anvils day and night, as to greatly disturb plaintiffs, and to the great injury of their health.

Plaintiffs also averred the defendants so used their forge and pipes or flues that the smoke and cinders from said shop entered into plaintiffs' house, through the doors and windows, to the great injury of plaintiffs' health and comfort and to the great discomfort of their tenants, and to the damage of plaintiffs' houses; and that the said operation of said shop had greatly lessened the value of plaintiff's property, and if continued would work irreparable injury to plaintiffs, and the plaintiffs prayed for an injunction restraining defendants from so operating said shop and for judgment for $1,000 in damages, and obtained a temporary injunction enjoining the defendants from operating said shop in the night time from 8 o'clock p. m. until 6 o'clock a. m. Upon final hearing the court dissolved the injunction, dismissed the petition and rendered judgment against plaintiffs for cost, from which judgment plaintiffs have appealed to this court.

The proof by the witnesses, as well as the facts and circumstances proven, conduce to show that appellants are very much inconvenienced by appellees in the prosecution of their work. It seems that appellants resided in the residence part of the town, and had owned their property and used the same for residence purposes for some time prior to the building of said shops. It often happens in towns that one person may so use his property or so conduct his business as to discommode other citizens, and yet not violate any law or become responsible for damages to the person so inconvenienced, but there is always a limit to an unreasonable use of property. The law will not allow A to engage in a business which will entirely destroy the enjoyment or value of adjacent property.

It seems to us that the appellees should not be allowed to operate their shops during the night time in such a manner as to prevent the occupants of plaintiffs' property from rest and sleep, nor should defendants be allowed to so use their flues or smokestacks as to cause the smoke and cinders to enter appellants' buildings.

The judgment of the lower court is, therefore, reversed and cause remanded, with directions to the court below to perpetually enjoin the appellees from doing any work in the said shops between 8 o'clock p. m. and 6 o'clock a. m., as will make a noise or sound sufficient to disturb persons in plaintiffs' houses, or either of them, and to also enjoin appellees from so using or operating said shops as to cause smoke and cinders, or either of them, to go into appellants' houses or either of them.

KOHN BROS. v. STEINAU, &c.

(Filed March 7, 1895—Not to be reported.)

1. Insolvency of the husband is not of itself a sufficient ground to authorize a court to confer upon his wife the power to trade as a feme sole.
2. Same—Evidence—Where the application of the wife for authority to trade as a feme sole is opposed by a creditor of her insolvent husband, such power will not be conferred upon her where the evidence does not show that she has any estate in possession or expectancy, or that she has any trade or avocation. Evidence of a witness that if such power is conferred on the wife her father-in-law or mother-in-law will give her assistance, and that

said witness is satisfied the application is not made to cheat, hinder or delay the husband's creditors, does not authorize a decree granting of her application.

Barnett, Miller & Barnett for appellants.

O'Neal, Phelps & Pryor for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

Lewis Steinau and his wife, Sadie Steinau, filed a petition in the Jefferson Circuit Court, Chancery division, asking that the rights to trade as a feme sole be conferred upon the wife as provided in section 6, article 2, chapter 52, General Statutes. The appellees, Kohn Bros., being creditors of the husband, interpleaded, were made defendants, and resisted the application. The court granted the relief sought by the petitioners, and Kohn Bros. appeal from that judgment.

The only question to be determined is as to the sufficiency of the evidence upon which the decree is based.

But one witness was introduced, who wholly failed to prove that the wife had any estate whatever, or that she had any in exceptancy, or that she had any trade or vocation, in pursuit of which she might engage to make a living for herself or family.

The witness testifies that in the event that the rights to trade as a feme sole were conferred upon the wife, her mother-in-law or father-in-law would give her assistance; that the husband is insolvent, and that he is satisfied the action is not brought to defraud, cheat, hinder or delay the husband's creditors.

The witness did not give any facts from which the court could determine as to the ability or willingness of her mother-in-law or father-in-law to aid her in any business enterprise. If such testimony would be "satisfactory evidence" upon which the rights sought should be granted, the parties who could give the necessary aid would alone be competent to prove their willingness to do so.

The witness says that he is satisfied the action is not brought to defraud, cheat, hinder or delay the husband's creditors. His opinion is not of any value to the court upon this question.

What may have satisfied the witness might not satisfy the court. The court can only determine the question as to the effect of granting the wife the privileges to trade as a feme sole on her husband's creditors from a state of facts proven, not from the mere opinion of a witness.

The testimony does satisfactorily establish one fact, that is, the insolvency of the husband. This ground does not, as held by this court in Moran v. Moran, 12 Bush, 301, authorize the court to grant the wife the power to trade as a feme sole.

Judgment reversed, with directions that further proceedings be had consistent with this opinion.

CITY OF LUDLOW, &c. v. BOARD OF EDUCATION OF THE CITY OF LUDLOW.

(Filed March 7, 1895—Not to be reported.)

Municipal indebtedness—Constitutional law—Where an amendment to a city charter, authorizing the incurring of a certain indebtedness and the issuing of the bonds of the city to pay same, was enacted prior to the adop-

elberger and Michael Spitzelberge ps required by said act to an-
from operating a blacksmith sh en before the adoption of said
residence, and which plaintiff e bonds after the Constitution of
use of large sledge hammers. ving been so authorized under "a
day and night, as to great the Constitution, they are valid and
injury of their health.

Plaintiffs also averre ilants.
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into plaintiffs' hous ee.
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comfort of their ' ton Circuit Court.
and that the s
the value of court by Judge Paynter.
irreparable
injunctior in this case is as to the authority of the city of
and for ' ough its board of council, to issue and sell the bonds
rary ir amounting to $25,000, and turn the proceeds over to
shop of education of the city, to be used for the purpose of
Up board
th suitable grounds and building for the public schools of
the city. The board of council express a willingness to do so, if
the authority exists.

By an act approved April 19, 1890, the council of the city of Ludlow was empowered to build, enlarge, repair and furnish necessary schoolhouses and purchase or lease sites therefor or rights of way thereto. For the purpose of paying for the lands purchased or leased and for the purpose of erecting suitable school buildings on the land acquired under the provisions of the act, the council was authorized to issue and sells bonds of the city of Ludlow, not exceeding in amount $30,000.

It was further provided, when it shall have been determined by the council the amount of the bonds so to be issued, that before the bonds were issued or tax levied to pay them the question of issuing the bonds should be submitted to the freeholders residing in the city, at an election to be held at such time as the council might determine, first giving ten days' notice of the election. If a majority of such freeholders voting at such election upon the question of issuing the bonds voted in favor thereof, of then the bonds might be issued and the tax levied.

In June, 1890, the council, by resolution, determined that the amount of the bonds, if issued, should be $25,000, and fixed August 4, 1890, as the day upon which the freeholders of the city should vote upon the question. The election was held, and a majority of the freeholders voting at the election voted that the bonds should be issued.

On September 18, 1890, the council passed an ordinance, directing that bonds amounting to $25,000 should be issued and sold for the purpose heretofore stated.

It is agreed that the sum of $25,000 is necessary to provide a suitable school building for the school children of the city, and to raise that amount it is necessary to issue and sell the bonds of the city.

The council doubts its power to issue and sell the bonds because of the inhibition of the Constitution of the Commonwealth and an act, entitled "An act for the government of cities of the fourth class."

The act which authorized the council of the city of Ludlow to issue the bonds was an amendment to the charter of that city. After its passage the council proceeded to comply with its provisions, and put it in force by taking all necessary steps to empower them to issue the bonds. Every necessary step was taken to that end, and the power to issue was complete when the Constitution was adopted.

tion of the Constitution of 1891, and all the steps required by said act to authorize the issuing of said bonds had been taken before the adoption of said Constitution of 1891, the city may issue the bonds after the Constitution of 1891 became effective, and the bonds having been so authorized under "a law in force prior to the adoption" of the Constitution, they are valid and obligatory on the city.

Walter F. Ritchie for appellants.

Wm. Goebel for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The question in this case is as to the authority of the city of Ludlow, through its board of council, to issue and sell the bonds of the city, amounting to $25,000, and turn the proceeds over to the board of education of the city, to be used for the purpose of providing suitable grounds and building for the public schools of the city. The board of council express a willingness to do so, if the authority exists.

By an act approved April 19, 1890, the council of the city of Ludlow was empowered to build, enlarge, repair and furnish necessary schoolhouses and purchase or lease sites therefor or rights of way thereto. For the purpose of paying for the lands purchased or leased and for the purpose of erecting suitable school buildings on the land acquired under the provisions of the act, the council was authorized to issue and sells bonds of the city of Ludlow, not exceeding in amount $80,000.

It was further provided, when it shall have been determined by the council the amount of the bonds so to be issued, that before the bonds were issued or tax levied to pay them the question of issuing the bonds should be submitted to the freeholders residing in the city, at an election to be held at such time as the council might determine, first giving ten days' notice of the election. If a majority of such freeholders voting at such election upon the question of issuing the bonds voted in favor thereof, of then the bonds might be issued and the tax levied.

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The act which authorized the council of the city of Ludlow to issue the bonds was an amendment to the charter of that city. After its passage the council proceeded to comply with its provisions, and put it in force by taking all necessary steps to empower them to issue the bonds. Every necessary step was taken to that end, and the power to issue was complete when the Constitution was adopted.

The question arises as to whether the provisions of the Constitution relating to cities incurring indebtedness prohibits the exercise of the power which the act conferred upon the council.

By section 157 of the Constitution, "for other than school purposes," it is provided that the tax of cities, towns, shall not exceed a given rate, ranging according to the population of the cities or towns, unless it should be necessary to enable such city or town * * * to pay the interest, and provide a sinking fund for the extinction of indebtedness contracted before the adoption of the Constitution.

Section 158 of the Constitution provides that cities and towns shall only incur indebtedness to a given amount, including existing indebtedness, and in the aggregate not exceeding certain-named maximum percentages on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment previous to incurring the indebtedness. There is a proviso in the section in which appears a clause as follows: "Any city or town * * * may contract an indebtedness in excess of such limitation when the same has been authorized under laws in force prior to the adoption of this Constitution."

The council of the city of Ludlow were authorized by the act approved April 19, 1890, to contract an indebtedness not to exceed $30,000, for the purpose of providing a suitable public school building for the city. They determined that $25,000 was sufficient for the purpose. The freeholders, at an election held on August 4, 1890, for the purpose as provided in the act, approved that determination. In pursuance to such ratification an ordinance was passed directing the bonds to be issued.

It follows that the right to issue the bonds was authorized under a law in force when the Constitution was adopted on September 28, 1891.

This opinion follows the interpretation given the sections supra of the Constitution in the cases of Aydelott v. South Louisville, 16 Ky. Law Rep., 166; Ex parte City of Lexington, 16 Ky. Law Rep., 467.

Judgment affirmed.

FUGATE v. CITY OF SOMERSET.

(Filed March 7, 1895.)

1. It is the duty of a municipal corporation to maintain its streets in good condition and repair, so as to keep them reasonably safe for the public travel.

It must also keep its streets clear of obstructions that are dangerous to the public using them, and for its failure to do so it is liable in damages to one injured by reason of said obstructions, if it had actual or presumptive notice of their existence.

2. A city may temporarily place obstructions in its streets for the purpose of repairing them, but such obstructions can be permitted to remain in the streets only a reasonable time for purposes of such repairs.

3. A city is required to erect barriers along embankments on its streets only where the location of the street and the embankment is such that the street is not reasonably safe for public travel without the barriers.

4. Questions for jury—Peremptory instruction—Whether particular obstructions in the street of a city rendered it unsafe and dangerous for public travel, and whether a particular plaintiff was injured by such obstructions, and whether a failure to erect a fence along an embankment on a street rendered it not reasonably safe to the public, are questions for the jury to

determine, when there is evidence conducing to sustain the plaintiff's claim in this regard in an action against a city.

5. A peremptory instruction for a defendant ought not to be given unless, after admitting every fact proven by plaintiff's evidence to be true, as well as all reasonable inferences that can be drawn therefrom, the plaintiff has failed to establish his case.

W. O. Bradley and J. W. Colyer for appellant.

O. H. Waddle and W. A. Mororw for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Grace.

This is an appeal from the judgment of the Pulaski Circuit Court dismissing plaintiff's petition for damages claimed against the city of Somerset.

Plaintiff alleged in his petition that prior to August, 1889, the defendant, by its agents and officers, placed, or suffered and permitted others to place, large piles of lumber on one of its principal streets, whereby same was made and left in an unsafe and dangerous condition for public travel, and so suffered and permitted same to remain for a considerable length of time; and that while in this condition plaintiff, on the third Sunday in August, was driving along said street in said town and his horse became alarmed and unmanageable and ran away, and ran onto and over said obstruction, throwing the plaintiff out of his buggy over and down an embankment, where said lumber was piled up, and greatly injured this plaintiff in his back and hip, and that all this was without fault or negligence on his part; that his horse and buggy were both injured at the same time and from the same cause. Plaintiff further charges that this same street was unsafe by reason of the failure and negligence of the city in not providing and having erected a fence or other barrier or partition along and on the side and at the top of the embankment for the safety and protection of the public in traveling over same.

Defendants in their answer deny substantially each allegation of plaintiff, and say that plaintiff's injuries were caused by and resulted from his own carelessness and negligence in not providing his harness and using a safe line, but that the line used was old and rotten and insufficient to guide or restrain his horse, whereby he was injured.

A jury being empannelled, plaintiff introduced himself and other witnesses, proving substantially the allegations of his petition that on, and along this street where he was driving there was an embankment some fifty or more yards long and some ten or twelve feet high; that this was unprotected in any way, and that on and along this street and in same several piles of lumber had been placed some two and a half feet wide, the plank being some twelve feet long, same being placed endwise to the street and covering several feet of the improved part of said street and extending upon the metaled part of same, and that his horse, from some reason becoming unmanageable, ran away and over and on this pile of lumber, turning his buggy over and throwing him out, down and over this embankment and seriously injuring him in his back and hip; and that after a period of three years he was still at the time of the trial in a crippled condition and unable to labor for a support. He also proved that his lines were good and of strong leather, but that in pulling them to keep his horse off this lumber pile one of them did break, but without his

fault. He showed that the lumber had been piled upon this street by the direction of one of the councilmen of the city, and that another one lived near by and knew of this obstruction; that this lumber was first removed to that side of the street early in July to make some repairs on the sidewalk on the opposite side of the street, but that these repairs had been completed some time before his injury, though the obstruction still remained. On this testimony in substance plaintiff rested his case; whereupon the court, on motion of the defendant, instructed the jury as in case of a nonsuit, over the objection of plaintiff. Exception was duly taken, and after the motion for a new trial was overruled this appeal was taken. The duty of the city to put and keep its streets in good condition and repair, and to keep them reasonably safe for public travel, seems to be admitted. It is equally clear that it must keep same clear of obstructions that are dangerous to public travel, where it has notice of same, or where the same has been obstructed so long that it may be reasonably presumed to have notice. In this case one of the city councilmen authorized the obstruction to be placed on the street. Another lived near by, and must have known of it.

While it is also true that a city may temporarily place obstructions on a street for the purpose of making repairs, yet same is only permitted as a matter of necessity and for only a reasonable time, after which they should be removed. As to whether the city was under obligations to erect a fence or other barrier along this embankment we think that depends whether, on all the facts of the case, the street was reasonably safe for travel without this fence. If so, then the city is not required to erect same. Cities are not required to insure by this means the absolute safety of the traveler against the possibility of injury, but only to make and keep their street reasonably safe, and this is a question for the jury.

Upon these issues presented by the pleadings as to whether said street was so obstructed as to render same dangerous and unsafe for public travel, and whether plaintiff was injured by reason of same, and as to whether plaintiff was himself guilty of such negligence as to prevent his recovery, were all questions of fact for the determination of a jury under appropriate instructions by the court.

Under the usual rule that, admitting every fact given in evidence to be true, and every inference reasonably deducible therefrom, if plaintiff has made out his case it is error to take the case from a jury by a peremptory instruction. Viewing the evidence in this light and under the principles of law herein announced, which we think applicable to the case, we think the court erred in giving the instruction asked for. We refer for authority herein to Elliott on Roads and Streets, pages 451-2-3; same as to notice to the city, 461, and to Dillon on Corporations, sections 730, 1008, 1017, 1024, 1025.

Judgment must be reversed and cause remanded for further proceedings consistent with this opinion.

TYGRET, &c. v. POTTER, &c.

(Filed March 7, 1895.)

1. Limitation—Recovery of usury paid by mortgagor—Where a mortgagor pays his debt and accrued interest by making a conveyance of the fee simple title of the property embraced in the mortgage to the mortgagee, and the latter surrenders the notes evidencing the debt, the mortgagor can not main-

tain an action to recover usury so paid more than one year after the transaction.

2. Mortgages—Conditional sales—Where the nature of the conveyance is doubtful the deed will be considered a mortgage and not a conditional sale, because this construction is most favorable to the debtor. But where the mortgagor makes to the mortgagee an absolute deed of conveyance of the land mortgaged to satisfy and discharge the debt and accrued interest, and reserves the right to redeem the land within one year by repaying the consideration and eight per cent. interest thereon, such conveyance must be construed to be a conditional sale and not a mortgage.

3. Same—The fact that the grantee in the deed obtained the consent of the grantor to sell part of the land within the year does not show that the deed was intended as a mortgage rather than a conditional conveyance.

Clark & Clark for appellants.

J. M. Galloway and Edward W. Hines for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Tygret, being indebted to the appellees, P. J. Potter & Co., in the sum of $4,242, executed to them his note, payable in twelve months from date, and secured by a mortgage on several tracts of land containing about 150 acres.

After this note matured, the appellant not being able to make payment, and the debt amounting to $4,678.60, with its interest, appellees purchased the land and surrendered the note, the appellant executing an absolute conveyance, acknowledging the receipt of the purchase money, the deed containing the usual covenants as to title.

At the time this deed was executed the vendees (appellees) executed to the appellant this writing: "We agree with John T. Tygret that he can have twelve months from this time in which to have the privilege of paying us the amount we this day pay him for certain lands this day deeded to us by said Tygret and wife, viz.. the sum of forty-six hundred and seventy-eight dollars and sixty cents, the consideration expressed in said deed; and should said Tygret make such payment of said sum after the 12th of December, 1889, he is to pay us eight per cent. interest per annum on said sum from said date until time when he pays us; and should he thus pay us within twelve months, we are, upon said payments being made to us, to convey him or to his order the land this day conveyed to us; and should he fail to pay us said $4,673.60, with interest from date, this contract is of no binding effect.

"We further agree, should said Tygret not pay us the amount by December 22, 1889, we, P. J. Potter & Co., agree to rent him (said Tygret) the land for the year 1890, lease to begin December 25, 1889, and end December 25, 1890, and Tygret is to pay as rent $373, and for this rent Tygret is to make us a well-secured note, due December 25, 1890. When the lease expires Tygret agrees to surrender the possession, etc.

(Signed:) "P. J. POTTER & CO."

"I agree to comply with the terms of this contract as to renting said property for the year 1890, should I not sell before December 25, 1889. (Signed:) J. T. TYGRET."

Before the expiration of the twelve months, the time during which the appellant had the right to repurchase, the appellees,

by the consent of the apellant, sold a part of the land for $2,500, and for the balance of the land it was agreed the appellant should pay as rent $175. There was also a verbal extension of time to enable the appellant to repurchase that was not complied with, and after notice to surrender the possession this action was brought by the appellees to recover the rent and the possession of the land.

The main defense is that the writings evidence a mortgage, and not a conditional sale of the land. The defense also relies on the defense of usury, that, if it ever existed, is barred by the statute in the event this transaction was a sale and not a mortgage.

It is often difficult to determine the intent of parties with reference to conveyances of this character, and it is a well-settled rule of equity that when a doubt arises as to whether the writing is a sale or mortgage, that doubt is resolved in favor of the debtor and the writing construed to be a mortgage.

In this case the appellees held a mortgage upon the entire premises conveyed at the time the deed was executed that passed to the appellees all the right and title the appellant and his wife had in the land as a security for the debt, and there could have been no motive prompting the parties to so change the terms of a writing that upon its face was plainly a mortgage to an absolute conveyance, unless they both intended this conveyance to pass the absolute fee in the event the debt was not paid within twelve months, and at the end of that time the appellant to become the tenant of the appellees.

The evidence of the debt had been surrendered, and there is no evidence conducing to show the land to be of greater value than the sum paid for it, or that the agreement was unconscionable or oppressive; but, on the contrary, it is manifest the appellant saw or believed he could not discharge or release the mortgage, and, therefore, made the best possible terms with his creditor, that was, to sell him the land with the right to repurchase within twelve months, and, if he failed to do so, then to become his tenant.

The fact that appellees obtained the consent of appellant to the sale of a part of the land is no evidence that the writing was intended as a mortgage, because the twelve months in which he had the right to have the land reconveyed had not expired.

This sale evidenced the fact, however, that the appellees did not want the land, and that appellant could not pay for it, and, therefore, consented to the sale, and every opportunity was given the appellant to comply with his agreement, but this he failed to do.

In Rue v. Dole, 76 Ill., 277, it was held, in a case similar to this, that in the absence of deception, fraud or oppression a conveyance of this character, with a provision for a repurchase, will be sustained, even if the land was sold at less than its full value.

In this case the debt had been discharged. The conveyance was made in full satisfaction of the claim, and no debt existed.

If, then, the debt was discharged at that time, the date of the conveyance, the plea of usury, that eight per cent. was included in the note or paid, is barred by the statute. That the writings express upon their face a sale of this land, with the right of repurchase, and that such was the intention of both the debtor and creditor, we have no doubt.

Judgment affirmed.

LUTTRELL v. WELLS, &c.

(Filed March 8, 1895.)

1. Sale of land for re-investment not forbidden by will—A sale for re-investment of land held by one for life, remainder to others, under section 491 of the Civil Code, is not prohibited or forbidden by a will devising to W. the rents and profits of the land during his life, the land to remain in his possession as long as he lives, and at his death to go to his wife, if she survives him, until their youngest child arrives at the age of twenty-one years, when it is to be sold and the proceeds divided between the wife and the children of the parties, the wife taking a child's share; and if W. survives his wife the farm to be sold at his death and the proceeds divided between their children and their heirs, the heirs of a deceased child to take its parent's share.

2. Same—Failure of guardian for infant to execute bond—In the proceedings for a sale under section 491 the order of sale and the sale are not void by reason of the failure to execute the bond required by section 498 to the infant defendants, who held remainder interests in the property, since the court, by its commissioner, retained control and custody of the fund arising from the sale until it was re-invested.

3. Same—Parties—Where the parties in being at the time of the sale, in whom the contingent remainder interest would vest if the contingency had happened before the commencement of the action, were made parties to the suit, the proceedings would vest in the purchaser the title of the contingent remaindermen under the provisions of section 491 of the Civil Code.

4. Same—Sale must be public—An order authorizing the sale of land for re-investment by the court's commissioner at private sale is prohibited by section 696 of the Code, and a private sale made in pursuance of such order must be set aside.

5. Same—Credits—A commissioner has no authority to sell land on terms different from those set out in the order authorizing the sale.

Cochran & Son for appellant.

T. C. Campbell and W. J. Hendrick for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Eastin.

This is an equitable action brought for the sale of real estate, in which there are remainder interests, for investment of the proceeds in other real property under the provisions of section 491 of the Civil Code.

The property sought to be sold consists of a farm in Mason county, Ky., the title to which is held under the following provision in the will of Richard Wells, deceased, to wit: "I give and bequeath to my son, William Y. Wells, the rents and profits of the farm upon which he lives during his life. Said farm contains about 190 acres of land, and is to remain in the possession and under the control of William as long as he lives, and at his death, if his wife survives him, she is to have the use and profits of said tract of land until their youngest child arrives at the age of twenty-one years, then said farm is to be sold and the proceeds divided between the widow and children of William, she to take a child's part.

"Should William survive his wife, at his death the farm is to be sold and the proceeds divided between his children and their heirs, the heir of a child to take the share of the deceased parent, should one or more of the children be dead when the land is to be sold, and the proceeds divided according to the provisions of this will."

All persons in being, who have an interest in the property, were made parties to the suit, the plaintiff being the life tenant,

William Y. Wells, his wife and their six adult children, with the husbands of their daughters who are married, and the defendants, being their two infant children, and the executor of Richard Wells, deceased.

The petition alleges the fact, and proof was taken conducing to show, that a sale and re-investment of the proceeds will benefit the parties interested in the property; a copy of the will under which the title is held was filed, a guardian ad litem was appointed and answered for the infant defendants, and at the June term of 1893 the circuit court adjudgde a sale of the farm for the purposes set forth in the petition, and appointed William Y. Wells, the life tenant and one of the appellee's here, special commissioner to make the sale, and required of him a bond for the faithful discharge of his duties, which bond was executed and approved by the court.

In the judgment of sale the commissioner was authorized to sell, either at public or private sale, for the best price obtainable, and either for cash or on credits, not exceeding six, twelve and eighteen months; or for one-third cash and balance on time, not exceeding one and two years; and on November 20, 1893, said commissioner reported to court a sale of the farm to appellant, on September 6, 1893, at the price of $20,002.50, of which $1,000 was paid October 20, 1893, and $5,667.50 was to be paid March 1, 1894, and the balance to be paid in two equal installments of $6,667.50 each, on March 1, 1895, and March 1, 1896, respectively, for which deferred payments appellant had executed bonds, with surety, bearing interest from October 20, 1893, and to securew hich a lien was retained.

The commissioner also reported at the same time the purchase of a farm in Shelby county, Ky., for the sum of $20,000, as a re-investment of the proceeds of the farm sold, the payments to be made practically on the same terms and at the several dates stipulated in his sale to appellant.

Before the confirmation of said report of sale the purchaser, appellant, Thos. Luttrell, filed exceptions thereto, and moved the court to quash and set the same aside for the following reasons, to wit:

"1st. Because no bond was executed as required by the Code before the rendition of the judgment of sale.

"2d. Because the sale was private, and not a public sale.

"3d. Because a sale and re-investment of the proceeds is forbidden and prohibited by the will of Richard Wells, under which the title is held.

"4th. Because these proceedings will not vest the title in the purchaser, so far as the children of plaintiff, William Y. Wells, who may die before him, are concerned."

Upon the hearing of these exceptions by the court below they were all overruled and the report confirmed, to which the purchaser excepted, and from which order he prays this appeal.

As this case must be reversed, and as this court is of the opinion that at least one of the grounds of exception filed by appellant should have been sustained, it might be sufficient to notice that exception alone; but for the guidance of the appellees, in case they should desire to perfect the proceedings for the sale of this property, the court will now consider briefly, and pass upon each of the several questions raised by appellant's exceptions.

In the first place, then, as to the objection based upon the idea that a sale of this property if forbidden by the will under which the title is held, the court is of the opinion that this exception was properly overruled, and that the will of Richard Wells does not, either expressly or by implication, prohibit the sale of this property by order of the chancellor for the purpose of re-invest-

ment of the proceeds thereof. Such sale is certainly not forbidden in express terms, nor do we find in the language of the devise anything to lead us to the conclusion that this was the purpose or intention of the testator.

It is true that he provides that this farm "is to remain in the possession and under the control of William as long as he lives," but when we consider this language in connection with the devises over after William's death—first, to his wife for a certain period of time, if she shall survive him; or, second, in case his wife shall have died first, to his children, or the heirs of such of them as may be dead—then it seems to us that the purpose of these words was merely to emphasize the right of William to the use, benefit and enjoyment of the property during his life, without interference on part of the remaindermen or any other person. Nor does the fact that the testator has fixed a time at which the farm is to be sold, that is, when William's youngest child shall attain the age of twenty-one years, if William shall then be dead and the wife surviving, or at William's death, if his wife shall have theretofore died, necessarily or reasonably imply a prohibition against the sale of the property for the purpose of re-investing its proceeds, when such sale will benefit all the parties whom he is seeking to benefit by this devise.

He has directed the sale of the property for the purpose of division between the eight children of William, all of whom were living at the time of the execution of this will and of its probate, after the expiration of William's life estate, because only in that way could it be equally and advantageously divided between these beneficiaries in remainder.

In view of the language of the devise and in the light of former adjudications of this court, we conclude that a sale of this property, for the purpose of re-investment of the proceeds thereof under section 491 of the Civil Code, was not prohibited by the will under which the title was held, and, therefore, the exception on this ground was properly overruled. (McGraw v. Minor, 12 Ky. Law Rep., 687; Lindeweir v. Lindeweir, ibid, 767.)

Then as to the exception based upon the fact that no bond was executed to the infant defendants, as provided in section 493 of the Civil Code, it need only be said that under this section, as originally passed, the omission to exceute the bond referred to would have been fatally defective, and would have rendered the sale absolutely void.

By an amendment to the Code, approved May 9, 1892, which was prior to the institution of this action, it is provided that no bond shall be required in cases under section 491 of the Code, where the court shall, by its commissioner, retain the custody and control of the fund arising from the sale until the same shall be re-invested, and shall order the money to be paid by the commissioner directly to the person from whom the purchase for re-investment was made, as was practically done in this case. (Session Acts 1891-2-3, chapter 37, section 1, subdivision 5, page 58.) This ground of exception was, therefore, properly overruled.

And then as to appellant's fourth exception, which seems to be based on the idea that as some of the children of William Y. Wells, the life tenant, may die before he does, in which event the share of the one dying is to pass to his "heirs," probably meaning children, and as it can not, for this reason, now be told who may become entitled to take in remainder under this will, therefore, the purchaser can not get a perfect title under this proceeding, it is sufficient to say that section 491 of the Code was designed to meet such cases, and that, although the remainder

may be contingent, yet if the person in being, in whom the remainder interest would have vested if the contingency had happened before the commencement of the action, be properly before the court, as seems to have been the case here, a complete and perfect title may be passed under a proceeding conforming to the provisions of that section and the subsequent sections of the Code regulating such proceedings.

But as to the only remaining exception filed by appellant to this report of sale, and based on the fact that this was a private sale and not a public sale as required by law, we are of the opinion that this exception should have been sustained.

The circuit court, in its judgment authorizing this sale, has expressly provided and undertaken to empower its commissioner to make this sale privately, and also to sell either for cash or on certain specified credits notwithstanding the provisions of section 696 of the Civil Code of Practice, which expressly forbids such private sale or sale for cash in these words, to wit: "Every sale made under an order of court must be public, upon reasonable credits to be fixed by the court," etc.

There seems to be no room to doubt that the court was wholly without authority to confer any such power on its commissioner, or that the sale of this property at private sale was unauthorized by law and void.

As to the terms on which the sale was made, it may be well to call attention to the fact that while the judgment of the court provides that the commissioner may make the sale either for cash or on certain credits therein specified, which credits are within those prescribed by law, and while he did not sell for cash but sold on credits which the law would authorize, yet he has exceeded the credit prescribed by the judgment itself. His report shows that he has extended the time of payment beyond that which was authorized by the court in its judgment, and this might have been a valid ground of exception for the purchaser if he had chosen to avail himself of it.

But, without further comment, it is enough to say that the sale of this property at private instead of public sale was directly in violation of the law regulating such sales, and for this reason the judgment of the lower court, confirming the report of sale, must be reversed and this cause remanded for further proceedings consistent with this opinion.

CHESAPEAKE & OHIO RY. CO. v. OSBORNE.

(Filed March 12, 1895.)

1. Railroads—Excursion train let to another—Neglect—A railroad company can not escape liability for injuries done through the negligent or wrongful acts of those in charge of one of its trains on the ground that it had let the train, with all the train hands, to a private person for the purpose of running an excursion to a certain point, and was not responsible for the acts of those in charge of it.
2. The refusal to grant a continuance on account of the absence of a material witness is not a reversible error when the witness appeared and testified before the conclusion of the trial.
3. The refusal to give instructions not contained in the bill of exceptions is not a ground for reversal, since it must be presumed that the refusal was proper.

Wadsworth & Son and Cochran & Son for appellant.

Thos. H. Paynter for appellee.

Appeal from Greenup Circuit Court.

Opinion of the court by Judge Guffy.

This is an appeal taken from a judgment of the Greenup Circuit Court, rendered in the action of David Osborne against the appellant, Chesapeake & Ohio Ry. Co.

It appears that appellee, some time prior to July 11, 1891, bought of the ticket agent of appellant at Russell, Ky., a ticket to Ashland, and that soon afterwards a train of cars reached Russell and appellee, with the ticket stuck in his hat, boarded the cars, or at least got upon the steps, and was by one Stivers ejected from its car by force, and, as appellee claims, while the car was in motion, and that he was thereby injured, mortified and humbled, and to recover damages for the injuries instituted suit in said court. A trial resulted in a verdict and judgment in favor of plaintiff for $1,000.

Appellant filed grounds and moved the court for a new trial, which motion was overruled and the defendant has appealed. The defendant in the court below denied its liability for the injury, if any was sustained. The substance of the answer was that it had let J. W. Stewart have the train, train hands, including conductor, for the purpose of running an excursion train to Kanawha Falls, and this appellant was in nowise responsible for the acts of Stewart, and this appellee had no right to ride on that train.

Public policy and the law alike forbid that a railway company shall be allowed to place their road, trains, hands and cars in the hands of or under the control of a stranger for such purpose as is claimed in this action, and thus evade liability for the wrongs done by such person.

Appellant set out a number of grounds for new trial, nine in all. Inasmuch as defendant finally procured the attendance of its principal witnesses, whose testimony was so much desired, the refusal of the court to continue the case did not interfere with the substantial rights of defendant. The admission of the testimony of Carver and Hill, although erroneous, did not affect, as we think, the substantial rights of the defendant, especially as the same was afterwards withdrawn. Instructions 1 and 2 given by the court were as favorable to defendant as it was entitled to, and the same may be said as to instructions 3 and 4. Instructions 5, 6, 7 and 8 are not in this record, and under the well-known rule of law they must be held to have been properly refused.

It does not appear that the verdict is so excessive as to show that it was the result of passion or prejudice. The other grounds need not be further noticed. It seems to us that the instructions, taken altogether, were not prejudicial to the substantial rights of defendant.

All the issues of fact involved in the case were, under proper instructions, submitted to the jury, and the jury being the judges as to the facts proven and the credibility of the witnesses, found for the plaintiff, and we do not feel authorized to disturb the verdict so found.

Judgment affirmed.

Judge Paynter not sitting.

TABLER, &c. v. SULLIVAN.

(Filed March 8, 1895.)

1. Release of homestead—A release of a homestead by a husband and wife, to be effectual, must be made in strict compliance with the statute relating thereto.

A written transfer of a homestead right signed by a husband and wife, but never acknowledged or recorded, is ineffectual to transfer the homestead right.

2. Same—Case—T. and wife conveyed a house and lot to S. for alleged consideration of $3,000 cash, and $2,500 to be paid in one year. Subsequently T. assigned all his other property to S. for benefit of his creditors, except such property as was exempt from execution. Thereafter the creditors of T. brought suit against T. and S. to have the conveyance of the house and lot to S. declared fraudulent, as an attempt by T. to prefer S. to his other creditors. The parties to the last-named suit compromised it by agreeing that S. should sell the house and lot as if he held it as trustee, and out of the proceeds first repay to himself the cash payment he made on the house, and then that he should hold the residue for benefit of all the creditors of T. The property sold for $5,500, and the court set aside $1,000 of this in lieu of homestead therein. When compromise was made of the suit T. and wife conveyed their homestead right in this house and lot to S. by a writing signed by him, but not acknowledged or recorded. S. and T. and wife each claim the $1,000. Held—The compromise restored the homestead right to T. and wife, and they could transfer or release it only in the manner authorized by statute, which they have not done, therefore, they are entitled to the $1,000.

Gaither & Vanarsdall and Chas. W. Rodes for appellants.

Thompson & Wilson for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Lewis.

May 5, 1891, M. Tabler and wife, Susie B. Tabler, for the recited consideration of $3,000 in hand paid, and $2,500 to be paid twelve months thereafter, for which a note was given, conveyed by deed duly acknowledged to C. B. Sullivan, a tract of seven acres of land, whereon was a dwelling house, in Harrodsburg; and September 5, 1891, M. Tabler, his wife not uniting, conveyed to C. B. Sullivan, in trust for payment of debts, all his other property, real and personal, including choses in action, except such as was exempt from execution.

January 13, 1892, the Mercer Grain & Coal Co., creditor of M. Talber, instituted an action against him and C. B. Sullivan to set aside the deed of May 5, 1891, upon alleged ground it was fraudulently made to cheat, hinder and delay creditors, and in contemplation of insolvency, with design to prefer.

February 12, 1892, an agreement to compromise that action was made by the parties thereto in substance as follows: That the lot was to be sold by Sullivan as trustee, as if it had not been deeded to him, but had passed under the deed of trust of September 5, 1891, to him as trustee of Tabler; that out of proceeds of the sale Sullivan was to retain $2,700 and interest, being, as recited in the article of compromise, actual amount of cash paid at time of sale and deed of May 5, 1891; that the residue of proceeds was to be reported to the Mercer Circuit Court, and constituted and be distributed as assets under judgment. It was further agreed that M. Tabler surrender all right to redeem the property which he

had under contract between him and Sullivan, and have benefit of the provision of the deed of September 5, 1891, and he and his wife were to convey by general warranty to purchaser of the property when sold.

That compromise agreement was filed in and entered as judgment of the court, and subsequently there was a judicial sale of the property at the price of $5,500; but the purchaser refusing to accept a conveyance otherwise, C. B. Sullivan, as trustee and individually, and also Tabler and wife, united in a deed of the property.

The present controversy, being between Sullivan and Tabler and wife, is whether $1,000 of proceeds of the seven acres of land set apart by judgment, after same was made, in lieu of homestead right therein, belongs to him or to them; and the lower court having adjudged he was entitled individually to the fund, they have appealed.

The basis of Sullivan's claim to the fund is the following attempted transfer and assignment executed by Tabler and wife February 27, 1892, same date as the compromise agreement: "The suit of the Mercer Grain & Coal Co. having been agreed this day to be dismissed against C. B. Sullivan and the undersigned, M. Tabler, now this instrument of writing transfers and assigns to said Sullivan all of our claim for homestead exemption under deed of assignment of September 5, 1891, made by me to said Sullivan; and the said Sullivan is hereby authorized to retain whatever sum is allowed to us as homestead exemption by the Mercer Circuit Court, in case of C. B. Sullivan, trustee of M. Tabler against M. Tabler and others, and this shall be his receipt for the same."

Effect of the judgment rendered in pursuance of the compromise agreement was to set aside and cancel the deed of May 5, 1891, leaving the parties to it in the same attitude they were before it was made, and to subject the seven acres of land to sale under same conditions and for same purposes as was Tabler's other property, rendered subject in virtue of the deed of trust of September 5, 1891, except that Sullivan was to retain out of proceeds amount of cash consideration for the land. As, then, the compromise agreement, when made judgment of court, operated to restore the homestead exemption right in the seven acres of land as though it had never been conveyed, or attempted to be conveyed, the result is it could not be released or waived except in the manner prescribed by the statute; and as the written transfer relied upon by Sullivan was, though signed by Tabler and wife, never acknowledged or recorded as required by the statute in all cases, it was ineffectual to divest them, or either of them, of the homestead right. Nor does the fact Tabler and wife agreed to release it, or the additional fact Sullivan entered into the compromise upon faith they would release and transfer the homestead exemption to him, deprive them of their right to the fund set apart in lieu of it.

The statute prescribes the particular mode in which a homestead right may be released or waived, strict compliance with which this court has often held to be indispensable, and Sullivan must now abide the consequence of failing to procure such release or waiver in the only sufficient and effectual mode.

Therefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. v. SAMPSON'S ADM'R.

(Filed March 8, 1895.)

1. Railroads—Willful neglect—Overhead bridges—The maintenance by a railroad company of an overhead bridge at such a height above its track that its brakemen, by the exercise of ordinary care and prudence, can not, while engaged in the discharge of their duties on the tops of its cars, pass under it with reasonable safety to their persons, is an act of willful neglect as to a brakeman who is thereby killed while in discharge of his duty or who had no knowledge of the dangerous character of the structure.

A freight train parted a mile before it reached a low overhead bridge, and a brakeman went, as his duty required, to the rear of the front section to give signals to those on the second section so as to prevent a collision. While so standing on the top of a car, with his back to the engine and facing the rear section, he came in contact with the overhead bridge, which was so low that one could not safely pass under it standing erect on a car, and was thereby injured so that he died. He had been in the employ of the railroad on this part of its road about a month. Held—The maintainance of the low bridge was, as to this brakeman, an act of willful neglect for which the company is liable in damages to his administrator.

2. Same—Evidence—The fact that the overhead bridge had been for years maintained over the railroad prior to the accident complained of without any employe of the road being injured or killed by it does not prove that it was a reasonably safe structure for the employes.

3. Same—Evidence by the widow of deceased that she had one child was incompetent, the condition of the family of deceased not being an element in the measure of damages, but its admission was not prejudicial, the jury not being authorized by the instruction to consider the statement in determining the damages.

C. B. Simrall and J. W. Yerkes for appellant.

Robert Harding, R. J. Breckinridge and J. W. Rawlings for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Pryor.

The personal representative of James R. Sampson brings this action to recover for the loss of life of his intestate, alleging he was killed by coming in contact with an overhead bridge constructed by the appellant (the C., N. O. & T. P. Ry. Co.) on its road, while he was in its employ as a brakeman and in the discharge of a duty he owed the company by reason of that employment.

The basis of the recovery is the alleged willful neglect of the appellant in the construction and maintenance of its bridge in such a manner as rendered it more than ordinarily hazardous to its employes, who were acting as brakemen.

The appellee's intestate had been in the employ of the company on this part of the road but a short time before his death, about one month, but had much experience as a brakeman, having been in the employ of railroad corporations since he was twelve years old, but seems to have been on this part of the appellant's road but a short time.

The train upon which the intestate was killed was going south, and composed of twenty-six cars. It was on a down grade, as it approached the bridge, and running at a speed of fourteen or fifteen miles an hour, and when within a half mile of the bridge the pin used in coupling the cars came out, when the train

divided, leaving the intestate on the one section and other employes on the other. The intestate was in the cab at the time, but instantly left, climbing from the cab to the box cars, and going to the rear end of the first section, and, as we must assume, to signal those on the second section, as was his duty, so as to prevent a collision.

It is conceded that this was his duty, and in the attempt to discharge it he met with the misfortune that ended his life. The back of his head and shoulders were horribly mangled, and the evidence of his coming in contact with the bridge, causing his death, is conclusive. His back must have been towards the bridge, with his face fronting the section behind, and from this effort to discharge his duty, connected with the alleged negligence of the appellant, his death is said to have resulted.

The pleadings make up the issue as to the knowledge of the condition of the bridge on the part of the company, and the want of knowledge on the part of appellee's intestate, and, if willful neglect is etablished, the judgment below will not be disturbed.

There is some evidence conducing to show that the bed of the railroad had been raised since its original construction, which would lessen the distance from the rails below to the bridge above, but when this was done does not distinctly appear; and it being conceded in argument, and it appearing from the testimony of appellant's own witnesses, that this bridge was too low for brakemen to pass under it standing erect, without the loss of life or subjecting their persons to great peril, we will consider this case upon the character of its construction, as appellant concedes it to have been when this accident happened, and the peril in which the intestate was required to place himself in the discharge of a duty imposed upon him by his employer.

Railroads, as this court has heretofore said, are not insurers of the lives or safety of their employes, but must provide reasonably safe appliances for their safety, and if the bridge causing this accident was of such a height as enabled its employe to pass under it by the exercise of only ordinary care on their part, a case of willful negect has not been made out by the testimony, and a nonsuit should have been directed by the trial court.

It is contended that this bridge has been constructed for many years, and no employe having been injured or killed by reason of its construction, it must be assumed that it is such a structure as is reasonably safe for its employes. We can not adopt this view of counsel, but, on the contrary, it is plain from the record before us that this overhead structure was in no such condition as enabled this employe to discharge the duty he owed the company, and at the same time, however careful, protect himself from the danger impending, by reason of the unsafe condition of the bridge.

The employe assumes the ordinary risks pertaining to an employment that is often and necessarily attended with much danger, but this does not exempt the railroad company from liability, where reasonable precaution on its part would save its employe from harm, and in a case like this where the exercise of the slightest care would have prevented the accident.

There can be, and has been, no reason assigned in this case why a corporation, with the means to construct a railway, would, in the construction of small or large bridges, leave them in such a condition as involves its employes (brakemen) in imminent peril, when passing through them, when, with a small expenditure, such structures, in this regard, could be made perfectly safe.

We are aware of many reported cases, some of which have been referred to by counsel, where the absence of ordinary care and the means of knowing the condition of the bridge by the employe, have been held as relieving the railway company from responsibility in such cases. This court, however, has not followed or approved those decisions in reference to such structures, but, on the contrary, in the case of Derby's adm'r v. Ky. Central R. R. Co., 9 Ky. Law Rep., 153, plainly intimated that if the intestate in that case had been required to be on top of the car as it passed through the structure in discharge of his duty, and was killed by reason of its being too low for the cars to pass with the brakeman standing erect upon them, a recovery would have followed.

In that case the jury, by their verdict, said the structure was sufficiently high to enable one standing erect on the cars ordinarily used by the company to pass through safely, and the judgment for the defendant was affirmed, not only on the ground that the intestate knew the car he was on was too high for him to stand upon, but for the additional reason that he was master of the train, and had made it up, placing in the train this high car that belonged to another road.

Mr. Beach, in his work on Contributory Negligence, page 364, says: "If the roof or overhead structure of the bridge is so low that it will strike a brakeman standing erect on top of the train, it is an essentially murderous contrivance, and it is not creditable to our jurisprudence that such buildings are not declared a nuisance. There is nothing in the reports worse than the cases that sustain the railway corporations in building or maintaining these man traps." (St. Paul & Wichita R. R. Co. v. Irvin, 37 Kansas, 701.)

In the case of Wright, on the appeal of the Louisville, New Abany & Chicago Ry. Co., 115 Ind., 378, a like accident happened to the brakeman, and on the trial of that case (an action for damages) it appears that Wright had been in the employ of the company about one month, and had passed through the bridge several times, still the jury, under proper instructions, returned a special finding to the effect he had no knowledge of the perilous condition of the structure, and the court, upon a motion for a new trial, sustained the verdict.

The only difference between that case and the one being considered is that the intestate had more experience with reference to railroading than Wright, the right of recovery in either case depending upon the fact whether the overhead structure was in such a condition as enabled the employe to perform his duties with reasonable safety.

The jury have, by their verdict, said the intestate was ignorant of the condition of the structure, and while his own version of the accident went to the grave with him, the facts and circumstances connected with his death were such as authorized the jury to say that his efforts to check the broken train indicated a belief on his part that the structure was of sufficient height to enable him to pass in safety.

The structure may have been in such a condition as to enable an ordinarily prudent brakeman to remain on top of the car, when nothing intervened to divert his attention from the necessity of stooping, in order to pass through safely, but when, by reason of the separation of the train, or some other unexpected obstruction to the movement of the train as it approached the structure, prompt and speedy action on the part of the brakeman was required to save the lives of passengers or the collision of

one part of the train with the other, can it be said under such circumstances this bridge is reasonably safe to the employe discharging such du ties, when, by the slightest care and precaution on the part of the company, the employe can be protected when undertaking such hazardous risks?

It is plain to us this brakeman could not have discharged the duty imposed upon him that resulted in his death by the exercise of ordinary care and thus save his life, or that such a risk as he was required to take upon himself when killed, with reference to the location of this bridge, was such as is usually incidental to the employment.

This court said, in Derby's adm'r v. Ky. Central R. R. Co., before cited, in reference to the doctrine that railroad companies should be required to construct their bridges and make up their trains so as not to expose the person of the brakeman to danger, said "that a consideration of humanity should prompt them to do so," and it seems to us a failure in this regard is the highest degree of negligence.

In the case of the Chicago & Alton R. R. Co., 116 Ill., 206, the court said: "When a railroad company constructs a covered bridge along the line of its road it should be built of sufficient height so that persons employed by the railroad company as brakemen, and who are required to go on top of the freight car, discharging their duties as brakemen while going through a bridge, may pass through and under it without danger to their personal safety, and the law does not require of a brakeman that he should absolutely know all the defects of construction and all the obstructions that may be along the line of the road."

We can perceive no distinction between a covered bridge and one without a top, save in the former obstructions may be concealed on the inside, not visible to the brakeman, but the court, in that case, was discussing the necessity of having the structure of sufficient height to enable the employe to pass over it with reasonable safety; and certainly of such height as to enable the brakeman to save himself from harm when duty to his employer required him to take extraordinary risks for the preservation of life and property.

The facts of this case come up to the full meaning of the term willful neglect, as defined by this court. They manifest what is equivalent to intentional wrong, and a recklessness evidencing the absence of all care for the safety and protection of the brakemen.

During the progress of the trial witnesses examined for the defense, as well as those for the plaintiff, were asked the question: "Has not the bridge been raised higher since the accident?" The answer was : "Yes; about eighteen inches or two feet."

Objections and exceptions were properly made and taken, for the reason that such testimony would authorize the inference that this was an admission of the negligence. The objection might be available if it was not shown by the testimony for the appellant and from the undisputed facts that the structure was too low for a brakeman to pass through without stooping, as upon this fact, connected with the circumstances attending the loss of life, the recovery must depend.

Several instructions were offered by the defense and refused. These instructions embraced the law of contributory neglect, the care the employe must take for his own safety, and the duty of the company to provide reasonably safe appliances for the protection of its employes. If a recovery is proper in this case the instructions should have been refused, and, in our opinion, the two instructions given by the court embodied the law.

"The court instructs the jury it was the duty of the defendant in the construction and maintenance of the overhead bridge where decedent was killed to so construct and maintain it, as to the height thereof, that its brakemen on top of the trains could pass under it, while engaged in the discharge of their duties, with reasonable safety to their persons while standing or walking on it; and if you believe from the evidence in this case the bridge was not so constructed and maintained as to the deceased as to the height thereof, and by reason thereof decedent was killed, you shall find for the plaintiff. Unless you believe from the evidence that decedent knew the said bridge was insufficient in height to enable him to pass under it with safety while on it, or that he recklessly, and with indifference to the consequences, exposed himself to the danger, in which latter state of case you will find for the defendant."

The second instruction was as to the measure of damages, "the criterion of which was the power to earn money had he lived, not exceeding the amount claimed." The instruction given in regard to negligence is based on such facts as would authorize the court to say to the jury, as a matter of law, that if the bridge was not of sufficient height to enable the brakeman to pass with reasonable safety, the company was guilty of willful neglect under the former decisions of this court.

It was doubted by Justice Lewis, in his dissent in Derby v. Ky. Central Ry., whether, if guilty of willful neglect, the issue of knowledge or want of knowledge on the part of the decedent as to the danger of the structure should have gone to the jury. The jury, however, passed on the question in this case, and rendered a verdict for the plaintiff.

The widow was introduced as a witness, and stated she had one child. The condition of his family was not made an element of damage in any instruction, and no reversal should be had on that ground.

The judgment below is affirmed.

PROCTOR v. BELL'S ADM'R.

(Filed March 9, 1895.)

An equitable action against one of several defendants in a common law judgment on a return of nulla bona can be maintained only when an execution has been issued against such defendant to the county of his residence, or to the county in which the judgment was rendered, and has been duly returned nulla bona.

Where several defendants in a judgment reside in several counties different from that in which the judgment was rendered, the issuing of an execution against all of them to the county where one of them resides and its return of "nulla bona" does not authorize the maintenance of an equitable action on such return against those defendants who do not reside in the county to which the execution was issued.

J.H. Power and G. A. Cassidy for appellant.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Paynter.

On the 8th of November, 1872, in the Nicholas Circuit Court, the appellee recovered a judgment for $515 against the appellant, A. W. Proctor, I. N. Proctor, Sr., and I. N. Proctor, Jr. In March,

1873, an execution was issued upon the judgment, directed to Fleming county, the then residence of the Proctors.

I. N. Proctor, Sr., and I. N. Proctor, Jr., then instituted an action in the Nicholas Circuit Court, alleging that the judgment had been improperly obtained against them, and that a large part of the judgment against them was wrong, as certain items with which they were charged, and which went to make up the amount of the judgment, were individual debts of A. W. Proctor, and for which they were not liable as his sureties, or at all. An injunction was sued out restraining the collection of the judgment of them.

After the pendency of this action until the 26th of Spetember, 1878, on that day, by consent of parties, an order was entered directing that the injunction should be dissolved, without damages, and that an execution on the judgment should be issued against M. W. Proctor, administrator of the estate of I. N. Proctor, Sr. (he having died pending the action), to be levied of assets, and against I. N. Proctor, Jr., for the sum of $289, interest and costs, thus fixing their liability on the judgment at that sum.

No execution, save the one directed to Fleming county in 1873, was issued upon the judgment until the 14th day of March, 1890, which also was directed to the sheriff of Fleming county, and which that officer made a return, in substance, no property found to satisfy the execution.

Upon the judgment obtained in 1872 and the return of no property found this action is based, and in which an attachment was obtained against the porperty of appellant. Two grounds of defense to the action were relied upon:

1st. That appellee could not maintain the action because no execution had ever been issued to Nicholas county, the county in which the judgment was rendered, or to Mason county, the county of appellant's residence.

2d. That no execution having been issued upon the judgment from March, 1873, until the 14th day of March, 1890, the right to an action upon the judgment was barred by the statute of limitation.

We are of opinion that both defenses are good, and we will consider them in the order stated.

Title 10, chapter 4, Civil Code, particularly prescribed the condition upon which the extraordinary equitable remedy may be applied to enforce the payment of a judgment. No rule in equity affords such a remedy as is done by the Civil Code in cases where there is a failure to collect the judgment by an execution. It being a statutory remedy, it must be strictly pursued. Every fact must exist as required thereby before the aid it intended to afford in the collection of a judgment can be invoked.

Under these provisions of the Civil Code the judgment creditor, by an equitable action, can subject any chose in action, legal or equitable interest in any property, to the satisfaction of the judgment. To aid in doing this without affidavit or bond he can procure an order of attachment against the property of the defendant.

By summary proceedings the court can enforce the surrender of money or secureties therefor, or for any other property of the defendant in the execution which may be discovered in the action, and for such purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender. When such extraordinary remedies are afforded a judgment creditor, and such vast power is conferred upon the court to enforce it, the law should be strictly followed. (Maddox v. Fox, 8 Bush, 402; Wetherford v. Myers, 2 Duvall, 91; Clements v. Waters, 11 Ky. Law Rep., 880.)

The testimony is entirely satisfactory that the appellant lived in Mason county when the execution was directed to Fleming county. The fact that one of the defendants in the execution lived in Fleming county when the execution was directed to and placed in the hands of the sheriff of that county, and by him returned no property found, did not authorize the appellee to maintain the action against the appellant.

When the execution is not directed to the county in which the judgment was rendered, then it must be to the county of the residence of that defendant against whom it is desired to institute an equitable action, as in this case. The fact that there are several defendants, and an execution is directed to the county of the residence of some of them, does not obviate the necessity of having one directed to the county where the judgment is rendered, or to the county of the residence of that one against whom it is proposed to institute proceedings on a return of no property.

It may be said that it will work a hardship upon the party holding the judgment because it may be difficult to learn, or may be uncertain as to the county in which the defendant resides; but this is not true because, when that is the case, the execution can be directed to the county in which the judgment is rendered and returned no property found, then the right to maintain the action is complete.

More than fifteen years had elapsed from the date of the issual of the first execution until the next was issued. It is insisted that appellant obstructed the collection of the judgment by a connivance with I. N. Proctor, Sr., and I. N. Proctor, Jr., in having the action instituted and the order of injunction issued. The injunction proceedings never suspended the collection of the judgment so far as the appellant was concerned. The appellant was made a defendant to that action. No relief was sought against him nor did he file any pleading in the action asking for any relief. He was a nominal and unnecessary party to it.

In the proceedings of I. N. Proctor, Sr., and I. N. Proctor, Jr., against the appellee a consent judgment was entered, fixing their liability on the judgment at $289, which was an acknowledgment that they were not liable as the appellant's sureties for the entire amount for which the judgment was obtained against them.

Although the appellant may have given his sureties the information that they were not liable for the whole amount of the claim which appellee asserted against him and aided them in proving it, yet as the injunction did not suspend the collection of the judgment as to him, it can not be said that he obstructed the collection of the judgment so as to prevent the running of the statute of limitation pending that litigation.

The statute of limitation barred appellee's right to maintain an action on the judgment, and the clerk should not have issued an execution thereon against appellant.

Judgment reversed, with directions to dismiss the petition.

LOUISVILLE, ST. LOUIS & TEXAS RY. CO. v. BOURNE & EMBRY.

(Filed March 12, 1895—Not to be reported.)

1. Carriers of live stock—Contract limiting liability—A common carrier receiving live stock for transportation over its own and connecting lines may by contract limit its liability for any delays at connecting points caused by the refusal or inability of the connecting line to take charge of the stock

after receiving notice of their arrival on the connecting track; but it is the plain duty of the initial line, under such contract, to promptly notify the connecting line of the arrival of the stock at the receiving track.

2. Same—Pleadings—Where the initial line is sued for damages to the stock resulting from delays after arriving at the connecting point and before being received by the connecting road, and its defense is that it gave prompt notice to the connecting line of the arrival of the stock, it is its duty to plead affirmatively the giving of such notice to the connecting line and to aver what connecting line it did give notice to.

Therefore, an averment that it gave notice to a certain official, who was the proper official to see that the stock was duly transferred, but did not know whether the connecting line was operated by one of two railroad companies or by a third railroad company, is insufficient. It is presumed to know the company to which it gave notice.

Helm & Bruce for appellant.

O'Neal, Phelps & Pryor for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Hazelrigg.

The cattle of the appellees are alleged to have been injured while waiting to be delivered to the agents of certain connecting lines in the city of Louiville. They were shipped by the appellant under a contract releasing it from responsibility for delays at terminal points, caused by the refusal or inability of the connecting line to take charge of them after notice of their arrival on the receiving track; and while we may admit that the carrier may thus, by contract with the shipper, limit its responsibility, yet it was its plain duty to have promptly notified the connecting line of the arrival of the stock.

This duty is admitted in this case, and appellant's defense is that it did promptly notify its co-defendants, the Louisville Southern R. R. Co. and the Kentucky & Indiana Bridge Co., of such arrival; and these carriers, it is alleged, controlled the recieving track and furnished the motive power for conveying the cattle to the yards to which they were consigned.

By their reply the plaintiffs denied that such notice had been given, and the two companies also denied having received such notice. On this issue of notice or no notice to the connecting lines the case was heard.

The appellant failed to show any notice of the arrival of the stock to either of these companies, and, therefore, tendered an amended answer, in which it averred that it had notified the officer who should have been notified in order to get the cattle transferred to the proper yards, but that whether the line was operated at the time by the two companies theretofore named or by the Louisville, New Albany & Chicago Ry. Co. it did not know.

This pleading was tendered upon the conclusion of the trial and was permitted to be filed, but seems not to have been regarded, as judgment was rendered for the plaintiffs.

It seems to us that as the duty devolved on the appellant to notify the proper connecting line, it was incumbent on it to aver affirmatively what line it did notify. This was its defense, and must have been pleaded in unequivocal terms. It certainly must have known to whom it gave notice, and the plaintiffs were entitled to know, so as to meet the issue presented by the answer.

The plaintiffs, it is true, had joined the two companies first named as defendants to their action, but this was because, as is

alleged, the shipping company, before the suit was brought claimed to have given the companies the required notice as receiving lines. If they were not in fact the proper lines to notify the answer should have disclosed the name of the company to whom the notice was in fact given. The superintendent of the appellant, as well as its inferior officers, prove that they knew that the Louisville, New Albany & Chicago Ry. Co. were operating the receiving line when the plaintiff's cattle were placed on the receiving track. (See contra L., St. L. & T. Ry. Co. v. Bourne, &c., 16 Ky. Law Rep., 445.)

It was neither in furtherance of justice nor in order that the pleadings might conform to the proof that this amendment was permitted to be filed, and, moreover, when filed, it presented no defense.

Judgment affirmed.

JOHNSON v. HICKS' GD'N, &c.

(Filed March 13, 1895.)

1. Where a solvent debtor of an infant qualifies as his guardian he is in law charged with the amount of his debt as cash received by him as guardian, for which his sureties as guardian are liable.

H. was indebted to certain infant, the debt being evidenced by a note signed by himself, and T. as his surety. Subsequently, and when solvent, he qualified as guardian of the infant, and T. and J. became sureties on his bond as guardian. In an action against his sureties as guardian to recover the money he failed to pay his wards, Held—In law the guardian is charged with the debt owing by him to the wards at the time of his qualification, and the sureties on his bond may be held liable for said sum.

2. Where one of the sureties on the guardian's bond was also a surety on the note held by the wards as against the guardian at the time he became guardian, that fact does not entitle the other surety on the bond to a judgment over against his co-surety for the part of the note he was compelled to pay because the guardian was charged with it as cash, and failed to pay it over to the wards.

S. B. & R. D. Vance for appellant.

Yeaman & Lockett for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

It appears that James T. Hicks was the guardian of Wirt Hicks and Baxter Hicks. While acting as such guardian he loaned to Wm. Hatchitt some money belonging to his wards, for the balance of which Hatchitt executed his note for $953.68, with the appellee, John T. Hatchitt, as his surety. After the maturity of the note, and before it was paid, James T. Hicks died. Wm. Hatchitt became administrator of his estate and also qualified as the guardian of Wirt and Baxter Hicks. On Wm. Hatchitt's bond as guardian the appellee, John T. Hatchitt, and the appellant, A. S. Johnson, became his sureties.

Wm. Hatchitt was removed as guardian and the Ohio Valley Banking and Trust Company was appointed guardian of Wirt and Baxter Hicks. The former guardian, Hatchitt, failing to pay to the guardian the amount for which he was liable to his late wards, these actions were brought against his sureties, Johnson and Hatchitt. The court rendered judgment against them for the amounts due each ward.

The appellant, by an appropriate pleading, denied his liability for any part of the amount for which the action was brought, and insisted that his co-surety, John T. Hatchitt, being solvent and liable as surety on the note which Wm. Hatchitt had executed to Hicks' guardian, that in the event that the present guardian should be permitted to recover of him, then he should be allowed to recover against John T. Hatchitt such amount as he was compelled to pay in consequence of his liability on the bond of Wm. Hatchitt as guardian.

On the other hand it is contended that Wm. Hatchitt charged himself as guardian with the amount of the note which he owed the former guardian of his wards, or if he did not formally do so, being solvent when he qualified as their guardian, in law he was charged therewith, and should be treated therewith as a cash asset in his hands.

The testimony conduces to show that James T. Hicks commenced, but failed to complete a settlement of his accounts as guardian with the county judge; that afterwards Hatchitt, as guardian, completed the settlement which Hicks began, in which it appears that the assets in the hands of the guardian are treated as cash.

Wm. Hatchitt testifies that he held the notes as so much money in his hands belonging to his wards, but it does not appear that he made any charge in any book to that effect; in fact it does not appear that he kept any book containing an account as guardian.

John T. Hatchitt testifies that Wm. Hatchitt, soon after he qualified as guardian, gave him to understand that the note came to his hands as so much cash. He never turned the note over to the present guardian.

From the foregoing facts it must be concluded that Wm. Hatchitt in effect charged himself as guardian of the amount of his note, and his sureties in the bond which he executed as guardian are liable to the wards therefor.

Even if nothing had been done by the guardian indicating a purpose to charge himself with the amount of his note, he was in law charged therewith, as he was solvent when he qualified as guardian.

When a debtor who is solvent qualifies as the administrator of the estate of his creditor, or as the guardian of infants, the amount which he owes such estate must be treated as a cash asset coming to his hands, for the proper disposition of which his sureties in his bond are liable. (Karr's adm'r v. Karr, 6 Dana, 6; Hickman v. Kamp, 3 Bush, 206.)

The fact that John T. Hatchitt was his surety on the note does not change the law which should be applied to the case. When Wm. Hatchitt qualified as guardian and got possession of the note the right to an action was suspended thereon, as it could not be expected that he, as a guardian, would sue himself thereon.

The surety on the note had his position altered, as he could not obtain the relief which the statute would have given him before Wm. Hatchitt became the guardian, in this, that he could not give a notice requiring the holder of the note to sue, thus releasing himself of liability in the event of a failure of the holder of the note to sue. We think Wm. Hatchitt being solvent when he qualified as guardian of the Hicks children, his sureties became liable on the bond for the amount of the note which he owed the former guardian.

It follows from the views expressed that the appellant was not entitled to recover of appellee, John T. Hatchitt.

Judgment affirmed.

MEADER FURNITURE CO. v. CITY OF NEWPORT.

(Filed March 21, 1895—Not to be reported.)

Root & Root for appellant.

Thos. P. Carothers for appellee.

Appeal from Campbell Criminal Court.

Opinion of the court by Judge Paynter.

This is an appeal from a judgment of the Campbell Criminal Court imposing a fine of $1 on the appellant for the violation of an ordinance of the city of Newport.

This court has no jurisdiction to review a judgment imposing a fine of $1 (section 347, Criminal Code), therefore, this appeal is dismissed.

GREEN v. CASEY, ADM'X, &c.

(Filed March 14, 1895—Not to be reported.)

Mortgages—Acceptance of deed—Evidence—In this action a creditor claims a mortgage lien on certain lots as the property of a decedent; the decedent's wife claims that said lots belonged to and were paid for by her, and that she had held same adversely for more than thirty years, and that her husband had no right to mortgage same to secure payment of his debts. Two deeds or papers executed prior to the marriage of decedent and his wife, and conveying the lots to the husband, were found lodged in the clerk's office. The last deed was acknowledged by the vendors after the marriage of the decedent. It is held that there is no evidence showing that the husband paid for or ever claimed the property as his own; that his wife paid for same; that it was to be conveyed to her and that she held it adversely for more than thirty years, and that the husband never accepted the deeds to himself. The wife is adjudged the property free from the alleged mortgage lien.

W. E. Selecman and W. C. McChord for appellant.

John W. Lewis for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Guffy.

In February, 1891, the appellant, Jas. Green, instituted suit in the Washington Circuit Court against the appellee, M. L. Casey, &c., seeking to subject three lots in the town of Springfield, Ky., also six acres of land, to the payment of a mortgage executed to him by M. R. Casey.

The appellee, who was also administratrix of M. R. Casey, pleaded usury and payments, and also asserted claims to the three lots, averring that she had paid for them with her own means, earned, held and owned by her before her marriage, and that the lots were to have been conveyed to her, and claimed that she had been in the actual, adverse possession of same from 1856 to the time of filing this suit.

The court below adjudged that plaintiff had a lien upon the six acres of land, and adjudged a sale of same to pay plaintiff's debt sued on, adjudging that plaintiff's debt was not subject to any

credit and that it contained no usury, but adjudged that appellee was the owner and entitled to the three lots in contest, and from the latter part of the judgment appellant has appealed, and insists that the same should be reversed, and urges that the fact that two writings from Fox, who it is admitted once owned the lots, being found lodged in the county clerk's office, reciting a sale to M. R. Casey, and acknowledging payment of a part of the purchase money, and bearing date prior to the marriage of appellee to decedent, is conclusive as to the title of decedent to the lots, at least so far as creditors are concerned.

The first paper was dated November 16, 1852, but was only signed by Jesse Fox, and a memorandum on the back as follows: "November 17, 1852. Acknowledged by Jesse Fox," etc. No signature to said memorandum. This paper recited that $400 had been paid, and the residue secured by notes.

The other deed or paper bore date of February 22, 1854, and purports to convey the same property, and recites that $555 had been paid, the balance as follows, $45, being the balance on a note for $200 due October 7, 1853, and a note for $200 due October 1, 1854. This deed, if we may call it a deed, was signed by Fox and his wife, who, it seems, were then in Spencer county, and acknowledged by them February 22, 1855, one year after it appears to have been written.

From the evidence of the clerk of the Washington Circuit Court it appears that both of these papers were left in his office prior to 1869; that he has been clerk of said court ever since 1869, but he could give no information as to how these papers came to be in his office. No tax had been paid on them to his knowledge, nor any endorsement showing that they had been lodged for record, and that no one had ever given him any order to record either paper.

It will be seen that the papers bear date prior to appellee's marriage, but the acknowledgment of the grantees was nearly a year afterwards. The deeds fail to show who made the payments or who executed the notes or what notes are meant.

It may be fairly concluded that the paper dated November, 1852, was considered by all the parties of no effect, else the one of 1854 would never have been executed; and as the acknowledgment of the deed of February, 1854, was not made until February, 1855, it may be taken as true that the conditions or requirements of the vendors had not been complied with at the date of the deed, hence we conclude that the dates of these two deeds and their recitals do not disprove the claim of appellee that she bought and paid for the lots in contest, and they were to be conveyed to her.

There is no evidence in this case finding that decedent ever lodged said deeds in the county clerk's office, and, although he resided in Springfield for more than thirty years after the date of the deeds, he never ordered either one to record nor ever accepted same; and unless he did accept it, no title, legal or equitable, ever vested in him to the lots, and it follows that if he had no title to the lots, that he could not create a lien in appellants' favor by the execution of the mortgage.

It does not appear that appellant ever knew of the existence of the deed, hence did not, and could not, have given credit on account of its execution.

If the lots had been conveyed to M. R. Casey by deed, acknowledged and recorded, then under the law, as held by this court in numerous cases, the mortgage would have given appellant a lien for his debt, and although appellee's claim as to her purchase and payment might be true; but in this case it appears that ap-

pellee bought and paid for the lots; that they were to be conveyed to her, and that she occupied, claimed and held the same as her own for more than thirty years before execution of the mortgage. The legal title never vested in decedent, and inasmuch as appellee's equity is prior in time to that of appellant, it must prevail.

It does not appear that any considerable amount, if any, of improvements were placed upon the land by decedent after the creation of the debt sued on, hence the question of improvements is of no consequence in this case.

The controversy was between appellee and appellant, and appellee was a competent witness, especially after appellant had tesitfied.

It is noticeable that the mortgage executed to plaintiff includes six acres of ground not in contest in this suit, and that decedent mentioned his vendor from whom he purchased same, but nowhere claimed or asserted any title to the lots in controversy. There is some evidence conducing to show that appellant knew, before taking the mortgage, that appellee had paid for the three lots.

Taking all the evidence together, we are of the opinion that the proof authorized the judgment of the court below, and the judgment is, therefore, affirmed.

TOWN OF WEST COVINGTON v. SCHULTZ.

(Filed March 19, 1895—Not to be reported.)

Injury to abutting property by street improvement—Where a street is constructed or improved by a city in a proper and reasonable manner, the owner of a dwelling abutting on the street can not recover damages from the city for diminution in the value of his property caused thereby, provided none of his property rights are invaded; but where the improvement is so made as to result in immediate and direct injury to his property, by causing water to flow through his lot and dwelling and by filling his lot with dirt, so as to prevent ingress and egress from the doors and windows of the first story of his house, the city is liable. Where such an injury and trespass has been done by the city it is no defense to allege that the city had a right to make the street improvement in accordance with a city ordinance.

Orlando P. Schmidt and Hallam & Myers for appellant.

Tisdale & Gray for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action is against the town of West Covington, based on an injury to the dwelling of Maria Schultz, located on Peter street. The building was erected on the hillside, when, in grading the street under an ordinance of the town under the supervision of its engineer, the building, by reason of the grading and leveling of the street, was not only made uninhabitable but ruined.

The tes timony shows that this building was erected before the street opposite was improved, and the house, or its foundation, stood below the grade of the street, as laid out by the town authorities, and the appellee, as we must assume, had built her house under a mistake as to the grade of the street, and this the proof conduces to establish.

In the construction of this street the contractor placed dirt upon the premises of the plaintiff to the depth of five or six feet,

against her doors and windows, preventing ingress and egress by the front door or the window, and by entirely covering her shrubbery on her lot back of her house. The work was also so carelessly done as to cause water, after rains, to flow in large volumes through her dwelling, and to such an extent as compelled her to abandon it. While the town denies the injury, the proof is conclusive on that subject, and the defense is that the town had the right to grade this street in accordance with the ordinance, although it might injure appellant's premises.

This is a mistaken view of the law; for where there is a trespass or an entry upon the premises of the owner and injury results, an action can be sustained for the wrong.

The facts in this case show not only an inconvenience to the property owner, or the making of a low or high grade in front of appellee's property that might lessen its value, and to which the property owner must submit unless it should interfere with the right of ingress or egress, and not then if the town supplies the right of way, but it is an invasion of private right, terminating in the destruction of the property.

It was the duty of the city to have erected a barrier to this dirt, so as to prevent the injury to the building, or required the appellee to do so; but to destroy her property because the street had to be graded, to comply with the ordinance, is no defense whatever, and doing so knowingly is an aggravation of the wrong. The cases of Kemper v. The City of Louisville, 14 Bush, 87, and Pearson v. Zabel, 78 Ky., 170, sustain this view of the question.

The owners of lots hold them subject to the right of the city to improve them in a proper and reasonable manner, and there is no remedy, although there may be a diminution of value to the lots by reason of the improvement; but when the improvement results in a direct injury to the lots, as causing water to flow upon them in such a manner as to injure the value, or to throw dirt upon the premises against the consent of the owner, in all such cases an action will be allowed for the injury, if the city authorities direct the execution of the work in the manner causing the injury.

There is some question raised as to the reply of the plaintiff to the answer of the defendant, in which it is claimed there was a cause of action or complaint that should have been set up in an amended petition. We have examined the pleadings and find no departure from the original cause of action, or any fact alleged in the reply that could not have been proven under the averments of the original petition, and in fact the reply was but a denial of the defense made by the answer, and the statement in the reply "that by the faulty construction of the street the water had been collected in a large stream and caused to flow over her premises and through her cellar," is not the averment of any fact that could not have been shown by proof under the allegations of the original petition, as it is there averred that the filling up of her lot and covering her premises with the soil caused the water, after heavy rains, to run into her premises," etc.

We do not see how the appellant is to escape paying for the value of this house that it has destroyed, nor is there any valid reason why it should not be held responsible.

The instructions refused were all, save one, based on the idea that the town had the right to grade this street, although it resulted in this great injury to the plaintiff, and such is not the law. An instruction, specific in its character, was refused, to the effect that if this injury was caused by the breaking or slid-

ing of the hill on the premises of another, the town was not responsible. The issue was whether or not the injury resulted from the act of the town, and the jury could not have been misled as to the real issue by the refusal of this instruction. The sole issue really was "the extent of the injury sustained;" and in estimating the damages the jury have not gone beyond the limit fixed by the testimony.

The instructions given the jury, including the word grievances, of which complaint was made, while not sufficiently specific, did not mislead the jury, for the question was: Did the act of the city ruin appellee's dwelling, causing her to abandon it? If answered in the affirmative, the verdict was proper, and fully sustained by the evidence.

Judgment affirmed.

Judge Pryor delivered the following response to petition for a rehearing:

Counsel for the appellant are laboring under a misapprehension as to the effect of the decision in this case, or its departure from any well-settled rule on the subject.

"The public, like a private person, must so use its own as not to injure another's property," and, although every citizen of a town or city owning real estate holds it subject to the right of the city to improve its streets, and if, in making such an improvement, there is no invasion of private right, but only a diminution in value of the property bordering upon it, caused by the improvement, the owner is without remedy; but to hold that the rights of the citizen are not to be protected where there has been an actual trespass and a destruction of the property itself, would vest in the city authorities a power unheard of in a government like ours.

The city in this case is defending upon the ground of its right to actually barricade the doors and windows of the owner's dwelling; to make it uninhabitable because, as is contended, the property or improvement may be subjected to this trespass when necessary for the construction of these improvements.

We know of no case sustaining such unlimited power on the part of either the State or municipal government, and, while recognizing the rule that for an incidental injury to the owner by making such improvement no action can be maintained whenever a private right has been invaded, a full and complete remedy may be had.

Petition overruled.

SELLARS v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO.

(Filed January 19, 1895—Not to be reported.)

1. New trial—Grounds—A statement in a motion for a new trial that the verdict is contrary to law, is not sufficiently defined to authorize a review of the judgment appealed from. The alleged error of law must be specified in the motion to authorize this court to consider and determine it.

2. Same—Newly-discovered evidence—Newly-discovered evidence, which is merely cumulative and which, it appears, could have been discovered and produced at the trial by the exercise of reasonable diligence, does not entitle a party to a new trial.

G. W. Shadoan for appellant.

C. B. Simrall and O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Lewis.

The jury having, in this action to recover for cattle killed by a railroad train, returned a verdict for defendant, plaintiff moved for a new trial upon three written grounds, to which we must be confined in revising the judgment appealed from:

1st. Because of accident or surprise which ordinary prudence could not have guarded against.

2d. Because the verdict is not sustained by the evidence, and is contrary to law.

3d. New discovered evidence, material for the plaintiff, which he could not, with reasonable diligence, have discovered and produced at the trial.

It is not indicated wherein there was accident or surprise, and of course the first ground must fail.

To say, in general terms, that a verdict is not sustained by the evidence, is presenting no specific or sufficient reason for us to disturb it. It is not stated to be nor is it in fact flagrantly against the evidence, nor can this court, upon the bare statement in grounds for a new trial that the verdict is contrary to law, revise the judgment appealed from. There must be some alleged erorr of law specified to authorize this court to consider and determine whether the motion for a nontrial was properly overruled.

The third ground can not avail because the evidence described as newly discovered is merely cumulative. Besides, it does not appear to us it could not have been discovered and produced by exercise of reasonable diligence.

Judgment affirmed.

CHESAPEAKE & OHIO RY. CO. v. YOST.

(Filed February 5, 1895—Not to be reported.)

1. Willful neglect is a degree of neglect that applies only to actions to recover for loss of life, wherein, if established, punitive damages are recoverable, and the plea of contributory negligence constitutes no defense. This degree of negligence does not arise in action to recover damages for injury to property.

2. The allegation that a horse and wagon was injured by the "willful neglect" of defendant railroad company should be regarded as synonymous with an allegation of "gross neglect," or at least to embrace all degrees of neglect, from gross to ordinary.

3. Contributory negligence may be pleaded as a defense to an action to recover damages for an injury to a horse and wagon through the gross negligence on the part of those in charge of defendant railroad company's train of cars.

F. T. D. Wallace and Wadsworth & Cochran for appellant.

Brown & Brown for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, W. B. Yost, instituted this action below to recover of the appellant, the Chesapeake & Ohio Ry. Co., damages for an injury to his horse and the wagon in which the horse was being driven, caused by the negligent operation of its train of cars at a crossing near Catlettsburg.

The defense is that the injury was caused by the negligence of the driver of the wagon, and was unavoidable on the part of those in charge of the train.

There is evidence conducing to show negligence on the part of the defendant, and also testimony tending to establish contributory negligence on the part of the driver of the team. The court gave the proper instruction as to contributory neglect, saying to the jury that if the plaintiff's driver was guilty of such neglect as caused the accident, and but for which the collision would not have taken place, they must find for the defendant, but qualified that instruction by the instruction following it, to the effect that if the defendant was guilty of willful neglect, they must find for the plaintiff, notwithstanding the negligence of plaintiff's driver contributed to the injury, unless the jury believe from the evidence that after the horse and wagon were in danger from collision, the defendant's employes could have prevented the collision by the use of proper care and diligence, etc.

In what manner the latter part of the instruction was to be applied to the facts we can not well see, and, while it is law, its effect, when made part of instructions, was calculated to confuse the minds of the jury.

Willful neglect is a degree of neglect that applies alone to actions brought for loss of life, and must be established before punitive damages can be awarded, and the plea of contributory neglect constituted no defense under the statute authorizing such actions.

Where property is injured, as in this case, the plea of contributory neglect is, if established, a good defense, and the question as to who is in fault should be left to the jury, whether the charge is gross or ordinary neglect.

The term willful neglect, alleged in the petition, should be held to be synonymous with gross neglect, or at least to embrace any degree, from gross to ordinary neglect, but the court should not assume to tell the jury that if gross neglect is established contributory neglect will not avail. Gross neglect may be defined, and while those in charge of the train may have failed to blow the whistle or give the proper signal of its approach to the crossing, still if the plaintiff was guilty of such neglect as but for that neglect the accident would not have happened, the defendant would be entitled to a verdict.

For instance, if the appellee's driver had gone onto the track without stopping or looking to see or listen whether a train was approaching, but recklessly went on the track and the horse and wagon were injured, the verdict should be for the defendant.

While, on the other hand, if the negligence consisted in the driver going onto the track without listening or looking for the train's approach, and the employes saw the danger, and, notwithstanding the negligence of the driver, could, by the exercise of ordinary care and prudence, having due regard to the safety of those on board the train, have avoided the injury, and failed to do so, the company would be liable.

The issue in this case is plainly made. If the plaintiff's driver stopped and listened when near the crossing and heard no train approaching, and there was no signal given by those in charge so as to warn the driver of the approach of the train, or, if given, not until the train was too near for him to avoid the danger, then plaintiff is entitled to a verdict. On these material facts the evidence is conflicting, and it is for the jury to say whose neglect caused the injury.

Reversed and remanded for a new trial. (Owen, &c. v. L. & N.R. R. Co., 87 Ky., 630.)

SPAULDING, &c. v. THOMPSON, &c.

(Filed March 13, 1895—Not to be reported.)

1. Land owned by a wife should be listed for taxation in her name and not in that of her husband; and where it is assessed and sold for taxation as the property of the husband the purchaser does not acquire the title of the wife.

2. Same—Pleadings—In an action by the husband and wife to set aside the tax sale of her land, sold for taxes as the property of her husband, on the ground that the husband possessed horses, cattle, household and kitchen furniture, out of which the taxes could have been collected at the time of the sale, an answer by the purchaser is insufficient which avers that at said time the sheriff and others had returned executions against the husband "no property found," and that the horses and cattle were mortgaged for debts in excess of their value, and that the mortgage liens were prior and superior to the lien for taxes.

H. P. Cooper for appellants.

Lev Russell for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

Isabella Thompson owned a tract of land in Marion county, Ky., and in the year 1890 it was listed for taxation in the name of her husband, D. T. Thompson, and sold for his taxes, at which sale the appellant, H. P. Cooper, became the purchaser. This action was brought to set aside the sale.

It is alleged, among other things, that D. T. Thompson owned personal property, consisting of horses, cattle, household and kitchen furniture, out of which the taxes could have been made. Appellees anwered that the sheriff and other officers, "at the time complained of, before and since," returned execution against D. T. Thompson no property found; that the horses and cattle were mortgaged for sums largely in excess of their value, and when one or more of the mortgages were sought to be foreclosed could not be found, etc.; that the mortgage lien was prior and superior to that for taxes.

The court sustained a demurrer to the answer.

Failing to amend, the court adjudged that the sale should be set aside. From that action of the court this appeal is prosecuted.

The answer did not state facts constituting a good defense. In the first place the assessor should have listed the land in the name of the owner, Isabella Thompson. The land not having been so listed, no sale of it, as the property of her husband, for his taxes could deprive her of the title to it. The sale was invalid. (Wheeler v. Bramel, 10 Ky. Law Rep., 301.)

The fact that there were mortgage liens on the horses and cattle of the husband did not prevent the seizure and sale of them to pay his taxes. These liens were inferior to that existing for taxes. (Sections 2 and 8, article 9, chapter 92, General Statutes.)

The sheriff was not authorized to sell the land for taxes, there being personal property out of which he could have made them. (Section 15, article 9, chapter 29, General Statutes.)

It is not alleged there was any mortgage lien upon the household and kitchen furniture of D. T. Thompson, nor was it denied that the taxes could have been made out of this property. We do not think the court erred in sustaining a demurrer to the answer.

Judgment affirmed.

JACKSON, &c. v. ROSE, &c.

(Filed March 13, 1895—Not to be reported.)

Settlement of guardian's accounts not set aside—A settlement of the accounts of a grandfather as guardian of his granddaughter, who resided with him, by allowing him certain sums for her maintenance and education, will not be disturbed or set aside, although the guardian may not have been charged with as much interest as was due the ward, especially when it appears that the guardian was not credited with sums for maintenance of the ward at the times they were really chargeable, and that a readjustment of the whole interest account would be unfavorable to the ward, and that the additional sums, if any, found due the ward would have to be paid out of the small pittance left her grandmother, with whom she resided up to the time of her marriage.

J. C. Gilbert for appellants.

J. W. Dycus for appellees.

Appeal from Marshall Circuit Court.

Opinion of the court by Judge Hazelrigg.

At the time of the death of H. W. Rose in 1882 he was the guardian of the female appellant, Martha E. Jackson, then Thomason, who was his granddaughter and whom he had raised and provided for since her infancy.

A settlement of the accounts of Rose as administrator of appellant's father, made in 1879, showed a balance in his hands of $432.19, which belonged to his ward.

Upon his death L. B. Rose qualified as such guardian, and J. K. P. Rose as administrator of H. W. Rose. The former presented a claim of $536.08 against the administrator, and upon his refusal to pay it was about to institute suit therefor. After consulting their attorneys, however, it was agreed by the parties to submit the matters in issue to arbitration.

The defense to the guardian's claim was that for some twelve years the ward had been taken care of, sent to school, provided with clothing, medicines, etc., and a reasonable compensation therefor, it was claimed, should be allowed. The arbitrators met, heard proof and allowed the administrator the sum of $385, in full of the claim. The granddaughter continued to live with her grandmother without further charge.

After her marriage in 1892 her husband brought this suit, in which the wife is made a party plaintiff, against the appellee, J. K. P. Rose, administrator of H. W. Rose, and the appellee, C. York, his surety on his bond as such administrator, seeking to surcharge the settlement of 1879, and charging fraud in the procurement of the arbitration. The chancellor dismissed the petition.

It may be that the sum found due in the settlement in the county court in 1879 was somewhat too small because interest does not appear to have been computed on a former balance in biennial rests; but it is apparent that had the small charges allowed the guardian for the keep of the child been credited as of the dates when they were in fact due, the result would have been less advantageous to the ward than the plan adopted by the arbitrators.

It is contended, however, that the former guardian did not intend to charge for board, etc., and this may have been his intention had he lived, but upon his death it seems to have been re-

garded as right by the grandmother, the uncle of the child and other relatives to settle the matter of compensation in some just way, especially as the sum found due the ward would have to be paid out of the small pittance left the grandmother, who had borne the burden of raising the child since she was a few months old, and who still had her in her care.

The chancellor found no evidence of fraud in the arbitration, nor do we. If there were errors of law or fact in the award they do not appear to have been hurtful to the interests of the ward to any significant extent.

Judgment affirmed.

MONIG'S ADM'X v. PHILLIPS, &c.

(Filed March 14, 1895—Not to be reported.)

Landlord and tenant—Allegations of answer admitted by failure to file reply—An answer alleging that M. made a written surrender of all interest in his lease and delivered possession to the landlord, who, being thus in possession, made a lease of the premises to defendant, who then took possession, being admitted by the failure of M. to file a reply, must be taken as true; and, being so taken, M. has no right to an injunction restraining defendant from cultivating the premises or removing his crop.

O'Neal, Phelps, Pryor & Selligman and Gibson, Marshall & Lochre for appellant.

M. A., D. A. & J. G. Sachs for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

April 19, 1888, H. Monig brought this action for an injunction restraining J. R. Phillips from interfering, himself or through others, with plaintiff in his use, occupation and cultivation of thirty-seven acres of land described, which it was alleged defendant was, by violence and threats, doing.

In an amended petition, filed in October, 1888, it is alleged that Frank Kuster and G. H. Kuster, also made defendants, had forcibly and unlawfully deprived plaintiff of possession of the land, and against his will cultivated crops thereon, to prevent removal of which he asked and obtained an injunction, and also judgment for damages for being deprived of possession.

It appears that July 18, 1881, by written contract, J. R. Phillips leased the land in question to J. R. Korfhage for the term of ten years, the entire rent being paid in advance; and October 2, 1885, for consideration paid, donee Korfhage, as he had reserved in the contract right to do, sublet for residue of the term to H. Monig, who cultivated it during the years 1886-7, not, however, residing upon it.

The land did not belong to J. R. Phillips, but to his infant children and his wife, and, consequently, as provided by section 6, article 2, chapter 48, General Statutes, he had no power to lease it longer than a term of seven years; but that period did not end until July, 1888, and the lease was still in force when Phillips, as plaintiff alleged, took forcible possession and leased the land to G. H. Kuster. So they were both wrongdoers—one in depriving

him of possession by threats and violence, if he was guilty, and the other in going upon and cultivating the land, if done against his will.

But in his answer G. H. Kuster states that April 5, 1888, plaintiff, H. Monig, through his son and authorized agent, agreed in writing to give up possession to J. R. Phillips, agent of his wife and guardian of his children, and in pursuance thereof moved his crop therefrom and surrendered possession; and that on March 6 J. R. Phillips, being in possession, leased the land to him, G. H. Kuster, from that date until March 1, 1889, under which he took possession and raised crops that plaintiff seeks to enjoin him from removing or appropriating.

No reply was filed by plaintiff, and, consequently, it must be taken as undenied and true, whatever may be the evidence produced, that the posssession was taken by Phillips and the land cultivated by G. H. Kuster, not forcibly or against the will of H. Monig, but by his agreement and consent; and such being the case, he can not maintain the action, and the judgment dismissing it is affirmed.

PAYNE v. COMMONWEALTH.

(Filed March 28, 1895—Not to be reported.)

1. An indictment for a misdemeanor may be tried when the defendant is not present, and his failure to appear and plead to such indictment, after due service of process upon him, is in law a confession of the allegations contained in the indictment.
2. Criminal law—Continuance—Where the defendant was prevented from attending trial of an indictment against him for a misdemeanor, by reason of illness, and his attorney employed to defend was absent without his knowledge, and the allegations of the indictment were taken as confessed by him, he is entitled to a new trial.

T. F. Hallam for appellant.

Wm. J. Hendrick and W. W. Cleary for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Guffy.

In June, 1894, an indictment was returned by the grand jury of Kenton county against the appellant, John A. Payne, accusing him of the offense of common nuisance, and on June 26, 1894, the case was assigned for trial on October 2d thereafter, upon which process was duly issued and duly executed.

On October 2, 1894, the indictment was taken for confessed and case set for the 9th inst., and on October 10, 1894, it appears that appellant failed to appear, thereupon a jury was empannelled and sworn and returned a verdict of guilty, and fixed the fine at $1,500, and judgment was entered in accordance with the verdict. On October 26, 1894, the appellant filed motion and grounds for a new trial, which motion was overruled by the court, and defendant has appealed to this court.

Appellant insists that the court could not lawfully try the case in defendant's absence, nor take the indictment for confessed. It seems clear to us that under the provision of the Code that indictments for misdemeanors may be tried in the defendant's absence, and his failure to plead to the indictment is in law a confession of the allegations of the indictment.

The decision of this court, in case of Commonwealth v. Cheek, 1 Duvall, 26, is a correct enunciation of the law as to the contention aforesaid.

The affidavit of the appellant and that of his physician, Dr. Taylor, show that defendant was unable to attend the trial, and that he had employed an attorney to defend for him, who was absent, without appellant's knowledge. These facts entitled appellant to a new trial.

The judgment of the court below is reversed and cause remanded, with directions to set aside the judgment and award the appellant a new trial and for further proceedings consistent with this opinion.

SHARP v. COMMONWEALTH.

(Filed March 28, 1895—Not to be reported.)

An indictment for a misdemeanor may be tried when the defendant is absent, and his absence and failure to plead may in law be taken as a confession of the allegations of the indictment.

T. F. Hallam for appellant.

Wm. J. Hendrick and W. W. Cleary for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Guffy.

On June 12, 1894, the grand jury of Kenton county returned an indictment against the appellant, S. L. Sharp, for a nuisance, and on the 26th inst. the case was assigned for trial on October 2d thereafter. Process on said indictment was duly issued and served on the defendant. On October 2d the indictment was taken as confessed, and case set for the 9th inst. for trial.

On October 10th, the defendant failing to appear, a jury was empannelled and sworn, and returned a verdict finding the defendant guilty and fixed the fine at $2,000, and judgment was thereupon rendered against defendant for said sum of $2,000.

On October 26, 1894, the appellant moved the court for a new trial and filed grounds therefor, which motion was overruled by the court and defendant has appealed to this court.

Appellant contends that the indictment could not be taken as confessed, nor could a trial be had in his absence. We are of opinon that the Code of Practice authorizes the trial of indictments for misdemeanors in the absence of the defendant, and his failure to appear and plead to the indictment is in law a confession of the averments contained therein. (Commonwealth v. Cheek, 1 Duvall, 26.)

But it seems to us that the affidavit of appellant sufficiently accounts for his absence and failure to appear and make defense, hence a new trial should have been given him.

The judgment is, therefore, reversed and cause remanded, with directions to the court below to set aside the judgment and award appellant a new trial, and for further proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. HINDER.

(Filed March 28, 1895—Not to be reported.).

Master and servant—Defective machinery—A railroad employe can not recover for damages sustained by him through the use of defective machinery furnished by the railroad, unless the evidence shows that the machinery was defective; that the railway knew, or ought to have known, of the defect, and that the employe did not know of it or have means of knowing equally with his superior employes.

Where an employe was injured by the breaking of a wooden handle attached to the iron lever that propelled a hand car, and the defect, if any, in the wooden handle was so hidden by the iron socket of the lever that it could not be discovered by looking at or inspecting the handle, or without actually removing it from the lever, and the railroad employes, superior or subordinate, had not knowledge of the defect, the company is not liable

J. A. Craft and J. W. Alcorn for appellant.

H. C. Eversole for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Eastin.

This action was brought by appellee against appellant for the recovery of damages for personal injuries sustained, and resulted in a verdict in the court below in favor of appellee for the sum of $750, and from the judgment entered thereon this appeal is prosecuted.

The accident which caused the injuries complained of seems, from the evidence, to have been brought about by the breaking of the wooden handle attached to the end of the lever used in propelling one of appellant's hand cars, whereby appellee was thrown in front of and run over by said hand car.

It appears from the evidence that on the day of the accident appellee, who was in the employ of the appellant as a track walker, and who, when not engaged in walking the track, worked with the other men on that section, came to the point on appellant's road where these other section men were preparing to return, after their day's work, to the section house.

It was the habit of all these men, including appellee, in going to and from their work, to ride on a hand car furnished by appellant and propelled by themselves. This they did by working back and forth an iron lever, through the upper end of which passed a wooden handle, tightly fitting in a socket at this end of the lever, and projecting about two feet on either side thereof.

Appellee, with the other section men, being ordered by the foreman to mount the hand car for the purpose of riding home, did so, and while one of the others took hold of one end of this wooden handle appellee took the other, with his back turned in the direction they proposed to go. Very soon after the car had gotten under full headway, and without any warning, that end of the wooden handle which appellee was using broke off even with the edge of the iron socket through which it passed, and he was thrown from and in front of the car and run over by it.

That end of the handle which appellee was holding was never seen after the accident by any witness who testified for either party on the trial, but that part which was left in the socket was examined by several witnesses, some of whom testified that it showed that there was an old crack, one-eighth or a quarter of

an inch deep in the handle just where it broke, and about the same number of witnesses testified that no such crack was shown; but whether there was in fact such a defect in this handle seems to us wholly immaterial, in view of the uncontradicted testimony of both parties that no such defect was visible or could have been discovered except by removing the handle from the socket.

Appellee himself, in his testimony, says that "owing to the fact that the crack was just at the edge of the iron socket in which the handle or lever was placed, and the fact that the handle or lever filled up the socket, no one could have detected the crack by merely looking at the handle and inspecting it."

It is not shown by the testimony that the appellant or any of its employes, superior in rank to appellee, knew of any defect in this handle, but the foreman on this section expressly denies any such knowledge, and denies that there was in fact any such defect as appellee testifies to. No other defect, or supposed defect, than this crack being testified to by any witness, and it being admitted that it could not have been discovered by looking at the handle and inspecting it, it seems to us that there is a total failure to establish a state of facts upon which appellant could be held liable.

We do not lose sight of the rule of law so often recognized by this court which requires the employer to exercise a certain degree of care and diligence in supplying his employe with safe and suitable machinery and appliances in carrying on his business; but in view of the facts, as admitted in this record, we find nothing in this case showing any violation of that rule.

In the case of Bogenschutz v. Smith, 84 Ky., 330, this court has quoted with approval, and has in effect adopted, the rule laid down by some of the text-writers with reference to this liability, in these words, to wit: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions:

"1st. That the appliance was defective.

"2d. That the master had notice thereof or knowledge, or sought to have had.

"3d. That the servant did not know of the defect, and had not equal means of knowing with the master."

Without considering any other feature of this case, or either of the other propositions above laid down, it seems to us that the application of the second one of these propositions is sufficient to dispose of this case. Appellee has failed to establish either that appellant had notice or knowledge of any defect in this handle, which is said to have been defective, or that he ought to have had such knowledge or notice, by which is meant that he would have had it if he had exercised a proper degree of diligence.

The lower court, therefore, erred in refusing to instruct the jury peremptorily to find for defendant at the conclusion of plaintiff's testimony, and for the reasons indicated the judgment of the court below is reversed and the action remanded for further proceedings consistent with this opinion.

STARR v. COMMONWEALTH.

(Filed March 29, 1895.)

1. Criminal law—Dying declarations—On a trial for murder statements of the deceased prior to his death are not admissible as dying declarations unless the evidence shows that they were made by declarant under a solemn sense of impending death, and relate to the circumstance or cause of death.

Where the deceased lived nearly seven months after being shot, statements by him shortly before his death that "he would not get well," and that he "could not stand it much longer," do not indicate a belief of impending death on his part such as renders subsequent statements by him competent as dying declarations.

The admission of a declaration of deceased that "he did not know what made Starr shoot him; that they had always been good friends; that he hated to die and leave his family," was highly prejudicial to the accused.

2. Same—A statement by deceased on the day before he died that "he could not get well; that there was a boy he hated to die and leave; that he hated to die and not know one thing; he would like to know what made Bill Starr shoot him; and that he did not believe he would if Gus Underwood had not told him to do so," was not admissible as a dying declaration because not shown to have been made under a belief of impending death by deceased, and was incompetent because it did not relate to the circumstances of the shooting, the fact of the shooting of deceased by accused not being a disputed matter on the trial.

3. Same—Evidence—Where defendant admits shooting deceased and pleads self-defense, he may testify in his own behalf that at the time he shot deceased he believed he had no other means of escape except to fire. Such statement is competent evidence.

4. Same—Instructions—An instruction which, in confused terms, makes the conviction of appellee for murder depend upon the belief of the jury that at the time of the shooting one Underwood, jointly indicted with appellee, was present, and aided and encouraged and advised appellee to do the shooting, was, in view of the evidence heard on the trial, erroneous, and highly misleading and prejudicial to appellee.

5. Same—The instruction limiting defendant's right to plead self defense in this case, if he brought on the difficulty with deceased or acted or assisted or encouraged one jointly indicted with him to bring on the difficulty, was clearly erroneous because not authorized by any evidence.

6. Same—Right of peace officer to carry arms—Where the defendant was a constable, and was engaged on the day and evening of the homicide in arresting persons charged with crime and in keeping the peace, the court ought to have instructed the jury as to the right of the defendant to carry arms in the discharge of his official duties.

Kirk & Kirk, T. S. Kirk, T. W. Newberry and A. Copley for appellant.

Wm. J. Hendrick for appellee.

Appeal from Martin Circuit Court.

Opinion of the court by Judge Hazelrigg.

William Starr, a constable of Martin county, was tried and convicted of manslaughter under an indictment charging him and one Underwood, the police judge of Eden, the county seat of that county, with the murder of John James. On appeal from the judgment of conviction he complains of numerous errors. We shall notice only such as appear to be of a serious nature.

The deceased was drinking heavily, and on the night of the killing was boisterous and quarrelsome. While passing through the streets of the village, and in the hearing of all, he amused himself by singing songs of the vilest character, the words of which were most indecent and vulgar. This was in the hearing

of the police judge, town marshal and appellant. The police judge suggested that the marshal arrest the offender, but that official replied that he would not do so as long as he harmed no one, but when he became sober he would summon him and have him fined. The deceased became involved in a difficulty with one Cassady, and again with the marshal, kicking the latter's lantern out into the street. After quiet had been restored, Underwood, Starr and others went over to Price's, where there was a wedding, and were engaged in general conversation in a crowded room when the deceased came in. What there occurred is testified to by a large number of witnesses whose statements, though not altogether tallying, are less contradictory than might be expected under the circumstances.

The fact that the deceased, with a large open knife in his hand, was making at the appellant when the latter fired is testified to by nearly all the witnesses, both for the State and for the defendant. Nevertheless, if a fair trial has been accorded the accused, we are to assume, from the finding of the jury, that he was not acting in his necessary self-defense when he fired the fatal shot.

The error which most seriously affected his substantial rights and deprived him of such a trial, the appellant urges, is that of the court in admitting the sister and brother-in-law of the deceased to detail to the jury their brother's alleged dying declaration. The sister testifies that she heard her brother say, a short time before his death, that "he would not get well;" that he "could not stand it much longer."

The question is, did this language indicate a sense of impending death? It does not appear that the deceased had been told that he could not recover, and he had lived for nearly seven months after being shot. The language seems to us rather that of discouragement than of a conviction of impending death.

In Vaughn v. Commonwealth, 86 Ky., 431, the language of the declarant was "he believed he would have to die," and it was held insufficient to constitute a basis for the introduction of the alleged "declaration."

"It is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." The mere belief of the declarant that he will not get well, but that he will ultimately die from his injuries, is not sufficient to admit his declaration. (Greenleaf on Evidence, volume 1, section 158.)

The declaration of the deceased was that "he did not know what made Starr shoot him; that they had always been good friends; that he hated to die and leave his family."

If the deceased did not know "what made Starr shoot him," the inference necessarily is that he had given the accused no cause for doing so. It was as if he had said "I am wholly blameless, and one who has always been my friend shot me without my knowing why he did so."

We can not say that this evidence did not influence the jury. It was certainly calculated to arouse their prejudices and inflame their passions against the accused as one who had shot his friend without cause. We think it was incompetent and prejudicial.

The testimony of the brother-in-law is that the deceased talked to him, on the day before he died, about dying, and said "he could not get well; that there was a boy he hated to die and leave; that he hated to die and not know one thing; he would

like to know what made Bill Starr shoot him, and that he did not believe he would if Gus Underwood had not told him to do so." Here we have no better foundation for the testimony than that laid down by the evidence of the sister. The statement of James, that "he would not get well," is far from indicating that he was then resting under a solemn conviction that his dissolution was immediately at hand or closely approaching. The statement, too, that he did not know why Starr had shot him is repeated and thus empbasized before the jury. In addition to this the jury are told, in effect, by the deceased that the accused had shot him for no reason except that he was told to do so by Underwood. Such a statement, it seems to us, might have strongly prejudiced the jury against the accused, and, if they believed it, would properly have influenced them to disregard his plea of self-defense. In vain might the defendant attempt to show that he shot the deceased only after he was advancing on him in a drunken frenzy, if the minds of his triers are once filled with the declaration of a dying man—so admitted before them by the court—to the effect that there was no cause for the shooting save an order to do it by an accomplice. Even if the proper basis for the proof had been made, yet the testimony is incompetent as detailed by the sister and the brother-in-law.

In Leiber v. Commonwealth, 9 Bush, 11; Collins v. Commonwealth, 12 Bush, 271, it is held that the general rule is that dying declarations are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the declarations, and such evidence should be admitted only upon the ground of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it and forming part of the res gestæ.

In this case the act of killing was shown by a number of witnesses and admitted by the defense. The declaration was not even directed to that act, and if it had been it was wholly unnecessary. The statements do not conform in any particular to the rule laid down in the cases cited.

The question was asked the accused: "Did you or not believe, at the time the shot was fired, that you had no other means of escape but to fire the fatal shot?" but objection to it was sustained, and this is another ground of complaint.

In Williams v. Commonwealth, 90 Ky., 596, such testimony was held to be competent as rebutting the unfavorable inference that might be drawn if the accused, having the chance to do so, failed to state his belief that he was in danger, and so it appears to us as to this testimony.

The instructions are also complained of. The first one submits to the jury the law of murder, and is accurate. The second one is on the same subject, but the conviction of the accused of the crime of murder is based in part, and somewhat confusedly so, on the belief of the jury that Underwood was present at the killing, and aided, encouraged and advised Starr to do the shooting. The proof disclosed that Underwood was present, and some witnesses testified that during the difficulty he said: "Put it to him;" and while Underwood swears that he only cried out to the town marshal to "arrest him," or "arrest them," yet it was error to predicate the guilt of the accused upon the conduct of Underwood. Such an instruction, in view of the admission of the declarations of the deceased that Starr had shot him only because Underwood had told him to do so, must have been ex-

tremely misleading and prejudicial. The third instruction correctly gave the law of manslaughter, and the fourth invested the jury with the usual discretion as to convicting for the lessor crime. The fifth told the jury that mere threats made by James to kill Starr did not justify the latter in killing the former unless Starr believed James was about to execute his threats, and take his life. This instruction is confusing, and ought not to be given. The sixth instruction properly gave the law of self-defense, except for the words of qualification appended to it—"unless the jury should believe that the defendant, William Starr, brought on the difficulty with James, or aided or assisted or encouraged Underwood to bring on the difficulty with said James, and sought his life or to do him great bodily harm or injury, and if they so believed they can not acquit on the ground of self-defense and apparent necessity."

There is no testimony on which to base such an instruction in this case. Every witness to the transaction testifies that James commenced the trouble in the room where the killing occurred, and if the instruction pointed to any act of the accused outside of that room which might have "brought on" the difficulty, he seems to have abandoned it before the shooting. The simple instruction on the law of self-defense offered by counsel for the accused should have been given.

It appears that on the day of the homicide the accused, as constable, had been engaged in making the arrest of certain parties charged with crime and was attending the examining trial that evening. For this reason he had borrowed of one Price the pistol with which he shot the deceased. It also appears that he was engaged, on the very night of the killing, in attempting to keep the peace as an officer. For these reasons we think the court should have given the instruction asked on the subject of the right of officers to carry arms for their protection while in the discharge of their official duties.

Other errors are insisted on involving the competency and conduct of certain jurors, the speech of the attorney for the Commonwealth, etc., which do not seem to be of any significance.

For the reasons indicated, however, the judgment is reversed, with directions to grant the defendant a new trial, and for further proceedings consistent with this opinion.

NORTON, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 10, 1895—Not to be reported.)

Master and servant—Damages occasioned by defective machinery—A section hand, who was using a hand car with other employes of a railroad company, can not recover damages for injuries sustained through the defective condition of the lever of the hand car, when it appears that he had full knowledge of the defective condition of the lever before attempting to use it, and assisted in repairing, or attempting to repair, the alleged defect just before he was injured.

Wm. E. &. S. A. Russell and Lafe S. Pence for appellants.

H. W. Bruce, Thompson & McChord and W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Pryor.

There was a nonsuit ordered in this case, and the only question is as to correctness of that ruling.

The appellant was a section hand in the employ of the appellee, and when operating a hand car was thrown off and injured, by reason, as is alleged, of a defective lever. The testimony shows that prior to the day on which the injury happened this car lever was out of repair, and so known to be by the appellant, and that on the day of the accident the handle became loose, and the appellant, together with other employes, fastened it, or attempted to do so. It seems this handle was made fast by a nail stuck or wedged in, to hold it in place, and this the appellant knew, and not only so, but when it worked loose helped to replace the nail or to make the handle more secure.

While a railway company is bound to furnish safe appliances and tools for the use of its employes, and is liable if it fails to do so, yet this liability is not extended to cases where the defects complained of come within the ordinary risks the employe assumes when he enters the services or when he is aware of the defect and still continues to use the machinery.

The employe is not required to look for defects, but such as are patent or known to the employe, and he still handles the machinery, when fully competent to judge of the danger, he must be held to have assumed the risks.

In this case whether or not the fastening of the handle by the use of a nail was or not negligence was a question of fact, and if negligence, the appellant knew it was fastened in that manner and continued to use it.

Judgment affirmed.

GARRETT'S ADM'R v. ASHCRAFT.

(Filed Macrh 16, 1895—Not to be reported.)

1. Final order—Appeals—An order reciting that plaintiff "tendered and offered to file an amended petition and defendant objected. Court being advised, sustained said objection, and plaintiff excepts. Same is marked 'R,' for identity, and made part of record. The plaintiff then prayed an appeal to the Superior Court, which is granted. It is adjudged that the defendant recover of the plaintiff his cost herein expended," is not a final order from which an appeal lies, and this appeal is dismissed.

2. Same—Clerical misprision—If the failure of such order to recite that the petition was dismissed was a clerical misprision, then the court below ought to have corrected it by an order nunc pro tunc offered by appellant; but the refusal of the court below to make such correction can not be considered by this court in a petition for a rehearing of the judgment dismissing their appeal.

Grant E. Lilly for appellant.

Riddell & Riddell for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Eastin.

This appeal is prosecuted from an order of the circuit court of Estill county, entered July 7, 1894, in these words, to wit: "This day came the plaintiff and tendered and offered to file an amended

petition and defendant objected. Court being advised, sustained said objection and plaintiff excepts. Same is marked 'R,' for identity, and made part of the record. The plaintiff then prayed an appeal to the Superior Court, which is granted. It is adjudged that the defendant recover of the plaintiff his cost herein expended."

This being the entire order appealed from, it will at once be seen that it is not an order from which an appeal will lie. So far as the record shows no answer was ever filed to the original petition, nor was any order made as to its sufficiency as against appellee, but the same is still pending and undisposed of.

For the reason that the order appealed from is not a final order and that no final judgment, as between appellant and appellee, has been entered in the cause, the appeal is dismissed.

Judge Eastin delivered the following response to a petition for rehearing:

If the omission to insert in the order of July 7, 1894, a dismissal of the petition was, as is claimed by counsel for appellant, a clerical misprision, then it would have been proper in the court below to remedy this by allowing the order tendered March 26, 1895, to be entered nunc pro tunc, as of July 7, 1894, and it was error to have rejected it; but this question must be brought before this court by another appeal, if at all, as the appeal has been dismissed on the record as we find it here, and that record can not be perfected in the manner proposed, nor can this court grant a rehearing of the case or consider it on its merits, as it is now asked to do upon this appeal, which has been dismissed.

The petition for a rehearing is overruled.

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KENTUCKY COURT OF APPEALS.

SHIELDS, &c. v. LOUISVILLE & NASHVILLE R. R. CO.

SHIELDS, BY, &c. v. SAME.

(Filed March 9, 1895.)

1. A traveler who has been delayed by the obstruction of a public highway by a railroad train can not maintain an action to recover damages therefor against the railroad company in the absence of an allegation of special damages by him.

2. Same—Obstruction of highway—Proximate cause of injury—Where the passengers on a railway train that was obstructing a highway, by their rude, violent, obscene and insulting language greatly shocked the moral feelings of a traveler on the highway, who was delayed for one-half hour by the train, the delay of the train so as to obstruct the highway can not be considered the proximate cause of the injuries resulting to the traveler from the shock sustained.

Where the delay to the traveler by the obstruction caused her to be delayed until after dark before reaching home, and on the journey home in the dark she became frightened and jumped from her vehicle, injuring her knee in so doing, the obstruction of the highway can not be considered in law the proximate cause of the injury to her knee.

G. G. Gilbert for appellants.

Ashton P. Harcourt and Edward W. Hines for appellee.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Grace.

These two suits by mother and infant daughter arise upon the same state of fact, grow out of the same transaction and involve the same issues; were heard together in the court below, and may be considered together by this court.

Mrs. Nannie Shields and her daughter, Mamie, residents of Spencer county, had, on Sunday, the 9th day of July, 1893, been visiting some relatives, and when returning home on that day along a public turnpike road, and not very long before sundown,

approached a crossing of the L. & N. railroad and this turnpike road at Wakefield, where they found the turnpike obstructed by the passenger coaches of defendant corporation, who, it seems, on that day was running an excursion train for the colored people of Louisville down to Bloomfield, south of the point indicated, and on returning to Louisville they found a south-bound passenger train late and had side tracked the excursion train to allow the passenger train to go by on the regular track. And it appears from the evidence that in this way these plaintiffs were delayed some thirty minutes, possibly more, by reason of this obstruction; that plaintiff, Mrs. Shields, saw no conductor nor any of the servants of appellee near by; that being so delayed, many of the negroes, passengers on the accommodation train, got off same and were wandering about near the station, up and down the track and up and down the turnpike where the plaintiff was delayed, cursing, swearing, using obscene, vulgar language, fighting, throwing rocks, one of which came near her and her little daughter in her buggy, a pistol being fired off in the melee, and all this to the terror and alarm and annoyance and insult of herself and little girl; that after being delayed for quite a while in this way and under these circumstances for between half an hour and an hour, and just as the sun was setting or a little after, and when the trains passed and this accommodation train pulled out off of the turnpike, these plaintiffs, proceeding on their way home, found a nearer way barred by a locked gate, and being then compelled to go around a greater distance, some two and a half miles, to their home, darkness came on them, and the road being rough, the mother became alarmed at the danger of turning over and in jumping from the buggy she injured her knee, and that then, and since to the trial, it had been inflamed, swoolen and had greatly pained her, and was to some extent stiffened; that by reason of the alarm and fright from the conduct of the negroes at the station both she and her little daughter had been made nervous and suffered greatly, the little girl not being able to sleep soundly for some nights. And all this, plaintiffs say, was by reason of the negligence and wrongful acts of the defendant in obstructing said public passway, and in suffering and permitting the drunken and vicious negroes to go at large on and near its roadway and on and near the turnpike where she was detained, and all to the great damage of both plaintiff and her little daughter. Wherefore, in appropriate separate suits, they claim damages.

Defendant, after demurring, filed its answer, denying that by gross negligence it obstructed the turnpike; denied that it wholly obstructed it at all; denied that its officers abandoned the train or the control or management of same; denied that it had any knowledge of the misconduct of the negro passengers, as complained of by plaintiff, in any particular; in a second paragraph charging that plaintiffs, by their own negligence, contributed to any injury they may have sustained; and in a third paragraph charging that this delay and obstruction of the turnpike was rendered necessary by the approach of the south-bound passenger train, and that this was the only place in that vicinity where it could side track its train and allow the other to pass, and that all this was well known to plaintiffs; that its train only stopped on this turnpike a short time, and for this purpose. Of course defendant denies liability.

A jury having heard the evidence of plaintiff, sustaining substantially her petition, the court, on motion of defendant, gave a peremptory instruction to find for defendant, exceptions were taken by plaintiffs, motion for new trial overruled, and appeal filed.

Defendant corporation, by its attorneys, in its brief contends that, if it did obstruct the turnpike road and travel on same, it was a public nuisance, and for which it is subject to indictment; but that the private citizen, unless he has sustained special damage other than mere detention, can not sue; that any injury he sustained by delay only, being common to all travelers, will not support an action. And again, it says any possible damage or injury by reason of the misconduct of any of its passengers (if such there was), while off its train, was beyond its control, beyond its authority or duty or power to restrain or prevent; neither was same or any damage to plaintiffs or either of them the necessary or natural result of such delay or obstruction; or, in other words, that any negligence of the railroad company in obstructing the turnpike was not the proximate cause of the injury to plaintiffs, but that the misconduct of its passengers towards plaintiffs caused said injury; neither was the neligence of defendant the proximate cause of plaintiff, Mrs. Shields', injury on her way home.

Defendant cites numerous authorities along this line and in support of its contention.

In an early case in Kentucky, Burr & Yeiser v. Stevens, 1 Bibb., 293, the court says: "Upon general principles that common interest which belongs equally to all, and in which the parties suing have no special or particular property, will not maintain a suit. Thus a public nuisance is not the subject of a suit by a private individual unless he has sustained some special injury thereby. As if a man fell trees in a highway, whereby it is stopped up, to the annoyance of the passengers, it is a nuisance common to all, a public nuisance, for which, at common law, he might be prosecuted by the Commonwealth and punished, but a suit against him could not be maintained by a private individual who had only sustained the injury, common to all, of being turned out of the way; but that if in attempting to ride over the tree felled in the road an individual's horse should be thrown, whereby himself or his horse is wounded, he can maintain an action for this special damage. The reason why he can not without special damage maintain his suit for the nuisance against the wrongdoer is, that if one could sue, all might, and this would be ruinous."

This doctrine, thus clearly and early announced, seems to have been kept steadily in view in Kentucky, and the following case may be cited in support or recognition of same; Selfried v. Hayes, 81 Ky., 380, a slaughterhouse case, and damages being allowed only to those showing special damage.

Southerland on Damages, volume 1, page 766, maintains the same general principle.

Elliott on Roads and Streets, page 501, says: "Mere delay caused by an obstruction, unaccompanied by any special damage or injury, does not, as a rule, give any right to an action for special damage."

And in 16 American and English Encyclopedia, 976, it is said that "for mere delay in a journey, or for being compelled to take a circuitous route, by reason of an obstruction in a river or a road, it would seem, from the weight of authority, that a cause of action does not arise."

Wood on Nuisances, section 674, is cited to the same effect.

On the other question, as to whether any injury to the feelings, or by reason of any alarm or fear excited in either of the plaintiffs by reason of the misconduct of the negro passengers, was so connected with any negligence in defendant in obstructing the turnpike way as that it may be fairly said to be the

proximate cause of same, and so to hold defendant liable. We find the general doctrine on this subject announced in American and English Encyclopedia, volume 16, page 428, to be that "it is a maxim that the law looks at the proximate and not at the remote cause of an injury, and that out of the application of this maxim grows the liability or non-liability of a defendant charged with the infliction of an injury by his negligence. Unless the alleged negligence of the defendant was the proximate cause of the injury of which plaintiff complains, there can be no recovery; or consequences of which his act or omission was only a mere condition or remote cause, the defendant is not liable."

Same work also recites, page 431, that "there is no fixed unbending rule that in every case will clearly distinguish proximate and remote causes and discriminate between active efficient causes and apparent causes that are merely conditions and not causes of the injuries that follow. * * *

"It follows that to constitute actionable negligence there must not only be a casual connection between the negligence complained of and the injury suffered, but the injury must be by a natural and unbroken sequence (without intervening efficient causes), so that but for the negligence of the defendant the injury would not have occurred; that it must not only be a cause but the proximate—that is, the direct and immediate—efficient cause of the injury."

In 7 Wall. (U. S.), 44, Justice Miller said: "We have cited to a general review of the doctrine of proximate and remote causes as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it and often upon the very nicest discriminations."

So that after all we can but return to the facts of this case and say whether any negligence of the defendant in obstructing this passway, at the time and place, was the proximate cause of any alarm, fright or injury arising or growing out of the misconduct of the passengers on said railway train at the time.

This obstructing train was but a thing, an inanimate thing, a physical fact, or force, or power, barring the passing of plaintiff.

It was not a person, not a thing of life. The injury of which plaintiff complains was committed by persons, free moral agents, sential beings, yet drunk, as charged, and offending the moral feelings of plaintiff by blasphemy and card playing, and affrighting her by fighting, throwing rocks and firing pistols. How can it be said that the railway train was doing any or either of these things? It is not claimed that defendant's agents were employed in or participating in these wrongful acts.

It should further be considered that these officers of the railway train were not civil officers. They had no right or power to arrest or imprison or determine the guilt or innocence of any particular individual, nor to inflict punishment on the guilty if identified. Why then should it be said that they did themselves the things complained of, or that they suffered and permitted them to be done, to the injury of the plaintiffs, or so as to hold the railway company liable to plaintiffs for any damage sustained thereby?

We recognize the fact that in certain limited cases these railway officers have a certain limited power or authority in the protection of the property of their employes, and in protecting it from injury, violence or annoyance, the passengers on their trains

under their immediate custody and control; but beyond this we know of no such authority or power.

If plaintiff's moral sensibilities were outraged, or if she was put in fear by the wrongful acts of others, her remedy is against those who injured her and not the railway company. As to the injury sustained by plaintiff, Mrs. Shields, by jumping out of her buggy, this is still further removed from any possible connection with the negligence of defendant in obstructing the passway.

This negligence was not the proximate cause of either injury complained of. This was doubtless the view taken by the judge below in dismissing the petition of plaintiffs.

The judgment is affirmed.

MAYSVILLE & BIG SANDY R. R. CO. v. INGRAM.

(Filed March 13, 1895—Not to be reported.)

1. Construction and operation of railroad in street—Damages to abutting property—Where a railroad is so constructed in a street of a city or town as to obstruct and change the natural flow of water, and the property of an abutting lot owner is overflown or so that the lot owner is deprived of the reasonable use of the street in the usual mode of travel, as a means of ingress or egress to and from his property, and where the railroad, after being constructed, is so operated upon said street as that smoke and soot and cinders are thrown upon and into abutting buildings, the railroad company is liable for the damages so done to the property.

2. Same—Estoppel—The owner of an abutting lot is not estopped from claiming damages for the special injuries done his property by the construction and operation of a railroad in the street by reason of the fact that the railroad was constructed with his knowledge and consent, since even if he had objected to such construction he could not have prevented it by injunction or otherwise, it being well settled that injunction will not issue in such cases to prevent the building of the road, but the owner must resort to an action for damages.

3. Same—Measure of damages—The measure of damages in such case is the fair cash value of the property just before it was known generally that the railroad was to be built, and then ascertain what, if any, depreciation in its value followed the building of the road by reason of the injuries complained of by the plaintiff.

But if any of the injuries complained of are merely temporary in their character, and such as may be remedied by proper drainage, then plaintiff can recover for such injuries only the damages suffered up to the time of trial.

Cochran & Son and Wadsworth & Son for appellant.

Samuel J. Pugh for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Grace.

This is an appeal by the Maysville & Big Sandy R. R. Co. from a judgment of the Lewis Circuit Court against it for $1,150 in favor of John C. Ingram, appellee, for injuries done by said railroad company to his property, situated on Third street, in the town of Vanceburg, along which street the defendant has built and was operating its line of railroad, plaintiff claiming that in building same they had so elevated the grade as made an em-

bankment along this street in front of his property as to obstruct the usual and natutral flow of water from his lot, and causing same, in times of rainfall, to dam up and overflow his ground, and enter his wagon and blacksmith shop, as also to injure his residence, both being on same street and both fronting this line of railway; and further charging that the defendant had built a double track or line of railway, and this on a narrow street, with narrow sidewalks, and that there was not room sufficient to drive wagons or other wheeled vehicles along this street in front of his residence and shops, and that in this way the ingress and egress to and from the property had been and was unreasonably obstructed and hindered; and further charging that by reason of the narrow street and the proximity of his residence to same (which was built and owned by him before the building of this line of railway), and in the running and operating of the trains, that the smoke, soot and coal cinders was blown into and against his residence, and greatly to the injury of same and to the great danger of same, as well as to the annoyance of himself and family; plaintiff, by reason of these injuries, claiming damages in the sum of $3,000. Issue was joined in substance on all these allegations, and, in addition, the railroad company asserting its right under its charter and under authority granted by the corporate authority of the town of Vanceburg to build its line of railway along Third street in the way and manner and on the grade upon which same was built, and denying any damage to the property of plaintiff other than such as resulted to the plaintiff in common with all other persons living on this street, and near its railway, in and from its necessary use, and that they had built same in a careful and prudent manner; and also affirming that this railway was so located and grade made and railway built with the knowledge and consent of plaintiff, and denying all liability for any injury that might thereby have been done to the property of plaintiff.

Of this plea in estoppel it may be said that this court, early in the building of railroads in Kentucky, affirmed their right so to build on and through the streets of cities and towns when authorized by their charters and the legally constituted city or town authorities, and refused to entertain injunctions at the instance of the property owners along such streets to prevent the exercise of this right to build, but left each party owning property abutting on such street, where the railroad might be built, to his separate, independent action for any special damage he might sustain by reason of same.

We do not well see how the knowledge of plaintiff, that defendant under its charter and by authority and consent of the town authorities of Vanceburg was so constructing its line of railway, could or should estop him in his suit for particular damages to his property by reason thereof.

As early as 8 Dana, 29, this court said that while the railway might so build its road "that it was equally clear, both here and elsewhere, that the owners of lots have a peculiar interest in the adjacent street which neither the local nor general public can pretend to claim—a private right, in the nature of an incorporeal hereditament, legally attached to their contiguous ground—an incidental title to certain facilities and franchises assured to them by contract and by law, and which are as inviolable as the property in the lots themselves." * * * and, proceeding, the court, in speaking of the operating of railroads on the streets of a town or city, though under legislative and municipal authority, said if it should appear that such use was being made of same as "encroaches on any private right or obstructs the reasonable use

and enjoyment of the street by any person who has an equal right to use it, we shall be ready to enjoin all such wrongful appropriations of the highway."

This doctrine was affirmed in the case of the Elizabethtown, Lexington & Big Sandy R. R. Co. v. Combs, 10 Bush, 282, and in this same case the right of an owner of a lot abutting on a street so osbtructed by a railway company as to impair his free and unobstructed ingress and egress to and from his property, or so used as that the soot and smoke or fire blow into or against his property, and injured same or impaired its value, to maintain his suit for damages, was affirmed;" and this case was again approved in the case of J., M. & I. R. R. Co. v. Esterle, 13 Bush, 677, and since then it seems to be the settled law in this State.

In the case now under consideration the court below laid down the law carefully, in accordance with the cases cited, telling the jury that plaintiff might recover if they found from the evidence that he was the owner and in possession of the property in question, abutting on third street, and that the defendant, in the grading of said street and throwing up the embankment on same, obstructed this street so as to deprive the plaintiff of the reasonable use of same and the reasonable means of ingress and egress to and from his property thereon, in the usual mode of travel, or so obstructed the natural flow of water as to dam up the same on plaintiff's lots; or that if they found that, in the use of their road, its engines threw smoke, soot and cinders against, upon or into his said buildings, to the injury or damage of same, that then, in either event so established by the evidence, plaintiff might recover for the injury so done.

This instruction was made applicable to each lot owned by plaintiff, one on which his residence was built and the other (some distance away) on which his blacksmith and wagon shops were located.

The court further instructed the jury that in estimating this damage they might take the fair value of this property, just before it was known generally that this road would be built, and then take any depreciation of the value of this property after the building of the railroad, by reason of the injuries complained of, as established by the evidence, and so estimate the damage to plaintiff.

This was the appropriate method of ascertaining damages to the owners of lots and houses abutting a street occupied by a railroad company to an unreasonable extent; and, as indicated by this court in the Esterle case, 13 Bush, 677, before cited, same has been since followed in this court.

After giving instructions, as above indicated, the court further told the jury that they could not estimate in favor of plaintiff any damage or decrease in the value of his property, by reason of mere danger in crossing same while going to his postoffice or eslewhere, or for the mere liability of horses to scare while traveling said street, or because the tracks on said street and the use of them by the trains was disagreeable or unsightly or otherwise unpleasant to his residence on this street; and that if the injury from water overflowing the grounds of plaintiff, by reason of the embankment, was not permanent but only temporary, and that same might be remedied by proper drainage, then the estimate of damage could only be for such as had occurred up to the time of trial, and these estimations were made to apply to both pieces of property.

Thus it appears that the jury were not only instructed properly as to such matter of damage or injury as should enter into their estimate, but also warned by the court to exclude other matters

spoken of by plaintiff and his witnesses that the court thought too remote to authorize any recovery.

We think this careful warning by the court cured any possible erorr there may have been committed by the court in permitting witnesses to speak generally of the damage to plaintiff's property by reason of the building of the railroad in the way and manner it was constructed on Third street. In addition to this guarding of the jury in their estimates the witnesses, who first spoke in a general way of the damage in gross, were led by further questions of both plaintiff's counsel and by cross-examination of defendant's counsel to separate and give in detail the several items entering into their estimate of damage, and thus the court was enabled to separate, by its instructions to the jury, such items only as should enter into their verdict, and to exclude the others. That this proved effective is shown by the fact that the jury only gave to plaintiff damages for a little over one-third of the amount generally estimated by plaintiff's witnesses.

We perceive no error prejudicial to the material rights of the appellant.

Judgment affirmed.

FARSON, LEACH & CO. v. BOARD OF SINKING FUND COMMISSIONERS OF CITY OF LOUISVILLE.

(Filed March 14, 1895.)

1. Constitutional law—Right of city to issue bonds to refund indebtedness—The sections of the Constitution of 1891, limiting the indebtedness that municipal corporations may incur, do not prohibit the city authorities, when authorized to do so, from issuing refunding bonds to retire bonds of the city outstanding at the time of the adoption of the Constitution. Such refunding bonds can not be considered as an increase of indebtedness by a city.

2. Same—Even if such refunding bonds could be considered as a new and increased indebtedness, those about to be issued by the city of Louisville, involved in this case, would not increase the indebtedness of that city beyond the maximum sum permitted by the Constitution.

3. Same—Where an indebtedness has been authorized by a city by an act of the legislature prior to the adoption of the Constitution of 1891, the city may issue bonds to pay indebtedness after the Constitution went into effect, even though it was not incurred in the manner required by said Constitution.

4. The act of May 20, 1890, relating to the refunding of certain bonds by the city of Louisville was not repealed by any of the provisions of the Kentucky Statutes relating to the "sinking fund" of that city.

5. Authority of city to make its bonds payable in gold—Where general authority is given a city to issue bonds to refund its indebtedness, the city may make the principal and interest of the new bonds payable in gold or other currency, in its discretion.

M. L. Barker for appellants.

H. S. Barker for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Eastin.

By the provisions of an act of the legislature of Kentucky, approved March 30, 1880, the commissioners of the sinking fund of the city of Louisville, appellees herein, were charged with the

payment of the floating indebtedness of that city, existing on the 1st day of January, 1879, and, for the purpose of paying same, the general council of said city was authorized and directed to cause to be issued and turned over to said commissioners, for sale, the coupon bonds of said city to the amount of $1,000,000, bearing interest at the rate of 5 per cent. per annum, one-half of said bonds to be so issued that they might be called in and paid off at any time after ten years from their date, and the other half at any time after twenty years from their date.

Under an ordinance passed by the general council of said city, in pursuance of said act, bonds of the city, to the amount above named, bearing date May 1, 1880, and conforming to the provisions of said ordinance and said act, were issued and delivered to appellees for the purpose above mentioned, and were sold by them.

For the purpose of enabling appellees to call in and pay off the one-half of the bonds so issued, which were made payable at the expiration of ten years from their date, the legislature of Kentucky passed another act, which was approved May 22, 1890, whereby the mayor of the city of Louisville was authorized and directed to cause to be issued other bonds of said city to the amount of $500,000, payable twenty years after date, and bearing interest at the rate of 4 per cent. per annum, and to deliver said bonds, when issued, to the appellees, to be by them sold at the best price obtainable, but not at less than par, and to apply the proceeds thereof, when sold, to the payment of the bonds issued under said act of March 30, 1880, or to exchange them, in whole or in part, for the bonds issued under this last-mentioned act, if terms of exchange could be agreed upon.

The bonds authorized by the act of May 22, 1890, amounting to the sum of $500,000, were accordingly issued in conformity with said act and delivered to the appellees, who subsqeuently offered the same for sale, and on November 7, 1894, received a proposition in writing from appellants, offering to purchase the entire issue of bonds at par, which proposition was, on the same day, accepted in writing by appellees. Under said contract of sale the bonds were tendered to appellants, and payment therefor was demanded by appellees, but refused, and suit having been brought to enforce the performance of said contract, the lower court adjudged that the same be enforced, and from that judgment this appeal is prosecuted.

The grounds upon which appellants base their refusal to comply with their offer are, as we understand from the answer filed by them in the court below, as follows, to wit:

1st. That as the act of May 22, 1890, under which these bonds were issued, was not acted upon, and as none of said bonds were sold until after the adoption of the present State Constitution, which went into effect on September 28, 1891, and some of the provisions of which are supposed to forbid the issuing of these bonds, therefore, they are void, as being issued in violation of the State Constitution.

2d. That this act of May 22, 1890, was repealed by the general act subsequently passed with reference to the sinking fund of the city of Louisville, and found under the head "Sinking Fund," at page 1023, and being section 3010 of the Kentucky Statutes; and

3d. That there was no authority in the mayor or in appellees to make these bonds payable in gold, and that both principal and interest thereof being made payable in gold coin of the United States, they are, for that reason, void. Briefly considering these objections in their order, we need only say that we can not agree

with appellants in their contention that the issuing of these bonds is a violation of any provision of the Constitution of this State.

The argument for the appellants, on this branch of the case, is based largely upon the assumption that the creation of this indebtedness of $500,000, by the issue of bonds to that amount, would increase the aggregate indebtedness of the city of Louisville to an amount in excess of the Constitutional limit of 10 per centum of the assessed value of the taxable property therein, as fixed by section 158 of the Constitution for cities of the first class, to which the city of Louisville belongs.

In reply to this argument it is only necessary to call attention to the fact that the certificates of the officials of the city of Louisville in charge of these departments, viz, of the secretary and treasurer of the sinking fund, of the city comptroller and of the city assessor, purporting to give the respective amounts of the bonded indebtedness, the floating indebtedness and the assessed value of the taxable property in said city, as of the date on which this contract for the sale of these bonds was made, all of which certificates were filed and are to be considered in evidence in this case, conclusively show that, even if the indebtedness represented by the bonds here in issue were to be considered as an additional item of indebtedness, still this would not make an aggregate indebtedness nearly equal to 10 per centum of the assessed value of the taxable property in said city. This argument must, therefore, fail because it is based on a mistaken assumption of fact.

But even if this were not so, it seems to us that as these bonds are expressly issued for the purpose of retiring or taking the place of other outstanding bonds of said city, the amount represented by them is not to be considered as an increase of the city's indebtedness in estimating the amount of indebtedness which it may incur under the constitutional limit above referred to, but that it is expressly excluded from such calculation by the closing sentence of said section 158 of the Constitution, which is in these words, to wit: "Nothing herein shall prevent the issue of renewal bonds, or bonds to fund the floating indebtedness of any city, town, county, taxing district or other municipality."

And, furthermore, even if the indebtedness represented by these bonds had in fact increased the aggregate indebtedness of said city to an amount in excess of the constitutional limit of 10 per centum of the assessed value of the taxable property therein, yet the fact that it was authorized under the act of May 22, 1890, passed prior to the adoption of the Constitution, would seem to protect it under the language of another clause in said section 158 of the Constitution, which is in these words, to wit: "Provided any city, town, county, taxing district or other municipality may contract an indebtedness in excess of such limitations (10 per cent. of assessed value of taxable property in this case), when the same has been authorized under laws in force piror to the adoption of this Constitution."

A question very similar to this was recently considered by this court in the case of Aydelott v. South Louisville, 16 Ky. Law Rep., 166, in which the validity of certain bonds of South Louisville, issued subsequent to the adoption of the present Constitution under an act of the legislature passed prior to the adoption of the Constitution, was questioned upon the same grounds urged here, and in that case the bonds were held valid and unaffected by the provisions of the Constitution. We refer to that case, without quoting from the opinion, as settling the question now under consderation here.

In the next place, as to the contention of appellants that this act of May 22, 1890, under which these bonds were issued, was repealed by section 3010, Kentucky Statutes, it is sufficent to say that not only is there nothing in this general act, found in section 3010, inconsistent with the provisions of the act of May 22, 1890, but the very first clause of said section 3010 is in these words, to wit: "The sinking fund, to pay the bonded debt of the city, is hereby continued as now established by law." There was, therefore, no repeal of this special act by section 3010, Kentucky Statutes.

The only other ground upon which it is claimed that these bonds are invalid is based upon the fact that they are made payable, both principal and interest, in gold coin of the United States, while there is nothing said in the act authorizing their issue as to the kind of currency or money in which they are to be made payable.

The precise question here raised was passed upon by the Supreme Court of Alabama, and that court, in its opinion sustaining the power of the city to make its bonds payable in gold, although the act authorizing them was entirely silent on the subject, uses this lanugage, to wit: "Express and general power to issue negotiable bonds, in the absence of legislative restrictions, carries the implied or incidental power to make them payable generally; that is, in currency, which is constitutionally a legal tender, or payable in the particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured." (Judson v. City of Bessemer, 87 Ala., 240; also Ashley v. Board of Supervisors, &c., 60 Fed. Rep., 55; Moore v. City of Walla Walla, 60 Fed Rep., 961.)

It seems to us that in every grant of power of this kind the legislature may be presumed to have left something to the discretion of the grantee of the power where the exercise of discretion would necessarily or naturally be incidental to a full and complete execution of the power in all its details. In other words, there is contemplated in and embraced by every such grant not only the powers conferred in express words, but those fairly implied in or incident to the powers expressly granted. In determining the extent of the power, therefore, some regard should be had to the objects of the grant.

As said in the case of South v. City of Newbern, 70 N. C., 14, in discussing the powers of municipal corporations under legislative grants, "if we say they can do nothing for which a warrant could not be found in the language of their charter, we deny them, in many cases, the power of self-preservation as well as many of the means necessary to effect the essential object of their creation, hence they may exercise all the powers within the fair intent and purpose of their creation, which are reasonably necessary to give effect to powers expressly granted, and in doing this they must have the choice of means adapted to ends, and are not confined to any one mode of operation."

Looking now at the powers granted in the case before us, and the objects and purposes of the same, we find that they were, among other things, and mainly to issue its negotiable securities, running over a period of twenty years, for the purpose of borrowing money by the sale thereof at their face value, and carrying a low rate of interest. These bonds are to be offered on a market in which there is current more than one circulating medium, but one which is regarded as more stable and less subject to fluctuation than any other, which is the recognized standard of value and which is the equivalent of and corresponds in value with that which the borrower is to receive for its bonds. Can there be any legal reason why the borower, in case it should

seem, in the exercise of sound discretion, both prudent and advantageous to stipulate for the payment of the loan in that particular medium of circulation, so that the exact measure of the contract what is to be paid by the borrower on the one hand and what is to be received by the lender on the other—may be fixed and understood by both contracting parties, should not be allowed to so contract? It seems not to us, and it further seems to us that this is purely a matter of contract which should be and is entrusted to the discretion of the borrower, who is thus authorized to go into the open market to negotiate the desired loan, and who might, under some circumstances, be seriously embarrassed, or possibly rendered wholly unable to negotiate his securities, if denied this pirvilege of contracting as to these details, as an individual might do.

We, therefore, see no valid objection to these bonds by reason of their having been made payable in gold, and the judgment of the lower court is affirmed.

MORELAND'S ASS'EE, &c. v. CITIZENS SAVINGS BANK.

(Filed March 16, 1895—Not to be reported.)

1. The fact that the protest of a negotiable note held by a bank was made by a notary public, who was the cashier and a stockholder of the bank, does not invalidate it.

2. Pleadings—Premature submission—Where defendant's motion to require plaintiff to make his reply more specific was not overruled until February 13th, it was error to submit the case on the next day without giving defendant time to plead and take proof in support of his defense, his rejoinder not being due until said motion was disposed of.

C. S. Walker for appellants.

R. S. Todd and Reuben A. Miller for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

Citizens Saving Bank instituted suit in the Daviess Circuit Court against S. V. Walden, J. P. Moreland, etc., seeking to recover judgment on a bill of exchange for $5,000. E. P. Taylor, assignee of Moreland, by petition asked to be and was made party defendant, and set up various defenses. Judgment was finally rendered in favor of plaintiff for $4,805. From that judgment said Taylor and the defendants have appealed to this court, and insist that the notary public, being the cashier of the plaintiff bank and a stockholder in the same, could not legally protest said bill, and also claim that the action did not stand for trial at the term at which judgment was rendered.

The fact that the notary, Parrish, was cashier of and a stockholder in said Citizens Savings Bank does not invalidate the protest. It, however, appears that appellant had, in February, 1894, entered a motion to require appellee to make its reply more specific, and that said motion was taken under consideration by the court, and so held until July 13, 1894, and then overruled. Appellant then asked for time to reopen and prepare the case for trial, which motion was denied by the court and judgment rendered on July 14, 1894, being the last day of that term of court.

The rejoinder of the appellants was not due until the motion of appellants had been decided, hence it seems to us that the court erred in not allowing appellant time to plead and time to take proof in support of his defense, the action having been transferred to equity.

The judgment is, therefore, reversed and cause remanded, with directions to allow appellants to complete the pleadings and prepare the cause for trial and for further proceedings consistent with this opinion.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. GELTMAKER, BY, &c.

(Filed March 26, 1895—Not to be reported.)

1. Railroads—Contributory negligence—Instructions—In an action by an infant to recover damages for personal injuries alleged by him to have been caused by the gross neglect of a railway company in backing one of its cars upon him when he was attempting to cross a street in a city, and when the defendant's evidence conduces to show that plaintiff was injured while attempting to get upon or hold to or in some manner ride upon a moving train, part of which had already passed him, it was a prejudicial error for the court to refuse to give the following instruction, viz: "If * * the plaintiff, knowing it to be improper or imprudent to do so, voluntarily approached the side of a moving train, the front end of which had passed him, and thereby came in contact with said train and was injured, he can not recover and the verdict must be for the defendant.

2. The return of a verdict by the jury within ten minutes after retiring does not necessarily show passion or prejudice on its part in an action to recover damages for personal injuries alleged to have been caused by the gross neglect of a railroad company.

3. Where a witness, when called to testify, is found to be so intoxicated that his conduct and testimony is prejudical to the party calling him, that party should, at the time, call the court's attention to his condition and ask a continuance until he is restored to his normal condition.

Chas. H. Gibson for appellant.

R. C. Davis and Matt O'Doherty for appeliee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Guffy.

In 1891 Charles Geltmaker, an infant, by Ben Reiley, his next friend, instituted suit in the Louisville Law and Equity Court against the appellant, the Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. The petition in substance alleges that the appellant by gross negligence ran back a train of cars while appellee was in the act of crossing Fourteenth street, in Louisville, Ky., at or near its intersection with the north line of Pirtle street, upon him, so crushing his left leg that it had to be amputated to save his life, and crushing his left hand so that portions thereof had to be amputated, and otherwise injured him to the amount of $25,000, for which judgment was asked.

The appellant, in the first paragraph of its answer, denied that the injury was caused in the manner alleged by plaintiff, and traversed all the material averments of the petition. The second paragraph alleged in substance that appellee's injury was caused entirely by his own carelessness; that he, without authority or right, attempted to get upon and ride on the train of freight

cars passing through Fourteenth street, and while so attempting to get on said train fell under the train and thus received the injuries complained of, and that without any fault or negligence upon the part of appellant. To this answer appellee replied, traversing the same. A trial resulted in verdict and judgment in favor of appellee for $10,000.

Appellant's motion for a new trial having been overruled, it has appealed to this court and asks a reversal, claiming that many errors to its prejudice occurrd in the court below.

It is not necessary to discuss the alleged errors in detail. It seems to us that the instructions given on appellee's motion were proper. Appellant insists that the court erred in refusing the instruction asked for by it. We are of opinion that no error occurred in that regard, except as to instruction No. 8 asked by appellant, and was as follows: "If the jury believe from the evidence that the plaintiff, knowing it to be improper or imprudent to do so, voluntarily approached the side of a moving freight train, the front end of which had passed him, and thereby came in contact with said train and was injured, he can not recover, and the verdict must be for defendant."

The real contention of appellee seems to be that the train had moved forward and that he attempted to cross the track, and the train was suddenly moved back and thus caused his injury. The defendant's chief contention seems to be that appellee attempted to get upon the steps of the car, or in some manner ride on or hold to the train, and thereby fell under the wheels and was injured. Instruction No. 8 presented the view of defendant as to this contention, and should have been given.

The fact that the jury returned the verdict within ten minutes after retiring does not necessarily show that it was given under the influence of passion and prejudice.

It may be that the witness, Fisher, was in such an intoxicated condition that his conduct and testimony prejudiced appellant, yet if such was his condition when introduced, appellant should then have called attention to that fact and asked for a continuance until the witness was restored to his normal condition.

The newly-discovered testimony of Crutcher, which it appears could not, with reasonable diligence, have been discovered before the trial, would be material and not merely cumulative. It seems to us that appellant should have an opportunity to produce the evidence of Crutcher.

If plaintiff was injured in the manner alleged by him he is clearly entitled to recover; but if the injury was the result of his own careless and illegal conduct, as claimed by appellant, then appellant should not suffer.

For the errors indicated the judgment of the court below is reversed and cause remanded, with directions to award a new trial and for further proceedings consistent with this opinion.

McKAY v. MAYES, &c.

(Filed February 5, 1895—Not to be reported.)

1. In the absence of any summons in the record filed on appeal a recitation in a judgment that the defendant had been duly summoned would not be sufficient evidence of the service of a summons to sustain the judgment in the absence of proof on the question; but where the motion by defendant for a new trial is based on the ground that no summons on the amended and

supplemental petition was issued or served. it must be inferred, from the ground of the motion, that service of process was had on the original petition.

2. Summons on an amended or supplemental petition is not necessary where the amendment sets up no new matter and no distinct cause of action from that set out in the original petition.

In an action by a daughter on a note which she holds as a gift form her deceased mother, made with the consent of the mother's husband and by him endorsed, an amended or supplemental petition by surviving husband of the mother, now dead, and by her executor disclaiming all interest of any character in the note, does not set up such new matter or distinct cause of action as renders service of a summons thereon on the defendant and maker of the note necessary.

3. Husband's interest in wife's personal estate—Choses in action belonging to the wife at the time of her marriage vest in the husband, provided he reduce them to possession or dispose of them during coverture. If the husband survive, without having so reduced them to possession or disposed of them, he is entitled to take them as administrator of the wife, and, after paying her debts, he takes the surplus absolutely.

Choses in action accruing to the wife during coverture vest absolutely in the husband.

E. W. Hines and E. E. McKay for appellant.

John S. Kelly for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Paynter.

On the 14th day of May, 1877, E. E. McKay, the husband of appellant, executed his promissory note to Mrs. Charrie McElroy, wife of R. A. McElroy, for the sum of $3,000, and to secure the payment of the note E. E. McKay and his wife executed a mortgage on certain land in Nelson county, and by the terms of the agreement E. E. McKay was to and did procure a policy of life insurance, which he assigned to Mrs. McElroy as additional security for the payment of the note.

Mrs. McElroy died in 1882. The husband, R. A. McElroy, survived her. Before her death, with the consent of the husband, she gave and delivered to her daughter, Mary McElroy, now the wife of T. Scott Mayes, the $3,000 note.

On October 7, 1891, E. E. McKay, for the interest that was due on the note, executed to Mary McElroy Mayes his note for $2,440, and to secure the payment of which executed a mortgage on the same property embraced by the first mortgage, and likewise assigned insurance policy.

This action was instituted by appellee, Mary McElroy Mayes, and her husband, T. Scott Mayes, to recover on the notes, and to subject the land and life insurance policy to the payment thereof. E. E. McKay answered, but upon the trial of the case the court rendered judgment against E. E. McKay for the amounts of the notes and interest, and ordered a sale of the property to pay them. But before rendering the judgment T. Scott Mayes qualified as the administrator of the estate of Charrie McElroy, deceased, and he, as such administrator, and the husband, R. A. McElroy, filed an amended and supplemental petition, disclaiming any interest in the note, and asked that the plaintiff, Mary McElroy Mayes, recover thereon.

E. E. McKay does not appeal, but his wife, Ophela W. McKay, prosecutes this appeal. She filed grounds, and entered motion to have the judgment set aside because "the same is void as to

her, she not having been served with summons or process on the amended or supplemental petition of T. Scott Mayes, administrator of Mrs. Charrie McElroy, deceased, and others, and not being before said court as to said amended and supplemental petition herein."

The court overruled her motion and grounds to have the judgment set aside. From that action of the court this appeal is prosecuted. There is no summons in the record to show that the appellant had been summoned to answer the original petition. The judgment recites that Ophelia McKay was duly summoned in the original petition.

In the absence of a summons, this recitation, being merely formal, would not be sufficient evidence of service without any other proof, and by the authority of Long v. Montgomery, 6 Bush, 394, we would hold that the judgment should be reversed. But the appellant, in the grounds which she files to have the judgment set aside, admits she was before the court on the original petition by saying "she was not served with summons or process on the amended and supplemental petition." This admission, together with the recital in the judgment that she had been summoned to answer the original petition, is sufficient evidence that she was before the court on the original petition.

Is it not reasonable to conclude she was before the court on the original petition or she would have made that one of her grounds for setting the judgment aside? To have shown this fact would have been sufficient to have set the judgment aside. Had it existed, she certainly would have shown it.

It is insisted that she should have been summoned on the amended and supplemental petition before the court was authorized to render judgment in the case. No additional cause of action was set up. No additional facts were alleged in relation to the cause of action declared upon. Upon the other hand the administrator of the estate of Charrie McElroy, deceased, and her surviving husband disclaimed any ownership in the note in suit.

As the amended petition set up no new matter and a distinct cause of action, not connected with that embraced by the original petition, the court did not err in treating it as confessed as to the appellant by her failure to answer, she having, as we hold, been summoned to answer the original petition.

The proof shows the note was given and delivered to the daughter by the mother, with the consent of the husband, and she thus acquired the ownership of the note. If any interest in the note survived to the husband he fully passed it when he, after the death of his wife, endorsed her name across the back of it. If it did not survive to him, as contended by appellant, but to the administrator of the estate, that right was relinquished by the amended petition. In either state of case the judgment concludes both husband and administrator.

However, except for the fact the note was given to the daughter, the surviving husband of Charrie McElroy, R. A. McElroy, would have taken the beneficial interest in his own right, and could have maintained this action as survivor.

Choses in action of the wife at her marriage vest in her husband on condition that he reduce them to his possession or dispose of them during coverture. If the husband survive, and no such disposition having been made of them, the husband then is entitled to have them as administrator, and after the payment of her debt he is entitled to the surplus.

If choses in action accrue to her while she is covert they vest

absolutely and eo instanti in her husband, because she has no legal capacity to take in her own right during coverture. If the choses in action accrue to the wife during coverture, then an action may be maintained by the husband alone or by the wife joining in the action. When a chose in action thus accrues the surviving husband can maintain the action in his personal right and character. (Jones' Adm'r v. Warren's Adm'r, 4 Dana, 334.)

It follows from this that, although the gift of the note was in parol, the endorsement of the husband on the note, after the death of the wife, entitled the daughter to maintain the action without either joining the husband or administrator of the estate of the wife. Except for his endorsement on the note, as the gift was by parol, the husband would have been a necessary party to the action.

It is insisted by counsel for appellant that the cases subsequent to Jones' Adm'r v. Warren's Adm'r, supra, have contradicted the doctrine announced in this case. Brown v. Alden, 14 B. M., 141; Cox v. Coleman, 13 B. M., 453, are cited to sustain this contention. In neither of the cases was the question involved as in Jones' Adm'r v. Warren's Adm'r.

In each case the question involved was as to whether the surviving husband or the wife's heirs would take the wife's separate estate. The husband was expressly deprived of the use, control or ownership of the property during the lifetime of the wife. The very terms of the instruments which created the separate estate placed it beyond the power of the husband to acquire any interest in the property during the lifetime of the wife.

In Brown v. Alden, supra, the court said that the personalty left was at the disposition of the law, "which gives the personalty, including furniture and money or notes, to the husband as survivor or as administrator."

The question as to who could maintain the action was not directly involved in the case, and the court seems not to have decided who could maintain the action. The court in that case recognized the common law doctrine that the interest the wife has in personal property in possession vests absolutely in the husband.

In Cox v. Coleman, supra, the court held that the separate estate of the wife at her death vested absolutely in the husband as survivor or administrator of the wife's estate, the question not being raised as to how the action should be brought by the husband, whether in his personal character as survivor or as administrator of his wife's estate.

If, in these cases cited, the court was in doubt as to the character in which the husband should sue to recover the separate estate of his deceased wife, and, therefore, did not care to express an opinion, no doubt could be entertained in this case because it was a chose in action accruing to the wife during coverture, vesting absolutely and eo instanti in the husband; and section 11, chapter 31, General Statutes, does not change the rights of the husband in such choses in action.

It is insisted by counsel for appellant that this is not the kind of contract that is assignable under the statute because it does not embrace only a contract to pay money. A sufficient answer to this is to say that the note assigned was an obligation distinctively to pay money. The mortgages and the assignment of the insurance policy were simply incidents to the obligation assigned. The liens embraced thereon followed the debt.

Judgment affirmed.

H. B. CLAFLIN CO. v. LEVITCH, &c.

(Filed February 5, 1895—Not to be reported.)

1. A payment for goods at the time of purchase by an insolvent merchant is not an unlawful preference of a creditor by the debtor, such as will operate as an assignment of the debtor's estate for the benefit of all his creditors under the act of 1856.

2. Same—Judgment not authorized by pleadings—Evidence of payment of a particular debtor by an insolvent creditor, in contemplation of insolvency, will not authorize a judgment declaring such payment to operate as an assignment of the debtor's estate for the benefit of creditors under the act of 1856, unless said transaction is set out in the pleadings as the unlawful act for which such judgment is sought.

R. H. Cunningham for appellant.

Yeaman & Lockett for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Grace.

This record presents a question between the H. B. Claflin Co. and other attaching creditors of Mrs. Etta Levitch on the one hand, and I. & S. Bing and quite a number of other creditors of Mrs. Levitch on the other, the latter claiming an equal distribution of the property of said Mrs. Levitch under the act of 1856 among all her creditors, the attachments being sued out and levied from the Henderson Circuit Court, on the 17th and 18th days of October, 1892, on the ground that said defendant had been and was then disposing of her property with the fraudulent intent to cheat, hinder and delay her creditors; same being levied on a store of general merchandise which sold for some $4,800.

The appellees, being the other creditors of said Etta Levitch, claim and charge in their pleading that said attachments were sued out by the several plaintiffs therein by collusion with said defendant and with a view to giving said parties priority of her estate, and charging that said Etta Levitch had, before the suing out of said attachments, and within six months next before the filing of their suits, being indebted to one James Shefsky, and with a view of preferring said Shefsky and in contemplation of insolvency, had transferred and delivered to said Shefsky a large quantity of goods, wares and merchandise; and that said Levitch, being largley indebted to divers other creditors, and with like intent and purpose as aforesaid, transferred and delivered a large amount of goods, wares and merchandise and other money to said creditors, etc. They make said Shefsky, as well as Mrs. Levitch, a defendant to said proceedings, said creditors making themselves defendants to the attaching creditors' suits.

Issue being joined by appropriate pleadings on these several allegations by both Shefsky and the attaching creditors, suit being prepared, a judgment was finally rendered "sustaining said attachments as against defendant, Etta Levitch, but declaring in general terms, without any specification, that said defendant, Etta Levitch, had, within six months next before the filing of said suits by the general creditors and before the suing out of the several attachments, transferred and disposed of a part of her estate in contemplation of insolvency and with a view to prefer certain of her creditors, in whole or in part, to the exclusion of others, and that said acts operated to transfer

all her estate to and for the benefit of all her said creditors, and finally declaring that all of her estate should be equally divided between all of her creditors existing on the 3d day of October, 1892, and making a rule on I. & S. Bing to show cause why they should not be required to pay into court the $250 paid them by said Etta Levitch on the said 3d day of October, 1892.

Said judgment returned to two other creditors, the Ives, Balke Co., Williams Co. and to Rothschild, Blumenthal & Co., certain goods claimed by them respectively, and which they claimed had but recently been procured from them by the fraudulent acts and representations of said defendant Etta Levitch, and from this judgment the H. B. Claflin Co. and others, being the attaching creditors, prosecute this appeal, not, however, complaining of the orders returning to the Ives, Balke Co., Williams Co., nor to Rothschild, Blumenthal & Co., the goods claimed by them. So that in this judgment that of the lower court, in reference to said two creditors, will remain undisturbed.

The evidence taken in the cause abundantly sustains the charge of fraudulent disposition of the goods, wares and property of the defendant, Etta Levitch, by her with a view to cheat, hinder and delay her creditors, and sustains the attachments sued out by appellants, as also the claim of the firms who obtained their specific goods from said defendant. The court, in its judgment below, declared also that there was no fraudulent combination between the several plaintiffs, the attaching creditors and the defendant, Mrs. Levitch, the court not specifying in its judgment whether it relied on any transfer or sale of goods to Shefsky to support its judgment, and not, at any rate, making any orders against said Shefsky, and entering no rule against him for return of any such goods or merchandise.

The evidence heard fully justified the finding of the court below that there was no collusion between the several plaintiffs in their attachment suits and the defendant.

The evidence likewise failed to show that defendant Levitch had, at any time since her original purchase of the $5,300 worth of goods of Shefsky, paid any money or transferred or delivered any of her own goods or merchandise to said Shefsky or any indebtedness owing to him by said defendant; neither was there, in all the evidence heard, any testimony to show any payment either in goods or money by said Levitch to any one of her numerous creditors since her purchase of the Henderson store of Shefsky or within six months of the filing of the insolvency suits by the general creditors against her save and except only that at the time of the purchase of some $1,300 to $1,500 worth of goods from I. & S. Bing, on the 3d day of August, 1892, and before the shipment of said goods, and, as a part of her contract of purchase of same, she did, on said day, give said I. & S. Bing & Co. a check on some bank for $250, said check being then dated ahead and of date October 1, 1892, and which check was paid at maturity. The name of the bank is not stated, neither does it appear when the money deposited for its payment was made.

It will be observed in the pleadings that this transaction is not set up by either of the creditors seeking to bring this estate under the insolvency act of 1856. It is not even mentioned, much less the charge is not made, that same was done or paid in contemplation of insolvency, and with a view to prefer said Bing & Co., either in whole or in part, to the exclusion of her other creditors. This much is indispensable to bring the case within the

statute, and so make this transaction overreach the attachments of the several attaching creditors.

If authority was needed on so plain a proposition, this court held in the case of Hendrick & Co. v. Silva, 89 Ky., 428, in a proceeding under the same statute: "That proof without pleading can not avail; that it is quite meritorious in a debtor to pay his creditor. He may even prefer him over his other creditors without being guilty of actual fraud. Relief, in such a case, is afforded by reason of the statute alone, and to obtain it a party must aver in his pleading the facts required by the statute to authorize it." Then, quoting the statute, the court proceeds: "Two things must concur to entitle the creditor to relief: First, the act must be done in contemplation of insolvency; and, second, with a design to prefer one creditor over another."

And the court may now well add that the payment by the debtor must be made to some antecedent creditor and not on a part of the contract of original purchase, and at the time of such purchase. The statute has never been so applied in any of the numerous cases, when same has been before this court.

In the very nature of the thing it is inapplicable. The two things—one a purchase and payment at the time of part of the purchase money, and without which, by the terms of the contract, the goods would not be delivered, and the other a voluntary payment in contemplation of insolvency and with a view to prefer some creditor and on a pre-existing debt—are so widely dissimilar that we wonder that they could have ever been confused into one and the same thing, or that the former, that is part payment by a purchaser at the time of the purchase, should ever have been supposed to apply to a case stated and pointed out by the statute of preferring one antecedent creditor.

In support of the doctrine now announced the court refers to the case of Vinson, Goble & Pritchard v. McAlpine & Co., 87 Ky., 357. Other cases might be cited of similar import.

Thus it is that, presuming, in the absence of any other transaction sufficient to warrant the judgment by the court below and by reason of that court's fixing the date of the receipt of this $250 by Bing & Co., and of the rule against them to return same, that this must be the transaction relied upon by the court to sustain said judgment distributing said estate as under the act of 1856, and as, in our opinion, said transaction is insufficient, either on principle or authority, for this purpose, said judgment must, therefore, and same is now reversed and this cause is remanded, with directions to the circuit court to set aside the said judgment distributing said estate in court of said Etta Levitch to her creditors generally; that the court will dismiss the petition and cross actions for said purpose, and, having already sustained the attachments sued out by the attaching creditors, will proceed to distribute the fund in court to the several attaching creditors in said insolvent suits, having due regard to the priority of same under the law. Appellants will recover their costs in this appeal.

Cause reversed.

WESTERN DISTRICT WAREHOUSE CO. v. HOBSON, &c.

(Filed February 6, 1895.)

Sale of good will—Contract not to engage in a certain business for ten years—A contract by partners, when they sold their tobacco warehouse and good will, not to engage, as a firm or individually, in said business, directly or indirectly, for a period of ten years, is not an illegal restraint of trade or void, as it must be understood to bind the members of the firm not to engage, for ten years, in the tobacco warehouse business in the place where their warehouse was located or in the vicinity thereof.

Therefore, it was error to sustain a demurrer to the petition filed by the purchaser seeking to recover damages from one member of the firm and to restrain him from engaging in the tobacco warehouse business in the place where the partnership warehouse was located, which alleged that defendant, within less than five years after the date of sale, was engaging in said business at said place.

W. S. Bishop and W. D. Greer for appellant.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Guffy.

It appears that the appellees were the owners of a tobacco warehouse in Paducah, and had built up quite a large trade in that vicinity. Some time prior to March 16, 1892, the appellant purchased the property and good will of the appellee, and also, as alleged, contracted and agreed with them that they (appellees) would not enter into said business, directly or indirectly, for ten years. Appellees executed deed of conveyance to appellant for said property, but afterwards appellee, H. Hobson, engaged in the same business in the town of Paducah, and within less than five years from the sale of the said warehouse property, etc., to appellant.

The appellant, the Western District Warehouse Co., instituted this action, seeking judgment for damages against appellee, and asking that he be enjoined from engaging or continuing in said tobacco business in Paducah or in the vicinity.

Appellant's petition sets out in apt language the purchase from appellees, payment for same and breach of contract, and files its deed with petition.

The appellee, Hobson, demurred to plaintiff's petition and amended petition, and the demurrers were sustained by the court, and upon the refusal of the court to allow appellant to file its last amended petition it failed to plead further, and the petition was dismissed by the court with costs. From that judgment plaintiff has appealed. There is no brief for appellees on file, but we presume, from the reading of appellant's brief, that the court below was of the opinion that the obligation to not engage in the tobacco warehouse business was void, being in restraint of trade. It may be readily conceded that a contract to refrain from engaging in such business for ten years without reference to place or other conditions would be void, but a contract such as plaintiff claims to have made with defendant, is not void.

The deed is copied into this record and describes fully the property and business sold to plaintiff, and toward the close these words are used: "And also all our good will in said warehouse business as members of the firm of H. H. Hobson, etc., or as individuals, and we agree with said company not to engage in said business, directly or indirectly, for a period of ten years from this date."

The deed is dated the 22d of November, 1890. It seems to us that the language of the deed, taken in connection with the subject-matter and understanding of the parties at the time, can only mean that appellees only contracted to not engage in said business in Paducah, or in the district or vicinity in which they had been doing business, and which business they had just sold or at leasts ought to sell to appellant.

It seems to us that such a trade or contract is not void, and can not properly be held to be in restraint of trade. We are, therefore, of opinion the court below erred in sustaining the demurrers of defendant.

The judgment of the lower court is reversed and cause remanded, with directions to overrule the demurrers and for further proceedings consistent with this opinion.

FRANCIS v. RAMSEY & SHEARER.

(Filed February 28, 1895—Not to be reported.)

1. The finding of the chancellor on the question of settlement of partnership accounts will not be disturbed on appeal where the evidence is conflicting.

2. A former opinion of this court in this case, directing the discharge of the attachment herein, should be obeyed by the chancellor, and the attachment should be discharged.

Sam C. Hardin and P. Watt Hardin for appellant.

T. Z. Morrow and D. W. Lindsey for appellees.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Hazelrigg.

The chief contention of the appellant on his former appeal of this case was that the lower court erred in sustaining the attachment of the appellees.

The only ground of attachment alleged was that the defendant (appellant) did not have sufficient property in the State subject to execution to satisfy the plaintiff's debt, and the collection thereof would be endangered by delay in obtaining a judgment or a return of no property found.

These allegations were controverted, and it was urged that the evidence disclosed that the value of the appellant's property in the State subject to execution was more than sufficient to satisfy the amount of the judgment obtained by the plaintiffs. This court so concluded, or, at any rate, in reversing the judgment directed the attachment to be discharged. (13 Ky. Law Rep., 283.)

However, the construction of the contract, by which the result was reached which brought the appellant in debt to the appellees, was held to have been erroneous, and the case was sent back for a settlement of the partnership under the contract as construed by this court.

Upon a return of the case amended pleadings were filed and the case tried out on the issues suggested by the opinion. The chancellor reached substantially the same conclusion he did in his first judgment, and again sustained the attachment.

The questions involved on the settlement of the partnership are largely issues of fact, and, as the testimony is conflicting, we

shall not disturb the finding below so far as it fixes the amount of the judgment for the plaintiffs. The former opinion, however, required the discharge of the attachment, and that must be done.

The judgment is reversed for that purpose and to that extent only.

SNEED v. HOPE.

(Filed March 15, 1895—Not to be reported.)

Champerty—Adverse possession—At the time appellee conveyed to a railroad company the land sought to be recovered by appellant, who claims under the railroad company, he retained possession of it and he has held adverse possession ever since, claiming that the deed to the railroad company was fraudulent and void: therefore, the conveyance to appellant was champertous and void, appellee being in adverse possession of the land at the time it was executed.

Jones & Wickliffe for appellant.

E. Dudley Walker for appellee.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Paynter.

On the 25th of November, 1871, the appellee by deed conveyed the land in controversy to the Owensboro & Russellville R. R. Co. The Louisville Banking Co., having obtained a judgment against the Owensboro & Russellville R. R. Co., had the land in controversy sold under an execution, at which sale the banking company became the purchaser.

On the 5th day of February, 1880, the sheriff made the Louisville Banking Co. a deed for the land. On the 13th day of January, 1885, the banking company by deed conveyed it to the appellant, who instituted this action to recover the land of appellee.

The court below held that the deed of appellee to the Owensboro & Russellville R. R. Co. was procured by fraud; that appellee was in the adverse possession of the land at date of the sale of the land by the sheriff and his conveyance to the Louisville Banking Co.; that he was so in possession at the time the banking company conveyed the land to the appellant, and that the sale of the land by the sheriff, his conveyance to the banking company, and the deed to appellant was champertous and void.

It is unnecessary to discuss all the conclusions reached by the court below. It is sufficient to discuss one which must control the action of this court were it of the opinion that the court below had erred in its conclusion on the other questions.

The evidence conduces to show that the appellee continued to hold the possession of and claim the land as his own from the time he conveyed it to the railroad company until this action was brought, upon the ground that the deed was obtained by fraud.

He was in the adverse possession of the land, claiming it as his own, at the date of the deed of the Louisivlle Banking Co. to the appellant. The deed was champertous, hence null and void. The appellant not having title to the land, could not maintain the action.

Judgment affirmed.

Judge Grace not sitting.

LEVI v. CITY OF LOUISVILLE; Common Pleas division.

REED v. SAME; Common Pleas division.

KETCHUM v. SAME; Law and Equity division.

(Filed May 4, 1895.)

1. Constitutional law—Municipal taxation—The provisions of the present Constitution, requiring all property to be assessed for taxation at its fair cash value and requiring taxation to be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, apply as well to taxation for municipal purposes as to county and State taxation; and under these mendatory provisions of the Constitution a city must impose taxes for revenue by an ad valorem system uniformly upon real and personal property alike; it can not exempt from payment of ad valorem taxes so much personal property as is employed in the business of wholesale and retail merchants who pay a license tax to the city. The city can not substitute a license system for an ad valorem system of taxation as to personal property.

2. Same—When the Constitution, for the purpose of securing uniformity and equality in taxation, establishes a certain general system of assessment for all purposes, State, county and municipal, a city can not lawfully adopt another and different system, even though it will produce the same uniformity and equality in the imposition of the burden of taxation.

3. The provisions of the Kentucky Statute conferring the power of taxation for municipal purposes upon cities of the first class do not, when properly construed, authorize the city to substitute a license system for an ad valorem system of taxation as to personal property.

4. Same—Remedy—Although an ordinance levying municipal taxes for a particular year is erroneouss to the extent that it attempts to exempt personal property, when used in a business paying a license tax, from the burden of the ad valorem tax imposed on all other property, the levy is not void as to taxpayers whose property has been assessed by the ad valorem system; and the chancellor will not enjoin the collection of ad valorem taxes properly levied and assessed, but will require the proper city authorities to amend the ordinance levying the tax so as to require the proper ad valorem tax to be collected upon the personal property previously omitted from the ad valorem system.

Phelps & Thum, Lane & Burnett, J. D. Reed and M. S. Barker for appellants.

H. S. Barker, Humphrey & Davie, Helm & Bruce and Stone & Sudduth for appellee.

Appeals from Jefferson Circuit Court, law and equity division and Common Pleas division.

Opinion of the court by Chief Justice Pryor.

The appellants, Levi, Reed and Ketchum, are the owners of real estate in the city of Louisville, and decline to pay the taxes on their realty, by reason of the discrimination made by the ordinance levying the tax between real and personal estate, applying the ad valorem system to the one (realty) and a license tax to the other.

Levi and Reed, two of the appellants, filed a petition, seeking an injunction to prevent the collection of tax on their real estate upon the ground that the levy ordinance imposing the license tax on personal property made the entire ordinance or levy void. A demurrer was filed to their petitions by the city, and on the hearing the chancellor adjudged the levy as made unauthorized

and invalid, but refused to grant the injunction on the ground that this irregularity in the imposition of the tax, even if illegal, afforded no reason for the chancellor's interference.

The appellant, Ketchum, filed his action in a different branch of the Jefferson Circuit Court, asking relief on the same grounds assigned by Levi and Reed, and to this petition the appellee (the city of Louisville), instead of demurring, filed an answer, alleging in substance that the burden of taxation had been equalized by the additional tax imposed by the city upon trades and occupations and professions, and, therefore, nothing was lost to the city, and that the burden of taxation on realty was not increased by reason of the discrimination made as to the manner only of imposing the burden.

To this answer a demurrer was filed by Ketchum, and overruled, and his petition dismissed, and all three of the taxpayers have brought the cases here for revision. The relief sought is based on the ground that the ordinance leying this tax is void, for the reason the city council failed and refused to follow the mandate of the Constitution, requiring all taxation to be uniform within the territorial limits in which the burden is imposed, and for the still greater reason of their failure to levy an ad valorem tax upon the personal as well as the real estate located within the city and subject to taxation.

It is alleged in the petitions of Levi and Reed that the system of assessing personal property adopted by the city, by imposing upon it a mere license tax, increased the burden upon the realty, and in effect relieved from taxation personal property of the value of fifteen or twenty millions, that, under the ad valorem system, would be required to discharge its portion of the burden.

It is insisted by the city that no provision of the Constitution is mandatory as to the mode of assessing personal property for taxation, and that the ad valorem system is to be applied alone to the assessment of real estate; that the power to classify property for taxation exists now, with those authorized to impose the burden, as it did under the former Constitution, and, therefore, as to personalty the substitution of a license tax in lieu of the ad valorem system is permissible upon the goods, wares and merchandise of the wholesale and retail merchants in the city, as well as other business associations owning such property liable to taxation, who may, by ordinance, be required to pay a license tax upon all their property except their realty.

It is further contended by the attorney for the city that the provisions of the Constitution in relation to the general system of taxation applies only to taxation for State and county purposes, and not to cities of the first class, and that as to the municipal government of the first class the mode of imposing the tax is left (except as to real estate) to the judgment and discretion of the general council, the latter having the right to apply the ad valorem system to the one and the license tax to the other.

The questions arising in these cases are of the highest importance to both the State and municipal governments, and if the system and mode of the assessment of property for taxation is to be followed as it existed under the former organic law of the State, there is then but little difficulty in sustaining the right of the city to substitute as to personalty the license tax instead of the ad valorem system, while on the other hand, if there has been a fundamental change in the mode of assessment, in ascertaining the value of real and personal property it must be followed, and the suggestion or argument that the mode adopted, differing from the provisions of the organic law, will produce

the same result—that of uniformity and equality in imposing the burden—can not be permitted to control the decision of this question, were it more just and equal in its results.

The present Constitution is more definite and specific in its provisions in relation to taxation than our former Constitutions, and to such an extent as to leave but little for the legislature to do in having them executed. The exercise of legislative power is dispensed with as to the mode of assessment, and the mode of taxation is regulated by constitutional enactments that under former Constitutions was left to the will of the legislature.

There is but one general system of assessment as to all property under the present Constitution for the purposes of government, whether State or municipal, and in addition taxation may be based on income, on licenses, on franchises, and a head or poll tax. The ad valorem system relates to the assessment and taxation of all property; the income tax to the product or income from property or from business pursuits. The license tax is one imposed on the privilege of exercising certain callings, professions or avocations that, when collected, go into the State treasury, and when applied to municipal taxation is termed license fees. A license based on franchises includes the ascertainment of its value and the mode of determining that value. The power to impose an income tax, a license or franchise tax is expressly given by the Constitution to the legislature, and the exercise of such powers by municipal governments must be derived from legislative enactments; but there is no authority, express or implied, conferred by the Constitution on either the State or municipal legislatures to substitute a license tax in lieu of the ad valorem system.

No income tax has been imposed by the legislature, but a license tax has been imposed for State and county purposes, and the power conferred upon municipalities to enact license fees, which is in effect a license tax.

The contention, however, is that the city government, by certain provisions of the Constitution, can impose a license tax upon personalty, and if legislative authority is required, the general provisions of its charter confers such power, and it becomes, therefore, necessary to examine the ordinance under which this license tax has been imposed by the city, and the provisions of the organic law from which it is claimed this power is derived, as well as the various sections of the Constitution directing the mode of assessment and taxation.

The ordinance relating to the taxes for the fiscal year ending August 31, 1894, is as follows:

"Be it ordained by the general council of the city of Louisville: That the following ad valorem tax is hereby levied for the fiscal year ending August 31, 1894, on lands and improvements, and on such personalty as is not used and employed in business paying a license tax for such business, and in each case on each $100 in value, but shall not be levied on any property exempt from taxation." The ordinance then proceeds to numerate the purposes to which the tax is to be applied and the rate upon each $100 on value of property to raise the necessary revenue.

The following sections of the Constitution have a direct bearing on the question involved in this case:

Section 171 provides: "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

Section 172 provides: "All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale;" and the section then proceeds to impose penalties on those authorized to assess values for a willful neglect of duty.

Section 174 provides: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value unless exempted by this Constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, license or franchise."

Section 181 provides: "The general assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may by general laws confer on the proper authorities thereof, respectively, the power to assess and collect such taxes. The general assembly may, by general laws only provide for the payment of license fees on farnchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax, and may by general laws delegate the power to counties, cities and other municipal corporations to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

It is argued from these several provisions of the Constitution, and particularly sections 174 and 181, is derived the authority to impose a license tax on the personal estate of those engaged in mercantile or business pursuits, and relieving it from that mode of assessment as to valuation claimed by the appellants to apply to all kinds of property, whether real or personal.

In support of the position taken by the learned judge of the law and equity court, that uniformity and equality in taxation may be reached by diversity of taxation as to the various kinds of porperty, reference is made to the Constitution of other States where it has been held, under provisions requiring that all porperty shall be subject to taxation according to its value and shall be equal and uniform, by the courts of those States, that such porvisions apply to the methods of taxation for the State, and not to municipalities.

The sections of the Constitutions of Indiana, Virginia, Louisiana and Arkansas, from which the questions originated, are cited, and the cases of Gilkeson v. Frederick, 13 Grattan, 577; Washington v. The State of Arkansas, 13 Arkansas, 572; Hamilton v. Wayne, 40 Indiana, 491; and Louisiana v. Pittsburg, 105 U. S., 278, all well considered cases, and would sustain the contention of the city if the respective Constitutions were similar to those of this State. In the State of Arkansas the value of property is to be ascertained in such manner as the general assembly may direct, and the provision of each Constitution referred to on that subject confers, in express terms, upon the legislature the power of prescribing the mode of reaching a just valuation for taxing porperty, a power that existed with the legislature of this State under the former Constitution, because not prohibited, and the exercise of which was not doubted, or when questioned the legislature sustained by this court. The power to prescribe the mode of assessment or of ascertaining the value of property has been taken from legislative control and fixed by the Constitution, so there is nothing left but to follow its provisions, and no authority is given to the legislature to value or have property valued, but in one mode, with the right to impose an income tax, a license tax and a franchise tax, and if the provisions on the subject of taxa-

tion were taken from the Constitution and inserted in legislative enactments, it would not be contended that the power to ignore the ad valorem system could be sustained as to personalty, and a license tax substituted.

Under the former State Constitution the right to impose one rate of taxation on one class of property and a different rate on another class was well understood, but in considering the provisions of the present Constitution we find the mode of assessment prescribed by that instrument, requirng in plain terms that all property shall be assessed for taxation at its far cash value, estimated at the price it would bring at a fair voluntary sale. It would do violence not only to the intention of the framers of this instrument, but its letter and spirit, to hold t hat the system adopted by its provisions could be disregarded and another selected better suited to the business of the municipality and more just and uniform in its results. Nor do we find in the Constitution a provision of any kind conferring on a municipal government the power to assess property for the purposes of revenue by imposing a license tax, nor has the legislature the power to authorize the imposition of a tax on the amount of property, whether real or personal, in any other mode than that provided in the organic law.

The power of the legislature to tax a franchise is expressly conferred, and for that reason the mode of determining its value is pointed out by that body, and after creating a board of valuation to value every and all corporations, associations or companies having or exercising any exclusive privilege or franchise not allowed by law to natural persons, the power of this board is confined to the invisible estate of the corporation, and its real and tangible property, such as can be seen and valued by the assessor, is required to be omitted, or rather deducted from the value of the franchise as found by the board, because this species of property is required to be assessed in the county or place where located or its franchise exercised.

The legislature was careful when adopting a mode of valuing a franchise to omit from its valuation the tangible property, that must, under the provisions of the Constitution, be assessed where located by the State, county or municipal authorities, at its fair cash value; and whether or not this mode is nearer uniformity and equality than the mode contended for is not for this court to determine, nor can these porvisions, so plain an unmistakable in their purpose, be made the subject of judicial consideration. It must be conceded that if the mode of valuing a franchise had been fixed by the Constitution, as is found in the statute, no power would exist with the legislature to adopt any other mode.

If, as contended by counsel for the city, this mode of assessment applies alone to the State, it would be difficult to determine under what provision of the Constitution municipal governments derive the power to classify property for taxation, or even to impose taxes for any purpose; nor can it be assumed that in prohibiting the legislature from imposing taxes on or for municipalities, the Constitution intended to leave the entire mode of assessment to the discretion of the general council, and giving to such bodies the exercise of a power expressly denied to the representatives of the people.

The object of such a provision as placed the city government beyond legislative control as to imposing taxation was to prohibit the latter body from determining the amount to be imposed and the objects to which it should be applied.

The words license tax imply a burden on that which is not property, but results from its enjoyment or the conduct of a busi-

ness or calling, and the legislature assembling after the adoption of the Constitution and composed of some of the leading members of the Constitutional Convention, understood the meaning attached to the phrase, license tax, and under the title of revenue and taxation, in subdivision 4 of chapter 108, imposed a license tax on certain kinds of business, such as a license on taverns, retailing spirituous liquors, on saloons, selling pistols, bowie knives, ten-pin alleys, peddlers, insurance companies, circus, and so on, showing plainly that its imposition as a tax upon property was not even considered. Its meaning is, therefore, clearly ascertained by its application, as understood by the legislature, and made still more so by the debates in the convention by every member who spoke upon the subject and still plainer by the provisions of the Constitution we are now consdering.

The convention doubtless saw, after they had adopted a general system for assessing and taxing property, that the legislature should be clothed with a power that might be required to be exercised in imposing burdens for the exercise of mere privileges under the police power of the State, and that such intangible rights as that of franchises and incomes should be made the subjects of taxation, and, therefore, porvided in section 174 that nothing shall be construed to prevent the general assembly from providing for taxation based on incomes, licenses or franchises, and while this character of tax might be upheld, even without express constitutional authority, it was doubtless thought best to be more specific on the subject. The members of the convention had no thought, when annexing to seticon 174 the power to the legislature to impose a license tax, they were destroying the structure they had already constructed in regard to the taxation of property, and that constituted the governing feature of taxation in that instrument, and by addenda had delegated the same power to the legislature and municipalities to classify property for taxation as under the former Constitution.

Under the title of Municipal Corporations, section 2980, Kentucky Statutes, the legislature, in creating charters for cities of the first class, provided: "Each city shall raise a revenue from ad valorem taxes and a poll tax and license fees; and to that end the common council of each city is hereby authorized and empowered to provide each year by ordinance for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for state purposes, and shall levy an ad valorem tax on same not exceeding the rates and limits prescribed by the Constitution," etc; "and may impose license fees on stock used for breeding purposes, or on franchises, trades, occupations and professions, and provide for the collection thereof," and in section 2984 it is further provided that the assessor shall assess at its fair cash value, as of the 1st of September of every year, all the lands, improvements and personalty subject to an ad valorem tax under this act.

These license fees may be granted, as the charter provides, for no longer period than one year, but may be granted for a shorter time. It is apparent, therefore, that these license fees can not be imposed in lieu of the tax for revenue, as required by law, not only by reason of the provisions of the Constitution, but the amount and the period for which they may be granted repel such a conclusion.

The framers of the Constitution left no discretion with the legislature as to the assessment and valuation of either real or personal property, or as to what property shall be taxed or exempted from taxation, and, however wise or unwise the system may be, it is the mandate of the Constitution that all must obey.

It results, therefore, that the imposition of a license tax upon personalty, whether used or not in a business for the exercise of which license fees are paid or license tax imposed, is not warranted by the Constitution.

As the judgments in these cases were for the city and all relief denied the taxpayer, it is for this court to determine the remedy they have, if any, and the solution of the question is not free from difficulty. If it involved a question only as to local improvements and an assessment for such a purpose, we would have but little trouble in holding that the Constitution did not affect such questions when the burden is imposed by reason of local benefits, for in such a state of case a wrongful levy or assessment would authorize the interference of the chancellor by injunction; but in these cases the assessment, or rather the levy, made by the ordinance is for the revenue upon which the maintenance of the city government depends, and to say to one taxpayer "you are not required to pay your taxes under such an ordinance" would in effect become a release for all taxpayers and leave the city without any revenue or power to collect it. The chancellor should well hesitate before staying, by a judicial order, the tax collector from recovering or collecting these public dues.

This levy ordinance is not, however, void, and while levying an ad valorem tax for the fiscal year ending August 31, 1894, on land and improvements, and on such personalty as is not used and employed in a business not paying a license tax for such a privilege, the general council has omitted to tax the personalty (ad valorem), where it is used in a business upon which a license tax has been imposed, is not such an irregularity or mistake as renders the entire ordinance void, but does produce a discrimination between taxpayers, and is such an immunity from taxation as compels the chancellor to afford the complaining taxpayer some relief; and that relief must consist in the chancellor requiring the city government to comply, in imposing such a burden, with the organic law of the State and the charter creating the municipal government. The legal part of this levy can be separated from the illegal, and the omission to assess personal estate in the proper mode will not render the entire ordinance inoperative. (Desty on Taxation, volume 1, page 468.)

The chancellor has no power to appoint an assessor or to correct the error, but has the power to compel the city government to do so in order to remedy the wrong resulting from a mistaken construction by the council of the constitutional provision affecting this question.

The appellants have been legally taxed, and are complaining that the property of others, entitled to bear a part of the burden, has in effect been exempted; and, if the averments of the petition are true, the failure to impose the tax on this personalty must necessarily increase the tax on those who have been compelled to pay on the same kind of property under the advalorem system. Nor is it necessary that the chancellor should be satisfied that such a discrimination exists. The fact that a license tax is imposed on the personalty in the one case and the ad valorem on the other is sufficient, as, when imposed as a part of the license tax, it is a violation of the charter of the city as well as the Constitution, and it is no answer to say that the one mode is as just as the other.

Mr. Cooley, in his work on Constitutional Limitations, page 279, fifth edition, says: "There is and must be an inherent power in every town to bring the money necessary for the purposes of its creation into the treasury, and if its course is obstructed by ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means."

The existence of the municipality itself depending upon the collection of this revenue, the chancellor should require some steps to be taken by the council to collect this tax as if the ordinance had been without error in the first place—that is, the council should amend the ordinance and have this property assessed, applying the ad valorem system as of the date at which the property under the ordinance was required to be assessed. The chancellor can not, it is true, lessen the amount of tax levied by the ordinance by reason of the future collection of tax from this omitted personal property, but it must be assessed and taxed, the taxes when collected forming a part of the revenue of the city and redounding to the benefit of all the taxpayers. The chancellor has properly refused to grant the injunction, but to say that such taxation can be imposed and no relief granted, would be to sanction not only an unjust discrimination, but a plain violation of the Constitution, and no remedy afforded.

A court of equity, under such circumstances, must afford some relief, and we perceive no reason why this omitted property should not be required to pay this tax.

The charter of the city, in order to provide against such mistakes or omissions on the part of the general council, and to correct such errors, provides: "If any year the general council shall fail to pass a levy ordinance, or if the levy ordinance in any year shall be invalid or inoperative, the rate of taxation for that fiscal year shall be the same as it was the year before, item for item."

While this section of the charter may apply as to the rate of taxation, there must be difficulty in proceeding under it without an assessment. The rate of tax is fixed and the property omitted from taxation assessed by correcting the levy ordinance, and then, with the proper assessment, the tax may be collected; while license fees can not be imposed so as to embrace the value of the property, and the amount to be imposed is with the council. Where this has been done in such a state of cases the council should be directed to credit the amount paid, if any, on the tax bill when collecting on the ad valorem system.

This suggestion is made in view of the fact that some of the license fees authorized to be imposed, as appears from the statute, indicate an amount approximating values, and if so the sum should be deducted from the tax bill, and of this the council must be the judge. The city being the defendant, its common council should be required to correct the levy ordinance, and to have assessed the personal property (omitted from the ad valorem system) existing at the date of the assessment under the ordinance in which the error was committed, its value to be ascertained as of the date at which the original assessment was required to be made.

This mandate is based on the idea that no steps have been taken to correct the error of the council.

ARMSTRONG, &c. v. RUSSELLVILLE DISTRICT TURNPIKE CO., &c.

(Filed February 6, 1895—Not to be reported.)

1. Validity of bonds—The county judge having submitted to the qualified voters of a magisterial district the proposition of subscribing money, payable in bonds, to be used in constructing turnpike roads in said district, according to the terms of a statute upon that subject, and a majority of the votes having been cast in favor of it, there can be no question raised as to the validity of the bonds issued from time to time and sold to innocent purchasers.

2. Taxes—Liability of voters in district—Where the county court has, at the request of numerous parties, so changed the bounds of a magisterial district as to include the farms of the petitioners and to allow them to vote in the said district, the successive occupants of those farms are liable to be taxed as other residents of that district. The appellants, being within the territory so changed, are liable for taxes ordered to be collected to meet the accruing interest on bonds, and to provide for a sinking fund.

Craddock & Sandidge for appellants.

W. F. Browder for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Lewis.

By statute the Russellville District Turnpike Co. was, in 1868, incorporated and the Logan County Court authorized to subscribe, on behalf of the Russellville magisterial district, $75,000, payable in bonds and to be used in making turnpike roads in that territory, upon a vote of a majority of the qualified voters being cast in favor of the proposition.

By terms of the statute the presiding judge of the Logan County Court was directed to submit the proposition, which was done, and a majority of the votes cast in favor of it. So there can be now made no question of the validity of the bonds issued from time to time as the work progressed and sold to innocent purchasers.

In 1886 there appeared to be yet unpaid of those bonds about the sum of $28,000, and proper orders were made for collecting taxes within the district sufficient in amount to meet accruing interest and set aside a sinking fund.

In June, 1889, J. R. Armstrong and many others, uniting, brought this action to enjoin collection from them of any part of taxes so assessed and ordered collected upon the ground they do not reside within limits of the Russellville district.

According to boundary fixed by commissioners under the statute of 1851 the farms of plaintiffs below, now appellants, are outside the limits of that district. But in 1856 an entry of the Logan county court was made of record that Josiah Marshall and fifteen others named filed their petition praying to vote in the Russellvillle district, and it is ordered by the court that the prayer of their petition be granted and that they vote in the Russellville district. Such an order made for benefit of a single person unexplained would not be valid; but it appears that those in whose favor that one was wade were at the time owners and occupants on adjacent farms, and the object and effect of it was to so change and enlarge the boundary of the district as to include their farms, which it was in power of the county court to do. And the strip of territory thus identified has been treated as part of the Russellville district, and successive occupants of the farms belonging to the original petitioners continued to vote without question in that district from 1856 to the time this action was commenced.

By the judgment some of the plaintiffs in the action were, by the lower court, decided not to be in the Russellville district, and they are not parties to the appeal; but it was, we think, properly determined by that court that appellants were within that district, having the right to vote there, and, consequently, liable in common with other residents thereof to the taxes in question.

Judgment affirmed.

GERMAN NATIONAL BANK v. LOUISVILLE BUTCHERS' HIDE & TALLOW CO.

(Filed March 5, 1895.)

1. Corporations—Ultra vires—A corporation must account for benefits which it has received under an ultra vires transaction; therefore, where it has used the proceeds of a note in its business it can not escape liability on the note upon the ground that its president had no power to discount the paper.

2. Negotiable instruments—Correction of mistakes—Mistakes in the execution of negotiable paper may always be corrected unless the rights of third parties have intervened.

Where a negotiable note, payable at and discounted by the German National Bank, was repeatedly renewed, the several renewals being made in the same way until the last renewal here sued on, which was made payable at "said bank," the word "said" being by mistake substituted for the words "German National," as it is manifest that in the contemplation of all the parties the words "said bank" meant the plaintiff, the German National Bank, they will be so read by the court; but if they could not be so read, the mistake being pleaded and proved, would be corrected, the rights of no third persons being involved, the defendants, who were indorsers, having received the proceeds of the note.

O'Neal & Pryor and W. O. Harris for appellant.

T. L. Burnett, Lane & Burnett and Frank Hagan & Son for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hazelrigg.

The appellee is a corporation, the stockholders of which are the butchers of Louisville. In aid of its trade it also organized a corporation known as the Kentucky Oak Tanning Co., the stockholders of which, with a trifling exception, were the first corporation and its stockholders.

Pursuant to the purposes of its organization the latter corporation, some ten years before the institution of this action, took from the appellee a large quantity of hides, coming from animals slaughtered by the butchers of the city, and executed its four notes, aggregating some $40,000, negotiable and payable to the appellees at the bank of the appellant. These notes were at once discounted at their place of payment, and their proceeds placed to the credit of the appellee.

Upon the maturity of each of the notes, from time to time, for many years, the appellant bank, at the instance and request of the two corporations—the payee and the payor—renewed the paper in the usual course of business, using for that purpose the following form:

"$..... Louisville, Ky....., 18..
..... after date..... promise to pay to the order of.....
..... dollars, value received, negotiable and payable at the office of the German National Bank at Louisville, Kentucky, with interest after maturity at the rate of six per cent. per annum until paid."

This was signed thus:

"KENTUCKY OAK TANNING CO.,
"BY ITS PRESIDENT GOTTLIEB LAYER."

Endorsed: "LOUISVILLE BUTCHERS' HIDE & TALLOW CO.,
"BY ADAM C. LAYER, President."

The name of the appellee would be filled in as the payee, and when the proper dates and amounts were inserted and the signatures of the parties attached, the note would be delivered to the bank.

When two of the notes matured on April 8, 1890, the usual form was not at hand, and the bank official furnished to the payor a form of this kind:

"$..... Louisville, Ky., ... , 189
..... days after date we, jointly and severally, promise to pay to the order of the German National Bank, of Louisville, Ky., ... dollars, value received, negotiable and payable at the office of said bank at Louisville, Ky., with interest after maturity, at the rate of six per cent. per annum until paid."

Upon getting this form the bookkeeper and general manager of the tanning company, with an old form before him, sought to make the new conform to the old form, and, therefore, ran his pen through the words "German National Bank," as well as through some other words not found in the old. The note then read as follows, it being one of those sued on in this action, the other one differing only as to its amount:

"$9,464.21. Louisville, Ky., April 8, 1890.
"Four months after date we promise to pay to the order of the Louisville Butchers' Hide & Tallow Co. $9,464.21, value received, negotiable and payable at the office of said bank at Louisville, Ky., with interest after maturity at the rate of six per cent. per annum until paid.
Signed: "KENTUCKY OAK TANNING CO.,
"BY GOTTLEIB LAYER, President."
Endorsed: "LOUISVILLE BUTCHERS' HIDE & TALLOW CO.,
"BY ITS PRESIDENT, ADAM C. LAYER."

The other two notes were renewed on the old forms. When they were due the last time each of the four was duly protested for nonpayment, and thereafter this action on them was brought in the Jefferson Court of Common Pleas, but was finally heard by the chancellor in the Louisville Chancery Court.

The petition was amended and reformation asked as to the two notes where the erasures occurred, and it was alleged that the words "German National" were left out by mistake, and that the words "said bank" meant in fact, in contemplation of all the parties, the German National Bank.

This was denied by the appellee, and it was contended that the notes were not negotiable and payable at any bank, and that the only liability imposed on the appellee was that of assignor, and that had been discharged by the negligence of the bank in failing to prosecute the maker of the note to insolvency.

It was also contended that the act of the appellee's president, in discounting and renewing the four notes, was ultra vires; that as to two of the notes there was no mistake, or if there was it could not be corrected.

After an elaborate preparation of the case the chancellor held that the contention on the part of the defendant, that its president had no right under its articles of incorporation and by-laws to discount paper could not be sustained; that it had received the proceeds of the discounts and had continued to hold them, and in many other ways had approved the action of its president

in making the discounts in question. As to two of the notes, therefore, judgment was rendered for the plaintiff.

It was held, however, that the evidence as to the mistake in the execution of the other notes was insufficient to authorize the court to reform them, and as to them the court dismissed the petition.

It is to be observed at the outset that this contest is between the original parties to the notes. The rights of no innocent holder are involved, or of any endorser for mere accommodation. The appellee sold to the appellant and received and used the proceeds of the notes in its business. It continues to do so, and we hardly need cite authority in support of the chancellor's conclusion that the transaction was not void for want of authority on the part of the appellee's president to discount the paper. The corporation can not hold on to the money and repudiate the acts by which it got it.

"In every case a corporation must account for benefits which it has received under an ultra vires transaction. This is a well known equitable doctrine. It has been applied not only to persons of full age, and under no disability, civil or mental, but also to those who are under some incapacity—infants and lunatics. From these persons the principle has been extended to corportions." (Brice on Ultra Vires, 2 Eng. Ed., 769.)

"A corporation can not be charged with the loan of money made by its directors without authority, but if any portion of the money was applied for the benefit of the company, it may be held liable to that extent at least." (Morawetz, section 123.)

Also to same effect Springfield T. P. R. Co. v. Harrodsburg, 11 Ky. Law Rep., 309; Sherman Center Town Co. v. Russell, 26 Pacific Rep., 715 [Ks.]; Empire Spring Co. v. Knowlton, 103 U. S., 57.)

As to the question of the place of payment, it seems to us hardly necessary to have made the attempt to correct the oversight of the draftsman in leaving out the words "German National." It is perfectly manifest that, in the contemplation of all the parties to the transaction, the words "said bank" meant the appellant.

Three times each year for from eight to ten years the appellee had regularly endorsed the forms furnished by this bank, where it had originally gotten the money, and we do not doubt it was as much surprised as the appellant in discovering the absence of the usual words. Under the circumstances the language "said bank," as used, meant the German National Bank, but if we could not so read the paper the evidence is absolutely conclusive as to is real meaning.

The officers of the bank, those of the tanning company as well as those of the appellee, unite in saying that in signing the notes sued on in renewal of former ones, the intention was to sign duplicates of the old notes, which were all payable at the German National Bank.

The president of the appellee says that when he signed the notes sued on he intended signing such duplicates, and that what he did in fact sign meant the German National Bank; that there was no other meant.

The learned chancellor was of opinion that there was no direct proof of an antecedent contract between the parties that the particular notes sued on were to be made payable at this bank, and it may be admitted that none of the witnesses say in express terms that there was such an antecedent agreement or contract to that effect. What is absolutely clear, however, is that the evident understanding of each party to the transaction was that the renewals were to be made payable as the old notes had been for years.

The common intention of the parties, as shown by the entire absence of any contriety in their testimony on this point, is evidence of their mutual understanding and agreement. It was because of this arrangement and agreement, so well understood that the intent was common and mutual to all to sign notes payable at the bank where they were doing this particular business. If such was the purpose of the parties to the bills, why may not the agreement be carried out by the insertion of the omitted words?

In Scales v. Ashbrook, 1 Met., 358, it was held that "whenever an instrument"—in that case a bill of exchange—"which is intended to carry into execution an agreement previously made but which, by mistake of the draftsman, either as to law or fact does not fulfill that intention or violates it, equity will correct the mistake and compel the party refusing to comply with the agreement according to its terms." (Citing 6 Monroe, 311; 1 Peters, 13; Story's Equity, section 115. To the same effect see Parcles v. Gohegan, 2 J. J. Mar., 133; McCurdy v. Breathitt, 3 Mon., 234.)

In Cothran v. Cunningham, 28 Ga., 178, it was held that parol evidence was admissible to show that it was agreed to make a note payable in bank, and the fact that a former note, of which the note sued on was a renewal, was so payable was a cogent circumstance, going to show such an agreement. (Also Tarr v. Ricker, 46 O. St., 265; Watkins v. Maule, 2 Jacob & Walker, 237.)

Mr. Daniel, in his work on Negotiable Instruments, lays down the rule that mistakes in the execution of such paper may always be corrected unless the rights of third persons have intervened. (Sections 850-3.)

The learned chancellor very aptly said that courts of equity never rectify contracts, but that they did rectify the instruments evidencing the contracts. We can not agree with him, however, in holding that the agreement in this case was not shown by sufficient proof, or that no mistake was shown in the execution of the notes.

If the manifest intention or agreement of all the parties to the bills is to be effectuated, the instruments must be read as if they contained the words "German National" between the words "said bank." It is possible to doubt this under the proof.

Affirmed on cross appeal and reversed on the original appeal with directions to enter judgment on each of the notes sued on.

GRIFFITH, &c. v. OWENSBORO & NASHVILL RY. CO.

(Filed March 19, 1895.)

Breach of condition subsequent—Re entry—Rents—Where the estate of the grantee has been forfeited by breach of a condition subsequent contained in his deed, an actual re entry by the grantor is not necessary in this state in order to entitle him to possession of the premises or to recover rents, when the grantee withholds possession after it is demanded by the grantor.

Grantors conveyed land to a railroad company, so long as it should be used for depot and other railroad purposes; and in the event use of it for depot purposes was discontinued by the railroad the grantors reserved the right to resume possession, allowing the railroad to remove improvements put by it on the premises; or, at the election of the railroad company, it could, by paying the grantors the value of the land at the time of the conveyance, entitle itself to a fee simple conveyance. The railroad ceased to use the land for depot purposes, and the grantors notified it to remove its buildings from the property or to pay for it, both of which the railroad refused to do. In this action to recover rents and possession of the property, Held—The

grantors were entitled to recover rents from the date of their demand upon the railroad, and not merely from the date of their re-entry upon the property.

C. S. Walker for appellan's.

Wilbur F. Browder for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

On the 20th day of January, 1869, D. M. Griffith and W. N. Sweeney conveyed to the Owensboro & Russellville R. R. Co. (now being the Owensboro & Nashville R. R. Co.) a certain parcel of ground near the city limits of Owensboro. The conveyance was made in consideration that the railroad company would locate its Owensboro depot on the land conveyed.

The habendum is as follows: "To have and to hold said parcel of ground for the use of said railroad depot and other railroad purposes, such as they may deem proper to the said party of the second part, so long as the same shall be used for said purposes; but in the event the said railroad shall discontinue the said point as a depot for the said road, and said ground shall no longer be useful for said purposes or should the road be discontinued when built, then said Griffith and Sweeney have the right to resume the possession of said property, allowing said railroad company the right to remove any improvements they may have put thereon; or in default of this, and at the election of the said company, they may, by paying to Griffith and Sweeney the present value of said property, entitle themselves to the absolute fee simple, and said Griffith and Sweeney will, in this contingency, execute any further conveyance that may be necessary to such vesting of the absolute title."

The appellant removed its Owensboro depot to another place in the city in 1877. The appellants gave appellee notice to remove the improvements it had on the ground or elect to pay them the value of the property of the date January 20, 1869, but upon its failure to elect they would resume possession of the ground.

Refusing to elect, but retaining possession of the ground, the appellants instituted an equitable action to recover the ground and rents. Pending that action the appellants commenced this action to recover the possession of the land. The court below adjudged that they were entitled to recover the possession, and this court affirmed that judgment. (14 Ky. Law Rep., 236.)

On a return of the case it was consolidated with the equitable action, and in which consolidated action the court adjudged that appellants were entitled to recover rents from February 2, 1889, until April 27, 1892. From that judgment this appeal is prosecuted.

The court proceeded upon the idea that the appellants were not entitled to recover rents until they made a re-entry upon the ground by going upon it and declaring a purpose to resume possession. This was done in January or February, 1889.

It is insisted that appellants' right to possession did not accrue until that form of re-entry was made. In this we do not agree with counsel.

This court held in this case on the former appeal that the deed simply granted the "possessory right" to the land to continue as long as it was used for depot purposes, and there having been a breach of the condition in the deed the possession vested to the grantors.

It is not necessary to enter into a discussion as to the kind of estate created by the deed or as to whether or not at common law the re-entry insisted on would have been necessary to have enabled the grantors to recover possession of the land. At common law, when, from the character of the estate conveyed, it was necessary to have livery of seizin; then if in such deed there was a condition subsequent, the breach of which would entitle the grantor to be re-invested with the estate conveyed, a re-entry or claim was necessary to avoid the estate of the grantee. The reason of the law was that in cases where the deed conveyed such an estate as made a livery of seizin necessary, in order to regain the estate on account of a breach of the condition subsequent contained therein, the grantor must make an entry to defeat the livery which was made. However, in cases where the entry could not be made, then a claim was tantamount to an entry.

In 4 Kent, 129, it is said: "It was a rule of the common law that when an estate commenced by livery it could not be determined before entry."

It is said (1 Sheppard's Touchstone, 153), "regularly, when a man will take advantage of a condition he must enter, for an estate of freehold or inheritance will not cease without entry or claim."

"When an estate is upon condition in deed * * * the law permits the estate to continue beyond the time when the contingency happens, unless either the grantor or his heirs make an entry or claim in order to avoid the estate." (2 Blackstone, 155.)

The necessity for livery of seizin does not exist in this State.

Without that necessity none exists for a re-entry to be made in order to avoid an estate which has been defeated by a breach of a condition subsequent in a deed.

Livery of seizin is now abolished in England. (Statute 8 and 9, Vic. C., 106.)

To prove that the common law as to livery of seizin does not prevail in this State, it seems to us that a quotation from 2 Blackstone, 314, as to how livery of seizin in deed was performed will suffice. It is as follows: "The feoffor, lessor or his attorney, together with his feoffee, lessee or his attorney * * * came to the land or to the house, and then, in the presence of witnesses, declare the contents of the feoffment or lease on which livery is to be made; and then the feoffor, if it be land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough then growing, with words to this effect: 'I deliver these to you in the name of seizin of all the land and tenements contained in this deed.' But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form, and then the feoffee must enter alone and shut the door, and then open it and let in the other."

As this mode of delivery of possession of land is no longer necessary, it follows that it was unnecessary for appellants to go upon the ground and declare they had re-entered thereon.

By the terms of the deed the appellee had the right to elect to keep the ground which appellants had conveyed it by paying the value of it at the date of the deed; but failing to make the election, then appellants were entitled to have the possession returned to them on demand, be it either written or verbal.

Failing to surrender it on such demand, then their cause of action accrued for the possession and rents of the ground, and the court should have allowed rents from the date of appellants' demand on appellee to comply with the terms of the deed. It

was error for the court to allow rents only from the date of the figurative re-entry.

Appellants were entitled to maintain the equitable action to have the effect of the deed declared and to recover rents.

The judgment is reversed, with directions that further proceedings be had consistent with this opinion.

SMITH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 19, 1895—Not to be reported.)

1. The party alleging that his personal injuries were inflicted by the gross neglect of a railroad company must prove it; and when his evidence does not conduce to sustain the allegation, a peremptory instruction for the defendant is proper.

2. Same—Case—Plaintiff was injured at night while attempting to cross a railroad track on a street in the outskirts of the city of Louisville. The engine that injured him was backing towards him ringing its bell and giving the usual signals of its approach and had a large head light burning on the rear of its tender which threw a light along the track for from 150 yards to 200 yards. The plaintiff saw the light and engine before going on the track, but supposed it was going away from instead of towards him, and was struck while attempting to drive across the track. Held—A peremptory instruction for defendant was proper, nor was the absence from the rear of the tender, at the time of the injury of a brakeman who had gone into the cab of the engine to relight his small lantern that had gone out, an act of willful or gross neglect as to plaintiff.

T. L. Burnett and Lane & Burnett for appellant.

Lyttleton Cooke for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Grace.

This is an appeal by M. M. Smith from a judgment of the Jefferson Circuit Court dismissing, by peremptory instructions to the jury, his suit for damages claimed against the appellee for injuries sustained by being run against and knocked off of defendant's railway, which plaintiff alleges was done by reason of the gross and willful negligence of the employes, agents and servants in charge of the locomotive and engine of defendant.

The injury is charged to have occurred on Spring street, in the eastern portion of the city of Louisville, on the night of February 7, 1893.

A condensed statement of facts show that Spring street runs north and south, and that it is crossed by the railway of defendant, going east from the city, having at this crossing a double track; that the southern track, being the right hand one going out of the city is generally used by trains, both passenger and freight, going out of the city, and the northern line of railway is generaliy used by trains entering the city; that at this point, going east, is a steep grade, and that freight trains often have to be assisted in going up same by an extra engine and tender attached, and that when this is the case the engine so giving assistance, after the train is well up the grade, returns along this same southern track, backing into the city; that this general arrangement and working

of defendant's trains and engines on these two tracks was well known to the plaintiff, who lives in the immediate vicinity of this crossing; that Spring street, while well up towards the eastern part of the city, yet has considerable travel on same by day and for some hours into the night; that a watchman is usually stationed there by day, but none at night; that no gate or bars are maintained there by the railroad company; that on the west of this north line is a considerable elevation, running east, some fifty feet high and some hundred and fifty feet long.

It appears that on the night in question the engine of defendant had been assisting one of the freight trains out on this southern track and up this grade, and at the time of the injury to plaintiff was returning to the main yards of the defendant company in the city, backing down, as usual, with a headlight stationd on the north rear corner (then going in front) of its tender giving the necessary signals, by ringing its bell constantly, and blowing its whistle for the several crossings, but that just before crossing Spring street, say 150 to 200 yards, the small lantern carried by the switchman to assist him in discharging his duties had been blown out by a strong wind, and that not being able to relight same where he was, on the rear end of the tender, he had gone for the moment to the engine or cab room for this purpose, and that the injury occurred just as he returned to his accustomed position.

It appears that the headlight, where it was placed on the rear and north corner of the tender, threw its rays well down and along both these tracks, estimated to the extent of 150 to 200 yards, the evidence of the switchman saying that his small lamp added nothing material to the larger and more brilliant headlight.

It further appears that plaintiff, who works on the north side of this railway some distance, but lives on the south side, was going home on the night in question, being a dark night, about 7 o'clock; that when he reached these railway tracks he looked to his left, east, and saw engine and tender, with headlight, of defendant's coming into the city, but he says that he supposed it was a train coming in on the north track of the two; and that being, as he supposed, some 100 to 200 yards away, he estimated that he would have ample time to cross this track before the train reached him, and going over this one safely, and when across the other rails also, but when just on the south end of the cross-ties, on the south track, the rear end of the tender (being then in front) struck him, knocking him off the track and materially and seriously injuring him internally, in the side and back and head, from which he suffered greatly, rendering him unable to labor for his support, and that when this case was tried (in June) he was still not well by any means.

His brother, who testified in his behalf, estimated the speed of the train, at the time of the injury, at fifteen miles an hour. The switchman said it was going quite slowly, and was stopped in half the length of the tender after the injury.

On the conclusion of plaintiff's evidence, as above detailed, the court, on motion of defendant and against the objection of plaintiff, instructed the jury to find for defendant, and of this instruction the plaintiff complains.

Plaintiff insists that the facts given in evidence by him showed gross and willful negligence on the part of the employes of defendant corporation, which can not be excused or barred when injury occurs, even by the contributory negligence of the person injured, and further insisting that this question of negligence, and the particular degree of same, is a mixed question of both law and fact, to be determined by the jury under appropriate instructions by the court.

Of course there are quite a number of cases cited in Kentucky in which the court said as much on both heads. It is equally true that there are quite a number of other cases wherein the court has said that where the degree of negligence, as charged by a plaintiff in his petition, is willful, and where same was necessary to be established as charged in order to his recovery, and that where same was clearly not established by the evidence, that then the court might and should give a peremptory instruction of this latter class of cases.

We refer to the case of Wallington v. N. N. & M. V. Co., 14 Ky. Law Rep., 559, wherein the court sustained an instruction by the court below to find as in case of a nonsuit, "saying that where willful negligence is charged that it must be proven, that it will not be presumed, and that where the plaintiff's evidence failed in toto to support the case, that then such an instruction was proper."

Again, in the Canal Co. v. Murphy's Adm'r, 9 Bush, 533, the court said: "Where the facts are conceded upon which the question of negligence is based, it then becomes a question of law as to whether a case of negligence has been made out. * * * Actions for negligence are governed by the same rules, with reference to the power of the court to grant a nonsuit, that other civil actions are, and it would be a useless waste of time, as well as trifling with the rights of litigants, for the court to permit the jury to deliberate upon a question of fact when the party making the complaint has failed, by his proof, to show any right of action."

Again, in the case of Rupard v. C. & O. R. R. Co., 88 Ky., 280, this court, in speaking of an injury to a lady, by reason of the fright to her horse while passing on a public highway that ran under the railway track of appellee, built on a trestle, after holding that in that state of case it was the duty of the railroad company to give notice of its approach by timely warning, and while it is proper to leave the question as to whether the failure to give such warning was negligence to the jury, yet said further: "That it conclusively appears from appellant's own testimony that she received the injury in consequence of her own negligence. She was familiar with the crossing and its surroundings; the track, in the direction in which the train was coming, was clear of obstruction several hundred yards, and she could have seen the approaching train that distance had she looked, but she did not look, nor did she give any reasonable excuse for not looking, but hurried up to the crossing and attempted to cross, regardless of the fact that the train might come at any moment. So as it conclusively appeared that the injury was the result of appellant's own negligence, the instruction was not improper." (The instruction referred to was peremptory to find for the defendant.)

And again, in the case of Hughes v. Cincinnati R. R. Co., 91 Ky., 526, this court said that in an action to recover damages for the neglect of defendant, the burden of showing neglect is on the plaintiff, and reciting that in that case the plaintiff had only shown that the injury might have occurred from one of two causes, only one of which could be imputed to the negligence of defendant, holding that plaintiff had failed to make out his case, and that it was not competent for the court to leave the question to the jury.

We have not overlooked the cases cited by appellant, wherein this court has often held railroads to a high degree of care and diligence in running their trains through the streets of populace cities, and wherein, for slight negligence, they have been held answerable in damages; nor are we inclined nor do we mean in

anywise to abate or modify the standard of care required by the court in the several cases cited, and under the particular facts of each case.

We only mean to say that in this case the facts are widely different, as, first, this Spring street is not in a populous part of the city, nor is it so greatly used for travel as in the cases cited, both in Louisville and Covington; and, second, the employes of the company were, at the time of this injury, using every necessary and reasonable precaution in the management of this engine.

The only possible thing of which plaintiff can complain is that for the moment the small lamp of the watchman was blown out by the high winds, and that momentarily he went to the engine cab to get it relighted, and so was necessarily absent this short time from his post. Such an occurrence under such circumstances is far from any definition of willful negligence that we have examined.

The material question after all is, did the traveler along the streets have ample and timely warning of the approach of the trains to get out of danger if imperiled or to keep out of danger until they (the train) could pass same? Unquestionably to a reaonable extent, at least, having the preference. It is not pretended that any employe of defendant saw the plaintiff in any dangerous position before the injury occurred. All signals, whether by whistle or bell, and other precautionary measure, as by gates or bars or by watchmen, only look to that end—notice to the traveler of the approach of the train—and having this notice, clearly and distinctly, the company have the right to assume that a person of full age and average intelligence will keep out of danger assuming in those cases, of course, that the train was being properly managed.

Upon the facts recited in this case we think it quite clear that the railway company was not guilty of gross or willful negligence, and that notice of the approach of the train was clearly made manifest by the usual signals and by the headlight, and that plaintiff clearly and certainly, by his own evidence, had knowledge of same in ample time to have avoided any collision with defendant's train, hence it necessarily appears that the plaintiff's injuries were caused by his own gross carelessness. Neither upon principle nor authority ought he to recover in such a case.

Wherefore, the judgment is affirmed.

BOARD OF TRUSTEES OF AUGUSTA v. MAYSVILLE & BIG SANDY R. R. CO., &c.

(Filed March 19, 1895.)

1. Constitutional law—Title of act—An act entitled "An act to amend the charter of the city of Augusta, in Bracken county," which authorizes said town to subscribe to the capital stock of a proposed railway on certain conditions, sufficiently expresses in its title its subject-matter under the Constitution of 1849.

2. Necessity of notice of election—Where a statute authorizing the holding of an election in a town, concerning a subscription by the town in aid of a proposed railroad, fixes the time for holding the election, the notice otherwise required to be given may be dispensed with.

3. Subscription by town in aid of railroad—Contract—Where the act authorizing a city to subscribe to the capital stock of a railroad company provides for an election in the city on that subject, and further provides that, in the event the election results in favor of the proposed subscription, the railroad should be entitled to the bonds on its compliance with certain

conditions, the contract of subscription is completed when the election results in favor of the road, and to complete the contract it is not necessary for any of the boards of the town to subsequently enter into or authorize it.

4. Same—Time for completion of road—The evidence shows that the failure to complete the road within two years was due to high water; and as the time for its completion was by the contract extended in case of floods, the railroad is entitled to the municipal bonds notwithstanding its failure to complete within two years.

George Doniphan and R. K. Smith for appellant.

A. M. J. Cochran and W. H. Wadsworth for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant board, on May 1, 1886, ordered an election by the qualified voters of the city of Augusta to be held on May 15th thereafter, for the purpose of ascertaining the will of the people in regard to the issual of the bonds of the city for the sum of $4,000 in aid of procuring the right of way for the appellee company in constructing its railroad.

The ordinance provides that the bonds shall not be issued or delivered to the company "until the Maysville & Big Sandy Railroad is completed as a standard guage road and is equipped with rolling stock, of locomotives, coaches, etc., and a train has passed over the road from Ashland, Boyd county, Ky., through Augusta, Ky., to Covington, Kenton county, Ky."

And further, that the company would "cause to be issued to the city certificates of stock in said Maysville & Big Sandy Railroad to the amount of $4,000 in shares, as the railroad charter specifies," etc. And, moreover, "that if the vote of the city is in favor of the issue of said bonds, it will be of no binding force upon the city if the railway is not constructed and equipped within two years from the date the vote is taken, excepting such time as may be lost by cause of floods."

In pursuance of the provisions of the ordinance the election was held under the supervision of the officers appointed by the board, the vote resulting largely in favor of the issual of the bonds. Thereupon the road was completed and equipped as required by the terms of the ordinance, and on about January 1, 1889, ran its first regular trains from Ashland to Covington.

Upon the refusal of the board to issue the bonds, for the reason, as alleged at the time, that the road had not been completed in the stipulated time, this action was brought by the company for the use of certain citizens who had guaranteed a fund for the payment of the rights of way over the line proposed, and who were, therefore, the real parties in interest in the suit to compel the issual of the bonds as provided in the ordinance. Various defenses were interposed to prevent recovery.

The act of the general assembly, upon the authority of which the vote was taken and the subscription made, was entitled "An act to amend the charter of the city of Augusta, in Bracken county," and it provided for an issual of the bonds of the city to the extent of $25,000, as subscription to the capital stock of the Cincinnati & Southeastern Ry. Co., which subscription had been approved by a prior vote of the electors of the city, and the third section of which is as follows: "In the event the said Cincinnati & Southeastern Ry. Co. fail to build their road, the city council may, at any time in the future, issue bonds of the city to the amount of $25,000 in aid of any railway company that will con-

struct a railroad through said city: Provided a majority of the legal voters, voting, of said city shall vote in favor thereof at an election called and held for that purpose."

It is conceded by the appellant that long prior to the adoption of the ordinance of May 1, 1886, the enterprise of the Cincinnati & Southeastern Ry. Co. had fallen through, and that the conditions existed upon which the vote might be taken on the proposition to subscribe to the capital stock of any road proposing to run through the city of Augusta, but it is urged by demurrer to the petition and by plea that the act of the general assembly authorizing the issual of the bonds upon the vote of the people therefor is unconstitutional, in that its title is not expressive of the subject-matter embraced in it; that the petition does not aver that any notice was given of the time for holding the election; that there was in fact no contract of subscription, the allegations of the petition stopping at the point where the vote merely is alleged to have been taken, and that vote, they say, does not amount to a contract of subscription or control the discretion lodged in the mayor and councilmen to issue or not issue the bond in question; that the private citizens who guaranteed the rights of way over the proposed route, and thus became entitled to the subscription, did so before the vote of the city was taken, and hence their action was not induced by the vote, and the road was not built on the pledge of this subscription to the road; that the present Constitution took effect before the rendition of the judgment below, and the city is prohibited from taking stock in railroads; that the road was not completed within the time prescribed in the ordinance, and the delay was not caused by floods.

All the grounds relied on were deemed insufficient by the court below, and judgment resulted for the plaintiffs.

It is only necessary to refer without elaboration to the long line of decisions of this court construing section 37, article 2 of the old Constitution on the subject of valid titles to acts of the general assembly to dispose of the appellant's objection on that behalf.

The act in question affected the powers and duties of the governing body of the city, and pertained to the legitimate exercise of its functions. (Phillips v. Covington & Cincinnati Bridge Co., 2 Met., 219; Swift v. City of Newport, 7 Bush, 37; City of Covington v. Voskotter, 80 Ky., 219; McArthur v. Nelson, 81 Ky., 67.)

It is also well settled that when the law fixes the time for holding an election the notice otherwise required to be given may be dispensed with. (Toney v. Harris, 85 Ky., 475; Berry v. McCullough, 94 Ky., 247; Doores v. Varnen, 15 Ky. Law Rep., 244.)

The contention that a subsequent subscription, depending on the discretion of the board, was necessary before a liability to issue the bonds existed is not tenable. The duty of issuing the bonds was rendered imperative by the enabling act, and the vote taken in pursuance of it.

By the very terms of the ordinance directing the vote, the adoption of which was an exercise of discretion, it is manifest that upon the vote being cast for the issual of the bonds the company became entitled to them upon the happening of certain events. The conditions were carefully prescribed upon which the company were not to have them. They were not to be issued or delivered until the road was completed as a standard guage and a train was passed thereover from Ashland to Covington, or until a favorable vote was had or until the construction was finished within two years. The necessary conclusion is that when the conditions and requirements were fulfilled the company be-

came entitled to the bonds. Such is the natural meaning of the language of the act of the legislature and the ordinance of the city under which the vote was taken.

The act of issuing the bonds was merely ministerial after the conditions upon which they were to issue had been complied with. If the object of the vote was simply to empower the board to issue the bonds in their discretion, the authorities relied on by the appellants would be in point. We do not, however, so construe the enabling act and the ordinance of the board. The act empowered the board not to subscribe, but to issue bonds, upon a vote resulting favorably on the question.

It would be singular if after a favorable vote under an ordinance providing that the bonds were not to issue until the road was built, that when the road was built the city was under no legal obligation to issue them. As said by council, "it would be a rare city council that would subscribe stock or issue bonds to a railroad already constructed unless in obedience to some legal obligation incurred when the interest of the city required it."

It is true the words "may issue bonds" are used in the act, but this permissive language does not leave compliance optional. The provisions are to be deemed compulsory because it is the only rational construction to be given the words when looking to the intent and purposes of the enactment and the conduct of the parties.

Mr. Endlick, in his work on Interpretation of Statutes, after a full discussion of this subject, says: "The result seems to be that when a public power for the public benefit is conferred in enabling terms, a duty is impliedly imposed to exercise it whenever the occasion arises." (Section 312.)

As to the delay in completing the road the proof is abundant that high water caused it. It is true, as contended by counsel, that there was no such floods during the period of construction as devastated the Ohio valley in 1847 or in 1883 and 1884, but the testimony is that for many months the water was more than fifty feet over some parts of the work, and for all practicable purposes prevented any progress as completely as if the noted flood of 1847 had revisited the valley.

The judgment is affirmed.

DEATLEY v. COMMONWEALTH.

SAME v. SAME.

(Filed February 21, 1895—Not to be reported.)

1. Indictment—Aiders and abettors—An indictment which charges that several defendants, jointly indicted, conspired to commit murder; that D., in pursuance of the conspiracy, killed deceased with a knife, and that the other defendants, being present, pursuant to said conspiracy, aided and abetted in the commission of the crime, is good on demurrer, and is not objectionable on the ground of charging more than one or different modes or means whereby the alleged crime was committed.

2. Same—Instructions—Where the aiders' and abettors' defense is that there was no conspiracy, and that they did not aid or abet the crime but attempted to prevent its commission, it was not erroneous to instruct the jury to find them guilty if the conspiracy existed and said defendants aided D. to kill deceased when it was unnecessary, and said D. had no reasonable grounds to believe it to be necessary to kill deceased in his own self-defense.

If the aiders and abettors had offered any evidence conducing to show that when they aided D. they believed that D. was in danger of death or great bodily harm at the hands of deceased, the foregoing instruction might have been erroneous as to them.

Smoot & Gudgell, John P. Norvell and J. H. Herron for appellants.

C. W. Goodpaster and Wm. J. Hendrick for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Paynter.

The appellants were jointly indicted, and the evidence and the instructions given by the court to the jury being substantially the same in each case, the appeals are heard together.

The appellants, together with Wm. Deatley and L. P. Deatley, were indicted in the Bath Circuit Court for the crime of murder. They were tried, convicted and sentenced to the penitentiary for a term of years. A demurrer was filed to the indictment and overruled. It is insisted that this action of the court was an error.

Only one offense is charged in the indictment, and that is murder. The indictment charges that the defendants, Geo., Lee, Wm. and L. P. Deatley, on the 14th of May, 1894, feloniously, willfully and with malice aforethought, conspired, confederated and agreed together to kill and murder Mark Cline, and in pursuance to the conspiracy, confederation and agreement Wm. Deatley did feloniously, willfully and with malice aforethought, kill and murder Cline with a knife, the appellants, George and Lee Deatley being present at the time and place of the killing, did, in pursuance of the conspiracy, confederation and agreement, encourage, advise, counsel, abet and assist Wm. Deatley to kill Cline.

It is insisted that the indictment charges different modes and means by which the crime was accomplished, and the different modes and means of the killing should have been charged in the alternative, therefore, the indictment was defective.

The indictment charges that the offense was committed by but one mode and means, and that is that Wm. Deatley, in pursuance of the conspiracy, killed Cline with a knife, and that appellants, in pursuance of such conspiracy, aided and abetted in the commission of the offense.

We think the indictment is good. We have examined the instruction with great care, which the court gave the jury, and we think that they are as favorable to the appellants as they were entitled to have given to the jury.

Instruction No. 1, given by the court in the Lee Deatley case, reads as follows: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that Wm. Deatley, in the county of Bath, State of Kentucky, before the finding of the indictment, did willfully, feloniously and with malice aforethought, cut, thrust or stab and kill Mark Cline with a knife or other sharp instrument, when the same was not necessary, and said Wm. Dealtey had no reasonable grounds to believe it to be necessary to protect himself from immediate death or great bodily harm, then about to be inflicted on him by the deceased, Mark Cline; and that the defendant, Lee Deatley, was present or within a convenient distance, and willfully,

feloniously and with malice aforethought, aided, assisted, counseled, advised, incited or encouraged the said Wm. Dealtey in cutting, thrusting or stabbing and killing said Mark Cline, then the jury will find the defendant, Lee Deatley, guilty of the crime of willful murder, and fix his punishment at death or by confinement in the penitentiary for life, in discretion of the jury."

The same instruction was given in the case of George Deatley, except George's name was used where Leo's name appears in the instruction.

It is insisted that the foregoing instruction, as well as the second instruction, is prejudicial to the appellants because they make their guilt or innocence turn upon the belief of Wm. Deatley, thus taking from them the right of thought or belief.

The question of self-defense was not made by appellants, nor did they claim that they had aided and abetted to save Wm. Deatley from murder or death, or to prevent Cline from the commission of a felony.

The defense was that they were not parties to a conspiracy to kill Cline, and that they did not aid and abet in his killing; but, on the contrary, they endeavored to arrest the effort of Wm. Deatley to kill Cline. Had they admitted that they had gone to the assistance of their brother, Wm. Deatley (who was not a wrongdoer), to have saved him from immediate death at the hands of Cline or some one else, and in doing so Cline had been killed, then it would have been improper for the court to have placed the question of their guilt or innocence upon the belief of Wm. Dealtey because, in such a case, Wm. Deatley might have been utterly unconscious of his danger, not even knowing that he was about to be assaulted.

Although their defense was that they did not join in a conspiracy to aid or to abet in the killing of Cline, the court took the proper view of the case, which was that if Wm. Deatley did the killing in self-defense, then if they did aid and abet him, they had committed no offense, as the act of Wm. Dealtey was excusable under the law.

There is no testimony in the record conducing to prove that Cline was doing anything at the time he was killed to even provoke an assault from Wm. Deatley, much less doing anything which threatened his life or great bodily harm.

Under the state of case presented by this record, if Wm. Deatley was guilty, it follows that the appellants are also guilty if they conspired with him to kill Cline or aided and abetted him in doing so. There was an absence of any testimony upon which the court could base an instruction presenting the question as insisted by counsel.

There being testimony tending to prove the guilt of the appellants, although there is a sharp conflict in the testimony upon the question, we can not reverse the case on the ground that the verdict is against the evidence. The court has considered all questions raised by counsel for appellants, and, upon the whole case, it is satisfied that the substantial rights of the appellants have not been prejudiced thereby.

Judgment affirmed.

Judge Hazelrigg delivered the following response to a petition for rehearing:

The witness, Lee Deatley, who was offered as a witness for the appellant, and the offer refused, was a competent witness, although he was charged with a conspiracy with appellant to kill the deceased. (Act March 23, 1894, chapter 112.) But no avowal was made of what the witness would prove, and it does not otherwise appear in the record what it would be.

Petition for rehearing overruled.

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