KENTUCKY OPINIONS

CONTAINING THE

UNREPORTED DECISIONS

OF THE

COURT OF APPEALS

COMPILED
Under the Supervision of
J. K. ROBERTS, ESQ., OF THE KENTUCKY BAR

VOL. XI.
From February 1, 1881, to March 1, 1883

INCLUDES FULL REPORTS OF ABSTRACT CASES
IN KENTUCKY LAW REPORTER, VOL.
2, P. 209—VOL. 4, P. 722

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
1914

CITE THIS VOLUME

11 Ky. Opin.

FOLLOWED BY PAGE

TABLE OF CASES.

Abell v. Abell 128
Abshire, Gentry v. 81
Adams v. Commonwealth 161
Adams v. McClary 871
Adams, Berryman's Admr. v. 286
Adkins, Dils v. 298
Adsit, Goodnight v. 157
Aetna Ins. Co. v. Strickle 417
Albertson, Riley v. 316
Alexander v. Owens 898
Allen v. Duckworth 725
Allen v. Farmers' Bank 725
Allen v. Stump 493
Allen, Tilford v. 883
Allison v. Moore 253
Alsop v. Commonwealth 851
Anderson v. Carrick 312
Anderson, Boyd v. 134
Anderson, Dinkle v. 239
Anderson, Harris v. 230
Anderson, Park v. 49
Andreas' Assignee v. Rust 478
Arnold v. Commonwealth 333
Arnold's Exrs. v. Commonwealth 515
Arthur v. Harlan 788
Asher v. McCarty 21
Atchison, Skillman v. 105
Auger, City of Lexington v. 657
Austin v. Commonwealth 664
Avord, McLaughlin v. 151

Babcock, Dawson v. ---------- 248
Bailey v. Cheatham ---------- 761
Bailey v. Commonwealth ---------- 178
Baker's Heirs v. Gilbert ---------- 912
Baldwin v. First Nat. Bank---------- 628
Baldwin, Harwood v. ---------- 699
Ball v. Pursefull ---------- 340
Ballard v. Franklin ---------- 473
Bank of Columbia v. Bush---------- 559
Bank of Kentucky v. Poyntz ---------- 99
Bank of Woodford, Taylor v. ---------- 794
Banta, McGinnis v. ---------- 721
Banta's Exrs. v. Terry ---------- 44
Barbee v. Northern Bank ---------- 201
Barbour, Mayfield v. ---------- 342
Bardstown & L. Tpk. Co. v. Commonwealth---------- 516
Barents, Commonwealth v. ---------- 353
Barker v. Barker ---------- 203
Barnes v. Green ---------- 235
Barrows, Meredith v. ---------- 51
Bartlett's Admr. v. Gray's Admr. ---------- 866
Bates v. Scobee's Assignee---------- 608
Bates, Standeford v. ---------- 154
Battres v. Heiss ---------- 103
Baughman, Miller v. ---------- 266
Beadles' Admx., Griffin v. ---------- 495
Beall v. Bethel ---------- 343
Beall v. Bethel's Admr. ---------- 567
Beard v. Hudnall ---------- 653
Beard v. McKay ---------- 483
Bearn, Hunter v. ---------- 265
Beatty v. Curtis ---------- 768
Beauchamp v. Commonwealth ---------- 655
Beaver v. Marion County ---------- 577
Beck v. Brown ---------- 808
Bell v. Commonwealth ---------- 336
Bell, Northern Bank v. ---------- 346
Bell, Stuckey v. ---------- 217
Benton's Trustees, Warren v. ---------- 272

Bergmeyer v. Commonwealth ---------- 648
Berkley, Brown v. ---------- 359
Berkley, Maupin v. ---------- 487
Berry v. Branham ---------- 592
Berryman v. Hisle ---------- 897
Berryman's Admr. v. Adams ---------- 286
Best v. Burnam ---------- 388
Bethel, Beall v. ---------- 343
Bethel's Admr., Beall v. ---------- 567
Bibb v. Hall ---------- 877
Bickel v. Judah ---------- 612
Bickel, Judah v. ---------- 914
Bingham v. Orr ---------- 169
Bishop, Cox v. ---------- 110
Bissell, Weller v. ---------- 604
Black v. Black,---------- 330
Blackburn v. Mann ---------- 598
Blevins' Exr., Walters v. ---------- 309
Board, Brown v. ---------- 453
Bolden v. Commonwealth ---------- 183
Booker's Exr., Carter v. ---------- 961
Bordus, Commonwealth v. ---------- 17
Bosley, Myers' Admr. v. ---------- 765
Botts, Connor v. ---------- 132
Bowman's Exrs. v. Bowman ---------- 859
Boyce, Bramlett's Admx. v. ---------- 711
Boyd v. Anderson ---------- 134
Boyd v. Wilson ---------- 547
Boyd, Murphy v.---------- 817
Boyer v. Lincoln ---------- 437
Bracken County, Hargett v. ---------- 245
Bradford, Gillespie v. ---------- 804
Bramel v. Cunningham ---------- 409
Bramlett's Admx. v. Boyce ---------- 711
Brandon, Glazebrook v. ---------- 355
Branham, Berry v. ---------- 592
Breckinridge v. Carrico ---------- 405
Breckinridge, City of Henderson v.---------- 315
Brevard v. Stevens ---------- 37

Briggance, Commonwealth v. ---- 514
Bright v. Commonwealth ---- 647
Bronaugh v. Commonwealth ---- 137
Bronson v. Ransom ---- 960
Bronston v. Davidson's Trustee ---- 672
Broseke v. Carton ---- 540
Brown v. Berkley ---- 359
Brown v. Board ---- 453
Brown v. Brown ---- 237
Brown v. Casbier ---- 459
Brown v. Commonwealth ---- 10, 687
Brown v. Geiger ---- 240
Brown v. Mundy's Admx. ---- 270
Brown v. Stubblefield's Admr. ---- 767
Brown, Beck v. ---- 808
Brown, Cotton v. ---- 573
Brown, Deils v. ---- 13
Browning, Morford v. ---- 186
Browninski v. Phelps ---- 207
Brown, Louisville & N. R. Co. v. ---- 199
Bryan, Taylor's Admr. v. ---- 607
Bryant Station & L. Tpk. Co. v. Johnson ---- 427
Bryson v. Osenton ---- 383
Buchannan v. Trimble ---- 406
Bunger v. Hart ---- 410
Burge, Moore v. ---- 826
Burke v. Crutcher ---- 695
Burlington & B. T. P. R. Co., Commonwealth v. ---- 526
Burnam, Best v. ---- 388
Burns v. Hoffman ---- 549
Burns v. Stephenson ---- 589
Burns, Crabtree v. ---- 112
Burton v. Commonwealth ---- 841
Burton v. McFarland ---- 428
Burton, Kirkland v. ---- 86
Bush, Bank of Columbia v. ---- 559
Bush, Elliott's Admr. v. ---- 354
Byram v. Grimes ---- 778
Byrd v. Kincaid, ---- 314

Cain, Reid v. ---- 269
Calloway v. Green ---- 121
Camp v. Second Nat. Bank ---- 257
Campbell v. Commonwealth ---- 524
Campbell, Vance v. ---- 368
Cardwell v. Kemple ---- 480
Carrick, Anderson v. ---- 312
Carrico, Breckinridge v. ---- 405
Carrico, Cunningham v. ---- 102
Carter v. Booker's Exr. ---- 961
Carter v. Carter's Admr. ---- 940
Carter v. Commonwealth ---- 92
Carter's Admr., Carter v. ---- 940
Carton, Broseke v. ---- 540
Casbier, Brown v. ---- 459
Cavanaugh v. Fried ---- 238
Cavender v. Graves ---- 937
Chaney v. Flynn ---- 164
Chapman v. Vanover ---- 706
Cheatham, Bailey v. ---- 761
Chick v. Randall Grain Separator Co. ---- 435
Chick v. Tucker ---- 90
Childers' Admr., Miller v. ---- 944
Cissel v. Rapier ---- 553
City of Bowling Green, Delafield v. ---- 71
City of Covington v. Glennon ---- 9
City of Covington v. People's Bldg. Assn. ---- 731
City of Covington v. Woods ---- 216
City of Frankfort v. Watson ---- 149
City of Henderson v. Breckinridge ---- 315
City of Lexington v. Auger ---- 657
City of Louisville, Davis v. ---- 965
City of Louisville, Dumesnil v. ---- 180, 667
City of Louisville, Garrison v. ---- 466
City of Louisville, Kastenbine v. ---- 471
City of Louisville, Kaye v. ---- 415
City of Louisville,, Loran v. ---- 723
City of Louisville, Neal v. ---- 466
City of Louisville, Robinson v. ---- 365

City of Owensboro v. Elder ---------- 246
City of Paducah v. Duke---------- 46
Clark's Run & Salt River Tpk. Co., Ware v. ---------- 249
Clements, McDaniel's Admr. v. ---------- 96
Coakley's Admr. v. Coakley ---------- 182
Cockrill v. Commonwealth ---------- 385
Coleman, McDowell v. ---------- 152
Collier v. Sharpe ---------- 764
Collins v. Richart ---------- 283
Combs v. Wallace ---------- 338
Commonwealth v. Barents ---------- 353
Commonwealth v. Bordus ---------- 17
Commonwealth v. Briggance ---------- 514
Commonwealth v. Burlington & B. T. P. R. Co. ---------- 526
Commonwealth v. Crawford ---------- 14
Commonwealth v. Creel ---------- 575
Commonwealth v. Curley ---------- 263
Commonwealth v. Douglas ---------- 523
Commonwealth v. Dunivant ---------- 569
Commonwealth v. Ferrell ---------- 566
Commonwealth v. Hicks ---------- 891
Commonwealth v. Hunter ---------- 11
Commonwealth v. Knoerr ---------- 514
Commonwealth v. Littrell ---------- 693
Commonwealth v. McElroy ---------- 242
Commonwealth v. Mahoney ---------- 133
Commonwealth v. Matthews ---------- 385
Commonwealth v. Searls ---------- 335
Commonwealth v. Simrall ---------- 334
Commonwealth v. Stegala ----------532, 533
Commonwealth v. Stevens ---------- 114
Commonwealth v. Wammock ---------- 227
Commonwealth, Adams v. ---------- 161
Commonwealth, Alsop v. ---------- 851
Commonwealth, Arnold v. ---------- 333
Commonwealth, Arnold's Exrs. v. ---------- 515
Commonwealth, Austin v. ---------- 664
Commonwealth, Bailey v. ---------- 178
Commonwealth, Bardstown & L. Tpk. Co. v. ---------- 516

Commonwealth, Beauchamp v. ---- 655
Commonwealth, Bell v. ---- 336
Commonwealth, Bergmeyer v. ---- 648
Commonwealth, Bolden v. ---- 183
Commonwealth, Bright v. ---- 647
Commonwealth, Bronaugh v. ---- 137
Commonwealth, Brown v. ----10, 687
Commonwealth, Burton v. ---- 841
Commonwealth, Campbell v. ---- 524
Commonwealth, Carter v. ---- 92
Commonwealth, Cockrill v. ---- 385
Commonwealth, Cook v. ---- 676
Commonwealth, Crittenden v. ---- 193
Commonwealth, Davis v. ----934, 969
Commonwealth, Dry Creek & C. Tpk. Co. v.---- 517
Commonwealth, Ellis v. ---- 233
Commonwealth, Farrell v. ---- 386
Commonwealth, Galloway v. ---- 951
Commonwealth, Gifford v. ---- 185
Commonwealth, Hicks v. ---- 214
Commonwealth, Hodge v. ---- 645
Commonwealth, Hogg v. ---- 370
Commonwealth, Luckett v. ---- 844
Commonwealth, Mackey v. ---- 209
Commonwealth, McKinney v. ---- 348
Commonwealth, Maden v. ---- 674
Commonwealth, Mathis v. ---- 686
Commonwealth, May v. ---- 396
Commonwealth, Mays v. ---- 229
Commonwealth, Mullins v. ---- 527
Commonwealth, Offutt v. ---- 287
Commonwealth, Pence v. ---- 593
Commonwealth, Prater v. ---- 578
Commonwealth, Price v. ---- 888
Commonwealth, Rose v. ---- 568
Commonwealth, Rowlett v. ---- 571
Commonwealth, Sewell v. ---- 213
Commonwealth, Sikes v. ---- 890
Commonwealth, Smith v. ----223, 224, 774

Commonwealth, Sosh v. ---- 710
Commonwealth, Staton v. ---- 374
Commonwealth, Stewart v. ---- 138
Commonwealth, Stone v. ---- 135
Commonwealth, Stovall v. ---- 820
Commonwealth, Strassel v. ---- 886
Commonwealth, Sutterfield v. ---- 395
Commonwealth, Taylor v. ---- 642
Commonwealth, Turner v. ----640, 842
Commonwealth, Tye v. ---- 206
Commonwealth, Utz v. ---- 211
Commonwealth, Varble v. ---- 570
Commonwealth, Wade v. ---- 356
Commonwealth, Warmouth v. ---- 847
Commonwealth, Wormoth v. ---- 670
Commonwealth, Webb v. ---- 792
Commonwealth, Woolsey v. ---- 776
Commonwealth, Young v. ---- 689
Conger, Crittenden County v.---- 485
Connor v. Botts ---- 132
Continental Ins. Co. v. Randolph---- 125
Cook v. Commonwealth ---- 676
Cook v. Fryer ---- 454
Cooper's Admr., Louisville & N. R. Co. v. ---- 519
Corcoran, Vanmeter v. ---- 15
Cordrey, Joplin v. ---- 643
Corum, Dorch v. ---- 322
Cotton v. Brown ---- 573
Covington St. R. Co. v. Shinkle---- 58
Cox v. Bishop ---- 110
Cox's Admr. v. Mudd---- 565
Crabtree v. Burns ---- 112
Craddock v. Jordan ---- 146
Craddock, Wilder v. ---- 146
Crawford v. Rice ---- 64
Crawford v. Stagner ---- 543
Crawford, Commonwealth v. ---- 14
Creel, Commonwealth v. ---- 575
Crisp, Davenport v. ---- 930

Crittenden v. Commonwealth ---------- 193
Crittenden County v. Conger ---------- 485
Crofoot's Exr. v. Duvall ---------- 443
Crutcher v. Shelby R. R. Dist. of Shelby County---------- 404
Crutcher, Burke v. ---------- 695
Crutchfield's Exr., Hayden v. ---------- 214
Cunningham v. Carrico ---------- 102
Cunningham, Bramel v. ---------- 409
Curley, Commonwealth v. ---------- 263
Curtis, Beatty v. ---------- 768

Davenport v. Crisp ---------- 930
David, Orme v. ---------- 443
Davidson, Layne v. ---------- 506
Davidson's Trustee, Bronston v. ---------- 672
Davis v. City of Louisville---------- 965
Davis v. Commonwealth ----------934, 969
Davis v. Wiley ----------580, 585
Davis' Assignee v. Smallgood ---------- 441
Davis, Faulds v. ---------- 610
Davis, Monterey & New Columbus Tpk. Co. v.---------- 336
Dawson v. Babcock ---------- 248
Dawson, First Nat. Bank v. ---------- 26
Dayton v. Newport Water Works---------- 777
Dean v. Skinner's Admr. ---------- 302
Dean, Monarch v. ---------- 596
Deathy v. Ralls ---------- 306
Decker, Horn v. ---------- 171
Deff, Wittey v. ---------- 61
Deils v. Brown ---------- 13
Delafield v. City of Bowling Green---------- 71
Delaney's Admr. v. Delaney ---------- 62
Denny v. McAtee's Admr. ---------- 194
Devon v. Kobigen ---------- 882
Dils v. Adkins ---------- 298
Dils v. May ----------619
Dimmit, Ross v. ---------- 525
Dinkle v. Anderson ---------- 239
Dodd v. Hays ---------- 426

Dohoney v. Lyon ---------- 481
Dorch v. Corum ---------- 322
Douglas, Commonwealth v. ---------- 523
Dowdy v. Preston ---------- 623
Downey, Urton v. ---------- 564
Driver v. Hunt ---------- 169
Dry Creek & C. Tpk. Co. v. Commonwealth ---------- 517
Duckworth, Allen v. ---------- 725
Duell's Exr. v. Israel ---------- 122
Duke, City of Paducah v. ---------- 46
Duke's Exrx., Perry v. ---------- 29
Dumesnil v. City of Louisville ---------- 180, 667
Dunivant, Commonwealth v. ---------- 569
Dunlop v. Dunlop ---------- 188
Dutlinger v. Salmons ---------- 331
Duvall, Crofoot's Exr. v. ---------- 443

Earl v. Porter ---------- 85
Eastin, Rankin v. ---------- 173
Ecton v. Moore ---------- 735
Eddy v. Longshaw ---------- 179
Edmonson v. Green ---------- 433
Eginton v. Rusk ---------- 537
Elder v. Lucas' Exr. ---------- 47
Elder, City of Owensboro v. ---------- 246
Elliott v. Lee ---------- 557
Elliott's Admr. v. Bush ---------- 354
Ellis v. Commonwealth ---------- 233
Ellis v. Johnson ---------- 868
Elmore v. Elmore's Admr. ---------- 902
Endies' Exr. v. Harrison ---------- 885
English v. Studicker ---------- 947
Epperson v. Graves ---------- 423
Erleinson, Lowe v. ---------- 57
Estill, Scott v. ---------- 789
Everett, Wilson v. ---------- 43
Eversole, Herd v. ---------- 597
Exchange Bank, Star Planing Mill Co. v. ---------- 277

Fannin v. Murray ---------- 225
Farmers' Bank, Allen v. ---------- 725
Farmers' Bank, Kennedy v. ---------- 725
Farmers' Bank, Menzies v. ---------- 634
Farmers' Bank, Shawhan v. ---------- 725
Farrar's Assignee, Sargent v. ---------- 2
Farrell v. Commonwealth ---------- 386
Faulds v. Davis ---------- 610
Faulkner v. Jennings ---------- 399
Ferguson v. Sims ---------- 472
Ferguson, Martin v. ---------- 351
Ferguson, Mayo v. ---------- 530
Ferrell, Commonwealth v. ---------- 566
Ferrell, Miller v. ---------- 48
Filmore, Riley v. ---------- 745
First Nat. Bank v. Dawson ---------- 26
First Nat. Bank, Baldwin v. ---------- 628
First Nat. Bank, Porter v. ---------- 5
First Nat. Bank, Stone v. ---------- 796
Fisher, Yates' Admr. v. ---------- 948
Fisk v. Snyder ---------- 928
Fletcher v. Harl ---------- 297
Flynn, Chaney v. ---------- 164
Ford, Jacobs' Exrs. v. ---------- 73
Ford, Owens v. ---------- 451
Forsythe v. Lawler ---------- 382
Fowler v. Gordon ---------- 475
Frank v. Lacy ---------- 289
Frankfort Cotton Mills Co., Wheat v. ---------- 903
Franklin, Ballard v. ---------- 473
Franks' Exr., Revill v. ---------- 602
Fretsch, Hand v. ---------- 380
Fried, Cavanaugh v. ---------- 238
Frost's Exr., Skillman v. ---------- 900
Fryer, Cook v. ---------- 454

Gabhart, Trower v. ---------- 508
Gaines v. Scott ---------- 361
Gaines, Kentucky Elec. Inst. v. ---------- 831

Gaitskill's Exrs. v. Wilson ---------- 302
Gaitskill's Exr., Skinner's Admr. v. ---------- 302
Gallagher v. Wooster ---------- 722
Galloway v. Commonwealth ---------- 951
Gardner's Admr. v. Roberts ---------- 873
Garrett v. Royse ---------- 184
Garrison v. City of Louisville ---------- 466
Garrison, Gray v. ---------- 19
Garvey v. Garvey ---------- 910
Gearhart v. Pritchard ---------- 39
Geiger, Brown v. ---------- 240
Gentry v. Abshire ---------- 81
Gifford v. Commonwealth ---------- 185
Gilbert, Baker's Heirs v. ---------- 912
Gillespie v. Bradford ---------- 804
Glackin's Admr. v. Glackin ---------- 654
Glass v. Tevis ---------- 247
Glazebrook v. Brandon ---------- 355
Glennon, City of Covington v. ---------- 9
Gonhot v. Hipkins ---------- 458
Goodhart, Kahn v. ---------- 462
Goodin v. Goodin ---------- 218
Goodman, Turner v. ---------- 136
Goodnight v. Adsit ---------- 157
Goodpaster v. Richart ---------- 326
Gordon, Fowler v. ---------- 475
Gowdy's Admr., Smith v. ---------- 430
Graham v. Jones ---------- 503
Graham, Marks v. ---------- 27
Graves, Cavender v. ---------- 937
Graves, Epperson v. ---------- 423
Gray v. Garrison ---------- 19
Gray, Patterson v. ---------- 226
Gray's Admr., Bartlett's Admr. v. ---------- 866
Gray's Exrs. v. Patton's Admr. ---------- 327
Green v. Keltmers ---------- 98
Green, Barnes v. ---------- 235
Green, Calloway v. ---------- 121
Greene v. Southworth ---------- 82

Green, Edmonson v. ---- 433
Greer v. Howard ---- 755
Greer v. Mechanics' Mut. Sav. Assn. ---- 439
Greer v. Spencer ---- 358
Gregg v. Woods ---- 424
Gresham v. Gresham ---- 547
Gresham, Moore v. ---- 547
Griffin v. Beadle's Admx. ---- 495
Grimes v. Williams ---- 28
Grimes, Byram v. ---- 778
Grinstead, Scott v. ---- 857
Grover, Reidbaugh v. ---- 34
Guscurth, Sawyer v. ---- 498
Gutzwilder v. Wagner ---- 371

Hall, Bibb v. ---- 877
Haly, Hendrick v. ---- 787
Hamilton's Admr. v. Tarlton ---- 371
Hampton v. Lashley ---- 865
Hand v. Fretsch ---- 380
Hannah, Mays v. ---- 630
Hardcastle v. Rector ---- 4
Hargett v. Bracken County ---- 245
Harlan, Arthur v. ---- 788
Harl, Fletcher v. ---- 297
Harned v. Harvey ---- 437
Harris v. Anderson ---- 230
Harris v. May ---- 700
Harrison, Endies' Exr. v. ---- 885
Harrison, Story v. ---- 669
Hart, Bunger v. ---- 410
Hartford Fire Ins. Co., Mayes v. ---- 534
Hart, Haydon v. ---- 845
Harvey, Harned v. ---- 437
Harwood v. Baldwin ---- 699
Hathaway, Stuart v. ---- 800
Hayden v. Crutchfield's Exr. ---- 214
Haydon v. Hart ---- 845
Hays v. Sprigg ---- 694

Hays, Dodd v. ---- 426
Heiss, Battres v. ---- 103
Helm v. Lyon ---- 803
Helm v. Neal ---- 33
Henderson v. Henderson ---- 172
Henderson's Exr. v. Henderson ---- 172
Hendrick v. Haly ---- 787
Herd v. Eversole ---- 597
Hessey, Simmons v. ---- 40
Hibbler, Shipp v. ---- 691
Hickman v. Sewell ---- 153
Hicks v. Commonwealth ---- 214
Hicks, Commonwealth v. ---- 891
Hildreth v. Shipp ---- 325
Hill v. Messer ---- 18
Hill, Howard's Admr. v. ---- 945
Hines' Curator, Riley v. ---- 87
Hipkins, Gonhot v. ---- 458
Hisle, Berryman v. ---- 897
Hite, Trustees of Town of Stanford v. ---- 145
Hocker, National Bank v. ---- 416
Hodge v. Commonwealth ---- 645
Hoffman, Burns v. ---- 549
Hogg v. Commonwealth ---- 370
Holden, Payson v. ---- 771
Hooser v. Hooser ---- 651
Horn v. Decker ---- 171
Howard, Greer v. ---- 755
Howard's Admr. v. Hill ---- 945
Howe, Puthuff v. ---- 599
Howser v. Watson ---- 324
Huban v. Huban ---- 197
Hudnall, Beard v. ---- 653
Hudson v. Louisville & N. R. Co. ---- 477
Hudson, Poor v. ---- 758
Hume, Oldham's Trustee v. ---- 779
Hunt, Driver v. ---- 169
Hunter v. Bearn ---- 265
Hunter v. Watts ---- 366

Hunter, Commonwealth v. ---------- 11
Hunter's Admr. v. March ---------- 55
Hurst v. Phillips ---------- 101

Irvine v. Walker ---------- 387
Isenberg v. Strasser ---------- 501
Israel, Duell's Exr. v. ---------- 122

Jacob's Exrs. v. Ford ---------- 73
Jacob, Tyler v. ---------- 924
Jarvis v. Satterwhite ---------- 167
Jenkins v. Netherland ---------- 432
Jennings, Faulkner v. ---------- 399
Jennings, McCown's Admr. v. ---------- 123
Johns v. Martin's Admr. ---------- 109
Johnson v. Johnson ---------- 744
Johnson, Bryant Station & L. Tpk. Co. v. ---------- 427
Johnson, Ellis v. ---------- 868
Johnson, Newport St. R. Co. v. ---------- 35
Johnson, Taylor's Gdn. v. ---------- 464
Johnston, Knott v. ---------- 271
Jones v. Jones ---------- 412
Jones v. Newport & L. Tpk. R. Co. ---------- 698, 834
Jones, Graham v. ---------- 503
Jones, Lathram v. ---------- 150
Jones, Youtsey v. ---------- 830
Joplin v. Cordrey ---------- 643
Jordan, Craddock v. ---------- 146
Joyce v. Woods ---------- 811
Joyes v. Lawrence ---------- 538
Judah v. Bickel ---------- 914
Judah, Bickel v. ---------- 612

Kahn v. Goodhart ---------- 462
Kastenbine v. City of Louisville ---------- 471
Kaye v. City of Louisville ---------- 415
Keltmers, Green v. ---------- 98
Kemple, Cardwell v. ---------- 480
Kendall v. Thomason ---------- 175

Kennedy v. Farmers' Bank 725
Kennedy, McKnight v. 208
Kentucky Cent. R. Co. v. McMurty 509
Kentucky Cent. R. Co., Parks v. 552
Kentucky Elec. Inst. v. Gaines 831
Kincaid, Byrd v. 314
Kincaid, Tutt v. 310
Kirkland v. Burton 86
Kirk's Exrs., Showalter v. 741
Klump v. Liebold 421
Knock v. Triber 203
Knoerr, Commonwealth v. 514
Knott v. Johnston 271
Knox v. Shannon 452
Kobiger, Devon v. 882
Kueborth v. Mead 408
Kueborth v. Pratt 440

Lacy, Frank v. 289
Lancaster's Assignee, Walker v. 896
Lankey's Admr. v. McElroy 102
Lashley v. Patton 893
Lashley, Hampton v. 865
Lathram v. Jones 150
Lawler, Forsythe v. 382
Lawrence, Joyes v. 538
Layne v. Davidson 506
Layne v. Loar 484
Lee, Elliott v. 557
Lemcole v. Shaw's Exrx. 38
Lewis County Court v. Lovell 294
Lewis, O'Doherty v. 901
Lewis, Rountree v. 68
Liebold, Klump v. 421
Lillard's Admr. v. Mary Houston Transp. Co. 705
Lincoln, Boyer v. 437
Lindsay v. Smith 232
Linning, Longshaw v. 628
Littrell, Commonwealth v. 693

Loar, Layne v. ---- 484
Longshaw v. Linning ---- 628
Longshaw, Eddy v. ---- 179
Loran v. City of Louisville ---- 723
Louffer, Mann v. ---- 742
Louisville & N. R. Co. v. Brown ---- 199
Louisville & N. R. Co. v. Cooper's Admr. ---- 519
Louisville & N. R. Co. v. Wilson ---- 357
Louisville & N. R. Co., Hudson v. ---- 477
Louisville & N. R. Co., Stewart v. ---- 943
Louisville, C. & L. R. Co. v. Ramsey ---- 274
Louisville German B. & L. Assn. v. Wissing ---- 822
Louisville Presbyterian Orphan Asylum, Whipple v. ---- 159
Lovell, Lewis County Court v. ---- 294
Lowe v. Erleinson ---- 57
Lucas' Exr., Elder v. ---- 47
Luckett v. Commonwealth ---- 844
Ludlow v. Maxwell ---- 679
Ludlow v. Rich ---- 124
Lyon, Dohoney v. ---- 481
Lyon, Helm v. ---- 803

McAtee's Admr., Denny v. ---- 194
McCarty v. Taturn ---- 633
McCarty, Asher v. ---- 21
McClary, Adams v. ---- 871
McCown's Admr. v. Jennings ---- 123
McCrory, Miller v. ---- 625
McDaniel's Admr. v. Clements ---- 96
McDonald, Yeatman v. ---- 748
McDowell v. Coleman ---- 152
McDowell v. Wiseman ---- 285
McDowell, Moore v. ---- 649
McElroy, Commonwealth v. ---- 242
McElroy, Lankey's Admr. v. ---- 102
McFarland, Burton v. ---- 428
McFerran v. Wilson ---- 17
McGinnis v. Banta ---- 721
McKay, Beard v. ---- 483

McKee v. Walker ---------- 111
Mackey v. Commonwealth ---------- 209
McKinney v. Commonwealth ---------- 348
McKnight v. Kennedy ---------- 208
McLaughlin v. Avord ---------- 151
McMillion's Admr., Taylor v. ---------- 352
McMurty, Kentucky Cent. R. Co. v. ---------- 509
Maden v. Commonwealth ---------- 674
Magee v. Phelps ---------- 869
Mahoney, Commonwealth v. ---------- 133
Maloney v. Smith's Admx. ---------- 577
Mann v. Louffer ---------- 742
Mann, Blackburn v. ---------- 598
March, Hunter's Admr. v. ---------- 55
Marion County, Beaver v. ---------- 577
Marks v. Graham ---------- 27
Marshall v. Senour ---------- 594
Marshall v. Vanmeter ---------- 491
Martin v. Ferguson ---------- 351
Martin, Martin's Assignee v. ---------- 195
Martin's Admr., Johns v. ---------- 109
Martin's Assignee v. Martin ---------- 195
Martin, Smith v. ---------- 818
Mary Houston Transp. Co., Lillard's Admr. v. ---------- 705
Mason's Admx. v. Mason ---------- 345
Matheney, Wearen v. ---------- 600
Mathis v. Commonwealth ---------- 686
Matthews, Commonwealth v. ---------- 385
Mattingly v. Wathen ---------- 66
Maupin v. Berkley ---------- 487
Maupin's Admr. v. Pace ---------- 204
Maxey v. Wallhatt's Exrs. ---------- 31
Maxey, Stone v. ---------- 156
Maxwell, Ludlow v. ---------- 679
May v. Commonwealth ---------- 396
May, Dils v. ---------- 619
Mayer's Admr., Posey v. ---------- 456
Mayes v. Hartford Fire Ins. Co. ---------- 534
Mayfield v. Barbour ---------- 342

May, Harris v. ---- 700
Mayo v. Ferguson ---- 530
Mays v. Commonwealth ---- 229
Mays v. Hannah ---- 630
Mays, Padgett v. ---- 24
Mead, Kueborth v. ---- 408
Mead, Powell v. ---- 292
Means, Overton v. ---- 1
Mechanics' Mut. Sav. Assn., Greer v. ---- 439
Menzies v. Farmers' Bank ---- 634
Meredith v. Barrows ---- 51
Merriwether v. Merriwether ---- 251
Messer, Hill v. ---- 18
Miller v. Baughman ---- 266
Miller v. Childers' Admr. ---- 944
Miller v. Ferrell ---- 48
Miller v. McCrory ---- 625
Miller v. National Bank ---- 662
Miller v. Withers ---- 200
Miller's Admr., Worthington v. ---- 708
Miller's Exr. v. Wilson ---- 541
Millien, Whittaker v. ---- 268
Million's Admx., Patterson v. ---- 434
Mitchell's Admr. v. Ray's Assignee ---- 588
Monarch v. Dean ---- 596
Monlinier, Wallace v. ---- 701
Montcalm, Smart v. ---- 93
Monterey & New Columbus Tpk. Co. v. Davis ---- 336
Moody v. Moody ---- 381
Moore v. Burge ---- 826
Moore v. Gresham ---- 547
Moore v. McDowell ---- 649
Moore, Allison v. ---- 253
Moore, Ecton v. ---- 735
Moore, Morton v. ---- 938
Moore, Southern States Coal, Iron & Land Co. v. ---- 916
Moran v. Smithers ---- 139
Moreland, Westerfield v. ---- 247
Morford v. Browning ---- 186

Morgan v. Wood ---------- 320
Morrow v. Morrow ---------- 496
Morton v. Moore ---------- 938
Morton, Williamson v. ---------- 590
Moss' Admr., Smith v. ---------- 848
Mudd, Cox's Admr. v. ---------- 565
Mullins v. Commonwealth ---------- 527
Mullins v. Pendleton County Court ---------- 95
Mundy's Admx., Brown v. ---------- 270
Murphy v. Boyd ---------- 817
Murray v. Murray ---------- 121
Murray, Fannin v. ---------- 225
Myers v. Myers ---------- 39
Myers' Admr. v. Bosley ---------- 765

National Bank v. Hocker ---------- 416
National Bank v. Reed ---------- 733
National Bank, Miller v. ---------- 662
Neal v. City of Louisville ---------- 466
Neal, Helm v. ---------- 33
Nethercutt, Saulsberry v. ---------- 163
Netherland, Jenkins v. ---------- 432
Newman v. Newman ---------- 413
Newport & L. Tpk. R. Co., Jones v. ---------- 698, 834
Newport St. R. Co. v. Johnson ---------- 35
Newport Water Works, Dayton v. ---------- 777
Nicholl, Wand v. ---------- 879
Northern Bank v. Bell ---------- 346
Northern Bank, Barbee v. ---------- 201
Norton, Stephens v. ---------- 474

O'Doherty v. Lewis ---------- 901
Offutt v. Commonwealth ---------- 287
Oldham's Trustee v. Hume ---------- 779
Orme v. David ---------- 443
Orr, Bingham v. ---------- 169
Orr's Admr, Snapp v. ---------- 785
Osenton, Bryson v. ---------- 383
Overton v. Means ---------- 1

Owens v. Ford ---- 451
Owens, Alexander v. ---- 898
Owsley, Vaughn v. ---- 222

Pace, Maupin's Admr. v. ---- 204
Padgett v. Mays ---- 24
Park v. Anderson ---- 49
Parker v. Wilcox ---- 280
Parks v. Kentucky Cent. R. Co. ---- 552
Parrish, Smith v. ---- 502
Patterson v. Gray ---- 226
Patterson v. Million's Admx. ---- 434
Patton, Lashley v. ---- 893
Patton's Admr., Gray's Exrs. v. ---- 327
Payne, Villerre v. ---- 70
Payson v. Holden ---- 771
Pence v. Commonwealth ---- 593
Pendleton County Court, Mullins v. ---- 95
People's Bldg. Assn., City of Covington v. ---- 731
Percifull v. Wilson's Heirs ---- 545
Perkins, Sutton v. ---- 76
Perkins, Woodford v. ---- 561
Perry v. Duke's Exrx. ---- 29
Peters v. Sword's Exr. ---- 500
Phelps, Browninski v. ---- 207
Phelps, Magee v. ---- 869
Phillips v. Phillips ---- 23
Phillips v. Phillips' Admr. ---- 78
Phillips, Hurst v. ---- 101
Phillips, Queen v. ---- 363
Pigg v. Whitman ---- 108
Poor v. Hudson ---- 758
Porter v. First Nat. Bank ---- 5
Porter, Earl v. ---- 85
Porter's Admr. v. Porter ---- 244
Posey v. Mayer's Admr. ---- 456
Powell v. Mead ---- 292
Poyntz, Bank of Kentucky v. ---- 99
Prater v. Commonwealth ---- 578

Pratt, Kueborth v. ---- 440
Preston, Dowdy v. ---- 623
Prethoff, Walker v. ---- 143
Price v. Commonwealth ---- 888
Price v. Rodman ---- 7
Pritchard v. Warner's Assignee ---- 751
Pritchard, Gearhart v. ---- 39
Puckett, Sutton v. ---- 89
Pursefull, Ball v. ---- 340
Puthuff v. Howe ---- 599

Queen v. Phillips ---- 363

Ralls, Deatly v. ---- 306
Ramsey, Louisville, Cincinnati & Lexington R. Co. v. ---- 274
Randall Grain Separator Co., Chick v. ---- 435
Randolph, Continental Ins. Co. v. ---- 125
Rankin v. Eastin ---- 173
Ransom, Brownson v. ---- 960
Rapier, Cissel v. ---- 553
Ray's Assignee, Mitchell's Admr. v ---- 588
Reavis, Stephens v. ---- 391
Rector, Hardcastle v. ---- 4
Reed, National Bank v. ---- 733
Reid v. Cain ---- 269
Reidbaugh v. Grover ---- 34
Revill v. Franks' Exr. ---- 602
Rice, Crawford v. ---- 64
Richardson v. Wycoff ---- 9
Richart, Collins v. ---- 283
Richart, Goodpaster v. ---- 326
Rich, Ludlow v. ---- 124
Riley v. Albertson ---- 316
Riley v. Filmore ---- 745
Riley v. Hines' Curator ---- 87
Roberts, Gardner's Admr. v. ---- 873
Robinson v. City of Louisville ---- 365
Robinson v. Robinson ---- 832
Rodman, Price v. ---- 7

Rose v. Commonwealth ---------- 568
Rose, Shepherd v. ---------- 104
Ross v. Dimmit ---------- 525
Ross v. Weaver ---------- 131
Rountree v. Lewis ---------- 68
Rowlett v. Commonwealth ---------- 571
Royse, Garrett v. ---------- 184
Rusk, Eginton v. ---------- 537
Russell, Spragins v. ---------- 717
Rust, Andreas' Assignee v. ---------- 478

Salmons, Dutlinger v. ---------- 331
Sanders' Exr., Wilson v. ---------- 863
Sanford's Receiver, Snape v. ---------- 609
Sargent v. Farrar's Assignee ---------- 2
Satterwhite, Jarvis v. ---------- 167
Saulsberry v. Nethercutt ---------- 163
Saur v. Sayres ---------- 52
Sawyer v. Guscurth ---------- 498
Sayres, Saur v. ---------- 52
Scobee's Assignee, Bates v. ---------- 608
Scott v. Estill ---------- 789
Scott v. Grinstead ---------- 857
Scott, Gaines v. ---------- 361
Seale, Steel v. ---------- 659
Searls, Commonwealth v. ---------- 335
Second Nat. Bank, Camp v. ---------- 257
Senour, Marshall v. ---------- 594
Sewell v. Commonwealth ---------- 213
Sewell, Hickman v. ---------- 153
Shannon, Knox ---------- 452
Sharpe, Collier v. ---------- 764
Shawhan v. Farmers' Bank ---------- 725
Shawhan v. Smith ---------- 814
Shawley, Taylor v. ---------- 22
Shaw's Exrx., Lemcole v. ---------- 38
Shelby R. R. Dist. of Shelby County, Crutcher v. ---------- 404
Shepherd v. Rose ---------- 104
Shinkle, Covington St. R. Co. v. ---------- 58

Shipp v. Hibbler ---------- 691
Shipp, Hildreth v. ---------- 325
Showalter v. Kirk's Exrs. ---------- 741
Sikes v. Commonwealth ---------- 890
Simmons v. Hessey ---------- 40
Simrall, Commonwealth v. ---------- 334
Sims, Ferguson v. ---------- 472
Skillman v. Atchison ---------- 105
Skillman v. Frost's Exr. ---------- 900
Skinner's Admr. v. Gaitskill's Exr. ---------- 302
Skinner's Admr. v. Stevenson ---------- 302
Skinner's Admr., Dean v. ---------- 302
Smallgood, Davis' Assignee v. ---------- 441
Smart v. Montcalm ---------- 93
Smith v. Commonwealth ----------223, 224, 774
Smith v. Gowdy's Admr. ---------- 430
Smith v. Martin ---------- 818
Smith v. Moss' Admr. ---------- 848
Smith v. Parrish ---------- 502
Smith v. Smyser ---------- 176
Smith v. Wilson ---------- 946
Smithers, Moran v. ---------- 139
Smith, Lindsay v. ---------- 232
Smith's Admx., Maloney v. ---------- 577
Smith, Shawhan v. ---------- 814
Smyser, Smith v. ---------- 176
Snape v. Sanford's Receiver ---------- 609
Snapp v. Orr's Admr. ---------- 785
Snyder, Fisk v. ---------- 928
Sosh v. Commonwealth ---------- 710
Southern States Coal, Iron & Land Co. v. Moore---------- 916
Southworth, Greene v. ---------- 82
Spencer, Greer v. ---------- 358
Spragins v. Russell ---------- 717
Sprigg, Hays v. ---------- 694
Stagner, Crawford v. ---------- 543
Standeford v. Bates ---------- 154
Starling v. Starling's Assignee ---------- 141
Star Planing Mill Co. v. Exchange Bank ---------- 277

Staton v. Commonwealth ---------- 374
Steel v. Seale ---------- 659
Steele v. Swayne ---------- 949
Stegala, Commonwealth v. ----------532, 533
Stephens v. Norton ---------- 474
Stephens v. Reaves ---------- 391
Stephenson, Burns v. ---------- 589
Sterman v. Thornton ---------- 442
Stevens, Brevard v. ---------- 37
Stevens, Commonwealth v. ---------- 114
Stevenson, Skinner's Admr. v. ---------- 302
Stewart v. Commonwealth ---------- 138
Stewart v. Louisville & N. R. Co. ---------- 943
Stone v. Commonwealth ---------- 135
Stone v. First Nat. Bank ---------- 796
Stone v. Maxey ---------- 156
Story v. Harrison ---------- 669
Stovall v. Commonwealth ---------- 820
Strassel v. Commonwealth ---------- 886
Strasser, Isenberg v. ---------- 501
Stretlow v. Vonderhide's Exr. ---------- 377
Strickle, Aetna Insurance Co. v. ---------- 417
Strother, Young v. ---------- 575
Stuart v. Hathaway ---------- 800
Stubblefield's Admr., Brown v. ---------- 767
Stubbs, Sublett v. ---------- 32
Stuckey v. Bell ---------- 217
Studicker, English v. ---------- 947
Stump, Allen v. ---------- 493
Sublett v. Stubbs ---------- 32
Sutterfield v. Commonwealth ---------- 395
Sutton v. Perkins ---------- 76
Sutton v. Puckett ---------- 89
Swayne, Steele v. ---------- 949
Sword's Exr., Peters v. ---------- 500

Tarlton, Hamilton's Admr. v. ---------- 371
Taturn, McCarty v. ---------- 633
Taylor v. Bank of Woodford ---------- 794

Taylor v. Commonwealth ---------- 642
Taylor v. McMillion's Admr. ---------- 352
Taylor v. Shawley ---------- 22
Taylor's Admr. v. Bryan ---------- 607
Taylor's Gdn. v. Johnson ---------- 464
Taylor, Wilson v. ---------- 793
Terry, Banta's Exr. v. ---------- 44
Tevis, Glass v. ---------- 247
Thomas v. Whittaker's Admr. ---------- 875
Thomason, Kendall v. ---------- 175
Thompson v. Thompson ---------- 812
Thornton, Sterman v. ---------- 442
Tilford v. Allen ---------- 883
Todd v. Todd ---------- 349
Triber, Knock v. ---------- 203
Trimble, Buchannan v. ---------- 406
Trower v. Gabhart ---------- 508
Trustees of Town of Stanford v. Hite ---------- 145
Tucker, Chick v. ---------- 90
Turner v. Commonwealth ---------- 640, 842
Turner v. Goodman ---------- 136
Turpin v. Turpin's Admr. ---------- 802
Tutt v. Kincaid ---------- 310
Tye v. Commonwealth ---------- 206
Tyler v. Jacob ---------- 924

Underwood v. Underwood ---------- 535
Unverzagt, Urso v. ---------- 46
Urso v. Unverzagt ---------- 46
Urton v. Downey ---------- 564
Utterback v. Wilhoit ---------- 507
Utz v. Commonwealth ---------- 211

Vance v. Campbell ---------- 368
Vanmeter v. Corcoran ---------- 15
Vanmeter, Marshall v. ---------- 491
Vanover, Chapman v. ---------- 706
Varble v. Commonwealth ---------- 570
Vaughn v. Owsley ---------- 222

Vice v. Vice ---------- 319
Villerre v. Payne ---------- 70
Vonderhide's Exr., Stretlow v. ---------- 377

Wade v. Commonwealth ---------- 356
Wagner, Gritzwilder v. ---------- 371
Walker v. Lancaster's Assignee ---------- 896
Walker v. Prethoff ---------- 143
Walker v. Walker ---------- 809
Walker, Irvine v. ---------- 387
Walker, McKee v. ---------- 111
Wallace v. Monlinier ---------- 701
Wallace, Combs v. ---------- 338
Wallender v. Wintersmith ---------- 83
Wallhatt's Exrs. v. Wallhatt ---------- 31
Wallhatt's Exrs., Maxey v. ---------- 31
Wallhatt, Wallhatt's Exrs. v. ---------- 31
Walters v. Blevins' Exr. ---------- 309
Wammock, Commonwealth v. ---------- 227
Wand v. Nicholl ---------- 879
Ware v. Clark's Run & Salt River Tpk. Co. ---------- 249
Warmouth v. Commonwealth ---------- 847
Warner's Assignee, Pritchard v. ---------- 751
Warren v. Benton's Trustees ---------- 272
Wathen, Mattingly v. ---------- 66
Watson, City of Frankfort v. ---------- 149
Watson, Howser v. ---------- 324
Watts, Hunter v. ---------- 366
Wearen v. Matheney ---------- 600
Weaver, Ross v. ---------- 131
Weaver's Heirs v. Weaver ---------- 258
Webb v. Commonwealth ---------- 792
Weller v. Bissell ---------- 604
Westerfield v. Moreland ---------- 247
Wheat v. Frankfort Cotton Mills Co. ---------- 903
Whipple v. Louisville Presbyterian Orphan Asylum---------- 159
Whitman, Piggs v. ---------- 108
Whittaker v. Millien ---------- 268
Whittaker's Admr., Thomas v. ---------- 875

Wilcox, Parker v. ---------- 280
Wilder v. Craddock ---------- 146
Wiley, Davis v. ----------580, 585
Wilhoit, Utterback v. ---------- 507
Williams, Grimes v. ---------- 28
Williamson v. Morton ---------- 590
Wilson v. Everett ---------- 43
Wilson v. Sanders' Exr. ---------- 863
Wilson v. Taylor ---------- 793
Wilson, Boyd v. ---------- 547
Wilson, Gaitskill's Exrs. v. ---------- 302
Wilson, Louisville & Nashville R. Co. v. ---------- 357
Wilson, McFerran v. ---------- 17
Wilson, Miller's Exr. v. ---------- 541
Wilson's Heirs, Percifull v. ---------- 545
Wilson, Smith v. ---------- 946
Wintersmith, Wallender v. ---------- 83
Wiseman, McDowell v. ---------- 285
Wissing, Louisville German B. & L. Assn. v. ---------- 822
Withers, Miller v. ---------- 200
Wittey v. Deff ---------- 61
Woodford v. Perkins ---------- 561
Wood, Morgan v. ---------- 320
Woods, City of Covington v. ---------- 216
Woods, Gregg v. ---------- 424
Woods, Joyce v. ---------- 811
Woolsey v. Commonwealth ---------- 776
Wooster, Gallagher v. ---------- 722
Wormoth v. Commonwealth ---------- 670
Worthington v. Miller's Admr. ---------- 708
Wycoff, Richardson v. ---------- 9

Yates' Admr. v. Fisher ---------- 948
Yeatman v. McDonald ---------- 748
Young v. Commonwealth ---------- 689
Young v. Strother ---------- 575
Youtsey v. Jones ---------- 830

KENTUCKY COURT OF APPEALS

RICHARD OVERTON *v.* PRESTON MEANS.

[Abstract Kentucky Law Reporter, Vol. 2—211.]

Vested or Contingent Interest in Real Estate.

Whether an interest of a devisee in real estate is vested or contingent, it is vendible and subject to sale to satisfy its owner's debts.

Estoppel of Debtor.

One called upon to make discovery and to disclose the extent of his right and interest under his father's will should state the facts and take necessary steps to enable the court to determine his rights, and where he fails to do so and judgment is taken against him he must abide the result of his own neglect to make a more complete discovery.

APPEAL FROM FAYETTE CIRCUIT COURT.

February 1, 1881.

OPINION BY JUDGE COFER:

We do not deem it important or even proper, in the absence of other parties interested in the question, to determine whether the appellant has a vested or contingent interest in the land devised by his father. Whether it be the one or the other, it is vendible and subject to sale for the satisfaction of his debts. Gen. Stat. (1879) Ch. 38, Art. 12, § 1.

The appellant was called upon to make discovery, and if he deemed it to his interest that the extent of his right under his father's will should be ascertained by the judgment of the court, he should have stated the facts and taken the steps necessary to enable the court to do so. These facts were peculiarly within his knowledge, and having failed to state them, when called upon to disclose his effects for the satisfaction of the judgment against him,

1

he must abide the result of his own neglect to make a more complete discovery.

Judgment *affirmed.*

F. Waters, for appellant.

T. N. Allen, for appellee.

[Cited, *McAllister v. Ohio &c. Trust Co.,* 114 Ky. 540, 24 Ky. L. 1307, 71 S. W. 509; *Davis v. Willson,* 115 Ky. 639, 25 Ky. L. 21, 74 S. W. 696.]

C. B. SARGENT ET AL. *v.* JAMES FARRAR'S ASSIGNEE ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—212.]

Distraint for Rent.

Before personal property can be subject to a distress warrant against a tenant it must appear that such property belonged to the tenant at the time or after the accrual of the rent distrained.

Landlord's Lien.

The landlord's lien under the statute can only attach to property belonging to the tenant, and can not be for more than one year's rent due or to become due.

APPEAL FROM FAYETTE CIRCUIT COURT.

February 1, 1881.

OPINION BY JUDGE COFER:

Although § 648 of the Civ. Code (1895) seems to contemplate the trial of motions for judgment upon bonds executed under § 645 without written pleadings, yet when that section is considered in connection with §§ 444 and 449, we incline to the opinion that such motions may be heard upon or without written pleadings. In *Maupin & O'Rear v. Couchman,* MSS. Opin., we held that it was not error to allow written pleadings to be filed in such cases.

It was alleged in the appellants' pleading, which is styled a petition and answer, in the record, that the whisky in contest was the property of Farrar at the time the levy was made. This allegation was not denied in the reply, but the appellant sought to avoid it by averring that the whisky was found and levied upon the leased premises, and that when brought upon the premises it was the property of Warren, their tenant, and was therefore subject to seizure

under the distress warrant. To this there was no reply, and the appellants contend that these allegations should have been taken to be true, and judgment rendered for them on the pleadings.

Although the law did not require, it permitted written pleadings, and the parties having seen proper to commence such pleadings the case should be treated as if written pleadings had been required; and if on the pleadings as they stood at the trial the appellants were entitled to recover, judgment should have been rendered in their favor without regard to the evidence.

But we are of the opinion that appellees, and not appellants, were entitled to judgment on the pleadings. By failing to deny it the appellants admitted that the whisky was the property of Farrar when levied on. They alleged in reply that it was the property of Warren when it came on the leased premises. This was not denied, and therefore is to be taken to be true.

We then have these facts established by the pleadings: 1. That the whisky belonged to Farrar when levied upon; 2. That it was then on the leased premises; 3. That when it came upon the premises it was the property of Warren. Do these facts render it subject to be distrained for the rent for which the warrant in this case was issued?

It is not stated in any of the pleadings when or how Farrar became the owner of the whisky. That it was one time the property of Warren and was on the leased premises as his property does not render it subject to distraint. It must have belonged to him at the time or after the accrual of the rent distrained for. The statute provides that the landlord's lien shall be upon property belonging to the tenant, but such lien shall not be for more than one year's rent due or to become due. It was therefore necessary that the reply should have contained an allegation that the whisky was the property of Warren during the time the rent claimed was accruing, or after it had accrued.

Suppose the rent distrained for was for one year immediately preceding the issuing of the warrant, and that Farrar became the owner of the whisky two years before that date. In that case it would be clear that no lien attached to it, for the reason that it was not the property of the tenant at any time after the rent commenced to accrue; and the appellants, having admitted that it belonged to Farrar when levied upon, should have alleged, if such

were the fact, that it belonged to Warren while the rent was accruing or after it accrued.

Wherefore the judgment must be *affirmed.*

Morton & Parker, for appellants.

Beck & Thornton, for appellees.

[Cited, *Dugan's Admr. v. Mitchell,* 5 Ky. L. 150.]

E. HARDCASTLE ET AL. *v.* W. W. RECTOR ET AL.

[Kentucky Law Reporter, Vol. 2—209.]

Principal and Surety—Discharge of Surety.

When the principal upon a legal consideraton makes a contract with his creditor to extend the time of payment, the risk of the surety is increased, and by the extension he is discharged.

APPEAL FROM WARREN CIRCUIT COURT.

February 1, 1881.

OPINION BY JUDGE HARGIS:

The surety has a material interest in the rights and remedies which the creditor is entitled to under the contract for the performance of which he is bound. Where a person is surety at law for the debt of another, payable at a specified time, and the payee makes a contract upon a legal consideration, which could be lawfully used to defeat the condition of the obligation, the surety, whose risk can not be thus increased without his consent by the payee, is thereby discharged.

If, therefore, the appellants accepted the note of W. W. Durham for $73.50, dated July 31, 1876, in consideration of the interest which had accrued and which would accrue on the notes for $350 executed by him and the appellees, as his sureties, and payable Oct. 26, 1875, they altered the time of its payment and put it out of their power to sue the principal until the expiration of one year beyond the time agreed upon with him and his sureties, and discharged them from their obligation unless they agreed thereto or subsequently ratified the transaction.

The interest to accrue, and the correction or recognition of the alleged mistake in the note for $350, of the time at which and to which it bore ten per cent. interest, constituted a valuable legal

consideration that will uphold the contract contained in the note for $73.50, given for the forbearance, if such contract was agreed to or accepted as such by the appellants.

But they deny the agreement or acceptance of the note from Durham, who, they allege, wrote it without their consent and against their protest, upon the back of the note sued on, and that it was intended only as a memorandum of the accrued and accruing interest, but not as a contract for its payment by Durham. These allegations being denied by appellees, the issues thus made should have been submitted to the jury for their verdict. For if the appellants did not make the agreement, or accept the note for $73.50, although it was written on the back of their note on which they seek judgment, they are entitled to recover against the sureties, because they were not bound or expected to surrender the possession of their note in order to avoid responsibility upon a contract which they deny having made or assented to.

With the weight of the evidence we have nothing to do; that is to be determined by the jury. Wherefore the judgment is *reversed* and cause remanded, with directions to grant the appellants a new trial, and for further proceedings not inconsistent with this opinion.

R. Rodes, H. J. Beauchamp, for appellants.

Halsell & Mitchell, for appellees.

H. H. PORTER v. FIRST NATIONAL BANK OF LOUISVILLE.

[Abstract Kentucky Law Reporter, Vol. 2—212.]

New Trial on Account of Newly Discovered Evidence.

A new trial will not be granted on account of newly discovered evidence which is merely corroborative or contradictory to evidence given at the trial.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 3, 1881.

OPINION BY JUDGE COFER:

The sole issue on the former trial was whether the bank, at the time of receiving the check for $500 on the Long Branch Bank, paid the appellant the amount of the check and thus became the owner of it, or whether the bank received it for collection and omitted to give the appellant credit.

Evidence was introduced by each party upon that issue. The appellant himself testified that he did not receive the money. Smith, the teller, testified that he did receive it. The newly discovered evidence is therefore merely cumulative. The only effect of the testimony of Kage and the negro woman is to corroborate and strengthen the testimony of the appellant himself. They do not profess to know whether the money was received by the appellant or not. They merely state facts and circumstances conducing to show that he was not at the bank on the day on which Smith swore the money was paid. This evidence does not even conduce in the remotest degree to establish or disprove any fact except such as were testified to on the former trial, but as already said it merely corroborated the testimony of the appellant and conduced to contradict the testimony of Smith.

That a new trial will not be granted on account of newly discovered evidence merely corroborating or contradicting testimony given on the original trial is well settled. *Allen v. Perry,* 6 Bush (Ky.) 85; *Bell v. Offutt,* 10 Bush (Ky.) 632.

Neither the witnesses nor the facts which they prove can in any just sense be said to be newly discovered. The appellant had no doubt forgotten that he was at home all day on the 7th of July, that he did not go to the bank on that day, that he had sent the $1,000 check by Kage, and that Kage and the nurse knew he was sick and at home on that day; but a failure to recollect facts once known will rarely, if ever, warrant the granting of a new trial. The answer of the bank apprised the appellant that the bank would attempt to prove that the money sued for was paid to him July 7, 1877; that the $500 check was purchased and paid for on that day, and was not received for collection.

That answer was filed more than a month before the trial, but the appellant was absent and possibly never saw it until the day of the trial, which occurred within less than a year after the transaction out of which the controversy arose. To grant new trials under such circumstances to enable a party to introduce witnesses to prove facts forgotten in so short a time would lead to the worst consequences and render litigation practically interminable.

Judgment *affirmed.*

Samuel Cleaver, for appellant.

Ward & McAffee, Rodman & Brown, for appellee.

J. S. PRICE v. JOHN RODMAN.

[Abstract Kentucky Law Reporter, Vol. 2—213.]

Recovery on Indemnity Contract.

One can not recover on a written obligation delivered to one person to be delivered to another as indemnity to him for signing a note where there is nothing in the obligation to show that the signer of the note received it as collateral. The court can not gather the intention of the parties from that which does not appear in the obligation.

Rule of Construction of Contract.

While it is the purpose in construing a written contract to arrive at the intention of the parties to it, such intention must be gathered from the writing itself.

APPEAL FROM FRANKLIN CIRCUIT COURT.

February 3, 1881.

OPINION BY JUDGE COFER:

The paper sued upon contains no direct undertaking to any designated person. Upon its face it appears to be an agreement between the obligors and Dr. Price, or between the signers themselves. If it were intended as an agreement between Price and the obligors, it would not be claimed that an action could be maintained for its breach; and if it be an agreement between the obligors, of course neither Price nor Scott, nor both together, can recover on it.

But it is alleged that Scott agreed to become bound on the consolidated note on condition that those who were bound on the notes to be consolidated would indorse other notes for equal amounts, to be used to take up the consolidated note in case Price was unable to pay the calls upon it; that the defendants were notified of that fact and entered into the writing sued upon, and delivered it to Price, to be by him delivered to Scott, to secure and save him harmless from loss by reason of his becoming bound as Price's surety on the consolidated note; that Price delivered the writing to Scott, who, in consideration of the covenants contained therein, signed the consolidated note.

These allegations show that in point of fact the obligors made the writing and delivered it to Price, to be delivered to Scott as indemnity to him, and that he signed the consolidated note relying

upon the writing for indemnity. But except the fact that the appellee and others signed the writing, all these allegations are outside of it, and we are called upon to gather the intention of the obligors, not from the writing, but from facts outside of it. It can not be gathered from the writing that Scott had or was intended under any circumstances to have any interest in it.

As already said, the writing upon its face seems to have been entered into between Price and the obligors themselves. It contains no mention of Scott, or indeed of any one else, as indorser of the consolidated note; and no attempt to show by any possible construction an intention to indemnify Scott or any other person who shall indorse the consolidated note is expressed in the writing. That intention is sought to be shown by allegations aliunde the writing, and it is insisted, as we understand the argument of counsel, that if it were the intention of the obligors to bind themselves by the writing to indemnify Scott, and he acted upon the faith that the writing bound them, they should be held to be bound by it, although no such intention can be gathered from the writing.

The intention of the parties is certainly a governing principle in the law of contracts. But that intention must be gathered from the written memorial when the contract is in writing. The writing shows that the obligors intended to bind themselves to indorse Price's note in the contingency mentioned. But this is not enough to maintain this action. It must appear expressly or by fair and reasonable inference from the language of the writing that they intended to become bound to Scott; and no such intention being expressed in or fairly inferable from the writing, it can only be shown by evidence, in violation of the rule that a writing can not be enlarged by parol evidence. It would be as much a violation of that rule to prove by parol evidence who was intended to be the obligee as to prove what the obligors intended to bind themselves to do. If they had undertaken, in terms, to indemnify any one who should become bound as surety on Price's note, and Scott acting on the faith of such undertaking had become surety, that fact could have been proved by parol, because such evidence would neither enlarge nor vary the writing.

We are, therefore, of the opinion that the demurrer was properly sustained and the judgment is *affirmed*.

G. W. Craddock, Frank Chinn, for appellant.

William Lindsay, for appellee.

THOMAS C. RICHARDSON ET AL. *v.* J. A. WYCOFF ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—216.]

Proceedings in Bankruptcy.

Where one has been declared a bankrupt in a court of bankruptcy and it is claimed by a creditor that the bankrupt has transferred property, his remedy is in the bankrupt court and the debtor or bankrupt or his assignee can not be required to litigate the question in any other court.

APPEAL FROM WASHINGTON CIRCUIT COURT.

February 3, 1881.

OPINION BY JUDGE PRYOR:

It seems from the exhibits filed and made part of the answer in this case that the creditors of the insolvent debtor relied on the transfer or assignment now sought to be enforced as an act of bankruptcy. The assignment was made in June, 1878, and the petition in bankruptcy filed in July following.

If the estate of the debtor has not been settled up the remedy of the appellants is in the bankrupt court, that court having taken jurisdiction of the case, and declared the debtor a bankrupt before any proceedings in the state court. We perceive no reason for requiring the debtor or his assignee to litigate the questions involved in any other tribunal.

Judgment *affirmed.*

W. C. McChord, for appellants.

L. R. Thurman, for appellees.

CITY OF COVINGTON *v.* MARGARET GLENNON ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—215.]

Attorney's Argument.

The Court of Appeals will not reverse a cause on the ground of an improper argument made in the trial of the cause by an attorney unless the argument amounts to a flagrant abuse of the privilege the attorney had in presenting his client's cause.

Damages Against City.

Where a city could have provided against the injury complained of by the exercise of proper care and skill in constructing a sewer, it is liable for the results of its negligence.

APPEAL FROM KENTON CIRCUIT COURT.

February 3, 1881.

OPINION BY JUDGE PRYOR:

The case of *Kemper v. Louisville*, 14 Bush (Ky.) 87, determines the principal question raised in this case. Instruction No. 1 should have been refused, as it was not sustained by the proof introduced by the city. It is clear that the city could have provided against the injury by the exercise of proper care and skill in constructing the sewer, and it was not therefore the result of inevitable casualty. The third instruction should have been refused, as the city authorities had no right, by either judicial or ministerial action, to destroy the property of the appellees. We see nothing in the case prejudicial to the appellant, and the argument made by counsel for the appellees, if improper, does not appear from the record in the case; nor would this court reverse upon such a ground unless it was a flagrant abuse of the privilege the attorney had of presenting his client's cause.

Judgment *affirmed*.

M. L. Roberts, for appellant.

W. E. Arthur, for appellees.

WM. H. BROWN *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—214.]

Jurisdiction of Criminal Court.

Pursuant to Gen. Stat. (1879) Ch. 28, Art. 11, § 5, the criminal court has exclusive jurisdiction of a case by the state against the sheriff and his sureties for failure to pay over money collected on execution issued on a judgment on a forfeited recognizance.

Civil Action.

A suit against a sheriff and his sureties by the state to collect money which the sheriff has collected but failed to pay over is a civil action, and has none of the elements of a criminal or penal proceeding, although the judgment upon which the execution issued was based on and grew out of the forfeiture of a recognizance.

APPEAL FROM ROBERTSON CRIMINAL COURT.

February 3, 1881.

OPINION BY JUDGE HARGIS:

The trustee of the jury fund caused an action to be instituted in the Robertson Criminal Court in the name of the commonwealth of Kentucky against the sheriff of that county and his sureties, for the amount of an execution issued upon a judgment rendered on a forfeited recognizance by the Robertson Criminal Court, alleging that he had collected and failed to pay it over to the trustee, although demanded of him. The appellant, one of his sureties, demurred to the petition on several grounds. It was overruled, other proceedings followed, and finally a judgment was rendered against him for the amount claimed, for which he prosecutes this appeal.

None of the grounds of the demurrer or proceedings need be noticed except that questioning the jurisdiction of the court over the subject of the action. General Statutes (1879) Ch. 28, Art. 11, § 5, regulates the jurisdiction of the criminal court district to which Robertson belongs, and it is in this language: "The said criminal court shall have exclusive jurisdiction in criminal and penal proceedings; and it shall take the place of the circuit courts in the counties of said district in such jurisdiction; and it shall also have concurrent jurisdiction with the circuit court in inquests of lunacy and idiocy, and exclusive of the circuit court in allowing claims connected with the business of said criminal court."

This action was civil, with none of the elements of a criminal or penal proceeding in it, although the judgment upon which the execution issued was based upon and grew out of the forfeiture of a recognizance. It will be seen that the Robertson Criminal Court has no jurisdiction over any but criminal and penal proceedings, and therefore has no jurisdiction in a civil action, such as this manifestly is. The same question arose and was decided by this court under a similar statute in the case of the *Commonwealth v. Skeeters,* 10 Ky. Opin. 924, 2 Ky. L. 59, as we have determined in this appeal.

Wherefore the judgment is *reversed* and cause remanded with directions to sustain the demurrer, and for other proper proceedings.

W. P. Ross, for appellant.

COMMONWEALTH *v.* J. B. HUNTER.

[Abstract Kentucky Law Reporter, Vol. 2—214.]

Criminal Law—Indictment for a Wager.

An indictment for making a bet is sufficient where it charges, in

substance, that pending the election for president of the United States in the year 1880 the accused bought a horse, agreeing to pay $300 for it in the event of James A. Garfield's election to the presidency of the United States at said election, Garfield being one of the candidates, and if he was not so elected then the accused was to pay nothing for the horse.

APPEAL FROM GARRARD CIRCUIT COURT.

February 3, 1881.

OPINION BY JUDGE HARGIS:

The indictment alleges, in substance, that, pending the election for president of the United States in the year 1880, the accused bought a horse of John K. Faulkner, agreeing to pay $300 for the horse in the event of James A. Garfield's election to the presidency of the United States at said election, Garfield being one of the candidates, and if he was not so elected then the accused was to pay Faulkner nothing for the horse.

This was a bet according to the ruling of this court in the case of *Commonwealth v. Shouse,* 16 B. Mon. (Ky.) 325, where it is said "that a sale of property, to be paid for at its fair value—or at more than its fair value—in a certain event of a pending election, and not to be paid for at all, or to be paid for at more or less than its real value, as understood between the parties, in a different event of the same election, is in substance a bet upon the result of the election."

It is argued by counsel for the appellee, whose demurrer was sustained to the indictment, upon this appeal by the commonwealth from the judgment of the court in sustaining the demurrer and dismissing the indictment, that it was necessary to aver that Garfield was a candidate and voted for in the year 1880, and that it could not be truthfully alleged that he was voted for or proposed for the presidency in the year 1880, as there was no election for that office and could not be an election therefor in the year 1880, and this court must take *ex officio* notice of that fact and the laws regulating it.

Admitting that it was necessary to allege that Garfield was a candidate, or proposed or voted for, for president in the year 1880, then the indictment is good, because it avers that he was a candidate for president in 1880, and it is true that, according to law,

the election for president must have taken place in the month of December in the year 1880.

The electors for president are required to be appointed on the Tuesday next after the first Monday in November every fourth year succeeding every election for president. U. S. Rev. Stat. (1878) Tit. 3, Ch. 1, § 131. Section 135 of the same chapter and title requires that the electors for each state shall meet and give their votes the first Wednesday in December in the year in which they are appointed. The election, therefore, takes place at the time specified in the last section mentioned. By § 142 all congress has to do with the election thereafter is to truthfully and correctly count the vote and ascertain and declare the person to fill the office of president, agreeable to the Constitution.

If the proceedings of the electoral commission show that a president was elected or appointed in 1877, instead of 1876, it can not affect the judgment herein, as those proceedings are not authority in any court, and especially to establish the right of congress to elect a president by counting the vote and ascertaining and declaring therefrom the person elected to that office, because the election of that officer must, according to the law and the Constitution, have taken place in the year 1876, and hence the next election followed in 1880.

Wherefore the judgment is *reversed* and cause remanded with directions to overrule the demurrer and for further proceedings consistent with this opinion.

P. W. Hardin, for appellant.

Walton & Kauffman, for appellee.

JOHN DEILS, JR. *v.* G. A. BROWN.

[Abstract Kentucky Law Reporter, Vol. 2—214.]

Bill of Exceptions.

When the judge who presided at the trial also presides when the motion for a new trial was passed upon, a bill of exceptions can not be legally certified by bystanders. This can only be done where the judge does not preside when the motion is disposed of.

APPEAL FROM PIKE CIRCUIT COURT.

February 3, 1881.

OPINION BY JUDGE HARGIS:

The appellee objects to the bill of exceptions of what occurred on the first trial, when the verdict was adverse to him, but a new trial was awarded of which the appellant complains, on the ground that the bill is certified by two bystanders.

Buckner and Bullitt's Civ. Code (1876) § 337, Subsec. 5, is in this language: "If the judge who presided at the trial do not preside when a motion for a new trial is overruled, the bill of exceptions may be certified by bystanders, and be controverted and maintained, pursuant to the provisions of subsections 3 and 4 of this section."

When the motion for a new trial was sustained, the judge, who presided at the trial, did preside, and as the case authorizes the bill of exceptions to be certified by bystanders only where the judge does not preside when the motion for a new trial is disposed of, the bill of exceptions in this case is without legal sanction.

Wherefore the judgment is *affirmed.*

James M. York, A. J. Auxien, for appellant.

G. A. Brown, for appellee.

COMMONWEALTH *v.* T. J. CRAWFORD.

[Kentucky Law Reporter, Vol. 2—210.]

Criminal Law—Obstructing Public Highway.

In an indictment for obstructing a public highway it is necessary to describe the highway claimed to have been obstructed, and a description is not sufficient which describes a highway only by giving its number. There should be such a description as will enable one familiar with the county to know from reading the indictment what road was intended.

APPEAL FROM BOYLE CIRCUIT COURT.

February 3, 1881.

OPINION BY JUDGE COFER:

The indictment charges the offense of obstructing a public highway, and the omission of the word obstruct in the statement of the manner in which the offense was committed did not vitiate the indictment. There is enough in the indictment to enable a person

of common understanding to know what offense was intended to be charged.

But we are of the opinion that there was not a sufficient description of the road alleged to have been obstructed. It is described as road No. 36, in Boyle county, so designated and numbered by the Boyle County Court. It is true the grand jury say the exact point where said road begins and ends is unknown to them, but, while this must be taken to be true, it by no means follows that some more definite and certain description could not have been given. It is not sufficient that the defendant might have learned from the county court records which road was referred to. There should have been such a description as would have enabled one familiar with the county to know from reading the indictment what road was intended. From the very nature of the case the court knows that such a description could have been given as would have enabled one familiar with the roads of the county to know what road the defendant was charged with obstructing. The demurrer was properly sustained.

P. W. Hardin, for appellant.

Durham & Jacobs, for appellee.

JOHN M. VANMETER *v.* J. C. CORCORAN ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—216.]

Release of Sureties in Building Contract.

When it is stipulated in a building contract that the last payment should be made when the building is completed according to the terms of the contract, the owner is entitled to retain that sum until the contract is complied with; and where such sum is paid over to the contractor and not retained a surety on the contractor's bond is released to the amount of said sum.

APPEAL FROM FRANKLIN CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE COFER:

That Sower and Sallender are mere sureties and not co-contractors is clear from the contract and indorsement thereon signed by them. The stipulation that the last payment should be made

when the house was completed according to the terms of the contract entitled the appellant to retain that sum until the contract was complied with.

The security thus provided was as effectual as if Corcoran, at the time of entering into the contract, had placed a sum equal to the last payment in appellant's hands as security for the due completion of the work. If that had been done and the appellant had surrendered the money thus deposited, we presume no one would contend that the sureties were not released to that extent from liability. It is too well settled to require either argument or authority to prove that, if a principal places securities in the hands of a creditor and also gives personal security, the creditor is bound as between himself and the sureties to hold on to the securities for their indemnity, and that if he surrenders the securities he releases the sureties to the extent of the value of the securties surrendered. It was, therefore, the appellant's duty to Sower and Sallender to withhold the last payment until the work was completed.

If he did not do so he has discharged them to the extent of the last payment. If he did not pay it then he has full indemnity in his own hands, and has no cause of complaint against the sureties. It is true he states his damages in the original petition at $1,000; but in the last amended petition, in which he sets out the items for which he claims damages and the amount claimed for each, he only claims damages to the amount of between four and five hundred dollars.

It is suggested in the argument that Corcoran could not complete the work without the last payment, and that it was applied by him to the completion of the job. This is not alleged, but if it was it would not alter the case. The appellant had a right to withhold the payment, and should have done so, and if Corcoran failed to comply with his contract the sureties would have been liable. If that course had been pursued the appellant might have employed another to complete the work and have received of the sureties the cost, less the amount of the last payment then in his hands. But he had no right without their consent to pay it to Corcoran.

The judgment sustaining the demurrer is right and must be *affirmed.*

Ira Julian, for appellant.

A. Duvall, for appellees.

J. B. McFERRAN *v.* CHARLES WILSON.

[Abstract Kentucky Law Reporter, Vol. 2—220.]

Recovery on Tax Sale.

Where property was properly assessed and sold for taxes, and the purchaser's petition is not denied, it is taken for confessed and he is entitled to recover.

APPEAL FROM BOYLE COURT OF COMMON PLEAS.

February 5, 1881.

OPINION BY JUDGE PRYOR:

The allegation of the petition being undenied, the appellant was entitled to some relief. The property, as is alleged, was properly assessed and sold for the taxes, and the appellant became the purchaser. These allegations are taken for confessed, and we see no reason why the appellant should not recover. On the return of the cause, if no defense is interposed, judgment should be rendered accordingly.

Judgment *reversed* and cause remanded for further proceedings.

J. B. McFerran, for appellant.

COMMONWEALTH *v.* WESLEY BORDUS ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—219, as Commonwealth v. Borgus.]

Enforcement of Bail Bond.

Before a bail bond can be enforced it must be shown that the accused was legally in custody, charged with a public offense, and that he was discharged by reason of the giving of the recognizance or bond.

APPEAL FROM WARREN CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE HINES:

Before a bail bond in such a case as this can be enforced it must appear that the accused was legally in custody, charged with a public

offense, and that he was discharged by reason of the giving of the bond or recognizance. Crim. Code (1876) § 85.

In this case it does not appear that the accused was discharged or set at liberty by reason of giving the bond, and it is therefore unenforcible.

Judgment *affirmed.*

Payton & Hardin, for appellant.

JOHN P. B. HILL AND AMOS HILL *v.* BARBARA MESSER AND JOHN RIGGS.

[Abstract Kentucky Law Reporter, Vol. 2—222.]

Guardian and Ward.

Where by the terms of a will a legacy is to be paid when the legatee becomes 18 years of age, the guardian has no right to collect the amount until his ward reaches such age; and the fact that the executors in charge of the money are wasting it will give the guardian no right to attach or collect the same and he is not liable for his failure to do so.

APPEAL FROM GREENUP CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE PRYOR:

It is plain from the provision of the will under which the first-named appellee claims that she was not entitled to the legacy until her arrival at the age of 18 years, and that her guardian had no right to demand the principal until the same became due. The executors or parties required to pay it hold this money in trust for the appellants' ward until the period arrives for its payment.

While it is the duty of guardians to be vigilant in securing and protecting the estate of their wards, counsel for the appellees has failed to show any case, or reference to any recognized rule of law or equity, that would enable the guardian to collect this money from the trustee before it was due, or that conduced to establish the right in the guardian to coerce the collection, for the reason only that he was acting as such. A payment to the guardian is in law and equity a payment to the ward, and what right has either to this fund until the period arrives at which it becomes due? The

trustees may have been and were doubtless in failing circumstances, but this did not authorize an attachment against their estate. The guardian, upon the facts of this record, was left with his hands tied, for the reason that the devisor had seen proper to intrust this fund to the control of others until the beneficiary arrived at the age of 18 years. The devisor of this fund having placed it, as he had a right to do, beyond the reach of the guardian for a limited period, the fault is with him if loss is sustained, and not the guardian. The guardian did undertake in good faith to recover this money, and for the reasonable costs incurred he should be credited if he has made payment.

While the guardian might, perhaps, be unable to recover the interest of the executors or trustees until time had been given them to sell the estate and collect the money for that purpose, still the legacy should bear interest from the death of the testator or the probate of the will, as the interest was as much a devise as the principal fund; and we see no reason why the guardian could not have collected this interest.

The judgment making the appellants liable for the principal fund is *reversed* and the cause remanded for further proceedings consistent with this opinion.

This disposes of both the original and cross-appeal.

E. F. Dulin, J. Davidson, for appellants.

T. H. Paynter, for appellees.

GRAY & BEST *v.* WM. GARRISON.

[Abstract Kentucky Law Reporter, Vol. 2—218.]

Petition on Contract.

A demurrer should be sustained to a petition for breach of a contract when it contains no allegation of a readiness and willingness on the part of plaintiff to comply with his contract of purchase.

Effect of a General Demurrer.

Where a part of a paragraph of answer is bad, and a portion of the paragraph states a defense, a general demurrer to the whole paragraph should be overruled.

Variance.

When a party declares upon one contract and establishes by proof another contract, there is a fatal variance. There can no more be a recovery without allegation than there can be on a controverted point without proof.

APPEAL FROM MASON CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE HINES:

The demurrer to the petition was properly sustained because of the failure of appellants to allege their readiness and willingness to comply with their contract of purchase. The demurrer to the second paragraph of the answer was properly overruled. The first paragraph denied the purchase of a crop of tobacco of appellee, amounting to 4,000 pounds at eight cents per pound, while the second paragraph alleged the purchase to be of an undivided crop of tobacco of 8,000 pounds, belonging jointly to appellee and Chambers, and also alleged that it had been agreed between appellee and Chambers that Chambers should fix the price of the tobacco, and that the whole crop should be sold together. The demurrer was general to the entire paragraph, and while that portion of the paragraph alleging the agreement between appellee and Chambers, of which appellant had no notice, is doubtless bad, the first portion of the paragraph alleging the purchase of a crop of tobacco belonging jointly to appellee and Chambers being good, the demurrer to the whole paragraph was properly overruled.

The admission of the evidence of the agreement between appellee and Chambers that the entire crop should be sold in bulk was not detrimental to appellants because, independent of this, on the pleadings and evidence furnished by appellant, Best, appellee, was entitled to a peremptory instruction to find for him. The petition proceeds upon the assumption that the contract of purchase was of 4,000 pounds of tobacco belonging to appellee, while appellants, by failing to deny the first part of the second paragraph of the answer, admit that the purchase was of the whole crop of 8,000 pounds belonging jointly to appellee and Chambers; and in the bill of exceptions appellant, Best, expressly states that the purchase was of the whole crop, and not of the interest of the appellee in the crop. Appellants allege one contract and establish by proof another, which results in a fatal variance. There can no more be a recovery without allegation than there can be, on a controverted point, without proof.

By reason of appellants' failure to reply to the first part of the second paragraph and of the evidence of Best, appellee was entitled

to recover without regard to the evidence as to the agreement between himself and Chambers, and therefore the instructions asked for by appellants were properly refused, and the instruction given was more favorable to appellants than the pleadings and proof authorized.

Judgment *affirmed.*

L. W. Robertson, E. Whittaker, for appellants.

[Cited, *Boyd's Admr. v. Farmers' Nat. Bank,* 24 Ky. L. 756.]

DAVID ASHER ET AL. *v.* WILLIAM MCCARTY.

[Abstract Kentucky Law Reporter, Vol. 2—218.]

Suit to Quiet Title and for Possession.

The naked possession of real estate is sufficient upon which to base a recovery against one not showing a better title in himself. One entering upon land in the possession of another can not defend such entry on the ground that the person in possession had no title to the land or right to its possession unless he has a better right himself. He must sustain his entry by the strength of his own and not by the weakness of his adversary's title.

APPEAL FROM LAUREL CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE HARGIS:

The surveyor's report, filed the second day of the August term, 1876, and signed by J. R. Brown, seems to be the most satisfactory ascertainment of the line of the George Thompson survey of 19,250 acres patented November 8, 1789. The blue line from "N" to "S" must be regarded and treated as the George Thompson line, as far as the parties to this action are concerned. This line, so located, divides the 34 acres in controversy into equal parts. While the Thompson patent does not cover the whole of the 34 acres, still the question presented by the answer is not vital to the cause of action set forth in the petition.

It is alleged, in substance, that plaintiff, David Asher, under authority of the former, was in possession of the land in controversy when the defendant, McCarty, unlawfully entered and took possession of the land and cut and destroyed a quantity of timber thereon. The defendant answered and denied that David was the owner,

or that it belonged to his vendor, or that the latter had any legal authority to sell it to David Asher, and denies that the plaintiffs were entitled to the possession of the land.

It will be seen that this answer does not deny that the plaintiffs were in actual possession of the land, or that the defendant entered and ousted their possession. But the legal effect of the answer is that the plaintiffs and their vendor had no legal title to the land; and, while the former were in actual possession of the land, they were not entitled to that possession, and therefore the defendant had the right to enter. If the plaintiffs had no other title than that based on the naked possession, it was sufficient to recover in this action from the defendant unless he showed a better title in himself or those from whom he claims. He can not defend his entry upon the land on the ground that the plaintiff had no title to the land or right to its possession, unless their want of right resulted from the fact that he had a better right than theirs and this he must show by pleading as well as proof. He must sustain his entry, by the strength of his own and not by the weakness of his adversary's title, in whom he has admitted possession at the time of his entry.

Having determined the locality of the George Thompson line, in order to have the settlement of this controversy on its merits, we are of opinion that the defendant, on the return of the cause, should be allowed to amend his answer if he can truthfully do so, and set forth any title he may have superior to that of plaintiffs, as this is an action for possession and to quiet title.

Wherefore the judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

R. L. Ewel, G. Pearl, for appellants.

C. B. Farris, for appellee.

J. H. TAYLOR *v.* ISAAC SHAWLEY ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—217.]

Jurisdiction of An Appeal.

Since the Act of February 10, 1880, amending Gen. Stat. (1879) Ch. 28, Art. 22, § 2 (Acts 1879, p. 20), the minimum of this court's jurisdiction of appeals from judgments for money or personal property has been $100 and since such date this court had no jurisdiction of appeals from judgments of less than one hundred dollars.

APPEAL FROM NELSON CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE COFER:

The appellant, who was plaintiff below, sued on a traverse bond claiming judgment for $90. Sayres pleaded a set-off, in which he claimed judgment for $175. In his reply the appellant pleaded a counterclaim, in which he sought judgment against Sayres, compelling the specific performance of a contract for the conveyance of the title to a tract of land. On final hearing, November 9, 1879, judgment was rendered in favor of Sayres for $95, with interest from November 9, 1878, subject to a credit of $50, the amount of damages found to be due to the appellant on account of the breach of the traverse bond.

No disposition was made of the counterclaim set up in the reply. No appeal was granted by the court below, but an appeal was granted by the clerk of this court April 28, 1880. February 10, 1880, the general assembly passed an act to amend Gen. Stat. (1879) Ch. 28, Art. 22, § 2 (Acts 1879, p. 20), whereby the minimum of this court's jurisdiction of appeals from judgments for money or personal property was raised to $100. That act took effect from its passage, but does not apply to appeals then pending. This appeal was not then pending, and, although the judgment was rendered before the act was passed, we have no jurisdiction of the appeal, and it is *dismissed.*

F. D. Cosby, for appellant.

C. T. Atkinson, for appellees.

[Cited, *Louisville &c. R. Co. v. Rountree,* 4 Ky. L. 447.]

OLIVIA PHILLIPS *v.* PHILLIPS & BROTHER.

[Abstract Kentucky Law Reporter, Vol. 2—217.]

Setting Aside Judgment.

Where the court rendered a final judgment at the August term, 1877, it had no power at the January term, 1878, to set it aside, and an order then made purporting to set it aside is void.

APPEAL FROM MARION CIRCUIT COURT.

February 5, 1881.

OPINION BY JUDGE COFER:

Mrs. Phillips owned a life estate in the house and grounds embraced in the mortgage, and as she and her husband united in the mortgage the mortgagees acquired a lien on her interest. Her husband had no estate in the land, and consequently his children inherited nothing from him. They have an interest contingent upon surviving their mother, but that interest was not affected by the mortgage and will not be affected by the judgment or sale. Consequently they were not necessary parties, and Mrs. Phillips being already before the court, the judgment rendered at the August term, 1877, was final, and the court had no power at the January term, 1878, to set it aside.

The order purporting to set it aside was therefore void, as also the subsequent judgment to sell the property. This latter is the judgment appealed from, and being void, and no motion having been made in the court below to set it aside, no appeal lies. Buckner and Bullitt's Civ. Code (1876) § 763, *Bullitt v. Commonwealth,* 14 Bush (Ky.) 74.

The court had jurisdiction, however, to set aside the sale under the judgment of August, 1877, and nothing seems now to remain but to execute that judgment.

Wherefore the appeal is *dismissed.*

J. R. Thomas, for appellant.

Russell & Avritt, for appellees.

E. PADGETT ET AL. *v.* HENRY MAYS.

[Abstract Kentucky Law Reporter, Vol. 2—213.]

Bill of Exceptions.

A bill of exceptions can only be made a part of the record by the court's order, and where no order is made filing a bill of exceptions the mere memoranda by the clerk that it was filed will not make it a part of the record.

Withdrawing a Defense or Cause of Action.

At any time before a cause is submitted to the jury a party should

be allowed to withdraw a defense or cause of action which he does not desire longer to maintain.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

February 6, 1881.

OPINION BY JUDGE COFER:

There is nothing before us to show that the bill of exceptions copied into the transcript was ever made part of the record. The following is all the transcript contains on that subject: "The defendants' motion for a new trial was overruled, and they were allowed until the 1st day of the July term, 1879, to prepare and file their bill of exceptions. Defendants prepared and filed their said bill of exceptions with the clerk on the 26th day of June, 1879, which is as follows": etc.

No portion of this purports to be an order of court, and it is all, no doubt, mere memoranda by the clerk. At any rate it can not possibly be regarded as an order filing a bill of exceptions. Nearly all the errors assigned are reviewable only on a bill of exceptions, and there being no such bill we need make no further reference to such as can not be considered without it.

The refusal of the court to permit the answer to be amended furnishes no ground for reversal. In the first place, no amendment was tendered; but waiving that the answer already in contained an averment that the property was voluntarily surrendered, and the proposed additional allegation that the process in the hands of the deputy sheriff was a mittimus and not a capias, did not improve the defense. If the goods were voluntarily surrendered it was immaterial whether the officer had the one writ or the other, and if the surrender was not voluntary then a mittimus gave no authority to seize them.

As a general rule a party should be allowed at any time before the cause is submitted to the jury to withdraw a defense or cause of action which he does not desire longer to insist upon; yet we are unable to see in what way the defendants were prejudiced by the refusal of the court to allow them to withdraw the second paragraph of their answer. There was no error in awarding the capias on the judgment [Gen. Stat. (1879) Ch. 38, Art. 3, § 1], nor in ren-

dering judgment for interest. Gen. Stat. (1879) Ch. 60, Art. 1, § 6.

Wherefore the judgment is *affirmed*.

W. H. Miller for appellant.

W. O. Bradley, M. C. Saufley, for appellee.

FIRST NATIONAL BANK OF SPRINGFIELD *v.* CHARLES DAWSON.

[Abstract Kentucky Law Reporter, Vol. 2—230.]

Non est Factum.

A plea of non est factum is supported by proof showing that a note after execution was altered so as to provide for interest from date instead of after maturity, as it originally provided; and where the consideration for the note was the sale of cattle an action may still be maintained for the price of the cattle, but this must be by the original payee or his assignee.

APPEAL FROM NELSON CIRCUIT COURT.

February 7, 1881.

OPINION BY JUDGE PRYOR:

The single issue made in this case is: Was the note after its execution and delivery to the payee by Dawson altered without his consent so as to increase the extent of his liability? If so, the plea of non est factum was proper and released the obligor. As the note was originally printed it read so as to make the obligor responsible for interest at the rate of eight per cent. from date of maturity until paid. The words "of maturity" seem to have been erased, leaving the note to read "interest from date until paid." This was a material alteration in the paper, and if made without Dawson's consent destroyed the effect of the obligation. That it was altered after the execution and delivery and without the knowledge of Dawson the proof conduces strongly to show; and, the issue being purely a legal one, this court will not disturb the finding of the court below.

The appellant has introduced proof tending to the opposite conclusion, but the weight of the evidence on the issue is with the appellee; and if not, the verdict or judgment must stand unless palpably against the weight of the testimony. The appellant, although

purchasing the note in good faith, can not be substituted on his own motion to the rights of the original payee so as to institute an action in its own name on the original consideration, and particularly when the payee was not a party to the amended petition offered for that purpose. We think it was proper to dismiss the action or render a judgment for the defendant as the court did, and remand the parties to their action to recover the price of the cattle sold; and this right is not in the appellant, but in the original payee or his assignee.

There is no proof in the record showing that the payments made to the parties from moneys received on the sale of stock was made in contemplation of insolvency and with a design to prefer these creditors. The judgment is therefore *affirmed*.

E. E. McKay, for appellant.

Muir & Wickliffe, for appellee.

B. D. MARKS v. CHAS. A. GRAHAM.

[Abstract Kentucky Law Reporter, Vol. 2—222.]

Taxation of Costs.

The taxation of costs includes only costs incurred by the successful party. Each party is liable to the officer performing services for him, and in case of a successful result the costs so incurred are taxed against the adverse party.

Fees for Transcript.

The fees of the reporter for making transcripts are fixed by the judge and are payable by the party ordering the same; and a litigant who does not formally order a transcript but receives and uses it must pay for it, and if successful in the higher court such costs will be taxed against his adversary.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 8, 1881.

OPINION BY JUDGE COFER:

The appellant accepted and used as part of his bill of exceptions the transcript made by the appellee, and the statute is peremptory that the fees of the reporter for taking notes and making transcripts shall be fixed by the judge and paid forthwith by the party or

parties at whose instance the same was ordered. Whether the appellant formally ordered the transcript or not, the appellee made it and the appellant received and used it, and the substance and effect of the statute is that one who receives the work of the reporter and applies it to his purposes shall pay for it. We entertain no doubt of the power of the court to compel payment by rule as in any other case in which the allowance to an officer is to be made by the court.

The provision that the fee of a reporter shall be taxed in the costs can not apply when the person at whose instance the notes are taken or a transcript is made is the unsuccessful party in the action. The taxation of costs is never made to include anything except the costs incurred by the successful party. Each party is liable to the officer performing services for him, and in case he succeeds in the action the costs so incurred are taxed against the adverse party. If the appellant had prosecuted his appeal successfully, and had finally succeeded in the action, the allowance to the reporter for the transcript of the evidence would have been taxed in the cost against his adversary; but as that was not done there is no authority to tax it against them.

Judgment *affirmed.*

Edwards & Seymour, for appellant.

Morris St. Joseph, for appellee.

SAMUEL GRIMES *v.* JOHN W. WILLIAMS.

[Abstract Kentucky Law Reporter, Vol. 2—222.]

Usury.

A reply to an answer to a suit on a note is sufficient when it contains a denial that the sum sued for is for interest calculated on defendant's debt at a greater rate of interest than six per cent.

Slight Error in Sum Recovered.

The Court of Appeals will refuse to reverse on account of an error in the judgment in being for $2.10 more than was due on the note.

APPEAL FROM OLDHAM CIRCUIT COURT.

February 8, 1881.

OPINION BY JUDGE COFER:

The reply contains a denial that said sum of $58.39, or any other sum, is for interest calculated upon defendant's debt at a greater

rate of interest than six per cent. This is as specific as the allegations in the answer, and is substantially good, especially after judgment. According to the calculation made by appellant's counsel, which we assume to be correct, the two judgments are for $2.10 more in the aggregate than was due on the note.

This court has repeatedly refused to reverse a judgment on account of an error so small as this. The error amounts to only a little more than double the tax on the appeal, and to less than one-half the taxed attorney's fee in the case in this court.

Judgment *affirmed.*

Joe Clare, for appellant.

Ben S. Robbins, for appellee.

T. N. PERRY & CO. *v.* E. E. DUKE'S EXRX. ET AL.

Diligence in Suit to Hold Assignors.

One who does not cause execution to issue for more than five months after a judgment is rendered fails to prosecute to insolvency with the diligence required by the law in order to hold the assignors bound on their assignment.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

February 8, 1881.

OPINION BY JUDGE PRYOR:

The defendant, Hazelrigg, admits the receipt of $628.59 of the notes described in paper "Z", and says he returned some of the remainder to Perry & Co. and instituted suit on the residue in their names against H. H. Lewis, a constable against whom they had been listed for collection, and that he may have received some small amounts on those listed with the constable.

In explaining the manner in which the proceeds of the notes were to be applied he first stated that they were to be used in payment of a bill of goods purchased of Duke & Co. by Perry & Co. In this statement he admitted that he was mistaken, and explained his mistake by saying that they were to be applied to the payment of a note for $590.24 due Elam and Hazelrigg, dated December 20, 1858, and due one year thereafter.

But his own written statement, together with the note, is produced by Perry & Co., showing that it was paid at maturity by the

assignment of different notes from those in paper "Z". In view of the confusion in these statements, the admission that he received $628.59 of the notes, his inability to account for the application of that amount of them in a satisfactory manner, and the testimony of the Perrys that they were to be paid on the mortgage debts, establish the fact with reasonable certainty that Perry & Co. are entitled to a credit for the $628.59 which the circuit court refused to allow them.

As to the remainder of the notes and inventories on paper "Z", Hazelrigg's estate should not be required to account, as Perry & Co. have instituted suit for them against the constable, unless it be made to appear that Hazelrigg received money thereon from the constable, for which his estate should be held liable, or instituted suit against him without Perry & Co's. authority; and in that event his estate is bound for the notes placed in the constable's hands unless it be shown that Perry & Co. assented thereto, or that the notes were insolvent and uncollected, as in either case the estate of Hazelrigg would not be bound.

As to the items of $100 of February 8, 1867, and $195.85 of June 18, 1867, they appear to have been credited on the note of T. D. Perry and B. F. McCormack, dated December 3, 1866. Those credits should stand; but the item of $81 of December 31, 1866, ought to have been credited to Perry & Co. by the master, as it is proved.

The record shows that Hazelrigg did not cause execution to issue on the Clark judgment for $250 in the Wolfe Circuit Court until over five months had elapsed from its rendition. This was a failure to prosecute Clark to insolvency with the diligence which the law requires in order to hold the assignors, Perry & Co., bound on their assignment. For this reason Hazelrigg was properly charged with the $230 remaining after deducting the discount.

The individual debts of T. D. Perry due to Hazelrigg can not be pleaded in discharge of his debts and obligations to the firm of T. N. Perry & Co., and for this reason the remainder of the note for $946.43, dated December 3, 1866, was properly thrown out of the settlement of the mortgage debts by Perry & Co. to Hazelrigg, and of his debts to them.

The first view presented by the commissioner's report as ascertaining the balance due T. N. Perry & Co. on December 1, 1866, to be $965.57, after adding thereto the $81 of

December 31, 1866, should have been confirmed. The pleadings are not in a condition to authorize a judgment in behalf of Perry & Co. against Hazelrigg's administrators, but leave to amend should be granted either party that may desire it on the return of the cause.

Wherefore the judgment is *reversed* on the original appeal of Perry & Co. and *affirmed* on the cross-appeals of Duke's executrix and Hazelrigg's administrators, and the cause is remanded for further proceedings not inconsistent with this opinion.

Peters & Brock, R. Reid, W. H. Holt, for appellants.

B. D. Lacy, for appellees.

PHILLIP MAXEY ET AL. *v.* F. L. WALLHATT'S EXRS. ET AL.
F. L. WALLHATT'S EXRS. *v.* J. W. WALLHATT ET AL.

Claims Against Executors—Statute of Limitations.

An executor is not compelled to plead the statute of limitations, even if such a defense can be made; and where he pays a claim justly due, a claimant can not be required to refund the money.

APPEAL FROM HART CIRCUIT COURT.

February 8, 1881.

OPINION BY JUDGE PRYOR:

The executors in this case, acting in the best of faith, paid to the surviving partners the balance due each on a settlement of the partnership transactions, and having made the payment, which was allowed as a credit on the settlement of their accounts, the chancellor should have been satisfied of the injustice of the claims before disturbing the settlement made by the county judge. The affidavits of the partners based on the partnership books with a settlement made with one of the executors show that the allowance by the county judge of these claims was proper, and we see no room to question their right to it.

Maxey's claim is proved by young Wallhatt, and the latter's claim by Maxey, and all based on the partnership books and entries made therein. There is no evidence against the validity of these claims, and if partners are not allowed to establish their claims in this way it would be difficult to settle a partnership after the death of one of the partners. The executors were not compelled to plead the statute

of limitations, even if such a defense could have been made, and having paid claims that were justly due there was no reason requiring them to refund the money.

On the appeal of the surviving partners it appears in that case they were made to refund after settlement had with the executors, and the sworn statements of the latter in their pleadings at least show that their claims were just. The judgment in each case is erroneous. On a petition for rehearing these cases have again been considered, and after a submission for several months this court will not disturb the judgment here to enable parties to file briefs.

The case below was evidently instituted on the ground that the claims were unjust. This is not a proceeding between the personal representative and the creditor, but a proceeding attacking a settlement passed on and approved by a tribunal with full authority to settle these questions; and when the claim is just and has been paid, as in the case here, the executor, before he is made to refund, should be required to have his vouchers verified.

Upon the return of the cause upon the proper affidavits made by the creditor the claim should be allowed. The case of Maxey v. F. L. Wallhatt's Exrs. is *reversed,* with directions to dismiss the proceedings, and the case of F. L. Wallhatt's Exrs. v. J. W. Wallhatt is *reversed* and remanded for further proceedings.

I. T. Woodson, W. B. Harrison, for Phillip Maxey.

Lewis & Porter, for F. L. Wallhatt's Exrs.

W. H. Chelf, for J. W. Wallhatt.

JOHN G. SUBLETT *v.* JAS. W. STUBBS.

[Abstract Kentucky Law Reporter, Vol. 2—223.]

Suit on Purchase-money Notes.

Where notes are taken for purchase-money of real estate, which the grantor agrees to convey upon their payment, in a suit on such notes the grantor, to make his petition good, must allege that he has title and is willing, ready and able to convey.

APPEAL FROM TAYLOR CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE COFER:

The petition is defective in that it does not contain an allegation that the plaintiff has title, and is ready and able to convey. There is nothing to show that the notes sued on are not all that remains unpaid. The $75 note shows that it is for the second payment, but that does not show that the first is unpaid. The debt having been created in 1877, the appellant had no right under an act of 1878 to have the land appraised, or to redeem it.

But, the appellee having recognized the valuation and the right of the appellant to redeem by procuring an order to sell the equity of redemption, the appellant may have been misled, and bidders may have been prevented from bidding on account of the supposed right of the appellant to redeem; and as the judgment must be reversed for the defects in the petition, the order confirming the sale should also be reversed, as well as the order granting a writ of *habere facias.*

The judgment and orders indicated are *reversed* and the cause is remanded for further proceedings.

J. R. Robinson, A. Harding, for appellant.

GEORGE L. HELM *v.* WILLIAM NEAL.

[Abstract Kentucky Law Reporter, Vol. 2—224.]

Attachment for Rent.

Neither the refusal of a tenant to sign a lease nor his denial that he was bound for the rent will furnish any ground for an attachment of his property.

APPEAL FROM BARREN CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE COFER:

There is no evidence whatever of any purpose on the part of the tenants to do any act calculated to endanger the security for the rent. There was no effort to prove that they had removed, or proposed to remove, sell or otherwise dispose of any of their property, or that the property on the premises was not ample security for the rent.

The fact that Thomas H. Helm denied liability, and that he and his father refused to sign the lease prepared for the appellee, afforded no ground for the attachment. The lease contained some unusual provisions and one harsh provision, and there was no evidence that they agreed at the time of the renting to execute a lease containing these extraordinary provisions. There was some evidence that they promised to sign it, but unless they agreed to do so at the time the contract of leasing was made they were not bound to sign because they may have subsequently agreed to do so. But, however the fact may be as to the agreement to execute the writing, neither the refusal to execute it nor the denial of Thomas that he was bound for the rent furnished any ground for an attachment.

There being a failure of proof to sustain the attachment, the order sustaining it must be *reversed* and the cause remanded with directions to set aside the judgment and dismiss the attachment.

J. & J. W. Rodman, for appellant.

Clarke & Grider, for appellee.

FRANCIS REIDBAUGH *v.* A. P. GROVER.

[Abstract Kentucky Law Reporter, Vol. 2—223.]

Demand Before Suit.

No demand before beginning a suit on an obligation for money payable on demand is necessary; the summons itself is a sufficient demand.

Separate Execution of Instrument by Wife.

When at the time a wife acknowledges a mortgage she is out of sight of her husband and far enough out of the way to be out of his hearing, it is a sufficient compliance of the statute requiring that she should be examined separate and apart from her husband.

APPEAL FROM OWEN CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE COFER:

No demand is necessary before commencing suit on an obligation for money payable on demand; the summons is all the demand

that is necessary. See authorities quoted in Barbour's Digest, Title "Demand", § 24.

At the time the mortgage was acknowledged by the appellant she was, according to the testimony of the deputy clerk, out of sight, and far enough out of the way to be out of hearing of her husband when the mortgage was acknowledged. This was a compliance with the statute, notwithstanding she and her husband may have been in the same building or even in the same room at the time. The reason for requiring the wife to be examined separate and apart from her husband, as far as we are able to see any reason at all for it, is that the mere presence of the husband may induce the wife to sign and acknowledge a deed she is really unwilling to execute. This purpose is as well subserved by separating them so far apart that the husband can not hear what passes between the feme and the clerk, as if they were separated by a wall and even by the distance of one or ten miles.

The evidence does not sustain the charge of fraud, and the judgment must be *affirmed.*

J. & J. W. Rodman, for appellant.

Lillard & Hallam, A. P. Grover, for appellee.

NEWPORT ST. R. Co. *v.* J. W. JOHNSON.

[Abstract Kentucky Law Reporter, Vol. 2—225.]

Instructions in Damage Case.

The court is not bound in a civil case to include in its instructions to the jury the whole law of the case, and there can be no reversal because the whole law of the case may not have been given, unless instructions are presented and the court is requested to give them.

Negligence of Railroad Company.

The fact that the plaintiff in a damage suit against a railroad company was not a passenger on the car, and the fact that the driver of the car on which plaintiff was riding may have been guilty of negligence, constitutes no defense. The railroad company is bound, as to all persons, to use ordinary care to avoid injuring them, and it can not excuse its own negligence by showing that the negligence of a third person contributed to the injury.

APPEAL FROM CAMPBELL CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE COFER:

The testimony of the appellant as to the wages one of his trade could earn was competent as conducing to show the damage resulting from the injuries of which appellee complained. The testimony of the driver as to what might happen in the future on that part of the track where the appellee was injured, though irrelevant and not material, was not calculated to secure a verdict or to increase its amount. The court must assume that juries are men of ordinary intelligence and honesty, and certainly no intelligent and honest man would be induced to base a verdict upon evidence of that character, or to increase the amount of his finding because of it.

No sufficient reason was shown why Dr. Kearns was not offered as a witness before the case was submitted, and the jury sent out to consider of their verdict. If the appellee chose to confide in his promises to be present, instead of taking his deposition, as might have been done, or of taking legal steps to coerce his attendance, if his personal attendance was deemed material, it did so at its peril.

The question whether the appellant was guilty of negligence, which caused the injury, and whether the appellee so far contributed to it that he was not entitled to recover, were properly submitted to the jury. Counsel do not indicate any objection to the instructions, and we are unable to discover any. No claim was made in the pleadings that the injury resulted from inevitable accident; nor was the court asked to submit that question to the jury. The appellant asked no instructions, and as those given correctly presented the law of the case there can be no reversal because the whole law of the case may not have been given. The court is not bound in civil cases to give the whole law of the case unless instructions are presented and the court is requested to give them.

As to whether there was negligence on the part of the company or its car driver, or on the part of appellee, the evidence was conflicting, and a verdict either way could not be disturbed by this court. Nor is the verdict so excessive as to show passion or prejudice in the jury. The evidence conduced to prove that the injury was a severe one. The accident occurred in July, 1878, and at the trial in July, 1879, the appellee testified that he had been unable to walk without crutches since the accident occurred, and that he had suffered greatly from the injury, and could not pursue his former

vocation because he was unable on account of the injury to stand on his feet. There was evidence conducing to show that the injury was not so serious as stated by the appellee, but it was for the jury and not for this court to weigh this conflicting evidence.

Neither the fact that the appellee was not a passenger on the appellant's car, nor the fact that the driver of the car on which appellee was riding may have been guilty of negligence, constitutes defense. The appellant was bound as to all persons to use ordinary care to avoid injuring them, and it can not excuse its own negligence by showing that the negligence of a third person contributed to the injury. Judgment *affirmed.*

[Cited, *Cincinnati &c. R. Co. v. Curd,* 22 Ky. L. 1222; *South Covington &c. R. Co. v. Core,* 29 Ky. L. 836.]

F. M. Webster, for appellant.

T. F. Hallam, for appellee.

JOHN W. BREVARD ET AL. *v.* L. E. STEVENS ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—226, as Brevard v. Stephens.]

Garnishment.

No judgment can legally be rendered against the garnishees upon their failure to answer, and when it is made to appear that the debt alleged to be due by them to the parties sued belonged to some one else, it afforded an additional reason for not rendering the judgment.

APPEAL FROM KENTON CHANCERY COURT.

February 10, 1881.

OPINION BY JUDGE PRYOR:

No judgment should have been rendered against the garnishees upon their failure to answer; and when the record showed affirmatively that the debt alleged to be due by them to the parties sued belonged to some one else, it afforded an additional reason for not rendering the judgment. The case should also have been transferred to the court at Independence. See *Wolfe v. Stephens,* 10 Ky. Opin. 647, 1 Ky. L. 122. The parties, on the return of the cause, may require Rich, Jr., to set up his claim, and the parties can then litigate their right to this fund. The motion to transfer the case should be sustained.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

R. D. Handy, for appellants.

HARRY P. LEMCOLE ET AL. *v.* CHAS. G. SHAW'S EXRX. ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—226.]

Right of Homestead.

A nonresident has no homestead right in this state, and, even if a resident here, a homestead can not be asserted against a mortgage for purchase-money of the real estate.

APPEAL FROM KENTON CHANCERY COURT.

February 10, 1881.

OPINION BY JUDGE PRYOR:

If the appellants occupied the premises in controversy prior to the execution of the mortgage in 1866, the occupancy was that of tenant, and not as owner. It was conceded on the hearing that this property was indivisible, and, a sale being inevitable, we see no reason why the chancellor could not sell the property and determine the question of priority as between the creditors in making a distribution of the proceeds. The owner, or debtor, at least, has no cause of complaint by reason of such action. The only other error assigned is as to the right of homestead asserted by the appellants.

The mortgage from appellants to Courtenay was executed August 11, 1866, and from the same party to Ellis on August 10, 1866. The mortgage to Ellis, dated October, 1868, was a renewal of the debt and mortgage of August 10, 1866, and the appellants did not become owners of this property until the 11th of August, 1866; and besides, the record conduced to show that the appellants were then residents of Cincinnati, and in addition that the mortgage debt to them was the purchase-money for the property sold appellant. There is no error assigned to the effect that the judgment is for too much, but that the claims should not have priority over the homestead.

Judgment *affirmed.*

D. A. Glenn, J. G. Carlisle, for appellants.

J. L. Furber, for appellees.

DAVID MYERS *v.* MARINA MYERS.

[Abstract Kentucky Law Reporter, Vol. 2—226.]

Jurisdiction to Reverse Divorce Judgment.

The Court of Appeals has no jurisdiction to reverse a judgment granting a divorce.

Alimony.

Where, in a divorce case, alimony is allowed in the sum of $500 and is not disproportioned to defendant's estate, and is justified by evidence in the case, this court will refuse to reverse.

APPEAL FROM ROWAN CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE HINES:

As to the first assignment of error, there is no jurisdiction in this court to reverse a judgment granting a divorce. As to the second, third and fourth assignments of error, it is sufficient to say that the allowance of $500 as alimony is not disproportioned to appellant's estate, and is justified by the same proof in the case that authorized the decree, appellee not being in fault. The allowance to the attorneys of $75 is justified by the evidence, and is authorized by the law, and the costs follow as an incident to the decree in favor of appellee.

The fifth, sixth and seventh assignments of error present no question that is not settled by the evidence against appellant.

Judgment *affirmed.*

H. Burns, for appellant.

Reid & Stone, for appellee.

ADAM GEARHART ET AL. *v.* LEWIS PRITCHARD.

[Abstract Kentucky Law Reporter, Vol. 2—225.]

Sheriff's Duty to Pay Claims.

Where the county court directs claims to be paid out of the levy of a certain year, and the sheriff collects the money, he has no right to deduct, as against claimants, any amount due him on general account, for the direction of the county court amounts to a dedication of so much of the fund derived from the levy as may be necessary to discharge such claims.

APPEAL FROM CARTER CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE HINES:

Appellee's petition substantially alleges, and it is not denied, that the claims sued on were directed to be paid out of the levy of 1876, and that the sheriff had collected and had in his hands of that levy a sum more than sufficient to satisfy appellee's demand. This direction by the county court to pay the sums sued for out of a particular fund amounted to a dedication of so much of that fund to the payment of appellee's demand, and the sheriff, therefore, had no authority to deduct, as against appellee, any amount due him on general account; and the only legitimate issue in the case, which was properly presented, was as to the amount of the payments made by the sheriff to appellee. It follows from this that the demurrer to the answer of appellants was properly sustained, and that the judgment of the court below, even as to the sureties, who alone appeal, should be *affirmed*.

E. F. Dulin, for appellants.

Botts & Botts, for appellee.

MINTA SIMMONS *v.* FANNIE HESSEY.

EDWARD HESSEY'S EXR. *v.* MINTA SIMMONS.

[Abstract Kentucky Law Reporter, Vol. 2—224.]

Will—Conditional Legacy.

Where by will a testator bequeaths to his servant the income from $800, to be received by her during her life provided she should remain with the testator and his wife and perform her duties in helping to care for them, such legacy is not relinquished because of the fact that after the death of the testator the servant left the widow and went to live with her children, at the request of the widow, who did not need her services, especially since the relation between the white and black races in this state is such that the mere expression by the widow of a desire that her servant (colored) should leave her house was equivalent to a command.

APPEALS FROM BULLITT CIRCUIT COURT.

February 10, 1881.

OPINION BY JUDGE COFER:

Edward Hessey by his will directed his executors, "as soon after the death of his wife as convenient, to set apart $800 for the benefit of Minta Simmons, a former slave of the testator, and to pay to her the proceeds therefrom semi-annually during her life, if she should do as she had agreed to do and remain with him and his wife, and discharge her duty; but if she should prove refractory and not perform what she had agreed to do, then the provision was to be void. He further provided that after the death of Minta the $800 bequeathed for her benefit should go to the appellee, Fannie Hessey, but should she not survive Minta, then it should go to the living children of William and Lizzie Hessey, if any, and if none then to said William and Lizzie.

The widow of the testator died in 1877; this suit was commenced by the guardian of Fannie Hessey against the surviving executor and Minta Simmons to recover the $800, on the ground that Minta had not complied with her agreement to remain with and serve the testator and his wife during their lives, but had voluntarily abandoned the widow soon after the death of the testator. Minta answered, alleging that she remained with the testator until his death, and afterwards until his widow gave her permission to go and live with her children, saying she did not want her to remain any longer, and that she had fully complied with her agreement and the provisions of the will until thus dismissed. She also alleged that she had remained with the testator and the widow under the agreement mentioned in the will; that she knew the provision had been made for her, and these three years' services were rendered in anticipation that she would be paid therefor from the income of the $800; and she asked in case she was held not entitled to the legacy that she should have judgment against the executor for $360, less $150 admitted to have been received from the testator and his widow in clothing and money. Her answer was made a cross-petition against the executor and the plaintiff, and she prayed judgment for the income from the $800, if entitled to it, and if not for the value of the services actually rendered in expectation of the legacy.

The executor failed to demur to or answer the cross-petition. The plaintiff answered, controverting her right to the legacy or compensation for her services, pleading the statute of limitations as to the

latter, but withdrew the plea at the hearing. The court decided that Minta was not entitled to the income from the $800, but gave her judgment against the executor for $210 for her services, and adjudged the $800 to the plaintiff. The executor appeals from the judgment in favor of Minta, and Minta appeals from the judgment awarding the $800 to the plaintiff. There is no complaint that Minta failed in any particular to comply with the terms of the will as long as she remained with the testator or his widow; and the evidence clearly shows that, if she did not leave by the positive direction of the widow, she left at her suggestion and in accordance with her wishes. Mrs. Ellaby, a niece of the testator's widow, who lived in the family at the time Minta left, says: "Aunt had no further use for her, and told her that she had no further use for her." "She had nothing for her to do." Again "Aunt said she had no use for her, and if she wanted to go to her children she could go." Minta testifies to substantially the same facts.

It appears there was a man claiming to be Minta's husband, but to whom she was never married, who was in the habit of visiting her very frequently, and that the widow made some objection to his coming, but it does not appear that she ever forbade his visits or that her desire that Minta should leave was occasioned to any extent by her objections to these visits. On the contrary, it appears that this man was in the habit of visiting her in the life-time of the testator, and that, while he also objected, he did not withdraw his bounty on that account. It likewise appears that both he, and the widow after his death, had the greatest confidence in their servant, and a kindly solicitude for her comfort and welfare.

The fact that she left the widow under these circumstances can not be regarded as a refusal on her part to perform her obligations under the agreement, or to comply with the provisions of the will. In view of the relation between the white and the black races in this state, and especially where the relation of master and slave has once existed between the parties, the expression by the widow of a desire that Minta should leave her house was equivalent to a command, and the right to the legacy ought not to be held to have been lost by her compliance with the evident wish of her old mistress.

The court should, therefore, instead of adjudging her compensation for her services, have directed an account to be taken of the income from the fund (allowing the executor a reasonable time after the death of the widow to collect it in and set it apart), and

have directed it to be paid over to her, and that the future income be paid to her half-yearly during her life.

Judgment *reversed,* and causes remanded for further proper proceedings.

E. Badger, for Simmons.

R. J. Meyler, for Hessey.

L. D. WILSON ET AL. *v.* G. C. EVERETT ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—227.]

Sheriff Failing to Levy Distress Warrant.

When the sureties on a rent bond sue the sheriff for failing to levy a distress warrant upon all the property which was subject thereto, there can be no recovery when it is shown by the sheriff that other executions had been levied against the debtor, and the plaintiffs, who were also sureties on such other debts, had received the benefits of said property not included in such distress warrant. Such plaintiffs were not damaged by the sheriff's failure to levy on all available property where they received the benefits from such omitted property under other executions.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

February 12, 1881.

OPINION BY JUDGE HINES:

This is an action by appellees, who were sureties on a rent bond of P. M. Everett, against appellants, as sureties of the sheriff for failing to levy a distress warrant upon all the property of P. M. Everett which was subject thereto, and for failing to subject all the property upon which the distress warrant was levied. Appellees proceed upon the theory that they have been damaged by the failure of the sheriff to discharge the duties for which appellants were sureties.

The evidence tends to show that there was property upon the rented premises belonging to P. M. Everett which was not levied on by the sheriff to satisfy the rent claim; but it also shows that the greater part of the property not embraced by the levy and return on the distress warrant was covered by executions previously levied, and that it was appropriated under such levy to the payment of claims against P. M. Everett, for which one or the other of the appellees was bound as surety. As appellees united and sued

jointly to recover against appellants for injuries suffered by them on account of alleged dereliction on the part of the sheriff, it is immaterial whether one or both received the benefit of the property not covered by the distress warrant as levied. In case either or both of them received the proceeds of the property not covered by the distress warrant, and to the extent they or either of them received such proceeds, the amount thus received should go to reduce the sum, if any, which they would otherwise be authorized to recover.

It is immaterial whether the claimant's bond executed by Hart or the distress warrant was returned by the sheriff to the proper office, unless it can be shown that such failure resulted in damage to appellees; and, as we have substantially stated, it is immaterial whether the property covered by the executions was previously subject to the rent, provided the proceeds were applied to the use or benefit of appellees or of either of them. As the view of the law here suggested was not presented to the jury, it follows that the instructions are erroneous, and for that reason the cause should be reversed.

It being necessary to reverse for the reasons mentioned, it is deemed unnecessary to notice in detail the assignments of error, as the court below will doubtless permit such amendments by either party as will fairly and fully present to the jury the merits of the controversy.

Judgment *reversed* and cause remanded for further proceedings.

R. Reid, H. L. Stone, for appellants.

Leslie O'Rear, for appellees.

PETER BANTA'S EXRS. ET AL. *v.* JAMES TERRY ET AL.

[Kentucky Law Reporter, Vol. 2—202.]

Setting Aside Fraudulent Conveyance.

Where a man over seventy years of age owns real estate subject to the life estate of another man in good health and only thirty-seven years of age, and the whole title is worth not over $3,000, a conveyance made in good faith to the owner of the life estate for $700 will not be deemed fraudulent or set aside, especially since at the time of the conveyance lawyers differed as to whether the grantor had any title to convey.

APPEAL FROM BATH COURT OF COMMON PLEAS.

February 12, 1881.

OPINION BY JUDGE HINES:

It appears to us very clear that the deed of Thompson to Bell and wife operated to give the husband and wife a joint interest in the land embraced in the deed; that at the death of Mrs. Bell her interest descended to her daughter, and that, the daughter dying in infancy, the grandfather, James Terry, took the daughter's interest.

The only remaining question of any moment is as to whether the conveyance by James Terry to William Bell was fraudulent. The record develops the fact that William Bell, who has an estate for life by the curtesy, was only thirty-seven years of age, that Terry at the time of the conveyance was over seventy years of age, and financially embarrassed. It also appears that, prior to the institution of this suit, an action was brought to subject the interest of Terry to the payment of a certain debt due by him; that Bell and Terry, in good faith, and for the purpose of ascertaining what right, if any, Terry had to the property, consulted the best legal talent within their reach; that some of the attorneys consulted gave the opinion that Terry had no title, while others decided that he did; and under these circumstances Bell agreed, in consideration of a conveyance of such interest as Terry might have, to pay off the claim thus asserted, amounting to over $700. Bell paid the money and took the conveyance sought to be set aside. The evidence showed that the interest of Terry in the land, the life estate of Bell being out of the way and no cloud on the title, was worth about $3,000 or more; but when the age of the life-tenant is considered, and the doubtfulness of Terry's claim, as advised by counsel, it appears to us that the small amount paid by Bell for such an interest does not evidence fraud. It is doubtful, considering all these facts, whether a creditor could have realized more from the interest of Terry than was paid by Bell.

The third assignment of error, which complains of the failure of the court to give personal judgment against Terry, is not good, if for no other reason, because the court below only disposed of so much of the case as attempts to set aside the conveyance from Terry to Bell. Judgment *affirmed.*

Judge Hargis not sitting.

Ross & Kennedy, for appellants.

Reid & Young, Reid & Stone, Hargis & Norvell, for appellees.

[Cited, *Turner's Trustee v. Washburn,* 25 Ky. L. 2198.]

CITY OF PADUCAH *v.* T. A. & ELIZA DUKE.

[Abstract Kentucky Law Reporter, Vol. 2—229.]

Mortgage of Wife's Real Estate for Husband's Debts.

The power to sell the separate estate conferred by the statute upon the wife does not imply the power to mortgage such real estate for the debts of the husband.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

February 15, 1881.

OPINION BY JUDGE HINES:

It is conceded that the property mortgaged in this case, and which was declared by the court below not to be subject to the mortgage, is the separate estate of the wife. We have decided in the case of *Hirschman v. Brashears,* 79 Ky. 258, that the power to sell separate estate, conferred by Gen. Stat. (1879), Ch. 52, Art. 4, § 17, does not imply the power to mortgage for the debt of the husband. That case is conclusive of this, and the judgment is *affirmed.*

L. D. Husbands, for appellant.

J. C. Hodge, for appellees.

URSO & MORSICAN *v.* UNVERZAGT & SMITH.

[Abstract Kentucky Law Reporter, Vol. 2—228.]

Court of Appeals Will Not Weigh Evidence.

The law does not permit the Court of Appeals to assume the functions of the jury and weigh evidence, and it will not reverse where the evidence is not flagrantly or overwhelmingly against the finding.

New Trial on Newly Discovered Evidence.

A motion for a new trial on account of newly discovered evidence must state the facts from which the court may determine that the party, by the exercise of reasonable diligence, could not have discovered said evidence and produced it at the trial. A new trial will never be granted upon newly discovered evidence when it is only cumulative in its nature, and not by any means conclusive of the issue.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 15, 1881.

OPINION BY JUDGE HINES:

The question as to whether the goods were purchased for the appellees through Gordon as their agent was submitted to the court. The evidence as to Gordon's agency is somewhat conflicting, but it is sufficient to support the judgment. The law does not permit this court, in such cases, to assume the functions of the jury and weigh the evidence; nor need we do more than state our conclusion that the weight of the evidence is not flagrantly nor overwhelmingly against the finding.

As to the motion for a new trial on the ground of newly discovered evidence it might be sufficient to say that appellants state no facts from which it can be determined that "by reasonable diligence" the evidence might not have been discovered before the trial. It is not sufficient that appellants so allege. They should state facts from which such conclusion by the court would be authorized. Beside, the evidence tendered is only cumulative in its nature, and not by any means conclusive of the issue. *Allen v. Perry,* 6 Bush (Ky.) 85; *Bell v. Offutt,* 10 Bush (Ky.) 632; *Hargis v. Price,* 4 Dana (Ky.) 80.

Judgment *affirmed.*

A. T. Dudley, for appellants.

William Lindsay, H. F. Turner, for appellees.

THOMAS ELDER *v.* WM. LUCAS' EXR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—229.]

Sale of Land by Sheriff.

When one in good faith buys at sheriff's sale a tract of land represented to contain 150 acres, and the tract contains only 90 acres, equity will give him relief and he will be permitted to withhold deferred payments equal to the value of the land he did not receive.

APPEAL FROM RUSSELL CIRCUIT COURT.

February 15, 1881.

OPINION BY JUDGE PRYOR:

It is conceded that Lucas sold to Elder the tract of land as containing 150 acres, and it is also admitted that the tract contained

only ninety acres. Elder, it is true, was placed in the possession, and, finding that his land was deficient in quantity, brought suit against the owner of the adjoining land in order to recover what he supposed was the quantity of land to which he was entitled. His action was without merit, having not even a shadow of right to recover; still he is made to pay the balance of the purchase-money when there is an admitted deficit of sixty acres. This fact is not controverted, and why he should be made to pay the remaining purchase-money can not well be perceived. The sale and purchase both seem to have been made in good faith, and the error originated in the sale of the land by the sheriff to the vendor, Lucas, the tract having been sold as containing 150 acres when it only contained ninety acres. Equity certainly entitles the appellant to relief.

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

J. F. Montgomery, A. Duvall, for appellant.

J. E. Hays, for appellees.

T. J. MILLER *v.* B. F. FERRELL.

[Abstract Kentucky Law Reporter, Vol. 2—227.]

Attachment of Funds.

Where the assignee of a bankrupt has in his hands a fund belonging to a creditor and a creditor of such creditor attaches the fund in the assignee's hands, his action will fail where the assignee alleges and proves that he was surety of the attachment debtor and others on a note, and as such paid off the note and it was assigned to him, and there was a balance due on it exceeding the amount of the attached funds in his hands.

APPEAL FROM MARION CIRCUIT COURT.

February 15, 1881.

OPINION BY JUDGE COFER:

The appellant is assignee in bankruptcy of John Cravens, and has in his hands as such the dividends on a claim of B. F. Ferrell proved against the bankrupt's estate. John H. Ferrell, a creditor of B. F. Ferrell, attached the fund in appellant's hands. The appellant

answered, alleged and proved that he was surety for B. F. Ferrell and others on a note to Johnson; that long prior to the attachment he, as such surety, paid off the note, and it was assigned to him; and that there was a balance due on it exceeding the amount of the funds in his hands.

On these facts it was error to adjudge the fund to the attaching creditor. He could have no greater right or higher equity than his debtor, B. F. Ferrell, who, according to the allegations of the petition, "has no property in this state subject to execution;" and it is quite clear that he could not recover the fund while he remains indebted to the appellant in a larger sum for money paid as his surety.

The case of *Payne v. Pusey*, 8 Bush (Ky.) 564, does not apply here. John H. Ferrell is not a creditor of Cravens, and has no claim to the fund except through B. F. Ferrell, who is the common debtor of both John H. Ferrell and appellant.

Judgment *reversed* and cause remanded, with directions to discharge the attachments, so far as it affects the appellant.

Rountree & Lisle, for appellant.

J. R. Thomas, for appellee.

D. G. PARK, ET AL. *v.* L. ANDERSON.

[Abstract Kentucky Law Reporter, Vol. 2—228.]

Meaning of the Word "Maintenance."

The word "maintenance," as used by law writers, is used indifferently to mean clothing, food and shelter, or tuition, clothing, food and shelter, depending upon the circumstances surrounding the parties and the connection in which it is used. In such cases the meaning attached to the word and the intention of the parties becomes a question of fact, to be submitted to the consideration of the jury.

APPEAL FROM GRAVES CIRCUIT COURT.

February 15, 1881.

OPINION BY JUDGE HINES:

This action was brought by appellants against appellee as surety on the bond of E. Anderson, deceased, who was guardian for appellant, Nellie Park. Appellants sued to recover $500, charged to

have gone into the hands of the guardian and unaccounted for. To this appellee pleaded as a counterclaim and set-off a fee of $250 as attorney for the ward in a certain suit in which he was employed by the guardian, and certain other sums alleged to have been expended by the guardian for tuition of the ward. From a judgment for $395.40 this appeal is prosecuted.

The grounds for complaint in the motion for a new trial are the giving of instruction "A", the refusal to give "D" and "F", and permitting appellee to testify for himself in regard to the services rendered by him as attorney for the guardian. Instruction "A" is as follows: "The court, at the instance of defendant, instructs the jury that paper 'D', filed by plaintiff in this action, does not include or settle any amount that may have been paid by said guardian for tuition of said ward."

The paper "D" referred to in this instruction reads as follows: "We have this day settled the amount due Nellie Park and D. G. Park on the money received by Ewin Anderson as guardian for Nellie Hanson, from the Mutual Benefit Life Insurance Company from Eph Anderson, and have also settled the amount of allowance to said guardian for said ward, and for board and maintenance, allowing her the interest on said insurance money from the time said guardian received it until his death in July, 1876, including full amount to be allowed as guardian, September 23, 1878.

(Signed) ELIZA J. ANDERSON, ADMX.
NELLIE PARK, p. a. D. G. PARK.
D. G. PARK."

The terms of this contract, so far as they evidence a contract, do not appear to be so definite and certain in meaning that it can be said with confidence that it was or was not intended to embrace tuition. The term "maintenance" is used by law writers indifferently to mean clothing, food, and shelter, or tuition, clothing, food and shelter, depending upon the circumstances surrounding the parties and the connection in which it is applied. In such cases the meaning attached to the word and the intention of the parties becomes a question of fact that should be submitted to the consideration of the jury.

The evidence of appellee as to the contract with E. Anderson, deceased, was incompetent under Buckner & Bullitt's Civ. Code (1876), § 606, Subsec. 2. The other assignments of error not men-

tioned in the ground for a new trial need not be considered, nor need we consider the assignment of cross-error, as this is no cross-appeal, but for the errors indicated the judgment is *reversed* and cause remanded for further proceedings.

D. G. Park, Hugh Rodman, for appellants.

W. M. Smith, for appellee.

R. W. MEREDITH ET AL. *v.* G. W. BARROWS.

[Kentucky Law Reporter, Vol. 2—208.]

Lottery Contracts.

A lottery contract between a city and a person authorizing a lottery on the ternary or three number plan only does not authorize a single number lottery, and the bondsmen of the operator are not liable either to the city or to the holders of tickets who may be entitled to prizes, where such tickets are issued as a single number lottery.

APPEAL FROM CAMPBELL CHANCERY COURT.

February 17, 1881.

OPINION BY JUDGE COFER:

There are two conclusive reasons why the appellants have no right to enjoin the appellees, G. W. and J. E. Barrows, from operating a lottery which it is alleged they are conducting. The contract between the city of Frankfort and Stewart only authorizes a lottery on the ternary or three number plan; and as the Barrows are operating a single number lottery it is illegal, and appellants can not in any event become liable on the bond of Stewart, on which they are sureties, either to the city or to the holders of tickets who may be entitled to prizes. That the Barrows profess and claim to have authority under the Frankfort grant can not alter the fact that they have no such authority.

The Barrows only claim to be the owners of nineteen classes in a scheme consisting of 30,900 classes. This gives them no authority whatever to draw a lottery. The lottery franchise is an entirety, and only authorizes the setting up and operating a single lottery, and does not authorize the sale of classes to different per-

sons, and the operation of a separate lottery by each owner of a class.

Whether Stewart could legally transfer the whole scheme so as to authorize the transferee or transferees to operate a lottery is a question that does not arise on this record. But for the reasons already given the judgment must be *affirmed.*

J. G. Carlisle, D. W. Armstrong, for appellants.

D. W. Sanders, P. B. Muir, for appellees.

[Cited, *Lawrence v. Simmons,* 10 Ky. L. 347.]

SAUR, SCHURMAN & CO. *v.* ALEX. SAYRES.

[Abstract Kentucky Law Reporter, Vol. 2—229.]

Petition on Contract for Sale of Bark.

Where a contract stipulated for the delivery of 500 cords of prime chestnut-oak bark in the yard of a railroad company at Louisville on or before September 15, 1877, and that the bark should be solidly loaded in the cars, a petition against the purchaser should allege that the bark tendered was prime chestnut-oak bark, solidly loaded in the cars and tendered in the yard of the railroad company at Louisville on or before September 15, 1877; and where it fails to allege such facts or equivalent ones it is bad on demurrer.

Measure of Damages for Breach of Contract.

In a suit for breach of contract in not receiving certain personal property sold and tendered, the measure of damages is the difference between the market price and the contract price, at the time and place of the tender for which the defendants are liable; and the price for which the plaintiff actually sold the property is not at all material.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 17, 1881.

OPINION BY JUDGE COFER:

The contract stipulated for the delivery of 500 cords of prime chestnut-oak bark in the yard of the Louisville & Nashville R. Co. at Louisville on or before September 15, 1877, and that it should be solidly loaded in the cars.

Instead of alleging that the bark tendered was prime chestnut-oak bark, and that it was solidly loaded in the cars and tendered in the yard of the railroad company on or before September 15,

1877, the pleader alleged that, at the respective dates set out in paper filed with and as part of the answer, he shipped to E. P. Martin & Co. "for defendants, delivered in the cars in the yard of the Louisville & Nashville R. Co. at Louisville, Kentucky, the number of cords shown thereon (i. e., on the exhibit), to-wit: 298 cords and 21 feet, of the quality and kind in the contract mentioned, and then and there tendered same to defendants," etc., and that it was solidly loaded in the cars.

Thus far there are two obvious defects in the petition which are not cured by anything else contained therein. Of course the appellee can not recover, no matter what other facts may appear, unless he tendered the bark on or before September 15, 1877. By reference to the exhibit it will appear that the tender was within the time specified in the contract. But as it was indispensable to the appellee's case that the tender should be shown to have been within the time limited in the contract, it should have been stated in the petition when the tender was made, or that it was made on or before the 15th of September. As this is a fact without which the appellee had no cause of action it can not be supplied by reference to an exhibit. *Hill v. Barrett,* 14 B. Mon. (Ky.) 83; *Gebhard v. Garnier,* 12 Bush (Ky.) 321. In the second place, instead of alleging that the bark was of the quality and kind in the contract mentioned the allegation should have been that it was "prime chestnut-oak bark."

The petition is defective in another particular. It does not contain a statement of facts showing any, or at any rate no more than nominal, damages. Having tendered the bark, the appellee might have abandoned it and sued for and recovered the price, upon showing that it was of the kind and quality, and was delivered at the time and place and in the manner stipulated; or he might treat it as his own and sue for the difference between the contract and then market price, or he might sell it, using due precaution to satisfy his lien, and sue for and recover the unpaid balance. *Bell v. Offutt,* 10 Bush (Ky.) 632, and authorities there cited. It does not very clearly appear from the petition which of these optional rights the appellee intended to exercise.

The allegation is that the appellants refused to receive and pay for the bark, "and plaintiff was compelled to put same upon the market for sale at said place and times, and did so sell same at the respective prices shown in said paper, and said 298 cords and 21

feet of bark so sold brought only $2,111.25, instead of $3,727.05, according to contract price, whereby plaintiff hath sustained great loss, and was greatly injured and damaged, to-wit: in the sum of $1,615.80."

There is here no statement that the price received for the bark was the current market price, nor that it was all that could reasonably have been realized for it. That he sold the bark for a designated sum is not equivalent to an allegation that it was sold at the market price or for all he could get for it. The third paragraph is also defective. It was contended in the argument that the defects in the petition were cured by the answer and verdict. Without stopping to discuss the question whether the first and second defects in the second paragraph pointed out above may not have been cured by the answer and verdict, we are satisfied the third was not.

It was necessary that it should appear by allegation in the petition or by denial in the answer that the plaintiff had sustained some damage in consequence of a breach of the contract by the defendants. No such damage is shown by any allegation by the plaintiff or denial by the defendants. The plaintiff alleged that he was compelled to and did sell the bark for a certain sum, and the defendants denied these allegations. Now it was wholly immaterial whether these allegations were true or false, unless it had also been shown that the price realized was the market price at the time and place of the tender. It is for the difference between the market price and the contract price at the time and place of the tender for which the defendants are liable, if liable at all, and the price for which the plaintiff sold the bark is not at all material.

There was, therefore, no issue between the parties as to the question of damages, and the verdict can not cure the defect in the pleadings. The rule on this subject is, "Where there are defects or imperfections in the declaration, yet the issue joined be such as necessarily require, on the trial, proof of the facts defectively or imperfectly stated, or even omitted, and without which it is not reasonable to presume a jury would have given a verdict for the plaintiff, such deficiency is cured by the verdict." *Vaughn's Exr. v. Gardner,* 7 B. Mon. (Ky.) 326. The issue joined, so far from being such as necessarily required on the trial proof of the fact that the price received by appellant for the bark was the current

market price, only required him to prove that the sum alleged was all he sold it for.

As the case must go back for a new trial it would be improper to express an opinion upon the first, second and third grounds for a new trial. The fourth ground is not sufficient to raise any question in this court. *McLain v. Dibble & Co.,* 13 Bush (Ky.) 297. Judgment *reversed,* and cause remanded with directions to sustain the demurrer to the second and third paragraphs of the petition and for further proper proceedings.

M. A. & D. A. Sachs, for appellants.

William Lindsay, E. E. McKay, for appellee.

[Cited, *Newport &c. Lumber Co. v. Lichtenfeldt,* 24 Ky. L. 1969.]

WILLIAM HUNTER'S ADMR. *v.* A. MARCH.

[Kentucky Law Reporter, Vol. 2—240.]

Competency of Witnesses.

Buckner and Bullitt's Civ. Code (1878), § 606, subsec. 2, provides that "no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, one who is * * * dead when the testimony is offered to be given" will not render a party to suit on a note given to the intestate incompetent to testify that he did not know the intestate named on the note as the payee, that he did not sign the note for him, and that there never was any agreement or understanding between him and the other person who signed the note that the latter might sign his name as his surety, for these statements were not concerning any verbal statement of or any act done or omitted to be done by the decedent.

Leading Questions.

Although questions excepted to could be and were answered "Yes" or "No" it does not follow that they were leading.

APPEAL FROM JESSAMINE CIRCUIT COURT.

February 17, 1881.

OPINION BY JUDGE COFER:

The appellant, as administrator of William Hunter, sued John and Absalom March on a note to his intestate, purporting to have

been executed by them January 1, 1873. Absalom pleaded non est factum, and gave his deposition in the case to be read in his own behalf. The appellant excepted to the whole deposition on the ground that the witness was incompetent, and to certain questions on the ground that they were leading. The court overruled both exceptions.

Whether the first of those rulings was correct is the most important question in the case. Buckner and Bullitt's Civ. Code (1878), § 605, provides that: "Subject to the exceptions and modifications contained in § 606, every person is competent to testify for himself or another unless he be found by the court incapable of understanding the facts concerning which his testimony is offered."

The only exception or modification contained in § 606 which has any bearing in this case is contained in the second subdivision of that section, and is in these words: "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by * * * one who is * * * dead when the testimony is offered to be given," etc. There is nothing in subdivisions a, b, c or d of subsec. 2, § 606, that affects the question, and it must be decided on the language already quoted.

The witness did not testify concerning any verbal statement of or any act done or omitted to be done by the decedent. The substance of his testimony was that he did not know William Hunter; that he did not sign the note for him, and that there never was such an agreement or understanding between him and John March, who signed his name to the note, that the latter might sign his name as his (John's) surety.

Section 605 makes all persons not mentally unfit competent to testify for themselves in all cases and as to all matters in dispute, except so far as they are declared incompetent in the next section. The fact that the testimony of one who is offered as a witness in his own behalf will affect the estate of one who is dead does not render him incompetent, except as to verbal statements of or a transaction with or acts done or omitted by the deceased person. If both parties be living, either may testify in his own behalf to facts not within the knowledge of the adverse party, and the fact that one is dead can furnish no valid reason for excluding the other from testifying as to such facts as do not appear to have been

within the knowledge of the other. We are, therefore, of the opinion that the witness was competent as to the facts testified to by him.

Although the questions excepted to could be and were answered "yes" or "no," it does not follow that they were leading. They left the witness free to answer either way, without suggesting to him the answer desired by his attorney. The appellant excepted to other depositions, but his exceptions were not acted upon by the court below, and they must be deemed to have been waived. *Corn v. Simms*, 3 Met. (Ky.) 391.

The judgment is sustained by the evidence, and must be *affirmed*.

H. A. Anderson, for appellant.

Geo. R. Pryor, for appellee.

[Cited, *Waters v. Cline*, 27 Ky. L. 586.]

J. F. LOWE v. HENRY ERLEINSON.

Weight of Evidence.

The Court of Appeals will not disturb a verdict or finding on the weight of evidence, and when an issue is formed and submitted, and there is proof on both sides, and when the trial court or jury has passed on the facts and arrived at a verdict or finding, the Court of Appeals will not interfere to reverse.

APPEAL FROM KENTON CHANCERY COURT.

February 17, 1881.

OPINION BY JUDGE PRYOR:

The question as to the ownership of the two horses involved the validity of the sale to the appellee, and this was placed directly in issue. The court or jury having passed on the facts, this court will not interfere. There is proof conducing to show a change of possession, and certainly proof establishing the purchase by the appellee. The latter had the horses in Cincinnati and there offered them for sale, and the fact that he kept them in the livery stable owned by the party of whom he purchased should not be allowed to defeat the action. The vendor's business was to keep and provide feed for horses for compensation, and that the purchaser had taken the possession, although he kept them in the same livery stable, was

a fact the jury could well have determined from the facts in the record.

The case was properly dismissed as to Lowe, and he has no cause to complain. The bond of indemnity, while it may have protected the sheriff, did not authorize him to hold or seize the property of the appellee to satisfy an execution to which the appellee was a stranger. This would be a novel mode of transferring title.

Judgment *affirmed.*

J. M. Tesdale, R. D. Handy, for appellant.

J. W. Bryan, for appellee.

COVINGTON STREET R. CO. *v.* AMOS SHINKLE, TRUSTEE, ET AL.

Validity of Corporation Bonds.

When bonds of a street railroad company are issued by the consent of all of its directors and stockholders, in pursuance of a contract of sale of the stock of the road, the sellers receiving some of the bonds as a consideration for the transfer of their stock, the fact that such sellers soon after the issue of the bonds resigned as directors in the interest of those becoming the purchasers, and who constructed the road and assumed all the liabilities growing out of it, ought not to be considered as evidence of fraud on the part of either.

APPEAL FROM KENTON CHANCERY COURT.

February 17, 1881.

OPINION BY JUDGE PRYOR:

The right of the president and directors to issue bonds for and in behalf of the corporation styled the "Covington Street Railway Company" has not been questioned, and the grounds upon which a reversal is sought are: First, that the bonds were obtained from the corporation by fraud. Second, that the appellee, West, the holder of the bonds, took them with notice of the fraud and want of consideration.

The capital stock of the corporation was $250,000, and as soon as a subscription of stock to the amount of $25,000 had been made, directors could be elected under the provisions of the charter, and the corporation was authorized to issue bonds not exceeding the

amount of its capital stock, bearing interest at no greater rate than 10 per cent. and in denominations not less than $1,000, and to secure the payment a mortgage might be made on the property and income of the company.

Bullock, Sherlock, Lewis, Cook and McDowell each subscribed $5,000 in stock, making the sum necessary to organize the corporation, and when organized, with McDowell as president and the others directors, they entered into a contract with the city of Covington for the use of its streets for the purpose of constructing the railway, and agreed with the city to complete two and one-half miles of its road within a definite period, and for the performance of their contract executed, or had executed, to the city a bond in the penal sum of fifty thousand dollars.

The president and directors of this corporation being the only stockholders, and, as the proof shows, hesitating in regard to the undertaking, made as parties of the first part an agreement with McDowell, who was the president, and one Thomas C. Robbins, of the second part, the two latter contracting not only for themselves but for other parties, by which agreement the latter were to perform all the obligations that the then president and directors were under to the city, and to assume their subscriptions to the capital stock, by having it credited on the cost of construction and equipping the road. When released from all liability the said Bullock, Sherlock, Lewis, Cook, etc., were to transfer to McDowell and Robbins all their right and interest in the capital stock of the corporation, and would take in the meantime no other subscriptions of stock. In consideration therefor the parties of the second part were to issue and secure by mortgages on the rights and franchises of the corporation a certain number of bonds of the denomination of $1,000, and transfer to each of the parties of the first part $5,000 of said bonds, bearing 7 per cent. interest and payable semi-annually in the city of New York, the bonds to become due in twenty years. Under this arrangement, the parties of the second part, McDowell and Robbins and their associates, performed their part of the contract, and the parties of the first part resigned their position as directors, except McDowell, and the parties of the second part became directors and stockholders in their stead.

In the first place all the officers of the road, the president and directors, they being the only stockholders, contracted with third parties to perform their undertaking, and in consideration there-

for transferred to them all their capital stock and all interests they had in the corporation. The parties to whom this transfer was made, on the resignation of the parties of the first part, were elected as a board of directors; and they owned all the stock of the corporation, and so far as the record shows are today, or their assignors are, the owners of the stock entirely. If, as has been assumed in argument, this contract between these stockholders was fraudulent, who is to be benefitted by a judgment declaring the bonds a nullity or denying to the appellees the right to recover on their coupons that have long since fallen due?

McDowell, T. C. Robbins, A. T. C. Robbins, Bushnell and Russell, with whom, or for whose benefit this contract was made, after they had completed this line of railway, were the sole owners of all the stock, and being such owners and the only parties having any pecuniary interest at that time in the franchise or the income from it, executed these bonds and delivered them to the original stockholders. So all the parties in interest were parties to the contract, and a judgment canceling their bonds would necessarily enure to the parties or their assigns who entered into this alleged fraudulent agreement. The bonds were issued by the consent of all the parties in interest, and when the twenty bonds were delivered to Bullock and others, the parties delivering them were not only the directors, but owned every dollar of the stock. If fraud exists it affects only those who were alone interested in the subject-matter of the agreement; but as we construe the agreement in this case it was in effect a sale to McDowell and others of all the right and interests of Bullock and others, including their capital stock in the corporation, and the fact that they resigned as directors in the interest of those who had constructed the work, and assumed all the liabilities growing out of it, ought not be considered as evidence of fraud on the part of either.

This written agreement and the mortgage given to secure the bonds were both matters of record, the one made a part of the proceedings of the board and the other of record in the Kenton county clerk's office. No stock seems to have been issued prior to the recording of this mortgage, and therefore no innocent party appears in this record to have been affected by the contracts made.

While the answer filed in this case presents an issue affecting the validity of all the bonds, as well as the coupons transferred or sold to the appellees, still the recovery was only sought in the

original action on the coupons that were then due. The amendments presented distinct causes of action, although growing out of the same contract, and while the appellant may have made no objection, still it should have been served with process. But if this is an independent cause of action, has this court the right to reverse the judgment until after a motion has been made in the court below? The motion being void on each amendment, a motion to set the same aside should have been made so as to give this court revisory power over it.

Judgment *affirmed.*

J. G. Carlisle, for appellant.

W. H. Mackay, for appellees.

E. WITTEY *v.* PETER DEFF.

[Abstract Kentucky Law Reporter, Vol. 2—230.]

Construction of Deeds of Conveyance.

Before the chancellor undertakes to alter or vary the terms of a deed, either on the ground of fraud or mistake, he ought to be well satisfied that the draftsman has failed to embody the real contract in the writing, and where there is conflicting testimony raising a doubt as to what was the real contract between the parties, the written evidence of the contract must control the action of the chancellor, and the contents of the conveyance must determine the question.

APPEAL FROM METCALFE CIRCUIT COURT.

February 19, 1881.

OPINION BY JUDGE PRYOR:

When considering the conveyance and its terms under which the appellee claims, the decided weight of the testimony is with the appellant. Before the chancellor undertakes to alter or vary the terms of such an instrument, either upon the ground of fraud or mistake, he ought to be well satisfied that the draftsman has failed to embody the real contract in the writing. The deed is so plainly written that one of ordinary understanding could readily see what it purported to convey; and, in fact, the appellee says he understood the legal effect of the deed at the time he accepted it, and was induced to accept it on the representation of the appellant that his

bond was as good as his word, and that the tract contained 250 acres. As to this representation the parties disagree, and the appellant established, by a witness who claims to have heard the contract made, that it was the sale of the boundary for so many dollars. The appellant also swears, and in addition proves, that the appellee stated to divers other persons that he bought the boundary. The appellee denies this, and swears that he purchased on the faith of the representations made, and by others he proves that such admissions were made by the appellant, and that he said he would make up the deficit, all of which leaves the mind in doubt on this conflicting testimony as to what was the real contract between the parties. This doubt existing, the written evidence of the contract, when resorted to, must control the action of the chancellor, and the contents of the conveyance must therefore determine the question. It is the best evidence in the absence of any other writing as to what the contract was, and the chancellor therefore erred in abating the contract price.

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

B. F. Hunt, R. B. Dahoney, for appellant.

Bales & Muncie, for appellee.

JAMES W. DELANEY'S ADMR. ET AL. *v.* GEO. T. DELANEY ET AL.

Wife's Inheriting Real Estate.

When a wife inherits real estate from her father, and in a partition suit it is ordered sold and is purchased by the wife and others interested as heirs, but conveyance is afterward made to the husband, the wife owns it; and it is immaterial whether there is any evidence of a promise on the part of the husband to convey or have conveyed to his wife. It is, in effect, allotted to her in the division of her father's estate, and to the extent of her interest the title stands as if there had been no conveyance to the husband. It is not like a case where the husband has reduced his wife's choses-in-action or her personal property to possession, and then makes use of it in paying for property the title to which he takes to himself, for in such case the wife takes no interest in the property unless there was an agreement, prior to the reduction of the personalty, that she should have an interest in the property into which it should be converted.

APPEAL FROM UNION CIRCUIT COURT.

February 19, 1881.

OPINION BY JUDGE HINES:

It appears to us that the judgment of the court below is correct. The record in the case of the *Pool Heirs v. Heirs of Henshaw* was a suit for a division of the estate between the heirs. As the most convenient method of reaching this end, the property was sold under decree and purchased by the heirs, and was in effect a division of the property between the heirs by consent. At that sale J. W. Delaney became the purchaser of the 234 acres of land in controversy, and executed his two bonds for $300 each, upon one of which is indorsed a credit of $250. No other credits are indorsed upon the bonds and no other evidence that they are satisfied by paying money. In April, 1852, the commissioner, under an order of the court, made a deed to the land to J. W. Delaney, in which there is no reference as to how the $600 were paid. The oral evidence in the case tends strongly to the conclusion that the land came to Mrs. Sarah Delaney from the estate of her father, and taken in connection with the facts shown by the record for the division of her father's estate the court was authorized to conclude, and evidently did conclude, that the land in controversy in effect descended to Mrs. Sarah Delaney from her father, and that J. W. Delaney held the title in trust for her, except to the extent that he had paid on the so-called purchase.

With this view of the evidence in the case it seems immaterial whether there is any evidence of a promise or agreement on the part of J. W. Delaney to convey or have the land conveyed to his wife. It is, in effect, allotted to her in the division of her father's estate, and to the extent of her interest the title stands as if there had been no conveyance to J. W. Delaney. It is not a case where the husband has reduced his wife's choses-in-action or her personal property to possession, and then makes use of the same in paying for property, the title to which he takes to himself. In such case the wife takes no interest in the property so purchased unless there was an agreement, prior to the reduction of the personalty to possession, that she should have an interest in the property into which it should be converted. Prior to the adoption of the Revised Statutes there would be no resulting trust in favor of the wife in real

estate purchased by her husband with her general estate which he had reduced to possession.

It is not material in this controversy to inquire whether Mrs. Sarah Delaney received more than her share in her father's estate. The fact, if it existed, would be only a circumstance tending to the conclusion that she did not get the land as her part of the estate. But if it were material to determine this matter there is not enough in the record to conclude the question one way or the other. 1 Perry on Trusts (4th ed.), §§ 124, 128; *Jas. M. Shepherd v. Polly Sharp,* 10 Ky. Opin. 885, 1 Ky. L. 418.

As the court has made no final disposition of the rights of the creditors to have the five-twelfths of the land belonging to the heirs of J. W. Delaney sold, they have no right to complain, except as to the ruling of the court in holding the heirs of Sarah Delaney entitled to seven-twelfths of the land, and that question we have determined.

Judgment *affirmed.*

W. P. D. Bush, Jesse S. Taylor, for appellants.

A. Duvall, D. H. Hughes, for appellees.

GEO. W. CRAWFORD *v.* JACOB RICE.

Credibility of Witnesses.

The facts that a witness refuses to give his deposition until a litigant pays him $50, that the litigant accedes to his demand, and that several witnesses impeach the witnesses' character to a considerable extent, may all be considered as circumstances from which the trial court may disregard his testimony.

APPEAL FROM CARTER CIRCUIT COURT.

February 19, 1881.

OPINION BY JUDGE HARGIS:

The appellant instituted an action against appellee to settle a partnership between them, and also sued him upon a note on which various credits were entered. The causes were consolidated and referred to a commissioner for the purpose of auditing and settling the partnership and individual transactions between the parties.

The commissioner made a report, to which was added a supplementary report on the matters which were before him when he made

the first, in which, after a statement of the matters between the parties, made from the pleadings and voluminous evidence taken by the commisioner, he concludes that the appellant was, on the 7th day of April, 1873, indebted to the appellee in the sum of $651.47. Both parties excepted to the report, and upon final hearing the court rendered judgment in appellee's favor for the sum of $1,026.60, with interest from April 7, 1873. From that judgment both parties appeal.

After a faithful and careful examination of all the numerous errors assigned in the original and cross-appeal, we are unable to discover any error substantially prejudicing the rights of either party. As to the errors assigned with reference to the $171.96 for taxes as guardian, $39 alleged to have been paid to Vincent, the alleged contract to board hands at $1.50 per week, the wheat, the work done by the hands alleged to have been furnished by each partner, the blacksmith account, $500 for the millrace, $36.72 for castings, the individual services by the partners, amount of Power's item, and the wages of Negro Nailor, the judgment of the court is not against the weight of the evidence; and without analyzing it here, we are of the opinion it sustains the judgment on each of those items.

Appellant admitted in his pleading that the $25 left by McKenzie should be credited upon the accounts between him and the appellee. He also admitted in his deposition that he leased the mill for four years and a half, only one month less than the appellee claims, who seems to have made no mistake about the time, and there appears to be no error as to those items.

The action on the receipts for fee-bills was barred by limitation, as more than 15 years had elapsed before any pleading was filed in the case, properly presenting them for adjudication. Whether a credit was allowed the appellee upon the note or partnership the result would have been the same. No questions can arise in this case, such as frequently present themselves where debtors of a firm attempt to plead a set-off or credit based on a private claim against a member of the firm.

The appellant admits on oath that he had to pay Jesse L. Duprey the sum of $50 before he would consent to give his deposition in the case. Several witnesses impeach his character to a considerable degree. Under these circumstances, if the court below did disregard his testimony, we do not feel inclined to say it acted improp-

erly. In view of this conduct upon the part of the appellant and witness the testimony introduced by appellee was sufficient to sustain the credit for $720 paid for the boiler and expenses of its shipment.

There is no sufficient reason shown for disturbing the judgment of the court in rejecting the claim of appellee for the alleged use of the water power, or for an excess above $500 for cutting out the mill-race. The testimony conduces to prove that appellee at least took it upon himself, if he did not so contract, to do the work on the mill-race for $500. The other assignments of error on the cross-appeal are either immaterial or too general, and will not, therefore, be considered.

Wherefore the judgments on the original and cross-appeals are *affirmed*.

Wm. Bowling, for appellant.

K. F. Pritchard, Geo. N. Brown, for appellee.

H. C. MATTINGLY *v.* WM. C. WATHEN.

Bond for Deed.

The terms of a bond for a deed, when ambiguous, are susceptible of being explained by parol testimony.

Meaning of the Word "Farm."

When the vendor never showed the vendee the land proposed to be conveyed, and all he did was to sell him his farm, the vendee has no right to suppose that the word "farm" included a tract of land three or four miles away from the principal tract of land.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

February 23, 1881.

OPINION BY JUDGE PRYOR:

James Mattingly, or rather his administrator, is not a party to the appeal, and the case will be considered alone with reference to the rights of H. C. Mattingly, he being the only appellant. It is evident from the testimony in this case that neither the appellant nor his father were informed of the fact that a conveyance had been made of the land, the sale of which is the subject of controversy; and this fact, taken in connection with the contents of the bond

executed to the appellant, and the oral testimony as to the land actually sold, leaves but little doubt as to the extent of the purchase made, and that was the principal tract and the timbered land adjacent or but a short distance from it. That the contract was made with James Mattingly for the benefit of his son is clearly shown; and neither one of the two (the father and son) examined any other land, or regarded themselves as having purchased any other land, than the two tracts; and the description given of the land in the bond, as being all the land owned by the vendor in Breckinridge county, must have been inserted by mistake, or with a view of embracing other tracts than those really sold. The parol proof shows what the sale was, and such a bond is susceptible of being explained by parol testimony. The vendor seems to have had the land surveyed without notice to the parties, and although he swears that the appellant was present the proof conduces to show that he was not present and never assented to it.

B. Wathen, the vendor, says he never showed appellant or his father any part of the land, and all he did was to sell him his farm. If such was the case the appellant certainly had no right to suppose that the word farm included a tract three or four miles off from the principal tract sold and the singular contents of the bond conduces to show that Wathen was of the same opinion, and for that reason caused the execution of the bond evidencing the sale of all the land he owned in the county.

This was certainly not the contract as proven by any of the parties. It is true that Wathen swears that the appellant lived near the land, but the proof shows he lived many miles away, and had not been in the vicinity of the land more than twice before he bought, and then for a very short time. B. Wathen, the vendor, knew when he had the deed recorded that the appellant would not accept it, and without even making him a tender of the deed, seems to have consummated the entire agreement by having the deed recorded as if he were the only party in interest. The 183 acres and the 50 acres was the only land sold, and while there may be some circumstances indicating a contrary conclusion, the decided weight of the testimony is in favor of the appellant on this branch of the case.

We have as little doubt as to the branch of the case involving the amount paid on this land. B. H. Wathen's version of the payments is correct, and it is plain that the $900 receipt was embraced

in the receipt for $1,593.39. After the $900 was paid, Mattingly paid $400 in cash and an order given him by McGill on Wathen for $293.39, making $693.39, and this added to the $900 makes $1,593.39, the amount of the large receipt. If the version of the appellant is true, the land having been purchased in payments, he was paying Wathen a large sum of money before it was due. He gave his note for $2,000 payable January 1, 1871, when, if he had paid as much as he says was paid, the note should have been for a little more than half of that sum. All that is owing by Mattingly is balance due, if any, after deducting the payments made on the tract sold; the tract including the two pieces is 233 acres at $25 per acre. The conveyance, having been made to the three tracts or pieces of land and never accepted by the appellant, should be held void, and the appellee permitted to amend his petition with proper allegations tendering a deed for the land sold, and this, if properly made, should be accepted and the lien enforced.

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

Lewis & Fairleigh, Kinchelve & Eskridge, for appellant.

G. W. Williams, J. C. Walker, for appellee.

THOMAS ROUNTREE *v.* JOHN W. LEWIS.

Right to Easements.

Where a spring located on or near the dividing line between two landowners has been for a long period of time recognized as a partnership spring, and verbal assurances have been made by each immediate vendor to his vendee that the spring was a partnership spring, and that the owners of both tracts were entitled to use the water, they each have a right to its use; and if the correct boundary line disclosed that it is located on one side of the line, the owner of the tract on the other side has an easement in the use of the spring that he can not be deprived of without his consent.

OPINION BY JUDGE HARGIS:

APPEAL FROM EDMONSON CIRCUIT COURT.

February 23, 1881.

By the accumulation of mud and sand in the spring the location of the water has been changed a few feet from its position when

the land was sold by Owens to Spearman and Parrish and Hamilton. All that is needed to bring the water back to its proper and natural locality is to clean out the spring. But the appellant fenced it up, and claims that he is entitled to its exclusive ownership and use, because, first, the water is upon his land; second, its use by appellee has been merely permissive; and, third, the spring issues a flush branch from which the appellee can obtain water equal in temperature and purity to that of the fountain itself.

While the mud and sand have somewhat altered the locality of the water, and the evidence tends to locate the spring on the appellant's side of the line, the deed from Owens to Hamilton and from the latter to Tarter show a deflection in the line so as to include on appellee's side of it a part of the water, which all the owners of both parcels of the original tract on which the single spring is situated, down to the appellant, have used in common. They, without exception, concur in the statement that it was used and recognized as a partnership spring, that verbal assurances were made by each intermediate vendor to his vendee that the spring was a partnership spring, and that the owners of both tracts were entitled to the use of the water; and such use was conceded to exist as a matter of right.

The appellant's vendor testifies that he told him, before he closed the trade with him, that only one-half of the spring belonged to the place, and that the appellant knew when he bought the land of him that he was only to get one-half of the spring. The appellee seems to have used the water from the spring as a matter of right, which was not forbidden nor denied until he and appellant had fallen out, and for the first time the latter enclosed it.

Although there is a flush branch running from the spring, and it may be as good water as that afforded by the spring, still the evidence tends to show that it was befouled by some one placing impure matter on appellant's side of the line and near the spring, and such practices would destroy appellee's use of the branch, which only flows for some thirty yards from the spring before it finally disappears and sinks into the earth.

The judgment does not alter the line nor take from appellant his ownership of the land upon which the spring seems now to be situated. It simply secures appellee in a reasonable enjoyment of the use of the water issuing from the spring, to be taken from the fountain head. We think the right to the use of the water accom-

panied the occupancy of the land and was properly enforced by the chancellor.

Wherefore the judgment is *affirmed.*

B. F. Edwards, for appellant.

W. E. Settle, T. B. McIntyre, for appellee.

PAUL VILLERRE *v.* GEORGE PAYNE.

[Abstract Kentucky Law Reporter, Vol. 2—230.]

Precaution to Prevent Injury to Others.

Even where servants and agents engaged in driving a cow along a highway did not know of her viciousness, but such animal, on reaching the streets of a town, attacked persons on the street long before it reached the place where plaintiff was injured by her, such agents in the exercise of ordinary prudence should have secured the cow by some means so as to prevent any attempt to injure others; and where they neglect to do so, but persist in driving her along a street with the knowledge of her enraged condition and she attacked and injured a person, her owner is liable for the damages caused by such injury.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 23, 1881.

OPINION BY JUDGE PRYOR:

The right of recovery was based on the ground that the appellee had been injured by a vicious cow owned by appellant while it was being driven by his agents, all of them knowing the dangerous character of the animal. It is doubtful whether a recovery could have been had on account of the negligent conduct of the agents in driving her, but for the statement contained in the answer in which it is distinctly averred that, in driving said cow at the time, the defendant or his agents used proper precaution, and such precaution as a prudent man would use, etc. Nor is it shown by appellant's proof that the cow was a gentle cow at home, and that he had no reason to believe that she would become unruly or vicious when she reached the streets of the city. But the proof further shows that as the agents were driving the animal it attacked those on the street long before it reached the place where appellee was injured, and forced them to take refuge by climbing the fences. Agents of ordi-

nary prudence should have seen the condition of the cow and secured her by some means so as to have prevented any attempt to injure others, but, neglecting this plain duty, they persisted in driving it, with a knowledge of its enraged condition, until the attack was made upon the appellee.

While the special findings may be to some extent inconsistent, it is evident that the jury meant to say by their verdict that these agents knew the enraged condition of the cow and failed to use the proper precaution to prevent injury to those who were passing on the streets of the city.

Judgment *affirmed.*

Russell & Helm, for appellant.

Young & Trabue, Lewis & Collins, for appellee.

HARRIETT DELAFIELD v. CITY OF BOWLING GREEN.

City Street Assessment.

The owner of a city lot through which the city desired to run and improve a street agreed to relinquish the lot in consideration that the city would convey to him a vacated street. Having stood by and allowed the improved street to be made under the agreement, and having full knowledge of the city's authority to assess a part of the cost upon him, he can not thereafter raise a question as to the regularity of the proceedings taken to collect the assessment without specifying wherein the irregularity consists.

Evidence Not Prejudicial.

Where a part of the evidence accepted and allowed by the court is inadmissible and should have been rejected, but still if all of such improper evidence had been stricken out there would still be enough to support the judgment, the error of admitting such evidence can not be held to be prejudicial to appellant.

APPEAL FROM WARREN CIRCUIT COURT.

February 26, 1881.

OPINION BY JUDGE HINES:

General E. M. Covington, being the owner of fifty acres of land, caused it to be embraced in the corporate limits of Bowling Green in 1850, and subsequently to be laid off into lots separated by streets and alleys. After his death, by a proceeding in court for that pur-

pose, these lots were apportioned between his heirs, and in the settlement appellant became the owner of Lot No. 49. Along the border of that lot was a street known as Potter street, which the city desired to close and dispose of, and in lieu thereof to open another street through the same lot. To enable the city to dispose of its interest in the old street an act of the legislature was passed (Acts March 18, 1871, Ch. 1662, § 7). It was then agreed between the city and appellant that, in consideration of appellant's permitting another street to be opened through Lot No. 49, the city would convey its interest in old Potter street to appellant.

Under this agreement the city caused the new street to be opened, graded and paved. After the completion of the new street, the paving being done at the expense of the lot owner, as authorized by the charter, appellant instituted this action against the city to enjoin the collection of the assessment, and to test the question as to the right of the city to make conveyance of old Potter street. The pleadings do not deny the title of the city to the street, but, upon this point, raise only the question as to the authority of the city to make title as against the public, and not as against a claimant of the fee in reversion. The substance of the petition as to the injunction is the charge that the city is proceeding illegally and informally to collect the assessment. There is no allegation of specific defect or irregularity in the manner of making the assessment or in the proceeding to enforce its payment, nor is any question made as to the authority of the city to make the improvement and assess its cost upon appellant. On trial, the temporary injunction was dissolved, and appellant required to accept a conveyance of old Potter street, and from that judgment this appeal is taken.

We deem it unnecessary to enter into a discussion as to the power of the city, under direct legislative grant, to close up streets in which it owns the fee, and to make conveyance of them so as to vest the absolute title in the vendee, since neither the pleadings nor the evidence raise any such question. Appellant did not contract for an absolute fee simple title to old Potter street, but only for such right as the city had to the use of the street, and that appellant unquestionably has. Appellant's title and that of the city come from the same source, and with that title appellant was perfectly familiar. There was no warranty, no fraud and no deceit, but clearly an agreement in good faith to accept whatever right the city had, upon the faith of which agreement the city made the improvements

on the new street. This knowledge and acquiescence estops the appellant to question the city's title.

Appellant, having stood by and allowed these improvements to be made under the agreement and with full knowledge of the authority of the city to assess the cost upon appellant, can not now raise the question as to the regularity of the proceedings taken to collect the assessment without specifying wherein that irregularity consists. The right to do the thing not being denied to the city, the burden of proof is on appellant to establish a cause for interference by the court. In this she has failed. There is nothing in the case to show any irregularity that would invalidate the proceedings of the city to subject the property. The injunction was properly dissolved.

Appellant was not entitled to costs. Her action was not in form for the purpose of compelling a conveyance, but rather to determine the right of the city to make the conveyance, but if it had been in that form the costs go as an incident to the judgment against the unsuccessful party. Beside, the evidence does not show the city in default in not tendering a conveyance that appellant has never manifested a willingness to accept.

Some portion of the evidence accepted should have been rejected, but when all of such improper evidence is stricken out there is enough to support the judgment. Its admision was not prejudicial to appellant.

Judgment *affirmed.*

H. T. Clark, for appellant.

B. F. Proctor, for appellee.

ALFRED JACOBS' EXRS. ET AL. *v.* JAMES FORD.

Filing Amended Answer and Cross-Petition.

A defendant, in a suit for settlement between partners, after the plaintiff has given his deposition on application, should be allowed to file an amended answer and cross-petition for the purpose of conforming the pleadings to the facts proved; and when he is not allowed to do so he should not be criticised for failing to prove material facts not probable under the pleadings on file. In a settlement between partners where there are a large number of items, the court should refer the case to a commissioner for examination.

APPEAL FROM BOURBON CIRCUIT COURT.

February 26, 1881.

OPINION BY JUDGE HARGIS:

Dixon, Jacobs and the appellee, Ford, as a silent partner, formed a partnership for the purpose of buying cattle and shipping them to New York, under the firm name of Dixon & Jacobs. They seem to have bought and sold cattle to the extent of about $100,000. On the 3d day of December, 1875, they undertook to make a full settlement of the partnership affairs, with the mutual agreement to correct any errors or mistakes that might be committed in the settlement.

The appellee claims that they fully settled, and on that day it was ascertained the partnership had sustained a loss of $4,649.52, one-third of which, amounting to $1,549.50, was charged to him, and that he had paid out for the firm $3,540.21 in excess of the sum expended for it by his co-partners. After deducting his share of the loss from the excess paid by him, there was due to him $1,991.21, for which Dixon and Jacobs gave him their joint check, which he immediately indorsed for a valuable consideration to the Northern Bank of Kentucky at Paris.

The appellants shortly afterwards notified the drawee not to pay the check, and it was regularly protested; thereupon the Northern Bank instituted an action upon it against Dixon, Jacobs and Ford. Subsequently Ford discharged a personal judgment rendered against him by default in favor of the bank, and in an amended answer claims the amount he paid the bank against the appellants.

Hereafter the question raised as to the faith of the transaction between Ford and the bank will not be noticed, as the final result of the litigation must determine which party shall pay its costs, in which it is not now interested.

The appellants filed an answer and cross-petition, in which they aver that the settlement of December 3, 1875, contained several errors and mistakes against them amounting to more than the check of $1,991.21. The appellee gave his deposition on the 9th of April, 1877, and on the 20th appellants moved to be allowed to file an amended answer and cross-petition. Their motion was overruled, to which they excepted, and at the next term renewed the motion to file their former and an additional amendment, which was denied, and they again excepted. On the 27th of April, 1878, they offered an additional amendment for the alleged purpose of conforming the pleadings to the facts proved, but this was also refused, and at the

following April term, 1879, judgment was rendered for the appellee for $1,442.21, with interest from the date of the check, from which judgment the appellants prosecute this appeal. Pending the suit Alfred Jacobs died, and it was revived against his personal representative. As to John Jacobs it was adjudged that he was not a partner.

The appellee admits that there was a mistake of six cattle worth $549, which he did not account for in the settlement. It appears in the rejected amendments and by the appellee's testimony that on the 28th of September, 1875, there were purchased 32 cattle of Harrison Berry at the price of $3,010.90, and 16 cattle of Laban Becraft at $1,242.72. It is substantially alleged in those amendments that Dixon and Jacobs, before these purchases were made, sent to appellee a check for $5,000, out of which he paid Berry the price of his cattle, but did not pay Becraft for his. It is sufficiently shown that Dixon and Jacobs, on the 18th of October, 1875, gave to appellee a check for $1,242.72, the exact price of Becraft's cattle, to whom the appellee indorsed it in payment for the 16 cattle bought of him. What appellee did with the remainder of the $5,000 check, of date September 27, 1875, after paying Berry, does not appear, nor does he attempt to explain what he did with it. So it is very clear, as the record now stands, that the appellee should be charged with the remainder of that check, amounting to $1,989.10, with interest from the date of the check.

In his deposition the appellee testifies that all the proceeds of sale of all the cattle by the firm went into the hands of Dixon and Jacobs, and that he did not receive a cent in any way from the sales. But they allege, in effect, in their amendment last tendered, that the appellee received for sales of partnership cattle the sum of $4,087.19 on the 30th of August, 1875, from H. B. Burchard, and exhibited his check to the appellee for that sum. Without denial or explanation the appellee should be charged with the amount of that check, which shows he indorsed it, and, the inference is, received the money on it. The evidence establishes the fact that John Jacobs was an employe of the firm, and each partner should be compelled to pay an equal amount of the value of his labor.

The appellee in his deposition denies that there were 89 cattle in a lot bought of Harry Berry, which were shipped about the 19th of October, 1875, but says there were 87, and two purchased from Stoner made the 89, and that the Berry cattle cost $8,522 and

Stoner's $174.50, which would make a total of $8,696.50. But Dixon and Jacobs aver in the amendment offered April 20, 1877, that appellee received 89 cattle, and exhibit a quotation from an alleged letter of appellee acknowledging that there were 89 of the Berry cattle. If he wrote the letter some explanation, at least, is necessary as to the two cattle, or he should be charged with their value.

There are a number of other items claimed by appellants, and a claim upon the part of appellee for what is termed "draw backs," and some indications of a further claim on his part as to other items, none of which, however, will be considered on account of the unsatisfactory condition of the pleadings and proof.

As the court refused to allow any of the amendments offered by appellants to be filed, and rejected all the evidence irrelevant to the matter set out in the cross-petition of the appellee, no presumption should be indulged against him because of his failure to offer any explanation of the remainder of the check for $5,000 given to him by Dixon and Jacobs, and the Burchard check, until he be allowed an opportunity to answer the appellants' amendments and prepare his cause.

Wherefore the judgment is *reversed* and cause remanded with directions to allow appellants to file the rejected amendments, and, with a view of settling the partnership transactions, permit either party to file an appropriate pleading for that purpose, and refer the cause to a commissioner, with power to make a full report thereon, and for further proceedings not inconsistent with this opinion.

Cunningham & Turney, for appellants.

W. H. Cord, J. B. Houston, for appellee.

JOSEPH SUTTON *v.* W. H. PERKINS ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—233.]

Sufficiency of Attachment Bond.

When a demand in an attachment suit is for $780 and the bond is in the sum of $1,400, the court, nothing else appearing, will presume it sufficient.

Property of Subtenant Liable for Rent.

In a contest between a landlord and a subtenant the personal property of the subtenant on the premises is liable for the rent accruing after he entered, and a contest between the tenant and subtenant can not regulate the amount of the landlord's recovery

unless he has accepted it in lieu of his contract with the tenant. The fact that the landlord received a portion of the rent money paid by the subtenant on his contract with the tenant is not evidence of an acceptance of the contract between the tenant and subtenant.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 26, 1881.

OPINION BY JUDGE HINES:

The bond executed to obtain the attachment was sufficient. The statute prescribes no form for a bond to obtain an attachment for rent, but provides that the bond shall have good security to indemnify the defendant, that is, to secure him against any loss by reason of the levy of the attachment. That the bond is given in a certain sum does not invalidate it, provided the sum is large enough to secure the defendant against loss; and where, as in this case, the amount sought to be recovered is $780, and the bond is in the sum of $1,400, the court, nothing else appearing, will presume it sufficient. But if that were not true, the bond subsequently tendered and accepted, conditioned to indemnify, was authorized by Buckner & Bullitt's Civ. Code (1876), §§ 198, 682. Nor does it matter that at the time the last bond was given Hill was dead. No objection is made to the sufficiency of the security, nor is any reason perceived why the bond should be held invalid because the name of the dead partner appears in the firm name to the bond.

The answer discloses no equitable matter that is properly cognizable in equity, nor does it disclose where there is another suit pending with which this case should be consolidated. There is no bill of evidence in this case, and nothing in the pleadings to show that the amount for which the judgment was rendered was not for rent due and to become due within a year from the date of the attachment, and nothing to show that all the rent did not accrue after the interest of the subtenant, Sutton, began. In a contest between the landlord and the subtenant the property of the subtenant upon the premises is liable for the rent accruing after he entered. This is not a question of priority of liens, such as is contemplated by Gen. Stat. (1879), Ch. 66, Art. 2, § 12.

The contest between the tenant and the subtenant can not regulate the amount of the landlord's recovery unless he has accepted it

in lieu of his contract with the tenant. The fact that the landlord received a portion of the rent money paid by the subtenant on his contract with the tenant is no evidence of an acceptance and adoption of the contract between the tenant and subtenant.

Judgment *affirmed.*

McHenry & Haynes, for appellant.

Owen & Ellis, for appellees.

JAMES G. PHILLIPS *v.* D. W. PHILLIPS' ADMR.

[Abstract Kentucky Law Reporter, Vol. 2—232.]

Award and Arbitration.

Where a will is made and probated, giving an estate to two people, and an administrator with the will annexed is appointed and enters suit for possession of the assets from a former agent of the testator, and the agent also brought a suit in equity for a settlement of his accounts as agent, it was held to be entirely proper, after such causes had been consolidated, for such parties to enter into an agreement to arbitrate the matters in controversy, and when an award is made based on such an agreement it may be pleaded in said cause as a defense.

Sufficiency of an Award.

Where an award is made by those selected as arbitrators in a pending cause, which states that they found stocks, notes, etc., in the agent's hands of the value of about $140,500, including about $16,000 in bad debts, and show item by item how they arrived at the aggregate sum, such an award is not subject to the objection that it is indefinite; and where no bad faith or fraud is shown such award will be final and binding on both parties.

APPEAL FROM MARION COURT OF COMMON PLEAS.

February 26, 1881.

OPINION BY JUDGE PRYOR:

There are many questions raised by counsel on each side of this controversy that we do not propose to consider, as in adopting either view this court would not be controlled by it when passing on the real question raised by this record. The devisor, D. W. Phillips, died, leaving two instruments of writing, each purporting to be his last will and testament. The first was executed in the year 1869,

and the other in the year 1877. He died in July, 1878, and after his death the appellant, who was left his executor by the paper of 1869, and who had been his agent in the control of a large estate for many years, offered the first paper for probate. The paper of 1877 was also offered for probate and resisted by the appellant, and on the hearing was admitted to record as the last will of the decedent. By this last paper, which was finally established as the will of Phillips, H. B. Ray and Benjamin Dooin, two nephews of the devisor, were his sole devisees, the will, however, making one H. B. Phillips the trustee for Benjamin and his family, and as such he was to control, or had the right to control, that part of the estate devised to Benjamin Dooin for the latter's use and that of his family.

After this controversy had originated in regard to this will, the appellant, James G. Phillips, filed a petition in equity for a settlement of his accounts as the agent of the devisor, running through a number of years, and also seeking to retain the property in his hands, claiming that he was made the executor of the first paper, and that it was the last will of the decedent. This petition was filed in September, 1878. On the 2d of October, 1878, N. S. Ray, who had been appointed administrator with the will annexed of Phillips, brought his action against the appellant to recover all the estate of the decedent that the appellant claimed to hold and control as agent, amounting in value, as is alleged, to the sum of $125,000.

The two actions were consolidated, and during the progress of the case a pleading was filed by the appellant, setting up an agreement to arbitrate the matters in controversy, and alleging that an award was made in accordance with the agreement setting up the rights of all the parties, and the award is made part of that pleading. The parties to that award are H. B. Ray and H. B. Phillips, trustee for Benjamin Dooin. Dooin and H. B. Ray being the sole devisees, and H. B. Phillips being the trustee of Dooin, we see nothing to prevent H. B. Ray, in his own right, and H. B. Phillips, as trustee, from referring the whole matter in dispute to arbitration. This agreement to refer was made on the 28th of August, 1878, and recites that it was for the purpose of settling the accounts of J. G. Phillips as the agent of the decedent, and fixing his compensation. Samuel Spalding, N. S. Ray and Fletcher Wilson were agreed upon as arbitrators to settle his accounts and all other matters growing out of the agency, and the award, made in writing, would be final and binding between the parties. The only reservation made in this

agreement was that it was not to affect the validity of either will, each party then claiming that the paper represented by him was the last will.

These arbitrators in September, 1878, reported, in a writing signed by each of them, making the amount in the agent's hands $140,528.05. A copy of the award was delivered to each of the parties. A demurrer was sustained to the pleading setting up this award, and this is the principal question raised in the case. It was urged in argument here that the award was too indefinite and uncertain, and for that reason constituted no defense. They state in a general way that they found stocks, notes, etc., in the agent's hands of the value of about $140,500, including about $16,000 in bad debts, etc. The arbitrators, however, proceed to state item by item, and show how they arrive at the aggregate sum, and no award could well be more definite. They give the precise amount of railroad stock, of bonds, of stock in banks, of promissory notes, of coupons of each in bank, and of insolvent claims. The award on its face evidences investigation by the arbitrators, and without any bad faith attributed to them, or any fraud or wrong practiced by the appellant, we must adjudge that such an award is final and binding on both parties. N. B. Ray, one of the arbitrators, is the administrator with the will annexed and the party instituting this action.

It is said in argument that the record shows the fact that he signed this award after he qualified as administrator, but it is urged that as he did not agree to the reference as administrator, and had not then been appointed, it is not binding on him. This, perhaps, might avail the administrator if he had declined to go further after his appointment than to decline by reason of his fiduciary relation to act as an arbitrator, but failing to take this step, and having signed the paper after his appointment, he should be estopped to deny the validity of the award unless upon some equitable ground. Besides, the sole devisees were parties to the award, and there is no pretense that this fund is necessary to pay creditors. The parties in interest have entered into the agreement and this money, or the property in the hands of the appellant, having been turned over to the administrator, we think this answer presented a complete defense to the action by the administrator. It is conceded that the appellant is not in default in complying with the award, and, the record showing that he has surrendered the property in his hands, the court below should have overruled the demurrer. These con-

solidated causes should be treated as actions for the settlement of the accounts of appellant, and the reply of appellee and rejoinder of appellant as amendments to their original pleadings. The award is the evidence of the settlement, and no reference is necessary or should be made so long as the award itself is not assailed on some equitable ground.

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

Russell & Arritt, William Lindsay, for appellant.

E. E. McKay, W. B. Harrison, for appellee.

NATHAN GENTRY ET AL. *v.* WILLIAM ABSHIRE.

[Abstract Kentucky Law Reporter, Vol. 2—231.]

Attachment for Rent.

It is not enough that plaintiff should believe, in an attachment suit, that he would lose his rent if the attachment should not issue, but he must go further and show that there existed reasonable grounds for that belief.

Judgment Not Palpably Against the Evidence.

In an action at law where a jury is waived and submission is to the court, its judgment will not be disturbed unless it is palpably against the evidence.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

February 26, 1881.

OPINION BY JUDGE HARGIS:

The law and facts were submitted to the court, and after hearing the evidence it discharged the attachment. The rule has often been laid down that in an action at law, where a jury is waived and the cause submitted to the court, its judgment will not be disturbed unless it is palpably against the evidence. The burden was upon the appellants to show that there existed reasonable grounds for the belief that they would lose the rent unless an attachment issued.

Proving that they believed they would lose their rent is not sufficient. They must go further and show that there existed reasonable grounds for that belief, otherwise tenants would be subject to be

harassed with attachments whenever a suspicious or mistaken landlord saw proper to invoke that strong and extraordinary remedy.

The testimony sustains the judgment and it is *affirmed.*

T. J. Scott, for appellants.

Smith & Little, for appellee.

HENRY GREENE *v.* THOMAS SOUTHWORTH.

[Abstract Kentucky Law Reporter, Vol. 2—233.]

Consolidation of Causes.

When a number of actions between two parties have been consolidated, the judgment in the consolidated cause will be treated as if there was but one action or one petition containing several counts.

Execution of Note on Sunday.

Where a note is executed on Sunday in lieu of another note for a like amount, its validity not being in question, and the old note delivered up to the debtor, before he can avoid the obligation to pay he must return, or offer to return, the consideration received for it, which in that case is the old note.

APPEAL FROM OWEN CIRCUIT COURT.

February 26, 1881.

OPINION BY JUDGE PRYOR:

The actions between these parties having been consolidated, the judgment will be treated as if there was but one action or one petition containing several counts, and as the judgment is final as to some of the claims the case will be disposed of on its merits. While it was, no doubt, intended by the court below to credit the sum due for the land by the deficit in the quantity, it has not been done, and for that error must be reversed. There is some conflict in the testimony as to the number of barrels of whisky delivered by the appellant to the appellee.

The amended answer of Greene in case No. 1252 only claims a credit of 28 barrels of whisky at a fixed price, and this sum has been adjudged for the appellant, and we find no other credit for whisky paid on the land asserted in any pleading by the appellant. The other whisky (three barrels) appellant has credit for on the Belden notes. The fourth barrel is the only one in controversy, and whether appellant received that or not is involved in much

doubt. Having accounted for 31 barrels, and the proceeds or value having been credited to the account of appellant and applied by the chancellor, we see no reason for disturbing the judgment in that particular. As to the $25 difference in the exchange of lands, we are satisfied no legal obligation rested on appellee to pay it, and if there did, it seems from the proof that the appellant failed to comply with his contract with Southworth in reference to the condition of the horse, and if not, his remedy is against him for the money. The judgment having been rendered at the November term, 1875, on the note for $226.30, for all the amount not credited the appellant on the final hearing, and having been allowed a credit for $191.65 for whisky, a judgment should have been then rendered for the amount due on that part of the note in contest, and on the return of the cause the judgment should be so entered with reference to this note.

As to the execution of the note on Sunday, it seems that it was executed in lieu of another note for a like amount, its validity not being questioned, and the note delivered up to the appellant. Before the latter can avoid the obligation to pay, he must return or offer to return the consideration received for it. It would be unjust to cancel the note in controversy and permit him to retain the note delivered to him.

For the errors indicated the judgment is *reversed* and cause remanded for further proceedings.

Strother & Orr, for appellant.

Geo. C. Dane, for appellee.

[Cited, *Hale v. Harris,* 28 Ky. L. 1172, 91 S. W. 660, 5 L. R. A. (N. S.) 295.]

MARTHA A. WALLENDER *v.* WINTERSMITH, WALKER & CO.

[Abstract Kentucky Law Reporter, Vol. 2—232.]

Husband and Wife—Husband's Creditors.

The fact that a husband many years ago received money from his wife's father for purposes of investment in the wife's name, but such purposes were not carried out by him, although he had promised his wife to do so, will not, as against the husband's creditors, entitle the wife to claim the ownership of real estate purchased with such money and conveyed to the husband.

APPEAL FROM LOGAN CIRCUIT COURT.

February 26, 1881.

OPINION BY JUDGE PRYOR:

Although the estoppel is not pleaded in this case the contract of the appellant conduces strongly to show that the conveyance to her from Riley was never delivered to nor accepted by her from her husband as vesting her with any interest in this property. It was not delivered to the appellant by Riley, and the husband of the appellant, who must have known more of his pecuniary condition than any one else, regarded the act of passing this title to his wife as a wrong upon his creditors. This fact he recognized, as well as the obligation he was under to her, and her own statement shows the reason why the deed was not delivered and recorded.

The acts and conduct of the wife and husband were all perfectly consistent with the motives influencing the husband with reference to the property. When he became a bankrupt and was compelled to surrender the property owned by him this house was listed as a part of the estate, and in obtaining his final discharge, being in the occupancy and asserting his right to a homestead, he was allowed one thousand dollars out of the proceeds of the estate in lieu of homestead. Besides, when this house and lot were sold, the appellant and her husband were present, as well as the attorney for her father. Her brother was also present, and not one word was uttered by any of them by way of objection to the sale being made. No claim of title was asserted by the appellant, but the purchaser permitted to execute his bonds for the purchase-money.

It is true that this purchaser and Browder, the assignee in bankruptcy, knew that Williamson was not invested with the legal title; both had been informed of that fact. But at the same time they knew that Riley had exchanged with Williamson this house and lot for other property, and would have to convey the title. There is nothing in the record conducing to show that there was any reason for believing that the appellant had any claim upon it, but on the contrary every action on the part of both the appellant and her husband was an invitation to others to bid at the sale, and there was nothing that transpired to place any one on inquiry with reference to the claim of the wife. That the husband had many years prior thereto received money from the wife's father for purposes

of investment in the wife's name may be true, but these purposes were never complied with; and such agreements between husband and wife as to the disposition he will make of the wife's money after having reduced it to possession will not be enforced against the claims of creditors, as has been repeatedly decided by this court.

We are satisfied after a careful examination of the record that the chancellor acted properly in dismissing the appellant's petition.

Judgment *affirmed.*

Golladay & Frazer, for appellant.

William Lindsay, for appellees.

[Cited, *Wright v. Williams,* 25 Ky. L. 1377, 77 S. W. 1128.]

H. O. EARL ET AL. *v.* J. C. PORTER ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—316.]

Purchaser at Judicial Sale.

The title of a purchaser of real estate at judicial sale is unaffected by an appeal from a judgment directing the sale and not from the order confirming it.

Order for Sale of Real Estate.

It is not error to decree a sale of an entire tract of land where to divide it would impair its value.

APPEAL FROM HICKMAN COURT OF COMMON PLEAS.

March 2, 1881.

OPINION BY JUDGE HINES:

As the appeal here is from the judgment directing the sale, and not from the order confirming it, a reversal could not affect the title of the purchaser, notwithstanding the fact that the purchaser was an attorney of record in the case, and must be presumed to be cognizant of whatever defect there may have been in the proceeding. Although the purchaser may be a party to the action he acquires the same rights by purchase under the decree as if he were a stranger to the record. The case of *Miller v. Hall,* 1 Bush (Ky.) 229, is practically overruled in *Yocum v. Foreman,* 14 Bush (Ky.) 494.

There was no error in decreeing a sale of the entire tract of land. It is alleged in an amended petition, and not denied, that to divide

the tract would impair its value. Buckner & Bullitt's Civ. Code (1876), § 694, authorized such a sale when the court is satisfied "by the pleadings," etc., that the land can not be divided without materially impairing its value. Besides, it does not appear that appellants' rights have been prejudiced, since the whole tract sold for less than the debt.

As against H. O. Earl, the decree for the ten per cent. interest, founded upon his agreement to pay that amount of interest and enforcing its payment out of the land on which the debt was a lien, is not erroneous, and as to Mrs. Earl it is not a reversible error, because when that amount is deducted from the judgment it leaves the purchase-price insufficient to satisfy the lien debt.

There was no error in decreeing the sale of the whole tract of land, because Mrs. Earl was a joint owner. The whole of the land was bound for the payment of the debt, and her liability could be enforced in no other way than by a sale of her interest, as no personal judgment could be rendered against her.

Judgment *affirmed.*

William Lindsay, for appellants.

W. B. Bradley, Geo. Husbands, for appellees.

[Cited, *Talbott v. Campbell,* 23 Ky. L. 2198, 67 S. W. 53.]

THOMAS KIRKLAND ET AL. *v.* JOHN W. BURTON.

[Abstract Kentucky Law Reporter, Vol. 2—319.]

Principal and Surety.

A surety who has not paid his principal's debt is not entitled to foreclose a mortgage held to indemnify him against loss.

Release of Surety on Replevin Bond.

Where no execution is issued on a replevin bond for nearly two years after its execution, the surety is released from all responsibility.

APPEAL FROM WASHINGTON CIRCUIT COURT.

March 2, 1881.

OPINION BY JUDGE PRYOR:

While Burton was entitled to the benefit of the execution, etc., he could not be substituted to the rights of Phelps, as the latter

had incurred no liability for Kirkland that would authorize him to foreclose the mortgage. Phelps having become the surety of Kirkland, the latter, in order to indemnify him as such, executed the mortgage on the land adjudged to be sold. The surety never paid the debt for which he was liable, nor any part of it; and, the writing evidencing this liability being a replevin bond, and no execution having issued on it for nearly two years after its execution, the surety was released from all responsibility; and if Phelps could not enforce this mortgage lien, it necessarily follows that the sheriff who paid off the debt can not.

Besides, the liability of Phelps originated long after the passage of the act creating the homestead, and the liability of the sheriff long subsequent to the execution of the bond by Phelps, so in either state of case the appellant was entitled to a homestead.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

L. R. Thurman, A. Duvall, for appellants.

R. J. Brown, for appellee.

CORNELIUS RILEY *v.* JOHN HINES' CURATOR.

[Abstract Kentucky Law Reporter, Vol. 2—318.]

Limitations.

Where a claim is barred by the statute of limitations, evidence of a new promise to pay the debt is held to be a failure of proof.

Pleadings on Claim Barred by Limitation.

When the statute of limitations is pleaded as a defense, and a new promise in avoidance is relied upon, it must be alleged, in the original or an amended petition, if the new promise be made after the limitation shall be complete, for the reason it is a new cause of action and must be declared upon as a basis to authorize proof upon it.

APPEAL FROM LOGAN CIRCUIT COURT.

March 2, 1881.

OPINION BY JUDGE HARGIS:

The appellee, who was the plaintiff below, declares on a note which was clearly barred by limitation, nothing else appearing, and, in anticipation of the plea of the statute of limitations, alleged that the appellant had, by a letter written at a certain date, which was

within fifteen years after the note fell due, promised to pay it. The appellant answered and pleaded limitation in bar of the note and non est factum to the letter.

The parties went to trial, and the appellee declined to read the disputed letter, upon which suspicion was cast by his failure to present it in evidence and the offer of the appellant to prove it to be spurious, and introduced testimony of a verbal promise to pay the note claimed to have been made at a wholly different time and prior to the date of the letter by the appellant, who objected to the admission of the evidence. Having appealed from a judgment on a verdict against him for the amount of the note, he insists that there was a failure of proof to sustain the alleged cause of action.

In this position, we agree with appellant. Where the action was to recover a debt barred by a release, evidence of a new promise to pay the debt was held to be a failure of proof, in *Moore v. McKibbin*, 33 Barb. (N. Y.) 246. Newman on Pleading and Practice, p. 722, citing this case, lays it down that the same rule would no doubt be applied if the original cause of action was barred by the statute of limitations.

If limitation be pleaded and new promise in avoidance be relied on, it must be alleged, either in the original or amended petition, if the new promise be made after the limitation shall be complete, because it is a new cause of action and must be declared on to authorize the hearing of proof upon it.

But, if the new promise be made before the completion of the period of limitation, it is not necessary to allege it, under the old code, to render evidence of its existence admissible; yet, if a party alleged a specific promise in writing to avoid the anticipated plea of limitation, which would manifestly constitute a complete bar to the action without it, there is no reason why he should not be confined to the promise selected and solemnly relied on by himself. But there are many good reasons against a departure from this rule, which can find no better illustration than is furnished by the facts and management of this action in the trial court.

Under our present code, while it would have been unnecessary to embrace the new promise in the petition, yet, upon the affirmative plea of limitation being presented, it would have been necessary to reply and either deny the plea or confess and avoid it by alleging a new promise or some other matter in avoidance.

There is no difference in the elements necessary to constitute a

new promise made within a period of limitation and subsequent to its completion. In either case the same quantity of evidence is necessary to sustain the promise which constitutes in both predicaments the substantive cause upon which the promise must succeed. We are therefore of the opinion that the evidence of an oral promise was irrelevant to the issue formed by the pleadings.

Wherefore the judgment is *reversed* and cause remanded with directions to grant the appellant a new trial and for further proper proceedings.

R. S. Bevier, for appellant.

J. H. Bowden, for appellee.

KELLY SUTTON *v.* MARTHA A. PUCKETT.

[Abstract Kentucky Law Reporter, Vol. 2—316, 319.]

Release of Homestead.

A mortgage which purports to convey the whole estate in the mortgaged property destroys the homestead, whether the fee be in the wife or in the husband.

Acknowledgment of Mortgage.

Where an acknowledgment of a mortgage is taken before a deputy clerk, and the clerk writes out the certificate and puts the mortgage and certificate to record but fails to sign the certificate either on the record or the mortgage, after his term of office expires his successor may legally sign the name of the former clerk both to the mortgage certificate and to the certificate on the record, and such mortgage will have the same force and validity that it would have had if signed by the clerk who wrote the certificate.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

March 2, 1881.

OPINION BY JUDGE HINES:

The mortgage in this case purports to convey the whole estate in the mortgaged property. The homestead right is thus destroyed, whether the fee be in the wife or in the husband. *Wing v. Hayden,* 10 Bush (Ky.) 276.

The mortgage was acknowledged before a deputy, who made his indorsement in the usual form, and afterwards the clerk wrote out the certificate as if the acknowledgment had been made before him.

put the mortgage and certificate to record, but failed to sign the certificate written on the mortgage or on the record. After the term of service of the clerk had expired, the mortgage remaining in the office, his successor signed the name of the former clerk both to the mortgage certificate and to the certificate on the record. The mortgage was executed while the Revised Statutes were in force. 1 Rev. Stat. (1867), Ch. 24, § 27, authorizes such signing without prescribing the effect. The effect of this signing by the clerk of the certificate made by his predecessor is to give it the same force and validity that it would have had if signed by the clerk who wrote it. Otherwise the statute is imperative. Treating the certificate as if signed by the clerk who wrote it, there being no fraud charged upon the mortgagee, and no mistake alleged on the part of the clerk making the certificate, it is conclusive as to the fact of acknowledgment as certified. *Harpending's Exrs. v. Wylie,* 14 Bush (Ky.) 380.

Judgment *reversed* and cause remanded with directions for further proceedings.

M. Merritt, for appellant.

M. Yeoman, for appellee.

CHICK & DEUT *v.* J. H. TUCKER ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—311.]

Husband and Wife—Pledge of Wife's Note.

The husband is the real owner of a note given for the sale of his wife's land, but taken in his name and reduced to his possession, and he may pledge such note as collateral; and upon the death of the wife her heirs can not maintain a claim to such note.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 5, 1881.

OPINION BY JUDGE PRYOR:

While the lien for the purchase-money was retained in the original deed from Tucker and wife to Elliston and others, it is evident that when Tucker made the trade with Chick and Deut there was a change in the notes, and this was done in order to enable the parties to transfer to Chick and Deut their interest in the large note, or to

place it with them as a collateral. Some of the parties are evidently mistaken as to the nature of the transaction; but the version of the transaction, as detailed by the witness for the appellee, is perfectly consistent with the transaction itself, and this court will not disturb the judgment of the court below on this branch of the case. The land sold by Tucker and wife, it seems, was the land of the wife, and the notes payable to her, and afterwards sold and disposed of by the husband and wife in their business transactions. The note was pledged to the bank or to Benton to secure the payment of the amount due Benton for the Bullitt county land, and although the husband says it was without the wife's knowledge, still he had the note in his possession, and had been using it prior to the pledge for like purposes, and, we are satisfied, by the consent of the wife.

This land in Bullitt county, it seems, is claimed to have been purchased by the wife or for her use, although the notes of the husband were executed for the purchase-money, but whether so or not the husband pledged the note to Benton. The wife is now dead, and her right of survivorship or an equitable settlement is not involved; but on the contrary the husband is the real owner, and by right of survivorship entitled to the note or its proceeds. He had the note not only in his possession, but had pledged it; and, the wife dying, we see no reason for denying to the husband the right to dispose of it, and the chancellor will certainly do so for him in a case like this. The note was pledged to secure the payment of the notes due on the Bullitt county land, and when these notes are paid, the vendor having a lien, the husband is entitled to the note or its proceeds held by the bank as collateral only. It clearly appears that the land in lien for the purchase-money on the original sale of Tucker and wife is insufficient to pay or satisfy the several lines, and therefore the bank should be required to subject the Bullitt county land and what is left unpaid of the purchase-money. The lien to that extent can be enforced in conjunction with the lien of appellants on the land sold by Tucker and wife to Elliston. The case should be retained on the docket until the bank may ascertain by a sale of the Bullitt county land the extent of its interest in the $6,200 note.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Russell & Helm, for appellants.

Barnett & Noble, for appellees.

ELIJAH CARTER *v.* COMMONWEATH.

[Abstract Kentucky Law Reporter, Vol. 2—311.]

Larceny of Wild Animals.

One can not be guilty of stealing such animals as are fearae naturae and unclaimed, or of wild fowls at their natural liberty; and an indictment for unlawfully taking and carrying away pigeons is bad when it does not allege that the pigeons were tame and in the care and custody of the owner.

Former Conviction.

A former conviction must be specifically pleaded, whether presented as a defense to an indictment or inserted in the charge by the prosecutor with a view of increasing the punishment.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 5, 1881.

OPINION BY JUDGE PRYOR:

Larceny at common law can not be committed, says Wharton, of such animals as are fearae naturae and unclaimed, as deer, hares, or of wild fowls, and at their natural liberty; bees not secure in a hive are not the subject of larceny unless in the care and custody of their owners, or when they are tame or become domesticated. 2 Wharton's Crim. L. (11th ed.), §§ 1104-1110.

The indictment in this case charges the prisoner with the unlawful taking and carrying away twenty-three pigeons, the personal property of W. H. Honnaker, of the value of more than $10, and also charges that the prisoner had twice before been convicted of felony and sentenced by the judgment of the Fayette court. The jury, finding the accused guilty as charged in the indictment, and this being his third conviction of felony, returned a verdict of confinement in the state prison during his life, under a clause of statute authorizing such a punishment.

The indictment is defective, because it is not alleged the pigeons were tame and in the care and custody of the owner, in order that the court might know that they were the subject of larceny. In the case of the *Queen v. Cheafor,* 5 Cox C. C. 367, it was argued that pigeons in the prosecutor's dove-cote on her premises, where they could leave and return at their pleasure, were not the subject of larceny, and the court of Nottingham seems to have so adjudged,

but Lord Campbell said it was purely a question of fact for the jury whether the pigeons were tame and reclaimed. Nor is there any allegation in the indictment authorizing proof of a former conviction. A former conviction must be specifically pleaded, whether presented as a defense to an indictment or inserted in that pleading by the prosecutor with a view of increasing the punishment. The fact that the accused had been previously indicted for a felony, describing the nature of the offense, in a court having jurisdiction, that he was assigned and pled to the indictment, and was found guilty and sentenced, etc., are facts necessary to be alleged. The prisoner must know from the statements contained in the indictment the former convictions relied on.

The court erred in refusing to instruct the jury on the subject of petty larceny, as under the instruction given it was assumed that the accused was either guilty of grand larceny or entitled to an acquittal. The jury were told that if the pigeons were of the value of $10 or more the accused was guilty of grand larceny, and refused to permit them to consider the question as to the lesser offense. Although the proof conduces to show that the pigeons were worth a sum exceeding ten dollars, and there seems to be no proof to the contrary, yet the jury had the right to regard the value as merely speculative and not real, and therefore could have returned a verdict for a lesser offense. While the pigeons stolen were known as fan-tailed pigeons, the jury might not have attached a greater value to them than to the ordinary pigeon; at least, it was never permitted to pass upon the question. The proof of the confession made to the owner we think admissible.

Judgment *reversed* and cause remanded with directions to award a new trial.

A. K. Woolley, for appellant.

P. W. Hardin, for appellee.

BEN P. SMART *v.* ELIZABETH P. MONTCALM.

[Abstract Kentucky Law Reporter, Vol. 2—317.]

Conveyance of Life Estate.

In a conveyance to the mother of a grantor during her natural life, and after the death of the mother the whole of the property to go to grantor's wife and the children, if there should be any living

at the time of the death of the mother, the wife, although she had no children on the happening of the event, takes a fee simple title to the property; but when the conveyance provides that "if she should die leaving no children of the marriage, then the property to go to the right heirs of the undersigned, after the death of the undersigned," it means not that such title should pass to his right heirs if the wife survived him, but that it should so pass after his death in the event he survived his wife.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 5, 1881.

OPINION BY JUDGE PRYOR:

The conveyance of the house and lot to the mother of the grantor is for and during her natural life, and then a fee is attempted to be vested in the appellee (the wife of the grantor) and her children, if any living, at the death of the tenant for life. If there was nothing more in the conveyance than the clause "and after the death of the said Caroline (the mother) the whole of the property aforesaid is to go to Elizabeth P. Montcalm, wife of the undersigned, and the children, if there should be any living, at the time of the death of the said Caroline," there would be no doubt but that the wife, although she had no children on the happening of the event, would take fee simple title to the property, and such, doubtless, was the intention of the grantor; but as she might die without children prior to the death of the grantor, or in the event he survived her, he saw the necessity of reserving title in himself, and on the happening of such a contingency, he provided that "if she should die leaving no children of the marriage, then the property to go to the right heirs of the undersigned, after the death of the undersigned," not that it should pass to his right heirs if the wife survived him, but that it should so pass after his death in the event he survived his wife. He seems to have had no near relations, and after giving his mother a life interest, his object, as is manifest from the conveyance, was to secure the fee to his wife and children, and to reserve in himself an interest in the event of his surviving his wife and her dying without children.

While the devise to the wife by the husband of this same property after the execution of the conveyance may evidence his intention that his wife should own it absolutely, it can not be looked to in the construction of the conveyance. Besides, this conveyance

having been made prior to the adoption of the General Statutes, it may well be argued that the reservation of the estate in the grantor, with a clause in the conveyance that it should go to his right heirs after his death, did not divest the grantor of title, and his heirs would take by descent and not by purchase.

The judgment below is therefore *affirmed.*

J. Barbour, N. T. Crutchfield, for appellant.

Wm. Carroll, for appellee.

B. B. MULLINS ET AL. v. PENDLETON COUNTY COURT.

[Abstract Kentucky Law Reporter, Vol. 2—317.]

Settlement by Sheriff.

A settlement made by the sheriff purporting to be final can not be corrected or inquired into unless there is fraud or mistake alleged by the party attacking the settlement.

Pleading Conclusions.

A petition against a sheriff and his sureties, which does not allege an indebtedness on the part of the sheriff by reason of his obligation to the county, nor show what the covenants of the bond were and the defendant's failure to comply with its stipulations, is defective. An allegation that one bond was conditioned for the collection of the revenue and the other for the county levy constitute only the conclusion of the pleader. The undertaking should be specifically set forth.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 8, 1881.

OPINION BY JUDGE PRYOR:

Neither the petition nor amended petition in this case allege an indebtedness on the part of the principal by reason of his obligation to the county of Pendleton; nor are the covenants of the bond properly alleged in order that the court may determine whether there has been a failure on the part of the principal to comply with its stipulations. The allegation is that one was conditioned for the collection of the revenue and the other for the county levy. Such a statement is the conclusion of the pleader only, and to make the petition good the undertaking should be specifically set forth.

Nor is it alleged anywhere in the petition that a demand was

made by any one authorized to receive the money from the sheriff. While these defects might be cured by the answer and the petition held sufficient after verdict and judgment, this case must still be reversed, for the reason that it should have gone to the chancellor upon proper pleadings that he might correct the mistake, if any, made by the sheriff in his various settlements, and have a report from the commissioner as to the condition of the sheriff's accounts with the county. A settlement was made by the sheriff purporting to be final, and can not be corrected or inquired into unless there is fraud or mistake alleged by the party attacking the settlement. The attempted recovery in this case is based on a settlement alleged to have been had by the sheriff with the commissioner of the county court for the year 1875; but during the progress of the case the jury are required to investigate and pass upon questions arising out of other settlements in order to determine the extent of the appellants' liability.

The jury are required to find whether a mistake was made in a settlement with Brannan in which the sheriff was allowed credit by vouchers, for which he had received credit on a settlement with Minturn and Perrin, and as to this settlement the jury are told they can not find for the plaintiffs a greater sum than $2,660, the amount for which it is said the sheriff received double credit. All these matters should be investigated by a commissioner on pleadings directly attacking the settlement complained of.

It is improbable, or at least not practicable, for a jury to properly investigate such questions, and while any issue of fact may be submitted to them as to the validity of any claim, and a special finding had at the instance of either party, this class of cases should go to a competent commissioner in order that the chancellor may arrive at a just and proper conclusion as to the rights of the parties.

The judgment is *reversed,* with leave to either party to amend their pleadings, and cause remanded for further proceedings.

C. H. Lee, A. Duvall, for appellants.

Clarke & Simon, for appellee.

JAMES MCDANIEL'S ADMX. ET AL. *v.* JOHN H. CLEMENTS ET AL.

Construction of Will.

Where a devisor gives to his wife the accrued dividends which ex-

isted at his death, or that might thereafter accrue on twenty shares of bank stock in a named bank, his object was to invest her with the dividends or the interest on the shares of stock during her lifetime, without regard to the cessation of business by the bank; and when such shares are reduced to cost she should have their proceeds and be required to give bond for the purpose of securing the principal to those owning the shares subject to her life estate, and if such bond is not given the principal should be placed in the hands of a receiver.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 8, 1881.

OPINION BY JUDGE HARGIS:

The will of B. J. McDaniel gave to his wife, Malinda McDaniel, among other property, the accrued dividends which existed at his death or that might accrue thereafter on twenty shares of bank stock in the Southern Bank. The object of the testator was to invest her, as a means of annual support, with the dividends or interest which had accrued on the twenty shares of stock, and which might be produced by it during her lifetime without regard to the cessation of business by the bank.

It was the duty of the court to require her to give bond, for the purpose of securing the principal of the money which came to her hands as the proceeds of the twenty shares of bank stock exclusive, or the dividends or interest thereon, to the representatives and creditors of the deceased son and the daughter, who are entitled to it at her death. Upon her failure to execute such bond the court should have required its payment into court, and placed the same in the hands of an intelligent receiver, with directions to loan or invest the money with safe security, at a rate of not less than six per cent. interest, and for the highest conventional rate if it could safely be done, so as to be able to collect and pay to her the interest annually, during her life.

It was error to order a sale, destruction or alteration of the principal fund from which the testator intended to secure to her the annual dividends, as long as it remained bank stock, and thereafter the annual interest during the remainder of her life. Vouchers containing the objectionable words, "just claims," were that far illegal, and on the return of the cause they will be rejected unless

vouchers in conformity to law are filed within a reasonable time after an opportunity shall have been given for that purpose.

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

Weir, Weir & Walker, for appellants.

W. N. Sweeney, Owen & Ellis, for appellees.

MARTIN GREEN *v.* JOHN KELTMERS.

[Abstract Kentucky Law Reporter, Vol. 2—312.]

Occupying Claimants.

One in the occupancy of real estate under the belief that he owns it, relying upon a grant to his remote vendor, is entitled under the statutes to pay for improvements he placed upon such land.

APPEAL FROM BELL CIRCUIT COURT.

March 8, 1881.

OPINION BY JUDGE HARGIS:

The judgment is not for 2,000 acres, but is for the land in controversy included in the 2,000-acre survey. The plea of limitation was not sustained, because the appellant had no actual occupancy of the land in question by settlement thereon for seven years before the commencement of the action.

But the court erred in not adjudging to the appellant the value of his improvements. The appellee and he claimed the land under different grants, and the appellant seems to have believed, as he had the right to do, that he was the owner by reason of the patent to his remote vendor, and in this state of case he was entitled, under Gen. Stat. (1879), Ch. 80, Art. 1, § 1, to pay for his improvements. *Fairbairn v. Means,* 4 Met. (Ky.) 323; *Proctor v. Smith,* 8 Bush (Ky.) 81.

The improvements were shown to be worth $150, from which should be deducted the sum of $25 for the rent of the land, as unimproved, by the appellant, and a judgment rendered in his favor for the remainder; and until the appellee shall pay the value of the improvements as indicated, the court will not cause possession to be delivered to him.

Wherefore the judgment is *reversed* and cause remanded with

directions to enter a judgment in pursuance of the terms of this opinion.

L. Farmer, J. & J. W. Rodman, for appellant.

J. M. Unthank, for appellee.

BANK OF KENTUCKY *v.* S. B. POYNTZ ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—308.]

Satisfaction of Claim.

When a creditor by his voluntary act accepts a sum less than the amount of his claim under an agreement of creditors, in full satisfaction of his debt, he can not make an additional collection on the claim unless it is shown that the debtor fraudulently procured the creditor to accept the lesser sum in satisfaction of his claim.

APPEAL FROM WASHINGTON CIRCUIT COURT.

March 10, 1881.

OPINION BY JUDGE HARGIS:

There is no admission in the pleadings of John B. Poyntz or James P. Poyntz that they, or the firm of Poyntz & Co., are indebted to the appellant bank in any sum on account of the payment made to it by Samuel B. Poyntz as their surety. Their pleadings distinctly admit and assert their indebtedness to Samuel B. Poyntz therefor, but in describing or referring to the debt they occasionally denominate it as the bank or Samuel B. Poyntz debt. Their pleadings with reference to this claim should be construed together, and not by isolated sentences, the meaning of which may be perverted unless the whole that has been said by these parties in their pleadings be considered.

The assignment by Samuel B. Poyntz to the bank of his claim against Poyntz & Co., by reason of the payment to it, as their surety, of the fifty cents on the dollar, was for the benefit of the bank to enable it to collect the whole of the remainder of its claim against Poyntz & Co. The bank admits in its pleadings that the assignment was made for the purpose of securing its debt against Poyntz & Co., and good faith requires that it shall not be allowed to convert a collateral into an absolute assignment, so it may establish the right to receive more than the amount of the whole of its

original claim. While it generously says it will refuse to receive more than one hundred cents to the dollar with interest thereon, if the court should decide in its favor, yet this can not change the law, for if it is entitled to any of the claim it owns the whole of it.

The display of supposed generosity in effect admits the injustice of the legal right claimed to exist and demanded for the bank, which, if allowed, would present the case of a creditor receiving greatly more than the whole of the debt in its primary and undiminished state. The law can not maintain such a disposition upon the part of the bank towards its principal debtors and their security. After it accepted the fifty cents on the dollar and the assignment from Samuel B. Poyntz and released him, it entered into a contract with his principals, Poyntz & Co., whereby it accepted the sum of $2,500 in full discharge of the whole of its claim against them. This composition settled and discharged all the liability of Poyntz & Co. to it on account of the claim on which Samuel B. Poyntz was their surety.

Thus the bank, by its own voluntary act, accepted the last named sum in satisfaction of their debt, and there is no rule based in equity and good conscience that will justify an additional collection on this satisfied claim unless it were shown that Poyntz & Co. fraudulently procured the bank to accept the $2,500 in satisfaction of its claim against them. And there has been no sufficient proof introduced of such conduct on their part.

The bank has failed to show its right to the claim asserted by Samuel B. Poyntz, and whether he is entitled to it or not in no way concerns the bank, as it must recover on the strength of its own title to the claim, and not upon the weakness of Samuel B. Poyntz's title to it. Poyntz & Co. alleged in express terms their indebtedness to him for the amount of his payment as their surety, and the court having adjudged it to him, the bank can not complain, as it had parted with all of its right in the principal debt for a valuable consideration. Consequently, the claim assigned for the security of the principal debt was released to the owner.

Poyntz & Co. do not complain of the judgment, and, perceiving no error to the prejudice of the appellant, it is *affirmed*.

Breckinridge & Shelby, J. G. Hickman, Goodloe, Roberts & Humphrey, for appellant.

William Lindsay, W. H. Wadsworth, for appellees.

SAMUEL H. HURST ET AL. *v.* ABRAHAM PHILLIPS ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—312.]

Appeal from Report of Sale of Real Estate.

Where no exceptions are filed to the report of sale of real estate, and no action thereon had by the court, no appeal can be prosecuted from the report of such sale.

APPEALS FROM WOLFE CIRCUIT COURT.

March 10, 1881.

OPINION BY JUDGE HARGIS:

The appellants, Hurst and Landsaw, were parties to several of the original actions before their consolidation, and they remained parties until the suits were consolidated and proceeded to judgment. The sale of the lands under the mortgage to Hurst and Chambers, and their purchase by appellee, Combs, was reported by the commissioner to the court. No exceptions were filed to the report, but action thereon was postponed until the following term. No appeal can be prosecuted from the report of sale because it was never excepted to nor acted on by the court. Combs' purchase, however, invested him with an unencumbered title to the lands; and his adverse occupancy and claim of the lands for a period of more than fifteen years, and his purchase from Johnson's widow and heirs, would have invested him with a complete and unencumbered title but for the mortgage which has been discharged by him, and whether the sale is confirmed or not makes no difference to his title.

The petitions for a new trial do not state a single ground for vacating or modifying the judgment. They are arguments to show the supposed errors of the judgments which can be reached only by an appeal which has been taken; but no error has been shown therein, for the above reasons, and because the record filed as an exhibit shows that the appellants were parties and participated in the original proceedings, and we can see no error in sustaining the demurrer to each of the petitions. As Combs' title is perfected the appellants can not recover a judgment for his lands against the other parties to the record.

Wherefore the several judgments appealed from are *affirmed*.

W. L. Hurst, for appellants.

J. E. Cooper, for Combs.

C. F. CUNNINGHAM *v.* WILLIAM CARRICO.

[Abstract Kentucky Law Reporter, Vol. 2—310.]

Interest on Note.

The contract expressed in a note dated and payable twelve months after date, with ten per cent. interest per annum, is a contract to pay interest at the named rate for twelve months from date, but not to pay such interest until paid.

APPEAL FROM WASHINGTON CIRCUIT COURT.

March 10, 1881.

OPINION BY JUDGE PRYOR:

The recital in the note as to the interest was evidently intended to indicate the interest the note should bear from date until its maturity. The note is dated the 6th of January, 1876, and payable twelve months after date with ten per cent. interest per annum. This is a contract to pay in twelve months $428, with ten per cent. interest from date, not until paid, but until the maturity of the note. The identical question was settled by this court in *Rilling v. Thompson,* 12 Bush (Ky.) 310.

Judgment *reversed* and cause remanded for further proceedings.

W. C. McChord, for appellant.

R. J. Browne, for appellee.

MICHAEL LANKEY'S ADMR. *v.* A. C. MCELROY ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—313.]

Recitals in Conveyances.

The truth of a recital in a conveyance may be controverted by parol proof. Such a recital is competent between the parties to the instrument, but is incompetent against strangers.

APPEAL FROM WASHINGTON CIRCUIT COURT.

March 10, 1881.

OPINION BY JUDGE PRYOR:

That the truth of a recital in a conveyance may be controverted by parol proof is well settled, and the evidence shows conclusively

that funds belonging to the wife were invested in the property for her benefit; and, the conveyance having been fully executed, it is now too late for a creditor to assert his equity, if he has any, against both the equitable and legal claim of the wife.

The evidence shows that the transaction is in no manner tainted with fraud, and the chancellor acted properly in sustaining it. A recital in a conveyance is competent between the parties to the instrument, but is incompetent against strangers, and when offered against the party making it may be explained by parol. This is elementary and needs no authority to support it.

Judgment *affirmed.*

Russell & Avritt, for appellant.

W. B. Harrison, for appellees.

CARRIE BATTRES *v.* B. HEISS.

[Abstract Kentucky Law Reporter, Vol. 2—308.]

Negligence.

It is as much the duty of a tenant as it is the landlord to look to the condition of the premises, especially when the appearance of a building indicates decay; and unless knowledge of the dangerous condition of a building is brought home to the landlord no recovery can be had by the tenant for an injury caused by the unsafe building.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

March 10, 1881.

OPINION BY JUDGE PRYOR:

The testimony shows that the premises rented the mother of the appellant was in a dilapidated condition and out of repair when she took possession, and a total absence of proof as to the appellee's knowledge of the dangerous condition of the privy attached to the premises. It was as much the duty of the tenant to look to the condition of the premises as the landlord, particularly when the appearance of the building indicated decay; and unless there was some knowledge of the dangerous condition of the building brought home to the appellee no recovery can be had. The ordinance on the subject, although not complied with, does not authorize the recovery. The fact really appears that the accident originated from hidden

defects that were unknown to all the parties, and that not even a brick wall would have prevented its occurrence. The testimony did not authorize the verdict, even if the views of appellant's counsel as to the law are correct.

Judgment *affirmed.*

J. L. Clemmons, for appellant.

Laf. Joseph, A. Cary, for appellee.

[Cited, *Franklin v. Tracy*, 117 Ky. 267, 25 Ky. L. 1409, 1909, 77 S. W. 1113, 78 S. W. 1112, 63 L. R. A. 649.]

JOHN SHEPHERD ET AL. *v.* W. C. ROSE.

[Abstract Kentucky Law Reporter, Vol. 2—314, as Shepard v. Rose.]

Proof in Suit on Tax Collector's Bond.

In a suit for the purpose of settling the accounts between the sheriff and one who has collected taxes, the defendant having the tax books in his possession, and the fact as to whether he had collected the taxes embraced in the list being peculiarly within his knowledge, it was his duty to make known what he had collected, and in the absence of proof to the contrary he will be presumed to have collected the whole.

APPEAL FROM WHITLEY CIRCUIT COURT.

March 10, 1881.

OPINION BY JUDGE HINES:

The record does not show that appellant, Shepherd, was charged with more taxes than he collected. Having the tax book in his own possession, and the fact as to whether he had collected any or all of the taxes embraced in the list being peculiarly within his knowledge, it was his duty to make known what he had collected, and in the absence of proof to the contrary he will be presumed to have collected the whole. This was the theory upon which the court below proceeded, and it is correct.

The suit was for the purpose of settling the account between the sheriff and Shepherd for all the taxes that may have been collected by Shepherd, either in 1867 or 1868, and after a careful examination of the evidence we are unable to discover any error in the finding upon the evidence as to the several amounts collected. The

evidence does not satisfactorily show that there was a complete and full settlement for the collections for the year 1867, and there was therefore no error in the charge of $65.32 for collection on that year.

The evidence authorized the court in finding the sureties liable on the bond for the year 1868, as well as for the year 1867. The evidence shows that the bond was executed in the usual form, and it fails to show that it was restricted in its operations to 1867.

Judgment *affirmed.*

John Smith, for appellants.

MARY E. SKILLMAN *v.* W. A. ATCHISON ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—314.]

Jurisdiction Over Party to Suit.

Where a brother appears for his sister, who is a nonresident party to a suit to establish a claim against real estate, in which such sister has an undivided interest, and the brother has no authority to appear, the court has no jurisdiction or power to enter a personal judgment against her.

Judicial Sale of Real Estate a Nullity When Procured by Fraud.

When a nonresident, who is the owner of an undivided interest in real estate, is sued with the other owners to subject the real estate to sale to pay a debt, judgment is taken against all the owners, and a brother of the nonresident, who is also the owner of an interest in the real estate, appears for the nonresident without authority to do so, and judgment is entered against all the defendants, but the brother causes the interest of the nonresident alone to be sold to pay the judgment, and buys such interest at the sale, he will secure no title thereto, and the nonresident is entitled to recover such land, together with the rents thereof. Her interest is liable only for a pro rata part of such debt.

APPEAL FROM WARREN CIRCUIT COURT.

March 12, 1881.

OPINION BY JUDGE HARGIS:

Stapleton Burch died in Warren county, the owner of several hundred acres of land, which was subsequently partitioned between his widow and children. One of his sons, H. C. Burch, left for a distant state before his father's death and was not heard of for a

great while. At the time of his departure he was indebted to the appellee, Atchison, evidenced by two promissory notes with his father as surety. Atchison instituted suit on the note against the widow and children, alleging, in substance, that H. C. Burch had not been heard of for more than seven years and that he was dead; that the defendants had received his share, and more of the estate of his father, who was his surety, than would be necessary to pay the demand.

The appellant, Mary E. Burch (now Skillman), was a resident of Tennessee, and was constructively summoned to answer the petition. The other defendants were actually summoned. She gave her brother, Julian, a power of attorney to sell her interest in the lands laid off to her. He and another brother, W. H. Burch, took upon themselves the management of the defense to Atchison's suit, and caused a joint answer to be filed for all of the defendants, including the appellant. There is no sufficient proof that she gave them any authority to cause an answer to be filed for her, but the facts tend to show that they might have mistakenly exercised that authority.

The suit progressed to the hearing, and a personal judgment was rendered against all the defendants who had received equal portions, and more than enough of their deceased father's estate to pay the plaintiff's notes; but the share of the nonresident sister alone was sold to pay the whole of the judgment. Thereby the whole burden was thrown upon her, when she should have borne an equal part only in the payment of Atchison's demand. At the sale 85 acres of the 102 allotted to her in the partition were sold, and W. H. Burch, who had figured in the management of the defense and the committal of his absent sister as a party to the suit and judgment by entering her appearance, bought it for the amount of the judgment, as he contends, for his mother, who executed bond with him as surety. He afterwards paid the bond himself, and was in possession of the land when the appellant appeared in Warren county and demanded possession of it. This being refused, she instituted suit against Atchison, and the defendants to the action brought by him, seeking to vacate the judgment in his favor as fraudulent, and to recover the 85 acres of land from W. H. Burch.

She alleges that no authority was given to her brothers to enter her appearance, and insists that she has the right, under Buckner & Bullitt's Civ. Code (1876), § 414, to have the judgment set aside because of the want of authority on their part to enter her appear-

ance, and by reason of her nonresidency. This question need not be decided, as her right can be established and full remedy afforded her without disturbing that judgment.

She alleges that the appellee, W. H. Burch, is illegally in possession of her land, and has been since the date of the purchase by the mother, and seeks judgment against him for it and the rents thereof during the time of his unlawful possession. The facts authorized the conclusion that the appellee, W. H. Burch, fraudulently permitted a decree to be enforced against the lands of his absent sister, and became the purchaser through his mother to shield his purpose and sanctify his conduct, while he became the real owner of his sister's birthright. It is within the power of the chancellor to prevent the consummation of such wrong, and the appellant's petition presents a good cause of action against appellee, W. H. Burch, for the possession of the land.

He can not rely upon the title of his mother to protect him, because it is based upon a judgment which is fraudulent against the appellant, so far as each of the appellees, except Atchison, is concerned. The appellant is entitled to the possession of the 85 acres of land and the rent thereof from the time appellees, Lucinda Burch and W. H. Burch, took possession of it. The evidence shows that the rent is reasonably worth $100 per year, and appellant should have been adjudged rent at that rate.

The appellant should bear her equal portion with the other children of the amount of Atchison's demand, which has been paid by Lucinda or W. H. Burch, and they should be credited with that amount upon the rent; and if the rent should be insufficient to pay her part of the amount paid Atchison, then she should be required to pay the remainder, and in default thereof so much of the 85 acres as may be necessary for that purpose should be sold. But in no event should Lucinda Burch or W. H. Burch be allowed to retain the possession of the appellant's land if any delay should occur in adjusting these matters.

Wherefore the judgment is *reversed* against the appellees, except Atchison, as to whom it is *affirmed,* and the cause is remanded with directions to enter a judgment and for further proceedings consistent with this opinion.

H. J. Beauchamp, for appellant.

Halsell & Mitchell, Rodes & Settle, Covington & Porter, for appellees.

JOHN PIGG, SR., *v.* JOHN A. WHITMAN ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—320.]

New Trial to Rectify Mistake.

When the attorney for a party is misled by representations made by his adversary, and the rights of his client have been voluntarily or inadvertently compromised by counsel, a new trial should be granted to rectify such mistake.

New Trial on Account of Newly Discovered Evidence.

Where a party has lost his cause by insufficient evidence or because the weight of evidence was against him at the trial, the discovery afterwards that the prevailing party confessed and is willing to testify that the judgment is against the truth, a new trial should be granted upon such newly discovered evidence, if discovered within the time provided by law.

APPEAL FROM LAWRENCE CIRCUIT COURT.

March 12, 1881.

OPINION BY JUDGE HARGIS:

The evidence, which is alleged to have been discovered since the trial, is of such a certain and conclusive character that we are inclined to think that under the circumstances of this case it is not merely cumulative. McHatchen, one of the heirs of Wallace, and an appellee, testifies against her interest, and positively to facts which should have produced a different result from the judgment before us, had the evidence of the witnesses known to the appellant before the trial been taken.

The facts of this case do not show that the attorney for appellant acted fraudulently or wantonly, but they clearly establish that he was mistaken as to obtaining a continuance in order to secure the record evidence from Washington of the claim against the government. It was not unreasonable for the attorney to advise the appellant that he need not take his evidence before the coming term, in view of his inability to procure the record evidence from Washington, and of the agreement made between the appellant and appellee, Castle, who was the husband of an heir of Wallace and a defendant and counsel in the action, to survey or have surveyed the land, and to acquiesce in the survey, which had not been made when the judgment was rendered.

The demand of a trial under these circumstances was a surprise

to the appellant and his attorney, against which they could not by reasonable care have provided. It appears that appellant knew nothing of the character of the judgment until a month or so after it was rendered, and the subsequent discovery of the fact that Castle had demanded a trial, notwithstanding the agreement to survey, was newly discovered evidence, as the quantity of the land was in issue.

It is said in the case of *Winn v. Young,* 1 J. J. Marsh. (Ky.) 51, in substance, that when the rights of a party have been voluntarily or inadvertently compromised by counsel a new trial should be granted to rectify such mistakes. Here there is not so much inadvertence or mistake on the part of the attorney as being mislead by matters which he had the right to rely on, and especially by the agreement to survey the land before the trial. Where a party has lost a cause by insufficient evidence or because the weight of the evidence was against him at the trial, the discovery afterwards that the prevailing party confessed and is willing to testify that the judgment was and is against the truth, a new trial should be granted upon such newly discovered evidence, if discovered, as in this case, within the time provided by law.

Wherefore the judgment is *reversed* and cause remanded with directions to overrule the demurrer to plaintiff's petition as amended, and for further proceedings consistent with this opinion.

W. M. Fulkerson, A. Duvall, for appellant.

G. W. Castle, for appellees.

JOHN G. JOHNS ET AL. *v.* JOHN P. MARTIN'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 2—312.]

Statute of Limitations.

In case the evidence in a suit on a note shows a payment after the note became due, the plea of the statute of limitations was properly held to be unavailing, although more than fifteen years had elapsed since the note became due, because fifteen years had not expired from the date of the last payment.

APPEAL FROM FLOYD CIRCUIT COURT.

March 12, 1881.

OPINION BY JUDGE HARGIS:

The question whether the credit on the note, entered March 1, 1861, was a bona fide entry at the time the $12 was paid, was submitted to the court, and its finding must be treated as the verdict of a jury. There is no conflict of evidence, and the only complaint which can be urged is as to its sufficiency. While the testimony is not conclusive it tends to a considerable degree to prove that the $12 were paid and entered on the note March 1, 1861. It is of such strength as to free the finding of the court from the objection that it is palpably against the evidence. In such case it has been held so often, that the judgment should not be disturbed, that citation of authority is unnecessary.

The payment and correctness of the date of its entry on the note having been found, the plea of the statute of limitations was properly held to be unavailing, although more than fifteen years had elapsed since the note became due, because fifteen years had not expired from the date of the last payment and before Martin's administrator presented the note by the answer filed by him asking judgment thereon. This rule is clearly established by the authority of *Hopkins v. Stout,* 6 Bush (Ky.) 375, and *English v. Wathen,* 9 Bush (Ky.) 387.

The parties having waived their right to a jury and submitted the question of fact to the court, its finding must be considered as conclusive, unless shown to have been palpably against the evidence, which has not been done.

Wherefore the judgment is *affirmed.*

Jas. Stewart, for appellants.

Reid & Stone, Geo. W. Brown, for appellees.

WM. H. COX ET AL. *v.* H. S. BISHOP.

[Abstract Kentucky Law Reporter, Vol. 2—310.]

Husband's Claim Against Wife's Real Estate.

When there is no fraud alleged or shown on the part of a husband and wife, and the evidence shows that the husband paid nothing to make the improvements on his wife's land, and all he contributed was in his own labor, and the improvements made were necessary to prepare the land for a home for himself and wife, the land of the wife is not subject to the husband's debts.

APPEAL FROM GRAYSON CIRCUIT COURT.

March 14, 1881.

OPINION BY JUDGE HINES:

The judgment in this case appears to us to be erroneous. There is no allegation of fraud on the part of Cox and wife, and it appears from the evidence that Cox paid nothing out of his own means to make the improvements, and that what he contributed was his own labor. The improvements made were necessary to prepare the land for occupancy as a home, and so long as the title remained in Mrs. Cox it could not have been subjected to the payment of the husband's debts. *Robinson v. Huffman,* 15 B. Mon. (Ky.) 80.

There are cases where the land can be subjected to the extent of the enhanced value put upon the land by the husband's means. Under what circumstances this can be done is discussed in the case of *Heck v. Fisher,* 78 Ky. 643. But this case does not come within the rule there laid down. Nor does it matter that this is a proceeding to subject the proceeds of the sale instead of the land itself. The note for the purchase-money is made payable to Mrs. Cox, and does not belong to the husband. It is to be treated as any other chose in action belonging to the wife. Until reduced to possession by the husband a court of equity will see that she is first provided before the creditors can be allowed to subject any portion, and as the estate of the wife is small and the husband insolvent the court should have allowed it to the wife upon the ground of an equitable settlement.

Judgment *reversed* and cause remanded with directions to dismiss the petition as to Mrs. Cox.

Conklin & McBeath, for appellants.

G. W. Stone, for appellee.

HENRY CLAY McKEE v. PETER WALKER.

[Abstract Kentucky Law Reporter, Vol. 2—320.]

Title of Purchaser at Tax Sale.

Before a purchaser of property at a tax sale is entitled to recover possession of the property in a suit he must allege and prove facts showing that the property was listed for taxation, or that a levy was made on the property for taxes, and that the sheriff, before he

made the levy, tendered a receipt and demanded payment. A general statement that the sale was proper and that all the steps were taken authorizing such a sale is insufficient.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

March 15, 1881.

OPINION BY JUDGE PRYOR:

It does not appear from this record that the property sold for taxes was ever listed for taxation, nor that any levy was made on the property for taxes. Neither does it appear that the sheriff, before he made the levy, tendered a receipt for the taxes to the owner or demanded payment. A general statement alleging that the sale was proper and that all the steps were taken authorizing such a sale is insufficient. The pleader must allege facts showing that none of the requirements are wanting before he can receive possession as a purchaser in such cases.

Judgment *affirmed.*

J. J. Cornelison, for appellant.

O. S. Tenny, for appellee.

JOHN CRABTREE *v.* R. T. BURNS, RECEIVER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—312.]

Mortgage in Contemplation of Insolvency.

The mere fact that a creditor believes and the debtor knows that he is in a perplexed financial condition is not sufficient to convert an innocent effort to secure such creditor into an assignment of all his property for the payment of his creditors generally, and a mortgage to secure such creditor is valid, especially when the debtor, at the time, has property sufficient, if judiciously managed and not sacrificed by his creditors, to pay all his debts.

APPEAL FROM LAWRENCE CIRCUIT COURT.

March 15, 1881.

OPINION BY JUDGE HARGIS:

When appellees, Burns and Smith, had their executions, which amount to about $450, placed in the hands of the sheriff, the appel-

lant, Crabtree, surrendered 40 acres of land appraised at $12 per acre to pay them. But they permitted the whole of the 40 acres to be sold at $6 per acre, and the equity of redemption for $5, and as to the remainder of their executions they were returned "no property found."

It appears from this act of Crabtree that he had given them as much, if not greater preference than Lackey, to whom he executed the mortgage more than a month after he surrendered the 40 acres of land to pay the debts of Burns and Smith, the equity of redemption of which was purchased by the former at the price of $5 per acre.

After having permitted the land surrendered to pay their debts to be sacrificed, they instituted an action on a return of nulla bona against Crabtree as to the remainder of their executions, alleging that he had mortgaged his land to appellee, Lackey, in contemplation of insolvency, and with a design to prefer him to other creditors. These allegations were denied by Crabtree and Lackey. The evidence shows that the mortgage was neither made in contemplation of insolvency nor with the design to prefer Lackey to any other creditor.

At the time the mortgage was executed the appellant owned a tract of land worth from $3,000 to $4,000, and was indebted about $2,500, which included the demands of all the appellees. Lackey testified that he believed Crabtree "was in failing circumstances, and he wanted to secure his debt," as any prudent man has a right to do if he does not violate the law in so doing. Instead of appellant attempting to prefer appellee, Lackey, to the other appellees, he treated them all alike, and appears to have made a bona fide effort to pay each in full. He evidently did not contemplate a preference to the exclusion of appellees, Burns and Smith, because if there be a preference intended by Crabtree he selected them to receive the first fruits, as is shown by his act of surrendering enough land to pay both of their claims more than a month before the execution of the mortgage. The mere fact that Lackey believed and Crabtree knew he was in a perplexed financial condition, is not sufficient to convert an otherwise unquestionably innocent and dutiful effort to secure his creditors into an assignment of all his property for the payment of his creditors generally, especially in view of the fact that the debtor possesses enough property, if judiciously managed and not sacrificed by his creditors, to pay his debts in full.

Crabtree should be allowed to redeem the forty acres, or it should be first sold and the proceeds applied to the payment of Burns and Smith in the order in which they are named. The equitable title was in Crabtree, and the inchoate right thereto was in Burns when he instituted suit, which he did within less than one year after the sale of the forty acres of land under the execution.

Wherefore the judgment is *reversed*, with directions to dismiss the alleged cause of action under the Act of 1856, set forth in the appellees', Burns' and Smith's, petition, and for further proceedings not inconsistent with this opinion.

George N. Brown, John M. Rice, Alexander Lackey, for appellant.

E. P. Moore, for appellees.

COMMONWEALTH *v.* JOHN B. STEVENS ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—315.]

Petition for Damages.

The Act of March 11, 1876 (I Acts 1876, ch. 657), gave to the owners of the locks and dams on Rough creek authority to sue the state for the loss of the value of their improvements, and gave the court or jury the right to fix the amount of such damages. They were restricted to a single cause of action sounding in damages, and gave them no authority to sue upon contract or for breach of contract.

Powers of State Reserved in Grant.

In granting a right to build locks or bridges or operate a ferry, or in granting other franchises, the state does not deprive itself of the power to construct other facilities of trade and travel, although the exercise of the power may result in individual loss and injury. By such a grant the state enters into no agreement, express or implied, that the rights of the grantee shall not be impaired or the profits of their franchise may not be lessened by future legislation or by other grants, and the state is not liable for damages to the holders of the first grant by reason of such legislation or other grants.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 15, 1881.

OPINION BY JUDGE HARGIS:

By an act of the legislature approved March 8, 1856, a company was incorporated to build such locks and dams on Rough creek as

might be deemed necessary for its navigation. Any one or more individuals who should enter into a prescribed bond "shall be deemed the company and entitled to all the rights and privileges hereof." The company was to have power to condemn land and to be responsible for all the damages resulting from the erection of said dams; all the property belonging to the company was to be liable for its debts, or damages caused by the work; and it was authorized to receive such tolls as it might demand, "not exceeding those upon Green river, and at all times subject to the revision of the Board of Internal Improvement." The business of the company was declared to be the improvement of the navigation of Rough creek, and the erection and carrying on of such machinery and manufactures as they might build. The right was reserved to the state to buy the company's interest in the locks and dams by paying the original cost of the same, with interest. II Acts 1855-6, Ch. 459.

Under this charter a company was organized, who went on to construct a lock and dam, and perhaps other improvements. In February, 1866, James Ford sued the company to recover an alleged balance of about $3,600 for work done by him in constructing the lock and dam, and to enforce a lien therefor upon the property. Other creditors came in and set up their claims and liens. A receiver was appointed to collect the tolls at the lock, and on certain contingencies to lease it out to the highest bidder. It was accordingly leased at a rental of $30 for the first six months, and $22 for the next six months. On the 1st of October, 1867, the court rendered a judgment reciting and adjudging "that as the Rough Creek Nav. & Mfg. Co., have not the means to discharge its obligations, and the rents of the property will be insufficient ever to pay the same, it is therefore ordered that lock and dam No. 1 on Rough creek, together with all its fixtures and property, and all the corporate rights of said company under the charter, so far as the same can be sold by law, and the real estate incident or belonging to said lock and dam or said company, except the water power, be sold for the purpose of paying off the debts of the company, etc. On the 6th day of July, 1868, a sale of the property was made under this judgment, William Brown becoming the purchaser at the price of $3,200, who gave bond therefor with William Duke and J. B. Stevens, Titus Bennett and John B. Bennett, his sureties. The sale was confirmed on the 7th of October following.

On the 9th of March, 1868 (II Acts 1867-8, Ch. 1165), the legis-

lature incorporated the Green & Barren River Nav. Co., by which the "Green and Barren river line of navigation and their tributaries, together with the grounds, houses," franchies, etc., were "loaned and conveyed unto the corporators for * * * and during the term of thirty years from and after the time they get possession thereof." The 6th section of the act provides that all tolls shall inure to the company, establishes the rate of tolls on certain classes of boats passing each designated lock on the two rivers, and authorizing the company to establish tolls on the other boats, passengers, etc., from time to time, not exceeding the present rates established by the Board of Internal Improvements "as applicable to the Kentucky, Green, and Barren river lines of navigation at this time."

The company immediately took possession of the property and franchises so "loaned and conveyed." Afterwards the plaintiffs, John B. Stevens and others claiming to be the "present owners" of the improvements on Rough creek, holding that the act incorporating the Green & Barren River Nav. Co. gave that company "such franchises as were the cause of effectually destroying the value of their improvements on Rough creek, and making it worthless to them," and claiming finally that they were "entitled to damages from the state for the loss of their property on account of the legislation referred to," obtained the passage of an act March 11, 1876 (I Acts 1876, Ch. 657), which, after reciting the foregoing claims, authorized the plaintiffs to file their petition setting forth their demand for damages, the allegations to be treated as controverted and to be established by proof. If, on the hearing, it should be found "that the plaintiffs are the owners of the improvements on Rough creek, * * * and that they are entitled, under the law and fact of the case, to damages against the state, for the loss of the value of their improvements, as recited in the preamble of this act," judgment therefore should be rendered against the commonwealth.

In April following the plaintiffs filed their petition. The court below overruled the demurrers, general and special, filed by the defendant, and, on the evidence, rendered judgment in favor of the plaintiffs for $4,928, with interest from July 12, 1877, to reverse which the commonwealth has appealed.

By the terms of the enabling act, the appellees were required to establish, by appropriate allegations and proof, these propositions: First, that they were, at the time of the passage of the act, the

owners of the improvements on Rough creek; and second, that they were "entitled, under the law and facts of the case, to damages against the state, for the loss of the value of their improvements, as recited in the preamble of this act."

In their petition the appellees allege merely "that they are the owners and personal representatives of the owners, in part, of said property, as herein stated, and successors to said company." When or how they become either owners of the property or successors to the company is not shown. It appears, as already stated, that at the decretal sale reported by the commissioner in the case of Ford against the company, William Brown became the purchaser, and that Duke, Stevens and the two Bennetts were his sureties on the bond for its price. It is not pretended that the appellees acquired the title or ownership of the property otherwise than under this purchase; and there is a total failure of proof to show that Duke, Stevens or the Bennetts acquired any title whatever, either by purchase from Brown, or otherwise. It would seem to result that, having failed to establish their ownership of the property, they, at least, were not entitled to relief.

But, waiving this point, and conceding that Brown and his sureties became joint purchasers and owners under the decretal sale, the remaining inquiry is, Did they thereby become entitled under the law and facts of the case to damages against the state for the loss of the value of their improvements?

For the appellees it is insisted that the second section of the act (Acts 1867-8, Ch. 1165), incorporating the "Green and Barren river line of navigation and their tributaries, together with the grounds," etc., which were "loaned and conveyed" to that corporation for thirty years, was an election by the state to buy the improvements on Rough creek, under the right reserved in the act incorporating the Rough Creek Navigation Co.; that it was an absolute purchase and appropriation by the state of those improvements, the title of which vested at once, and that immediately upon the passage of the act authorizing the loan and conveyance, the state became liable, as purchaser, for the original cost of the same with interest from the date of the completion of the work.

If this proposition were conceded, it is not easy to see how it would help the claim of the appellees. If the state purchased their property on the 9th of March, 1868, and thereby acquired the title, and became at once liable for the cost of it with interest, what

possible title or right could the appellees have acquired by the purchase at the decretal sale of the same property on the 6th day of July, 1868? What was there for the commonwealth to sell or the purchaser to buy?

But there was no such purchase. The state, in loaning to the Green & Barren River Nav. Co., for thirty years, the Green and Barren river line of navigation and their tributaries, did not include and could not have intended to include the improvements on Rough creek. It included such tributaries of the two rivers as were within the control of the state, such as it had a right to lease or loan, and none other. Neither the state nor the Green & Barren River Nav. Co. ever construed the lease as embracing the lock and dam on Rough creek; no possession of them was ever claimed or taken; nor is it pretended that they were of any use or value whatever to that corporation.

Besides, the appellees asserted no claim founded on the supposed purchase by the state, either in their application to the legislature for authority to sue, or in their petition. Their claim as recited in the preamble of the enabling act (I Acts 1876, Ch. 657) was that the act incorporating the Green & Barren River Nav. Co. conferred on that company such franchises as caused the destruction of the value of their improvements on Rough creek, "making it worthless to them, and an obstruction to the natural navigation of said stream." The fourth section of the act provides that if, on the hearing, it shall be found that the plaintiffs are the owners of the improvements and are entitled to damages "for the loss of the value of their improvements, as recited in the preamble of this act" the court or jury shall "fix the amount of such damages" and render judgment. The authority of the appellees to sue is there restricted by the act to a single well-defined cause of action, sounding purely in damages, and necessarily excludes any cause of action arising upon the contract.

If it were conceded that the state was liable for the damages resulting from the supposed loss of the value of the Rough creek improvements, as recited in the enabling act, we are of opinion that the Rough Creek Nav. & Mfg. Co., and not the appellees, would be entitled to such damages. The alleged wrongful act of the state, the passage of the charter of the Green & Barren River Nav. Co., was done on the 9th of March, 1868. The corporation which made the improvements on Rough creek was undoubtedly the

owner of them at that time. True, there was then a judgment against the corporation for the sale of its property, but that judgment is no way divested or impaired of its title. The judgment was executed by the sale made on the 6th of July, 1868. What passed by that sale? Certainly not the right of action which had accrued four months previously to the corporation. Where real property, valuable chiefly for its improvements, is adjudged to be sold, and before the sale a wrongdoer wantonly destroys the improvements, would it be seriously contended that the subsequent purchaser would be entitled to the damages resulting from the injury, either upon the ground, as argued here, that the sale related back to the judgment, or that the purchaser was the successor of the original owner?

But we are of opinion that under no possible view of the "law and facts of the case" can the state be held liable, either to the corporation or to the appellees, for the damages resulting from the supposed injury.

It is alleged in the petition that at the time the charter of 1856 was passed, the state had control of the works on Green and Barren rivers, on which it had established certain rates of tolls; that in view of these privileges belonging to and used by the state, the investments on Rough creek were made, "and these were the inducements moving thereto, and these were the pledges made to said company and its successors by the defendant at the time of said investment," that in March, 1868, the state, in violation of said contract, leased to a company, then incorporated, the Green and Barren river line of navigation, with authority to charge higher rates of toll, which company, under the authority thus conferred, did lawfully charge boats running on Green river such rates of toll as to drive them from the trade on Rough creek, thereby destroying the value of the lock and dam on that stream.

The idea of contract or pledge arising, by way of implication, out of a grant like this, was effectually set at rest by the celebrated case of *Charles River Bridge v. Warren Bridge,* 11 Pet. (U. S.) 420, in which the legislature of Massachusetts incorporated a company, in 1785, to build a bridge over Charles river, granting them tolls. The bridge was built under this charter, and the corporation received the tolls allowed by law. In 1828 another company was incorporated to build the Warren bridge near the former over the same river. This bridge was allowed to, and did, become free after

a few years. The result was that the value of the franchise granted by the act of 1785 was entirely destroyed. In the suit brought by the Charles River Bridge Co. the principal ground of relief relied on was that the charter granted to Warren Bridge Co. was a violation of the contract implied by the grant to the former. "Its income," says the Supreme Court, "is destroyed by the Warren bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. * * * In order, then, to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain." But it was held that the charter contained no such contract on the part of the state, it containing no words that even relate to another bridge, or to the diminution of their tolls or to the line of travel, and that such an agreement can not be implied.

This court has distinctly and repeatedly approved this doctrine. In the case of the *Richmond & L. Tpke. R. Co. v. Rogers,* 1 Duv. (Ky.) 135, it was held that, in granting a ferry or other similar franchise, the state does not deprive itself of the power to construct other facilities of trade and travel, although the exercise of the power may, and generally does result in individual loss and injury, for which no legal means of relief are provided.

It follows that in the grant made to the Rough creek company the state entered into no agreement, express or implied, that there should be no impairment of the profits of the franchise by any change which the state might choose to make in the rate of tolls on either of the rivers. On the contrary, those rates on both rivers were expressly placed within the uncontrolled discretion of the legislature. The Rough creek company was given power to demand tolls "not exceeding those upon Green river, and at all times subject to the revision of the Board of Internal Improvement." The tolls upon Green river were, at the time, under the control of the same board, which was a mere agency of the state. The wisdom of the law under which the tolls on Green river were increased may be questionable, but the power of the legislature to pass it seems undoubted.

The judgment is *reversed* on the original appeal, and *affirmed* on the cross-appeal, and the cause remanded with directions to sustain the general demurrer to the petition and to dismiss the action.

T. E. Moss, P. W. Hardin, for appellant.

W. N. Sweeney & Son, E. D. Walker, for appellees.

W. L. MURRAY *v.* CAROLINE MURRAY ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—321.]

Survivors of Devisees.

Under the statutes (General Stats., Ch. 50, Art. 2), where the devisee dies without descendants, and before the testator, the joint tenants or those jointly interested in the subject-matter devised take by survivorship.

APPEAL FROM ADAIR CIRCUIT COURT.

March 15, 1881.

OPINION BY JUDGE PRYOR:

The devise to the children is not as a class, but the case, notwithstanding that fact, is embraced by Gen. Stat. (1879), Ch. 50, Art. 2. The right of survivorship having been abolished as recognized by the rule of the common law, the law-making power, in order to prevent a devise from not taking effect in certain cases, has provided that in this class of cases, where the devisee dies without descendants and before the testator, the joint tenants or those jointly interested in the subject-matter devised shall take by survivorship. The possession by the life tenant is the possession by the remainderman, and they have in law all the unities necessary to constitute a joint tenancy. If no particular estate had been created these devisees would have been entitled, at the death of the testator, to the actual possession, and the fact that a particular estate is carved out of the devise, before the principal devisees take the actual possession, will not destroy the object of the statute.

Judgment *affirmed*.

T. T. Alexander, H. C. Baker, for appellant.

T. C. Winfrey, for appellees.

S. E. CALLOWAY *v.* GEO. R. GREEN ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—309.]

Officer Presumed to Have Done His Duty.

When a decree for the sale of land directs a sale in parcels, and, if the several portions would not bring enough to pay the debts, the

commissioner was directed to sell the land in a body, this court, in the absence of a record showing otherwise, will presume that the commissioner discharged his duty as directed.

APPEAL FROM LOGAN CIRCUIT COURT.

March 15, 1881.

OPINION BY JUDGE HINES:

The decree in this case directed a sale in parcels, and if the several portions so sold did not bring enough to satisfy the debts the commissioner was authorized to sell the land in a body. The decree is specific as to the sale of that portion belonging to the appellant, and directs that it be sold only for the satisfaction of the debt to the extent that the lien existed thereon; and we must presume that the commissioner discharged his duty under the decree and sold the land in parcels, and that the portion belonging to the wife did not sell for enough to discharge the lien thereon. If so the decree was not prejudicial to appellant, and should be affirmed.

There is nothing in the suggestion of counsel that the sale of the whole of the land for a gross sum was prejudicial because it prevented the wife from redeeming that portion belonging to her. The debts and liens were created before the passage of the law authorizing a redemption, and therefore the right to redeem did not exist.

Judgment *affirmed.*

T. O. Townsend, for appellant.

J. H. Bowden, for appellees.

GEORGE DUELL'S EXR. *v.* LOUIS ISRAEL.

[Abstract Kentucky Law Reporter, Vol. 2—315.]

Bankruptcy of Fiduciary.

A release in bankruptcy will not discharge the bankrupt from an obligation created while acting in a fiduciary capacity.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 15, 1881.

OPINION BY JUDGE HINES:

There is no brief for appellant in the record, nor is there any reason apparent for reversal. The obligation was created while appellant was acting in a fiduciary capacity, and was not therefore discharged by release in bankruptcy.

There is nothing in the suggestion contained in the assignment of errors to the effect that the payments made by appellant, after the execution of the obligation to appellee, operated as a discharge of such obligation. Whatever payments were made were made with a full knowledge on the part of appellant that the obligation to appellee was in full force.

Judgment *affirmed.*

Jas. P. Sacksteder, for appellee.

W. H. McCOWN'S ADMR. *v.* JOHN JENNINGS.

[Abstract Kentucky Law Reporter, Vol. 2—315.]

Advancements.

When an advancement is pleaded as a defense to a suit on a written instrument, the fact of its being an advancement is inconsistent with and contradicts the writing sued on, both in its import and legal effect, and fraud or mistake should be alleged and established before such defense could be available.

APPEAL FROM ANDERSON CIRCUIT COURT.

March 17, 1881.

OPINION BY JUDGE PRYOR:

The appellant's intestate intended, doubtless, to make the advancement as indicated by the answer, and as is evidenced by the entry or memorandum made by the testator himself; still, as said by this court in the case of *Haggard v. Hay's Admr.*, 13 B. Mon. (Ky.) 175, the fact of its being an advancement is inconsistent with and contradicts the writing sued on, both in its import and legal effect,—fraud or mistake should be alleged and established before such a defense could be available. It might be, as was decided in that case, that an averment to the effect that the administrator,

after payment of debts, had enough in his hands to make the other distributees equal, would constitute an equitable defense, but no such defense is made.

Judgment *reversed* and cause remanded for further proceedings.

Ira Julian, John Felix, for appellant.

T. C. Bell, for appellee.

Petition for Rehearing.

[Abstract Kentucky Law Reporter, Vol. 2—436.]

APPEAL FROM ANDERSON CIRCUIT COURT.

May 5, 1881.

OPINION BY JUDGE PRYOR:

Although the attention of the court was called by the brief of counsel alone for the appellee to the questions of fact, the conveyance, or rather its contents, by the appellee to the other heirs was overlooked. This conveyance and agreement between the heirs recognizes the fact that the note in controversy was an advancement, and in consideration of that fact Jennings and wife have relinquished all interest in the estate to the other children. If the intention of the intestate was to make all the children equal, they have for a valuable consideration waived any such right by agreeing that Mrs. Jennings shall retain what she has received, relinquishing all right to any greater interest. Such a contract the parties were competent to make, and the administrator ought not to be permitted to collect the note when it is evident that it is not necessary for the payment of debts. Those having the right to it in the final distribution have consented that Mrs. Jennings shall have it, and as there is an ample estate left to pay the debts, or at least no pretense that there is not, the judgment should be *affirmed.*

Felix & Julian, for appellant.

T. C. Bell, for appellee.

WM. S. LUDLOW ET AL. *v.* G. W. RICH ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—317.]

Improvement Assessment.

When no fraud is shown on the part of a city council even when the

cost of a public improvement exceeds the cost of improvement on another part of the street, but the cost is assessed in a manner as near equality as could well be attained, such assessment is valid.

APPEAL FROM KENTON CHANCERY COURT.

March 17, 1881.

OPINION BY JUDGE PRYOR:

There is no plat nor description of the location of the streets in Ludlow filed with the petition, and if we construe the amended pleading properly it appears that Dr. Cooper's east line and the east line of lot No. 3 are one and the same, and that the western portion of Arch street had been previously improved, to or from that point, so that upon a reasonable and proper construction of the charter the east line of lot No. 3 was the beginning or the termination of the street to be improved. If the improvements connected with that portion of the street already constructed, it was, in substance, a compliance with the charter. There is no fraud shown on the part of the council, and while the costs of improvements at this particular part of the street may exceed the cost of that portion already improved, it is as near equality as could well be attained unless the property holders on the whole street are compelled to contribute; and if this were so the benefits likely resulting to the appellants would be much greater than to others living on the same street.

The judgment below is *affirmed.*

Stevenson & O'Hara, for appellants.

J. F. & C. H. Fisk, Simmons & Schmidt, for appellees.

CONTINENTAL INSURANCE COMPANY *v.* PAUL RANDOLPH.

[Abstract Kentucky Law Reporter, Vol. 2—313.]

Motion to Transfer to Equity Docket.

It is not error for the court to overrule a motion to transfer a cause to the equity docket when the motion is not made until after answer is made setting up mistake.

Oral Evidence.

Oral evidence is competent where the pleadings present the issue as to whether there was a mistake in reducing a contract of insur-

ance to writing, and to do so is not a violation of the rule that a written contract can not be altered, erased nor added to without an allegation of fraud or mistake.

Evidence.

Where notice or knowledge of the character of instructions received by an agent from his principal is not communicated to a person dealing with such agent, it is proper to refuse to allow him to answer as to the character of such instructions.

Waiver of Proof of Loss Under Insurance Policy.

The failure of an insurance company to require exact proof of loss, and the reliance upon the failure to pay the premium promptly, was a waiver of the requirement in the policy as to the manner of the proof of loss.

Jury to Determine Weight of the Evidence.

It is proper for the court to refuse to instruct the jury as to the degree or character of the evidence necessary to establish a mistake in a contract. It is the province of the jury to pass upon the weight of the evidence and to determine from all the evidence admitted whether there was a mistake.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

March 22, 1881.

OPINION BY JUDGE HINES:

The refusal of the court below to sustain the demurrer to the first amended petition, because it was inconsistent with the original petition, was not prejudicial to the substantial rights of appellant, and need not, therefore, be considered. The same may be said of the second amended petition. In neither case was there such an abuse of discretion as would authorize interference by this court.

The motion to transfer the case to the equity docket came too late. It was not entered until after answer to the second amended petition setting up mistake, and it is not, therefore, necessary to determine whether the case should have gone to equity if the motion had been made within the time specified by the code.

The pleadings having presented the issues as to whether there was a mistake in reducing the contract of insurance to writing, it is clear that oral evidence was competent upon that issue. This is no violation of the familiar rule that a written contract can not be altered, erased nor added to without an allegation of fraud or mistake. Notwithstanding the fact that there is no direct evidence

showing that Weinland was acting for appellant, we see no reason for reversing because his letter to appellee was admitted in evidence. It is difficult to perceive how it could have prejudiced appellant, as it only purported to inform appellee that he had forfeited his policy by failure to pay the premium when due.

The refusal of the court to allow the agent to state, "according to his best knowledge and belief, what the contract was," could not have been prejudicial, since the agent had already been interrogated, and had stated to the best of his recollection what passed between appellee and himself at the time of the making of the contract. There is nothing to show that the answer would have been different, or that it would have been more beneficial to appellant than his previous statements.

It was proper to exclude from the jury evidence as to the character of the instructions received by the agent from the company, where there was no evidence that appellee had knowledge of such instructions; and, after the agent had stated that he did not remember that he had communicated his instructions to appellee, it was proper to refuse to allow him to answer that he "nearly always" informed the person obtaining insurance what his instructions were. Such evidence, in view of the positive statement of appellee as to what the contract was, could not have altered the result.

Unless it could be shown, from the circumstances surrounding the parties at the time the insurance was obtained, that the contract was entered into with reference to the "general custom" of insurance companies in regard to such matters, it was not proper to allow evidence of such custom. The failure of appellant to require exact proof of loss, and the reliance upon the failure to pay the premium promptly, was a waiver of the requirement in the policy as to the manner of the proof of loss. *Phoenix Ins. Co. v. Stevenson,* 78 Ky. 150.

It is immaterial whether the agent acted beyond and outside of his instructions in fixing the time for the payment of the premiums unless the instructions to the agent had been communicated to appellee. He had a right to presume that the agent was acting within his authority, as that authority was unquestioned so far as the taking of risks and stipulating for the payment of premiums was concerned, and there is no evidence that any communication was made to appellee as to the extent of the agent's authority.

The instruction asked for as to the degree or character of the evidence necessary to establish a mistake may be actually correct, but the court properly refused to give it to the jury. The province of the jury was to pass upon the weight of the evidence, and to say from all the evidence admitted by the court whether there was a mistake. The rule is a good one when it is applied to the chancellor, but has no application to jury trials. The question as to whether there was a mistake was properly submitted to the jury, and their verdict is amply supported by the evidence.

The fact that the officer issuing the policy did or did not know of the mistake can not alter the case. Appellee had a right to rely upon the supposition that the agent had authority to stipulate as to time of payment, and the stipulation having been made under this supposed authority appellee was under no obligation to make inquiry to ascertain that the officer issuing the policy knew what his agent had done. There would be quite as much reason for saying that the insured should in the first instance ascertain what the instructions of the agent were.

We see no error in giving or refusing instructions, and as the evidence appears to us to support the verdict, the judgment is *affirmed.*

R. H. Cunningham, for appellant.
Vance & Merritt, for appellee.

MARIETTA ABELL ET AL. *v.* BEN F. ABELL ET AL.

Action for Settlement of Estate by Remaindermen.

Generally, an action for a settlement of an estate can not be maintained by remaindermen, but under some conditions such an action may be maintained in order that the remaindermen may ascertain the extent of their interest in the estate.

Lien on Heirs' Interest in Real Estate.

While heirs, by reason of assets received, may be liable for the debts of the ancestor to the extent of property received, the creditor has no lien on such property, but the remedy must be by execution on judgment procured.

Remedy at Law First Exhausted.

The remedy at law must be exhausted before the chancellor will take jurisdiction to cancel even fraudulent conveyances, and equity will not give a remedy to reach property received by an heir from an

ancestor, to satisfy claims against the ancestor's estate. The law gives an adequate remedy in such a case.

APPEAL FROM MARION CIRCUIT COURT.

March 24, 1881.

OPINION BY JUDGE PRYOR:

After the objections interposed by the appellants to the substitution of the appellees as plaintiffs in the action in equity, instituted by the administrator de bonis non, the appellants filed answers and cross-petitions, in which the estates of both John H. Abell and L. A. Abell are settled in this controversy, and the representatives of John H. Abell are seeking a judgment against the appellants. The matters on the cross-petition of the John H. Abell representatives the court could certainly consider, and the claims are so blended that one can not be determined without the other. Why Mrs. Abell, the owner for life of all of this estate, ceased to be a plaintiff in the action does not appear, and how a judgment can be rendered for a party not asking it, or for those not entitled, is not perceived.

She was certainly barred by limitation, and the only reason that the children are not barred is that they are not entitled to the estate until the death or marriage of their mother; but if, being permitted to sue, as well as the life tenant, at any time, there is no reason why the statute, when running against the party entitled, should not also run against the other parties in interest. The infants are certainly not entitled to the money, and the mother leaving the case without any assignment of her interest destroyed the right of recovery on the part of the children; and the only question is, could they require a settlement under the circumstances of this case in order that they might know what was in the executor's hands? This estate had been administered upon for more than twenty years. The executor had died and his estate was being distributed, and the remaindermen were certainly interested in ascertaining what was in the hands of the executor and the amount to which they were entitled at the death of the life tenant. Ordinarily an action for a settlement could not be maintained by those in remainder; but under the facts of this case there was much reason why a court of equity should take cognizance of the case in order that those in remainder might know the extent of their interest, and this is all the relief they are entitled to.

Besides, this court ascertains that the conveyance made by John Abell in his lifetime to his sons was made in good faith, and yet adjudges that these appellants have a lien on the land for the satisfaction of the judgment. This is erroneous. If the parties are liable as heirs or distributees by reason of assets received a judgment should be rendered against them, but there is no lien on their estate, nor any reason why the debt could not be made by an ordinary execution. In fact, such is the rule; the remedy at law must be exhausted before the chancellor will take jurisdiction to cancel even fraudulent conveyances. We have examined the proof in this case carefully, and there is no reason to complain of the amount found due by the settlement. After the lapse of so many years the chancellor will presume that the debts of the testator were discharged by his executor. The proof shows that he owed as much or more than came to the hands of his father, and the widow, who was entitled to this money, has stood by, and by her silence for nearly a quarter of a century sustained this assumption of the chancellor; and we are not inclined to conclude that the debts paid and the expenditures made by the father of appellants' testator would more than balance the claims set up by the appellants; but the commissioner below has sifted all of these transactions and given credit for all the claims that have been really proven, and we will therefore not disturb the amount found due by the settlement and to which the widow is entitled. We concur with the court below that the transactions between John Abell and his sons were bona fide, and ought not to be disturbed.

On the return of this cause the widow may, by amended petition, reduce the amount due to the estate, or may relinquish in favor of the children; if so, the executions may go in their names. This is the only solution of the trouble this case has gotten into by reason of the pleadings.

Judgment *reversed* on the cross-appeal and *affirmed* on the original appeal.

Russell & Avritt, for appellants.

Rountree & Lisle, for appellees.

JAMES V. ROSS *v.* N. J. WEAVER ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—314.]

Capacity to Make Will.

In a contest of a will on the ground of mental incapacity, the sole question to be determined is as to the testator's mental capacity at the time the will was executed. The moral character of the testator, or the fact that the property is devised to persons other than relatives, are not involved in such a case except as such facts bear upon the testator's mental capacity.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

March 24, 1881.

OPINION BY JUDGE PRYOR:

After a careful consideration of this record we have been unable to find any testimony conducing to show either a want of mental capacity in the testatrix, or the exercise of an undue influence over her at the time of the execution of the paper purporting to be her will, by any of the parties in interest. The draftsman of the will, as well as the other subscribing witnesses, both of whom are intelligent physicians, and one of them the family physician of the deceased, all testify as to her mental capacity and her ability to duly comprehend what she was doing when she executed the paper in controversy. One of these physicians, while entertaining no doubt as to her mental powers, speaks of her having been morally insane, and if the will was a good will she was competent to make it, and if not she was incompetent. All of this should have been excluded from the jury, as it shed no light on the issue they had to try, but on the contrary was calculated to mislead them. The testatrix seems to have been so low in her morals as to have kept a house of prostitution for a number of years, and the principal devisee of the paper in controversy seems to have been one of her paramours. Her depravity in this regard may have led the physician to conclude that she was morally insane, as there is no other fact in this record upon which to base such a conclusion, and although she may have been an abandoned woman, she nevertheless had the right to dispose of her estate as she saw proper, and it was simply a question as to her mental capacity at the time she signed the paper.

There is no evidence that Ross influenced her to make the will,

or that he exercised any improper influence over her in that regard. She had abandoned her family and friends and was leading a life that necessarily estranged her from them, and while a jury might conclude that she ought to have given her estate to her relatives instead of her paramour, this conclusion must be reached from the evidence in the case and not from one's own ideas as to the manner in which the property should have been devised.

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

J. W. & Geo. R. Gorin, Bush & Porter, J. M. Hines, for appellant. Halsell & Mitchell, for appellees.

SYE CONNOR *v.* BENJAMIN BOTTS.

[Abstract Kentucky Law Reporter, Vol. 2—384.]

Trespass for Void Distress Warrant.

To maintain a trespass because of the execution of a distress warrant the plaintiff must show that the proceedings under the distress warrant were void.

Waiver of Exemption from Distress Warrant.

The failure of a defendant in a proceeding under a distress warrant to bring an action to recover the possession of exempted corn taken under the warrant, or to execute a bond and move for a judgment on it and for judgment that the corn was exempt, amounts to a waiver of the defendant's exemption rights.

APPEAL FROM BATH COURT OF COMMON PLEAS.

March 24, 1881.

OPINION BY JUDGE HARGIS:

The distress warrant was for $81.63. That sum was constituted for the sum of $72 for supplies and $9.63 for rent. The distress was, therefore, not void, but the levy was excessive, and an action for excessive distress would have lain. The appellant, however, brought an action for trespass which could be maintained alone upon the ground that the proceedings under the distress warrant were void.

The corn set aside as exempt from the distress warrant was insufficient provision for the appellant and his family for one year, because he was entitled to enough corn for bread and to buy meat also for one year, as he had no meat.

There are two reasons, though, that justified the judgment of the court to which the law and facts were submitted. 1. The corn levied on was sold for its market value. 2. The appellee had a lien thereon, regardless of exemptions for the whole of that part of the account for supplies, by Gen. Stat. (1879), Ch. 66, Art. 6, § 5.

The appellant can not complain, because he could, as soon as the levy was indorsed, have brought an action to recover the possession of the corn taken under the distress warrant to the extent of the items in the account for supplies, or executed bond; and on motion for a judgment on it against him he could have depended upon the ground that the distress was in whole or in part illegal, or that the corn levied on was exempt by statute. He failed to avail himself of either of these remedies, and has been unable to sustain the trespass because the warrant was not void; he must, therefore, submit to the inevitable result authorized by the statute mentioned.

Wherefore the judgment is *affirmed.*

R. Gudgell, for appellant.

Reid & Stone, for appellee.

COMMONWEALTH *v.* MIKE MAHONEY, JR., ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—314.]

Action for Forfeiture.

Where an accused person gives bond to keep the peace, his conviction thereafter for drunkenness and disorderly conduct is not a breach of the terms of such bond, and where a proceeding is for an alleged breach shown by judicial conviction, unless the record thereof exhibits the breach, there is a failure of proof and the breach can not be shown by alteration of the record by parol evidence.

APPEAL FROM FRANKLIN CIRCUIT COURT.

March 24, 1881.

OPINION BY JUDGE HARGIS:

A conviction of the offense of drunkenness and disorderly conduct does not constitute "a judicial conviction of the defendant of an offense involving a breach of the peace within the period specified in the bond." *Rankin v. Commonwealth,* 9 Bush (Ky.) 553. The proceedings of the police court were the basis of the action for

the forfeiture, and an attempt by allegation to show that the conviction was for a different offense than exhibited by the record would, if tolerated, authorize the commonwealth to contradict the record by parol proof.

Whether there can be other breaches of the bond than those specified in Buckner & Bullitt's Crim. Code (1876), § 391, need not be determined, as this proceeding is for an alleged breach shown by judicial conviction, and unless the record thereof on inspection exhibits the breach, there will be a failure of proof, and the breach can not be shown by alteration or variation of the record by parol evidence relating to the same acts for which the alleged conviction was had.

Wherefore the judgment is *affirmed.*

P. W. Hardin, for appellant.

Major & Jett, for appellees.

[Cited, *Cornett v. Commonwealth,* 25 Ky. L. 1769, 78 S. W. 858.]

WM. W. BOYD *v.* R. L. ANDERSON ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—388.]

Commissioner's Sale.

Where there is no direction given a commissioner by the judgment to value the property sold, and not being subject to appraisement, still he fixes its value and requires at the sale that it should bring two-thirds of such value, the rights of the creditor are prejudiced, as he is entitled to have such property sold for what it will bring.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 29, 1881.

OPINION BY JUDGE PRYOR:

There was no direction given the commissioner by the judgment to value the property sold, and not being subject to appraisement, the valuation made, and the requirement by the commissioner that it should bring two-thirds of its value, enured to the benefit of the

owner, and prejudiced the rights of the creditor. We perceive no reason for disturbing the judgment or sale.

Judgment *affirmed.*

Morton & Parker, for appellant.

Beck & Thornton, D. G. Falconer, for appellees.

STEPHEN STONE *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—391.]

Criminal Law—Indictment.

An indictment is good which charges that the accused wilfully and maliciously shot and wounded a named person. It will be implied that the accused shot at him, and in the absence of a bill of exceptions exhibiting the evidence, it will be presumed the evidence sustained the charge.

APPEAL FROM FLOYD CIRCUIT COURT.

March 29, 1881.

OPINION BY JUDGE HARGIS:

The indictment is sufficient because it charges that the accused wilfully and maliciously shot and wounded Arnett, which implies that he shot at him; and it must be presumed that the evidence sustains the charge, in the absence of a bill of exceptions showing us what evidence was introduced on the trial.

The trial was not commenced and completed in the absence of the accused, and the error assigned on that ground is not available. The trial was commenced and proceeded to the retirement of the jury to consider their verdict in the presence of the acused, who fled so soon as the jury retired.

The action of the court in overruling appellant's motion for a new trial was not subject to exception (Buckner & Bullitt's Crim. Code [1876], § 281), and is not a reversible error on the ground assigned. *Kennedy v. Commonwealth,* 14 Bush (Ky.) 340.

Wherefore the judgment is *affirmed.*

J. & J. W. Rodman, B. H. Weddington, Thomas G. Fitzpatrick, James Goebel, for appellant.

P. W. Hardin, for appellee.

JAMES V. TURNER *v.* A. A. GOODMAN.

Easement in Passway.

The fact of a passway having been located over the lands of those in interest was a sufficient consideration for its use in common; and its use for a long time and its repair by those interested created a right that can not be disturbed without their consent.

APPEAL FROM METCALFE CIRCUIT COURT.

April 7, 1881.

OPINION BY JUDGE PRYOR:

The testimony in this case is conclusive of the fact that the respective owners of the lands over which this passway runs established it, and recognized it as indispensable for the use of themselves and families for nearly half a century, and that they kept it in repair and occasionally left the old track when timber fell across the beaten path, or changed it on better ground. While the changes thus made might conduce to prove that the use was merely permissive, the location of this private passway with reference to the farms over which it ran, and its use and repair by the parties in interest, would negative such a conclusion. The fact of the passway having been located over the lands of those in interest was a sufficient consideration for its use in common, and the use under such circumstances for so long a time, and its repair by those interested, created a right that can not be disturbed without their consent or by some equitable or legal proceeding. The fact that other passways have been constructed, or others closed or obstructed, can not affect the rights of the parties to the use of the way in controversy. The parties in interest never abandoned it, and the manner in which the appellant was prevented from its use conduces to show that the appellee supposed he had such a right as would be attempted to be enforced.

Judgment *reversed* and cause remanded with directions to enter a judgment declaring the appellant's right to the use of the passway, and restraining the appellee from obstructing its use by him. See *Wilkins v. Barnes,* 79 Ky. 323, in which the question here involved is fully discussed.

L. McQuown, R. B. Dehoney, for appellant.

Bales & Winston, for appellee.

ED BRONAUGH v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—386.]

Criminal Law—Hog Stealing.

In a charge for hog stealing, notwithstanding the fact that none of the witnesses placed the value of the hogs at less than four dollars, the court should have instructed the jury as to what constitutes petit larceny and as to the circumstances under which they were authorized to find the accused guilty of that offense.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 7, 1881.

OPINION BY JUDGE HARGIS:

The indictment charges the accused with the offense of stealing three hogs. The demurrer was filed, but a motion in arrest of judgment was made. As the indictment charges a public offense, the motion was properly overruled.

But the court should have instructed the jury as to what constitutes petit larceny, and as to the circumstances under which they were authorized to find the accused guilty of that offense, notwithstanding the fact that none of the witnesses placed the value of the hogs supposed to have been stolen at less than four dollars. This principle is established in the case of *Carter v. Commonwealth,* 11 Ky. Opin. 92.

While the witnesses may honestly give their opinion as to the value of the property alleged to have been stolen, yet its description or quality, and the knowledge common to all men, of such things, may justify a different opinion of its value from that expressed by the witnesses, and the jury will not be absolutely confined to their estimate in disregard of such means of information.

The name of the owner of the hogs, alleged in the indictment, is idem sonans with that proven, and the variance is not fatal. *Commonwealth v. Riley,* Thach. Cr. Cas. (Mass.) 67; *State v. Patterson,* 2 Ired. (N. Car.) 346; *Bates v. Starr,* 6 Ala. 697.

Wherefore the judgment is *reversed* and cause remanded with directions to award the appellant a new trial and for further proceedings consistent with this opinion.

Joseph Haycraft, Baker & Boyd, for appellant.

P. W. Hardin, for appellee.

JOHN STEWART *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—386.]

Criminal Law—Charging Former Conviction.

When it is sought to increase the punishment of one accused of felony on the ground of his former conviction of felony, the former conviction must be alleged as well as proven; and where no such allegation is made in the indictment, it is error for the court to charge the jury that it might find that there had been a former conviction.

APPEAL FROM McCRACKEN CIRCUIT COURT.

April 7, 1881.

OPINION BY JUDGE HARGIS:

The indictment does not allege that the accused had been formerly convicted of a felony. It is entirely silent on that subject, yet under the instructions authorizing the findings, the jury found the accused guilty of the offense charged in the indictment, and that he had been formerly convicted of a felony, and fixed his punishment at double the term of the first conviction.

This court held in the case of *Carter v. Commonwealth,* 11 Ky. Opin. 92, that the former conviction must be alleged as well as proved, and for that reason the instructions and verdict were erroneous. See also *Mount v. Commonwealth,* 2 Duv. (Ky.) 93. The court properly rejected the pardon offered in evidence by the accused, because it was incompetent for any purpose, as was held in the last case cited, to which we adhere as good law.

Wherefore the judgment is *reversed* and cause remanded with directions to grant the appellant a new trial and for further proceedings consistent with this opinion.

Jas. Campbell, for appellant.

P. W. Hardin, for appellee.

[Cited, *Herndon v. Commonwealth,* 105 Ky. 197, 20 Ky. L. 1114, 48 S. W. 989; *Hall v. Commonwealth,* 106 Ky. 894, 21 Ky. L. 520, 51 S. W. 814.]

B. F. MORAN ET AL. *v.* LAUNCELOT SMITHERS ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—385.]

Sale of Real Estate by Trustee.

Under the statute in this state a purchaser at a trustee's sale is not required to look to the application of the purchase-money unless the deed or devise expressly requires it.

Construction of Conveyance.

Where a conveyance is made in trust for a named person and his wife for their joint lives, and then to the survivor as follows: If the wife shall survive, then to her own proper use and behoof forever; if the husband shall survive then to his use during life, "with power of disposition for his benefit and all remainder after his death as follows," naming remaindermen, it is held that something more than a life estate was intended for the husband, and that the husband had a right to have his trustee convey the land, if in the judgment of the trustee it is deemed necessary or proper to the support or maintenance of said husband after the death of his wife.

APPEAL FROM MARSHALL CIRCUIT COURT.

April 12, 1881.

OPINION BY JUDGE HINES:

Mrs. Sophrona S. Moran, being the owner and having title to a certain tract of land in Marshall county, united with her husband, who is appellant, in a deed conveying the land to Thos. F. Gobeen, Jr., "in trust," as expressed in the conveyance, "for said B. F. Moran and Sophrona S. Moran (as the same was held immediately before the execution of this instrument), for their joint lives, and then to the survivor as follows; if the said Sophrona S. Moran shall survive, then to her own proper use and behoof forever; if the said B. F. Moran shall survive, then to his use during life, with power of disposition for his benefit; and all remainder after his death as follows:" naming appellees.

The trustee, desiring to sell a portion of the land, and being in doubt as to his power under the deed, brought this action for construction. Whereupon the court below held that the deed authorized the trustee "to sell so much and only so much of the lands described therein as was or may be necessary for the reasonable maintenance of said B. F. Moran." The inquiry is as to the correctness of the interpretation.

It does not appear from the record that Moran and wife had any children, nor does it appear that the persons mentioned to take in remainder are related to either. It appears to us that the only object in view in the execution of the deed was to provide for B. F. Moran in case he survived his wife. The legal title to the land was in the wife, and without the trust deed would have remained hers absolutely; so there was no necessity for the deed, so far as she was concerned; but as to the husband, his control over the land and his right to its beneficial use would have ceased at the death of the wife, there being no tenancy by the curtesy. If the deed had gone no further than the expression "to his use during life," there would be no question that he was to have a life estate with beneficial use only, because such an expression aptly and appropriately creates a life estate, but the expression immediately following, "with power of disposition for his benefit, and all remainder after his death," etc., shows that something more than a life estate was intended.

To give the last expression effect it must be construed to mean something more than the mere use during life. "The power of disposition" must mean the right to convey, for every other power over the land, such as cultivating, renting or leasing, exists in a life estate, and, the power of disposition extending in terms to the whole land, it can not, without arbitrary interpolation, be construed to extend to only a portion of the land, if in the judgment of the trustee it is deemed necessary or proper to the support or maintenance of the cestui que trust to sell the whole. This discretion must be exercised by the trustee, at his peril, subject to liability for an intentional wrongful execution of the trust. Under any sale the trustee may make in apparent good faith the purchaser will take a perfect title as against appellant, B. F. Moran, the remainderman, or any person claiming through Mrs. Moran, and such purchaser will not be required to look to the application by the trustee of the purchase-money. Under the statute in this state a purchaser is not required to look to the application of the purchase-money unless the deed or devise expressly requires it. Gen. Stat. (1879), Ch. 113, § 23. If any of the land or its proceeds remains at the death of B. F. Moran it will go to those in remainder.

The expression, as the same was held immediately before the execution of this instrument, does not, under present circumstances,

alter the construction, because it applies to the manner of holding and the rights of Moran and wife during "their natural lives."

Judgment *reversed* and cause remanded with directions to enter a decree in conformity to this opinion.

Tice & Smith, for appellants.

J. W. Dycus, for appellees.

MARY H. STARLING *v.* E. L. STARLING'S ASSIGNEE.

[Abstract Kentucky Law Reporter, Vol. 2—384.]

Construction of Will.

A testator bequeathed his property of every description to his wife for and during her widowhood, to go at her death to his daughter by her and in equal shares to such other children as might be born to them. If his widow should remarry then he gave her one-third of all his property, and the two-thirds to go to said daughter and other children if there were any. If his daughter then living and all other children which he might have by said wife should die unmarried and before attaining the age of twenty-one years, then he willed that the remaining two-thirds devised to them should vest in his son by a former marriage, or if he should be dead, to his children. The widow never remarried and the daughter died in infancy leaving no issue, and no other children were born to said testator and his wife. It was held that the son became vested with the fee simple and absolute title to all the property, subject to the life estate of the widow and subject to be defeated as to one-third thereof only, by the marriage of said widow, and that the son was seized of a vested interest in remainder, the extent thereof only being subject to a contingency.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

April 12, 1881.

OPINION BY JUDGE HINES:

A determination of this case depends upon the construction of the fourth clause of the will of Lynn Starling, which is as follows:

"All the rest and residue of my estate, real, personal or mixed, in expectancy, or enjoyment in possession, remainder or reversion of whatsoever kind or character it may be, and wheresoever situated, whether in or out of Kentucky, and however its kind or character may be altered or changed by my executors under the

provisions of this will, I do hereby devise, will and bequeath to my beloved wife, Mary H. Starling, for and during her widowhood, and at her death to my daughter, Anna Mariah Starling, and such other child or children as I may have by my said wife, Mary H. Starling, in equal shares, and to their or any of their heirs per stirpes. And if my said wife shall again marry, then I devise, will and bequeath to her in her own absolute right the one-third equal part of all my estate, or its avails, if sold by my executors, and the other two-thirds immediately upon said marriage of my said wife is to pass and be vested in said Anna Mariah Starling and my other children by my said wife, in the manner aforesaid; and if the said Anna Mariah, and all other children which I may have by my said wife, Mary, shall die unmarried and before she or they attain the age of twenty-one years, then and in that event my will and desire is that my said last mentioned two-thirds of my estate above devised to them shall pass and be vested in my son, Edmon S. Starling, or his child or children if he be dead, leaving issue, and if he die without issue and before he is twenty-one years old, then the said two-thirds of my estate is to pass and be vested in heirs general. But if any one or more of my children by my said wife, Mary H. Starling, shall die without issue, unmarried and intestate, then the whole share of the child or children so dying shall be vested in my surviving child or children by my said wife, Mary, subject to the restrictions and conditions last aforesaid. It is my further will and desire that the one-third of my estate hereinbefore devised to my said wife, Mary H. Starling, shall be held, used and enjoyed by her absolutely free from the control of any husband she may hereafter have, and free from all responsibility for the debts or contracts of my said wife's husband or husbands, and that she may dispose of the same or any part thereof by will or apportionment in writing, in any way she may choose."

The child, Anna Mariah, mentioned in the will, died in infancy and without issue. There were no other cdildren by Mary H. Starling by her marriage with Lynn Starling, the E. L. Starling mentioned in the will being a son of Lynn Starling by a former marriage. E. L. Starling is over twenty-one years of age, married and has children, and Mary H. Starling remains a widow.

Under a proceeding by the assignee in insolvency of E. L. Starling to subject his interest in certain real estate and bank stock, the court adjudged that Mrs. Mary H. Starling took only a life interest

in the real estate and in the personalty, and directed a sale of the interest in remainder of E. L. Starling, and enjoined the bank and Mrs. Mary H. Starling from disposing of or transferring the bank stock.

This decree we think is unquestionably correct. E. L. Starling took a vested, vendible interest in remainder in all the property, one-third by inheritance and two-thirds by devise, subject to the life estate of Mary H. Starling, and subject to be defeated as to one-third only by the marriage of Mary H. Starling. There is certainly a vested interest in remainder, the extent of that interest only being subject to a contingency. Whatever that interest may be it is a present interest, and the purchaser takes the remainder subject to have it cut down one-third by the marriage of Mrs. Starling. No sale can be made that will interfere with the beneficial use of the life estate by Mary H. Starling, but in order to protect the interest in remainder it was proper to enjoin the transfer or disposition of the bank stock, leaving Mrs. Starling with the dividends. This power in a court of equity to thus interpose in the administration trusts is too familiar to require citation of authorities or argument to support it.

Judgment *affirmed.*

John T. Bunch, for appellant.

M. Yeoman, for appellee.

MARGARET WALKER *v.* H. V. PRETHOFF ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—390.]

Liens on Real Estate.

Where a husband and wife convey real estate, reserving in the deed a lien for the sum of $75 per year so long as either or both of the grantors shall live, the creditors of the vendee have no liens upon the land, and the lien of the grantors must be first paid out of the rents and profits.

Homestead.

The widow of a grantee of 44 acres of land, upon which she lives, is entitled for herself and infant son, as against her husband's creditors, to a homestead of the value of $1,000 to be laid off to her so as to include the dwelling-house, but her homestead lien is subject to a lien of her husband's father and mother who conveyed the land to him, reserving in the deed a lien of $75 per year for their benefit.

APPEAL FROM GREENUP CIRCUIT COURT.

April 12, 1881.

OPINION BY JUDGE HARGIS:

The deed from Robert Walker and his wife, Margaret, to John H. Walker, reserved a lien for the sum of $75 per year so long as either or both of the grantors should live, to be paid triannually to them, or either of them if one should survive the other.

The creditors of the vendee have no liens upon the land embraced by the conveyance, according to the facts disclosed by the record. The lien in favor of the appellant, Margaret Walker, for the $75 payable annually, as directed by Robert Walker's will, is superior to their claims, and she must be first paid out of the rents and profits of the land.

The appellee, Emily Walker, for herself and infant son, is entitled, as against her coappellees and their claims, to a homestead of the value of $1,000, to be laid off to her so as to include the dwelling-house, but subject to the appellant's lien. The homestead, being laid off, will remain as it is, but the excess of 13½ acres, and so much of the 30½ acres as constitutes the homestead, should be rented annually until the amount due the appellant from May 16, 1875, with interest in annual rents to date, shall have been paid. Afterwards, so much of the whole tract as shall be necessary, first renting the 13½ acres, should be rented annually to pay the appellant's $75 per annum as it falls due.

The appellee, Prethoff, should be required to pay into court the rent received by him; and this amount, with any accumulated rents under the court's control, should be paid to the appellant at once and credited on the sum due her.

The evidence shows that the rent of the 13½ acres is insufficient to raise the sum which will become due to the appellant annually during the remainder of her life, and as the sum accumulated in her behalf is considerably larger than the amount that will become due to her annually, the appellees, who are creditors of John H. Walker, have not shown themselves entitled to any of the rents of any part of the 44 acres of land, in view of the superior claim

of the appellant and of the right to a homestead by the appellee, Emily Walker.

Wherefore the judgment is *reversed* with directions to render judgment in conformity with this opinion.

Roe & Roe, T. H. Paynter, for appellant.

J. Davidson, for appellees.

TRUSTEES OF TOWN OF STANFORD *v.* W. H. HITE.

[Abstract Kentucky Law Reporter, Vol. 2—386.]

Recovery of Money Paid Under Void Ordinance.

In this state when money is exacted under the provisions of a void city ordinance, paid and collected under the mistaken belief that the ordinance is valid, the person paying it may recover it from the city.

APPEAL FROM LINCOLN CIRCUIT COURT.

April 14, 1881.

OPINION BY JUDGE PRYOR:

The appellee, W. H. Hite, having paid to the town of Stanford under a void ordinance a certain amount of money for the privilege of vending saddles and harness manufactured by him in the town of Lebanon, instituted the present action to recover back the money on the ground that the burden imposed was unauthorized and the ordinance requiring its payment void; and that he paid the money under a mistake as to his legal rights, and the corporation had received it under the belief that the power existed to impose the tax.

That the ordinance under which the exaction was made is void seems not to be questioned, and that the money was paid by the appellee to the town authorities under a mistake as to his legal rights and with the full belief that the burden was properly imposed, is equally certain. Each party acted in the best of faith, the one that it was his duty as an officer of the town to exact the money, and the other that it was his duty to pay it. It subsequently appears that both were mistaken, and under such circumstances ought the corporation, in law, conscience or good morals, be permitted to retain the money? While numerous authorities have been adduced

against the right of recovery upon such a state of facts, the decisions of this court without an exception authorize the recovery.

As said in the case of *Ray v. Northern Bank of Kentucky,* 3 B. Mon. (Ky.) 510, "Whenever, by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor or good conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back."

The corporation has no right to this appellee's money. He was under neither a legal nor moral obligation to pay it; and having received no consideration in any manner by reason of its payment the corporation was properly required to refund it. The readiness of the appellee to obey the law of the city, and to comply with what he had the right to suppose was a valid ordinance, presents a stronger reason for affording him relief than in a case where there had been a mutual mistake with reference to an ordinary business transaction. See *Anderson v. Louisville,* Mss. Opin.

Judgment *affirmed.*

J. S. & R. W. Hocker, for appellant.

Hill & Alcorn, for appellee.

[Cited, *Bruner v. Stanton,* 102 Ky. 459, 19 Ky. L. 1514, 43 S. W. 411.]

JAMES H. CRADDOCK ET AL. *v.* J. S. JORDAN.

J. B. WILDER *v.* W. J. CRADDOCK ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—387.]

Jurisdiction of the Louisville Chancery Court.

The Louisville Chancery Court has no jurisdiction nor power to issue an execution addressed to the marshal of that court to levy on and sell property outside of Jefferson county to satisfy a judgment of said court. The court's jurisdiction extends only over said county, and a levy and sale of property by the marshal under an execution, located in another county, is void.

APPEALS FROM WARREN CIRCUIT COURT.

April 16, 1881.

OPINION BY JUDGE HINES:

On the appeal of James H. Craddock we need consider but one question, and that is whether an execution issuing from the Louisville Chancery Court in the county of Jefferson, addressed to the marshal of that court, and by him levied upon land lying in Warren county, gives a lien in favor of the execution plaintiff. The execution, in the usual form, commands the marshal of the estate of Wm. J. Craddock to make the sum of $3,702.13, without designating any particular property and without specifying jurisdiction within which the marshal is to exercise his functions.

Counsel for appellants insists that the power to make a valid levy by the marshal on land lying outside of Jefferson county is conferred by an act of February 28, 1835, and that this act was not repealed by the Civil Code in force prior to the 1st of January, 1877. The portion of the Act of 1835, Ch. 900, § 9, relied upon is as follows: It shall be the duty of the marshal "to execute the commands and orders of the court, and to execute throughout the state, all lawful precepts directed to him, and issued under authority of said court."

In view of the fact that at common law no execution was operative beyond the territorial jurisdiction of the court issuing it, whether it was directed to the officer of that court or to the officer of the court within whose jurisdiction the property to be seized was situated, it is questionable whether the legislature, in the use of the term "precepts," intended to embrace an execution by means of which the officer could invade the territorial jurisdiction of another court of equal dignity, and seize the property of the citizen lying therein. Prior to the Act of 1796 there was no law by which the court of one county could cause an execution to be issued and directed to the officer of another county; and at the time of the passage of the Act of 1835 there was no law authorizing any court to send its officer to execute process or precepts outside of its jurisdictional limits. The word "precepts" ordinarily will be taken to embrace all writs, but it appears to us that, if it had been the intention of the legislature to confer upon the marshal of the Louisville Chancery Court the exceptional and extraordinary power of taking and executing a fieri facias in another county, the specific terms "fieri facias," or "writ of execution" would have been used instead of the general term "precepts."

This is quite a different matter from the execution of a summons requiring attendance of the party in order to inquire into the fact of liability on his part. The distinction might well be drawn, but as we are of opinion that the Act of 1835 has been repealed by Myers' Code (1854), Ky. Code of Prac. (1854), it is considered unnecessary to discuss this aspect of the case. Section 817 of Code is as follows: "Process of the court to other counties may be issued and directed, and shall be executed and returned, as such process from a circuit court."

At the time the section quoted was adopted the law required that when a process was to be executed in another county it should be directed to the sheriff of that county, and should be executed and returned by such sheriff. This section seems to import that and nothing more. It is in reference to the subject-matter of the service of processs in other counties of the state, and was apparently intended to provide the method and manner of the service of such process, and by necessary implication excludes all other methods. The general rule is that when, in the revision or codification of the law, a certain subject-matter is treated, the presumption is indulged that all the law with reference to the subject has been considered and is embraced in the enactment. Myers' Code (1854), § 875, Ky. Code of Prac., 1854, does not conflict with this view, because it expressly provides that all laws "in any case provided for by this Code" are repealed.

The case of *Lloyd's Admr. v. McCauley's Admr.*, 14 B. Mon. (Ky.) 535, is not in point, because Myers' Code, § 817, was not embraced in the Code of 1857. No provision was made in that code for service of process outside of the county from which it issued. We are, therefore, of the opinion that under the Code of 1854 the Louisville Chancery Court had no authority by execution and through its marshal to levy upon land lying in any county other than Jefferson county.

As to the appeal of J. B. Wilder, we think the judgment of the court below is correct. The weight of the evidence is to the effect that appellant agreed with W. J. Craddock to receive the 57¾ acres of land in full discharge of his claim; and having fully considered the evidence we deem it unnecessary to set it forth in detail, as it is our conclusion from such examination, and not from the detailed statement of the evidence, that determines the rights of the parties.

Wherefore the judgments on the appeals of James H. Craddock and J. B. Wilder are *affirmed.*

H. T. Clark, for Wilder.
Halsell & Mitchell, for James H. Craddock.
R. Rodes, Wright & McElroy, for Jordan.
J. W. & G. R. Gorin, for W. J. Craddock.

CITY OF FRANKFORT v. GEO. C. WATSON.

[Abstract Kentucky Law Reporter, Vol. 2—388.]

Special Damages by Maintenance of a Nuisance by City.

In a suit for damages by reason of the conduct of a city the plaintiff must aver special damages, and before there can be a recovery he must show that he has suffered damages; but where he has done this it devolves on the city to show that the thing complained of is a common nuisance, affecting all the citizens alike and therefore a public nuisance to be reached by indictment.

Waiver of Ruling on Demurrer.

Where there is no order of the court overruling a demurrer, it must be considered that appellant waived it and the case be treated as if no demurrer had been filed.

APPEAL FROM FRANKLIN CIRCUIT COURT.

April 16, 1881.

OPINION BY JUDGE HINES:

The petition contains a substantial averment of special damages to appellee by reason of the conduct of the city. We concur with counsel for the appellant that before there can be a recovery against the city for damages the party complaining must allege and show by proof that he has suffered damages; but when he has done this it devolves upon the city to make it appear that the thing complained of is a common nuisance, affecting all the citizens alike, and therefore to be reached by indictment. Appellee alleged the injury to himself, and it was not necessary to allege that the thing complained of did not affect every one else in the same way. There is no order of the court overruling the demurrer, and under the well known rule of practice it must be considered that appellant waived it, and the case must be treated as if it had not been filed. There

being then no demurrer, all the formal defects in the petition, if any, which could not be reached by general demurrer, are waived by the answer of appellant, which is a plea to the merits.

As there was a substantial issue, and there is no bill of evidence, we must assume that the evidence heard was sufficient to authorize the verdict and judgment.

Judgment *affirmed.*

Hugh Rodman, for appellant.

John L. Scott, for appellee.

ELIZA JANE LATHRAM ET AL. *v.* FRANKLIN T. JONES ET AL.

[Kentucky Law Reporter, Vol. 2—424.]

Construction of Will.

Where by will a testator devises to his wife a life estate in one-third of his home farm, gives the remainder to his five children equally, but declares that he has advanced to one daughter $738.69 and asks that each of the other four heirs shall receive an equal sum before the daughter shares with them, and on administration the personal property is not sufficient to make the four heirs equal to the daughter, the real estate may be subjected to sale to pay to each of the four the amount necessary to make them equal to what the daughter has received as an advancement.

APPEAL FROM BATH CIRCUIT COURT.

April 20, 1881.

OPINION BY JUDGE HARGIS:

Ambrose Jones, by his will, gave to his wife, during her life, one-third of the farm on which he lived, and to his daughter, Eliza Jane Lathram, $738.69, which the testator stated in his will he had paid to her husband. By the third clause, he appointed two of his sons executors, and directed them to sell his personal property, pay his debts and funeral expenses, and to give to his wife one-third of the remainder, and the balance to divide equally among his five heirs, naming them.

After directing that Eliza Jane Lathram's share should be paid to her, "her husband to have no control or interest in the same whatever," he uses this language: "And the balance of my four heirs

is to have each the sum of $738.69, to make them equal with my daughter, Eliza Jane Lathram, which is spoken of in this instrument. * * * Last, I now wish my real estate to be equally divided among my five heirs, whenever a majority of them agree to do so."

He had five children, including Eliza Jane Lathram, who prosecute this appeal from a judgment subjecting so much of the real estate as was necessary to make the four heirs equal with her, the personal estate being insufficient for that purpose. The question presented is, Did the testator intend to confine the application of his property to the equality of its distribution among his children to the personal property alone? If such was his intention the words of his will and all fair conclusions to be derived from them furnish no sufficient evidence of it. He did not say that the personal estate alone should be used to make them equal, but he directed that each should have the sum of $738.69, to make them equal, without specifying the species of property out of which it should be paid or realized.

It is true, in the last clause of his will he directed his real estate to be equally divided between all of his heirs, but it is also true that he directed the balance of his personal estate to be divided equally between all of his heirs after the payment of his debts and funeral expenses, and giving to his widow one-third thereof. So the language used with reference to the division of both classes of his estate is the same, and clearly indicates that his main object was to divide his estate, both real and personal, after providing for his widow and the payment of debts, equally between all of his children, having first provided for making them equal with the appellant, whose husband had received more than the rest of his children.

Wherefore the judgment is *affirmed.*

R. Gudgell & Son, for appellants.

Reid & Stone, J. S. Hurt, for appellees.

C. A. McLAUGHLIN, JR., *v.* F. A. AVORD.

[Abstract Kentucky Law Reporter, Vol. 2—390.]

Partition of Land.

The fact that the sale of the entire tract of land sought to be partitioned would conduce to the interest of the parties is not sufficient to authorize a sale, especially where the commissioner's report shows

that the land is susceptible of division without greatly impairing its value.

APPEAL FROM KENTON CHANCERY COURT.

April 20, 1881.

OPINION BY JUDGE PRYOR:

The report of the commissioner in connection with the testimony of Rice, the surveyor, shows that the partition of the land between the appellant and the appellee was fair and equal, and while others express a different opinion the same character of conflicting proof could be readily obtained in regard to almost any partition of land. The fact that a sale of the entire tract would conduce to the interest of the parties is not sufficient to authorize a sale of the entire land. Besides, the commissioner's report shows that the land is susceptible of division without greatly impairing its value; and not only so, but such a division has been made. Nor did the parties make any such question when the order of partition was made, or before, but raise the question for the first time by exceptions to the commissioner's report.

The judgment below is *affirmed.*

Stevenson & O'Hara, for appellant.

R. D. Handy, for appellee.

HENRY S. MCDOWELL *v.* WILLIAM COLEMAN ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—389.]

Jurisdiction of Police Court.

Real estate can not be reached by execution from the police court. Its judgments and executions create no lien on real estate, and when such a levy is made and a bond of indemnity is taken, such bond is without consideration and is void.

APPEAL FROM CALDWELL CIRCUIT COURT.

April 20, 1881.

OPINION BY JUDGE HINES:

The property levied upon in this case was real estate (*Clore v. Lambert,* 78 Ky. 224), and could not therefore be reached by exe-

cution from the police court. No lien was created by the levy of the execution; there was no consideration for the bond of indemnity; there was no authority to accept a bond of indemnity in case of levy on real estate. For that reason and for the reason that the execution could not reach real estate, the bond was a nullity, and the court properly instructed the jury to find for the defendant.

Judgment *affirmed.*

G. W. Duvall, for appellant.

J. H. HICKMAN *v.* C. G. SEWELL.

[Abstract Kentucky Law Reporter, Vol. 2—439.]

Easement in Passway.

Where in plaintiff's petition it is only shown that a party and the public at large for more than fifteen years from a certain date continuously and uninterruptedly used a certain passway, claiming and holding the same as a passway, the petition is not good as an averment of adverse holding under a claim of right. However, where no demurrer is filed, but an answer denying the averments is filed, its filing cures the defects in the petition.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 20, 1881.

OPINION BY JUDGE HINES:

It may be conceded that, as against appellant, no record title is established in appellee to the private passway, but we think the pleadings are sufficient to present the issue of adverse holding and use for the statutory period of limitation, and that the evidence is sufficient to sustain the decree. The petition charges that the roadway was dedicated to appellee by the deed from J. F. May, and that the appellee and the public at large "for more than fifteen years, viz.: from said December 15, 1859, to the year 1876, continuously and uninterruptedly used the said road, claiming and holding same as a passway," of which appellant had notice. This is not a good averment of adverse holding under a claim of right, and might have been taken advantage of by demurrer or motion to make specific; but instead of doing either appellant answered and said he denied that any passway as aforesaid was opened, or that it was used by

the plaintiff or the public from December 15, 1859, up to 1876, or for any time, under a claim of right in the plaintiff or the public. This clearly cures the defect in the petition and presents the issue as to whether appellee had used the passway for fifteen years under a claim of right.

The deposition of appellant shows that he had agreed to purchase the land before he had notice of the claim of appellee, but on hearing of the claim he refused to execute his notes or to accept a deed until he was satisfied by his vendor that appellee's claim could not be enforced. In his deposition he says he "was apprised of the fact (of the claim) before I made a payment or received a deed; after having his (May's) explanation and telling me that Sewell's claim was merely verbal we closed the trade—would not have done so otherwise."

There is no trouble in locating the road. It extended to the limits of appellee's claim between the fences constituting the lane.

Judgment *affirmed.*

W. N. Sweeney & Son, for appellant.

ELIZABETH STANDEFORD ET AL. *v.* CASPER BATES.

[Abstract Kentucky Law Reporter, Vol. 2—389.]

Wife's Joining Husband in Deed.

Where a wife signs and acknowledges a conveyance, and it is lodged in the proper office for record, the failure of the clerk when it was recorded to insert the name of the wife will not affect the rights of the grantee.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 22, 1881.

OPINION BY JUDGE PRYOR:

It is admitted in the pleadings of this case, or if not the evidence establishes the fact beyond controversy, that the wife of the appellee signed and acknowledged the conveyance sought to be cancelled, as the law requires, and it was then lodged in the proper office for record. The omission by the clerk to insert the name of the feme when it was recorded can not affect the rights of the grantee, nor will the verity of the certificate made by the principal clerk be ques-

tioned for no other reason than that the proof during the progress of the case discloses the fact that the acknowledgment was taken by the deputy, and not by the principal. The foundation for an attachment upon the action and conduct of the officer must be found in the pleadings before the court can or will consider such a question.

The transfer of the title was regular and proper and the only remaining question is as to the competency of the wife to execute the conveyance, and whether or not its execution was induced by the exercise of an undue and improper influence on her by her husband. The wife left no children surviving her, and it was not material that the wife should desire to give to her husband, in preference to her relatives, the estate owned by her, and such a purpose would be the more certainly entertained in a case like this, where the husband, during the long and sad affliction of the wife, had manifested the greatest solicitude in regard to her condition, using every means that was available to restore her health. All the testimony on the part of the appellant, as well as the testimony for the appellee, conduces to show that this exhibition of kindness on the part of the husband was prompted by the love and affection he had for his wife; and an entire absence of any mercenary motive on his part. He may have yielded readily to the wishes of his wife in regard to the disposition of her estate; but that he even influenced her in the execution of the conveyance is not sustained in any manner by the proof, unless his affection for her, originating from the purest motive, is to be held as evidence of undue influence.

The attorney preparing the deeds conversed with the wife on the subject in the absence of her husband, and she had no hesitation in expressing to him her wishes on the subject. It is true that the appellee had seen the attorney some time before the deeds were executed, and consulted with him as to the manner in which the title could be passed from his wife, but this was done, as the appellee swears, at the instance of the wife, and we find nothing in the record authorizing the chancellor to discredit his statement.

Some of the neighbors say she was unacquainted with business matters and would not have likely known what a conveyance was unless explained to her, but when explained she had the mental power to comprehend it. This would be doubtless true of almost any woman who had never engaged in the business affairs of life. The testimony clearly shows that she had at least an ordinary intellect, and could not only express her wishes in regard to her es-

tate, but could comprehend fully the nature of the writing she was executing.

The judgment below is *affirmed.*

Harlan & Wilson, for appellants.

William Lindsay, N. G. Rogers, for appellee.

BELINDA STONE ET AL. *v.* P. L. MAXEY.

[Abstract Kentucky Law Reporter, Vol. 2—389.]

Sale of Property by Trustee.

When real estate is held in trust for the support of another, with discretionary power to sell, but where the trustee does not see fit to exercise such power, it is error for the court to order it sold at the instance of a creditor whose claim is not so large that it might not be paid out of the rents.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 22, 1881.

OPINION BY JUDGE PRYOR:

It does not appear that either the trustee or the appellants were in the actual occupancy of the house and lot when this suit was instituted, and therefore no homestead right exists; but we think the court erred in directing a sale of the property. The property was left in trust for the support of the appellants, with the discretionary power on the part of the trustee to sell. This power the trustee has not exercised, and it may be to the interest of the appellants that it should not be sold. The debt of the appellee does not exceed $125, including costs, and whatever it may be could doubtless be paid out of the rent of the property.

The judgment is *reversed* and cause remanded with directions to have the property rented out and apply the proceeds to this debt. A sale, of course, can be made if all the parties desire it.

Rodman & Brown, Kinney & Bernard, for appellants.

C. B. Seymour, for appellee.

J. J. GOODNIGHT *v.* J. H. ADSIT ET AL.

Constitutionality of a Statute.

An act of the legislature may be constitutional in part and unconstitutional in another part.

Claims Against Commissioner.

Claims may be proved before a commissioner without an action to establish their validity, for in such case the claims may be as effectively questioned by exceptions to the commissioner's report as they could be by suit.

Liens of Materialmen.

Where money is loaned for and applied to the business of manufacturing in which the debtor was engaged, it comes within the lien statute and is superior to the claim of an attaching creditor.

Waiver of Materialman's Lien.

One having a lien as a materialman waives it by accepting a mortgage for the same claim and electing to pursue his remedy thereon.

APPEAL FROM SIMPSON CIRCUIT COURT.

April 22, 1881.

OPINION BY JUDGE HINES:

It is contended by the appellant that 1 Acts March 20, 1876, Ch. 902, § 1, Gen. Stat. (1879), p. 944, is unconstitutional because it violates the obligation of contract. This we concede, in so far as it attempts to reach, in behalf of the materialmen, property mortgaged prior to the furnishing of material or the performance of services by materialmen; but the principle does not apply here because the proceeds of all the property covered by the mortgage in this case were applied to the discharge of the mortgage debt. An act of the legislature may be constitutional in part, and unconstitutional in another part.

It is objected in the second place that the court erred in allowing all claims presented within sixty days after the levy of the attachment, insisting that no claim should have been allowed which had been overdue sixty days. It is provided in § 4 of the act that the lien shall attach whenever the property is taken under attachment; and § 5 provides that suit may be brought within sixty days next after the right of action shall accrue. As no right of action

under the statute can arise until the lien attaches it is manifest that the limitation begins at that time. The statute is treating of the enforcement of liens and not of the right of action against the person—of proceedings in the nature of proceedings in rem and not of proceedings in personam—and it must therefore be construed in reference to the matter about which it specially treats, and not by the general law as to limitations.

It is objected in the third place that certain claims were improperly allowed, because they were simply filed before the commissioner without the formality of a suit against the debtor and a complaint. We think this objection not well taken. The question might well arise if there were no parties to the action except the appellant and the creditor, and the whole estate had not passed into the hands of an assignee for general distribution. According to the relative rights of claimants, the rule applicable to the distribution of insolvent estates in the hands of an assignee must apply. The claims may be proved before the commissioner without an action to establish their validity, for in such case the claims may be as effectively questioned before the commissioner and by exceptions to his report as they could be by suit. *Dobyns v. Dobyns' Assignee,* 79 Ky. 95, 2 Ky. L. 274.

It is contended in the fourth place that certain claims for money loaned to the debtor were improperly allowed as liens prior to appellant's claim. The evidence as to these claims is that the money was loaned for and applied to the business of manufacturing in which the debtor was engaged. We think it is within the spirit of the statute to allow them as superior to the claim of the attaching creditor. The one who furnishes money which was applied to the business of manufacturing in effect furnished "supplies" for the conduct of such business. It is upon the same principle that one furnishing an infant money to buy or supply necessaries is entitled to claim upon the ground that he has furnished the necessaries. *Watson v. Cross,* 2 Duv. (Ky.) 147.

As to the complaint that the claim of Thompson & Booker should not have been allowed because the coal and wood for which the allowance is made was not used in the business of manufacturing, it is sufficient to say: (1) the whole amount ($10), if improperly allowed, would not authorize a reversal on that ground alone; and (2) the evidence does not show how much of it was used in the business, but does show that some portions were so used.

As to the claim that appellant should have been preferred to the extent of the whole of his claim there is this to be said, that even if it be conceded that the claim is for material, within the meaning of the statute, appellant waived that lien by accepting the mortgage for the same claim and electing to pursue his remedy thereon. We need not speak of the policy or impolicy of this law, nor of the hardships it may work, because it is our duty to construe the law as we find it, and because the features that counsel consider most obnoxious have been repealed by an act approved May 4, 1880.

Judgment *affirmed.*

R. Rodes, J. H. Goodnight, for appellant.

G. W. Whitesides, Walker & Walker, for appellees.

MARY WHIPPLE v. LOUISVILLE PRESBYTERIAN ORPHAN ASYLUM ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—391.]

Abandonment of Cemetery.

When a cemetery is abandoned by the corporation owning it, and for a period of more than twenty years no bodies are buried in it, and all its officers and trustees are dead, a court of chancery will not at the instance of one lot holder, whose relatives are buried there, appoint new trustees and decree that such cemetery should be maintained as such, where it is shown that all the bodies except the lot holder's relatives have been removed. The owner of such lot, however, has a right of property in the lot bought by her of which she can not be deprived.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 27, 1881.

OPINION BY JUDGE PRYOR:

It appears that the West Louisville Cemetery was chartered in the year 1848, and purchased for its burial ground about fifteen acres of land in or about the city of Louisville, the same now being within the corporate limits; that in the year 1849 the appellant purchased a lot in the cemetery, where many of her family have been buried. It further appears that the act of incorporation was re-

pealed in the year 1854, and that the property has been abandoned as a cemetery, without trustees or interments within its limits for nearly or perhaps more than twenty years. Other burying grounds more remote from the business portions of the city have been chosen, and all the lots in the West Louisville Cemetery sold and the dead removed, except the lot owned by the appellant. The ground has been sold to and some of it given by deed to the Presbyterian Orphan's Home of this city.

The appellant, after the lapse of more than twenty years from the appointment of any trustees, and after the original trustees had resigned or died, and when the property had been abandoned as a cemetery and its dead removed, filed this petition asking the chancellor to appoint trustees for the corporation, and that the entire property be held and controlled by these trustees for burial purposes. Ordinarily, a corporation can not be dissolved by reason of the death or resignation of its members, or by the act of a majority of those interested; and while the same rule would be held in this case if there had been no abandonment of the right, still we are satisfied under the circumstances that the separate owners of the property or lots had the right to dispose of the ground, and when disposed of and abandoned for the period of twenty years, without improvement or interments and its dead removed, that the chancellor will not appoint trustees to take charge of and protect the property, or hold it as a burying ground when those interested decline to use it as such and have disposed of the property for other purposes.

There is no fund belonging to the corporation, and the ground is an open common, or the property in such a dilapidated condition as to evidence the necessity of a change of the cemetery or a removal of the dead to the beautiful cemetery in the suburbs of the city. A chancellor would not compel any corporation to continue its business or hold its property when the evidences of ruin and decay are not only made manifest from the proof at the time, but when the fact is further developed that the corporation can not exist. The appellant has a right of property in the lot purchased; of this she can not be deprived; but where a franchise like this, or the exercise of rights under it, have been abandoned, as in this case, the chancellor will not disregard the rights of all the members of the corporation, save one, when it is evident that the party seeking the aid of the chancellor can not exercise the rights of a franchise,

except in regard to her own lot. Of this she has not been deprived by the judgment below.

The judgment below is therefore *affirmed.*

J. T. O'Neal, for appellant.

J. B. Kinkead, E. W. C. Humphrey, Bennett H. Young, Barrett & Brown, for appellees.

MATT ADAMS *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—388.]

Errors in an Instruction Must Be Stated as Ground for New Trial.

The object of making the giving of an erroneous instruction a ground for a new trial is to give the trial court an opportunity to correct such error; and even when such an instruction is excepted to, if not included in the motion for a new trial, this court will not reverse on account of such error.

APPEAL FROM McLEAN CIRCUIT COURT.

April 29, 1881.

OPINION BY JUDGE PRYOR:

Although the instructions in this case may be erroneous, the right to a reversal on such a ground can not be relied on in this court for the reason that no such cause was assigned for a new trial in the court below. The object in requiring a party complaining of such errors to state them as the basis of a motion for a new trial is, that the attention of the judge may be called to the alleged error, so that he may have an opportunity to correct it. In this case, although the instructions were excepted to when the verdict was returned, no complaint was made that the court had improperly instructed the jury; and although no assignment of errors was necessary in this court, still the attorney for the accused called the attention of counsel for the state to the errors which he should rely on, and yet assigns no error in regard to the instructions. Although this is no obstacle to a reversal, still, if the error had been assigned on the motion for a new trial, it would show that counsel had waived the error, if any such had been committed. The principal ground relied upon in this court for a reversal the court has no supervisory power over, as has been repeatedly decided and as counsel concedes in his argument, for an

error committed in overruling a motion for a new trial. Challenges to the panel or to a juror this court can not reverse. *Morgan v. Commonwealth,* 14 Bush (Ky.) 106; *Kennedy v. Commonwealth,* 14 Bush (Ky.) 340; *Kean v. Commonwealth,* 10 Bush (Ky.) 190, 19 Am. Rep. 63. Such questions have so often arisen in this court and been determined by it that it is useless to refer to authority.

The objection to Bennett's evidence should not prevail, as in our opinion it was competent, and besides, the proof was so positive as to the cutting and purpose of the accused as to render it certain as to her intent, regardless of the statement of Bennett. The proof of the statements made by the deceased was competent. The witness professes to give a detailed statement of what the deceased said, direct from hearing his evidence before the examining court.

It appears that the deceased wrote his answer in response to questions propounded, and these answers must have been read in open court in the presence of the witness and accused; at least the witness swears that he heard the statements of the deceased, and is able to state what he swore to on the examining trial. It would have been error to have permitted the minutes of the examining court to have been read. The constitutional objection to such testimony would have availed. Besides, what Linthicum said as a witness is proved, in substance, by many witnesses, and is in effect not denied by the accused. That the knife was used with a murderous intent is clearly shown. The witnesses for the defense establish this fact as well as the prosecution, and the serious question, and one over which the court has no control, was as to whether the wounds caused the death of the deceased. The fact as to the pursuit of the deceased by the accused, and his inflicting the wounds, is not controverted in argument, nor can it be from the proof. The jury has passed upon the question of fact, and for an error committed by the court below, if any exists, and to which this court's attention has not been called on the motion for a new trial, this court can not reverse. *Kean v. Commonwealth,* 10 Bush (Ky.) 190, 19 Am. Rep. 63.

The judgment is therefore *affirmed.*

J. C. Johnson, W. T. Owen, for appellant.

P. W. Hardin, for appellee.

[Cited, *Boner v. Commonwealth,* 19 Ky. L. 409, 40 S. W. 700; *Wilson v. Commonwealth,* 21 Ky. L. 1333, 54 S. W. 946; *Thompson v. Commonwealth,* 22 Ky. L. 501, 28 Ky. L. 1137, 91 S. W. 701.]

WILLIAM SAULSBERRY *v.* STEPHEN NETHERCUTT, RECEIVER.

[Kentucky Law Reporter, Vol. 2—426.]

Bad Faith Toward Surety.

Where two bonds are taken by a receiver for the sale of machinery, the first of which only is signed by a surety and falls due six months before the maturity of the second, and the receiver makes no effort for execution on the first bond until after maturity of both, and then procures execution on both, and levy and sale of the machinery, the surety is entitled to have the proceeds of said sale applied to the payment of the first bond before any part thereof is applied to the payment of the second.

APPEAL FROM CARTER CIRCUIT COURT.

April 30, 1881.

OPINION BY JUDGE HARGIS:

The appellant, William Saulsberry, executed as security the first of two bonds given to the receiver for the sale of an engine, boiler, etc., and payable in six and twelve months. The receiver, who became the purchaser of appellant's property under the judgment appealed from, refused to have an execution issued on the first bond at the time, and for six months after it became due. The engine, boiler, etc., was in the possession and owned by the principal in bonds during the said six months, and therefore subject to levy and sale under an execution upon the first bond.

But in order to divide the proceeds of their sale as a credit upon each bond, and thereby hold the appellant in effect bound upon the second bond for one-half of the amount for which the engine, boiler, etc., should lack in bringing to pay both bonds, the receiver refused to cause or permit execution to be issued upon the first bond until the second became due, and then he caused both to issue upon the same day, and to be placed in the hands of the deputy sheriff at the same time, who levied them upon the engine, boiler, etc., at the same time, and sold that property thereafter, and apportioned the sum it brought equally between the two executors.

The appellant, who, it seems, was the only solvent person on either bond, was told by the receiver as an inducement to sign the first bond that the engine, boiler, etc., would always bring its amount, and the appellant thereupon signed it, but absolutely refused to sign the second bond.

Under these circumstances it was bad faith upon the part of the receiver to refuse or intentionally neglect to have execution issued upon the first bond so soon as it became due, and proceed with reasonable diligence to its collection by subjecting the engine, boiler, etc., to its payment. If he had done so the appellant would have had nothing to pay, as the property brought considerably more than the amount of the first bond.

The highest legal value that belongs to a contract is its enforcibility according to the spirit and understanding in which each party knows or has reason to know the other made it. No deception should be allowed to be made effectual by the act of a party who holds the controlling power to that end and perverts it to that purpose; and we are, therefore, of the opinion that enough of the proceeds of the sale should be applied to the first bond to extinguish it, and the remainder credited upon the second bond.

Wherefore the judgment is *reversed* and cause remanded with directions to correct the credits on the bonds as herein indicated, and to dismiss the appellee's action against the appellant, William Saulsberry.

Roe & Roe, for appellant.

R. D. Davis, for appellee.

ANNA CHANEY ET AL. *v.* LEVI FLYNN ET AL.

[Kentucky Law Reporter, Vol. 2—417.]

Contract of Married Woman for Sale of Land.

A married woman can not make a valid contract for the sale of her land, and since such a contract is void it can not be ratified by her after the death of or divorce from her husband.

Rights of Occupying Claimants.

Occupying claimants, under deeds of conveyance, are entitled to have lasting improvements made by them set off against the rents of the land.

APPEAL FROM ESTILL CIRCUIT COURT.

April 30, 1881.

OPINION BY JUDGE HARGIS.

Allen Flynn left Kentucky in 1851 or 1852 and removed to Arkansas. At that time he owned about 1400 acres of land in the

county of Estill. He appointed his brother, Levi Flynn, his agent to rent and care for the land during his absence. He died in Arkansas during the year 1868, leaving the female appellant his only heir at law. She married, and in 1869 she and her husband wrote to Levi Flynn to sell the 1400 acres. He offered her $1,000 for it, and she agreed, by letter, to take it under certain payments. Immediately he enclosed, in a letter accepting her proposition, his promissory notes in accordance with it. But before they reached her she had changed her mind, and returned the notes by letter, to him.

She thereafter obtained a divorce, and came to Kentucky in 1872. She stayed with Levi Flynn nine months. When she arrived, he told her that he had sold the home place of her father, but could get it back for her; but proposed to let her have a tract of land known as the "Hoover place" at the price of $800, to be credited on the $1,000 she had agreed, by letter, to take for the lands descended to her from her father. She verbally consented to take the Hoover place at $800, and took possession of it, and lived on it one year, and received some rent from a tenant whom Flynn had placed on the land.

She became dissatisfied, left the "Hoover place," and brought this suit for the 1400 acres of land against the appellee, Levi Flynn, who had sold all except $150 worth of it to his coappellees, whom she sued in separate actions, which were consolidated with the action she brought against him.

The appellee, Levi Flynn, answered, relying upon the facts above stated as a defense to the action. His vendees adopted his defense, and alleged that they had made certain lasting and valuable improvements on the lands. Upon a hearing, the court below dismissed her petition, and she and her husband, whom she married after she came to Kentucky, prosecute this appeal from that judgment.

It is clear that she made a contract, by letter, with the appellee, Levi Flynn, while she was in Arkansas, but she was at the time a married woman, and the contract was void for that reason. Her subsequent agreement to take the "Hoover place" did not, and could not, amount to a ratification of the contract made with her while she was laboring under a disability that rendered her contract void, it being settled that a void contract can not be ratified. At the time she agreed to take the "Hoover place" she was discovert and compe-

tent to contract, but the evidence of a legally binding contract is wanting in regard to that agreement, as it was not in writing. It is clearly within the statute of frauds, and is not enforcible. It leaves her as if she had never contracted to sell the 1400 acres at all.

The consequences which may follow, by reason of the sales made by Levi Flynn, can not abrogate well established rules of law. And as this record does not show that the vendees purchased from him by reason of any promise of the female appellant made to them, they can not defeat her action by reason of the injury to them, as they have their remedy against the appellee, Levi Flynn. His vendees are entitled, so far as the appellant is concerned, to have their lasting improvements set-off against the rents, but to no greater extent, and for the excess, if there be any, they must look to their vendor.

We have not recounted the particulars of the evidence, because the legal effect of the status of the appellant, when the first contract was made with her, and the absence of any written memorial of the second contract, renders the defense to her action insufficient to defeat it.

But the failure of the appellee, Levi Flynn, to disclose to her that he had collected $462 of rent as her father's agent, and the further fact that he sold the 1400 acres, except the $150 worth which he still holds, for the sum of $3,382, and yet was only proposing to give her $1,000 for the land and for what he might owe her father, gives strong color to the equity of her claim, and casts doubt over the propriety of the transaction upon his part.

He should be charged with the rents he admits he collected, with interest from the time he annually received it, and credited with one-half thereof, which he testifies his services as agent were worth—there being no opposing evidence on that point. She should be charged with the value of the rent of the "Hoover place" during the time she occupied it, and for any rent or benefit she may have derived from its use by others, and the same should be set off against the amount due by Levi Flynn for rents collected for her father, and a personal judgment rendered in favor of the party holding the excess, and a judgment should be rendered in her favor for the 1400 acres of land.

Therefore the judgment is *reversed,* and cause remanded with directions to render judgment in conformity to this opinion.

Robert Fluty, J. B. White, for appellants.

H. C. Lilly, for appellees.

[Cited, *Baker v. Hines,* 102 Ky. 329, 19 Ky. L. 1354, 43 S. W. 452; *Holloway's Assignee v. Rudy,* 22 Ky. L. 1406, 6 S. W. 650, 53 L. R. A. 353; *Rupple v. Kissel,* 24 Ky. L. 2371, 48 S. W. 40.]

WILLIAM JARVIS *v.* T. P. SATTERWHITE.

[Abstract Kentucky Law Reporter, Vol. 2—436.]

Estoppel.

One who stands by and permits another to purchase land of which he is the owner, without asserting his claim, will be estopped to assert it afterward against the purchaser.

License to Construct a Building.

Where one consents that another may so erect his house that the cornice hangs over the other's land, it amounts to a license, and when the owner of the building expends his money in its erection on the faith of the permission given the other is estopped by his own act and will not be allowed to revoke such permission.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 5, 1881.

OPINION BY JUDGE PRYOR:

It is unreasonable to suppose that the appellee would have constructed his house with the knowledge of the fact that the cornice was overhanging the ground of the appellant, without the latter's consent, and when it is admitted by the appellant that he gave his consent to the construction of the cornice so as to cover a part of his lot, but at another part of the building, with the condition that it should be removed thereafter in the event appellant requires it, the question in the case is easily solved. The appellant had no doubt forgotten what transpired at the time this consent was given, and when it appears that the plan of the building was exhibited to him at the time his consent was obtained, and not only so, but that he saw the building progress to completion without any objection, it is manifest that the testimony of the appellee must control the decision of this case.

The circumstances are strongly corroborative of appellee's statement, so much so that there is but little doubt left as to its verity. The party here relying on the consent of the appellant has erected

a building at considerable cost, and to alter the plan or reconstruct the building would necessitate an additional expense, originating alone from the attempt on the part of appellant to revoke the license or permission to construct the house in accordance with the plan shown him. It is too late to recall his action in the premises after the expenditure has been incurred. It seems to us the only question in this case is, Did the appellant consent that the cornice might be constructed so as to overhang his lot? If so, the case is for the appellee. It is not an easement that the appellee is asserting, but on the contrary a license to erect his house, or a part of it, on appellant's land; and whether there was a consideration or not passing to the appellant is immaterial. The building was constructed and the expenditure made on the faith of the permission given, and that fact being established by a preponderance of the testimony the appellant is estopped by his own act, as in the case of an easement, when the grant is by parol, when, if the party entering has expended money in the way of improvements that must be entirely lost if the grant is revoked, the chancellor will not interfere at the instance of the owner. *Dillon v. Crook,* 11 Bush (Ky.) 321.

One who stands by and permits another to purchase land of which he is the owner, without asserting claim, will be estopped to assert it afterwards against the purchaser. In the case of *Phillips v. Clark,* 4 Met. (Ky.) 348, where the vendor of the land, who was insolvent, contracted with mechanics to build a house on the land, they erected the building, and the vendee, who had the title, asserted his right to the property because he was the owner and had not authorized the work. This court said that, while the building was being constructed, the vendees, aware of that fact, stood by and remained silent, and permitted the mechanic, who was ignorant of the vendee's claim, to complete the work. If this was an action to enforce an agreement on the part of the appellant showing his consent in parol, the doctrine contended for by him would apply; or if a parol license had been given and an entry made under it and no expenditures incurred, or the parties could be placed in statu quo, the chancellor would grant relief. But in this class of cases the chancellor will not and ought not to interfere at the instance of one who has induced another to build on his land, when to remove the building or change the plan would incur a useless expenditure

of money to gratify one whose breach of faith is the prime cause of risking the interposition of the chancellor.

Judgment *affirmed.*

Russell & Helm, for appellant.

Roogloe, Roberts & Humphrey, for appellee.

BENJAMIN DRIVER *v.* A. HUNT ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—435.]

Contract Avoided by Fraud.

Where as an inducement to contract for the purchase of territory in which to sell a patented machine the seller falsely and fraudulently represents that said territory had not been canvassed, the purchaser is not bound by said contract.

APPEAL FROM DAVIESS CIRCUIT COURT.

May 5, 1881.

OPINION BY JUDGE HINES:

The evidence in this case appears to us sufficient to support the allegation that Conlin & Bro. fraudulently represented that the territory bought by appellees had not been canvassed for any other washing machine similar to the one patented to Conlin. The statement of the witnesses as to what they heard about the canvassing for another machine is not competent; but, in the absence of any conflicting evidence, the evidence that other machines similar to this were found in the counties visited by appellees is sufficient in itself to show that the representation was false and fraudulent. It matters not whether Conlin knew this fact or not. He made the representation at his peril, and appellees had a right to rely upon it.

Judgment *affirmed.*

Little & Slack, for appellant.

George W. Jolly, for appellees.

W. H. BINGHAM ET AL *v.* J. F. ORR ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—434.]

Deed Incompetent as Evidence.

A deed, dated July 7, 1807, acknowledged November 11, 1808, and

recorded August 22, 1809, more than eight months after the acknowledgment, and more than eighteen months after the sealing and delivery of the deed, according to the Acts of 1785 and 1797, was not recorded in time to render a certified copy of it competent evidence.

Statute of Limitations.

Where defendants have been in the adverse possession of land for more than fifteen years next before they were sued, and the plaintiffs were not laboring under disability when the cause of action accrued, the statute of limitations begins to run from the time the action accrues.

APPEAL FROM WEBSTER CIRCUIT COURT.

May 5, 1881.

OPINION BY JUDGE HARGIS:

The deed from George Pickett to Randolph Lewis, of date July 7, 1807, was acknowledged November 11, 1808, and recorded August 22, 1809, more than eight months after the acknowledgment, and more than eighteen months after the sealing and delivery of the deed. According to the Acts of 1785 and 1797, it was not recorded in time to render a certified copy of it competent evidence.

The defendants had been in the adverse possession of the land for more than fifteen years next before they were sued. As the heirs and beneficiaries of a part of each class were laboring under no disability when the cause of action accrued, the statute of limitations began to run from that time. *Moore v. Calvert*, 6 Bush (Ky.) 356. There was a legal remedy in favor of the life tenant and remaindermen, for any permanent injury to the lands or act to divest them of the title thereto. *Simmons v. McKay*, 5 Bush (Ky.) 25.

The incompetency of the copy of the deed, and the statute of limitations, present conclusive reasons for *affirming* the judgment, which is done.

J. & J. W. Rodman, Cook & Lowery, for appellants.

D. H. Hughes, for appellees.

B. F. HORN ET AL *v.* W. H. DECKER ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—435.]

Land Held in Trust Not Subject to Debts of Trustee.

Where creditors knew that a person held property only as trustee they can not be heard to say that they extended credit or purchased the property upon the faith that he was the beneficial owner, and such property can not be subjected to their claims.

APPEAL FROM DAVIESS CIRCUIT COURT.

May 7, 1881.

OPINION BY JUDGE HINES:

It can not be denied that if appellants knew that W. H. Decker had no beneficial interest in the land, and that he simply held the legal title, it is immaterial whether the land was redeemed for Nathaniel Horn or was purchased by Decker and held by him in trust for his children, for in neither case could the property of the children be taken to pay Decker's debts. If the purchase were made by Decker in trust for his children, no one having knowledge of that fact could subject the land to the payment of a debt contracted by Decker on his individual account, and on the other hand if the land, with the knowledge of appellants, was redeemed by Decker for Nathaniel Horn, appellants could not subject it to Decker's debts, and the children, as heirs of Nathaniel Horn, would be entitled to it.

That the land was redeemed by Decker for Nathaniel Horn or that it was purchased by him for his children, the appellees, and that these facts were known to appellants, the evidence satisfactorily establishes. But it is contended by counsel for appellants that the evidence does not support the conclusion that the land was redeemed for Nathaniel Horn, and that the pleadings do not authorize the conclusion that the purchase was made by Decker, and that the land was to be held in trust by him for appellees. The allegation in the answer of appellees is that the land was redeemed for Nathaniel Horn.

The evidence by each of the appellants is that they purchased the land for themselves, while Decker testifies that the agreement between all the parties, including Nathaniel Horn, was entered into for the purpose of preserving the land to those who would be en-

titled to it by descent as heirs of Nathaniel Horn, and that he (Decker) purchased for the benefit of appellees' children, and that these facts were all known to appellants. The purchase by each of the children of Nathaniel Horn for his or her benefit is not inconsistent with, but supports the allegation that the land was redeemed for Nathaniel Horn, and the fact that the conveyance was made to each of the heirs in proportion to the interest they would receive by inheritance is not inconsistent with a redemption, because it was necessary to preserve the land from levy and sale by the creditors of Nathaniel Horn. The fact of Nathaniel Horn remaining upon the place until his death, and the fact that Decker rented the property from Nathaniel Horn after the purchase or redemption, strengthens the conclusion that the transaction was substantially a redemption. The evidence, when considered together, but we consider it unnecessary to discuss it in detail, authorizes the conclusion that appellants knew of the agreement in regard to the redemption or purchase as testified to by Decker, and knowing these things they can not be heard to say that they extended credit to Decker or purchased the property upon the faith that he was the beneficial owner.

Judgment *affirmed.*

Little & Slack, W. N. Sweeney & Son, for appellants.

Riley & Walker, for appellees.

ELEANOR A. HENDERSON'S EXR. *v.* W. N. HENDERSON.
HOWARD L. HENDERSON *v.* WILLIAM H. HENDERSON.

[Abstract Kentucky Law Reporter, Vol. 2—436.]

Construction of Will.

Where different interests are devised to named heirs and it is provided that one of the heirs shall hold the interest of the others in trust, it does not mean that the legatee and trustee takes his own interest in trust for himself, but in his case the devise is absolute and without limitation or restriction.

APPEALS FROM LOUISVILLE CHANCERY COURT.

May 7, 1881.

OPINION BY JUDGE PRYOR:

The court below, in the opinion rendered, has placed a proper con-

struction on the will of Eleanor A. Henderson. By the second and third clauses of the will the shares devised to Victoria and Howard L. pass to the next of kin therein named, in the event of their dying without issue. As to the interest of W. N. Henderson there is no limitation nor restriction, and he is vested with the absolute right to his interest. The words "in trust", if operative, make him his own trustee, and when the testatrix has seen proper not to limit his interest, it would be a strained construction to say that the word "trust" implied that he held his share on the same terms and conditions as the devise to his sister and his brother Howard. Nor is the chancellor authorized to speculate as to the intention of the devisor, so not only to fix the time or conditions when or upon which Warren's share is to pass from him, but to designate the persons who are to take on the happening of the event.

This would be making a will for the testatrix, instead of ascertaining the proper meaning of a will conceded to have been executed by her.

The judgment below is *affirmed.*

Barnett & Noble, for Eleanor A. Henderson's Ex'r.

Barrett & Brown, for Howard L. Henderson.

Walter Evans, for W. N. Henderson.

Isaac Caldwell, for William H. Henderson.

W. L. RANKIN *v.* A. C. EASTIN ET AL.

[Kentucky Law Reporter, Vol. 2—427.]

Judicial Sale of Real Estate.

Where on an appeal from a judgment decreeing the sale of real estate the judgment is reversed, but, there being no supersedeas, the land was sold by the commissioner in conformity to the decree, before such reversal, the report of sale confirmed and conveyance made without any exceptions being made, the purchaser takes a good title.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

May 7, 1881.

OPINION BY JUDGE HINES:

On a former appeal in this case there were in the record two judgments, one declaring the conveyance to L. M. Eastin fraudu-

lent and void, and the other adjudging in favor of the mortgage lien of White, and directing a sale of the property and the payment of appellant's debt. Pending that appeal, there being no supersedeas, the land was sold by the commissioner, in conformity to decree, to appellant, report of sale confirmed, and conveyance made in accordance therewith.

On the first appeal this court reversed the case, declared that the sale to L. M. Eastin was not fraudulent, and directed a sale of the land to pay first the debt of White, then to pay L. M. Eastin, and afterwards to pay appellant's claim. On the return of the cause, appellees moved the court for judgment in accordance with the mandate which they claimed demanded a resale of the land. To this motion appellant objected, and filed a response and amended petition setting up the fact that, under the former decree of sale, appellant had become the purchaser of the land, and that the sale had been confirmed without exceptions, and conveyance made to him. Notwithstanding the objection, the court below decreed a resale of the land and a distribution of the proceeds, as intimated in the opinion of this court on the former appeal. From that judgment this appeal is taken.

There is some discussion by counsel in their briefs as to whether the appeal in the first case was from the judgment declaring the conveyance from Eastin void, or from the judgment decreeing a sale. So far as appellant is concerned we think this is immaterial. If the appeal was from the judgment decreeing the sale, and the object of the mandate was to have a resale, the reversal could not affect the title of the purchaser, notwithstanding the fact that the purchaser was a party to the action. He will be protected as fully in his purchase as a stranger to the record, and so long as the order confirming the sale remains unreversed the purchaser under the decree can not be interfered with.

It is manifest that if all these facts as to the sale and report of commissioner, and confirmation of sale, had appeared in the first record, and there had been no appeal from the order confirming the sale, the reversal of the judgment directing the sale would not have interfered with the rights of the purchaser; and that these facts existed but did not appear can not alter the case. *H. O. Earl v. J. C. Porter*, Mss. Opin., March 2, 1881. The case of *Miller v. Hall*, 1 Bush (Ky.) 229, is practically overruled in *Yocum v. Foreman*, 14 Bush (Ky.) 494.

The mandate of this court on the first appeal must regulate the distribution of the proceeds of sale, but can not interfere with the purchase by appellant. Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Montgomery Merritt, for appellant.

Vance & Merritt, William Lindsay, for appellees.

LON KENDALL ET AL *v.* ELIAS THOMASON ET AL.

[Kentucky Law Reporter, Vol. 2—422.]

Assessments on Property.

Where there is a proceeding to subject property to the payment of improvement assessments it must appear that every step has been taken to create the lien, and it is not sufficient to merely allege that plaintiff has the lien. The petition must show the facts necessary to create the lien.

Judgment Against Infants.

Before judgment is taken against infants, a guardian ad litem must answer for them, and a judgment where no answer is filed, either by a guardian or guardian ad litem, will be reversed.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 12, 1881.

OPINION BY JUDGE PRYOR:

The infants, who are the owners of the lots subjected to the payment of the various liens, are before this court as appellants without any error assigned; but from an examination of the record we find no answer or defense made by the guardian ad litem, and for that reason the judgment must be reversed. The court will assign the error for them without requiring the guardian here to make it, as the error is manifest and necessitates a reversal. Besides, on the appeal of Bates and others the record fails to show any publication of the ordinance in regard to the improvements ordered, when such an issue is directly made. It is not an immaterial issue, for the reason that the traverse is equally as well pleaded as the affirmative averment found in the petition. Nor does it appear in the petition how and in what manner the property was assessed for taxes, or for what purpose.

It is plain, where there is a proceeding to subject property to the payment of such assessments, that it must appear affirmatively that every step has been taken to create the liability, or rather the lien. To allege the plaintiff has a lien is insufficient, and to allege the property was properly and duly assessed, and a lien created, adds nothing to the validity of the petition. Such facts must be alleged as will show on the face of the petition the existence of the lien, else the petition is defective, and certainly no judgment can be rendered against infants on such a pleading.

For the reasons indicated the judgment is reversed, and cause remanded for further proceedings consistent herewith. The parties should be allowed to amend their pleadings.

W. B. Fleming, for appellants.

Mix & Rogers, H. M. Lane, for appellees.

WILLIAM SMITH ET AL. *v.* JACOB L. SMYSER ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—440.]

Change of Contract.

Where there is a departure from the specifications of a contract to make certain improvements looking to securing water power necessary to run a manufacturing plant, but such improvements when completed answered every purpose and were as valuable and substantial as the plan first agreed upon, the contractor is entitled to the contract price.

Purchaser Not Liable for Rents.

When one enters into possession as a purchaser and not as a tenant he is not liable for the rents of the real estate.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 12, 1881.

OPINION BY JUDGE PRYOR:

That there was a departure from the specifications of the original contract by which Lewis Smyser undertook to make certain improvements for the purpose of securing the water power necessary to their manufacturing establishment, located adjacent to the falls of the Ohio river, on the northern side of that stream, admits of but little doubt; but if the improvements made answered every purpose, and were as valuable and substantial as the plan agreed upon,

we see no reason why Lewis Smyser is not entitled to the contract price. At the time the original leasing took place, according to the statement of some one or more of the engineers, it was impossible, or rather impracticable, to make such specifications as could be carried out to the letter, and that changes would necessarily be made was evidently contemplated by both Smith and Smyser.

They both saw the work progress to completion, and no complaint was ever made that the contract was violated, or that the work was worth, upon a quantum meruit, the price agreed upon; but on the contrary the proof conduces to show a plain right on the part of Smyser to his money. The proof may be conflicting, but on the whole case it is evident that Smith was satisfied with the plan and execution of the work, and if living would make no objection. The interference of the government officials prevented a compliance with the contract according to its specifications, and when Smith and Smyser were informed that the plan, if carried out, would obstruct navigation, it necessitated a change that was then made, which affected neither the substantial plan agreed on, nor, if so, did not lessen the value of the labor and improvements made. A change in the contract did not affect the value of the improvements to the owner, and there was no reason for lessening the price as fixed by the contract; nor was there any reason for charging Smyser with a greater sum for rent than the amount fixed by the lease.

In regard to the rents of land in Indiana, and its collection by the Jacob Smyser who was then the administrator of Smith, it appears that the lots of ground from which rents were collected had been given by Smith to Smyser, and the latter, under this parol gift, had made improvements on the lots in the way of buildings, and when renting them out collected the money. He also sold some of the lots, and having received some of the purchase-money, cancelled the contracts of sale and retained what had been paid him. That gift to Smyser was repudiated by the appellants, who are the heirs of Smith, and while they may be entitled to recover the property itself, the appellee, Smyser, having entered not as tenant but as purchaser, or rather as a devisee of the property, will not be required to account for the rents.

The amended petition of July 20, 1874, was filed after the administrator, Jacob Smyser, had settled his accounts, and when the report had been confirmed. He was not a party to that petition, but on the contrary it appears that the process was returned "not

found;" but if he had been served the amended petition failed to state a cause of action, and besides, the proof shows, as already indicated, the manner in which he collected the rent. His surety was not liable for rent collected after the death of Smith, and besides, the Indiana administrator expressly disclaims the right of the Kentucky administrator to collect rents, and declines to ratify his acts in the premises, but still asks to have the rent paid over to him. It is certain that the Kentucky administrator had no right as such to collect the rents, but his surety is not responsible therefor.

We have made these suggestions on the merits of the case to prevent any future litigation, although it is manifest the appeal should be dismissed on motion of the appellee, as this is a case for the settlement of the decedent's estate, and the court below should have specified the character of schedule to be made out.

The case, however, should be and is now *affirmed*.

D. M. Rodman, for appellants.

W. P. D. Bush, Andy Barrett, for appellees.

PHILLIP BAILEY *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—436.]

Criminal Law—Instruction.

If there is no evidence from which the jury in a murder case might have found that the accused did the killing complained of in his own self-defense, even an erroneous instruction on the law of self-defense is not prejudicial to a defendant's substantial rights.

Evidence of Dying Declaration.

There is no error in allowing a witness to testify orally to the dying statements of deceased after the written statement had been read where the oral statements were simply an elaboration of what is contained in the writing, and are not contradictory to the writing.

APPEAL FROM FRANKLIN CIRCUIT COURT.

May 12, 1881.

OPINION BY JUDGE HINES:

If there was any evidence in the case from which the jury might have found that appellant did the killing in necessary or apparently necessary self-defense, the error contained in in-

struction No. 1 for appellant would authorize a reversal; but as there is no such evidence it does not appear that the error could have been prejudicial to the substantial rights of the appellant. To authorize a reversal there must be error, and it must appear that that error was prejudicial to the substantial rights of the accused.

There was no error in allowing the witness to testify orally to the dying statements of Green after the written statement had been read. The oral statements were simply an elaboration of what was contained in the writing, and were not contradictory to the writing. Besides, there is nothing to show that these statements were injurious to appellant. It has been too often decided by this court that an error first appearing in a motion for a new trial is not the subject of review to require any further comment.

Judgment *affirmed.*

Ira Julian, for appellant.

P. W. Hardin, for appellee.

LYDIA EDDY *v.* L. M. LONGSHAW.

[Kentucky Law Reporter, Vol. 2—423.]

Malicious Prosecution.

Where there is an absence of probable cause for having one prosecuted for crime the law will imply malice; and it is with the jury to say whether malice existed, first being charged as to what constituted probable cause.

APPEAL FROM HARDIN CIRCUIT COURT.

May 13, 1881.

OPINION BY JUDGE PRYOR:

The question in this case was whether the defendant (appellee) was informed or in possession of such facts as would induce one of ordinary prudence and discretion to believe the plaintiff guilty of the alleged larceny for which she had been tried and "acquitted." That the appellee had the appellant tried and convicted on a charge of grand larceny is admitted. If there is an absence of probable cause the law will imply malice, and it is

with the jury to say whether malice existed or not; but the jury should have been told what constituted probable cause, and not left to determine both the law and facts of the case. What amounts to probable cause has already been stated, and when this definition has been given it is with the jury to say whether or not the appellee had sufficient grounds for having the appellant arrested.

The general character of the appellant was not successfully assailed, and the testimony of the witness that he heard one person say she was of bad repute should have been excluded from the jury, also the statement of others made to the effect that they knew appellant took the lumber—this was incompetent, whether to contradict the witness or as evidence in chief. It was also incompetent to permit the evidence of the quarrel between appellant and appellee's wife to go to the jury. It shed no light on the issue raised. Nor was it proper for counsel to offer to prove by the physician, either before or after the testimony closed, that he had at one time delivered appellant of a bastard child. While this was not permitted to be done, still the object was to prejudice the case of the appellant, and could in no matter elucidate the question involved.

The appellee has pleaded in defense of this case the grounds relied on for his action in causing the arrest and making the affidavit, and this is the cause to be tried. The inquiry as to general character of the appellant for honesty may be made, but what some one may have said in regard to her character is clearly incompetent.

For the reasons indicated the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Wilson & Hobson, for appellant.

H. A. DUMESNIL ET AL. *v.* CITY OF LOUISVILLE.

[Kentucky Law Reporter, Vol. 2—429.]

Right of Plaintiff to Dismiss His Action.

As long as no final judgment is pronounced and the chancellor retains control over a pending action, the plaintiff may dismiss his entire action at his costs.

Life Estate Liable for Taxes.

The life tenant has the right to the enjoyment of the estate and

is liable for the taxes on the estate, and the interest of the remainderman can not be sold for taxes until the estate of the life tenant is exhausted; and before the fee simple is liable for sale it must appear that the life estate is insufficient and that the life tenant has no other property out of which the taxes could be made.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 28, 1881.

OPINION BY JUDGE PRYOR:

In this case, at a subsequent term from that at which the judgment was rendered, the plaintiff in the court below (appellee) came into court, and on its own motion dismissed the action without prejudice, and permitted a judgment for costs to be entered for the appellants. Whether this power existed so as to prejudice the rights of the appellants it is not necessary to determine. It is certain, in a judgment settling the rights of the parties, that a plaintiff in an action would have no right to have an order disturbing the final adjudication, without the consent of the defendant. But in this case the plaintiff has done what the appellant is asking the court to do. It has, in effect, confessed the errors and annulled its judgment by entering an order dismissing the entire action. The court reserved the right to modify the judgment upon the report of the commissioner for the purpose of determining what lot should be sold, and it may well be doubted whether the judgment was final; but whether so or not, while this power of the chancellor had been retained over the case, the plaintiff came in and dismissed the entire action at its costs, and there is now no action pending nor judgment to appeal from. The dismissal cancelled the judgment and left the parties in the same condition they were in with reference to the taxes before any suit was instituted. The appeal is therefore dismissed at appellant's costs, on the ground that there is no judgment to appeal from.

In case 193, the chancellor, at the time the cross-petition of the city was filed, had no jurisdiction to sell the real estate for the payment of taxes, and besides, if the jurisdiction subsequently attached, the life tenants were liable for the taxes, and that interest should have been subjected, and not the interest of the infants. The remaindermen had neither rents nor profits, nor

the right to the enjoyment of the estate; and we see no justice or equity in having the interest of the party in remainder sold until the estate of the life tenant is exhausted. Nor will the allegation that the life estate is insufficient authorize a sale of the remainder. It must appear that the life tenant has no other property out of which the taxes could be made. The tenant for life is primarily liable, and why should the chancellor subject the estate of the remainderman to the payment of the taxes when the party primarily liable is able to pay, and especially when those in remainder are infants or married women, and when no possible injury can result therefrom to the city?

The fact that the statute authorizes the payment of taxes in such cases will not justify the commissioner in reporting that fact, unless it appears that all the steps have been taken in order to create the incumbrance or liability. The proper averments must be shown—the ordinance and its publication—so that the court may know that the estates of infants or married women ought to be made liable. In this case the city has appeared and pleaded, asserting its claim to the taxes alleged to be due, and, although at the instance of the parties seeking to subject the property or to sell for reinvestment, it must affirmatively appear that the lien exists; and to show this, all the steps necessary to create the liability must be alleged and proved. It has not been done in this case. The failure to allege publication of the ordinance is itself fatal.

Judgment *reversed* and cause remanded for further proceedings.

Woolley & Duvall, for appellants.

H. M. Lane, for appellees.

[Cited, *Fenly v. Louisville,* 119 Ky. 569, 27 Ky. L. 204, 84 S.W. 582.]

WILLIAM COAKLEY'S ADMR. *v.* THOMAS COAKLEY.

[Abstract Kentucky Law Reporter, Vol. 2—437.]

Res Adjudicata.

Where an item was involved in former litigation, constituting one of the errors assigned, even if a clerical misprision, this court having passed upon it at the instance of appellant, it constitutes a complete bar to any other appeal for the same cause.

APPEAL FROM GREEN CIRCUIT COURT.

May 28, 1881.

OPINION BY JUDGE PRYOR:

The item of credit of $650 was involved in the former litigation, and constituted one of the errors assigned by the cross-appellant; and even if it were a clerical misprison, this court having passed upon it at the instance of the appellant, it constitutes a complete bar to any other appeal for the same cause. The same questions were discussed in the briefs of counsel, and there endeavored to be maintained that the appellee was only entitled to credit for one-half of the $650, and not for the whole. This court decided otherwise, and that, too, when the question was directly made. If a former adjudication is to be regarded as settling the rights of parties the previous hearing in this case has settled the issue now attempted to be made.

The judgment below is *affirmed.*

W. H. Chelf, for appellant.

A. J. James, William Lindsay, for appellee.

[Cited, *Thompson v. Louisville Banking Co.*, 21 Ky. L. 1611, 55 S. W. 1080; *Masterson v. Masterson*, 22 Ky. L. 1193, 60 S. W. 301.]

LEVI BOLDEN v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—439, as Baldin v. Commonwealth.]

Criminal Law—Robbery.

An indictment is sufficient which charges that the accused "feloniously took a pocketbook and forty-six dollars from D. P. Sheldon by force and violence, against his will, and by putting him in fear of some immediate injury to his person."

APPEAL FROM McCRACKEN CIRCUIT COURT.

May 31, 1881.

OPINION BY JUDGE HARGIS:

The indictment charges that the appellant "feloniously took a pocketbook and forty-six dollars from D. P. Sheldon by force

and violence, against his will, and by putting him in fear of some immediate injury to his person." These facts constitute robbery, and the indictment is therefore sufficient.

No demurrer was filed to the indictment, and the motion in arrest of judgment was properly overruled, because it charges a public offense, which is all that is required of the verdict.

While the first instruction alone does not present the law of robbery, yet the instruction which the court of its own motion gave to the jury cures the defect. The word "force," used in connection with the qualification that Sheldon must have been put in fear or had a struggle with the accused, is equivalent in sense to the word "violence."

Because the indictment failed to allege the value of the pocketbook and money so as to authorize a conviction of larceny in the event of a failure to prove robbery, did not prejudice the appellant, but relieved him from the danger of conviction of an offense clearly proven by the facts without the proof of violence or fear.

Wherefore the judgment is *affirmed*.

E. W. Bagby, for appellant.

P. W. Hardin, for appellee.

JAMES GARRETT ET AL. *v.* J. F. ROYSE, ADMR., ET AL.

[Abstract Ketucky Law Reporter, Vol. 2—438.]

Construction of Will.

Where by a clause in a will a testator demised real estate, but there is no clause disposing of cash on hand, the executor could not even by investing the cash in hand make it subject to the clause of the will disposing of the land to the benefit of the legatees there named. As to such cash, the testator died intestate, and it will descend to his heirs.

APPEAL FROM NICHOLAS CIRCUIT COURT.

May 31, 1881.

OPINION BY JUDGE PRYOR:

It is plain from the provisions of the will that the devisor, even if the four thousand dollars had been invested in land, did

not devise it to those named in the fourth clause of the will; and besides, no investment having been made by the executor, and the money on hand being insufficient for that purpose, the court below properly held that the personalty was undevised. The testator, in directing the investment, did not intend to add to the devise already made in the fourth clause, and if such was his purpose the investment could not have been made for the want of the proper sum of money with which to make it, and no devise having been made by his brother, it passed to the next of kin as directed by the judgment, and the same is now *affirmed.*

J. P. Norvell, for appellants.
Ross & Kennedy, for appellees.

JAMES E. GIFFORD *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 2—437.]

Repeal of Criminal Statute.

Where there is a positive repugnancy between two acts of the general assembly, the latter repeals the former by implication.

APPEAL FROM PENDLETON CRIMINAL COURT.

May 31, 1881.

OPINION BY JUDGE HINES:

Section 47 of an article in relation to the town of Falmouth, II Acts 1878, ch. 794, gives to the trustees exclusive power to grant licenses, and forbids the sale of liquor without first having obtained license therefor. The only question presented is whether this act repeals the local option law, which was in effect in that precinct at the time of the passage of the act of 1878.

It is insisted that it does not repeal, because it is provided in the local option law that it may be repealed by a vote of the people, and this is exclusive of the method of repeal by implication. It is further insisted that as one law is general and the other local they should both be upheld unless there is an express repeal. The rule might have some application if it were insisted that a general law passed subsequent to a special law did not re-

peal the special law, but the reverse is the case here. So far as the application of such rules of construction is concerned both laws are local or special. The local option law, while general in one sense, is local in its application to the precinct in which Falmouth is situated. But be this as it may there is a positive repugnancy between the two laws, and by any rule of construction the latter repeals the former. *Commonwealth v. Cain,* 14 Bush (Ky.) 525.

Judgment *affirmed.*

John H. Fryer, for appellant.

J. H. Barker, for appellee.

[Cited, *Tabor v. Lander,* 94 Ky. 237, 15 Ky. L. 8, 21 S. W. 1056; *Commonwealth v. Lemon,* 25 Ky. L. 522, 76 S. W. 40.]

JAMES W. MORFORD *v.* JAMES O. BROWNING ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—440.]

Priority of Lien.

Where the owner of a one-half interest in a saw-mill sold it, the purchaser assigning two notes to him and executing his own note to him for the purchase-money, and also executing a paper to him as follows: "And on this last note the said James W. Morford is to hold a lien on the mill until paid for, and the aforesaid James O. Browning (purchaser) can not bargain and sell and give a clear title until all claims are settled," it is held that such a lien is superior to the claim of judgment creditors who purchased said interest after they had read the above named lien and had knowledge of said lien.

APPEAL FROM BRACKEN CHANCERY COURT.

May 31, 1881.

OPINION BY JUDGE HARGIS:

The appellant, Morford, sold and delivered the possession of one-half interest in a portable saw-mill to Browning, in consideration of $1,000. The latter assigned two notes which he held on Jett, and executed his own note to appellant for the purchase-money. He executed a paper to Morford at the same time, containing this language: "And on this last note the said James W. Morford is to hold a lien on the mill until paid for, and the

aforesaid James O. Browning can not bargain and sell and give a clear title until all claims are settled."

The mill remained on Morford's land until the appellees, Swann & Coons, who were judgment creditors of Browning, caused executions to issue against him, and to be levied on his undivided interest in the mill subject to Morford's lien. On the day of sale Swann & Coons were shown the paper under which Morford claimed a lien, and they then became the purchasers of Browning's interest, subject to whatever lien Morford might have.

The notes on Jett were cancelled by an action he brought to rescind the contract with Browning, in pursuance of which he had executed them to him. They were therefore without consideration. It is insisted for the appellees that they secured a superior lien to Morford by virtue of the sale and purchase under their execution; and the case of *Vaughn v. Hopson,* 10 Bush (Ky.) 337, is relied on as sustaining their position. That case does not apply to a creditor who becomes such before any right of the debtor to the property is created, and who purchases it with notice of the lien of the vendor.

As between the vendor and the vendee the lien can not be denied nor defeated by the latter until it shall be discharged consistently with the terms of the contract embracing it. The appellees, who were mere creditors, purchased with notice of Morford's lien, and they can not therefore claim the character of innocent purchasers for a valuable consideration. They are in no better attitude than the debtor, who was bound by his written contract not to bargain nor sell the mill until all claims are settled. Besides this, the language of the writing is, that "Morford is to hold a lien on the mill until paid for."

While the instrument is somewhat ambiguous, yet it contains enough to give appellees ample notice of both the nature and extent of Morford's lien. It is agreed that it was read by the appellees before they caused the execution sale and became the purchasers. Their only contention is that the lien was confined to the note executed by Browning, and that the amount covered by the Jett notes was not embraced in the lien.

But the language "until paid for" and "until all claims are settled," negatives the idea that the lien was not commensurate with the whole of the purchase-price. The appellees are not

prejudiced by their inability to make their debt out of property which in equity and good conscience never did belong to their debtor. Especially is this so in view of the fact that he did not obtain credit from them on the faith of its possession or ownership.

Whatever may be the facts as to verbal statements of appellant relative to the extent of his lien, it is admitted that he relied upon and exhibited the written instrument containing his lien to the appellees before they purchased the mill at their execution sale, and that they purchased subject to the lien shown by that writing. It must regulate the rights of the parties and exclude the doubtful and unreliable guide of oral statements, which are rendered confused and dubious by the strenuous disputes of the parties. It follows that appellant's lien should have been held to cover the whole of the purchase-money due him from Browning, and the appellees should have been postponed until his lien was satisfied.

There were no exceptions to the commissioner's report of the state of accounts between Morford and Ingram, and the judgment on that branch of the case can not, for this reason, be disturbed, and it is therefore *affirmed.* But the judgment in favor of Swann, surviving partner of J. W. Swann & Co., and Swann & Coons and Browning, is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

C. H. Lee, for appellant.

B. G. Willis, for appellees.

ELLEN B. DUNLOP *v.* ROBERT DUNLOP.

[Abstract Kentucky Law Reporter, Vol. 3—20.]

Residence of Wife in Divorce Suit.

A suit for divorce by the wife must be brought in the county where she resides, but where the husband resides in this state, his domicile is in law the fixed residence of the wife, even though actually living elsewhere; and the courts of this state have jurisdiction to hear and determine her cause, and such jurisdiction is in the court of the county where her husband resides.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 2, 1881.

OPINION BY JUDGE PRYOR:

The parties to this action were married in the state of Virginia on the 6th of February in the year 1878, and in a few days removed to the home of the husband at or near Louisville, Kentucky. The wife returned to the home of her parents in about five or six months after the marriage, where she has since remained.

The husband has continued to reside in Kentucky, and on the 19th of February, 1879, the wife instituted this action against him, in the Louisville Chancery Court, for a divorce and alimony on the grounds of the existence of an alleged loathsome disease upon him at the time of the marriage, and his concealment of that fact from her.

The chancellor dismissed her petition and she has appealed. It is maintained by counsel for the appellee, the husband, that the wife, being an actual resident of the state of Virginia at the institution of the action, the courts of that state alone had the jurisdiction to hear and determine her complaint. In that position we can not concur. The domicile and residence of the husband was in Kentucky when the action was brought, and he had been living within the state for more than one year, and his counsel must give to the chancellor the jurisdiction. The statute of this state, with reference to this character of action, required the suit to be brought in the county where the wife actually resides, and, being local in its application, can not be construed to mean that, if actually living out of the state, the action must be brought where she resides, thereby divesting the courts of this state of jurisdiction.

It is true the statute provides that the action shall not be brought by one who has not been a continuous resident of the state for a year next before its institution, but this provision can not be made to apply to the wife, because she is living in another state apart from her husband, when his domicile or residence is within the state. The domicile of the husband is, in law, the fixed residence of the wife; she may live elsewhere, but her legal residence is with the husband, and the words continuous resident for more than one year in this state, when affecting the rights of the wife, must be so construed; otherwise she is deprived of any remedy unless she returns and lives

within the state for the mere purpose of enabling her to sue her husband. Gen. Stat. (1879), Ch. 52, Art. III, § 4.

It is certain that the courts of this state would not recognize as binding upon them the judgment of a sister state divorcing the wife from the husband in a case like this, where the husband was an actual and bona fide resident of this state, the separation taking place here, and the wife seeking another jurisdiction for the purpose of dissolving the marriage relation. The chancellor would determine in such a case that her residence was in Kentucky, and that she could not abandon her husband and his home to make such complaint in another judisdiction. This present question was decided in the case of *Maguire v. Maguire*, 7 Dana (Ky.) 181, when this court said that no such divorce would be recognized or held as valid.

The husband and wife living in Kentucky when the separation took place, and the cause of the divorce accruing here, the fact of the wife being out of the state when she instituted the action will not be adjudged by the chancellor as depriving him of the jurisdiction; and although she may be living out of the state, that fact will not be regarded as a change of residence or domicile so as to give the foreign state or territory jurisdiction to annul the marriage contract.

It is conceded that the actual residence of the appellee is now, and was at the time of the separation, within this state, and that he has at all times been within the jurisdiction of its courts. If the wife contracted the disease at or after the marriage, the chancellor will not stop to inquire whether it was communicated to her during the first or second week of their married life. If she had this disease, and it was caused by reason of the marital relation, she was as liable to have been impregnated with the poison in this state as in Virginia. See Buckner & Bullitt's Civ. Code (1876), § 76, as to the jurisdiction of the chancellor.

If the wife is not in the state the suit must be brought in the county of the husband's residence. It is alleged in the amended petition that the disease existed and was upon him in this state at the time of their marriage, and that the concealment occurred in this state, and it would certainly be technical to hold under the original pleadings that the appellant must have contracted the disease in Virginia, and that the cause of divorce originated in that state, because it is alleged that the appellee had the disease

at and before the marriage. The sole question presented by this record is, Did the appellee have syphilis, and was that disease communicated by him to his wife, and, further, did he conceal the fact of his having this disease from her?

The testimony found in the record presents a singular state of case, and but for the peculiar condition of appellee's genital organs shortly before his marriage, a doubt might possibly arise as to the manner in which this unfortunate plaintiff contracted the disease. That her whole system was inoculated with syphilitic poison, and she made a wreck by reason of its ravages upon her, is clearly established if the opinion of men skilled in medical science, who actually saw and administered to the patient in her sufferings, are to be considered by the chancellor. These medical men not only testify as experts, but actually examined and treated the unfortunate wife for the disease; and it is impossible, or at least improbable, that men of such standing in their profession could be mistaken, or that they would not only stultify themselves, but blight forever the future of the young wife by even mentioning her in connection with the horrid disease, merely for the purpose of gratifying her parents in their desire to have the marriage dissolved. Nor is it to be presumed that her father and mother, or either, are so destitute of parental feeling as to ruin forever a daughter they have raised so tenderly and loved so well, for no other purpose than to obtain this divorce. Their love and affection for the daughter, evidenced upon almost every page of this record, repels any such conclusion, and there can be no doubt but the appellant contracted the disease shortly after the marriage, and that it was communicated to her by the appellee. That she might have contracted the disease by accident is unquestioned, and such a conclusion might be reached if there were no other facts in this case than the statements of learned physicians, who examined the appellee after this suit was instituted, and even the statements of medical gentlemen, who treated the appellee for the sore on his male organ shortly before his marriage.

The entire proof shows that, up to the time of the marriage, the wife was a robust, healthy and beautiful girl, and every effort to show that the disease was hereditary, or not the disease alleged to have existed, has been successfully refuted. It is shown that shortly after the marriage the syphilitic symptoms

manifested themselves, and in a little while her entire system was infected with it. That the appellee was diseased is evident, and also that shortly before his marriage he became restless and uneasy in regard to his condition, and consulted physicians in Baltimore and Louisville to know the nature of the disease. It is true some scientific men were of the opinion that it was herpes and not syphilis, and if they are not mistaken, the appellant, by some of her associations, became infected with the poison, still this view of the question can not be maintained.

Her social relations were of as high an order as that of any young lady in Virginia. Neither her family nor neighborhood associations would authorize any such a conclusion; nor will the chancellor close his eyes to the fact that no appearance of any such disease ever manifested itself upon the young woman until after the marriage was consummated, and then, within the prescribed time, as ascertained by medical science and stated by learned physicians in this case, the disease and its effects began to develop. Dr. Yandell gives the appearance of the diseased organ with a sore as large or larger than his thumb nail, disfigured by a chancroid, and by a discharge from the urethra, and although he had in a former deposition concluded the young man was free from the disease, when, as an expert, he learns the history of the appellant, he seems to have no doubt but that he was diseased at the time of his marriage. The statements of Drs. Chisolm, McSherry, Johnson, Taylor, etc., who are distinguished in their profession, stand uncontradicted on the record as to the disease with which the appellant was afflicted and the diseased condition of the appellee, followed by the condition of the wife shortly after the marriage, and his letters to her suggesting, "I deserve nothing but hatred, but detestation," "I have wrecked your life—mine is miserable," are facts removing all trouble in arriving at a proper solution of this unfortunate controversy.

The appellee knew the opportunities he had for contracting this disease, and although the advice given him by medical men may, to some extent, palliate the wrong, he concealed from the wife that which she ought to have known, and the chancellor ought not, under the circumstances of this case, to add to her misfortune by denying the relief sought.

The plea of condonation, if properly made, but aggravates the

wrong. No such plea can be maintained where the husband, protesting his innocence to a faithful and confiding wife, invites her to his bed that he may renew the evidence of his affection for her.

The judgment of the court below is therefore *reversed,* and the cause remanded with directions to grant the relief asked, and for further proceedings consistent with this opinion.

R. W. Woolley, for appellant.

Muir, Bijur & Davie, for appellee.

[Cited, *Cummings v. Cummings,* 133 Ky. 1, 117 S. W. 289; *Muir v. Muir,* 133 Ky. 125, 28 Ky. L. 1355, 92 S. W. 314, 4 L. R. A. (N. S.) 909; *Miller v. Miller,* 141 Ky. 681, 133 S. W. 588.]

ALEX. CRITTENDEN v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—56.]

Criminal Law—Instruction as to Malice.

The law never implies malice from a given fact or facts, but its existence is in every instance to be determined by the jury. Hence an instruction is erroneous which informs the jury that under certain circumstances the law implies malice. Under the law in this state it is error to define in an instruction to the jury the term "Implied Malice."

Prejudicial Error.

Even where an instruction is erroneous this court will not reverse where it is not shown to be prejudicial to the substantial rights of the accused.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 4, 1881.

OPINION BY JUDGE HINES:

The instruction given in this case which undertakes to define malice is abstractly wrong, because it tells the jury that under certain circumstances the law implies malice. We have repeatedly held that such instructions are erroneous, as the law never implies malice from any given fact or facts, but its existence is in every instance to be determined by the jury. Under the law of this state it is error to define in an instruction to the jury the term "implied malice." That belongs to the domain of logic,

and not to that of jurisprudence. The jury must determine from all the evidence in the case whether malice exists, but in doing so they are governed by the same rules of logic, and pursue the same method of reasoning, that are pursued and applied in the determination of any other material fact to fix guilt upon the accused. As in any other instance, the evidence may be direct and positive that malice exists, or the jury, from collateral facts and circumstances, may determine its existence. In any case it is a matter of inference to be drawn by the jury from the evidence, and not a matter of law to be determined by the court.

In the case under consideration, however, the instruction could not have been prejudicial to appellant, and the error is not, therefore, a reversible one. The court instructed the jury as to the law of self-defense and as to the offense of cutting in sudden heat and passion, and, in substance, said to the jury that in either case the law does not imply malice. These exceptions and reservations preclude the possibility of the instruction in regard to malice being misleading to the jury or prejudicial to the substantial rights of the appellant.

Judgment *affirmed.*

Hunt & Darnell, Beck & Thornton, for appellant.

P. W. Hardin, for appellee.

C. E. DENNY ET AL. *v.* CLOTILDA MCATEE'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 3—36.]

Debt for Purchase-Money.

Where money is shown to have been borrowed to pay for the land sought to be subjected, and it was agreed that the lender should have a lien upon the land for its repayment, as between the parties the lender has such a lien as to deprive the borrower of his right to claim a homestead as against the debt.

APPEAL FROM DAVIESS CIRCUIT COURT.

June 4, 1881.

OPINION BY JUDGE HINES:

There is no evidence that appellee's decedent agreed to pay board, and it was, therefore, proper not to allow the set-off for that claim.

The evidence is conclusive that the money was borrowed to pay for the land sought to be subjected, that it was so applied, and that it was at the time agreed that appellee's decedent should have a lien upon the land for its repayment. This was sufficient, as between the parties, to give a lien and to deprive appellant of his right to claim a homestead as against this demand. This demand is, under the spirit of the homestead law, purchase-money. The description of the land in the petition and decree is sufficient.

Judgment *affirmed.*

Owen & Ellis, for appellants.

Little & Slack, for appellee.

J. B. MARTIN'S ASSIGNEE *v.* JOHN B. MARTIN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—56, as Martin v. Martin.]

Sale of Land on Levy Made.

Where a levy is made on 500 acres of land and a sale is made on it of 800 acres, the purchaser can get no title except to 500 acres. It will not be presumed, and proof will not be admitted to show, that the levy was on the entire tract of 800 acres. The levy of the execution contradicts any such conclusion.

APPEAL FROM WARREN CIRCUIT COURT.

June 4, 1881.

OPINION BY JUDGE PRYOR:

While there is much evidence conducing to show fraud on the part of Martin, we are not disposed to adjudge that Stone, who no doubt was influenced to become the purchaser of all the rights of Bruner, the execution creditor, for the purpose of securing the land to his sister, has been guilty of any act with reference to the property that would invalidate his purchase. The levy of the execution in favor of Bruner was on four hundred acres of land, and the execution in favor of Duncan was on five hundred acres. It seems the sale of the land was made under all the executions and Bruner became the purchaser. The levy made by the officer is not on the entire tract of land, but on four hundred acres by reason of the Bruner execution, and five hun-

dred acres by reason of the Duncan execution; and the sale of the land under all of the executions invested the purchaser with the title, if made in good faith.

It appears, however, that there were near eight hundred acres in the entire tract, so that according to appellees' own showing he can only assert title, or even the claim of title, to the quantity of land purchased, and no more. If the sale was made by reason only of the Bruner execution it would be void, certainly, as to one hundred acres, as the sheriff levied on 400 acres and sold 500 acres. The sale was made as well under the Duncan execution as Bruner's, and therefore the title passed as to the quantity sold, but not to the whole tract. The levy does not show what particular land was intended to be sold, nor will it be presumed or proof be admitted to show that the levy was on the entire tract. The levy of the executions contradicts any such conclusions, and besides, there being more than eight hundred acres of land in the tract no such construction will be given as to the extent of the levy, as that insisted upon by counsel for the appellees.

The deed passes title to no greater quantity of land than the levy, and Martin is left the owner of all the land except the 500 acres, and what is left passes to the appellant, Hines, for the benefit of creditors. The question of fraud, or that of limitation, is not involved in the controversy as to that part of the land unsold, and this court is not disposed to disturb the appellee, Stone, in his purchase, and, as before stated, there is no sufficient proof to authorize the court to say that the land was bought for Martin. The latter had no means, and it may have been the intention of the appellee, Stone, to purchase the land for his sister, and that he had the right to do. As to the personal property sold by the appellee, Stone, to Mrs. Martin, it appears that it was paid for with her own money; still it was on the farm and in the possession of the husband, and such of it as remains, not exempt from execution, would have been set apart for the debts of the husband but for the plea of limitations. It was purchased by Stone and sold to his sister. She has been asserting claim to it in her own right all the time, and by a proceeding in equity has been permitted to use, control and dispose of it as a feme sole. These facts were all within the knowledge of the

assignee, or could have been known with the exercise of the proper diligence. The conveyance to her of the 92 acres of land has been cancelled, and this is as far as the judgment should affect her rights.

There is no mistake in the conveyance to the appellees, but there is a bill of discovery in regard to the property owned by Martin, and a distinct allegation that there was more than 400 acres of land in the tract. The land will be divided by allotting to the appellee, Stone, the 500 acres, including the family residence, in such a manner as will be just to all the parties, allotting the remainder to the appellant, Hines, that he may dispose of it for the benefit of creditors.

The judgment is *reversed* as to Stone and *affirmed* as to Mrs. Martin and cause remanded for further proceedings. Mrs. Martin is entitled to a judgment for costs against the appellant as assignee, and the same is now awarded.

H. T. Clark, for appellant.

Halsell & Mitchell, for appellees.

MARTIN HUBAN v. THOMAS HUBAN.

[Abstract Kentucky Law Reporter, Vol. 3—56.]

Suit to Set Aside Conveyance.

Where an old person, weak and infirm in body and mind, owning but one piece of property, is induced to convey it to his half-brother, who soon thereafter drives him away by cruel treatment, and the evidence of the grantor shows that he did not know he was conveying his real estate and that he received no consideration for such conveyance, and the grantee fails to offer his evidence, such a conveyance will not be upheld.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 4, 1881.

OPINION BY JUDGE PRYOR:

There is nothing in this case for the appellant. It appears from the statements of the petition and the evidence in the record that the appellee, shortly before the conveyance was made, had been found a lunatic and sent to an asylum, and that his mind was restored, or that fact afterwards ascertained by the

verdict of a jury; but it further appears from the testimony of the appellee that he was in feeble health, advanced in years, and was entirely ignorant of the conveyance until he was informed that it was of record. The consideration expressed is one dollar and other valuable considerations. What these considerations were does not appear, except from the statement of the appellee. He says that no consideration whatever was paid him, but on the contrary deposes that he was compelled to leave the residence of his half-brother, to whom the conveyance was made, on account of his cruel treatment to him. This was all the estate the appellee owned, and without it he is entirely destitute of means for a support. It is unreasonable to suppose that he would voluntarily give all of his property to the appellant, whom the proof shows was of a trifling character and unable to provide for himself, much less the appellee. The appellee gives a plain, consistent statement of the facts of which he seems to be cognizant, while the appellant stands with his mouth closed, and declines to enlighten the chancellor as to this singular transaction.

This appellee, once a lunatic, with a mind doubtless as feeble as the body, living with a half-brother, who is utterly insolvent, conveys to the latter, without any consideration whatever, his entire estate; and when an opportunity is afforded the grantee to explain the transaction and show to the chancellor its fairness, he expresses or declines to make any explanation whatever, but stands upon the recitals of his deed. This will not do. The facts of this case conduce to show that the appellee was under the control of the appellant, or at least subject to his influence, and with a mind to some extent wrecked. No chancellor should enforce such an unjust and unconscientious transaction.

The judgment is *affirmed.*

R. W. Nelson, for appellant.

J. S. Ducker, for appellee.

[Cited, *Combs v. Davidson,* 24 Ky. L. 2528, 74 S. W. 261.]

LOUISVILLE & NASHVILLE R. Co. *v.* J. B. BROWN.

[Kentucky Law Reporter, Vol. 3—82.]

Damage for Killing Animals.

If, in a suit against a railroad company for damages caused by its cars killing plaintiff's animal, the evidence is conflicting, and two juries on the same facts have returned verdicts for the plaintiff, the Court of Appeals will not disturb the verdict.

Jury Viewing Premises.

Where, in a damage suit against a railroad company for killing an animal, the ground and crossing and the approaches to the crossing are fully described and made plain by the evidence, it is proper for the court to refuse to order the jury to view the premises where the animal was killed.

APPEAL FROM HART CIRCUIT COURT.

June 9, 1881.

OPINION BY JUDGE PRYOR:

On the former appeal in this case one of the questions distinctly passed on by this court was as to the burden of proof; but one of the errors assigned was that the verdict was contrary to the evidence. While the failure to pass on that question at the former hearing could not determine the action of the court on a like question, where there has been another trial, still it is to be presumed that this court regarded the evidence as sufficient to authorize the recovery, for if not, it would have been so adjudged as to prevent future litigation. Besides, this is the second verdict on the same facts, and while there is no valid reason for discrediting the testimony of the engineer, there is an apparent conflict in the evidence. The owner of the animal says that he discovered no tracks made by the animal or other indications of its being struck by the cars at the place designated by appellant's witness, but he did find tracks and blood at other points at and near where the animal was found. Where the mare was killed, or rather thrown on the side of the road, there seems to have been a narrow cut in the road so hemmed in by bushes and briers as to prevent any escape except by taking the road, and while in this position on the side of the track and unable to escape, the crippling might have been inflicted, and

from the statement of the owner it is altogether plausible. The jury had the witnesses before them, and were fully acquainted with the location of the road, either from their personal knowledge or from the proof. It was not necessary that the jury should have been sent to the place in order that they might have a view of the surroundings. The evidence was plain as to the character of the ground and the locality of the crossing, as well as the approach to it, and to have sent the jury to view the spot would have been a reckless waste of time.

While the instructions given for the appellee may be, to some extent, objectionable, they were cancelled by the instruction given for the defendant; and in fact those given for the defendant were more favorable than they should have been. While this court on the former hearing failed to pass on the facts, when the question was directly made, and when two juries have found a verdict for the appellee on the same facts, it becomes very persuasive that the evidence of the owner of the animal should have some weight in determining the question at issue, and this court will not, therefore, disturb the verdict.

The damages, however, ought not to have been awarded on the judgment. There was no time nor place designated in the notice for making the appraisement; nor should it have been made on the same day the notice was given. The parties ought to be afforded an opportunity for taking proof, so that the appraisement might be fairly made. The fact that the appraisement went to the jury as evidence was erroneous; but the appraisers having been examined as witnesses on the trial, no injury need have resulted from it.

The judgment is *reversed* with directions to set aside the order awarding damages and permit the judgment on the verdict to stand. The appellee must pay the costs.

Lyttleton Cooke, for appellant.

W. H. Chelf, for appellee.

JAMES MILLER ET AL. *v.* W. B. WITHERS.

[Abstract Kentucky Law Reporter, Vol. 3—57.]

Refusing to Permit Filing of Amended Answer.

The trial court does not abuse its discretion by refusing to allow

an amended answer to be filed, which was tendered a year after the original answer was filed and no reason was stated why it was not offered sooner, nothing appearing on its face to indicate that all the facts stated were not known to the pleader when the original answer was filed.

APPEAL FROM GRAYSON CIRCUIT COURT.

June 11, 1881.

OPINION BY JUDGE HINES:

The amended answer that the court refused to allow to be filed was not tendered until a year had elapsed from the filing of the original answer. No reason is stated why it was not offered sooner, and there is nothing on the face of the amendment to indicate that all the facts therein stated were not in the knowledge of the pleader when the original answer was prepared and filed. The court did not abuse a sound discretion in refusing to allow it to be filed. Bliss on Code Practice, § 430

The original answer does not point out any specific defect in the title except the incumbrance in favor of Smith, which was subsequently removed; nor does it allege that appellee had no title. As the evidence tends to show an acceptance of a deed of general warranty, as there has been no eviction and as there is no adverse claimant, appellant can not complain, but must accept the possessory title tendered.

Judgment *affirmed.*

J. S. Wortham, for appellants.

Conklin & McBeath, for appellee.

F. J. BARBEE ET AL. *v.* NORTHERN BANK OF KENTUCKY ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—57.]

Suit to Reform a Deed.

When the legal title to real estate is allowed to remain in a person for fifteen years or more, and until after he becomes insolvent, the deed ought not be reformed and it be permitted to be shown that the property really belonged to the grantee's wife, after the rights of creditors have intervened upon the faith that the land belonged to the husband. In such case the loss should be made to fall upon the one whose negligence brought about the state of affairs as they exist.

APPEAL FROM BOURBON CIRCUIT COURT.

June 11, 1881.

OPINION BY JUDGE HINES:

Appellants having, without question, allowed the legal title to the land to remain in F. J. Barbee for fifteen years, and until after the insolvency of Barbee, the deed ought not to be reformed. The rights of creditors have intervened upon the faith that the land belonged to F. J. Barbee, and in such case the loss should be made to fall upon the one through whose negligence this state of things came to pass. *Worley v. Tuggle,* 4 Bush (Ky.) 168; *Speak v. Mattingly,* 4 Bush (Ky.) 310; *Mattingly v. Speak,* 4 Bush (Ky.) 316. Besides these considerations, the evidence is not satisfactory that there was any agreement that the title should vest in the wife for life and remainder to the children; nor does it clearly appear that the whole of the consideration moved from the wife and children. But whether this is true or not, the conveyance ought not to be now disturbed so as to affect the creditors of F. J. Barbee.

As to the appeal of Horace Miller, we think the judgment of the court below is also correct. He holds under a deed with general warranty. There has been no eviction; he does not allege the insolvency of the warrantors, or any other fact that would authorize him to disregard the warranty and proceed before eviction. He holds all the title that Barbee and wife could convey, and as to the children, who are not parties to this appeal, it will be time enough to determine their rights when there shall be a direct proceeding to settle that question. Whatever right appellant, Miller, may have, it can not be determined in the present condition of the pleadings.

Judgment dismissing the petition of Barbee and wife, and dismissing the cross-petition of Horace Miller, is *affirmed.*

Cunningham & Turney, for appellants.

Prall & Dickson, for appellees.

JOHN KNOCK v. CHRIST TRIBER ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—57.]

Judgment Without Process, a Nullity.

Where the legal owner of real estate is not a party to a proceeding to sell real estate a judgment of sale is a nullity, and is no bar to a subsequent proceeding where the owner is made a party.

APPEAL FROM CAMPBELL CHANCERY COURT.

June 11, 1881.

OPINION BY JUDGE PRYOR:

In this case, while the court has not been aided by the briefs of counsel for the appellees, it appears that the original sale of the land by Henson to the appellant was for $6,750, and only $2,400 had been paid, or about that sum; and while the judgment is not explanatory of the transaction, it is evident the chancellor applied the credits to the whole of the purchase-money. This being the case there is no error in the record of which the appellant can complain on this branch of the case. In the case of Triber it appears that the original petition was instituted to sell this land when the title was in the wife of the appellant, who was not before the court. The judgment to sell was therefore a nullity, and the second petition, setting forth these facts and praying for a sale of the property and making all the parties in interest defendants, presented a cause of action and entitled the plaintiff to the relief sought. There is no error in the record prejudicial to the appellant.

Judgment *affirmed.*

E. W. Hawkins, for appellant.

F. M. Webster, for appellees.

J. F. BARKER v. PARALEE BARKER.

[Abstract Kentucky Law Reporter, Vol. 3—58.]

Suit to Vacate Judgment.

Where a judgment has been entered in a cause against a person who was not a party to the action, before such person can appeal from such a judgment he must make an effort to set the judgment aside.

Void Judgment.

A judgment is void when taken against a person not served with process who resides within the jurisdiction of the court and who does not appear to the action.

APPEAL FROM PULASKI CIRCUIT COURT.

June 14, 1881.

OPINION BY JUDGE PRYOR:

It seems from this record that the appellant not only filed his petition to vacate the judgment, but also made his motion for that purpose, and failed in each proceeding. An appeal from the original petition in which the judgment had been rendered, without the service of process, could not have been maintained without first making an effort to set that judgment aside. This petition was of itself a motion for that purpose, and the court asked to set it aside, and we see no reason why it should not have been sustained.

The publication required by the statute is intended as notice only to those who are not required to be brought before the court or to be made parties to the proceeding. The husband is required to be made a defendant where he fails to unite with the wife, and we know of no rule of practice based on statutory proceedings that will authorize a judgment against a party or affecting his rights, who is a defendant to the action and his person within the jurisdiction of the court, without the service of process upon him, and the statute before us should not be so construed.

Judgment *reversed* and cause remanded with directions to annul and set aside the judgment and for further proceedings.

Stone & May, for appellant.

Morrow & Newell, for appellee.

M. H. MAUPIN'S ADMR. *v.* W. H. PACE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—58.]

Rescission of Contract.

One who is induced to purchase real estate by the false representation of the seller that vacant ground in front of it is a street may have such contract of sale rescinded. A vendee has the right

to rely on representations of the seller which prevents him from ascertaining the facts.

APPEAL FOM BARREN CIRCUIT COURT.

June 16, 1881.

OPINION BY JUDGE PRYOR:

It is manifest from the proof in this case that at the time of the sale by Maupin to the appellee, Pace, that the open piece of ground in front of the property purchased was a public street, and relying on these representations the purchase was made.

The vendee had the right to rely upon those representations, and while he might, by an examination of the city or town records, have ascertained the fact, still he was prevented from doing this by the statements of his vendor that turned out to be false, and of this he had the right to complain. That it was not a street and Maupin without title to it at the time of the sale are facts clearly shown. While a perfect title, by Maupin, if tendered even after five years, would have cured the defect, the purchase-money being unpaid and there being no offer to cancel when appellee knew of the defect in the title, still, without passing on the right or title of Maupin or his administrator subsequently acquired to the street, we find that a title to part of the property is in the infant children of Mrs. Miller. The power of attorney, executed by Mrs. Miller and her husband in the state of Tennessee, was acknowledged before a deputy clerk only, and certified in the same manner, and did not pass Mrs. Miller's title; and besides, the certificate of acknowledgment is defective in not stating that the contents of the instruments were explained to the feme by the official when taking her acknowledgment. The proof shows that the children are infants, certainly some of them, and that the estate of the decedent is not sufficient to pay the debts; and, whether solvent or insolvent under the proof, the contract should have been and was properly rescinded.

The fact that there was no outlet or street when it was represented that a public street existed lessened greatly the value of the lot, and this fact alone gave the chancellor jurisdiction to grant the relief; and while this defect may have been cured after suit was brought an insuperable difficulty is presented in the

way of enforcing the lien, when it is shown that the title to one-fourth of the property is in the infant children of Mrs. Miller. The fact that the property is ordered to be sold to pay the purchase-money does not affect the rights of the administrator, but it is difficult to see how the title is to pass without having those who are invested with title upon the rescission before the court. As this does not affect the administrator the judgment is *affirmed.*

Lewis & Porter, for appellant.

L. McQuown, Hord & Trabue, P. H. Leslie, for appellees.

EWELL TYE *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—59.]

Criminal Law—Jeopardy.

A defendant is not in legal jeopardy at the time the court, upon motion of the state, quashed the indictment and resubmitted the charge to the grand jury, because no part of the jury had been empannelled, which must precede the reading of the indictment and statement of the defendant's plea.

Impeachment.

A witness sought to be contradicted should first be examined concerning the matters sought to be proven.

APPEAL FROM WHITLEY CIRCUIT COURT.

June 21, 1881.

OPINION BY JUDGE HARGIS:

The appellant was not in legal jeopardy at the time the court, upon motion of the commonwealth's attorney, quashed the indictment and resubmitted the charge to the grand jury, because no part of the jury had been empannelled, which must precede the reading of the indictment and statement of the defendant's plea. Buckner & Bullitt's Crim. Code (1876), §§ 217-219.

The evidence offered to be introduced by the accused was competent and relevant to the issue, but the witness whom he sought to contradict by it should have been examined concerning the matters sought to be proven. Buckner & Bullitt's Civ. Code (1876), § 598. The examining trial and the evidence given

at it did not constitute any part of the res gestae, nor did statements made several days after the alleged commission of the offense compose any part of the occurrence; therefore the evidence excluded was not substantial evidence.

It was proper to allow the commonwealth to prove the number of attempts by the defendant for the purpose of establishing the alleged identity of the accused, and the court so restricted the evidence. We are therefore of the opinion that no error was committed to the appellant's prejudice. Whether the evidence was sufficient to establish the appellant's guilt belongs to the province of the jury, and as it tends, at least to a considerable degree, to identify him as the perpetrator of the offense, we can not for that, as well as other reasons disturb the verdict.

Judgment *affirmed.*

C. W. Lester, for appellant.

P. W. Hardin, for appellee.

[Cited, *O'Brien v. Commonwealth,* 115 Ky. 608, 24 Ky. L. 2511, 74 S. W. 666; *Bennett v. Commonwealth,* 133 Ky. 452, 118 S. W. 332.]

ROMAN VICTOR BROWNINSKI ET AL. *v.* J. S. PHELPS.

[Abstract Kentucky Law Reporter, Vol. 3—59.]

Title of Purchaser at Judicial Sale.

Where all the parties interested in real estate are before the court and the real estate is ordered sold to pay debts, the purchaser secures a good title. A mere irregularity in the failure of the court to appoint a guardian ad litem and to file an answer for minor defendants, while it may be erroneous, will not affect the title of the purchaser whose purchase has been confirmed by the chancellor.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 21, 1881.

OPINION BY JUDGE PRYOR:

All the parties in interest were before the court on the hearing of the original action for the sale of the real estate to pay the debts of Lewis Smyser, deceased. His children, all being of age, united in a conveyance for that purpose, and it is evident from

the record in this as well as the original action that a sale of the real estate purchased by the present appellee was necessary for the payment of the debts of the testator, and that when sold the proceeds were insufficient to satisfy that indebtedness. Besides, the infant children, who under the will of Lewis Smyser became entitled to the estate upon certain contingencies, being before the court, can not complain of the judgment so as to affect the title of the purchaser. The court had jurisdiction over the parties and the subject-matter, and a mere irregularity in the failure to appoint a guardian ad litem, and to file an answer, while it might be erroneous does not affect the title of the purchaser, whose purchase has been confirmed by the chancellor. The present petition, as well as the original action, shows a necessity for the sale, and that the rights of the infants have in no manner been prejudiced by the action of the chancellor in rendering his judgment in either case. Nor would this court inquire as to the necessity for the sale so as to disturb the appellee in his purchase in the absence of fraud or bad faith on the part of the purchaser and the parties seeking the sale, towards the infant appellants. The sale having been confirmed, the purchaser is entitled to the same protection by the chancellor as he would be if all the parties in interest were adults. *Yocum v. Foreman,* 14 Bush (Ky.) 494.

Judgment *affirmed.*

John Mason Brown, for appellants.

Zack Phelps, Goodloe, Roberts & Humphrey, for appellee.

[Cited, *Hulsewede v. Churchman's Exrx.*, 111 Ky. 51, 23 Ky. L. 487, 63 S. W. 1.]

W. H. MCKNIGHT *v.* THOS. S. KENNEDY.

[Kentucky Law Reporter, Vol. 3—85.]

Devisee's Right to Convey.

Where property is conveyed by will subject to be divested upon a contingency if it should occur before a named date, and the time is passed within which it could occur and it did not occur, the devisee has good title and may convey the same.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 25, 1881.

OPINION BY JUDGE PRYOR:

The will of John L. Martin has been heretofore construed by this court, and under the construction given that instrument then and now there can be no doubt as to the right of Kennedy and wife to dispose of that part of the estate devised to Mrs. Kennedy.

In the case of *Kennedy v. Ten Broeck,* 11 Bush (Ky.) 241, Mrs. Ten Broeck, who was a granddaughter and one of the immediate devisees under the will, disposed of her interest in the estate prior to her death, and, although dying without leaving issue, this court held that she was vested with a fee under the will and had the right to convey.

The contingency upon which these immediate devisees (Mrs. Kennedy being one of them) were to be divested of their interests, can not now possibly happen, as by the provisions of the will that contingency must have happened prior to January 1, 1872. This was the ruling in the case of *Duncan v. Kennedy,* 9 Bush (Ky.) 580, and it therefore results that the power to convey is unquestioned.

Judgment *affirmed.*

Byron Bacon, for appellant.

Russell & Helm, for appellee.

CHARLES MACKEY v. COMMONWEALTH.

Criminal Law—Dying Declaration.

A declaration made by a wounded person within a half of an hour after being wounded and more than forty days before he died, preceded by his statement that "he had fears that he would not recover from his wound and that he desired to make a statement, so as no false impression should go out in regard to the matter," is admissible as a dying declaration. The statement shows that the deceased was under the belief that his wound would prove fatal.

Facts Taken as True to Avoid Continuance.

A continuance of the trial is authorized on account of the absence of a witness where the materiality of such testimony is shown and due diligence has been used to procure the witness, unless the attorney for the commonwealth admits upon the trial that the facts which the affiant states will be proven by the witness are true, and having admitted this he can not impeach such witness' general character or contradict such fact.

APPEAL FROM BARREN CIRCUIT COURT.

June 25, 1881.

OPINION BY JUDGE HARGIS:

The appellant offered to prove by L. H. Rousseau what the deceased said in half an hour after he was wounded, and fifty days before he died. This was objected to and excluded, on the ground that the statement of the deceased at the time and in his state of mind was not a dying declaration. Only so much of the avowal as is pertinent to the question of competency will be quoted, as the remainder of it is unquestionably material.

It was avowed that the witness would prove that the deceased, who was fatally wounded, although he lived for fifty days afterwards, said "he had fears that he would not recover from his wound and that he desired to make a statement, so as no false impression should go out in regard to the matter."

This statement, in our opinion, shows that the deceased was under the belief that his wound would prove fatal, and his expression that "he had feared that he would not recover" is equivalent to a statement that he believed he would die, when his condition and the expressed purpose for which he made the declaration is considered. He evidently spoke with a view to the use of what he said as evidence, and the correction of all false impressions about the matter to the prejudice of the accused.

There are many and various modes of expressing a belief that has taken hold of the mind. Often a word accompanied by a look or the pressure of the hand speaks a settled belief more strongly than an extended attempt to explain the condition of the declarant's mind.

The above statement, coupled with the character of the wound, and the fact that, through fifty days of suffering, he never altered it nor abandoned his fears of not recovering, clearly shows that he did not expect to survive the injury. This condition of mind is the necessary prerequisite to the admission of the statements of the deceased as to the circumstances of his death.

Had the accused in good faith used due diligence in his attempt to procure the presence of Geo. A. Hurst, a person really in existence, as a witness, it would have been erroneous to allow

the commonwealth either to impeach his general character or contradict the appellant's affidavit as to what the witness would testify, because whenever a party is entitled to read such an affidavit, or the prosecution consents that he shall do so, its statements must be treated as true, whatever may be the character of their source or the ability of the commonwealth to disprove them. This is the plain meaning of the letter and spirit of Buckner & Bullitt's Crim. Code (1876), § 189, which authorizes a continuance where the materiality of the witness is shown and due diligence used, or the attorney for the commonwealth admits upon the trial that the facts which the affiant states will be proved by the absent witness, are true.

But we are of the opinion that the court did not err in allowing the statements of the affidavit to be contradicted and the character of the witness to be impeached, because the appellant had not shown due diligence in obtaining the presence of this somewhat ubiquitous witness, nor did the attorney for the commonwealth admit that the facts were true.

Wherefore the judgment is *reversed* and cause remanded with directions to grant appellant a new trial, and for further proceedings.

Porter & Ritter, for appellant.
P. W. Hardin, for appellee.

JAMES UTZ *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 3—88.]

Criminal Law—Larceny.

Where a minor exchanges his mare for another animal, and after the exchange goes at night and takes the mare originally belonging to him from the possession of the person to whom he traded her, and makes no effort to conceal the fact of his possession, these acts do not show a felonious intent but rather a purpose to repudiate his contract.

APPEAL FROM BOONE CIRCUIT COURT.

June 25, 1881.

OPINION BY JUDGE PRYOR:

That the accused took the mare with the intention of keeping

her is no evidence of a felonious intent from the facts found in this record. The proof shows that the accused was about eighteen years of age, and had exchanged this mare, alleged to have been stolen by him, with one R. L. Willis for an animal belonging to Willis; that after the exchange he went at night and took the mare originally belonging to him from the possession of Willis, and carried her across the river; that he made no effort at concealing the fact of his possession, nor did any other act save that of taking the mare in the night, involving a felonious intent. While the entry on the premises of Willis was a trespass, the accused, having regained the mare, had the right to trade her as his own and to repudiate the contract. Nor does the fact of Willis' knowledge as to his infancy affect the question of guilt or innocence. If the taking was to repudiate the contract and reclaim that which he had the right to demand he was not guilty of the alleged larceny.

In *Williams v. Norris*, 2 Litt. (Ky.) 157, Annie Gillespie, an infant, sold to Williams a certain mare, and afterwards regained the possession and sold the mare to Norris. Williams brought action of trover against Norris for the animal, and the latter, in order to defeat the recovery by Williams, offered to prove that at the time of sale to Williams, Annie Gillespie was an infant, and the court below excluded the evidence. This court held, that, being an infant, the vendor had the right to disaffirm the sale, and if she did so and regained the possession, no matter how, she had the right to resell it.

So, in this case, if the appellant, repudiating the sale, had resold it to a third party, the title could have passed, and it must reasonably follow that he was entitled, upon the facts of this record, to an acquittal instead of a conviction.

Judgment *reversed* and cause remanded with directions to award a new trial.

J. J. Landrum, for appellant.

P. W. Hardin, for appellee.

[Cited, *Blake v. Ray*, 110 Ky. 705, 23 Ky. L. 84, 62 S. W. 531; *Triplett v. Commonwealth*, 122 Ky. 35, 28 Ky. L. 974, 91 S. W. 281.]

THOMAS SEWELL *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 3—86.]

Argument in a Criminal Case.

In a trial of a murder case the trial court has a large discretion as to limiting the time for argument and the Court of Appeals will not reverse except for a gross abuse of such discretion.

Evidence.

It is error in the trial of a murder case to admit evidence of proceedings which occurred away from the place where the homicide took place, between one person and the deceased, in which the deceased abused such person, the defendant not being present and having no knowledge of what occurred there.

APPEAL FROM MADISON CIRCUIT COURT.

June 25, 1881.

OPINION BY JUDGE HINES:

It was error to admit evidence of what occurred in the house between Miss Davis and appellant prior to the shooting of Dunbar. Dunbar was not present, took no part in it, and had no connection with the difficulty in the house, and, so far as is shown by the record, he had no knowledge of it. The transaction in the house in which Miss Davis was abused by appellant was not a part of the transaction in which Dunbar was killed, and in no way illustrates it. 1 Wharton on Evidence (10th Ed.), § 266. *Highly v. Commonwealth,* 8 Ky. Opin. 579.

As to the limitation of the argument of counsel, it is sufficient to say that the lower court has a large discretion in such cases, and this court will not reverse, except for a gross abuse of that discretion, of which we see no evidence in this case.

But for the error indicated as to the admission of evidence the judgment is *reversed* and cause remanded with directions for a new trial.

A. R. Burnam, W. B. Smith, for appellant.

P. W. Hardin, for appellee.

[Cited, *Williams v. Commonwealth,* 82 Ky. 640, 6 Ky. L. 764.]

MAJOR HICKS *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 3—87.]

Criminal Law—Change of Venue.

When an application is made for a change of venue in a criminal case it is the duty of the court to hear evidence produced, and from the evidence determine whether the applicant is entitled to a change of venue.

APPEAL FROM KENTON CRIMINAL COURT.

June 25, 1881.

OPINION BY JUDGE HINES:

Appellant, a negro, was indicted for and convicted of killing a white man, and sentenced to death. On this appeal it is complained, first, that the court erred in refusing a change of venue, and second, that the court erred in refusing to quash the indictment and to sustain a challenge to the panel because there was no negro nor colored person on the jury, and that such persons had been excluded on account of color.

As to the first point, by 1 Acts 1879, p. 61, Ch. 698, it is provided that on an application for a change of venue the court shall hear all evidence produced by either party, and from the evidence determine whether the applicant is entitled to a change of venue. The evidence introduced on the trial of these motions sustained the conclusion of the court below that a fair and impartial trial could be had in the county where the offense was committed and where the indictment was pending.

Unless, in the selection of the jury, persons were excluded on account of race or color, appellant has no right to complain, as it appears from the record that he had a fair and impartial trial. *Commonwealth v. Johnson,* 78 Ky. 509, 1 Ky. L. 108.

T. F. Hallam, for appellant.

P. W. Hardin, for appellee.

URBAN HAYDEN ET AL. *v.* A. G. CRUTCHFIELD'S EXR.

[Kentucky Law Reporter, Vol. 3—83.]

Judgment After Notice.

Persons in court assigning no valid reason why judgment should not be entered are not prejudiced by entering the judgment. The object of notice is to enable the party to show cause why the judgment should not be entered, but if the party is present in court, and suggests no ground against judgment being entered, the reason for notice ceases.

Exemption of Crops.

A tenant has no exemption as against his landlord as to tobacco raised, for the exemption extends only to such crop as would be suitable for the purpose of provisions.

APPEAL FROM DAVIESS CIRCUIT COURT.

June 25, 1881.

OPINION BY JUDGE HINES:

We do not perceive how appellants were prejudiced by the entry of the judgment one year after it had been announced. They were present in court, and assigned no valid reason why the judgment should not be entered, but they complain that it was error to enter the judgment without previous notice. The object of notice in such cases is to enable the party to show cause why the judgment should not be entered, but if the party is present in court and suggests no ground against the entering of the judgment the reason for notice ceases; besides, if it were a technical error, we would not disturb the judgment because the error does not appear to be prejudicial to appellants' substantial rights.

The only remaining question is, Can the landlord subject to the payment of rent a crop of tobacco grown upon the rented premises when there is not a sufficiency of provisions to support the widow and children one year, and when there is no other growing crops, nor other property or money to supply the deficiency? The statute [Gen. Stat. (1879), Ch. 38, Art. 13, § 6] provides that the landlord may subject to the payment of his rent any property not exempt from execution, and, further, that there shall be exempt from execution "a sufficiency of provisions, including breadstuffs and animal food, to sustain the family one year; and if there be not a sufficiency of provisions on hand for that purpose, so much of the live stock suitable for the

purpose, and of the growing crop, if any, as may be necessary to supply the deficiency."

It will be observed that this statute is unlike that in regard to descent and distribution. Gen. Stat. (1879), Ch. 31, § 11, provides that the sufficiency may be made up out of other property or money on hand, while the statute quoted makes no such provision. The growing crop, exempt from execution under the statute quoted, is only such crop as would be suitable for the purpose of provisions, as has been frequently held by this court.

Wherefore the judgment is *affirmed.*

Owen & Ellis, for appellee.

Little & Slack, for appellants.

[Cited, *Millay v. White,* 86 Ky. 170, 9 Ky. L. 462, 5 S. W. 429.]

CITY OF COVINGTON *v.* WOODS.

[Kentucky Law Reporter, Vol. 3—85.]

City Improvement Contracts.

The city council can only enter into an improvement contract by following the course prescribed by the law, and parties contracting with a city are bound to know the law regulating the mode of contracting and under what state of case such contracts for improvements can legally be made.

APPEAL FROM KENTON CHANCERY COURT.

June 25, 1881.

OPINION BY JUDGE PRYOR:

Our attention having been called to the case of *Murphy v. City of Louisville,* 9 Bush (Ky.) 189, we can not well see how the judgment is to stand, if the principle recognized in that case is to govern this, and we see no reason for departing from the rule. The cases are analogous, and there is no reason for making an exception.

The council had the power to contract in a particular way only, and the party contracting with the city must be presumed to know the law regulating the mode of contracting, and under what state of case such contracts for improvements can be made.

In this case it was held, in the former opinion, that the council

had no power to make the contract without first referring their proceedings to the committee on law, and having failed to do this the contract was invalid. It was the duty of the appellee to see that they were acting within the scope of the authority given.

Rehearing granted, judgment *reversed* and cause remanded.

M. L. Roberts, for appellant.

D. A. Glenn, for appellee.

HARRY STUCKEY *v.* CALLIE BELL.

[Abstract Kentucky Law Reporter, Vol. 3—248, as Stucky v. Bell.]

Liability of Wife's Separate Estate for Husband's Debts.

Where parties contemplate charging the wife for money loaned to her husband, it will not be presumed that her separate property is charged with the debt, but that the credit was given upon her general estate. The wife's separate estate is not liable for the debts of her husband in the absence of her agreement to become liable and pay out of such estate.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 10, 1881.

OPINION BY JUDGE PRYOR:

The evidence in this case conduces to show that the appellant was not relying upon any separate estate of the wife for the debt in controversy, as he did not seem to know of what the separate estate consisted. He charges that she has separate estate, and that it is in the hands of a trustee, but does not know whether it is real, personal or mixed property. The appellee denies making any promise to pay the debt out of her estate in the hands of Peters, and we are inclined to think from the proof that such was not the intention of the parties. This estate consisted of a small income consisting of interest on certain bonds and notes, with the remainder to the children of Mrs. Bell, and the trustee has made advances already largely in excess of the interest due. Waiving the question of the right to charge her separate estate, it is evident that if the parties contemplated charging the wife for the money loaned her husband, it was upon the credit of her general estate, if she had any, as the appellant seems to have been in entire ignorance of what separate estate she had.

If for the board of the wife, the general estate, upon a proper state of case presented, might be made liable, but upon the proof in this case we must concur with the chancellor that the record shows an absence of intention to charge the estate in the hands of the trustee, even if such a judgment could be rendered.

Judgment *affirmed.*

A. Carey, for appellant.

Samuel McKee, for appellee.

A. Q. GOODIN ET AL. *v.* MARY E. GOODIN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—249.]

Statute of Limitations.

Where a husband was a tenant by the curtesy no action could be maintained for the recovery of the land until his death, and where his death occurred in 1877 the statute of limitations against such an action then begins to run.

Proof Necessary to Establish a Trust in Land.

Where it is probable a grantor desired to intrust his son-in-law with the title to land and the use of it, and a deed is thus made with knowledge and consent of the grantor, and the son-in-law is in possession under the deed for nearly a half a century, the proof of mere declarations made by the grantor at the time, in the absence of an allegation of fraud or mistake, is not sufficient to establish a trust.

Value of Written Evidence.

In a suit by children to show that their father held lands as trustee only for their mother, who was the real owner of the land, and where the conveyance shows the father to have been a purchaser of the land, and that he paid its full value and has held the legal title for more than forty years, the mere recollection of parties as to what took place forty years before should not be permitted to destroy the written evidence of title.

APPEAL FROM LARUE CIRCUIT COURT.

September 14, 1881.

OPINION BY JUDGE PRYOR:

Albert Goodin intermarried with Fannie Vernon in the year 1832. She died in 1844, leaving five children surviving her. He again married, and had by his last wife six children, and died

in the year 1877. He left a large estate in land and personalty. Three of his children by his first wife survived him, and the six children by his last wife.

This action was instituted for the purpose of dividing the real estate between his children, and of allotting to the widow her dower. Three hundred acres of the land left by the father is claimed in this action by the children of the first wife, they alleging that this much of the land was an advancement to their mother by her father, Anthony Vernon, and was held in trust for their mother by their father, Albert Goodin. The children by the last wife say that Anthony Vernon gave this three hundred acres of land to Betsey Bledin, one of his daughters, and conveyed it to her and her husband in the year 1834, and that in June, 1834, their father, Albert Goodin, purchased the land of Bledin and wife for the sum of $600, and obtained a conveyance. The children by the first wife admit the conveyance to Bledin and wife, and by them to Albert Goodin, their father, but allege that Bledin and wife were never in possession of the land for the reason that they preferred to take other land, and the same was then given to their mother, Fannie Vernon, and a deed made by her father to Bledin and wife, and by them to Albert Goodin at the instance of the donor, Anthony Vernon, and in his presence, and that both conveyances were acknowledged on the same day.

The children of the last wife also rely on the statute of limitations, but in response to this defense it is maintained that their father was tenant by the curtesy, and no action could have been maintained by them for the recovery of the land until his death, which took place in the year 1877. In this position they are correct, for if it was the land of the mother the husband was tenant by the curtesy, and his holding was not adverse to the claim of the children.

The principal and only question is as to the existence of the alleged trust. The father entered into the possession of this land in the year 1834, under an absolute conveyance from Bledin and wife to him, upon the alleged consideration of $600 by him paid to the grantors. He remained in possession under this conveyance from that time until his death, a period of near forty-three years, and now a trust is attempted to be created upon the idea that it was the wife's estate given her by her father, and that he

was only tenant by the curtesy. There is no testimony of any holding on the part of Albert Goodin for his wife, except the proof of verbal statements by him that are unsatisfactory. Taking the theory of appellants to be true, their grandfather caused the conveyance to be made to their father without any express trust, and no inducements were offered nor fraud practiced by the husband and son-in-law to obtain the conveyance; and in such a case we see no reason why a trust should be declared, or the rights of the husband limited to a life estate. The father, if he chooses, may give or convey the land to the son-in-law, and while he obtains it by reason of the marriage, this affords no sufficient reason for the chancellor to regard it as trust property and to cancel the conveyance by restricting the rights of the husband. The conveyances made by Anthony Vernon to his other daughters convey the land to John Kennedy and Lucinda, his wife, and to John Bledin and Betsey, his wife, etc. Now the husband and wife in each conveyance hold jointly, and the mere fact that the conveyance was made by the father of the married woman, without any other consideration than love and affection, will not deprive the husband of his joint interest or authorize a cancellation of the deed.

The father of Mrs. Goodin, the first wife, consented that the conveyance should be made in this case to the husband, and was present when it was made and acknowledged, and, assuming the facts as relied on by appellants to be true, there is no reason for depriving his children by his last wife of their interest in the land.

Cases frequently occur where commissioners, dividing lands to which feme coverts are entitled by inheritance, have conveyed the lands to both husband and wife, in which cases it has been held the commissioner had no right to deprive the feme of her inheritance without her consent; but where the father or donor undertakes to make the conveyance in that way, in the absence of some fraud or mistake in its execution, the aid of the chancellor can not be invoked to cancel the deed or declare the existence of a trust.

In the case referred to by counsel, *Samuel v. Samuel's Admr.*, 4 B. Mon. (Ky.) 245, the will of the testator authorized a sale and conveyance of the real estate and a distribution of the pro-

ceeds between his heirs. The husband in that case received a conveyance of the land on no other consideration than the interest of the wife, and it was held that he was a trustee for the wife. If, however, the father or testator had conveyed the land to the husband of his daughter without any trust declared, the mere fact that he was the son-in-law, although in the absence of any valuable consideration, would not deprive the husband of the real estate. It may be that the donor intended and desired to intrust the son-in-law with the title and use of the land, and when a deed is thus made with the knowledge and consent of the parent, and the husband is in the possession under the deed for near half a century, the proof of mere declarations, made by the grantor at the time, in the absence of an allegation of fraud or mistake, is not sufficient to establish a trust; and even when the proper allegations are made for the purpose of reforming the deed the proof should be satisfactory to the right to relief before the chancellor would grant it. In this case, while the facts conduce to show that the land was an advancement to the daughter, still there is conflicting testimony tending to show that the purchase was made by Albert Goodin, and this testimony is sustained by the conveyance itself, acknowledging a consideration of $600 in hand paid by him.

Holding, as Goodin does, under such a conveyance after the lapse of forty years, the chancellor would not only hesitate to establish a trust upon the proof in this case, but should deny the relief sought. The conveyance shows the father of these parties to have been a purchaser of the land, and that he paid its full value, and the mere recollection of parties as to what took place forty years before they are called to testify should not be permitted to destroy the written evidence of title, and, if it could be deemed sufficient, it further appears that the conveyance was made by the consent of the father of Mrs. Goodin and acknowledged in his presence, and the fact that it may be charged as an advancement to the wife can not affect the question involved.

The chancellor acted properly in dismissing the petition and establishing perfect equality in the division between the children of the common parent. *Elliott v. Nichols,* 4 Bush (Ky.) 502; *Croan*

v. Joyce, 3 Bush (Ky.) 454; *Thompson v. Peebles' Heirs,* 6 Dana (Ky.) 387; *Babbit v. Scroggin,* 1 Duv. (Ky.) 272.

Judgment *affirmed.*

W. H. Chelf, William Lindsay, J. W. Tevyman, for appellants.

T. A. Robertson, for appellees.

B. B. VAUGHN ET AL. *v.* W. F. OWSLEY.

[Abstract Kenutcky Law Reporter, Vol. 3—249, as Vaughan v. Owsley.]

Dower and Homestead.

Where the wife merely relinquishes her right of dower, it does not pass the homestead, but where the husband and wife convey the whole estate, whether in the nature of a mortgage or by an absolute deed, without limitation as to the rights of either, the homestead passes.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

September 15, 1881.

OPINION BY JUDGE PRYOR:

The several mortgages in this case show an absolute conveyance by the husband and wife, and in the one there is a special clause relinquishing both dower and homestead. Both conveyances were acknowledged before the clerk, and there is no room to question the correctness of the judgment below. Where the wife merely relinquishes her right of dower, it does not pass the homestead, but where the husband and wife convey the whole estate, whether in the nature of a mortgage or by absolute deed, without limitation as to the rights of either, the homestead passes. See *Wing v. Hayden,* 10 Bush (Ky.) 276. We see no error in the record authorizing a reversal.

Judgment *affirmed.*

Scott Walker, for appellants.

[Cited, *First Nat. Bank v. Root,* 20 Ky. L. 1863, 50 S. W. 16.]

HENRY SMITH ET AL. v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—249.]

Criminal Law—Gaming Machine.

The president and directors of a county fair violate the law by permitting a machine and contrivance used in betting and other games of chance to be set up, kept and exhibited on premises in their occupation and under their control.

Meaning of Term "Tables" in Law Against Gaming.

The term "tables" is an apt designation of gaming itself, and when used with reference to gaming does not necessarily mean a round or square table on which cards are generally played. Any kind of a machine or contrivance at which a game of chance or betting can be engaged in is a "table" in the parlance of those who use them most often.

APPEAL FROM WARREN CIRCUIT COURT.

September 15, 1881.

OPINION BY JUDGE HARGIS:

The appellants were indicted for unlawfully and knowingly permitting "a machine and contrivance used in betting and other games of chance" to be set up, kept and exhibited on premises in their occupation and under their control. The manner of the commission of the offense is alleged to have been by permitting "a wheel of fortune" to be set up and operated on the fair grounds, while in their occupation and control as president and directors of the Warren County Agricultural and Mechanical Association. They allege that the "wheel of fortune" was a machine and contrivance used in betting, and people openly bet at it during the fair.

They were found guilty and their fine assessed at $250 each. From the judgment therefor they have appealed, and ask its reversal on various grounds. General Statutes (1879), Ch. 47, Art. 1, § 6, pronounces a heavy penalty against any person who "shall set up, exhibit, or keep for himself or another * * * any faro bank, gaming table, machine or contrivance used in betting, or other game of chance, whereby money or other thing is or may be won or lost." Section 7 of the same chapter and article provides: "Whoever shall permit any such game or table,

as is mentioned in the last section, to be set up, kept or exhibited * * * on any premises in his occupation or under his control * * * shall be fined," etc.

The terms used in this section include faro bank, machine and contrivance used in betting or other game of chance, or any kind of gaming table whatsoever, mentioned in the sixth section. The use to which the faro bank contrivance and machine for betting and other games are put by those who use them show that they are "gaming tables," in the sense in which those terms are mentioned in the sixth section, which is referred to by the seventh section to avoid repetition. The term "tables" is an apt designation of gaming itself.

"Monsieur, the nice, when he pays at tables, chides the dice." "Table," when used with reference to gaming, does not necessarily mean a round or square table on which cards are generally played. Any kind of a machine or contrivance at which a game of chance or betting can be engaged in is a "table" in the parlance of those who use them most often, and suffer most by their folly. Such we believe is its meaning as used by the legislature in § 7.

Wherefore the judgment is *affirmed.*

Nat A. Porter, Rodes & Little, for appellants.

John M. Porter, for appellee.

HENRY SMITH ET AL. *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—248.]

Criminal Law—Unlawful Gaming.

Pool selling is neither a wager nor a game, and the president and directors of a county fair can not be convicted of permitting a game of chance on the premises controlled by them by permitting pools to be sold on such grounds.

APPEAL FROM WARREN CIRCUIT COURT.

September 15, 1881.

OPINION BY JUDGE HARGIS:

The indictment accuses the appellants of the offense of unlawfully permitting a game of chance on premises occupied by

them and under their control, committed by knowingly permitting pools to be sold on the Warren county Fair Grounds, which were in their occupation as directors and managers of the Agricultural and Mechanical Association of that county.

It has been held that pool selling was neither a wager nor a game. *Check v. Commonwealth,* 79 Ky. 359. Therefore the acts alleged did not constitute the offense with which the appellants were charged.

Wherefore the judgment is *reversed.*

Nat A. Porter, Rodes & Little, for appellants.

John M. Porter, for appellee.

JACKSON FANNIN ET AL. *v.* SAMUEL MURRAY ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—251.]

Filing an Amended Petition.

Where in an original petition it is not alleged that the sale of land was in writing, and the proof shows such sale to have been made by a bond for a deed, the filing of an amended petition may properly be permitted.

APPEAL FROM LAWRENCE CIRCUIT COURT.

September 17, 1881.

OPINION BY JUDGE PRYOR:

This record contains a mass of conflicting testimony, but in our opinion the proof preponderates on the side of the appellees. The original petition fails to allege that the sale of the land from Joseph Gort to old man Murray was in writing, but the amended petition cures this defect and alleges the execution of the title bond. This amendment should have been permitted to be filed to correspond with the proof, particularly when the witnesses speak of the execution of the bond on their first examination.

The fact that the widow of Joseph Gort sold her dower to the decedent, Murray, and the additional fact that Murray erected his dwelling upon the fifty-acre tract within a few feet of his own land, tends strongly to corroborate the testimony of the appellants, by whom the existence of the bond is established. Besides, Fannin, the appellant, is on the land, the same pur-

chased by Joseph Gort and his mother, and the decedent, Murray, seems to have aided in paying for this land, and that was a part consideration from Murray to Joseph Gort in the purchase of the fifty acre tract in controversy.

The wife of Murray and the mother of Joseph Gort seem to have been the principal managers of the business affairs of the former's husband after he became advanced in years, and proof of her declarations to ownership we think are not entitled to much weight. It is shown by the testimony of the appellants, with a view of establishing title in Mrs. Murray, that she and her husband had one or more quarrels in regard to the ownership of this property. It is unreasonable to suppose that the husband would have set up any claim to this land in his own right and to the extent of producing dissatisfaction on the part of the wife, when he was without the semblance of title.

It is evident Murray was asserting an absolute claim in his life-time, and when the existence of the bond is certainly shown, notwithstanding the lapse of time, we are not disposed to discredit the statements made as to its existence.

Judgment *affirmed.*

Geo. N. Brown, Jas. E. Stewart, for appellants.

W. C. Ireland, for appellees.

J. H. PATTERSON ET AL. *v.* LYNCH GRAY.

[Abstract Kentucky Law Reporter, Vol. 3—251.]

Judgment Decreeing Sale of Town Lot.

The court will presume that a town lot is indivisible, but this presumption may be rebutted by answer or proof showing that it would be to the interests of all parties to have such lot divided. Where there is no such answer or proof the judgment should decree the sale of the entire lot.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 17, 1881.

OPINION BY JUDGE PRYOR:

This court in *Faught v. Henry,* 13 Bush (Ky.) 471, adjudged that the court would presume a town lot was indivisible, and

therefore a judgment subjecting it to sale should sell the whole lot. This presumption may be rebutted by answer or proof showing that it would be to the interest of all parties to have the lot divided, but in this instance it does not appear that a division of the lot could have been made. The judgment should therefore have directed a sale of the entire lot. A sale of a part of it, although paying the debt, might render the remainder valueless, when if the whole lot was sold it might pay the debt and leave something of value to the owner.

Judgment *reversed* and cause remanded for further proceedings.

R. W. Slack, for appellants.

McHenry & Haynes, for appellee.

COMMONWEALTH v. W. H. WAMMOCK.

[Abstract Kentucky Law Reporter, Vol. 3—250.]

Criminal Law—Failure to Vacate Seat by a Judge.

Under the statute of April 22, 1880, making it a punishable offense for the county judges of Carter and Elliott counties to fail or refuse to vacate the bench when a litigant objects to his sitting in a cause and files his affidavit in support of his objection, this court will not reverse a judgment sustaining a demurrer to the indictment in the absence of a showing that the affidavit contains sufficient reasons for the vacation of such seat, as is required in the law requiring circuit judges to vacate their seats and punishing them for refusing to do so.

APPEAL FROM CARTER CIRCUIT COURT.

September 17, 1881.

OPINION BY JUDGE LEWIS:

The offense charged in the indictment against the appellee is for "unlawfully failing and refusing to vacate his seat upon the bench as judge of Carter county, after sworn objection by written affidavit made and filed to his presiding as judge aforesaid."

The facts alleged are that, pending an application before him as county judge for tavern license, with the privilege of selling spirituous liquors, "One, John Gallagher, who made the application, having made and filed an affidavit in said court and before said Wammock as judge, setting out in said affidavit his

objection to said Wammock presiding and hearing said motion as county judge of Carter county, he, the said Wammock, did unlawfully fail and refuse to vacate his seat upon the bench as county judge aforesaid."

Appellee was indicted under an act of the general assembly entitled "An act providing for special judges of county courts in certain cases in the counties of Carter and Elliott." 2 Sess. Acts (1879), Ch. 1048, approved April 22, 1880. By that act it is provided that whenever there shall be an objection made, upon written affidavit filed, to the county judge of Carter and Elliott counties presiding or hearing any motion or other proceeding, it shall be the duty of the county judge to vacate his seat upon the bench. For his failure or refusal to do so he shall "be subject to the same penalties as are prescribed by law against circuit judges who fail to give way to special judges."

In so important a matter as requiring a county judge, entrusted with responsible, discretionary duties and acting within the jurisdiction and authority given him, to vacate his seat upon the bench and give place to a justice of the peace summoned by the clerk, the reason and spirit of the law requires something more than the mere objection of a party, without any grounds therefor.

As the legislature has, by the special statute under which appellant was indicted, imposed the same penalties for the refusal of county judges of Carter and Elliott counties to vacate their seats that are prescribed by law against circuit judges who fail to give way to special judges, it is proper to assume that it was intended that the same reasons for the vacation of his seat by the regular judge should exist and be presented in the one case as in the other.

It is impossible to determine from the indictment whether appellee, in refusing to vacate his seat upon the bench, acted within or without proper judicial discretion, legally or illegally, conscientiously or corruptly. There are other objections made to the indictment, but as it is fatally defective for the reasons given it is unnecessary to decide them.

The judgment of the court below sustaining the demurrer is *affirmed*.

P. W. Hardin, for appellant.

W. C. Ireland, for appellee.

EUGENE MAYS v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—250.]

Criminal Law—Liquor Law Indictment.

An indictment for a violation of the intoxicating liquor law is good when the facts constituting the offense are stated substantially in the language of the statute.

Instruction.

An instruction telling the jury that it should convict if it believed from the evidence that the defendant within one year before the return of the indictment sold to a named person any whisky, brandy, wine, gin or alcohol, or mixture thereof, without a written prescription given by a regular practicing physician, is not erroneous. It is more favorable to the defendant than the statute authorized and he can have no objection to it.

APPEAL FROM GRAVES CIRCUIT COURT.

September 17, 1881.

OPINION BY JUDGE LEWIS:

Appellant was indicted, convicted and adjudged to pay a fine of sixty dollars for violating the provisions of Sess. Acts (1878), Ch. 218, entitled "An act to regulate the sale and giving away of spirituous, vinous or malt liquors in the city of Mayfield, Graves County, Kentucky, or within one mile of said city," approved February 19, 1878. His motion for a new trial having been overruled, he appeals to this court for reversal of the judgment.

The first error complained of is the action of the court in overruling the demurrer to the indictment. By the act the sale of spirituous, vinous or malt liquors, or the mixture of the same, in the city of Mayfield, or within one mile of the corporate limits thereof, to any person, is made unlawful, except in certain cases therein specified. The offense, as well as the facts constituting the offense, are distinctly and substantially, in the language of the statute, stated in the indictment, and the demurrer was properly overruled.

No error in refusing or giving instructions is perceived. By the first instruction the jury were told it was their duty to find appellant guilty if they believed he, within one year before the

finding of the indictment, sold to Haggard any whisky, brandy, wine, gin or alcohol, or mixture thereof, without a written prescription given by a regular practicing physician. So far from the instruction being prejudicial, it was more favorable to him than the statute authorized.

The second instruction given is in pursuance of and entirely consistent with the third section of the act. Counsel for appellant seem to misapprehend the evidence, as set forth in the bill of exceptions. There is no evidence that the liquor which he is charged with having sold to Haggard was a portion of a quart primarily purchased on a prescription by the physician. The evidence shows two distinct sales, the first on a prescription, the second without any. The instruction asked for by appellant was properly refused. The statute is violated when a sale is made without the prescription of a regular practicing physician, whether the purchaser be sick or well.

Wherefore the judgment of the court below is *affirmed*.

Samuel H. Crossland, for appellant.

P. W. Hardin, for appellee.

JOHN D. HARRIS ET AL. *v.* DOROTHY ANDERSON ET AL.

[Kentucky Law Reporter, Vol. 3—237.]

Sale of Ward's Land by Guardian.

Where minor children hold the fee simple to real estate, subject to the life estate of their mother, under provisions of the will of the father of the mother, the guardian of the children by the acquiescence of their mother, who is willing to join in a conveyance of the real estate, may legally sell the same and reinvest the proceeds if the court, after hearing the petition, believes it is to the best interest of the wards to do so; and the court's decree should provide that property in which the proceeds are reinvested should be held in the same way under the will as was the real estate sold.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

September 17, 1881.

OPINION BY JUDGE PRYOR:

James Blythe died in the county of Madison, leaving a last will and two daughters, Mrs. Anderson and Mrs. Sims, surviving. He devised to his two daughters certain lands, and to his

daughter, Mrs. Anderson, the tract of land sold in this case. The devise is to his daughter for life, with remainder to her children, with the further provision that if either of his daughters die without children, the survivor of her lineal descendants should take the estate. Mrs. Anderson has one child, and the father, J. C. Anderson, is his statutory guardian. The guardian filed this petition, asking a sale of the tract of land devised, that the proceeds might be reinvested in other lands, alleging that it would redound to the interest of all the parties in interest, and that the land purchased with the proceeds might be held on the same conditions and limitations as placed on the right and title of the land sought to be sold by the will of James Blythe.

Mrs. Sims and her husband are living, and they have several children, all of whom are made defendants to the action and served with process. The adult defendants made no objections to the sale and reinvestment, and the infants are represented by a guardian ad litem. It seems to be to the interest of all that the land should be sold and the reinvestment made. The sale was ordered by the chancellor under Buckner and Bullitt's Civ. Code, §§ 489, 491. A bond has been executed by the guardian and approved by the court securing the rights of the infant, and the steps required to be taken, by the provision of the code, complied with. That these provisions authorize the sale is unquestioned; and the chancellor retaining the control of the proceeds for purposes of reinvestment, we perceive no reason why the purchaser should not pay into court the purchase-money.

The court requires that when the reinvestment is made the parties shall hold the title as under the will of the testator. Mrs. Anderson, who was made a party plaintiff by an amended petition, was made a defendant, and thus cured any defect in the proceeding so far as she was interested; in fact her husband and herself could unite in conveying her interest. As there is no valid objection made to the title, and none existing in the record, the exceptions by the purchaser to the sale and proceedings under it were properly overruled. He should be required to accept the title and comply with the terms of sale.

Judgment *affirmed.*

John Bennett, for appellants.

J. W. Caperton, for appellees.

[Cited, *McClure v. Crume,* 141 Ky. 361, 132 S. W. 433.]

JOHN LINDSAY *v.* H. T. SMITH.

[Abstract Kentucky Law Reporter, Vol. 3—252.]

Partnership Debts.

A partner has no right, by executing his own note for a partnership debt and paying the note at forty cents on the dollar, to recover from his partner one-half of the whole amount of the debt. The partner has a right to credit for half the sum saved to the firm by the payment of the debt with less than the sum due, and this is true after dissolution of the firm as well as before.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

September 20, 1881.

OPINION BY JUDGE HARGIS:

There is no allegation that the agreement of February 3, 1872, was executed through fraud or mistake; and according to its terms, by which the court must be governed in its construction, the appellee agreed to pay only the debts that were posted on the books at that time, and as to any other debts that might be thereafter presented they were to be jointly settled by appellant and appellee. The evidence tends to prove that the debts, which appellee claims were subsequently presented and paid by him, were so paid and presented, and were not posted on the books at the time of dissolution of the partnership.

Case denominated No. 2 being a suit sounding in damages, easy of ascertainment, for a breach of the written agreement of dissolution, the judgment of the chancellor can not be disturbed as to the fact of liability But we are of opinion that the amount of appellant's liability was not correctly adjudged. The appellee, it seems, instead of paying the firm debts due to the Cabinet Maker's Union, executed his individual note therefor amounting to $454.95 and afterwards discharged the note by the payment of forty cents on the dollar. In other words, he paid the debt which the "Union" held against the firm with the sum of $181.98, one-half of which he was entitled to, but he was erroneously allowed the whole of his note to the "Union." This was a partnership debt which appellee paid, and he had no right, by executing his own note, and paying it off at forty cents on the

dollar, to recover from his partner, for whom he was acting as agent, the sixty per cent. he had made by the transaction.

After dissolution, as well as before, partners are required to act with the utmost good faith with one another. Whatever either may make in the adjustment of a partnership debt inures equally to the benefit of the other unless the contract of dissolution provides otherwise.

Suit No. 1, for the amount of an open account, and No. 2, as we have seen, is for damages for the breach of a written contract. They present entirely different causes of action, and we know of no law that requires a party to write in one suit all of the causes of action he may have, although they may be such as can be joined, unless there be such a multiplicity of them as would by separate prosecution result in vexation and oppression. There is no reason, however, in this case, to deny the appellee his costs in each of the actions in the court below, prior to the rendition of the judgment from which this appeal is prosecuted. As to the other errors assigned they relate to numerous items which were reported by the commissioner, who, it seems to us, has presented the result of the evidence. It is true it is somewhat conflicting, but not to such an extent as to authorize a reversal of the judgment, except to the extent indicated.

Wherefore the judgment is *reversed* and cause remanded with directions to render judgment in pursuance of this opinion.

W. H. Holt, for appellant.

J. J. Cornelison, for appellee.

SAMUEL ELLIS v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—251.]

Criminal Law Indictment for Injuring Real Property.

Whether a field of another is enclosed by a lawful fence or not, the owner of cattle can not turn them into it for the sake of gain or to injure the property without rendering himself amenable to the punishment provided by Gen. Stat. (1879), Ch. 29, Art. 28.

APPEAL FROM SHELBY CIRCUIT COURT.

September 20, 1881.

OPINION BY JUDGE HARGIS:

This is the second time we have had this case before us. The opinion in the former appeal is reported in 78 Ky. 130, 3 Ky. L. 251, and none of the questions therein settled will be further noticed.

Upon the return of the case the attorney for the commonwealth, upon the interposition of a demurrer by the accused, elected to prosecute the offense for injury to real property, committed by turning and driving the cattle into the field and causing them to eat and destroy the grass, and dismissed the charge of injuring the fence by pulling it down, and then the court properly overruled the demurrer. The election, in legal effect, took from the indictment the charge, "did injure the fence," and the allegation "pulling down said fence and," and the words "fence and," which described the manner in which the injury to the fence was committed, and the value of the fence, and left the indictment as if the charge of injuring the fence and the manner of doing it had never been made.

The indictment, therefore, as now before us, charges the accused of the offense of unlawfully injuring and destroying real property, by wilfully and unlawfully turning and driving cattle in the field and upon the grass of Davis, and by causing said cattle to eat and destroy the grass.

Hence no words in the indictment with reference to the fence can be considered as any part of the description of the act charged against the accused. The authorities holding that an allegation, not impertinent, whether necessary or unnecessary, which is particularly descriptive of what is legally essential to the charge, cannot be rejected as surplusage, but must be proved, do not apply to this case, because the court instructed the jury, in appropriate language, that they must find the acts set forth in the indictment as constituting the offense to have been committed by the accused before they could find him guilty.

It was not essential that the jury should have been instructed that they must also find that the accused "caused the said cattle to eat and destroy the said grass," for if he turned and drove the cattle into the field, and they ate and destroyed the grass, he was causing them to do it; and instructing the jury was in effect telling them all the facts which were legally necessary to be found to fix his guilt. The manner in which the grass was injured and

destroyed is sufficiently alleged. It was enough to specify that the accused turned the cattle into the field, and that they ate and destroyed the grass. Any person of common undersanding would know what is intended by such a statement. Buckner & Bullitt's Crim. Code (1876), § 122.

Whether the field was enclosed by a lawful fence or not, the accused could not with impunity and for the sake of gain, or to injure the property of Davis, turn his cattle into his field, without rendering himself amenable to the punishment denounced by the statute for the injury they might do to the realty. Such acts are unlawful, and eating and destroying growing grass is an injury to real estate. The object of the legislature in enacting Gen. Stat. (1879), Ch. 29, Art. 28, was to prevent intentional trespasses and injury to real or personal estate by creating a penalty therefor which would be an additional remedy to the action that exists at common law for the civil injury.

The bill of exceptions only shows the tendency of the evidence introduced on both sides, and, in the absence of what was detailed by the witnesses, the law presumes that it was sufficient to authorize and sustain the verdict. We have carefully examined the case, without reference to the propriety of the verdict, with which, on this record, as presented, we have nothing to do, and we can discover no error prejudicial to the substantial rights of the accused.

Wherefore the judgment is *affirmed.*

Bullock & Beckham, William Lindsay, for appellant.

Carroll & Barbour, J. S. Morris, P. W. Hardin, for appellee.

ANN H. BARNES ET AL. *v.* SILAS T. GREEN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—253.]

Claims Against Insolvent Estate.

The effect of a court order preventing creditors from instituting suits at law to collect their claims against an insolvent estate does not deny to them the right of collecting their claims in the manner provided by the statute for the settlement of decedent's estates, and where they fail to present their claims properly verified within the statute of limitations their claims are barred by such statute.

APPEAL FROM MADISON CIRCUIT COURT.

September 22, 1881.

OPINION BY JUDGE PRYOR:

Barnes died in the year 1863, and administration was granted on his estate to Silas Green in the same year. Green filed his petition in equity in the year 1864, for the settlement of the estate as an insolvent one. The creditors were made parties, and an order entered as authorized by the statute enjoining them from proceeding at law to coerce their claims of the administrator. The appellants filed their claims with the commissioner without sufficient verification, and in 1866 or 1867 the petition and proceedings under it were filed away. Why this step was taken does not appear. In the meantime the administrator, Green, had made an assignment of his estate, or if not it was placed in the hands of A. R. Burnam as trustee. The action remained filed away until the year 1877, when the widow and children of Barnes filed a petition in equity against Green and Burnam for a settlement of his acts and for judgment. On motion of the defendants, the old case filed by Green was then redocketed and consolidated with the action filed by the widow and children against him. These appellants, as creditors who had filed their claims in the original action instituted by the administrator, appeared before the commissioner, alleging that their several debts were unpaid, and asking for a judgment. None of these claims are verified as required by the statute, and to any allowance for their payment the widow and children excepted, relying also on the statute of limitations.

The claims, each and all, should have been rejected, first, because they were not properly verified, and, second, because the statute was a bar to any recovery. The effect of the order preventing the creditors from instituting suit or actions at law did not deny to them the right of collecting their claims in the manner provided by the statute for the settlement of decedent's estates. It was their duty to present their claims, properly verified, to the court or its commissioner, and when this was done they had done all that was required to prevent the statute from running, unless their laches in not compelling a settlement for the period of ten years would defeat their recovery. We are not satisfied after the lapse of such a time, with the papers filed away,

that the case ought to have been redocketed, but on the contrary it would look like an abandonment of the action by both the administrator and creditors. It is not necessary, however, to determine this question, as the claims were not proven and never in a condition for payment, and the case must stand as if the creditors had presented their claims all due on open accounts for the first time in the year 1877.

The fact that the representative promised to pay these debts does not alter nor change the rule. They must be verified as required by law before the administrator is required to pay them, and in this controversy between the widow and heirs on the one side and the representative and creditors on the other they should be allowed to rely on the statute, as well as defend on the merits.

The judgment is *reversed* with directions to disregard their claims in the settlement between Green and the appellees.

Chenault & Bennett, for appellants.

J. W. Caperton, for appellees.

[Cited, *Dugan's Admr. v. Mitchell,* 5 Ky. L. 150; *Biggs v. Lexington R. Co.,* 79 Ky. 470, 3 Ky. L. 263.]

MASON P. BROWN *v.* ORLANDO BROWN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—253.]

Construction of Will.

Where a testator made the support of an invalid daughter and the maintenance of his family a charge upon his whole estate, and gave his trustees the right to mortgage any of it or "to sell any real estate which may be necessary to pay debts and maintain the family," and directs that his children shall take as under the statute of descent and distribution except his said daughter, it is held that the division of the estate was not contemplated by the testator during the life of the daughter, and that the trustees had power to sell the real estate to support said daughter where it is necessary to do so.

APPEAL FROM FRANKLIN COURT OF COMMON PLEAS.

September 22, 1881.

OPINION BY JUDGE PRYOR:

We are satisfied that Orlando Brown, Sr., by his last will, made

the support of his daughter, Euphenia, and the maintenance of his family, a charge upon his whole estate, and his two sons, as trustees, or the survivor, are empowered fully to execute the trust. The trustees, or the survivor, are authorized by an express provision of that instrument "from time to time to mortgage any of my estate, real or personal, to raise money, if they think necessary to pay debts or support Euphenia." By a codicil attached they are empowered "to sell any real estate which may be necessary to pay debts and maintain the family." The prime object of the devisor seems to have been to provide for his unfortunate daughter, and while he directs that his children shall take as under the statute of descent and distribution, except Euphenia, he seems not to have contemplated a division of his estate, or if he did, as he had limited the estate of Euphenia to an estate for life, the better to secure for her a support, he charges the whole estate with the burden, and vests in his two executors, or the survivor, the power to execute the trust.

The daughter is still living and the widow is dead. One of the executors is also dead, and the surviving executor is now seeking a construction of the will, alleging that it is necessary to sell the real estate for the maintenance and support of his sister. This power is clearly given, and the right to sell such real estate as may be necessary for the support of Euphenia can be exercised. As to the extent of the power further than this it is not necessary to determine, as the only question before us is, Has the surviving trustee the power to sell? We think he has.

Judgment *affirmed.*

Hugh Rodman, for appellant.

D. W. Lindsay, for appellees.

CATHERINE CAVANAUGH *v.* GEO. M. FRIED.

[Abstract Kentucky Law Reporter, Vol. 3—253.]

Personal Judgment Against Garnishee.

A plaintiff is not entitled to a personal judgment against a garnishee, but there should have been a rule awarded against him to bring the money into court or to produce the property that it might be sold.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 22, 1881.

OPINION BY JUDGE PRYOR:

The objection in this case to a personal judgment against the appellant is that none is asked, and standing in court as a mere garnishee a rule should have been awarded against her to bring the money into court. It is evident from the facts of this record that the appellant is entitled to relief. The personal judgment could not have been rendered for the additional reason that no cause of action is alleged upon which to base it. The appellant should either bring the money into court or produce the property that it may be sold.

Judgment *reversed* and cause remanded for further proceedings.

Lane & Harrison, for appellant.

D. M. Rodman, for appellee.

[Cited, *Sanders v. Herndon,* 122 Ky. 760, 29 Ky. L. 322, 93 S. W. 14, 5 L. R. A. (N. S.) 1072, 121 Am. St. 493.]

H. C. DINKLE v. CHAS. B. ANDERSON.

[Kentucky Law Reporter, Vol. 3—243.]

Innocent Purchaser Protected.

Where it is contended that an instrument sued upon was given for corn planters that were worthless, and that the appellant obtained the assignment to himself from the seller with intent to defraud the purchaser, which is denied, the burden is on such purchaser seeking to avoid payment to show that the appellant knew of the fraud at the time he obtained the paper by indorsement, and was therefore a party to it, and where he fails to do so and the evidence shows such appellant to be an innocent purchaser, the purchaser is liable to him on such instrument.

APPEAL FROM MASON CIRCUIT COURT.

September 22, 1881.

OPINION BY JUDGE PRYOR:

If the petition in this case be regarded as defective the answer cures it. It is admitted in the answer that the paper, such as is described in the petition, was transferred by Springer & Co. to the plaintiff, and accepted by him, for the mere purpose of defrauding the appellee; and in the second paragraph it is stated

that the paper sued on was given for certain corn planters that were worthless, and that the appellant obtained the assignment to himself from Springer & Co. with a like fraudulent intent.

The acceptance by the appellee does not appear on the paper copied in the record, and we suppose it is a mere omission by the clerk, as its execution is admitted by the appellee in his answer, and the case went to the jury upon instructions asked by the appellee, based upon the fact of his having accepted the paper. The testimony of the appellee also shows that he indorsed the accepted draft in payment for the machines.

The petition, we think, is fully descriptive of the paper, so as to enable the court to know that it is commercial in its character. The proof shows that it was discounted by the appellant; and while the burden was on the appellee to show that the appellant knew of the alleged fraud practiced on him by Spring & Co. at the time he discounted or obtained the paper by indorsement, the appellant voluntarily took the burden, and has shown by his own testimony and that of others that the assignment was made in good faith for its full value. There is no room for doubt from the proof in the record as to his being an innocent purchaser.

The fact that the appellant was an attorney at law and a director in a bank in the town in which Springer lived, will not authorize the assumption that he was a party to the fraud, nor authorize the jury to disregard the direct and positive testimony showing that appellant acted in good faith.

The appellant was entitled to a judgment on the proof, and there was no question for the jury to determine.

Judgment *reversed* and cause remanded with directions to award a new trial.

Stanton & Larew, for appellant.

William Lindsay, for appellee.

GEO. N. BROWN *v.* D. D. GEIGER.

[Kentucky Law Reporter, Vol. 3—239.]

Mistake as Ground for Relief.

Mistake can not furnish ground for relief to the party by whose fault it occurs. Such a mistake can not be relied on for affirmative relief against a written contract by a party who knew of the facts

at the time he made the contract, which mistake he relied upon to reform it.

Mistake Known to One Party Only.

If a mistake be known to one party and it operates as a surprise or fraud upon the other party, who is ignorant of it, the latter, but not the former, can obtain relief in equity upon the ground of mistake.

APPEAL FROM BOYD CRIMINAL COURT.

September 22, 1881.

OPINION BY JUDGE HARGIS:

Without regard to the extraneous evidence, the written agreement of Nov. 25, 1869, between the appellant and appellee, although it may be construed as an exchange of lands, would not prevent the appellee from recovering on the ground of mistake in the value of the excess in the pasture field exchanged or sold to appellant, but for the fact that appellee admits in his deposition that at the time of the trade he knew the land he was about to let appellant have "would overrun the five acres."

He also testified that he did not remember that he stated his knowledge of the fact to appellant, because both tracts had to be surveyed, and if his overrun it would go as a credit on the $1,000 due Mr. Brown on their contract. Had he disclosed his knowledge to appellant that the "pasture field" contained more than five acres, the latter might not have been willing to pay $160 per acre for any material excess over that quantity, or exchange his lands for so many acres as 8 1/10 acres at $160 per acre. It was the duty of appellee not only to disclose his knowledge of the excess, but, if he wished to bind appellant to pay him therefor, he should have had it so stipulated in the written contract. Only the deficit was provided for in the contract, and appellant had the right, from this stipulation, to believe that appellee thought there would be no excess, and was not concealing the fact that "he knew at the time" his land would overrun five acres.

Mistake can not furnish any ground for relief to the party by whose fault it occurs. Nor can mistake be successfully relied on for affirmative relief against a written contract by a party who admits he was not mistaken, but knew of the facts at the time he made the contract, which he relies on to reform it. *McKee v.*

Hoover, 1 T. B. Mon. (Ky.) 32. If a mistake be known to one party and it operates as a surprise or fraud upon the other party who is ignorant of it, the latter, but not the former, can obtain relief in equity upon the ground of mistake. 1 Story's Eq. Jur. (11 ed.), § 147.

As to the conflict between appellee's land and the 42 acre tract of appellant, the latter should not have the benefit of the quantity contained in the interference. Leaving this out, the difference between 90 acres and the actual quantity in three tracts which appellant sold, or exchanged with appellee, should be credited on the $600 due from the appellee to appellant, and judgment should be rendered in favor of the latter for the remainder.

Whereupon the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Geo. N. Brown, A. Duvall, for appellant.

W. C. Ireland, for appellee.

COMMONWEALTH *v.* J. H. MCELROY.

[Kentucky Law Reporter, Vol. 3—241, as Commonwealth v. McCrory.]

Criminal Law—Indictment.

Generally an indictment for a statutory offense is sufficient if it be in the words of the statute, but this is not always true. In charging one with unlawfully shooting at another with intent to kill or wound it is not sufficient to merely allege that the accused shot at another with intent to kill, for the fact of shooting at another does not necessarily imply the use of a weapon sufficient to kill or wound, because it may be done with an instrument totally insufficient and under circumstances showing no criminal intent. In such an indictment it must be alleged that the weapon used was a deadly weapon.

APPEAL FROM MARSHALL CIRCUIT COURT.

September 24, 1881.

OPINION BY JUDGE LEWIS:

Appellee was indicted under Gen. Stat. (1879), Ch. 29, Art. 17, § 2, for the offense of unlawfully shooting at another with intent to kill or wound such person, although without inflicting a

wound. This appeal is from the judgment sustaining a demurrer to the indictment.

The only objection made to the indictment necessary to be noticed is that the instrument or weapon with which the alleged offense was committed is not stated. The indictment should contain a statement of the act constituting the offense, and should be direct and certain as regards the particular circumstances of the offense charged, if they be necessary to constitute a complete defense.

Generally, but not always, an indictment for a statutory offense is sufficient if it be in the words of the statute, as this is. "Whether sufficient or not, depends upon the manner of stating the offense in the statute. If every fact necessary to constitute the offense, is charged, or necessarily implied by following the language of the statute, the indictment in the words of the statute, is undoubtedly sufficient, otherwise it is not." *Commonwealth v. Stout*, 7 B. Mon. (Ky.) 247. The facts necessary to constitute the offense must be alleged, and it is not sufficient that the essential facts may be inferred from those which are stated. *Taylor v. Commonwealth*, 1 Duv. (Ky.) 160.

Tested by these rules the indictment is insufficient. The simple charge of shooting at another with intent to kill or wound is merely a conclusion of law, for the act of shooting at another does not necessarily imply the use of a weapon sufficient to kill or wound, because it may be done with an instrument totally insufficient, and under circumstances precluding the idea of a criminal intent. To make the offense complete the instrument used must be such as corresponds with an intent to kill or wound, in other words, a deadly weapon; and that it was so used must be directly and expressly alleged in the indictment, and not left to be inferred.

If the section under which the indictment was drawn be construed in connection with § 1 of the same article, which is proper, as they are on the same subject, and under the revised statutes made but one section, it is manifest that the gravamen of the offense, in the meaning of the legislature, is shooting at another with

intent to kill or wound, without inflicting a wound, with a gun or other instrument loaded with a ball or other hard substance.

Wherefore the judgment is *affirmed*.

P. W. Hardin, C. H. Thomas, W. W. Robertson, for appellant.

Gilbert & Reid, William Lindsay, for appellee.

[Cited, *Commonwealth v. Barney,* 115 Ky. 475, 24 Ky. L. 2352, 74 S. W. 181.]

CHAS. B. PORTER'S ADMR. ET AL. *v.* C. W. PORTER ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—244.]

Dower.

Where a testator devised all of his land, except ten acres, to his widow for life, and all his personal estate to his widow and children, and the widow does not renounce the provisions of the will, whether her husband's estate is solvent or insolvent the property devised to her must be held to have been accepted in lieu of dower, and she is not entitled to have dower set off to her.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 24, 1881.

OPINION BY JUDGE PRYOR:

No objecton has been made to the improper joinder of actions. This is a suit by the administratrix on a note, and also an action by the widow for allotment of dower. It appears that long after the land was sold by the husband, the latter conveyed to his wife, in consideration of love and affection, 100 acres of land, and by his will devises all of his land to his widow, except ten acres, for life, and all of his personal estate to the widow and children.

The widow is the administratrix with the will annexed, and sues as such. She has never renounced the provisions of the will, and, whether her husband's estate is solvent or insolvent, the property devised must be held to have been accepted in lieu of dower. *Grider v Eubanks,* 12 Bush (Ky.) 510.

The whole estate has been conveyed and devised to the widow, and she claims in her petition to be the owner and holder of the note for that reason. Whether the note has been paid or not, the land for which it was executed was conveyed by the husband of the widow with a clause of general warranty, and when that

warranty is broken the estate in the hands of the widow conveyed and devised to her would be held liable. The proof also conduces to show that this land was sold and the purchaser placed in possession before the marriage of this appellant. The conveyance itself recites that the land had been formerly sold and is now conveyed.

It is not necessary to decide whether the answer and petition was or not filed. It was nothing more than a repetition of the original pleadings and presented no new issue.

Judgment *affirmed.*

Riley, Jolly & Walker, for appellants.

W. N. Sweeney, for appellees.

H. M. HARGETT v. BRACKEN COUNTY.

[Abstract Kentucky Law Reporter, Vol. 3—255.]

Recovery for Work Done.

In a suit to recover for work done, where it is admitted the work was done, the jury may determine the value of the services rendered without proof, and are not compelled to render a verdict for as much compensation as the weight of the evidence may indicate.

APPEAL FOM BRACKEN CIRCUIT COURT.

September 24, 1881.

OPINION BY JUDGE PRYOR:

Upon the issue as to the mere value of services rendered much latitude must necessarily be given the jury, and while the preponderance of the evidence is with the appellant this is not such a case as will authorize this court to say the verdict was flagrantly wrong.

A jury in such a case may, upon the admission of the fact that the services were rendered and a reasonable compensation made, determine the value of the services without proof, and are not compelled to place as high an estimate in this class of cases on the value of the work done as the weight of the evidence may indicate. A witness has stated in this case that he has undertaken the labor for a less sum, and the county court, to whom the claim was originally submitted, like the jury, with a personal

knowledge of the value of the services, has said that the services were worth less than $200. While this court might be inclined to give the amount asked, we are not authorized to disturb the verdict upon the facts of this record.

Judgment *affirmed.*

H. C. Weaver, for appellant.

CITY OF OWENSBORO *v.* CHARLES F. ELDER.

[Abstract Kentucky Law Reporter, Vol. 3—255.]

Recovery of License Money.

Where a city undertakes to grant a license, takes the money of the applicant for such license and agrees to issue one to him, but fails to do so, he may recover such money from the city.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 28, 1881.

OPINION BY JUDGE PRYOR:

In this case the appellant undertook to grant a license to the appellee and failed to do so. It received his money, for which he obtained no consideration. The fact that he sold spirituous liquors does not preclude him from recovering. This was done in violation of law and can constitute no defense on the part of the appellant. The appellee was compelled to pay a penalty for selling under what he supposed was a valid license. It was not necessary to allege that he received no benefit from the license issued. This is not like a case where the city has improved the property of a party, although under a void ordinance, and the party paying will not be allowed to recover the money back where he has derived such benefits as would have resulted from the labor expended if the ordinance had been a valid one. Here the city took the money of the appellee and agreed to issue a license therefor as authorized by the city charter, but neglected or failed to do so, and there is no reason either in law or morals for permitting the appellant to keep the money.

Judgment *affirmed.*

Geo. W. Jolly, for appellant.

Williams & Powers, for appellee.

MARY A. GLASS v. J. A. TEVIS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—325.]

Separate Estate of Married Woman.

The separate estate of a married woman can not be subjected to the payment of her debts by an action ordinary. This can only be done by a proceeding in equity.

APPEAL FROM SHELBY CIRCUIT COURT.

October 1, 1881.

OPINION BY JUDGE LEWIS:

This is an action to recover a personal judgment against a married woman upon an account for the tuition of her daughter. Upon the trial a verdict for the amount of the account sued on and interest was rendered by the jury, and thereupon the court gave judgment to be levied of her separate personal estate, for $241.46. A new trial having been refused, she appeals to this court.

We know of no authority, and counsel for appellee have cited none, sanctioning the proceedings had in this case. The separate estate of a married woman cannot be subjected to the payment of her debts by an action ordinary. If done at all it must be by a proceeding in equity, the chancellor only having the power to subject it.

It is unnecessary to notice the various errors assigned by appellant. The judgment of the court below must be *reversed* and the cause remanded with directions to set aside the judgment of the court and verdict of the jury, and for other proceedings consistent with this opinion.

Bullock & Beckham, for appellant.

Caldwell & Harwood, for appellees.

C. P. WESTERFIELD v. P. B. MORELAND.

[Abstract Kentucky Law Reporter, Vol. 3—324, as Westerland v. Moreland.]

Levy of Execution—Right of Defendant.

A judgment defendant has a right to elect what property he will

retain under his exemption against an execution, and when he elects to retain a certain horse, but the sheriff levies upon and sells it first, taking an indemnity bond from the plaintiff, the debtor is entitled to recover the value of the property upon the bond given.

APPEAL FROM OHIO CIRCUIT COURT.

October 1. 1881.

OPINION BY JUDGE PRYOR:

The appellee, at the time of the levy and seizure of the horse by the sheriff, was the owner of two other horses that had been mortgaged to other creditors, and he had the right to elect which of the three he would retain under the law exempting certain property from sale under execution. The election in this case was made on the day of sale, and but for the bond of indemnity executed by the appellant no sale would have been made. It is insisted that as the appellee failed to claim the property as exempt from execution at the time of the levy, he could not afterwards reclaim it, without first substituting other property equal in value. We see no reason for such a position, and have been referred to no authority sustaining it. The sheriff taking the property under the circumstances, the debtor being present and making no election at the time, could not be treated as a trespasser ab initio, but the right of the debtor to recover the value of the property in such a case as this on the bond of indemnity is unquestioned.

Judgment *affirmed.*

Townsend & Massie, for appellant.

Walker & Hubbard, for appellee.

W. H. DAWSON ET AL. *v.* BABCOCK & NILLE, ASSIGNEES.

[Abstract Kentucky Law Reporter, Vol. 3—324.]

Consideration for a Note.

The sale of the use of a patent right in a certain territory is a good consideration for the execution of a note, and if the title to the right is defective at the time of the sale and is afterwards perfected the right inures to the benefit of the purchaser.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 4, 1881.

OPINION BY JUDGE PRYOR:

The only defense relied on is the want of consideration for the note in controversy, and this is attempted to be maintained on the ground that, at the time of the sale of the use of the patent right in certain counties in Tennessee, the patentee had parted with his title, and there is some proof conducing to establish that fact. It further appears that if the title was defective the appellees, or their assignees, had acquired the title, and this enured to the benefit of the appellant who was the vendee. He does not allege that he attempted to sell the washing machines and found that he had no right to the territory purchased, or that he has been injured in any way, and as his title has been perfected, if it ever was defective, he now has the right to sell and can exercise it. Besides, it is evident that Crittenden had attempted to convey the same territory to Curtis in April, 1878, and by inadvertence the state of Tennessee was omitted, and in November, 1879, the mistake was corrected. So there was never any obstacle in the way of appellants selling their patent right, nor is any shown.

Judgment *affirmed.*

Geo. W. Jolly, for appellants.

Sweeney & Son, for appellees.

J. W. WARE *v.* CLARK'S RUN AND SALT RIVER TPK. CO.

[Abstract Kentucky Law Reporter, Vol. 3—325.]

Liability of Turnpike Company.

As long as a turnpike company controls a road and takes toll it is bound to keep its road free from obstructions and safe for the passage of persons and property, and for its failure to do so it is liable for injury caused thereby.

Petition for Damages.

A petition against a turnpike company, for damages caused by the road being obstructed by a wagon, must allege and prove either that the wagon was placed in the road with the knowledge or by the permission of the company, or that it was there under the authority or permission of the company.

APPEAL FROM BOYLE CIRCUIT COURT.

October 4, 1881.

OPINION BY JUDGE LEWIS:

While an incorporated turnpike road company owns, controls and takes toll upon a road they are bound to keep it free from obstructions and in a condition safe for the passage of persons and property; and for their failure to do so they are liable for any injury caused thereby to persons passing over it, as well as to the penalties imposed by law.

Though a chartered turnpike is the private property of the company, it is also a public thoroughfare upon which any person may lawfully travel, whether he be required by the terms of the charter to pay toll or not. Besides, the legislature has for the benefit and profit of these companies prohibited the opening of lateral roads to run within one mile of a chartered turnpike road, whereby persons residing upon or near to the latter roads have no other outlet.

But the petition is defective in the failure of the plaintiff to allege either that the particular wagon by which he was injured was placed in the road with the knowledge or permission of the company, or that the obstructions alleged by him to have been constantly placed in the road with the knowledge and permission of the company were at the same place he received the injury, or where he was in the habit of passing. They may have been at a point upon the road distant from where he was injured. Before he can recover the plaintiff must allege and prove either that this particular wagon was placed in the road with the knowledge or by the permission of the company, or that it was there under the general authority or permission of the company for wagons to be placed in the road at that place.

Wherefore the judgment of the court below is *affirmed*.

A. B. McFerran, for appellant.

Durham & Jacobs, for appellee.

DAVID MERRIWETHER *v.* GEO. W. MERRIWETHER ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—326.]

Liability of Trustee.

A trustee, in handling an estate placed in his hands, must use ordinary prudence and discretion, and if he loans the money of the estate on security that at the time was reasonable and sufficient he can not be held liable for a subsequent loss unless he could have foreseen the loss, by the exercise of that judgment usually belonging to men of ordinary business habits.

APPEAL FROM SHELBY CIRCUIT COURT.

October 6, 1881.

OPINION BY JUDGE PRYOR:

It was incumbent upon the trustee to manage and control the estate placed in his hands for the interest of the beneficiaries, and in order to do so it was necessary that he should make the trust fund productive, and make such loans or investments as one of ordinary prudence and discretion would have done with reference to his own affairs. His fiducial position required no greater degree of vigilance, and when loaning the money on a security that at the time was reasonable and sufficient, he should not be held responsible for any subsequent loss unless he could have foreseen with the exercise of that judgment that usually belongs to men of ordinary business habits that loss to his beneficiaries would be the result if steps were not taken to make the debt.

Although the deed and mortgage was made to the appellant individually it is evident that he regarded the investment made as trust property. He listed it for taxation as such, and reported it in his settlement; and those of the beneficiaries who were adults were aware of the fact that this investment had been made on the lands of Stephens.

The trustee has acted in the best of faith, managing and controlling a large estate for the best interest of his wards, unless the investment in this instance was such an error of judgment as indicates a want of proper care and precaution in securing the trust fund. The estate or land mortgaged by Stephens, as the proof shows, was certainly sufficient at the time of the loan to

pay the debt and the encumbrances upon it, and having made the loan it was the duty of the trustee to purchase in the property, if necessary to secure the debt. The trustee had full power under the will to make the investment, and having loaned the original $2,000, to buy in the property, if as a business man he had the right to believe it was to the advantage of the cestui que trust. If the investment was not a judicious one, or such as an ordinary business man would have made under the circumstances, of course the trustee would be liable. Now in this case it appears that the property was worth $5,000. Robinson states that the property purchased by the trustee at $4,000 he regarded as very cheap and would have taken it at that price. In this he is corroborated by the decided preponderance of the proof. It shows that the first year after he purchased the property, the trustee rented it for $600, a very handsome income on an investment of $4,000.

The fact that the land depreciated in value was not the fault of the trustee, and to hold him responsible would be to make him an insurer of the trust fund. This trust estate now amounts to about $26,000 and was placed in the hands of the trustee by the testator on account of his confidence in his honesty and good judgment in the control of such an estate. The fund with the expenditures included has increased in the hands of the trustee. His expenditures, so far as appears from the record, were prudent and economical, and having acted in the best of faith and with a judgment that almost any business man would have exercised with reference to the investment, he ought not to be held responsible for an imaginary loss, that if established will work but little injury to the beneficiaries of the trust fund. The proof of the appellee shows that the land is worth $3,500.

The judgment is therefore *reversed* and cause remanded with directions to credit the trustee with the $4,000, and require the appellant to convey to the present trustee or the beneficiaries the land in which the investment was made, free from all encumbrances.

A. Duvall, Ira Julian, for appellant.

Bullock & Beckham, for appellees.

JULIA ANN ALLISON *v.* JOHN T. MOORE.

[Abstract Kentucky Law Reporter, Vol. 3—326.]

Fraudulent Conveyance.

Where a conveyance of real estate is made by one to her half-sister after an attorney has caused the deed to be read and he has explained to the grantor just what interest she is conveying, and no undue influence is shown to procure the conveyance, the deed will not be cancelled, in the absence of proof showing that fraudulent and false representations were made to the grantor by the grantee.

Rejection of Deposition of Party.

Under the provisions of Buckner & Bullitt's Civ. Code (1876), § 606, subsec. 4, no person may testify for himself in chief after taking other testimony in chief, and where the appellee, before she gave her deposition, had taken that of another in chief, the withdrawal of said first deposition will not render her own deposition admissible.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 6, 1881.

OPINION BY JUDGE PRYOR:

The ground of recovery in this case is based on the alleged fraudulent representations of Mrs. Emma Moore, made to her sister (the appellant) in regard to her interest in the estate of Mrs. Burge, and the concealment from her that she had an interest in the property she was about to convey. It is also alleged that her mind and health were impaired to such an extent as to enable those to succeed who desired to practice such a fraud upon her.

Mrs. Burge died, leaving what was supposed to be her last will and testament, by which she attempted to dispose of her whole estate. She devised a house and lot on Main street, in Louisville, Kentucky, to her sister, Mrs. Emma Moore, and the balance of her estate to her husband, R. Burge. At the time she executed the paper she was a married woman, and left her husband surviving her. The real property devised was her general estate, and having no power to make a will, no title passed to the devisees as such. Mrs. Burge left surviving her the appellee, Mrs. Moore, a sister of the whole blood, and the children of a

deceased sister of the whole blood, and the appellant, a half-sister.

Those of the whole blood, under our statute, being entitled to twice as much as those of the half blood, Mrs. Moore and the children of the deceased sister were entitled to two-fifths each, and Mrs. Allison, the appellant, to one-fifth. The appellant conveyed her interest to her sister, Mrs. Moore, in consideration of love and affection, and in order to carry out the wishes of her half-sister, Mary R. Burge, deceased. This conveyance is now sought to be cancelled for the reasons already stated. The appellant was in her sixty-ninth year at the time she made the conveyance, and testifies that her sister concealed from her the fact that she had an interest in the property, and the further fact that the will of Mrs. Burge was a nullity; that her sister stated she wanted her to sign the conveyance as a matter of form, because some lawyer had given an opinion to the effect that the will was void. She says that she (the witness) supposed the will was valid, and believed that her half-sister had the right to do as she pleased with the property; that the matter was never explained to her by any one, and she did not know that she owned an interest of one-fifth, or was conveying that interest to Mrs. Moore. This is the substance of the testimony of the appellant, with the additional statement that her visit to Louisville was at the invitation of her sister, with the suggestion in the letter that her sister wanted to see her in reference to a matter that concerned her (Mrs. Moore). The appellant at the time lived in Indianapolis. She states that no conversation was had between her and Mrs. Moore in regard to the property, but that it was at her sister's instance that the deed was made.

The deposition of Mrs. Moore was taken, but upon exceptions filed was excluded, and we think properly. Buckner & Bullitt's Civ. Code (1876), § 606, Subsec. 4, provides that no person shall testify for himself in chief, in either an ordinary or equitable action, after taking other testimony in chief. In this case the appellee, before she gave her deposition, had taken the deposition of R. Burge, the husband of the deceased sister. This deposition was in chief, and taken for the reason that the witness was in bad health, and the parties regarded his testimony as important. The appellees withdrew his deposition and then offered to read that of Mrs. Moore, supposing that this would remove

all objections. We find no exception in the code on this subject so as to allow parties to testify, although the testimony taken may be withdrawn, or may have been taken from necessity. The object was to prevent parties from supplying omissions or defects in the testimony adduced by them by their own statements, so as to make out the cause of action or defense, and to permit the withdrawal of the testimony previously taken to enable the parties to testify would, in effect, nullify the salutary provision of the code. So the case must be determined in the absence of the testimony of both Mrs. Moore and R. Burge. The code makes no such exceptions as are urged, and this court has no right to add to its provisions.

If the testimony of the appellant stood uncontradicted there would be no doubt of her right to have the conveyance cancelled; but other facts appear in the record that are utterly irreconcilable with the statements made by the appellant. Judge Muir, who had advised the husband of Emma that the will of Mrs. Burge was a nullity, and he would have to perfect the title, was told by Moore during the appellant's visit to Louisville to prepare the conveyance. He wrote the deed, and the appellant and Mrs. Moore came to his office, and he then explained to the appellant that the will of her half-sister was void, and that she owned one-fifth of the house and lot in her own right; that while he had no apprehension of anything wrong, inasmuch as she was conveying her interest for no other consideration than to carry out the wishes of Mrs. Burge, he felt it his duty to explain to her fully the character of interest she had in the property; that he read the conveyance to her, or had it read by his clerk, and the same was again read by the clerk taking the acknowledgment. It was not only read to her twice, but this witness says he so explained the matter that she could not have misunderstood the nature of her interest, or the fact that the will was void. He had no doubt she comprehended fully the nature of the transaction, and in this he is corroborated by two or more who were present. There is but little doubt but that she was fully informed as to the extent of her interest in the property when she signed and acknowledged the deed. It seems that she had but the one conversation with Mrs. Moore in regard to the conveyance, and nothing had ever passed between herself and the husband of Mrs. Moore in regard to the property.

That the appellee was desirous of owning the property devised to her by her deceased sister, and that the will of the latter should be fully executed, is apparent from the proof in the record; and the appellant, desiring to gratify the wishes of the appellee, signed the conveyance, and doubtless felt after its execution that she had been too generous for one in her pecuniary condition, in consenting that her sister should take the house and lot.

In the case of Hoghton v. Hoghton, 11 Eng. L. and Eq. 134, the doctrine was announced, in relation to a transaction between the father and son, that in the absence of unequivocal proof that the whole of the facts were known to the son and the purposes of the deed fully explained to him, the contract or conveyance would not be supported.

In the cases of *Cooke v. Lamotte,* 21 Law J. (1852) 371, and *Gibson v. Jeyes,* 6 Ves. 266a, it is stated that where one person obtains by voluntary donation a large pecuniary benefit from another, the burden of proving the fairness of the transaction falls on the person taking the benefit. But this proof, Lord Eldon says, is given if it be shown that the donor knew and fully understood what it was that he was doing unless the disposition to do so was induced by undue influence.

No undue influence is shown to have been exercised over the appellant, and if she is entitled to cancel the deed it is by reason of the alleged fraud. The chancellor would be reluctant on such facts as appears in this case to believe that the appellee, for the mere purpose of acquiring this interest of one-fifth in the house and lot, had resorted to such fraudulent devices in order to induce the execution of the conveyance. There is some evidence conducing to show that the general condition of the mind of appellant was such as to preclude her from understanding fully her rights in the premises, but the weight of the testimony is against her, and in fact her answers to the various interrogatories propounded to her in this case evince not only an intelligent understanding of her own interests, but the existence of a more than ordinary intellect. While we think the appellant was in no condition pecuniarily to give her interest in this estate to those who were certainly not in need of it, still, giving to that fact its full weight, together with all the circumstances connected with the transaction, we cannot conclude that the appellee conceived the fraudulent purpose of acquiring the property in controversy, and

consummated it by obtaining the conveyance. The appellant was doubtless impressed with the idea that the wishes of her deceased half-sister should be carried out.

It is not unreasonable to suppose that the parties were all willing, if not anxious, that Mrs. Moore should have the property devised to her. The children of Mrs. Burge conveyed their interest to Mrs. Moore, but it is insisted that this was done in order that the will might stand, and to prevent Mrs. Moore from disregarding its provisions. This could not well be, as the property in controversy seems to have been the only real estate owned by the decedent, and her personal estate devised to her husband would have passed to him as the survivor, or as the personal representative.

Conceding the burden to have been on the appellee with the testimony of appellant alone in conflict with these others as to her information and knowledge of the transaction and her rights in the premises, we cannot adjudge the appellee guilty of the fraudulent conduct attributed to her in the execution of the conveyance. The court will not presume fraud or undue influence from the mere relation of these parties, and where there was a motive or reason for executing the conveyance, such as existed in this case, viz.: the execution of the purposes of the deceased sister, we are not disposed to adjudge that the burden was on the appellant, nor do we regard the decision of that question necessary in determining the issue raised here. If the appellant has been too generous in thus parting with her property, or if she signed the conveyance merely to gratify the wishes of her sister, the latter's sense of justice will no doubt manifest a generosity equal to that displayed by the appellant.

Judgment *affirmed.*

Duke & Richards, for appellant.

Baker & Toney, William Lindsay, for appellee.

JAMES B. CAMP *v.* SECOND NATIONAL BANK OF LOUISVILLE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—326.]

Judgment Against Infant.

A judgment against an infant will not be set aside for the only reason that the defendant was an infant when the summons was

served on him, for before such a judgment will be set aside it must be made to appear that the defendant had a valid defense to the action. Such defendant may have obtained the money or property of the plaintiff, and under such circumstances the chancellor should refuse to vacate the judgment.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 8, 1881.

OPINION BY JUDGE PRYOR:

The only ground relied on in this case is the error committed in the court below in rendering judgment against an infant upon a defective service of process. In fact, the record discloses the fact that when the judgment was rendered the infancy had ceased; but waiving this question and treating the case as if the disability existed at the time, still there is no ground for relief.

The only reason for asking the chancellor to set aside the judgment is: "That the appellant was an infant when the summons was served on him." This may and does constitute one of the grounds for vacating the judgment; but by Buckner & Bullitt's Civ. Code (1876), §§ 520, 521, there must be a valid defense to the action, and if there is no other reason than that the appellant was an infant, the chancellor will not interfere. He may have obtained the money or the property of the appellees, and the chancellor would scarcely interfere and vacate the judgment under such circumstances.

Judgment *affirmed.*

W. T. Thurman, M. Boland, for appellant.

D. M. Rodman, for appellees.

JEREMIAH WEAVER'S HEIRS *v.* W. H. WEAVER ET AL.

Res Adjudicata.

An order of a county court admitting a will to probate in proper form is conclusive on all parties until reversed or the order vacated, and such an order can not be attacked in a collateral proceeding.

Probate of a Will.

Where the county court had jurisdiction to hear an application to probate a will and order it probated, a legatee under such will or an heir of the testator, after thirty years have elapsed, can not under a

petition, for the alleged purpose of having the will construed, raise a question of the validity of the probate of the will and have the probating order vacated for the reason that one of the legatees was a witness to the will and helped to probate it in the county court.

Legatee in Will Competent Witness.

While a legatee is a competent witness to testify on an application for probate as to the will in so far as it disposes of the property to others besides himself, and not competent to testify as to the part of the will bequeathing property to him, but he is permitted to do so without objection, the probate of such will can not be vacated many years thereafter in a petition to construe the will.

APPEAL FROM SPENCER CIRCUIT COURT.

October 8, 1881.

OPINION BY JUDGE PRYOR:

Jeremiah Weaver died in the county of Spencer in the year 1850, leaving a last will and testament that was probated by the county court in March, 1851. The will gave his estate to his his widow for life, and at her death, his son, W. H. Weaver, was to have the farm on which the testator lived, on the following terms and conditions: "He shall pay $30 per acre for it to the heirs, and $200 annually until the place is paid for. He is to pay no interest."

The widow holding under the will remained in the possession of this land until her death in the year 1879. After her death the devisee in remainder, W. H. Weaver, took possession of the place, and now claims it under the will. The remaining devisees and heirs of the testator instituted the present action in the year 1880, seeking a construction of the will, and insisting that the devise to W. H. Weaver was null and void for the reason that he attested the will under which he claims to hold. It is alleged in the petition that the will was not written by the testator in whole or in part; that it was attested by the devisee, W. H. Weaver, as one of the two subscribing witnesses, and that he appeared in the county court as a witness to the will. A general demurrer was filed to the petition and sustained, and the appellants (the heirs) failing to plead further, the petition was dismissed.

The validity of the devise to W. H. Weaver is questioned solely on the ground that he was a subscribing witness to the

will, and appeared in the county court as such. At the time of the execution of this will (in the year 1850), the statute provided: "If any person shall subscribe his name as a witness to a will wherein any bequest is given to him, if the will may be not otherwise proved, the bequest shall be void, and such witness shall be allowed and compellable to appear and give testimony on the residue of the will, in like manner as if no such bequest had been made." Statute Law (1834) 1541.

It is well settled that an order of a county court admitting a will to probate in proper form is conclusive until reversed or the order vacated, and it can not be attacked in a collateral proceeding. This will has been admitted to probate by a tribunal (the county court) having the jurisdiction to examine and take the proof of wills, and of determining all causes testamentary. No other tribunal has such jurisdiction, and until the judgment of the county court has been denied by some proper proceeding it must be held binding on all. *Stevenson v. Huddleson,* 13 B. Mon. (Ky.) 299; *Abbott v. Traylor,* 11 Bush (Ky.) 335; *King v. Bullock,* 9 Dana (Ky.) 41.

It is intimated by counsel for appellants that this is not an attempt to nullify the order of the county court; but on the contrary they are recognizing the existence of the probate, and are asking in this action for a construction of the will, in order to ascertain the rights of the parties under it. The issue in the county court is, "will or no will," and in order to establish the validity of the paper the fact of a legal publication, and the capacity to make it, is necessarily involved.

The statute [Gen. Stat. (1879), Ch. 113, § 13] expressly provides that the witness, who is a devisee, shall be compelled to appear and give testimony on the residue of the will in like manner as if no such bequest had been made, and the fact that the will was not fully proved should have been made to appear in the records of the court admitting the will to probate. The order admitting the will to probate reads: "This writing purporting to be the last will and testament of Jeremiah H. Weaver, deceased, dated the 24th of September, 1850, was produced in court by Mary C. Weaver, James B. Weaver, John Weaver and Samuel Weaver, the executors therein named, in order to be proved, and therefore Richard Weaver, one of the children of said Jeremiah Weaver, by his attorney, appeared and opposed

the probate of the will." And the case was continued until the next county court. At the April term of the county court the contestant withdrew his opposition, and after reciting that fact the order reads: "Whereupon the same was proven according to law by the oaths of Warren H. Prudy and Warren H. Weaver, witnesses thereto, and ordered to be recorded," and thereupon the executors qualified, etc.

The entire will in this case was admitted to probate more than thirty years prior to the institution of the present action, and we are now asked to disregard the devise to the appellee because the statute precludes him from taking the devise from the fact of his being a subscribing witness. This view is based upon the idea that it is a construction of the will the appellants are demanding, and is not an attack upon any order or record of the county court admitting the paper to probate. The testimony as to the execution of the testamentary paper was indispensable to its probate, and we can not well see how a construction of the will can be obtained except upon the face of the instrument itself. Here it is conceded that the testator owned the property and had the right to devise it, and the appellee, the devisee, was capable of holding the property either by descent or purchase.

There is, then, no room for construction, and the only question really presented is, Was the will properly proven? In order to ascertain that fact this court must necessarily inquire as to the character and kind of evidence heard before the county court. Suppose the appellee, instead of demurring to the petition, had denied the allegations made with reference to the manner in which the will was proven, and pleaded by way of defense that the will was wholly in the handwriting of the testator. This would have opened an investigation as to the propriety of the judgment of the county court upon the very issue that tribunal alone could decide, viz.: whether the witnesses to the will were or not competent. If the appellee had urged his competency to prove the entire will, and the county court, on the issue of devisavit vel non had decided in his favor and admitted the will to probate, what right would the chancellor have when asked to construe the will to determine that the witness was incompetent and the devise void? The paper upon its face does not show the devise to be void, and to ascertain by parol proof or otherwise how the case was heard and disposed of by the county court

would be retrying an issue passed on by a court of competent jurisdiction more than thirty years ago.

The paper, on its face and from the records of the court, seems to have been legally executed by a testator of disposing mind and memory; and although it may afterwards appear in a collateral proceeding, affecting alone the right of property, that the witnesses to the will were incompetent, still the order of the county court remains in full force, and the question as to what part of the testamentary paper could have been proven by the witness should have been raised in that court. The English cases relied on by the counsel for the appellant are rendered under a statute declaring the devise void, and while they may be analogous to the case before us under our statute, where a will may be probated on the testimony of the subscribing witnesses in the handwriting of the testator, with a court invested with the jurisdiction to determine such questions, it would be a dangerous precedent to say that the judgment of this tribunal could at any time be disregarded by a proceeding for the purpose of determining whether the will was proven by the subscribing witnesses, or was in the testator's own handwriting. Although the record of the county court may show that the paper was proven by the oath of the subscribing witness, still he would be allowed to show in a collateral proceeding that it was really written by the testator himself.

In the case of *George v. Bussing,* 15 B. Mon. (Ky.) 558, the devisor, by a will admitted to probate, devised a certain part of his estate to a slave. This court held the devise void as neither the owner of the property had the power to will, nor the slave the right to hold the property devised. In the case of *Mitchell v. Holder,* 8 Bush (Ky.) 362, a feme covert made a devise of both her separate and general estate. This court held that her general estate did not pass under the will. These cases counsel rely on as affecting the question here. We think they are not analogous. There is a manifest distinction in determining what property passes under a will or the extent of the power conferred to make such an instrument, and in adjudging whether or not a will has been properly proven so as to pass the estate.

Here the power to devise and the right to receive and hold the property by the devisee is unquestioned, but it is maintained that the manner of proving it defeats the devise. By the pro-

vision of the statute before us the subscribing witness was competent to prove the residue of the will, and if, when offered as a witness, his incompetency had been urged, and the decision had been adverse to his testifying, as to the execution of the paper in so far as it affected him, the record should have shown that so much of the will as made the devise to the subscribing witness was not proven; and on the contrary, if admitted as a witness to prove the whole will, and his right to do so passed on by the county court, we see no reason why a judgment based on his testimony is not binding until reversed.

The question is, Had the court jurisdiction to admit the entire will to probate? If so, the fact of the admission of incompetent testimony does not invalidate it. The main ground of affirmance, however, is that, as the will may have been proven in different modes, the court having jurisdiction of the subject matter having admitted it to probate in proper form, no other tribunal will investigate the manner of probate, so as to defeat the claims of the devisee. This entire will was admitted to probate more than thirty years ago, and while the life tenant held for all, if the will is disregarded it seems to us the remedy should have been by an appeal. The petition in this case negatives the idea that the will was in the handwriting of the testator, and expressly avers that it was not in his handwriting, thus tendering an issue upon facts not appearing in the record of the county court, and such an issue as was necessary to make the petition a good one, or if not, such an issue as the appellee could have made; and when made we have another tribunal investigating the character of proof upon which a court with complete and plenary jurisdiction had rendered the judgment. This can not be done.

Judgment *affirmed.*

Gibbs & Beauchamp, for appellants.

Caldwell & Harwood, for appellees.

COMMONWEALTH *v.* THOMAS CURLEY.

[Abstract Kentucky Law Reporter, Vol. 3—331.]

Criminal Law—Cutting and Carrying Away Trees.

It is not necessary to a charge of felony in an indictment for cutting and carrying away trees, when the word feloniously is used

in stating the motive of the offender, to allege that the offense was committed without the consent of the person injured by its perpetration; his consent, if it was given, is a matter of defense.

APPEAL FROM OHIO CIRCUIT COURT.

October 8, 1881.

OPINION BY JUDGE HARGIS:

The indictment charges that the accused "did in the county of Ohio on the —— day of November, 1880, and before the finding of this indictment, feloniously cut down and carry away a number of trees (the exact number the grand jury are unable to find out), being timber growing on the lands of E. Black and being of less than twenty and more than five dollars in value, without having any title or color of title in himself to the land upon which said timber was growing or to the said timber."

The other parts of the indictment are unobjectionable. To it the appellee filed a demurrer which was sustained and the appellant appeals. Gen. Stat. (1879), Ch. 29, Art. 11, §§ 10, 11, as follows: § 10. "Any person who shall feloniously cut or saw down and carry away timber growing upon the lands of another, of the value of twenty dollars or more, and without color of title in himself to the land upon which said timber was growing, or to said timber, shall be confined in the penitentiary for a period of one year." § 11. "If such timber so cut and carried away shall be of less value than twenty and more than five dollars, the offense shall be punished by a fine * * * or imprisonment," etc.

The indictment contains all the essential elements which are required to constitute the statutory offense charged. The averment that he feloniously cut down and carried away the trees growing on the lands of Black without having any title or color of title in himself to the lands on which they were growing, or to the trees, sufficiently charges that the accused did not have the consent of Black to cut down and carry away his trees. It is not necessary to a charge of felony, when the word "feloniously" is used in stating or describing the motive of the offender, to allege that the offense was committed without the consent of the person injured by its perpetration. Black's consent is a matter of defense which, if it existed and should be proven, will furnish a complete exoneration of the accused.

The same facts, except the value of the timber, are necessary to a conviction under each section. The difference in the penalty fixed by them is based on the value, and it was therefore properly stated in the indictment.

Judgment *reversed* and cause remanded with directions to overrule the demurrer.

P. W. Hardin, for appellant.

J. W. HUNTER *v.* WILLIAM BEARN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—327.]

Ratification of Contract by Infant.

Where an infant gave a note and executed a mortgage on her real estate during her minority, and after she became twenty-one years of age the mortgage was foreclosed against her and she made no defense, her conduct amounts to a ratification of her contract, and she can not thereafter question the validity of her contract on the ground of her infancy at the time of its execution.

APPEAL FROM NELSON CIRCUIT COURT.

October 11, 1881.

OPINION BY JUDGE PRYOR:

The demurrer to the petition was properly sustained. The principal question presented below was, Is the contract of an infant void or voidable? Whether void or voidable we think is immaterial here. After the feme had signed the mortgage, and after her arrival at age, she and her husband were sued to foreclose it. The mortgage was foreclosed and the land sold, and no reason is shown why she did not make defense to the action of foreclosure. Her infancy when she signed it was a complete defense, and should have been made in that action. There is no relief now for her in an independent action, for no other reason than her infancy when she executed the mortgage. The cases referred to by appellant have no analogy to this. In the one case the infant, when sued, pleaded her infancy. In the other, as soon as she arrived at age she elected by action not to abide the contract. In this case she made no defense, but when sued, being

an adult, permitted judgment to go, and now offers to plead. It is too late.

As to the mere question whether the acts of an infant are void or voidable, the elementary books and all the decisions we know of adjudge their contracts voidable only. What effect her being a feme covert at the time has on the question is not necessary to be determined.

Judgment *affirmed.*

Thomas & Wathen, for appellant.

Muir & Wickliffe, for appellees.

W. H. MILLER, COUNTY ATTORNEY, *v.* S. H. BAUGHMAN.

[Abstract Kentucky Law Reporter, Vol. 3—328.]

Appeal from Claim Against the County.

Under the provisions of 1 Acts 1879, p. 651, Ch. 632, the county attorney may appeal to the circuit court in his own name for the use of the county, from the allowance of a claim in Lincoln county, and if judgment be rendered against him in that court he may appeal to the Court of Appeals.

APPEAL FROM LINCOLN CIRCUIT COURT.

October 11, 1881.

OPINION BY JUDGE LEWIS:

At the October term, 1880, of the Lincoln County Court of Claims appellee presented a claim against that county, in which was included a charge of $300 for additional compensation as sheriff under an order of the county court at its January term, 1880, which was allowed by the court of claims. From the order allowing the charge of $300 the county attorney of Lincoln county appealed in his own name to the Lincoln Circuit Court, which court, upon the motion of appellee, rendered judgment dismissing the appeal, and from that judgment the county attorney has appealed to this court.

The ground upon which the motion to dismiss the appeal from the order of the court of claims was made and sustained by the circuit court is that the act of the legislature giving to the county attorney the right to prosecute the appeal in his own name is

repugnant to the constitution of this state, Art. 2, § 37, which declares that "No law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title."

The act was approved March 29, 1880, and is entitled "An act requiring persons having claims against the counties of Magoffin, Floyd, Carter, Elliott, Johnson, Menifee, Fleming, Lincoln, Nicholas, Robertson, or Bath to file them ten days before the first day of their annual court of claims." 1 Acts 1879, p. 651, Ch. 632.

By the third section of that act it is provided that "The county attorney, in his name, for the use of the county, may prosecute an appeal to the circuit court from the allowance of any claim against either of the counties herein named, when the amount is twenty dollars and upwards, without executing bond for cost."

The first question to be considered is whether, conceding the act to be constitutional, the county attorney may in his own name for the use of the county prosecute this appeal. No express authority is conferred upon him by the act to prosecute an appeal to any other than the circuit court. But having by virtue of the act acquired a standing in that court, he is upon equality with other litigants, and it is very questionable whether the legislature would have the power to deny him the same right of appeal therefrom possessed by others. At least the legislature's intent to do so must be clearly expressed before this court will decide such to be the case. The manifest object of the act being to protect the counties mentioned in the title against the allowance by the court of claims of improper claims, it is a reasonable presumption that the legislature intended to confer upon county attorneys the right to appeal to this court if in their opinions the ends of justice should so demand.

Although the subject of the law is not expressed in the title with technical accuracy, it is done so substantially. The law relates to but one subject, and that is claims against the counties enumerated, which are annually presented to and passed upon by the respective courts of claims. All the provisions of the act relate directly or indirectly to that subject, have a natural connection, and none of them are foreign to the subject expressed in the title. We are of the opinion that the act is not in conflict with the constitution. The object is plainly indicated in the title,

and every section is both consistent with and in aid of that object.

Wherefore the judgment of the court below dismissing the appeal from the court of claims is *reversed* and the cause is remanded for further proceedings consistent with this opinion.

W. H. Miller, for appellant.

Welsh & Saufley, for appellee.

IRVINE WHITTAKER ET AL. *v.* GREEN B. MILLIEN.

[Kentucky Law Reporter, Vol. 3—320.]

Purchase-Price for Sale of Real Estate.

A purchaser of real estate is not required to accept any but a good title, and before judgment can be taken against him for the purchase-price such a title must be tendered to him; and where the title offered is such that a nonresident owner is given five years in which to vacate such a conveyance, it is not such as would require him to accept it.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

October 15, 1881.

OPINION BY JUDGE LEWIS:

In this case the appellants, though put upon the proof of title, did not show either a legal or equitable title in themselves. They allege their ancestor many years ago purchased the land from one Silas Barnes, who gave him a title bond, but do not exhibit nor prove the bond ever existed.

Barnes is a nonresident of the state, and even if he had been constructively summoned in the manner required by the Civil Code, he would have one year after the actual service of a certified copy of the judgment upon him and five years without such service to appear and have the action retried.

Appellee is not required to accept any but a good title to the land before judgment against him for the purchase-price, and as the court had no authority, as the case stood, to direct a conveyance by commissioner, which might not be hereafter cancelled by Barnes, and he did not appear in person to make the

conveyance, appellants were not entitled to judgment for any more than it was rendered for.

Wherefore the judgment is *affirmed.*

C. F. & A. R. Burnam, for appellants.

T. J. Scott, for appellee.

S. G. REID *v.* JOHN S. CAIN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—329.]

Jurisdiction.

A party can not join a cause of action at law against one party with averments constituting an equitable cause of action against him and other parties, and by doing so obtain jurisdiction of the former to try the action at law in a distant county from his home, unless he obtains judgment against the defendants who reside or are summoned in the county where the suit is brought.

APPEAL FROM BOURBON CIRCUIT COURT.

October 15, 1881.

OPINION BY JUDGE HARGIS:

The judgment in favor of *Field v. Kentucky Union R. Co.* was upon notes which were placed upon the footing of bills of exchange in so far as to deprive the appellant, Reid, or the appellee company of asserting any equitable defenses which they might have had to the notes before they were assigned to Field, unless he had notice of the asserted equities or had fraudulently combined with Cain to cheat the appellant. Neither the alleged notice nor the charge of fraud is proven, and as neither can be presumed, but must be proven, the court properly dissolved the injunction and dismissed the appellant's action against Field and the company.

The process was served upon the appellee, Cain, in Jefferson county and the appellee company in Bourbon where the suit was brought. The court had jurisdiction of the subject of the action and the persons of all the defendants on the issues of fraud and notice to Field; but as they were decided against the appellant, he had left no other cause of action stated in his petition, but upon the written contract of November 4, 1874. As the remedy

for its breach is complete at law we are of opinion that the court did not err in dismissing the action as to Cain without prejudice. He objected to any judgment against him, and, the appellant failing to establish his cause of action against his codefendants, he was not entitled to hold Cain in the jurisdiction of a county in which he was neither served nor resided, to try an action purely at law, which was brought in equity for the purpose of obtaining jurisdiction.

A party cannot join a cause of action purely at law against one party with allegations which constitute an equitable cause of action against him and other parties, and thus obtain jurisdiction of the former to try the action at law in a distant county from his home, unless he obtains judgment against the defendants who reside or are summoned in the county where the suit is brought.

It is not necessary, therefore, to construe the written contract or ascertain the rights of the parties to it.

Wherefore the judgment is *affirmed.*

Prall & Dickson, for appellant.

Beck & Thornton, for appellees.

[Cited, *Burt & Brabb Lumber Co. v. Bailey,* 22 Ky. L. 1264, 60 S. W. 485; *Louisville Home Tel. Co. v. Beeler's Admx.,* 125 Ky. 366, 101 S. W. 397.]

RICHARD BROWN ET AL. *v.* JAMES MUNDY'S ADMX. ET AL.

[Abstract Kentucky Law Reporter, Vol. 2—330.]

Inheritance by Children of Half Blood.

Children of the half blood will inherit one-half as much as children of the whole blood. Children born in wedlock entered into according to the custom among negroes are legitimate and capable of inheriting.

APPEAL FROM BOURBON CIRCUIT COURT.

October 15, 1881.

OPINION BY JUDGE HARGIS:

James Mundy, a man of color, died without children, leaving a widow, one sister, and children of a brother and a half-brother.

The half-brother, Richard Brown, Sr., died before the act of Feb. 14, 1866 (Acts 1866, p. 37, Ch. 556), relative to the marriage and legitimacy of negroes, leaving the appellants, a son and daughter, the issue of a customary marriage between persons of his race during slavery. The testimony satisfies us that Richard Brown, Sr., was, as well as his children, the issue of such a marriage and the half-brother of the intestate.

In the cases of *Whitesides v. Allen,* 11 Bush (Ky.) 23, and *Brown v. McGee,* 12 Bush (Ky.) 428, it was held that children born in wedlock entered into according to the custom among negroes, before as well as after the adoption of the act of February 14, 1866, were legitimate and capable of inheriting. The appellants were entitled to inherit one-half as much as either the sister or the children of the whole brother, to be divided equally between them.

Wherefore the judgment is *reversed* and cause remanded for further proper proceedings.

G. C. Lockhart, for appellants.

R. W. KNOTT *v.* G. P. B. JOHNSTON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—330.]

Acknowledgment of Deed by a Married Woman.

The law does not allow the acknowledgment of a deed by a married woman to be simultaneous with the acknowledgment by the husband.

Description in a Deed.

A description in a deed is sufficient when it is definite enough to enable the officer to indentify the lot without reference to any other paper. It is not necessary that it be so minute as to enable a person without any previous knowledge or inquiry whatever to find and recognize it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 18, 1881.

OPINION BY JUDGE LEWIS:

The property purchased by appellant is described in the judgment as "a lot of ground and improvements thereon having a

front on the north side of Broadway street in the city of Louisville, between Third and Fourth streets, of 38 feet, and extending northwardly from Broadway the same width 180 feet, being the eastern part of the lot of ground conveyed by John F. Gray and Mary P. Gray, his wife, to G. P. B. Johnston, and the same conveyed by said Johnston to James Harrison as trustee."

The description in the judgment is certain and definite enough to enable the officer to identify the lot without reference to any other paper, and that is all that is required. It is not necessary, even if practicable, that the description shall be so minute and vivid as to enable the officer without any previous knowledge or inquiry whatever to find and recognize it.

The law does not permit the acknowledgment of a deed by a feme covert to be simultaneous with the acknowledgment by the husband, and the deed having been signed by both Gray and his wife, it was not material which of them first acknowledged it before the clerk. It is sufficient to pass the title of both if they signed and acknowledged the deed in the manner and at the time appearing from the copy made a part of the record.

The mortgagee, Graham, has filed her answer and set up her debt, stating the amount, and asserted her lien, and it is substantially provided in the judgment that the debt is to be first paid. It is impossible to see how appellant can be prejudiced by paying the purchase-price of the property subject to the order of court, when the court has in effect already adjudged the encumbrance must be removed from the land before any part of it is paid to appellees.

Wherefore the judgment is *affirmed.*

Ward & McAffee, for appellant.

Harrison & McGrain, for appellees.

[Cited, *Thompson v. Brownlie,* 25 Ky. L. 622, 76 S. W. 172.]

C. WARREN ET AL. *v.* J. H. BENTON'S TRUSTEES ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—332.]

Trustee's Duty to Protect Property.

Where trustees purchase real estate for $1,494, pay $1,200 of said price and have in their hands a sum sufficient to discharge the remainder, but fail to pay it, and suffer themselves to be sued and

the whole of the land sold to pay it, and thereby negligently sacrifice the $1,200 which they had invested, they are liable for such loss.

Sureties of Executors.

Where executors are named by a will and by the same will the same persons so named are also named as trustees of one of the legatees, and give bond as executors but give no bond as trustees, the sureties on such executors' bond are not liable for their defalcation or negligence as trustees.

APPEAL FROM BOURBON CIRCUIT COURT.

October 20, 1881.

OPINION BY JUDGE HARGIS:

Horace Benton died in 1866, leaving a will by which he devised his estate equally to his daughter and two sons, but directed that the share of his son, John H. Benton, should be held by trustees for the use and benefit of himself and family during his life, with remainder to his children.

The testator nominated his son, Charles Benton, and his son-in-law, Wm. J. Steele, as executors, and appointed them trustees for his son, John H. Benton. They qualified and executed separate bonds in the usual form as executors. After making two partial settlements they and their sureties were sued by John H. Benton and his children for an alleged balance due them from his father's estate.

It appears that on the 20th of March, 1867, the executors, in their capacity as trustees under the will, bought a tract of land from William Ragan for the use and benefit of their cestui que trusts, and executed to him their joint note for the sum of $1,494, the price thereof. They paid $1,200 on the note March 1, 1868, and had in their hands, not definitely ascertained, however, by settlement, a sum more than sufficient to discharge the remainder of the note. But they failed to pay it, suffered themselves to be sued for the remainder, and the whole of the land sold to pay it, thereby negligently and inexcusably sacrificing the $1,200 which they had invested for John H. Benton and his children in pursuance of the power conferred in the will to invest his share.

The trustees have become insolvent, and their sureties on the executive bonds named were adjudged to be liable for the loss

of the $1,200, and the balance of $481.80 found in the executors' hands by the confirmed report of the master commissioner.

It was held in *Warfield v. Brand's Admr.*, 13 Bush (Ky.) 77, that the liability of the surety is always to be measured by his covenant, and as the bond of an executor, drawn and executed in the usual form, does not embrace his duties as trustee, although constituted such by the same will, the surety cannot be made liable for any dereliction of duty as trustee by the nominated executors. The covenants of the bond executed by appellants as sureties for Steele embraced his executional duties alone, and made no reference whatever to his capacity or duties as trustee. Under the authority of the case cited, which refers to numerous adjudications in its support which we deem conclusive of the question, we are constrained to hold that the appellants are not bound for any part of the $1,200 paid to Ragan, but the judgment against them for the $481.80 is correct, because no settlement had been made, before the institution of the action, by which the remainder of John H. Benton's share was ascertained or could be identified.

The settlement of the estate was an executional duty, to be performed within two years, or at most within a reasonable time, if the circumstances of the estate required an extension beyond that period, and as the executors have failed to do this and render the estate capable of distribution, they and their sureties are responsible for the estate unascertained and remaining unsettled in their hands.

Wherefore the judgment is *reversed* and cause remanded with directions to render judgment in conformity to this opinion.

A. Duvall, for appellants.

G. C. Lockhart, N. P. Reid, for appellees.

LOUISVILLE, CINCINNATI & LEXINGTON R. Co. *v.* S. A. RAMSEY.

[Abstract Kentucky Law Reporter, Vol. 3—385.]

Filing Amended Complaint.

Where a defendant makes no objections to the filing of an amended complaint in the court below, it is too late for him to raise the question for the first time in this court.

Weighing Evidence.

The trial jury who have an opportunity to note the eye, tone and facial expression, countenance and whole bearing of the witnesses can form a more correct idea of the value to be placed upon their credibility than can the Court of Appeals, and this court will not reverse on the mere weight of the evidence.

APPEAL FROM CLARK COURT OF COMMON PLEAS.

October 20, 1881.

OPINION BY JUDGE HARGIS:

The case is here on appeal the second time. Without giving a history of the facts, we deem it sufficient to dispose of the assignments of error in the order they are made.

There are no objections to the filing of the amended petition on February 12, 1880, and it is too late to raise the question here for the first time. We may add that the amended petition did not set up a new cause of action, but so extended and completed the original cause of action as to include the grounds on which a recovery for one-half the value of part of the stock killed could be had, notwithstanding an inability on the part of appellee to prove negligence. *Louisville, Cincinnati & Lexington R. Co. v. Case's Admr.*, 9 Bush (Ky.) 28. The demurrer to the plea of limitations pleaded by appellant was therefore properly sustained.

The testimony of Clinkenbeard, as to the speed of the train on the night and at the time the stock was killed, was relevant, and tended to prove negligence by the defendant company's employés. He testified that the train, when the stock was killed and injured by it, had on it General Williams and his friends as passengers; that they were returning from Frankfort where he had just been elected United States Senator. A brass band was accompanying the party, and persons were firing Roman candles, and he judged from the way the sparks or balls flew that they were going faster than usual.

From all the circumstances detailed by the witness a strong probability of the correctness of his statement is created. Although the employés of the appellant company are introduced as witnesses to negative the prima facie evidence of carelessness established by the proof of the killing and damaging of the stock, they do not altogether do so in the absence of Clinkenbeard's

evidence. The jury saw them, and had an opportunity to note the eye, tone and facial expression, countenance and whole bearing of the several witnesses, and could from these guides form a reasonably correct estimate of the value to be placed upon the credibility of each, and if they believed Clinkenbeard, as they are supposed to have done, we see no ground for disagreeing with them, or disturbing the verdict in any particular for the want of sufficient evidence to support it.

It is not necessary for a witness to understand engineering or the management of railroad trains in order to render him competent to testify to the speed of a train, or make him capable of knowing when it is running faster than the usual rate, or than safety requires.

The value of property in the open market as testified to by witnesses is not the only criterion for fixing the value of the property killed and injured by the appellant. The jury had a right to apply their knowledge of the value of property gained from such experience as comes to all men from the ordinary transactions of life, and also to consider the evidence of value given by farmers and traders and other witnesses, although not acquainted with the actual state of the market, as they were permitted to do in this case, in making up their verdict. There is sufficient evidence to sustain the value found in the special verdict.

After a careful examination of the instructions given and rejected we find they are counterparts, in substance, of those given and refused on the former trial, and the action of the court in regard to the instructions on the former trial having been approved by this court in the opinion delivered on the first appeal, we see no reason for overruling that decision.

The fifth instruction given on the first trial was decided to be erroneous, but the reason for so holding that then existed no longer exists, the amendment and evidence having made it proper on the second trial. The other errors assigned are included of necessity in the above views.

Wherefore the judgment is *affirmed.*

Geo. B. Nelson, for appellant.

W. M. Beckner, for appellee.

STAR PLANING MILL CO. *v.* EXCHANGE BANK OF KENTUCKY.

Indorsement of Note Discounted.

When a note is handed over to a bank cashier for a valuable consideration the indorsement is a mere form, the transfer for consideration is the substance; it creates an equitable right and entitles the party to call for the form, and under proper issues in a case the transferrer of the bill may be compelled by bill in equity to indorse.

Mistake in Failing to Indorse Note.

Where a person is in the habit of discounting his corporation's notes at a bank and takes a note to the bank for such purpose, but by mistake and oversight fails to indorse the note, which he discounts, the mistake may be corrected in a suit on the note and the corporation held liable as an indorser.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 20, 1881.

OPINION BY JUDGE HARGIS:

On the 9th of April, 1877, A. W. Richardson executed his promissory note for the sum of $215.34, payable to the appellant 90 days after date, at the Exchange Bank of Kentucky. The note was negotiable. The bank is chartered and authorized to discount bills and notes, and had been in the habit of doing so for the appellant when it discounted the note named above.

At the time the note was delivered to the bank by the appellant's agent and secretary, by neglect, as the evidence shows, of both the agent and cashier the name of the appellant company was not indorsed on the back of the note as had been done in other instances when discounting paper with the appellee. The latter brought suit, alleging that the appellant discounted the note to it, and by mistake failed to indorse it, but received the sum of $212.94 therefor. The appellant denied the mistake and its liability as indorser and pleaded that it sold and assigned the note to the appellee, who had not prosecuted the maker to insolvency by obtaining judgment and return of no property found against him.

Issue was joined by reply upon the facts alleged in the answer. The only question involved in this case is, Did the appellant discount or assign the note? This is purely a question of fact,

but it arises upon an exclusively equitable issue, and, therefore, the judgment of the court can not be treated as the verdict of a properly instructed jury, but it must stand or fall by the fair deductions to be drawn from the evidence.

The only evidence on which the appellant company relies to sustain its defense is the following meager statement of the agent who discounted the note to the appellee: "I just went and asked him what he would charge to give me the money on the note sued on, and he said $1.40, and I said all right, and he gave me credit on the pass book. This is all that was said and all that was done." Take this statement, and under the test of ordinary attention in its examination it will not support the appellant's plea, which seems to have been based upon the theory and uncommunicated belief of its agent.

When a business man proposes to sell and assign a note saving to himself all the legal protection belonging to an ordinary assignor for value, he does not generally ask the purchaser what he will charge to give him the money on the note, but asks the purchaser what he will give for the note. The term "charge" is very naturally used in connection with discount, and bankers generally charge so much discount on indorsed bills and notes. If the agent meant to sell and assign the note why did he not enter the assignment on the note? His unexpressed and noncommunicated understanding would then have rested in an abiding form. The transaction, as this witness describes it, strikes our mind as one of the kind which the appellant had before had with the appellee in regard to similar paper.

But aside from this view of the evidence, the cashier testifies that he discounted the note in the usual way and so accepted it, and the omission to have the indorsement of appellant's name on the note was the result of mistake. It is also proven that the maker of the note was a nonresident of the county where both of these litigants reside, and insolvent at the time the note was discounted to the appellee bank, and that the appellant company was furnishing the maker with considerable quantities of lumber, and therefore interested in sustaining his credit, rather than placing him in the attitude of being sued the first term after the note should become due, unless he paid it, whether it was convenient for him to do so or not.

It appears that the cashier was wholly unacquainted with the financial condition of the maker, and it is unreasonable to suppose that he would buy a note on a stranger in the capacity of assignee when he was the representative of a bank of discount and exchange, whose interest is to avoid the purchase of notes as assignee for the same or a lower rate than its authorized and obtainable discounts, when such notes can as easily be discounted and a known and solvent indorser secured.

The length of time the appellee bank held the note before suing to rectify the mistake is a circumstance against its claim, but it was equally as strong an inducement to the appellant to attempt escape from liability as indorser, as the lapse of time favored the theory of its alleged understanding.

The witnesses seem to have testified fairly on both sides, but what they have said is not necessarily in conflict, as neither the agent of the appellant company nor the cashier of the appellee bank disclosed to the other, in words, whether the appellant company was indorser or assignor; but the circumstances touched above, and the fact that both parties agree that the appellant's name should have been written on the paper, but differ as to the intent and purpose thereof, are consistent with the usual course of trading adopted by the parties and sustain with singular certainty the judgment rendered below.

The authorities are full and uniform in sustaining the rule as vigorously expressed by the *Master of the Rolls,* 2 Jac. & Walk. 243, where it is said, in treating the question whether a difference existed between an indorsement by the party and an indorsement by his representative, that "when a note is handed over for valuable consideration, the indorsement is a mere form; the transfer for consideration is the substance; it creates an equitable right, and entitles the party to call for the form."

This doctrine is broadly laid down in 1 Story's Eq. Jur. (11 ed.), §§ 99, 729, where the general principle stated in 1 Daniel on Neg. Inst. (6th ed.), § 744, may be found. The last authority says, in a state of case like the one before us, that the transferrer of the bill may be compelled by bill in equity to indorse. This is the effect of the judgment, and it is therefore *affirmed.*

Tyler & Hazelrigg, for appellant.

Reid & Stone, for appellee.

R. E. PARKER ET AL. *v.* G. T. WILCOX ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—386.]

Conveyance to Defraud Creditors.

While a creditor may be preferred if not within the Act of 1856, where the parties are in good faith, but a conveyance of real estate is made to enable a debtor to defraud his creditors and the grantor and grantee both participated in the fraud, and no actual consideration passes, such a conveyance will be set aside at the instance of a creditor.

Inadequacy of Price for Land.

The court will not refuse to confirm a sale of real estate on account of a mere inadequacy of price when there is shown no fraud nor collusion by the parties to it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 20, 1881.

OPINION BY JUDGE PRYOR:

The principal question in this case, and out of which all this litigation originated, has been under consideration for some time, and the conclusion reached by the court is, that the circumstances connected with the execution of the conveyance by R. E. Parker to Collier are such as to require that the claims of the latter should be postponed to those of the creditors of R. E. Parker, and that the chancellor acted properly in subjecting the property thus conveyed to the payment of their several demands. After the service of the summons on R. E. Parker in favor of Wilcox on the notes, or one of them assigned by Thos. E. Parker, the former declared his intention to so fix his property as to place it beyond the reach of Wilcox, and in a short time thereafter applied to know if he would receive a deed for the land, and upon his refusal to accept the conveyance, or about that time, he visited his brother-in-law (the appellant) in Boone county, Indiana, and on his return in June, 1876, caused the conveyance in controversy to be prepared, executed and recorded, by which his brother-in-law, for the alleged consideration of $5,000 in hand paid, became the purchaser and absolute owner of his entire estate, except the 75 acres of land upon which a lien was retained for the notes assigned by Thomas Parker to Wilcox.

No such sale as was represented by this conveyance was made, and not one dollar passed between the parties to it. The conveyance includes all the property of the grantor of any value. The recital on the face of the instrument is false and calculated to deceive creditors of the grantor, and is made to a brother-in-law at a time when the former was in search of some one who would accept a conveyance for the purpose of hindering and delaying Wilcox in the collection of his several debts. It is true it appears that R. E. Parker promised Collier to secure him in what he owed him by deed or mortgage, but it is a little remarkable and certainly unfortunate for the parties to the conveyance that it was made about the time that Parker was attempting to defeat Wilcox in the collection of the notes by an effort to make fraudulent conveyances of his whole estate. That a conveyance may be actually fraudulent as to the grantor, and constructively fraudulent as to the grantee, is well settled, but this case can not fall within such a rule. The claim here, if bona fide on the part of Collier, did not exceed $2,000, and the acceptance of the conveyance, absolute upon its face, under the peculiar facts of this case, gave to Collier not only a fraudulent preference for his own claim over other creditors, but aided the debtor to defeat the recovery of their claims entirely by the recital in the conveyance that $5,000 had been paid by him for the land. A creditor may be preferred if not within the Act of 1856, but the preference should and must be in good faith, and not with the ulterior purpose of enabling the debtor to defraud his creditors. Such was the necessary result of the conveyance in this case, and the facts and circumstances attending its execution lead to the conclusion that both the grantor and grantee participated in the wrong. See *Foster v. Grigsby,* 1 Bush (Ky.) 86. The judgment setting aside the conveyance and subjecting the land to appellee's debts is affirmed.

On the appeal of Hobbs we find no error to the prejudice of the appellant. It seems from the pleadings in the original action by Wilcox on the notes that an attachment was issued and levied on the land, the subject of this controversy, including the 11¼ acre tract, and that the attachment as to this particular parcel of land was waived; that a mortgage had been executed by Parker to Abbott for professionl services rendered, and the latter, by petition in equity, sought to foreclose this mortgage. Hobbs

claimed four acres and a fraction of this small tract of land under a conveyance from Matt Parker, the father of R. E. Parker. It is insisted that Hobbs was not the real owner of the land for two reasons: First, that he held it in secret trust for R. E. Parker; and, second, that his own acts preclude him from asserting title as against the latter. It is certain from the answer of Hobbs that he made no claim to this land, but on the contrary disclaimed in his deposition having any interest in it, and permitted the real owner, R. E. Parker, to place valuable and lasting improvements upon it under a conveyance that he had obtained of his father long subsequent to the conveyance made by his father to Hobbs.

We are satisfied that Hobbs, in his deposition taken prior to the action of Abbott, had forgotten that a conveyance had been made him, doubtless from the fact that he really had no interest in the land, and the father of R. E. Parker really executed the conveyance to his son that Hobbs himself should have executed. The waiver of the attachment by Wilcox on this particular tract, while it had the effect to discharge the lien created by it, did not deprive him of the right to resort to other legal steps so as to subject the land to his debt. The levy of his execution on the land created a lien, even if the sale was quashed, and when the chancellor undertook to enforce Abbott's lien created by the mortgage he had complete jurisdiction to determine all the liens and their priorities, whether by the levy of an execution or otherwise. Besides, the record shows a return of nulla bona on the executions, and this would give the chancellor jurisdiction. The judgment dismissing the petition of Hobbs was therefore proper, and the judgment determining the liens as between Abbott and Wilcox must also be affirmed.

The heirs of Matt Parker were not necessary parties, as the title had passed out of him by both the conveyance to Hobbs and to his son, and while the waiving order as to Collier was irregular it was not void. In the case cited by counsel the waiving had not been given sixty days before the first day of the succeeding term of the court, while in this case it had been given ninety instead of sixty days, more time than was required to be given by the code.

As to the sale of the two tracts of 44 and 52 acres of land the court did right in confirming the sale. There was no fraud or

collusion shown between Beckley and Wilcox, and a mere inadequacy of price will not authorize the chancellor to disturb the purchase. The bidding was fair and open to all, and while the land may not have sold for one-half or two-thirds of its value, in the absence of some fraud or unfairness in the sale it must be held valid. The judgment on that branch of the case is also affirmed.

As to the fifteen acre tract bought by Hobbs of Matt Parker, there is nothing showing that it belonged to R. E. Parker, or that he had any interest in it, and the judgment on the cross-petition of Wilcox is also *affirmed.* The appellants were entitled to a homestead, and all the original appeals as well as the cross-appeals are *affirmed.*

This opinion embraces the appeals of *Parker v. Wilcox,* the appeal of *Collier v. Same,* the appeal of *Hobbs v. Wilcox,* and the cross-appeal of Wilcox, and the appeal of *Parker v. Wilcox and Beckley.*

C. B. Seymour, for appellants.

Harrison & McGrain, B. F. Camp, W. R. Abbott, for appellees.

JULIA A. COLLINS ET AL. *v.* J. M. RICHART ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—332.]

Vendor's Lien on Land.

A vendor who conveys real estate and puts the vendee into possession, reserving a lien for purchase-money, holds such lien upon the land and not upon the rents or profits.

Receiver Accounting for Rents.

Where a vendor of real estate wrongfully has a receiver appointed, who takes possession of the land and rents it, dispossessing the vendee, but on appeal the appointment of the receiver was held to be wrongful and he was ordered to return the possession of the land to the vendee, such vendee is entitled to recover from the receiver the rents collected by him during the time of his possession.

APPEAL FROM BATH CIRCUIT COURT.

October 20, 1881.

OPINION BY JUDGE HARGIS:

On a former appeal this court decided that the appointment of a receiver to take charge of and rent out the lands which appellees sought to subject to the payment of their alleged vendor's lien was illegal, and reversed the cause for that error. It was said in the opinion that "the vendor who conveys and puts his vendee in possession, reserving a lien for purchase-money, reserves that lien upon the land and not upon the rents or profits." The right to use and occupy the land is in the vendee, and the vendor must look to the land and to a personal judgment for satisfaction of his demand. *Collins v. Richart,* 14 Bush (Ky.) 621.

On the return of the cause the motion of the appellant, Julia A. Collins, for restitution of the possession of the land, which appears to have been conveyed to her, was sustained and a writ of possession awarded to her against the receiver who had taken possession and rented and collected the rent for it during the two years the controversy over his appointment was pending. But her motion to compel the receiver to pay her the accumulated rents was denied, and she again appeals.

As she was entitled to the use and occupancy of the land the unauthorized appointment of a receiver can not sanctify his acts and render effectual what the court has declared illegal and an invasion of her right of use and occupancy. If such were the case an illegal proceeding would often prove as effectual to reach and subject property not embraced by a lien, as the valid order of a court of justice. She was entitled to the use and occupancy during the period the receiver rented the lands, and it inevitably follows that she is entitled to the value of that use and occupancy, and therefore the court should have adjudged that the rent be paid to her.

The question which arose out of the appointment of the receiver has been judicially determined, and the consequences flowing from that act can not be affected by evidence of the improper cultivation or threatened injury to the land which would have been relevant on the motion to appoint the receiver in the first place. Such facts can not now operate to deprive her of the rent which accrued during the time the controversy, which has been determined, was pending. The illegality of the

receiver's appointment has been settled, and it can not be opened again to hear evidence that might have been adduced, for the purpose of altering the necessary result of the decision.

Wherefore the judgment is *reversed* and cause remanded with directions to sustain her motion for the rent.

Wm. Lindsay, Reid & Stone, for appellants.

J. S. Hurt, B. D. Lacy, for appellees.

ELIZABETH McDOWELL ET AL. *v.* H. B. WISEMAN.

[Abstract Kentucky Law Reporter, Vol. 3—332.]

Recovery in Ejectment.

A party in an ejectment suit must recover, if at all, upon the strength of his own title, and can not do so upon the weakness of his adversary's title.

Injunction.

Injunction is an appropriate remedy to prevent trespasses and the carrying away of timber, and to settle a controversy and avoid a multiplicity of suits.

APPEAL FROM ESTILL CIRCUIT COURT.

October 20, 1881.

OPINION BY JUDGE HARGIS:

The bond from Baker to King, dated March 12, 1855, was assigned from one purchaser of the land embraced by it to another, until Estes finally became the owner and sold the land and assigned the bond to the appellee on the 15th of February, 1860. He has had possession of the land actually embraced by this bond since the last named date, and prior thereto the other persons above referred to occupied the land after the execution of the bond.

The appellants are living on the land adjacent to that contained in the boundary described in the bond. Their title came from Moses Henry and others to Samuel McDowell, and the deed from the former to the latter contains the correct boundaries of the lands of appellants.

The appellants and appellee are each entitled to all the lands embraced by their said title papers, which can be distinguished by a marked or well defined boundary. There is no confusion

in their boundaries except where they bind upon each other, and the surveyor's report, with the attending and consistent evidence, establishes with reasonable certainty that the appellee's boundary extends to Wiseman's Gap, and covers the land in controversy not embraced in said deed from Henry to McDowell.

It is true that a party must, in ejectment, recover upon the strength of his own and not upon the weakness of his adversary's title, but in this case the appellee has shown a right to possession and complete equitable title to the land with marked and well defined boundaries, and he is therefore entitled to recover under the rule laid down in *Bartlett v. Borden,* 13 Bush (Ky.) 45. There seems to be no question in this case other than the establishment of the true line between the lands of the parties. Their title and possession to that line are unquestioned, and we are of the opinion that the weight of the evidence sustains the judgment of the court in establishing the line as claimed by the appellee.

The trespasses alleged were frequent, and the timber taken composed a part of the permanent value of the land, and in order to avoid a multiplicity of suits and stay the permanent injury to the land the appellee adopted the appropriate remedy in filing his petition in equity and suing out an injunction.

Wherefore the judgment is *affirmed.*

I. N. Caldwell, for appellants.

J. B. White, for appellee.

T. A. BERRYMAN'S ADMR. *v.* D. S. ADAMS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—333.]

Construction of Will.

Where a testator devises an estate worth about $30,000 to his two grandchildren, and their mother, his only child, is left with an annuity of only $250 per annum, and he directs in his will that the board, tuition and clothing of his said grandchildren shall be paid for out of his estate, it is held that the mother was not required to pay for such maintenance out of her annuity.

APPEAL FROM OWEN CIRCUIT COURT.

October 22, 1881.

OPINION BY JUDGE PRYOR:

The fourth clause of the will of the testator directs that the board, tuition and clothing of his two grandsons shall be paid for out of his estate. He had devised the whole of the estate valued at near $30,000 to these two grandchildren, and their mother, his only child, was left with an annuity of $250 per annum. The testator certainly did not expect nor intend that the appellee (the mother) should board and clothe these children out of her own means, whether they lived at home or were boarded away from home. It would be unjust to demand it, and such could not have been the purpose of the testator. The error in the account was certainly an oversight, and as the agreed facts were for the purpose alone of having a construction of the will, and when it appears from an additional record filed that the error has been corrected, this court will not reverse the case.

Judgment *affirmed.*

Strother & Orr, for appellant.

J. J. Landrum, for appellees.

JAMES S. OFFUTT v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—333.]

Criminal Law—Plea of Former Conviction.

The plea by a defendant of former acquittal is a good defense, where the conviction for an injury to a person by assaulting and beating him denominated an intimidation and disturbance, and the second charge is for assault and battery based on the same facts and circumstances, the former offense of which he was convicted belonging to the same class of offenses, the latter being a degree of the former offense.

APPEAL FROM BOURBON CIRCUIT COURT.

October 22, 1881.

OPINION BY JUDGE HARGIS:

Whether the accused was in good faith committed or surrendered to the custody of the jailer can not be considered on this appeal, that being a question of fact for the jury, under the proof on a sufficient plea.

The plea of former conviction before the quarterly court judge under the Act of March 18, 1876, fully presented the facts, which, if true, showed that a legal trial and conviction for the offense charged in the indictment had been had before that officer. The plea does not disclose any fact which of necessity proved that the surrender or commitment of the accused was a device or contrivance to give the quarterly court jurisdiction and to escape a trial in the circuit court where the indictment was found. The demurrer, which admitted the facts but denied their sufficiency in law, ought therefore to have been overruled.

Although it was held in *Carrington v. Commonwealth,* 78 Ky. 83, that the appellant, who by a transparent device procured the quarterly court to try him, could not thereby oust the jurisdiction of the circuit court, and that a judgment of acquittal thus procured was not a bar, yet the fact on which that judicial determination was delivered was left to the jury to ascertain under appropriate instructions; but here the court refused to allow the record or any evidence to be heard upon the plea of former conviction, to which the demurrer was filed and sustained. The exclusion of the record and all evidence relative to the trial in the quarterly court would have been correct had the plea been bad.

The second plea, of former acquittal, substantially states that the appellant had been indicted, tried and acquitted under what is commonly known as the Ku Klux law, for the identical acts alleged in the indictment in this case. The prosecution took place in the same court, and the indictment, verdict and acquittal are shown from the record, in appellant's plea. To it a demurrer was also sustained. The plea was not deficient in form, and if the offense for which he was tried and acquitted in a court of competent jurisdiction belongs to that class of offenses of which assault and battery is a degree, the demurrer to the plea of former acquittal ought to have been overruled, because the trial and acquittal furnished a complete bar to the prosecution.

Under Buckner & Bullitt's Crim. Code, § 263, sub-sec. 2, "All injuries to the person by maiming, wounding, beating and assaulting, whether malicious or from sudden passion, and whether attended or not with intention to kill," are deemed degrees of the same offense. The indictment set forth in the plea charges that the accused and another unlawfully confederated and banded

themselves together for the purpose of intimidating, alarming and disturbing one, Jesse McFadden, and while so confederated and banded together did assault, beat, bruise and injure him. This court has recently held, Chief Justice Lewis delivering the opinion, that the injury under the law against intimidation, etc., must be the result of physical force. The indictment named in the plea discloses that the accused was tried for an injury to the person of McFadden by assaulting and beating him, which is denominated an intimidation and disturbance.

He was not only tried for confederating to intimidate and disturb McFadden, but for actually intimidating and disturbing him also, and this by the same acts for which he was indicted in the case before us. Thus it will be seen that the two offenses are degrees of personal injury inflicted by some of the modes named in the subsection above referred to.

If his second plea be true the prosecution and acquittal stated in it constitute a bar also to his further prosecution. Wherefore the judgment is *reversed* and cause remanded with directions to overrule the demurrer to the plea of former conviction and acquittal, and for further proper proceedings.

Chas. Offutt, for appellant.

P. W. Hardin, for appellee.

BEN F. FRANK *v.* W. S. LACY ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—335, as Frank v. Lacey.]

Agent's Representations to Induce One to Buy Real Estate.

Where an agent to induce a prospective purchaser makes representations as to the quality of the land, but only for the purpose of having the buyer to go and examine it, which he does and has as good or better opportunity to know the land and its value, and then buys the same, he can not avoid paying for the land after receiving conveyance and taking possession, on the claim that the agent made false representations to him as to the quality of the land.

APPEAL FROM MARSHALL CIRCUIT COURT.

October 22, 1881.

OPINION BY JUDGE PRYOR:

The agent of Jessup (Giltman) seems to have been entirely

ignorant of the land sold to the appellant, except from the information derived from the owner, and had no interest in it other than the usual commission for selling.

He no doubt represented the land as containing upon it valuable timber, and this he had the right to suppose from his general knowledge of its locality; but these representations were not intended to deceive the appellant, nor was he influenced by such statements further than to induce him to go upon the land and make the examination for himself. He went upon the land, saw its surroundings, and according to his own letter found but little valuable timber upon it, and that one-half or perhaps two-thirds of it was subject to overflow. In this letter he says: "I am sorry to say that it (the land) is not as good as I expected to find. Over two-thirds of it overflows, and the land that does not is covered with pine and post oak, etc. Please write me at Florence, Indiana, your least price, etc." This was written by the appellant after he had looked at the land and before the trade was consummated; yet the appellant is relying on the fact that the land overflows, and its destitution of timber for relief, upon the idea that the agent, Giltman, made false representations in regard to it. That appellant bought the land for the timber upon it, or that this was the primary object, is manifest from the proof, and the testimony conduces to show that there was upon this land valuable timber and the appellee had been realizing from the sale of it.

It is alleged, however, that young Jessup, who accompanied appellant to the land, represented to him that a tract of 245 acres adjoining this land was embraced within the boundary, when the assertion was false and fraudulent and intended to deceive appellant. It appears that young Jessup, who had never been upon the land, and knew nothing of the boundary, was told by the party accompanying them and by others that this land was Clark's and that he was in possession either as tenant or owner, and yet the young man persisted in saying that it was included in the boundary. He had no greater idea of the boundary than appellant, and it is unreasonable to suppose that he made the assertion or that appellant was influenced by it, if made. According to the proof of appellant's own witnesses it was of no greater value than the land sold, and young Jessup swears that he knew nothing of the boundary and had never been upon the

land and carried a letter of introduction from his father to some one being near it, asking him to show the land to his son and the appellant. Appellant is in possession of the entire tract sold him, with no deficit in the number of acres, and when he had a full and fair opportunity of knowing all about it. He consulted with a lawyer in the county in regard to it, and ascertained the value of the lands adjoining, and certainly had more information in regard to the land than Jessup's agent. There may be and is some defect in the paper title; still the title of record can be traced back to the year 1835, a period of over forty years, and a possession for more than thirty years, with perhaps a short interval when no one was on the land, but no adverse claim asserted.

The appellant is in the possession under a general warranty deed, has never been evicted, nor has any hostile claim been asserted; and with the conveyance fully executed and the party in possession, there is no reason for rescinding the contract. The wife accepted the deed as the agent of the husband or in her own right. It was put to record and the purchase-money paid by the wife; the husband was a party to it and made the contract, and it is now too late to rely upon the coverture of the wife, for the purpose of showing that an acceptance by her was not an acceptance by the husband. Not only so, but the parties after the execution of the deed entered into the possession and are now in the possession under the recorded conveyance. This is itself an acceptance.

There is no effort to make the feme personally liable, but to subject the land to the payment of the purchase-money, and the fact that the deed was made to her or that it was purchased for her affords no reason for refusing the relief sought. *Fought v. Henry*, 13 Bush (Ky.) 471.

Judgment *affirmed*.

Gilbert & Reid, L. D. Husbands, for appellant.

Petree & Little, for appellees.

[Cited, *McClure v. Bigstaff*, 18 Ky. L. 601, 37 S. W. 294, 38 S. W. 431; *Shoptaw v. Ridgway's Admr.*, 22 Ky. L. 1495, 60 S. W. 723.]

CHARLES H. POWELL ET AL. *v.* H. A. MEAD.

[Abstract Kentucky Law Reporter, Vol. 3—334.]

Errors Not in the Record on Appeal.

When an amended petition is claimed to have been offered for filing, but is not copied in the record on appeal, and where an affidavit for continuance is not in the record, the Court of Appeals can not know whether any error was committed or not.

Competency of Witness.

In the absence of a plea or claim of insanity or mental incapacity of a party to testify, it is irrelevant to prove his sickness and belief that death was approaching.

APPEAL FROM GREENUP CIRCUIT COURT.

October 22, 1881.

OPINION BY JUDGE HARGIS:

The appellant, Charles H. Powell, instituted an action against Samuel Powell to foreclose a mortgage held by the former on a tract of land owned by the latter, and made the appellee, Mead, a defendant, alleging that he also held a mortgage on the same land. Mead, not controverting the validity of Charles H. Powell's mortgage, filed his answer and cross-petition against Samuel Powell, seeking by appropriate allegations to foreclose his mortgage, which is senior to the mortgage of Charles H. Powell.

Samuel Powell, in substance, pleaded that he executed the mortgage through mistake, by reason of the fraud practiced on him by the appellee, Mead, and that he had paid and discharged the whole amount of the debt embraced by the mortgage before its execution, and specifically set forth the manner in which the debt originated, and how he had paid and discharged it.

The plea of payment, the non-receipt of a part of the mortgage debt and the discharge of the whole thereof were each and all controverted, specially and generally, by the appellee, Mead. The appellant, Charles H. Powell, adopted the plea of Samuel Powell and charged that the land was insufficient to pay both mortgages. On the issues thus formed the cause was referred to the master, who reported the full amount of Mead's mortgage debt in his favor, and rejected all of the credits and defenses

pleaded by the Powells. The court overruled the exceptions, nine in number, filed by Samuel Powell, confirmed the report and rendered judgment in favor of Mead for his debt and interest, secured by the mortgage to him, from which judgment Samuel Powell's Admr., he having died pending the suit, and Charles H. Powell, have appealed. We will notice the errors in the order assigned, which will afford a sufficient explication of the facts.

The amended petition offered March 6, 1879, is not copied into the record, and this court can not know whether any error was committed by its rejection.

The affidavit for a continuance is not in the record, and as the cause had been pending for four years, we can see no abuse of discretion nor infringement of law in refusing the appellants a continuance.

This assignment embraces all the exceptions filed to the commissioner's report, the first of which is that the commissioner based his report on the incompetent evidence of the appellee, Mead, who testified after Samuel Powell died. His evidence was competent because Samuel Powell had testified touching the same subject on which Mead gave his evidence, and besides this it could not very properly be treated as an affidavit denying the genuineness of the note of February 1, 1865, for $696. The second, third, seventh and ninth exceptions are too general, and are also included within the meaning of the other exceptions. The fourth exception was not well taken because the evidence does not sustain the payment by Charles H. Powell for Samuel Powell of the $840; and the note for $696 dated February 1, 1865, is shown not to have been genuine.

The four successive mortgages executed by Samuel Powell to Mead, in each of which the amount named is declared to be just and owing by Samuel Powell, negatives the ignorance of the state of their accounts and transactions asserted by Powell. It can not be believed that Samuel Powell would have executed any of the mortgages, much less four, if Mead had not paid for the land on which Powell lived, and if it had not been true that the latter knew this to be so. Nor is it probable that Powell would have executed a mortgage for more than $1,800 when the mortgagee owed him over $900, part of which, if it existed, was evidenced by the spurious note of February 1, 1865.

The introduction of this latter note and the deposition of John Powell, in which he denies any understanding existing between him and his father, Samuel Powell, and appellee, Mead, by which the latter was to give Samuel Powell credit on the mortgage for the corn raised by John on Mead's farm, and John's subsequent statement, proved by the appellants that he so testified because of his alarm when there could be nothing to fear but falsehood, renders all of the claims set up by Samuel Powell suspicious, and stamps the whole defense with a want of truth and justice which must, in connection with the other evidence, condemn it.

The evidence furnishes no clue to the beginning and ending of the period or periods during which more than a lawful rate of interest was charged, and we must therefore decline to disturb the master's deduction, which was approved by the judgment.

The remarks on the fourth exception dispose of the credits claimed for the $181 and the $500 check, and also the items for molasses, cattle, etc. The fourth error is not tenable, for without the plea or claim of insanity or incompetency on the part of Samuel Powell to testify, it was wholly irrelevant to prove his sickness and belief that death was approaching, by the witnesses, Gilley, Reynolds and Hayden. As to the deposition of Weir it detailed hearsay alone, and it could not in any event be competent against the appellee, Mead. The sixth, seventh and ninth errors have been in effect disposed of. They but repeat in a more general way the other assignments of error.

We forbear to analyze the evidence further than we have indicated because the same result would be reached, and it could not weaken our convictions, to which we adhere of necessity from the weight of the evidence.

Wherefore the judgment is *affirmed.*

D. K. Weiss, for appellants.

E. F. Dulin, for appellee.

LEWIS COUNTY COURT ET AL. *v.* R. B. LOVELL ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—334.]

Petition Against Sheriff and Sureties.

A petition against the sheriff and his sureties to compel the sheriff to pay a balance claimed to be due the county, being the

county levy for 1871, is insufficient as against demurrer when it contains no allegation that the county was entitled to the alleged balance of the levy of 1871 by reason of having since paid out of other moneys the claims of county creditors allowed for that year. The fact that the county either had or did not have creditors for the year 1871 must be alleged, and if there were such creditors for that year their names and amounts allowed and paid by the county should have been alleged.

Title of An Act.

The title of the Act of February 19, 1873, is "An act in relation to the county levy of Lewis county and the collection of the same," and the second section directs R. B. Lovell, after he had gone out of office, to return to the county court the names of all delinquent taxpayers of the county levy for the year 1871 and 1872, and the tax-receipts of the same. It is held that the subject of said second section is not embraced in the title of the act and said section is therefore ineffective.

Power of Legislature.

The legislature has no power to compel an exsheriff to supply lost tax-receipts. It is not his duty to supply such receipts and he can not be compelled to surrender under legislative command tax-receipts which either belong to him or some taxpayer. They are private property.

APPEAL FROM LEWIS CIRCUIT COURT.

October 22, 1881.

OPINION BY JUDGE HARGIS:

The county judge and justices of Lewis county, and a receiver appointed by them, instituted an action in their names for the benefit of Lewis county against appellee, Lovell, and his sureties, to compel him to pay to the receiver an alleged balance of the county levy for the year 1871, which they aver he, as sheriff, collected and failed to account for.

It appears from the petition and the exhibits made part of it that the appellee, Lovell, had returned to the county court the delinquent list for 1871, which was approved and allowed to him as a credit on the levy for that year; that he afterwards made a settlement with a commissioner, who reported that he had failed to account for a part of the delinquent list, and it is in effect alleged that he had failed, in pursuance of an act of the legislature passed in February, 1873, to surrender up to the county

court his tax receipts or make a new list of the delinquents for that year, or account for the list which he had returned and was allowed by the county court and which list had been abstracted from the office of the clerk.

A general demurrer was rightly sustained to the petition. There is no allegation in the petition that the county was entitled to the alleged balance of the levy for 1871, "by reason of having since paid out of other moneys the claims of county creditors allowed for that year." Nor is it alleged that there were no creditors of Lewis county whose claims were allowed for 1871. Nothing whatever is said about the county creditors. The fact that the county either had or did not have creditors for the year 1871 must be alleged; and if there were county creditors for that year their names and the amounts allowed and paid by the county should have been averred. *Owens v. Ballard County Court,* 8 Bush (Ky.) 611. The petition was therefore fatally defective.

The title to the Act of February 19, 1873, is as follows: "An act in relation to the county levy of Lewis county and the collection of the same." The second section thereof exclusively refers to R. B. Lovell, and directs him, after he had gone out of office, to return to the county court the names of all delinquent taxpayers of the county levy for the year 1871 and 1872, and the tax-receipts of the same.

The subject of said second section is not embraced by the title of said act. The title does not give the slightest intimation that R. B. Lovell was commanded by the second section thereof to render personal services and surrender his private property without just compensation. The act recites the fact that he had gone out of office, and while he was in office the law made it his duty to return the delinquent list for each year of his term, and for a failure to do his duty in this respect he and his sureties were bound to answer.

If the delinquent list for 1871 and 1872 had been abstracted, lost or destroyed there was a plain mode pointed out by the statute for supplying them, but the legislature had no power to compel R. B. Lovell to supply their loss. It was not his duty, more than any other citizen, to supply their lost, destroyed or abstracted delinquent list. We can not see on what pretext it can be maintained that he shall surrender to the county court

under legislative command tax-receipts which either belong to him or some taxpayer. They are private property.

The second section of the act is, therefore, in our opinion, obnoxious to the Constitution (1879), Art. 2, § 37, and contrary to the fundamental right to acquire and hold private property, which is above and beyond legislative control.

Wherefore the judgment is *affirmed.*

T. W. Mitchell, for appellants.

E. C. Phister, for appellees.

[Cited, *Dance v. Pendleton County Court,* 5 Ky. L. 234.]

J. W. FLETCHER *v.* CAROLINE HARL ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—335.]

Voluntary Conveyance of Real Estate.

A voluntary conveyance of real estate is not fraudulent as to subsequent creditors.

APPEAL FROM MEADE CIRCUIT COURT.

October 25, 1881.

OPINION BY JUDGE PRYOR:

A voluntary conveyance is not fraudulent as to subsequent creditors, and therefore on the face of the pleadings the appellee was entitled to a judgment. As all fraud was denied, and the conveyance recites a valuable consideration passing from the grantee to the grantor, and the debt was created long after the execution of the writing under which the property was held, the burden was on the appellant to establish the fraud, and failing to do this the judgment against him was proper. Although the deed was not recorded the appellant was not prejudiced by it unless he had shown a state of case making it fraudulent as to subsequent creditors. He had acquired no right in or title to the property in any manner, and, upon a well recognized rule of equity, the appellees' equity, being prior in time, must prevail, and her unrecorded deed is as valid against creditors and purchasers with notice. *Righter v. Forrester,* 1 Bush (Ky.) 278; *Forepaugh v. Appold,* 17

B. Mon. (Ky.) 425; *Swigert v. Bank of Kentucky,* 17 B. Mon. (Ky.) 268.

Judgment *affirmed.*

R. L. Stith, for appellant.

Lewis & Fairleigh, for appellees.

JOHN DILS *v.* WM. ADKINS ET AL.

Judgment by Confession.

Where an insolvent person suffers judgment to be rendered against him by his confession, in contemplation of insolvency and with the purpose to prefer some creditors to the exclusion of others, such act operates as an assignment of all his property for the benefit of all of his creditors.

New Trial for Errors.

When an error is committed by the trial court, a party against whom it is committed can not have the error passed upon by the Court of Appeals, without first bringing the matter before the trial court by motion for a new trial and giving that court an opportunity to correct the error.

APPEAL FROM PIKE CIRCUIT COURT.

October 27, 1881.

OPINION BY JUDGE HARGIS:

During appellant's absence from the county in 1861, his wife, acting as his agent, brought and caused an attachment to issue for $2,291.67, with interest, against William Adkins, who was alleged to have so concealed himself that a summons could not be served upon him, with the fraudulent intent to cheat, hinder and delay his creditors.

Summons was issued but not served until November, 1865. The attachment was levied by delivering to Mrs. Adkins a copy and posting one upon the home tract of the lands of the defendant, which consisted of several tracts aggregating about 1,200 acres. It was not returned nor the levy written until the December term, 1865, when the deputy sheriff who levied it signed the return, written by appellant's attorney, and delivered the attachment to the clerk.

This case was set for trial upon the sixth day of that term, but

on the fifth day thereof the appellant filed in court the following writing executed to him by Adkins, viz.: "The papers of this case in the attachment of J. Dils are just and not to be contested by me," and on that day took judgment by confession for the amount of his claims and sustaining the attachment. Within six months thereafter the appellee, Hamilton, filed his petition in equity, alleging the above facts and that Adkins was insolvent, and had suffered the judgment aforesaid in contemplation of insolvency and with the design to prefer the appellants to the exclusion of his other creditors.

The allegations of the petition with reference to the suit, attachment, levy and return, and the confession of judgment, were admitted; but the averments intended to bring the case within the statute against fraudulent conveyances in contemplation of insolvency were denied.

It appears that appellant agreed to give to the wife of Adkins $300 for her dower interest. Adkins testified that the appellant promised to do so if he would sign the paper named above, and the appellant denied that he made the offer to procure its execution. That Adkins was insolvent when he confessed and suffered the judgment to be rendered against him, there can be no doubt.

The Act of March 2, 1862, which was then and is now in force, declares that the mere suffering of a judgment, in contemplation of insolvency, with the design to prefer some to the exclusion of other creditors, shall operate as an assignment. The suffering of the judgment by Adkins was the first fact in this case which the statute makes necessary in order to sustain the action. It is admitted, and the court held such an act to be constructively fraudulent, if coupled with insolvency and a design by the debtor to prefer the creditor in whose favor the judgment was rendered. *Letcher v. Stagner,* 2 Duv. (Ky.) 423.

It is insisted that the judgment would have been rendered even if the confession had not been made by Adkins. This cannot be known to us, and the argument to show that it would have followed from the condition of the case assumes that Adkins would have made no defense because he agreed to the judgment and admitted its justice. If that assumption be true, then there was no necessity whatever for the appellants obtaining Adkins' written statement that the cause was just and he did not intend to contest it. Besides this, the statute could, according to argument, be

rendered wholly negatory in every case by the creditor showing that his debt was just, and a judgment would necessarily have followed without the debtor's confession.

Suffering judgment on a just claim, or confessing the facts alleged in the petition, or the grounds of an attachment whereby a creditor secures a judgment earlier than he otherwise would have done, or perfects a doubtful or incomplete lien, are within the denunciation of the statute, which is intended to render illegal the favoring act of an insolvent debtor by which some of his creditors are advanced and aided in securing a preference over others. Adkins was insolvent by reason of continued and accumulating indebtedness from the year 1855, and the facts of this case show that he must have known his condition was insolvent when he confessed judgment in favor of the appellant.

He is presumed to have known from his insolvency, if nothing else, that his act, evidenced by the writing signed by him, had the effect to give to the appellant a complete lien on his land, and consequently a preference to the exclusion of his other creditors, who were without liens, and a legal advantage over them. As he, like all men, is presumed to contemplate the necessary consequence of his own act, he must have designed to prefer the appellant to his other creditors as this is the necessary result of his confession of the judgment. *Thompson v. Heffner's Exrs.*, 11 Bush (Ky.) 353; *Applegate v. Murrill*, 4 Met. (Ky.) 22; *Temple v. Poyntz*, 2 Duv. (Ky.) 276. We are therefore of the opinion that the act of Adkins was within the letter and spirit of the statute.

It does not matter whether the appellant participated in his effort to prefer him, or knew of Adkins' insolvency, because the object of the statute was to prevent an insolvent debtor from making preference among his creditors, and to cause his estate to be equitably distributed among all of them.

The warning order directs the nonresidents to appear within 60 days from its date, which is not the length of time required by Myers' Code (1867), § 88, to be given a nonresident to appear and answer. There must be given 60 days which will expire before the first day of the next term at which the nonresident is warned to defend the action. In this case the warning order confines the nonresident within 60 days from its date to appear and defend. The nonresident defendants were not warned a sufficient length

of time to appear, nor were they warned to appear in the action on the first day of the next term of court beginning more than sixty days from the time of making the order, and hence were not constructively summoned a sufficient length of time to authorize judgment against them.

But rendering judgment before the action stood for trial was a clerical misprision of the clerk which furnishes no ground for an appeal until it shall have been presented and acted upon in the court below. As no motion was made to correct the judgment for this error the appellant, who complains of the error and had the opportunity of presenting and having it acted on by the circuit court, but failed to do so, can not successfully maintain the error as a ground of his appeal.

It is difficult to see how he is prejudiced by this misprision of the clerk, as his own interest made it his duty, as much as it was the duty of the appellees, to have Adkins' heirs, who are not appellants, properly before the court. No party can commit an error which can be remedied in the circuit court, and appeal from its judgment for such error without first presenting that court an opportunity to correct the mistake. No process from this court has been sought or served in any manner upon the heirs of Adkins, and the judgment as to them cannot be looked into.

The exception to the deposition of Adkins was properly overruled, because the certificate of the officer shows that Adkins read and subscribed the deposition in his presence, and this was equivalent to the deposition being read to Adkins before he signed it, by the officer.

Rendering the judgment in both cases at the same time and ascertaining the rights of the parties in each was an order of consolidation itself, and unless some prejudice were shown to appellant, resulting from hearing the cases together, we are of the opinion that he cannot complain.

Judgment *affirmed.*

Reid & Stone, for appellant.

G. W. Brown, for appellees.

STEPHEN DEAN *v.* I. C. SKINNER'S ADMR.
I. C. SKINNER'S ADMR. *v.* JOHN GAITSKILL'S EXR. ET AL.
I. C. SKINNER'S ADMR. *v.* ARCH STEVENSON.
GAITSKILL'S EXRS. *v.* WILSON.

[Abstract Kentucky Law Reporter, Vol. 3—336.]

Preference of Creditor by Insolvent Person.

Whether an insolvent debtor be ignorant of the fact that he has no right to prefer one creditor to others, or knowing such fact designs to prefer, if the debtor knows that he is insolvent he must be presumed to know that to secure one creditor in preference to another is fraudulent, and he will be taken to have designed that which necessarily follows from his own action.

Knowledge of Insolvency.

To render fraudulent against other creditors the act of preferring one creditor to another by an insolvent debtor, the fact of insolvency need not have been known to the creditor. If the debtor knows of his insolvency and does an act resulting in preferring one of his creditors over others, such act is fraudulent and will be taken as a general assignment of all of his property for the benefit of all of his creditors.

APPEAL FROM CLARK CIRCUIT COURT.

October 27, 1881.

OPINION BY JUDGE PRYOR:

This petition was filed by the sureties, charging actual fraud on the part of Tanner in disposing of his property and obtaining an attachment; and also by an amended pleading they charge constructive fraud and seek to bring the case within the statute against fraudulent preferences.

Tanner being liable, as the guardian of his infant children, for a large sum of money and failing to account for it, an action was instituted on his guardian's bond against himself and sureties. The sureties were I. C. Skinner and Ramsey, and were liable, as had been ascertained by a judicial determination, for near $9,000 on account of the default of their principal.

Some time in the fall of 1871, Tanner had a public sale of all his stock and personalty, and in a short time thereafter sold a

very valuable tract of land. The land was sold to Jacob Wilson in two payments, the aggregate amount being $16,310.

The embarrassed condition of Tanner seems to have been known by many of his neighbors, and several of them purchasing at the sale of his personal estate made the purchase with a view of satisfying their debts against him. It is insisted that the opinions of those who lived near the debtor and in the same county as to his pecuniary condition were incompetent to establish his insolvency. While it is by no means conclusive it is certainly evidence in a case like this for the purpose of showing the motives of the debtor in disposing of his property, as well as conducing to establish his insolvency. One familiar, by reason of his association and intimacy, with his neighbor and the property owned by him may be able to speak of his ability or inability to pay his debts without knowing every debt he owes, or the exact value of the property owned by him. Nearly all those who speak of the condition of Tanner were of the belief when his sale was made, or about that time, that his pecuniary condition was embarrassing, and the fact of the sale of the personalty and his valuable land was calculated to convince the creditor that he was selling from absolute necessity, either for the purpose of paying his debts or converting his estate into money so as to shield it from the claims of creditors. The latter seems to have been his object, as his subsequent conduct plainly demonstrates. It is certain, however, that the fact of his being on the verge of insolvency was notorious in the county where he lived. He seems to have collected the greater part of the first note given for his land, and what became of the money does not distinctly appear.

In January, 1872, he seems to have become anxious to dispose of the last note due for the land sold Wilson. For that purpose, he applied to John Gaitskill, a shrewd man, who lived in the same county and held two notes on Tanner at that time, one for $391 payable to himself, and another for seven or eight hundred dollars payable to his mother.

Arch Stevenson, it seems, was surety on both notes, or rather they had attached to them what purported to be the name of Stevenson as surety, and so far as this case is concerned the signature must be regarded as genuine. Stevenson was the brother-in-law of Tanner, and this record discloses the fact that the former's name had been freely used by Tanner without any authority.

Gaitskill discounted the paper at 12% and deducted the amounts due him and his mother and became the owner by assignment. What property Tanner had in January, 1872, when this assignment was made, does not clearly appear, but it is evident that at that time he had no property subject to execution except some stock of not much value, and equally as manifest that he was then unable to pay his debts. He says he knew at that time that he was in an insolvent condition, but up to the time of the suit against him by his sureties he thought he would be able to pay out. His land and personalty had then all been sold, and he owed nearly seventeen thousand dollars, besides a large claim said to be due I. C. Skinner arising out of a partnership transaction, and perhaps debts to others. He had sold all his interest in certain other property, of not much value, to his son, and it is evident that in January, 1872, his creditors were anxious and had reason to apprehend that their debts due by Tanner were in danger of being lost, and that Gaitskill, with a view of securing his debt, sent his son to see Wilson to know if he was still owing the amount of his last note.

It is immaterial, however, whether the appellant's intestate (John Gaitskill) knew of the insolvency of Tanner at the time he bought the note, or that he purchased it with a view of securing what was owing him or his mother; still, if the debtor were insolvent, and the act done by him caused the preference, or rather if the preference were the necessary result of his action, the case is brought within the statute.

A party insolvent may not in his own mind design to prefer, or may be ignorant of the fact that he has no right to prefer; yet if the debtor knows that he is insolvent, he must be presumed to know that to secure one creditor in preference to another is constitutionally fraudulent, and he must be taken to have designed that which necessarily follows from his own action. See *Applegate v. Murrill,* 4 Met. (Ky.) 22; *Thompson v. Heffner's Exrs.,* 11 Bush (Ky.) 353.

If, as counsel contend, the fact of insolvency and the design to prefer must have been known to the creditor as well as to the debtor, then this case is for the appellant. Such is not the language of the statute or the construction given by this court. The creditor may be entirely ignorant or innocent of any wrong, yet if insolvency with the design to prefer exists when the preference

is given, the case is clearly made out. Gaitskill must have known of the insolvency of Tanner, and hence his great anxiety to know whether the note was all right owing by Wilson, the same purchased of Tanner. The fact that Tanner defrauded both Wilson and Gaitskill by concealing the existence of Fry's lien, and that Gaitskill was at best a loser by the transaction, can not affect the decision of the question raised. When this note was purchased all the parties, that is, both Wilson and Gaitskill, were ignorant of the lien existing in behalf of Fry, and if that lien had not been asserted, or never existed, the preference would have been given. The intention to prefer at the time the note was assigned is not refuted by a subsequent event of which both parties were in ignorance. If the note had been paid off, no consideration therefor passing, the case might be different, but where the note is genuine and the transaction real, and the claim undisputed except as to a part of the note, the assertion of the lien by Fry can not relate back so as to relieve the parties from an act that rendered the original transaction a legal fraud. In the case upon the appeal of Dean the facts show clearly a preference, and therefore the judgment is *affirmed* on the appeal of Dean, and *reversed* on the cross-appeal of *Skinner's Admr. v. Gaitskill's Admr.*

As to the appeal of Gaitskill's administrator from the judgment in favor of Wilson we have but little difficulty. It is apparent from the entire proof that Wilson did not induce the appellant's intestate to purchase the note, but on the contrary the intestate of the appellant was approached by Tanner, and as a matter of precaution he doubtless desired to know if the note was right. The response by Wilson was that he supposed it was all right, and it would be paid when due, and if not the appellant's intestate would indulge him. He was then in ignorance of Fry's lien, and made just such a response as any debtor would have made under the circumstances. On the first interrogation of the witness who interviewed Wilson on the subject of the note, he says there was no statement made as to any defense or set-off, but that Wilson stated it would be paid when due. On the second examination the witness states that Wilson also said there was no set-off to the note. These statements are certainly conflicting, and evidence a purpose to strengthen the case on the principal issue made.

The inquiry was natural on the part of Gaitskill's son, and the response equally so, as first made, and to hold Wilson responsible under the facts of this case would be carrying the doctrine of estoppel so far as to preclude any defense to such an obligation when in the hands of a third party. The signature of Wilson to the paper implies his obligation to pay, and gave to the appellant all the information he obtained from Wilson when the inquiry was made. It was his obligation, and he expected to pay it when due. We find nothing in the case to show that Wilson induced the appellant to purchase this paper, but on the contrary it was Tanner, whose fraudulent designs appear in nearly every page of this record. It was appellant's intestate who trusted Tanner, and not Wilson. The judgment in favor of Wilson is therefore *affirmed.*

On the appeal of *Skinner's Admr. v. Stevenson,* it is plain, we think, that Tanner had no authority to sign the latter's name to the note, and while the original was filed by counsel in good faith, admitting the execution of the paper, it was at Tanner's instance, and the court under the circumstances acted properly in permitting the plea of non est factum to be filed. Judgment in favor of Stevenson is *affirmed.*

In this case the judgment is *affirmed* on the appeal of Dean and *reversed* on the cross-appeal of *Stevenson's Admr. v. Gaitskill,* and is also *affirmed* on the appeal of *Gaitskill Admr. v. Wilson,* and is *affirmed* on the appeal of *Skinner's Admr. v. Stevenson.*

W. M. Beckner, for Skinner's Admr.

B. J. Peters, C. Eginton, for Dean and Gaitskill's Exrs.

C. Eginton, for Stevenson.

T. S. Tucker, for Wilson.

[Cited, *Tichenor v. Owensboro Sav. Bank &c. Co.,* 113 Ky. 275, 24 Ky. L. 145, 68 S. W. 127.]

GEO. W. DEATLY *v.* N. P. RALLS.

[Abstract Kentucky Law Reporter, Vol. 3—386.]

Purchase-Money Lien.

When in a conveyance of real estate a lien for purchase-money is reserved, and under an agreement with the debtor, a friend advances him the money to pay the purchase-money note or a part of

it, and the note is delivered to the friend, the debtor agreeing that he should have the lien that goes with it as collateral for advancing the money to the debtor, such friend holds the purchase-money lien for the amount of the note.

Usury.

Where one borrows money and pays usury to another with it he can not recover the usury paid from any one except the person to whom he pays it. He has no claim on the person loaning him such money.

APPEAL FROM BATH COURT OF COMMON PLEAS.

October 29, 1881.

OPINION BY JUDGE HARGIS:

Wilson sold a tract of land to Terry, who paid part of the consideration and executed three promissory notes for the remainder. The last note became due the 1st day of January, 1869. On the 20th day of August, 1862, Terry agreed, in writing entered on the back of the note, in consideration of indulgence, to pay ten per cent. interest per annum from the 1st day of the preceding January until the note should be paid.

August 24, 1872, Wilson sold and assigned the note to the appellee. On October 12, 1874, Terry paid by check of appellant the sum of $944.20 to appellee, who executed the following receipt, viz.: "Received $944.20 of G. W. Deatly, which is to be credited on the note that Ralls holds against Terry, which is a land note, and Deatly is to have the note when he pays the balance on the note. The amount of the note is $2,054.30. This receipt is to have ten per cent. interest from this date." There is some contrariety in the evidence about the wording of the receipt, but we shall regard the above copy as containing the substance of the receipt which appellee executed.

February 25, 1875, Terry paid appellee $1,000, and executed his note with security for the remainder due on the land note, which had been assigned to appellee as aforesaid, and which appellant had let him have for that purpose.

It appears that appellant was the friend of Terry, and, sympathizing with him in his financial distress, loaned him the money which he paid to appellee, with the understanding that appellant was to have the note when it should be paid to appellee, and the

lien for its security as an indemnity against loss by reason of his advancements to Terry.

The delivery of the note by the latter to appellant was for the sole purpose of continuing the lien for appellant's security, and it was done in compliance with their previous agreement to that effect. In no sense does the evidence or the receipt named prove that the appellee was either assignor or guarantor of the note which was paid by Terry, in pursuance of the agreement with appellant, in which appellee had no participation as a party further than to give his assent to the delivery of the note when he should receive payment thereof.

If the receipt could be construed as a proposition by appellee to assign the note to appellant on condition that he should pay it and interest, then he could not recover because he failed to pay the note, for the remainder of which Terry executed his note that is still in great part unpaid. If appellant trusted Terry with enough money to pay appellee the latter can not be treated as having received it, although Terry may have kept the money and deceived appellant, who had made him his agent, unless the appellee knew of the bad faith with which Terry had acted. But there is no evidence that appellee had any knowledge of such conduct on the part of Terry, and it is a disputed fact whether Terry so acted.

The receipt states that upon its payment by appellant he "is to have the note." This expression accords with the terms upon which Terry contends he received the money from appellant, and is potent in negative of the latter's claim that he is either assignee or guarantee. The agreement that the receipt was to bear ten per cent. interest added nothing to the amount of the credit evidenced by it, it being the purpose evidently to have the credit bear the same rate of interest as the note. The note was not assigned by the appellee, but it was delivered to Terry by and for whom the appellant furnished the money to pay it.

Only so much of the note, after deducting the usury, as remained unpaid was a lien on the land, and to that extent it was an available collateral security to the appellant; but the remainder of his loan to Terry rested upon the unsecured personal obligation of the latter, against whom no judgment could be rendered therefor because of his discharge in bankruptcy. Terry could not have defeated a recovery against him on the ground that he took the

money borrowed from appellant and paid usurious interest with it, because in no case can usury be recovered except from the party who received it; nor can such a plea be sustained to a demand in which no usury is embraced, although the proceeds have been used by the borrower to discharge usurious contracts.

Had appellee assigned or guaranteed the note to the appellant hardly a doubt could be entertained of his right to recover any part of the note which had been paid, either to appellee or his assignor before the assignment, and this right would not depend upon the institution of a suit at the first term after the assignment. But, as we have said, the evidence shows that no assignment or guaranty was made by appellee. Besides the auxiliary evidence of other witnesses and the disinterested attitude of Terry with relation to the rights of the parties as strongly tending to sustain his credibility, the manner in which the whole transaction took place furnishes intrinsic evidence of the correctness of his version and the erroneous construction placed upon it by appellant.

Judgment *affirmed.*

Reid & Young, for appellant.

Reid & Stone, for appellee.

[Cited, *Blakeley v. Adams,* 113 Ky. 398, 24 Ky. L. 324, 68 S. W. 473.]

H. G. WALTERS *v.* P. J. BLEVINS' EXR.

[Abstract Kentucky Law Reporter, Vol. 3—386.]

Building Destroyed on Real Estate Sold.

Where a commissioner sells real estate, the destruction of a building upon it before confirmation of the deed does not release the purchaser from liability, for where the judgment directed the property sold it belonged to the appellant from the date of his purchase.

APPEAL FROM POWELL CIRCUIT COURT.

October 29, 1881.

OPINION BY JUDGE PRYOR:

There is no defect in the title pointed out by any exception to the commissioner's report, and the proof conduces to show that

the rails were taken from the land before the sale. If taken after the sale the appellant would be compelled to take the property and look to the trespasser for reparation.

The commissioner sold only the boundary of the land mentioned in the judgment, and it appears that this did not embrace the building forming the subject of the exception, and if it is within the boundary the appellant can recover its value from the wrongdoer. The destruction of the property before confirmation does not release the purchaser from liability, and if the judgment directed this property to be sold it belonged to the appellant from the date of his purchase. The commissioner had no power to sell more property than the judgment authorized, and the proof shows that he did not exceed his authority. His report of sale and his own testimony establishes this fact, and while there is conflicting proof, the court should sustain the commissioner's report, unless it is made manifest that he has violated the instructions given him.

The purchaser could have ascertained what was ordered to be sold, by looking to the judgment and in this case we are satisfied he obtained the boundary of land purchased by him. If the other proceedings are irregular it can not affect his title. He acquired by his purchase a title of which he can not be divested by any of the parties to the action.

Judgment confirming the sale is *affirmed*.

Fluty, Lilly & White, for appellant.

W. H. Holt, for appellee.

JOHN TUTT ET AL. *v.* SOCRATES KINCAID ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—389.]

Continuances.

It is not an abuse of discretion for the trial court to overrule a motion for a continuance in order to give defendants time to file pleadings and prepare for trial, where two continuances had theretofore been granted for the same purpose.

Presumption Where Papers Are Not Copied Into the Record on Appeal.

Where papers are filed and read in evidence they should be copied on an appeal to this court, but where they are omitted from the

record the presumption must be indulged that they sustain the judgment of the court below.

Assignment of Error.

Where there is no assignment of error specifying the failure of appellees to make and file an affidavit purging their claim after the death of appellant's ancestor and before the rendition of judgment the Court of Appeals can not look into such question.

APPEAL FROM WOLFE CIRCUIT COURT.

November 3, 1881.

OPINION BY JUDGE HARGIS:

The delay in presenting any defense the appellants may have had was inexcusable, and the court, after granting the two new trials for the purpose of allowing the appellants to prepare their defense, did not abuse a sound discretion in overruling a third motion for a new trial in order to give them an opportunity to file pleadings and prepare the cause for trial, which ought to have been done years before.

It appears that the title papers of the appellees were on file in another suit pending in the court where this action was brought and tried, and they were referred to and made part of this suit sufficiently to be read upon the trial. They were to all intents and purposes filed in this case, and ought to have been copied as a part of this record, as they were evidently used in the trial below. They are omitted from the record, and the presumption must be indulged, in their absence, that they sustain the judgment of the court below, especially as it was appellants' duty to have them before this court on his assignment of error that they are defective, and fail to show title in the appellees. In their absence we are unable to determine whether they embrace the lands in controversy, but the presumption exists that they do embrace it.

No reason is assigned why the appellees' pleadings are insufficient to authorize a recovery, and we are unable to discover any substantial defect in them. The testimony in connection with the presumably complete title papers is sufficient to sustain the judgment. The notes admitted to be genuine furnish ample evidence of a contract of sale, and it is admitted that a title bond was executed, but appellants' ancestor claimed in his answer it was lost at the time this suit was brought against him. No plea of payment

or discharge from the obligation of the notes was offered by either the appellants or their ancestor, and no reason exists why they should not pay for the land they have so long enjoyed without disturbance under the appellees' title.

There is no assignment or error specifying the failure of appellees to make and file an affidavit purging their claim after the death of appellants' ancestor and before the rendition of the judgment, and without an assignment of error specifying the ground of complaint this court cannot look into it, as has been frequently held.

Wherefore the judgment is *affirmed.*

W. L. Hurst, for appellants.

H. C. Lilly, E. P. Moore, for appellees.

HUGH ANDERSON ET AL. *v.* JAS. A. CARRICK ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—388, as Anderson v. Carrich.]

Vacation of Dirt Road.

Under the provisions of Gen. Stat. (1879), Ch. 110, § 13, requiring dirt roads within one mile of turnpikes to be closed, with certain exceptions, a dirt road will not be closed when at some points it is less and at others it is at a greater distance than one mile from a turnpike, leading to and being between the same points, where it is shown that the dirt road was established first, is nearer from point to point of intersection than the the turnpike, where its being closed would shut out some of the people living along the dirt road from any public way and where such dirt road is not used for the sole purpose of avoiding the payment of tolls on the turnpike.

APPEAL FROM SCOTT COURT OF COMMON PLEAS.

November 3, 1881.

OPINION BY JUDGE LEWIS:

This is an appeal from the judgment of the Scott Court of Common Pleas affirming a judgment of the Scott County Court dismissing an application to close the Lushing dirt road in that county.

The proceeding was commenced in the county court under Gen. Stat. (1879), Ch. 110, § 13, which reads as follows: "No lateral road shall be opened to and from the same places now connected by any turnpike, gravel or plank road, or which may be

hereafter so connected, so as to run within one mile of said road; and any such lateral road now in use, or which may hereafter be in use, shall, by order of the county court, be shut up and closed. But such lateral roads shall not be precluded from so running as near as a mile for the distance of one mile from any town or city."

The Georgetown & Oxford Turnpike, it appears, begins at a point upon the Georgetown & Paris Turnpike about one mile from Georgetown, and runs thence through Oxford to Lushing and Cynthiana. The dirt road sought to be closed begins at or near the same point, and running in the direction of Lushing intersects the turnpike at the distance of about four miles. From the one point of intersection to the other the dirt road is shorter than the turnpike by about one-half mile, the length of the latter being increased by a divergence made in order to run it through the village of Oxford.

The greatest distance the two roads are apart is about one mile and an eighth, and the average distance apart is from one-half to three-fifths of a mile. It is shown that persons residing upon the dirt road who have access over their own lands to the turnpike will derive advantage from closing the road in the saving of fencing, and that the tolls upon the turnpike which are now insufficient to keep it in good repair will be considerably increased. On the other hand, injury and inconvenience will result to other citizens of the county by closing it; for some of them have no other outlet; and others will be compelled to travel a greater distance to reach the county seat than they now have to travel.

But the statute being peremptory it is the duty of this court to construe it in such manner as to carry out the intention of the legislature. To construe the statute literally would lead to palpable injustice, contradiction and absurdity. For manifestly it was not the intention of the legislature that every dirt road running to and from the same places which may be connected by a turnpike, and running at some places within one mile of such turnpike, should be closed, irrespective of the injury thereby done to individuals and the public, and without regard to the distance it might diverge from the turnpike at other places. Nor did the legislature intend that in no case should a dirt road be closed that at some one point is a mile distant from the turnpike.

The object of the statute is to prevent the establishment of dirt roads that serve the purpose only of diverting travel from

turnpike roads, and enable persons to avoid the payment of tolls, without being necessary for the public or individual convenience. It was not the intention of the legislature to close dirt roads that are indispensable, and the only outlets from the homes of citizens to the county seats, churches and school-houses, or that are the nearest and most convenient ways for them to such places, merely to increase travel upon turnpike roads.

The dirt road sought in this place to be closed is nearer from point to point of intersection than is the turnpike. Some of those who now use the dirt road, if it were closed, would not use the turnpike at all to go to the county seat, and some of them would be shut out entirely from any public way and be at the mercy of those on whose lands they would have to travel to reach a public road.

The dirt road was established before the turnpike, is for some distance more than one mile from it, and is necessary to enable citizens to reach places where they have a right to go, and it is their public duty to go, and was not established nor is it used for the sole or principal purpose of avoiding the payment of tolls on the turnpike.

Wherefore the judgment of the court below is *affirmed.*

Bradley & Bradley, Jas. E. Cantrill, for appellants.

W. S. Darnaby, for appellees.

WM. H. BYRD v. SOCRATES KINCAID ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—388.]

Consolidation of Suits.

Where a party to one suit has no interest in another suit in the same court to which his adversary is a party, the trial court should refuse to order such suits consolidated.

APPEAL FROM WOLFE CIRCUIT COURT.

November 3, 1881.

OPINION BY JUDGE HARGIS:

The appellant, Wm. H. Byrd, may have some interest in the tract of land sold by Kincaid to Spencer, but we are of the opinion that the fact that it was sold from the Turner boundary, unless

there was a conflict between it and the tract sold to Tutt, is conclusive that the appellant, Byrd, had no interest in the controversy between the latter's heirs and Kincaid's heirs, and therefore the court properly refused to allow the two suits about the separate and unconnected tracts to be consolidated.

The judgment in either case could not be used against any of the parties to the other, and as the admission of Byrd with his controversy to this action would have only produced confusion and delay we are constrained to affirm the judgment on Byrd's appeal.

Wm. L. Hurst, for appellant.

H. C. Lilly, E. P. Moore, for appellees.

CITY OF HENDERSON *v.* MARION BRECKINRIDGE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—387.]

Enjoining the Collection of Taxes.

Where real estate is located with reference to public streets, and its owners are enjoying the benefits of city government, an injunction against the city's collection of taxes thereon should be dissolved.

Recovery of Assessments Paid.

If property not properly taxable is necessarily benefited by the improvement made around it by a city, although the taxes are improperly levied, the taxes can not be recovered back; nor can a recovery be had if the plaintiffs, knowing their rights, voluntarily paid the assessment.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

November 3, 1881.

OPINION BY JUDGE PRYOR:

If the statements contained in the answer filed by the city to the petition in which the injunction was obtained are true, the injunction granted the appellees should have been dissolved. The four acre lot is surrounded on all sides but one, as averred in the answer, by principal streets, and on that side by a public alley; and not only so, but the ground adjoining has been divided into town lots, and many of them built upon, leaving the appellees with their lot enjoying all the privileges and benefits arising from the municipal government. It is not necessary that this four acre lot should have

been partitioned, or actually laid off from the other lands of the appellees after the Act of 1867. This had already been done, whether in anticipation of the extension of the city limits is not necessary to enquire. At the time the taxes were imposed, as the proof conduces to show, this four acre lot was separated from the other lands of the appellees by public streets and alleys, and such being the case was embraced within the provisions of the act of 1867. Besides, from the testimony in the action under which the recovery of the taxes paid was had against the city, it clearly appears that the appellees were fully advised of their rights in the premises; that an injunction had been obtained against the collection of taxes, and the action dismissed; and further the appellee, Breckinridge, says that he knew they had no right to collect. So in either state of case the judgment should have been for the city in the event the four acre lot is located with reference to public streets; and if the owners are enjoying the benefits of the city government, as is alleged in the answer, the injunction should have been dissolved. If the property, although not properly taxable, was necessarily benefited by the improvements made by the city around it, the taxes cannot be recovered back, although they may have been improperly levied; nor can a recovery be had if the plaintiffs, knowing their rights in the premises, voluntarily pay the assessment. *Louisville v. Anderson,* 79 Ky. 334, 2 Ky. L. 344, 42 Am. Rep. 220.

The judgment in each case is *reversed* and cause remanded for further proceedings consistent with this opinion.

James F. Clay, William Lindsay, for appellant.

M. Merritt, John Young Brown, for appellees.

[Cited, *Brands v. Louisville,* 111 Ky. 56, 23 Ky. L. 442, 63 S. W. 2.]

JOSEPH RILEY *v.* JOHN T. ALBERTSON.

[Abstract Kentucky Law Reporter, Vol. 3—391.]

Capacity to Contract.

Evidence of witnesses who give it as their opinion that a person has or has not capacity to contract, without stating any facts on which they base their opinion of his capacity except that he is a bad trader, is not of very great weight.

Mental Capacity to Understand.

When a person has mind enough to understand the subject, that is, deliberate upon the matter and weigh the consequence, he is competent to contract, and no mere want of skill or experience or weakness of mind will destroy mental capacity to contract, but these elements are to be considered where fraud is charged.

APPEAL FROM GREENUP CIRCUIT COURT.

November 8, 1881.

OPINION BY JUDGE HARGIS:

It appears from the evidence that appellant sold a horse for $200, which was more than it was worth, to the appellee, who let him have a wagon at $100 and executed a note for the remainder, and a mortgage to secure its payment. Appellee also let him have a bridle, saddle and sewing machine on the mortgage.

The appellant threatened to sue on the mortgage, and they thereupon had a settlement in which appellee on his side was allowed,

The mortgage of	$100.00
A second mortgage for	36.00
Interest on both mortgages at ten per cent. for one year	13.60
Amount paid William Riley	11.50
Money	39.00
One year's interest on it	3.90
Making	$204.00
And appellee was credited by machine at	25.00
The bridle and saddle at	15.00
And the same horse purchased of appellant to whom he returned him	76.00
	$116.00

This left the sum of $88; but the appellant executed a note and mortgage for $98.91 to appellant, who brought this suit to foreclose that mortgage. A judgment was rendered against him for costs, from which appellant appeals, and the appellee prays a cross-appeal.

Whether appellee was competent to make a contract when he

bought the horse from appellant and executed the mortgage for the balance of the price is the only question necessary to settle with reference to that transaction, for if he was competent to contract we have no power to relieve him from a bad bargain or to release him from his liability to appellant to pay the price agreed, although it was more than the horse was worth. None of the witnesses who testify touching his competency to contract state any facts on which they base their opinion of his capacity except that he is a bad trader, and let an estate of $1,300 belonging to himself and an estate of over $20,000 belonging to his mother slip through his hands, and he now has no property outside of a horse or two and a cow, mortgaged to appellant to pay the debt sued for.

He is about thirty years old. He refused to take the advice of some of his neighbors who urged him to quit trading. Most of the witnesses for him say that he has not capacity to transact business in a prudent discreet manner. Legal capacity, however, is not necessarily accompanied by prudence and discretion. These elements are frequently lacking in the strongest minds. When a person has mind enough to understand the subject, that is, deliberate upon the matter and weigh the consequences, he is competent to contract, and no mere want of skill or experience or weakness of mind will destroy mental capacity to contract; but these elements are to be considered where fraud is charged, as in this case.

The deposition given by appellee himself develops considerable mental ability upon his part. He gives dates, amounts, conversations and terms of contracts and transactions with ordinary accuracy, and the language used by him is far better than that of the average witness, and his testimony is entirely free from any defect of reason that might lead a man to testify against his own interest, and we must conclude from it that he was competent to contract.

There is no evidence in the record sufficient to establish that any fraud had been practiced upon him in the sale of the horse, or the execution of the mortgage for the $36. But in the settlement they made at the time appellee executed the mortgage and note sued on, the evidence shows that the full amount of the payments made by appellee were not allowed to him. He should have been credited with $155, which the evidence shows the horse, sewing machine, saddle and bridle were worth, when appellant received them from appellee.

Wherefore the judgment is *reversed* and cause remanded with directions to render judgment in behalf of appellant for $49, with interest from April 22, 1876.

Judgment *affirmed* on the cross-appeal.

B. F. Bennett, for appellant.

G. T. Halbert, for appellee.

MATILDA VICE *v.* D. M. VICE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—390.]

Descent of Infant's Real Estate.

Real estate owned by an infant dying without issue descends to the parent from whom such estate is derived, either by descent, demise or gift; and in case such parent be dead the infant's real estate will descend to his or her kindred, provided the kindred are not more remote than grandparents, uncles or aunts.

Descent from Infant to Half-Blood.

Where the owner of real estate dies intestate leaving children by a former marriage and a wife and one child by his last marriage, and the last named child dies in infancy, not leaving issue, the real estate of said child will descend to its father's children by his first wife to the exclusion of its mother.

APPEAL FROM BATH CIRCUIT COURT.

November 8, 1881.

OPINION BY JUDGE HARGIS:

William Vice died, leaving a widow and a child by her named Llewellen, and six other children by a former wife. He was the owner of 119 acres of land that descended to his heirs. After the division of the land between the widow and heirs, Llewellen died at the age of four years, and the widow asserted claim to a double portion in Llewellen's share of the real estate which descended to her from her father. The half-brothers and sisters resisted her claim to any part of the land, and the court having decided adversely to her, the widow appeals from the judgment seeking its reversal.

Gen. Stat. (1879), Ch. 31, § 9, provides: "If an infant dies without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole shall descend to that par-

ent and his or her kindred, as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles, and aunts of the intestate, and their descendants."

This section confines the descent of real estate owned by an infant, who dies without issue, to the parent from whom such estate is derived, either by descent, devise or gift. In case such parent be dead the estate will descend to his or her kindred, provided the kindred who demand the exclusion are not more remote than grandparents, uncles or aunts.

In the case of *Driskell v. Hanks*, 18 B. Mon. (Ky.) 855, it was held that the real estate of an infant who had died without issue, which was devised to him by his father, passed to his uncles and aunts, and that his mother was excluded from participation in it by Rev. Stat. (1867), Ch. 30, § 9, which is identically the same as the section quoted. See *Talbott's Heirs v. Talbott's Heirs*, 17 B. Mon. (Ky.) 1.

These authorities settle this question and sustain the judgment. The case of *Milner v. Calvert*, 1 Met. (Ky.) 472, relied on by appellant's counsel, is not applicable to the case before us. That case was in regard to a deceased infant's personal estate, which Gen. Stat. (1879), Ch. 31, § 11, provides shall be distributed as if he had died after full age.

Judgment *affirmed*.

Reid & Young, for appellant.

R. Gudgell & Son, for appellees.

THOMAS A. MORGAN *v.* HENRY WOOD.

[Abstract Kentucky Law Reporter, Vol. 3—391.]

No Reversal on Evidence After Several Trials.

Where an issue of fact is submitted to a jury at three different trials, each resulting in a verdict for the appellee, before the Court of Appeals will reverse such a case there must be some palpable error committed to the prejudice of the appellant.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 10, 1881.

OPINION BY JUDGE PRYOR:

This is the third time the case before us has been in this court, and three jury trials have been had, resulting each time in a verdict for the appellee. There must be an end to litigation, and before a reversal could be had for the third time there must appear to have been some palpable error committed to the prejudice of the appellant, and particularly when the sole question to be determined is one of fact. The only issue really is as to the terms of the contract between the appellee and appellant. The appellee undertook to work the farm of the appellant on shares, and the question of dispute is: Was he to receive one-half or one-third of the crop raised, and one-half or one-third of the increase of stock, etc. This is a simple issue, and one that ought to be tried without giving eight or ten instructions at the instance of either party.

The instructions asked by appellant were not presented until after the case had gone to the jury, and arguments been heard under instructions given by the court, and for that reason they were properly refused. The letter and telegram offered in evidence by the appellee were pertinent to the issue, and equally as competent as the proof of the verbal admission as to what the contract was. The proposal by appellant to give one-half, although not accepted at the time, conduced to show that the claim of the appellee was properly asserted. The jury did find special facts, and ought not to have been compelled to respond to every question made. They knew that it was their duty to ascertain what the contract was, and to value the products of the farm. The value they could determine without proof after ascertaining the character and quantity of products from other witnesses. It is useless, however, to make further suggestions on the law and facts of the case. The issues were few and simple, and the testimony is so conflicting that a court would not have disturbed the finding for either party. There was evidence conducing to show that appellee was required and compelled to abandon his contract and leave the premises. After the third verdict in a case like this the controversy should come to an end, and the judgment below is now *affirmed*.

John H. McHenry, Little & Slack, for appellant.

Owen & Ellis, for appellee.

JOHN DORCH ET AL. *v.* WILLIAM CORUM, RECEIVER, ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—391.]

Conveyance to Defraud Creditors.

While a conveyance of real estate is not fraudulent as against persons who become creditors after the conveyance, it may be fraudulent as to creditors who become such before such deed is delivered to grantees.

Evidence of Fraud.

Where the evidence shows that a grantor, a man of means, makes a deed to a person of no means and in no condition to buy real estate, and the conveyance is not acknowledged and the grantor holds possession and control of the land and proclaims to a witness that he will soon have the property back, it indicates that such conveyance was made in fraud, and persons dealing with such a grantor had the right to assume that he was the owner of said property.

APPEAL FROM GREENUP CIRCUIT COURT.

November 10, 1881.

OPINION BY JUDGE PRYOR:

It is maintained in argument by counsel for the appellants that, as the several conveyances and bills of sale were made prior to the time at which the debts of the various appellees originated, no fraud could have been practiced on the appellees, nor any intention have existed on the part of John Dorch, Sr., to defraud subsequent creditors. It is evident that the effort on the part of John Dorch, Sr., in the year 1872, was to avoid payment of alleged demands that were then being asserted against him, and with this purpose in view he attempted to divest himself of all right and title to his entire estate, with the exception of the right to collect rents from one of his tracts of land. These conveyances were lodged with the clerk by the grantor, but no tax was paid, nor was there any direction to have them recorded.

John Dorch, Sr., was a man of means and credit, while those to whom he made these transfers of his estate were certainly in no condition to purchase. The conveyances were not even acknowledged, and the party, who was in fact the real owner, in the possession of and enjoying the use of the property, created new liabilities from time to time, upon the faith and credit of a con-

siderable estate that all with whom he dealt had the right to suppose belonged to him and liable for his debts. When the action for slander was instituted against the grantor, or shortly before, he expressed his determination to place his property out of his hands, and said to one witness it would only be for a short time. The conveyances were not in fact delivered to the grantees, nor were they acknowledged or intended at the time to divest the grantor of title, except upon a certain contingency. William Dorch, Jr., to whom the conveyances were made in trust, never accepted them until after the liability of his father had been created, nor until the bonds executed by Matthews matured. He says, in relation to the Greenslate place, one of the trusts conveyed to him, that he has had no charge of the land, paid none of the taxes, nor received any of the rents; and as to the other tract, his father has lived upon it and controlled it in conjunction with Frank since the conveyance was made. As to the bill of sale of the personal estate made to him by his father, he says that it was for work done and performed for his father, more than twenty years before the writing was executed, and after retaining the possession for a short time, it was all returned to the old man.

It is plain that these conveyances lodged with the clerk, and were not accepted by the grantees, nor even an attempt made to deliver them, but were accepted and ordered to be recorded in 1874, at a time when John Dorch, Sr., was much involved, and in anticipation of his creditors proceeding against him, or the property, with a view of collecting their several debts. Not one of the grantees in any of the conveyances, although made defendants to the action and the fraud of the father directly alleged, made any defense. John Dorch, Sr., is the only defendant to the action denying the fraud; and the allegations of the petition, standing confessed as to the adult grantees, failing to answer, and the proof being conclusive as to the fraudulent purposes of John Dorch, Sr., there is no reason for disturbing the judgment. The infant defendants were served with process and answered by their guardian ad litem. The proof authorized the judgment against them. We have examined the record with some care as to John Dorch, Jr., for the purpose of ascertaining whether an answer was filed by him controverting the allegations of any of the petitions in the consolidated causes, and find that no defense

was made by him except a denial of payments alleged to have been made by certain of the creditors.

We perceive no cause for reversing the judgment, and it is *affirmed.*

Roe & Roe, for appellants.

B. F. Bennett, E. F. Dulin, W. C. Ireland, for appellees.

LAMANDA HOWSER *v.* JAMES E. WATSON.

[Kentucky Law Reporter, Vol. 3—382.]

Sufficiency of Petition for Damages.

1 Acts (1878), p. 30, Ch. 319, neither imposes a penalty nor authorizes a recovery of damages in selling liquors except where the seller has a license to sell such liquors. It follows that a petition for damages under said act must allege that the sale was made and that the seller at the time had a license to sell.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

November 10, 1881.

OPINION BY JUDGE LEWIS:

The statute, entitled "An act to amend chapter 29, of article 35, title 'Crimes and Punishments of the General Statutes'" (1 Acts 1878, p. 30, Ch. 319), under which this action was brought, neither imposes a penalty nor authorizes a recovery of damages for a violation of its provisions against any other class of persons except those who have licenses to sell spirituous, vinous, or malt liquors; and consequently the fact of license is a material element of the law, and it should have been alleged in appellant's petition that appellee had such license when he sold and gave liquor to her husband.

If, however, the issue of license or no license had either been made by the answer, or submitted to and tried by the jury, this court would disregard the defect of the petition in that respect. But it was not made in the answer. Nor, in the absence of a bill of exceptions containing the evidence, and showing what instructions were given, can this court say or, in the face of the judgment of the court below, presume the issue was submitted to and tried by the jury.

As the record stands there seems to be no error in the judgment non obstante verdicto, and there is nothing to show that the substantial rights of appellant were prejudiced thereby. If appellee was entitled to judgment, it was not error in the court to permit him to withdraw his motion for a new trial.

The amended petition referred to by counsel is not by bill of exception or otherwise before this court, and we cannot, therefore, say the court below erred in refusing to permit it filed, even if it had been offered at the proper time.

Wherefore the judgment must be *affirmed*.

Richards & Baskin, for appellant.

J. T. O'Neal, Parsons & Beckham, for appellee.

JASPER A. HILDRETH ET AL. *v.* E. L. SHIPP.

[Abstract Kentucky Law Reporter, Vol. 3—393.]

Sale of Property to Defraud Creditors.

One largely in debt can not legally convey and sell his property for the purpose of defrauding his creditors, especially where the proof shows that no consideration was paid by his son who received the conveyance.

APPEAL FROM BOURBON CIRCUIT COURT.

November 12, 1881.

OPINION BY JUDGE PRYOR:

It was not an abuse of discretion on the part of the court to permit the filing of the amended petition, and without analyzing the testimony we do not well see how any other judgment could have been rendered on the facts than the one appealed from.

In a very short time after the judgment in the original case had been rendered, the whole estate of the debtor had passed out of his hands, or was so encumbered by heirs as to prevent the appellee from making his debt. This valuable estate had gone to near relatives, and large sums of money said to have been advanced that have in nowise been accounted for by the debtor; and the proof of the consideration alleged to have been paid by the son is by no means satisfactory.

The appeal by Hildreth did not preclude the party from attempting to secure his debt when the latter was attempting to dispose of his property to avoid payment; and besides, the amendment shows a return of no property found on the execution issued upon the judgment after it had been affirmed by this court.

Jasper Hildreth had burdened his estate by becoming bound as the surety for others, and doubtless thought it proper to secure something from the wreck, when seeing his estate applied to pay that for which he had received no consideration. Such astions, however, the law cannot sanction, and the judgment must be *affirmed.*

Prall & Dickson, Russell Mann, for appellants.

G. C. Lockhart, for appellee.

R. H. GOODPASTER *v.* J. H. RICHART ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—392.]

Petition on Note.

A petition to collect a note must contain an allegation showing that the defendant promised to pay. A promise must be alleged in the petition to make it good, and the execution of the note sued on will not obviate the necessity of setting out the undertaking, promise or agreement.

APPEAL FROM BATH CIRCUIT COURT.

November 12, 1881.

OPINION BY JUDGE HARGIS:

There is no allegation in the petition that the defendant promised, agreed, covenated or undertook to pay the sum stated in the note sued on, or any sum; and no facts are stated from which an express promise is reasonably inferable. The consideration of the note is stated in the petition at some length, but the statement of the consideration does not amount to an allegation that the defendant promised or agreed to pay it.

It has been held explicitly by this court in *Huffaker v. National Bank of Monticello,* 12 Bush (Ky.) 287, that "Under our Code of Practice a promise or agreement must be averred to make the petition good, and the exhibition of the note sued on

will not obviate the necessity of setting out the undertaking, promise or agreement." The demurrer to the petition ought therefore to have been sustained.

There was no error in disregarding the protection papers, as they only protect defendant from arrest, and their mere exhibition does not authorize a stay of proceedings in a state court, and especially where the time has expired for presenting and filing a petition for a final discharge in bankruptcy, the presumption being, in the absence of an explanation, that the discharge was denied.

There is no other error in the proceedings. Wherefore the judgment is *reversed* and cause remanded with directions to sustain the demurrer, with leave to plaintiff to answer, and for further proper proceedings.

J. J. Cornelison, for appellant.

Reid & Young, for appellees.

H. GRAY'S EXRS. ET AL. *v.* WM. M. PATTON'S ADMR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—393.]

Revivor of Action and Judgment.

The proceeding to revive an action is by order of court or on motion, and the proceeding to revive a judgment is by rule and by action under the code.

Recovery of Money Paid on Erroneous Judgment.

Where there is an appeal from a judgment decreeing plaintiff's lien as prior to that of a defendant, and during the pendency of the appeal the receiver of the property pays money to such plaintiff in accordance to the judgment and the judgment is reversed on appeal and the lien of the defendant held prior, the defendant may file his cross-bill for restitution of the money so paid under an erroneous judgment, and for revivor, when the plaintiff has died and an administrator has been appointed; and a demurrer will not lie to the bill because it does not show how much was collected by the decedent or his representative.

APPEAL FROM BOYD CIRCUIT COURT.

November 12, 1881.

OPINION BY JUDGE HINES:

Upon a former appeal, this court decided that the appellants'

mortgage lien was prior to the lien of appellees under their attachment, and reversed the cause with directions to render a judgment conforming to this opinion. *Gray's Admr. v. Patton's Admr.*, 13 Bush (Ky.) 625.

After the judgment was rendered in the court below, giving appellees the priority, and before its reversal, Wm. M. Patton received, according to the receiver's report, a considerable sum which arose from the sale of the mortgaged property, the priority to which was determined in this court as stated. He subsequently died, and the appellee, Geo. B. Patton, was appointed administrator of his estate, and the cause was regularly revived against him before the reversal of said judgment.

On the return of the cause the appellants had it redocketed, and filed their affidavit, reciting, in substance, what had been said with reference to the appeal and reversal, and asking for a rule against the administrator, Geo. B. Patton, whom they alleged had collected a portion of the proceeds of the mortgaged property, but how much they could not state, because the receiver had not made a full report, and asked a rule, which was awarded against said administrator, to show cause why he should not make restitution of the money which the receiver had paid to him out of that arising from sales of the mortgaged property.

On motion of the administrator, Patton, the rule was quashed and appellant excepted, and then filed a supplemental answer and cross-petition alleging the receipt by Wm. M. Patton in his lifetime, and by his administrator after his death, of part of the money produced by the sale of the mortgaged property under the erroneous judgment before its reversal, and praying that the administrator be compelled to disclose the amount he had received.

No demand having been made of the administrator on his motion the pleading was dismissed for that cause, and appellants excepted and have appealed from that judgment and the order discharging their rule. No demand was necessary, as the parties were before the court when the cause of action arose out of the state of facts over which the chancellor has complete jurisdiction and power to grant and enforce relief in behalf of those interested. The proceeds of the mortgaged property is in the custody of the law and under the chancellor's control. *Kane v. Pilcher*, 7 B. Mon. (Ky.) 651.

The revivor of an action and the revivor of a judgment are procured by different modes of proceedings. In the former the proceeding is by order of court or on motion; in the latter it is by rule, and possibly by action under the new code and certainly by action under the old code.

In the case cited of *Curry's Admr. v. Bryant's Admr.*, 7 Bush (Ky.) 301, an ordinary action was brought to revive a judgment, and therefore a demand was held to be necessary; but in the case before us the action has long since been revived, and the rule sought is for the purpose of compelling the administrator to do what any other litigant who obtains money pending the action under an erroneous judgment, which is reversed, would be compelled to do. As to the sum, if any, received by his intestate, an affidavit purging the claim which was made is all that is required from the appellants. *Matthews v. Jones' Admr.*, 2 Met. (Ky.) 254. Therefore, the reason upon which the rule was discharged, and the supplemental answer and cross-petition dismissed, was insufficient.

In the cases of *Kane v. Pilcher*, 7 B. Mon. (Ky.) 651, and *Gregory v. Litsey*, 9 B. Mon. (Ky.) 43, 48 Am. Dec. 415, this court held, in the first, that even after the action is out of court the chancellor has power to place the parties in the possession of money or property of which they have been deprived by his antecedent action in the case between them; and decided in both that a rule was a proper and efficient remedy to accomplish the end.

In the case of *Madison's Exrs. v. Wallace's Exrs.*, 2 Dana (Ky.) 61, it was decided that a cross-bill filed after a reversal and return of the cause, for restitution of money paid under an erroneous judgment, and for revivor, was an appropriate mode of proceeding, and that a demurrer would not lie to it because it did not show how much was collected by the decedent, or his representative or heir.

These authorities meet all the objections made by appellees to the mode and the substance of the proceedings adopted by appellants, to obtain restitution which they are entitled to, unless it be necessary to place it in the hands of the receiver for the purpose of distribution between creditors whose claims are superior or equal to those of appellants, or the appellees have some sufficient legal or equitable defense to restitution, which has arisen since the receipt of the money by the administrator or his

intestate; but no defenses that were or might have been pleaded before the rendition of the erroneous judgment can be relied on to avoid the restitution.

Although the proceedings adopted by appellants were both appropriate, and the court erred in dismissing either, yet they must on the return of the cause elect which one they will prosecute, and abandon the other. It would be well, however, to require the receiver to report the amount of money received by him, when and to whom he has paid it, and in what sums, in order that the chancellor may be informed as to the extent of the restitution, should it appear that any ought to be made. It being the duty of the chancellor to know or ascertain the condition of the funds under his control, the report of the receiver should not delay appellants in their proceedings for restitution, as it is the appellees' duty to disclose what may have come to their hands when asked to do so by rule or a proper bill.

Wherefore the judgments are *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

E. F. Dulin, William Lindsay, for appellants.

K. F. Pritchard, A. Duvall, for appellees.

T. J. BLACK ET AL. *v.* SALLIE A. BLACK ET AL.

Partition of Real Estate.

The court in a partition of real estate has no power to change the title of the interested parties or to qualify or subtract from their tenures.

APPEAL FROM BRACKEN COURT OF COMMON PLEAS.

November 12, 1881.

OPINION BY JUDGE HARGIS:

Mrs. Black's dowable interest was more valuable than a child's share, and without any consideration she gave her written consent to a division in which she was to receive only a child's portion. There were several infant heirs who could not be bound by such a division, as they were entitled to an absolute fee, not only in the shares they might receive in the present division, but

also in the shares that they would be entitled to in the portion allotted to the widow at her death.

Their title was absolute in the whole of the estate, subject alone to the right of the widow to use one-third thereof for her life-time, and the court had no legal power in a mere division to qualify or subtract from their tenure.

Mrs. Black, at the time she was applied to by one of the heirs, who subsequently became the purchaser, to sign the written consent to take a child's part, was in deep sorrow and mourning for the loss of her husband, who had been dead for less than two months. The purchaser and heir who participated in the matter of obtaining her signature parted with no money for his purchase and did not change his condition, so far as the record shows, to meet the supposed obligation he was under to pay for the land.

Under these circumstances we do not think the chancellor erred in setting the sale aside and ordering a division of the land, which from its nature and the description given of it is certainly susceptible of partition.

It is plain that "ten-ninths" were used, in the order of division, by mistake, which was caused by the fact that one of the children had died and left her portion to another, who thus became entitled to two shares instead of one share. This mistake may be rectified by the report of the commissioners of division, but if they do not correct it the question can be properly raised before the confirmation of their report.

Judgment *affirmed.*

Hallam & Perkins, for appellants.

B. G. Willis, for appellees.

ANNIE DUTLINGER ET AL. *v.* R. D. SALMONS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—395.]

Claims of Creditors of Husband as Against Wife.

Parol contracts between the husband and wife as to the personalty of the wife in his possession and under his control will not be permitted to interfere with the claims of creditors of the husband.

APPEAL FROM SIMPSON CIRCUIT COURT.

November 15, 1881.

OPINION BY JUDGE PRYOR:

This case is unlike that of Campbell *v. Galbreath,* 12 Bush (Ky.) 459. There the husband had never reduced the money of the wife to his possession, but on the contrary executed to her a mortgage to secure it for her separate use. Suppose in that case, as in this, the husband had collected the money and paid it to a creditor or invested it for his own use; it is evident that as between the creditor of the husband and the wife of the debtor the latter would have no equity. Parol contracts as between the husband and wife as to the wife's personalty in his possession and under his control will not be permitted to interfere with the claims of creditors. In this case the money belonged originally to his wife, or she inherited it from her deceased child. The husband had it in his possession and invested it in the firm of Salmons & Co. as his own. There is no pretense that it was paid for the house and lot in controversy, or that the firm of Salmons & Co. has ever received one dollar for this property, but that the whole amount of the money has been lost by the investment made in the partnership. It is unreasonable to suppose that a check would be sent by the husband to Salmons, or to Salmons & Co. in his own name, for this money, and used as a part of the firm capital, if, as appellants now insist, it was for the purchase of the house and lot. Appellants took possession of the house and lot belonging to the firm, and although purchased, as is alleged, for the wife, no written evidence of the contract was ever entered into, and the other partners are entirely ignorant of the existence of any agreement between the wife and husband. The firm was charged for shrubbery set out on the premises, and other improvements made, and still it is claimed that the property belonged to the wife.

The payment of the taxes may have been made, and the firm may have agreed to let Salmon have the property at a fixed price; still this did not vest his wife with any title to the property so as to defeat the claim for the purchase money, even if such a contract had been made. The husband may have practiced a fraud on his wife, and the facts of the record conduce to show this and nothing more; but it is too late after he has used this money for his own purposes for the wife to assert her claim as against his creditors, either for the house and lot or the money invested in

the firm by her husband. The firm's liabilities, as well as her husband's indebtedness, must be first discharged.

Judgment *affirmed.*

C. W. Milliken, for appellants.

Walker & Walker, for appellees.

W. H. ARNOLD v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—394.]

Impeachment of Witness.

Before a witness can be impeached by proof of statements made by him out of court contrary to those made in court, he must first be asked if he had made such statements to or in the presence of witnesses at the time and place referred to by them, and where the question is not asked of him it is error to permit the impeaching witness to state what the witness said out of court.

APPEAL FROM GARRARD CIRCUIT COURT.

November 15, 1881.

OPINION BY JUDGE HINES:

As has been frequently decided by this court, misconduct on the part of the jury made to appear on motion for a new trial is not the subject of reversal on appeal. The court below, however, erred in permitting Austin and John S. Arnold to state what the witness, Loyd, said, for the purpose of contradicting him, when Loyd had not been asked if he had made such statements to these witnesses or in their presence at the time and place referred to by them. Loyd was given no opportunity to deny or explain such statements. This was clearly error, and under the circumstances of this case as clearly prejudicial to the accused, because the introduction of such testimony tended to destroy the credibility of Loyd, who was a material witness for the accused.

The court also erred to the prejudice of the accused in permitting the witnesses to state that Loyd told them that he had Boyle under arrest at the time of the shooting. As to whether he was under arrest was a conclusion of law, and not the statement of a material fact in reference to which the witness could be contradicted, and in such cases when the witness states that he did not make such statements he can not be contradicted.

While some of the instructions are not as clear as they might have been made to the understanding of the jury by reason of the repetitions therein, we see no valid objection to any except the 9th. That instruction is erroneous because it gives undue prominence to a certain part of the evidence. The whole of the evidence ought to have been left to be weighed by the jury without direct or indirect interference by the court.

Judgment *reversed* and cause remanded with directions to grant appellant a new trial.

W. O. Bradley, George Denny, for appellant.

P. W. Hardin, for appellee.

COMMONWEALTH *v.* J. W. SIMRALL.

[Abstract Kentucky Law Reporter, Vol. 3—395.]

Criminal Law—Sale of Liquors.

It is no offense either at common law or under the statute to sell whisky in any quantity without license, unless the person so selling is a merchant or unless the liquor is sold to be drunk upon the premises or adjacent thereto.

Indictment for Creating a Nuisance.

It is an offense to rent a house for the use and purpose of creating a nuisance, but to make the indictment good it must set forth facts constituting such an offense. It is not enough to charge that the accused knowingly and wilfully rented the house for the sale of vinous and spirituous liquors, and for the purpose of erecting a tippling house where such liquors were to be sold, the accused having no license therefor, if no charge is made that such liquor was sold to be drunk on the premises or adjacent thereto and no charge is made that the person to whom the house was rented was a merchant.

APPEAL FROM BOYLE CIRCUIT COURT.

November 15, 1881.

OPINION BY JUDGE HINES:

The indictment here is for renting a house for the use and purpose of creating a nuisance, which is an offense at common law. *Cheek v. Commonwealth, 79* Ky. 359, 2 Ky. L. 339. But the specifications in the indictment do not set forth facts constitut-

ing such an offense. The specifications, in substance, are that appellee "knowingly and wilfully rented the house for the sale of vinous and spirituous liquors, and for the purpose of erecting a tippling house, where vinous and spirituous liquors were to be sold, the person so renting having no license therefor." There is no charge that the person to whom the premises were rented was a merchant, or that liquor was to be sold or was sold to be drunk upon the premises or adjacent thereto. As decided by this court in *Commonwealth v. Wheeler*, 79 Ky. 284, 2 Ky. L. 199, it is no offense either at common law or under the statute to sell whisky in any quantity without license unless the person so selling is a merchant, or unless the liquor is sold to be drunk upon the premises or adjacent thereto.

Judgment *affirmed.*

P. W. Hardin, for appellant.

Durham & Jacobs, for appellee.

COMMONWEALTH *v.* JOE SEARLS.

[Abstract Kentucky Law Reporter, Vol. 3—394.]

Criminal Law—Indictment.

An indictment does not charge two offenses when it charges the accused with having cut and carried away a certain number of trees. This constitutes but one offense.

APPEAL FROM MARSHALL CIRCUIT COURT.

November 15, 1881.

OPINION BY JUDGE HINES:

This indictment does not charge two offenses, as appears to have been the view of the court below. The charge is of taking and carrying away personal property, and the specification is that appellee cut and carried away a certain number of trees. Both the cutting and carrying away are denounced by the statute, and constitute but one offense under Gen. Stat. (1879), Ch. 29, Art. 28, § 7.

Wherefore the judgment is *reversed* and cause remanded.

P. W. Hardin, for appellant.

Gilbert & Reid, for appellee.

PHIL BELL *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—395.]

Criminal Law—Fair Trial.

The Court of Appeals will not reverse for any error of law unless it appears from the record that the accused has been prejudiced in his substantial rights.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 15, 1881.

OPINION BY JUDGE HINES:

The complaint on this appeal seems to be that appellant was tried at the term during which the indictment was returned when there had been no examining trial, and the accused was not in custody on the charge embraced in the indictment. A continuance of the case was asked upon these grounds, but there was no intimation to the court that appellant had any defense to present, or that he would in any respect be in a better attitude to make defense at the next term of the court. When fundamental rights are not involved, such as trial by jury, to be confronted with the witnesses against him and to be represented by counsel, this court will not reverse for any error of law unless it appears from the record that the accused has been prejudiced in his substantial rights. Here the accused, as shown by the record, was tried by an impartial jury, was represented by counsel, and was confronted by the witness upon whose testimony he was convicted. *Rutherford v. Commonwealth,* 78 Ky. 639.

Judgment *affirmed.*

W. N. Sweeney & Sons, for appellant.

P. W. Hardin, for appellee.

MONTEREY & NEW COLUMBUS TPK. CO. *v.* F. W. DAVIS.

[Abstract Kentucky Law Reporter, Vol. 3—465.]

Injunction Against Execution in Quarterly Court.

Where an appeal in a civil suit is erroneously taken from a justice of the peace to the quarterly court, and this court has no jurisdiction of the cause but renders a judgment for the plaintiff, neither the

failure of the defendant to object nor even the consent of both parties could give the court authority to enter a judgment, and execution on such a void judgment may be enjoined.

APPEAL FROM OWEN CIRCUIT COURT.

November 17, 1881.

OPINION BY JUDGE LEWIS:

In 1878, upon the trial of an action in the court of a justice of the peace for the recovery of $100, judgment was for the defendant in the action. But an appeal being taken to the quarterly court, the plaintiff in the action recovered judgment for the amount of his debt. From that judgment an appeal was taken to the Owen Circuit Court, which was by that court dismissed. Subsequently an execution was issued on the judgment of the quarterly court, and this action was brought in that court to enjoin proceedings under it. Upon the trial judgment was rendered perpetuating the injunction, and upon appeal to the circuit court the judgment of the quarterly court was affirmed. The case is before this court by appeal from the judgment of the circuit court.

The only question to be considered is whether the quarterly court had jurisdiction of the subject of the action in which the judgment enjoined was rendered. By the fourth section of an act of the General Assembly entitled "An act to regulate the civil jurisdiction of justices of the peace, police judges, and quarterly courts, and the appellate jurisdiction of circuit courts from judgments, and to authorize the quarterly courts to appoint clerks," 1 Acts 1876, Ch. 998, it is expressly provided that "In all cases where the matter in controversy is of the value of ten dollars or more, exclusive of interest and costs, either party may have an appeal to the circuit court * * *; but no appeal shall be taken from the judgment of a justice of the peace or police judge to the quarterly court."

By Civ. Code, § 92, sub-sec. 4, it is provided that the failure to answer is not a waiver of the objection to the jurisdiction of a court of the subject of the action. The quarterly court not having jurisdiction of the subject of the action in this case, but being in express terms denied the right to exercise it, neither the

failure to object, nor even consent of the parties, rendered the judgment valid.

The case of *Hughes' Admr. v. Hardesty,* 13 Bush (Ky.) 364, referred to by counsel, differs essentially from this. In that case the circuit and quarterly courts, under the provision of a special act applicable to certain counties named, both had jurisdiction of the subject of the action, and it was decided that the objection to the jurisdiction because the appeal had been brought directly from the justices' court to the circuit court, instead of being brought there from the quarterly court, was waived by a consent of the parties to a trial in the circuit court.

In this case the law required the appeal to be taken directly from the justices' court to the circuit court, and expressly prohibited it being taken to the quarterly court at all.

Wherefore the judgment of the court below is ***affirmed.***

Hallam & Gordon, for appellant.

T. D. Theobald, for appellee.

WM. M. COMBS ET AL. *v.* JOHN A. WALLACE.

[Kentucky Law Reporter, Vol. 3—384.]

Amendment of Pleadings.

The civil code authorizes proceedings as well as pleadings to be amended in furtherance of justice.

Abandonment of Cause.

Although a trial did not occur for several years after a motion was made to recover upon a claimant's bond, still, as long as the case was kept upon the docket, it could not be considered abandoned until an order of court was made to that effect.

Measure of Recovery.

In a proceeding by a plaintiff in execution to recover upon a claimant's bond, he was only entitled to recover the amount at which the property was appraised and ten per cent. thereon, and it was error in the court to render judgment for a greater sum.

APPEAL FROM POWELL CIRCUIT COURT.

November 19, 1881.

OPINION BY JUDGE LEWIS:

This is a proceeding by the plaintiff in execution to recover

upon a claimant's bond. The notice was given and motion made at the March term, 1869, of the circuit court, but the case was not tried until the March term, 1879, when verdict and judgment were rendered for the plaintiff for $225, the property being appraised at the time the bond was given at $175. The court having overruled the motion for a new trial, the defendant in the motion appeals to this court.

The first error complained of is that the court permitted the notice to be amended. The Civil Code expressly authorizes proceedings, as well as pleadings, to be amended in furtherance of justice; and as it does not appear the defendant was either surprised or prejudiced thereby, we can not say the court below abused a sound discretion in permitting the notice to be amended.

The plaintiff in the motion was not required to state in the notice or show upon the trial that he sustained any loss by reason of the execution of the claimant's bond, or that he could not have collected his debt otherwise than by a sale of the property claimed. If the property was subject to his execution when the levy was made, he was entitled to judgment, unless the debt, interest and cost, were shown by the defendant to have been paid off and satisfied previous to the trial.

Although the trial did not occur for several years after the motion was made, still, as long as the case was kept upon the docket, it could not be considered abandoned or discontinued until an order of court was made to that effect.

We perceive no error in the instructions given. Myers' Code (1867), § 716, requires the court to direct a jury empanneled, and such issues tried as it may prescribe, and also direct which party shall be considered plaintiff in the issue. Two issues were submitted to the jury. The first was, in substance, whether the property was subject to the execution, and the second was as to the value of the property. Though the jury did not, in terms, respond to either issue, but rendered only a general verdict in favor of the plaintiff for $225, this would not be a reversible error if the judgment of the court had been for the amount at which the property was appraised, and ten per cent. thereon. But, as the plaintiff in the notices stated he would move for judgment for the sum fixed by the appraisers, and ten per cent. thereon, it was error in the court to render judgment for a greater amount.

For that error the judgment of the court below is *reversed,* and cause remanded with directions to grant a new trial, and for other proceedings consistent with this opinion.

J. B. White, for appellants.

WM. R. BALL *v.* WILKERSON PURSEFULL ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—396.]

Description in Conveyances.

The natural objects mentioned in a description in a deed or executory contract will control courses and distances.

Conveyance of a Mill.

The grant of a mill carries with it the use of the water by which it is run, the flood gates, dam and all things necessary for its use, as well as the land on which it stands and that over which it projects.

APPEAL FROM LINCOLN CIRCUIT COURT.

November 22, 1881.

OPINION BY JUDGE HARGIS:

Hutchison sold a tract of land to the appellant, Ball, which is described in the deed to him in this language: "A certain tract of land, lying in Lincoln county, Kentucky, known as the Dudderar's mill seat, together with the dam and all its appurtenances, containing about twenty acres, more or less, commencing at a double sycamore tree on the river, thence with Hutchison's line round to the river at an elm tree, thence up the river to the beginning."

Afterwards appellant sold it to the appellees and executed to them a writing, which is in form a deed, but was intended by the parties as an executory contract. He instituted suit against them for the remainder of the purchase money, and they answered alleging that the written contract embraces more land than the appellant had title to, and sought its rescission on equitable terms.

It appears from the written contract between them that the land is described as a certain tract of land, lying in the county of Lincoln, Kentucky, on the waters of Dix river, known as the H. Dudderar mill and dam and its appurtenances, containing about

twenty acres, more or less, "beginning at a double sycamore tree on the river near a branch, thence with the meanders of said branch to John Francis' line, thence with said Francis' line around to the river to an elm tree, thence crossing said river in a north direction to a mulberry tree, a corner to said mill tract and Sargent, thence up said river to the beginning."

It will be seen that the executory contract was intended to convey the mill tract, mill dam and its appurtenances, which was the purpose of Hutchison in his deed to appellant. According to all the authorities of this court, the natural objects mentioned in a deed will control courses and distances.

The clause in the description set forth in Hutchison's deed to appellant, which says the land is known as the Dudderar's mill seat, together with the dam and all its appurtenances, when properly construed, locates the line from the elm tree to the beginning so as to include the south end of the mill dam resting on the opposite side of the river from the mill, because that description not only names and describes a natural object, but it shows that the mill and dam combined was the main inducement to the purchaser; and it is impossible to run the line along the bank on which the mill is located without destroying the manifest intention of the parties and defeating the object of both seller and buyer. The court erred in prescribing the boundary so as to cut the mill in two and leave only a fragment of it within the lines of the deed, as the course and distance called for must necessarily include the mill and appurtenances, which are specifically mentioned and conveyed.

The grant of a mill carries with it the use of the water by which it is worked, the flood gates, dam, and all things necessary for its use, as well as the soil and freehold of the land on which it stands and that over which it projects, and such a grant may embrace land adjoining the mill which is necessary for its use and which is actually used with it at the time of the grant. These principles are well settled, and demonstrate the unreasonable and destructive tendency of the construction placed by the court below on Hutchison's deed to appellant. See Washburn on Real Property (4th Ed.), Ch. 5, § 4, Subsecs. 24 and 26, and authorities cited.

With that deed properly construed, even in the absence of any allegation of mistake, the deficit would not exceed three acres,

which is not worth more than $25, and may be separated from the mill tract so as not to depreciate the intrinsic value of the mill, dam and appurtenances. The deficit is too small to authorize a rescission, in view of the fact that the purchase of the mill appears to have been the main inducement to the bargain.

Besides this, pending the suit, one of the appellees, although in undisturbed possession under the purchase from appellant, bought Hutchison's supposed claim, founded on the inaccurate description in the deed, for the sum of $25, balance of the price of a spotted horse, and received from him a deed for the deficit. This purchase should have been held to enure to the benefit of the appellant, because Hutchison's claim was fraudulent and asserted by him when he knew there was a mistake in drawing the deed, which is clearly shown by the evidence, and when he intended by the deed to convey to appellant the Dudderar mill tract of land supposed to contain twenty acres.

The deed from Hutchison to the appellees was so drawn as to leave the mill and the whole of the dam out of it, and it contradicts the boundary which they sought to have established by the erroneous judgment in their favor. As the appellant did not plead the mistake, although he proved it, before submission of the cause, he should be required to allow appellees' credit for the sum they paid Hutchison in buying his fraudulent claim which appellant's laches gave him an opportunity to assert.

Wherefore the judgment is *reversed* and cause remanded for judgment in conformity herewith.

Hill &Alcorn, for appellant.

Welsh & Saufley, for appellees.

[Cited, *Kentucky Land &c. Co. v. Crabtree,* 113 Ky. 922, 24 Ky. L. 743, 70 S. W. 31.]

WILLIAM MAYFIELD *v.* R. J. BARBOUR.

[Abstract Kentucky Law Reporter, Vol. 3—397.]

Partnership Creditors.

The creditors of a partnership have no lien on partnership assets except through a partner, and the denial of the right of one partner to appropriate partnership assets to his own use is for the protection of the copartners and not of the creditors; therefore, where each member of the firm consents to the appropriation, it is as binding as if applied to a partnership debt.

APPEAL FROM LEWIS CIRCUIT COURT.

November 22, 1881.

OPINION BY JUDGE PRYOR:

It is plain that the court below erred in adjudging that the firm could not consent through each individual member to the disposition of a part of its assets, for the benefit alone of one of its members by paying his individual debts. The creditors of a partnership have no lien on the firm assets except through the partner, and the denial of the right of one partner to appropriate partnership assets to his individual use is for the protection of the copartners, and not for firm creditors, and therefore where each individual member of the firm consents to the appropriation, it is as binding as if applied to a partnership debt. In this case the proof, except that of Barbour, is conclusive of the fact that the latter consented to a transfer of the notes, and the right and title passed to the assignee, and if not, assigned to the holder to whom they were delivered in payment of the debt. *Jones v. Lusk,* 2 Met. (Ky.) 356.

Judgment *reversed* and cause remanded for proceedings consistent with this opinion.

G. T. Halbert, for appellant.

J. R. Garland, for appellee.

[Cited, *Merkley v. Grand Switch Roller Mills Co., Assignee,* 28 Ky. L. 1010, 90 S. W. 1059.]

MARGARET A. BEALL *v.* DAVID P. BETHEL ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—397.]

Consideration for a Note.

Where a note originally given for the purchase of moonshine whisky is afterwards partly paid and then assigned, and when the assignee, who is an innocent purchaser, agrees in compromise to take a new note properly secured for a less sum than the face value and the old note is surrendered and the new secured note is made payable to assignee's wife, the compromise and new agreement constitute a new consideration sufficient to support the promise and said note is valid.

APPEAL FROM HARDIN CIRCUIT COURT.

November 22, 1881.

OPINION BY JUDGE PRYOR:

The obligor in the note pleaded that the original note was executed by Bethel to one Gaddie for moonshine whisky, and that payment had been made on it reducing it to $168; that no license had been obtained authorizing its sale by Gaddie, and being in fraud of the revenue laws of the country the note was void. It seems from the proof that Gaddie delivered to Bethel, the principal obligor, three barrels of whisky, upon which no government tax had been paid, and that two of the barrels were stolen, and the third barrel sold by Bethel; and for the money received on the sale of the whisky Bethel executed the note originally for $268. After it had been reduced by payments to $168 the note was transferred to A. T. Beall. Beall was about to institute an action upon it and by way of compromise agreed to take Bethel's note, with surety for the sum of $100. The note in controversy was then given, and the note for $168 surrendered. The note was then assigned (the $100 note) to the wife of Beall, who brought this suit, she being authorized to act and trade as a feme sole by a judgment of the Louisville Chancery Court. Bethel, according to his plea, was as much guilty of fraud in the transaction as Gaddie, and whether he should be relieved as against a bona fide purchaser of this claim upon him, and to whom he had executed his note, is a question that might well arise in the case; but here a compromise is shown to have been made of the original claim assigned to Beall, and $68 of the amount due remitted, and the note only taken for $100. It is alleged that the husband of the appellee purchased the note, and when this compromise was made and a new agreement entered into it was a sufficient consideration to support the promise, and judgment should have been rendered for the plaintiff.

It is not pretended that the holders of the note were particeps criminis, but on the contrary the proof conduces to show that they were ignorant holders.

Conceding the defense to have been properly pleaded, and that is a matter of much doubt, as the averments are scarcely suffi-

cient to show a violation of the revenue laws, still the appellant was entitled to recover.

Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings consistent with this opinion.

W. H. Chelf, for appellant.

[Cited, *Kentucky Citizens' Building &c. Assn., Assignee, v. Daugherty,* 27 Ky. L. 342, 84 S. W. 1178, revd., 27 Ky. L. 759, 86 S. W. 705.]

DR. E. MASON'S ADMX. *v.* THOMAS E. MASON.

[Abstract Kentucky Law Reporter, Vol. 3—397.]

Statute of Limitations.

Where a devisee has refused to qualify, though appointed executor, and without administration takes the estate into his hands, he can not rely on the statute of limitations to defeat a claim of another legatee against him for his portion of said estate.

APPEAL FROM LOGAN CIRCUIT COURT.

November 22, 1881.

OPINION BY JUDGE LEWIS:

It is admitted that E. C. Mason, upon a settlement of his accounts as executor of George Mason, deceased, in 1866, had in his hands a balance of the legacy going to appellee. It also appears that D. A. Mason received, as devisee of her husband, E. C. Mason, estate more than sufficient to pay the amount due to the appellee. As there is not sufficient evidence to show it ever was paid over to him the only question for this court to consider is whether the recovery of it is now barred by limitation.

By Gen. Stat. (1879), Ch. 71, Art. 4, § 7, relied upon by counsel, it is provided that "No action upon a cause which accrued against a deceased person in his life-time shall, when his estate has been distributed and divided, be brought against his heirs or devisees, jointly with his personal representative, after the expiration of seven years from his death."

In this case there does not appear to have been a personal representative who qualified; nor has the estate of E. C. Mason, deceased, been distributed or divided in the meaning of the law;

nor is the action against the heir or devisee jointly with a personal representative of the estate. Consequently the section referred to does not apply.

If, as is provided in § 6, same article, a personal representative who has qualified can not plead limitation to an action brought against him after the expiration of seven years from the date of his qualification, unless he has, before the action is brought, settled his accounts and made distribution of the whole assets in his hands, certainly a devisee who has refused to qualify, though appointed executor, and without administration taken the estate into his own hands, should not be permitted to do so. To allow the plea of limitations to avail in this case would be giving preference to those who evade the law.

Wherefore the judgment is *affirmed.*

J. H. Bowder, R. S. Bevier, W. F. Browder, for appellant.

A. G. Rhea, for appellee.

NORTHERN BANK OF KENTUCKY *v.* HENRY BELL ET AL.

Duty of a Bank Director.

The director of a bank is only in a limited sense a trustee for the bank, its stockholders and those dealing with it, and where he has a claim of his own against the bank he is under no obligation to postpone his claim to that of the bank and is as much entitled to the reward of diligence as any other creditor.

Attachment.

The code expressly requires that the affidavit for an attachment shall state that the claim is just, and the omission to state is fatal to the efficacy of the attachment.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 26, 1881.

OPINION BY JUDGE HINES:

A director of a bank is only in a limited sense a trustee for the bank, for the stockholders and those dealing with it. There is no trust where there is no duty, and in the discharge of his duty he is held only to good faith and fair dealing in the execution of the trust. In this instance it is not alleged, nor does it appear, that appellee had any duty to perform in reference to the suit

instituted by the bank, or that he in fact knew that the suit had been instituted; but even if he knew of the suit by the bank his claim would not be postponed to that of the bank unless in the discharge of a duty as director he had instituted the proceedings or directed their institution, and the defect in the proceedings was the result of bad faith on his part in order to give preference to his own claim, or was the result of negligence so gross as to evidence fraud or bad faith. He was under no obligation to postpone his claim to that of the bank, and was as much entitled to the reward of diligence as any other creditor.

Civil Code (1876), Ch. 3, Art. 1, § 196, expressly requires that the affidavit for an attachment shall state that the claim is just; and we have repeatedly held that its omission is fatal to the efficacy of the attachment, and that a statement in the affidavit of the amount the affiant believes he ought to recover does not cure the defect. We see no reason for changing these rulings. The legislature had the unquestioned right to prescribe the conditions upon which an attachment should be effective, and on a failure to comply with such conditions or requirements, as we have frequently held, the attaching creditor takes nothing by his attachment as against one whose rights intervene before an amendment of the affidavit.

The transfer of the case of the appellees to the court in which the action by the bank was pending, and the consideration of the two cases together, is expressly authorized by the code; and on submission it was the duty of the court, without a motion to discharge the attachment of the bank, to determine from the face of the papers who was entitled to preference in the distribution of the fund which had been brought into court by these two actions.

Judgment *affirmed.*

M. C. Johnson, for appellant.

Buckner & Allen, Breckinridge & Shelby, for appellees.

MICHAEL MCKINNEY ET AL. *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—465.]

Jury in Forfeited Recognizance Case.

In a trial to recover on a forfeited recognizance the defendant is entitled to demand that a jury try the issue presented.

Delivery of Prisoner by His Bail.

To exonerate a bail his delivery of the prisoner to the jailer must be such as to give the jailer dominion over the accused and this can ordinarily only be done by putting the accused in the jail.

APPEAL FROM JACKSON CIRCUIT COURT.

November 26, 1881.

OPINION BY JUDGE HINES:

This was a proceeding upon a forfeited recognizance. To the rule issued against appellants, they, in substance, respond that they delivered the person for whom they were bail to the jailer of the county in which the proceedings were pending, and an issue being formed upon this, and the court refusing an application of appellants to allow a jury, a judgment was rendered against them, from which they appeal.

The Crim. Code (1876), § 86, provides that the bail may obtain from the clerk a certified copy of the bail bond, and surrender the accused with a copy of the bond to the jailer, and upon the jailer giving a written acknowledgment of the surrender the bail shall be exonerated. Section 94, Sub-sec. 3, regulating proceedings upon forfeited bail bonds, provides that no pleadings shall be required of the commonwealth until after the service of summons; then that "all subsequent proceedings shall be the same, as in ordinary civil actions."

The Civ. Code (1876), § 312, subsec. 2, reads: "Issues of fact in ordinary actions, except for injuries to person or character, shall be tried by the court, unless a jury trial be demanded by a party." It is clear that under these provisions appellants on demand, were entitled to a jury to try the issue presented. It was the province of the jury to find the facts, and the duty of the court to instruct them as to what constitutes a delivery in law. A delivery to the jailor so as to exonerate the bail must be such as to

give the jailer dominion over the accused, and this can ordinarily be done only by putting the accused in the apartment of the jail where prisoners are usually confined, and in doing this it is the duty of the bail to assist the jailer. Until the accused is in some way physically restrained of his liberty there is no such delivery as is contemplated by the statute. The receipt of the jailer is not essential to an exoneration of the bail, but it is the best evidence of the delivery and acceptance by the jailer, and might be given in evidence against him in a proceeding for suffering an escape.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

John L. Scott, for appellants.

P. W. Hardin, for appellee.

MADISON TODD *v.* D. F. TODD ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—398.]

Burden of Proof of Payment.

One who purchases land by a contract in which he agrees to pay to the vendor the purchase-price must assume the burden of proving payment.

Evidence of Payment.

Where the language in a contract of purchase of land is, "I am to pay," it clearly negatives the idea that the payment had been previously made; and without allegation or proof of fraud or mistake in its execution, the promise must be treated as relating to a future payment of such purchase-money and is inconsistent with an alleged settlement and payment before the execution of the contract.

APPEAL FROM MADISON CIRCUIT COURT.

November 26, 1881.

OPINION BY JUDGE HARGIS:

The appellant, Madison Todd, held the executory contract with the appellees for the 300 acres of land more than ten years without suit to enforce it. They rented and listed the land for taxes during the greater part of that time, and the appellee, D. F. Todd, shows his ability to have discharged to a considerable extent the purchase-money and his payment to the appellant, in

cash and whisky, of a sum which is not shown by the latter to have been appropriated to any other purpose than his reimbursement for sums paid by him on the land.

Appellant testified that the paper of February 5, 1868, was a forgery, and afterwards admitted that it was genuine. The paper contradicts the statement of himself and his son, Lindsay Todd, to the effect that the executory contract was delivered on the day of its execution, and it also contains the agreement to pay D. F. Todd $30 per acre for said 300 acres of land. The language of the promise is, "I am to pay" and clearly negatives the idea that the payment had been previously made, and without allegation or proof of fraud or mistake in its execution the promise must be treated as relating to a future payment of the $9,000, which is wholly inconsistent with the alleged settlement and payment of that sum before the execution of the contract of January 7, 1868.

The agreement of D. F. Todd to acknowledge the receipt of the money at the time of making the deed as stated by the appellant in the paper of February 5, 1868, is, to some extent, obscure, because of its uselessness and failure to disclose the object of the parties, by its insertion; yet it is not inconsistent with appellant's promise to pay the consideration for the land subsequent to the date of that paper, which must be construed according to the ordinary rules of construction.

The two papers mentioned are inconsistent with each other, and the only solution of their disagreement in the light of the contradictory evidence is that the paper of January 7, 1868, with the acknowledgment of the receipt of the consideration for the land stated in it, was delivered to the appellant to enable him to hold the land against any claims of the government growing out of the violation of the revenue laws by D. F. Todd, and that the paper dated February 5, 1868, embracing a statement that the consideration was not paid, was delivered to the appellee, D. F. Todd, to protect him against the inconstancy of the appellant, should he undertake to claim the land under the paper held by him.

But whether we are right in this conjecture or not, by the execution of the paper of February 5, 1868, the appellant has placed upon himself the burden of proving payment by him of the consideration named in it. That paper, having been executed

last, controls the inconsistent expressions contained in the first; and the extraneous oral evidence of payment, not wholly satisfactory and entirely denied by the testimony introduced by appellees, is not sufficient to authorize this court to disturb the judgment.

Wherefore it is *affirmed.*

W. B. Smith, for appellant.

C. F. & A. R. Burnam, for appellees.

LEWIS H. MARTIN *v.* H. H. FERGUSON.

[Abstract Kentucky Law Reporter, Vol. 3—445.]

Instruction to the Jury.

Where the only issue submitted by the pleadings is as to whether the defendant in the action, subsequent to his discharge in bankruptcy, promised to pay the debt sued on, an instruction is erroneous which instructs the jury to find for the plaintiff upon the hypothesis that the promise made was to pay the debt when he was able, for under the averments of the petition it was incumbent on the plaintiff to have proved an express and unconditional promise to pay the debt. The promise pleaded being unconditional, the plaintiff was not entitled to a verdict upon the proof of a conditional promise.

APPEAL FROM WOODFORD CIRCUIT COURT.

November 29, 1881.

OPINION BY JUDGE LEWIS:

The court did not err in permitting the amended petition to be filed. But the plaintiff in the action having elected to strike from the pleading the statements of the petition, which were inconsistent with those contained in the amended petition, the only issue presented for trial was whether the defendant in the action, subsequent to his discharge in bankruptcy, promised to pay the debt sued on.

The promise alleged to have been made, and which is the foundation of the action, being absolute and unconditional, in order "To maintain his action in the form in which it was brought, it was incumbent on him to have proved an express and unconditional promise by the defendant to pay the debt. * * * If the defendant's promise was conditional, it should have been averred by the plaintiff in his declaration." *Egbert v. McMichael,* 9 B. Mon.

(Ky.) 44; *Walker's Exrs. v. Ogden,* 1 Dana (Ky.) 247; *Scouton v. Eislord,* 7 Johns. (N. Y.) 36.

It follows, therefore, that so much of the instruction given as directs the jury to find for the plaintiff, upon the hypothesis that the promise made was to pay the debt when he, the defendant, was able, is erroneous. Neither the pleading nor evidence authorized the instruction as it was given. The promise pleaded and relied on being unconditional, the plaintiff was not entitled to a verdict upon the proof of a conditional promise. Even if the conditional promise had been both pleaded and proved the instruction should not have been given in the absence of proof of the defendant's ability to pay the debt.

If the defendant's promise was to pay when able, his ability to do so is the essence of the promise, and it should be averred and proven. The jury should be satisfied by the facts proven at the trial that the debtor has property and means which enable him to pay the debt; otherwise no verdict or judgment can be rightfully rendered against him on such conditional promise. Such is the doctrine announced by the court in the cases of *Mason v. Hughart,* 9 B. Mon. (Ky.) 480, and *Eckler v. Galbraith,* 12 Bush (Ky.) 71, and we see no reason why it should not be adhered to.

Wherefore the judgment of the court below is *reversed* and the cause remanded with directions to award to appellant a new trial, and for other proceedings consistent with this opinion.

D. L. Thornton, for appellant.

Porter & Wallace, for appellee.

WILLIAM TAYLOR *v.* JOHN H. MCMILLION'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 3—465.]

Vendor's Lien on Real Estate.

In the conveyance of real estate when the vendor retains a lien for the purchase-money the fact that the note for such purchase-money has a surety upon it can make no difference; such fact does not discharge the lien.

APPEAL FROM MONROE CIRCUIT COURT.

November 29, 1881.

OPINION BY JUDGE PRYOR:

There was no error in the judgment below determining that the lien of the vendor, McMillion, was superior to that of the mortgagee. The note for the purchase-money was given and accepted by the appellee's intestate at the time the deed was executed and the lien retained, and the fact that the note has a surety upon it, and is described only as the note of the vendee in the conveyance made, can make no difference. It is the note of the vendee, Logan, and instead of being a waiver of the lien, the proof as well as the conveyance shows that it was the purpose of McMillion in taking the surety to make the security of the debt more certain. There is no evidence of any waiver or any intention to abandon the lien, but on the contrary, the whole transaction, being one, evidences a plain purpose on the part of the vendor to retain a lien. The proof also shows that the down timber purchased of the appellant, or rather his right to near 50 cords of it, was in no manner impaired, and the reason the appellant was prohibited from cutting it was that he attempted to remove timber that by the terms of the contract he had no right to remove.

The judgment below is *affirmed.*

W. A. Bullock, J. M. Busham, for appellant.

V. H. Grinstead, P. H. Leslie, for appellee.

COMMONWEALTH *v.* J. R. BARENTS.

[Abstract Kentucky Law Reporter, Vol. 3—466.]

Forfeiture When No Bond.

When there is no bond in the circuit court nor any minutes from an examining court filed in the circuit court, no forfeiture on a bond can be decreed.

APPEAL FROM CLINTON CIRCUIT COURT.

December 1, 1881.

OPINION BY JUDGE PRYOR:

The demurrer to the entire proceeding in this case was properly sustained for the reason, if no other, that the forfeiture was had when there was no bond in the circuit court, nor any minutes from

an examining court filed in the circuit court when the judgment was entered that a bail bond was executed.

It was a forfeiture by the court alone. No bond had been executed. *Morgan v. Commonwealth,* 12 Bush (Ky.) 84.

Judgment *affirmed.* Judge Lewis not sitting.

P. W. Hardin, S. M. Payton, for appellant.

Sandige & Craddock, for appellee.

S. ELLIOTT'S ADMR. *v.* S. H. BUSH ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—466.]

Administrator Collecting Rent.

While an administrator may not be authorized to collect rent on real estate of the intestate, and hence his bondsmen will not be liable on account thereof, if he does collect the rent he is liable for it. Rents so collected do not belong to a purchaser at administrator's sale. His right to collect the rent begins only when the sale is confirmed.

APPEAL FROM HARDIN CIRCUIT COURT.

December 1, 1881.

OPINION BY JUDGE PRYOR:

The appellees were not entitled to the rents collected by the administrator or that fell due prior to the confirmation of the sale. The administrator may have had no right to rent the real estate in that capacity, but his response to the rule states that he was also guardian for the infant in whom was vested the legal title. Suppose, however, he had no legal power to rent; still, if he did so and it was necessary that this part of the estate should be applied to the payment of debts, the appellant would be liable for the rent collected and could be required to pay it to creditors under the order of the chancellor. His sureties may not be liable on his bond; yet he can not escape liability. He held this rent either for creditors or the heir at law, more properly for the heir at law. The purchasers obtained the possession after the confirmation, and while their title related back to the purchase from the act of confirmation it did not vest them with the possession or the right of possession prior to that time. We do not say that the chancellor for extraordinary reasons, such as to secure the safety of the property, could not

place the purchaser at once in possession; but this was not done and ought not to be done except in a prescribed state of case. Then the purchaser would hold same in the capacity of a receiver, rather than as purchaser, up to the date of confirmation.

Judgment *reversed* and cause remanded.

Wilson & Hobson, for appellant.

S. H. Bush, for appellees.

[Cited, *German Bank v. Louisville,* 108 Ky. 377, 2 Ky. L. 9, 56 S. W. 504; *Norris v. Williams,* 23 Ky. L. 1497, 65 S. W. 439; *Vance v. Vance's Admr.,* 116 Ky. 520, 25 Ky. L. 741, 76 S. W. 370.]

GLAZEBROOK & BRO. *v.* JOHN D. BRANDON.

[Abstract Kentucky Law Reporter, Vol. 3—466.]

Sale of Equity of Redemption.

One who has a lien on land for his execution debt and the land is sold on his execution can not legally have a lien on the equity of redemption. The first sale exhausts his lien. To sell the equity of redemption it is necessary to make another levy, and where before he does so another creditor levies on the exemption he becomes prior in right to the execution plaintiff who caused the land to be first sold.

APPEAL FROM MONROE CIRCUIT COURT.

December 1, 1881.

OPINION BY JUDGE PRYOR:

We are inclined to concur with the court below in adjudging to the appellee a lien on the land for his execution debt, but this did not give him a lien on the equity of redemption. When the land was sold under his execution the lien was exhausted, and to sell the equity of the debtor it was necessary to make another levy. Before this was done the rights of another creditor intervened, who levied his execution, or had it levied, on the equity of redemption; and if the proceeding was regular this creditor was invested by his purchase with the right to redeem. This lien of the appellee was created prior to the amendment of the exemption laws enacted at the session 1879-80, and can not be enlarged so as to come within the provisions of that law, even if that law can be construed as giving the creditor a lien by his execution on the land first, and then on the equity of redemption. We see no objection to sub-

jecting it, however, unless the right has passed to the appellant. He should have been made a party defendant, if his levy is prior in date and otherwise proper, that is, on a valid judgment to which he has priority.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

John W. Compton, Lewis McQuown, for appellants.

W. S. Maxey, for appellee.

MATTHEW WADE *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—442.]

Recovery of Penalty—Sufficiency of Summons.

The same strictness of pleading is not required in a justice court as in the circuit court, and a summons or warrant is sufficient in such court if it commands the officer to summons the accused to appear in court on a named day, to answer the charge of having committed the offense, briefly describing the character of the offense, the object being to get the party accused before the court when he has violated the law.

APPEAL FROM MONROE CIRCUIT COURT.

December 1, 1881.

OPINION BY JUDGE PRYOR:

The appellant was tried before a justice of the peace and fined one hundred dollars for peddling without a license. The warrant or summons charges the appellant with the offense of peddling in Monroe county, Kentucky, alleging that "in August, 1879, he unlawfully peddled goods by then and there selling goods, wares and merchandise consisting of shoes, prints, sugar, coffee, and notions of all kinds, without a license so to do, contrary to the form of the statute."

The fine was imposed by a justice, and an appeal taken to the circuit court as authorized by the statute. There was a demurrer to the warrant, both in the justice's and circuit court, and the demurrer overruled. The facts clearly established the guilt of the accused, and the only question presented here or necessary to consider is, Is the warrant sufficient?

The same strictness of pleading is not required in a court of justice of the peace as in the circuit court. No written information or pleadings is required in prosecutions in justices' courts. The warrant of arrest or summons is issued on information given the justice, and the summons, if in a penal prosecution, merely commands the officer to summons the accused to appear in court on a named day to answer the charge of having committed the offense, briefly describing the character of the offense. The offense in this case is "peddling without license," and is sufficiently described in the warrant. The object is to get the party accused before the justice when he has violated the law, and when the justice has the jurisdiction no pleading is necessary. In this case the jurisdiction is expressly conferred by the statute, and the justice before whom the party is brought may proceed at once to the investigation of the charge, giving, of course, the parties before him such time as may be necessary to prepare for trial. See Crim. Code, §§ 310, 311, 330; Gen. Stat. (1879), Ch. 84.

Judgment *affirmed*. Judge Lewis not sitting.

Grinstead & Basham, for appellant.

W. A. Bullock, P. W. Hardin, for appellee.

[Cited, *Geo. H. Goodman Co. v Commonwealth,* 30 Ky. L. 519, 99 S. W. 252; *Bitzer v. Commonwealth,* 141 Ky. 58, 132 S. W. 179.]

LOUISVILLE & NASHVILLE R. Co. *v.* JOHN H. WILSON.

[Abstract Kentucky Law Reporter, Vol. 3—469.]

Answer Before Demurrer.

When a defendant answers a petition and the answer is not withdrawn, it is not error for the court to overrule the demurrer filed after the answer, for the answer cured the alleged defect in the petition.

Proof of Negligence.

When plaintiff's proof established the defendant's negligence and the defendant offered no proof, it is proper for the court to instruct the jury that negligence had been proven and to so find.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

December 3, 1881.

OPINION BY JUDGE HARGIS:

The evidence for appellee established negligence upon the appellant company, which failed to introduce any testimony. It admitted the contract of shipment, and while negligence is denied the failure of delivery is virtually confessed. In view of these facts the court properly instructed the jury that negligence had been proven, and to so find.

As the evidence conduced strongly to establish greater damages than were given by the jury in their verdict, even adjudging interest to it, the appellant was not prejudiced by the instruction to add interest to the sum of the damages and include both in the verdict.

As appellant failed to withdraw its answer before filing or causing the demurrer to be heard, the court did not err in overruling it because the answer cured the alleged defect in the petition.

Judgment *affirmed.*

S. M. Burdett, Lyttleton Cooke, for appellant.

A. L. GREER *v.* ISAAC SPENCER.

[Abstract Kentucky Law Reporter, Vol. 3—469.]

Time Within Which Appeal May Be Taken.

One desiring to appeal from a judgment of the city court to the circuit court may do so by filing a transcript and executing an appeal bond, at any time within sixty days after the judgment is taken, the day of judgment being counted as one.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 3, 1881.

OPINION BY JUDGE HARGIS:

The appeal was taken on the 31st of December to the circuit court from a judgment rendered in the city court on the 2nd of November. The 60 days had not expired when the appeal was taken. Civil Code (1876), § 729, provides that "No appeal shall be taken * * * except within 60 days from the rendering of the judgment." The rendering of the judgment is the act from which the appeal is taken, and the time for taking the appeal embraces the day on which the judgment was rendered; but so long as any part

of the sixty days remains unexpired the time for taking the appeal is not out, and a party may prosecute an appeal taken on any day of the sixty days allowed by law.

The appellant filed a transcript, and executed an appeal bond; the clerk issued a supersedeas to the city court and a summons to the county in which the judgment was rendered. This was all that the law required the appellant or the clerk to do in order to take the appeal. The fact that the appellee lived in another county than the one to which the summons was issued could not destroy the appeal, as the summons might have been lawfully executed had appellee remained or come into the county; and besides this, if the appellee had not entered his appearance to dismiss the appeal it could never have been lawfully tried without a summons having been served upon him.

There was no bad faith shown upon the part of appellant in causing summons to issue to the county wherein the judgment was rendered and trial had. In fact, it was not unreasonable to suppose that summons might be executed upon appellee in that county, notwithstanding he resided in another.

Wherefore the judgment is *reversed* and cause remanded with directions to overrule the motion to dismiss the appeal.

B. J. Peters, Tyler & Hazelrigg, for appellant.

J. J. Cornelison, for appellee.

[Cited, *Brown v. Bennett*, 102 Ky. 518, 19 Ky. L. 1579, 44 S. W. 85; *Board of Councilmen v. Farmers' Bank*, 105 Ky. 811, 20 Ky. L. 1635, 49 S. W. 811.]

JOHN C. BROWN *v.* GEO. M. BERKLEY.

[Abstract Kentucky Law Reporter, Vol. 3—469, as Brown v. Berkeley.]

Possession Under Judicial Sales.

A purchaser of real estate at a judicial sale buys with the knowledge that such sale is subject to the confirmation of the chancellor, and he is not entitled to collect the rents on said real estate until the sale is confirmed and possession delivered to him.

APPEAL FROM JESSAMINE CIRCUIT COURT.

December 3, 1881.

OPINION BY JUDGE LEWIS:

Appellant brought this action to recover of appellee the rent of a tract of land from the date of his purchase of it at a commissioner's sale to the time he got possession under order of court.

It is stated in the petition that the sale was made on the 21st of April, 1879, under a judgment rendered in the action of *Parris v. Berkley;* that appellant gave bonds bearing interest from the date of sale for the price bid by him, which was more than two-thirds of the appraised value of the land; that at the August term next after the sale it was approved and confirmed by the court; and that appellee continuously used and occupied the land from the day of sale to November 1, 1879. A demurrer to the petition was sustained, and an amended petition was offered, but the court sustained the objection and refused to permit it to be filed, and rendered judgment for the defendant in the action.

In addition to the allegations of the original petition it is stated in the amended petition that at the time of the sale appellee was living upon and occupying the land; that contrary to appellant's expressed wishes and against his rights as purchaser he continued to occupy and use it until September 21, and that at the August term of the court a writ of possession was awarded to issue and to take effect on September 21, and was placed in the hands of the sheriff, who made return that upon being notified appellee voluntarily surrendered the possession of the land September 21.

In the case of *Castleman v Belt,* 2 B. Mon. (Ky.) 157, it was held that a purchaser of an equity of redemption does not by such purchase acquire a right to rent for any occupancy prior to the date of the conveyance to him as absolute purchaser; that from the date of the conveyance to that of surrender of the premises the law implies a promise by the occupant to pay rent to him. In the later case of *Taliaferro v. Gay,* 78 Ky. 496, this court used the following language: "If the rent goes with the legal title, and the right to possession begins and ceases with it, the location of the legal title and the right of possession at any given time determines the right to the rents."

As the purchaser at judicial sales buys with the knowledge that such sales are subject to the confirmation and approval of the chancellor, and that the time when the conveyance shall be made and possession delivered to him is left by law to the sound discretion of

the chancellor, he is not prejudiced by the rule established by this court in the two cases cited.

In this case it does not appear that a conveyance was made to appellant at the August term, 1879; and as he had neither the legal title nor right of possession while the land was occupied by appellee, he was not entitled to the rents sued for.

Therefore the judgment is *affirmed*.

Geo. R. Pryor, for appellant.

J. S. Bronaugh, Ben P. Campbell, for appellee.

[Cited, *German Bank v. Louisville,* 108 Ky. 377, 22 Ky. L. 9, 56 S. W. 504; *Norris v. Williams,* 23 Ky. L. 1497, 65 S. W. 439.]

NORMAN GAINES *v.* C. T. SCOTT.

[Abstract Kentucky Law Reporter, Vol. 3—418.]

Alteration of Note.

When a note is executed by several persons and afterwards by consent of the holder and one of the makers it is altered as to the rate of interest it is to draw, the alteration is a material one and will operate to discharge the other obligors from all liability upon it.

Consideration of Implied Contract.

To maintain an action upon an implied as well as on an express promise, there must be a consideration, either prejudicial to the plaintiff or beneficial to the defendant, in the action to uphold it.

APPEAL FROM HENRY CIRCUIT COURT.

December 3, 1881.

OPINION BY JUDGE LEWIS:

On the 4th of Sept., 1876, a promissory note for $3,000, payable twelve months after date, and bearing interest at the rate of ten per cent. per annum from date until paid, was given to appellant, for money loaned, and signed in the order following, by Chilton Scott, W. H. Stratton, C. T. Scott, Joseph Campbell and C. T. Chilton. In 1878, by agreement between appellant and Chilton Scott, but without the knowledge or consent of the other parties to the note, the face of it was so altered as to make the rate of interest eight instead of ten per cent. per annum.

As it was lawful at the date of the note, as well as at the time it was altered, to contract for the payment of a rate of interest not

exceeding eight per cent. per annum, but to intentionally charge ten per cent. made the whole interest subject to be forfeited, the alteration of the note by appellant and Chilton Scott was a material one, and therefore, as is well settled, operated to discharge the other obligors from all liability upon it.

It does not appear whether appellant attempted, after the alteration, to recover on the note or not. This action was brought by him against C. T. Scott alone, not upon the note, but upon an alleged implied contract to pay the $3,000 it was executed for, and which, it is averred in the petition, appellant loaned and advanced to him and Chilton Scott at his special instance and request, whereby he became liable to pay, etc. In his answer appellee denies the money was loaned or advanced to him, or to him and Chilton Scott, but alleges it was loaned to the latter; that he, appellee, received no part of it, and did not hold himself out as being connected with Chilton Scott as principal in borrowing it or any part of it.

The verdict of the jury and judgment of the court being for defendant in the action, this appeal is prosecuted, and errors of the court in giving and refusing instructions, and admitting incompetent evidence, are relied upon for reversal. But unless appellant has a right of action upon the implied contract he was not entitled to either the instruction refused or the one given. To maintain an action upon an implied as well as upon an express promise, there must be a consideration either prejudicial to the plaintiff or beneficial to the defendant in the action to uphold it.

It is shown by both the pleadings and proof in this case that appellee did not get any part of the money loaned, the whole of it being received by and used for the benefit of Chilton Scott. Therefore, as appellee did not receive any benefit directly or indirectly from the loan, in order to authorize a recovery it must appear that appellant loaned the money at the request of appellee, and was induced by him to rely upon his promises or assurances, and to forego other or better securities for his debt.

It does not appear that appellant did, in this case, forego any advantage or security for his money, or that he has suffered any loss or injury in consequence of placing confidence in the undertaking of appellee. On the contrary it is manifest that the money was loaned upon the security afforded by the note. For it was found upon the trial that appellant refused to loan the money upon the credit of appellee alone, but required the execution of the note by the other

parties to it as a condition of, as well as security for, the loan. There is consequently no consideration whatever for the implied promise sued on.

Appellant complains that the court below improperly admitted, upon the trial, the evidence of the other obligors, which showed that Chilton Scott was the principal and all the others were his sureties on the note. We are of the opinion it was competent for appellee to prove, by the parties to the contract, the attitude they each occupied in the transaction. From their testimony it appears that they were the cosureties and equally bound with the appellee for the payment of the note. Such being the case, it is clear that the alteration of the note would, if appellee is held responsible upon the implied contract, have the effect of imposing upon him a greater burden than he undertook, by the express contract, to bear.

Assumpsit is in the nature of an equitable action, and recovery upon an implied promise may be defeated by showing that *ex aequo et bono* the plaintiff ought not to recover. In this case the appellant, in an attempt for his own advantage to increase the liability of the obligors to the note beyond what, by the terms of it, they were legally bound for, has discharged them entirely. Having done so, we do not think he has the right to recover, upon an implied promise of appellee alone, what he undertook to be bound for in common with his cosureties.

It is not necessary to consider the question whether appellee, if he had been a beneficiary of the loan, would be liable upon an implied promise.

For the reasons indicated the judgment must be *affirmed*. Judge Hargis dissenting.

W. P. Thorne, Carroll & Barbour, Webb & Masterson, for appellant.

Harwood & Carroll, for appellee.

[Cited, *Moayon v. Moayon,* 114 Ky. 855, 24 Ky. L. 1641, 72 S. W. 33, 60 L. R. A. 415, 102 Am. St. 303.]

JOSEPH QUEEN *v.* MARY E. PHILLIPS.

[Abstract Kentucky Law Reporter, Vol. 3—470.]

Homestead.

A sale of real estate by the chancellor under a decree of foreclosure

does not pass the title to the homestead, for the reason that the statute expressly exempts it from sale under a judgment. In a sale under an execution the homestead right does not pass for the reason that the sheriff has no power to sell it.

APPEAL FROM NELSON CIRCUIT COURT.

December 3, 1881.

OPINION BY JUDGE PRYOR:

The question presented by the answer of the appellee can not be determined on the record as now presented. The demurrer was sustained to the plaintiff's petition, and what purports to be the record filed with the answer is no part of the petition, and cannot be considered. The plaintiff alleges the sale of his property under an execution, the conveyance by the sheriff, and a recovery of the possession, but further alleges that this levy and sale was afterwards set aside, so it left the appellant invested with the right to the property; and no writ of habeas facias should have issued if the statements in the petition are true. In the case of *Wing v. Hayden,* 10 Bush (Ky.) 276, this court held that a sale by the chancellor under a decree of foreclosure did not pass the title to the homestead for the reason that the statute expressly exempts it from sale under a judgment. So in the case of a sale under an execution the homestead right does not pass for the reason that the sheriff has no power to sell it, but if he does sell it and makes a conveyance to the purchaser, and the latter, in an action in the nature of an ejectment, recovers the possession, the question then arises whether the defense to the recovery of the possession is a bar to the recovery of the homestead. This question, although made by the answer, can not now be decided, as the demurrer was sustained to the petition alone. It is also pleaded that the question of a right to a homestead was litigated upon the motion for the writ of habeas facias. Whether it was or not we can not decide, as no issue of fact has been made as to the affirmative matter set up in the answer.

The judgment is *reversed,* for the reason that the demurrer to the petition should have been overruled, and cause remanded for further proceedings.

E. E. McKay, for appellant.

Muir & Wickliffe, for appellee.

W. G. ROBINSON *v.* CITY OF LOUISVILLE.

[Kentucky Law Reporter, Vol. 3—444.]

Dismissal of Policeman.

A policeman, duly elected by the police commissioners of the city of Louisville, who is dismissed by the mayor, has a right to appeal to the commissioners from such dismissal; but where he fails to exercise such right he can not maintain an action against the city for his salary after dismissal by alleging his willingness to perform the duties of his office.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 6, 1881.

OPINION BY JUDGE PRYOR:

The appellant was elected a policeman of the city of Louisville for three years from the 19th of January, 1878, and having been commissioned as required by the city charter, proceeded to discharge the duties of a policeman. On the 21st of January, 1879, the mayor of the city issued an order dismissing him from the police force in the following words: "For cause which I deem sufficient you are hereby dismissed from the police force of the city of Louisville." Signed, Wm. G. Baxter, and addressed to the appellant. The appellant filed this petition against the city, alleging his removal without cause, seeking to recover the regular pay due him as a member of the police organization, averring that he was at all times in readiness to discharge his duties and so notified the chief of police, and denying the right of the mayor to remove him without cause. He further alleges that no cause was assigned for his dismissal and none in fact existed. By the City Charter, § 32, the mayor, the president of each board of the general council, and the chairman of the police committee of each board constitute a board of police commissioners with the power to elect the police force. By § 39 of the charter the mayor is empowered to dismiss any member of the police for intermeddling with or directly or indirectly taking part in elections further than to vote, for failing to perform any duties imposed on him as a policeman, for neglect of his family, or for any other cause he may deem sufficient.

It is urged in argument of counsel for the city that under this general power of removal the mayor can act without making any

specific charges against the accused, and by appellant's counsel that his client is entitled to know the nature of the complaint made that he may have an opportunity of disproving it. It is not necessary for this court to pass upon this question, as the examination of other provisions of the city charter satisfied us that appellant's remedy is by an appeal to the tribunal created by the charter for hearing such complaints and not to the courts of the state. Section 39 of the charter provides among other things, "But any policeman so dismissed may appeal to the board of police commissioners, and if the action of the mayor be not sustained, the commissioners may restore such policeman to his place." There is no reason assigned why this appellant could not avail himself of the plain remedy provided by the provisions of the charter under which he was elected, as the commissioners had full and complete power to reinstate him if he had been removed without cause. The court below acted properly in declining to supervise the action of the mayor in his attempt to maintain an effective police force within the city, or to interfere with the terms of the charter that invest those who understand the entire plan of police organization, and the rules by which its members are governed, with the power to hear the complaint where the act of removal is complained of.

It is asserted, however, that as the dismissal was without cause there is nothing to appeal from. We cannot adopt this view of the question, nor hold the order of dismissal void. The power of removal exists, and if without cause the board of commissioners is authorized to take cognizance of the case and reinstate the appellant. The denial of the jurisdiction in the court below only remands the appellant to a tribunal with more facilities for investigating the wrong of which he complains. If reinstated the court will listen to his claim for compensation.

Judgment *affirmed.*

C. B. Seymour, for appellant.

T. L. Burnett, for appellee.

THOMAS HUNTER ET AL. *v.* F. WATTS.

[Abstract Kentucky Law Reporter, Vol. 3—470.]

Enforcement of Lien on Wife's Real Estate.

Where "A" conveys his land to "B," and in consideration thereof

"B" agrees to convey his land to "A's" wife, and does so, reserving a lien for the difference in the purchase-money, "B" is entitled to enforce his lien against said land, even in the face of a plea of coverture by "B's" wife, but he is not entitled to a personal judgment against said wife.

APPEAL FROM JESSAMINE CIRCUIT COURT.

December 6, 1881.

OPINION BY JUDGE LEWIS:

A contract was made between appellee and appellants, husband and wife, by which he sold and conveyed to the wife, Nancy S. Hunter, a tract of land containing about 243 acres, in consideration of a tract of about 16 acres conveyed to him by the husband, Thomas Hunter, he having the legal title to it, and the further consideration of about $1,552, for which the wife executed her two promissory notes, upon each of which notes was the following indorsement in writing: "This contract approved by me as husband of the within named, Nancy Stewart Hunter. Thomas Hunter."

In pursuance of the contract, possession of the 16 acres was delivered to appellee, and appellants, husband and wife, took possession of the other tract. Appellee brought this action to enforce his alleged lien upon the 243 acre tract of land for the payment of the two notes, and this is an appeal from the judgment of the court below directing a sale of the land, or enough of it to pay the debts.

Nancy S. Hunter pleaded coverture as a defense to the action and her counsel rely upon it here for reversal of the judgment. Undoubtedly the note is not binding on her, and appellee was not entitled to personal judgment against her. But as no judgment was sought or rendered against her for the debt, or for the sale or other disposition of the property that she claims the right to in her answer, it is difficult to perceive upon what grounds she bases her objection to the judgment. She asks for a rescission of the contract, and by the judgment it is practically rescinded, so far as she is concerned. She has no right to ask that the deed to the 16 acre tract shall be canceled, because the land belonged to her husband. The husband has no right to rescind the contract, because he not only made the conveyance of the 16 acres, but in writing assented to and approved the execution of the notes by his wife, and in pursuance of the contract took possession of the 243 acre tract.

Whether appellee would be entitled to a personal judgment against the husband is not necessary to decide. Having in the deed retained a lien upon the land to pay the two notes, whether the wife be bound or not, he is entitled to an enforcement of his lien for the purpose of paying the amount of the difference between the two tracts.

The judgment is *affirmed.*

Breckinridge & Shelby, H. A. Anderson, for appellants.

J. S. Bronaugh, for appellee.

[Cited, *Morgan v. Morgan,* 20 Ky. L. 1308, 49 S. W. 184.]

VANCE *v.* CAMPBELL ET AL.

[Kentucky Law Reporter, Vol. 3—448.]

Fraudulent Conveyance—Setting Aside—When Suit Will Lie.

A court of equity has jurisdiction to set aside a fraudulent conveyance and subject the property to payment of the grantor's debts either where the creditor proceeds by attachment under Civ. Code (1876), § 194, Subsec. 7, or where he has first reduced his claim to judgment and there has been a return of no property found.

Fraudulent Conveyances—Repeal of Statute—Equitable Relief.

Act 1838, 3 Stat. Laws, 116, authorizing suit in equity to set aside a fraudulent conveyance and subject the property to a creditor's claim, although the claim has not been reduced to judgment, and permitting attachment, is repealed by Civ. Code and Gen. Stat. relating to the same subject.

APPEAL FROM NICHOLAS CIRCUIT COURT.

December 6, 1881.

OPINION BY JUDGE HINES:

Appellant, having a claim against the appellee, Sallie Campbell, for $375, evidenced by note, and holding a lien on a piano to secure its payment, instituted an action in equity in which he alleged the existence of the lien, charged that appellee, Sallie Campbell, had fraudulently disposed of a certain tract of land to R. S. Campbell, for the purpose of cheating, hindering and delaying her creditors, and prayed for an attachment. The attachment was issued and levied upon the piano and upon the land, and on hearing the court discharged the attachment and dismissed appellant's petition, but

adjudged to him the proceeds of the sale of the piano ($205), which had been sold under an order of the judge of the county court.

The principal inquiry is, did the court have jurisdiction to set aside for fraud the conveyance made by the appellee, Sallie Campbell, to R. S. Campbell, before appellant had obtained a judgment at law and a return of no property? We are of the opinion that the court should have entertained jurisdiction. There are two instances in which a creditor can go into a court of equity for the purpose of setting aside a fraudulent conveyance and for the purpose of subjecting the property to the payment of his debt. One is where he proceeds by attachment upon the grounds specified in Civ. Code (1876), § 194, subsec. 7, and the other is where he has first reduced his claim to judgment and had return of no property.

In construing the Act of 1838, 3 Stat. Laws 116, which authorized a suit in equity, notwithstanding the claim had not been reduced to judgment, and permitted an attachment, it was held that the power of the court to subject the property did not depend upon the levy of an attachment. *Milward v. Cochran,* 7 B. Mon. (Ky.) 344. It is now suggested that that act is still in force and practice and the same is allowable. This we think is not correct. Without reference to previous statutes, it appears clear that the General Statutes and the Civil Code repeal the act of 1838. General Statutes (1879), Ch. 44, § 1, is, in substance, so far as it defines the fraud, the same as the Act of 1838, omitting any reference to jurisdiction or manner of proceeding, while § 194 of the Civ. Code provides for proceeding by attachment with bond, and § 439 of the Civ. Code provides for proceeding without bond on return of no property. There is legislation upon a subject embraced by the Act of 1838, which must be taken to cover the whole field intended to be covered by the statutes.

The cases recently decided by this court and relied upon by counsel for appellees were not proceedings by attachment, and therefore the question here under consideration was not discussed. *Napper v. Yager,* 79 Ky. 241, 2 Ky. L. 260, and *Haskell v. Wynne,* 9 Ky. Opin. 251. The rule there laid down is that in force prior to the Act of 1838, and we think it is correctly laid down when the party does not undertake to proceed by attachment under § 194 of the Code, as in this case.

Under the facts of this case, appellant's attachment should have been sustained, judgment should have been entered for the amount

claimed, the conveyance to R. S. Campbell set aside, and the land subjected to the payment of the debt.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion. Judge Hargis not sitting.

Hargis & Norvell, for appellant.

Ross & Lytle, for appellees.

[Cited, *Barton v. Barton,* 80 Ky. 212, 3 Ky. L. 746.]

W. T. HOGG *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—470.]

Payment of Reward.

The fact that the accused is induced to surrender by persuasion and not taken by physical force will not prevent the collection of the reward offered, there being no evidence of fraud or collusion between the accused and the person causing his surrender.

APPEAL FROM BREATHITT CIRCUIT COURT.

December 8, 1881.

OPINION BY JUDGE HINES:

The reward offered in this case should have been paid to the appellant. There is no evidence of fraud on the part of appellant, or collusion between appellant and the person for whom the reward was offered, by which the commonwealth was to be defrauded of the reward. The fact that the accused was induced to surrender by persuasion and not taken by physical force does not alter the case. The evidence of the sheriff is that he could not arrest the accused, and it appears that he would not have been brought to justice but for the offer of the reward. *Auditor v. Ballard,* 9 Bush (Ky.) 572, 15 Am. Rep. 728; *Hayden v. Souger,* 56 Ind. 42, 26 Am. Rep. 1, and notes.

Judgment *reversed* and cause remanded with directions for further proceedings.

J. & J. W. Rodman, W. W. McGuire, for appellant.

ELIZABETH GUTZWILDER *v.* ADAM WAGNER.

[Abstract Kentucky Law Reporter, Vol. 3—470.]

Error in Instruction a Ground for New Trial.

The error of the court in giving an erroneous instruction to the jury, not assigned as a ground for a new trial, can not be raised for the first time on appeal. The Court of Appeals will not pass upon such error.

APPEAL FROM CAMPBELL CIRCUIT COURT.

December 8, 1881.

OPINION BY JUDGE LEWIS:

We think the notice given by the surety in this case sufficiently explicit and definite, and service upon the plaintiff, or the delivery of it to her at the place and under the circumstances, was sufficient.

We perceive no error except the instructions given by the court. It is not sufficient to give the notice more than ten days before the court begins. Such is not the language nor meaning of the law. The notice should be given in time to enable the plaintiff to obtain judgment at the next term after notice is given. But the error of the court below in giving the improper instruction was not made a ground of the motion for a new trial, and hence can not be passed upon by this court.

The judgment therefore must be *affirmed.*

E. W. Hawkins, for appellant.

F. M. Webster, for appellee.

WILLIAM HAMILTON'S ADMR. *v.* L. P. TARLTON, RECEIVER.

[Abstract Kentucky Law Reporter, Vol. 3—471.]

Validity of Subscription.

Where a subscription to a public enterprise is conditional upon a certain named sum of solvent subscriptions being made, if the sum required is subscribed by subscribers solvent and able to pay when the subscription is made, one who subscribes can not be released from his subscription by showing that many of such subscribers became insolvent before their subscriptions became due.

Claims Against Estates.

The statute providing that no interest accruing after the death of

the decedent shall be allowed unless the claim be verified and proven as required by law, and demand be made of the representative within one year after his appointment, is rendered unnecessary where the administrator files a petition for a settlement within the year and a commissioner is called on to adjust the accounts; the presentation of the claim is to the court or the commissioner and not to the representative.

APPEAL FROM WOODFORD COURT OF COMMON PLEAS.

December 8, 1881.

OPINION BY JUDGE PRYOR:

In the consideration of the testimony in this case bearing on the question as to the performance of the condition precedent by the payees of the note or the trustees of Hamilton college, before they could enforce its collection, it conduces to show the best of faith on the part of the trustees, and a belief on the part of all that the subscribers were able to pay their individual subscription. They all owned property and had credit in the county in which they lived, and the pecuniary embarrassments of many of them originated from the depreciation of the value of property under circumstances that could not be averted. The list could have been taken by any business man at the time the subscription was made, as a compliance with the terms of the undertaking, and as a sufficient guarantee that the fund raised would insure the success of the enterprise.

The appellant's intestate, as well as others, realized this fact, and instead of resisting the payment of his subscription, induced the making of the compromise between the trustees of the institution and the holders of these subscription notes, resulting in securing the institution to those who had contributed to build it up. The intestate was himself at one time a member of the board, and seems to have been consulted as much as any other stockholder with reference to the business affairs of the institution. The reliance of the appellant is more on the subsequent insolvency of the subscribers than their condition at the time the subscription was made. That of McGarvey and Graham for $5,500 was an enforcible subscription. It is true they were not compelled to pay it as between themselves and those who indemnified them; but they were personally liable for the whole amount to the institution, and in the event they were com-

pelled to pay could look to the bond of indemnity for protection. This is clearly shown, and their note was executed in good faith, as much so as that of the intestate. It seems, although his note upon its face matured at a certain date, still he held the obligation of others to pay the calls upon him in the event he so desired, and the demand was not in fact to be enforced during his life. The parties interested were anxious to build up the institution, Hamilton among the number, and any valid subscription that could be used in making the payment to Hooker seems to have been taken. The other subscribers, or many of them, have made payments in full of their subscriptions, on the faith of the subscription made by the others, and all parties seem to have considered the success of the enterprise as fixed, and the amount of money subscribed as sufficient for the purposes contemplated, until the reverses in trade and speculation resulted disastrously to many who had agreed to pay. We see no reason for exempting the appellant, as the representative of the intestate, from liability.

It is insisted that this judgment should be reversed for the additional reason that interest was allowed on the note. General Statutes (1879), Ch. 39, Art. 2, § 53, provides, in substance, that no interest accruing after the death of the decedent shall be allowed, etc., unless the claim be verified and proved as required by law, and demanded of the representative within one year after his appointment. In this case the appellant, as administrator, filed his petition in equity within twelve months after his appointment, asking a settlement of the estate and requiring the creditors to present their claims, and the case was referred to a commissioner. The appellant by this proceeding required claims to be presented to the court or its commissioner, and a demand of the administrator would have been futile, as he had sought the aid of the chancellor to settle for him, fearing that the personal estate would be insufficient to pay the debts. The effect of this statute is to enable the personal representative to know the indebtedness of his intestate, that he may pay off the same so as to stop interest, or take such other steps as will insure a speedy settlement of the estate. While the statute makes no exceptions, it is evident that when the administrator files a petition for a settlement within the year, and a commissioner is called on to adjust the accounts, whether within the year or after the expiration of the year, the presentation of the claim is to the court or the commissioner, and not to the representative. It was never contemplated

that the claimant should prove his claim in such a case, then make a demand of the representative, and from him pass to the commissioner, who has to again pass upon it to enable the creditor to obtain his pro rata portion of the estate. Interest was therefore properly allowed. See *Gray's Exr. v. Lewis,* 79 Ky. 453, 3 Ky. L. 234.

Judgment *affirmed.*

D. L. Thornton, for appellant.

L. P. Tarlton, R. A. Buckner, for appellee.

[Cited, *Richardson's Admr. v. Banta,* 15 Ky. L. 348, 23 S. W. 350; *Hamilton's Exr. v. Wright,* 27 Ky. L. 1144, 87 S. W. 1093.]

JOHN STATON *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—471.]

Criminal Law—Indictment.

To be good, an indictment against a jailer for wilfully and negligently suffering a prisoner charged with murder to escape and go at large, must allege the nature of the commitment and the manner in which the prisoner was confined. The averment that such prisoner was lawfully committed to the jail is not an allegation of fact but the conclusion of the pleader, and is not sufficient.

Power of the Court.

The circuit court has inherent power to require the jailer of the county, who is a county officer and also an officer of the court, to produce a prisoner for trial and to keep him imprisoned and not allow him to go at large in violation of the law, and where the jailer refuses to comply with such requirement the court may legally direct the sheriff to take control of said jail and keep the prisoners in custody. The circuit court in such a case has no authority to declare the office of jailer vacant.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

December 8, 1881.

OPINION BY JUDGE PRYOR:

The demurrer to the indictment should have been sustained. The averment that Minton was lawfully committed to the jail of Breckinridge county is not an averment of fact, but the conclusion of the pleader from the facts before him. Those facts should have been alleged in the indictment to enable the court to know whether Min-

ton was in the legal custody of the jailor. This proceeding is to enforce a highly penal statute, the prosecution alleging that the appellant, as jailer, and having one Minton in custody, on a charge of murder, wilfully and negligently suffered him to go at large upon the streets of Hardinsburg, unguarded, and without any order or permission of the court, etc.

In order to impose the penalty the burden was on the commonwealth to show the nature of the commitment, and the manner in which the prisoner was confined to the custody of the jailer, and that the trial and commitment was by a tribunal authorized to place the accused in confinement. If so, it was necessary to allege these facts in the indictment. The facts must be stated and proven, showing that Minton was lawfully committed to jail, and that the appellant, having him in custody, permitted him to go at large. In the case of *Tully v. Commonwealth,* 11 Bush (Ky.) 154, Tully was indicted for being an accessory after the fact to the murder of Jerry Burns by aiding Benjamin Osborne, whom he knew to be guilty of the murder of Jerry Burns, to escape. The facts showing that the killing of Burns by Osborne was murder were not alleged, and this court held that it was necessary to show that Osborne was guilty of murder by alleging facts constituting the offense, before Tully could be adjudged guilty. So in this case it is necessary to allege facts showing that Minton was lawfully committed before the appellant can be adjudged guilty of permitting him to go at large, etc. Whether Minton was lawfully committed is purely a question of law, and must be determined by the court.

The grand jury has determined that Minton was lawfully committed, but the facts that are essential to show a lawful commitment and upon which that tribunal arrived at such a conclusion are omitted. *Commonwealth v. White,* 18 B. Mon. (Ky.) 92; *White v. Commonwealth,* 9 Bush (Ky.) 178; *Commonwealth v. Stout,* 7 B. Mon. (Ky.) 247; *Davis v. Commonwealth,* 13 Bush (Ky.) 318.

Constitution (1879), Art. 4, § 36, provides that where a jailer shall be indicted and convicted of malfeasance of office, his office shall become vacant. The indictment being defective, the order declaring the office vacant upon the conviction had is erroneous. If the conviction had been under a proper indictment, whether the court had or had not the power to enter an order declaring the office vacant would be immaterial, if the provision of the constitution re-

ferred to made it vacant, a question that is not now decided, as it does not properly arise, the indictment being defective.

Since the order declaring the office vacant must be reversed, as well as the judgment upon which it is based, it is proper to inquire to what extent the order placing the sheriff in charge of the jail and the prisoner is to be modified by it. The evidence shows without any contradiction that Minton was held upon a charge of murder and lodged in the county jail; that the jailer permitted him to go at large without restraint or control as to his actions on many occasions, and after he had been indicted for this wrong declared that he intended to permit the person to go at large notwithstanding the indictment. The commonwealth's attorney presented an affidavit or affidavits as to the conduct of the jailer in this regard, and moved the court to take some step to prevent such an open and flagrant violation of duty. No step, however, was taken until the appellant was found guilty of the misdemeanor in this case.

The jailer, although a county officer, was at the same time an officer of the circuit court. That court had the power to require the production of the prisoner for trial, and to see that he was kept in custody for all the purposes of a trial. Minton had been indicted for murder, and this officer of the court was permitting him, under the eye of the court, to go at large, and not only so, but declaring that no proceeding against him (the jailer) would deter him from permitting this prisoner to go at large. The inherent power of the court arising from the custody of the accused for the purpose of the trial, and the control of the jailer authorized the court to place the jail and the prisoner in the keeping and custody of the sheriff, vesting the sheriff with the exclusive control and custody of the jail and the prisoners in it until the further orders of the court. The order placing the jail and prisoner under the control of the sheriff was proper, but that portion of it declaring the office vacant was erroneous. The order placing the jail and prisoner in the custody of the sheriff must remain subject to be modified or set aside when the court may deem it safe to intrust him with the custody of prisoners. With the judgment vacating the office reversed, it leaves the order taking the jail from the control of the jailer merely interlocutory and could have been made before any trial was had. This court, taking jurisdiction of the appeal by reason of the order declaring the office vacant, must necessarily reverse the judgment for the fine upon which the order of removal was made. The judgment

imposing the fine is reversed, as well as the order declaring the office vacant, leaving the order placing the jail under the control of the sheriff to remain, this court regarding that portion of it as fully authorized and merely interlocutory. We have alluded to the facts in the case because they stand uncontradicted.

Judgment *reversed* and cause remanded.

John Allen Murray, Kinchelve & Eskridge, William Lindsay, for appellant.

P. W. Hardin, for appellee.

ELIZABETH STRETLOW *v.* W. H. VONDERHIDE'S EXR.

[Abstract Kentucky Law Reporter, Vol. 3—472, as Strelow v. Vonderhide.]

Gift to Relative.

Where a bachelor, tenderly cared for by his niece for many years, turns over to her notes not in excess of a settlement of the obligation he owes to her, and the evidence shows by disinterested witnesses that he intended to give her the notes and expressed his purpose for years prior to his death to give her all of his estate, and said to witnesses that he had given her the notes subject to his right to draw the interest during his lifetime, such evidence is sufficient to uphold the gift even in the face of a will, duly probated, undertaking to dispose of all his estate.

APPEAL FROM LOUISVILLE CHANCERY COURT.

Deember 10, 1881.

OPINION BY JUDGE PRYOR:

If there was no motive prompting the gift of the notes in controversy but the blood relation existing between the donor and the appellant, or if the proof of her meritorious claim comes alone from her immediate family and relatives, there might well arise a suspicion, at least, that the notes were only left in the custody of the appellant for safe-keeping, and with no purpose on the part of the appellee's intestate to part with any interest in them; but a much stronger case is presented by the appellant. Her uncle, the testator, was a bachelor, advanced in years, of intemperate habits, and for several years prior to his death seems to have been in feeble health, requiring the care and attention so necessary to the comfort of one in his condition.

Among all of his relatives in this country (being a foreigner by birth) no one but the appellant administered to his wants and nursed him in his sickness. He was sick at her house for months, and made that his home for years; and recognizing his obligation to this niece for her kindness, he expressed a purpose years before his death of giving to her the whole of his estate. He in fact made a will for the purpose of executing this intention, and for fear that he might die and that some obstacle would present itself in the way of the appellant getting possession of his estate, he declared his purpose to at once give the notes to the appellant with the understanding that she was to let him have, or that he was entitled to receive, the interest accruing on the notes as long as he lived. That he gave her the notes is abundantly shown by her immediate friends and family, and also that he was moved to make the gift by reason of the care and attention bestowed upon him by the appellant when his other relatives were not inclined to notice him, and certainly not to nurse him when recovering from his drunken frolics. There is no proof adverse to the claim of the appellant, except the declarations of the uncle a short time before he died, and the execution of a will, by which he seems to have forgotten the affection and kindness of the niece and devised all his property to kindred in Germany, except such as originated from the relation of brother and sister. The circumstances under which that will was written and the conditions of the unfortunate man at the time presents but slight grounds for rejecting the claim of the appellant; it declares an intention contrary to a fixed purpose long entertained, and is in entire disregard of the obligation he was under to the niece, springing not only from the many evidences of her affection for him, but from a valuable consideration by reason of the services rendered by her, at his instance and for his own welfare. It is true, the will, being probated, must be regarded and treated as the last will of the testator; but in this case it is to be considered, if at all, as a circumstance conducing to show that no gift was made of the notes in controversy. The admission to the county judge that she had notes and papers in her possession belonging to the testator has been given due weight, and his refusal to advise or take possession of the notes indicates that he felt the appellant should have legal advice before taking any steps that might prejudice her claims. That she claimed the notes is manifest; and in ignorance of her rights, or

as to what constituted a gift of the notes, she might well have applied to the county judge for advice.

The reason the testator assigned to nearly all the witnesses for making the gifts is expressed in the language used in one or more of their statements "that Mrs. Stretlow had treated him kindly, waited upon him, and took up for him when the others treated him badly." Ferguson, who was the obligor in the largest note, says that he executed the notes to the testator, and that he saw him deliver them to Mrs. Stretlow; that the notes were renewed from time to time, and whenever renewed she had the possession, and they were handed back to her. He had expressed prior to that time his intention to withdraw his money from the bank and loan it out, so that he could give the notes to the appellant, and his transactions with Ferguson show that he had executed that purpose. Dr. Knightly states that he knew the deceased about one year prior to his death, and that the appellant had told him that her uncle had given her these notes, and that he heard the same statement made in her uncle's presence. George Wagner states that the testator informed him on several occasions that he had given Mrs. Stretlow the notes and all he was worth except the interest during his life.

It may be urged that these conversations had reference to the will executed by him, and that his right to revoke that will cannot be doubted. This argument might prevail if the testator had not declared his purpose of converting his money into notes and delivering them to the appellant, so as to prevent trouble at his death. This he did, and if living, with an action in equity or at law to recover these notes, upon such proof as is found in this record as to the character of services rendered by the appellant for the deceased, it would be difficult to induce a court or jury to determine that the gift was revocable, or that no such gift was in fact made. It is certain that the declarations of the donor, made subsequent to the delivery of the notes, would be incompetent to explain the purpose on his part in placing the appellant in the possession of the paper. But admitting all the testimony as competent, and giving to the appellee the benefit of all the facts and circumstances connected with the case, the proof is convincing that these notes were given to the appellant not only in consideration of love and affection, but for a consideration actually rendered in the way of services in nursing, boarding and taking care of the decedent for a number of years, equal in value to the face of the paper. We perceive no rea-

son why the delivery of the notes upon such a consideration, reserving the interest, does not vest the holder with the property in it, certainly the equitable right, as against the donor, his heirs and representatives. See *Meriwether v. Morrison,* 78 Ky. 572.

The proceedings in the county court can not be held prejudicial to the appellant. The response made by her on each occasion when improperly proceeded against by rule works no estoppel, nor is the one inconsistent with the other. She denied in each that she had any property or notes belonging to the estate of her uncle, and it is evident that up to that time she had not been properly advised, or was in ignorance of what her rights were by withholding from her attorney facts within her knowledge and about which he should have been informed. This does not militate against a claim, proven as this is, and by parties who have no interest whatever in the result of the controversy. It is meritorious, just and equitable, and the appellant should have been adjudged the owner of the notes, less the interest that had accrued up to the death of the testator.

The judgment is *reversed* with directions to enter such a judgment upon the return of the cause, and for further proceedings consistent with this opinion.

O. H. Stratton, William Lindsay, for appellant.
Everback, Bacon & Badger, for appellee.

J. S. HAND *v.* FRETSCH, BURKHARDT & CO.

[Abstract Kentucky Law Reporter, Vol. 3—472.]

Principal and Surety.

Where the creditor and the principal on a note agree that title to mill property shall be transferred to a man to indemnify him if he will become surety on the note, and he is induced by the agreement to become surety and such indemnity is withheld from him, he has a defense to the note against the principal and the holder.

APPEAL FROM PENDLETON CHANCERY COURT.

December 10, 1881.

OPINION BY JUDGE PRYOR:

The answer, when considered with reference to each paragraph, presents a defense to the action by the surety. If it was agreed

between the plaintiff and the principal in the note that the title in the mill should be vested in the appellant to indemnify him as surety, and this agreement was the inducement and consideration for his becoming bound as such, it seems to us it presents a defense to the action in the event of a failure to comply. Collusion and fraud are also alleged between the appellees and the principal for the purpose of obtaining his name as surety. The demurrer should have been overruled to the answer as a whole, as it presented a defense to the action.

Judgment *reversed* and cause remanded.

Duncan & Barker, for appellant.

J. H. Pryor, for appellees.

SARAH J. MOODY *v.* R. H. MOODY ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—472.]

Dower in Husband's Real Estate.

A woman is not entitled to dower in real estate conveyed by the husband in good faith before her marriage to him.

APPEAL FROM TODD CIRCUIT COURT.

December 13, 1881.

OPINION BY JUDGE HINES:

The weight of the evidence in this case appears clearly to be in favor of the judgment of the court below. We have read it with great care, and as it is voluminous will content ourselves with stating simply the conclusions arrived at.

Appellant is not entitled to dower in the 80 acres of land conveyed by her husband prior to the marriage, for two reasons: First, the evidence shows that she knew of the conveyance, which appears to have been made for a valuable consideration, prior to her marriage, and was not therefore a fraud upon her marital rights; second, the terms of sale to the heirs were sufficiently comprehensive to embrace any dower claim she may have had in the 80 acres. The power of attorney under which the contract of sale was completed did not need to be acknowledged by appellant in order to make it binding, and as its terms are sufficiently broad to embrace every character of interest appellant may have had in the

estate, and as it appears to have been fully executed and well understood, and the contract was ratified by acquiescence and the receipt of benefits under it, there appears no reason why the judgment of the court should be disturbed. Appellant does not present herself in the record in such a manner as to entitle her to anything like a favorable consideration in a court of equity. The evidence clearly manifests that this litigation grows entirely out of an attempt on her part to avoid the payment of a debt justly due to appellee, Jackson.

She is not entitled to the amount of the note as against Jackson's claim upon the ground that it represents the proceeds of exempt property, first, because there is nothing to show that the personal property that would have been set aside to her could have been claimed by her as exempt from the payment of her own debts, and, second, there is nothing to indicate what amount embraced in the note is the proceeds of personal property that she could have claimed as exempt to her as a housekeeper, nor what proportion of the amount was the proceeds of the real estate.

Judgment *affirmed.*

Ben T. Perkins, Jr., for appellant.

W. L. Reeves, for appellees.

ABIGAIL H. FORSYTHE *v.* M. D. LAWLER.

[Abstract Kentucky Law Reporter, Vol. 3—473.]

Verdict on Amended Petition.

An amendment of a petition after a new trial is granted to cure a supposed defect in the petition, although erroneous, will not affect the right to claim under the first finding; but where a greater sum is sought to be recovered it amounts to an abandonment of the right to insist on the first recovery.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 13, 1881.

OPINION BY JUDGE PRYOR:

It is not necessary to pass on the various questions made by the appellant as to the action of the court in granting a new trial. The order taking the petition for confessed was merely interlocutory,

and when the new trial was granted this gave to the court a discretion as to the filing of appellee's answer.

Whether the grounds for a new trial were or were not sufficient is rendered immaterial, as the appellant, after the new trial was granted, filed an amended petition in which he claimed greater damages than in the original petition. There was no different cause of action stated, but the amount of recovery was enlarged, so that the appellant could have recovered, in the event the action could have been maintained, $3,000 instead of $2,500. If appellant proposed to stand by the former verdict no change should have been made by which a greater sum could have been recovered than on the action originally instituted. If a verdict had been rendered on the amendment for $3,000, under proper instructions and proof, the verdict should stand; and the appellant, therefore, will not be permitted to speculate upon the chances of recovering a larger sum by virtue of the amendment, and when failing to do so insist upon the verdict rendered in the original action. The amendment filed was a waiver of the right to rely on the verdict. The appellant was not compelled by any action of the court to claim the damages in order to have a standing in court, but voluntarily sought to recover more than was originally obtained.

An amendment curing a supposed defect in the petition pointed out by the court, although erroneous, would not affect the right to claim under the first finding, but where a greater sum is sought to be recovered it presents a different state of case and amounts to an abandonment of the right to insist on the first recovery.

The judgment below is, therefore, *affirmed*.

J. L. Clemmons, for appellant.

C. B. Muir, for appellee.

ELIZABETH BRYSON ET AL. *v.* JAMES OSENTON ET AL.

[Kentucky Law Reporter, Vol. 3—447.]

Disposition of Real Estate by Will.

Where a testator owned a five-sixths interest in real estate and his wife owned the other interest, his attempt by will to convey the whole of the land will fail; and where his devisees take possession under the will and mortgage it, the mortgagee will only have a lien on the interest which the testator owned. The fact that the wife had accepted the will under which she was a legatee and said nothing

about her claim of ownership to the one-sixth interest until it is sought to foreclose the mortgage does not estop her from asserting her interest as against the mortgagee and the mortgagors.

APPEAL FROM GREENUP CIRCUIT COURT.

December 14, 1881.

OPINION BY JUDGE HINES:

Appellant, Elizabeth Bryson, owned, through the will of her father, a one-sixth interest in a certain tract of land; the remaining five-sixths was owned by her husband, William Bryson, by purchase from the heirs of Mrs. Bryson's father. On the death of William Bryson he left a will, in which he made provision for his wife, and devised the tract of land mentioned to his sons without any mention of the one-sixth interest of Mrs. Bryson. The sons took possession of the land and lived upon it some two or three years, and mortgaged it to appellee, Osenton. In a suit to foreclose this mortgage Mrs. Bryson asserts claim to the one-sixth interest, and the question is whether it goes to Mrs. Bryson or to satisfy the mortgage.

It is claimed for appellee that the long silence of Mrs. Bryson and the receipt of benefits under the will amounted to an election to take under the will, and that she is estopped now to assert title to the one-sixth of the land. This is not a case for an election under Gen. Stat. (1879), Ch. 31, § 12, because that provision applies to cases where the testator is undertaking to dispose of his own property, and not that of another. The only estoppel that could be applied here is an equitable estoppel, which exists independent of the statute, and as to such estoppel there is neither plea nor proof. There is no equitable estoppel unless, by reliance upon the conduct and silence of Mrs. Bryson, appellee has been misled to his prejudice. There is no allegation or proof as to this matter. The allegation may be considered sufficient to raise the question of election under the statute, for in such case the law makes the estoppel. Biglow on Estoppel (2d ed.) 508.

For this error the case must be reversed, but as the parties will be entitled to a new trial, and additional evidence may be heard, we deem it improper to discuss the effect of the will of William Bryson, as these may appear under the new consideration as affecting its construction. On the appeal of Elizabeth Bryson the judgment is

reversed and cause remanded with directions for further proceedings consistent with this opinion, and on the appeal of Bryan the judgment is *affirmed*.

L. T. Moore, B. F. Bennett, W. H. Wadsworth, for Bryson; E. C. Phister, A. Duvall, for Bryan.

E. B. Wilhoit, for appellees.

COMMONWEALTH *v.* S. J. MATTHEWS.

[Abstract Kentucky Law Reporter, Vol. 3—473.]

Sale of Intoxicating Liquor on Prescription.

Where a druggist, a regular physician, kept the drug store himself and prescribed the liquors himself in good faith, he is not guilty of an unlawful sale even if he did not actually write out the prescription and preserve it as a protection from prosecution.

APPEAL FROM GRAVES CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE HARGIS:

It was not necessary for the defendant to make out for himself a prescription and preserve it as a protection from prosecution, because he proves that he was a regular physician, kept the drug store himself, and prescribed the medicine in good faith to Hagood. The court, in view of those facts, correctly instructed the jury.

Wherefore the judgment is *affirmed*.

P. W. Hardin, for appellant.

S. H. Crossland, for appellee.

[Cited, *Lindsey v. Commonwealth,* 89 Ky. 64, 18 Ky. L. 49, 35 S. W. 269; *Commonwealth v. McGorty,* 5 Ky. L. 674.]

CLIFTON COCKRILL *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—473.]

Collection of a Reward.

No appeal lies from an order of the circuit judge refusing to certify to a claim for a reward in accordance with the statute.

Bill of Exceptions.

Where a bill of exceptions is signed by bystanders in November,

1880, in a case decided in December, 1879, certifying that the bill is substantially correct as well as they remember, it is too uncertain and indefinite upon which to base a judgment of reversal.

APPEAL FROM BREATHITT CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE PRYOR:

We know of no rule of practice authorizing an appeal from an order made by the circuit judge refusing to certify to a claim for a reward in accordance with the statute. The judge is required to certify to certain facts showing the arrest of the person and his delivery to the jailer; but if he declines to do so, we know of no appeal from such an order. Besides, the bill of exceptions in this case is signed by bystanders, and they certify that the bill is substantially correct, as well as they remember. This certificate was signed in November, 1880, and the order entered in December, 1879, and is only a statement that it is substantially correct as well as they can remember. This is too indefinite and uncertain upon which to base a judgment of reversal if an appeal could be entertained.

We see no reason why the proof, if held insufficient by the presiding judge, can not be made again, unless there is some limitation fixed by the statute.

Appeal *dismissed.*

S. H. Patrick, for appellant.

P. W. Hardin, for appellee.

PATRICK FARRELL *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—474.]

Criminal Law—Robbery.

Larceny is not a degree of the offense of robbery, and where the charge against an accused is robbery, the jury could only convict upon proof showing that the prosecuting witness was compelled by force to surrender his money or that it was taken from him by the accused by force.

APPEAL FROM KENTON CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE PRYOR:

As to the propriety of the verdict rendered in this case this court is not authorized to determine unless the court below has improperly instructed the jury or refused some instruction prejudicial to the accused. The accused was indicted for robbery, the indictment charging that he wrongfully and maliciously assaulted one White, and with force and violence did rob and take from him certain silver coin (naming it).

There was proof conducing to show that it was a taking without force, and in that view of the case the defense asked an instruction in regard to petit larceny, and it was refused. Larceny is not a degree of the offense of robbery, nor is it so classified by any provision of the code; therefore the jury was authorized to convict alone upon proof that White was compelled by force to surrender his money, or that it was taken from him by force. The instruction in this regard was proper, and while the evidence was slight upon which the accused was found guilty, it was the province of the jury to determine from the facts whether or not the charge of robbery had been sustained.

The judgment below is *affirmed*.

T. F. Hallam, for appellant.

P. W. Hardin, for appellee.

WM. M. IRVINE ET AL. *v.* NANCY WALKER.

[Abstract Kentucky Law Reporter, Vol. 3—473.]

Guardian's Sale of Real Estate of Ward.

Where a guardian sold the real estate of his ward in 1850 at private sale, when such sale might be made at private sale if directed by the chancellor, the purchaser whose sale has been confirmed will not be disturbed in his ownership, either by the infant or those representing him, unless there has been some fraud practiced.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

December 17, 1881.

OPINION BY JUDGE PRYOR:

The judgment or decree under which C. J. Walker derived title to the land was rendered in the year 1850 in the case of John

A. Williams' heirs on petition for the sale of infant's land. As the statute then contained no prohibition as to the private sale of infant's real estate when directed by the chancellor, that practice sometimes prevailed, the chancellor deeming it best to accept the bid, as it was advantageous to the interest of the infant. The power to render the judgment and order the sale is unquestioned, and a purchaser with the purchase confirmed will not be disturbed either by the infant or those representing him, unless there has been some fraud practiced. We are not to be understood as determining that under our present statute regulating the sales of infant's estate the chancellor can order the guardian to make a private sale. The sale of this land was made near 30 years ago, and we see no reason why the purchaser should not accept the title and be compelled to pay the purchase-money.

Judgment *affirmed.*

John Bennett, for appellants.

T. J. Scott, for appellee.

E. BEST ET AL. *v.* MARY E. BURNAM.

Homestead.

A widow who derives the whole estate of her husband by and through his will has no claim of a homestead in the land.

Claim of Sureties on Notes.

Where a husband is in debt at the date of his death, but by his will devised all his estate to his widow, who took possession of the estate and controlled it and borrowed money with which to pay the debts of her husband, giving her notes thereon upon which sureties were placed, such sureties upon the failure of the widow to pay have no lien on the estate, and no claim which is superior to that of other creditors of the widow, especially where they become sureties on the strength of their belief that the estate belonged to her and that she would be able to pay her debts.

APPEAL FROM GARRARD CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE PRYOR:

The husband of Mrs. Burnam died in the year 1873, and in the year 1874 she administered upon his estate. They had no children, or if any, none survived her husband. The whole of his

estate he devised to his wife after the payment of his debts. She took possession of the estate or devise under the will and continued to use and occupy it as her own from the date of the death of her husband until the year 1879, when, finding herself embarrassed, she executed to Kauffman a conveyance in trust for creditors, by which she passed the title to the whole of her estate for their benefit. At the time of her husband's death he was somewhat involved, and the pecuniary embarrassments of the widow resulted from the attempt on her part to pay his debts, that she might enjoy it without being annoyed by creditors. She borrowed money from time to time to enable her to pay those debts, and struggled through a period of five years to relieve the estate of the obligations upon it. She was in possession of the estate, using it as her own, as she had the right to do under the will. This use was valuable, and from it could have been realized a considerable sum in the way of rentals, not less than $2,000.

Nearly all the business transactions she had were in her own right. The money she borrowed was upon her own credit, and those who dealt with her regarded her as the sole owner of the estate, which she was, and this gave her credit. She borrowed money to pay off the debts of her husband and for other purposes. Best, Montgomery and others became her sureties on certain obligations for the loan of money that they say, and doubtless such was the fact, was applied to the payment of her husband's debts. They claim that they became sureties on the faith of the estate left by the husband, and looked to that for payment, while the widow says they were her sureties and the money was loaned on her individual liability. They are not sureties on any bond executed by the widow as administrator, but claim that, as the money she borrowed was paid on the debts due by the husband, she being entitled to a credit for the amount paid, they should be substituted to her rights, and that, as between her husband's creditors and her individual creditors, the husband's creditors having a prior lien on this estate, this lien should extend to them.

The sureties of an administrator on his bond, when he has overpaid or paid more than the personal assets, may proceed to subject the real estate, because the administrator would have that right, but the case here presents no such state of case. Here

the widow, claiming this property as her own, has been using it for years, and by reason of the devise to her has obtained a credit originating in the execution of her individual obligations to many creditors, who are asking payment. When they apply for payment the response by the widow is that she has borrowed money and paid off the debts of her husband, and when these are satisfied they can assert their claims. An estate to which she has unquestioned title, and that she has used for years in her own interest, and upon which this credit has been obtained, she, or her sureties, desire now to have sold for her own benefit, to reimburse her for money borrowed at the expense of those who trusted her for the reason that she was the real owner. This is not equity. In fact, Best and others were crediting Mrs. Burnam in the same way; they looked to her as the owner of this estate and believed her able to pay her debts; and neither Mrs. Burnam nor her sureties on this individual paper will be allowed to take the application of the money for the purpose of acquiring a preference. The administratrix, who had used the estate for years for her own purposes, would not be allowed any priority, and certainly her sureties upon notes for borrowed money will not, as their equity, if they have any, must be derived from her.

The property sold by her was purchased in good faith. She was invested with title, and certainly could sell for the payment of debts. These purchasers will not be disturbed, nor will the liens acquired by the levy of the execution be disturbed in favor of these appellants. Certainly as against them the creditor had the right to levy, and to assert his lien by reason of it.

As to the homestead of Mrs. Burnam, she had none. She derived none from the husband, as she held under the will. She was not entitled to a homestead by reason of the title vested in her, as she was without a family and had no one with her to whom she was under a natural or legal obligation to support. The little girl's father was a man of wealth, able to take care of her and entitled to the custody of his child at any time. The homestead should have been denied, and the claim of the commissioner in the suit in which the husband's estate was involved should have been allowed as a preferred claim.

It is argued in behalf of the appellants that the conveyance to the trustee is fraudulent because it recites that the object is to prevent a sacrifice of the property by creditors. This declaration in

the conveyance might be regarded as a badge of fraud, if that instrument as well as the proof did not show an honest purpose on the part of the widow to sell her property to pay her debts. There was no intent on her part to perpetuate a fraud. She had been endeavoring to sell her estate in order to pay her debts, and finding that she could not do so, placed it in the hands of a trustee for that purpose. The object was to pay all the debts, no preference being given, except such as resulted from operation of law; and where all creditors were placed upon the same footing as far as the widow had the power to act, it seems to us the deed should be upheld.

We perceive only two errors in the judgment. The homestead should have been denied, and the commissioner, Price, who acted as such in the action in which the estate of her husband was interested, should have priority over the general creditors of the widow. He is in fact a creditor of the husband's estate.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

W. O. Bradley, H. T. Hall, Walton & Kauffman, for appellants.
Anderson & Herndon, B. M. Burdett, for appellee.

C. B. STEPHENS v. SARAH F. REAVIS.

[Abstract Kentucky Law Reporter, Vol. 3—475.]

Statute of Frauds and Perjuries.

In this state part performance is not sufficient to take an oral contract for the sale of land out of the statute of frauds and perjuries. It follows that there can be no judgment of specific performance of a verbal contract of purchase of land.

Occupying Claimant.

An occupying claimant of land purchased by a verbal contract, while not entitled to compel specific performance, is entitled to have a lien decreed for improvements made on the land by him; and when he is the son-in-law of the owner of the land an advancement to his wife by her father can not be charged against the son-in-law and be deducted from the amount of his claim and lien.

Rents Chargeable.

One who has entered upon real estate under a parol gift, which is afterwards repudiated by the donor, will not be required to account for rents.

APPEAL FROM WARREN CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE HARGIS:

Edwin Reavis, having paid $5,265 for a tract of land, caused it to be conveyed as an advancement to four of his daughters. Thereafter one of them married the appellant. In December following the marriage, the four daughters and appellant conveyed the land to Reavis, who suggested that by getting his land together he could divide it better between his children, and agreed in consideration thereof to will to the grantors other lands of equal value to the land they conveyed to him.

Soon after the execution of this conveyance Reavis induced appellant to sell a tract of land which he owned and resided on, and move to the land in contest, by agreeing to convey it to him and his wife. Not long after appellant was thus placed in possession, a child was born of his wife, and Reavis advised him to purchase an adjacent tract and improve the one in controversy. But appellant was unwilling to make the additional purchase without an assurance from Reavis that he would convey the land to him and his wife as he had agreed to do, and upon the iteration of Reavis' promise the appellant purchased the adjacent tract and improved the land in dispute to the extent of $2,000, $1,000 of which Reavis furnished him. Appellant's wife and child died in 1876.

Reavis having failed to convey the land to appellant or his wife, and having made his will and devised it to the appellee, after his death, she instituted this action in ejectment to recover the possession and damages for its detention. The appellant pleaded the facts as above set forth, which were substantially proven, and sought a specific performance of the verbal contract by which Reavis agreed to convey the land, and in the event this relief was denied he asked pay for his improvements and exemption from rents.

Appellee put in issue all the material allegations made by appellant. Upon hearing the court adjudged to the appellee the possession of the land, with rents from Reavis' death, and gave appellant credit for his improvements, except as to $1,000 which had been received by him from Reavis and used in erecting the

improvements. To reverse that judgment this appeal is prosecuted.

The promise to devise other lands equal in value to the lands conveyed to Reavis by the four daughters and appellant was based upon a valuable consideration, and while it is within the statute of frauds because he signed no writing to evidence his promise, yet equity and good conscience would have required him or his devisees either to surrender the land or pay for it, had a rescission of that contract been demanded. But no rescission having been prayed and the pleadings and proof failing to show that the land in contest was given in discharge of the consideration named in the deed from them to him, we are constrained to base our opinion upon the other transactions disclosed in the record, treating that transaction, however, as evidence of the purpose of Reavis in furnishing appellant with the $1,000.

Since the case of *Grant's Heirs v. Craigmiles,* 1 Bibb (Ky.) 203, the tendency of the decisions of this court has been to require evidence in writing of a contract of sale of land before a specific performance will be decreed. In England and some of the American states part performance has been held sufficient to take an oral contract for land out of the statute of frauds and perjuries, but it has met with but little favor for that purpose in this state, and it may be regarded as settled by authority that the rule does not obtain with us.

The agreement of Reavis to convey to the appellant and his wife the land in controversy, being verbal, can not therefore be specifically enforced; but the appellant was entitled to a lien on the land for the value of the improvements made upon it by him, without reduction by reason of the $1,000 which he received from Reavis. This $1,000 was given to the appellant as an advancement to his wife, and so soon as it came to his possession, free from the character of separate estate and unqualified by trust, the title to it vested in him absolutely. Its use in erecting the improvements did not operate to invest Reavis with title to such part of the improvements as were made by it.

There is no evidence that Reavis attempted to make the gift or contemplated return of this money to himself, until after the death of appellant's wife and child. His will shows upon its face that he had made advancements to all of his children except her. The deed to his four daughters and appellant for the land paid

for by him, and his reason which induced them to convey it to him, evidence a settled purpose on his part not to omit appellant's wife from the benefit of advancements which he was in the habit of making to his children. When he gave the $1,000 to appellant, nothing had occurred to suggest the idea that it was not an advancement to the latter's wife, but on the contrary the acts and statements of Reavis leave no moral doubt that such was his intention. Having executed that intention by the delivery of the money he had no legal nor equitable right to revoke his completed gift.

It is suggested, however, that instead of delivering the whole of the $1,000 to appellant, Reavis paid for some of the material and delivered, or caused it to be delivered, to appellant to build the house with. This, if true, can not alter the case, because the material was personalty and reduced to possession by appellant before it went into the improvements and became part of the realty. It was his absolute property when he used it in the erection of the building. We are, therefore, of the opinion that the $1,000 ought not to have been credited on the value of appellant's improvements.

It was error to charge appellant with rent from Reavis' death. The appellant took possession of the land at the solicitation of Reavis under an oral gift, and no demand of the possession is proved to have been made before the institution of the action, and certainly it would be unjust to require the appellant to pay rent, under this state of case, before the action was brought or the possession required.

But this court has laid it down broadly, in the case of *Smith v. Smyser* (see page 176 of this volume), that one who has entered upon real estate under a parol gift, which is afterwards repudiated by the heirs of the devisor, will not be required to account for rents. It can make no difference, in principle, that the donor repudiated the gift, for to hold otherwise would be to allow rent in violation of the contract of the parties, and to give damages where no injury has been inflicted.

Wherefore the judgment is *reversed* and cause remanded with directions to render judgment in conformity to this opinion.

Rodes & Settle, Ed. W. Hines, for appellant.

Wright & McElroy, for appellee.

JOHN SUTTERFIELD v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—474.]

Criminal Law—Murder.

In a case where the deceased had, previous to the shooting, threatened the life of the accused, and on the day of the shooting sought the altercation and was approaching the defendant in a threatening manner when he was shot by the defendant firing four shots at him, the first two taking effect, either one of which would have proven fatal, the other two not taking effect, being fired after the deceased turned to run and while he was being pursued by the defendant, the following instruction offered by the defendant should have been given: "A person free from fault, when attacked by another who manifestly intends by violence to take his life or to do him some great bodily harm, is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill in so doing, it is justifiable self-defense; and if Sutterfield (defendant), under the circumstances above stated, believed and had reasonable grounds to believe that his only safety was to pursue Butler (the deceased) and kill him, then the jury should acquit the defendant."

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE HINES:

Appellant, charged with the murder of one Butler, was convicted and sentenced to the penitentiary for two years. The evidence tended to show that previous to the shooting Butler had threatened the life of appellant, and that on the day of the shooting Butler sought the difficulty, and was approaching appellant in a threatening manner when he was shot. Four shots were fired, the first two taking effect, and either would have proved fatal. The other two, which did not take effect, were fired after Butler turned to flee and while he was being pursued by appellant.

The court properly instructed the jury as to the law of murder, manslaughter and self-defense, but refused to give any instruction applicable to the circumstances of the pursuit of Butler by appellant. The following instruction was asked, and under the peculiar circumstances of this case ought to have been given:

"A person free from fault, when attacked by another who

manifestly intends by violence to take his life or to do him some great bodily harm, is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill in so doing, it is justifiable self-defense; and if Sutterfield, under the circumstances above stated, believed and had reasonable grounds to believe that his only safety was to pursue Butler and kill him, then the jury should acquit the defendant."

Ordinarily this instruction would be objectionable because abstract, but under the facts of this case it is peculiarly applicable. The instruction in reference to self-defense, that the accused must then and there have been in danger of loss of life or great bodily harm, may well have misled the jury, in the absence of this instruction, into the belief that no pursuit was justifiable if the first shot was effective. But that is not the law. As developed by the evidence it was one entire transaction, and if appellant was justifiable in first shooting he was equally justified in pursuing his adversary until, in his judgment, from a reasonable standpoint, it was unnecessary to do so in order to protect himself.

Judgment *reversed* and cause remanded with directions for further proceedings.

T. C. Bell, John W. Lewis, for appellant.

P. W. Hardin, for appellee.

A. J. MAY v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—474.]

Criminal Law—Shooting with Intent to Kill.

If the accused did the shooting under circumstances from which he had reasonable grounds to believe and did believe that he was in danger of losing his life or of suffering great bodily harm at the hands of the person shot, the accused is justified and acted in self-defense.

Inadmissible Evidence.

Evidence in a case where the defendant is accused of shooting with intent to kill, and is seeking to defend on the ground of self-defense, is inadmissible on behalf of the state, when such evidence tends only to show what might appear to the jury to be reasonable belief of great bodily danger instead of what should appear reasonable belief of danger on the part of the accused. In such a case it is

not an inquiry as to what the danger actually was, but what, under the circumstances, it appeared to be to the accused.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE HINES:

This proceeding is on an indictment charging malicious shooting and wounding with intent to kill, and resulted in a verdict and judgment of guilty, fixing the punishment at confinement in the penitentiary for four years.

The evidence tended to show that a short time prior to the shooting appellant and Ferguson, the person shot, had an altercation, during which Ferguson asked for a pistol to defend himself from the assault being made by appellant, and that the parties separated, each in quest of guns. No one appears to have been sufficiently near the place of shooting to tell what occurred between appellant and Ferguson at that time. Ferguson and other witnesses were permitted to testify that, immediately after the first difficulty and before the shooting, Ferguson was offered a pistol to defend himself against the threatened assault by appellant and that Ferguson, in substance, said he didn't want the pistol, that the trouble was all over, and that appellant would apologize in the morning. These remarks of Ferguson were not communicated to appellant. The principal inquiry is as to the competency of the evidence, and whether it was prejudicial to appellant.

The inquiry then is, With what mind did appellant do the shooting? Was it done in malice, in sudden heat and passion, or without malice, without passion and in self-defense? Any evidence that would tend to throw light upon the intention with which the shooting was done would be competent upon these issues, but as the facts testified to, in reference to the statements of Ferguson, were not communicated to appellant they in no way tend to show the intent with which the shooting was done, and were therefore incompetent. The evidence shows that the circumstances surrounding the shooting were such that the jury were authorized to find malicious shooting, shooting in sudden heat and passion, or shooting in self-defense.

The law of self-defense is that if the accused did the shooting

under circumstances from which he had reasonable grounds to believe and did believe that he was then in danger of losing his life or of suffering great bodily harm at the hands of the person shot, the accused was justified. The evidence objected to was in conflict with this rule, in that it tended, when considered in connection with the instructions hereafter to be referred to, to substitute what might appear, on the part of the jury, to be reasonable belief of danger for what should appear reasonable belief of danger on the part of appellant. It is not an inquiry as to what the danger actually was, but what to appellant the danger appeared to be, so that evidence tending to show that there was no danger, unless that evidence or that fact testified to entered into the grounds upon which appellant acted, was not competent. The inquiry always is as to what the danger was as it appeared to the accused, and not what the danger actually was. In this connection the fifth instruction is misleading. The first part of it is as follows: "If at the time of the alleged shooting the defendant had reasonable grounds to believe and did believe that James Ferguson was then about to take his life or inflict upon him great bodily harm, then he had the right, under the laws of self-defense, to use such violence towards said Ferguson as, at the time, in the exercise of a reasonable judgment, seemed necessary for the protection of his person." This instruction left it to the jury to say whether it appeared to them necessary for appellant to do the shooting in order to protect himself, while the instruction should have gone to the facts as they appeared to appellant.

For the errors indicated the case must be reversed, but in doing so we do not wish to be understood as approving the manner in which the instructions are drawn.

Judgment *reversed* and cause remanded with directions for further proceedings.

Buckner & Allen, Breckinridge & Shelby, for appellant.

P. W. Hardin, for appellee.

[Cited, *Munday v. Commonwealth,* 81 Ky. 233, 5 Ky. L. 67.]

JOHN K. FAULKNER *v.* H. C. JENNINGS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—475.]

Payment or Gift to Defraud Creditors.

One may not make a gift of money to his wife and thereby defraud his creditors; but where his wife receives a farm by devise from her father who long before his death placed said daughter and her husband in possession, and the husband has the use of said land for a long term of years, rent free, and at the death of the testator there was not enough personal property to satisfy the debts, and the land devised to the daughter and her children is about to be sold to pay such debts, the husband, having had the use of the land for years, is under both a moral and legal obligation to pay the debt and relieve his wife's land, and when he does so his creditors, whose claims have accrued mostly since such payment, can not subject such land to sale to pay their claims.

Duty of Husband and Father to Support His Family.

The duty of a husband and father to support his wife and family is paramount to that of paying his debts. He owes to his wife and children such labor and means as may be necessary for their support and this includes the expenditure of both labor and means necessary to provide for them a habitation.

APPEAL FROM GARRARD CIRCUIT COURT.

December 17, 1881.

OPINION BY JUDGE LEWIS:

Samuel Lusk, whose will was probated Feb. 13, 1872, devised to his daughter, Mary D. Jennings, during her life, the farm on which she then resided, supposed to contain 220 acres, for her separate use and benefit, free from the control, sale or disposition of her husband, and at her death, leaving issue, to go, although not absolutely, to such issue or descendants.

It appears that previous to his death, about 1865, the testator placed her in possession of the farm, and it was occupied and used by her and her husband, H. C. Jennings, free from rent from that time until Lusk died. After he died it was found that the personal property left by him was insufficient to pay the debts against his estate, and that the several parcels of land devised to his children would have to be charged with the payment of the deficiency. By a judgment of court, rendered in an action instituted for the purpose of settling his estate, the amount with

which each share was so charged was about $2,702.98, and the lands devised to them respectively were ordered to be sold to raise from each that sum. But to prevent a sale of the farm devised to Mary D. Jennings, her husband, H. C. Jennings, advanced and paid out of his own means the sum with which her farm was so incumbered.

There is some conflict as to the precise date or dates at which the money was paid by him. But from his own statement, which is probably correct, $1,000 of the amount was paid in December, 1872, $937.14 paid in February, 1874, and the residue, $775.00, was paid in the spring or summer of 1875.

July 1, 1875, W. J. Lusk, as principal, and J. K. Faulkner and H. C. Jennings as sureties, gave their promissory note to the National Bank of Lancaster for $9,574.45, due January 4, 1876, and to bear interest at the rate of ten per cent. per annum from its maturity until paid. It appears that the consideration of that note was for other notes given by the same parties about the middle of the year 1874, of which it was a renewal.

Afterwards judgment was rendered upon the note against Faulkner and Jennings. Lusk having died October 23, 1876, no judgment was rendered against him. An execution was rendered upon the judgment, and the amount of the debt unpaid, which had at the time been reduced to $4,039.37, was paid by Faulkner, to whom the judgment was then transferred by the bank. Subsequently execution was levied upon the property of Jennings, and the sum of $607.89 was made by a sale of his property, leaving due from him to Faulkner the sum of $2,019.68, and interest from December 22, 1876, subject to the credit of said sum of $607.89.

This action was brought by Faulkner against H. C. Jennings, his wife, Mary D. Jennings, and her children, all of whom are infants, and others with whom there appears to be no controversy, for the purpose of subjecting the 220 acres of land, devised, as before mentioned, to her and her children by Samuel Lusk, to the payment of the demands of his creditors, to the extent of the amount paid by him in discharge of the incumbrance of the land as aforesaid.

In addition to the facts already stated, it is alleged in the petition that H. C. Jennings paid the entire amount with which the 220 acres was charged on account of the indebtedness of

Samuel Lusk's estate, she paying no part of it, although so reported by the commissioner in the action to settle the estate; that in order to do so H. C. Jennings had to borrow the money for the purpose; that at the time he did so, he was indebted beyond his ability to pay, to the extent of insolvency, and the payments were made in fraud of the rights of his creditors and was an attempt to give his wife and her children said amount of money, and thus create a charge and indebtedness upon his own estate without valuable consideration to the prejudice of his own creditors.

H. C. Jennings and Mary D. Jennings filed a joint answer. In it they allege that for the sole consideration of his love for his daughter, Mary D. Jennings, and for the promotion of her interest, Samuel Lusk, some time before his death, put them in possession of the land, and H. C. Jennings used and cultivated and received the entire proceeds and profits of the land without payment of rent, before as well as subsequent to his death; that H. C. Jennings was under a legal and moral obligation to Mary D. Jennings to pay off and discharge the incumbrance upon the land; and that in consideration thereof, and not to cheat his creditors, such payments were made by him.

They deny that H. C. Jennings was insolvent at the time he created the indebtedness to enable him to make the payments, or was so when they were made, but was solvent and had good financial credit. They deny the payments made by him were an attempt to give money to his wife and children or create a charge upon his estate without consideration to the prejudice of his creditors.

Upon the trial of the action, judgment was rendered by the court dismissing the petition, and the plaintiff in the action has appealed therefrom. In the petition it is substantially alleged that the payments were made by H. C. Jennings with the intent to defraud his creditors, and also without valuable consideration therefor, and relief is sought upon the grounds contained in Rev. Stat. (1867), Ch. 40, §§ 1, 2. These two sections are as follows:

"Sec. 1. Every gift, conveyance, assignment, or transfer of, or change upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to delay, hinder or defraud creditors, purchasers, or other persons, and every bond or other evidence of debt given, suit commenced,

decree or judgment suffered, with like intent, shall be void as against such creditors, purchasers, and other persons. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

"Sec. 2. Every gift, conveyance, assignment, transfer, or charge made by a debtor of or upon any of his estate, without valuable consideration therefor, shall be void as to all his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted, or as to purchasers with notice of the voluntary alienation or charge."

Under the operation of § 1, it is very questionable whether more than the life estate of Mary D. Jennings, if anything, can be subjected. For though the children may not be considered purchasers for a valuable consideration, still, being infants, they could not in fact or in legal contemplation have participated in the alleged fraud. But it is not necessary to decide that question. If the money was paid by H. C. Jennings either with the intent to defraud his creditors or without valuable consideration, the acts are void as to the plaintiff in this action, at least to the extent of such payments as were made subsequent to the creation of the bank debts of which the note dated July 1, 1875, was a renewal.

Therefore, as the determination of the question whether the payments by H. C. Jennings were made with or without a valuable consideration has a bearing upon, though not decisive of, the other question, whether they were made with intent to defraud his creditors, we will consider it first.

According to the policy of our law as always construed and recognized by this court, the duty of the husband and father to support his family is paramount to that of paying his debts. He has not the right to voluntarily and without consideration give, convey, assign or transfer his estate or create a charge upon it, to the injury of his existing creditors. But he owes to his wife and children whatever of his labor or means may be necessary for the suitable and comfortable support of his wife and children, and that includes the expenditure of both labor and means necessary to provide for them a habitation.

For several years previous to the death of Samuel Lusk, H. C. Jennings had the use and profits of the farm intended by the father solely for the use and benefit of his daughter and her children, free of rent, and has so used and enjoyed it ever since; and the evidence in this case shows conclusively that the value of the rents and profits of that farm, while so occupied by him, has greatly exceeded the amounts paid by him to prevent it being sold and sacrificed. His wife could, therefore, with entire justice, require him to relieve it of the charge upon it and save it as a home for her and her children. In our opinion, therefore, there was not only a moral obligation, but also such a legal obligation upon him to make the payments as a court of equity should uphold.

In our opinion the evidence in this case does not satisfactorily show that H. C. Jennings made the payments to relieve the land of his wife and children with the intent to defraud his creditors, in the meaning of the statute. It appears that up to and after July 1, 1875, when the note was given by W. J. Lusk, Faulkner and himself, he had considerable property and good financial credit, and could have met and paid all the debts he owed on his own account. It also appears that W. J. Lusk, up to and for some time after that date, had a considerable amount of real and personal property and financial credit.

As the two first payments to relieve the land of his wife and children were made some time before the execution of that note, and the last and smallest one was made about the time or shortly before the date of that note, and as he had no reason to believe that W. J. Lusk would fail in business and leave the note to be paid by Faulkner and himself as his sureties, it can not be fairly concluded that he made the payments with intent to defraud his creditors.

There are several other questions presented by counsel which it is not necessary to decide.

The judgment of the court below must be *affirmed*. Judge Hargis not sitting.

Jas. A. Anderson, for appellant.

J. S. Vanwinkle, R. P. Jacobs, for appellees.

T. G. CRUTCHER ET AL. *v.* SHELBY R. R. DISTRICT OF SHELBY COUNTY.

[Abstract Kentucky Law Reporter, Vol. 3—533.]

Election Precinct.

Where an order of the court fixed the boundary of a voting precinct in 1855, and such boundary is acquiesced in for many years, it is against public policy to declare the order void because there was no proper petition filed upon which to base the order.

Boundary Line.

It is the general rule that when a boundary line is drawn between given points, it is to be a straight line passing from one point to the other by the nearest course.

APPEAL FROM SHELBY CIRCUIT COURT.

January 7, 1882.

OPINION BY JUDGE LEWIS:

The Shelby County Court, by an order made at its May term, 1855, so changed certain election precincts or districts in that county that, if the new line then established be held to run in a straight course, the present residence and all the farm of appellants except about ten acres are included in District No. One. It is conceded that the order was made without the petition for the change by a majority of the voters of the districts affected by the change, and without the petition therefor of the person who then owned and occupied the farm of appellants.

We do not consider it necessary to decide whether 1 Rev. Stat. (1867), Ch. 32, Art. 2, § 3, under which the order was made, required a majority of the voters of each precinct affected by the change, or merely a majority of the voters to be directly affected thereby, in order to authorize the court to make it. For it would be manifestly improper and against public policy to now declare void the order so long acquiesced in and obeyed by all affected by it, even if made without the petition of the number of voters directed by the statute.

No objection to the order or attempt to vacate it having been made by either appellants or their vendor, but both having submitted to the change made by it and exercised their franchises and rights under it without question or complaint for more than

twenty-five years, they can not now be heard for the first time to object to it. Therefore, the only question necessary to decide is whether the boundary line in dispute shall be run straight or curved so as to exclude appellant from District No. One.

For the same reasons that make it improper to declare the order of the county court void, appellants are estopped to deny that the true boundary includes them in District No. One. Besides there is nothing in the order itself that indicates an intention on the part of the county court to deviate from or make an exception to the general rule that when a boundary line is drawn between the given points it is to be a straight line passing from one point to the other by the nearest course.

As appellants' right of action rests upon the assumption that the boundary line excludes them from District No. One, it follows the court below did not err in dismissing their petition, and the judgment is therefore *affirmed.*

John C. Cooper, L. A. Weakley, for appellants.

Caldwell & Harwood, for appellee.

J. D. BRECKINRIDGE *v.* H. J. CARRICO.

[Abstract Kentucky Law Reporter, Vol. 3—533, as Breckenridge v. Carrico.]

Possession Under Judicial Sale.

The purchaser of land at a judicial sale is entitled to possession after the confirmation of the sale, and an occupant and part owner of the land sold to pay debts and costs can not legally be permitted to occupy and enjoy the land free of rent after the sale and its confirmation.

APPEAL FROM GRAVES CIRCUIT COURT.

January 7, 1882.

OPINION BY JUDGE LEWIS:

In his answer appellant states he was a joint owner of the land purchased by appellee, and that, in his own right as tenant in common with Smith's heirs and as their agent, he had the possession at the time the action for the sale was commenced and up to the time judgment for the sale was rendered. The

record also shows that he continued in the possession and enjoyment of the profits of the land during the year 1878, the sale having been made in December, 1877, and confirmed at the April term, 1878. He also states that the object of the sale, for which he as well as Smith's administrator sued, was to pay the expenses and costs of the long litigation incurred in its recovery, presumably by himself and Smith.

But from the judgment in the two consolidated actions instituted by himself and Smith's administrator, a copy of which is made an exhibit in this action, it appears that the land purchased by appellee belonged to Smith's heirs, or at least was sold as their property, and that the debts amounting to $1,141.71, for which it was adjudged to be sold, were debts against the estate of Smith. If the allegations made by appellant in his answer be true, he occupies the unconscionable attitude of claiming the use and profits of land for a year after the sale made at his suit and for his benefit, and for which the purchaser has given sale bonds bearing interest from date. If the facts set forth in the judgment be true, his attitude is that of a mere intruder or stranger.

Whatever may be the rule in respect to the relative rights and duties of purchasers at judicial sales and debtors or mortgagors, there is no reason in this case for permitting appellant to occupy and enjoy the land free of rent subsequent to the sale and confirmation, whether he was a part owner of the land or mere intruder.

The judgment must, therefore, be *affirmed.*

Boone & Stanfield, W. W. Tice, for appellant.

Anderson & Robertson, for appellee.

WM. BUCHANNAN *v.* D. S. TRIMBLE.

[Abstract Kentucky Law Reporter, Vol. 3—533, as Buchanan v. Trimble.]

Vendor's Lien.

Where land was sold and conveyed in 1856 and notes were taken for a part of the purchase-money, under a written agreement that they were to be paid in labor, and the agreement is lost, after a period of twenty-five years, the vendor will not be allowed, by doubtful evidence, to show that the labor furnished was to satisfy some other claims and not as payment of said notes, so as to destroy the rights of the present holder of the title.

APPEAL FROM WOLFE CIRCUIT COURT.

January 7, 1882.

OPINION BY JUDGE PRYOR:

The notes in controversy, and the conveyance of the land for which the notes were given, were all executed in the years 1856 and 1858, fourteen or fifteen years prior to the institution of this action to enforce the lien. The conveyance, when exhibited, shows that no lien was retained, and the facts of the record conduce strongly to show that it was understood that no lien should be reserved in the deed for the payment of the purchase-money.

Besides, the decided weight of the testimony is to the effect that it was agreed, between the assignee of these notes (the appellee) and the appellant, that the latter should go upon the land of the appellee and perform certain labor in discharge of the two notes and a certain note held by one Lewis. This agreement was in writing but has been lost, and the appellee is attempting to show that the labor was in discharge of other debts than the notes mentioned, and is setting up accounts originating as far back as the year 1858 as a set-off to this claim for labor. While the statute of limitations is not pleaded, and the right of recovery on the accounts when properly proven is unquestioned, still we are satisfied that these notes were discharged and paid off under the agreement, and the appellee will not be allowed to substitute these stale claims as an off-set to the claim for labor so that he may enforce his lien on the land. He stood by for years and must have known, or could have known by the exercise of the slightest diligence, that the appellant, or others for him, held the legal title to the land free from any incumbrance; and after such a lapse of time, and when the agreement as to the labor in discharge of the notes is lost, he will not be allowed to defeat the plea of payment by showing the existence of other indebtedness. The proof warrants the conclusion that the appellant has fully paid off the notes, and if the appellee has other claims against him his remedy is plain.

The judgment is *reversed* and cause remanded with directions to dismiss the petition, or may permit the appellee, if he desires, to amend by setting up the claims due by account. The notes

for the purchase-money and note to Lewis have been pai
the proof shows.

J. E. Cooper, for appellant.

B. F. Day, J. M. Nesbitt, for appellee.

B. KUEBORTH *v.* H. A. MEAD.

[Abstract Kentucky Law Reporter, Vol. 3—533.]

Redemption of Land from Sale.

Where a debt, including interest and costs, is paid by the veyance of real estate, an agreement of the purchaser thereaf permit the grantor to redeem is a voluntary agreement bas no other consideration than his desire that the grantor should the land and pay the money, which the grantor agreed to do when he makes payments under such agreement, and fails t the whole of the debt, the creditor may take possession or e his judgment by again selling the land.

APPEAL FROM GREENUP CIRCUIT COURT.

January 7, 1882.

OPINION BY JUDGE PRYOR:

The appellee's debt was satisfied in full, including interes costs, by his purchase of appellant's land. The agreement t mit its redemption by the debtor was voluntary on the p the appellee, and without any other consideration than his that appellant should keep the land and pay the money. the latter agreed to do, and made various payments for the pose of redeeming the land, even after the sale had been firmed, and reduced the indebtedness by three payments $3,100 to a sum less than $1,000. The commissioner, in taining the amount of credits and the balance due appellee, interest at six per cent. on the debt, interest and costs, for the land sold and which was the entire debt due. This proper; the debt had been paid and the appellee had the at any time when there was a default to take possession land or enforce the payment of his judgment by again selli The appellant failed to redeem, and the interest should

been calculated at the rate of six per cent. on the amount of the purchase-price from the date of the purchase.

The judgment is therefore *reversed* and cause remanded for further proceedings. We think the first report of the commissioner contains both the law and equity of this case.

Roe & Roe, for appellant.

E. F. Dulin, for appellee.

ALEXANDER BRAMEL *v.* EMMA CUNNINGHAM.

[Kentucky Law Reporter, Vol. 3—512.]

Infant Appearing by Next Friend.

An infant plaintiff may prosecute his cause by next friend, and where he becomes of age before the judgment is entered, the defendant having filed his answer and gone to trial without excepting, it is then too late to object that the action was prosecuted by next friend after he arrived at age.

Instruction.

A cause will not be reversed on account of an instruction not entirely correct where such an instruction did not prejudice the substantial rights of the appellant.

APPEAL FROM MASON CIRCUIT COURT.

January 10, 1882.

OPINION BY JUDGE LEWIS:

The verdict of the jury and judgment of the court having been rendered against the defendant in this action for the sum of four hundred dollars, he has appealed to this court and assigned various errors which will be considered in their order.

1. Appellee, Emma Cunningham, being an infant under twenty-one years of age when the action was brought, had the right to sue by her next friend. The defendant having filed his answer and gone to trial without excepting, it is now too late to object that the action was prosecuted by her next friend after she arrived at full age, or that he failed to show his right to sue as required by Civ. Code, § 37.

2. In this case the plaintiff, Emma, testifies positively and distinctly to the truth of the allegations of the petition, and

though the defendant, with equal distinctness and emphasis, testifies to the contrary, and some facts are found tending to contradict her statement and corroborate his, still as the jury are made the triers of the facts and the judges of the credibility of the witnesses, this court is not authorized to set aside the verdict because not able to say it is palpably against the weight of the testimony.

3. Considering the character of the assault alleged to have been committed, the condition and relation of the parties at the time, and the estimate usually and properly put upon female chastity, we are not prepared to say the damages in this case are excessive, appearing to have been given under the influence of passion or prejudice.

4. As appellee, Emma, does not appear to have been a party to, or in any way connected with the difficulty between appellant and her brother, Jacob, we are of the opinion the testimony of appellant in regard to it was properly excluded.

5. We perceive no error in the instructions given by the court at the instance of the plaintiffs, except that the word "wrongfully" is improperly used in the first instruction. But to that appellant can not object because it was prejudicial, not to him but to appellee. The court instructed the jury to find for the plaintiff in case they believed appellant assaulted her in the manner alleged in the petition. To this mode of calling the attention of the jury to the issue made by the pleadings we see no objection. As to the second instruction it was given in the usual and proper language, and did not prejudice the substantial rights of appellant.

Wherefore the judgment is *affirmed*.

Wadsworth & Son, for appellant.

I. C. Campbell, for appellee.

P. G. BUNGER *v.* A. P. HART.

[Abstract Kentucky Law Reporter, Vol. 3—518.]

Usury.

If any rate of interest exceeding the rate authorized by law shall be intentionally charged, the whole of the interest must be forfeited.

Forfeiture on Account of Usury May Be Waived.

The forfeiture of all interest on account of a charge of usury may be waived; but where a defendant defaults and fails to set up by a pleading the grounds for a forfeiture, he waives his right and the court is not authorized to adjudge the whole interest forfeited.

APPEAL FROM HARDIN CIRCUIT COURT.

January 10, 1882.

OPINION BY JUDGE LEWIS:

The judgment rendered in this case does not belong to the class provided for by Buckner & Bullitt's Civ. Code (1876), § 763, as contended for by counsel for appellee; and it was not, therefore, necessary that a motion in the court below to set aside or modify it should have preceded this appeal.

Previous to the execution of the note upon which judgment was rendered the conventional rate of interest had, by Gen. Stat. (1873), Ch. 60, Art. 2, § 1, and also by Ch. 22, § 15, been fixed at ten per cent. It was also provided by Ch. 60, Art. 2, § 4, which is almost identical with Ch. 22, § 18, that if any rate of interest exceeding the rate authorized by the two sections just referred to shall be intentionally charged the whole interest shall be forfeited.

By 1 Acts 1876, Ch. 704, Ch. 60 was amended by striking out "ten" and inserting in lieu thereof the word "eight," and by a further provision of the act all laws or parts of laws in conflict therewith were repealed. But Ch. 60, Art. 2, § 4, as well as Ch. 22, § 18, were left unrepealed. So at the date of the note the conventional rate of interest was eight per cent. per annum, and the whole interest was subject to be forfeited when a greater rate than eight per cent. was intentionally charged.

Counsel for appellant contends that the rate of interest charged in this case, as appears by the face of the note, being ten per cent. and exceeding the rate authorized by law as it then was, the whole interest should have been adjudged by the court below forfeited. In support of that position the case of *Evans v. Chapel*, 13 Bush (Ky.) 121, is referred to. It is true that this court in that case held that, a greater rate than authorized by the conventional interest law having been charged, the whole interest contracted for was thereby forfeited. But it was not intended by

this court to announce the doctrine that the forfeiture should be pronounced by the court in the absence of a plea by the debtor, or that he might not waive the forfeiture. If so, he would not now be prepared to sustain it. In the later case of *Gist v. Smith*, 78 Ky. 367, this court expressly decided that the forfeiture might be waived, and made a plain distinction between the provision of a statute by which a contract for interest above a certain rate should be void as to the whole interest contracted for, and a provision that the whole interest should be forfeited.

As the defendant in the action, though duly summoned, made default, the court below was not authorized to adjudge the whole interest forfeited. But the court erred in giving judgment for a greater rate of interest than six per cent., and for that error the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Montgomery & Marriott, for appellant.

H. T. Nelson, for appellee.

[Cited, *Bitzer v. Mercke*, 111 Ky. 299, 23 Ky. L. 670, 63 S. W. 771.]

FANNIE JONES *v.* FRANK JONES ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—534.]

Widow's Rights Before Dower.

A widow is entitled to one-third of the rents of her husband's real estate from his death until her dower is assigned, and she may hold the dwelling house, yard, garden, stable and stable lot and orchard, but has no right to use or cultivate free of rent any other part of the real estate.

APPEAL FROM OWEN CIRCUIT COURT.

January 10, 1882.

OPINION BY JUDGE LEWIS:

Appellant was entitled to one-third of the rents and profits of her husband's real estate from his death until the assignment of dower. She also had the right to hold the mansion house, yard, garden, the stable and lot in which it stands, and orchard, if there was one adjoining any of the premises aforesaid. But she

had no right to use or cultivate, free of rent, any other portion of the real estate.

As no dower appears to have been assigned to her during the year 1878, no demand made upon her for a division of the land by the guardian of the children, or any effort made by any one to have the land leased or disposed of, she should not for that year be charged the full rental value of either tract of land, but the rental value only of such portions as she actually cultivated, and the value of the actual benefits or profits she received in pasturing her own stock or from others to whom she let the pasturage, after deducting her dowerable share of one-third and the shares belonging to the infant children residing with her.

As the instruction given by the court authorized the jury to find against her 10/21 of the entire rental value of the land, except the mansion house and curtilage, instead of limiting the recovery to the rental value of what she actually cultivated, used and enjoyed. The judgment must be *reversed* and cause remanded with instructions for further proceedings consistent with this opinion.

Hallam & Gordon, for appellant.

Geo. C. Drane, for appellees.

THOMAS NEWMAN v. RICHARD O. NEWMAN.

[Abstract Kentucky Law Reporter, Vol. 3—534.]

Judgment by Consent—Advancement.

Where in a suit between heirs a judgment by agreement is entered, decreeing that each of the children shall participate equally in an estate, money advanced to one of the heirs by the deceased father can not be charged against him so as to make his share under the decree less than that received by each of the heirs.

APPEAL FROM NELSON CIRCUIT COURT.

January 14, 1882.

OPINION BY JUDGE PRYOR:

The judgment below in this case must be reversed. It is evident that the $1,000 note was given to bring about a reformation on the part of the appellee by those who were so much interested

in his future welfare as to be willing to make any reasonable sacrifice to bring about such a result. When the first action was instituted on the note such was the conclusion reached by the jury, and the appellant admits in the action before us that such was the consideration, connected with the desire on the part of the mother to make him equal in distributing the small estate left by her husband. The agreed judgment in this action is, in effect, a consent of all the parties in interest made part of the record, that the appellee shall have an equal portion of the estate. "By consent of the parties it is adjudged that the plaintiff, R. O. Newman, recover of the defendants a sum equal to a child's full share of John E. Newman's estate, the interest in the personal estate to be paid in money and the real estate to be conveyed to him," etc.

His father had required him to account for $1.000 to the other children by the provisions of his will, and when the estate was divided, in order to make appellee account for the $1,000, there being but little personal estate, he had to account for it in the division of the real estate. In that division he obtained real estate that was valued at $750, less than the portion allotted to the other children, and this real estate he has conveyed, as the pleadings show, to his brother Thomas for a valuable consideration. The case has been referred to a commissioner to ascertain of what the estate consisted, and there was nothing in the pleading nor proof entitling him to a conveyance of a full interest in the realty when it appeared this Louisville property was the only real estate owned and that his interest under the will had been conveyed to his brother. He is entitled to real estate of the value of $750.00 and to a judgment for the personalty as found by the judgment rendered. When this is done he has secured all he is entitled to, unless when the case goes back other estate may be discovered, or he can make it appear that the brother has obtained fraudulently the land allotted to him in the division had under the will. The plain purpose is to make the children equal less the widow's interest. This the court is left free to ascertain by further reference to the commissioner, but must make the appellant account for what he has received since his father's death.

Judgment *reversed* and cause remanded. The personal judgment we think is right, but as to the realty, it is erroneous. Judg-

ment *reversed* and cause remanded for further proceedings consistent with this opinion.

Muir & Wickliffe, for appellant.

J. W. Thomas, Geo. S. Fulton, John A. Fulton, for appellee.

GEORGE KAYE ET AL. *v.* CITY OF LOUISVILLE.

[Abstract Kentucky Law Reporter, Vol. 3—534, affd. 13 Ky. L. 114, 14 S. W. 679.]

Proceeding to Collect Taxes.

A purchaser of real estate is required to pay the taxes against the property which are unpaid and which in the contract of purchase he has received from the grantor.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 17, 1882.

OPINION BY JUDGE PRYOR:

It is difficult to see in what manner Kaye is interested in this controversy. He was not primarily liable either to the city or to the last purchaser for the taxes due, and if liable to the last purchaser, who is the real appellant? The latter expressly states that he is fully indemnified by the judgment in the action under which he made his purchase. This is a proceeding in rem to enforce a lien for taxes due by the original owner, who is not before the court. It is not pretended that the taxes for the years named have been paid, and the appellant, Levy, says he is permitted to retain the taxes out of the purchase-money, or rather is fully indemnified by the judgment ordering a resale. Various questions of interest might arise in this case if the parties to the record could be affected by the judgment, but when the taxes have not been paid and the purchaser permitted to retain them he ought in equity to be required to pay over. He is not prejudiced in any way.

Judgment *affirmed.*

D. M. Rodman, for appellants.

H. M. Lane, for appellee.

NATIONAL BANK OF STANFORD *v.* S. G. HOCKER.

[Abstract Kentucky Law Reporter, Vol. 3—535.]

Delay in Collecting Evidence of Payment.

Where a bank, for a period of eight or nine years, delays a tempt to collect a note held by it, such delay tends to sho some settlement had been made.

Consideration.

The delivery of one note in consideration for another is b and may be pleaded, although not assigned.

APPEAL FROM LINCOLN COURT OF COMMON PLEA

January 17, 1882.

OPINION BY JUDGE PRYOR:

The delay on the part of the bank for the period of or nine years conduces strongly to show that some settl had been made with reference to the note in controversy while some of the instructions were perhaps erroneous, t covery was doubtless based on an instruction given at t stance of the plaintiff, the party now complaining. A surr of the right to control or collect the fund due from the est Givens was a sufficient consideration for the agreement t render the note due by the appellee; and if the appellant took to collect the money and failed to do so, when it could been done, it is responsible in damages, particularly whe laches of the bank has placed the entire burden of payme one of the obligors.

However, waiving this view of the question, the app asked the court to instruct the jury, "That before they coul for the defendant they must believe from the evidence tha plaintiff agreed and did accept the pro rata declared on the ert Givens note in full satisfaction of the note sued on." propriety of this instruction is now questioned by the appe and while his view of the law may be correct it is too l change the legal issue as presented by this instruction. proof of the defendant is that the bank did agree and did a the dividend in settlement and discharge of the note in c versy, and that he actually collected $100 of the money.

true the proof of the appellant is in direct conflict with that of the appellee, but it was with the jury to pass on the question of fact. It was certainly not necessary that the note on Givens should have been assigned to the bank in order to make the plea good. Under the former rule it would not have been a good plea of accord and satisfaction when not assigned, because the holder had no right to sue upon it; but under our present system he may sue, and a delivery of one note in consideration for another is binding and may be pleaded, although not assigned.

In this case it appears that Alcorn undertook to collect for the bank and actually paid $100 of the money, the proceeds of the Givens note; and while the record in the Givens suit shows the dividend was made for the benefit of some one else, still it is equally manifest that the party had no right to the money, and the proof tends to the conclusion that it was never paid to him; but whether so or not the issue was made, and if improperly made the appellant is in no condition to complain. We think upon another branch of this case it is clearly to be inferred that the bank undertook to collect this money and have it applied to the payment of this debt. It waited for years until two of the obligors become insolvent, neither demanding a renewal nor payment; and with such an agreement as is proven by Green to have been made with its president, the bank ought not to collect this money.

Judgment *affirmed.*

J. S. & R. W. Hocker, for appellant.

J. S. Vanwinkle, R. C. Warren, for appellee.

AETNA INSURANCE CO. *v.* J. W. STRICKLE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—535.]

Proof of Loss on Insurance Policy.

Where an insurance company refuses to pay a loss because it claims that the insured burned the property insured, the failure of the insured to make proper proof of loss within a reasonable time can not be relied upon as a defense.

Proof of Loss on Fire Policy.

In case of a fire consuming all the goods in a store room and all the books and accounts of the insured, proof by the insured and

his clerk by affidavits showing such fact and the amount and value of property destroyed, according to their recollection, is sufficient, especially where the company is defending on another ground.

APPEAL FROM WARREN CIRCUIT COURT.

January 19, 1882.

OPINION BY JUDGE PRYOR:

The question raised by the general demurrer to the petition is disposed of by reference to the answer. The affirmative averment found in the petition to the effect that the appellees had complied fully with all the conditions precedent on their part is not only traversed by the answer, but that pleading designates the conditions dependent upon a recovery after the destruction of the property insured, and then by specific statements sets forth each and every condition, and the failure of the appellees to comply with the same. This cured the defect in the petition, and the reply of the appellees, with the rejoinder, surrejoinder, etc., presented an entire pleading conforming to the most technical rules found in the elementary books on the subject.

There really were but two questions involved in this case arising on the pleadings and proof. The first was, did the appellees make to the agent a fraudulent representation as to their stock of goods and their value? Second, did the appellees or either of them set fire to the building or cause it to be done? There is much said in both the pleadings and briefs as to the failure of the appellees to make the proper proof as to the loss, and their failure to satisfy the company in a reasonable time, but it is evident that the company have concluded not to pay the loss, and based this action upon the cause of defense already stated. Besides, the proof clearly shows that the building and contents of the store were entirely consumed, including the books of accounts, invoice, bills, etc., and there was no other character of proof to be obtained than that presented to the company. A schedule of the entire stock on hand was made from memory by the appellees and the clerk. This the company had. They made the affidavits of the loss as required by the policy, and obtained a certificate from the magistrate in direct compliance with the policy. They submitted, to be interrogated by the agent of the company under oath, and signed the statement, except one, who

declined to sign his, although a sworn statement, by reason of what he considered to be certain improper and irrelevant questions propounded to him affecting his moral character. The agent lived in the town and knew of the loss. The names of the parties from whom they purchased their goods were submitted to the agent or adjuster of the losses, and on the whole case the preliminary proof of the loss and contents was ample and authorized payment, unless the real defense to the recovery could be made out. The failure to instruct as to the character of preliminary proof was immaterial, as from the exhibition made by the company of the written evidences of the loss, forwarded by the appellees, and the examination made by the agent of the parties themselves, the proof was sufficient to require payment. None other could have been made, and the appellees were not required to hunt up every party of whom they purchased to show the nature of the store and its value, as their own affidavits and that of Patterson, with the certificate of the magistrate, and their personal examination by the agent were sufficient.

With the two real grounds of defense this court has but little to do. As to the alleged fraudulent misrepresentation of the stock and its value the jury were the sole triers of that question. The appellees and Patterson swear as to the stock and its value, and besides, the local agent lived in the same city with the appellees, and had previously insured this stock of goods in another company for $2,000. It is scarcely to be presumed that one being in a small city and engaged in the business of insurance would not have some idea of the magnitude of the business in which the parties insured were engaged, and certainly would not insure first for $2,000 and then for an additional sum of $1,000, when the business was so trifling and the stock so valueless as to be known to men of scarcely any business habits living in the same vicinity. The proof on the one side fixes the value at the date of insurance at $4,200, on the other at $700 or $800. It was the province of the jury to decide the one way or the other. They saw proper to give full credence to the statements of the appellees and their clerk or salesman, and this proof certainly authorized the verdict.

As to the alleged charge of burning the property in order to obtain the insurance, the jury disregarded the positive testimony of one who made oath that the appellees, or one of them, had paid

him to burn other property, and had attempted by the offering of money to induce him to burn the property in controversy. This statement came from a witness of bad repute, is superfluous in its detail, and so incredible as to create grave doubts as to its truth. All the facts and circumstances were considered by the jury, and even the opinions of witnesses; and the details of conversations with others made up the mass of testimony affecting the character of the appellees and the probability of their having been instrumental in causing the destruction of their property. Still, the jury returned a verdict for the appellees. That verdict can not be disturbed on the facts.

The jury were also required to respond to various special interrogatories by the court:

1. What was the value of the plaintiff's stock at the date of insurance? Ans. $4,200.

2. What was the value at the date of the fire? Ans. $3,300.

3. Did plaintiffs make full and complete proof of loss, as required by the terms of the policy, and furnish them to defendant sixty days before suit? Ans. Yes. It is insisted that the court should have told the jury what preliminary proof was necessary and thus left them to decide whether or not this proof had been furnished. This may be true, but, as already stated, the defendant's own testimony shows that all the proof was furnished that the case was susceptible of, and looking to the defendant's proof alone, it was sufficient. Their own agent knew the policy of $2,000 was on the property and had himself effected the insurance.

4. Did or not plaintiffs or either of them use all possible diligence in saving or preserving the property insured? Ans. Yes.

5. Did sixty days elapse before the date of filing the last paper of their proof of loss and the filing of this suit? Ans. Yes.

So if all the instructions had been refused, these plain, simple and easily understood issues placed in the form of interrogatories cured any and all defects in the instructions, and having been answered in the affirmative, the general verdict necessarily followed.

Besides, the court gave to the jury at the instance of the defendant an instruction, "that it was the duty of the plaintiffs under the terms of the policy to have prepared and forwarded to defendant an intelligible proof of their claims, and unless they

did so, or were induced not to do so by defendant, they will find for defendant."

The proof was intelligible and sufficient, and there is no doubt but the insurance would have been paid but for the other defenses relied on. Some ten or twelve instructions were given for the defendant covering the entire law of the case and there is no reason for reversing this judgment either on the instructions or the testimony.

Judgment *affirmed.*

Bush & Porter, Porter & Porter, for appellant.

J. W. & Geo. R. Gorin, Halsell & Mitchell, for appellees.

JOHN KLUMP *v.* JOHN G. LIEBOLD.

[Abstract Kentucky Law Reporter, Vol. 3—684.]

Estoppel.

If a party has an interest to prevent an act being done, and acquiesces in it so as to induce a belief that he consents to it, and the position and right of others is altered by their giving credit to his sincerity, he is estopped from challenging the act to their prejudice.

Estoppel by words and conduct.

One who acquiesces in the erection of a column when it is partly on his land, by both words and conduct intimates his consent thereto, was present while the work was being done and expressed his satisfaction with it, is estopped from thereafter objecting to it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 19, 1882.

OPINION BY JUDGE LEWIS:

The evidence in this case is conclusive that appellant not only acquiesced in the erection of the column by appellee upon his side of the boundary line, but by both words and conduct intimated his consent thereto. As the division line as claimed by him was plainly described by the partition wall it is unreasonable to suppose that he, being present while the work was being done, was ignorant of the position of the column relative to that line. Not only do other witnesses besides appellee testify that

he was present and observed the work as it progressed and expressed himself satisfied with it, but he in his own deposition states that he told appellee he would be satisfied with the erection of the column if no further damage was done to him.

The doctrine is familiar and well settled that "If a party has an interest to prevent an act being done, and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license."

By an evident mistake in the two deeds from Knoller to appellant and appellee there was conveyed to the former nine and one-half inches more of land, and to the latter the same quantity less than they respectively purchased and believed they were getting. This fact was demonstrated by the survey made at the instance of appellee and was known to both of them while the improvement of appellee's portion of the house was going on. While, therefore, it can not be said that appellee erected the column in ignorance of the true position of the dividing line between them, the knowledge revealed by that survey to the appellant that he had obtained by the deed a greater and appellee a less quantity of land than they purchased and expected to get, may have induced appellant to the placing of the column at or near where they both believed, until the survey was made, the true line was.

Under the circumstances of this case we are of the opinion that appellant has not manifested any right to the relief sought in this case, particularly as to grant it would leave appellant without any recompense for the expenditure he was induced to make by the license and permission of appellant.

Wherefore the judgment of the court below is *affirmed.*

Barrett & Brown, John Barrett, for appellant.

R. C. Davis, for appellee.

[Cited, *Wright v. Williams,* 25 Ky. L. 1377, 77 S. W. 1128.]

D. F. EPPERSON *v.* ROBERT GRAVES.

[Kentucky Law Reporter, Vol. 3—527.]

Meaning of the Word "Process."

The word "process" means a writ or summons issued in the course of judicial proceedings.

Trespass by Serving a Writ.

It is the duty of the clerk of the circuit court to issue writs to the sheriff, and when he is a party to the action or interested therein, to the coroner, and when he is interested, to the jailer, and if all these officers be interested, then to any constable. But where the clerk issues a writ and directs it to the constable, because the office of sheriff is vacant, the constable is not required to determine and decide whether the writ is properly issued to him or not; and where the writ is regular on its face, and he obeys its command and serves it, he is not liable for trespass on account of the fact that it should not have been issued to him.

APPEAL FROM PULASKI CIRCUIT COURT.

January 21, 1882.

Judge Cofer delivered the following opinion January 14, 1880; after a rehearing it was again delivered by the court January 21, 1882:

The appellant, being sued by the appellee for seizing and converting to his own use certain goods and chattels belonging to the appellee, sought in one paragraph of his answer to justify under the following facts: He alleged that he was a duly elected and qualified constable of Pulaski county, and that there issued from the office of the clerk of said county an execution of fieri facias against the appellee, and that he seized the goods sued for under and by virtue of said writ, and not otherwise. The writ was directed to the sheriff or any constable, but he averred that the office of sheriff of Pulaski county was at the time vacant. The appellee demurred to that part of the answer and his demurrer was sustained, judgment was rendered against the appellee for the agreed value of the property, and he has appealed.

Civil Code (1876), § 667, Subsec. 1, reads as follows:

"Every process in an action or proceeding shall be directed to the sheriff of the county; or, if he be a party, or be interested, to the coroner; or, if he be interested, to the jailer; or, if all these

officers be interested, to any constable." "The word 'process' means a writ or summons issued in the course of judicial proceedings." Civil Code (1876), § 732, Subsec. 26. "The word 'writ' means an order or precept in writing, issued by a court, clerk, or judicial officer." Civil Code (1876), § 732, Subsec. 27.

A fi. fa. is a writ, and therefore included in the generic word "process" used in § 667, and, when issued from the clerk's office of the circuit court, is required to be directed as prescribed in that section; and, inasmuch as the office of sheriff was vacant, the fi. fa. under which the appellant seized and sold appellee's goods should have been directed to the coroner or jailer, unless those officers were interested, which does not appear.

But does it thence follow that the constable to whom it was thus directed is liable as a trespasser for having acted under it? We think not. The law made it the duty of the clerk to issue the writ, and to direct it to the proper officer. In order to do this he must first decide to which of the several officers it ought to be issued, and the constable, as a ministerial officer, had no right to revise or question the decision of the clerk, or to inquire whether the coroner and jailer were interested or not. The writ was issued by an officer authorized to issue it, and to indicate which of several officers should execute it, and being regular on its face, it was the appellant's duty to proceed with it. *Commonwealth v. O'Cull,* 7 J. J. Marsh. (Ky.) 149, 23 Am. Dec. 393; *Banta v. Reynolds,* 3 B. Mon. (Ky.) 80.

We are therefore of the opinion that the court erred in sustaining the demurrer to that part of the answer in which the appellant justified under the fi. fa. Judgment *reversed,* and cause remanded with directions to overrule the demurrer.

Curd & Waddle, for appellant.

T. Z. Morrow, for appellee.

SAMUEL S. GREGG *v.* WM. G. WOODS.

[Kentucky Law Reporter, Vol. 3—526.]

Warranty in Sale of Horse.

In a suit for an alleged breach of warranty that a horse sold was gentle, safe and a good harness horse it is not necessary for the plaintiff to show that the defendant knew the horse was not such as he warranted him to be.

Joining Causes of Action.

When the plaintiff has a cause of action upon a contract, and also a cause of action for fraud or negligence directly connected with the contract, he may unite them in the same petition.

APPEAL FROM JESSAMINE CIRCUIT COURT.

January 21, 1882.

OPINION BY JUDGE LEWIS:

Two causes of action are stated in the original petition. The first is for an alleged breach of warranty that the horse sold was gentle, safe and a good harness horse. The second is for fraudulent concealment of alleged unsoundness of the horse.

To maintain the action upon the first ground it was not necessary for the plaintiff to show that the defendant knew the horse was not such as he warranted him to be. Nor was it necessary in order to recover damages upon the second ground, for him to have tendered the horse back and demanded a rescission of the contract. The court, therefore, erred not only in instructing the jury that these were necessary conditions of recovery by the plaintiff, but also erred to his prejudice by embodying in one what should have been given in separate and distinct instructions, whereby the plaintiff was deprived of any alternative right of recovery.

In the amended petition tendered by the plaintiff, and which the court refused to permit filed, it is alleged that the defendant sold the plaintiff the horse as sound and all right, and warranted him to be such, whereas he was at the time diseased and unsound in his eyes and otherwise, and by reason thereof he was of no value to him. Though the cause of action stated in the amended petition is one arising upon contract and distinct from the one founded upon the alleged fraudulent concealment set forth in the original petition, still, under Civ. Code (1876), § 83, as construed by this court, it may be properly united and prosecuted in the same action with that cause of action.

In the case of *Jones v. Johnson*, 10 Bush (Ky.) 649, this court used the following language: "Whenever the plaintiff has a cause of action upon a contract, and also a cause of action for fraud or negligence directly connected with the contract, we have no doubt but he may unite them in the same petition."

NATIONAL BANK OF STANFORD *v.* S. G. HOCKER.

[Abstract Kentucky Law Reporter, Vol. 3—535.]

Delay in Collecting Evidence of Payment.

Where a bank, for a period of eight or nine years, delays any attempt to collect a note held by it, such delay tends to show that some settlement had been made.

Consideration.

The delivery of one note in consideration for another is binding and may be pleaded, although not assigned.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

January 17, 1882.

OPINION BY JUDGE PRYOR:

The delay on the part of the bank for the period of eight or nine years conduces strongly to show that some settlement had been made with reference to the note in controversy; and while some of the instructions were perhaps erroneous, the recovery was doubtless based on an instruction given at the instance of the plaintiff, the party now complaining. A surrender of the right to control or collect the fund due from the estate of Givens was a sufficient consideration for the agreement to surrender the note due by the appellee; and if the appellant undertook to collect the money and failed to do so, when it could have been done, it is responsible in damages, particularly when the laches of the bank has placed the entire burden of payment on one of the obligors.

However, waiving this view of the question, the appellant asked the court to instruct the jury, "That before they could find for the defendant they must believe from the evidence that the plaintiff agreed and did accept the pro rata declared on the Robert Givens note in full satisfaction of the note sued on." The propriety of this instruction is now questioned by the appellant, and while his view of the law may be correct it is too late to change the legal issue as presented by this instruction. The proof of the defendant is that the bank did agree and did accept the dividend in settlement and discharge of the note in controversy, and that he actually collected $100 of the money. It is

true the proof of the appellant is in direct conflict with that of the appellee, but it was with the jury to pass on the question of fact. It was certainly not necessary that the note on Givens should have been assigned to the bank in order to make the plea good. Under the former rule it would not have been a good plea of accord and satisfaction when not assigned, because the holder had no right to sue upon it; but under our present system he may sue, and a delivery of one note in consideration for another is binding and may be pleaded, although not assigned.

In this case it appears that Alcorn undertook to collect for the bank and actually paid $100 of the money, the proceeds of the Givens note; and while the record in the Givens suit shows the dividend was made for the benefit of some one else, still it is equally manifest that the party had no right to the money, and the proof tends to the conclusion that it was never paid to him; but whether so or not the issue was made, and if improperly made the appellant is in no condition to complain. We think upon another branch of this case it is clearly to be inferred that the bank undertook to collect this money and have it applied to the payment of this debt. It waited for years until two of the obligors become insolvent, neither demanding a renewal nor payment; and with such an agreement as is proven by Green to have been made with its president, the bank ought not to collect this money.

Judgment *affirmed.*

J. S. & R. W. Hocker, for appellant.

J. S. Vanwinkle, R. C. Warren, for appellee.

AETNA INSURANCE CO. *v.* J. W. STRICKLE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—535.]

Proof of Loss on Insurance Policy.

Where an insurance company refuses to pay a loss because it claims that the insured burned the property insured, the failure of the insured to make proper proof of loss within a reasonable time can not be relied upon as a defense.

Proof of Loss on Fire Policy.

In case of a fire consuming all the goods in a store room and all the books and accounts of the insured, proof by the insured and

OPINION BY JUDGE LEWIS:

By an act of the general assembly approved January 31, 1870, (1 Acts 1869-70, p. 205, Ch. 220), entitled "An act for the benefit of the Bryant Station & Lexington Turnpike Road Company," appellant was authorized to charge certain rates of toll which were in excess of the rates the legislature subsequently deemed reasonable and just, and in excess of the rates prescribed by Gen. Stat. (1881), Ch. 110, § 3, Subsec. 3, and an act approved March 19, 1878 (1 Acts 1878, Ch. 575), to be charged by all other turnpike road companies in this commonwealth incorporated since the year 1856.

It appears appellant was incorporated by order of the Fayette County Court, March 12, 1859, was duly organized, and completed about five miles of a turnpike road. It does not appear that subsequent to the act of January 31, 1870, or upon the faith of that act, appellant has expended or borrowed any money for the extension of its road, or done any act or incurred any cost or responsibility whatever. Much less does it appear that appellant has promised or agreed to perform or actually performed any act for the benefit of the commonwealth or its citizens in consideration of the exceptional benefits conferred upon it by that act, and which it now claims the right to use and enjoy to the exclusion of all other turnpike companies incorporated since the year 1856.

The act for the benefit of appellant approved January 31, 1870, was a mere gratuity, possessing none of the elements of a contract binding upon the commonwealth, but conferring an exclusive privilege upon the appellant, not now enjoyed by other turnpike companies, that the legislature had the right to repeal and has repealed, leaving appellant to be governed by the general laws applicable to other companies created for like purposes. The judgment is *affirmed*.

Houston & Mulligan, for appellant.

HORACE BURTON ET AL. *v.* JOHN G. MCFARLAND ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—536.]

Liability of Clerk of the Court for Failing to Issue Execution.

Where a judgment is entered and plaintiff's attorney made, in the

memorandum book kept by the clerk for such purposes, a direction to the clerk to issue an execution, and he fails to do so, and as a result the plaintiff is unable to collect his judgment, the clerk becomes liable for such loss and he and his sureties are liable therefor.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 24, 1882.

OPINION BY JUDGE LEWIS:

By the terms of the judgment rendered upon the 5th of June, 1874, in the case of *Burton v. Hagan,* the plaintiff, Burton, was entitled to an execution against J. W. Hagan for the whole amount of the debt, and upon the order of the plaintiff or his attorneys given before the sale by the master commissioner, it was the duty of appellee, as clerk, to issue the execution.

Upon the 19th of June, 1874, more than ten days after the date of the judgment, appellants' attorney made in the memorandum book kept by the clerk for such purposes the following entry: "H. Burton, etc. v. J. W. Hagan, etc. Issue execution without delay. June 19, 1874. Owen & Ellis." But notwithstanding the direction so given the clerk did not in a reasonable time after the date of the entry, or at any time during his term of office, which continued until the 1st of September next thereafter, issue the execution. It is alleged in the petition, and there is evidence conducing to show, that by reason of his failure to issue the execution appellant lost his recourse upon the assignors of the note for which the judgment was rendered, and failed to collect a considerable portion of his debt.

The judgment appears to have been rendered in favor of only one of the plaintiffs, Burton. But that omission did not invalidate the judgment, nor afford excuse for the failure of the clerk to issue the execution. No execution could have been issued against Maggie Hagan, because no personal judgment was rendered against her. There was no discretion given to the clerk except to ascertain whether the sale by the master commissioner had taken place; nor was there any reason for him to doubt or hesitate, for his duty to issue execution in favor of Burton, the plaintiff, against J. W. Hagan, the defendant, when ordered to do so by the plaintiff, was plainly indicated by the judgment.

Without deciding whether the defense pleaded by appellees is

sufficient to defeat a recovery, we are of the opinion that a cause of action is stated by appellants and that the proof conduces to sustain their allegations; consequently the court below erred in instructing the jury as in the case of nonsuit, and the judgment is *reversed* and cause remanded with directions to grant a new trial, and for further proceedings consistent with this opinion.

W. L. Burton, Little & Slack, for appellants.

S. H. SMITH ET AL. *v.* A. F. GOWDY'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 3—538.]

Judicial Sale of Real Estate.

Where land is appraised and purchased at a judicial sale for less than two-thirds of its value, the question as to the validity of such sale may be raised upon exceptions filed to the commissioner's report, but where no exceptions are filed and the sale is confirmed, and a writ of possession issues, it becomes final and valid.

Effect of Discharge in Bankruptcy.

A discharge in bankruptcy releases a debtor from personal liability, and no personal judgment can be taken against him on such debts, where he sees proper to set up and rely upon his discharge.

APPEAL FROM TAYLOR CIRCUIT COURT.

January 24, 1882.

OPINION BY JUDGE PRYOR:

It may be assumed in the determination of the questions presented in this case that the whole amount of the notes in controversy was not the purchase-price for the land; and still it appears that the parties had a settlement of their accounts up to a certain period, and in executing the notes it is evident that the payments made were applied to the other transactions between the parties and not to the purchase-money due for the tracts of land sold. The defense of non est factum was decided adversely to the appellants by the jury, as both parties concede, and these notes were executed and delivered by them at the time of the conveyances were made and a lien retained to secure their payment. The appellants do not attempt to show payment, but are endeavoring to avoid the legal effect of the notes and conveyances by showing

that they were not in fact executed for the purchase-price of the land, so as to enforce their claim to a homestead. The party with whom these dealings and settlements were had was dead at the institution of the action and can give no account or explanation of these business transactions, and therefore the chancellor would be reluctant to adopt the appellant's theory of this case merely for the purpose of securing to them a homestead, when there must be grave doubts as to the justice of such a claim, based alone upon the statements made by the appellants, if such statements were competent. The bankrupt proceeding did not prevent the enforcement of this lien or operate to divest the appellee of the right to sell the homestead.

There was no right of redemption in the land sold because the debts were created prior to the passage of the law authorizing such redemption; but as the land was appraised and purchased for less than two-thirds of its value, there might have been some question raised upon exceptions to the commissioner's report as to the exercise of such a right if there had been a great sacrifice of the property, connected with other facts presenting equitable grounds for the interference of the chancellor. There were no exceptions filed to the report of sale, but on the contrary the sale was confirmed and a writ of possession issued. There is an affidavit copied into the record showing that a tender had been made of the purchase-money. This affidavit was filed with the circuit clerk. No motion was based upon it, nor any step taken to prevent the confirmation of the sale. After the court had taken cognizance of the case the chancellor had the power to enforce the lien, but as a petition in bankruptcy was subsequently filed, the proceedings, so far as the personal judgment was concerned, should have been stayed. The discharge in bankruptcy operated to release the appellant from all personal liability on these debts, and for that reason the personal judgment is reversed that appellants may rely, if they see proper, on their discharge in bankruptcy; but as to the proceedings in rem to enforce the lien it will not be disturbed, and the judgment is to that extent *affirmed.*

Belden & Collins, for appellants.

W. E. & S. A. Russell, for appellee.

GEORGE JENKINS *v.* P. L. NETHERLAND.

[Abstract Kentucky Law Reporter, Vol. 3—538.]

Consideration for a Note.

The conveyance of land by a tenant by the curtesy is a good consideration for a note, and in the absence of fraud or mistake the conveyance can not be disturbed nor cancelled.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 24, 1882.

OPINION BY JUDGE PRYOR:

The right to relief in this case is not based on a mutual mistake by the parties in the execution of the conveyance to appellant, nor on a mistaken belief on the part of either as to the character of the title. The note is asked to be surrendered and the deed cancelled for the want of any consideration whatever for its execution. The parties in possession of the land did not hold adversely to the appellees. They were on the land as heirs of Rufus Jenkins and claimed in no other way. They held the possession in a legal sense, as much for the husband of their deceased sister as for themselves. He was tenant by the curtesy, owning for life the one-third interest to which his wife was entitled. Here was a consideration for the note, and in the absence of any fraud or mistake, and none is alleged, the conveyance can not be disturbed. If a mistake had been alleged it is doubtful from the proof whether the deed would not be reformed instead of being cancelled. The one party insists that he sold only a life estate, and was informed by the draftsman that the conveyance was all proper, while the other maintains that the conveyance was absolute as it purports to be. The appellant is in possession, and that possession has never been disturbed, and besides, it is alleged and not denied that the annual rental of this interest is of the value of fifty dollars per annum. The conveyance certainly will not be cancelled upon no other allegation than a want of consideration.

Judgment below is *affirmed.*

R. E. Puycar, P. W. Hardin, for appellant.

R. S. Montague, for appellees.

WILSON EDMONSON v. SIDNEY GREEN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—538.]

Homestead Right.

While a judgment determining the right of a debtor to a homestead will not preclude a creditor from an attempt to subject the homestead to a debt incurred prior to the passage of the homestead law, still, an effort to show by parol testimony after the lapse of twenty years that the debt was created as far back as the year 1850 will fail unless the proof is clear and conclusive.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 24, 1882.

OPINION BY JUDGE PRYOR:

It may be that the judgment rendered in this case determining the right of the debtor to a homestead did not preclude the creditor from an attempt to subject the homestead to a debt incurred prior to the passage of the homestead law; yet the effort in this case is to show by parol testimony after the lapse of twenty years that the note executed in 1871 was for an indebtedness created as far back as the years 1850 or 1854. In such a case the proof should be clear and conclusive before the homestead will be subjected. The proof in this case consists principally of the statements made by the obligee to others, not in the presence of the debtor. That they had business transactions in the year 1854 is evident, but whether these transactions were involved or constituted the consideration of the note in 1871 is doubtful, and the creditor, under the circumstances, should be satisfied with obtaining his pro rata of the estate with the other creditors. This being the view adopted by the court below the judgment is *affirmed.*

W. B. Harrison, for appellant.

John W. Lewis, for appellees.

WM. PATTERSON ET AL. *v.* BURREL MILLION'S ADMX. ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—538.]

Record on Appeal.

The Court of Appeals has no power to reverse a judgment except for errors appearing in the record, and where the record on appeal fails to show affirmatively the infancy of a party the court can not indulge the presumption that she was an infant.

Motion to Dismiss Appeal.

The statutory guardian of an infant appellant may move to dismiss his appeal. He has the power to control the ward in taking and prosecuting an appeal, especially where the interest of the ward does not conflict with the action of the guardian.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

January 24, 1882.

OPINION BY JUDGE HARGIS:

This was an action brought by the administratrix of Burrel Million to settle his estate, pay debts, and for distribution and partition of his estate among his widow and heirs. One of the heirs was an infant when the suit was instituted. During its pendency she married the appellant, William Patterson, had one child and died. But before her death and after the birth of her child, the landed estate of the decedent was, by consent of all the parties to the suit and subject to her privy examination, decreed by the court to be sold. It was sold, and her father became the purchaser, and the sale, without exception, was confirmed. At a succeeding term of the court the appellant, William Patterson, moved to set aside the sale. His motion was overruled and he prosecutes this appeal in which he has joined his infant son as appellant.

He contends that, at the time the sale of the land was adjudged, his wife was an infant and married, and that no bond was executed or privy examination made as required by Civ. Code (1876), § 493, and that for these reasons the sale was void. This court has no power to reverse a judgment except for errors appearing in the record. As the record fails to show affirmatively the disability of appellant's wife, we can not presume she was an infant when the judgment was rendered or sale made.

Had appellants instituted suit to vacate the judgment on the ground on which they seek a reversal they would have been compelled to show that her condition did not appear in the record, before his action would have been maintainable. As they have resorted to an appeal, they must show her disability by the record before a reversal can be awarded. Wherefore the judgment as to the appellant, William Patterson, is *affirmed*.

The statutory guardian of the infant appellant moves to dismiss this appeal as to his ward. We perceive no reason why he shall not control the ward in taking and prosecuting this appeal, as the interest of the ward does not conflict with the action of the guardian, and should the judgment stand as rendered the ward's rights will be greater than if the judgment was reversed.

Motion sustained and appeal dismissed as to Wm. R. Patterson, at the cost of his coappellant, Wm. Patterson.

John G. Cole, for appellants.

C. J. Bronston, for appellees.

A. R. CHICK *v.* RANDALL GRAIN SEPARATOR CO.

[Abstract Kentucy Law Reporter, Vol. 3—537.]

Preliminary Subscription.

One who enters into a written agreement, agreeing to convey to a number of men a patent owned by him, and after a corporation is formed to accept a certain number of its shares in consideration of said conveyance, and such corporation is formed and he participates in its proceedings at an election held after its organization, he is legally bound to comply with his contract of subscription.

APPEAL FROM WARREN CIRCUIT COURT.

January 24, 1882.

OPINION BY JUDGE HARGIS:

Randall owned the patent on his improved wheat fan separator and grader, an invention of his own. He entered into a written contract with appellant, Chick, and others, whereby he agreed to convey his patent to them or the corporation which they undertook thereafter to form under the provisions of Gen. Stat. (1881), Ch. 56. Randall bound himself to take 70 shares of

paid-up stock in consideration of his patent and they promised to take the remaining 170 shares, to be assessable stock. Each of the contracting parties annexed to his signature the number, character and total value of shares which he promised to take in the company to be incorporated as aforesaid. The shares designated as nonassessable stock were to belong to Randall and the subscribers were to pay or secure the amount thereof to him.

All the parties to the written contract except appellant and another adopted articles of incorporation drawn in compliance with the terms of their agreement. The articles were signed, acknowledged and recorded in accordance with law, and the organization of the corporation completed by the election of officers. Appellant, Chick, refused to pay the calls on his stock and the company brought this suit to compel him to do so.

He interposed several defenses, but none of them will be noticed except the plea that his contract was only a proposition to subscribe. It is alleged in the petition that appellant was, at his own instance, elected secretary of the company, but refused to perform the duties of his office. This he denies by averring, in effect, that if elected he was not elected under a charter legally obtained, or by a company authorized by law. These allegations amount to a legal conclusion, and do not put in issue the fact that appellant was at his own instance elected secretary of the company whose legal existence he questions. This act of his must be treated as a participation in the proceedings of the company. The contract, embracing the complete terms and conditions of the subsequent incorporation, evidences an association to become incorporated as fully as it is possible to prove such fact. As appellant took part in the association which must precede an incorporation under Gen. Stat. (1881), Ch. 56, and participated in the proceedings of the company at an election held subsequent to its organization, he is legally bound to comply with his contract of subscription, when it is shown, as in this record, that the terms of the contract have been complied with and the incorporation legally obtained. These facts distinguished this case from authority cited.

Judgment *affirmed*. Judge Hines not sitting.

John M. Porter, for appellant.

Halsell & Mitchell, for appellee.

GEORGE HARNED *v.* HARVEY & KEITH.

[Abstract Kentucky Law Reporter, Vol. 3—537.]

Assignment of Errors on Appeal.

A signed statement on the record that "The defendant * * * comes now and assigns for errors, and excepts to the whole of the judgment rendered in this case," does not constitute an assignment of errors, since it fails to specify the particular errors on which he means to rely, as provided by Civ. Code (1876), § 756.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

January 24, 1882.

OPINION BY JUDGE HINES:

We can not consider the questions made by counsel for appellant, because there is no assignment of errors.

Civil Code (1876), § 756, provides: "Every appellant or cross-appellant must, by his assignment of errors, specify the particular errors on which he means to rely; and no others shall be alleged by the party or examined into by the court."

The attempted assignment of error found in the record is as follows: "The defendant, Harned, comes now and assigns for errors, and excepts to the whole of the judgment rendered in this case." This amounts to no more than an exception to the judgment, and to consider the record upon such an assignment would in effect abrogate the section of the code quoted.

Judgment *affirmed.*

James G. Haswell, for appellant.

P. B. Muir, for appellees.

JOHN BOYER *v.* W. C. LINCOLN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—537.]

Effect of Discharge in Bankruptcy.

Where a defendant pleads and shows his discharge in bankruptcy, there can be no personal judgment against him. The remedy of the plaintiff was to subject the land upon which the debt sued on was a lien.

Homestead.

One is not entitled to a homestead in land which he and his wife

have mortgaged, where by the terms of the mortgage the homestead was conveyed, and the mortgage has been foreclosed, and the property sold and in the possession of the purchaser.

Amendment of Officer's Return.

The court has the power, when the parties in interest are before it, to cause the return of an officer to be amended or corrected so as to speak the truth without regard to whether the term of office of the person making the return has expired.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 24, 1882.

OPINION BY JUDGE HINES:

The judgment in this case must be reversed, first, because of the personal judgment in favor of W. C. Lincoln. Appellant having been discharged in bankruptcy, appellee Lincoln's only remedy was to subject the land on which the debt sued on was a lien. Secondly, it must be reversed because the judgment gives ten per cent. interest on the amount adjudged in favor of Lincoln from January 1, 1878, when it should have been for the rate of interest fixed by law at the date of the note, Nov. 28, 1871. The note sued upon with the then legal interest was a lien upon the land, but the subsequent agreement to pay ten per cent. interest was a personal undertaking and did not give Lincoln a lien upon the land for its enforcement. Thirdly, the judgment must be reversed because of the personal judgment in favor of the appellee, Stoltz. He was not entitled to a personal judgment for two reasons: First, the bankruptcy of appellant; second, because he had already obtained a personal judgment in his common-law action.

But the record as presented does not show that appellant is entitled to a homestead. It is alleged and is not denied that the tract of land on which the dwelling was situated and on which appellant resided had been mortgaged by himself and wife, that the mortgage by its terms conveyed the homestead right and had been foreclosed and the property sold, and that appellant was, at the time it was attempted to be subjected by appellees, occupying the premises as tenant of the purchaser at the mortgage sale. It does not matter that the land sought to be subjected in this proceeding is contiguous. Whether it is the same

or a separate tract is immaterial. The homestead having been mortgaged and disposed of, appellant does not hold in his own right, and is therefore not entitled to the exemption.

There can be no question of the power of the court, when the parties in interest are before it, to cause the return of an officer to be amended or corrected so as to conform to the truth, and that without regard to whether the term of office of the person making the return has expired; nor is there any question that the lien attached on making the levy, notwithstanding the erroneous return, and that it continued to be enforced in the state courts, notwithstanding the subsequent bankruptcy of appellant.

Judgment *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

Edwards & Seymour, for appellant.

W. P. Lincoln, Humphrey Marshall, for appellees.

JOHN W. GREER ET AL. *v.* MECHANICS' MUTUAL SAVINGS ASSN. OF NEWPORT.

[Abstract Kentucky Law Reporter, Vol. 3—539.]

Contempt of Court.

Where a litigant persistently failed and refused to execute a bond required until the final determination of the action, or to deposit the amount of a sale bond, the court may order him to pay into court forthwith the amount of the sale bond, interest and costs, and may order him to be committed in default of payment.

APPEAL FROM KENTON CHANCERY COURT.

January 26, 1882.

OPINION BY JUDGE LEWIS:

The facts set forth in the response by J. W. Greer and appellee, if pleaded at the proper time and in the proper manner, would authorize an injunction to issue upon the execution by them of the bond required in such cases, restraining the collection of the sale bond until the final determination of the action pending in the Campbell Chancery Court, or if they had deposited the amount of the sale bond in court and properly pleaded the same facts, the chancellor would have been authorized to retain con-

trol of the fund subject to the decision of the other action. See Civ. Code (1876), §§ 377, 378.

But they persistently and in contempt of court failed and refused to do either. The court below, therefore, did not err in requiring them to pay into court forthwith the amount of the sale bond, interest and costs, nor upon their refusal to comply therewith in ordering them committed.

The judgment is *affirmed* with damages.

R. D. Handy, for appellants.

O. W. Root, for appellee.

B. KUEBORTH *v.* B. F. PRATT.

[Abstract Kentucky Law Reporter, Vol. 3—540.]

Answer and Counterclaim.

An answer and counterclaim, filed after final judgment in a case, should on motion be stricken from the files.

APPEAL FROM GREENUP CIRCUIT COURT.

January 26, 1882.

OPINION BY JUDGE PRYOR:

After the judgment rendered in this case, and after the land had been sold by the commissioner, the appellant offered and was permitted to file what is denominated an "answer and counterclaim," in which he sets up certain causes of action against the appellee and asks to plead as a set-off or counterclaim to the judgment rendered. Why this was not done before the case went to final judgment, if the court could have considered it at all, does not appear. In no state of case, unless the amended answer can be regarded in the nature of a bill of review or a petition for a new trial, ought the court to have permitted its filing. It lacks every essential element to constitute a good pleading in either light. The appellee is amply able, so far as this record shows, to make good any liability of his to the appellant; so in any event the appellee is not without remedy. If the appellee was indebted to the appellant, growing out of the trust, the whole matter should have been litigated before the judgment.

That the purchaser does not want the sale of the land confirmed furnishes no ground for an exception to the report of sale.

The second ground is equally untenable. If Pratt is indebted there is nothing to prevent him from recovering it. The refusal of the application for a new trial was proper, because no reason is assigned for it. It is complained that the court erred in not giving to the appellant the value of his flat boat. There was no pleading or issue in the case authorizing such a judgment, and the attempt to raise the question after judgment upon an amended answer could not be entertained. The only question really in this case is as to this counterclaim set up after judgment. It was properly stricken from the files. Judgment *affirmed.*

Roe & Roe, for appellant.

Geo. T. Halbert, for appellee.

MILES DAVIS' ASSIGNEE *v.* JOHN SMALLGOOD.

[Abstract Kentucky Law Reporter, Vol. 3—539.]

Pleading Showing Bankruptcy.

One who asserts that he is assignee in bankruptcy can not defeat the proceedings in a state court against the bankrupt without pleading the facts and proving what he pleads.

Deed by Successor of a Sheriff.

The sale of real estate by one sheriff and deed executed by his successor in office is valid.

APPEAL FROM UNION COURT OF COMMON PLEAS.

January 26, 1882.

OPINION BY JUDGE HARGIS:

There is no title, valid either in law or equity, shown by the appellant, James M. Davis, who avers that he is assignee in bankruptcy of Miles Davis; and without exhibition of title evidenced by record, the assignee had no right to suspend or defeat the proceedings in the state court which can not know judicially anything of the proceedings in bankruptcy except as pleaded and shown by the records.

The sale by one sheriff and deed for the lot sold, executed by a subsequently elected sehriff, is valid. *Hamilton v. Vail,* 2 Met. (Ky.) 511; *Colyer v. Higgins,* 1 Duv. (Ky.) 6, 85 Am. Dec. 601.

The deputy sheriff who appraised the lot was a bona fide housekeeper and did not have the execution in his hands, and we

can see no valid objection to his acts; he was the deputy of the sheriff who was executing the fi. fa.

Wherefore the judgment is *affirmed.*

Thos. E. Ward, for appellant.

Hughes & Givens, A. Duvall, for appellee.

W. D. STERMAN *v.* H. H. THORNTON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—540.]

Rescission of Contract of Purchase.

Where there is a contract to purchase real estate, and a note is given and a lien reserved for its payment, and there is rescission of the contract afterward, the rescission cancels and releases the lien.

APPEAL FROM DAVIESS CIRCUIT COURT.
January 28, 1882.

OPINION BY JUDGE HARGIS:

The $240 note was executed by Bailey and wife for the lot conveyed to Eliza Jane Bailey January 25, 1870. On January 1, 1873, the contract was rescinded, and the lot, not having been paid for, was reconveyed by Bailey and wife to the appellee, H. H. Thornton, at the estimated value of $340, $240 of which was part of the consideration for a lot which appellee conveyed to Bailey at the same time for $1,040. Bailey executed his promissory note for $800 and appellee held the $240 note, which constituted together the consideration for the last lot.

Therefore the $240 was not a lien upon the lot first sold and conveyed to Mrs. Bailey, but it is a lien on the last lot unless it has been paid or to the extent it remains unpaid. Thornton could not receive the first lot in payment for the second lot and enforce a lien on the first for the $240 because the rescission cancelled and released the lien. The amended answer pleads the facts and is good.

Wherefore the judgment is reversed and cause remanded for further proceedings.

Riley, Jolly & Walker, for appellant.

GEO. W. ORME v. W. W. DAVID.

[Abstract Kentucky Law Reporter, Vol. 3—540.]

Liability of an Assignor.

To hold an assignor liable a party must allege and prove that he prepared and presented his claim in bankruptcy at least within a reasonable time after the note became due, and on the first opportunity he legally had after receiving actual notice of the bankruptcy.

APPEAL FROM UNION CIRCUIT COURT.

January 28, 1882.

OPINION BY JUDGE LEWIS:

The appellant failed to allege when he proved and prosecuted his claim on the assigned note for allowance in the bankruptcy proceedings against the payor of the note. For aught that appears in the petition he may have delayed doing so for four years or more, and as such delay would negative the legal diligence required to sustain his recourse upon his assignor, he must allege and prove that he prepared and presented his claim in bankruptcy at least within a reasonable time, in any event, after the note became due and on the first opportunity he legally had, after receiving actual notice of the bankruptcy.

The demurrer was therefore properly sustained and the judgment must be *affirmed*.

Long & Allen, for appellant.

Hughes & Givens, for appellee.

B. F. CROFOOT'S EXR. v. WILLIAM T. DUVALL.

[Abstract Kentucky Law Reporter, Vol. 3—541.]

Construction of Terms of a Will.

Where by a will it is provided "that at the death of my said daughter (who was by the will given a life estate in stock and bonds) I will and bequeath all of said stocks and bonds, and all profits and benefits thereof, to such children or child of my daughter as may then be living, and to be equally divided between them," it is held that the right to the use, possession and enjoyment of the property vests in the children at the death of the mother; and

where it is further provided in the will that in case of the death of such children or child before arriving at the age of twenty-one years without leaving issue such property shall go to another, the right vesting in a child at its mother's death is subject to be divested on the death of such child without issue before it becomes twenty-one years of age.

Devise of Real Estate.

A devise of real estate to one with a limitation over, that if he dies before he arrives at twenty-one years of age, without issue, the interest in such a case vests instante, subject to be divested by his death, without issue, before he becomes twenty-one years of age, and the interest devised and bequeathed becomes indefeasible when the child arrives at the age of twenty-one years.

Contingent Devise.

A devise to one when or if he shall attain the age of twenty-one years is contingent, unless followed by a limitation over; then the devise over is explanatory of the sense in which the testator intended the devisee's interest in the property should defease, namely, that at the age of twenty-one it should become indefeasible and absolute, and the interest therefore construed to vest at once.

Costs of Proceeding to Construe Will.

In a proceeding to construe a will the costs should be paid out of the estate and should not be adjudged against the executor who instituted such proceeding.

APPEALS FROM LOUISVILLE CHANCERY COURT.

January 31, 1882.

OPINION BY JUDGE PRYOR:

The will of Frank Crofoot probated in the Jefferson County Court on the 15th day of April, 1878, being of doubtful construction, the parties to the present record sought the opinion of the chancellor on the questions raised, and the appellant, who is the executor of the will, being dissatisfied with the judgment, has brought the case to this court.

The devisor, at the time he executed the will, had but one child living (a daughter, Anna), who had intermarried with Henry A. Duvall, and had by him one child, the present appellee, W. T. Duvall. The daughter died a short time prior to the testator, leaving the appellee surviving her, and the sole devisee of his grandfather's will subject to the limitations found in that paper. The appellee, the infant, and his guardian filed the petition, seek-

ing not only a construction of the will, but the removal of the executor for certain alleged causes, the litigation finally resulting in a settlement of the estate. The first and second clauses of the will make certain bequests that are in no manner affected by the judgment below, the third and fourth clauses presenting the questions that were heard and determined.

The third clause is as follows: "Item 3rd. I will and direct that my unimproved lot of ground of about sixty feet front on the north side of High street in Louisville, Ky., shall be sold by my executor, and that he shall, as soon as practicable, collect such debts as may be owing to me, and that the amount so realized by said sale and collections, together with such money as I may have on hand at my death, and the proceeds of the rest of my personal estate (after first paying therefrom my funeral expenses and just debts), shall be invested by my executor, in safe and profitable and annual or semiannual interest-paying bonds and stocks, and the entire interest thereon he regularly collected by my executor, and when so collected, be, by him, paid to my daughter, Mrs. Anna Duvall, wife of Arthur Duvall, for and during her life, and for the maintenance, comfort and support of herself and such children as she may have, and as her separate estate and free from the debts, liabilities, management and control of any husband she now has, or may, hereafter, have, and free from attachment, and free from pledge, mortgage or incumbrance by either wife or husband; and that said payments shall be, in no manner, anticipated by either party, nor advances, on account thereof, be made by my executor, before the interest be collected. And, at the death of my said daughter, I will and bequeath all of said stocks and bonds, and all profits and benefits thereof, to such children or child of my said daughter as may then be living, and to be equally divided between them; but should my said daughter die without leaving any children or child, or should said children or child die before the youngest arrives at twenty-one years of age, and without leaving any issue,—then, I will and bequeath said stocks and bonds and all interest that may have accrued thereon and not have been received by the beneficiaries, and all interest that may, thereafter, accrue thereon, to my aforesaid sister, Mrs. Green."

"Item 4th. As to such real estate as I may own at my death or have any present, contingent, remainder or reversionary inter-

est in (except the lot on High street hereinbefore directed to be disposed of), I will and direct that none of the real estate shall be sold,—but that my executor shall have the supervision, and take full charge, management and control of the same, and rent the same in such manner and on such terms as may be most advantageous to the parties who are, as herein shown, to receive the benefits thereof; and that my executor shall collect all of the rents, and, after paying from said rents all necessary and proper expenses for repairs and preservation of said property, and taxes on and assessments against the same, and a just and fair compensation for the trouble in superintending and managing the same,—the balance of said rents and profits I will and bequeath, and direct my executor to pay to my aforesaid daughter, Mrs. Duvall, for and during her life, as her separate estate, and for the maintenance, comfort and support of herself and such children as she may have, and free from the debts, liabilities, management and control of any husband she now has, or may hereafter have; and free from attachment, and free from pledge, mortgage or incumbrance by either wife or husband; and that said rents shall be in no manner anticipated by either party, nor any advances, on account thereof, be made by my executor, before said rents be collected; and at my said daughter's death said rents, when collected, to be for the benefit of, and so equally divided among such of her children or child as may be living at her death; and so to be paid until the youngest of said children shall arrive at twenty-one years of age; at which time, but not until then, or in a reasonable time thereafter, said real estate shall be sold, and the proceeds be equally divided between said children. Or, if but one child be then living and none of the other children have issue living, said real estate shall not be sold—but the fee simple title in and to all of the same shall go to and vest absolutely in said child. If my said daughter should die without leaving any children, or if all of her children should die before the youngest shall arrive at twenty-one years of age, and none leave issue—in that event, I will and devise and direct that, then, all of the real estate aforesaid shall go to and the fee simple title fully and completely vest in my aforesaid sister, Mrs. Chloe A. Green, if she be then living; or, if she be then dead, that the same shall go and vest in her heirs, and be divided."

By the third clause of the testator's will his executor, after the payment of debts, is directed to invest the personal estate and the proceeds of the lot of ground directed to be sold, in safe and profitable annual and semi-annual interest-paying bonds and stocks, and the entire interest to be collected and paid over by his executor to his daughter, Mrs. Duvall, for use during life for the maintenance and support of herself and children to the exclusion of her husband. That the wife took the interest on these bonds or the personalty thus invested during her life is not controverted; but it is maintained by the executor that at her death the child of Mrs. Duvall, the present appellee, took no greater interest than the mother, and that it was the duty of the executor to hold and control the fund, paying out of the income such a sum only as was necessary for the comfortable support of the appellee. The chancellor adjudged that the guardian of the appellee, the latter being an infant, was entitled not only to the interest but to the possession and control of the bonds and stocks in the possession of the executor, and in this judgment we must concur. The will expressly provides that "at the death of my daughter I will and bequeath all of my said stocks and bonds, and all profits and benefits thereof, to such children or child of my said daughter as may then be living, and to be equally divided between them," and further provides that should his daughter die without children or child before the youngest arrived at age, "then, I will and bequeath said stocks and bonds and all interest that may have accrued thereon and not have been received by the beneficiaries, and all interest that may, thereafter, accrue" to his sister, Mrs. Green. He expressly devises the bonds, stocks and interest, to the child or children of his daughter at her death, this right subject to be defeated by the death of the child or children without issue surviving before arriving at the age of twenty-one years. The right to the use, possession and enjoyment of the property vests in the children at the death of the mother subject to be divested on the contingency of the child or all the children dying under twenty-one of age and without issue. This contingency may yet happen, and if so the remote devisee, Mrs. Green, succeeds to the estate. There is no condition precedent annexed to the devise, but a condition subsequent that may deprive the next of kin from benefiting from

the devise, for should the death occur before the appellee i
ty-one years of age, his aunt, Mrs. Green, if living, becor
owner of the property.

The construction of the fourth clause of this will is a
with some difficulty.

This clause is confined to the real estate of the devis
directs that none of this real estate be sold, but that his e
shall have the supervision and take full charge and cor
the same, by renting it out on such terms as may be deeme
advantageous to the parties who are to receive the benefi
executor, after paying all expenses, such as taxes, etc., ar
pensating himself, is to pay the rent over to the daughte
Duvall, for the support of herself and children, as is
with reference to his personal estate. "At my said dau
death said rents, when collected, to be for the benefit of,
equally divided among such of her children or child as
living at her death; and so to be paid until the youngest
children shall arrive at twenty-one years of age; at whic
but not until then, or in a reasonable time thereafter, s
estate shall be sold, and the proceeds be equally divided b
said children." The testator was up to this time evident
viding for a state of case in which more than one child c
interested in the property, and in such case his intent w
the property should be held undivided until the younges
arrived at age, and then the entire real estate sold and t
ceeds divided between the several children. He seems
have considered the fact that the daughter might leave o
child surviving her, but pursuing his purpose further, p
"Or, if but one child be then living and none of the other
have issue living, said real estate shall not be sold,—but
simple title in and to all of the same shall go to and ves
lutely in said child." He gives no directions up to this p
to the disposition of the estate in the event the daught
leaving only one child, and it is evident that no other th
entered his mind than that the daughter would bear mo
one child, and he was providing against a division or sal
real estate before the youngest arrived at age. He then p
that, if his daughter should die without leaving any chil
her children should all die without issue before arriving a

ty-one years of age, the sister, Mrs. Green, was to have the estate.

What interest then did this child take at the death of his mother? He took a defeasible fee, and in the event he dies as provided by the will before he is twenty-one years of age, without issue, his aunt, Mrs. Green, as in the case of the personal estate, becomes the owner of the realty. This, we think, is the proper and just construction of the fourth clause of the will—that the property be kept together and rented out until the youngest of the children arrived at the age of twenty-one years. It was for no other reason than the belief on the part of the testator that the property would become more valuable and that a division of the proceeds at that date would have to be made between several children. But here no division was necessary, and no sale was required, as the testator provides that if all the children are dead and but one living, he shall have the fee simple estate, and upon such a contingency the clause by which Mrs. Green becomes entitled to the property is inoperative.

Here is a devise to the appellee with a limitation over, that if he dies before he arrives at twenty-one years of age without issue the estate passes to Mrs. Green. The interest in such a case vests instante, and becomes indefeasible when the child arrives at the age of twenty-one years. A devise of real estate to C. D. when or so soon as he attains the age of twenty-one years, but in case he should die then to become a devise over, it was held that C. D. on the death of the testator took an estate in fee subject to be divested on his dying under twenty-one years of age. Where there is a devise over, the direct devisee, on the death of the testator, takes a defeasible fee, subject to the happening of the contingency by which he is divested of title. He is also entitled to the possession. *Hughes v. Hughes,* 12 B. Mon. (Ky.) 115.

The doctrine is well settled that the first taker is entitled to the immediate use and possession of the property unless otherwise provided in the instrument vesting the title, whether by deed or executory devise. The rule is, that a devise to one when or if he shall attain the age of twenty-one years is contingent, unless followed by a limitation over; then, the devise over is explanatory of the sense in which the testator intended the devisee's interest in the property should defease, namely, that at

age it should become indefeasible and absolute, and the interest therefore construed to vest at once. 2 Jarmon on Wills (5th Am. Ed.), Ch. 25; 2 Washburn on Real Property (4th Ed.), 579.

We think, therefore, applying the rule applicable to such devises both to the personalty and real estate mentioned, the appellee, by his guardian, is entitled to the use and possession of the entire estate, and if dying before arriving at age without leaving issue the remote devisee will take under the will.

Many exceptions have been filed to the commissioner's report by both parties, and while the costs of administration as allowed, if followed up in the subsequent management of the estate, would leave but little income to the appellee, we are disposed to approve the action of the court below, and to sanction the report of the commissioner. The executor seems to have acted in good faith and performed services outside of the mere collection and disbursement of the monies, and a re-reference, if made, would but add to the heavy costs already incurred. The deduction from some of the claims of the attorneys was proper, and certainly the allowance to the appellant, Richardson, of fifty dollars, in addition to the allowance for services actually rendered, was ample. His allowance we deem amply sufficient.

As this proceeding was instituted for a proper construction of the will by the appellee, it seems to us that the costs should have been paid out of the estate and not adjudged against the executor, and for that reason the judgment must be *reversed* on the original appeal. The judgment is *reversed* on the cross-appeal with directions to make a final settlement with the executor and require the latter to deliver over to the guardian the entire estate of Crofoot devised by the will to his daughter and her children. The costs will be divided in this court, each party paying one-half the costs. Both appeals heard together.

Elliott & Hemmingway, for appellant.

Lane & Harrison, Bijur & Davie, for appellee.

E. E. OWENS ET AL. *v.* J. J. FORD ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—613.]

Creditors of Husband Subjecting Wife's Property.

Where land is purchased by the husband for the wife and conveyed to the wife before the creation of a debt of the husband, such creditor can have no claim on such debt against such land.

APPEAL FROM GRAVES CIRCUIT COURT.

February 2, 1882.

OPINION BY JUDGE HARGIS:

The land was purchased by the husband for the wife, before the creation of the debt sued on, in pursuance of an agreement made with her by him that if she would allow him to sell the land which descended to her in the state of Tennessee and use the proceeds he would purchase for her another tract equally as valuable. She was invested, by deed from the vendor, with the legal title before the institution of this action, which was brought to set it aside as fraudulent, and having paid to her husband an ample pecuniary consideration for it, she is entitled to the land and the deed should have been held valid, as against the appellees.

The case of *Latimer v. Glenn,* 2 Bush (Ky.) 535, settles the question as above decided and upon facts which are very much alike those of this case, and do not differ from them in any essential particular.

The testimony of the witnesses to the facts recited is uncontradicted and their characters are unimpeached, and we know of no authority to disregard such evidence and its legitimate effect.

Wherefore the judgment is *reversed* and cause remanded with directions to dismiss appellees' petition.

D. G. Park, for appellants.

J. B. KNOX *v.* E. B. SHANNON.

[Abstract Kentucky Law Reporter, Vol. 3—612.]

Wrongful Levy on Personal Property.

Where one wrongfully causes an officer to levy an attachment on property not owned by the execution defendant, and in which he has no interest, such person is liable to the owner of such property for its value or for the damage sustained by its unlawfully being taken on such levy.

APPEAL FROM HANCOCK CIRCUIT COURT.

February 2, 1882.

OPINION BY JUDGE PRYOR:

We perceive no objection to the judgment below. The law and facts were submitted to the court and the judgment rendered. The hay was levied on by the officer at the instance of the appellant and the appellee deprived of the possession. She may have employed the boat to take the hay to Memphis, but after the levy she had no control over it, nor did she undertake to exercise any. It matters not who took the hay from the river bank; the appellant is liable to the appellee for its value unless she consented to the taking. The levy was wrongful, and but for that the appellee would not have been deprived of the possession.

It is asserted, however, that the rain upon the hay injured its value and this could not have been avoided. The testimony for the appellee shows that the hay could have been protected from the rain and that it was her purpose to do so, until the levy was made, and the appellant could have protected it in the same way. The hay was of the value of $168. That much had been paid for it, and the judgment was for $192. The value of the hay, including attorney fees, was the amount of damage sustained. The fee was $25, but it is insisted this was for the whole case; yet it is evident it was on the attachment the defense was mainly directed.

The judgment below was proper under all the circumstances,

and the excuse offered by the appellant in the way of lessening the damages is not available as a defense.

Judgment *affirmed.*

W. N. Sweeney & Son, for appellant.

Eli Brown, for appellee.

JOHNSEY BROWN *v.* P. S. BOARD ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—612.]

Waiver of Defense Under Statute of Frauds.

One may waive, by a pleading, his rights to plead and rely upon the statute of frauds as a defense; and where one by a pleading consents that real estate sold by and under a verbal contract may be conveyed upon satisfactory proof that the property was purchased and paid for, he waives the right to plead the statute of frauds as a defense.

APPEAL FROM MARION CIRCUIT COURT.

February 2, 1882.

OPINION BY JUDGE LEWIS:

Appellees, the heirs-at-law of Felix Mercer, deceased, having in their reply waived the right to plead and rely upon the statute of frauds as a defense, and consenting that a conveyance of the house in controversy should be made to appellant upon satisfactory proof by him that he purchased and paid for the property, the only question really in the case is, whether he has made such proof.

By two witnesses, whose credibility no attempt was made to impeach, he proved that Felix Mercer sold to him the house and lot at a fixed price, put him in possession, acknowledged the full payment, and promised to make to him a deed therefor. As the statements of these two witnesses are not contradicted, improbable, or materially contradictory, or incompetent, there appears no reason to reject them and they must be taken as true.

We do not regard the pleadings by appellant or the proceedings had in the action by him against the administrators of Felix Mercer, deceased, referred to by counsel as an estoppel, as even inconsistent with the claim set up in this action by appellant.

In that action he gave the estate credit upon his account by the price at which the house and lot was sold by him, and the issue presented to and tried by the jury was simply as to his right to receive the balance after deducting the $300 he agreed to pay for the property. But if that was not so, appellees waived the right to plead it as a defense.

We are therefore of the opinion that appellant is entitled to the possession of the house and lot and a deed therefor, and that the court below erred in confirming the report of sale to appellee, Smith, and in directing a writ of possession to issue to him. Wherefore the judgment is *reversed* and cause remanded with directions to set aside the confirmation of sale and restore the possession to appellees, and for further proceedings consistent with this opinion.

J. R. Thomas, for appellant.

Russell & Avritt, for appellees.

A. B. COOK *v.* E. D. FRYER.

[Abstract Kentucky Law Reporter, Vol. 3—612.]

Commission for Sale of Real Estate.

One holding a contract from the owner of real estate for a commission for finding a purchaser therefor at a given price is entitled to his commission where he furnishes a purchaser at the price named even though the sale and conveyance is not consummated on account of the refusal of the owner's wife to agree to join him in a conveyance.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 2, 1882.

OPINION BY JUDGE LEWIS:

Appellee alleges in his petition that at the request of appellant he undertook and agreed to find a purchaser for his (appellant's) residence in the city of Louisville, and was to receive therefor a commission of one and one-half per cent. upon the amount for which it might be sold; that in pursuance of the contract he did procure one, H. Verhoff, to agree to purchase the property, and a contract was made therefor; that by the terms

of the contract between Verhoff and appellant, which was reduced to writing and signed by them, the residence and furniture were sold for the sum of $12,500, to be paid in cash upon the delivery of possession, and a house in another part of the city belonging to Verhoff valued in the trade at $7,000, making $19,500 as the agreed price to be paid; that afterwards he demanded of the appellant the amount so agreed to be paid for his services, but consented to receive $250 in full satisfaction, and for that sum brought this action. Upon the trial a verdict was rendered in favor of the appellee for the amount claimed in the petition, subject to a credit for the amount of a note pleaded as a set-off.

The only material difference between the allegations of the petition and answer is that appellant alleges the price agreed upon for appellee's services was one and one-fourth per cent. commission, and that appellee's compensation was made dependent upon the conveyance of his property and the acceptance of the deed by the purchaser. As to both these issues of fact the jury decided in favor of appellee, and we perceive no reason to disturb the verdict on that account. No conveyance of the property was ever made by the appellant and his wife, though Verhoff tendered the $12,500 in cash and the deed for the property he agreed to give in addition for appellant's residence.

It appears that the wife of appellant refused to unite with him in the conveyance, and he consequently was unable or indisposed to invest Verhoff with a complete title to the property, without which Verhoff was not, by the terms of their contract, compelled to accept the deed from appellant. Having procured a purchaser for appellant's property who agreed to pay the price that appellant was willing and in writing agreed to accept, appellee complied with his contract, and was entitled to the compensation for his services appellant promised to pay therefor.

If the contract between appellant and Verhoff was not consummated it was the fault of appellant and not of appellee. Though he had no power to coerce his wife to relinquish her inchoate right of dower, he and not appellee should suffer, for it was his duty to have informed himself as to her willingness to do so, before making the contract with appellee, or at least to have stipulated in the agreement with appellee that the pay-

ment for his services was to be dependent upon her uniting in the conveyance.

Appellant was not bound to accept the purchaser procured by appellee, nor to agree to any other terms for the sale of his property than suited him; but having accepted him and entered into a valid contract with him, appellee's commission was earned. *Coleman's Exr. v. Meade,* 13 Bush (Ky.) 358.

Counsel contend that appellant's liability for the commission should be made to depend upon appellant's power to compel Verhoff to execute the contract between them, and as he was not able to do so he was not responsible to appellee. Verhoff was willing, able and offered to pay the price and take the property according to the only fair and legal interpretation of the contract between them. But appellant failed and refused to receive the purchase-price or to invest him with such a title as he agreed to do.

The instructions of the court below are in accordance with the foregoing views. The judgment is *affirmed.*

C. B. Seymour, for appellant.

Young & Trabue, for appellee.

[Cited, *Guthrie v. Bright,* 26 Ky. L. 1021, 82 S. W. 985.]

JOHN W. POSEY *v.* ELIZA MAYER'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 3—613.]

Consideration for Note.

A new promise made by a bankrupt to pay a debt from which he had been discharged is founded upon a moral consideration, and constitutes a valid enforceable contract.

Promise to Pay Interest.

A promise in a promissory note to pay a debt "with eight per cent. interest" is an undertaking to pay eight per cent. interest from the date of the promise until the maturity of the note only. and from its maturity such a note only draws six per cent. interest.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 2, 1882.

OPINION BY JUDGE HARGIS:

After the appellant was discharged in baukruptcy from the payment of the debt of appellee's intestate he executed four notes, due respectively in one, two, three and four years, by which he promised to pay her the debt and its accumulated interest, "with eight per cent. interest." From or to what time the eight per cent. interest was intended to run is not expressed in any of the notes. He was sued on them, and by mistake the plaintiff alleged that they were each for $100, when one of them was for $137. The appellant answered, pleaded his bankruptcy and discharge, averring that the notes were without consideration because they were executed in payment of a debt which had been thereby discharged.

This court has so often decided that a new promise made by a bankrupt to pay a debt from which he had been discharged is founded upon a moral consideration and constitutes a valid enforceable contract, that we do not deem it necessary to say more than to cite the following authorities: *Graham v. Hunt,* 8 B. Mon. (Ky.) 7; *Carson v. Osborn,* 10 B. Mon. (Ky.) 155; *Egbert v. McMichael,* 9 B. Mon. (Ky.) 44; *Eckler v. Galbraith,* 12 Bush (Ky.) 71; *Ogden v. Redd,* 13 Bush (Ky.) 581.

The appellee amended his petition, correcting the mistake as to the amount of one of the notes, and moved for judgment; notwithstanding the answer, the motion was sustained and judgment rendered against appellant for the total amount of the four notes with 8 per cent. interest from the date of their execution, and he appeals from that judgment. A motion for judgment regardless of the answer was not the legal mode of disposing of that pleading. The appellee should have filed a general demurrer to it, and the court ought to have sustained the demurrer, and upon failure to amend with leave of the court, judgment would have been the necessary result.

The promise to pay the debt "with eight per cent. interest" is, in law, an undertaking to pay eight per cent. interest from the date of the promise. But the contract to pay that rate, which is conventional and greater than legal interest, does not embrace any time beyond the maturity of the notes. From the last event only six per cent. interest can be lawfully exacted, as the expressed promise to pay eight per cent. is from the date to the

maturity of the notes respectively. *Rilling v. Thompson,* 12 Bush (Ky.) 310. Although the prayer of the petition is for only $400 with eight per cent. and costs "and all other proper relief," the amended petition makes it certain that the amount of the notes is $437, and the answer does not deny the allegation.

The principal object of Civ. Code (1876), § 90, was to prevent judgments by default for any relief not specifically demanded in the prayer of the petition; and, when a person appears and answers, the dangers and wrongs arising from the evil sought to be remedied no longer exist, and he should be required to deny the substantive allegations of the petition or submit to a judgment, where a mistake, so patent as a prayer for a less amount than that of the note made the basis of the action and filed with the petition, is the only defect in the petition.

Wherefore the judgment is *reversed* and cause remanded for further proceedings.

Geo. A. Prentice, for appellant.

J. F. Clay, W. P. D. Bush, for appellee.

E. L. GONHOT ET AL. *v.* JAS. M. HIPKINS.

[Abstract Kentucky Law Reporter, Vol. 3—613.]

Jurisdiction of City Court.

While the jurisdiction of a city court was limited to cases where the penalty does not exceed $100, if a fine imposed amounts to $1,200, there is a right of appeal, and the judgment might be corrected thereby; and hence the power in the nature of a writ of prohibition could not be exercised over the city court's action in exceeding its jurisdiction.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

February 2, 1882.

OPINION BY JUDGE HARGIS:

The constitution of Kentucky expressly excepts the fees of the commonwealth's attorneys, in penal and criminal cases, from the pardoning and remitting power of the chief executive. Const., Art. 3, § 10. But the charter of the city of Hopkinsville, which is the fundamental law of this case, expressly authorizes

the chairman of the board, with the consent of two-thirds of the members of the board, to remit all fines and penalties "on condition of payment of all costs and fees due the city." 2 Acts 1869-70, Ch. 481, Art. 4, § 7.

The chairman of the board was authorized by the board to remit the fines imposed upon the appellee, Hipkins. In pursuance of that authority the chairman did remit them upon the condition that Hipkins should pay to the city its costs and fees; having paid those fees and costs we think the whole of the judgments against him were thereby extinguished in the exact manner and on the precise conditions authorized by the city's charter.

There is no exception in this charter, as in the constitution of the state, saving the fees of the city attorney, but the exception embraces the costs and fees of the city alone. It follows that the executions for $384 of the fines which had been remitted, although issued for the benefit of the city attorney on the ground that his thirty per cent. of the fines was not paid, were illegal and void, as no such unsatisfied judgments existed from which the executions could properly emanate. The execution of the replevin bonds did not revivify the judgments or impart validity to the executions, and their collection was properly restrained by the chancellor.

While the city court, by the amendment of March 6, 1871 (2 Acts 1871, Ch. 1945, § 7), was limited in its jurisdiction to cases where the penalty does not exceed $100, and the fine imposed upon appellee, Hipkins, by it, by a single judgment, was $1,200, still that judgment might have been corrected on appeal, and we therefore think the power in the nature of a writ of prohibition could not be exercised over that court's action in exceeding the lawful bounds to the extent of fines and penalties it may inflict. But for the reasons indicated the judgment is *affirmed*.

J. P. Ritter, J. & J. W. Rodman, for appellants.

John Feland, for appellee.

MEDORA E. BROWN ET AL. v. J. M. CASBIER ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—613.]

Wife's Separate Property.

The husband has no power, by his express agreement to that effect, to convert into a separate estate his wife's profits in business

or her earnings, to be enjoyed by her to his exclusion. Only a court of chancery and the husband's consent thereto can effect such purpose.

Parties to an Action.

The wife can not sue for an injury to her husband's property simply because it is in her manual possession, and she is not a proper party in such an action.

APPEAL FROM OHIO CIRCUIT COURT.

February 2, 1882.

OPINION BY JUDGE HARGIS:

It is alleged in the petition that Mrs. M. E. Brown was a tradeswoman and the owner of a grocery store, which she bought and paid for with money obtained by the sale of a tract of land which descended to her from her mother; that her husband agreed that she might trade and do business in her own name; that no part of the money for which she sold the land ever came to his possession; and that the defendant, Casbier, under color of his office as constable, illegally seized and took from her possession the stock of groceries and wrongfully disposed of them, without any sort of claim, process or precept against her and her goods. To the petition the constable and his sureties demurred and their demurrer was sustained and the petition dismissed, and she and her husband prosecute this appeal.

It was held by this court in the case of *Uhrig v. Horstman,* 8 Bush (Ky.) 172, that "under existing laws it is not within the power of the husband by mere assent, or even by an express agreement to that effect, to convert the wife's earnings, or the profits of any trade or business he may permit her to carry on, into separate estate, to be used and enjoyed by her to his exclusion. The wife can only be empowered to acquire such an estate from such sources by a court of chancery, and the husband's consent thereto, when necessary, must be given of record in that court." This authority is conclusive against her claim to the groceries based on the consent or agreement of her husband that she might trade and do business in her own name.

The proceeds of a wife's general estate may be set apart to her separate use, but there is no allegation in the petition that the money for which she sold the land or the groceries bought with

the money, or the profits of the business, was to be held by her as her separate estate. The most that is alleged in the petition is that her husband agreed that she might trade and do business in her own name and right as if she were unmarried, but nowhere is it alleged that he agreed that she might hold the property, its proceeds or profits, in her own separate right free from his use, interest or control.

No abandonment or surrender of his marital rights are alleged to have been made by him except the concession to permit her to trade as a feme sole, which can not be authorized in any other mode than that provided for by the statutes upon the subject. 2 Rev. Stat. (1867), Ch. 47, Art. 2, § 4. We are therefore of the opinion that the groceries were the husband's and the wife had no right of action in her name for the alleged trespass.

The caption of the petition contains the name of the husband as a coplaintiff, but he is not mentioned in the body of the petition. The plural term "plaintiffs" used in the petition expressly refers to Mrs. Brown and the commonwealth, which she joined as plaintiff for her use and benefit.

As no allegation is made by the husband declaring a general or special ownership in the property, or setting forth any damage sustained by him from the alleged wrongs of the constable, we think the demurrer was properly sustained so far as he is concerned.

It is well settled that the wife can not sue for an injury to her husband's property simply because it is in her manual possession, for, could she do so, every wife who keeps house and takes care of and controls the husband's goods and chattels, which so frequently come into her manual possession for such purpose, would be constantly a proper party to actions for trespass to property which does not belong to her and over which she does not exercise the rights or incur the responsibilities of an ordinary bailee for hire or gratuity.

Judgment *affirmed.*

Sandifer & Fogle, for appellants.

Walker & Hubbard, for appellees.

KAHN & WOLF *v.* A. GOODHART ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—615.]

Attachment for Fraud in the Sale of a Grocery.

When a sale of a grocery is made by its owner, who does not pay his creditors, and the fact is shown that such sale was made without any change of possession from the seller to the buyer, it is fraudulent and void as to the seller's creditors, and they may attach the property and subject it to the payment of their claims.

APPEAL FROM McCRACKEN COURT OF COMMON PLEAS.

February 4, 1882.

OPINION BY JUDGE HARGIS:

The appellants, after obtaining judgment and return of no property found, instituted this action in equity to subject, amongst other property, a family grocery containing $1,000 worth of goods, alleged to belong to A. Goodhart. An attachment was levied on the goods on the 10th of July, 1871, and the appellee, Melber, claiming the goods as his own, executed a forthcoming bond for their agreed value. Goodhart and Melber answered the petition, each alleging substantially that Goodhart had sold and received the consideration for the goods on the 24th of May, 1871, from the appellee, Melber, and that the attachment was wrongfully levied upon them. Judgment was rendered discharging the attachment and cancelling Melber's bond, and the appellants have appealed from that judgment.

The only question involved is, Did Melber in good faith purchase the goods from Goodhart? For some years before the 24th of May, 1871, Goodhart had been carrying on the grocery business in the same house in which the goods were kept that he and Melber claims were sold by the former to the latter. From the 24th of May, 1871, until Melber sold out, as he alleges, in December following to a man whose deposition is not taken and his whereabouts not shown, no visible change of possession or control of the goods and house is shown to have taken place. Goodhart's sign hung above the door. He and his son conducted the business, and some of the purchases to replenish the stock are shown to have been made by Goodhart and made in his own

proper name. Persons who dealt there and closed their bills by the week knew nothing of the alleged sale or change of ownership. None of the customers who bought goods at his grocery, nor any of the wholesale dealers of whom the goods were purchased to keep up its stock, ever saw Melber in general or special control of any part of the concern or recognized him in any way as being connected with it.

Melber and Goodhart swear that after the latter was burned out some four years prior to said May 24, the former loaned him $400 without security and took his note for it; again, immediately after his grocery was burned the second time, he loaned him $500 on the same terms and in the same manner; that Melber never asked Goodhart for the money on these notes and nothing was said about their payment out of the purchase-price of the grocery until after Goodhart had sold it to him; that then the two notes aggregating $900 were deducted from the agreed price and Melber paid the remainder thereof, it being $463, to Goodhart in cash. The latter testifies that the cash was paid three days after the sale, and the former says that it was paid on the day of sale.

The two promissory notes were not proven to have been surrendered, lost or destroyed, and their nonproduction adds some weight to the charge of fraud, as their production and genuineness, if shown, would have furnished strong evidence of the honesty of the transaction.

It is an unusual thing for a man like Melber, owning a little $800 farm eight miles away in the country, where he lived and carried on farming and marketing in a small way on an estate assessed by himself in 1870 and 1871 at less than $1,300, without any experience in merchandising, to buy, on the spur of the occasion, a grocery at a price greater than his whole estate as valued by himself and still live and conduct this farm as he had done aforetime, while the grocery business altered not in its course or apparent ownership. Connected with all these circumstances and badges of fraud, he only held the grocery long enough to rid himself of the goods through the agency of Goodhart & Son, and then sold out to a person "non est" and forever quit his new occupation for which he neither had taste, experience nor capital to maintain.

The facts of this case show preparation, agreement and a most

consummate device to cover up the goods from the reach of Goodhart's creditors. But in their very perfection and apparent consistency lurks their own destruction. For by their deceitful appearances the appellees were misled by the belief that they would sustain their conduct, and trusting to the formal completion of the contract of sale, Goodhart was permitted to proceed with his business as if nothing had happened so far as the knowledge of the public was concerned.

"It is a well-settled principle," says this court in *Steir v. Robinson,* 2 Bush (Ky.) 30, "applicable to private sales of personal property, that where such sales are made without any change of possession from the seller to the buyer, they are fraudulent and void as to creditors." The residence of the vendee with the vendor at the time of sale will not take such a case out of the operation of this rule of law. In this case, instead of residing with the vendor, at most the vendee visited the vendor on Saturday nights and stayed all night a few times.

See the cases of *Halbert v. Grant,* 4 T. B. Mon. (Ky.) 580, and *Waller v. Cralle,* 8 B. Mon. (Ky.) 11, which are cited in the case mentioned and fully sustain the doctrine therein laid down.

Wherefore the judgment is *reversed* and cause remanded with directions to render judgment in conformity to the principles of this opinion.

W. P. D. Bush, I. & J. Caldwell, for appellants.

WILEY P. TAYLOR'S GDN. *v.* SAMUEL JOHNSON.

[Abstract Kentucky Law Reporter, Vol. 3—615.]

Rights of Occupying Claimant Under Verbal Purchase of Real Estate.

Where one purchases land by oral contract, enters upon possession and afterward pays for the land, and the vendor dies without executing a deed, and his heir, through its guardian, brings suit in ejectment, the purchaser is entitled to have his lien declared on the real estate for the amount of improvements made by him on the land and the amount of the purchase-money paid by him for the land.

APPEAL FROM TODD CIRCUIT COURT.

February 4, 1882.

OPINION BY JUDGE HARGIS:

The appellee and W. S. Taylor, deceased, made a verbal contract by which the latter agreed to sell and convey an unimproved lot of half an acre of land in Guthrie City, to the former, in consideration of $125. The appellee took possession of it and at the time of W. S. Taylor's death had occupied it several years and erected valuable and lasting improvements on it. The guardian of Taylor's only child brought this suit in ejectment to recover possession of the lot, and for damages for its detention.

The appellee pleaded the verbal contract, stated his occupancy and improvements and alleged that he had paid the deceased for the lot. He also sought a judgment against the guardian, who was also administrator of Taylor, for the amount of his account, made up of the value of work and labor and for money had and received, after deducting therefrom the price of the lot. Upon hearing the court allowed appellee $75 as the value of his improvements and a lien on the lot therefor, and refused him a lien for the purchase-money, which he claims to have paid. Both parties appeal from the judgment.

The evidence would justify a slight increase in our judgment of the amount allowed for improvements, but as the evidence is conflicting and the allowance substantially right we will not disturb this part of the judgment. The appellant was not entitled to rent of the lot for any time before the institution of this suit. See *Stephens v. Reavis,* p. 391, this volume, and cases there cited. The evidence conclusively shows that the appellee had paid his vendor, Taylor, for the lot. John M. Swine testified that he heard Mr. Taylor say that Sam had paid for his lot, and he intended to give him a deed. Blair testifies that he heard Taylor make statements which were in effect an agreement to make to the appellee a deed. The concurrent testimony of several witnesses prove that the appellee cleared three acres of land at $20 per acre, worked on a barn, husked corn, made rails, broke cattle, and permitted two of his daughters to work for Taylor several months. It also appears in evidence that Sam raised a crop of tobacco worth $158, and that Taylor received the cash on the check which Wilcox gave for the tobacco.

It is true that the appellee got provisions from Taylor, but to what extent or value does not appear; and there are some ad-

missions which the guardian testifies that the appellee made to him, but the appellee denies them, and had he made them they amount only to a contradiction of his claim of having paid $10 in money on the lot at a certain time.

There is no satisfactory evidence that the appellee's claim, which he proved, was ever paid or discharged by Taylor. The account book of the latter produced by the guardian with a statement in it as follows:

"Settled up to date with Sam Johnson, but due W. S. Taylor fifteen dollars, March 16, 1873."

"W. S. Taylor paid March 18, 1874," so far from proving that the appellee had not paid for the lot tends strongly to establish the fact that W. S. Taylor was paid March 18th, 1874, for all that the appellee owed him, and the conclusion is strengthened by the statements made by Taylor afterwards that Sam had paid him for the lot and his expressed willingness to make to him a deed for it.

Appellee should have given a lien on the lot for the purchase-price thereof, and for his improvements also. Wherefore the judgment is *affirmed* on the original and *reversed* on the cross-appeal, and cause remanded with directions to render judgment in conformity to this opinion.

Ben T. Perkins, Jr., for appellant.

H. G. Petrie, for appellee.

[Cited, *Robards v. Robards,* 27 Ky. L. 494, 85 S. W. 718.]

NELSON NEAL ET AL. *v.* CITY OF LOUISVILLE.
VIRGIL GARRISON ET AL. *v.* SAME.

[Abstract Kentucky Law Reporter, Vol. 3—614.]

Res Adjudicata.

The city of Louisville brought an action to enforce its lien for taxes on real estate, procured a judgment, under which the real estate was sold to satisfy the same, and purchased the property at such sale, and the sale was confirmed and the city put into possession. Afterwards, in a suit against the former owners, it had their judgment corrected so as to describe correctly the real estate sold in the former action, and had a judgment quieting its title and its right to possession, which it had held since procuring its first judgment; and no appeal was taken from either of such judgments.

The former owners can not maintain an action to recover such real estate, as the former judgments unappealed from constitute a final adjudication as between such parties and those holding under or through them. The plea of res adjudicata made by the defendant, the city of Louisville, is good.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 4, 1882.

OPINION BY JUDGE LEWIS:

As the same questions are involved in these two causes, and though they do not affect the same property, relate to parts of the same, they will be heard and considered together.

On the 5th of May, 1878, the city of Louisville, appellee in these two cases, filed a petition in equity in the Louisville Chancery Court against Nelson Neal, Mary Neal, Charity Garrison, Virgil Garrison, Grey Garrison, Lucy Garrison, Jane Garrison and William Garrison, Nelson Neal and Mary Neal being the same persons who are appellants in one of these cases, and Virgil Garrison, the same person as the appellant in the other. In that petition it was alleged that the defendants thereto were the owners of a certain lot of land in the city of Louisville, beginning on the eastern side of Second street at a point 160 feet south of the southeast corner of Main and Second streets, thence south 50 feet and extending back the same width in lines parallel with Main street, 105 feet; that the lot was regularly assessed for city taxation; that for several years the taxes due thereon remained unpaid, and that a lien on said lot for the payment of the taxes existed in favor of the plaintiff, the city of Louisville. In pursuance of the prayer for relief, the defendants being regularly summoned to answer the petition, the chancery court, on the 27th of September, 1878, rendered judgment in that action enforcing the alleged lien and directing the property to be sold to pay the amount of taxes alleged to be due and unpaid. In pursuance of that judgment it was subsequently sold and by order of court the sale was confirmed, a deed made to the purchaser, the city of Louisville, and on the 15th of October, 1879, a writ of possession was directed by the court to be issued, which was done, and the purchaser in pursuance thereof put in possession, November 1, 1879.

On the 14th day of September, 1880, appellee, the city of Louisville, filed a petition in the Louisville Chancery Court against the same parties defendants, in which it was alleged that the deed directed by the court in the action before referred to, to be made and which was made to it as purchaser by mistake, locates the point of beginning of the lot as 102 feet from the southeast corner of Main and Second streets, instead of 160 feet therefrom. In that petition it is alleged that the defendants thereto set up claim to the lot, and judgment was asked quieting the title and possession of the plaintiff.

To that petition, appellants, Nelson Neal and wife, Mary Neal, and appellant, Virgil Garrison, filed their separate answers, Neal and wife alleging that they were the owners and entitled to the immediate possession of twenty-five feet on the south side of said lot, the same having been devised to said Mary Neal by her father, Matthew Garrison, deceased, and Virgil Garrison alleging that he was the owner and entitled to the immediate possession of twenty-five feet on the northern side thereof, the same having been purchased by him at a sale made under a judgment of said court in the action of Garrison v. Knight. They in their respective answers each alleged that said lot was illegally taken possession of by appellee, that the whole proceedings by virtue of which it obtained possession were void.

They denied that they were the owners, or part owners, of the entire lot at the time the judgment was rendered for the sale of it, but alleged that they were respectively the sole owners of twenty-five feet of the lot. They each prayed in their answers that the proceedings in the action No. 32,857, in which judgment for the sale of the lot was rendered, be revived and reheard, and judgment rendered declaring the proceedings therein void, and for a restoration to each of them to the possession of their respective parts of the lot.

On the 27th of September, 1880, appellants, Virgil Garrison and Neal and wife, each commenced actions against appellee in the Louisville Chancery Court for the recovery of the possession of their respective parts of said lot claimed by them, alleging in their petitions that appellee was wrongfully in possession, that they were the rightful owners thereof, praying that they be restored to the possession.

On the 25th of November, 1880, the three actions were heard and tried together and judgment rendered, to-wit: No. 35,364, *City of Louisville v. Charity Garrison et al.;* No. 35,422, *Nelson Neal et al. v. City of Louisville,* and No. 35,423, *Virgil Garrison v. City of Louisville.* Upon the trial the court decided that the judgment rendered in the action No. 32,857, for the sale of the lot, followed by the orders of court in that case confirming the sale and directing a writ of possession to issue, was a bar to the recovery by appellants upon their counterclaim in the action No. 35,364, as well as upon their respective petitions in the actions Nos. 35,422 and 35,423, and rendered judgment dismissing the counterclaims and both petitions. It was also adjudged that appellee have the legal title and actual possession, and directed a deed to be made to appellee for the lot, correcting the mistake made in the first deed.

The two actions now before this court are by ordinary proceedings and were each commenced the 2d of December, 1880, the action of *Virgil Garrison v. City of Louisville* being for the recovery of the northern half, and the action of *Neal v. City of Louisville* being for the recovery of the southern half of the lot.

For its defense to the two actions appellee pleaded and relied upon the judgments rendered in the actions aforesaid. On the 21st of February, 1881, the court below upon the trial of the actions sustained the motion of appellee for judgment on the face of the pleadings, and dismissed the petition in each case. From that judgment this appeal is prosecuted.

In its defense to each of the actions appellee pleaded not only the preceding judgments in the first action for the sale of the property, but also pleaded and relied upon the proceedings and judgment in the three cases tried together. Not only did the court, in the actions tried, adjudge that appellee was entitled to the relief prayed for by it, viz.: the execution by the commissioner of court of a deed correcting the mistake made in the first deed, and that the counterclaim in that action as well as the petitions of appellants be dismissed, but adjudged that appellee had the legal title and actual possession of the lot, and that the judgment rendered in the first action was a bar to the recovery by appellants upon either their counterclaims or petitions. The effect of the judgment rendered in the first action was to

invest appellee with the legal title as well as the possession of the lot.

In the second action appellee alleged a mistake in the deed and sought judgment correcting the mistake and quieting its title. The appellants in their respective counterclaims filed in the second action by appellee, as well as in their petitions in the third and fourth actions, alleged that they each owned at the time the judgment for the sale of the lot was rendered, not an undivided interest in the whole lot, nor any of it jointly with the other defendants in the first and second actions, but that they each owned distinct parcels of the lot.

Those allegations may be true without invalidating the judgment for the sale or the sale in pursuance of it. For the first action was not for the purpose of trying either the right of possession or the title, nor was either put in issue or litigation, both being conceded to be in the defendants to the action, including appellants. The object of that action was to enforce an alleged lien upon the lot, and subject it to the payment of taxes due, and for the payment of which it was adjudged liable. Whether the taxes were due as alleged, and whether the lot was encumbered with a lien in favor of appellee for their payment, were the issues submitted to the court and tried in that action.

We are unable to perceive how the two cases cited by counsel for appellants can be made to apply here. In those two cases the title and possession were put in issue and tried. In the first case brought by appellee the title was conceded to be in the defendants thereto, including appellants, and unless it had been done the action could not have been maintained against them. In the second case appellee, being in possession and holding the legal title under the previous judgment, sought to have its title quieted, and pending that action appellants commenced their two actions setting up title to the property and seeking to recover the possession. The court adjudged that the judgment rendered in the first action was a bar to both the counterclaims and the separate actions by appellants.

As the record stands the court below could, in our opinions, do nothing else than dismiss the petitions, particularly as the judgment rendered November 26, 1880, in the three cases, has

not been reversed, vacated or modified. The judgment in each case must be *affirmed.*

Buford Twyman, for appellants.

H. M. Lane, for appellee.

[Cited, *Shaw v. Milly's Exr.*, 23 Ky. L. 645, 63 S. W. 577; *Hill v. Clark*, 32 Ky. L. 595, 106 S. W. 805.]

L. D. KASTENBINE *v.* CITY OF LOUISVILLE.

[Abstract Kentucky Law Reporter, Vol. 3—615.]

Physician's Compensation for Holding Post-Mortem.

The city of Louisville is required to pay a competent surgeon or physician employed to make a post-mortem examination, and the city, under the statute, may regulate how and by whom such examinations shall be held in the city. The coroner is authorized to employ such physician to make such a post-mortem examination in the county outside of the city.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 4, 1882.

OPINION BY JUDGE HARGIS:

Gen. Stat. (1881), Ch. 25, § 12, by which the coroner is authorized to employ a competent surgeon or physician to make a post-mortem examination and the court of claims is required to allow the surgeon or physician a reasonable sum therefor, is not in conflict with the provisions of the Act of January 21, 1865 (1 Acts 1865, Ch. 647). So far as they relate to the city one regulates how and by whom post-mortem examinations shall be held in the county and the other applies to the city. From the former the city of Louisville is excepted, and it is required to pay for such examinations held in it.

Reasonable compensation for such services applies alone to the court of claims of counties, and was not intended to regulate the compensation to be paid by the city of Louisville or Covington. But if we are mistaken in this, the act adopting the General Statutes (1 Acts 1873, Ch. 1011), repeals all statutes of a general nature then in force and repugnant thereto, except certain statutes among which are "all statutes of a merely local

relation to any * * * city." The act of January 21, 1865, relates locally to the city of Louisville and to no other city, and is not repealed or modified by the section named of the General Statutes.

Judgment *affirmed.*

W. B. Fleming, for appellant.

T. L. Burnett, for appellee.

JOHN FERGUSON *v.* L. B. SIMS.

[Abstract Kentucky Law Reporter, Vol. 3—684.]

Partnerships—Agency.

Each partner is the agent of the other in transacting the business of the partnership, and their acts in the regular course of business and within the scope of the partnership are binding on each other.

APPEAL FROM CALDWELL CIRCUIT COURT.

February 4, 1882.

OPINION BY JUDGE HARGIS:

The appellant and his father were partners in a crop of tobacco which yielded five hogsheads. The latter sold two of the hogsheads and collected the price therefor, out of which he paid to the former $30 and agreed to pay him the remainder of his share when the other hogsheads should be sold. They were subsequently sold by the appellee as the agent of the father, who had died, and appellant brought this suit to recover from appellee one-third of the price of the five hogsheads of tobacco.

On what principle he expected to recover for the tobacco which his father sold and collected the price for, we are not advised by the record. It is well settled that each partner is the agent of the other in transacting the business of the partnership, and their acts, in the regular course of business and within the scope of the partnership, are binding on each other. *Judge v. Braswell,* 13 Bush (Ky.) 67, 26 Am. Rep. 185. Here the father had authority to make the sale according to the terms of the partnership, and by the expressed consent of the appellant, also. The collection of the price by the father from the vendee exonerates the latter from liability at the suit of the copartner.

If it had been alleged and proven that the appellee had bought and owed for the two hogsheads sold by the father it would have been beyond question that the purchaser could not set off or recoup from the price the private debt of the father. No such state of case, however, appears in this record. The only interest or right which belonged to the appellant was the one-third of the price for which appellee sold the three hogsheads of sugar in Clarksville.

The evidence is conflicting as to the price he received for it, and the jury having rendered a verdict for sixty-nine and two-thirds cents in favor of appellant, balance due after deducting the $159.95 paid to him by appellee, we will not disturb it, as the evidence is amply sufficient to support the verdict.

Judgment *affirmed*.

J. R. Hewlett for appellant.

[Cited, *Garth v. Davis*, 120 Ky. 106, 27 Ky. L. 505, 85 S. W. 692, 117 Am. St. 571.]

JAMES A. BALLARD *v.* BENJAMIN FRANKLIN, TRUSTEE, ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—616.]

Necessary Parties to an Action.

Where the record on appeal shows that the wife had an interest in certain real estate sought to be subjected to the payment of her husband's debts, she is a necessary and proper party to the action; and where she is not made a party it is not error for the court to dismiss the action as to such land.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

February 4, 1882.

OPINION BY JUDGE LEWIS:

As it appears from the record that Mrs. Franklin had such an interest in a part of the 27½ acres of land sought to be subjected to the payment of her husband's debts as made her a necessary and proper party to appellant's cross-petition, the court below did not err in dismissing it as to that land, she not having been made a party thereto or served with process.

Independent of the finding and the report of the facts by the

master commissioner, and the judgment of the court confirming that report, we would have little difficulty in concluding from the evidence in this case that the debt which Franklin owed to Mason was paid to Bicgerstaff, the administrator, by appellant, not with his own but with Franklin's money, and that the court properly rejected his claim for $375.25.

There is no other reason suggested for giving to Fisk two notes for the money borrowed instead of one, nor why appellant should have increased his liability as Franklin's surety beyond what was necessary to pay his own debt against Franklin, than that the $300 excess was to be used to discharge the Mason debt upon which appellant was surety for Franklin. Franklin swears distinctly and unequivocally that it was received by appellant to be so used, while to direct questions on the subject appellant's answers are evasive and unsatisfactory.

We do not perceive any error in the report of the commissioner, in respect to the personal property sought to be subjected, that is not mentioned in the deed of assignment.

Wherefore the judgment is *affirmed*.

John Bennett, Rankin Mason, for appellant.

C. F. & A. R. Burnam, for appellees.

W. J. STEPHENS ET AL. *v.* A. C. NORTON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—614.]

Judgment Must Follow the Verdict.

Where a matter at issue is submitted to a jury no judgment of the court can be entered until the jury has made a finding.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 4, 1882.

OPINION BY JUDGE LEWIS:

The issue for the jury to try in this case was whether the inquisition traversed is true or not. Without a verdict of the jury finding it to be not true, the court was not authorized to render judgment for the restitution of the premises. Against neither of the traverses was such verdict rendered, and as to one of these there was no verdict at all.

The special finding of the jury that the landlord did not agree with one of the tenants to release him as such, or from liability for the rent, did not seem to authorize the inference that either of them forcibly detained the premises from this landlord, for that finding might be true, and the inquisition not true.

The judgment of the court below is therefore *reversed* and cause remanded with directions to grant a new trial, and for further proceedings consistent with this opinion.

R. H. Thompson, for appellants.

I. & J. Caldwell & Winston, for appellees.

S. O. FOWLER *v.* A. A. GORDON.

[Abstract Kentucky Law Reporter, Vol. 3—616.]

Judgment Can Not Exceed Sum Asked For.

Where, in a suit to recover the value of property and for damages, the jury find that such value and damages amount to $625 and the plaintiff's petition only asks for $600, the court may enter judgment for $600 only.

Recovery of Personal Property.

In an action to recover personal property under the old action of detinue, the judgment would have been in the alternative for the property, if to be had, and if not, its value; and under the provisions of Gen. Stat. (1881), Ch. 38, Art. 6, § 1, "the plaintiff may, if he so elect, take a writ of fieri facias for the assessed value of the thing recovered; and in either case he shall have execution for the damages assessed for the detention, and his costs."

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

February 4, 1882.

OPINION BY JUDGE PRYOR:

In this case it was proper to require the jury to pass on the question of the alteration of the original contract of leasing. By the terms of the original lease the appellant was entitled to the furniture in the hotel or boarding-house on certain specified conditions, and the appellee claims that after its execution the contract of leasing was modified by which the appellant was to acquire no interest in the furniture, but the same belonged to the

appellee. The jury was therefore asked the question, Did the plaintiff and defendant, after the execution of the written lease, agree that Gordon should own the furniture at the end of the lease? They responded in the affirmative, and this settled the question as to the ownership of the property. Its value was fixed at $500 and the damages for the detention at $125. The value of the furniture and damages amounted to $625, and as the plaintiff had only asked a judgment for $600, the court had the right to enter a judgment for $600 and the plaintiff could claim no more. The remission afterwards of fifty dollars was an injury to the appellee and not the appellant, the proof authorizing the finding by the jury both as to the value and the damages.

The motion for a new trial was properly overruled. There is no reason why the witnesses for the plaintiff or their statements were not attacked prior to the rendition of the verdict. Every opportunity was afforded the appellant to prepare his case. He knew what these witnesses had sworn to on a former trial, and it would be a dangerous precedent to say that for the purposes of a new trial the unsuccessful party should be allowed to show that the witnesses for the plaintiff prior to the trial had made statements conflicting with the testimony made before the jury. There is no reason for awarding the new trial. This was an action to recover certain specific personal property, and under the old action of detinue the judgment would have been in the alternative for the property, if to be had, and if not, its value, etc. It is assigned for error in this court, that the judgment is for the value of the property and damages, without giving to the defendant the right of restoring the property. If the judgment had been rendered in the alternative the plaintiff could have elected to issue his fi. fa. for the value of the property and the damages. General Stat. (1881), Ch. 38, Art. 6, § 1: "The plaintiff may, if he so elect, take a writ of fieri facias for the assessed value of the thing recovered; and in either case he shall have execution for the damages assessed for the detention, and his costs."

The judgment below is therefore *affirmed.*

E. E. McKay, Badger & English, for appellant.

M. Mundy, R. B. Hawkins, for appellee.

THOMAS J. HUDSON ET AL. v. LOUISVILLE & N. R. Co.

[Abstract Kentucky Law Reporter, Vol. 3—616.]

Negligence in Damage Suit.

It is the duty of a railroad company to give due and proper warning of the approach of its trains to or near that part of its road running parallel with a turnpike road, and a failure to give such warning is negligence, which will subject the company to damages when an injury results from such failure.

Damages from Frightening Horses.

If a railroad company, through the operators of its engine, blows a whistle at or near those traveling on a nearby highway when there was no necessity for it and when the engine was so near as to frighten the horse of plaintiff by reason of the peculiar noise of the whistle and cause it to run away, injuring plaintiff, such company is guilty of negligence, and is liable for the damage caused thereby.

APPEAL FROM BOYLE CIRCUIT COURT.

February 4, 1882.

OPINION BY JUDGE PRYOR:

This is the third time this case has found its way to this court. First appeal, 14 Bush (Ky.) 303; second appeal, 10 Ky. Opin. 617, 1 Ky. L. 66. The appellant (the plaintiff below) has obtained a verdict and judgment for $375, and complains that the jury failed to give the amount of damages to which she was entitled. It seems to us the instructions of the court embrace the law of this case. Two propositions were submitted to the jury, under which this verdict was obtained:

1. It was the duty of the company to give due and proper warning of the approach of its trains to or near that part of its road running parallel with the turnpike, and a failure to give such warning subjected the company to damages when an injury resulted from this neglect.

2. If the warning was given or the whistle sounded at or near those traveling on the road, when there was no necessity for it and when the cars were so near as to frighten the horse of plaintiff by reason of this peculiar noise of the whistle, the verdict must be for the plaintiff.

These instructions covered the law of the case, and the jury, believing from the evidence that negligence existed on the part of the company, returned a verdict against it; and the question of damages was with the jury and not the court. It is argued that the court failed or refused to permit the jury to take into consideration the loss of time during plaintiff's illness in estimating the damages.

There is no such special damage alleged in the petition, and if the allegation as to the fact of the injury alone was sufficient to authorize the jury to consider it, a question not necessary to be determined, we would not, after three trials of this case, disturb the finding. The jury no doubt considered the nature and extent of such injury, and the consequences resulting from it, and if not there must be an end to litigation, and this judgment is therefore *affirmed*.

Thompson & Thompson, for appellants.

Durham & Jacobs, William Lindsay, for appellee.

ANDREAS' ASSIGNEE *v.* RUST ET AL.

[Kentucky Law Reportor, Vol. 3—772.]

Transfer of Property to Defraud Creditors.

Before a transfer of property may be held void according to the bankrupt law of the United States, and authorize the assignee to recover the value of property transferred before the bankruptcy proceedings were begun, from the person receiving it, it must be shown that the debtor making the transfer was insolvent, that the transfer was made to give preference to the creditor, and that the person receiving the property had, at the time, reasonable cause to believe the person making the transfer to be insolvent, and must also know that such transfer was in fraud of the bankrupt act; and the transfer must be made within four months before the filing of the petition by the bankrupt.

APPEALS FROM CAMPBELL CHANCERY COURT.

February 7, 1882.

OPINION BY JUDGE LEWIS:

These are two consolidated actions by appellant, Betz, assignee in bankruptcy of appellee, Andreas, to recover for the benefit

of the creditors the amount of a note for $214, and stock in a building association valued at $186, transferred by Andreas to appellee, Rust, in payment of a note for $250, given the 4th of May, 1878, for borrowed money, and an account for work and labor, and materials furnished amounting to $106.90.

It appears that the transfer was made on the 8th of August, 1878, and on the 10th of August, Rust repaid to Andreas about $46 in money, being the supposed balance, after deducting the amount Andreas owed him from the amount of the note and stocks transferred. On the 1st of August next after this transaction, Andreas filed his petition in bankruptcy, and was declared a bankrupt. Upon the trial the chancellor rendered judgment dismissing the petitions in both cases, and from that judgment this appeal is prosecuted.

To make such transfer void, according to the provisions of the bankrupt law of the United States, and authorize the assignee in bankruptcy to recover the value of the property so transferred from the person receiving it, the following facts must concur:

1. The debtor making the transfer must be insolvent.
2. If the transfer gives a preference, it must have been made with a view to give a preference to the creditor.
3. In any event the person receiving the transfer must at the time have reasonable cause to believe the person making the transfer to be insolvent.
4. He must also know that such transfer was in fraud of the provisions of the bankrupt act.
5. The transfer must be made within four months before the filing of the petition by the bankrupt.

Although Andreas may have been insolvent at the time the transfer was made, and it may have been made with a view to give a preference to Rust, still it is not void unless Rust had at the time reasonable cause to believe Andreas was insolvent, and also knew that the transfer was in fraud of the provisions of the bankrupt act.

In the language of this court in the case of *Edwards v. Tandy*, 78 Ky. 168, "there must be something more than mere knowledge of the fact of insolvency. It must be accompanied by such direct, or circumstantial evidence as establishes, * * * that

the creditor knew, at the time the transfer was made, that it was done in fraud of the provisions of the bankrupt law." There is no sufficient evidence in these cases that Rust had at the time of the transfer reasonable cause to believe Andreas was insolvent, and none at all that he knew the transfer was in fraud of the provisions of the bankrupt act.

At the time Andreas, as he swears, had no purpose to avail himself of the benefit of the bankrupt law. He was industriously engaged in his usual business, had a considerable amount of visible property, real and personal, more than sufficient at fair prices to pay all his debts, and if his business affairs had been judiciously managed he could easily have paid all his debts.

Rust, whose deposition is taken, swears positively that he had no reason to believe, and did not suspect, Andreas intended going into bankruptcy, and that he received the transfer of the note and stock in payment of what Andreas owed him, without any knowledge that it was in fraud of the provisions of the bankrupt law.

In our opinion the chancellor did not err in dismissing the petition in the two cases, and the judgment must be *affirmed*.

John S. Ducker, for appellant.

F. M. Webster, for appellees.

T. M. CARDWELL *v.* HELEN KEMPLE.

[Abstract Kentucky Law Reporter, Vol. 2—320.]

Mere Claim of Bondsmen Not Provable in Bankruptcy.

A mere liability on a bond of a cashier does not make his claim provable in bankruptcy.

APPEAL FROM MERCER COURT OF COMMON PLEAS.

March 15, 1881.

OPINION BY JUDGE PRYOR:

After a careful examination of the record we find nothing in it evidencing the second discharge of the appellant in bankruptcy. It is discussed in the briefs of counsel on each side, and is maintained by the appellee, that the last discharge was from debts existing on

the 26th of August, 1878; if so, there had at that time been no claim provable against the bankrupt's estate, and if the claim originated after that period the appellant is liable. This, however, is mere matter of speculation, as the evidence or exhibits of the discharge referred to are filed as part of appellant's supplemental answer, and show a discharge in the year 1872. This court decided at the last term of this court that a mere liability on a bond of a cashier did not make the claim provable in bankruptcy, and if so, the discharge in 1872 did not affect the liability of the appellant to the appellee. The judgment is not for too much. It is for the amount only that was paid for the appellee.

Judgement *affirmed.*

T. C. Bell, P. B. Thompson, Jr., for appellant.

Kyle & Poston, for appellee.

G. W. DOHONEY *v.* JAS. D. LYON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—249.]

Power of Collection Agent.

An agent in making collections has no right to take property instead of money. He may not speculate in property for the purpose of collecting the debt, and when he takes property in discharge of a debt his principal must account for the amount of the note.

Notes Held as Indemnity.

One holding notes to indemnify him on a debt must account for an excess of money derived from their collection over the amount of the debt they secure.

APPEAL FROM ADAIR CIRCUIT COURT.

September 15, 1881.

OPINION BY JUDGE PRYOR:

The commissioner in this case has made a very clear and intelligent report of the joint undertaking between these parties. The notes were placed in the hands of the appellant to indemnify him fully against loss, and from the testimony it is plain that he has been fully secured, and the judgment was proper. He claims that all the collections made only entitle appellees to a credit of $300, when he should have made an exhibit or disclosure of his collections

and have given the parties the credit to which they were clearly entitled.

The agent sent Smith to collect these notes, and had no right to compromise without the direction of the assignors; nor are we inclined to think that they were liable for the expenses of this agent in making his collection tour. The agent bought mules with the note of South for $226, and for this amount his principal was properly charged. He had no right to speculate in mules for the purpose of collecting the debt, and if he took mules in discharge of the note, his principal must account for the amount of the note. After deducting the expenses on the horse of the appellant, and the amount the son agreed should be deducted from the price, the balance was $49, for which the appellant has been credited.

The other exceptions we have noticed and find no error to appellant's prejudice; and as to the cross-errors they are unavailing unless the appellant was compelled, as an ordinary assignee, to exercise the utmost vigilance in the collection of the notes held by the appellant as collateral.

The rights of the parties as to the notes of Stewart and Compton were properly asserted. Because the notes were executed to J. D. Lyon was not a sufficient reason for making him bear the loss. Lyon, after giving a detailed statement of cash received of South, and how appropriated, had a balance of $34 to make his trip home. We see nothing in this case of which appellant should complain. It is certain that he has received all to which he was entitled.

The officers of the bank in which the notes were deposited show the amount collected, and the proof further shows the notes belonging to Robert Lyon and that belonging to Dohoney and Lyon; and from the record before us we can not see how a more equitable adjustment of these accounts can be made than that evidenced by the report of the commissioner.

The judgment is *affirmed* on the original and cross-appeal.

T. C. & F. R. Winfrey, for appellant.

William Stewart, Hindman & Sampson, Rhorer & Jones, for appellees.

[Cited, *Woodruff v. American Road Mach. Co.*, 23 Ky. L. 1551, 65 S. W. 600.]

WILLIAM BEARD ET AL. *v.* J. W. MCKAY ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—519.]

Usury.

Where a petition on a note does not demand a judgment for more than legal interest, but by clerical misprison a judgment including usurious interest is entered by the clerk, it can be corrected in the court below by motion.

APPEAL FROM HART CIRCUIT COURT.

January 19, 1882.

OPINION BY JUDGE PRYOR:

The demurrer to the answer was properly sustained. The note on Lowry was deposited with the bank as collateral security for the payment of the note on which the appellants were the sureties. McKay, the principal, gave an order to the bank to deliver the note to Ritchie as soon as the note sued on was paid off, the note upon which appellants are bound. We can not see how this prejudiced the sureties and no ground for reversal exists for that reason. nexed. All parties were to have recognized the rights of the appellants as sureties; therefore, the right of the bank to deliver the note held as collateral was restricted by the order. The note in controversy has not been paid nor has the note on Lowry been delivered to Ritchie. The acceptance of the order does not release the sureties. The bank accepted the order with the conditions an-

Nor can the judgment be reversed by reason of the usurious interest included in it. The note bears eight per cent. interest, and two per cent. of that interest is usury or must be so treated in the absence of any proof to the contrary. The judgment should have been for six instead of eight per cent. This, however, was a clerical misprison, for the reason that the statement of the petition ignored the right to recover the usury and only asked a judgment for the legal interest. This can be corrected in the court below by motion, as it was an oversight on the part, doubtless, of the judge or clerk. The petition did not ask for it, but on the contrary disclaimed the right to recover it.

Judgment *affirmed.*

Edwards & Seymour, for appellants

Woodson & Macey, for appellees.

[Cited, *Armendt v. Perkins,* 17 Ky. L. 1327, 32 S. W. 270; *Tousey v. Dehuy,* 23 Ky. L. 458, 62 S. W. 1118; *Bitzer v. Mercke,* 111 Ky. 299, 23 K. L. 670, 63 S. W. 771.]

LINDSAY LAYNE ET AL. *v.* STEPHEN G. LOAR.

[Abstract Kentucky Law Reporter, Vol. 3—618.]

Power of Chancellor to Cause Resale of Land.

Where land is sold under a decree of the court and the purchase-money is not paid, the chancellor has the power to order its resale for cash or on credit; and where the purchaser at the first sale is given notice and an opportunity to object to the order of resale and makes no objection, he can not thereafter make any objection thereto.

APPEAL FROM FLOYD CIRCUIT COURT.

February 7, 1882.

OPINION BY JUDGE HARGIS:

The judgment is not void, but were this so the appeal should be dismissed, as no motion to set aside or modify it was made in the inferior court. Civ. Code (1876), § 763. The notice to the appellants, who were purchasers of the land sold under the former decree of the court, was intended and operated as a notice of the proceedings which were in the nature of a rule to compel appellants to pay for the land or submit to a resale of it. It is neither an action nor the basis of the summary proceedings provided by Civ. Code (1876), Title 10, Ch. 5, but it furnishes notice to the appellants of all that the service of a rule would have afforded them, and in fact it is much more ample than rules for such purposes generally are. The object of the notice, as shown by its terms, was not to obtain judgment against the principal and sureties on the unpaid sale bonds, but to warn the appellants, who were in court for every legitimate purpose connected with the sale of the land, the collection of the purchase-money thereof and transmutation of the title, that, having failed to pay for the land, the power of the chancellor to order its resale would be invoked on a certain day of the term.

Having been given full opportunity to object to the order of

resale the appellants are concluded thereby, as the chancellor had the power to make such an order as was decided by a well considered opinion of this court in the case of *Page v. Hughes' Heirs*, 9 B. Mon. (Ky.) 117. In that case it is held that the chancellor had the power to order the resale for cash or on a credit; therefore the objection to the sale because it was directed to be made on a credit of six months is untenable. Besides this, the record shows it was better for appellants that the sale should be had on a credit, as a cash sale must have resulted in a greater sacrifice than appellants now complain of.

The debt for which the land was sold was created before the passage of the law requiring appraisements under decretal sales, and, as lately held by this court, that law does not apply to such cases. The appellants did not offer to redeem the land, and they are not in the attitude to complain of being denied that right.

The judgment of resale directed only so much land as should be necessary to pay the remainder of the purchase-money, after deducting the credits entered on the sale bonds, to be sold, and the amount bid at the resale was not so much as remained unpaid on the original sale bonds. We can not, therefore, see any prejudice to the substantial rights of the appellant from the failure of the court to specify more particularly the amount for which the land was sold.

The motion and notice were sufficient to inform any ordinarily reasonable person of the grounds and character of the judgment sought, and there is no substantial inconsistency between the notice and judgment.

Judgment *affirmed*.

W. H. Holt, Weddington & Stuart, for appellants.

Wm. Lindsay, for appellee.

CRITTENDEN COUNTY *v.* ELISHA CONGER.

[Abstract Kentucky Law Reporter, Vol. 3—618.]

Petition for Breach of Contract.

One who seeks to recover on account of a breach of contract must allege, in his petition, the contract and its provisions, its breach, and facts showing the loss or damage sustained by him because of the breach.

Contract Made by Agent.

Where one contracts with an agent the burden is on him, in a suit for its breach, to show not only that the agent made the contract, but also that he acted within the scope of his authority in doing so, for in the absence of such authority it will not be presumed that the agent had authority to make contracts.

Contract of a County.

A county is capable of contracting, and may be sued for a breach of its contract.

Appeal from County Court.

There can be no appeal from the judgment of the county court rejecting a claim, unless the claim shall first be presented to that court.

APPEAL FROM CRITTENDEN COURT OF COMMON PLEAS.

February 7, 1882.

OPINION BY JUDGE HARGIS:

Appellee alleges substantially that the appellant, by its agent, made a contract with him to take and keep all the paupers of the county for one year at $8.45 per month for each pauper. But by mistake the contract was not so reduced to writing, and he asks that it be reformed. He exhibits the written contract with his petition. He avers that the county failed and refused to allow him to keep eight persons who were paupers and kept by others that year under the employment of the appellant, and he was thereby damaged $800.

He does not allege that he could have kept each or all of said eight paupers at less than the contract price; nor does he allege that he was at any cost or expense in preparing to keep them. There are no facts stated in the petition which show that the appellee was subjected to any loss or damage by the alleged breach of the contract. All that is alleged in the petition may be true, and yet the appellee may not have been damaged anything. If the costs of keeping the paupers were as much as the county agreed to pay him he would not in that case be entitled to more than nominal damages for the breach of the contract.

It is a general rule of pleading that the contract, its breach, and the facts showing the loss or damage occasioned thereby, should be alleged. It is true general damage is alleged, but the

petition ought not to have left it doubtful whether the appellee had been damaged at all, as ambiguities and uncertainties are construed against the pleader who produces them.

The county court would invest its agent with power to contract with appellee only through orders made of record in that county. The burden of proof being on the appellee, not only to show that the agent made the contract, but that he acted within the scope of his authority in doing so, he should have alleged and shown by the records of the county court that the contract was authorized. In the absence of such authority it will not be presumed that the agent had authority to make contracts which conflict with the proper and wholesome exercise of the lawful power of the county court, in providing for the support of the paupers of the county. The petition was therefore defective and the general demurrer should have been sustained.

Gen. Stat. (1881), Ch. 27, Art. 3, § 11, does not provide an appeal from the judgment or order of the county court of levy and claims rejecting a claim, unless the claim shall first be presented to that court. The claim sued on was not presented or rejected by said court, and therefore none of the elements, which would authorize an appeal under that section, are shown in this record.

As a county is capable of contracting we perceive no reason why it should not be sued for a breach of such contracts as it may make, and that, too, in a court where its representatives will not be the judges.

Wherefore the judgment is *reversed* and cause remanded with directions to set aside the judgment and sustain the demurrer, and for further proper proceedings.

L. H. Jamcs, Wm. Lindsay, for appellant.

D. R. MAUPIN ET AL. *v.* B. F. BERKLEY.

[Abstract Kentucky Law Reporter, Vol. 3—617.]

Competency of Witness.

When a witness is incompetent to testify under Civ. Code (1876), § 606, subsec. 6, under a claim against the estate, but an heir of the estate is called as a witness by the administrator for the purpose of defeating a recovery, the evidence of such incompetent witness becomes admissible.

Binding a Surety by the Act of His Agent.

A surety is not bound by the act of an agent who signs the note for him, unless the authority of the agent is in writing signed by the principal, made in the presence of at least one creditable witness; but where the principal is present and holds or touches the pen when his name or mark is made executing a note, he signs as principal, and it is not material whether the person also holding the pen is his agent or not. He is bound on such instrument.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

February 7, 1882.

OPINION BY JUDGE PRYOR:

This action was instituted on a note for $578 against W. R. and D. R. Maupin, and a verdict and judgment rendered against them. The principal in the note, and John Maupin, who was also a surety, were not before the court or made parties. During the pendency of the action W. R. Maupin died and the suit was revived against his administrator. The order of revivor was made more than six months after the qualification, and although notice was given of the intention to revive within the six months, no objection was made at the time of revivor, and it is now too late to raise the question.

Both of the appellants pleaded non est factum, alleging in specific terms the alteration of the note after its execution and delivery to the payee. On this plea an issue was formed and a verdict under proper instructions rendered for the plaintiff. The verdict on this branch of the case was sustained by the proof and can not, therefore, be disturbed. It is assigned for error, however, that the plaintiff in the action was allowed to testify against the personal representative of W. R. Maupin. He was a competent witness, for the reason that John Maupin, who was an heir or devisee of W. R. Maupin, was introduced and examined in chief touching the issues made, and although his interest was slight, being an heir to the undevised estate amounting to forty or fifty dollars, he was interested in the result of the litigation, and having testified against the plaintiff, made the latter a competent witness. The plaintiff had previously testified as against D. R. Maupin, the living surety, but his testimony was expressly excluded in so far as it affected the liabil-

ity of W. R. Maupin's administrator; but when an heir of the intestate was examined by the administrator for the purpose of defeating the recovery, it was proper to permit the plaintiff to testify, as is expressly provided by Civ. Code (1876), § 606, subsec. c. There is, therefore, no error in the judgment against W. R. Maupin's administrator. As to the appellant, D. R. Maupin, a second defense was interposed, viz.: that he never executed the paper nor authorized any one to execute it for him. It appears that he is blind and his name written in full with his mark in the usual form. He further alleges that the party signing his name had no written authority to do so, or any authority in writing to make his mark, etc.

The appellee, for reply to this paragraph of the answer (No. 3), denies that the defendant never authorized the execution of the note or that he did not sign the note or make his mark. He denies that the person who signed the name of the defendant had no authority to do so. There is no denial of the allegation that the mark was made by another without written authority. The traverse is, "he denies that the person who signed the same had no authority to do so." The authority might have been in parol, and if so it was not binding on the surety, the statute expressly providing that to bind the surety the authority to execute the note or obligation for the surety must be in writing. There was no issue on this defense for the jury to try, and the verdict should have been for the appellant, D. R. Maupin. The court below holding the traverse sufficient, the case went to the jury on testimony conflicting as to the manner in which the signature or mark of this appellant was made to the note. The proof for the plaintiff, the principal obligor being the witness, is to the effect that this was a note in renewal of other notes for which the appellants were bound as surety, and that after explaining fully the nature of the note and its amount the name of the appellant, D. R. Maupin, was written by the witness, the appellee, with appellant's own hand hold of the pen as the signature was being made, and that appellant made his mark. This is denied by the appellant, insisting that no such authority was given and that he never touched the pen nor knew his mark was made.

As the case must go back for another trial it is proper to again

construe the statute with reference to the liability of sureties. The Gen. Stat. (1881), Ch. 22, § 20, provides that "No person shall be bound as the surety of another, by the act of an agent, unless the authority of the agent is in writing signed by the principal; or if the principal do not write his name, then by his sign or mark, made in the presence of at least one creditable attesting witness." This provision of the statute applies alone to the mode of executing a power under which the agent is authorized to sign the name of the principal.

Here the appellant took hold of the pen and the witness wrote his name, the appellant then making his mark. The act was in fact done by the principal in person, and the question of agency, if the witness for the appellee is to be believed, does not arise. A witness must attest the written authority only, and no attestation is necessary when the surety participates in its execution by making his mark or holding the pen as another makes it for him. Suppose the appellant had not been blind, and made his mark as testified to by the witness for the appellee. Can it be doubted that this would be the act of the principal and not the agent? The fact of his being blind might, and doubtless would, cause the court and jury to be cautious in enforcing the liability; still, if the proof, as in any other case, is sufficient to satisfy the minds of the jury that the appellant made his mark to the paper, knowing the nature of the obligation he was signing, the judgment should go against him. In arriving at such a conclusion the testimony on both sides of the issue will be weighed, for we are only discussing the question as if there were no testimony for the appellant. It must be recollected that the appellant's testimony is in direct conflict with that offered by the appellee, and it is the province of the jury to pass on the questions of fact. Our attention has been called to Civ. Code (1876), § 732, defining the words "signature or subscription." The words "signature" or "subscription" and words of like import include a mark by or for a person who can not write, if his name be subscribed to an instrument and witnessed by a person who is near thereto, and writes his own name as a witness. The Civil Code is intended to regulate the practice in civil cases, and it is in reference only to the executon of such instruments as is required to be executed under the provisions of the code that this construction or

definition of the word "signature" can apply. The title of the code, viz.: "An act regulating practice in civil cases," would be misleading if it undertook to determine the validity of contracts and the execution of ordinary obligations creating personal liabilities. The provision referred to was intended to apply and can only apply to the execution of such bonds or obligations, or other writings, as are incidental to the remedies provided in the prosecution of actions or special proceedings regulated by the code.

As the pleadings stood in this case the appellant was entitled to the verdict and judgment, and for that reason the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion. As to W. R. Maupin, administrator, the judgment is *affirmed*.

J. M. Nesbitt, W. H. Holt, for appellants.

Reid & Stone, for appellee.

[Cited, *Terry v. Johnson*, 109 Ky. 589, 22 Ky. L. 1210, 60 S. W. 300; *Meazels v. Martin*, 93 Ky. 50, 13 Ky. L. 958, 18 S. W. 1028.]

SUSANNA MARSHALL ET AL. *v.* W. F. VANMETER ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—619.]

Equities of Wife in Real Estate.

Where in a petition it is shown that land was purchased with the wife's money and by mistake the conveyance was made to the husband, and the exhibits filed with the petition show that such deed had been made more than twenty years and that the husband had deeded portions of it as if no mistake had been made and without any objections by the wife, the rights of the husband's creditors, which became certain by the levy on the land, are superior to the stale equity of the wife unsupported by the allegations of any specific facts showing that the money paid for the land was her's.

Homestead.

Land including the dwelling-house and appurtenances owned by the debtor not exceeding in value one thousand dollars, is exempt as a homestead; and neither the presumption that the officer in making a levy on such land did his duty nor the mistake in valuation or fraudulent valuation by appraisers can bar them of their right to a homestead of one thousand dollars in value.

APPEAL FROM GRAYSON CIRCUIT COURT.

February 9, 1882.

OPINION BY JUDGE HARGIS:

Appellants allege in their petition, in substance, that the land was bought from Butte with the wife's money, that by mistake the deed was made to the husband; that it is not worth $1,000; that the appellees' debt was created since June, 1866, and subsequent to the erection of the improvements, and it was not for purchase-money; that appellants are bona-fide housekeepers with a family, and as such were residing on the land as a homestead when appellees' execution was issued and levied on it, the land sold and the deed made by the sheriff. They sought a reformation of the mistake in the deed, and to enjoin further proceedings by the appellees under their deed to obtain possession from appellants, to quiet their title to their homestead and remove the cloud therefrom created by the levy, sale and deed by the sheriff.

To the petition a demurrer was sustained, and so far as the alleged purchase and deed from Butte are concerned, we think it was properly sustained, because the exhibits filed with the petition show that the deed had been made for about twenty years, and that appellants had sold and deeded portions from the original tract as if no mistake had been made in the deed to the husband; and the appellees' rights, which became certain by the levy, were superior to the stale equity of the wife unsupported by the allegations of any specific facts showing that the money paid for the land was her's.

These reasons are stated without reference to the question of homestead, for, whether the land belonged to the one or the other, the petition contains sufficient allegations to entitle appellants to protection of the homestead.

It was not necessary to allege that the sheriff did not appoint appraisers to value and set apart a homestead to the appellants, or that he did appoint them, and either by fraud or mistake of judgment they failed to allot a homestead of $1,000 in value. The appointment of appraisers and their acts are matters of defense. The appellants would not be concluded by the valua-

tion of the appraisers, even if any had been made, for they may not, as is usually the case, have had any particular knowledge of the appointment, and consequently they should be given in all cases an opportunity of being heard as to the value of the homestead; otherwise the exemption law might prove a shadow rather than substance.

The law says that there shall be exempted so much land, including the dwelling-house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars; and neither the presumption that the officer did his duty nor the mistaken or fraudulent valuation by appraisers, before whom the appellants could not appear and be heard as a matter of right, can bar them of their right to a homestead of one thousand dollars in value, if it has not been set apart to them, and if this has been done the appellees can establish it by taking the affirmative and proving the fact.

The petition on this point was sufficient. Wherefore the judgment is *reversed* and cause remanded with directions to overrule the demurrer and for proper proceedings.

Wilson & Hobson, W. R. Haynes, for appellants.
Conklin & McBeath, G. W. Stone, for appellees.

COLUMBUS ALLEN ET AL. *v.* REBECCA STUMP.

[Kentucky Law Reporter, Vol. 3—564.]

Guardian's Sale of Real Estate.

Before an infant's real estate can be sold there must be filed in court a proper petition for its sale by the statutory guardian appointed in this state and not in some other state, and in the petition the guardian should allege his belief that the sale would be to the benefit of his said ward. A sale on petition of a guardian in a foreign state is void.

APPEAL FROM HARRISON CHANCERY COURT.

February 9, 1882.

OPINION BY JUDGE LEWIS:

To give the court jurisdiction and authorize a judgment for the sale of the real estate of an infant, under Rev. Stat. (1867),

Ch. 86, Art. 3, § 1, subsec. 2, it was indispensable that the petition for such sale should be filed by the statutory guardian, and that he should allege in it his belief that the sale would redound to the benefit of the infant. Besides other requisites to a judgment, it was made the duty of such guardian to enter into a covenant, with security approved by the court, for a faithful discharge of his duty under the statute.

It is apparent from the language as well as the reason of the law that the statutory guardian meant is one appointed in pursuance of the laws of this commonwealth, and by the tribunal authorized thereby to make the appointment. If it had been the intention of the legislature to authorize such judgment upon the petition of a guardian appointed elsewhere than here, it would have been so provided in express and unambiguous terms.

In 1869, upon the petition of Chas. T. Daniels, who was appointed guardian, in the state of Missouri, of his infant daughter, appellant, Maria V. Daniels, now Allen, and without any defense being made for her by a guardian appointed in this state, either statutory or ad litem, judgment was rendered for the sale of her remainder interest in two lots of land, the property was sold, and without an order of court the proceeds were paid over to him and carried out of this commonwealth. The sale of the interest of appellant, Maria V. Allen, in the lots was, in our opinion, void as to her, and the purchaser acquired no title thereto, except to the extent of the life estate of Chas. T. Daniels.

Appellant, Maria V., having been made a party plaintiff in this action, and the petition having been dismissed as to so much thereof as sought a sale of her remainder interest in the property, the cause of action as it then stood was for the purpose of determining the conflicting claims of herself and appellee, and to quiet her title. We think she was entitled to such relief; and the court below, instead of dismissing the petition, should have rendered judgment ascertaining and determining that she was not divested of her interest in remainder by the proceedings referred to, but was, upon the termination of the life estate of her father, entitled to the possession of the property.

As the record stands, neither the pleadings nor proof required her to account for any part of the proceeds of the sale made in

1869. Wherefore the judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

Chas. Offutt, L. M. Martin, for appellants.
A. H. & J. Q. Ward, for appellee.

JOHN W. GRIFFIN *v.* A. B. BEADLES' ADMX.

Exceptions to Report of Sale.

When an interested party is misled by a notice of sale as to when the sale is to take place, and thus prevented from attending and bidding on the property to be sold, and the property is sold much below its value and she excepts to the report of the sale and offers to pay four times the sum received at the sale for such property, a resale should be ordered; and after notice of the exception to be filed to such sale the first purchaser, if he makes improvements on the property, does so at his own risk.

APPEAL FROM HICKMAN CIRCUIT COURT.

February 11, 1882.

OPINION BY JUDGE HARGIS:

The advertisement of the sale was so written as to mislead readers who might have desired to attend the sale. "Monday" appeared in the face of it, and although crossed out, the record shows it was almost as apparent as "Saturday" which was written above it. Monday was the 5th of the month, and appellee's attorney, after reading the advertisement, thought that was the day of sale and so informed his client. She was thus misled, and did not attend the sale that took place on Saturday, the 3d, at which the mill was sold at a sacrifice.

She shows, by coming into court and offering four times as much for the property as was bid by the appellant, that she in good faith wished to be present in person or by agent and bid the property up to something like its reasonable value. The appellant was notified before he made any improvements that the sale would be excepted to, and he can not be allowed to better his condition by hazarding improvements upon property for which he had not been accepted as the purchaser and after fair notice that his right to it would be contested.

Advertisements should be in a readable handwriting, if not printed, and no uncertainty should be contained in them about the day on which the sale is to be made.

Judgment *affirmed.*

Bullock & Bullock, for appellant.

Rodman & Rodman, W. R. Bradley, for appellee.

NARCISSA MORROW *v.* RICHARD N. MORROW ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—620.]

Waste by Life Tenant.

Where a widow, a life tenant of 240 acres of land, only 70 of which is cleared land, leaving 170 acres of woodland, sells about $170 worth of timber, and with the proceeds improves the fences and buildings on the land which had become decayed, she is not guilty of waste.

APPEAL FROM WARREN CIRCUIT COURT.

February 14, 1882.

OPINION BY JUDGE PRYOR:

Near twenty years elapsed from the death of the testator to the institution of the present action. His widow who survived him was entitled to the use and control of the farm owned by him and of which he was possessed during his life. He left four children residing with her, the youngest being about 11 years of age. The personal estate consisted of but little more than the property exempt from execution and distribution. The farm contained about 240 acres; 170 acres of this were in woods and the balance cleared. On this 70 acres the widow, who is now about 70 years of age, raised and maintained the younger children, having the land cultivated generally upon shares, she getting one-third of the crop, and this seems to have been her only income for the support of those who were entirely dependent upon her. The land, by constant cultivation, had become exhausted and unproductive. The buildings were in a dilapidated condition, the old homestead exhibiting the same evidences of decay that could be seen in the declining years of the aged mother who had labored so long and faithfully in providing for the wants of a large family. The only means of repairing the

homestead was in disposing of some of the timber on the place for that purpose, and with the money, amounting in all to about $170, the appellant (the mother) renovated the outbuildings, built a new crib, a new barn, covered the dwelling house and porch, and had other improvements made in the way of fencing, all of which cost greatly more than the timber sold for, and left of the woodland an abundance of fine timber for all the purposes of the farm. Those entitled in remainder are claiming that the use of the timber amounted to waste, and have by the judgment below obtained an injunction against the mother enjoining her from the commission of waste. There is proof conducing to show that the removal of the timber has decreased the value of the land, while on the other hand it is shown that the proceeds of the timber was used in improving the place, and that it was absolutely necessary that such improvements should have been made, both for the comfort of the life tenant and the preservation of the property, and, in addition, that enough timber was left on the place for all the purposes of the farm and in fact more than was necessary. It is argued, however, that the rent of the land was worth $140 per annum, and this was sufficient to support the widow and make these improvements; and the chancellor, adopting that view, has perpetuated the injunction.

It is not necessary to speculate upon the condition of this cleared land after a constant cultivation for 20 years, nor to question the economy used by the mother in conducting the farm and raising her children. The necessary result follows that the soil is gone and the land unproductive, and it required such economy as was practiced by this appellant to enable her to support herself and family upon it. The 170 acres was too much woodland for the 70 acres of cleared land, and instead of committing waste, as is charged, the mother would have been justified in clearing up a part of the woods and adding to the small pittance that was left for her support. During the period of 20 years the sale of $170 worth of timber is the waste she is charged with having committed, and some of that sold to the parties obtaining this injunction.

That there is timber enough left to last the farm for other generations is abundantly shown, and when it is made to appear that the proceeds of what was sold were applied to the improve-

ment of the place there was no cause for this injunction. It was for the use and benefit of the farm, and absolutely indispensable to the comfort of this old lady.

The judgment is *reversed* and cause remanded with directions to dismiss the petition.

R. Rodes, for appellant.

Halsell & Mitchell, for appellees.

JAMES SAWYER *v.* CHRISTIAN GUSCURTH ET AL.

[Kentucky Law Reporter, Vol. 3—592.]

Guardian and Ward.

It is only in an action by the guardian against his ward that the proceeds of the infant's estate can be applied for his maintenance and education, and in such an action the infant must be served with process.

Sale of Infant's Real Estate.

A statutory guardian, desiring to sell his infant ward's real estate for his maintenance and education, must make the infant a party defendant and have him served with process; and the court has no authority to order a sale where this is not done.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 15, 1882.

OPINION BY JUDGE LEWIS:

Under Civ. Code (1876), §491, in an equitable action by the owner of a particular estate or freehold in possession, against the owner of the reversion or the remainder, though an infant, real property may be sold for investment of the proceeds in other real property. Under that section this action appears to have been brought by the owner of the particular estate, being the mother of the infant defendants. But in her petition she asks that the value of her interest be paid in money directly to her, and the remainder be invested in a house and lot for herself and children, the title being taken to them.

Civ. Code (1876), § 489, subsec. 3, authorizes, in an action by a guardian against his ward, a sale of the estate of the ward for his maintenance and education. Section 489, subsec. 5, author-

izes, in such an action, a sale of the estate of an infant and investment in other property.

Notwithstanding, by the terms of § 491, as well as § 489, subsec. 5, the proceeds are required to be invested in other real property, and the purpose of the legislature seems to be to preserve the fund intact, still we are of the opinion that under the authority given by § 489, subsec. 3, as well as under the inherent power belonging to the chancellor, such portion of the proceeds belonging to the infant, arising from the sale under the proceedings of either the other two sections, as may be necessary for his education and maintenance, may be diverted from the investment and applied to such necessary purposes.

But it is only in actions by the guardian against his ward that the proceeds of the infant's estate can be applied for his maintenance and education. While the action authorized by § 491 may be brought by the owner of the particular estate, the actions authorized by § 489, subsecs. 3 and 5, must be brought by the guardian. Whether brought by the one or the other the infant must be served with process, as required by Civ. Code (1876), § 52. As the mother, upon whom the process upon the original petition was served for the infant defendants, was herself the plaintiff, it would seem that the spirit of the code was not complied with. The process, she being plaintiff, should have been served upon a guardian or other person described in § 52 not interested.

Though the pleading subsequently filed by the statutory guardian, Burton, was denominated a petition and answer, it was substantially a cross-action against the infants, seeking a sale of their estate for their maintenance and education, and being necessary party defendants thereto, they should have been made so, and served with process. As this was not done, the court had no authority to order a sale of their estate.

Though the first judgment was void, and the sale under it was properly set aside, the action was not necessarily discontinued. But being upon the docket, it was not improper for the court to permit the pleading to be filed by Burton, the guardian. If at the time the second judgment was rendered the infant defendants had been before the court, the sale would have been valid, for in every other respect the law was substantially complied

with. But for the reason stated the judgment of the court below, directing a sale of the property and overruling the exceptions filed by appellant, must be *reversed* for further proceedings consistent with this opinion.

Weir, Weir & Walker, for appellant.

W. N. Sweeney & Sons, for appellees.

THOMPSON M. PETERS ET AL. v. FRANCIS SWORD'S EXR.

[Abstract Kentucky Law Reporter, Vol. 3—620.]

Set-off Against Provision in a Will.

Where a testator gave to his daughter a tract of land, and provided that "a lien is retained upon the land for $250 that Thompson Peters, her husband, owes me," in a suit by the executor to enforce such lien a debt owing by the testator to his daughter for caring for and maintaining the testator for some years, under his promise to pay, may be set off against said lien; and where such claim exceeds the lien retained there can be no recovery on such lien.

APPEAL FROM PIKE CIRCUIT COURT.

February 16, 1882.

OPINION BY JUDGE HARGIS:

By his will Francis Sword gave to his daughter, Mrs. Sarah Peters, a tract of land, and in the clause giving it to her he used this language: "A lien is retained upon the land for $250 that Thompson Peters, her husband, owes me." After the will was probated the executor brought this action to enforce a lien for the $250 on Mrs. Peters' land. Her husband and she answered, alleging, in substance, that he did not owe the testator the $250 and never had created any debt to the testator for property, money or anything else; that one of his sons-in-law suggested that Peters was keeping a large account against the testator, and by reason of that suggestion he waived the $250 as a lien on her land to set off Peters' account.

The pleadings and evidence show that Peters and wife, at the instance of the testator, took charge of his home farm and boarded and cared for him for a period of five years, under a promise that he would do them right. The meaning of this

promise was that the testator would pay them the reasonable value of their services and of the board; and this his representative should he required to do, at least to the extent of the $250, which was evidently placed in the will for the purpose stated. The testator made no other distinction in the devises to his children. Mrs. Peters' tract was not worth any more than either of the tracts devised to the other children, and the improvements made by Peters on the home farm about consumed the rent; at any rate the excess of the rent does not, in the light of the evidence, reduce the price or value of the board and services of Peters and wife done for testator below $250, which is not more than one-half of their value.

The petition to enforce the lien for $250 should have been dismissed and the excess of appellants' set-off rejected, as taking possession of the land devised to Peters and wife did not constitute an estoppel to their claim for services and board, which the husband had a right to assert against the estate irrespective of the provisions of the will in his wife's favor.

Judgment *reversed* and cause remanded with directions to render judgment in conformity to this opinion.

A. J. Auxier, for appellants.

Connolly & Parson, for appellee.

SOL ISENBERG ET AL. *v.* NICHOLAS STRASSER.

[Abstract Kentucky Law Reporter, Vol. 3—621, as Isenburg v. Strasser.]

Binding Force of a Judgment.

A judgment, not having been vacated or reversed, binds the parties to it, and is conclusive of their rights which were put in issue in the action which resulted in such judgment.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 16, 1882.

OPINION BY JUDGE LEWIS:

In the action of *Strasser v. Isenberg,* No. 32,220, the court adjudged that Henrietta Abrams held in trust for appellee, Strasser, an undivided one-third interest in the two tracts of land, and directed her, or, upon her failure, the commissioner of

court, to convey the same to Strasser. That judgment was rendered upon the pleadings, proof and exhibits filed, including the contract between Abrams and appellants, upon which they then and now rely as a basis for their claim for interest upon the two thousand dollars that by the terms of that contract she agreed to pay them.

The consideration appellants agreed to pay appellee for the tract of land was $6,000, of which they paid $1,000 in cash, $3,000 by the cancellation of the mortgage debt they held against him, and the remaining $2,000 was the alleged debt of Abrams against him which they agreed to cancel. The court, in the action mentioned, substantially decided that not to be a subsisting debt against appellee, the effect of which was to release appellants from the payment of Abrams of that much of the purchase-price they agreed to pay appellee. But in equity appellee was entitled to recover of appellants that sum and interest. But in lieu of the $2,000 and interest the court adjudged appellee entitled to one-third of the land, which, according to the price fixed upon it by the parties to this appeal, was equivalent to the amounts appellants then owed appellee.

That judgment, not having been vacated or reversed, binds the parties to it, and in our opinion appellee took under it an undivided one-third of the two tracts, unencumbered by any claim or right appellants may have acquired by their contract with Abrams.

Wherefore the judgment is *affirmed*.

M. Mundy, for appellants.

John C. Walker, M. A. Sachs, for appellee.

E. D. SMITH *v.* A. B. PARRISH ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—620.]

Purchaser of Real Estate at Executor's Sale.

Where by the terms of a testator's will the trustee and beneficiaries are empowered to sell the land, for the purposes of reinvestment, the purchaser at such sale is not compelled to look to the application of the purchase-money and see that it is reinvested.

APPEAL FROM SCOTT CIRCUIT COURT.

February 16, 1882.

OPINION BY JUDGE PRYOR:

By the will of the testator the trustee and beneficiaries were empowered to sell the land, and although for purposes of reinvestment the purchaser is not compelled to look after the purchase-money when paid or see that the investment is made.

The Gen. Stat. (1881), Ch. 113, § 23, provides that "the purchaser shall not be bound to look to the application of the purchase-money, unless so expressly required by the conveyance or devise." A like provision is found in the Rev. Stat. (1867), Ch. 106, § 23.

There is nothing in the will of Parrish suggesting even that the purchaser must see that the investment is made. The title should therefore be accepted and the purchase-money paid.

Judgment *affirmed.*

Geo. V. Payne, for appellant.

Jas. F. Askew, for appellees.

JOHN A. GRAHAM ET AL. *v.* H. B. JONES.

[Abstract Kentucky Law Reporter, Vol. 3—620.]

Reversal for Excessive Recovery.

A finding by a commissioner, approved by the chancellor, charging a party at the rate of $7 per day for the use of a two-horse team used for hauling in the city of Louisville, is so excessive and unreasonable as to warrant the court in reversing a judgment based upon it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 16, 1882.

OPINION BY JUDGE PRYOR:

There are so many exceptions filed to the report of the commissioner in this case, and so much uncertainty as to the correctness of many of the items, that it is almost impossible to make an accurate calculation or settlement of the accounts between these parties. The appellee has produced his books of account, and as he was cashier and bookkeeper, with the right of access to them by the appellant, they must be taken as cor-

rect unless disproved, and particularly when the appellant, who kept a book known as the "drivers' team book," refuses to produce it for inspection that the commissioner might make a full investigation of the accounts. If it is a book of the firm and kept by him for the purpose of showing the teams employed or the days in which they were engaged at work, he ought to have produced it, and when failing to do so, the commissioner would only resort to other evidence in order to make the settlement, and ascertain facts that this book would likely have disclosed. It seems to us, however, that the report is radically wrong in charging appellee the sum of $13,765 for the hire or use of these teams for 207 days, deducting the costs of keeping the teams, hire, and other expenses in running them, amounting to $7,316, and leaving the appellant indebted to the firm for the use of these teams for 207 days in the sum of $6,449.

They were working together as partners for near 16 months, and their profits were only $11,871, not, of course, including their individual accounts. They seemed to be doing a good business, actively engaged in hauling during these periods, with the energy and labor of either partner devoted to the firm interests, and no doubt made as much profit as their business would justify. The commissioner has charged the appellant with the use of these teams (not as many as were used by the firm), giving him credit for their keeping, hire, etc., the sum of $6,449 for a period not exceeding one-half the time that the partnership continued. If the appellant had taken the teams when the partnership began and used them without the consent of the other partners, he would have made for the firm a much larger sum of money. To charge the appellant at the rate of $7 per day for two-horse teams (excluding Sundays) was erroneous. The chancellor or commissioner should have looked to the character of the business in which they were engaged, and the ordinary net profits realized by the use of such teams in the business in which they were engaged. It is hardly reasonable that one would agree to take a team at $7 for each working day for the period of 6 months to be employed in the ordinary business of hauling in the city of Louisville, although he might be allowed to deduct the cost of keeping. The inquiry, it seems to us, would be, to those conversant with such an employment,

what would likely be the net profits realized from the use of such teams, in the business in which they were engaged, for the period of 207 days. In the estimate the probable loss of time would be considered, the expense of drivers, keeping, shoeing and other necessary expenditures connected with such an undertaking. We are satisfied that to make appellant liable for $6,449 for the use of 5 two-horse teams, 2 four-horse teams and 2 drays for 207 days is exorbitant.

Nor do we understand the nature of the credits given the appellant in the judgment. Is he not entitled to the whole of the $24.24 as a credit on his account? Of this we are not certain, as the accounts are so stated as to render it difficult to determine how the credit should be applied. As this case must be reversed, we think the entire report should be disregarded and the case referred back to the commissioner as if no former reference had been made. It is evident that the item of hire for teams, etc., is greatly too much, and as this constitutes the principal item in the settlement the entire case should go back to the commissioner for an additional settlement and report.

On the appeal of Mundy and Parsons it appears that on their motion it is ordered that the receiver pay them the sum of $216 out of the fund in court in this action. This order, it is alleged, was made by consent, but the attorney on the other side disclaims, or rather denies, that any such agreement was made. If the money was obtained for Graham it was error to have made such an order, and if the order was made at the instance of the teamster company it should be paid back by them. None of the funds could be taken from the control of the chancellor, particularly by the attorneys of Graham, who was charged with being in default. The attorneys seem to have obtained the money on their own motion and ought to replace it. Of course the chancellor will not deprive them of the right to it if on final settlement Graham is entitled to it. The rule, having been made absolute as to Mundy, must be *affirmed*.

The judgment as to Graham is *reversed* and cause remanded for further proceedings consistent with this opinion.

M. Mundy, for appellants.

Jas. A. Beattie, John R. M. Polk, for appellee.

LINDSAY LAYNE ET AL. *v.* J. M. DAVIDSON.

[Abstract Kentucky Law Reporter, Vol. 3—621.]

Validity of Sheriff's Sale.

Where there are irregularities on the part of the sheriff in making a sale of real estate, caused by his omissions to pursue the directory provisions of the statute, and the purchaser does not participate in such irregularities or illegalities, they will not invalidate the sale.

APPEAL FROM FLOYD CIRCUIT COURT.

February 18, 1882.

OPINION BY JUDGE HARGIS:

The value of the land as proven by one of the appraisers and others shows that they made a mistake in its appraisement, and had the appellants offered to redeem they should have been allowed to do so; but having failed to offer to redeem or make any legal excuse for such failure, the appellants were not entitled to that privilege, for had the land been appraised at $500 and no redemption or offer to redeem had been made within 12 months, by paying or tendering the purchase-money and interest, the appellants would have been cut off from the right and privilege of redemption. When the judgment was rendered below more than one year had expired from the day of sale, and yet no offer to redeem was made.

The irregularities, if there be any, in advertising and making the sale, are not such as to render the sale void.

Davidson was not privy to the irregularity or defect in the advertisement, nor did he participate in or advise any of the steps or proceedings which the sheriff had in relation to the sale or appraisement; nor does he claim any of Lindsay Layne's land, and the proof fails to show that the sheriff's deed embraces any of it.

According to the cases of *Kilby v. Haggin,* 3 J. J. Marsh. (Ky.) 208, and *Faris v. Banton,* 6 J. J. Marsh. (Ky.) 235, Davidson not having participated in the alleged illegalities, which consist in alleged omissions to pursue the directory provisions of the statute, they do not invalidate the sale.

Judgment *affirmed.*

Weddington & Stuart, for appellants.

William Lindsay, for appellee.

WM. UTTERBACK v. MARY K. WILHOIT ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—622.]

Usury.

Where under the law at the time of the execution of a note the parties had the right to agree to pay eight per cent. interest on the note, such agreement was not illegal; but when it was agreed that in addition to the eight per cent. shown on the face of the note they also paid two per cent. in advance, the entire transaction is tainted with usury, and the payee of such note is only entitled to recover the lawful rate of interest, that is such interest as if no rate had been agreed upon, namely, six per cent.

APPEAL FROM WOODFORD COURT OF COMMON PLEAS.

February 21, 1882.

OPINION BY JUDGE PRYOR:

The case of *Johnson v. Utley,* 79 Ky. 72, settles the question here. There was no law enforcing the penalty of forfeiture at the time the action was instituted and therefore the appellant was entitled to recover his debt with legal interest.

The parties had the right under the law at the time this note was executed to agree in writing to pay eight per cent. interest on the principal sum, but in this case the agreement by which the appellee undertook to pay eight per cent. interest was erroneous, that is, two per cent. interest was paid in advance in addition to the eight per cent. agreed to be paid by the terms of the note, and by reason of this the entire transaction is tainted with usury, and the appellant can only recover the lawful interest, that is, such interest as if no rate had been agreed on. This opinion is substituted for the one already rendered, as it is manifest that only six per cent. interest should be allowed.

Judgment *reversed* and cause remanded.

H. C. McLeod, for appellant.

Porter & Wallace, for appellees.

JOHN TROWER *v.* MARTHA GABHART ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—622.]

Guardian's Sale of Real Estate.

Where land sold by a guardian brought its full appraised and actual value, even though the proceedings were not in strict conformity to the law, but were fairly conducted and the price received used for the maintenance and education of the infant, and the balance paid over to him when he arrived at the age of twenty-one years, he should not be permitted, by reason of the irregularities in the sale to deprive innocent purchasers of the land, without at least repaying the amount paid out by them for the land and received by him.

APPEAL FROM MERCER COURT OF COMMON PLEAS.

February 21, 1882.

OPINION BY JUDGE LEWIS:

The land sold upon petition of Williams, guardian of appellant, appears to have brought the full amount for which it was appraised, and as much as it was probably worth at the time. Though the proceedings were not in strict conformity with the law as it then existed, they appear to have been fairly conducted, and the sale was necessary for the support and education of the appellant. The portion of the proceeds to which appellant was entitled was fully accounted for by Williams as guardian, and the balance left in his hands after deducting the reasonable credits claimed by him was paid over to his successor, Sanford. The entire fund appears to have been faithfully and economically used for the support and education of appellant while under age, and the balance paid over to and received by him after he became of full age.

Under the circumstances he should not be permitted to deprive innocent purchasers of the land, without at least repaying the amount so applied for his benefit while an infant and received by him upon his final settlement with his guardian. As he made no offer to do so there is no error in this judgment of the court below and it must be *affirmed.*

C. A. & P. W. Hardin, for appellant.

Thompson & Thompson, for appellees.

[Cited, *Boro v. Holtzhauer,* 23 Ky. L. 2317, 67 S. W. 30.]

KENTUCKY CENTRAL R. Co. *v.* FRANK MCMURTY.

[Abstract Kentucky Law Reporter, Vol. 3—625, as Kentucky Central R. R. Co. v. McMurtry.]

Alleging Negligence in Damage Suit.

In a suit against a railroad company for damages caused by injury to a passenger, it is sufficient to charge that plaintiff was on board the train as a passenger; that the company had undertaken for compensation to transport him to his destination on its road; and that its train ran off the track and injured the plaintiff by reason of the negligence of those in charge of the train. This constituted a cause of action, and it is not necessary to allege what was done by the conductor causing the accident; that would be to require the plaintiff to plead the evidence.

Continuance on Account of Absence of a Witness.

It is not error to refuse a continuance on account of the absence of a witness, when the affidavit shows that the facts that he would swear to if present are the same as sworn to by other witnesses, and when such affidavit is read to the jury.

Negligence of Trainmen.

In a suit for personal injury caused by a wreck of a railroad train, the company is liable where it is shown that the company's employes in charge of the train failed to exercise that degree of care and skill in operating such train which experience has shown to be reasonably necessary to the safe transportation of passengers, under the usual and ordinary circumstances which experience has shown will arise, which failure resulted in a wreck and the plaintiff's injury.

Measure of Damages.

In an action against a railroad company for damages on account of injury to a passenger, the plaintiff has a right to compensation for the injury sustained, and all such further injury, temporary or permanent, that directly resulted from the injury complained of

APPEAL FROM SCOTT CIRCUIT COURT.

February 23, 1882.

OPINION BY JUDGE PRYOR:

The first and principal ground for a reversal is an objection to the petition, or the admission of testimony under it by reason of the failure to allege the facts upon which the negligence of the appellee is based. It is averred that the injury to the plaintiff was caused by the negligence and carelessness of the agents

and employes of the defendant in running and operating its train; that by this negligence the train was wrecked, and the car in which the plaintiff was riding thrown from the track and the plaintiff's foot mashed, broken and permanently injured. The facts are distinctly alleged, both as to the wrecking of the train and the injury resulting therefrom. Whether the result of negligence as alleged was the issue of fact to be tried by the jury. If no statement of facts had been made from which negligence could have arisen the mere allegation of neglect would have been insufficient; but here the facts appear, and the burden was on the plaintiff to show the negligence of the defendant's employes.

The fact that plaintiff was on board the train as a passenger and the company had undertaken for compensation to transport him to his destination on its road, and that its train ran off the track and injured the plaintiff by reason of the negligence of those in charge of the train, constituted a cause of action, and if what was done by the conductor causing the accident is required to be alleged, it would require the statement not only of a cause of action, but the evidence by which the plaintiff expected to support it. The petition was therefore good, and fully sustained by the cases of *Chiles v. Drake,* 2 Met. (Ky.) 146, 74 Am. Dec. 406, and *Louisville &c. Canal Co. v. Murphy,* 9 Bush (Ky.) 522. The plaintiff could then show as proof of negligence that the employes were running a train with a greater load on some of the cars than they could bear; that the axle on one of the cars became so hot as to melt off, and its heated condition was known to the conductor, who, disregarding his duty, failed to use proper precautions or take any step whatever to avoid the danger. The burning box was noticed by many on and off the train, and the conductor was utterly indifferent to the suggestions made by others as to the danger. These were all facts that were proper to go to the jury under the issue made, for the purpose of establishing negligence on the part of the defendant.

The affidavit of the agent of the company as to what the absent witness would swear was read in evidence to the jury, and we do not see how his presence, on the facts of this record, could have been material to the appellant; nor are we prepared to say that the spirit of the code, much less its verbage, has been fol-

lowed by the parties below in the attempt to have the witness testify in person to the jury. Both the party and his attorney should state that "The testimony of the witness is important, and the proper effect of his testimony can not in a reasonable degree be obtained without an oral examination in court."

It was clearly competent for Garnett and others to state that the conductor was told of the heated condition of the box and his reply. All the parties were present on or at the train, and their attention directed to its condition. The subject of inquiry was whether the conductor knew of the danger, and when told what the danger was at the time the box was blazing, his response to the information given was competent to show the care and judgment, or the absence of either or both, in running this train.

The appellant offered to prove that, when informed of the condition of the box, the conductor gave it as his opinion that he could run it safely to Cynthiana. While we perceive no objection to the admission of the testimony, the affidavit of Frisbie as to what Martin would prove stated the belief of the latter that he could run the train to Cynthiana without risk. The entire proof indicated that such was the opinion of the conductor, and therefore the exclusion of this testimony or the refusal to permit the witness to answer the question could not have prejudiced the case. The statement went to the jury in the affidavit, and the entire proof conduced to show what the conductor thought of the danger.

We perceive no error in the instructions given for the appellee. The second instruction given at the instance of appellee required that those in charge of the train should possess that degree of skill, care and knowledge which experience in that department of business has shown to be reasonably necessary to the safe transportation of passengers under the usual and ordinary circumstances which a like experience has shown will arise, etc.; and by the fourth instruction the jury is required to find for the defendant, unless the plaintiff was injured by reason of the failure to exercise that degree of care and skill as defined in Instruction No. 2. The jury must, we think, have understood the law of the case, and that the defendant's liability depended upon the failure of the conductor to exercise the skill and care in the conduct of the train that one of prudence and caution

should exercise when placed in such a condition. He must exercise all the vigilance that a prudent man would exercise, skilled in the business, to insure the safe transportation of passengers.

Instruction "B" asked for by defendant was properly refused. It may have been a duty the conductor owed to the company and to the public to make the proper time at Cynthiana on the day the accident happened; yet if he saw the danger connected with the running of the train his first duty was to the passengers on board the train, and when as a prudent and cautious man he saw or should have seen the danger, it was incumbent on him to stop the train at stations before he reached Cynthiana, and in so doing to have avoided all danger.

As to the measure of damages, the right to compensation for the injury sustained, and all such further injury, temporary or permanent, that would directly result from the injury complained of, was the proper criterion; and all such further injury, temporary or permanent, which will result immediately or directly from the injury complained of.

The court proceeds, it is true, to tell the jury that the suffering of mind and body, and the expenses, as well as the results of the injury, if affecting the plaintiff's power and capacity to engage in the ordinary occupations of life, should be considered in estimating the damages. This instruction is sustained by the cases of *Covington St. R. Co. v. Packer,* 9 Bush (Ky.) 455, 15 Am. Rep. 725; *Louisville & Portland R. Co. v. Smith,* 2 Duv. (Ky.) 556; and *Parker v. Jenkins,* 3 Bush (Ky.) 587.

In the case of the *Louisville & Portland R. Co. v. Smith,* the words "exemplary damages" were objectionable in the instruction because the party was entitled to compensatory damages only, this court holding that the words "exemplary" and "punitive" convey the idea of punishment, where vindictive damages are required to be given by reason of the wrong complained of. Damages for wrongs like these are either compensatory or vindictive, and when the jury was told that the plaintiff was entitled to compensation it negatived the idea of vindictive or punitive damages, and the jury must have understood the instruction. The only objection to the instruction in regard to the measure of damages is, that this court, after defining the true criterion, then proceeds to particularize, by informing the jury as to what facts they are to consider in estimating the amount

of compensation to which the appellant is entitled in the event the company is chargeable with negligence. This character of instruction is found in almost all cases such as this, and the jury must have had the intelligence to know that compensation did not include punishment.

It may be and is argued that the finding evidences the fact as to the manner in which the instruction was regarded by the jury. The verdict was for $8,000. Some of the physicians who testified express the opinion that the appellee will be a cripple for life, and that the may be able to walk without the aid of crutches by the use of a stick. All concur that the injury is permanent, and must necessarily be so from the character of the injury. The appellee was a farmer by occupation, had expended or incurred medical bills amounting to seven or eight hundred dollars, and from the decided weight of the testimony can not reasonably expect to engage any more in manual labor. The quantum of recovery in such a case as this is with the jury, and while a verdict may be excessive, we are not prepared to say that the verdict here is so palpably wrong or excessive as to authorize this court to disturb it. The cases of *Maysville &c. R. Co. v. Herrick,* 13 Bush (Ky.) 122; *Louisville & N. R. R. Co. v. Fox,* 11 Bush (Ky.) 495; *Caldwell v. New Jersey Steamboat Co.,* 56 Barb. (N. Y.) 425, affd. 47 N. Y. 282, and *Shaw v. Boston &c. R. Corp.,* 8 Gray (Mass.) 45, sustain the verdict as to the quantum of damages rendered in this case. The rule is that the damages must be so unreasonable as at first blush to appear to have been influenced by passion or prejudice, before the court will set it aside. Such an injury as will impair the ability of the party injured to engage in active out-door business, or that renders him a cripple for life, might well demand at the hands of a jury, by way of compensation only, the amount of recovery here, and while under the facts of this case we might have fixed upon a less sum for compensation, the verdict is not so unreasonable as to require a reversal on the ground of excessive damages.

Judgment *affirmed.*

Stevenson & O'Hara, for appellant.

L. M. Martin, J. Q. Ward, J. E. Cantrill, for appellee.

[Cited, *Pittsburg, &c., R. Co. v. Schaub,* 136 Ky. 652, 124 S. W. 885, 136 Am. St. 273.]

COMMONWEALTH *v.* A. J. BRIGGANCE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—623.]

Criminal Law—Indictment.

Where an offense is charged against one in an indictment, and in the caption two persons are named, and it is stated in the body of the indictment that the other person named in the caption joined in committing the acts set forth, no sufficient charge is made against the last named person.

APPEAL FROM FULTON CIRCUIT COURT.

February 25, 1882.

OPINION BY JUDGE HARGIS:

The names of the appellees appear in the caption of the indictment. Only one of them is charged with the offense of breach of the peace by fighting with the other.

It is stated in the body of the indictment that the latter joined in committing the acts set forth as constituting the offense charged against the former. The indictment was not sufficient accusation as to the one not charged with the offense. The offense is sufficiently charged, but Crim. Code (1876), § 124, requires more; it requires that the indictment shall be direct and certain as regards the party charged as well as the offense.

Judgment *affirmed*.

P. W. Hardin, for appellant.

P. Hughlette Wilson, for appellees.

COMMONWEALTH *v.* HENRY KNOERR.

[Abstract Kentucky Law Reporter, Vol. 3—624.]

Criminal Law—Charge of Selling Liquor.

Where an offense, consisting of an unlawful sale of liquor, is charged with reasonable certainty as to the time and place of sale and the person to whom it is sold, the charge is good. It is no objection that the particular kind of liquor sold is not specified, for if either kind or a mixture of either was sold, the offense was committed.

APPEAL FROM FULTON CIRCUIT COURT.

February 25, 1882.

OPINION BY JUDGE LEWIS:

It appears that within the time prescribed appellee obtained a copy of the warrant, and of the judgment and statement of costs, filed them in the clerk's office of the circuit court, executed the bond required with approved security, and also executed the covenant required in order to suspend the enforcement of the judgment rendered by the judge of the city court of Hickman. It was not erroneous, therefore, for the circuit court to permit the city judge, soon after the expiration of 60 days from the rendition of the judgment, to attest, as true copies, the transcripts from this court.

But we perceive no such defect in the warrant issued by the city judge as required it to be dismissed. The offense is charged with reasonable distinctness and certainty as to the time and place when the liquor was sold, and also as to the person to whom it was sold. It is no objection that the particular kind of liquor sold is not specified, for if either kind, or a mixture of either, was sold, the offense was committed.

The court, therefore, erred in dismissing the warrant, and the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

C. H. Wilson, P. W. Hardin, for appellant.

S. H. Crossland, for appellee.

PHILIP ARNOLD'S EXRS. v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—623; 80 Ky. 135.]

Claims Against Deceased Persons.

The statutes requiring that claims filed against deceased persons shall be sworn to do not apply to claims filed by the state in a proceeding to enforce the criminal or penal laws and recover on an appearance bond because of a failure to appear.

APPEAL FROM HARDIN CIRCUIT COURT.

February 25, 1882.

OPINION BY JUDGE PRYOR:

The statute in regard to the verification of claims against deceased persons does not apply to the commonwealth. The motion here is to recover against the representative of a surety on a bail bond, and the defense is that no demand is made. The purpose of the statute was to purge the conscience of claimants against the estates of decedents, and does not, by express terms or by implication, apply to the commonwealth in a proceeding to enforce the criminal or penal laws. There is no one to make the oath, and nothing appears in the statute by which any intention can be gathered that the statute should apply to the sovereign. The party was required by the terms of his bond to appear, and failing to appear in person a forfeiture was proper, and the fact that a trial was had does not relieve the forfeiture.

Judgment *affirmed.*

W. H. Chelf, for appellants.

P. W. Hardin, John Haycraft, for appellee.

BARDSTOWN & LOUISVILLE TPK. CO. *v.* COMMONWEALTH ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—623.]

Statute of Limitations.

Where the state is a partner in an enterprise with other stockholders to erect and maintain a bridge, and there is a promise that the stock should be repaid before any dividends should be paid on the original stock, the other stockholders will not be allowed to hold the money by pleading, through the corporation, the statute of limitations.

APPEAL FROM NELSON CIRCUIT COURT.

February 25, 1882.

OPINION BY JUDGE PRYOR:

The state of Kentucky was a stockholder in the Turnpike company and directly interested in having the bridges that had been destroyed rebuilt. For this purpose the state agreed (Acts 1865-6, Ch. 53, § 1) to appropriate the sum of $5,000, provided a like amount was raised by the private stockholders. This was

done and the money paid by the state. The appropriation by the state and that raised by the stockholders was but adding to the principal of the common fund by increasing the stock of each, with the proviso that this stock should be repaid before any dividends were issued or paid on the original stock; and whether so or not, the state was a quasi partner in the common enterprise, and the other stockholders will not be allowed to hold the money by pleading through the corporation the statute of limitations. It was a common fund, and the corporation will not be allowed to say to the stockholder, "You have delayed too long in asserting your rights."

The second section of the act making the appropriation by the state provides the manner in which the money is to be repaid to the state and the other stockholders; and the repeal of the third section (1 Acts 1869, Ch. 1474) leaves the act complete, with the full power on the part of the state to demand and receive the money. There is no evidence of any donation or release of the principal sum or the dividends, by the state to the other stockholders; but on the contrary the legislative intent to be gathered from the repeal of the third section is that the second section should remain in force and the rights of the state be preserved by it. We can well see why the third section should have been repealed, but it is needless to speculate upon the purpose in view, as this repeal in no manner affects the rights of the state.

Judgment *affirmed.*

Wm. Johnson, for appellant.

P. W. Hardin, for appellees.

DRY CREEK AND COVINGTON TPK. R. CO. *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—623.]

Surrender of Franchise Rights in a Street.

Where a turnpike corporation, pursuant to legislative enactment, surrenders to a town or city that part of its turnpike within such town or city, the repeal of such enactment will not give the turnpike company the right to again assume its control and ownership, or require it to do so, where such town or city, pursuant to such surrender, has taken control and possession and improved and repaired such highway.

APPEAL FROM KENTON CRIMINAL COURT.

February 25, 1882.

OPINION BY JUDGE PRYOR:

The appellant turnpike company, as we understand from the record, began at the western boundary of the city of Covington and ran through the towns of West Covington and Ludlow. They are both incorporated towns, with the usual powers conferred in regard to streets and other public improvements. In February, 1872 (1 Acts 1871-72, Ch. 201), the legislature authorized the turnpike company to surrender or give up to West Covington and Ludlow so much of their turnpike road as lies within the corporate limits of said towns, but required it to remove its toll gate and to continue to keep certain bridges in repair. This amendment to the charter was accepted by the company in March, 1872. and by an order on the books of the company formally surrendered that part of its turnpike to the towns and removed its toll gate and disposed of its toll house. The city of Ludlow accepted the road by a resolution of its city council entered upon its records, and that of West Covington undertook to repair the streets, obtained private subscriptions for that purpose, and also made appropriations from the town treasury. They were advised that under the legislative enactments it was their duty to keep the road or streets in repair, and so far as the appellant was concerned it was a complete surrender by it of any and all control over these streets.

In April, 1878, more than six years after all this took place (II Acts 1878, Ch. 752), the legislature repealed the act, or rather the amendment by which the turnpike company had surrendered a part of its road to the towns of Ludlow and West Covington. That West Covington assumed possession of that part of the turnpike within its limits is established, and the right to make the surrender of its property was conferred on the company by the act of February 6, 1872. The right to amend the charter of the turnpike company is unquestioned, but in determining this right we must first ascertain the nature of the franchise and what it was the legislature had undertaken to repeal.

The property of the corporation or the franchise embraced so

much of the former turnpike road as had not been surrendered or transferred to others. The company had no more control or right in that part of the road surrendered than it had in the streets of Covington, as the exercise of the power granted by the legislature had divested it of all interest in it. Suppose the company had been empowered to sell and convey by deed a part of its road bed; if it was the fee simple owner, will it be argued that under this right to amend its charter the legislature, in behalf of its vendee and without the consent of the company, could cancel the contract or conveyance and require the company to take back its property? This was the effect of the repealing act of 1878; the legislature (if the appeal had the effect contended for) has required the company to take and hold property it did not own or have any right to control, against its consent. In other words, it has added to the charter, not other rights and privileges, or restricted those already granted, but has enlarged its ownership by lengthening its road so as to make it include the streets of West Covington and Ludlow, and if this can be done, why not extend the line of road a still greater distance? Suppose the legislature had repealed the grant. Could a subsequent legislature, without the consent of the parties, revive the grant and require them to assume the possession? The bare statement of the question is its answer. This is not an attempt to disregard the act or the amendment on the ground of fraud, but a plain question as to the right of the legislature, after permitting a corporation to surrender or dispose of its property, to require it to take it back without its consent.

The judgment below is *reversed* and cause remanded with directions to set aside the judgment and grant a new trial.

Benton & Benton, for appellant.

P. W. Hardin, for appellee.

LOUISVILLE & NASHVILLE R. CO. *v.* W. S. COOPER'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 3—624.]

Negligence in Damage Suit Against a Railroad Company.

In running its trains a railroad company is bound to a high degree of care in order to prevent the taking of human life, and this care must be exercised when the danger is apparent or when those

in charge of the train, as reasonable and prudent men, should be apprised of the danger; and when such persons see a full grown man on the tracks, walking leisurely, two or three hundred yards in advance of the train, and there is room on the side of the track for the person to step aside and avoid injury, those in charge have the right to believe that he will leave the track; and where the person is entirely deaf, but those in charge of the train have no knowledge of the fact, they are not required to exercise any more care than if he was not deaf.

Failure of Injured Person to Exercise Care.

If it is shown, in a suit for damages against a railroad company on account of its train running over and killing a person, that the killing was intentional or the result of willful neglect, the failure by the deceased to exercise proper care will not excuse the company, but the facts upon which this knowledge of danger is brought home to the employes must be shown. The mere fact that they saw the deceased on the track in the absence of knowledge on their part that he was deaf, did not require that they should have stopped their train, for they had the right to assume that the deceased had all the faculties of hearing and would leave the track in time to avoid injury.

APPEAL FROM MARION COURT OF COMMON PLEAS.

February 28, 1882.

OPINION BY JUDGE PRYOR:

The appellee's intestate was run over and killed by a train of cars operated by the employes of the Louisville & Nashville R. Co. on its Knoxville division near St. Mary's Station in the county of Marion. He was a deaf mute and when killed was walking on the track of the railroad in the same direction the train was going, and at a point in the road where there was no crossing and where the intestate had no right to the road or any part of it as an ordinary highway. It seems that the deceased was from the state of Texas and at the time of the accident was on his way to visit some relatives in this state.

This action was instituted against the company, the representative of the deceased alleging that his intestate's death was caused by the negligence of those in charge of the train. A verdict for $1,000 was rendered and judgment entered accordingly, of which the railroad company complains.

The only testimony in the case upon the issue made as to neg-

ligence was, whether the employes of the train, after seeing the intestate upon the track, by the exercise of proper care and diligence, could have avoided the injury. An instruction was given in behalf of the appellee to the effect that, if those in charge of the train saw the plaintiff's intestate in time, by the use of the means in their power, to have saved his life by checking up the train, or by blowing the whistle and ringing the bell, and the defendant's employes willfully failed to use such means to avoid the killing, they must find for the plaintiff.

There is conflicting testimony as to the time the alarm was given by the employes, the witnesses for the plaintiff saying they heard no alarm or warning until after the accident, while others who were passengers on the train say they heard the whistle, the ringing of the bell, and on looking out saw the deceased about fifty yards in advance of the train, and in fact saw him when struck. The train was running at the rate of twenty-five or thirty miles per hour and on a descending grade at the time of the accident.

The company is bound to a high degree of care in running its trains in order to prevent the taking of human life, and this care and caution must be exercised when the danger is apparent or when those in charge of the train, as reasonable and prudent men, should be apprised of the danger. In this case the deceased, so far as the company is concerned, must be regarded as in the full possession of all his senses, as there is an entire absence of any proof showing a knowledge by any of the employes of his unfortunate condition.

He was seen by the employes some two or three hundred yards in advance of the train, walking leisurely on its track, and being a full grown man and with ample room on each side of the track for him to avoid any injury from the approaching train, those in charge of the train had the right to believe that he would leave the track; and if he could have heard the approach of the train, no doubt he would have stepped off of the track and avoided all danger.

Neither the ringing of the bell nor the blowing of the whistle, or any other similar warning, would have apprised him of his dangers; yet the company, upon the facts of this particular case, not being aware of his condition, should have exercised the same degree of care that its employes are required to exercise with

reference to those who were capable of hearing or understanding the warning given. If aware of his condition it was their duty to stop the train at once. Those in charge of the train had the right to believe that the deaf man would exercise at least ordinary care and caution on his part, and if he failed to do this, his death was the cause of his own recklessness and imprudence, unless the employes knew or had, as ordinarily prudent men, reasons to believe that the injury would occur unless the train was checked.

If the killing was intentional or the result of willful neglect, the failure to exercise proper care by the deceased will not excuse; but the facts upon which this knowledge of danger is brought home to the employes must be made to appear. In the absence of such facts the deceased must be regarded as the author of his own misfortune. The mere fact that the deceased was seen upon the track is not sufficient to authorize the jury to say that the employes were guilty of willful neglect, or the court to instruct the jury that it was the duty of those in charge of the train, when they saw the deceased upon the track, to use the means within their power to prevent the injury. Such is not the law. If this had been a child upon the track the employes should have exercised greater care, because it was not reasonable to suppose that one of tender years would not be aware of the danger; but where the party injured is an adult, although deficient in hearing, he must be treated as one of ordinary intelligence, unless his misfortunes are known. There have been two verdicts in this case. The first verdict, under similar instructions, was for $250 and the present verdict for $1,000. The first verdict was set aside and a new trial granted, and the evidence and instructions on each trial have been considered. *Paducah & Memphis R. Co. v. Hoehl,* 12 Bush (Ky.) 41; Sherman & Redfield on Negligence (3d Ed.), § 51.

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

Rountree & Lisle, for appellant.

Russell & Avritt, for appellee.

COMMONWEALTH v. WILLIAM DOUGLAS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—685, as Commonwealth v. Douglass.]

Criminal Law—Jurisdiction.

Where one is arrested for the offense of keeping a disorderly house and tried before the city court, and fined $60, and on appeal the cause is dismissed, it is proper, when it is shown that the city court had no jurisdiction of the offense named in the warrant, because the offense named was not a violation of any city ordinance of the city.

APPEAL FROM FULTON CIRCUIT COURT.

February 28, 1882.

OPINION BY JUDGE HARGIS:

The appellees were arrested upon a warrant for the offense of keeping a disorderly house, and tried before the city court of Hickman and fined $60 each. They prosecuted an appeal to the circuit court, which allowed them to have the transcript from the city court attested by the judge after the expiration of sixty days from the rendition of the judgment, and then upon their motion render judgment dismissing the warrant.

The commonwealth appeals. The appeal from the city court was taken and the transcript of the judgment, costs and a copy of the warrant were filed in the circuit court within sixty days, and, as held by this court in another appeal between these same parties, it was right to allow the city judge to attest the transcript, there being no other substantial defect in it.

The dismissal of the warrant was also proper, because according to Crim. Code (1876), § 13, subsec. 4, the city court of Hickman had not jurisdiction of the offense named in the warrant, for it was not a violation of any ordinance or by-law of the city, and the punishment of the offense would have exceeded $100, had the court seen proper and possessed the jurisdiction to inflict it.

No statute, by-law or ordinance passed by said city or relative thereto has been shown or suggested to us which brings the case before us within its jurisdiction. The section of the code

named, which is the general law on the subject, confers no such jurisdiction as claimed by appellant for the city.

Judgment *affirmed.*

C. H. Wilson, P. W. Hardin, for appellant.

S. H. Crossland, for appellees.

CROCKETT CAMPBELL *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—625.]

Criminal Law—Malicious Wounding.

It is a misjoinder of offenses to charge a defendant with wounding two distinct persons, although the cutting of both may have been contemporaneous acts; and he can not be legally tried and convicted at one and the same time unless he waives his right to object thereto.

APPEAL FROM HART CIRCUIT COURT.

February 28, 1882.

OPINION BY JUDGE HARGIS:

The appellant was indicted, tried and convicted of the offense of maliciously wounding two persons at the same time, and sentenced to the penitentiary. He has appealed, and insists that his demurrer to the indictment ought to have been sustained.

Crim. Code (1881), § 126, requires that the indictment shall charge but one offense, except in the cases named in § 127. That section does not mention the offense of maliciously wounding, and hence it was a misjoinder of offenses to charge the appellant with wounding two distinct persons, although the cutting of both may have been contemporaneous acts.

If he maliciously cut and wounded either he is subject to punishment, and if he so cut and wounded both at the same time he is guilty of two separate and severable offenses, for which he can not be legally tried and convicted at one and the same time unless he waives his right to object thereto, which the appellant did not do, but saved by his demurrer that should have been sustained, as the commonwealth's attorney failed to dismiss one of the offenses charged in the indictment.

Upon the return of the cause the demurrer should be sus-

tained, unless the attorney for the state, before the action of the court upon the demurrer, fails to elect which charge he will prosecute. The attorney for the appellant insists that the judgment should be reversed, with directions to dismiss the proceedings and discharge the prisoner, and asks, if this can not be done, to be allowed to dismiss this appeal.

We can not consent to such a practice. If a party submits his cause and this court adjudicates upon the merits, he will not be allowed, after ascertaining that the judgment is adverse to his wishes, to dismiss his appeal. He can not be permitted thus to speculate upon the chances between entire acquittal and a greater penalty, and run none of the risks attendant upon a new trial or future proceedings.

Judgment *reversed* and cause remanded with directions to grant appellant a new trial and for further proceedings consistent with this opinion.

I. T. Woodson, for appellant.

P. W. Hardin, for appellee.

W. S. Ross & Wife *v.* Elijah C. Dimmit.

[Abstract Kentucky Law Reporter, Vol. 3—685.]

Advancements.

The question of the ancestor's intentions will not control in determining what shall or shall not be deemed advancements, and in the settlement of a considerable estate the chancellor will not adjudge that small sums of monies, and beds, bedding, etc., given to children at the time of their marriage, are to be regarded as advancements made by the father.

APPEAL FROM BRACKEN CHANCERY COURT.

March 2, 1882.

Opinion by Judge Pryor:

The question of intention on the part of the ancestor of these parties will not control in determining what should be deemed advancements; and possessed as he was of considerable estate, the chancellor will not adjudge that small sums of monies, beds, bedding, etc., given at the time of their marriage, or upon their

leaving home to seek their own fortunes, are to be regarded as advancements made. It was proper, as his son, James, had made improvements on the place that the parent evidently intended for him, that he should be allowed pay for his improvements when charged with costs. The heirs declined to let him have the land, and it was an equitable adjustment of his interests to allow him the enhancement of the value of the land by reason of his improvements as against the heirs interested, in his accounting for the use of the place. We do not understand from the report that he has been credited twice by the improvements in the settlement and division of the estate. As he was on the place and had lived there for years the chancellor directed that his share should be allotted to him so as to include the improvements, and in this allotment he obtains no greater share in value than the other children. The attention of the court below was not called to any particular item of interest improperly paid, and no exception seems to have been filed to any voucher offered by the administrator in these settlements. For the first time this court has been called to examine these vouchers and to pass on the propriety of allowing them, and if it exists it is too small to justify the cost of a reference back to the commissioner. We perceive no objection to the allowance of the attorney fee to Clark. It was a retainer as counsel in regard to the entire estate, and the sum of $150 was not too much.

We think on the whole case the judgment is proper and ought not to be disturbed. Judgment *affirmed.*

W. H. Wadsworth, for appellant.

COMMONWEALTH *v.* BURLINGTON & BELLVIEW T. P. R. Co.

[Abstract Kentucky Law Reporter, Vol. 3—685.]

Criminal Law—Nuisance.

One who erects a fence across a public highway, or erects a pole across such public highway, is guilty of a public nuisance; and the punishment for such offense is a fine of one dollar for every twenty-four hours the obstruction continues.

APPEAL FROM BOONE CIRCUIT COURT.

March 2, 1882.

OPINION BY JUDGE LEWIS:

The indictment in this case is for the offense of setting up and maintaining a nuisance committed by erecting across a public highway a fence and strong pole called and known as a toll pole, whereby the free use of said road was prevented. The offense sought by this prosecution to be punished is that provided against by Gen. Stat. (1881), Ch. 94, § 41, which provides that when a fence shall be erected in or across a public road, the person erecting or causing it to be erected shall pay a fine of one dollar for every twenty-four hours the fence shall continue in or across the road.

The instruction given authorized the jury to find the defendants guilty in case they believed from the evidence the defendants erected in or across the road a fence of any character whatever, and to fix the fine at one dollar for every twenty-four hours the same may have remained.

As the instruction was consistent with the section referred to and with the indictment as presented, and the jury returned a verdict for the defendants upon the law thus correctly given and facts submitted to them, there does not appear a sufficient reason for disturbing the verdict, and the judgment is therefore *affirmed.*

P. W. Hardin, for appellant.

W. Monfort, for appellee.

JAMES MULLINS *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—686.]

Criminal Law—Murder.

When the commonwealth, in a trial of one charged with murder, proves a statement made by the accused to the officer arresting him, in the nature of an admission, it is reversible error for the court to sustain an objection made by the state to evidence, showing the whole of the conversation between the accused and the arresting officer. When one part of a conversation is introduced to show a confession of the crime the defendant has the right to have the whole of what was said in the conversation laid before the jury.

Evidence.

Where two or more persons are accused of crime, and there is a separate trial as to one, and there is no allegation or sufficient proof

of conspiracy to commit the crime, it is error in such trial to admit evidence that another who is charged with the crime has fled the country. The one on trial is not chargeable with the fact that the other has fled.

APPEAL FROM LINCOLN CIRCUIT COURT.

March 4, 1882.

OPINION BY JUDGE HARGIS:

James Mullins, James Raines and James White were jointly indicted for the offense of murder alleged to have been committed by shooting and killing George Adams. A separate trial was awarded the appellant, Mullins, and he was tried and found guilty of the offense of manslaughter and sentenced to the penitentiary for the period of twelve years. By this appeal from that sentence numerous questions are raised, but we will only consider those errors which appear to us important and prejudicial to appellant's rights.

The testimony, as embodied in the bill of exceptions, tends to show that the deceased was shot with two or three different pistols, which were not of the same caliber, and there is some contrariety of evidence as to the ownership of each pistol.

The commonwealth having introduced John Ballard as a witness, the small pistol being exhibited to him, the attorney for the commonwealth asked him to state, if he knew, whose it was and how he knew it. The witness responded, "It is the pistol of defendant Mullins, as he told me when I arrested him." The appellant's counsel then asked the witness to tell all that the appellant stated at that time. The court, upon objection being made, restricted the witness to such statements as the appellant may have made touching the ownership of the pistol, to which an exception was taken. The appellant avowed that Ballard "would say in response to the question that the defendant gave him the pistol, and said "This is my pistol, and I only used it to prevent Adams from killing me." But the court refused to allow the whole statement to go to the jury. This was error, because half of the sentence tends to connect the appellant with the killing, and the remainder to excuse him from its consequences.

One of the wounds was inflicted by a ball of the same caliber

as of the pistol which appellant admitted was his, and thus he was connected with the commission of the act by its use. There is no rule of evidence better settled, than if one part of a conversation is introduced to show a confession of the crime, the accused has the right to have the whole of what was said in the conversation laid before the jury. He is not confined to any explanation only of the part proven against him, but he has a right to give evidence of all that was said upon the occasion relative to the subject-matter in issue.

This rule is the dictate of both reason and humanity, and should be enforced with great care and caution because of the danger of mistake, the infirmity of memory, the zeal which so often prevails to convict offenders, and the inherent difficulties which attend an effort to disprove, by negative evidence, the alleged confessions of the accused, who may be able to rebut the proof of plain facts but wholly at a loss to meet the charge that he has made an extrajudicial confession of his guilt.

Words leave no physical traces and are lost with their sound; they are not like plain facts which are so often met and put down by negative evidence. They rest alone in the memory, which is often single and the only witness of their utterance. Hence "The whole of what the prisoner said on the subject at the time of making the confession should be taken together."

It was error also to allow the commonwealth to prove that Raines had fled the county. He was not on trial, and there was no allegation or sufficient proof of conspiracy to commit the alleged crime. Whatever may have been his motive for fleeing the county, it can not attach to the appellant who did not flee with him. The appellant, in the absence of a conspiracy, is responsible for his own acts alone.

The appellant should have been present during the whole trial, but as he appears by the record to have consented that one of the jurors be excused by reason of sickness and another put in his place after the jury had been sworn, and failed to object or except to the action of the court, before the evidence was introduced, or at any other time, and the bill of exceptions being rather inconsistent and leaving some doubt as to the fact whether the appellant was present when he consented to the discharge of the said juror, we do not think the question of such importance or so presented as to call for a discussion of the con-

stitutional objection raised to the proceeding, as a new trial must be awarded on account of the errors indicated.

Although appellant and the other defendants were colored men, we perceive no error in the order to the officer to complete the jury from by-standers, after the regular panel was exhausted, whether persons of the African race composed any of the body of by-standers or not, as the court has nothing to do with its composition, and it is not in duty bound to send out of the courthouse for the people of that race to come in and take a place among the by-standers so they may be represented on the jury. No other race of people are entitled to such extraordinary rights and distinction as citizens, and we do not think that race should be accorded greater rights than any others.

Wherefore the judgment is *reversed* and cause remanded with directions to grant appellant a new trial.

W. O. Bradley, S. M. Burdett, for appellant.

P. W. Hardin, for appellee.

[Cited, *Green v. Commonwealth,* 26 Ky. L. 1221, 83 S. W. 638.]

LYDIA MAYO *v.* S. W. FERGUSON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—687.]

Wife's Support.

It is the duty of a husband to support his wife and family. The claim of the wife on the husband for her support is as sacred, at least, as that of creditors; and the fact that the wife is made a feme sole does not release the husband from his obligation to support her.

APPEAL FROM FLOYD CIRCUIT COURT.

March 4, 1882.

OPINION BY JUDGE PRYOR:

The appellees' own testimony in this case conduces to show that the claim of the husband, or a part of it, was appropriated by the sheriff on the order of the husband or wife, or both, to the payment of certain debts. The husband owned no estate and was as much compelled to contribute to the support of himself and wife as the latter was to maintain him. The amount garnisheed in this case, as far as appears from the record, is

all that the husband had to contribute; and when reaching the hands of the wife, neither a court of law nor equity will compel her to support the husband and refund to his creditors any reasonable sum that may have been paid to her by the husband as his part of the common fund for the support of the family. There is nothing unreasonable in this transaction, and the claim of the wife on the husband, certainly in equity, for her support is as sacred as the claims of creditors. Because the wife is made a feme sole does not release the husband from his obligation to support her and place the entire burden on the wife, and when giving to her a reasonable sum of money for the support of the family, himself included, the chancellor will not subject the wife's estate at the instance of his creditors for the payment of the husband's debts.

The husband, it is true, can not vest his property or his money in the wife with a view of defrauding his creditors; but in this case the allowance made or to be made by the county court was beyond the reach of creditors until invested by the husband in other estate, if at the time he was county judge, and if not, when paid to the wife for the maintenance of the family or even the support of the husband, the chancellor will not seize her estate for creditors. He has only done that which in law and equity he was compelled to do, and when assigning to her two or three hundred dollars in his claims allowed him as judge, or in paying to her the money for their common support, the chancellor will secure the wife instead of taking it from her for the benefit of others. There is nothing improper or unreasonable in this action on the part of the husband, and certainly no fraud practiced on creditors, upon such a state of facts. This leaves out of view the right of the creditor to attach the fund in a case like this when in the hands of others who are not creditors or have no claims upon the husband for support and maintenance; it is not necessary to decide the question.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

William Lindsay, for appellant.

W. H. Holt, R. H. Weddington, for appellees.

COMMONWEALTH *v.* JOE STEGALA.

[Abstract Kentucky Law Reporter, Vol. 3—686.]

Right of Appeal.

Where the commonwealth's attorney moved the trial court for a forfeiture of a bail bond, introduced the clerk of the court to identify the bond, and the court refused to permit the clerk to answer the questions put to him, but the court made no order whatever respecting the motion, there can be no appeal taken from the court's refusal to allow the offered evidence. Appeals are only allowed from final orders or judgments.

APPEAL FROM FULTON CIRCUIT COURT.

March 4, 1882.

OPINION BY JUDGE LEWIS:

These five cases, being between the same parties and involving the same question, are heard and delivered together. It appears that an indictment was found at the September term, 1880, of the Fulton Circuit Court against appellee, in each of the five cases, and that a bail bond was given in each case. At the March term, 1881, the indictment in each case was set aside, and being re-referred to the grand jury a new indictment in each case was returned.

At the September term, 1880, the attorney for the commonwealth moved the court for a forfeiture of the bail bonds, and in support of his motion in four of the cases introduced the clerk of the court to identify the bonds. The court refused to permit the clerk to answer the questions put to him, but made no order whatever in respect to the motion to forfeit the bonds.

We are of opinion that it was never contemplated by the legislature that cases should be brought to this court by the commonwealth upon the rulings of the court below, upon the competency of testimony, before an order or judgment is rendered in the proceeding where the testimony is sought to be used.

The appeals are therefore *dismissed.*

P. W. Hardin, for appellant.

William Lindsay, for appellee.

COMMONWEALTH v. JOE STEGALA.

[Abstract Kentucky Law Reporter, Vol. 3—686.]

Quashing Bail Bonds.

Where one is indicted and arrested for keeping a disorderly house, and after arrest executed bail bonds and was discharged, it is error for the court to quash the bonds and release the defendant. The accidental omission of the word "Fulton" before the words "circuit court" does not invalidate such bonds.

APPEAL FROM FULTON CIRCUIT COURT.

March 4, 1882.

OPINION BY JUDGE LEWIS:

These four cases, being between the same parties and involving the same questions, are heard and determined together. Appellee, at the September term, 1880, of the Fulton Circuit Court, was indicted in each of the four cases, and, being in custody, gave a bail bond in each case for his appearance to answer the several indictments. The cases, having been called, were continued at the March term, 1881. At the September term, 1881, the court upon motion quashed the bail bonds in each of the cases, and from each order the commonwealth has appealed to this court.

We perceive no defect at all in three of the bonds. In one of the bonds there is an omission of the circuit court in which the defendant was required to appear and answer the indictment. But we do not think the accidental omission of the word "Fulton" invalidates the bond, because it was not indispensable. Appellee was indicted by the grand jury of Fulton county for the offense of keeping a disorderly house in Fulton county. A bench-warrant was issued from the office of the Fulton circuit court for his arrest to answer that indictment, and he was in pursuance thereof arrested by the sheriff of Fulton county, and was released from custody upon the execution of the bail bond by his surety for his appearance in the circuit court to answer the charge for which he was then in custody.

The bond, as written, required his appearance in the Fulton

Circuit Court as distinctly and peremptorily as if the word "Fulton" had not been omitted.

The judgment of the circuit court quashing the bail bond must therefore in each case be *reversed*.

P. W. Hardin, for appellant.

William Lindsay, for appellee.

R. C. MAYES *v.* HARTFORD FIRE INSURANCE CO.

[Abstract Kentucky Law Reporter, Vol. 3—687.]

Statements Made to Secure Insurance.

An insurance policy is not collectible, when to induce the company to issue the policy the insured makes false statements, and when one not the owner of a building, knowing that fact, represents that he is the owner in order to secure a fire insurance policy; and the fact that the company's agent knew such fact will not of itself prevent the company from defending on account of such representations.

APPEAL FROM GRAVES CIRCUIT COURT.

March 7, 1882.

OPINION BY JUDGE PRYOR:

We see no reason for departing from the rule laid down in the case of *Campbell v. Galbraith,* 12 Bush (Ky.) 459. The same cases referred to in that case as supporting the doctrine contended for by the appellant in this case were there considered by this court, and we declined to follow them. Cases might occur where the insured had been misled by the agent of the company upon a state of facts upon which the insured was ignorant with reference to the insurance, but in this case there is no question but that the assignor of appellant knew he had paid nothing on the property and was not in fact the absolute owner; and if his statements can be disregarded when he must have known they were untrue in this particular instance, the same rule would apply in regard to every representation made in order to obtain insurance. The insured could then be allowed to state that the house insured was occupied, when in fact it was vacant, that it had no inflammable material in it, when it was in fact

filled with such material, and still recover because he could show the agent was in possession of all the facts. There should be good faith practiced in all such transactions, and when the insured knew or is presumed to know the truth or falsity of the statement he is making in order to obtain an insurance, material to the risk, he must speak the truth, for upon these statements the company issue the policy and assume the risk. The appellant and his assignor in this case knew all about the title, and the incumbrances on the property, and the only defense made is that the agent knew as much about it as they did.

The judgment below is *affirmed.*

W. W. Tice, for appellant.

W. M. Smith, for appellee.

PETER UNDERWOOD ET AL. *v.* ALVIN UNDERWOOD ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—687.]

Legitimacy of Children Born in Slavery.

The children of marriages such as were customary among negroes are legitimate, whether born before or after manumission.

APPEAL FROM LEWIS CIRCUIT COURT.

March 9, 1882.

OPINION BY JUDGE HARGIS:

Alvin Underwood, a slave, fled to Canada in 1857. He remained there until 1875 or 1876, when he returned to Kentucky as the only son and heir-at-law of Matthew Underwood, and claimed the estate of the latter. The appellants, who are the only sons of Charles, a brother of Matthew, dispute his identity, and assert that they are his heirs.

Upon first blush we were inclined to believe that Alvin was an imposter, but after a careful analysis of the evidence by appellants we can find no material contradiction or inconsistency with his testimony. The admissions or statements made by Matthew and his wife to the effect that they had no children must have been based upon the belief that Alvin, from whom they had received no tidings for so many years, was dead. They did not say that they never had any children, but on the con-

trary, it is clearly proven by one witness that they said they had children before they were married.

Matthew bought his own freedom, and during the slavery of his wife had by her several children of whom Alvin must, as he says, have been the youngest. He then purchased her freedom, and she had no children after that event.

Their statements must have related to their children born in slavery when they spoke of them born to them before marriage. But that they lived together while she was a slave, and treated each the other as husband and wife after the customary marriage of slaves, there is but little room to doubt; and this court has held in *Whitesides v. Allen,* 11 Bush (Ky.) 23, that the children of customary marriages of negroes are legitimate, whether born before or after manumission.

That Mrs. Porter and her son, Thomas Porter, Jr., are not mistaken in their statements and description of Matthew Underwood is demonstrated by the deed of emancipation, executed by Thomas Summers and admitted to record on the 3d of September, 1839, in the Fleming County Court, first having been proved by the oaths of Thomas Porter and W. W. Blair. Mrs. Porter and her son state that Matthew had a son, Alvin, who ran away in 1857, that he had a "hump" on his back or shoulder, and that they recognized Alvin by that "hump," his general appearance and statements of events in the family which he could not have known without being the son of Matthew whom they had known from birth to the day of his escape.

The deed of emancipation destroys the efforts of appellants to conceal the fact that Matthew had lived in Fleming county, and belonged to Summers. Alvin fled a slave, incapable of inheriting property, but he returned free, and found the estate of his father and a law rendering him capable of inheriting it; and as he established his identity by those most likely to know the truth, we are of opinion that Matthew was his father and he the only living child, and properly adjudged the owner of the estate.

Judgment *affirmed.*

J. R. Garland, Roe & Roe, for appellants.

William Lindsay, for appellees.

CHAS. EGINTON ET AL. *v.* W. J. RUSK ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—689.]

Attorney's Lien.

When a conveyance has been made and the contract of sale fully executed, an action by the grantor to rescind, if defeated, can not amount to a recovery of the land by the grantee; nor would a recovery by the grantee, on a note that the grantor had given as an additional consideration for the purchase by the grantee, give to the attorneys a lien on the land.

No Lien for Defendant's Attorney.

When an attorney's client is merely a defendant to the action, not asserting affirmative relief, but resisting a recovery of property to which he has title, and the claim of the plaintiff is denied, no lien exists on the property in controversy for the attorney defending.

APPEAL FROM KENTON CHANCERY COURT.

March 9, 1882.

OPINION BY JUDGE PRYOR:

It seems to us that the case of *Wilson v. House,* 10 Bush (Ky.) 406, determines the question raised in this case. No real estate was recovered by the appellee's assignor in bankruptcy; but on the contrary, an action was instituted against Rusk for the rescission of the contract and a recovery back of the land conveyed to him by Fenton and wife in part consideration of a steamboat sold Fenton. The judgment below, in accordance with the mandate of this court, only denied the recovery on the part of Fenton and wife, and said that Rusk should return what had already been conveyed to him. The only action instituted by Rusk was to recover of Fenton's administrator (Fenton having died) the sum of two thousand dollars, the amount of the note Fenton had given for the boat, in addition to the land. Now the attorneys have a lien on the proceeds of this note, but they are asserting a lien, not on the note, but on the real estate; and this never was recovered by them in an action instituted by their client for that purpose. The attorneys of Mrs. Fenton would have had a lien because her action was to recover back the land, but the attorneys for Rusk have none, as he was declared the owner of that to which he was already invested with title, and

which title was alleged by Mrs. Fenton to be worthless, on account of the lunacy of her husband at the time he made the trade.

When a conveyance has been made and the contract of sale fully executed, an action to rescind by the grantor, if defeated, can not be said to amount to a recovery of the land by the grantee. Nor would a recovery by the grantee on a note that the grantor had given, as an additional consideration for the purchase by the grantee, give to the attorneys a lien on the land. The note is not a lien upon it, and although a part of the executed contract, a recovery on the note is not a recovery of the land. Nor was the prosecution of the appeal a recovery of the land. The primary and only object of this statute in relation to the fees of attorneys was to secure to them the value of their services for the successful prosecution of all actions for the recovery of choses-in-action, claims or the recovery of real or personal estate.

When his client is merely a defendant to the action, and is resisting, in that action, a recovery of claims or property to which he has title and the right of the plaintiff is denied, no lien exists on the property in controversy for the attorney defending. With this view of the case the judgment must be *affirmed*.

W. P. D. Bush, Chas. Eginton, for appellants.

Horace Chambers, for appellees.

WM. R. JOYES *v.* ELIAS D. LAWRENCE.

[Abstract Kentucky Law Reporter, Vol. 3—688.]

Vested Remainder.

Where a testator bequeaths real estate to her daughter during her life, after her death the same to go to her children and the survivor or survivors without issue, and in case she dies without a child or children or grandchildren, then said daughter is authorized to dispose of the property by will, and where the daughter had several children and one of them died before her mother, leaving a child, it is held that the children took a vested remainder, subject to be divested in the event of their death without issue, and the grandchild inherited from her mother, who had taken a vested interest.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 9, 1882.

OPINION BY JUDGE PRYOR:

By the will of Mary Lawrence she devised to Robert Tyler, in trust for the use of her daughter, Mary L. Riddle, certain real estate in Louisville during her life, and after her death the same to go to her children and the survivor or survivors without issue and in case she dies without a child or children or grandchildren, then the said Mary is authorized to dispose of the property by last will. Mrs. Riddle had several children, and one of them, Mrs. Joyes, died before her mother, leaving a child surviving her. The children took a vested remainder, subject to be divested in the event of their dying without issue; and as Mrs. Joyes left a child surviving this child inherited from the mother. Mrs. Joyes took a vested interest at the death of her grandmother (the testatrix), and was never divested of that interest, as she died leaving issue. See *Sale v. Crutchfield,* 8 Bush (Ky.) 636.

The trustee of Mrs. Riddle, who purchased the interest acquired by Hamilton under the execution against Joyes and wife, is not asserting any greater claim on the estate than will reimburse him in the expenditure for the mother of the appellant, and the taxes and other admitted liens on the property; and when these claims are satisfied he surrenders, by the judgment in this case, all interest to the appellant. This has been done by a conveyance to a trustee filed in the cause and approved by the chancellor. There is certainly no disposition shown on the part of the appellee to deprive the infant defendant, by any unfair means, of his estate; and from the facts before us it would seem that the interest of the infant requires that the prayer of the petition should be granted. The statutory guardian of the infant, although he has appealed in this case, seems not to be in the possession of any fact conducing to show any improper motive on the part of the appellee in seeking the judgment.

The trustee swears that he paid the money for Mrs. Joyes out of his own pocket, and that he held no means of hers whatever. If he can be said to have acted as a trustee in the purchase, still he is only claiming what he would be entitled to on a settlement of the accounts between the parties. It is not controverted that the mother of the appellee owed the debt for which this property was sold, and if she had a vested interest in it that interest

could be subjected to the payment of her debts. We have already determined that the will created in the mother a fee, and that she could only lose this estate upon the happening of the contingency provided for in the will. The cases of *Sale v. Crutchfield,* 8 Bush (Ky.) 636; *Hart v. Thompson's Admr.,* 3 B. Mon. (Ky.) 482; and *Morris v. Shannon,* 12 Bush (Ky.) 89, sustain the construction of the will given by the court below. See, also, the case of *Moore v. Lyons,* 25 Wend. (N. Y.) 119, referred to by counsel for the appellee.

Judgment below is *affirmed.*

James P. Beattie, Boyd Winchester, for appellant.

C. F. BROSEKE *v.* WILLIAM CARTON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—687.]

Dismissal of Appeal.

When an appeal is taken more than two years after the date of a judgment appealed from, it should be dismissed. The statute of limitations is a bar to such appeal.

APPEAL FROM PENDLETON CHANCERY COURT.

March 9, 1882.

OPINION BY JUDGE LEWIS:

At the April term, 1879, of the court the judgment appealed from was rendered. By that judgment it was determined that the defendant, the Pendleton Building & Savings Assn., was indebted to the plaintiffs in the action (appellees) in the sum of $900, and the association and its officers were ordered to place the claims reported in its favor in the hands of the master commissioner, who was directed to collect them.

As more than two years elapsed from the date of that judgment before this appeal was taken, the statute of limitations pleaded by appellee is a bar to the prosecution of the appeal, and it must be dismissed. At the April term, 1881, an order was made directing the commissioner to collect the money shown by his report to be due from appellant.

Although the last mentioned order was made within two years before the appeal was taken, it is but a repetition of the

judgment rendered in 1879, as respects the amount due from appellant; for by the report of the master commissioner, filed and confirmed April 11, 1879, the amount of appellant's indebtedness to the association was uncertain, and by the judgment rendered the 14th of April, 1879, the amount thus ascertained was directed to be collected of appellant.

The appeal from the order rendered at the April term, 1879, will, therefore, also have to be dismissed.

Duncan & Barker, for appellant.

[Cited, *Brenner v. Renner,* 4 Ky. L. 337.]

CLAYTON MILLER'S EXR. *v.* J. H. WILSON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—688.]

Counterclaim—Demand.

An objection, that the amount prayed for in a counterclaim being blank, the counterclaimant is not entitled to recover anything thereon, not made at the proper time, is waived, and comes too late when first made on appeal.

Usury.

To the extent that usury is embraced in a debt and so long as it can be traced, the new obligation given in discharge of the old indebtedness is without consideration; and if the usury in the old debt be carried into the new contract so as to constitute any part of the sum agreed to be paid by it on the plea of the debtor the usury should be extracted.

Recovery Back of Usury.

The law denies to the holder of a note the right to recover the usury embraced in it, if pleaded by the debtor; but a debtor can not recover back usury paid by him more than one year next before he sues for it.

APPEAL FROM ADAIR CIRCUIT COURT.

March 9, 1882.

OPINION BY JUDGE LEWIS:

This is an action upon a note given to Clayton Miller, deceased, by appellees for the amount of the supposed balance due upon a note previously executed by appellees and others, which was given up to them upon the execution of the one sued on.

Appellees in their answer denied that there was any balance due upon the old note when the new one was executed, and alleging that it had been overpaid, asked in their counterclaim for judgment for such excess. Verdict and judgment having been in their favor, this appeal is prosecuted.

It is objected that the amount prayed for in the counterclaim being blank, appellees were not entitled to recover anything thereon. But as appellant failed to make his objection at the proper time and in the proper manner, and whatever the excess claimed may be, if any can be ascertained by reference to the facts set forth in the pleading, the objection comes too late.

It is contended by counsel for appellant that as some of the obligors in the original note did not unite in the execution of the new one there was a novation, having the effect to make what was usury in the old note, in the new note legal interest. This court, in the case of *Rudd v. Planters' Bank,* 78 Ky. 513, held that to the extent that usury is embraced in a debt, and so long as it can be traced, the new obligation given in discharge of the old indebtedness is without consideration. In the case of *Fitzpatrick v. Apperson's Exr.,* 79 Ky. 272, 2 Ky. L. 249, is the following: "The mere change of the payee or of a part of the obligors is not a payment of the usury, but it is the creation of a new contract, and discharges the obligors from the old obligation. And if the usury on the old debt be carried into the new contract so as to constitute any part of the sum agreed to be paid by it, on the plea of the debtor the usury should be extracted."

So it seems to be now settled by this court that even when there has been a novation by merely lessening the number of the original obligors, the debtors may by plea prevent recovery upon the new note to the extent it may contain usury. But whether appellees have the right to recover upon their counterclaim for usury paid more than one year next before the commencement of their action for it, is a different question. While the law denies to the holder of a note the right to recover the usury that may be embraced in it, if pleaded by the debtor, it also denies to the debtor the right to recover back usury that may have been paid by him more than one year next before he sues for it. But as appellant did not plead and rely upon the statute of limitations in such cases provided, that question is not

before this court. Though the language used in Gen. Stat. (1881), Ch. 22, § 1, and Ch. 71, Art. 3, § 4, is similar, there is the difference that in cases within the statute of frauds, as called, no cause of action exists at all, while an action for the recovery of usury paid may be maintained, and can only be defeated by expressly pleading the statute of limitations.

As the pleadings stand we perceive no error in the ruling of the court upon this question. But in our opinion it was error to permit the credit upon the note dated December 1, 1871, to be read to the jury, and to permit the witnesses to testify as to the amount of that credit. The payment of the $80 was expressly denied in the reply, as well as the genuineness of the indorsement.

It is true, appellant had previously alleged that the credits to which the old note is entitled are correctly indorsed on the note. But that allegation was in reply to the statement by appellees that the credit dated July 1, 1869, should have been for $570 instead of $370, and was not inconsistent with the statement by appellee in regard to the indorsement dated December 1, 1871.

The old note being in possession of appellees, the burden was upon them to show that the $80 was paid and that the credit therefor was entered by Miller or by his authority. As there was no proof whatever that the amount was actually paid, or the indorsement made by Miller or any one for him, it was improper to permit the indorsement upon the note or the statement of the amount of the credit to go to the jury.

For this error the judgment must be *reversed* and cause remanded with directions to grant appellants a new trial and for further proceedings consistent with this opinion.

Alexander, Baker & Reid, for appellant.

Rhorer & Jones, William Lindsay, for appellees.

[Cited, *Crenshaw v. Crenshaw,* 24 Ky. L. 600, 69 S. W. 711.]

HARRY CRAWFORD *v.* H. C. STAGNER.

[Abstract Kentucky Law Reporter, Vol. 3—689.]

Failure of Consideration.

Where one executes a note for the purchase-money of real estate, receives a deed and is put into possession and defends against a suit

on the note, claiming that the vendor had no title to convey and that the title was in her children as heirs of her husband, and the plaintiff replies that the vendor acquired her title from a sheriff's deed, that the defendant was informed of the character of her title, and accepted from her a deed under which he still holds undisturbed possession, and the reply is not controverted, there is no error in allowing judgment against the defendant on the note and the sale of the land to satisfy it.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

March 11, 1882.

OPINION BY JUDGE LEWIS:

The defense made by appellant in this case is that Mrs. Larrison, the assignor of the note sued on, and vendor of the land for which the note was given, had no title at the time she sold and conveyed to him; that the title is in the heirs of John Larrison, deceased, who by threatening to sue for the land and by their speeches are throwing a cloud upon the title, and that Mrs. Larrison is insolvent.

The plaintiff in the action alleges that Mrs. Larrison acquired the title to the land by purchase under an execution against the heirs of John Larrison, and a deed was made to her by the sheriff who made the sale, and that at the time he purchased the land appellant was informed of the character of her title, and accepted from her a deed for the land which he was put in possession of, and has ever since held undisturbed.

None of the allegations of the reply are controverted by appellant, and there is nothing in the record to show that the title of Mrs. Larrison is defective.

As, under the circumstances, appellant made no effort to bring the heirs of John Larrison before the court, there was no error in the judgment of the court below against him for the amount of the note and sale of the land to satisfy it, and it must therefore be *affirmed.*

W. B. Smith, for appellant.

W. O. Miller, for appellee.

JAMES D. PERCIFULL ET AL. *v.* CATHERINE WILSON'S HEIRS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—759.]

Contract to Pay Attorneys' Fees.

When it is agreed by a firm of attorneys to represent a plaintiff and sue and recover lands of large value for one-fourth of its value, and in case of their failure to recover the land they were to receive nothing, such a contract requires the attorneys to perform all the services necessary, and they can not claim the whole of the fees stipulated for recovering the land when by reason of the withdrawal of one of the attorneys, it became necessary for plaintiff to employ other attorneys to perform a part of the services.

APPEAL FROM MEADE CIRCUIT COURT.

March 14, 1882.

OPINION BY JUDGE LEWIS:

In 1841, appellee, Thomas Burch, employed appellant, Percifull, and John Calhoun to prosecute, as attorneys, a suit for the recovery of a tract of land shown to be worth from eight to ten thousand dollars, and in writing signed by him agreed to pay them as a fee an amount equal to one-fourth the value of the land, if recovered, but nothing if the suit was not gained. Calhoun, being appointed circuit judge, withdrew from the case and rendered no services after the year 1841. But Percifull continued in the case and aided other attorneys subsequently employed until 1856, when the suit was terminated and the land recovered by Burch and those jointly interested with him.

As Calhoun withdrew from the suit and failed to carry out the contract, neither his personal representative nor Percifull has the right to recover an amount equal to one-fourth the value of the land, for the contract stipulated for the joint and united services of Percifull and Calhoun, and the proof conduces to show that the promise of Calhoun's services formed a considerable, if not the main inducement for the agreement on the part of appellee, Burch, to pay so great a fee as one-fourth the value of the land. By reason of the withdrawal of Calhoun other attorneys were employed, whom under the written contract Burch was not bound to employ, the proper interpretation of the con-

tract requiring Calhoun and Percifull to perform all the services required in the case.

It is true Payton, after the withdrawal of Calhoun, rendered valuable services in the case, and defendant insists that he was accepted in the place of Calhoun, and became entitled jointly with him to the benefit of the contract. But it is not shown that appellees ever agreed to accept the services of Payton as the substitute of Calhoun, and if they had done so, would not be bound, as Payton did not continue in the case later than 1852.

In our opinion neither Percifull nor the personal representative of Payton is entitled to recover more than the reasonable value of the services rendered. What that is it is difficult to determine as there is no evidence bearing directly upon the question. The commissioner reports that $250, being $125 each to Percifull and Payton, would be a reasonable fee in the case. But there does not appear any sufficient reason for fixing the amount due to each at the same sum, for Payton was not engaged but a little over one-third the length of time Percifull was engaged. The only thing in the case to authorize this court to fix the amount due to each, or to say whether the fee reported by the commissioner is reasonable or not, is the value put upon the services rendered by J. S. Taylor, which is $150. As it appears that Percifull prepared the original pleading and was in the case five or six years before Taylor was employed we see no reason why Percifull should not be allowed at least as much as he was, if not more. Nor is there any good reason why Percifull and the personal representative of Payton should not each recover a sum equal to what their services were respectively worth, and interest from the 23d of April, 1857, when this suit was commenced.

Wherefore the judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

Chas. B. Fontaine, for appellants.

Lewis & Fairleigh, for appellees.

JAMES A. BOYD *v.* H. S. WILSON.

[Abstract Kentucky Law Reporter, Vol. 3—689.]

Husband and Wife as Joint Tenants.

A conveyance of land made to a man and his wife is held jointly by them, and on the death of the wife her interest in the land passes to her child, subject to the husband's curtesy.

APPEAL FROM GRAVES CIRCUIT COURT.

March 14, 1882.

OPINION BY JUDGE PRYOR:

There is no controversy as to the fact that the conveyance of the land, the title to which is in dispute, was made to Anderson and his wife. They held jointly, and on the death of the wife her interest in the land passed to her child (the present appellee), subject to the husband's curtesy. The parties all claim title in the same manner and under the same deed. That there is a defect in the deed of Montgomery does not prejudice the appellant, for it tends to divest him of title as well as the appellee. But the Montgomerys or their heirs answer, disclaiming title, and this court will not presume that the attorney has filed an answer without any authority, and if he had, the appellant has no right to this land as against the appellee.

The judgment is therefore *affirmed.*

L. Anderson, for appellant.

W. M. Smith, for appellee.

WILLIAM GRESHAM, ALIAS WM. GRESHAM MOORE, *v.* R. P. GRESHAM ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—690.]

Application for Revivor.

In no case can an application for a revivor be made after the expiration of one year and a half; and where such an application is made after that time it should be struck from the docket.

Title by Adverse Possession.

Where one purchases land at an execution sale and receives a deed from the officer regularly executed and recorded, and thereafter occupies and claims the land as his own for more than fifteen years, it is clear that his holding is adverse, and the statute of limitations applies and is conclusive, and his title is good.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

March 16, 1882.

OPINION BY JUDGE HARGIS:

In no case can an application for a revivor under the provisions of the code be made after the expiration of one year and six months, and as more than that period of time had elapsed when the application, by petition, for a revivor in the case of *R. P. Gresham v. Wm. Gresham's Admr.* was made, the court properly struck the action from the docket. This, however, should have been done without prejudice to the rights of R. P. Gresham in a proper action upon the merits.

But he is not injured by the judgment, because the judgment on the compromise between him and the appellant embraces the loss for which R. P. Gresham instituted this action, to recover the value thereof by reason of the entry of it and subsequent sale thereof to the railroad.

The deed of 1833, from the commissioner, embraces the 400 acres of land owned by Uriah Gresham, but William and Taylor Gresham bought the land as his agents and for his benefit, and afterwards received a negro in payment to them of what they had expended on the purchase. They never made any claim to the land for more than thirty years. During this period R. P. Gresham had become the purchaser of it at an execution sale, and was invested with title by deed from the officer, regularly executed and recorded, and thereafter occupied and claimed the land as his own for more than fifteen years. The proof is clear that his holding was adverse, and the statute of limitations applies and is conclusive.

Wherefore the judgment is *affirmed* on the original and cross-appeal.

R. M. & W. O. Bradley, for appellant.

Wm. Lindsay, Welsh & Saufley, S. M. Burdett, for appellees.

J. D. BURNS ET AL. v. H. H. HOFFMAN.

[Abstract Kentucky Law Reporter, Vol. 3—696.]

Construction of Will.

Under the provisions of a will providing "That * * * the tract of land on which I now live * * * is to be retained as a home for my own family * * * and that the farm on which I live shall not be disposed of under any circumstances, if it can be, until my youngest child shall become of age, and then it may be sold or divided as my children may agree," and "That my wife and children shall have the use and benefit of my house and home tract of land for their mutual support and the education of my children * * * during the life of my wife," it was held, where the children have all arrived of age, that the creditors of the widow and some of the children may subject the undivided interests possessed by each to the payment of their claims.

Homestead.

Where a widow, by the will of her husband, is given a life estate in certain lands and liens on the land, keeping house with her children, she is entitled to claim dower in the land as against creditors.

APPEAL FROM OWEN CIRCUIT COURT.

February 28, 1882. March 19, 1882.

OPINION BY JUDGE PRYOR:

E. F. Burns died leaving a last will and testament, his widow and three children surviving him, two of whom are now living and both adults. The widow and children becoming involved in debt, their creditors having had returns of nulla bona on their several executions, are now seeking to subject an estate, or the income therefrom devised to the widow and children, to the satisfaction of their demands.

The second clause of the will reads: "That all the means I have be concentrated and collected together as fast as possible, and applied in payment of the tract of land on which I now live, and that is to be retained as a home for my own family; that my father-in-law, Thomas Seale, have a home with them as a member of the family, and that the farm on which I live shall not be disposed of under any circumstances, if it can be, until my youngest child shall become of age, and then it may be sold or divided as my children may agree."

By the fourth clause he provides "That my wife and children shall have the use and benefit of my house and home tract of land for their mutual support and the education of my children, sharing alike as a family combined during the life time of my wife, or so long as she remains a widow, but upon her marriage or death the benefit arising from the farm to be as equally shared by my children."

The widow of the testator and his son, J. D. Burns, are both involved, and the chancellor has subjected their interest in the land during the life of the widow to the payment of their debts. The interest of the son in remainder has long since been sold to pay creditors, and the widow and son are jointly liable for the debts to satisfy which this judgment was rendered. Helen, the daughter, is not liable for these debts and it is urged in argument that a sale of the interest of the widow and son in the estate is not only in contravention of the will, but will result in a division of the land, and the eviction of the unmarried daughter.

These parties are all adults, fully competent to contract, with the right to control this estate, using or disposing of it as they may think best. It would, it is true, require joint action on the part of all interested to dispose of the absolute estate; still it by no means follows that their respective interests may not be subjected to the payment of their debts. It is not within the power of one joint tenant to sell and convey the absolute estate, yet his interest may be sold to satisfy his debts; nor can the beneficiary ordinarily dispose of the trust fund, but the chancellor will seize the income therefrom and in some instances the fund itself to pay his debts. The will in effect gives the estate to the widow for life, burdened with the support and education of his children and with the right to use the estate in common, and certainly should not be construed as requiring the children to remain with the widow on the farm after they have arrived at full age to enable them to realize or enjoy the benefits resulting to them from the devise. They could not evict their mother, but when the prime object of the will has been accomplished, viz.: the support and education of the children, and while Helen is entitled to her full share in the land, we perceive no reason for denying all relief to creditors when these parties own an estate sufficient to satisfy their demands.

If the wiodow is regarded as a trustee for the children it can

not affect the question here. They have a direct interest in the land or its profits and can compel the widow to apply the same to their use. She has no power to exclude the children from the enjoyment of the estate; and the chancellor, where the parties are all competent to contract and with the right to use or enjoy the estate, would be reluctant to recognize a sale that would exempt such estate from the payment of their debts. A beneficial interest was devised to the widow and children in this land, and with such an interest there is no doubt but that the claims of creditors can be successfully asserted against it.

In the case of *Samuel v. Ellis,* 12 B. Mon. (Ky.) 479, the will of Ellis provided "That my farm on which I now live be sold and all the residue of my estate which is not named in the will and the proceeds equally divided amongst all my children, except my son Ottoway's, and my daughter, Nancy's part—their portion shall remain in the hands of my executors to be disposed of as they may think best for them and their heirs." It was held that the creditors of Ottoway could subject the fund in the hands of the executors to the payment of their debts.

In the case of *Eastland v. Jordan,* 3 Bibb (Ky.) 186, a negro was transferred to Jordan by deed in trust that the proceeds of his hire should be applied to the maintenance of Goodrich Lightfoot during his life. The negro was sold to pay the debts of the beneficiary. The question arising in this case about which much trouble arises is, What interest have these parties, and to what extent can such interest be subjected?

The widow, Mary E. Burns, claims a homestead, which, if she is entitled to it, can not be sold. It is argued here that she is not entitled because there is no proof that she was a housekeeper with a family. We find from the facts in the petition, that Mrs. Burns and her daughter were in the occupancy of this land, living upon it at the institution of the action, and if so we see no reason why she is not entitled to a homestead as against her creditors. She is under a natural and moral obligation to provide for and maintain her daughter, and the fact that the daughter is an adult and entitled to an interest in the land can make no difference. See *Brooks v. Collins,* 11 Bush (Ky.) 622. Adopting the view taken by counsel for the appellee, that she is entitled to a life estate in the land with the burden of sup-

porting and maintaining the two children, as against her creditors, she is entitled to a homestead not exceeding in value $1,000.

The chancellor should first allot to Ellen one-half the land as if no homestead existed upon it, and the other half to the son or the purchaser from him. When this is done the homestead should be carved out of each parcel, throwing it together, if practicable, so as to equal in value the $1,000 and to include the dwellings. The remainder interest of the son in his half having been sold, the life estate of the mother in so much of this half as is not embraced in the homestead may be sold to satisfy these creditors. If Thomas Seale is living the life estate of the widow in that part of the land to which the son or his creditors are entitled must bear its portion of the burden of supporting him. This the purchaser who buys the life estate must obligate himself to pay, and the chancellor can fix the proportion and require payment by rule at such times as may be designated by the judgment.

The judgment below is *reversed* and cause remanded for further proceedings consistent with this opinion. It is manifest that the daughter is entitled to a support out of this land, as the mother takes it subject to that burden. The one-half, after giving ing to the mother the homestead as directed, will not be more than sufficient for that purpose.

Barrett & Brown, Lillard & Hallam, for appellants.
Evan E. Settle, for appellee.

MATTIE PARKS *v.* KENTUCKY CENTRAL R. CO.

[Abstract Kentucky Law Reporter, Vol. 3—691.]

Personal Injury by Railroad Company.

Where one enters a railroad passenger car the trainmen have a right to assume that she is a passenger and had boarded the train for the purpose of going to some other point on the road.

Duty of One on a Train Who is Not a Passenger.

When one goes on a passenger train to assist another to a seat, and before leaving the train finds that it has started, instead of trying to jump from the train she should apprise the conductor of the fact that she desires to leave the train. Her want of judgment in jumping from a moving train can not be made the basis of a recovery against the company for injury caused by such jump.

APPEAL FROM NICHOLAS CIRCUIT COURT.

March 21, 1882.

OPINION BY JUDGE PRYOR:

The demurrer to the petition in this case was properly sustained. While the right of the appellant to assist her friend upon the cars existed, there is no averment of any fact showing that the employes of the train knew that her presence on the train was only to see her friend comfortably seated; but on the contrary they had the right to presume that the plaintiff was a passenger and had boarded the train for the purpose of going to some other point on the road. We know of no rule requiring employes of the company to inform themselves as to those who board the train with their friends only, and not with a view of being carried as passengers. Those on board trains at depot stations are hardly ever aware of the signals given for the departure of the train. The noise and confusion is such, as well as the inattention of those on board to the movements of the train, that the train often moves off without the hearing of any signal and when those on board are not expecting it. Besides, when appellant found the train moving she ought to have apprised the conductor of the fact that she was not a passenger, and taken proper precautions for her own safety, instead of attempting to jump from the train as it was moving off. Her want of judgment can not be made the basis of a recovery against the railroad company.

The conductor seems not to have known that she was on the train, and her injury being the resudt of her own imprudence no recovery can be had. Judgment *affirmed.*

Ross & Kennedy, for appellant.

Stevenson, O'Hara & Bryan, for appellee.

W. F. CISSEL *v.* LAWRENCE J. RAPIER.

[Abstract Kentucky Law Reporter, Vol. 3—690, as Cissell v. Rapier.]

Oral Evidence of Land Boundaries.

Visible or actual boundaries of land, whether natural or artificial, are to be taken as the abuttals of a survey so long as they can be found or proven. It is only in case the description in a conveyance

is ambiguous or doubtful that parol evidence of practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in aid of the interpretation.

Estoppel.

When one has united with others in a conveyance he is bound by and estopped to deny the recitals of the deed, and the estoppel runs with the land.

APPEAL FROM NELSON CIRCUIT COURT.

March 21, 1882.

OPINION BY JUDGE LEWIS:

About the year 1853 Charles Rapier devised to his son, James, for life, and upon his death without children to go to his brothers and sisters, the following described tract of land in Nelson county: Beginning on the Beech Fork at William Rapier's corner at the mouth of a branch; thence with William Rapier's line up to the head of the branch to a large blue ash; thence a southwest course a straight line to a white oak; thence an east course to Hunter's line; thence with Hunter's line to the Beech Fork; thence down the Beech Fork to the beginning. James Rapier having died, his brothers and sisters, including appellee, L. J. Rapier, in 1873, conveyed the same tract of land to P. S. Barbour, who in 1876 conveyed it to appellant.

In 1880, subsequent to the conveyance by Barbour to appellant, a patent was issued by the commonwealth to appellee for fourteen acres of land, which is described as follows: Beginning at a beech tree standing on the bank of a slough which was formerly the channel of the Beech Fork, a corner to Alexander Hunter and James Rapier tracts of land and running thence down said slough with Rapier's line, N. 21 W. 46 poles to four sycamores on the bank of the Beech Fork at the mouth of the slough; thence up and with the Beech Fork at low water mark, S. 86¾ E. 38 poles; S. 42½ E. 27 poles; S. 11½ E. 19 poles; S. 37 W. 26½ poles; S. 57 W. 12 poles; N. 76 W. 9 poles to a large sycamore at the head of the slough in a line of the Hunter tract; thence with the same down the slough, N. ¾ W. 24 3-5 poles; N. 30¾ W. 14 poles to the beginning.

The land covered by the patent is an island formed by the Beech fork and the slough, described in the patent as the former channel of the Beech Fork, and this action was brought by appellee to recover of appellant for trespass in taking and carrying away therefrom timber and rails alleged to belong to the plaintiff. Upon the trial, verdict and judgment were rendered for the plaintiff in the action and the defendant has appealed.

The question in the case is whether the island is included in the boundary of the land devised to James by Charles Rapier and now owned by appellant. If the call in the will and deeds to run with Hunter's line to the Beech Fork be followed, appellant's line will extend to the river at the head of the slough; thence down the river to the beginning corner, and must necessarily include the island. But if the line be stopped at the beech on the slough, Hunter's corner, and run from there down the river, the island, or a portion of it, will be excluded.

The rule is well settled that visible or actual boundaries, whether artificial or natural, are to be taken, as the abuttals of a survey, so long as they can be found or proved. It is only in a case where the description is ambiguous or doubtful that parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, or otherwise, is admissible in aid of the interpretation. The description of appellant's boundary is neither general nor ambiguous, but the course and distances, as well as the objects called for, may be accurately and precisely ascertained and reached by following Hunter's line from the point of intersection, which is not disputed, to Beech Fork. Appellee, having united with others in the conveyance to Barbour, the vendor of appellant, is bound by and estopped to deny the recitals of the deed, and the estoppel runs with the land. The calls of that deed, being the same as those of the one from Barbour to the appellant, must, therefore, be followed to the point on the Beech Fork, where Hunter's line leaves it at the head of the slough; thence down the river to the beginning corner, including the island. Even if the slough be considered a part of the river, still low-water mark on the main chan-

nel of the river is to be taken as the place indicated by the recitals in the deed.

Counsel for appellee contends that Hunter's survey can not be made to close by meandering the main channel of the river. There does not appear to be any controversy about where Hunter's line is, it being conceded that in point of fact it meanders the river to the head of the slough; thence with the slough to the beech corner. Besides, though there may be some inaccuracy in the description, the beech corner being known and recognized, the line must necessarily continue with the river to the point nearest or opposite thereto, and be thence run to the beech. But it does not make any difference from what point on the main channel of the river Hunter's line is extended to his beech corner; for wherever it may be, appellants' line, according to the recitals of his deed, runs with it.

It follows from what has been said that it is immaterial how Barbour may have understood the boundary to be, or whether, at the time he purchased, a survey and plat of the land, excluding the island, was made and shown to and adopted by him or not, for having a right to look to the recitals of the deed, appellant is not concluded by Barbour's acts. Nor is it material or competent to show what may have been the purpose and intention of appellee and those who united with him in the deed to Barbour, as to where the line should run.

The instructions given to appellant, as well as to appellee, being the converse of each other, are both improper. There is no controversy as to the objects called for; the boundary of a patent or deed is exclusively matter of law to be propounded by the court. *Cockrell v. McQuinn,* 4 T. B. Mon. (Ky.) 61. The recitals being unambiguous and the objects called for being certain, it is a question of law whether the island is embraced or excluded by the calls of the deeds, and the court should have construed the deeds and instructed the jury accordingly.

Wherefore the judgment of the court below is *reversed* and cause remanded with instructions to grant to appellant a new trial, and for further proceedings consistent with this opinion.

N. W. Halstead, E. E. McKay, for appellant.

Wm. Johnson, for appellee.

R. H. ELLIOTT ET AL. *v.* W. A. LEE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—692.]

Capacity to Make a Will.

Where a testator, in 1873, having a sound mind, makes a will giving his whole estate to his only son for life and remainder to his grandchildren, and afterwards, when suffering from paralysis, unable to speak and shown to be of unsound mind, executed another will giving to his only son the whole of his estate, and the son tries to have the will of 1873 probated and defends against the probate of the will afterwards made, which is sought to be probated by persons having no direct interest in the estate, the later will should be rejected and the former one probated.

APPEAL FROM OWEN CIRCUIT COURT.

March 23, 1882.

OPINION BY JUDGE LEWIS:

By the will executed by W. H. Elliott, May 3, 1873, the whole of his estate was devised to his only son, R. H. Elliott, for life, remainder in fee to his children, and this appears to have been the often expressed and fixed purpose of the testator. Moreover, the reasons assigned by him for such disposition are consistent and entirely proper.

By the will executed January 17, 1878, the whole of the estate of the testator was devised to his son absolutely. The last will was executed after the testator was to a considerable extent paralyzed, and when, as appellants contend, he was not a person of sound mind. Both the witnesses to the will testify that by reason of paralysis he was not of sound mind at the time the will was executed and they are corroborated by four or five other persons, near neighbors of the testator, who testify not merely to the unsoundness of his mind, but to a decided change in his habits and behavior from a cleanly and decent person to one slovenly and filthy and seemingly not knowing what he was about.

At the time the will was written the power of speech on account of paralysis was greatly impaired, so much so that the person who wrote the will, Oliver Hughes, states that he is not certain he correctly understood the directions given to him

by the testator as to the disposition of his property, but had to rely upon the testator's son to interpret him.

In the opinion delivered by the judge of the court to which the law and facts were submitted, a jury being waived, it is stated by the judge that but for the testimony of Oliver Hughes and Geo. W. Grass he should without hesitation have held that the testator was not of sound mind at the time of the execution of the last will.

The testimony of Hughes has been referred to. As to Grass, who, though as stated by the judge rendering the opinion, as a man of integrity, occupies an attitude that necessarily greatly lessens the weight of his testimony, for it is shown that he has a pecuniary interest in establishing the last will. The propounders of the will made in 1873 are Robt. H. Elliott and his children. The persons appealing from the judgment of the county court admitting to probate that will, and rejecting the one made in 1873, are J. H. Lee and W. A. Lee, appellees in this cause. What connection with or interest in the estate of W. H. Elliott, deceased, J. H. Lee and W. A. Lee have, does not appear from the record. As the record stands the only person who has any interest as devisee in the will made in 1875 is Robt. H. Elliott, and he and his children appeared in the county court to propound the will made in 1873, appeared in the circuit court, and appear here as appellants to have the will of 1873 probated and the one made in 1875 rejected.

As it is not shown that the propounders of the will of 1875 have any interest whatever, and Robt. H. Elliott, the only devisee of that will, insists upon the affirmance of the order of the county court rejecting it, and probating the one made in 1873, we are of the opinion that the court below erred in reversing the judgment of the county court.

We do not decide, because now not necessary, whether the judgment of the court is palpably against the evidence or not. But for the reason indicated the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Thos. D. Theobald, J. D. Lillard, Jas. A. Duncan, for appellants.
Geo. C. Drane, for appellees.

BANK OF COLUMBIA *v.* W. P. D. BUSH.

[Abstract Kentucky Law Reporter, Vol. 3—692.]

Objection to Sufficiency of Petition Waived.

Where a petition on a written contract does not positively aver a promise, but such a promise is inferentially averred, and no motion to make it more specific is made, it will be held sufficient after answer. The filing of the answer waives the error.

Waiver by Consent Judgment.

Where a judgment abating an action is set aside, except as to costs, by consent of the parties, for the purpose of trying the issue presented by another paragraph of the complaint, the judgment for costs, which was allowed to stand, is in effect a consent judgment; and to hold the demurrer to the answer sufficient would to be set aside that consent, which will not be done on behalf of one consenting thereto.

Assignment of errors.

Assignments of error not embraced in the grounds for a new trial will not be considered on appeal.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 23, 1882.

OPINION BY JUDGE HINES:

Appellant sued appellee upon a note to which two defenses were interposed: First, the pendency of another suit against appellee for the same cause of action; second, a release by appellant, upon the condition that appellee would assume and discharge certain debts, and an averment that appellee had assumed and discharged the debts. To the answer a demurrer was filed and overruled, and after exhibition of the record of the suit pleaded in abatement, it was adjudged that this action be abated. Subsequently it was agreed that the judgment abating the action, except as to costs, should be set aside in order that the issue tendered on the second count in the answer might be adjudicated. The main issue there tendered was of fraud in the obtention of the release, and upon this issue the jury found for the appellee.

It is contended for appellant that the court erred in overruling the demurrer to the answer, and upon the part of ap-

pellee it is contended, first, that whatever defect there may be in the answer it was waived by the consent order setting aside the judgment abating the action, and, second, that the petition is defective in not alleging a promise to pay on the part of appellee, that the demurrer to the answer should have been held to relate back to the petition, and that it should have been declared insufficient.

The petition substantially avers a cause of action, and the answer substantially sets forth a defense, but neither the petition nor the answer is technically accurate because some of the statements in each are not positive or specific averments of some of the facts necessary to make out the cause of action or the defense. For instance, there is no direct and full averment in the petition of a promise to pay; but it is inferentially averred, and if not taken advantage of by a motion to make more specific, would be sufficient to support a judgment after answer, which would not be the case if there were an entire failure to allege a cause of action. While the defendant may have been required to state specifically what debts he had assumed to pay in consideration of his release from the debt sued on, the general averment in reference to this was sufficient unless taken advantage of by motion to make more specific, as required by Myers' Code (1867), § 161. *Posey v. Green,* 78 Ky. 162. The defects complained of could not be reached by general demurrer, which would go as a failure to allege a cause of action or a defense, and not to the manner of alleging either. But any defect short of that to be reached by general demurrrer as stated was waived by the consent order. The judgment abating the action was only set aside in part (allowing the judgment for costs to stand), and that for the express purpose of trying the issue presented in the second paragraph of the answer, and was a waiver of any error of the court committed prior thereto. The judgment for cost, which was allowed to stand, was in effect a consent judgment, and to hold the demurrer to the answer sufficient (even if it had been specific) would be to set aside that consent, which would not be done on behalf of one consenting thereto. *Duncan v. Louisville,* 13 Bush (Ky.) 378, 26 Am. Rep. 201; *Boner v. Smith,* 7 T. B. Mon. (Ky.) 378.

The assignment of error that the court refused to allow

the filing of an amended petition is not available, first, because as this proceeding was under the old code appellant could have availed himself on trial of all the matters set up in the amendment, as all the material averments of the answer were to be taken as controverted; and, second, because the record of the previous suit, which was considered by the court in passing upon the motion to file the amendment, is not copied in the record. In addition to this the consent order referred to above was a waiver of this objection.

The third to the sixth assignments of error were not embraced in the grounds for a new trial, and will not, therefore, be considered. The seventh assignment is too general, as it does not indicate the instructions, to the giving or refusing of which appellant objects. We need not pass upon the point made by appellee, that there is technically no bill of evidence in the record, for a careful reading of what purports to be the evidence heard in the case convinces us that the defense set up in the second paragraph is fully sustained, and that on this evidence the judgment could not have been other than it is.

Judgment *affirmed*.

Alexander, Baker & Reid, for appellant.

W. P. D. Bush, for appellee.

WOODFORD & HATHAWAY *v.* W. H. PERKINS ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—691.]

Liability of a Sheriff's Sureties.

The sureties on a sheriff's bond are liable for moneys collected by that officer on writs of execution or other process, or by reason of some judgment of a court; but where parties to a cause leave the courts, either as a matter of convenience or otherwise, and direct the action of the sheriff under a private agreement, the sheriff's sureties are not liable if he collects money under such an agreement and fails to account for it.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 23, 1882.

OPINION BY JUDGE PRYOR:

The appellants in this case, who were the attaching creditors, entered into an agreement with the debtor, whose goods had been levied upon by the sheriff, that he (the sheriff) should proceed to sell the goods without an order of court, upon a credit of three months, and should hold the money or the proceeds of sale subject to the order of the court. The sheriff proceeded to sell under this agreement, collected a part of the money, and in some instances failed to take any security from the purchasers.

For his failure to pay the money collected and to take notes with surety from some of the purchasers of the goods, these appellants instituted an action against the sheriff and his sureties, alleging this default on his part as a breach of his bond. The sureties defended, upon the ground that the sheriff, under the agreement entered into between the creditors and their debtor, became the agent of the parties and was not liable by reason of his official character. The appellants insist that as the sheriff sold the goods under the process of the court, the selling being a mere incident to the collection of the claim, the sheriff and his sureties must either account for the value of the goods or the proceeds of sale; that the sale could have been ordered at any moment on the application of either party, and as the sheriff had nothing to do with the manner of sale or in obtaining an order for the sale, he nor his sureties can complain.

If the act of the parties is to be treated as equivalent to an order of court, and the sheriff, acting in the line of his duty only, did that which he was required to do, by virtue of his office, the judgment below should be reversed. All the sheriff could do under the attachment was to take the goods into his custody and then to sell them under an order of the court, when that order was made. The sureties agreed that he would faithfully discharge the duties of his office, and it was his duty to sell when ordered by the court and not before; but they never became bound, either by the letter or meaning of their covenant, to make good the default of their principal by reason of an agreement entered into between him and others that he should discharge a certain duty, although he might have been required to do or perform the same act by an order of court made for that purpose. The court could have directed a sale of the goods, on

a credit of three months, but the sheriff would have had no power to collect the money unless ordered by the court. Surety would have been required of the purchaser if sold under an order of the court, and the sureties in the sheriff's bond are fully protected. Under the agreement in this case the sheriff was empowered by the parties to sell on a credit of three months. Nothing was said in regard to securing the debts or obligations from the purchasers, nor was there any stipulation in regard to the collection of the money. The sheriff reports that as receiver he had collected about $1,100 of the proceeds of sale, and held it subject to the order of the court. He was certainly not the receiver of the court, but made so, if at all, by the agreement entered into between the parties. This sale was made in October, 1878, and the report not filed until January 16, 1880, and then the sureties called on to make good the default of the sheriff by reason of this private agreement, for no other reason than that an order of sale might have been obtained, establishing the rule that for any action of the sheriff done without an order or direction of a court his sureties will be liable, if the duty could have been required of him by an application to the court for that purpose.

No such precedent should be established, and particularly with reference to sureties on official bonds. These sureties are liable for moneys collected by the sheriff on writs of execution, or other process, or by reason of some judgment of a court, but where parties leave the courts of the state, either as a matter of convenience or otherwise, and direct the action on the part of the official under a private agreement, they must look to the agreement, under which the official acts, for indemnity, and not against his sureties. So far as the sureties are concerned the agreement becomes his bond. When the sheriff has failed to do that which the law compelled him to do, or has violated his official duty, he is liable to the party injured.

In the case of *Sanders v. Parrott,* 1 Duv. (Ky.) 292, the sheriff sold the attached property, and reported the sale and the proceeds of sale that had been collected by him. The court approved the report, and directed him to loan the money out on good security and report. He failed to discharge this duty and was sued on his bond. The court held the sureties not liable, as their principal had accounted for the money by paying it into

court, and when ordered to loan it out he was the agent of the court, and not acting in his official capacity as sheriff. In the case of *Greenwell v. Commonwealth,* 78 Ky. 320, the county court neglected to impose a levy for the payment of a railroad tax for the year 1878, having done so for previous years. The sheriff, under the impression that the levy had been made, proceeded to collect it. It was held, in an action against the sureties, that they were not liable.

In this case the parties interested undertook to control the property and to direct the sheriff as to the manner in which he should discharge his duties and thereby released the sureties.

Judgment *affirmed.*

Sweeney & Son, for appellants.

R. W. Slack, for appellees.

NELSON URTON *v.* JOHN DOWNEY.

[Abstract Kentucky Law Reporter, Vol. 3—692.]

Contempt of Court.

The chancellor does not commit reversible error by refusing to punish one for a contempt committed by an alleged obstruction of a passway which the chancellor had prior thereto ordered opened. It was for the chancellor to say whether the erection of the gate across the passway amounted to an obstruction.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 23, 1882.

OPINION BY JUDGE PRYOR:

This is evidently an appeal from an order of the chancellor refusing to punish the appellee for a contempt committed by an alleged obstruction of a passway which the chancellor had, prior thereto, ordered opened. We do not mean to say that an appeal would lie, but suggest that, as it was with the chancellor to say whether the erection of the gate amounted to an obstruction, it might well be argued that no disregard of the former judgment has been made to appear. Could not the chancellor, upon the former hearing, have permitted the erection of a gate, and if of great convenience to the one party and of but little

inconvenience to the other, would or ought the chancellor to punish for contempt?

Appeal *dismissed.*

Harrison & McGrain, for appellant.

T. B. Fairleigh, for appellee.

A. C. COX'S ADMR. *v.* W. L. MUDD, SHERIFF, ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—692.]

Collection by the Sheriff to Pay County Creditor.

Where a claim against the county is allowed and a levy ordered to raise money to pay it, and the sheriff directed to collect the money and pay the claim, the creditor has a right to presume that the county court imposed a sufficient levy to pay all the claims allowed at its regular term, and that the sheriff did or might have collected a sum sufficient to pay his claim; he is not required to show in his petition that the sheriff has in his hands a sum sufficient to pay his claim, after the time has expired within which he is required to make the collections and pay the claim.

APPEAL FROM GREEN CIRCUIT COURT.

March 23, 1882.

OPINION BY JUDGE LEWIS:

In our opinion facts sufficient to constitute a cause of action are stated in the petition and amended petition, and no brief being filed for appellee, we are unable to perceive the grounds upon which the demurrer was sustained. It is alleged that the claim against the county was allowed and ordered to be paid at the regular term of the court of claims; that at the same term an order was made making a levy to pay the claims then allowed, and a further order directing the sheriff to collect the levy and pay the claims so allowed; that the clerk of the court duly delivered to the sheriff a list of persons chargeable with the payment of such levy, the sum to be paid by each, a list of the sums due and from whom due to the county, and also a list of persons to whom the county was indebted, and the amounts to be paid by the sheriff to each, which list embraced the name of the plaintiff's testator and the amount due him.

It was also alleged that the payment of the claim had been demanded of the sheriff, and that he failed to pay any part of it. It must be presumed that the county court performed the duty required by law by imposing a sufficient levy to pay all the claims allowed at its regular term held for that purpose, and that the sheriff did or might have collected, in the time required by law, a sum sufficient to pay plaintiff's claim. Neither the statute nor public policy requires the burden to be placed upon a county creditor of showing the sheriff has in his hands a sum sufficient to pay his claim, after the time has expired within which he is required to collect the county levy and pay the claim.

Wherefore the judgment of the court below sustaining the demurrer to the petition and amended petition is *reversed,* and cause remanded for further proceedings consistent with this opinion.

R. S. Montague, D. A. Cardwell, for appellant.

COMMONWEALTH *v.* J. M. FERRELL.

[Abstract Kentucky Law Reporter, Vol. 3—693.]

Criminal Law—Bigamy.

It is the second marriage of one, at the time having a husband or wife living from which he or she has not been divorced, that constitutes bigamy; and where a man having a wife in this state elopes to Indiana with another woman and there marries her, he can not be punished in this state, for the offense is committed in Indiana, where the second marriage occurs.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE LEWIS:

The offense for which the defendant in this case was indicted is bigamy, and the particular circumstances of the offense as set forth in the indictment are that, having at the time a wife living to whom he was lawfully married in this state, the defendant eloped with another woman, a resident of this state, and married her in the state of Indiana, the marriage contract having been primarily made in the state, and that they immediately

returned to this state and have since lived here and cohabited together as man and wife.

The crime of bigamy is denounced and made punishable by Gen. Stat. (1881), Ch. 29, Art. 4, § 10, which is as follows: "Whoever being married, the first husband or wife, as the case may be, being alive, shall marry any person, shall be confined in the penitentiary not less than three nor more than nine years."

When the second marriage, which alone constitutes the offense, is a fact done without this commonwealth, though inquirable here for some purposes, like all other transitory acts, it is not by the rule of the common law cognizable as a crime, except within the jurisdiction where it took place. As in our opinion this rule of the common law has not been changed by the section of the General Statutes referred to, it follows that the court below had no jurisdiction of the offense charged in the indictment and the demurrer was properly sustained.

Judgment *affirmed.*

P. W. Hardin, for appellant.

A. J. BEALL *v.* WM. BETHEL'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 3—693, as Beall v. Bethell's Admr.]

Competency of a Deposition.

Even if a deposition is in itself competent evidence, it will not be permitted to be read when the person giving it is present in court and did actually testify as a witness.

Submission of Cause to the Court by Consent.

Where the law and the facts are by consent of the parties submitted to the court below, the judgment rendered in such cause is to be treated, as to the issues of fact, as the verdict of a jury would be treated.

APPEAL FROM HARDIN CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE LEWIS:

The law and facts having by consent of the parties been submitted to the court below, the judgment rendered in this case as

to the issues of fact must be treated as the verdict of a jury would be.

The only issue of fact about which there is any serious controversy is as to the value of the horses. At the time the two mares were delivered to Bethel they were valued and received by him at the appraisement, neither party objecting, but both agreeing to it. One of the mares has since that time been redelivered to the appellant, but no part of the sum for which they were pledged has been paid. So that while appellant is entitled to recover the value of the other mare and two colts and damages for their detention, the administrator of Bethel is entitled, under the pleading and in justice, to set off such recovery by the amount of his debt and the expenses incurred in raising, feeding, etc. We do not feel authorized to say from the record that the judgment of the court is palpably against the weight of the evidence.

We think the court properly sustained exceptions to the deposition of appellant. Even if it had been competent it would not have been proper to permit it read, as appellant was present in court, and did actually testify as a witness.

The judgment must therefore be *affirmed*.

Wilson & Hobson, for appellant.

Hayes & Bush, for appellee.

FROST ROSE *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—693.]

Criminal Law—Joinder of Causes.

Criminal Code, § 263, subsec. 2, permits the joinder of causes in different counts where they all embrace injuries to the person; and in such a case the commonwealth can not be required to elect upon which count it will prosecute.

Waiver of Objection.

When no objection is made at the trial because no order was made showing that the special judge was elected as provided by the statute or that the verdict was returned after the time had expired in which the court shall be held, the right to object is waived, and can not be made for the first time on the motion for a new trial.

APPEAL FROM BOURBON CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE HINES:

The indictment in this case is good. It does not improperly join separate offenses, and there was no error in refusing to require the commonwealth to elect. The several counts all embrace injuries to the person, and the joinder is authorized by Crim. Code (1876), § 263, subsec. 2.

The objection that there is no order showing that the special judge who tried the case was elected for that purpose in the manner provided by the statute [Gen. Stat. (1881), Ch. 28, Art. 7], and the objection that the verdict was returned after the time had expired in which the statute provides the court shall be held [Gen. Stat. (1881), Ch. 28, Art. 5, § 3], can not be considered because there was no exception or objection on the part of appellant, and his complaint first appears on the motion for a new trial.

The instructions are substantially correct. They could not have misled the jury to the prejudice of the appellant.

Judgment *affirmed.*

G. C. Lockhart, for appellant.

P. W. Hardin, for appellee.

COMMONWEALTH v. W. P. DUNIVANT.

[Abstract Kentucky Law Reporter, Vol. 3—694.]

Criminal Law—Indictment.

In a prosecution for obstructing a public highway, it is not necessary to describe the particular part of the highway obstructed, but it is sufficient for the indictment to designate it by name and to specify the character of obstruction, etc.

APPEAL FROM BALLARD CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE HINES:

A demurrer was sustained to the indictment in this case, and the commonwealth questions the correctness of that ruling. The indictment alleges the obstruction of a public highway, designating it by name, and specifies the character of obstruction and

the length of time continued. The ground upon which the demurrer was sustained seems to be (and in fact is defined in the judgment) that it does not designate the section or part of the highway obstructed. This we think was unnecessary. The object of making an indictment specific in detail is to afford the accused an opportunity to defend himself in the particular prosecution and to shield himself against a future prosecution for the same offense. Both these ends are substantially attainable under this indictment, and to require more would be to defeat the ends of justice by a technical closeness of construction.

Judgment *reversed* and cause remanded.

Chas. H. Thomas, P. W. Hardin, for appellant.

RICHARD VARBLE *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—694.]

Criminal Law—Intoxicating Liquors.

One can be punished for selling liquor by retail when it is drank upon adjacent premises, whether such premises are under his control or not.

APPEAL FROM OLDHAM CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE HINES:

The only question in this case is whether one can be punished for selling liquor by retail when it is drank upon adjacent premises not under the control of the person selling.

It appears to us that the language of the statute admits of but one construction, and that is that the selling and drinking on adjacent premises constitute the offense without regard to the question of control. The language implies an ownership and control had or exercised by some one other than the seller. The seller is not punished by the acts of others over which he has no control, but for the act of selling, which results in the drinking on adjacent premises. When he sells he knows the law and must take the chances of being made liable by the drinking of the liquor on adjacent premises, which is necessary to complete the

offense. If the legislature had considered control necessary to make out the offense it would have been so expressed.

Judgment *affirmed.*

Robbins & McIntyre, for appellant.

P. W. Hardin, for appellee.

[Cited, *Raubold v. Commonwealth,* 21 Ky. L. 1125, 54 S. W. 17.]

MARY ROWLETT *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—694.]

Criminal Law—Reversible Error.

While incompetent evidence can not always be entirely removed from the minds of a jury by an instruction attempting to withdraw it, still this court can not reverse a cause for any error unless it affirmatively appears that the error prejudiced the substantial rights of the accused.

Evidence from Post-mortem Examination.

Medical practitioners, having made a post-mortem examination, are competent to give their opinions as to the probable effect of an injury which they describe to the jury as having been inflicted upon the deceased charged in a murder case to have been killed by the defendant.

APPEAL FROM HART CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE HINES:

The evidence in this case tends to show that appellant was a step-mother to the deceased, who was a child of tender years, and that the accused so cruelly beat and used the child that it died from the treatment thus inflicted. The verdict and judgment was confinement in the penitentiary for life.

It is complained, first, that the indictment is too vague and uncertain as to the person charged with the crime. We think there is nothing in this objection. The apparent uncertainty arises from the fact that the name of the deceased and of appellant is the same, but as the accused is jointly indicted with her husband, Henry Rowlett, and wherever in the indictment the crime is charged the name of Henry Rowlett and of Mary Rowlett are combined as actors in the commission of the crime,

no one could be misled as to the persons charged with the crime or as to the identity of the deceased.

It is also complained that the court permitted evidence to go to the jury to the effect that the deceased was permitted to go insufficiently clad in inclement weather. It is insisted that such evidence was incompetent as against appellant, because the duty to clothe the child was on the husband, Henry Rowlett, and not on appellant. That is true, and if the evidence had gone to the jury unexplained there might be serious doubt whether the error would not be a cause of reversal, but appellant removed the sting from such evidence by having the court instruct the jury that the duty of clothing in a suitable manner was that of Henry Rowlett, the husband. It is true that the effect of incompetent evidence can not always be entirely removed from the minds of a jury by an instruction attempting to withdraw it, but as we can not reverse for any error unless it affirmatively appears that the error prejudiced the substantial rights of the accused, we will not reverse simply because there is a possibility that injury may have been done. The injury must be apparent and tangible.

It is further objected that the court erred in permitting the two witnesses who made a post-mortem examination of the deceased to give their opinion as to the cause of the death. The objection proceeds upon the idea that the evidence does not show that the witnesses are experts. We think the evidence sufficiently shows that they are medical practitioners, and therefore competent to give an opinion as to the probable effect of an injury which they describe to the jury. The evidence shows that one of the witnesses was sent for to treat the child while ill; that the witnesses are spoken of as doctors, and that they were called upon by the county authorities to make a post-mortem examination; that they made the examination by opening the skull, and that they found wounds on the outer portion of the skull and coagulated blood on the brain at points immediately opposite, and that the jaw was broken. This we think was sufficient to authorize the expression of an opinion as to what caused the death.

There is no evidence in the case to authorize an instruction

for involuntary manslaughter, and it was therefore proper not to give it.

Judgment *affirmed.*

Woodson & Macy, for appellant.

P. W. Hardin, for appellee.

COTTON *v.* BROWN.

[Kentucky Law Reporter, Vol. 3—679.]

Deed of Trust for Benefit of Wife Valid.

If a sale or gift by deed be by the husband directly to the wife, while the legal title will remain in him, the beneficial use will vest in her as her separate estate and the husband will be treated as her trustee, and upon her death her only child will inherit the same estate in the property.

Statute of Limitations.

While a conveyance by a debtor, without consideration, is declared void as to existing creditors, the statute of limitations applies, and an action to set aside such a conveyance can not be maintained unless begun within five years after the right of action accrues.

APPEAL FROM NELSON CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE LEWIS:

But two questions necessary to be considered arise in this case:

1. Whether the deed made by Abe Brown to Dilsey Brown on the 3d of January, 1871, and duly recorded in the proper office, is effectual for any purpose.

2. Whether that conveyance, being without valuable consideration, and therefore, under Gen. Stat. (1881), Ch. 44, Art. 1, § 2, void as to all the then existing creditors of Abe Brown, the statute of five years' limitation provided in the cases mentioned in Ch. 71, Art. 3, § 2, applies to this case.

It is contended by counsel for appellant that, the property being conveyed or attempted to be conveyed by a husband in trust for his wife, no title passed, because no grantee or trustee is mentioned in the deed. Although contracts between husband

and wife are, by the rules of common law, void, it is not so in equity; and it is a rule that admits of no exception that equity never wants a trustee, so that whenever a trust exists, either by the declaration of the party or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust. 2 Story's Equity Jur. (11th Ed.), § 976; 1 Perry on Trusts (2d Ed.), § 38. If a sale or gift be by the husband directly to the wife the legal title will remain in him, and the beneficial use will vest in her as her separate estate, and the husband will be treated as her trustee. *Campbell v. Galbreath,* 12 Bush (Ky.) 459.

The deed in this case operated to vest in Dilsey Brown the beneficial use of the property as her separate estate, and to make her husband, Abe Brown, her trustee, and upon her death appellee, Juliet Brown, being her only child and heir at law, inherited the same estate in the property.

Although conveyances by a debtor without consideration therefor are, by the terms of Gen. Stat. (1881), Ch. 44, Art. 1, § 2, declared not fraudulent, but void as to his then existing liabilities, still we are of the opinion they are, in the meaning of the statute, constructively fraudulent, and that the statuory bar of five years provided in Ch. 71, Art. 3, § 2, to an action for relief on the ground of fraud, was intended by the legislature to apply to such cases, as well as those of actual fraud.

As the deed from Abe to Dilsey Brown, under which appellee claims, was recorded more than five years before the institution, by appellant, of his action to subject the property, it follows that the plea of limitation should avail appellee.

Wherefore, Judge Hines dissenting, the judgment is *affirmed.*

C. T. Atkinson, for appellant.

Muir & Wickliffe, for appellee.

[Cited, *Phillips v. Shipp,* 81 Ky. 436, 5 Ky. L. 460; *Ward v. Thomas,* 81 Ky. 452, 5 Ky. L. 495.]

COMMONWEALTH, FOR ETC. *v.* B. F. CREEL.

[Abstract Kentucky Law Reporter, Vol. 3—693.]

Peddler's License Required to Be Paid.

Chapter 84, §§ 1 and 2, requires peddlers to take out and pay for licenses. This applies to all itinerant persons vending goods, etc., whether citizens of this state or not.

APPEAL FROM MUHLENBURG CIRCUIT COURT.

March 25, 1882.

OPINION BY JUDGE PRYOR:

We perceive nothing in the constitutional question raised in this case. If the amendment to the chapter entitled "Peddlers" passed February 21, 1874 (Acts 1873-74, Ch. 419), for the purpose of encouraging the manufacture or sale of home products, is unconstitutional, and we are not disposed to so adjudge, it can not affect the question involved here.

Chapter 84, §§ 1, 2, applies to all itinerant persons vending goods, etc. The appellant is a citizen of this state, and when he undertakes to peddle his wares must pay the license as required by the statute.

The position assumed by counsel, if entertained, would prevent any legislation on the subject.

Judgment *reversed* and cause remanded for further proceedings.

P. W. Hardin, for appellant.

M. J. Roark, for appellee.

NANCY P. YOUNG ET AL. *v.* LAVINA STROTHER.

[Abstract Kentucky Law Reporter, Vol. 3—695.]

Dower.

The wife is entitled to claim dower in her husband's real estate sold at the judgment of creditors, and bought by a purchaser subject to the wife's claim; and she is not precluded from asserting her claim because of the fact that her husband or creditors have given her $1,000, when she has done nothing to release her dower claim.

APPEAL FROM HENRY CIRCUIT COURT.

March 28, 1882.

OPINION BY JUDGE LEWIS:

By a provision in the deed for the benefit of his creditors made by J. F. Strother, now deceased, to Bruce, his assignee, the value of his homestead exemption was reserved, and subsequently paid to him out of the proceeds of the two tracts of land sold under judgment of court. The amount, $1,000, thus paid, was used by him to repurchase 38 acres of land, part of one of the tracts sold, the title to which he caused to be conveyed to appellee, who was then his wife.

The land in which she seeks in this case to have her dower allotted is a tract of 165 acres, purchased at the judicial sale by Gaines, the vendor of appellants, of which the 38 acres form no part. It is alleged in the pleadings and satisfactorily proven that at the time the 165 acre tract was sold, it was publicly announced that the land was to be sold subject to the dower right of appellee, and that Gaines was present at the time of the announcement. It is also shown that appellant, Young, purchased of Gaines with the knowledge that there had been no relinquishment of her dower right by appellee.

It is fair to presume that the public announcement made by the auctioneer had the effect to enable Gaines to purchase the land at a less sum than he could have obtained it at if it had been unincumbered. There is no pretense that appellee ever relinquished or promised to relinquish her claim of dower in the land, or that she has done anything whatever to forfeit her claim. No objection was made by the creditors of Strother to the payment to him of the one thousand dollars or to the investment by him of that sum for the benefit of his wife. Nor did appellee, by the terms of the deed to her, agree to accept the 38 acres in satisfaction of her dower in the land.

As appellee seeks in this case to recover nothing that Gaines purchased or paid for, or had the right to sell to appellants, they can not complain. Wherefore the judgment is *affirmed*.

J. & J. W. Rodman, for appellants.

Carroll & Barbour, Webb & Masterson, for appellee.

LEE BEAVER v. MARION COUNTY.

[Abstract Kentucky Law Reporter, Vol. 3—695.]

Recovery for Road Work.

Overseers and hands on roads are punished for not keeping highways in repair; and when a road becomes impassable and one makes a permanent improvement thereon in repairing it, the county is liable to compensate him.

APPEAL FROM MARION CIRCUIT COURT.

March 28, 1882.

OPINION BY JUDGE PRYOR:

All the testimony in this case conduces to show the bad condition of the road during the winter at the place where the work was done, and that on this account the road became impassable, compelling the traveler to pass through the farms adjoining in order to reach his destination. The proof also conduces to show that the improvements made were indispensable, and that on account of the peculiar condition of the clay it required either gravel or stone to make it a good road.

The appellant seems to have labored with his teams at the instance of the overseer and assisted in making this a permanent improvement; and while overseers and hands on roads should be punished for not keeping highways in repair, this is about the first instance where the overseer or the laborer has been punished for doing his work too well. Instead of withholding from him his money, he should be rewarded for placing this impassable road in good repair.

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

Belden & Shuck, J. D. Fogle, for appellant.

R. C. Palmer, for appellee.

JOHN MALONEY v. MAHLON SMITH'S ADMX.

[Abstract Kentucky Law Reporter, Vol. 3—695.]

Failure to Answer Petition.

The failure of a defendant to answer after he is served with process entitles the plaintiff to a judgment, upon proof of his cause of action.

APPEAL FROM MASON CIRCUIT COURT.

March 28, 1882.

OPINION BY JUDGE PRYOR:

The failure to answer was an admission of the statements contained in the petition. That pleading contains every essential averment necessary to constitute a cause of action. The name of Maloney or Mallonny is to the note and whether he signed it or authorized another to sign it does not appear; and besides, the positive averment is that by his certain note he promised and agreed to pay the debt mentioned, and the failure to answer after the service of process entitled the plaintiff to a judgment. Whether the names are identical, that is, whether Maloney is the person whose proper name is Mallonny and who now offers to defend this action, is not a question before us. The process or summons is followed by the judgment against the same party upon whom the summons was served and against whom the action was instituted.

Judgment *affirmed.*

Wadsworth & Son, for appellant.

T. A. Curran, for appellee.

FRANK PRATER *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—695.]

Criminal Law—Local Option Violation.

Under an indictment for selling spirituous liquors in a named district, evidence that the sale was made in another district should be excluded.

Changing Boundary of Local Option District.

Where the voters of a district have decided that liquors shall not be allowed to be sold therein, it is not within the power of the county court to nullify such action by changing the boundaries of a district so as to authorize sales to be made in territory in which they have been prohibited by the people's votes; but under an indictment charging a sale in district No. 9 without alleging or specifying the boundary in which it was sold, so as to enable the court to know that a portion of district No. 9 was within the district No. 2 in which sales were prohibited, prima facie, the party had the right to sell if licensed in district No. 9.

APPEAL FROM CARTER CIRCUIT COURT.

March 30, 1882.

OPINION BY JUDGE PRYOR:

The indictment in this case is for selling spirituous liquors in district No. 9, under which the appellant was fined $60. The evidence that the whisky was sold in district No. 2, or within the boundary of a district known as district No. 2, in which the local option law existed, should have been excluded. The proof shows that in district No. 2 a vote had been taken resulting in favor of local option, and that after this vote the county court made a new magisterial district and voting precinct by taking off certain parts of districts Nos. 1 and 2. Where the whisky was sold was in this new district, known as district No. 9, but within the boundary of district No. 2, where the local option was voted. The district in which the vote for and against local option was taken was only named to define or designate the boundary or territory in which the sale was prohibited in the event a majority favored the measure, and not subject to the control of the county court, or affecting in any manner the right of that tribunal to create new or additional voting precincts.

It surely could not have been contemplated that the county court could defeat the will of the people in a vote for or against the measure by changing the boundary of the territory in which the vote had been taken in the creation of an additional voting precinct or magisterial district. No such power is vested in that tribunal by the act authorizing the vote, and the geographical boundary designated as the district still remains, although portions of it may be annexed or embraced within the civil districts as laid off for county purposes.

Such a ruling would enable the county court in every instance to defeat the popular will by a mere change of the district. The right to determine whether spirituous liquors should be sold within this boundary was taken from the county court by this local option law and vested within the voters in the boundary. They alone have the right to permit its sale by a subsequent vote, if prohibited in the first instance, and the county court has no power over it. But the indictment charges a sale in district No. 9, without alleging or specifying the boundary in which it

was sold so as to enable the court to know that a portion of civil district No. 9 was within the district No. 2 in which the vote was taken; prima facie, the parties had the right to sell if licensed by the county court in district No. 9. For this reason the judgment is *reversed* and cause remanded for further proceedings.

J. D. Jones, R. D. Davis, for appellant.

P. W. Hardin, for appellee.

DAVIS, MOODY & CO. *v.* JOHN H. WILEY.

[Kentucky Law Reporter, Vol. 3—315.]

Recovery on Contract by One Not Party to It.

A third person may maintain an action in his own name upon a contract supported by a consideration, made in his favor though not made with him.

Defective Pleading Cured by Verdict.

Where there is a defect in a pleading which would have been fatal on demurrer, yet if the issue joined is such as necessarily required on the trial proof of the facts so imperfectly stated or omitted in the pleading and without which the jury would not have given the verdict, such defect or omission is cured by the verdict.

Statute of Frauds.

The statute of frauds applies only to promises made to the person to whom another is already or is to become responsible, and not to promises made to the debtor, on a sufficient consideration. A promise made to the debtor and not to the creditor is not a promise to answer for the debt of another within the meaning of the statute.

Power of Partner to Bind the Partnership.

One partner may bind the firm in all business relating to the partnership and in the regular and necessary course of the business, whether the partnership be commercial or noncommercial.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 25, 1881.

OPINION BY JUDGE LEWIS:

On the 19th day of March, 1870, the firm of Davis, Storts & Co. executed a promissory note for $400 to appellee, and on the 1st of January, 1876, the firm of Davis, Moody & Co., composed of Wm. Davis, Geo. E. Moody, John Mangold and —— Camp-

bell, executed to him a note for the same amount. This is an action by appellee against the present firm of Davis, Moody & Co., composed of Geo. E. Moody, John Mangold and John Mitchell, to recover the amounts of the two notes, less credits specified, upon the alleged promise and undertaking of the latter firm to pay, as the successors, the debts of the two preceding firms.

Upon the trial the jury returned a general verdict in favor of appellee for the amounts of the two notes subject to credits allowed, and also thirteen special verdicts. Appellants moved the court for judgment in their favor upon the special verdicts, notwithstanding the general verdict, and also, upon grounds filed, moved the court to set aside the general verdict and grant them a new trial. But, both motions being overruled and a judgment rendered in accordance with the general verdict, they have appealed to this court, and assigned the following errors.

1. That the court erred in overruling their motion for judgment upon the special verdicts, notwithstanding the general verdict, and in giving judgment for appellee.

2. In refusing to render judgment for them, or to dismiss the petition as to either of the notes.

3. In overruling their motion for a new trial.

The grounds of motion for a new trial are: 1. That the court erred in giving instructions not asked by the plaintiff. 2. That the general verdict is not sustained by sufficient evidence. 3. That the general verdict is contrary to law. But as the record does not show at whose instance any of the instructions were given, and there is no bill of exceptions containing the evidence, this court can not consider the two first grounds. The third ground will be considered in connection with other questions.

Various questions arising from both the pleadings and proceedings had at the trial are presented. But as no demurrer was filed in the court below, the inquiry as to the sufficiency of the pleadings must be confined to the objections that the petition does not state facts sufficient to constitute a cause of action, and the reply does not state facts sufficient to constitute a defense to the answer and set-off.

The first question to be determined is whether appellee can maintain this action at all, founded, as it is, upon the alleged

promise of appellants, made not to him but to the firms of Davis, Storts & Co., and the first firm of Davis, Moody & Co., to pay their debts, including the notes given to him. There is a conflict of the authorities in this country upon the subject, and the right was not recognized in the earlier decisions of this court; but it is now settled in this state that a third person may maintain an action in his own name upon a contract supported by a consideration, made in his favor though not made with him. *Smith v. Lewis,* 3 B. Mon. (Ky.) 229; *Lucas v. Chamberlain,* 8 B. Mon. (Ky.) 276; *Allen v. Thomas,* 3 Met. (Ky.) 198, 77 Am. Dec. 169; Story on Bailments, § 103; 1 Chitty on Pleadings 4. Such third person may sue upon such contract without a consideration passing from him to the promissor.

Appellants contend that this action being founded upon their alleged parol promise made to the preceding firms to pay the notes, rather than upon the note, the petition is fatally defective because it is not alleged there was a consideration for such promise. It is true no consideration is alleged in express terms, but it is attempted to be, and is imperfectly pleaded. It is stated substantially in the petition that the appellants are the successors of Davis, Storts & Co., and the first firm of Davis, Moody & Co., and as such agreed to pay their debts, including the two notes given to appellee. Appellants might have demurred in the courts below, but having failed to do so, and filed their answer and gone to trial, the defect of the petition on that account must be disregarded by this court if the issue was either made by the answer or submitted to and tried by the jury. "Where there is any defect, imperfection or omission, even of substance, in a pleading 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 imperfectly stated or omitted, and without which it is not to be presumed 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;" and it would be more than useless to send the case back from this court in order that the declaration should be amended by introducing that fact to be again presented for the consideration of the jury. *Wilson v. Hunt's Admr.,* 6 B. Mon. (Ky.) 379; *Louisville & Portland Canal Co. v. Murphy,* 9 Bush (Ky.) 522, quoting 1 Chitty on Pleadings 673. In their answer, though denying they agreed to pay either

of the notes, appellants do not deny they are the successors of the two firms by whom they were executed. Besides, they file with their answer and plead as an off-set to the note given March 3, 1870, an account beginning about that date, and which manifestly belonged to the two preceding firms, for the firm sued in this case did not then exist. But even if the issue of consideration or no consideration be not expressly made by the pleadings, it must be presumed it was submitted to and tried by the jury, and therefore that objection to the petition is not available here.

It is contended that the action, being upon a promise to answer for the debt of another, is inhibited by Gen. Stat. (1881), Ch. 22, § 1. It is only where the promise is distinctly collateral that it is within the statute, and the party for whom the promise has been made must be liable to the party to whom it was made. The statute applies only to promises made to the person to whom another is amenable. 3 Parsons on Contracts (6th ed.), 21-27, and notes. That the statute of frauds applies only to promises made to the person to whom another is already or is to become responsible, and not to promises made to the debtor, on a sufficient consideration, may be regarded as conclusively settled both in England and in this country. *North v. Robinson,* 1 Duv. (Ky.) 71; *Lucas v. Chamberlain,* 8 B. Mon. (Ky.) 276; *Hayden v. Christopher,* 1 J. J. Marsh. (Ky.) 383. In this case the promise is made to the debtor, and not to the creditor, and is not a promise to answer for the debt of another in the meaning of the statute.

Appellants say that the reply contains no specific denial of the account pleaded by them as a set-off, and therefore judgment should have been rendered in their favor for the amount of it. Though the allegation of the answer in respect to the account is not traversed in the reply, a settlement of the account on the first of January, 1876, is alleged, and one of the questions submitted to the jury, to which they responded affirmatively in a special verdict, was whether there was such settlement.

As defenses to the note dated January 1, 1876, it is alleged in the answer: 1. That it is not the act and deed of the first firm of Davis, Moody & Co. 2. That it was executed by Wm. Davis, a member of that firm, without the knowledge or consent of the other members of the firm, and in pursuance of a fraudulent agreement between him and appellee. 3. That it is without consideration.

In the absence of the evidence heard upon the trial, the facts can be but imperfectly understood, and only such conclusions can be arrived at as may be deduced from the pleadings and special findings of the jury. The jury, in the special verdicts, find and say, in substance, that the salary of the first firm of Davis, Moody & Co., paid to appellee during the year 1875, was thirty dollars per week, and none of the members of that firm but Davis agreed to pay him more than that for that year; that the note was executed by Davis without the consent of the other members of the firm, and they did not know of its execution at the time, and first learned of its existence from appellee in July, 1878. The jury further find that the note was given for balance of unpaid salary, and that appellee did not purposely conceal the fact that he held the note.

It then appears the note was executed by a member of the firm, and the consideration of it was unpaid salary. The other facts, that it was given without the knowledge or consent of the other members, and that the salary paid for 1875 was thirty dollars, and no other member of the firm except Davis agreed to pay more, do not invalidate the note because they stand isolated and appear to have no bearing upon the simple question whether the firm was indebted to appellee in the amount for which the note was given. Certainly they cannot, unexplained and unaided, negative the other fact found by the jury, that the note was given for the balance of unpaid salary, nor countervail the logical deduction from that fact, that such balance was a just demand. Neither is the court authorized, as the record stands, to say, notwithstanding the verdict of the jury and judgment of the court below, the execution of the note was fraudulent.

But counsel for appellants contend that, it being fairly inferable that the partnership was noncommercial, it is a question of fact, and not of law, whether one of the partners had the power to bind the firm, and that, according to the doctrine announced by this court in the case of *Judge v. Braswell,* 13 Bush (Ky.) 67, 26 Am. Rep. 185, it rested upon appellee to show either express authority in Davis to execute the note, or that such was the custom and usage of that particular branch of business in which the firm was engaged, or such facts as will warrant the conclusion the requisite authority had been given.

One partner may bind the firm in all business relating to the partnership and in the regular and necessary course of the business, whether the copartnership be commercial or non-commercial. There is no question of appellee being in the service of the firm, with the knowledge and consent of all the members of the firm. The jury say the note was given for a balance of salary due to appellant for his services to the firm. It would be a perversion of the law to say that a firm thus partly indebted for services rendered by its servant or agent is not bound upon a note given in consideration of such indebtedness, merely because no express authority is shown in any one member to execute it.

The general verdict does not appear to be inconsistent with the special verdicts, and we perceive no error in the refusal of the court to disturb it.

Wherefore the judgment is *affirmed.*

Russell & Helm, for appellants.

Rodman & Brown, for appellee.

[See following case in which rehearing is granted and case reversed. Cited, *Ingram v. Cincinnati &c. R. Co.,* 32 Ky. L. 849, 107 S. W. 239.]

DAVIS, MOODY & CO. *v.* JOHN H. WILEY.

[Abstract Kentucky Law Reporter, Vol. 3—755.]

Waiver of Right to Object to Defective Pleading.

Where a defendant in the trial court has a cause of demurrer to the petition on account of any defect, imperfection or omission, and fails or refuses to make the objection and permits the trial to be had upon the issues thus imperfectly joined, he should not be heard in the Court of Appeals after verdict to make the objection if the issue formed be such as necessarily required proof on the trial of the facts thus defectively or imperfectly stated. The verdict cures the defect.

Statute of Frauds.

To take a case out of the statute of frauds it is necessary that the promise by a third person to answer for the debt of another shall be made, not to the creditor, but to the debtor. Where a parol promise to pay the debt of another is relied upon for recovery it must be clearly stated who made the promise and to whom it was made; and the pleading failing to make such allegations, there is a failure to

allege facts sufficient to constitute a cause of action or to fix the liability of the persons sued. Such defects can not be cured by the verdict of a jury.

APPEAL FROM JEFFERSON CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE LEWIS:

When the opinion in this case was delivered the attention of the court was directed by appellants' counsel to a defect in the petition in the failure of the plaintiff in the action to allege there was a consideration for the promise upon which the action is founded. Our attention was not then, but is now for the first time, called to the failure of plaintiff to properly allege that such promise or agreement was in fact made by the defendants. We were then and are now of the opinion that, though it was not in terms, it was imperfectly alleged that there was a consideration, the allegation being that the defendants were the successors of the preceding firms, and as such made the promise or agreement to pay the debts sued on.

When a defendant in the court of original jurisdiction has a cause of demurrer to the petition on account of any defect, imperfection or omission and fails or refuses to make the objection, and permits the trial to be had upon the issues thus imperfectly presented, he should not be heard in this court to make the objection if the issue formed be such as necessarily required on the trial proof of the facts thus defectively or imperfectly stated. To depart from this rule and encourage a contrary practice would not serve the ends of justice, but needlessly procrastinate and increase the expenses of litigation. Therefore, assuming in the opinion delivered, as we now perceive we erroneously did, that the promise or agreement by the defendants to pay the two debts sued on, which is the foundation of the action, was properly and sufficiently set out in the petition, we held that the question of consideration therefor was presented and considered, and that the defect in the petition in failing to properly allege the consideration must be considered as cured by the verdict.

The action is founded upon the alleged parol promise or agreement by the defendants to pay the two debts sued on.

The first debt is upon a promissory note given to the plaintiff by the firm of Davis, Storts & Co. It is stated in the first paragraph of the petition that the defendants, Geo. E. Moody, John Mangold and John Mitchell, compose the firm of Davis, Moody & Co., and are the successors of Wm. Davis, George E. Moody, John Mangold and John Mitchell, who did business under the same name of Davis, Moody & Co. "It further states that the firm of Davis, Moody & Co. were the successors of Davis, Storts & Co., and that the firm of Davis, Moody & Co. agreed to pay the debts of Davis, Storts & Co. and all the former debts of Davis, Moody & Co."

To take the case out of the statute of frauds it is necessary that the promise by a third person to answer for the debt of another shall be made not to the creditor, but to the debtor. There is no allegation that the promise or agreement to pay the debt was made to or with the firm of Davis, Storts & Co., who gave the note, nor is it distinctly stated that it was made to or with the first firm of Davis, Moody & Co., or that the firm of Davis, Moody & Co. promised or agreed to pay the debt.

If an inference is to be drawn from the language used in the petition, and relied upon for recovery, the most reasonable one and the one used as a regular rule is that the promise was made to the plaintiff himself. If it was the action can not be maintained at all. If it be assumed that the promise was made to the first named firm of Davis, Moody & Co., then no cause of action is stated, because there is no allegation that that firm ever promised or agreed with Davis, Storts & Co., or was bound to pay the debt. The promise must be made to the debtor, or to the person who is legally bound to pay the debt.

Neither the language of the petition nor the relation shown to exist between the defendants and Davis, Storts & Co. authorize the assumption that the promise relied upon was made by the defendants to that firm. Though a parol promise to pay the debt of another is relied upon for recovery, it is not clearly and unambiguously stated who made the promise, nor is it stated at all to whom the promise was made. So that as respects both the subject matter and the parties, there is a failure to allege facts sufficient to constitute a cause of action, or to fix the liability of the person sued. Such defects can not be cured by the verdict of a jury.

The second paragraph of the petition is equally defective. It is stated that the debt is upon a note given by the first named firm of Davis, Moody & Co. to the plaintiff in the action, and that "the firm of Davis, Moody & Co. as it is now composed, and as the successor of Davis, Moody & Co. as it formerly stood, was bound to pay said note, as it agreed to settle the former debts of Davis, Moody & Co. It is not stated to whom the promise was made, nor, except as a conclusion of law, is it stated at all that any person made the promise.

Therefore, a rehearing is granted, judgment of the court below *reversed* and cause remanded with directions to set aside the verdict and grant appellant a new trial and for further proceedings consistent with this opinion.

Russell & Helm, for appellants.

Rodman & Brown, for appellee.

[Followed, *Cooper v. Nelson,* 12 Ky. L. 890; cited, *Garth v. Davis,* 120 Ky. 106, 27 Ky. L. 505, 85 S. W. 692, 117 Am. St. 571.]

JAS. A. MITCHELL'S ADMR. *v.* RAY & CO.'S ASSIGNEE.

[Abstract Kentucky Law Reporter, Vol. 3—754.]

Statute of Frauds.

Allegations in a petition showing that the testator simply promised to pay the debt of another and paid part of it are not sufficient to constitute a cause of action, the promise being verbal and within the statute of frauds and perjuries.

APPEAL FROM HANCOCK CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE HARGIS:

The only allegation of the petition relative to appellant's testator is that "he assumed to pay said note and in pursuance of said assumpsit did on the 16th day of August, 1873, pay to said Ray & Company on said note the sum of $755 as appears by a credit indorsed on the back of said note."

The question presented by this appeal is whether the averment quoted states a cause of action against the appellant's testator. There is no consideration alleged on which the as-

sumpsit is based. And the allegations show that the testator simply promised to pay the debt of another and paid part of it, which is insufficient to constitute a cause of action, the promise being verbal and within the statute of frauds and perjuries.

It was not necessary or proper to make a motion in the court below to set aside or modify the judgment before taking this appeal, because the judgment was not void, nor could it have been set aside or modified by the court after the term during which it was rendered. Civ. Code (1876), § 763. The judgment was erroneous but after the term had expired it would have been enforcible had the appellant failed to appeal.

Wherefore the judgment is *reversed* and cause remanded for further proper proceedings.

W. S. Roberts, for appellant.

R. C. BURNS *v.* M. A. STEPHENSON ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—754.]

Res Adjudicata as a Defense.

Where a suit is brought on two notes and the same defense was made to both of them and the second note was not due and for that reason alone the cause was reversed, but in that case the defendant pleaded and introduced proof on his set-off and counterclaim and the court decided against the validity of such set-off it amounts to an adjudication and is res adjudicata.

APPEAL FROM BOYD CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE LEWIS:

The same defense was made to the first and second notes and is sought again to be pleaded to the second note which was not due at the former hearing and for that reason alone the cause was reversed. Yet the court decided against the validity and sufficiency of the appellant's set-off and counterclaim which he interposed as a defense to the action on the notes by the assignee.

There is nothing either in the pleadings or proof which sufficiently shows that the appellant was lulled, deceived or surprised by the conduct of the appellee on the former trial, nor does it

appear that the appellee suppressed any of the facts which appellant might not have known by the exercise of that diligence which should be used by each party in the preparation of his case before going to trial.

Treating the supplemental pleading as a petition for a new trial we do not think the facts authorize one to be granted. As the matters in issue, according to *Davis v. McCorkle,* 14 Bush (Ky.) 746, become by the former opinion of this court res adjudicata, the judgment must be *affirmed.* The irregularities complained of do not prejudice the appellant's rights.

R. C. Burns, for appellant.

L. T. Moore, for appellees.

[Cited, *Bean v. Meguiar,* 20 Ky. L. 885, 47 S. W. 771; *Hardwicke v. Young,* 110 Ky. 507, 22 Ky. L. 1906, 62 S. W. 10.]

JOHN B. WILLIAMSON *v.* JOHN P. MORTON & Co.

[Abstract Kentucky Law Reporter, Vol. 3—755.]

Statute Merely Directory.

The provisions of Elliott's Charter, 342, § 15, authorizing an allowance of $1,000 or less by the city council for services rendered by the clerk in behalf of the commonwealth are not mandatory but are within the discretion of the council.

Common Count in Assumpsit.

Where goods are sold and delivered at the request of the purchaser for which he agreed to pay a reasonable sum and the goods are alleged to be worth so many dollars and these facts are alleged in an action in assumpsit the pleading is sufficient to maintain a recovery if the proof authorized it.

APPEAL FROM JEFFERSON CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE PRYOR:

We see no reason and find no statute for allowing to the clerk of the city court that which is not allowed by law to the other clerks of the state. Such record-books and stationery as the commonwealth is liable to furnish, the city should furnish when there is no special law on the subject. Such in fact is the

plain meaning of Elliott's Charter, 342, § 15. This is a general provision in the city charter authorizing an allowance of $1,000 or less by the city council for services rendered by the clerk in behalf of the commonwealth; and such an allowance, if made, and that is entirely within the discretion of the council, would cover all extra expenses. The county court makes annual allowances to the county clerks, more from custom than statute, of small sums to cover extra expenses and services rendered, and the same discretion may be exercised by the council as it is limited in the allowance to a sum not exceeding $1,000. Still this provision is not mandatory but is purely within the discretion of the council.

The appellant in this case, under the impression that the city was responsible, ordered Wannock, the clerk of the mayor, to get the articles for the value of which this recovery was had. Wannock applied to the appellees and made the purchase and the latter supposing that the city was responsible charged the items to the city. Finding the city not responsible, and the appellant having received the blanks, stationery, etc., and used them, and having ordered Wannock to get them, at the suit of the appellees in which it is alleged the goods were purchased at the instance and request of the appellant, the recovery is had. It is maintained that this is the averment of an express contract and that under it a recovery can not be had upon an implied promise. We do not understand this to be the law. It is a common count in assumpsit for goods sold and delivered at the request of the defendant for which he agreed to pay a reasonable sum and they are alleged to be worth so many dollars. This pleading was sufficient to maintain the recovery if the proof authorized it. We think the proof did authorize it and the judgment was proper. The appellant ordered the goods supposing another was responsible and under that order he obtained the goods and used them.

Judgment *affirmed.*

Kohn & Barker, for appellant.

A. C. Rucker, for appellees.

JOHN W. BERRY *v.* B. F. BRANHAM ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—756.]

New Trial on Newly Discovered Evidence.

A new trial will not be granted on the ground of newly discovered evidence even if due diligence is shown if the evidence discovered is cumulative only of evidence given at the trial.

APPEAL FROM LEWIS CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE PRYOR:

The elementary authorities conduce to sustain the instruction given, that the jury must be satisfied from a preponderance of the testimony of the right of recovery before a verdict for the plaintiff should be given. The words "satisfied" and "preponderance" may sometimes confuse a jury, and the ordinary mind, in passing upon an issue of fact, will often suggest that which the juror believes the party ought to recover, still he is not entirely satisfied as to the correctness of the conclusion reached. He sometimes weighs the evidence by the number of witnesses or is unable to analyze the testimony so as to determine that question. If the jury believe from the testimony in the case that the plaintiff is entitled to recover, the verdict should be so rendered, and this should be the general instructions upon issues of fact where a recovery is sought.

In this case the testimony is very conflicting and the appellant who is now complaining, with a view and under the belief that the preponderance of the testimony was for him, moved the court to instruct the jury that they were the sole judges of the credibility of the witnesses and must decide the case according to the weight of the evidence. This instruction it seems to us is similar in effect to the instruction asked for by the defendant, and while both instructions are perhaps within the legal rule still the better mode of presenting such an issue, is to leave the jury to determine whether a recovery should be had from the evidence, without attempting to define the extent of their belief or the mode in which they shall weigh the evidence. "The burden of proof is upon the plaintiff and if the jury believe from

the testimony that the defendant assaulted, beat and bruised the plaintiff as alleged in the petition they will find the defendant guilty and assess the damages at any sum in their discretion not exceeding the amount claimed."

We do not think from an examination of this record that the appellant has been prejudiced and the subsequent discovery of testimony upon which a new trial is asked is but an accumulation of proof on the same point and in regard to which many witnesses testified with a knowledge of the facts attempted to be elicited. This newly discovered testimony conduces to strengthen only the statements of those witnesses and is only cumulative.

Judgment *affirmed.*

Garland & Pugh, for appellant.

E. F. Dulin, F. W. Mitchell, for appellees.

[Cited, *Barnett v. Commonwealth,* 84 Ky. 449, 8 Ky. L. 448, 1 S. W. 722; *Anderson v. Baird,* 19 Ky. L. 444, 40 S. W. 923; *Cincinnati, N. O. & T. P. R. Co. v. Halcomb,* 25 Ky. L. 1444, 78 S. W. 205.]

ALEX. PENCE v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—756.]

Selling Liquor Without a License.

Any tavern keeper or merchant who sells spirituous liquors without having obtained a license to do so is guilty of violating the law.

Definition of the Word Merchant.

A merchant, as the term is used under the liquor-license law, is a person whose business is that of retailing merchandise and one is not a merchant whose business it is to sell liquors alone, and before the county court is authorized to grant a license to a merchant to sell liquors, it must be satisfied that he has not assumed the name and business of a merchant with the view and object of obtaining a license to sell spirituous liquors.

APPEAL FROM MADISON CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE LEWIS:

The defendant was indicted or intended to be indicted for a violation of the Gen. Stats. 1881, Ch. 92, Art. 3, § 5, by which it

is provided that any tavernkeeper or merchant who shall sell spirituous liquors without having obtained a license therefor, shall on conviction be fined $60.

There is no evidence in this case showing, or tending to show, that the defendant was a merchant, in the meaning of the statute, at the time the liquor is proved to have been sold by him.

A merchant is defined in Gen. Stat. (1881), Ch. 106, Art. 2, § 2, to be a person whose business is that of retailing merchandise, and before the county court is authorized to grant license to a merchant to sell liquors, it must be satisfied that "he has not assumed the name and business of a merchant with the view and object of obtaining a license to sell spirituous liquors." This shows conclusively that the legislature did not intend that a person engaged in selling liquors alone should be deemed a merchant entitled to license, subject to the penalty imposed upon a merchant for selling without having obtained a license therefor.

The instructions of the court being in conflict with this opinion the judgment is *reversed* and cause remanded with instructions to grant to defendant a new trial and for further proceedings consistent herewith.

J. W. Caperton, for appellant.

P. W. Hardin, for appellee.

M. C. MARSHALL *v.* T. W. SENOUR.

[Abstract Kentucky Law Reporter, Vol. 3—756.]

New Trial on Account of Newly Discovered Evidence.

A new trial will not be granted on account of newly discovered evidence when such evidence is merely cumulative of evidence given on the trial. A new trial will not be granted on the isolated ground of discovery of witnesses to a fact involved in the issue tried and upon which there was testimony given at the trial.

APPEAL FROM KENTON CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE HARGIS:

This appeal is taken from a judgment dismissing the appellant's petition for a new trial upon newly discovered evidence.

Considering the petition, without the amendment which was rejected, as substantially sufficient in every other respect, is the quality and strength of the newly discovered evidence such as would authorize the court to grant the appellant a new trial?

The evidence consists of verbal admissions which two witnesses state they heard the appellee make and which, if admitted, would only add to and strengthen appellant's testimony given on the issue that was tried between them. It is at best but calculative evidence. It is about the disputed fact which was in issue, and fully testified to by the parties themselves on the trial. And to grant a new trial on evidence tending to prove the verbal admissions of the successful party in regard to the same issues and matters that had been determined in the former trial, would be inconsistent with the doctrine laid down in *Respass v. McClanahan,* Hardin (Ky.) 342; *Daniel v. Daniel,* 2 J. J. Marsh. (Ky.) 52; *Allen v. Perry,* 6 Bush (Ky.) 85; *Leonhart v. Stalzenberger,* 7 Bush (Ky.) 209. It is held in the first case named that the discovery of new witnesses to prove any matter which was in issue in the former cause is not a ground for a bill of review. And in *Daniel v. Daniel* the court after laying down the general rule that the discovery of parol testimony to a point tried in the issue is not sufficient to authorize a new trial, says: "We know of no case, in which a new trial has been granted or sanctioned by this court, on the isolated ground of a discovery of witnesses, to a fact involved in the issue at law, and tried."

A number of cases are cited which sustain the principles of that opinion and as it is not alleged that the judgment was obtained by fraud, or that the appellant was surprised, lulled or mislead in the trial, or that the appellee had prevented the discovery of the evidence before the trial, we can not discover any reason which would exempt this case from the operation of the rule established by the unbroken current of authority in this state.

The character of the evidence relied on is also objectionable. It is both weak and dangerous, and does not belong to that permanent and unerring character of testimony which would necessarily have a decisive influence upon the evidence which appellant would seek to overthrow by it. See *Allen v. Perry,* 6

Bush (Ky.) 85; *Leonhart v. Stalzenberger,* 7 Bush (Ky.) 209; *McFarland's Admr. v. Clark,* 9 Dana (Ky.) 134.

Judgment *affirmed.*

R. D. Handy, for appellant.

H. P. Stephens, for appellee.

RICHARD MONARCH *v.* S. M. DEAN ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—757.]

Enforcement of Landlord's Lien.

When one without notice of a landlord's lien buys property at an execution sale conducted by the sheriff, the title passes to him and it becomes the sheriff's duty to pay to the landlord the rent or so much of it as the proceeds of the sale will pay, and where the sheriff fails to do so the landlord may by cross-petition against the sheriff and the tenant secure the proceeds of such sale to apply on his rent charges.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 1, 1882.

OPINION BY JUDGE HARGIS:

The Gen. Stats. (1881), Ch. 66, Art. 2, § 16, provides: "If the property be taken under execution or attachment, the officer shall, out of the proceeds of the property found upon the leased premises, and levied on or taken by him, make payment of the rent payable in money, due and to become due, for the year in which the levy is made, unless a bond of indemnity be executed." It was held by this court in the case of *Stone v. Bohm Bros. & Co.,* 79 Ky. 141, 2 Ky. L. 40, that the property being removed from the leased premises, and sold to an innocent purchaser before the expiration of fifteen days from the removal, the title passed to the purchaser and the landlord's lien could not be enforced against the property. The authorities were fully reviewed in that case and the principle then established is applicable to this case.

When the appellant, without notice of the landlord's lien, bought the horse at the execution sale conducted by the sheriff the title passed to him and it became the sheriff's duty to pay

to the appellee, Dean, the rent, or so much of it as the proceeds of the sale would extinguish. It was not, therefore, necessary, or proper, for the appellant to have made his answer a cross-petition against the execution plaintiff, Bosley, or the sheriff, Gates, as neither of them were responsible to him for the application of the proceeds of the sale. This defense was complete as to the proceedings instituted by Dean to enforce his lien for rent.

The cross-petition of Dean against the sheriff and Bosley should not have been dismissed, as he was entitled to the sum for which the horse was sold to appellant. The bond for the purchase-money having been taken payable to Bosley he was a proper party to Dean's cross-action, which in legal effect is the same as a rule and should be so treated. Besides, it is a proper supplemental pleading by which the proceeds of the property sold to the appellant may be brought into court.

The judgment is *reversed* and cause remanded for further proceedings not inconsistent with this opinion.

Williams & Powers, for appellant.

J. A. Dean, for appellees.

A. J. HERD ET AL. *v.* JAMES EVERSOLE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—757.]

Recovery Under Indemnity Mortgage.

The holder of an indemnity mortgage is entitled to recover out of the mortgaged property a sum of money equal to the amount of money he has become liable for by reason of the mortgagor's failure to satisfy the claim upon which the mortgagee has become liable.

APPEAL FROM OWSLEY CIRCUIT COURT.

April 4, 1882.

OPINION BY JUDGE PRYOR:

The proper construction of the agreement between the appellant, Sebastian, and the appellees is that he would have secured to the latter the sum of $300, and if this has been done the appellant has fulfilled his undertaking. The mortgage executed by Herd and wife, from the proof before us, indemnified the appellees to that extent, and there is no reason why they

did not proceed to have the mortgaged property sold for that purpose. It was sold, or adjudged to be sold, by the judgment in this case, but the appellant, Herd, complains and says that no pleading was filed asking a foreclosure of that mortgage; but on the contrary the appellees were disclaiming the lien created for their benefit and insisting that Sebastian was directly liable to them for the $300. The appellees are entitled to a judgment for whatever moneys they have been made liable for, by reason of Herd's failure to satisfy the claim of Brandenburgh, and to the extent of $300 secured by mortgage.

This judgment is *reversed* as to Sebastian, as the record shows he has complied with his agreement, and *reversed* as to Herd, because there was no pleading by them asking a sale of the mortgaged property. On the return of the cause the appellees may be allowed to show that they have not been secured by the mortgage, if such is the case, as there seems to have been no preparation on that branch of it. If the land belonged to Herd and wife and is worth the money they must look to the mortgage and not to Sebastian. Judgment *reversed* and cause remanded.

J. & J. W. Rodman, for appellants.

J. L. Scott, for appellees.

WM. BLACKBURN *v.* RICHARD MANN.

[Abstract Kentucky Law Reporter, Vol. 3—757.]

Relief Specifically Demanded.

The Code [Civ. Code (1876), Ch. 2, § 90] expressly provided that when no defense is made the plaintiff is not entitled to judgment for any relief not specifically demanded.

Pleading a Mere Conclusion.

A plaintiff, seeking to enforce a lien in a suit on notes, who, in his petition, confines himself to the bare statement that the notes are a lien on the land, pleads a mere conclusion and states no cause of action authorizing any equitable relief.

APPEAL FROM PENDLETON CHANCERY COURT.

April 6, 1882.

OPINION BY JUDGE PRYOR:

While the petition may have authorized a personal judgment it was error to have rendered such a judgment as no relief was asked for in the petition. It is alleged that the appellee is the owner and holder of the notes sued upon, and that the appellant promised and agreed to pay them, and while it would have been better pleading to have stated to whom the promise was made, after judgment it was too late to take advantage of the error. In this case no defense was made and the code expressly provides that in such a case the plaintiff can not have judgment for any relief not specifically demanded. Civ. Code (1876), Ch. 2, § 90. Nor was the judgment enforcing the lien proper under the pleadings. It is averred that the notes are liens on a certain tract of land but how those liens were created does not appear. There is no allegation that the plaintiff or his assignee sold the land or that it was created (the lien) by mortgage or in any other manner, the pleader confining himself to the bare statement that the notes were a lien on the land, there was therefore no cause of action stated authorizing any equitable relief.

The judgment is *reversed* and cause remanded with directions to permit the appellee to amend his pleadings and if not amended within a reasonable time to dismiss his action without prejudice.

A. R. Clarke, L. T. Applegate, for appellant.

T. C. Buckley, for appellee.

[Cited, *Bitzer v. Mercke,* 111 Ky. 299, 23 Ky. L. 670, 63 S. W. 771.]

H. V. PUTHUFF *v.* ROBT. HOWE.

[Abstract Kentucky Law Reporter, Vol. 3—758.]

Diligence by Assignee of Note.

A petition is bad which merely alleges that in due time suit was instituted by the assignee on the note assigned and a judgment recovered and in due time an execution issued and was returned "no property found." What is due time is a question of law, and the plaintiff must allege facts to enable the court to determine what diligence was exercised by the assignee in his effort to collect the note.

APPEAL FROM GREENUP CIRCUIT COURT.

April 6, 1882.

OPINION BY JUDGE PRYOR:

The petition is bad. It is by the assignee against the assignor to recover by reason of the insolvency of the debtor. It is alleged that in due time suit was instituted by the assignee on the note assigned and a judgment recovered, and in due time an execution was issued and returned "no property found." "What is due time" is a question of law and the plaintiff should have alleged the facts to enable the court to determine what diligence had been exercised by the assignee in the effort to collect the note.

Judgment *reversed* and cause remanded for further proceedings.

Roe & Roe, for appellant.

T. H. Paynter, for appellee.

WEAREN & EVANS *v.* S. B. MATHENEY.

[Kentucky Law Reporter, Vol. 3—710.]

Attachment and Garnishment.

When one summoned as a garnishee fails to make a disclosure satisfactory to the plaintiff, the latter may, either by an amended petition in that action or by another action, seek a personal judgment against him and also obtain an attachment; and when he seeks such a recovery in an independent action the garnishee may not successfully demur because at the time the other action is pending between the same parties and for the same cause.

APPEAL FROM LINCOLN COURT OF COMMON PLEAS.

April 6, 1882.

OPINION BY JUDGE LEWIS:

On the 19th of April, 1877, Wearen & Evans filed their petition against one P. F. Smith to recover judgment against him upon two promissory notes. An attachment was issued against the property of Smith, Matheney and others being summoned as garnishees. But on the 19th of July, 1877, before the term of court at which the garnishees were required to answer, an amended petition was filed and an attachment issued against the property of Matheney. At the September term of the court, judgment by default was rendered against Smith and the attachment sustained as to him. But as to Matheney the attach-

ment was discharged, and the demurrer filed by him to the amended petition sustained and the amended petition dismissed, and the summons on the attachment against him quashed.

This action was brought on the 20th of May, 1878, against Matheney alone, under Civ. Code (1876), § 227. In the petition, in addition to the foregoing facts, it is alleged that no part of the judgment against Smith had been satisfied, that the defendant, Matheney, was indebted to Smith in a large sum, and that the answer and disclosure made by Matheney as garnishee in the action of Wearen & Evans against Smith and others is untrue. An attachment against his property was issued, and a personal judgment sought against him.

The court having sustained the special demurrer filed, and dismissed the petition and amended petitions, this appeal is prosecuted by the plaintiffs in the action. The ground of the demurrer sustained by the court is that there was, at the time, another action pending in the court between the same parties and for the same cause.

By Civ. Code (1876), § 227, it is provided that "If a garnishee fail to make a disclosure, satisfactory to the plaintiff, the latter may bring an action against him, by petition or amended petition, in the same manner, and the proceedings therein shall be the same, as in other actions; and the plaintiff may procure an order of attachment in the same manner, and the proceedings thereupon shall be the same, as * * * authorized concerning attachments." Under that section it is clear that if the garnishee fail to make a disclosure satisfactory to the plaintiff the latter may, either by an amended petition in that action or by another action, seek a personal judgment against him, and also obtain an attachment as in other actions.

When this action was commenced there was no such action, as is authorized by that section of the code, pending against appellee, but he was before the court in the case of *Wearen & Evans v. Smith,* 80 Ky. 216, 3 Ky. L. 708, simply as a garnishee, and answered as a garnishee. It is true an amended petition had been filed in that action and attachment issued against him. But they were both premature, and the petition was properly dismissed and the attachment discharged.

There was not, in our opinion, at the time the demurrer was sustained to the petition and amended petition in this case,

another action pending between the same parties for the same cause. Wherefore the judgment of the court below is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

J. S. & R. W. Hocker, Hill & Alcorn, for appellants.

M. C. Saufley, for appellee.

J. R. REVILL ET AL. *v.* NANCY FRANKS' EXR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—758.]

Vested Remainder Created by Will.

Where by a second clause a will provides that "It is my will and desire, and I do hereby will and bequeath to my beloved wife, Nancy, all my worldly possessions, goods and effects, real, personal and mixed," and by a third clause it is provided that "In the event that my said wife shall marry or die, then it is my will and desire that my estate shall be equally divided between my children, and I hereby appoint my brother, William G. Simpson, and James F. Blanton my executors under this clause of my will," it is held that the interest of the children under the will was a vested remainder.

APPEAL FROM OWEN CIRCUIT COURT.

April 13, 1882.

OPINION BY JUDGE LEWIS:

D. L. Simpson died in 1861, testate, leaving a widow and three children, James, Lawson and Juliet. Lawson and Juliet died shortly after the testator, under age, and James died at the age of 26, intestate, leaving his mother surviving, who subsequently married a man named Franks. At her death in 1880 she devised the estate left by her first husband, Simpson, to appellees, and this action was brought by the heirs-at-law of the testator to recover the estate so devised by his widow.

The sole question involved is whether the children of D. L. Simpson took under his will a vested or contingent interest in remainder in his estate, and that question depends upon the construction that should be given to the second and third clauses of the will, which are as follows:

Second: It is my will and desire, and I do hereby will and

bequeath to my beloved wife, Nancy, all my worldly possessions, goods and effects, real, personal and mixed.

Third: In the event that my said wife shall marry or die then it is my will and desire that my estate shall be equally divided between my children, and I hereby appoint my brother, William G. Simpson, and James F. Blanton my executors under this clause of my will.

In our opinion the meaning of the words used in the third clause is the same as if the testator had said "upon the death or marriage of my wife it is my will and desire that my estate shall go to my children. To give to the words "in the event of" a meaning synonymous with the word "if" or any other expression signifying uncertainty as to the wife of the testator dying would be a perversion of the language used, as well as inconsistent with the scope of the will and the intention of the testator. Nor, unless words not used therein be added, can the third clause properly be interpreted so as to make the remainder interest of the children contingent upon their surviving their mother, or not dying before her marriage.

The remainder interest is not limited to take effect to dubious or uncertain persons, for the testator's children were then in being, nor upon a dubious and uncertain event, for it was by will made to take effect in any event at the death of the life tenant, or sooner if she married. The marriage of the widow could not, by the terms of the will, nor was it intended by the testator that it should, operate to defeat or make contingent the devise to the children, but had the effect only of giving to them the right to possess the estate whenever that occurred, which they could not otherwise enjoy until the death of their mother.

We are clearly of the opinion that the interests of the three children under the will was a vested remainder and that upon the death of James Simpson, intestate, the other two having died previously, the whole estate devised passed by descent from him, absolutely, to the mother with power to dispose of it by will.

Judgment of the court below is *affirmed.*

A. Duvall, Hallam & Gordon, for appellants.

Warren, Monfort & Joe Blackwell, for appellees.

[Cited, *Ochs v. Kramer,* 32 Ky. L. 762, 107 S. W. 260.]

W. L. WELLER *v.* GEO. P. BISSELL ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—759.]

Necessity of Summons on Amended Petition.

There is no necessity of a summons on an amended petition when such petition merely corrects averments as to the date of a bond secured by mortgage and describes the bond more minutely than the original petition, and where the parties have been brought before the court on the original petition.

Subdivision of Real Estate for Judicial Sale.

In the foreclosure of a mortgage on real estate the court may consider the question as to whether a division of the lots described was practicable and to the interest of the parties; and where a tract is divided into a number of parcels and offered first in parcels and then as a whole, the rights of the parties are not lessened or prejudiced by the court's action in such subdivision of the property. Such a sale is not void and the purchaser and the parties are not injured.

Irregularities in Judicial Sale.

Even where there are some irregularities in a judicial sale of real estate, they will not effect the rights of the purchaser at such sale.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 13, 1882.

OPINION BY JUDGE PRYOR:

The original petition in this case alleged the execution of the bonds for $1,000 each with the coupons attached, and that the property was conveyed for the purpose of securing them by the husband and wife. The two parcels of land are particularly described and the chancellor asked to foreclose the mortgage. Polk and wife, who were nonresidents, were before the court by warning order on this petition. An attorney was also appointed, who made his report.

The only effect of the amended petition was to correct an error as to the date of the bonds, it being alleged in the petition that they were dated on the 25th of May when in fact they were dated on the 24th of the month. It gave a more minute description of the bond and the property and was only explanatory of the real condition of the ground sought to be sold,

that it had a depth of not quite so many feet as the mortgage described. This was not a new cause of action, or different in any essential matter from the facts as originally stated. There are no new or distinct claims set up in any of the amendments, and we think the question as to the necessity for a summons is settled in the case of *Joyes v. Hamilton,* 10 Bush (Ky.) 544.

The record further shows that on the cross-petition of the city of Louisville a warning order was entered and an attorney appointed on the 25th of May, 1880, after the amendment had been filed in which the city asked that the liens for taxes be enforced for four years and for the tax to become due in 1880. So the defendants, Polk and wife, were before the court when this claim was asserted, and under the prayer for general relief and that the liens be enforced and the lien for the year 1880 secured as against the appellees, Bissell and Polk and wife, the judgment enforcing the liens can not be held void even if erroneous.

The court must have considered the question as to whether or not a division of the lots was practicable and to the interest of the parties. It was divided into 13 parcels and then offered first in parcels and then as a whole, and we can not well see how the rights of the parties have been endangered or lessened by such action on the part of the chancellor. The sale failed to produce a sum sufficient to pay off the debt due the appellees, and while there may be a slight error in the calculation as to the amount of all the indebtedness it does not render a sale by the chancellor under it void; and when not bringing enough to satisfy the debt mentioned in the original action without applying any of it to the liens we can not see how either the purchaser can be prejudiced by it, or the owners of the property against whom the proceeding is had. There may be irregularities in the proceeding such as would enable the nonresidents to have the judgment vacated or a new trial; still this, if done, can not affect the rights of the purchaser. Nor do we adjudge that any ground exists for opening the judgment. The tenants occupying the property as lessees were made defendants. Their leases showed what rights they had under them. They had been made parties as well as Polk and wife, by the plaintiff, and while the chan-

cellor may have erred in not selling subject to their rights under the leases instead of permitting them to remove the buildings, still this is only error, and it is manifest upon the facts of the record the rights of the tenants have only been enforced under their respective contracts.

The bond executed in this case secured the nonresidents. The principal, or plaintiffs, were liable without the bond, and the tender and approval of the surety made the proceedings proper, and if not it does not render the judgment void. We perceive nothing in the record out of the many errors assigned affecting the appellant's title.

The question arising on the antenuptial contract between Polk and wife has also been considered. The contract by its terms vests the wife with a separate estate by excluding the husband and giving to the wife the absolute power to sell and dispose of the personal estate in every particular as if she were a feme sole. In relation to the real estate of the wife it is evident that the parties were attempting not to convert it into separate estate, but agreed to make an agreement by which the wife could dispose of it by last will. But this contract when entered into or fully executed was not to interfere with the power of the wife to alienate, sell or convey any part of the real estate during her life; nor was it to interfere in any manner with the marital rights of the husband or to lessen his rights as tenant by the curtesy.

There are no words of exclusion used and nothing indicating a separate estate, and a general estate in a married woman is aptly presented by the draftsman in the writing before us. The rights of the husband are fully protected and no power given the wife that she could not have exercised in the absence of this writing. A separate estate in the wife excludes the husband from its control, with the right of the wife to dispose of and control it for her own benefit. The writing before us gives the husband and the wife the same control as they had before it was executed. The right of the wife to enforce it as against the husband with a view of enabling her to dispose of it by last will and testament is not necessary to be considered. The right to sell and convey and the rights of the husband over it were ex-

pressly retained by both husband and wife, and having made the mortgage the property mortgaged is liable for the debt.

Judgement *affirmed.*

Muir & Hayman, O. H. Stratton, for appellant.

Goodloe, Roberts & Humphrey, for appellees.

W. L. TAYLOR'S ADMR. ET AL. *v.* JORDAN BRYAN.

[Abstract Kentucky Law Reporter, Vol. 3—758.]

Sale of Real Estate by Verbal Contract.

Where the seller of real estate by a verbal contract repudiates the sale and ousts the purchasers, he can not be heard to complain against a judgment requiring him to pay back the purchase-money and to pay for valuable improvements made by the purchaser.

APPEAL FROM TODD CIRCUIT COURT.

April 13, 1882.

OPINION BY JUDGE HARGIS:

The evidence shows that the lot was unproductive and worth nothing in the way of rent until after it was improved. The court, however, set the rent off against the interest on the purchase-money, which was proper in view of the fact that the lot was timbered and capable of immediate use when it was sold.

The sale of the lot was by verbal contract, and the appellants disregarded it themselves by ousting the appellee, and they can not be heard to complain against the judgment of the court requiring them to pay back the purchase-money and for the lasting and valuable improvements without interest on either, as in this case. The evidence authorized the judgment as to the amount of purchase-money and value of improvements. There was error, however, in not allowing the appellee interest on both the purchase money and value of the improvements from the time of the ouster in October, 1877, instead of from the period the suit was begun. The appellants obtained the possession in October, 1877, and ought to pay interest on the purchase-money and rents or interest on the improvements for the use of the premises.

Judgment *affirmed* on the original and *reversed* on cross-appeal and cause remanded for judgment in conformity to this opinion.

Ben T. Perkins, Jr., for appellants.

H. G. Petree, for appellee.

W. F. BATES *v.* R. S. SCOBEE'S ASSIGNEE ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—758.]

Estoppel.

One not a party to a contract, by accepting its benefits and acquiescing in the arrangement for one year with at least constructive notice thereof, is estopped to set up any claim to the homestead rights of the husband.

Release of Dower Consideration for Contract.

The release by a wife of her dower interest constitutes a valuable consideration to support a contract between the husband and wife and the husband's creditors, made through their representative, the assignee.

APPEAL FROM SHELBY CIRCUIT COURT.

April 13, 1882.

OPINION BY JUDGE HARGIS:

The appellant accepted a part of the proceeds of the land sold in pursuance of the contract between the assignee, Whitesides, and Scobee and wife, and having acquiesced in the arrangement whereby Scobee and wife had surrendered and waived all right to homestead which they had in the land, and to her potential right of dower also, the appellant can not be allowed to appropriate the sum which Scobee and wife were to have in consideration of their waiver of homestead and dower, for the reason that he has reaped equally with the other creditors the fruits of their sacrifice of potential rights which they might have been unwilling to make on any other conditions than those agreed to by the assignee, who acted as much for the creditors as for his assignor; and they can not now be placed in statu quo or fully protected in any other way than by executing the contract under which they made the surrender which proved to be highly beneficial to the creditors by causing the land to bring a much better price than it would otherwise have done.

Although the appellant's claims were created before Scobee became a housekeeper or the erection of the improvements on the land, it would be inequitable to allow him to disturb the results of the contract by which all the creditors were benefited and under which he received an increased portion of his debt. While he was not a party to the contract, yet by accepting its benefits and acquiescing in the arrangement for one year, with at least constructive notice thereof, he is estopped to set up any claim to the homestead rights of the husband, and in no event possible from the facts of this record could he at any time have reached the dower interest of the wife, which furnished of itself a valuable consideration to support the contract that was in every way fair and made in the interest of the creditors through their representative, the assignee.

These unfortunate debtors have shown the utmost good faith and they should not be entrapped into a situation whereby the property of the wife not subject to the creditors can be appropriated to their benefit, and the consideration therefor afterwards withdrawn from the husband and wife, who were acting jointly in making the contract. The appellant has shown no reason why he should complain because the wife was not allowed enough for her dower. His disinterestedness in her behalf is altogether questionable as by this appeal he is attempting to take the whole of it from her.

Judgment *affirmed.*

Bullock & Beckham, for appellant.

L. A. Weakley, John C. Cooper, for appellees.

I. S. SNAPE ET AL. *v.* W. H. SANFORD'S RECEIVER.

[Abstract Kentucky Law Reporter, Vol. 3—760.]

Liability of Sureties on Bond of Clerk of Court.

Where money comes to the hands of the clerk of the court by consent of parties, but not under the order of the court and not as an officer, his sureties are not liable on account thereof, but the clerk is individually liable.

APPEAL FROM OWEN CIRCUIT COURT.

April 15, 1882.

OPINION BY JUDGE PRYOR:

It is manifest that the parties entitled to the money in the hands of the clerk could at any time have taken steps to collect it. It was not placed in his hands by any order of court, or if it had been, all the parties being sui juris and in a condition to protect themselves, they must look to others for indemnity and not to the sureties. The clerk is individually liable, whether receiving the money in the one capacity or the other. The statute was a complete bar to the recovery. See *Turner v. Rankin*, 80 Ky. 179, 3 Ky. L. 660.

The judgment is, therefore, *reversed* and cause remanded.

J. A. Duncan, Green & Lindsay, for appellants.

Geo. C. Drane, for appellee.

JOHN A. FAULDS *v.* W. B. DAVIS.

[Abstract Kentucky Law Reporter, Vol. 3—760.]

Payment to Partnership.

A payment to one partner is a payment to the partnership.

Jurisdiction of the Person.

When, in a suit against a debtor, the debtor files a cross-complaint against plaintiff and alleges that another person is a partner of plaintiff and that the partner is indebted to cross-complainant, but does not name such partner as a party nor have him served with process, the court has no jurisdiction over said partner and can not bind him by transferring the cause to equity in order to settle the partnership accounts between the plaintiff and such partner.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 15, 1882.

OPINION BY JUDGE LEWIS:

Appellee brought this action to recover one-half the proceeds of tobacco sold by him to appellant, the other half being paid to him before the commencement of the action. The sale is evidencd by two receipts executed by appellant at the different dates the tobacco was delivered. The first one, differing from the other only as to the amount and price of tobacco sold, is as follows: "Owensboro, Ky., 22 March, 1874. Received of W. B.

Davis 2960 lbs. of leaf tobacco, 1180 lbs. lugs, 1165 lbs. trash and 65 lbs. net trash, $320. John A. Faulds." Upon each of the receipts is the following indorsement: "One-half of the within receipt paid this May 4, 1874. John A. Faulds, per Howitt."

In his answer appellant alleges that the tobacco for which the receipts were given was the partnership property of and jointly owned by appellee and Lewis Sublett, and that before the commencement of the action he paid to Sublett one-half the price agreed to be paid, and the balance to appellee; that appellee and Sublett being partners and equally interested in the tobacco, Sublett had the right to collect and appellant had the legal right to pay the proceeds to him; but that if he was mistaken in his rights then Lewis Sublett is indebted to him in the sum of $309, being the one-half so paid to him; and to recover that sum he made his answer a cross-petition against Sublett.

At the December term, 1876, of the court, after the jury was empanneled and sworn to try the issue between appellant and appellee, Sublett not having been summoned upon the cross-petition, the court without motion discharged the jury, transferred the action to equity and referred it to the master commissioner to ascertain the fact of partnership, and if a partnership for the settlement of the accounts of the parties, to which order both parties excepted. The order of the court transferring the action to equity at this stage of the proceedings, as was done, is assigned as one of the errors. The court, in making the order, assumed that the defendant below, appellant here, could not get the benefit of any payment made to Sublett of the interest Sublett may have had in the tobacco except by a settlement and adjustment of the partnership accounts between the plaintiff and Sublett. But Sublett, though made a defendant to the cross-petition, was not made a defendant to the original action, nor did he enter his appearance as such.

The issue as to how the partnership accounts stood between Davis, the plaintiff in the action, and Sublett was solely between the plaintiff and defendant, Faulds, and all the proof was taken and the report of the commissioner ascertaining the balance due from Sublett to the plaintiff was made without Sublett being a party to the issue, and in proceedings thus had the judgment was rendered against appellant for the amount found due by

Sublett to the plaintiffs. If it was proper to transfer the action to equity in order to settle the partnership accounts between the plaintiff and Sublett, it was indispensable to make Sublett a party in order to bind him by the proceedings had and the judgment rendered ascertaining and determining how the accounts between them stood. Sublett is not concluded by the judgment, and has the right by another action against the plaintiff to compel a settlement that may show an entirely different result. Such being the case the judgment against the defendant, Faulds, was at least premature.

Besides, we do not perceive in this case a sufficient reason for disregarding that a payment to one is a payment to both partners. Though the tobacco was delivered by Davis, and the two receipts executed by appellant to him, it is shown, in fact not controverted, that it was partnership property, one-half belonging to Sublett. There is no bad faith or collusion between Faulds and Sublett nor any other fact shown authorizing an exception to that rule in this case. On the contrary, the payment to and receipt by Davis of one-half the proceeds of each lot sold, and the significant indorsement upon each of the receipts in Davis' possession of not a stated sum, but of "one-half," was calculated to induce the belief that Sublett was entitled to the other half.

Though it is not as fully shown as it ought to have been that appellant did actually pay the remaining half of the proceeds of the tobacco to Sublett, we think it satisfactorily appears from all the circumstances in the case that the payment was made to Sublett or his attorneys for him.

Wherefore the judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

Owen & Ellis, for appellant.

Sweeney & Son, for appellee.

BICKEL *v.* JUDAH.

[Kentucky Law Reporter, Vol. 3—728.]

Judicial Sale of Real Estate.

The debtor may pay off his debt to his creditor, and notwithstanding this fact a stranger who buys the real estate of the debtor

at judicial sale (which is confirmed) to satisfy the creditor's judgment, holds the property, and the fact of payment of the judgment by the debtor after sale will not affect the purchaser's title; but when the creditor, who is the plaintiff and the purchaser, accepts from the debtor payment in full of his debt, interest and costs, he thereby elects to restore to his debtor what he has purchased at the sale.

Subrogation of Surety.

A surety who has paid his principal's debt is entitled to be substituted to all the rights of the creditor, but a surety has no cause of action until he has paid the debt; but when he has done this he has the equitable right to avail himself of any security in the hands of the creditor to indemnify himself against loss.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 21, 1882.

OPINION BY JUDGE PRYOR:

This case has been heretofore fully considered, but the zeal and learning manifested by counsel for the appellee in his petition for a rehearing necessitates further investigation. As counsel seems to labor under the impression that the court has inadvertently fallen into some material errors of fact in the examination of this record, it may be proper to present the facts upon which, or the substance upon which, the opinion already delivered was based.

The appellee, Judah, held a claim against Reamer, evidenced by note and mortgage. The property mortgaged was sold at the instance of the appellee, Judah, for the payment of his debt, and it was several times purchased by either Reamer or his friends, and by reason of their failure to execute bonds, or for other causes, they failed to comply with the terms of sale, and finally the mortgaged property was again sold, and Judah, the appellee, became the purchaser at the price of $600. The report of sale was properly made, laid over for exception, and none being filed, was confirmed on the 12th of July, 1878, and by this order of confirmation leave was given the plaintiff, Judah, "to pay the state and city taxes due on said property, and to have credit on his purchase bonds therefor." No objection or exception was made or taken to this order. In the original action of Judah v. Reamer there was a personal judgment against Reamer, and a

foreclosure of the mortgage, and Reamer, having purchased the property and failing to give bond, was proceeded against for contempt, and thereupon superseded the judgment and brought the case to this court, the appellant, Bickel, becoming his surety on the supersedeas bond. The action or judgment of the court below was affirmed by this court, and on filing the mandate the property was again sold (Reamer failing to comply with his purchase), and the appellant became the purchaser at the price of six hundred dollars, which sale was confirmed and all the proceedings under it as already stated.

Judah finding, as he alleges, and the fact is doubtless true, that the taxes due and constituting a lien on the property purchased amounted to more than his bid of six hundred dollars, instituted his action against Reamer and Bickel, his surety on the supersedeas bond, alleging in express terms that the taxes exceeded the amount of his bid, that his debt was unpaid, and asked judgment against Bickel for the amount of the debt, including interest, damages and costs incurred in this court as well as the court below. In that petition was alleged the fact of Judah's purchase, the confirmation of the sale, and that the taxes due on the property, city and state, were $633, which, if credited on the bond of plaintiff, Judah, would leave the entire amount of his debt, interest and cost, unpaid. To this petition the appellant, Bickel, made no denial, and could not have well controverted the statements, as they are each and all verified by the record. Judgment was obtained against Bickel, the surety, for the entire debt, interest and costs, etc., and was paid by him in August, 1879. After this was done the appellant, Bickel, filed an amended pleading setting up the fact that he had paid the debt, and asking to foreclose his mortgage for his own benefit, alleging that the plaintiff, Judah, claims some interest in the property. Judah replied to this, setting up his title in the manner recited, and that reply has not been controverted.

Reamer and wife, in March, 1880, instituted the present action, the object of which was to attack the deed made by the commissioner to Judah on the confirmation of the report of sale in the original proceeding. A demurrer was interposed to this petition and sustained, and the petition dismissed, and that judgment was affirmed by this court. Reamer and wife had

made Bickel a defendant to the last suit, and Bickel, appearing in court, filed his answer and cross-petition against Judah, in which he insists that he is entitled to all the benefits arising from the mortgage to Judah, and by leave of court amended his cross-petition, alleging that "the purchase-price, bid by defendant, Judah, for the undivided one-third of the property, was $600. But there are taxes claimed as due, which Judah contends he has a right to pay off, but he has paid no taxes whatever, but has leave of court to pay the same," etc. A demurrer was sustained to the cross-petition of Bickel, he having made all the previous proceedings in the case part of that pleading, and failing to plead further his action was dismissed, and of that judgment he complains.

We are met with several objections urged by way of interrogatory to the reason given for the reversal in this case. We are asked to suppose a stranger to the action had purchased the property for $600. Would the payment by Bickel of the debt to Judah have authorized the latter to be substituted to the rights of the purchaser? The response to the inquiry must be in the negative. The sale and confirmation would vest in such a purchaser an absolute title. If Reamer and wife can not maintain the action to attack this final judgment resulting in the sale to Judah, where are the facts in this record authorizing Bickel to maintain such an action? It is clear that Reamer and wife could not maintain the action, because they have not paid one cent of the judgment against them, and the surety, Bickel, was in court asking to be substituted to the rights of Judah. Suppose, however, after this sale and its confirmation, Judah had demanded of Reamer and wife the payment in full of this debt, interest and costs, and payment had been made, and then Reamer and wife had said to Judah, "We will pay the taxes on the property sold, that you were, by the order of confirmation, allowed to pay, or if you have already paid them, we tender you the money and ask a reconveyance;" would a court of equity, upon the refusal of Judah, have hesitated for a moment to compel a restoration of the property? There is a manifest difference between a stranger making the purchase and the plaintiff in the action, who is the creditor in a case like this. The debtor may pay off the debt in full to the creditor, and still the stranger who

buys holds the property, and his title is in no manner affected; but when the creditor, who is the plaintiff and purchaser also, after his purchase and confirmation, accepts from the debtor payment in full of his debt, interest and costs, it is an election on his part to restore what he has purchased. It would be a singular rule of equity that would sanction such a proceeding, and the conscience of the chancellor would trouble him in the effort even to consider favorably such a proposition.

The chancellor is only asked in this case by the surety to compel the creditor, who has been fully paid, to restore that which has been obtained by the latter under a judgment that this surety has been compelled to pay at the instance of the creditor. If paid by the debtor the right to restoration will apply, whether the property sold was subject to redemption or not. The rights of a plaintiff who purchases are as sacred as those of a stranger; but he may elect to take the money for which the judgment was rendered and under which the purchase was made, and when this is done a court of equity will divest him of the title. In this case he was allowed to remove the lien on the property for the taxes due when he obtained his whole debt from the surety, or if paid by the debtor, the lien for taxes only exists upon it in favor of the state and city, and if paid by the appellee, the purchaser, he has the same liens the city and state had, nothing more.

In this case, however, the surety who paid the debt is entitled to be substituted to all the rights of the creditor. He is not asking to modify or vacate the judgment, but is in fact asking that the judgment be maintained to enable him to obtain the benefits resulting from it. But it is argued that the surety was sued by Judah, and in that action the latter set forth the order of confirmation, allowing him to pay the taxes, that they amounted to a larger sum than his bid for the property, and further, that the sale was not only confirmed, but a deed made, and therefore the surety is estopped from setting up any claim by way of substitution or otherwise; that Bickel admitted everything alleged in Judah's petition is conceded, and that upon his admission or failure to deny a judgment was rendered against him for $2,500, the full amount of the debt, interest and costs, which he has since paid.

This he was compelled to do, because the facts alleged by Judah were true, and the latter, although the purchaser of the property, had not received one dollar of his debt. Bickel, the surety, had no cause of action, either against Reamer or Judah, until he paid this debt, unless against his principal for indemnity. When the surety has paid the debt in full, and as Judah, in his action against him, alleged that he was permitted to pay the taxes without even an allegation that he had paid them, why should not the surety be allowed to pay the taxes and take the property, or if Judah has paid them, why should he not be allowed to refund the taxes with the interest and take the property, or subject it to the payment of his debt? It is true in the action on the supersedeas bond that the appellant might have tendered the money and demanded the right of subrogation, but this he was not compelled to do; and after satisfying the debt he had the equitable right to avail himself of any security in the hands of the creditor to indemnify himself against loss.

The appellee says that he received nothing; if not he can lose nothing. He has his debt, interest and costs, and what more is he entitled to receive, either in a court of law or equity? The creditor, who is the plaintiff in the action, and becomes the purchaser under his judgment of the land of his debtor, and who afterwards recovers the full amount of his debt, elects to restore what he has purchased to his debtor, and what in fact is in equity, by reason of the payment of the property of the debtor. Besides, in regard to sureties, it is a well settled rule that when "A surety who satisfies the debt for which he is liable, is entitled to have from the creditor whose debt he pays the securities which such creditor has obtained from the debtor; and if such securities are not voluntarily given up, it is the right of the surety to come to this court to have such security delivered up." *Goddard v. Whyte*, 2 Giff. 449; Brandt on Suretyship (1st Ed.), § 263. "As soon as the surety has paid the debt, an equity arises in his favor to have all the securities, original and collateral, which the creditor holds against the person or property of the principal debtor, transferred to himself, and to avail himself of them as fully as the creditor could have done; for the purpose of obtaining indemnity from the principal, he is considered as at once subrogated to all the rights, remedies and securities of the creditor; * * * and

entitled to enforce all his liens, priorities, and means of payment, as against the principal, and to have the benefit even of securities that were given without his knowledge." 1 White & Tudor Leading Cases in Eq. 136, notes to *Dering v. Earl of Winchelsea.* It is the right of the surety to stand in place of the creditor in all cases; this is the general rule. De Colyar on Guar. & Prin. and Sur. (Morgan's Ed.) 331, note.

"There are many cases in which a surety, paying a debt, will be entitled to stand in the place of the creditor, or to obtain the full benefit of all the proceedings of the creditor against the principal." 1 Story's Equity Jurisprudence 540. The surety in this case is not seeking to disturb the judgment, but to avail himself of all the rights the creditor has obtained under it by reason of his (the surety) having paid in full the debt due the creditor. We have seen that the debtor himself, upon paying the debt to his creditor, would have been entitled to a restoration of his land upon the payment of the taxes, either to the tax-gatherer or to the creditor if he has paid them, and if so it is plain the surety must have the relief sought. This relief is based not only on the principle of natural justice, but is that character of remedial justice the chancellor should delight in administering.

This judgment must be reversed and the cause remanded with directions to require the appellee, Judah, to surrender the property purchased, that it may be sold to satisfy the debt paid by this surety, first paying the taxes, if any, due on the property that may have been paid by Judah. The original opinion is to this extent modified, and the opinion now delivered substituted therefor. This mandate is based on the control record before us, the demurrer presenting the question arising upon the whole case.

If any fact has transpired outside of the record, showing that the surety has been indemnified or not entitled to the relief, then the overruling of the demurrer should not preclude such defense. The reason that the facts of the record are determined is that the case has been fully argued on both sides, and the entire question presented by the demurrer, and assuming the facts as they now appear and are stated by the appellee, the appellant is entitled to recover.

Barrett & Brown, for appellant.

Russell & Helm, for appellee.

[Cited, *Ryan v. Logan County Bank,* 132 Ky. 625, 116 S. W. 1179, 119 S. W. 768.]

JOHN DILS, JR. v. HENRY MAY.

[Kentucky Law Reporter, Vol. 3—765, as Dills v. May.]

Declarations a Part of the Res Gestae.

All declarations, made at the same time the main fact under consideration takes place and which are so connected with it as to illustrate its character, are admissible as original evidence; but where one who is charged with participating in a tort in plundering a store, comes into town where the store is with the plunderers, but takes no part in aiding them and during such plundering is in another part of the town protesting against the act, and on being asked by the plunderer to loan him his horse refuses to do so, declaring that his horse will not be used to carry off stolen property, and that it will not be used for such purpose so long as his pistol will fire, etc., and such declarations are not shown to be made other than in good faith, they are admissible in evidence as a part of the res gestae.

APPEAL FROM PIKE CIRCUIT COURT.

April 25, 1882.

OPINION BY JUDGE HARGIS:

This is the second appeal in this case. On the first trial a verdict was rendered for the appellant, but the judgment was reversed at appellee's instance. A second trial was had, which resulted in a verdict for the appellee, and the court having rendered a judgment thereon, dismissing appellant's action, he brings this appeal here seeking a reversal, on the grounds that incompetent evidence was admitted and a suppressed deposition allowed to be read to the jury. See *May v. Dills,* 10 Ky. Opin. 225.

The action was for an alleged participation by appellee in a tort committed by Menifee and his band in the year 1862. It appears that Menifee, with his men, entered Piketon in August of that year, and rifled the store of the appellant, taking from it several thousand dollars worth of goods, and that the appellee had voluntarily or accidentally fallen in with Menifee and come with him to Piketon, and was there when the tort was committed. The testimony relative to appellee's participation in it is conflicting, and with its weight we have nothing to do, as it is sufficient to sustain the verdict, if no illegal evidence has been admitted.

The principal error insisted on is that evidence of what appellee stated after the foragers had reached Piketon, and while they were engaged in robbing the store, was hearsay and therefore incompetent. Mrs. Cecil testified this: "I was at home at upper end of Piketon; saw Henry May about two hours after night or just before Dils passed out of town; May was at our house; during his stay two men came and said Menifee wanted H. May's horse to carry a load on; May replied and said his horse could not carry stolen goods; May left our house in a few minutes."

The evidence of James L. Ratcliff was to the same effect, with this addition, that Menifee's men threatened to press May's horses, and the latter replied to them that "Col. Menifee can't press them as long as my pistol will fire," and they did not press his horses. Lockard testified that "May came down the walk; I met him at the door (of Hamilton House); Mrs. Hamilton said to May: 'They are making the goods fly.' 'Yes,' he says, 'they ought not to do it.'" These conversations occurred a short distance from the store and while Menifee's men were plundering it. Was this testimony of the res gestae, and if so was it admissible? The general rule is that all declarations, made at the same time the main fact under consideration takes place, and which are so connected with it as to illustrate its character, are admissible as original evidence, being what is termed a part of the res gestae, in other words, a part of the thing done. 1 Greenleaf Evidence, § 108, says that when a person does any act material to be understood, "his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as 'verbal acts, indicating a present purpose and intention,' and are therefore admitted in proof like any other material facts."

The nature of the alleged tort is not the only thing to be determined by the declarations of the appellee, who is charged to have incited or aided in its commission; they are admissible to show the intention with which he did any act whereby his connection with the tort is sought to be established. In this case the character of the act of taking the goods is undisputed. It was a tort, but the acts of the appellee in traveling with Menifee and his band to Piketon, and what he said of any acts he may have done while there during the perpetration of the tort, is competent as illustrative of his movements and presence and explain his mo-

tive and object. While the taking of the goods was tortius, and all persons who advised or engaged in it responsible in damages therefor, from which they could not exempt themselves by contemporaneous statement, contrary to the legal nature of their acts, the real issue here is whether the appellee can be held liable, not by reason of the actual taking, but because of his presence as an aider or abettor.

His presence was not necessarily a guilty presence. It may have been from accident, duress, or with the purpose of protecting persons and property, and marked by the best of intentions; and consequently all his declarations, tending to explain his presence, which was not in itself unlawful, made simultaneously with that presence, were admissible evidence as part of the res gestae or acts done by him, and furnish the best if not the only clue to his motive.

It does not follow that the appellee participated or aided in the commission of the tort, from the fact that the goods were taken and he was present, because while the taking was unlawful his presence may have been lawful, and his declarations which throw light on his motive do not therefore render legal what is otherwise necessarily illegal, as supposed by counsel. His silent presence would have tended to connect him with the tort, but, illustrated by the words he then uttered, such an inference was unauthorized; hence the great importance, in a case like this, of treating the words of the actor as part of his acts.

Had he actually broken open the store, or assisted in conveying away the goods, but declared, while doing so, that his purpose was innocent, he would, nevertheless, have been legally liable for the tort. So if he came to Piketon to encourage the taking, and his object in being there was to give countenance to the wrongdoers, his deceitful declarations, made for the purpose of disguising the real object of his presence, could not exempt him from liability; but in all cases, where declarations have been made, simultaneously with the main fact in issue, the jury must judge of the weight, consistency and sincerity of such declarations, as they do with reference to any other competent evidence adduced in the cause. We can, therefore, see no error in the admission of the evidence concerning appellee's declarations.

The certificate of the notary to the deposition of James L. Rat-

cliff was defective, but no exception on that account was filed by appellant until after the expiration of the first term of the court, subsequent to the filing of the deposition; and the court, therefore, erred in sustaining the exception to the certificate. Civ. Code (1876), § 587, subsec. 1. After the exception was sustained the appellee, without an order of the court, caused the clerk to send the deposition by mail to the notary, who amended the defective certificate and remailed it to the clerk, and the latter received and filed it.

It is insisted that it was necessary to obtain an order of court, authorizing it to be done, before the certificate could be amended. But we are of a different opinion. Civil Code (1876), § 588, provides that "if the examining officer's certificate be defective, whether exceptions have been sustained or filed or not," the party for whom the deposition was taken may require the clerk to deliver the deposition or mail it, under seal, to the examining officer, and the only condition precedent to the exercise of this right by the party is the tender to the clerk of money enough to pay postage. The clerk is required to indorse upon the deposition the time of mailing it, and the examining officer the time and manner of its reception, and, if he can truthfully do so, amend his certificate and return the deposition to the clerk, who shall indorse on the deposition the time and mode of its reception. Civ. Code (1876), § 583.

These provisions are intended to avoid the delays which resulted, under the Code of 1854, from omissions to file exceptions, because of insufficient notice or defectively certified depositions, until the case was called for trial. It so often occurred under that code that a deposition, after it had been filed and lain in court for several years, free to the inspection of all parties, was suppressed on an exception to it for defects in the form of the notice, caption or certificate, and that unnecessary delays, inconsistent with justice, were thereby wrought. In order to break down such practices and cure this defect in our civil procedure, it is provided in the present code that no exception, other than to the competency of the witness or to the relevancy or competency of the testimony, shall be regarded, unless it be filed and noted both before the commencement of the trial and before or during the first term of the court after the filing of the deposition.

Hence the exception to the deposition in this case, on the ground that the certificate was defective, ought to have been overruled in the first place, because it was filed too late; and although the exception was sustained, no order of court was necessary to render the amendment of the certificate legal, as Civ. Code (1876), § 588, authorizes amendments to defective certificates, in the manner therein prescribed either before or after exceptions, or at any time after the deposition has been filed, whether court be in session or not. We conceive that this is the only construction of this section of the code which would give full effect to the intention of the law-making power.

Wherefore the judgment is *affirmed*.

Ireland & Hampton, for appellant.

Geo. N. Brown, for appellee.

[Cited, *McLeod v. Ginther's Admr.*, 80 Ky. 399, 4 Ky. L. 276; *Chesapeake & O. R. Co. v. Reeves' Admr.*, 11 Ky. L. 14, 11 S. W. 464; *Louisville & N. R. Co. v. Molloy's Admr.*, 122 Ky. 219, 28 Ky. L. 1113, 91 S. W. 685.]

J. F. DOWDY ET AL. *v.* PRESTON BROS.

[Abstract Kentucky Law Reporter, Vol. 3—760.]

Claim of Infancy Against Appellant.

The claim that appellant was an infant at the time the judgment was rendered is not a ground for reversal when no question is made in the pleadings as to such point. A suspicion of infancy is not enough; it must clearly appear that there is incapacity by reason of minority before a decree should be disturbed.

APPEAL FROM GRAVES CIRCUIT COURT.

April 27, 1882.

OPINION BY JUDGE HINES:

We do not perceive that the refusal of the court below to continue the case on account of the illness of counsel was an abuse of discretion or that it was prejudicial to appellants. There is nothing in the record to indicate that the presence of counsel at the trial would have in any way been beneficial to appellants. The answer of appellees to the petition of W. J. Dowdy had been

filed at a previous term of the court and the time for filing a reply had expired, so that the pleadings were complete, at least W. J. Dowdy would have had no right (except by grace of the court) to file a reply at the term at which the continuance was asked. The allegations of that answer being taken for confessed as to W. J. Dowdy there appears no reason for the postponement of the case as to him, nor does there appear any grounds for the other objections urged in his behalf. It is alleged that W. J. Dowdy purchased the land after the levy of an execution which created a lien in favor of appellees, and that he paid the $50 on the purchase-price after the institution of this action to subject the land to the payment of the appellees' demand. These facts being admitted by failure to reply, no injury was done W. J. Dowdy by allowing to be read the depositions taken in the cause prior to the time of his becoming a party, because no proof as against him was necessary. Whatever claim he has, by reason of his purchase, against Wm. Dowdy or his immediate vendee is protected by the decree which reserves the surplus, after paying appellees' debt, for distribution by the court according to the rights of the parties.

The complaint that appellant, W. J. Dowdy, was an infant at the time of the rendition of the decree is not tenable as a ground for a reversal. No question is made in the pleadings as to this point. He comes in ostensibly as an adult, and the suspicion that he may have been an infant at the date of the decree appears in his deposition in which he states that he is twenty years of age. The deposition is dated July 11, and the decree was entered on the 9th of May following. A suspicion of infancy is not sufficient. It must clearly appear that there is incapacity by reason of minority before the decree should be disturbed. The expression of the witness does not necessarily imply that the day of his declaration is his twentieth birthday, but on the contrary imports that the twentieth birthday was at some time prior thereto. In common speech we say that a person is twenty years of age when speaking of any period between the twentieth and twenty-first birthday.

It appears to us that the evidence is abundantly sufficient to support the finding of the court to the effect that the convey-

ances by William Dowdy were made to defraud his creditors and were without consideration.

Judgment *affirmed.*

Anderson, Brown & Stanfield, for appellants.

Tice & Smith, for appellees.

SAMUEL A. MILLER *v.* MCCRORY, WHITE & CO. ET AL.

[Kentucky Law Reporter, Vol. 3—774.]

Motion to Make Pleading More Specific.

Where a defect in a pleading is not a failure to state a cause of action or a defense, but in stating a good cause of action and a good defense in an improper manner, such defects must be reached by motion to make more specific and not by a demurrer.

Mechanics' Liens.

Laborers, mechanics and material-men, under the provisions of the Act of 1876, are entitled to liens on a building erected or repaired by them or for which they furnished the labor or materials; and where a mortgage is executed after the date of said act the parties to it must be held to have contracted with reference thereto, and such mortgage is second to such liens.

Foreclosure of Mortgage.

A stipulation in a mortgage that the debt should become due, on the failure of the mortgagor to keep up the insurance or to pay rent, is legitimate, and a violation of such stipulation will entitle the mortgagee to proceed to enforce his demand.

Proof in Action on Attachment Bond.

In an action on an attachment bond, the inquiry is as to whether the attachment was wrongfully obtained, and in proving such fact an order dismissing an attachment is prima facie evidence of its wrongful obtention; and if the suit is terminated by a finding in favor of the defendant, on an issue as to the truth of the facts alleged as ground for attachment, the judgment will conclusively establish that the attachment was wrongfully obtained.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 11, 1882.

OPINION BY JUDGE HINES:

The first question to be considered is as to the sufficiency of the pleadings. It is insisted that neither the petition nor the

answer is good. Technically they are not, but the petition substantially sets forth a cause of action, and the answer states a substantial defense. The defect is not a failure to state a cause of action or a defense, but in stating a good cause of action, and a good defense in an imperfect manner. Such defects must be reached by motion to make more specific and not by general demurrer. *Posey v. Green,* 78 Ky. 162. The objection on the part of the cross-appellants that the court struck out a portion of the answer will not avail for reversal, because it does not appear to have been prejudicial to cross-appellants. The pleadings as they now stand present all the issues in an intelligent and effectual manner for the determination of the rights of the parties. The objection by appellant to the refusal of the court to allow the filing of the supplemental petition is not available. The work caused to be done by appellant in completing the mantles, and thereby increasing their value, was done without the sanction of the court, in whose charge the property then was. The amelioration was for appellant's benefit, and having been done without authority from the court, which might have been obtained, there was no abuse of discretion in refusing to allow the filing of a pleading setting up claim for moneys so expended.

As to the question of fraud in obtaining the mortgages, we think the evidence amply supports the finding of the court below, to the effect that there was no fraud in their obtention and that they are founded upon a valuable consideration. We have read with great care the voluminous testimony, and have no doubt that the articles of agreement for the partnership between McCrory, White and Charles Miller were understandingly entered into, and that the first mortgage was made in pursuance to the agreement for the partnership previously entered into.

There was no error in discharging the attachment. The evidence is not sufficient to sustain it upon any of the grounds alleged in the petition. Nor was there any error in adjudging against appellees $728.08 instead of $853.80, the amount stated in the mortgage, for the evidence is sufficient to establish that the difference between these sums had been paid to appellant.

The court properly adjudged that the laborers, mechanics and material-men held the first lien on the property covered by the mortgages. The mortgages were executed after the passage of

the act of 1876, giving a lien in such cases to such persons, and the appellant must be held to have contracted with reference thereto. The case of *Goodnight v. Adsitt* has no application to this state of facts, and as to this case the act of 1876 is not unconstitutional.

But the court erred in so much of its judgment as dismissed that portion of appellant's petition which sought a foreclosure of the mortgage for $1,000. The stipulation in the mortgage that the debt should become due, on the failure of appellees to pay the rent or to keep up the insurance, is legitimate, and a violation of this agreement, which is shown by the evidence, entitles appellant to proceed immediately to enforce his demand. The rulings of the court in sustaining exceptions to depositions, where wrong, were not prejudicial to appellant, and will not, therefore, entitle him to have such rulings reversed.

The court did not err in ordering a sale of the attached property during the litigation. If it appeared to the court, as we must presume it did, that by reason of the cost of keeping the property it was to the interest of the litigants to sell, the subsequent speculative advance in the value of that character of property will not invalidate the order.

Nor was there any error in failing to expressly adjudge in terms that the order of attachment was wrongfully obtained. That is a matter properly to be determined in an action upon the attachment bond. In such an action the inquiry is as to whether the attachment was wrongfully obtained, and in the establishment of that fact ordinarily an order dismissing an attachment is *prima facie* evidence of its wrongful obtention; and if the suit was terminated by a finding in favor of the defendant, on an issue as to the truth of the facts alleged as the ground for the attachment, then the judgment would conclusively establish that the attachment was wrongfully obtained. Drake on Attachments (4th ed) § 173.

For the error in dismissing so much of appellant's petition as sought to enforce the mortgage for $1,000, or for the amount due thereon, the judgment is *reversed* but *affirmed* in every other particular, both on the appeal and on the cross-appeal of McCrory, White & Co.

John R. M. Polk, A. M. Gazlay, for appellant.

John Mason Brown, R. H. Blain, for appellees.

L. M. LONGSHAW *v.* LINNING & JACKSON.

[Abstract Kentucky Law Reporter, Vol. 3—822.]

Dismissal of Appeal.

The Court of Appeals will dismiss an appeal when from the record it appears that it is prosecuted solely for delay. An affidavit of the appellant that the appeal is not prosecuted for delay will not be considered.

APPEAL FROM CALDWELL CIRCUIT COURT.

May 11, 1882.

Petition for Rehearing.

RESPONSE BY JUDGE HINES:

This case affirmed on motion as a delay case. Appellant files what he denominates as a petition for rehearing which is nothing more than an affidavit to the effect that the appeal is prosecuted in good faith. The code requires that the court, upon such motions, shall determine whether the appeal is prosecuted for delay from an inspection of the record and not from the statement of the appellant as to what his intentions are.

Petition *overruled.*

L. Pepper, for appellant.

H. Burnett, for appellee.

D. H. BALDWIN & CO. *v.* FIRST NATIONAL BANK OF RIPLEY, OHIO, ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—822.]

Title of Personal Property by Purchase and Delivery.

While in some instances the title to personal property may pass as between the parties without delivery of possession when so intended by such parties, such a transfer of title will not affect an innocent purchaser for value. The first purchaser by leaving the possession with the vendor enables him to perpetuate fraud by making a second sale and where the second purchaser obtains possession without any notice of the prior claim he will be protected.

APPEAL FROM FLEMING CIRCUIT COURT.

May 12, 1882.

OPINION BY JUDGE HINES:

Appellants purchased of Chase certain unfinished pianos, designated by numbers, which Chase was to finish and ship to appellants at Cincinnati, Ohio, a place different from the place of manufacture, and for which Chase was to receive credit on his indebtedness to appellants. After the completion by Chase of one of the pianos and while it remained at the manufactory, Chase sold and delivered it to Vance who had no notice of the contract between appellants and Chase. Vance paid cash and executed his note for $400, the remainder of the purchase-price, which note was by Chase sold to and discounted by appellees without notice to them of the agreement between appellants and Chase. Appellees brought suit on the note against Vance, who answered alleging that appellants claimed to be the owners of the piano under the contract of purchase from Chase, asking that appellants be made parties and that they be compelled to litigate with the bank their claim, Vance expressing a willingness to pay the amount of the note to whom the court might adjudge. Appellants being made parties and asking that they be adjudged entitled to the amount due from Vance the court rendered judgment in favor of the appellees.

The only question we need consider is whether Vance by his purchase obtained title to the piano. If Vance obtained title so that the piano could not have been recovered from him, appellees, who were innocent purchasers of the note, are protected under the title of Vance.

In many instances the title may pass as between the parties without delivery of possession when such appears to have been the intention of the parties, but such a transfer of title will not affect an innocent purchaser for value. The first purchaser by leaving the possession with the vendor enables him to perpetuate fraud by making a second sale, and where the second purchaser obtains possession under his purchase without notice of the prior claim he will be protected. Both purchasers are equally innocent in fact and Chase being insolvent the entire loss must fall on the one or the other, and as the opportunity to make the

second sale was furnished by the act of the first purchaser in allowing the possession to remain with the vendor a court of equity will not transfer the burden of the loss to the second purchaser whose equity is strengthened by possession. This view of the case proceeds upon the assumption that as between appellants and Chase the title passed without delivery although it is doubtful if the facts justify the conclusion.

Judgment *affirmed.*

Thos. L. Given, for appellants.

W. S. Botts, J. P. Harbeson, W. H. Cord, for appellees.

ELIZABETH MAYS ET AL. *v.* W. N. HANNAH ET AL.

[Kentucky Law Reporter, Vol. 4—50.]

Statute of Limitations.

The cause of action of a remainderman for the possession and recovery of real estate does not accrue until the death of the life tenant and the statute of limitations begins to run against such remainderman from the date of such death.

Division of Ancestor's Real Estate.

Where a testator gave land to his widow for life with a fee to his four children and before the partition of the land the widow and three of the children conveyed certain portions of the land to the husband of the other child, evidently intending the conveyance for the benefit of the grantee's wife as one of the owners, and the husband of such child conveys 3½ acres thereof to a college which placed valuable improvements thereon, and several years thereafter and after the death of the husband in a partition between the heirs of the ancestor such child accepts said 3½ acres as a portion of the real estate, she knowing that her husband had conveyed the same and that his grantees were claiming to own it and had improved it, such college being purchasers in good faith had the right to say that the interests of the three heirs conveying to its grantor at least passed under the conveyance to it, and it could have compelled said heirs to have conveyed to such child, wife of its grantor, sufficient land adjacent to her own tract as would make up the deficit by reason of the conveyance to the college by her husband.

APPEAL FROM GRAVES CIRCUIT COURT.

May 13, 1882.

OPINION BY JUDGE PRYOR:

In 1842, John Anderson, who owned the northeast quarter of Sec. 10, Twp. 3, adjoining the town of Mayfield, departed this life, leaving his widow and four children surviving him. His daughter, Elizabeth, prior to her father's death, married R. L. Mays, who is also dead. Shortly after their marriage she and her husband moved on a part of this land, including the land in controversy.

Anderson, by his will, gave his estate to his wife for life, and at her death to be divided between his children. In the year 1851, Mrs. Anderson and her three sons conveyed directly to R. L. Mays, the husband of the appellant, Elizabeth, the land upon which she and her husband lived, and on the face of the deed it is manifest that it was to be considered as a part of the inheritance, or rather a part of the devise to Mrs. Mays from her father and to be accounted for by her in the final division of the estate. No division was then made and none attempted to be made until the year 1866. The husband of Mrs. Mays died in 1861. Prior to his death, in the year 1853, he conveyed by quitclaim deed, 3½ acres of the land conveyed to him by Mrs. Anderson and her sons, to the trustees of the Mayfield Presbyterian Seminary, and these trustees conveyed it to the trustees of Graves College. Valuable improvements were made on this lot in the way of college buildings, and no claim set up adverse to the claim or title derived by the trustees from Mays, until the year 1875, when this action was instituted by Mrs. Mays to recover the land. Her mother, who owned a life estate, did not die, however, until the year 1864, and therefore, the statute did not begin to run against Mrs. Mays until her mother's death, she having no cause of action until that time. It is certain that her mother and brothers had no right to convey the land to her husband, and that his conveyance to the trustees of the college did not deprive her of title to her full share of the estate. The appellant knew, however, that her husband had sold this land and that these parties (trustees) were claiming to own it by reason of this purchase. No division of the land left by her father was made until five years after her husband's death, and when that division was made she saw proper to accept, as a part of the land to which she was entitled,

this 3½ acres of land, then in the possession of the trustees of the college, under the deed from her husband.

Her mother and brothers had conveyed this land to her husband, and as these trustees (appellees) were purchasers in good faith, they had the right to say that the interest of her brothers, which was three-fourths at least, passed under this conveyance, or if not, having entered upon this land of but little value and erected upon it valuable buildings, and no division having been made between the heirs, the trustees could have compelled the brothers of Mrs. Mays to have conveyed her as much land, adjacent to her own tract, as would have made up the deficit, by reason of the conveyance to the trustees by her husband. As there had been no division of the land, why, in a court of equity, did not these appellees have the right to require that this much of the land should be taken from the brothers, or one of them, and allotted to Mrs. Mays, so as to adjust equitably the rights of all the parties. Instead of this the division is had with a full knowledge of all the facts, and without making these trustees parties in any way. The appellant accounts for the land in the division, where she was under no obligation to do so, and in ten years after institutes the present action.

In equity this land could have been left in the quiet possession of the trustees and the brothers made to account for their wrongful acts in conveying it to their brother-in-law, instead of conveying it to their sister, and there is no reason why the chancellor should not, under the circumstances, require Mrs. Mays to seek this equitable relief.

Under this view of the case the appellant has no reason to complain of the mechanics' liens that were allowed upon the property. As she has no claim upon the land, the error against the trustees will not authorize a reversal in her favor.

Judgment *affirmed.*

John A. Mayes, W. A. Turner, A. Duvall, E. W. Hines, for appellants.

Wm. Lindsay, for appellees.

[Cited, *Davis v. Wilson,* 115 Ky. 639, 25 Ky. L. 21, 74 S. W. 696.]

GEORGE McCARTY ET AL. v. CHAS. TATURN ET AL.

Parties to Actions.

Civil Code (1876), § 24, provides that "parties who are united in interest must be joined as plaintiffs or defendants," and § 25 provides that "if the question involve a common or general interest of many persons and because they are so numerous, one or more of them may sue or defend for the benefit of all."

Jurisdiction of the Chancery Court.

In a suit by parties to recover the amount paid by them for lottery tickets issued and sold to them and a large number of other persons whose names are alleged by plaintiffs to be unknown to them, the total sum due to all of such purchasers can not be alleged so as to raise the amount to give the court jurisdiction. The purchase is a separate and distinct transaction and when the sum for which plaintiffs ask for judgment is only $3, the Louisville Chancery Court has no jurisdiction.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 13, 1882.

OPINION BY JUDGE LEWIS:

This is an action brought by appellants in the Louisville Chancery Court to recover of appellees the amount paid by them for lottery tickets issued and sold by appellees to them and a large number of other persons whose names, it is alleged in the petition, are unknown to appellants.

It is manifest that the Louisville Chancery Court has no jurisdiction of the subject of the action, and the petition was properly dismissed, unless Civ. Code (1876), §§ 24, 25, can be properly construed to apply to this case. For although the aggregate amount for which the lottery tickets are alleged to have been sold to the various holders is sufficient to give jurisdiction, the amount sued for and claimed by appellants in their own right is only $3.

By § 24 it is provided that "parties who are united in interest must be joined as plaintiffs or defendants," and § 25 is as follows: "If the question involve a common or general interest of many persons," or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, "one or more may sue or defend for the benefit of all." We are of the opinion that the "common or general interest of many

persons" in the meaning of the code, is such as that a separate judgment in favor of one of them would not be proper, or indicate such relation to or connection with the subject matter by all the persons interested as to preclude a separate action by any one of them.

As appears from the petition in this case the purchase of the lottery tickets by each one was a separate and distinct transaction. And while appellees may be liable to all the holders of the tickets for the several amounts paid therefor by them respectively, they, if liable at all, are liable to each one of them, and each one may maintain a separate action and obtain a personal judgment for the amount paid by or due to him without prejudice to the rights of the others.

It is not necessary to consider the other questions raised by counsel, as the chancery courts clearly have no jurisdiction of the subject of the action.

The appeal is therefore *dismissed.*

Harlan & Willson, Matt O'Doherty, for appellants.

D. W. Sanders, W. O. & J. L. Dodd, J. & J. W. Rodman, for appellees.

JOHN W. MENZIES ET AL. *v.* FARMERS' BANK OF KENTUCKY.

[Abstract Kentucky Law Reporter, Vol. 3—822.]

Indorsement of Bill for Collection.

Where a bill is indorsed "Pay A B or order on account of G C & D" it operates as notice that A B holds or held it in trust for G C & D and that neither he nor his indorsers had any property in it.

Notice to Bind Drawer and Indorser for Nonpayment.

Notice of protest for nonpayment should be mailed to a drawer and indorser at his last known postoffice address and where at the time a bill or note is drawn or indorsed the party resides at a certain place the holder may presume that he resides there at its maturity and send his notice of protest accordingly unless he has received information of his change of residence. And where there is more than one postoffice where the indorser is in the habit of receiving his letters, notices may be sent to either of such addresses.

APPEAL FROM KENTON CIRCUIT COURT.

May 13, 1882.

OPINION BY JUDGE PRYOR:

The Farmers' Bank of Kentucky brought this action upon a bill of exchange drawn by Wm. Timberlake on H. C. Timberlake in favor of John W. Menzies for $7,140, dated October 10, 1877, payable in four months. The bill was accepted by H. C. Timberlake, indorsed in blank by Menzies, delivered to Taylor & Sons, and discounted by the Farmers' Bank. A judgment by default was rendered against the acceptor, H. C. Timberlake. The drawer, Wm. Timberlake, and the indorser, John W. Menzies, made defense and a trial was had, which resulted in a verdict and judgment against them for the amount of the bill from which they prosecute this appeal. The defense relied on in the court below was: 1. That the Farmers' Bank was not the owner of the paper. 2. The want of notice as to the dishonor of the paper. As to the question of ownership, it clearly appears that the appellee, the Farmers' Bank, was the holder of the paper at the institution of the action, and from the testimony of the cashier, corroborated in every particular by others, it is evident that the appellee was the owner of the paper in good faith and had discounted it at the instance of Taylor & Sons in order to settle a debt with the Farmers' Bank for which the Taylors, individually, and H. C. Timberlake were jointly liable. There is no evidence that Taylor & Sons own the paper or have any interest whatever in it, but on the contrary the testimony conduces to show that the Taylors obtained the bill with the view of having it discounted, so that H. C. Timberlake might assume on his own account his portion of the large debt owing jointly by them to the Farmers' Bank. It appears that the Farmers' Bank held the note of the Taylors and H. C. Timberlake for $22,000 that matured in October, 1877. In payment of this note the Farmers' Bank took the note of John and James B. Taylor for $12,080, and the bill in controversy for the balance, discounting the latter paper at Taylor's instance. The large note for $22,000 was then charged to Taylor & Sons and that firm was credited by the proceeds of the note for $12,080 and the proceeds of the bill now in controversy. There is no evidence of any knowledge on the part of the Farmers' Bank as to any arrangement between these parties as to the large debt due by the Taylors and H. C. Timberlake or as to the proceeds of the bill on which the appellees have been made liable.

This paper was received from Taylor who presented it to the bank for discount and the proceeds credited in part payment of the large note for which H. C. Timberlake was liable. H. C. Timberlake, for whose accommodation the paper was drawn and indorsed, paid in this way his one-third of the large note, and it is not pretended that the appellee was entitled to the money; and the only defense made to the title of the bill or the right to the proceeds is that Taylor & Sons and not the bank own the paper. This defense is not sustained by the proof, unless the indorsement to Taylor & Sons makes that firm the owner of the paper. After it had been discounted by the bank it was sent to the banking house of Taylor & Sons for collection, with this indorsement, "Pay James Taylor & Sons, or order, for account of Farmers' Bank of Kentucky, Frankfort.

Grant Green, Cashier."

This was only an indorsement authorizing the banking house of Taylor & Sons to collect the bill for the Farmers' Bank and did not invest them with the title. "Where a bill was indorsed 'Pay J C, or order, on account of B G & S,' it was held that it operates as notice that J C held it in trust for B G & S and that neither he nor his indorsers had any property in it." Daniel on Neg. Inst. 516. So in any view of the case we think it plain that the appellee is the owner of the bill, and being the owner and holder we see no reason why the action was not properly brought against all the parties to the paper.

The remaining question to be decided is the sufficiency of the notice to the drawer and indorser of its non-payment. The bill was duly presented for payment at the banking house of Taylor & Sons, and notice of protest mailed on the same day to the drawer and indorser. The notice was inclosed to William Timberlake, Florence, Boone County, Ky. Florence was his post office at the time the bill was signed and had been for many years, and according to his own testimony he had received his mail at that post office up to the 12th of November, 1877, within three or four months of the time of protest. There is no evidence that the appellee, or its agents, or the notary knew of the change in his post office. He says in a conversation with Taylor he told him there was a grocery, post office, and blacksmith shop at Greenwood Lake on the southern road, but does not pretend

to have given him any direction to send his letters or notices to that post office, and on the other hand both Taylor and the notary swear they did not know such a post office as Greenwood Lake was in existence. "If at the time the bill or note is drawn or indorsed the party resides at a certain place the holder may presume that he resides there at its maturity and send notice accordingly." 2 Daniel on Neg. Inst. 75. The holder should be permitted to act in good faith upon the presumption of his continued residence unless he has received information of his change of residence. In this case the notary and the bankers, Taylor & Sons, knew that Florence, a town about half a mile from Wm. Timberlake's residence, had been his post office for many years. They had enclosed notices and addressed letters to him at that place and there is nothing in this record showing that they knew his post office had been changed, or that as prudent business men should have been aware of such a fact. The notice was, therefore, sufficient to charge him as drawer and the instruction for the plaintiff to the effect that he was responsible "unless after the date and discount of the paper and before the 13th of February, 1878 (the time of protest), Timberlake had changed his post office from Florence to Greenwood Station and that James Taylor & Sons, or either, or the notary, or the plaintiff knew that he had changed his post office," was properly given and left the jury to determine the only question really at issue on the question of notice to Timberlake. As to the notice given the indorser (Menzies) it appears from the testimony that there were three post offices nearer to his place of residence than the Covington post office, to which the notice was mailed. The indorser had a box in the post office at Covington and one in the office at Falmouth, and from the weight of the testimony the office to which his mail matter was generally sent seems to have been at Falmouth although there is testimony, if competent, conducing to show that notices with reference to his banking transactions were usually enclosed to him at Covington. This question it seems to us is, however, made immaterial from the testimony before us. Taylor, one of the firm of Taylor & Sons, states that he was directed by the appellant, Menzies, to enclose notices to him at Covington and that he had been in the habit of doing so for years. This is not denied by the appellee except in the statement that his mean-

ing when giving this direction was with reference to his own paper. It seems that no such explanation was given the banker, nor any limitation placed on his action with reference to such notices. The direction to send was general and to a point at which the appellant obtained mail matter, and where notices had been sent to him by the banking house of Taylor & Sons for years without complaint, and this direction having been given, it was incumbent on the appellant to show that the banker knew it applied only to paper on which the appellant was primarily liable. Leaving out of view therefore the proof as to the usual custom of the banks at Covington in sending notices to the appellant, or its competency, when offered, it is manifest that under the direction given it was Taylor's duty to enclose the notice of protest, directed to the appellant's address at the Covington post office. He owned or had a box in that office; had received notice of the maturing of his own paper from this box; had directed notices to be sent to him at that post office, and if there had been no direction we are not prepared to say that the notices were insufficient. "Where there are two or three post offices where the indorser is in the habit of receiving his letters, notices may be sent to either." 2 Daniel on Neg. Inst., § 1028. Taylor informed the notary of the directions given by the appellant, and whether so or not, if the bank had sent the notices to Falmouth, after this instruction to Taylor, it would at least be doubtful whether a recovery could be had against the indorser. Besides, the court below in an instruction given at the instance of the defendant told the jury "to disregard the evidence of Taylor as to the direction given him by the appellant, provided that they believed from the evidence that this statement of Menzies only included, and was intended to include notices of the approaching maturity of paper, held and owned by Taylor & Sons upon which Menzies was maker." This instruction was more favorable than it should have been, and certainly, leaving to the jury the question of intention on the part of the appellee when giving the direction, the issue was made as the appellant desired it should be, and we, therefore, see no reason to complain of the action of the court on this branch of the case.

The instruction controverted the exercise of a right under a general direction to send notices to a particular post office, by the

intention of the appellee, at the time the direction was given. This we think was error to the prejudice of the appellee and not to the appellant. It is also insisted that the bill was never delivered, or if delivered, was made with certain conditions not expressed on the face of the paper. The bill was delivered to Taylor and by him discounted at the Farmers' Bank, or if not it was signed by all the parties for a particular purpose, and when in the hands of Taylor was discounted by the appellee without any knowledge of a parol understanding between the parties to the bill, and being an innocent holder, the bank can not be affected by any such agreement. Wm. Timberlake's own testimony, when considered alone, did not relieve him from liability and the reading of his answer to the jury could in nowise have prejudiced the appellant, Menzies. Timberlake being liable and Menzies being the indorser the only question as to the latter was whether he had been notified of the non-payment of the bill. The refusal to permit Wm. Timberlake to state that he was only an accommodation indorser could not have changed the result, as it is evident that both of the appellants were on the paper at the instance of H. C. Timberlake and for his accommodation; still they are both liable to the bank by reason of their being parties to the bill, and if Taylor & Sons have made an improper use of the paper, or its proceeds, the remedy is against them and not against an innocent holder. The statement by Green as to the character of the indorsement to Taylor & Sons and that it was for collection, if incompetent, and we do not think it was, did not determine or control the question of title to the bill, as the indorsement itself shows the purpose for which it was made. There are other errors assigned not necessary to be considered for the reasons already given.

We have again considered the question as to the ownership of the bill sued on, and there is no escape from the conclusion reached in the original opinion, unless we discredit the statement of the cashier of the Farmers' Bank and we find nothing in the record that would justify such a finding either by a court or jury. The question of notice has also been fully discussed, the proof showing notice or the existence of proper diligence in that regard by the holder or the notary, both as to the drawer and indorser. The object of Taylor was to relieve himself of liability for Timberlake and to accomplish this the appellant became the

indorser of the paper. While he was ignorant of the purpose in view or the nature of the transaction between Taylor and Timberlake, and the case may be one of hardship upon him, still the rights of the holder can not be affected by it and the judgment must be *affirmed.*

Stevenson & O'Hara, for appellants.
McKee & Finnell, for appellee.

ISAAC TURNER *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 3—794.]

Criminal Law—Refusing a Continuance.

The Court of Appeals can not reverse a homicide case on account of the fact that the trial court refused a continuance where only that part of the record is before it showing the affidavit for the continuance and its denial, for the whole record may show that the witness for whose attendance the continuance was asked would testify only to facts cumulative in character or not material to the issue.

APPEAL FROM LAFAYETTE CIRCUIT COURT.

May 16, 1882.

OPINION BY JUDGE PRYOR:

It is not necessary to determine the question as to the rights of the appellant to prosecute an appeal in a case where no appeal was prayed in the court below, as there is no record before us showing the evidence upon which the conviction was based.

The sole ground for a new trial, and the only exception taken in the court below, was upon the refusal of the court below to grant a new trial, on account of the absence of a witness. No bill of exceptions was filed or tendered, and the affidavit shows that other witnesses of more importance to the accused were either examined, or could have testified as witnesses on the trial. Whether they did testify or who did testify in the case does not appear, and there is no mode of ascertaining the effect of the statement of this witness or the extent to which the accused was prejudiced by the refusal to continue the case, in the absence of the testimony upon which the conviction was had. There are no exceptions to the instructions, and if any had been made they contain the law

in regard to homicide and the accused was properly convicted if the facts authorized it. The sufficiency of the evidence was with the court and jury below, and what that evidence was this court can not know, as no part of it is found in the record. We are asked to reverse because the court refused a continuance, and only that part of the record is here showing the affidavit for the continuance, and the denial of the motion by the presiding judge.

Any ruling of the court below might be regarded as error, and a reversal had if only parts of the record are brought to this court. The accused would always omit to bring the part of it here conducing to show that the judgment was proper. A part of a record might sometimes justify a reversal when the error committed was such as could not possibly be cured by any subsequent proceeding, but this can not apply to a mere question of evidence, and to dispense with the bill of exceptions in such a state of case would, in effect, enable parties to reverse judgments in every instance where an appeal is prosecuted. It appears from the record in this case that the accused is to suffer the penalty of death for the commission of the crime of which he has been convicted, and from the statement of counsel, who appeared in this court in his behalf, the discovery of testimony since the trial has thrown much light upon the matter of his defense, and, if true, would probably result in acquittal, or in mitigation of his punishment. The issue in this case is of such importance, when considered with reference to statements of counsel made here, as to require additional investigation, not with a view of ascertaining whether an error was committed by the enlightened judge who tried this case below, but of ascertaining the existence of certain alleged facts not heard below that if true would at least lessen the punishment. But the helpless condition of the accused, the severity of the punishment, and the want of knowledge on the part of counsel, who were only appointed to defend for him, as to the true history of the case, and the failure to make such a record as would enable him to appeal, are arguments to be addressed to the executive and not to the judicial department of the state.

The appeal must, therefore, be dismissed.

Sharp & Beauchamp, for appellant.

P. W. Hardin, for appellee.

MATT TAYLOR *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 3—783.]

Criminal Law—Grand Larceny.

The Gen. Stats. (1881), Ch. 29, Art. 1, § 12, which authorize an increased punishment for grand larceny where former convictions are alleged and proved, is not in violation of the state constitution which provides that no one shall for the same offense be twice put in jeopardy.

APPEAL FROM FAYETTE CIRCUIT COURT.

May 16, 1882.

OPINION BY JUDGE HINES:

On an indictment for grand larceny, charging two prior convictions for like offenses, appellant was found guilty of the offense charged, and it was also found that he had been twice convicted and sentenced for like offenses, and the punishment for the last offense was fixed at confinement in the penitentiary for life. The punishment for grand laceny is, in ordinary cases, confinement in the penitentiary from one to five years.

This increased punishment is authorized by Gen. Stat. (1881), Ch. 29, Art, 1, § 12. The only question is, whether the provision of the statute is in conflict with the constitution which provides that no one shall, for the same offense, be twice put in jeopardy of life and limb. If we had any doubt of the constitutionality of this statute we would feel constrained to solve it in favor of the previous rulings of this court, and to hold the act constitutional. In *Mount v. Commonwealth,* 2 Duvall (Ky.) 93, such a law was held constitutional. The increased punishment for the last offense is no part of the penal consequences of the first and second, but applies exclusively to the last as aggravated by its repetition of the same crime. None of the evidence necessary to a conviction on the first or second indictment is heard on the last. Nothing is competent except the evidence that the former convictions had been had and for like offenses. There is no trial on the issues made on the former indictments. The accused is not required a second time to make response to the charges of guilt in those indictments, but proof of the former convictions fixes

his status, and to this status the increased punishment is applied without regard to whether the former convictions were rightful or wrongful.

Judgment *affirmed.*

J. H. Beauchamp, for appellant.

P. W. Hardin, for appellee.

[Cited, in *Boggs v. Commonwealth,* 9 Ky. L. 342, 5 S. W. 307; *Chenowith v. Commonwealth,* 11 Ky. L. 561, 12 S. W. 585; *Hall v. Commonwealth,* 106 Ky. 894, 21 Ky. L. 520, 51 S. W. 814; *Herndon v. Commonwealth,* 105 Ky. 197, 20 Ky. L. 1114, 48 S. W. 989, 88 Am. St. 303; *Hyser v. Commonwealth,* 116 Ky. 410, 25 Ky. L. 608, 76 S. W. 174; *White v. Commonwealth,* 20 Ky. L. 1942, 50 S. W. 678.]

F. M. JOPLIN *v.* MARGARET CORDREY.

[Abstract Kentucky Law Reporter, Vol. 4—56.]

Partnership Losses After Death of a Partner.

The estate of a partner should not be held liable for any partnership losses occurring after his death except such as may have originated from the insolvency of parties who were indebted to the firm at the time of such death.

Heir of a Partner May Sue for Partnership Settlement.

Although not a partner, an heir of a partner may sue and maintain an action for a settlement of the partnership and for an accounting.

APPEAL FROM HARDIN CIRCUIT COURT.

May 20, 1882.

OPINION BY JUDGE PRYOR:

It is hardly probable that a business like that engaged in by the husband of the appellee and the appellant would yield such an immense profit in the course of two years, and while the statements of the appellant conduce to such a conclusion the facts of the case are all adverse to them. The parties at the time they formed the partnership only placed in the concern as capital $400 or $500 each, and in two years the profits realized is estimated in the thousands. We think the exaggerated statements made by the appellant were more for the purpose of eluding the vigilance

of creditors by inducing them to believe the firm was perfectly solvent than from any other motive. He was borrowing money to pay debts and induced the appellee, no doubt, to make him the loan of $800 on that idea and came near involving her in the partnership. He knew the condition of the firm and ought not to have held out such false values and for that reason in equity should be compelled to pay the debt of $800 with its interest; nor ought the estate of appellee's husband or the appellee be made liable for any losses occurring after the death of her husband except such as may have originated from the insolvency of parties who owned the firm prior to the death of Cordrey. There is no excuse on the part of the appellant for his ignorance in regard to the business of the firm, and to permit him to take advantage of the appellee under the circumstances would be inequitable, particularly when he undertook to continue the business, replenish the stock and transact its business as if no dissolution had occurred. It appears, or he so alleges, that with the firm assets he purchased or erected two dwellings on certain lots in the town, one conveyed to or in the possession of the appellee and the other in his possession. Now if the firm was really insolvent at the death of the husband of the appellee, and the appellant has paid the debts, or the creditors are seeking to subject the assets to their payment, there is no reason why both pieces of property should not be embraced in or regarded as assets belonging to the firm, and for that reason, if no other, the action for a settlement should not have been dismissed either in behalf of the appellant or the appellee. The appellee was in court insisting upon a settlement and was entitled to have one, although she was not a partner, nor do we think from the proof that she ever entered into the partnership, but she is interested in the result of the settlement and no objection has been made to the character of the action or the manner of uniting the several causes of action. It is perhaps proper under the circumstances to have the whole matter settled up, and in any event, so far as this record shows, the appellee must have her $800 or the amount of her loan refunded to her. The case must be reversed on both the original and cross appeal and should on its return go to the commissioner, the books of the concern be submitted for investigation, and the condition of the firm ascertained at the death of Cordrey so that the

chancellor may know whether the appellant was speculating upon the credibility of the appellee and the firm creditors, or was in fact realizing the enormous profits asserted by him as a fact on and after the death of his partner.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion. Each party to pay his own costs.

Montgomery & Poston, for appellant.

Wilson & Hobson, Brown & Chelf, for appellee.

S. HODGE v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—822.]

Criminal Law—Indictment for Selling Liquor.

An indictment for selling liquors is sufficient which charges the act of selling and specifies the time and place of sale, the quantity sold and the person to whom sold, and that the district wherein the act was committed was governed by the local option law; it is not necessary to allege negatively that the law had not been repealed.

Taking Effect of Local Option Law.

The law takes effect as soon as the certificate of the examining board is entered in the order book of the equity court.

Local Option Law Applies to Manufacturers.

The provisions of the local option law apply to all persons, including distillers or manufacturers of such liquors, the sale of which is prohibited by the law, whether licensed by the United States government or not.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

May 23, 1882.

OPINION BY JUDGE HARGIS:

The appellant, Hodge, was indicted for unlawfully selling spirituous liquors in Marion dist. No. 1, of Crittenden County, on the 18th of December, 1880, "after a majority of the legal voters in said district at the August election, 1877, had voted against the sale of spirituous, vinous, or malt liquors in said district, and the vote had been compared and certified to the Crittenden County Court by the board of examiners of said election and the

certificate thereof had been entered upon the order book of said court as provided in the law, contrary to the form of the statute in such cases made and provided." No demurrer was filed to the indictment, a jury was waived, and the law and agreed facts were submitted to the court. Judgment was rendered against the appellant for $50.10 from which he appeals.

It was agreed that the appellant was a licensed distiller under the laws of the United States, and had sold at the time and place charged one quart of whisky to the person named in the indictment and that at the time of the sale "what was known as the local option law did and does now exist" in said precinct. The question presented on this state of case is whether the indictment charges a public offense.

It is provided in § 6 of an "Act to regulate the sale of spirituous, vinous or malt liquors in this commonwealth," Gen. Stat. (1881), p. 947, § 6 (appendix), that, "After the entry of the certificate of the examining board, as above provided for, in the order book of the county court, it shall be unlawful for any person to sell any spirituous, vinous or malt liquors in the said district, town or city to any person; and any person who sells any such liquors in said district, town, or city shall, upon conviction, be fined the sum of not less than $25 nor more than $100 for each offense." This section applies to all persons, including distillers or manufacturers of such liquors, whether licensed by the United States government or not. And that it does so apply is clearly demonstrated by the exceptions contained in the next section, which provides that, "The provisions of this act shall not apply to any manufacturer or wholesale dealer, who in good faith and in the usual course of trade, sells by the wholesale." The indictment is sufficient because it charges the act of selling and specifies the time and place of sale, the quantity sold and the person to whom sold, and that the district wherein the act was committed, was governed by the local option law. It shows that the local option law was adopted in the year 1877, and the liquor was sold subsequent to that date against the form of that statute. It was not necessary to allege negatively that the law had not been repealed, and as it affirmatively appears that the law was adopted in the district before the act of selling, and that the sale was contrary to the statute, we think the existence of the law is sufficiently alleged.

The law takes effect so soon as the certificate of the examining board is entered in the order-book of the county court, and this fact is explicitly alleged which shows the lawful adoption of the local option law in that district.

Judgment *affirmed.*

Wm. Lindsay, for appellant.

P. W. Hardin, for appellee.

[Cited, *Fitch v. Commonwealth,* 4 Ky. L. 339; *Commonwealth v. Jarrell,* 9 Ky. L. 572, 5 S. W. 763.]

L. F. BRIGHT *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—823.]

Criminal Law—Right of Appeal.

Under the provisions of Crim. Code (1876), § 369, no appeal can be taken from a judgment of a county judge or of a city, police or justice's court after 60 days from the rendition thereof.

APPEAL FROM FLEMING CIRCUIT COURT.

May 25, 1882.

OPINION BY JUDGE PRYOR:

The appeal came too late. Crim. Code (1876), § 369, provides that "No appeal shall be taken from a judgment of a county judge, or of a city, police, or justice's court, after it is satisfied, nor after 60 days from the rendition thereof." So when an appeal is allowed the provisions of the civil and criminal code must govern, in the event the act allowing the appeal does not prescribe the time in which it is to be taken. There is no act giving the unsuccessful party two years to appeal from the judgment of the county judge or county court, and no such limitation should be adopted even by analogy if any other limitation could prevail. The limitation of two years in the county court would prolong the litigation for four years at the instance of either party, and work a great hardship on the party entitled to the judgment. The judgment dismissing the appeal is *affirmed.*

Wm. J. Hendricks, for appellant.

P. W. Hardin, for appellee.

N. BERGMEYER *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 3—823.]

Criminal Law—Sale of Liquor in Greenup County.

2 Session Acts (1878), Ch. 1062, § 2, provides that it shall be a criminal offense to sell or dispose of any spirituous, vinous or malt liquors in Greenup county in less quantities than one-half gallon, and any such offenders will be deemed to have violated the general laws of the state against keeping a tippling-house and subject to the penalties provided for such offenses.

Evidence of Selling Liquors.

In a charge against one for selling spirituous, vinous or malt liquors in Greenup county, under the provisions of 2 Sess. Acts (1878), Ch. 1062, § 2, it is not necessary for the state to show that the defendant has been guilty of twice selling such liquor in order to convict, but it is competent to show any number of sales which he may have made to the person named in the indictment within one year prior to the finding of the indictment.

APPEAL FROM GREENUP CIRCUIT COURT.

May 25, 1882.

OPINION BY JUDGE HARGIS:

It is provided by § 2 of an act to regulate the sale of spirituous, vinous and malt liquors in the county of Greenup that "if any person or persons shall sell or dispose of any spirituous, vinous or malt liquors in Greenup county, in less quantities than one-half gallon, they shall be deemed to have violated the general laws of this commonwealth made and provided against keeping a tippling house, and, upon presentment and conviction, shall be subjected to the penalties therein provided for against such offenses." 2 Sess. Acts (1878), Ch. 1062.

The appellant was, subsequent to the passage of said act, indicted, tried and convicted of the offense of selling malt liquors in a less quantity than a one-half gallon in said county, and fined the sum of $60, which is the penalty for keeping a tippling house, and he has appealed from the judgment.

The act which is forbidden and made punishable by this statute, is the sale or disposition by bargain, of either spirituous, vinous or malt liquors in quantities less than one-half gallon, and

the penalty prescribed for that offense is the same as that denounced against persons for keeping a tippling house. There is but one penalty for keeping a tippling house provided by the general laws of this commonwealth, and that penalty is $60. The statute under consideration has no reference to the acts necessary to constitute the offense of keeping a tippling house under the general law. This statute refers to those laws solely for the purpose of fixing the penalty for the act forbidden by it.

It was not necessary for the commonwealth to show that the appellant had been guilty of twice selling, in order to convict him of the offense charged; but it was competent to show, by the evidence, any number of sales which appellant may have made to the person named in the indictment within one year prior to the finding of it, as to all of which, so shown, this trial would be a bar to any future prosecution therefor. Nor is it the law, as urged, that one act of selling subjects the offender, under this act, to the penalty fixed by the general laws for retailing.

This act is particular in its application to Greenup county, and it prohibits the authorities from licensing persons to sell and also authorizes the infliction of a fine upon all persons who sell spirituous, vinous or malt liquors in any quantity less than one-half gallon in said county. The amount of the fine can not be any more or less than is inflicted by the general laws for keeping a tippling house, because the special statute says so in so many words, and we are not authorized by construction to do away with their plain import.

Judgment *affirmed*.

Roe & Roe, Wm. Lindsay, for appellant.

P. W. Hardin, for appellee.

W. W. MOORE ET AL. *v.* LUCIEN MCDOWELL ET AL.

[Abstract Kentucky Law Reporter, Vol. 3—823.]

Validity of Town Election.

Where an election is provided for in a town to determine whether a proposed new charter shall be adopted and it is provided that on the first Monday in August, 1880, a vote is to be taken upon the question, and that "The clerk of the election shall * * * open a separate poll for the taking of such votes," and the election was

held under this act by the town clerk and not by the clerk of the regular county and district election, there being a fair expression of the popular will, such election was not void.

APPEAL FROM BOURBON CIRCUIT COURT.

May 25, 1882.

OPINION BY JUDGE PRYOR:

There is only one question necessary to be considered in this case. In the creation of a new charter for the town of Flemingsburg (Acts 1879, Ch. 1318) the 38th section provided that "the provisions of this act shall not take effect until at the next regular election in said town and district under state laws. On the first Monday in August, 1880, a vote shall be taken upon the question whether or not this charter shall be adopted. The clerk of the election shall on that day open a separate poll for the taking of such votes, and on this question all the legally qualified voters residing within the corporate limits of said town shall have the right to vote," etc. The election was held under this act by the town clerk and not by the clerk of the regular county and district election, and the court below for that reason held the election void. In construing the section of the charter before us it is proper to consider not only the subject matter of the entire law in order to arrive at the legislative intent, but the charter for which the act in question was intended as a substitute.

If a majority of the voters were polled against the new charter the old one remained in full force. The charter then in existence by an amendment passed in 1867 required the town elections to be held in August at the same time fixed for the acceptance or refutation of the new charter. At such elections the officers of the town were elected, and a reasonable and fair construction of the section is that the words "at the next regular election in said town and district under state laws" was intended only to designate the time of taking this vote. Although the legislature had by the charter provided that the present trustees shall hold their offices until the election took place under the new charter, still here was the corporation with its officers and clerk authorized to hold an election under the old charter, and the direction that the clerk of the election should on that day open a separate poll for the taking of such votes had reference clearly to the clerk

of the town and not the clerk holding the election for the county and district offices. At such an election if held by the clerk of the county election at least two-thirds of the voters would be ineligible. The voters possessed different qualifications, and in passing the act the attention of the legislature was evidently directed to the terms of the old charter and the authority given the officers of the town under it to hold the election, and if not, there is no pretense that there was not an expression of the popular will; and we are not prepared to say that if the authority was not found in the new charter the election could be held void. The judgment is *reversed* and cause remanded for proceedings consistent with this opinion.

J. & J. W. Rodman, M. M. Teagar, W. J. Hendricks, Jas. W. Anderson, for appellants.

Andrews & Sudduth, J. P. Harbison, Wm. Lindsay, A. Duvall, for appellees.

BELLE R. HOOSER *v.* J. H. HOOSER.

[Kentucky Law Reporter Vol. 3—796.]

Liability of Administrator.

Where an administrator has knowledge of the existence of a valid claim or judgment against the estate he represents and still distributes the estate to the heirs without requiring refunding bonds, he is liable and may be held as responsible as if the assets were in his hands. If he has acted in good faith he may recover of the distributees whatever sums he may be compelled to pay on such claim.

APPEAL FROM TODD CIRCUIT COURT.

May 26, 1882.

OPINION BY JUDGE HINES:

Appellant instituted action on a note for $1,802.37, against appellee, as administrator of G. W. Hooser, obtained judgment, which was affirmed on appeal to this court. Appellant then instituted this suit against the administrator, charging devistavit. Appellee admits that there has been a large surplus of the estate which he had distributed to the heirs without requiring a refunding bond, but says there ought not to be any judgment against him, for the reason that he had been misled by appellant to believe the

debt had been satisfied, and it was under that belief that the estate had been distributed. He alleges that appellant held a note against Daniel Hooser for about $1,800, which she induced his decedent, G. W. Hooser, to take up and to execute to appellant his own note in lieu thereof, which is the note sued on; that it was agreed between appellant and G. W. Hooser that he should take a mortgage from Daniel Hooser to secure himself; that appellant was to look to the mortgaged property for her debt and G. W. Hooser was not to be held personally liable on his note to appellant; that after the death of G. W. Hooser and pending the suit to foreclose the mortgage from Daniel to G. W. Hooser, in order to carry out the first agreement, appellee agreed with the appellant that he would buy the mortgaged land for appellant and that she was to take the land (after paying a prior lien) in discharge of her debt; that he did buy the land for her and she took possession of the land, surrendered the note to G. W. Hooser, but subsequently induced him to return to her the note; and that appellant did not repudiate the agreement until after she had been in possession of the land some two or three years, and in the meantime he had distributed the assets. The court below refused to give a personal judgment against the appellee, but directed that the land be sold to pay the debt and adjudged that appellant be charged $400 for the use of the land. From that decree appellant appeals, and insists that she ought not to be charged with rent and that she is entitled to a personal judgment against appellee.

The first judgment is conclusive as to the liability of the estate, but not as to the personal liability of appellee. He may make any defense affecting his personal liability that does not go to affect the liability of the estate. He was a party to the first suit, although in a different capacity, and had an opportunity to make, and it was his duty to make, any defense for the protection of the estate and of himself that would exonerate the estate. The only question then is, Has there been any wasting of the estate, or is appellant, by reason of the agreement with appellee, estopped to look to appellee for the satisfaction of her claim? We think the evidence does not authorize the raising of an estoppel as against appellant. Appellee testifies that the agreement was made with appellant's husband, and there is no sufficient evidence of agency on the part of the husband, nor was the conduct of appellant such as to authorize the conclusion

on the part of appellee that the debt was satisfied by the purchase of the land. Appellee having acted under an erroneous belief not authorized by the conduct of appellant, and having distributed the estate without requiring refunding bonds, he ought to be held as responsible as if the assets were in his hands. If appellee has acted in good faith in these transactions he may recover of the distributees whatever sums he may be compelled to pay to appellant on her claim.

It was error to allow appellee credit by the rent. As we have seen, the agreement in regard to the land was with the husband of appellant, and to charge the rent to appellant would in effect be to compel her to pay her husband's debts out of her separate estate. Judgment *reversed* and cause remanded with directions to enter judgment against appellee for the amount of appellant's claim that may remain unsatisfied by the sale of the land.

Ben T. Perkins, Jr., for appellant.

H. G. Petrie, W. L. Reeves, for appellee.

ELIZABETH BEARD ET AL. *v.* J. W. HUDNALL.

[Abstract Kentucky Law Reporter, Vol. 4—54.]

Title by Adverse Possession.

Where one holds adverse possession of real estate under a conveyance to him, uninterruptedly for nearly twenty-five years, and tracing the title of record back shows connected paper title for more than sixty years, he has a good title.

APPEAL FROM WARREN CIRCUIT COURT.

June 1, 1882.

OPINION BY JUDGE PRYOR:

The case of Logan v. Bull, 78 Ky. 607, is conclusive of this case. There is no attempt made by the appellants to show any defect of title in the appellee who sold the land to their ancestor. The only objection made is that there is no title deducible from the commonwealth by reason of the failure of the appellee to exhibit a patent to Todd, under whom it is alleged by the appellee in his reply to the answer and cross-petition of the appellants, in which they are seeking a rescission of the

contract, that the land in controversy was originally patented to Robert Todd under whom he claims. This patent was not filed and the reason for not filing it does not appear in the record. Thos. J. Todd in the year 1818 conveyed this land by a general warranty deed to the remote vendors of the appellee, and the paper title is traced from that date to the 15th of July in the year 1854, when the appellee obtained the conveyance. The appellee was in the actual undisturbed possession under this conveyance from the date of his deed until his sale to the ancestor of the appellants. Their ancestor entered into the possession and his heirs, of whom appellee is one, still hold the land. The possession under the appellee by virtue of his deed made in 1854 has been uninterrupted for nearly twenty-five years, and tracing the title of record back from him shows a connected paper title for the period of more than sixty years with no evidence of any adverse claim or assertion of claim against the appellee or those under whom he claims during that period. There is scarcely a remote possibility of any claim being asserted. The ancestor of the appellants has made two payments on the land, also improvements upon it, and has cut and sold timber from the premises, and these appellees base their right to rescind upon no other ground, or at least none other appears in the record, than the failure of the appellee to exhibit the patent to Robert Todd. In our opinion the judgment below requiring a performance of the contract was proper and is therefore *affirmed*.

H. T. Clark, for appellants.

J. M. Tyler, E. W. Hines, for appellee.

DIANA GLACKIN'S ADMR. ET AL. *v.* ANDREW GLACKIN

[Abstract Kentucky Law Reporter, Vol. 4—54.]

Election of Defense.

A defendant having two defenses not inconsistent with each other can not be required by the court to elect upon which of them he will go to trial. He should have the benefit of both.

APPEAL FROM BOONE CIRCUIT COURT.

June 8, 1882.

OPINION BY JUDGE PRYOR:

The testimony in this case conduces to establish a gift of the notes and money in controversy to the appellants, and the effect of such proof was to sustain, to some extent at least, the statements of the original defense made by the appellants, viz.: That there was a marriage contract between the appellee and his wife. Whether or not the proof was sufficient is not necessary to be determined, as the case must be remanded with leave for additional testimony in support of the gift by the appellee to the children or the contract between the husband and the wife. The two defenses are not inconsistent and the motion requiring the parties to elect should have been overruled. Nor are we disposed to determine in the present state of the pleadings and proof that the evidence warranted a judgment for the appellee upon the subject of gift. The appellee is a man advanced in years, but still, as the proof shows, capable of transacting his business and of comprehending the nature and effect of all his acts; still, in view of the condition of the appellee at this time, considering his advanced age and the fact of his having a short time before lost his wife, it would be more satisfactory to the chancellor to require or permit the appellee to inquire of Conners who had been invited by him to his home on the day this alleged gift was made as to what transpired at the time.

The court below erred in requiring the appellants to make the election as to their defense. The entire case is left open with leave, if either party desires, upon proper motion to take proof as to the marriage contract and the gift. The judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Wm. Lindsay, Norman & Stephens, for appellants.
O'Hara & Bryan, for appellee.

H. T. BEAUCHAMP v. COMMONWEALTH.

[Kentucky Law Reporter, Vol. 4—27.]

Jurisdiction of the Regular and Special Judge.

The constitution and the law provide for the election of a special judge and empower him to serve when from any cause the judge

shall fail to attend, or being in attendance can not properly preside; and where the special judge is elected when there is a regular judge and has assumed jurisdiction over a cause, and the parties have gone into trial, before the resignation of the regular judge is tendered or accepted, the special judge has jurisdiction to complete such trial and enter a judgment, even though the regular judge has at that time resigned.

APPEAL FROM GREEN CIRCUIT COURT.

June 10, 1882.

OPINION BY JUDGE PRYOR:

This case was heretofore dismissed and afterwards reinstated on the docket. The point made is that the trial of this cause was had after the resignation of Judge Lewis as circuit judge, and the special judge had no power to try the accused, when there was, in fact, no circuit judge. If this was a civil case we would have no difficulty in determining the question, as the parties had the right to consent to the trial of such causes, either in the absence of the regular judge or after he had resigned, and as the special judge had been elected, under the statute, before the resignation, the consent of the parties would be presumed; in other words, they would waive the right to raise the question of jurisdiction in this court for the first time. In this case, before judgment of conviction, the question of jurisdiction was raised and the conviction claimed to be void, on the ground that there could not be a special circuit judge when there was no regular judge. The constitution, Art. 4, § 28, provides that "The General Assembly shall provide by law for holding circuit courts when, from any cause, the judge shall fail to attend, or, if in attendance can not properly preside," an election shall be held, etc. Both the statute [Gen. Stat. (1881), Ch. 28, Art. 7, § 1] and the constitutional provisions recognize the fact that there is a regular circuit judge, who is prevented from presiding by reason of his failure, from some cause, to attend the court, or if in attendance, by reason of his interest, or some other sufficient cause, can not properly preside.

The regular judge is the life of the court in which the special judge is elected, and when he resigns, and his resignation is accepted, his rights and duties as circuit judge terminate. The

constitution directs the manner in which the vacancy can be filled, and when there is no judge to attend or preside in the court, there can be no special judge to preside in his stead. But here the special judge was elected when there was a regular judge and had, in fact, assumed jurisdiction over the particular case—that is, the parties had gone into a trial before the resignation was tendered or accepted, and it was only after verdict that the question was made.

We think the jurisdiction having attached, by reason not only of the election of the special judge but by the additional fact of the trial being in progress at the time, that the judge had the full and complete jurisdiction to hear the case to its termination. The statute [Gen. Stat. (1881), Ch. 28, Art. 7, § 2] provides that "The person elected shall, during the period that he acts, have all the powers and be liable to all the responsibilities of a circuit judge," and while under this statute he may not have had the right to require the party to go into a trial after the resignation of the regular judge, the jurisdiction having properly attached, by the actual trial of the case before the resignation, this jurisdiction continued for all the purposes of the trial. The indictment is sufficient and the demurrer was properly overruled. The appellant is charged with stealing a gray mare, the property of J. J. Sutherland, of the value of one hundred dollars. It is maintained that the description is insufficient. We think not. The judgment of conviction issued constitutes a bar to any indictment for stealing a gray mare of Sutherland, prior to the finding of this indictment. Judgment *affirmed.*

D. Hudson, for appellant.

P. W. Hardin, for appellee.

CITY OF LEXINGTON *v.* WILLIAM AUGER, JR., ET AL.

[Kentucky Law Reporter, Vol. 4—23.]

Negligence of City in Suffering a Street to be Left in Dangerous Condition.

A passenger on the streets of a city has the right to assume that the streets are in a reasonably safe condition; and where the city has caused an excavation to be made in a street and leaves it unguarded for a period of several weeks, notwithstanding there is

ample room to pass around it, the city is guilty of negligence and is liable to pay damages sustained by a foot passenger who is injured by falling into such excavation.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 10, 1882.

OPINION BY JUDGE PRYOR:

It is not material to the decision of this case that an inquiry should be made as to the sufficiency of the first paragraph of the appellee's petition. The second paragraph contains every essential averment necessary to constitute a cause of action, and the appellant only traverses the question of negligence. That the hole of which the appellant had notice was dug or was in the street is a fact admitted by the pleadings, and the sole question was that of negligence on the part of the city authorities. The issue being formed as to the question of negligence, there is no reason for reversing this case if the testimony authorized the finding, and this involves the question made by counsel for the city on the motion for a peremptory instruction.

No exceptions were taken to any of the instructions by the appellant and therefore it is not necessary to discuss them. One of the grounds for a new trial, being that there was no evidence to support the verdict, permits the question made by the peremptory instruction.

It appears from the evidence that Broadway street is one of the principal streets of the city, and that in or near the pavement of the sidewalk of this street, not far from the depot of the Cincinnati railway, where foot passengers were in the constant habit of passing, a hole three feet deep and two feet wide was dug about the middle of November by the directions of the city council, and left open and exposed without any guard around it or near it nor anything to notify the passerby of his danger. This hole, together with others, was left open for several weeks, although some of the council, according to the testimony of a member of the police force, had been notified of the danger. It is true there was ample room on the sidewalk for the traveler and he would have to make a diversion from the main path in order to reach the danger; still he had the right to the use of any part of the street for the purpose of travel, and there was no excuse

for the negligence on the part of the city in leaving these holes uncovered for such a length of time.

It is attempted to be shown that the appellee was under the influence of liquor at the time the accident occurred, and even if this were true, and it is not sustained by the testimony, he had the right, although drunk, to presume that no such danger existed in one of the great thoroughfares of the city; and if in a helpless condition the greater the necessity for vigilance on the part of the city fathers in order to prevent such injuries. The hole dug for this post had been filled with snow and there was nothing to apprise the appellee of his danger; nor was there anything from which a man of ordinary prudence had the right to suppose that the danger existed. The quantam of damage was with the jury. The testimony was heard as to the character of the wound, and while the actual expenses incurred, including the loss of time, might not have exceeded one hundred dollars, the physical sufferings of the appellee had to be considered in estimating the amount of the recovery, and with the proof on this subject we are not prepared to say that the verdict was the result of prejudice or passion. The judgment below is therefore *affirmed.*

H. B. Higgins, for appellant.

Beck & Thornton, for appellee.

(NOTE.—The judgment appealed from and affirmed in this case was for $500.)

[Cited, *City of Glasgow v. Gillenwaters,* 113 Ky. 140, 23 Ky. L. 2375, 67 S. W. 381; *Merchants' Ice &c. Co. v. Bargholt,* 129 Ky. 60, 33 Ky. L. 488, 110 S. W. 364.]

JOHN STEEL ET AL. *v.* J. W. SEALE ET AL.

[Kentucky Law Reporter, Vol. 4—42.]

Petition for a New Trial.

Where a litigant defending a damage suit entered against him has been vigilant through several courts, and when the cause is set for trial in the circuit court at a specified time and he has on file an answer stating a legal defense to the action and has informed his attorney that he will attend at the trial, and he shows in his suit to set aside a judgment taken against him in his absence at the time set for trial that on the night before the trial his daughter

took violently sick and for that reason he was unable to and did not attend the trial, his application for a new trial should have been allowed and a new trial given on the grounds of accident and misfortune, which could not have been guarded against by ordinary prudence, and which prevented him from appearing and defending the case.

APPEAL FROM BREATHITT CIRCUIT COURT.

June 10, 1882.

OPINION BY JUDGE HARGIS:

The appellee, Seale, sued the appellant, Chambers, alleging that he aided and encouraged a band of rebels to camp on his farm, and take from it his corn, meat, hay, wheat, etc., and to burn his fences, and procured an attachment against Chambers' property, which was levied on several tracts of land. After the war closed Chambers appeared and demurred to the petition, which was sustained. This court, on Seale's appeal, reversed that judgment and remanded the case.

After numerous continuances, mostly at Chambers' instance, at the May term, 1873, of the Wolfe Circuit Court, whither the venue had been changed, Seale, during Chambers' absence, obtained a judgment for $1,500 in damages against him. In the following month Chambers prosecuted an appeal from the judgment, and also filed a petition for a new trial. The judgment was affirmed by this court, and the petition for a new trial was dismissed by the circuit court, and from the latter judgment the appellant, Chambers, prosecutes this appeal.

He alleged substantially in his petition for a new trial that the reason he did not attend the May term, 1873, when the verdict was rendered against him, was because his daughter, who had been sick, became suddenly worse on Sunday evening, which was the day before the court began, and that by reason of this unavoidable accident and misfortune he was prevented from appearing or defending the suit.

Counsel for appellee confused this character of action for a new trial with a suit to vacate or modify judgments on the grounds prescribed in Civ. Code (1876), § 518, subsecs. 2, 3, 4, 5, 6 and 8. They are essentially different. In an action like this, where there was an issue formed by sufficient pleadings in the

suit in which the new trial is sought, it is not necessary to allege and prove a valid defense to the action before a new trial can be granted. It is sufficient and only necessary to show that an issue had been joined, or that the party had been prevented from forming an issue or presenting his defense when he had one; that the evidence known to him, which he might have introduced, but for his necessary absence, would have supported a verdict in his favor, and that the ground relied on for the new trial is true, and belongs to one of the classes embraced by Civ. Code (1876), § 340, subsecs. 2, 3 and 7.

As to the other grounds for a new trial provided for by subsecs. 1, 4, 5, 6 and 8, of said section, the record will show the existence or nonexistence of the truth of the ground, and it is only incumbent on the applicant, where the ground is thus shown, to prove that the ground was discovered after the expiration of the term, or although known during the term the party was, in either case, unavoidably prevented from making the application, as prescribed by § 342.

It is true that § 518, which authorizes the vacation or modification of judgments, embraces the grounds and manner of granting a new trial prescribed by § 344, and that its 7th subsec. is similiar to subsec. 2, of § 340. Yet it provides other grounds, whose truth must be shown, and a valid defense proved also, not contemplated by the provisions relative to new trials. Civ. Code (1876), Title 9, Ch. 2, Art. 6.

The record in this case shows that Chambers had, before the trial, filed an answer which contained a legal defense to the action; and the evidence about the date of his daughter's sickness and of the term, while conflicting, satisfactorily establishes that she was very sick during that term. Chambers proved that he had borrowed a horse to go to that term of court a few days before the term began, informed his attorney the day before court began that he would be at the court, and that his daughter took suddenly worse that evening. The record shows that he has defended the case with pertinacity and continuality, and there can be no motive attributed to his failure to attend except the relapse of his daughter, and in our opinion the facts of this case show a valid reason for a new trial on the ground of accident and misfortune which could not have been guarded against by ordinary prudence, and

which evidently prevented said appellant from appearing and defending the case.

The evidence known to the appellant at the time of the trial would, if it had been introduced, have rendered the evidence conflicting, and supported a verdict in his behalf, had one been rendered for him. He swears that he would have testified and will now testify that he had nothing to do with the alleged tort, and other witnesses testify to facts which tend in some degree to support his defense, and he was entitled to have this evidence heard and weighed by the jury under proper instructions, and whether they would or will decide for him on another trial is not a question for our determination. It is only necessary to know that they may do so, and will, if they should believe his evidence to be true.

Neither the negligence of Chambers' attorney in retaking the suppressed depositions nor the alleged newly discovered evidence were sufficient to authorize a new trial, but for the reasons we have given Chambers ought to have been granted a new trial. As to the injunctions obtained by the appellants, Steele and Woodward, who were pendente lite purchasers of the attached lands, the court should have made such orders as would have enjoined the judgment in favor of the appellee, but not so as to affect any future judgment he may obtain, as the attachment lien is superior to the rights of those who purchased after its levy.

Wherefore the judgment is *reversed* as to each of the appellants, and cause remanded, with directions to grant appellant, Chambers, a new trial, reinstate the injunctions, and for further proceedings not inconsistent with this opinion.

H. C. Lilly, John L. Scott, for appellants.

I. N. Cardwell, for appellee.

[Cited, *Prentice v. Oliver,* 25 Ky. L. 1576, 78 S. W. 469.]

S. D. MILLER ET AL. *v.* THE NATIONAL BANK OF LANCASTER ET AL.

[Kentucky Law Reporter, Vol. 4—25.]

Injunction at Suit of One Not Interested.

One in possession of real estate which has been sold at the instance of his creditor and bought by the creditor, the sale approved and deed confirmed by the court, and who is a defendant on a writ of possession, has no interest in such land and is not entitled to an injunction against the purchaser and his grantee on the alleged

ground that the sale and conveyance of the land by such purchaser was void because the grantee, being a national bank, was not authorized to buy real estate, etc. One not having an interest can not raise a question of the validity of such transfer.

APPEAL FROM LINCOLN CIRCUIT COURT.

June 15, 1882.

OPINION BY JUDGE PRYOR:

John W. Miller was indebted to The National Bank of Lancaster in the sum of $12,300. Miller became insolvent and made an assignment for the benefit of creditors, and in January, 1879, his creditors, the bank among them, released him from all liability upon the payment of a certain sum, much less than the real indebtedness.

S. W. Miller, the father of John Miller, became embarrassed about the same time and conveyed his estate, in trust, to M. J. Durham for the benefit of creditors. S. W. Miller was indebted to The National Bank of Danville in a large sum of money, and his son, John, was on his paper for the sum of about $3,500 to that bank. The Danville bank had not released John from his liability on that paper. The sale of the land of S. W. Miller was made under the decree in an action by the trustee for the settlement of the trust, and The National Bank of Danville became the purchaser. The sale was reported and confirmed and a deed made to the bank, approved by the court and recorded. After this The National Bank of Lancaster, after the release of its claim of John Miller, believing that the bank could be made whole by the arrangement, purchased of The National Bank of Danville its claim on John and S. W. Miller, or rather obtained a conveyance from the bank of the greater part of the land it bought belonging to S. W. Miller, for the consideration paid of $13,945.

The Millers were in possession of the land under some arrangement with the trustee, Durham, or the bank, and when their time expired a writ of possession was issued in favor of M. J. Durham, trustee, at the instance of the banks, for the possession, the writ issuing in the action instituted by Durham for the settlement of Miller's estate. An injunction was obtained by the Millers, preventing the execution of the writ, because the sale and conveyance by the bank at Danville to the bank at Lancaster was void,

by reason of the provisions of the National Banking Act, prohibiting national banks from dealing in real estate, except to secure debts previously contracted or as may be pursuant to secure debts, etc. U. S. Rev. Stat. (1878), § 5137.

Without discussing the effect of the purchase made by the bank at Lancaster, it may be proper to inquire what interest the appellants have in the subject-matter of this controversy. The Danville National Bank had the right to purchase the land in satisfaction of its debts. That sale has been confirmed and a deed made, divesting the appellant, S. W. Miller, of all title. If so, the conveyance by the Danville Bank to the Lancaster Bank can in no manner affect the appellants, and we perceive no reason why the bank at Danville can not place any person in possession, natural or artificial, it may see proper, and if the bank at Lancaster had no right to the writ the stronger the reason for permitting the writ to issue in the name of Durham, the trustee. Both banks are willing that he shall have the possession, and how the rights of Miller or the appellants are affected by it we can not see. If the title to the one bank by the other is void, and we do not so decide, it belongs to the National Bank at Danville and that bank indorses the writ, or consents to its issual. The real owner is making no complaint, nor even before the court in this case, but on the contrary, the record shows, is willing that Durham, in his own right or as the agent of the Lancaster bank, shall take possession. The injunction was properly dissolved, and the question as to the validity of the sale need not be determined.

Judgment *affirmed.*

W. O. Bradley, W. P. D. Bush, for appellants.

Anderson & Herndon, Durham & Jacobs, for appellees.

WILLIAM AUSTIN *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 4—29.]

Criminal Law—Fundamental Rights.

When fundamental rights are involved in a criminal case, such as the right of trial by jury, the right to be heard by counsel and the right to be present during the trial, the Court of Appeals will reverse unless it affirmatively appears from the record that the defendant has not been injured; but in cases where such rights are not involved the court will not reverse unless it affirmatively appears

from the record that the error complained of is detrimental to the substantial rights of the accused.

Argument of Counsel.

It is not error for the court to stop counsel from argument regarding the analysis of blood found on the clothing of the accused where, in fact, no analysis of such blood was shown by the evidence.

Jury's Viewing Premises.

The court may direct the jury to view the premises where an offense was committed when in his opinion it is necessary, no matter at whose suggestion it is done.

APPEAL FROM GARRARD CIRCUIT COURT.

June 15, 1882.

OPINION BY JUDGE HINES:

Counsel for appellant insists upon a reversal, first, because the court instructed the jury orally after argument of counsel, and after the case had been given to the jury. The instruction complained of is as follows: "The jury have no right to decide as to the guilt of the prisoner by lot." Crim. Code (1876), § 225, provides that the court shall instruct the jury before argument of counsel, and that the instruction shall be in writing, and § 340, as amended, provides that this court may reverse for any error of law appearing on the record when, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced thereby. When these two provisions are considered together it is manifest that the first is simply directory, and that no reversal can be had except upon a consideration of the whole case; the instruction, though given orally, appears to have been prejudicial. In this case it only appears inferentially, if at all, that the instruction was oral, and it clearly appears that it could not have been prejudicial because the verdict was not arrived at by lot, either as to the question of guilt or as to the degree of punishment to be inflicted. The conclusion as to the guilt of the accused was reached by ballot, but not by lot, and there is nothing to indicate that the conclusion as to the degree of punishment was so reached, but if it had been so reached it would not be a ground for reversal.

The correct rule of construction of the last mentioned provision is, as stated in *Rutherford v. Commonwealth,* 78 Ky. 639, that

when fundamental rights are involved, such as the right of trial by jury, the right to be heard by counsel and the right to be present during trial, this court will reverse unless it affirmatively appears from the record that the accused has not been injured; but in cases where fundamental rights are not involved this court will not reverse unless it affirmatively appears from the record that the error complained of is detrimental to the substantial rights of the accused.

Second, it is complained that the court erred in stopping counsel in argument in regard to the analysis of blood found upon the clothing of the accused. This was not error because there had been no analysis of the blood, and no evidence introduced in reference thereto. It was proper for the court to say that the jury, in arriving at their verdict, should determine the truth of the charge from the evidence heard, rather than from the argument of counsel. Considerable latitude should be allowed to counsel in the argument of a cause when it is confined to the facts and circumstances of the case as developed in evidence, but outside of that limit it would rarely be a reversible error for the court to restrain the argument.

It is further insisted that evidence was heard on the view of the premises, and that the view was ordered by the court without authority, because made at the suggestion of the jury. As to the last suggestion, the Crim. Code (1876), § 236, says that a view may be ordered when in the opinion of the court it is necessary. It would appear that the making of the order by the court, no matter of whose suggestion, would be sufficient evidence of the fact that the court was of the opinion that it was necessary that the view should be had. As to the hearing of evidence on the view it is only necessary to say that the prisoner, his counsel, the judge and the jury were present, and that ample opportunity to cross-examine the witness was offered; besides, the statements made in the presence of the jury on the view had no material bearing on the question of guilt or innocence of the accused.

Judgment *affirmed*.

O. D. McManama, Burnett & Noel, H. T. Walton, for appellant.

Denny & Tomlinson, P. W. Hardin, for appellee.

H. A. DUMESNIL ET AL. *v.* CITY OF LOUISVILLE.

[Kentucky Law Reporter, Vol. 4—14.]

Enforcement of Payment of Taxes.

The notice of taxes and assessments which the board of commissioners are required to give by § 2 of the act of February 17, 1866 [Sess. Acts (1866) 73, § 2], is an essential prerequisite to the enforcement of the payment of taxes and before there can be recovery it must be alleged and proved that such notice was published in the manner required by said section.

Notice by Assessor of Enforcement of Taxes.

The assessor is not authorized to publish a notice of the enforcement of the payment of taxes under the provisions of § 2 of act of February 17, 1866. Such notice must be caused to be published by the board of commissioners.

Power of Assessor.

There is no authority given the assessor to hear or determine applications of aggrieved taxpayers for the correction of errors made by himself. This duty devolves upon the board of commissioners.

APPEALS FROM LOUISVILLE CHANCERY COURT.

June 17, 1882.

OPINION BY JUDGE HARGIS:

These three cases involve the same questions and will be heard together. Many of the points argued were conclusively settled in the former opinions herein, and will not, therefore, be touched upon again. See *Dumesnil v. City of Louisville,* p. 180, this volume.

It was held in *Ormsby v. City of Louisville,* Mss. Opin., December 14, 1880, that the notice which the board of commissioners of taxes and assessments were required to give by § 2 of the Act of February 17, 1866 [Sess. Acts. (1866) 731, § 2], was an essential prerequisite to the enforcement of the payment of taxes, and that it was necessary to allege and prove that such notice was published in the manner required by said section. While we are satisfied that the form of the notice published in the Courier Journal and Anzieger, over the signature of the assessor, was sufficient, and that it was published the requisite number of days, still we are met upon these appeals with another question not presented in

any of the former appeals, which is fatal to the judgment in each of these cases. By said section it is provided, that "said board of commissioners of taxes and assessments" shall cause the notice required by it to be given in the manner therein specified.

It appears from the record that the board neither gave nor authorized any one else to give the notice, but that J. A. Krack, the assessor, believing that he had the authority under said act to give the notice, caused it to be published the requisite number of days over his signature, and the question is whether this was such a notice as the statute requires. It takes three members to constitute the board, and it seems to be beyond question that an act required to be done by the board can not be done by any one else, and that the notice given and caused to be published by the assessor was not a compliance with this plain provision of the statute any more than if any other person without authority had given it. It is a well settled rule that where any person or body of persons acting by a majority, is designated and required to give, or cause to be given, notice upon which depends the legal rights and duties of others, that no other person can officiously perform the duty so as to render the notice valid. Were the rule otherwise confusion and uncertainty would be the consequence.

Cooley on Taxation (1876) 218, says, that every notice which the statute provides for a review of the assessment, "whether by publication or otherwise, must be given with scrupulous observance of all its requisites." And it seems, from authority, that this character of notice should always be given or caused to be given by those authorized to do so by the statute and none others. One of the greatest essentials of such notice, if there be a distinction, consists in the fact that it emanates from authority which alone can vest it with legal vitality and effect.

It is not necessary to decide the other important question, which is presented by these records, as the one we have disposed of settles this litigation. But we think it proper to say that we see no authority conferred upon the assessor, after the assessment rolls are completed and returned by him, to hear or determine applications of aggrieved taxpayers for the correction of errors made by himself. This is the duty of the board, which is given 30 days for its performance, and in the discharge thereof reasonable opportunities should be afforded the citizen to make his application to the board.

Wherefore each of the judgments is *reversed* and the causes are remanded with directions to dismiss them.

R. W. Woolley, Geo. DuRelle, for appellants.

H. M. Lain, T. L. Burnett, for appellee.

[Cited, *Slaughter v. City of Louisville,* 89 Ky. 112, 12 Ky. L. 61, 8 S. W. 917; *Harris v. Zable,* 5 Ky. 114; *City of Louisville v. Louisville Gas Co.,* 15 Ky. L. 177, 22 S. W. 550; *Fenley v. City of Louisville,* 27 Ky. L. 204.

L. S. STORY ET AL. *v.* CATHERINE HARRISON ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—54.]

Individual Liability of Administrator.

An administrator who, under a mistaken belief of his right to do so, collects money for the hire of a slave and appropriates it to the payment of the debts of the estate and does so without collusion with the heirs, is individually liable and the heirs are not liable therefor.

APPEAL FROM CALLOWAY CIRCUIT COURT.

June 20, 1882.

OPINION BY JUDGE HINES:

The money collected by the administrator for the hire of the slave was of his own wrong although under the mistaken belief of his right to collect and appropriate to the payment of the debts of the estate, and as the money was so collected and appropriated without collusion with the heirs the liability is the individual liability of the administrator and not the liability of the heirs whose land, descended to them, is attempted to be subjected. The case is the same as if the administrator had appropriated the money to his own use, as he has paid with it the debt of another without having been so directed to do. No question as to substitution to the rights of any creditor of the estate who may have received the money thus collected and paid out by the administrator can arise here because the claimants were under no legal obligation to pay any debt of the decedent. This view of the case renders it un-

necessary to consider the question of subrogation presented in the case.

Judgment *affirmed.*

W. L. Weathers, D. W. Lindsay, for appellants.

L. Anderson, for appellees.

H. C. WORMOTH *v.* COMMONWEALTH.

Indictment for Forgery.

When in an indictment for forgery a party is charged with obtaining money by reason of the forgery, or where the forgery is perpetrated for that purpose, the indictment must allege the contents of the writing or at least the substance of the instrument that the court may know that the execution of the paper amounts to a forgery.

APPEAL FROM MEADE CIRCUIT COURT.

June 20, 1882.

OPINION BY JUDGE PRYOR:

It is essential in an indictment for forgery when the party is charged with obtaining money by reason of the forgery, or where the forgery is perpetrated for that purpose, to allege the contents of the writing or at least the substance of the instrument that the court may know that the execution of the paper amounts to a forgery. It may not be such an instrument the signing of which would amount to a forgery. The allegation that the writing forged was a receipt is not sufficient as the legal effect of the writing must be determined by the court and not the pleader. The indictment in this case alleges that the accused "did unlawfully and feloniously make and forge a receipt for fourteen hundred dollars in money on Adams Express Company outward-way bill-book by writing therein the letter 'S' an initial letter which was the check mark used by Slaughter, the messenger of said company, to indicate the receipt of money by Slaughter, a fact known to the accused, and which letter when so written by said Wormoth did indicate the receipt of money by said Slaughter, done without authority, and with the intention to defraud the Adams Express Company." What fact is alleged in the indictment from

which the court can say that the letter "S" indicates the receipt of money or that the check mark appended to the bill-book if signed by the accused amounted to a forgery? The pleader says it was a forgery but this is a mere legal conclusion in entire absence of an averment of facts showing that a forgery had been committed. Such facts with reference to the fraud must be specifically alleged so as the court when reading the indictment can say that if the facts exist as alleged the party is guilty of the offense charged. It is not necessary under our system of pleading to set out the instrument in hac verba but enough must be stated to constitute the issue.

The facts upon which the commonwealth seeks a conviction are these: C. M. Slain was the local agent of Adams Express Company at Brandenburg and Slaughter was a messenger of the company upon a line of boats that ran to and from certain points on the Ohio River. It was the duty of Slain, the local agent, when a package was delivered to him, to forward the same by this messenger to its place of destination, or when delivered to the messenger he delivered it, if the place of delivery was in his travel to the consignee and if not he delivers it to the next messenger. When a package was delivered to the messenger he signed his initial, the letter "S" on what is called the "outward-way bill-book." This book has an entry made by the local agent showing of whom the package was received, its contents and the place of destination, and the consignee or name of the party to whom it is to be delivered. The messenger when he receives the package from the local agent appends his initial, the letter "S," to the paper describing the package and this evidences the fact of his having received it. The local agent received a package containing $1,400 from J. W. to be sent to Fayette Hewitt. Frankfort, who was the clerk of Slain, the local agent, transacted the business for Slain, and Wormoth instead of delivering the package to the messenger entered or had entered the description of the package in the way bill-book and appended thereto the initial letter "S" for the fraudulent purpose of showing that the messenger had received the money. This book was kept and used by the local agent to show what express matter was received by him, from whom and to whom to be forwarded and to further evidence the fact of his delivering the package to the messenger to be delivered to the party entitled. The money never reached its destination and hence the

indictment. There is no averment that the accused obtained the money by reason of the forgery nor a statement of facts that would amount to a forgery. The statements contained in the briefs filed by counsel, if admitted to be true, make out the case against the accused, but they must first appear in the pleadings so that an issue can be formed and the case properly heard. We do not mean to say that it is necessary to set forth all the entries in the way bill-book, but the entry this signature is said to have fraudulently made, should be set forth and in addition thereto the further allegation as to the purpose of the book and the entries therein.

The demurrer should have been sustained to the indictment and the judgment is for that reason *reversed.*

C. C. Fairleigh, Lewis & Fairleigh, for appellant.

P. W. Hardin, M. A. & D. A. Sachs, for appellee.

C. J. BRONSTON *v.* CATHERINE M. DAVIDSON'S TRUSTEE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—56.]

Title by Adverse Possession.

Where a deed is executed in 1839, and the vendee and the successive vendees have been in possession under it for a period of over forty years, it is too late after such a lapse of time to successfully assert a claim of right under some other claim of title.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 22, 1882.

OPINION BY JUDGE PRYOR:

J. H. Davidson, who is one of the appellees in this case, holds the legal title to a house and lot with its appurtenances situated in the City of Lexington, in trust for his mother for life, with remainder to her children. The appellant Bronston, purchased the property of the trustee, and the latter, for his own protection and to secure the purchaser in the title, filed a petition in equity in the Fayette Circuit Court against Bronston and the life tenant, also all the beneficiaries in remainder, asking the chancellor to approve the sale and to direct a commissioner to convey the title. The appellant, Bronston, resisted the prayer of the petition alleg-

ing a defect in the title and the want of power in the trustee, or the right of the chancellor to approve his acts. The first objection made to the title is, that in the year 1838, the trustees of the Episcopal Theological College held the legal title and that in selling the property all the trustees failed to unite. Whatever defect, if any, in the conveyance by these trustees is now cured by limitation. The deeds were made in the year 1839 and the parties who held under the deeds and their vendors have been in the possession since that time, a period of over 40 years, and there is no pretense that these trustees or the beneficiaries are even setting up any claim and if they did it is too late after such a lapse of time to assert successfully a claim of right under their title. It further appears that in the year 1865, the title to this property had descended or passed to an infant by the name of Brown, and during that year the property was sold and the infant divested of title by a proceeding instituted under Rev. Stat. (1867), Ch. 86, Art. 3. It is claimed that these proceedings were irregular. Conceding this to be so, the proceedings were not void but subject to be reversed if not in accordance with the statute. The sale having been made and confirmed without any objection and the purchaser invested with the title by an order of court he would now hold as against the infant even if the judgment was reversed. The further question presented is, that as some of these beneficiaries were infants (some two or three of them) the trustee and the adult children had no right to sell with the consent of the chancellor without proceeding under the statute regulating the sale of infants' real estate. The fund with which this property was purchased was devised under the will of J. C. Hull. He devised one-half of his estate to his executors in trust for his sister, Kate Davidson, during her life and then to her children, the life tenant holding her interest as separate estate. The husband of the life tenant is dead and his wife, Kate Davidson (the tenant for life), survives him. She has seven children, all of whom are adults but two. All these parties were before the court and the infant defendants represented by their guardian ad litem.

The property devised to Mrs. Davidson for life, remainder to her children, consisted of money and this trust fund passed from one trustee to another by reason of resignation and removal until it reached the hands of the present appellee, J. H. Davidson, who was appointed the trustee and who is also a remainderman. After

he obtained possession of the trust fund it became necessary, in his opinion, to invest $4,000 of the money in a home for his mother and the children, and he did make the investment and obtained a conveyance to himself as trustee for the house and lot. The entire trust fund amounted to $8,284, and the trustee finding the income barely sufficient to support the family, and the property needing repairs, he concluded it was best to sell the property upon an advance made of nearly $2,000 to the appellant Bronston. He did sell to Bronston for $6,000 and this is the sale he is asking the chancellor to approve. He had converted the original trust fund from money into real estate and might well have asked the chancellor to have the trust fund restored in kind by a sale of the property and certainly when it is for the best interests of the infants, with the legal title already in the trustee we see no reason why the chancellor by reason of the inherent power of courts of equity over trust estates had not the right to have the trust estate or trust fund so disposed of, controlled, and managed as would subserve the purposes of the trust and advance the interests of the beneficiaries. The statutory guardian of the infants, if any existed, could have no control of the trust fund during the continuance of the trust, or the right to deprive the trustee of either his title as such or power to control it. It is not a case within the statute regulating the sale of infants' real estate. The judgment is therefore *affirmed*.

Morton & Parker, for appellant.

Breckinridge & Shelby, for appellees.

[Cited, *Elliott v. Fowler*, 112 Ky. 376, 23 Ky. L. 1676, 65 S. W. 849.]

ANTHONY MADEN *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 4—45.]

Criminal Law—House-breaking.

In an indictment for house-breaking it is only necessary to allege the manner in and the intent with which the house was broken, and the allegation that the accused did actually steal was unnecessary to complete the offense.

Evidence of Intent.

In the trial of one charged with house-breaking with intent to steal it is competent to admit evidence tending to prove that the

defendant did steal things from the storehouse, since this evidence shows the motive and intent of the breaking.

Possession of Stolen Goods—Instruction.

In the trial of a cause for house-breaking with intent to steal, it is error for the court to instruct the jury that the possession or failure to account for the possession of any of the stolen goods, which they might believe, from the evidence, were found with the accused, would authorize them to convict him.

APPEAL FROM OHIO CRIMINAL COURT.

June 22, 1882.

OPINION BY JUDGE HARGIS:

The indictment charges the appellant of the offense of breaking into the storehouse of Samuel Ferguson. It is alleged in the indictment that the appellant forced the door of the storehouse, with some unknown implement, and entered it with the intention of stealing, and that he did steal therefrom things of value.

A demurrer to the indictment was properly overruled, as it charges but one offense. The surplusage in the descriptive part of the indictment does not render it obnoxious to the Crim. Code (1876), § 165, subsec. 3. It was only necessary to aver the manner and the intent with which the house was broken, and the allegation that the appellant did steal, was unnecessary to complete the offense, but being alone a substantive felony, had it been embraced in the charge against the appellant, it would have rendered the indictment demurrable, because of charging more than one offense. It was competent to admit evidence tending to prove that the appellant did steal things from the storehouse, as this character of evidence illustrated the motive or intent of the breaking. And the appellant was not prejudiced by the unnecessary requisites of instruction No. 1, that the jury must believe appellant not only broke into the storehouse with the intention to steal, but that he also did steal therefrom things of value.

All that the commonwealth ought to have been required to show was that the appellant broke into the storehouse in the manner described in the indictment, with the intention of stealing therefrom.

It was error, however, to instruct the jury that the possession, or failure to account for the possession of any of the stolen goods,

which they might believe, from the evidence, were found with the appellant, would authorize them to convict him. The possession of any of the stolen goods, and a failure to give a satisfactory explanation of how he came by them, are facts from which an inference of guilt may be drawn, but they should not be separated from the rest of the facts proved, and given undue prominence by an instruction of this character.

The credibility of the witnesses ought to be left to the jury, generally, without indicating to them any particular test.

Wherefore the judgment is *reversed* and cause remanded with directions to grant appellant a new trial.

Walker & Hubbard, for appellant.

P. W. Hardin, for appellee.

JOHN COOK *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 4—31.]

Instruction in Homicide Case.

An instruction in a homicide case that in order to constitute legal provocation so as to reduce a homicide from murder to manslaughter it is necessary that the accused should be in danger of great bodily harm and that it must be shown that a blow or actual trespass to the person has been inflicted is erroneous.

Legal Provocation.

Legal provocation, such as will reduce murder to manslaughter may consist of an assault or battery of such force, or inflicted under such circumstances as was calculated to produce sudden heat and passion, or a sudden anger.

Credibility of Witnesses.

The jury are the judges of the credibility of the witnesses and it is error for the court in his instruction to indicate any particular test of credibility to the jury or to instruct or indicate that if a witness has wilfully and corruptly sworn falsely as to any material fact they may disregard the whole of his evidence. A particular conclusion, based upon a single supposed fact, should not be pointed out to the jury as one that they may come to.

APPEAL FROM HARDIN CIRCUIT COURT.

June 22, 1882.

OPINION BY JUDGE HARGIS:

The appellant, Cook, was tried upon an indictment for the murder of Warren Miller, and convicted and sentenced to the penitentiary for life, from which he prosecutes this appeal.

The evidence tends to prove that appellant and Smith were playing ten-pins, on New Year's day, against the deceased and Williams, and when the game was concluded the appellant claimed that Williams owed him fifty cents he had won on the game. Williams denied it and they denounced each other as liars, and Williams asked Smith for a pistol to "shoot the d——d s—n of a b——h," and appellant said "give him one if that is his game," and drew his pistol. At this moment deceased interfered, saying he was appellant's friend, but the appellant said he was not his friend, and if he advanced on him he would shoot his d——d head off. He rubbed the pistol in the face of the deceased, who continued to advance on him, until they got back near the stove and the wall, when appellant shot him and was knocked down by Smith, Williams being too drunk, as he swears, to know what was going on, except he remembers what was said between him and the appellant and the pistol shot. Appellant escaped hatless from the house. There is evidence conducing to prove that the deceased, Smith, and Williams were friends, and the first two were brothers-in-law. Smith was the keeper of the ten-pin alley, which was connected with a bar-room.

The court properly instructed the jury as to the law of the case in all of the instructions, except the seventh and eighth. By the seventh instruction the jury were told, in a confused and almost unintelligible manner, that the heat and passion necessary to reduce a crime from murder to manslaughter must be produced by a blow or an actual trespass to the person, or such conduct on the part of the deceased as indicated to the defendant a present intention to attack defendant and do him some great bodily harm. In order to constitute legal provocation that will reduce a homicide from murder to manslaughter it is not necessary that the defendant should be in danger of great bodily harm, for this constitutes self-defense. Nor must it be shown that a blow or actual trespass to the person has been inflicted. The definition of legal provocation given by the court, coupled with the confusion in the first part of the instruction, was calculated to mislead the jury and

cause them to believe that a blow, or danger of great bodily harm to the appellant, was necessary to be proved before they should find him guilty of manslaughter. See *Donnellan v. Commonwealth,* 7 Bush (Ky.) 676.

In the case of *Williams v. Commonwealth,* 80 Kentucky 313, it was held that legal provocation consisted of an assault or battery of such force, or inflicted under such circumstances as was calculated to produce sudden heat and passion, or a sudden anger. This we believe to be the correct law, which will insure justice, if it be intelligently applied by the juries of the country to the facts of the particular cases. Unreasonable tempers, and habitually bad and uncontrollable passions, should not be shielded by trivial or trifling provocations, but the jury should be judges of such matters, guided by and within the requisites of the law.

Again and again this court has indicated to the inferior courts that it is improper to instruct the jury that if a witness has wilfully and corruptly swore falsely as to any material fact they may disregard the whole of his evidence. The jury are judges of the weight and credibility of the evidence, and the court should not indicate any particular test of credibility to the jury. They should apply all legal, logical, and common-sense tests to both the sufficiency and credibility of the evidence of which they must necessarily judge, but a particular conclusion, based upon a single supposed fact, ought not to be isolated and pointed out to the jury as one that they may come to. While we would not have reversed this case on account of the giving of this instruction, still such an instruction ought never to be given in any kind of a case, and were it shown to be prejudicial to a party we would feel it our duty to remedy the error.

Wherefore the judgment is *reversed* and cause remanded with directions to grant the appellant a new trial.

H. T. Wilson, W. S. Chelf, for appellant.

P. W. Hardin, for appellee.

[Cited, *Barnett v. Commonwealth,* 84 Ky. 449, 8 Ky. L. 448, 1 S. W. 722.]

WM. S. LUDLOW ET AL. *v.* E. X. MAXWELL ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—55.]

Confidence Reposed as Ground for Granting Relief.

Where a sister reposes great confidence in a brother who has been managing her estate and seeks to have the estate partitioned and her portion set off to her and to that end institutes a proceeding to partition and two persons are selected to divide the property and they act honestly in the matter but are dominated and practically selected by the brother on account of the confidence the sister has in him, and these commissioners divide the estate following the desires and advice of the brother in doing so, even if no fraud is practiced either by him or the commissioners the award will be set aside and a new trial and partition granted if the award made is unfair as to values and the sister receives materially less values than the brother and other shareholders.

APPEAL FROM KENTON CHANCERY COURT.

June 22, 1882.

OPINION BY JUDGE PRYOR:

The ancestor of the appellants and the appellee at the time of his death was the owner of a large landed estate bordering on the Ohio River in this state, and lying opposite the city of Cincinnati. He devised his estate to his wife for life and at her death to his children, three in number, the appellee, Mrs. Maxwell, and the appellants, William and Albert Ludlow. A part of the real estate constitutes or lies within the city of Ludlow and the balance is farming land adjoining. During the life of their mother, the life tenant, this large and valuable property was managed and controlled principally by the appellant, William Ludlow, who continued the same supervision over it after her death. His sister, the appellee, was not living in Kentucky at the time her mother died, and the rents of this realty or her portion of it was collected by William and paid over to her at stated periods. The entire family and each and every member of it reposed the greatest confidence in William, trusting and submitting the entire control of the estate to his own judgment and discretion. The children held the estate in common for some time after the mother's death, and until the appellee, Mrs. Maxwell, became desirous of having a division of the estate.

The proposition for a division was not acceeded to by William and his objections were based mainly on the ground that the gradual and constant growth of the two cities adjacent to Ludlow would doubtless in a few years increase greatly the value of the property and it had better remain in common awaiting future developments as to value. The railroad known as the Cincinnati Southern Railway was then in process of construction, or had been located through a part of this landed estate and it is manifest that the views of the appellant William in reference to the division should have prevailed. Counsel, however, were advised with by Mrs. Maxwell, and finally the parties agreed that a division should be made by and under the supervision of General Kerner Garrard, who was related to the parties, and the Hon. James O'Hara, of Covington. Both of these gentlemen were familiar with the property and its surroundings and undertook to make the partition. This partition was made and the parties accepted it, and executed conveyances in accordance with it. In the partition the interests of the two brothers, William and Albert, were by consent thrown together, and that of Mrs. Maxwell, consisting of various parcels, conveyed to her.

After the partition was made and the conveyances placed on record the appellees, becoming dissatisfied with the partition, filed this petition in equity asking that the partition be set aside and the deeds cancelled and a redivision of the property made. The main ground for this relief is alleged to consist in the fraud practiced by William in obtaining certain parcels of the land allotted to him and his brother, by concealing from the commissioners the relative value of the parcels allotted to each, and in the fact that the value of the property, actual and rental, was known to William who had been managing it for years and unknown to the appellee and the commissioners, and that in the division the appellee failed to have allotted to her an equal part of the estate. It is further alleged and maintained in argument that William having controlled and managed the property for years, and having the confidence of the appellee and the commissioners, was permitted to make the division and when made it was assented to by the two commissioners who were not acquainted with the values but acted upon William's representations.

There has been a vast amount of testimony taken by the parties, including maps of the property and its surroundings, and

much of it tends more to confuse than enlighten the chancellor as to the equity of the partition made. The chancellor seemed to think the division unjust, and by his judgment cancelled the deeds.

We have examined the record with much care, and have been unable to find any evidence of fraud on the part of the appellant William Ludlow. The agreement to divide the estate was voluntary and the commissioners selected by the parties were not only intelligent men but had been acquainted with the property and the adjacent territory for many years. Mrs. Maxwell had been raised on the estate and must have had some knowledge of the value of the property allotted to her in this division.

The growth of the cities adjacent to this property, and the construction of the Southern Railway was then being discussed and the road located, and all these matters must have been taken into consideration by the parties, and were, in fact, the causes assigned by William for opposing a partition of the estate at the particular time. So we think under the circumstances, and without any evidence of bad faith on the part of William, the chancellor ought not to have cancelled the deeds of partition, requiring an account of rents and a redivision of the entire estate. Leases have been made by the parties of some of their lots, and improvements made on others, and while the testimony of the husband of Mrs. Maxwell may to some extent conduce to show fraud on the part of William, the decided preponderance of the testimony refutes such a conclusion, and in this view of the case we are sustained by the statement of the commissioners and the surveyor who were selected by these parties to make the division. The homestead was allotted to the appellee at her own instance and consented to by William, and perceiving no reason for disregarding the entire division, we will proceed to discuss the manner of division and to ascertain if there was such an inequality between any of the parcels assigned to the appellee and those assigned to the appellants as would require the chancellor to interfere and compel the parties to account in some manner for the difference. There was a classification of the property divided, and one parcel allotted to the appellee as an equivalent for a particular parcel allotted to the appellants. There was no specific or defined value on any parcel, but the commissioners proceeded to allot one parcel as the equiva-

lent for another designating the particular parcels allotted. Some of the parcels consisted of pasture lands, others of city lots, etc., and such allotments ought not to be disturbed when equal, or approximately equal in the division. There is much said by counsel in the argument of the case as to the value of certain gravel beds, when the proof shows that over one-third of the territory there is fine gravel or sand beds, a fact that must have been known to the commissioners and ought to have been known to the appellees; and to disregard the entire division for such causes in the absence of fraud, or some act equivalent to fraud by the party charged, is not denounced by any rule of law or equity. We have analyzed the testimony with a view of ascertaining whether there were fraudulent representations made or suppressed even by William with reference to the division, and while such charges are distinctly averred in the petition and argued in the brief of counsel we have been unable to reach such a conclusion from any fact appearing in the case.

If there is any reason for the chancellor disturbing the division in any particular it can be based alone on the relation he bore to the sister and the property, and the confidence reposed in him by her as well as the commissioners. The division although assented to by the commissioners selected by the parties was in fact made by the appellant. He was not only the brother of the appellee, Mrs. Maxwell, but had been her confidential adviser and managed the entire estate at his discretion prior to this division. All his acts were approved by her, not only by reason of the perfect confidence she had in him, but because he had conducted the business affairs connected with the estate, so far as this record shows, so as to give to each of the children their just proportion of the rents and profits. The same confidence seems to have been placed in him by the two commissioners in making the division and his views were, generally, adopted by them. The question then arises, will the appellants be allowed an advantage over their sister in the division of the estate when William occupied the relation of trust and confidence that this record shows he did towards both the sister and the commissioners selected to make the division.

It may be and the rule doubtless is that circumstances creating in the mind only a suspicion of fraud are not sufficient to authorize

"a satisfactory conviction of fraud." *Marksbury v. Taylor,* 10 Bush (Ky.) 519. A trustee is in such a position of trust and confidence, says Perry, that his contract or bargain with the cestui que trust will be either held void or he will be a constructive trustee. 1 Perry on Trusts (4th ed.) 244, § 195. While the appellant in this case may not in a legal sense be deemed a trustee, the same author says that equity goes further. It not only watches over the defined relation of the parties, but it scrutinizes the undefined relations of friendly habits of intercourse, personal reliance, and confidential advice. I Perry on Trusts (4th ed.) 243, § 194.

No higher degree of confidence could have been reposed in another than the appellee seems to have had in the appellant with reference to all business transactions; and when the commissioners were inspired with a confidence almost equal to that of the sister, will or ought the chancellor to know anything more than that inequality existed in the division at the time it was made and accepted by the parties? Although Mrs. Maxwell accepted the deed it can not be said that the parties were contracting at arms length when she accepted the conveyance as a full and final division of the property. An error of judgment, or a mistake of facts made by the appellant in the division (although assented to by the commissioners) when looking to the relation existing between these parties at the time, and resulting in inequality ought to be corrected. A mere inequality resulting in but little loss to the parties would not be sufficient upon the facts of this case to authorize the interference of the chancellor. It is not to be expected in the division and subdivision of such a large estate into lots, that exact equality could be arrived at, but where a loss is substantial it seems to us a court of equity ought to remedy the wrong. Mrs. Maxwell and her husband were present when the division was made and although they may have had ample opportunity to have inspected the property after the division, or to seek the advice of others, there was the relation of brothers and sister, and a confidence in business transactions in reference to this estate by the sister in the brother for many years, that must have created such an influence as would have removed not only any suspicion of inequality, but left her to suppose that exact and equal justice had been done all parties in the division. Fraud, in our opinion, is not shown, but an inequality appears with refer-

ence to some of the classifications made in the division that prompts an inquiry by the chancellor and authorizes some relief to the appellee. The only grounds of complaint on which any relief can be obtained so far as the record now appears is that part of the division known as the river front and the ferry property. It is plain from the statement made by one of the commissioners and from the proof in this case that the allotment with reference to the river shore is unequal considered with reference to the entire division or as classified by the commissioners. The deep water suitable for landing and mooring boats and for boat harbors has all or nearly all been allotted to the appellants, and in making the division the commissioners and the appellant William seem to have made no difference in value because of the deep and low water. The one is valuable and the other not and, therefore, an equal proportion of the deep and shallow water should be allotted each as near as is practicable, locating the same as near as possible to the lots owned by each that front the river, or that lie adjacent to the river road separating them from the river. There is deep water in front of the residence allotted to Mrs. Maxwell and there is no reason why some portion of this should not be allotted to her. This may not be practicable when examined by the commissioners and for that reason they should be left to examine this river front and give to each so far as is practicable their equal proportion in value of the river front. The mooring of boats and harbors by reason of this deep water makes such front of great value, and this was overlooked by the appellant and the commissioners.

In the allotment as class No. 1, the appellee obtained the distillery property as defined by the report or deed and the Arnold House. William and Albert in lieu of this obtained certain lots on Second street, east of the distillery, including all east of distillery, ferry franchise, landings, etc., that is, the ferry rights and property pertaining to it. Now it is evident that this ferry property or that part of the territory belonging to it, on the Cincinnati side, was not estimated or valued as it should have been, and this view is sustained by the testimony of O'Hara and by other witnesses in the case. While the value placed on the ferry property by some may be speculative, still in reading the record it is plain, we think, that the valuation as compared with that allotted Mrs.

Maxwell in lieu of it renders that part of the division unequal. The case should, therefore, go to the commissioners with instructions to ascertain and report the difference in value of class or lot No. 1, if any, at the time the division was made, and the facts upon which they base their opinion and whatever difference there may be the appellants must pay to the appellee in money, or have allotted and conveyed to her certain parcels of the land already allotted them to make up the difference, and this must be done under the supervision of the chancellor through his commissioner unless the parties can agree. It does appear that the annual income from that part of the estate designated as No. 1 is about equal to each child but we are inclined to adjudge that the parcels embraced in lot No. 1, assigned to appellants, give to each an undue proportion, so far as value is concerned, over Mrs. Maxwell. The case should, therefore, go to the commissioners already appointed by the court, or such as the court may designate, with directions to so allot the river shore as to give to each a fair and equal proportion in value of the entire river front and to report the difference in value of the allotments made and designated as lot No. 1, in exhibit "U."

We find no other error that we think authorized the chancellor to interfere further. The appellant William, the commissioners, and the surveyor, all sustain the division as equitable except in the parcels already indicated, and when the parcels have been assigned, barns made, as well as improvements on particular lots, the chancellor would hesitate to rescind where actual fraud had been practiced, if he could otherwise reach an equitable adjustment; and in a case like this where there is no fraud or actual concealment of facts, the parties should be made equal without disturbing the division if it can be avoided, and particularly when the party complaining is asserting an equity opposed to the action of those she has selected to protect her interests. The judgment is *reversed* and cause remanded with directions to refer the case to the commissioners as herein indicated, and to set aside so much of the judgment as cancels the deeds of partition and for further proceedings consistent with this opinion. Each party should pay one-third of all the costs of this litigation both in this court and the court below.

It is urged by counsel for the appellants that as to the appel-

lant William, the division can not be disturbed as he took no part in the partition. We think different. This common estate was left to be divided by the brother, and was in fact divided by him and relief should be given to all entitled to it against those who have received undue portions of the estate.

Mrs. Maxwell is entitled to her proportion of the rents of the ferry property and the river front to the extent the division is unequal.

T. F. Hallam, John G. Carlisle, Wm. Lindsay, for appellants.
J. F. & C. H. Fisk, for appellees.

FRED MATHIS *v.* COMMONWEALTH.

[Kentucky Law Reporter, Vol. 4—53.]

Competency of Witness Charged with Being a Co-conspirator.

One person indicted, charged with conspiring with another and committing murder, is a competent witness for the other if the indictment is a good indictment for conspiracy.

Indictment for Conspiracy.

An indictment for conspiracy is insufficient when it charges the conspiracy but fails to allege what the object of the conspiracy was.

APPEAL FROM HARDIN CIRCUIT COURT.

June 24, 1882.

OPINION BY JUDGE HINES:

The indictment charges Fred Mathis and Robert Price with the murder of one Murphy, and alleges that they "did conspire together and willfully, unlawfully and feloniously, with malice aforethought, kill and murder Thomas Murphy." To the indictment a demurrer was overruled, and on trial of Mathis he was found guity and sentenced to the penitentiary for twelve years. On the trial, Price was offered as a witness for Mathis, but was rejected by the court apparently upon the ground that he was jointly indicted, and the indicement charged a conspiracy. The Crim. Code (1876), § 234, provides that persons jointly indicted may be competent as witnesses for each other, unless the indictment charge a conspiracy. To exclude the witness thus jointly indicted, the indictment must be a good indictment for conspiracy

at common law, which is clearly not the case here. The charge is of a conspiracy, but what the object of the conspiracy was is not alleged. It is not charged that they conspired to kill Murphy. The conspiracy may have been for any other purpose. The indictment is in this repect defective. The demurrer should have been sustained.

Judgment *reversed.*

Wm. Wilson, J. P. Hobson, for appellant.

P. W. Hardin, for appellee.

BENJ. BROWN v. COMMONWEALTH.

[Kentucky Law Reporter, Vol. 4—49.]

Larceny—Receiving Stolen Property.

Three hogs worth more than ten dollars each were stolen and the accused was indicted in two counts, one for stealing hogs worth more than $4 and the other for knowingly receiving the stolen property of the value of more than $4. The evidence showed that the hogs stolen were worth $10 each. Some of the fresh pork worth less than $4, and a part of one of the stolen hogs, was found in the possession of the accused. The court instructed the jury in substance that if the accused alone or with others feloniously took and carried away the hogs or any of them of the value of $4, or feloniously received them knowing them to be stolen, they must find him guilty and fix his punishment at not less than one nor more than five years in the penitentiary. It was held in view of the evidence that the court should have given to the jury also an instruction asked by the accused to the effect that if he neither participated in the felony nor received the hogs when stolen, but if the jury believed beyond a reasonable doubt that after the theft, he received a part of the stolen goods of less value than $4 without any knowledge or participation in the felony, his punishment should be confinement in the county jail.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 24, 1882.

OPINION BY JUDGE PRYOR:

There are two counts in this indictment, the first for stealing hogs of the value of more than $4; second, for knowingly receiving the stolen property, the hogs, of the value of more than $4.

Three hogs of more than the value of $10 each, the property of Kilpatrick, had been stolen. Some of the fresh pork, of less value than $4, and a part of one of the hogs, was found in the possession of the appellant.

The court instructed the jury that if the accused alone, or with others, feloniously took and carried away the hogs, or any of them of the value of $4, or feloniously received them, knowing them to be stolen, they must find accused guilty, and fix their punishment at confinement in the penitentiary not less than 1, nor more than 5 years. The court also told the jury that if they had a reasonable doubt as to whether said hogs were of the value of $4 they must fix the punishment by confinement in the county jail, etc. There was no doubt but the hogs were of the value of $30 or $40, as no proof was offered to the contrary and, therefore, under the instructions of the court, the jury was compelled to find the parties either guilty of stealing the hogs, or of receiving them as stolen property, or of finding them not guilty of either offense. The proof was that the accused, the appellant, was found in the possession of part of the hog of less value than $4, and this was sufficient, in the opinion of the jury, to convict him either of the offense of stealing the three hogs, or of receiving them, knowing them to have been stolen. This was the only issue the jury could try or were required to determine from the instructions. The accused, however, maintained that while the possession of a part of the stolen property might be evidence sufficient to convict him of the felony, still he was entitled to an instruction based upon the idea that if he was not the original felon or an aider or abettor in the felony, but received a part of this hog with no other knowledge than that the part received by him had been stolen, and was of less value than $4, it was a misdemeanor and not a felony. If he was not a party to the stealing, but after the felony had been committed he accepted from the thief a part of the meat of less value than $4, this constituted his offense, and the punishment was confinement in the county jail. Such was the instruction asked by counsel and refused. He had not the benefit of this ruling under any instruction given. The only instruction on the subject given was, that if the jury have a reasonable doubt as to the value of said hogs being $4 they must acquit. The party was either guilty or not guilty of stealing the hogs or of receiving them, knowing them to have been stolen, under the instructions.

The further instruction should have been given to this effect: If he neither participated in the felony, nor received the hogs when stolen, but the jury should believe, beyond a reasonable doubt, that after the theft was committed, he received a part of the stolen property of less value than $4, without any knowledge or participation in the felony, his punishment is confinement in the county jail. This, it seems to us, combined the whole law of the case, and without it the accused was prejudiced. The judgment as to Benjamin Brown, in our opinion, was erroneous.

Mat Walton, for appellant.

P. W. Hardin, for appellee.

SCOTT YOUNG *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—55.]

Receiving Stolen Goods—Instructions.

When one is charged with receiving stolen goods, it is error at the trial for the court to refuse to give an instruction asked by the defendant that "Before the jury can find the defendant guilty they should believe beyond a reasonable doubt that the defendant received the watch knowing it had been stolen."

Instruction.

Upon the trial of one charged with knowingly receiving stolen property it is error to instruct the jury that they were authorized to find the defendant guilty if he knew, or believed at the time he received the property, either from information received at or before that time, or from facts within his own knowledge that it had been stolen. The words "knowledge" and "belief" are not synonymous as used in the statute.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 24, 1882.

OPINION BY JUDGE LEWIS:

Appellant was indicted for the offense denounced by Gen. Stat. (1881), Ch. 29, Art. 11, § 8, which is as follows: "Whoever shall receive any stolen goods, chattels, or other thing, the stealing whereof is punished as a felony or misdemeanor, knowing the same to be stolen, shall be liable to the same punishment to which the person stealing the same is by law subjected."

Upon the trial the court below instructed the jury that they were authorized to find the defendant guilty if he knew, or believed at the time he received the property, either from information received at or before that time, or from facts within his own knowledge, that it had been stolen. At the same time in behalf of appellant the following instruction was asked: "Before the jury can find the defendant guilty they should believe beyond a reasonable doubt that the defendant received the watch knowing it had been stolen," which instruction the court refused to give, unless qualified "so that the guilty knowledge should be defined as it is defined in the instruction given at the instance of the commonwealth." The instruction asked for by appellant's counsel being in the identical language of the statute for a violation of which he was indicted ought to have been given without the qualification required by the court below. And as instruction "A" contained language not in the statute and is palpably inconsistent with the real meaning of the statute it should not have been given.

That the legislature has seen proper to define the offense by the use of the word "knowledge" is a sufficient reason why the word "belief" which possesses quite a different idea should be excluded from the instruction by the court. "Knowledge" is defined as "the highest degree of the speculative faculties and consists in the perception of the truth of affirmative or negative propositions." "Belief admits of all degrees, from the slightest suspicion to the fullest assurance."

The offense for which appellant was indicted and tried is for receiving stolen goods, knowing, not believing, the same to be stolen.

As by the error of the court below the substantial rights of the appellant have been prejudiced, the judgment must be ***reversed*** and cause remanded with directions to grant him a new trial and for further proceedings consistent with this opinion.

R. A. Thornton, Z. Gibbons, for appellant.

P. W. Hardin, for appellee.

E. T. SHIPP v. S. M. HIBBLER ET AL.

[Kentucky Law Reporter, Vol. 4—47.]

Fraudulent Conveyance of Land.

Where a father in the year 1862 put his daughter into possession of a farm and executed to her a memorandum that "This is to show that the farme I own in Harrison county, of two hundred and forty-seven and a half acres, known as the William H. Wilson farme, I give to my daughter, Louisa Sims, to have and to hold until her death, and then to go to her children. * * * This 17th of April, 1862," and in 1875 conveyed the land to his said daughter and her husband for life, with fee to their children, it is held that creditors of the father, becoming such after 1862, can not subject such land to their claims.

Possession as Notice to Creditors.

Where the donee of real estate is given a memorandum showing the gift, and enters into possession, even if the memorandum is not recorded, the creditors of the donor, becoming such after such possession and claim of ownership under the gift, must take notice and be on their guard.

APPEAL FROM BOURBON COURT OF COMMON PLEAS.

June 24, 1882.

OPINION BY JUDGE HINES:

This is an action by appellant to set aside a voluntary conveyance and to subject the land conveyed to the payment of appellant's debts against the appellee, S. M. Hibbler. The conveyance was made by S. M. Hibbler to his daughter, Mrs. Sims, and her husband, for life (with remainder to her children, and it bears date February 22, 1875, subsequent to the debt of appellant. It is, therefore, claimed that the conveyance is void as to appellant. To this Mrs. Sims and husband answer that they took possession of the land, claiming it under a parol gift from S. M. Hibbler, and that subsequently the parol gift was consummated by a writing, which reads as follows:

MEMORANDUM.

"This is to show that the farme I own in Harrison county, of two hundred and forty-seven and a half acres, nowin as the Wil-

liam H. Wilson farme, I give to my daughter, Louisa Sims, to have and to hold until her death, and then to go to her children. This 17th of April, 1862.

"Given under my hand. S. M. Hibbler."

The evidence shows that at the date of this writing S. M. Hibbler had two children, to the other of whom he had previously advanced much more than the value of this gift to the daughter; that he was not indebted to any one, in fact, was worth some $45,000, and that Mrs. Sims and husband had held and claimed this land, under this gift, for about thirteen years before the creation of the debt to appellant. No question is made as to the genuineness of the writing nor as to the identity of the land.

It is insisted that the writing is not effectual, because not recorded. The recording of a conveyance does not affect the rights of the parties themselves, but is intended as a notice to creditors and purchasers for their protection, and as the gift was accompanied by possession and by claim to ownership under the gift there was notice which was sufficient to put purchasers and creditors upon guard.

It is also insisted that appellee, Mrs. Sims, should not be allowed to rely upon the writing of 1862, because of the acceptance of the deed of February, 1875, which it is claimed is essentially different. There is no material difference in the terms of the writing of 1862 and the deed of 1875, but if there was it would be no cause of complaint on the part of appellant, provided the writing of 1862 completed the gift from S. M. Hibbler to Mrs. Sims and could have been enforced against Hibbler. The terms of the writing of 1862 are a life interest to Mrs. Sims with remainder to children, while the deed of 1875 is to Mrs. Sims and husband, for their joint or several lives, with remainder to children. If the writing of 1862, with the facts accompanying it, constitute a gift, as we are clearly of the opinion that it did, it was competent for the parties to the gift, so far as it might affect strangers, to make any disposition they chose of the property. There is nothing in the suggestion that appellee, Mrs. Sims, can not rely upon the writing of 1862, because she accepts the deed of 1875. She, in fact, relies upon the writing of 1862 in the pleadings, and upon the deed of 1875 as a final completion of the original agreement to make formal conveyance.

The writing sufficiently describes the land. The only object of description is identification, and that object is accomplished by the writing. Besides, no question is made as to the identity of the land. *Ford v. Ellingwood,* 3 Met. (Ky.) 359.

Judgment *affirmed.*

Huston & Mulligan, E. M. Dickson, for appellant.

J. Q. Ward, J. & J. W. Rodman, J. H. Webster, Cunningham & Turney, for appellees.

COMMONWEALTH *v.* JAMES S. LITTRELL.

[Abstract Kentucky Law Reporter, Vol. 4—251.]

Indictment for Assault With Intent to Ravish.

An indictment under Gen. Stat. (1881), Ch. 29, Art. 4, § 9, is sufficient when it contains a charge that the defendant detained the prosecuting witness (naming a woman) against her will by assaulting, seizing and holding her for the space of ten minutes with the felonious intent to ravish and carnally know her.

APPEAL FROM GALLATIN CIRCUIT COURT.

September 7, 1882.

OPINION BY JUDGE HARGIS:

General Statutes (1881), Ch. 29, Art. 4, § 9, provides that "Whoever shall unlawfully take or detain any woman against her will, * * * with intent to have carnal knowledge with her himself, * * * shall be confined in the penitentiary not less than two nor more than seven years."

The appellee is charged with having detained Sarah M. Sweeney against her will by assaulting, seizing and holding her for the space of ten minutes, with the felonious intent to ravish and carnally know her.

To the indictment a demurrer was sustained, and the commonwealth has prosecuted this appeal for a reversal of that judgment. The indictment states the facts which, if true, constitute the offense denounced by the statute quoted. Only two essential elements are required by the statute to constitute this offense: First, unlawful detention of a woman against her will. Second, the intention of having carnal knowledge with her. When these acts

concur they constitute the offense which this statute was designed to punish, as this court recently held in the case of *Evans v. Commonwealth*, 79 Ky. 414, 3 Ky. L. 30.

Wherefore, the judgment is *reversed* and cause remanded with directions to overrule the demurrer.

P. W. Hardin, for appellant.

W. Montfort, for appellee.

J. C. HAYS *v.* J. L. SPRIGG ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—251.]

Liability of Deputy Sheriff and His Sureties.

The deputy sheriff is liable for all the moneys collected by him and for all that could have been collected; and the principal sheriff has his remedy by action whenever there is a breach of the deputy's bond, whether he has been compelled to account for the breach or not, when such sheriff is liable, on account of such breach, to the state or to third parties.

APPEAL FROM HARDIN CIRCUIT COURT.

September 9, 1882.

OPINION BY JUDGE PRYOR:

The deputy sheriff, and his sureties in this case by the stipulations of the bond, undertook to collect all the taxes due the state and county within a particular district in the county of Hardin. The covenant that he would discharge all the duties of deputy sheriff imposed the obligation upon him, and the further obligation that he would pay over the moneys when collected. It is plain that the deputy is liable for all the moneys collected by him and for all that could have been collected, and the principal sheriff has his remedy by action whenever there is a breach of the deputy's bond, whether he has been compelled to account for the breach or not. It is averred in the petition that the deputy has collected or could have collected by the exercise of proper diligence all this money that he undertook to collect and had failed to pay it over, and there is no reason where there has been a default that the principal should not recover of the deputy in order to make good the default. The breach is a failure to collect and

pay over money belonging to third parties, for which the principal is bound. Now is not the sheriff entitled to recover on a bond like this a sum sufficient to enable him to discharge the debt due this third party, and for which he has been made liable by reason of the default of his deputy?

The deputy and his sureties are liable, first, for what taxes were collected and unaccounted for; second, for what taxes could have been collected. The defense may show that the moneys or taxes could not have been collected or that the principal sheriff is not liable to the state or the third party; but to the extent of the sheriff's liability by reason of the acts of his deputy the sureties are bound, the petition averring that the deputy has or could have collected the whole of the money.

In the case of *Robertson v. Morgan,* 3 B. Mon. (Ky.) 307, this court said "shall he [the principal] not be allowed to recover an amount sufficient to pay the debt to the third party to whom he and his sureties are alone liable and the deputy is not?" The principal in that case recovered a judgment although he had not paid the debt. Judgment *reversed* and cause remanded with directions to overrule the demurrer. A motion to make the statements more specific as to the amount collected might prevail but the petition is good on demurrer.

Wilson, Hobson & Sprigg, for appellant.

D. C. Haycraft, for appellees.

C. R. BURKE *v.* BARTLETT CRUTCHER ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—251.]

Custody of Children.

Where after the death of his wife, leaving a daughter two weeks old, the father gives her to his late wife's mother to raise and care for and after the child has become five years of age and greatly attached to its grandparents, who are attached to it and amply able and competent financially and otherwise to give it all advantages, a court of equity does not abuse its discretion by refusing the application of the child's father for its custody after his remarriage, especially when the father does not allege his love for the child but contends that his first wife's people have said unkind things of his second wife.

Best Interest of Child Governs As to Who Should Have Its Custody.

A father has only a naked legal right to the custody of his child, and a court of equity is not bound to enforce such right when to do so is not for the best interest of the child and against an equity growing out of contract or springing from acquiescence and strengthened by ties of affection which the conduct of the father has permitted to grow between the child and its grandparents.

APPEAL FROM FRANKLIN CIRCUIT COURT.

September 9, 1882.

OPINION BY JUDGE HINES:

Appellant married the daughter of appellees. She died on the 21st of March, 1874, leaving two children of the marriage, a son two years of age, and a daughter, Mary E. Burke, two weeks old. Two days after the death of Mrs. Burke appellant gave the custody of the children to their grandmother, Mary Crutcher, appellee. On the 1st day of October, 1878, appellant again married, and on the 18th of that month claimed and received custody of his son, the daughter remaining with the grandparents. This action in equity was instituted by appellant to recover possession of the daughter, who at the time of the institution of the action was five years and three months old. The court below adjudged that the child should remain in the custody of appellees until the further order of the court, and from that judgment the appeal is taken.

The defense of appellees is upon two grounds: First, that appellant agreed with appellee, Mrs. Mary Crutcher, that she should take and rear the daughter and should keep the son until he was large enough to go to school; second, that appellant had surrendered the custody of the child to appellees, and that since the surrender of the possession he had not manifested such parental affection as would entitle him to the possession of the child.

The record shows that the child is and has always been delicate, that she has been tenderly cared for by the grandparents and by her aunt, who has given her special attention, that the grandparents are of high social standing and financially able and manifestly willing to give the child the best moral and mental training, and that the child is greatly attached to the grandparents. On the other hand there is nothing in the evidence that conflicts

with the conclusion that appellant and his present wife are religious, of good social standing and financially able to rear and educate the child.

It is clearly shown by the evidence that appellant agreed that Mrs. Crutcher should take and rear the daughter "as her own," and that she and her husband have so far fully complied with the agreement, and there is no reason to doubt they will do so in the future. But whether such agreement is shown by positive evidence seems to us immaterial, since it is shown that appellant abandoned the control of the child to appellees, giving them the burden of support, until there has grown up such an attachment between the child and the grandparents that the happiness of the child would be endangered by an enforced separation.

Neither the consent of appellant nor the declaration by him of his motive in seeking the recovery of the child recommends his claim to the favorable consideration of a court of equity. His visits to the children when they were both with the grandparents were not oftener than twice a month, although he lived not exceeding ten miles from them, and after he had possession of his son he visited the daughter not more than twice in twelve months. He made no claim to the custody of the daughter for five years, and the reason then assigned was not his affection for her, nor that her interest would be forwarded, but that the "Crutcher girls had said a good many spiteful things about his present wife."

Appellant in this case has at most only a naked legal right which a court of equity ought not to enforce, contrary to the interest of the child, against an equity growing out of contract or springing from acquiescence, and strengthened by the tenderest ties of affection which the conduct of appellant has permitted to grow between the child and its grandparents.

The decree of the court below is not final as to the ultimate custody of the child. The right to revoke or modify the decree, as circumstances may require, is reserved, so that no harm can result or hardships follow either to the child or parent. Hurd on Habeas Corpus (2d ed.) 543; *Ellis v. Jesup,* 11 Bush (Ky.) 403.

Judgment *affirmed.*

Eugene P. Moore, D. L. Thornton, for appellant.

Frank Chinn, for appellees.

THOS. L. JONES ET AL. *v.* NEWPORT & LICKING TPK. R. CO.

[Abstract Kentucky Law Reporter, Vol. 3—252.]

Corporations—Increase of Stock.

The sole owners of the chartered rights and franchises of the corporation as well as its property have the right to increase the capital stock and prescribe the terms on which it may be sold.

Corporations—Acquiescence in Action Increasing Stock.

Subscribers to an increased issue of stock may not raise the question of the right to increase the stock where they have accepted the stock and acquiesced in the arrangement for upward of eleven years.

APPEAL FROM CAMPBELL CHANCERY COURT.

September 9, 1882.

OPINION BY JUDGE LEWIS:

Though the statement of facts agreed upon by the parties in this case is not as full or clear as it should be, it sufficiently appears that the original stockholders of the Newport & Licking Tpk. R. Co. authorized the increase of their own stock and it was issued to them before any more stock of the company was subscribed or sold. We think it is also shown that the new stockholders had notice before subscribing or purchasing that such issue of additional stock to the original stockholder had been made.

The additional or increased stock thus issued to the original stockholders amounted to 100%, or double the amount originally subscribed and paid in, and was ascertained and determined by the amount of tolls that were collected and applied to repairing the road from 1856, when the road was completed, to the 1st of January, 1870.

As to the power of the original stockholders under the charter to thus increase or to fix a value upon their own stock subscribed and paid in more than fifteen years previously, we perceive no difficulty. For they were the sole owners of the chartered rights and franchises of the corporation as well as the property, and certainly had the right to prescribe the terms upon which others might become members and jointly entitled

to the privileges and benefits of the corporation. To deny them this right is to arbitrarily and against their will fix a value upon property which they are as free to dispose of as any other property.

It can not be pretended that they had not the right to prescribe the terms upon which others might become stockholders; and the new stockholders having subscribed or purchased stock upon the terms prescribed, and acquiesced for about eleven years, have no right now to complain, particularly in the absence of any allegation of fraud or mistake.

Wherefore the judgment of the court below, except so much thereof as relates to the stock issued to T. L. Jones, is *reversed* and cause remanded with directions for further proceedings consistent with this opinion.

O'Hara & Bryan, for appellants.

Jas. C. Wright, for appellees.

HIRAM HARWOOD ET AL. *v.* D. H. BALDWIN & CO.

[Abstract Kentucky Law Reporter, Vol. 4—253.]

Contract of Sale of Personalty.

The fact that a contract for the sale of personal property is denominated a renting contract does not make it a renting contract.

APPEAL FROM KENTON CIRCUIT COURT.

September 12, 1882.

OPINION BY JUDGE PRYOR:

The identical question involved in this case was determined by this court in the case of *Greer v. Church,* 13 Bush (Ky.) 430, the only difference being that in the reported case the property sold had been purchased by a stranger. There can be no doubt from the written agreement between the parties but that they understood the stipulations of the contract as evidencing a sale and not a renting, and while it may be styled a renting in the agreement it does not make it so. Twenty-five dollars was paid in hand and the vendee was to pay and did pay $75. All these payments, it is insisted, are to be regarded as so much paid for

the use of a piano that was worth only $350, and the vendee was required to surrender the property after the payment of $240 of the purchase-money.

The appellees doubtless had two objects in view in making such a contract. The first was to protect them against a purchaser from the vendee, and this was not accomplished by its terms, as was decided in *Greer v. Church*. The second object was to secure the payment as between the parties of the balance of the purchase-money by retaining a lien so that they might subject the property to the payment of the unpaid purchase-money. It is a mortgage in the pocket of the appellees and as between the parties should be enforced. The judgment below is therefore *reversed* and cause remanded with directions to permit the appellees to amend their petition and transfer the case to the equity docket that the property may be sold to satisfy the unpaid purchase-money.

T. F. Hallam, for appellant.

J. F. & C. H. Fisk, for appellees.

C. L. HARRIS *v.* R. H. MAY ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—253.]

Sale of Real Estate by Bond.

Where A purchases real estate from B and receives a bond for a deed and pays B the purchase-price, and B by fraud or mistake conveys or causes said real estate to be conveyed to his own wife and children, B becomes liable to A for such purchase-price; and where A agrees to surrender his claim for $15 more than such original price B is liable for such excess as well as such original purchase-price.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

September 14, 1882.

OPINION BY JUDGE LEWIS:

It is evident from all the circumstances in this case that when appellant, Harris, sold the three acres of land by. verbal contract to J. C. Barnett, put him in possession and received the purchase-price in full, that he agreed and also had the power to

cause a good title to the land to be made to him. It is also evident that without the knowledge or consent of Barnett and in violation of the terms of the sale to him appellant subsequently procured his vendors, whose title bond he held, to convey to his own wife and children the entire tract of 96 acres, including the 3 acres previously sold by him to Barnett. Whether this was done fraudulently or by mistake is immaterial.

The price at which Barnett resold the 3 acres to appellant, for which the note sued on was given, is only $15 in excess of what Barnett paid to him for the same land, not enough to cover interest and taxes. The practical effect of the judgment rendered by the court below in favor of Barnett's assignee is, therefore, merely a rescission of the original contract of sale by appellant to Barnett and the repayment of what Barnett paid for the land in the first instance, and to that Barnett was clearly entitled when appellant caused the title to be conveyed to his wife and children. At least, appellant should not now be heard to plead as a defense to the action upon the note a want of title in Barnett, which if true is the result of his own wrong.

We are also of the opinion that the circuit court correctly decided that the claims pleaded as off-sets to the note by appellant should be applied as credits upon the account held by Barnett against him and not deducted from the amount of the note.

Wherefore the judgment is *affirmed.*

W. D. Greer, C. L. Harris, for appellant.

Handlin & Webb, for appellees.

C. G. WALLACE *v.* W. P. MONLINIER.

[Abstract Kentucky Law Reporter, Vol. 4—253.]

Measure of Damages in Conversion.

Where a landlord is charged with taking possession of his tenant's crops by force and converting them to his own use, if the proof sustains the charges the measure of damages should be the value of the property converted less the value of the rental of the land for the time it was rented.

Competency of Evidence.

In a suit by a tenant against his landlord for conversion, where it is alleged that plaintiff's father as well as plaintiff was thrown

out of possession, but the father is not a party to the suit, and the court refused defendant's motion to strike out that part of the petition relating to the father, if such ruling was proper, then it was proper to prove the statements of the father as to the manner of his holding the possession.

Motion to Strike Out.

Where a tenant alone sues his landlord for dispossessing him and for conversion of his crops, and alleges that his father as well as himself was turned out of possession, on motion of the defendant, the court should have struck out that part of the petition relating to the father.

APPEAL FROM PENDLETON CHANCERY COURT.

September 14, 1882.

OPINION BY JUDGE PRYOR:

This is a peculiar case and one presenting some difficulty. It is claimed in the action instituted by the appellee that the appellant had violated a contract of leasing by the terms of which the appellee had the right to enter upon the premises and occupy them from March, 1875, till December, 1875, at a monthly rental of $——; that the appellant, disregarding his lease with force and arms, entered upon the premises before the expiration of his term, turned the appellee out of possession and took possession of his crops, converting the same to his own use. The action partakes of the nature of an action for a breach of the contract, of trespass quare clausum fregit, and of trover and conversion.

The proof shows that the father of the appellee was the owner of a tract of land lying in the county of Campbell, and that this land was sold to satisfy various liens and purchased by the appellant, Wallace, and others for $5,000; that the purchasers were entitled to their writ of possession, and in March, 1875, the appellee (the son of the original owner) came to Wallace at the instance of his father and proposed to rent the land until the following December; that they differed as to the price, and Wallace, declining to rent or fix the price until others interested were consulted, told the appellee in substance that he must give him his written obligation for the rent with security, but that he could go and plant his crop and he and his (the appellee's) attorney would fix up the details of the agreement. It seems

that the appellee left with that understanding and that he would furnish the security and enter into the agreement. This is in substance the testimony of the appellee and his attorney, Blakely. They both say that bond with surety was to be given, and the attorney says that the appellee gave him a power of attorney to execute the lease but that no security was ever furnished or any agreement made as to the amount of rent to be paid, and that Wallace called on him time and again for the obligation but his client failed to furnish it.

Wallace and Benton, the latter representing the other purchaser, or one of them, controvert the statements of Blakely and say that no permission was given to plant crops and no agreement entered into, but that the father of the appellee was in possession and had so remained since the sale without any other agreement than the promise of the son to return and make a contract of renting. So if the parties remained in the possession after the purchase by Wallace and others, they were subject to be turned out at any time under the writ of habeas facias unless there was some agreement to permit them to remain and cultivate the farm. It is certain that no such agreement was made, but on the contrary, looking alone to the testimony of the appellee and his attorney, the appellee was permitted to plant his crop on the assurance that he would give bond and security for the rent, and that his attorney and Wallace should arrange the matter. This he failed to do, and in fact admits that he failed to comply in any particular.

Evidence was offered to show that the father of the appellee stated that he did not intend that the contract should be complied with, but this was refused. In our opinion the evidence was competent. The son stated that he was sent by the father to make the contract, and the complaint is that the father as well as the son was turned out of possession, and on motion to strike out that part of the petition relating to the father the court below regarded it as properly a part of the complaint and refused to strike the allegation from the petition. Now if the overruling of the motion was proper under the circumstances it was proper to introduce the statements of the father as to the manner of his holding. If there had been no agreement of any character as to the possession the purchasers were entitled to their writ.

The only question, it seems to us, for the jury to determine was, Did the appellant consent that the appellee should plant his crop before executing his obligation or before an agreement as to the terms of the renting, upon the assurance by appellee that the written obligation with security should be given? If so, and the appellee violated his contract by refusing or neglecting to give any obligation for the rent, his recovery should be limited to the extent of the conversion of the crop by Wallace or by his authority, less the value of the rental. If there had been no crop planted and the appellee had failed to comply with his agreement as he admits he did, it leaves his father in possession having no other right than he would have had if the son had never seen Wallace.

But if Wallace consented to the planting of the crop or had a knowledge of his planting and cultivating it for three or four months it would amount to an acquiescence as to his right. The record shows no case for punitive damages on the idea even that the conditional consent of Wallace was given. If the crop was used or converted by Wallace or by the tenant of Wallace by the latter's direction, or he was refused permission to take it from the place by Wallace or by his authority, the latter is liable for its value, less the value of the rental. The damages if placed at the highest estimate made is more than the proof authorized. In fact, as this is an action for converting the property to the use of the appellant, the damages should be confined to the value of the property taken and converted by Wallace or those authorized by him to take it, less the value of the rent for the time he had the possession. The instructions were erroneous and misleading. There was no evidence of any lease or contract and no instruction should have been given upon either idea.

The only question is, Did the appellant consent that the crop should be planted before the terms of the contract were entered into upon the assurance that the contract would be entered, and if not, did the appellee plant and cultivate the crop with a knowledge on the part of Wallace that he was cultivating it? If so, the jury may imply consent. If these facts are established, and they are based alone on the testimony of the plaintiff and his witnesses, the jury can find the value of the property converted by Wallace or by his direction or authority, less the

value of the rental from March until the appellee was dispossessed. The motion to strike from the petition the allegation in regard to the father should have been sustained, and then the father's statement would be properly excluded.

The judgment below is *reversed* and cause remanded for a new trial in conformity with this opinion.

R. D. Handy, A. Duvall, for appellant.

Wm. Lindsay, for appellee.

TOM LILLARD'S ADMR. *v.* MARY HOUSTON TRANSPORTATION CO.

[Abstract Kentucky Law Reporter, Vol. 4—254.]

Contributory Negligence in a Damage Suit.

Where plaintiff's intestate, being an employe of a steamboat company, rashly and recklessly placed himself in a position of danger which resulted in the loss of his life, without the fault of his employer, there can be no recovery.

Assumed Risk.

Where in a suit against a transportation company operating a freight boat on the river, brought by plaintiff on account of his intestate having lost his life in an effort to carry out the orders of the company to retake a barrel which had fallen overboard, there is no evidence of willful neglect or of reckless and wanton conduct towards the intestate in the direction given him to catch the barrel, it is held that the danger was one of the perils attending navigation that he had agreed to risk when accepting the employment and there could be no recovery.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 19, 1882.

OPINION BY JUDGE PRYOR:

The only question in this case was whether the death of the appellant's intestate was caused by the willful neglect of the defendant or its employes. The instructions given, at least so far as the appellant is concerned, were unobjectionable. The jury certainly understood the issue, and from the testimony in the case, looking to that of the plaintiff alone, it does not appear that the barrel was lodged against the wheel of the boat at the

time the deceased was ordered to regain it, nor that the employes of the defendant knew it had lodged or floated there at the time the intestate was drowned. The boat was landed, and as is usual and necessary with boats the wheel was occasionally turned so as to keep it from moving off; and the intestate, who knew or ought to have known this fact, rashly and recklessly placed himself in a position of danger resulting in the loss of his life and, as we think the testimony conduces to show, without the fault of the defendant. As soon as the danger was ascertained efforts were made to prevent the accident, but proved unavailing. There was no evidence in this case of willful neglect or of reckless and wanton conduct towards the intestate in the direction given him to catch the barrel that had fallen overboard. It was one of the perils attending navigation that he had agreed to risk when accepting the employment.

The verdict and judgment in our opinion was proper and is now *affirmed.*

I. H. Trabue, for appellant.

Goodloe, Roberts & Humphrey, for appellee.

A. C. CHAPMAN *v.* ELI VANOVER.

[Abstract Kentucky Law Reporter, Vol. 4—254.]

Receiver for Farm on Account of Waste.

Where the plaintiff in his petition for the appointment of a receiver of a farm, on account of waste, charges only that the land will not pay the debt due him and that the defendant is permitting the farm to go to waste, but not alleging how or in what manner the waste is being committed, and this is shown for the first time by affidavits at the hearing, the defendant on his application should be allowed time to produce proof of the falsity of such affidavits, and no receiver should be appointed until he has been given a chance to meet such charges, especially where he fiiles his own affidavit of such falsity and offers to furnish other proof thereof if given time to procure affidavits.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 19, 1882.

OPINION BY JUDGE PRYOR:

This is an appeal from an order placing the real estate of the appellant in the hands of a receiver in an action to enforce a vendor's lien. The action was instituted in November, 1870, and in the following month (December) an answer was filed. The appellee failed to reply until March, 1880, and at the June term a rejoinder was filed by the appellant and no surrejoinder filed by the appellee until January, 1881. So the laches in the preparation of the pleadings was with the appellee and necessarily delayed the judgment.

The ground of the motion is that the land will not pay the debt and appellee is permitting the farm to go to waste. How or in what manner the waste is being committed does not appear in the notice or statement of the complaint. Affidavits were read on the hearing, and for the first time, so far as this record shows, the grounds for the motion were defined and that in the affidavit of the witnesses. The appellant asked time to controvert the affidavits, offering his own affidavit to the effect that he would disprove the statements made; that the farm was in as good condition as when he purchased it with the exception of the barn that had accidentally burned; that his ground had been broken up for his spring crops and his garden planted, and that to oust him under the circumstances would result in great injury. The names of the witnesses are given, by whom he proposed to establish the truth of the statements made, and if not, as the specific charges as to waste had been disclosed on the hearing for the first time, an opportunity should have been afforded him to produce rebutting testimony, particularly when the delay in obtaining a judgment was not to be attributed to the appellant. Under the circumstances, having plowed his land and planted his garden, a strong case should have been made out before the chancellor would or ought to have deprived him of possession.

Judgment *reversed* and cause remanded with directions to set aside the order placing the land in the hands of a receiver.

Little & Slack, for appellant.

Sweeney & Son, for appellee.

HENRY WORTHINGTON *v.* JOHN J. MILLER'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 4—252.]

Incompetency of Evidence.

Where a suit is brought on a note which is more than ten years overdue and the defense of payment is made, it is incompetent for plaintiff, in his effort to weaken the conclusion that payment had been made that might arise from the long delay in bringing suit to show that he had other notes which he had not sued on although they were many years overdue. Such evidence throws no light on the question of payment and is incompetent.

Fact of Partnership.

It is error for the court, in a case where the issue is as to whether persons were partners, to charge the jury that "A single transaction is sufficient to constitute a partnership" without any other explanation; he should have told the jury the character of transactions required to establish the partnership or a joint liability.

APPEAL FROM KENTON CIRCUIT COURT.

September 19, 1882.

OPINION BY JUDGE PRYOR:

This case has been heretofore in this court, and many of the questions now raised or that could have been raised should have been urged on the former appeal. The motion to require the appellee to paragraph his petition or to adopt one or the other causes of action was made on the first hearing, and if the motion should have prevailed the present appellant, although the appellee on the first appeal, could have had the error corrected. As to the sufficiency of the petition, the court in effect determined on the first appeal that the appellee had a cause of action. The judgment below must be reversed, however, on other grounds.

The present appellant (Worthington) was sued as a member of the firm of James Whipps & Co. and sought to be made liable as a partner upon a due bill executed by James Whipps in the name of James Whipps & Co. to the appellee's intestate for a lot of tobacco alleged to have been sold and delivered by the intestate to the firm. The partnership was denied as well as the authority of Whipps to execute any such paper, and further that the debt had been paid. The testimony shows that Miller, to whom the note was given, had been for a number of

years preceding his death in embarrassed circumstances, and that Worthington, the alleged debtor, was a thrifty man and always able to pay.

The due bill was executed in June, 1865, and the present administrator finding it among the papers of the intestate instituted this action upon it in October, 1876, a period of more than ten years from its execution. With a view of rebutting the evidence upon the plea of payment, or to destroy the effect that the pecuniary condition of the parties, connected with the lapse of time since the note fell due, might have on the minds of the jury, the appellee was permitted to show that the intestate had one or two other notes that had matured years before his death and were uncollected at the time of his death. This evidence was incompetent and threw no light upon the question of payment, and must necessarily have involved the inquiry as to why there was such delay in the collection of the notes offered in evidence. While his general conduct as to vigilance in the pursuit of his debtors might perhaps have been warranted to rebut some of the circumstances relied on by appellants as evidences of payment, still the fact of his indulging A & B was no evidence of the fact that he indulged the appellant, and the objection to the introduction of such testimony should have been sustained.

Again, one of the issues was as to the existence of the partnership. It was admitted that Whipps, who gave the note, was authorized to buy tobacco for Worthington for cash, and the effect was to show that Whipps had in fact paid the intestate, and if not that he had no authority to execute the paper, and the appellant was not a member of the firm of James Whipps & Co.

The instruction "F" asked for by the appellees and given, as to what constituted a partnership, was certainly misleading. That Whipps purchased the tobacco of Miller is established, and that he signed the name of James Whipps & Co. to the due bill is not questioned, but whether or not Worthington was a member of such a firm was the principal issue. The jury was told that "A single transaction is sufficient to constitute a partnership," without any other explanation; and while this may be so, the jury should have been told the character of transaction required to establish the partnership or a joint liability,

that is, if these parties, Worthington, Cox and Whipps, were buying and selling tobacco as a firm or jointly and Whipps, one of the firm, purchased the tobacco for which the note was given, they should find for the plaintiff.

We think the appellant should be allowed, if he so desires, to cross-examine the witness Piatt. Objections have been made to the course pursued by counsel for the appellee in making the closing argument, and the substance of the speech of each counsel embodied in the bill of exceptions. It is not to be presumed that counsel will intentionally mistake either the law or facts of a case in his argument to the jury, and while in the display of advocacy he may make such a presentation of the testimony as to annoy his adversary, it does not indicate a want of professional integrity or call from the bench a rebuke, for what at most is to be regarded as an over-zeal in behalf of his client. Judgment reversed and cause remanded for proceedings consistent with this opinion.

J. F. & C. H. Fisk, for appellant.

Hallam & Perkins, for appellee.

J. M. SOSH *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—254.]

Instruction in Criminal Case.

It is the duty of the court to instruct the jury in a criminal case on the law applicable to the case but he is not required to instruct either as to an offense for which the defendant could not be convicted under the indictment or on an assumption of fact without evidence to support it.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 21, 1882.

OPINION BY JUDGE LEWIS:

The Gen. Statutes (1881), Ch. 29, Art. 17, § 1, applies only to the offense of shooting and wounding with a gun, or other instrument loaded with a ball or other hard substance, or of cutting, thrusting or stabbing with a knife, dirk, sword or other deadly

weapon, and does not embrace the offense for which appellant was indicted, striking and wounding with a wooden club. The court below therefore did not err in refusing to instruct the jury on that section of the statute.

There is no evidence in the record showing or tending to show that appellant inflicted the wound in his necessary self-defense. And the instruction upon that hypothesis asked for by appellant was properly refused.

By the Crim. Code (1876), § 225, it is made the duty of the court to instruct the jury on the law applicable to the case. But it never was intended that the court should instruct either as to an offense for which the defendant could not be convicted under the indictment, or on an assumption of fact without evidence to support it.

Wherefore the judgment is *affirmed.*

Baker Boyd, for appellant.

P. W. Hardin, for appellee.

[Cited, *Erwin v. Commonwealth,* 96 Ky. 422, 16 Ky. L. 602, 29 S. W. 340.]

BRAMLETTE'S ADMX. *v.* BOYCE.

[Kentucky Law Reporter, Vol. 4—196.]

Rule for Construing a Written Contract.

In construing a written contract the whole of it must be considered rather than detached provisions and the intent of the parties to it, gathered from the purport and tenor of all the terms employed in it.

Corporate Authority.

A private corporation established in one state has the right without the consent of the state in which it is incorporated, to go into another state and there do anything it may be authorized to do by the laws of the state to which it goes.

APPEAL FROM JEFFERSON CIRCUIT COURT.

September 21, 1882.

OPINION BY JUDGE HARGIS:

Thomas E. Bramlette died in 1875. His widow was ap-

pointed administratrix of his estate. In the year 1879 this action at law was brought against her, in her fiduciary capacity, a trial was subsequently had, and a verdict and judgment rendered against her for the amount of the following "Endowment Bond," viz.:

"Southern Baptist Theological Seminary. Endowment bonds. Name, Thos. E. Bramlette; amount $1,000; post-office, Louisville, Ky., State of Kentucky, Jefferson county.

"For value received, in consideration of the future removal of the Southern Baptist Theological Seminary from Greenville, South Carolina, to Louisville, Ky., and the ample endowment of the same; and for the purpose of promoting the objects of the institution, I do hereby bind myself, my heirs, executors and assigns to pay to James P. Boyce, Treasurer of the Southern Baptist Theological Seminary, or to his successor in office, at the ———— the sum of $1,000, in five equal annual instalments, the first on the first of October, 1873, the second on the first of October, 1874, the third on the first of October, 1875, the fourth on the first of October, 1876, and the fifth on the first of October, 1877, with interest at the rate of six per cent. per annum from the first of October, 1872.

"Provided, That the said institution shall be located within or near to the corporate limits of the city of Louisville, Ky., by the first of October following the expiration of twelve months after the sum of five hundred thousand dollars shall have been subscribed for its permanent endowment.

"Provided, further, That neither this bond nor any moneys delivered in payment thereof, nor any of the investments made of such money or moneys, nor any of the profits therefrom, shall be liable in any way for any obligations of said seminary that may have been incurred from contributions made in South Carolina or elsewhere prior to the first of October, 1872, or from any contract between the conventions which established the said seminary and the state convention of the Baptist Denomination in South Carolina, or the Furman University, or any citizens of the state of South Carolina, or any citizens of any of the other states of the United States in virtue of any contributions made by any such citizen or citizens, or by the Furman University, to the endowment fund of said seminary or to its support prior to the said first of October, 1872.

"Provided, also, That the principal of this bond, so far as paid, shall not be expended, but shall be deposited in bank or duly invested until the board or its duly authorized committee shall have ordered the removal of the said seminary to Louisville, upon the ascertainment by the said board or committee that the sum of five hundred thousand dollars has been subscribed, the trustees, however, having the right to retain and expend or pledge so much of the interest as shall have accrued, either paid or unpaid, or the income from the investments of such principal as may have been paid to the payment of the expenses of the agency work in Kentucky in raising this endowment, but not to the agency work of the other states, and also to apply any surplus of interest and income above what is needed for the agency work in Kentucky to the payment of the annual current expenses of the said seminary until the possibilities of an actual endowment of five hundred thousand dollars shall have been ascertained.

"And provided, further, That when the trustees of the said seminary and the general association of Kentucky shall have mutually resolved that it is inexpedient further to prosecute the work of the endowment and location of the said seminary at Louisville, Ky., then this bond shall become void, and any principal that has been paid in cash or in its invested form to ——— heirs, executors or assigns, together with any amount of interest or income, which may not have become due for the agency expenses aforesaid, or for the current expenses of the said seminary.

"Witness my hand and seal this 16th day of June, in the year of our Lord, 1873."

The widow appeals from the judgment. The assigned errors will not be considered separately, as each depends upon the correct construction of the writing on which the action is based, and a general consideration of its terms will solve all the material questions presented by the record.

In construing the written contract before us, the whole must be considered, rather than detached provisions, and the true intention of the parties gathered from the purport and tenor of all the terms which they have employed. Tested by this general rule the writing becomes harmonious, and the conflict between its different provisos and the promissory clause, which

would be produced by the adoption of the appellant's construction, is avoided.

In the first place the obligor agreed to pay $200, on specified days, annually for five years, and fixed the period at which the interest should begin to accrue before any of the instalments were to become due. If he did not intend the fractions of his bond to be collectible until the things mentioned in the qualifying provisions of the contract were finally done, or definitely determined, why was it not so provided? It seems to us that he contemplated the payment of the several sums on the days named, as in the second proviso it is declared in substance that neither the principal, nor any payments thereon, nor any interest or profits therefrom, are to be applied to the discharge of any obligations of the seminary created before October 1, 1872. In the third proviso the use of the principal of the bond is also forbidden until the removal of the seminary and the ascertainment by the board that the sum of $500,000 has been raised; and it clearly contemplates the payment of the principal before the performance of either of those conditions, as it declares, so far as paid, the principal shall be deposited in bank, or duly invested, and authorizes the trustees to retain and pledge or expend the interest paid or unpaid, and the income on any investment they might make of the principal, for the payment of agency expenses first, and if any sum remained after the agency expenses were paid, they were authorized to apply it to the payment of the current expenses of the seminary.

These precautionary and provident provisions made to prevent the loss of the principal, and to secure the immediate use of the interest and income to the seminary, show that the trustees were expected by Bramlette to control the principal and expend the interest, even before ordering the removal of the seminary. There is but one state of case provided for in which the bond is to become void, and that is when the trustees of the seminary and the general association of Kentucky shall resolve that it is inexpedient further to prosecute the work of the endowment and location of the seminary.

The promise to pay at specified dates which were bound, according to the magnitude of the undertaking, to come to pass before the $500,000 could be raised by the exercise even of the most extraordinary diligence; the requirement that the sum

paid upon the bond should be deposited if the seminary had not been removed, and its endowment completed; and the authority to the trustees to retain, expend or pledge the interest or income of the bond, demonstrate that the raising of the $500,000 is not a condition precedent to its payment.

There is ample remedy to protect the appellant from loss or misappropriation of the principal, interest or income of the bond, if there be any danger of either, as the chancellor, upon the presentation of facts showing that the removal and endowment would result in failure, or that the principal or interest on the bond might be lost or misapplied, would cause the safe deposit or secure investment of the principal, and control the proper application of the interest or income, according to the terms of the contract. In view of his express promise to pay the instalments at fixed dates, Bramlette must have known and relied upon such a remedy so clearly pointed out in the third proviso of the bond.

As no equitable ground based upon either of the hypotheses above suggested was relied upon by the appellant, and her defense embraced alone the legal construction of the bond, we do not think the court erred in its instruction to the jury, as the raising of the endowment fund is not a condition precedent to the collection of the bond executed for the purpose of producing it, and the proof shows that the seminary had been moved to Louisville.

The objection that the removal is illegal in the absence of the consent of the legislature of South Carolina is unavailing to the appellant for several reasons. Her testator united in procuring the removal to be made. As the removal is an accomplished fact, it involves no such violation of sound public policy as renders his contract void or voidable, were it admitted that the state of South Carolina, complaining in her sovereign capacity, could, by proper procedure, have prevented the removal. It is too late for the appellant to interpose this objection.

It is an undisputable proposition that a private corporation established in one state has the right, without its consent, to go into another state, and there do anything it may be authorized to do by the laws of the latter state. As the state of South Carolina is not complaining, and the state of Kentucky has authorized the seminary to be located in or near Louisville, and in

pursuance of that authority the location has been made, thereby rendering the corporate existence of the institution both legal and perpetual in this state, there remains to appellant no legal or equitable grounds of complaint on that head, the corporation being purely private and possession no element that might render the removal a subtraction from the sovereignty of our sister state of South Carolina. It is insisted by appellant's counsel that the death of Bramlette, before the removal of the seminary, revoked his promise.

Considering the general plea of no consideration as sufficient to raise that question, we will state the facts on which it is made, and present our views. Bramlette died in 1875, and the removal was not made until 1877. It does not appear that the trustees or agents of the seminary expended any money or incurred any legal liability by reason of the removal, or in contemplation of the removal, until after the death of Bramlette.

If the only object of the subscription had been to pay for the removal of the seminary without a corresponding legal obligation on the part of the trustees to remove it, Bramlette's death would in law have revoked his promise if the seminary had not been removed or money expended, or legal liabilities incurred for the purpose of its removal. Then, to that state of facts, the case of *Pratt v. Trustees of the Baptist Society,* 93 Ill. 475, and authorities therein cited, would have been applicable and conclusive.

But the removal of the seminary was not the only object, nor indeed was it the most important purpose of the subscription. It was made to aid, also, in raising an ample endowment of the seminary, and to promote its objects. Other persons have subscribed to those objects and the endowment fund until it reaches the sum of about $370,000. Each of them had the right, in taking upon himself the obligation to pay a portion of that sum and to complete the endowment, to rely upon the good faith and validity of the promise of every other subscriber.

The trustees and their agents have performed the work and incurred the expenses necessary to raise the subscriptions already obtained, which would furnish at least a meritorious consideration that might very justly and reasonably be held to support the promise of the appellant's testator. But we are not without authority on this question, as in the cases of *Collier v.*

Baptist Education Society, 8 B. Mon. (Ky.) 68, and *Trustees Kentucky Female Orphan School v. Fleming,* 10 Bush (Ky.) 234, the point was decided. The court said in the latter case that "The plea of a want of consideration did not cast the burden of proving consideration upon the appellant." The note was no doubt given for a donation intended to be made to appellants, which, by Sec. 2 of their charter (Acts 1846-7, Ch. 300), they were authorized to receive. The law made it their duty to apply the fund to carrying out the charitable and benevolent purpose of the institution and the donor. This obligation furnished consideration enough to uphold the promise to pay it.

This case shows the same state of facts. The bond was given for a donation to the seminary, and the charter granted by this state (1 Acts 1876, Ch. 179) perpetuates the fundamental laws of the institution established in 1858, and authorized them to retain the property and subscription then held, and receive other property and subscriptions in the future.

It also makes it the duty of the trustees to apply the income of the property and funds of the institution to its current expenses and annual support and maintenance, and to preserve sacredly the principal "of said estate" except for permanent improvements, etc. These obligations and duties form consideration sufficient to render the promise legally enforcible. This law is founded in justice and supported by reason and sound policy.

This case is broadly distinguishable from the facts of those laid down in the authorities cited by appellant's counsel, and it does not fall within the principles they announce.

The judgment is *affirmed.*

M. Mundy, for appellant.

C. B. Seymour, for appellee.

J. L. SPRAGINS *v.* M. T. RUSSELL ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—255.]

Inadequate Consideration.

While inadequate consideration will not invalidate a sheriff's sale, when it is grossly inadequate, it will be considered by the chancellor in determining the question of fraud raised.

Validity of Sheriff's Sale.

Where a sheriff's sale of real estate is alleged to have taken place in 1872 and no conveyance was made thereunder until 1877, long after the sheriff had gone out of office, and there is no record or evidence of it showing the sale except the recital in the sheriff's deed and no record showing that the sheriff ever made any return on the execution if one was issued, the recitals in such a deed are not evidence, as against the owner, that any sale was made. And where less than fifteen years have elapsed since such alleged sale no presumption will arise that the officer did his duty and the burden is on the defendant to show that the plaintiff's title has been divested.

APPEAL FROM LINCOLN CIRCUIT COURT.

September 23, 1882.

OPINION BY JUDGE PRYOR:

Pinkney Spragins died in Lincoln county in the year 1868, leaving a last will. At the time of his death he owned a farm of one hundred twelve acres of land upon which he resided and a smaller tract of fifty acres not far distant. Under his will his wife took an estate for life in the land and the appellant the remainder. In May, 1872, one W. J. Russell caused an execution to be levied on the interest of the appellant in the one hundred twelve acres devised to him by his father, and about the same time execution for a smaller amount that had been transferred from the quarterly to the circuit court in favor of White and others was levied on the fifty acres, the tract being described as containing eighty acres. These executions were returned levied on the two tracts of land as stated, but the sale if made was under a venditioni that seems to have issued, but whether it ever found its way into the hands of the sheriff is a matter of much doubt. On the 14th of October, 1872, it is claimed that the two tracts of land were sold and purchased by M. T. Russell, who had purchased before the time the execution issued in favor of W. J. Russell. A conveyance was made by the sheriff to him in May, 1877. His debt and the two smaller debts amounting to near $400, constituted the consideration paid or agreed to be paid by Russell for the land. It seems that at the date of the alleged sale the appellant was out of the state and in ignorance of the fact that his land had been

sold. After the death of his mother, the life tenant, which occurred in 1878, the appellant, by himself or agent, took possession of the land and ascertaining the cloud upon his title filed his petition in equity to cancel the conveyance made by the sheriff to Russell and a mortgage made by Russell to one Timothy Hardin who is also made a defendant. He alleges that no levy or sale was made of his land and that the sheriff and execution purchaser combined together for the purpose of defrauding him. It is manifest from the proof that the land of the appellant worth from $3000 to $4000 was conveyed by the sheriff to M. T. Russell in consideration of his paying, or agreeing to pay the indebtedness amounting to $300 or $400. That the price was grossly inadequate must be conceded and while this fact will not invalidate the sale it must necessarily be considered by the chancellor in disposing of the questions raised. The sale is alleged to have taken place in October, 1872, but no conveyance was made by the sheriff until May, 1877, more than four years after the alleged sale and long after the sheriff had gone out of office; nor is there any evidence of record showing this sale except the recital in the conveyance of May, 1877, made by the sheriff. These recitals are not evidence as against the appellant that any sale was made, and while a possession and claim under such a conveyance for the period of fifteen years would authorize the presumption that a sale had been made and that the officer had discharged his duties, no such presumption can arise in this case and the burden is on the appellees to show that the appellant has been divested of title. That a levy was made is, we think, established, but the execution upon which the return is made is found in the office with no other return upon it, and the only evidence of the sale and the steps necessary to authorize it is found in the oral statement of the beneficiaries in the execution and the payment by Russell of one of the small debts.

Whether a sale can be made after the return of the execution without a venditioni is, we think, not a question necessary to be determined here. The Gen. Stat. (1881) Ch. 38, Art. 5, § 3, provides that "An officer may at any time after tne return day, while the original execution is in his hands, sell any property taken in virtue thereof, provided the levy was made before the return day"; but conceding such a right to exist with the sheriff,

there is no evidence of the sale either under the original writ or the venditioni, but that fact established alone by the statements of those who are the beneficiaries. Oral testimony might be introduced to establish the identity of the land sold where such an issue was raised by reason of an imperfect return, or to aid the return of sale where a combination to defraud is alleged as in this case between the sheriff and the purchaser. Here there is no record of the fact either by the sheriff's return or otherwise (except the deed) that a sale was made, nor any record evidence of an appraisement, advertisement or bond for the purchase-money; and while such irregularities as a failure to advertise, to take bonds, or to appraise the property will not affect the purchaser, still it is plain the sale must be established as a matter of record, and if the return is lost that fact must be made to appear and the loss supplied in a proper mode before the purchaser can be said to be invested with title. The sheriff and those whoever it is said appraised the land are dead, and with so many irregularities in the action of the sheriff, if he acted at all, and an entire absence of any record or the loss of any paper, evidence of the sale, we perceive no reason for withholding the relief asked by the appellant. It does not appear that the sheriff ever had a venditioni in his hands or that he made any return of a sale of the land in any manner, and under such circumstances the presumption will not be indulged that the sheriff did his duty. Hardin, who claimed to hold as mortgagee and as purchaser, is in the same condition as Russell. If Russell had no title he has none and besides, the recitals in the conveyance remanded him to the records where he could inspect the title. He could have seen that the deed was made by the sheriff more than four years after the alleged sale and for a trifling sum compared with the actual value of the land; that no return had been made on the execution, or evidence of record showing that a sale had been made. He was required as a prudent man to look to the judgment execution and sale under it, and when making the investigation would have ascertained that no evidence was to be found of any sale made to his vendor, so if he claims to occupy the position of an innocent purchaser, for the reason that his vendor acquired title, when a reasonable inquiry would have enlightened him as to the nature of the title, such a defense can not avail and in a court of equity he occupies no

better position than his vendor. The gross inadequacy of price, connected with the lapse of time intervening between the alleged sale and the conveyance by the sheriff, the absence of all record proof as to the preliminary steps required to be taken by the sheriff before the sale and no return whatever evidencing the sale present such a state of case as would authorize the conclusion that a wrong had been done the appellant; and if not, the facts of this record show a want of title in the purchaser and equity demands that the relief sought should be granted and a cancellation of the several conveyances and mortgage, and a further judgment subjecting the land to the payment of the executions with the interest thereon, and the costs of these actions, the judgment to be indorsed in behalf of the mortgagee, Hardin, who should be held entitled by reason of his mortgage to the proceeds of the sale.

Judgment *reversed* and cause remanded with directions to enter a judgment in conformity with this opinion.

Welsh & Saufley, W. H. Miller, Geo. R. McKee, for appellant.
Hill & Alcorn, J. S. & R. W. Hocker, for appellees.

JORDAN MCGINNIS ET AL. *v.* SAM W. BANTA ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—256.]

Meaning of the Word "Children" in Conveyance.

While the word "children" is ordinarily a word of purchase it should not be so construed when such a construction is opposed to the intent of the grantor.

APPEAL FROM MERCER CIRCUIT COURT.

September 26, 1882.

OPINION BY JUDGE PRYOR:

The intention of the grantor is plainly manifested by the provisions in the conveyance and in determining that the wife took a life estate it does not in our opinion conflict with the legal signification of the language used. The purpose was to secure the land to the exclusive use of the grantor's wife and children by their marriage, and the consideration causing the conveyance

consisting alone in the love and affection he had for his wife and children. To give the children an equal interest with the wife would be to vest her with a fee-simple title to an equal part with the children in the land, and by this construction that part of the land would pass from the hands of the original grantor to the children by the second marriage and they would inherit equally with all of their mother's children. The mother having married a second time the children by the first husband want a division. The chancellor determined that the mother has a life estate, remainder to the children and in this view he is supported by the case of *Davis v. Hardin,* 80 Ky. 672, 1 Ky. L. 165, and *Webb v. Holmes,* 3 B. Mon. (Ky.) 404, and *Foster v. Shreve,* 6 Bush (Ky.) 519. While the word "children" is ordinarily a word of purchase it should not be so construed when opposed to the intent of the grantor.

Concurring with the court below the judgment is *affirmed.*

Thompson & Thompson, for appellants.

Bell & Wilson, for appellees.

JOHN S. GALLAGHER *v.* JOHN WOOSTER.

[Abstract Kentucky Law Reporter, Vol. 4—256.]

Power of City to Confiscate Property.

The legislature can not constitutionally confer the power on a city to pass an ordinance to seize and sell hogs found running at large in the streets of such city. The property of a citizen can not be appropriated by the city without judicial proceeding in which he is brought before the court.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 26, 1882.

OPINION BY JUDGE HINES:

This action was brought by appellee to recover the value of certain hogs alleged to have been wrongfully converted by appellant. Appellant pleaded in justification an order of the Louisville city court, of which he was marshal, alleging that an order under which he sold the hogs was obtained in a proceed-

ing in rem founded upon an ordinance of the city which authorized the seizure and sale of hogs running at large in the streets of the city. To this plea a demurrer was sustained and the only question presented on the appeal is, whether the property of a citizen can be thus appropriated by the city without judicial proceeding in which the citizen is before the court on actual or constructive process. This question was fully considered by this court in *Varden v. Mount,* 78 Ky. 86, 39 Am. Rep. 208, in which it was held that no such power could be constitutionally conferred by the legislature.

Judgment *affirmed.*

T. L. Burnett, for appellant.

Kohn & Barker, for appellee.

JOHN C. LORAN *v.* CITY OF LOUISVILLE.

[Abstract Kentucky Law Reporter, Vol. 4—257.]

Repeal of a Statute.

A statute is only repealed by an express provision of a subsequent law, or by necessary implication, and before a statute can be repealed by implication there must be such a positive repugnancy between the provisions of the statutes that they can not stand together or be consistently reconciled.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 28, 1882.

OPINION BY JUDGE HINES:

Appellant, clerk of the city court of Louisville, brought this action to recover the sum of $50,000 claimed to be due him as his percentage of fines assessed in the city court which were satisfied by labor in the city work-house.

The question presented involves the inquiry as to whether the following provision of the city charter is in force: "When parties shall be committed to the city work-house, upon capiases for fines issued upon judgment of the city court of Louisville, and the same shall be satisfied in whole or in part by labor in said work-house, the city shall not, on account thereof, be re-

quired to pay anything to the university and public schools aforesaid, or to any officer on account of his fees in the case." 2 Sess. Acts (1868), Ch. 1012, § 16. This provision became a law in March, 1868, but is claimed by counsel for appellant to have been repealed by the amendment to the charter adopted in 1870, which is as follows: "Said clerk shall receive an annual salary of $2,400, and be allowed the further sum of $1,200 annually as a salary for one deputy, to be paid monthly out of the city treasury, in lieu of all other fees or charges as now allowed by law, except the lawful fees and charges for naturalizations, and official copies of records and papers on file in his office, for which he may charge and receive pay in addition to his salary." 2 Sess. Acts (1870), Ch. 460, § 45.

Prior to the Act of March, 1868, the clerk of the city court was allowed as compensation for his services the same fees as were authorized to be charged for similar services by the circuit and county court clerks of the county of Jefferson and such other sums as the general council of the city might deem reasonable for services performed by him in cases where the parties had been committed to the city work-house.

The well established rule of construction is that a statute is only repealed by an express provision of a subsequent law, or by necessary implication. There must be such a positive repugnancy between the provisions of the statutes that they can not stand together or can not be consistently reconciled. This rule not only applies when both the statutes are of general nature but as well where they are both of local application to the same subject-matter. In this instance there is no express repeal nor is there any such repugnancy as to operate as a repeal by implication. The statute fixing a salary "in lieu of all other fees" is certainly inconsistent with the law allowing compensation by fees, but not inconsistent with the provision forbidding the compensation in cases where the fine was discharged by labor in the work-house. The salary was evidently intended, as expressed, to be in lieu of and to take the place of such compensation as had previously been allowed to be derived through fees, but not in terms, or by implication, to allow compensation for services

in cases where the law had expressly declared that no fees should be collected or compensation received.

Judgment *affirmed.*

Wm. Lindsay, A. Duvall, for appellant.

Gilbert Burnett, T. L. Burnett, for appellee.

ELLEN ALLEN *v.* FARMERS' BANK OF KENTUCKY ET AL.
KATE ALLEN *v.* SAME.
ELI M. KENNEDY *v.* SAME.
HENRY E. SHAWHAN *v.* SAME.
EVERETT ALLEN *v.* J. D. DUCKWORTH ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—257.]

Attachment of Land Conveyed Fraudulently.

An attachment by creditors against land charged to have been conveyed by a debtor to defraud his creditors and that the grantee participated in and had knowledge of the fraud is sustained by proof that the grantor, after suits were filed against him by creditors, stated that he was not going to pay such debts but would convey his estate to others and that he did convey the greater portion of a good sized estate to relatives residing with him and who knew of his financial troubles and who do not furnish proof of or explain the transactions between them.

Liens on Land Reserved for Purchase-Money.

The liens of purchase-money notes secured by liens reserved in the conveyance are not lost by accepting renewals, without any intention to release them thereby.

APPEALS FROM SCOTT COURT OF COMMON PLEAS.

September 30, 1882.

OPINION BY JUDGE PRYOR:

The appellees, who are the creditors of one Joseph Cantrill, Duckworth, and others, are claiming precedence by reason of their attachments and executions levied, over the vendees of Cantrill and those to whom he had transferred and assigned certain notes executed to him by Duckworth. The Bank of Kentucky (an appellee) had sold to Cantrill a tract of land, retaining in the conveyance a lien for the purchase-money, and Cantrill sold the land to Duckworth, and afterwards purchased

Duckworth's land. There were liens on both tracts of land and the case is complicated to some extent by the pleadings, and the assertion of many conflicting interests. So far as the liens of the vendors exist there is but little difficulty, the only questions arising as to those liens being as to the extent of the payments made, and this branch of the case will be hereafter considered. When Duckworth purchased of Cantrill the land purchased by the latter of the bank, he conveyed to Cantrill a tract of 34 acres of land on which there was a dwelling, besides other improvements of considerable value. The appellees, the Bank of Kentucky and the Farmers' Bank, were pressing their claims for collection by suit, and Cantrill, who was in embarrassed circumstances as this record shows, conveyed, at or shortly after the institution of the actions by the banks, thirty-four acres of the land obtained from Duckworth to his sister-in-law, Ellen Allen, including the dwelling and the improvements, for the alleged consideration of $5,000.

The Bank of Kentucky in its petition alleges that the conveyance was made after it had taken legal steps to collect its debt, and further, that the conveyance was made to hinder and delay the creditors of Cantrill, and that Ellen Allen, the grantee, knew this when she accepted the conveyance and that neither the $5,000, nor any part of it, was paid. A further statement is made in the petition to this effect: "If they say she had paid $5,000 she is asked to say when she got it, and he is asked to state what become of it." An attachment was obtained and levied on the land, and the relief asked for is that the conveyance to Ellen Allen be set aside and the land subjected to the payment of the debts due the bank. The Farmers' Bank had an execution levied on the land conveyed to the appellant Ellen in a short time after she obtained the conveyance, and having been made a defendant to the action by the Bank of Kentucky, filed an answer and cross-petition against Cantrill and others for the purpose of enforcing the lien by reason of the levy. The appellant was not made a defendant to this cross-petition, but the claim of the bank was asserted against Cantrill and Duckworth by reason of the lien. The Farmers' Bank, however, during the progress of the case, filed another answer and cross-petition in which the conveyance of the land to the appellant was alleged to be fraudulent, as well as the assignment of the notes to

Shawhan, Kennedy, Everett Allen and Kate Allen. The averments of fraud are specifically made as against all the defendants and they entered their appearance to this pleading.

There was but little oral proof on the question of fraud. The testimony of one witness is that Cantrill stated, a few days before the conveyance was made, that he did not intend to pay the debts due the bank and preferred to convey this land to some lady whose name the witness did not recollect. The case was submitted and the court below placing the burden of proof on the appellant adjudged the deed fraudulent as to these creditors whose debts were due when the conveyance was made. Counsel for the appellant in the argument of this case assumes that no pleading alleging fraud was filed by the Farmers' Bank to which these appellants were made parties, but in this he is mistaken, and he now insists that, inasmuch as the appellant was asked to state in the original petition where she got the money, her answer should be read as a deposition, or at least that the burden of showing fraud was on the plaintiffs. We deem it unnecessary to determine whether interrogatories propounded in the body of a petition by the plaintiff and responded to by the defendant are to be regarded as a deposition. It is sufficient to say that in this instance the mere inquiry of the defendant as to where she got the money is not sufficient on the facts of this record to place the burden on the plaintiff, and if such was the ruling, still the facts of this record justify the conclusion reached by the chancellor. It is certain that Joseph Cantrill, the real debtor, was much involved at the date of the transactions and that when his creditors were attempting to make their debts, and after coercive remedies had been resorted to for that purpose the conveyance was made, and not only so, but a short time prior to this conveyance these notes on Duckworth amounting to many thousand dollars were transferred to his kindred, and no reason given why such a sweeping disposition of his entire estate was made at or about the time his creditors were attempting to make their debts or at least when he was greatly involved in debt. The fact that the appellant lived with the debtor, and with no other explanation of the transaction between the appellant and her relative than the inheritance of the money alleged to have been paid him from her father's estate fifteen or twenty years prior to the transaction,—did not change

the burden of showing fairness in the transaction, nor is it so persuasive as to authorize a judgment in her behalf.

The appeals of Kennedy against the banks, and of Kate Allen against the same will be next considered. Joseph Cantrill had transferred certain notes executed by Duckworth to him for land to these two appellants, and the Bank of Kentucky on an amended pleading alleged "that any sale or transfer of the notes except by Joseph Cantrill, if not made to hinder, delay and defraud creditors, as well as the sale and transfer of the notes described in the original petition and the sale of the land, was made in contemplation of insolvency, and with a design to prefer, and the contemplated insolvency was known to those to whom the transfers were made; that the sale to Kennedy was of notes amounting to $13,000 for $9,000, showing fraud upon its face." In addition it further alleged that the transfer to Kate Allen of her note was without consideration or an adequate consideration.

The same facts exist in regard to the action of the debtor in his assignment to these two parties as in the case of Ellen Allen, but it is maintained that there is no charge of fraud against any of the parties in this amended petition bringing them before the court for the first time, and it is again urged that the Farmers' Bank has no pleading attacking the assignment as fraudulent. On pages 13 and 14 of the record or that volume of it numbered 646 and containing the judgment it will be found that an amended answer and cross-petition was filed by the bank making specific charges of fraud, to which these appellants entered their appearance and answered, so the record as to the last appellants stands with a charge of fraud and want of consideration on the one side and a denial on the other. Besides in the case of the Bank of Kentucky they filed answers putting in issue the fraud alleged in the original petition and denying that imperfectly alleged in the amended pleading, in express terms, that the assignment was made to hinder and delay creditors. The issue as to the fraud was directly made and there is no escape from the conclusion reached by the chancellor as to these appellants. It is plain from the pleadings in this case that the assignor of the notes against whom executions had been issued and returned "No property found," when being pursued by his creditors, was placing his property beyond their reach,

and that those with whom he lived or those connected with his family had by assignment from him the bulk of his estate, and all are silent as to the consideration paid, or fail to give any explanation as to the good faith of the several transactions. No stronger case could be made out of the purpose on the part of the debtor to place his property beyond the reach of creditors, and it was certainly required of those who held these notes constituting the bulk of his estate to make a full and fair disclosure of these transactions had with Joseph Cantrill.

On the appeal of Shawhan, he states that the consideration for the assignment of a part of one of the notes to him was his agreeing to become bound as the surety of Cantrill to one Hall for a large sum of money; that he did become the surety and pay the money and take up the Hall note which is filed with his pleading. This fact is admitted in the pleading of Cantrill but there is no proof of the assignment and the fact is controverted in the answer of the banks to Shawhan's cross-petition. Shawhan says the note was not delivered to him and when filed with the answer of Kate Allen shows no assignment upon it. There is an amended answer by the Farmers' Bank in which it is alleged that the assignment is fraudulent. Joseph Cantrill gave his deposition and proves the payment to Hall by Shawhan but fails to prove any assignment. We are satisfied that the transaction between Cantrill and Shawhan was in good faith and, as he is entitled to a lien after the payment of the appellees' claim, it was error to allow the banks or those entitled to the rights of the bank ten per cent. on the lien notes. Such was not the original contract with the Bank of Kentucky, and the increased rate of interest by reason of a subsequent agreement can not be said to constitute a lien on the land. For this reason the case should be reversed, if no other, and we think on the return of the case he (Shawhan) should be allowed to take proof as to whether the assignment was in fact made, and, if made, attaching creditors or liens created by the levy of executions can not prevail over the lien he is entitled to assert by reason of the assignment from his vendor. The issue as to whether an assignment was made him by Cantrill is the only issue to be tried on this branch of the case on the return of the cause as between the appellees and Shawhan. It is further insisted by counsel for Shawhan that the renewal of the two notes discharged the lien

and that John Cantrill was not entitled to the rights of the bank who was the original vendor of the land to Cantrill. It is certain that John Cantrill, as the surety of Duckworth and Joseph Cantrill, paid off $2,800 of the purchase-money to the bank and that the bank retained a lien or rather never surrendered the lien note, but held it, subject to be credited when the $2,800 should be paid under the agreement with all the parties. John Cantrill had the note to pay and is asserting his right to a lien through the bank or claiming that in equity he is the holder of the lien to that extent.

This note paid by him was in fact the purchase-money due on the land and paid as such and as said in the opinion below he was the surety in fact, if not in form, for $2,800 of the purchase-money. It was error as already stated to have allowed the ten per cent. or the excess of interest as a lien on the property.

This brings us to the consideration of the appeal of Everett Allen, and upon that branch of the case the testimony conduces to show that the $2,800 credit given Duckworth in his settlement with Cantrill is the identical $2,800 for which John Cantrill is allowed a lien on the land sold Duckworth. The credit is for the same amount of the note paid Cantrill. The note is not produced by Duckworth and he says it was with his papers in the bank. The date of the credit is the same or about the same time, and, therefore, although there may be some doubt, there is no question that Duckworth is not entitled to the credit of $2,800, as the record now stands. As to the disposition of the other credits allowed Duckworth we perceive no error, and from the facts of this record it is evident that Everett Allen has but little cause to complain, and on the return of the cause if the assignment to Shawhan should be established we see no reason why the claim of Shawhan to the extent he has an interest in the purchase-money note should not be placed upon an equality with Everett Allen. We perceive no error in enforcing the lien of the Bank of Kentucky except as to the extra interest agreed to be paid. Upon the return of the case, as there is doubt whether the $2,800 credit claimed by Duckworth is the same allowed John Cantrill, Duckworth may be allowed to produce the note, or adduce more satisfactory evidence than he has given of its payment.

1. To simplify the case on the return of the cause the extra

interest to the bank said to be a vendor's lien should be disallowed as such.

2. Shawhan should be allowed to show his assignment to him of the note.

3. Duckworth must introduce more satisfactory proof as to the payment of the $2,800 other than that paid by John Cantrill or the credit would be repeated. That is all that is left of this case.

The judgment is *affirmed* as to Ellen Allen, Kate Allen and Kennedy, and *reversed* as to Shawhan and Everett Allen and cause remanded for further proceedings consistent with this opinion.

Wm. Lindsay, for appellants in first three cases.

D. W. Lindsay and A. Duvall, for appellees.

Prewitt & Duvall, for Cantrill.

Hugh Rodman, for Duckworth.

CITY OF COVINGTON *v.* PEOPLE'S BUILDING ASSN. OF COVINGTON.

[Abstract Kentucky Law Reporter, Vol. 4—258.]

Enforcing Collection of Taxes.

The mode of taxation and the manner of enforcing the collection of taxes must be exercised in strict compliance with the terms under which the right is claimed, and when enforcing payment by a proceeding in court those having authority to impose and collect the tax must keep within the powers given them and must follow the law in every essential particular.

Collection of Taxes by Treasurer.

The law makes it the duty of the treasurer to collect taxes and he is clothed with authority to levy and sell the property of the delinquent taxpayer and when given such power he has no right to resort to the chancellor to collect taxes. The chancellor is not a tax collector and the treasurer in the absence of some ground for asking relief at the hands of the chancellor must pursue the delinquent taxpayer in the manner provided by the statute.

APPEAL FROM KENTON CIRCUIT COURT.

September 30, 1882.

OPINION BY JUDGE PRYOR:

The general rule with reference to the mode of taxation as well as the manner of enforcing the collection of taxes is that the power must be exercised in strict conformity with the terms under which this right is claimed, and when coercing payment by suit the compliance by those who have the authority to impose the tax, with the power delegated, must be made to appear in every essential particular.

The ordinance must show the character of property assessed. It must be designated. Publication must be made as required in order that the citizen may have notice of the assessment made to enable him to discharge his duty. The word "surplus," however, is sufficiently explicit and conveys the idea of the purpose to tax under the equalization law. And while the clerk has construed the meaning of the word "surplus" it is no objection to the averment made by him that it is specific in its character. This amount and character of property, it is alleged, was omitted under the original assessment, and if so, under the provisions of the charter, it was the duty of the clerk to make the assessment. If the individual stockholder has paid the tax it is a sufficient defense to that extent against the claim of the city. But waiving all other questions raised by the demurrer, it is difficult to perceive upon what theory the appellant proceeds in a court of equity. So far as this record shows there is no obstacle in the way of collecting this omitted tax. It is alleged that the property was omitted from the tax list and that it had been assessed by the clerk and the tax-bill placed in the hands of the city collector. What then is to prevent the city collector from making the money or collecting the tax? He has the power to collect and his tax-bill authorized him to levy and sell the property of the delinquent taxpayer. 2 Sess. Acts (1876), Ch. 440, was not passed for the purpose of making the chancellor the collector of the city taxes. That act provides (§ 7) that where the tax assessed "shall amount to $100 or over, and shall have been due and unpaid for more than six months, said city council may cause the same to be sued for in the name of the City of Covington, in the circuit court; and this shall apply to taxes now due as well as those that may hereafter become due, and whether said amount shall accrue from one assessment or successive assessments. Said city shall have the power in such cases to sue for and collect its taxes, and enforce its lien." The exercise of

this jurisdiction must be made to depend upon the action of the treasurer and city collector; that is, when their power is exhausted, and they have no means of coercing payment, the chancellor may be appealed to upon some equitable ground to enforce payment. Any other construction would make the circuit court or the chancellor the tax-gatherer for the city and when payment is not made to the treasurer after notice given or even without notice, any taxpayer in default is liable to an action in the circuit court. Such is not a proper construction of the act. The treasurer is authorized to collect or receive the taxes after notice as provided by the charter. In default of payment the tax-bills are placed in the hands of the collector at the time or in the manner provided by the charter. He has the power to levy and sell the estate of the taxpayer and armed with such authority and with the tax-bills in his hands, why resort to a court of equity to obtain the same character of writ, or an execution upon which the same character of estate may be levied upon and sold. If the collector can not make the money and has returned his tax-bill delinquent, or there is some ground for asking relief at the hands of the chancellor, or in cases where it may be necessary to reach choses-in-action or other equitable rights existing in the city, the chancellor's aid may be invoked, but not where the taxpayer merely declines or fails to pay when demanded. The demurrer was therefore properly sustained.

McKee & Finnell, for appellant.

J. F. & C. H. Fisk, for appellee.

[Cited, in *Greer v. City of Covington,* 83 Ky. 410, 7 Ky. L. 419, 7 Ky. L. (Abst.) 453, 2 S. W. 323.]

NATIONAL BANK OF STANFORD *v.* JULIA A. REED ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—346.]

Judgment for Want of a Reply.

Where in a suit on a promissory note the statute of limitations is pleaded as a defense and no reply is filed showing facts why the defense is not good, until after judgment, it is then too late to file a reply.

APPEAL FROM BOYLE COURT OF COMMON PLEAS.

October 7, 1882.

OPINION BY JUDGE HARGIS:

The appellee executed a promissory note to John M. McClure, negotiable and payable at the appellant bank, which was organized under the National Banking Act of the United States. McClure indorsed the note in the usual form to the appellant and it brought this action on that paper against the appellees who pleaded that it was over five years due at the institution of the suit and had been indorsed to and discounted by the appellant and was therefore barred by the statute of limitations. The reply was filed to the answer of the appellees and on hearing judgment was rendered for them in bar of the action. The appellant, two days after the judgment, without giving any reason for failing to reply before the judgment, tendered a reply and asked the court to set aside the judgment and permit the reply to be filed, which the court refused to do and the appellant has appealed. The action of the court was right for two reasons:

1. No sufficient reason was shown for neglecting to reply at the proper time, and no explanation whatever of the neglect of the appellant was offered. 2. Because the reply was insufficient as a traverse or plea in avoidance.

It appears from the record filed with appellant's petition that it had, several years before, brought suit on the identical note against McClure as indorser, alleging that it was the owner of the note which was indorsed and transferred to appellant by McClure, and "placed upon the footing of a foreign bill of exchange." This suit was dismissed but the reply discloses no reason for the dismissal or explanation of the solemn admissions made by the appellant in that suit as shown by the allegations referred to above. The allegations in the reply that the note was executed by the appellees and indorsed as an accommodation indorser by McClure for the purpose of taking up a former note of the appellees of like character do not necessarily negative the solemn admission that the note had been placed upon the footing of a foreign bill of exchange, and the inference following that admission that the appellant had discounted the note and was, therefore, entitled to it against all equities existing between the drawers and indorsers.

Taking all the appellant's pleadings together, it does not certainly appear whether the note was discounted or not. The appellant alleged in the first suit, and made a part of its present petition, substantially that the note had been discounted, and this is denied in the reply but no mistake is suggested for the inconsistencies in its pleadings which are therefore bad.

Wherefore the judgment is *affirmed*.

Hill & Alcorn, for appellant.

W. B. Harrison, Thompson & Thompson, Samuel & Robt. Harding, for appellees.

ECTON ET AL. *v.* MOORE ET AL.

[Kentucky Law Reporter, Vol. 4—307.]

Establishing a Resulting Trust.

Where an attempt is made to establish a resulting trust and the conveyance attacked is fair on its face, there being no charge of fraud, there is no presumption, since the statute of resulting and constructive trusts against the legal title holder, but upon the contrary the statute shifts the burden upon the one attacking the title.

APPEAL FROM CLARK CIRCUIT COURT.

October 7, 1882.

OPINION BY JUDGE HINES:

F. F. Jackson died testate in 1861, leaving a widow and three children. At the time of his death he owned more than 600 acres of farming land, a number of slaves, and other personal property of considerable value. The will provided that the widow should have such portion of the estate as she would have been entitled to in case there had been no will, and gave the remainder of the estate, real and personal, to the three children, "each of them to have an equal third part thereof, to be held by them during their respective lives, and, if any one of them should die, without descendants of their bodies, then the portion of the one so dying shall vest in the survivor, or survivors, of said three children or their descendants, respectively."

On the land devised there was a mortgage debt of about

$7,000, on which suit was brought in 1864 to enforce payment, a decree and sale, at which the widow, Mrs. Ann C. Jackson, became the purchaser for the amount of the mortgage debt, and a deed was made to her of the title in fee. To this suit the widow and children were parties and before the court by actual service, except John H. Jackson, who was constructively summoned. In 1870 Mrs. Jackson and the three children, John H. Jackson, Lucy W. Jackson (afterwards Green) and Mrs. Ecton, filed a petition in the county court seeking a division of the land, so as to set apart to John H. Jackson one-third, which was done, and a commissioner's deed in fee executed to him, the remaining two-thirds, in compliance to the prayer of the petition, to be held and enjoyed by Mrs. Ann C. Jackson during her life. John H. Jackson mortgaged his portion, the mortgage lien was enforced, and appellee, Emerson, became the purchaser. Mrs. Green and Mrs. Ecton, about the same time, conveyed by separate deeds, with covenants of general warranty, their undivided interests to appellee, Moore, Mrs. Ann C. Jackson having died previous thereto.

Under these circumstances appellees brought this action to quiet title, and appellants answered and claimed to hold under the will of F. F. Jackson, and that, therefore, each held an estate defeasible in case she or he should die without descendants, and that they did not hold a fee simple in trust by descent from their mother, Mrs. Ann C. Jackson. The court below held that the interest of the children came by descent from their mother, that each held the fee in her or his respective portions of the land, and that the titles of the purchasers should be quieted. Since the institution of this action John H. Jackson and Mrs. Green have died, leaving no children, Mrs. Ecton surviving and having three children.

The inquiry is as to whether the purchase by Mrs. Ann C. Jackson, at the decretal sale on the foreclosure of the mortgage, which was a lien on the land of F. F. Jackson, vested in her an absolute fee, or whether she held it in trust for the children, under the provisions of the will. If Mrs. Ann C. Jackson did not hold in trust, Mrs. Ecton, who alone has a right to complain, has no interest in that portion of the land conveyed by John H. Jackson and Mrs. Green, and, of course, none in the portion she conveyed, because she professed to convey the absolute title and entered into a covenant of general warranty. This involves the

construction of the statute in regard to resulting and constructive trusts, which is as follows:

"When a deed shall be made to one person, and the consideration shall be paid by another, no use or trust shall result in favor of the latter; but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person." Gen. Stat. (1881), Ch. 63, Art. 1, § 19.

Under this statute, in order to establish an enforcible resulting trust, it is essential to allege and prove, first, that the consideration was paid by appellants; second, that the conveyance attacked was made to the grantee without the consent of the appellants. It is necessary to allege both of these things; otherwise the first portion of the section abolishing resulting trusts is inoperative, for prior to the statute a recovery could be had upon allegation and proof that the consideration was paid by the claimant. If it is only necessary to allege that now, the statute has not altered the law, and if it is necessary to allege both of these things it is essential to prove them, for without the existence of both there is no cause of action.

In Mrs. Ecton's answer there is no allegation that the consideration for the land deeded to Mrs. Jackson was paid out of the funds to which she was entitled, but in the pleadings by John H. Jackson there is such an allegation of which she may take advantage, as it goes to the merits of the whole controversy, and such a ground of recovery by one enures to all, but the proof does not sustain the allegation. It is shown that there was considerable in value of personal property, enough to pay the purchase-price for the land, which was enough to satisfy the mortgage lien, but how much more in value of the personalty is not shown. It does appear, however, that independent of the one-third interest in the personalty to which Mrs. Jackson was entitled, in her own right, and independent of the proceeds of the farm to which she was entitled before any allotment of dower, she held of the money of her son, some fifteen hundred dollars, or possibly two thousand dollars, which was used in making the payment. To this money, as between herself and Mrs. Ecton, she had a right, and, as her son never asserted any claim to it,

it must be treated as hers. The proof shows that Mrs. Jackson labored unceasingly and exercised the greatest economy in order to save money to discharge the debt against the land. The burden of the proof as to the source from which the money was obtained being on appellant, there is a failure to establish that it came from the personal property to which she and her brother and sister were entitled. Such a claim, after the lapse of fourteen years before its assertion, may very properly be said to be stale, and in all such cases the chancellor will require positive and conclusive evidence before divesting the legal title for the benefit of the claimant. It will not avail if it be conceded, as appellant, Mrs. Ecton, alleges, that she did not know the contents of the will, or her rights under it, for the presumption ought to be indulged, under all the circumstances and after such a lapse of time, that she did not know. Besides, it is not shown that the interest of John H. Jackson, Mrs. Green and Mrs. Ecton, in the personal estate, was not properly consumed in the support of Mrs. Green and Mrs. Ecton, the former of whom remained in the family for many years, and the latter until about a year after marriage in 1863, or that it was not consumed in the payment of other debts against the estate. In view of the length of time appellant delayed in asserting her claim, not until after the death of Mrs. Jackson, and of the fact that the burden was upon her and she nowhere charges upon Mrs. Jackson any fraud, or that there was a mistake, and the fact that there is nowhere in the evidence an intimation of fraud or bad faith on the part of Mrs. Jackson, certainly nothing ought to be presumed against the title as it exists of record.

As to the matter of consent on the part of Mrs. Ecton to the appropriation of the funds belonging to her, if any, there is not only a failure in her answer to allege that her consent was not given, but on the contrary she alleges that such consent was given by charging that Mrs. Jackson purchased the land under an agreement to hold it in trust for the children, under the terms of the will. This defense, or rather claim of recovery as a failure of consent, or that the purchase and conveyance was made without her consent, is individual and personal to each of the children, so that if Mrs. Ecton consented that the property of the estate might be appropriated to the purchase of the land to satisfy the mortgage debt and the conveyance made to Mrs. Jack-

son, she can not avail herself of the fact that John H. Jackson or Mrs. Green did not consent. But of their failure even to consent there is no proof, except as to John H. Jackson, and that was to the effect that he was not a party by actual service to the suit; and as to Mrs. Green the evidence is conclusive, from her own deposition, that she consented that Mrs. Jackson should purchase the land and hold it in her own right. Mrs. Ecton's deposition was not taken, but her husband testified, and both of them were parties to the suit in which the decree of sale was made, and the husband was present at the sale under the decree. He gives no evidence of dissent on the part of the wife or himself. But such evidence would amount to nothing, as the issue is not tendered, but on the contrary she affirmatively alleges consent as stated. Where an attempt is made to establish a resulting trust, and the conveyance attacked is fair upon its face and there is no charge of fraud, there is no presumption, since the statute, against the legal title holder, but upon the contrary the statute shifts the burden upon the one attacking the title. A resulting trust is neither alleged nor proved in this case.

If the trust is to rest, as set up in the answer of Mrs. Ecton, upon an agreement between the parties, it is not enforcible, first, because it is within the statute of frauds, because not in writing, and second, independent of the statute, there is no proof of an agreement such as alleged. If there is no resulting trust under the statute, as we decide, the remaining inquiry is, Is there a constructive trust under the last clause of the section of the statute? This clause is as follows: But this shall not extend to cases "where the grantee, in violation of some trust, shall have purchased the lands deeded with the effects of another person." Gen. Stat. (1881), Ch. 63, Art. 1, § 19.

Conceding that Mrs. Ann C. Jackson, who was at most an acting executrix, without legal qualification as such, was a trustee within the meaning of this provision and held the personal estate in trust for the payment of debts against the estate, it is incumbent on appellees, who are attacking the conveyance under which the title was vested in Mrs. Jackson, to show that the purchase was made with the effects belonging to appellees. Under the statute, if she was acting as executrix of the estate and had in her hands enough of the personal estate of the decedent to discharge

the debt against the land, but instead of so discharging it she had appropriated the funds to her own use, or refused to account for them, and had with her own interest in the estate made the purchase of the land, the heirs might have had the right, in case there is no estoppel in favor of purchasers, to subject the property to the extent of the value of the personal property belonging to them, and which had been appropriated by the acting executrix. But that would not affect the title, because the land was not paid for with the proceeds of the property belonging to the claimants.

As we have already said, Mrs. Jackson was acting in the quasi capacity of trustee in this transaction, in the absence of an allegation of any fraud, mistake or unfair dealing; and in the absence of any proof of either, the parties seeking to annul the conveyance to Mrs. Jackson ought to be required to bring themselves within the letter of the law. Especially is this true where, as in this case, the land in controversy is in the hands of purchasers for a valuable consideration, with no actual notice of the facts upon which Mrs. Ecton bases her claim under the statute, that is, that the consideration for the purchase by Mrs. Jackson was paid out of the personal estate of F. F. Jackson that should have been appropriated to the payment of the mortgage lien; and that Mrs. Ecton claimed to hold under the will and not through the deed to her mother. In fact, there is nothing in the record that could put appellees upon inquiry as to the source from which Mrs. Jackson derived the funds by which she paid for the land, and the evidence, such as it is, of constructive notice, that appellee's title was derived through the will of F. F. Jackson and not by inheritance from Mrs. Jackson, is too slight to be considered in appellee's favor after such a lapse of time and in the face of the fact that appellees paid an adequate consideration for the land. Under the statute there is no constructive trust.

The decision of these questions renders it unnecessary to discuss the other points made by counsel.

Judgment *affirmed*. Chief Justice Hargis dissenting.

Jas. Flanagan, Wm. Lindsay, Geo. B. Nelson, for appellants.

Wm. M. Beckner, L. Hathaway, for appellees.

T. B. SHOWALTER v. BENJAMIN KIRK'S EXRS.

[Abstract Kentucky Law Reporter, Vol. 4—348.]

Consideration for Promise to Pay Increased Rate of Interest.

A memorandum attached to a note after the date of its execution promising to pay an additional rate of interest for the time that had elapsed since said execution, is no part of the contract embraced in the note and is without consideration and unenforcible.

Incompetent Witness.

Where the maker of a note is dead, the payee is incompetent to testify concerning any part of the transaction or as to statements made by the obligor at the time of the execution of such note.

APPEAL FROM MASON CIRCUIT COURT.

October 12, 1882.

OPINION BY JUDGE HARGIS:

The judgment appealed from gave the appellant the sum of $3,471.36 as secured by the mortgages to him.

The notes with credits deducted stood thus on the 1st day of May, 1880, when the judgment was rendered:

1. Note due April 10, 1871	$3,555.29
Interest at six per cent. to October 23, 1875	967.63
2. Note due July 27, 1871	2,000.00
Interest at six per cent. to October 23, 1875	508.66
	$7,031.58
Credit on the last named date, cash $2,000, and two Bain notes for $1,226.25 each	4,452.50
	$2,579.08
Interest thereon from October 23, 1875, to May 1, 1880, at six per cent.	699.34
	$3,278.42

It will be seen that the appellant's secured debts were not as much as the court allowed him and he can not justly complain.

The memorandum attached to each of the notes on August 4, 1873, promising to pay ten per cent. per annum from Septem-

ber 1, 1871, is no part of the contract embraced by the notes, and is without mutuality. There was no consideration to sustain the promise, or either memorandum, to pay additional interest on the time that had elapsed. Nor did either embrace a promise by appellant to forbear to sue or collect the notes for any period of time in the future. After the memorandas were made the appellant could, at any time, have brought an action upon the notes and the obligor could not have prevented a recovery by reason of any supposed agreement or obligation on the part of appellant depending upon the terms of the writing evidencing the promise to pay the ten per cent. interest. The writing must be considered as the only legal evidence of the contract before us and as embracing the whole of the agreement, because the appellant was incompetent to testify, when he gave his evidence, concerning any part of the transaction or statement made by the obligor who was then dead, and as the writing imports no consideration, the court properly refused to allow the appellant any but legal interest on his claims against the decedent's estate.

The judgment is therefore *affirmed.*

Campbell & Mitchell, for appellant.

JOHN MANN *v.* GOETLIBB LOUFFER ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—348.]

Fraudulent Conveyance of Real Estate.

Where real estate purchased is conveyed to the wife and no objection or claim to title is made by the husband for thirteen years thereafter it is too late for him to assert such a claim and to charge his wife with fraudulently procuring the conveyance to be made to her instead of to both of them, especially when he waits until after he and his wife are separated and she is locked up in a lunatic asylum and unable by reason of a crazed mind to make any defense.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 12, 1882.

OPINION BY JUDGE PRYOR:

The facts of this record give no satisfactory explanation for

the failure on the part of the appellant to assert title to the property in controversy until after his wife became a lunatic. The conveyance was made to the wife and entered on record near thirteen years prior to the institution of the present action in which the appellant is claiming that his wife practiced a fraud upon him, in having the deed executed to herself when it should have been made to both husband and wife. Their marital relations had been anything but pleasant for many years, so much so as to result in a separation, the appellant living in the one house and the wife in the other. They had no business transactions and seemed to have lost all affection for each other, and while this condition of affairs continued it is a little singular that the appellant failed to discover the condition of his title or to assert a claim to what must have been the bulk of his estate if he was in fact the owner. But he failed to make any discovery of the alleged wrong until the wife became wrecked in mind, and then for the first time discovers that his wife is, by reason of the conveyance made by the vendor, Crack, the sole owner of the house and lot. That the wife had more business capacity than the appellant is conceded, and in conducting the business of marketing she no doubt, from the proof before us, accumulated more of the estate than the husband, and whether she did or did not it is too late after the lapse of thirteen years for the husband to assert such a claim against the wife, and more particularly when his wife is locked up in a lunatic asylum and unable, by reason of a crazed mind, to make any defense. It is also apparent from the proof that the appellee, Louffer, entered into the possession of the house by the consent of the appellants and has paid as much rent as the property is worth. While we do not say that the possession can not be recovered by the husband (his wife still living) upon proper notice to the tenant in possession, we do adjudge that this equitable action can not be maintained, the proof showing an entry by consent of the appellant and no notice to leave, but a judgment asked for possession as a mere incident to the prayer for cancelling the conveyance. We perceive no error in the judgment for costs.

Judgment *affirmed.*

James Harrison, for appellant.

THOMAS JOHNSON *v.* FLORA JOHNSON.

[Abstract Kentucky Law Reporter, Vol. 4—348.]

Rights of Children Under Decedent's Title Bond.

Where the husband during his lifetime purchased a tract of land by title bond and was in possession of it when he died, the widow is not entitled, by paying the balance or all of the purchase-money out of her own means, to procure from the court an order directing conveyance to be made to her. The children, against their consent, can not be deprived of their rights in that way. However, the widow in a proper proceeding might have a lien decreed in her favor for the purchase-money paid by her.

APPEAL FROM HARDIN CIRCUIT COURT.

October 12, 1882.

OPINION BY JUDGE PRYOR:

The husband of the appellee in his lifetime purchased a small tract of land of one Fifo and obtained a bond for title. He left several children and his widow surviving, all of whom lived on this tract of land. The widow brought this action in equity claiming that she had since the death of her husband, out of her own means, paid off the purchase-money notes, and asking that the conveyance be made to her. This was resisted by one of the children upon the ground that the estate of the decedent, his father, or rather its proceeds, was used in paying the purchase-money. The chancellor on hearing the proof directed the deed to be made to her by the commissioner. This was error even if the proof conduced to show the payment of all the money by the widow. She might have had a lien by reason of its payment that could have been enforced by subjecting the land, but she had no right to be substituted as purchaser without the consent of those who were entitled to the deed.

It is plain, however, from the proof that the purchase-money, except $100, was paid by the sale and the exchange of personal property belonging to the appellee's husband, and there are no facts appearing in the record upon which to base her right to the land or a lien upon it except as to the $100. She has been in the possession of and enjoyed the use of most of the land since her husband's death, but upon it has raised a large family

of children, and we think the equity of the case requires that her lien for $100 should be enforced to bear interest from the day the judgment is hereafter rendered. One of the sons has either made or had improvements made by his father for him on one part of this land and has been living upon it for years. This will not be sold unless there is an insufficient quantity of land outside of that occupied by him to pay the lien. The order referring this case to the commissioner should be set aside and the parties remanded to the county court for a division, or if a division is not practicable then a petition can be filed to sell it.

We do not intend to affect by this opinion the interest the widow may be entitled to by reason of the consent of those who are adults and unite with her in the petition asking that the title be conferred upon or vested in the mother. This they may do, but those who are resisting the judgment are entitled to an interest in the land. The extent of the interest owned by the appellant or the effect the improvements made by him, if any, are to have in a division is not in issue here. The judgment should direct a conveyance to the heirs or children of the intestate, except such as consent that the widow shall take their interest, and then subject the same to the payment of the $100 purchase-money due the widow.

Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

A. B. Montgomery, for appellant.

W. H. Chelf, for appellee.

WILLIAM RILEY, JR., *v.* CHARLES FILMORE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—347.]

Right to Homestead.

A homestead exemption can not be asserted by the owner of real estate so as to defeat a lien for the balance of purchase-money.

What is Purchase-Money.

Money borrowed by the owner of real estate to pay off the balance of purchase-money thereof and used for that purpose, and a mortgage given to secure it, the lender being informed that the money is borrowed for such purpose, is purchase-money, and no

homestead plea can be interposed to an action for the enforcement of such mortgage lien.

APPEAL FROM GREENUP CIRCUIT COURT.

October 12, 1882.

OPINION BY JUDGE HARGIS:

Filmore bought 64 acres of land from Warnock and paid him all the purchase-money except $200, for which a note was executed and a lien retained on the land. The note was assigned to Ghent, who brought suit and recovered judgment for its amount and the sale of the land to pay it. The appellant, Riley, went with Filmore to Ghent's attorney and either paid or handed the money to Filmore, and he paid the residue of the purchase-money for which the judgment had been rendered but not executed. Filmore executed to Riley a mortgage on the land for the repayment to him of the money.

A second mortgage of the same character was executed, but Riley not being satisfied with their terms, which failed to express the contract between them, Filmore executed and acknowledged a third mortgage, which was duly recorded and in which the parties recited the purchase of the land by Filmore, the assignment of the purchase-money note to Ghent and his suit thereon, and stated that the money Riley had advanced was the remainder on the purchase-price of said lands. The mortgage then proceeds in the usual form, beginning, however, with this covenant: "Now in order to secure said Riley in the payment of said sum of $361.24, balance on purchase-money, the parties of the first part by way of mortgage," etc. Mrs. Filmore did not sign or acknowledge either of the mortgages.

Riley instituted suit on the third and last mortgage, obtained judgment foreclosing it, and directing the land to be sold, which was done, and he bought it. The sale was confirmed, deed made, and a writ of possession ordered and executed, placing him in possession of the land except ten acres which was not included in Riley's bid. Filmore and wife brought this action to recover a homestead in the land, it being worth less than $1,000, and they having been housekeepers with a family at and before the date of their eviction from the premises.

The only question is whether the court correctly adjudged to the appellees a homestead regardless of the appellant's claim that his demand is "for purchase-money due therefor." In the case of *Denny v. McAtee's Admr.*, p. 194, this volume, 3 Ky. L. 36, this court said: "The evidence is conclusive that the money was borrowed to pay for the land sought to be subjected, that it was so applied, and that it was at the time agreed that appellee's decedent should have a lien upon the land for its repayment. This was sufficient, as between the parties, to give a lien and to deprive appellant of his right to claim a homestead as against this demand. This demand is, under the spirit of the homestead-law, purchase-money." In *Bradley v. Curtis,* 2 Ky. L. 329, this court again said: "The right to a homestead is purely statutory, and without reference to liens or their priority in pursuance of the policy which forbids the consumption of another's substance in procuring a homestead without remunerating him, declares in effect that no homestead shall be exempt until the purchase-money therefor be paid."

The case before us presents a clear violation of the spirit of the exception embraced by the statute which declares that the homestead shall not be exempt from the payment of purchase-money due therefor. Filmore, by his solemn deed, which is not attacked either for fraud or mistake, admitted that the money which Riley either paid to or for him was a balance on purchase-money which he owed for the land, and to secure its repayment covenanted that Riley should have a lien by way of mortgage thereon. This record shows that Filmore agreed to pay Warnock $700 for the land and that he has paid only $200 of the purchase-money. He borrowed $300 from a neighbor and used it in paying Warnock and has never paid back any part of that sum. So he has paid $200 of his own means and $500 obtained from his neighbor, appellant, for the land which he now claims is his under the exemption law. Such dishonesty can not be sanctioned and the beneficent provisions of the homestead act prostituted to its support.

Where the evidence is clear, as in this case, that the money borrowed is to be used in paying off the purchase-money, and that intention is communicated to the lender at the time he makes the loan and the borrower agrees that he may look to and have a lien upon the land for repayment, and the money so ob-

tained is actually used in paying purchase-money due for the land, no homestead plea can be successfully interposed to an action for the enforcement of the lender's lien as his money has performed the office of paying the purchase-money, whose place it takes by the contract of the parties.

This doctrine does not contravene the policy of the homestead statute, but will result in much benefit to the heads of families who are too poor to pay for a homestead all at once by enabling them to borrow money and escape sacrifices which often result from sickness in the family or other unforeseen misfortunes. Besides this, it comports with the immutable principles of common justice and finds the place within the true spirit of the statute.

The purchase-money due to Ghent was only $220.70, with interest at six per cent. from Sept. 8, 1869. That sum, and no more, is due Riley as a lien upon the land, and as to the excess named in the mortgage it is made up of usury or other matters and the land was exempt from its payment. Upon the return of this cause the parties should be allowed to amend their pleadings and their demand for relief. In case they do so within a reasonable time judgment should be rendered for the $220.70 with legal interest from Sept. 8, 1869, and the lien therefor enforced by a sale of so much of the land as may be necessary to pay it, and the remainder of the land, if any after its payment, should be declared exempt from the balance of the appellant's claim. The appellant should be required to pay the costs incurred in the suit to foreclose the mortgage, and each party must pay his own cost which accrued in the circuit court, and the appellant has his costs on this appeal.

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

Geo. T. Halbert, for appellant.

T. H. Paynter, for appellees.

HENRIETTA L. YEATMAN ET AL. *v.* MARY MCDONALD.

[Abstract Kentucky Law Reporter, Vol. 4—348.]

Title by Adverse Possession.

Where real estate is purchased by a husband and paid for by his wife, and the husband died in 1858, and from that date as well as

before the widow claimed the absolute ownership of the property and was in the absolute and exclusive possession of it uninterruptedly under such claim, and made valuable and lasting improvements on it, and continued to so claim such ownership until her death in 1874, which was more than fifteen years after her husband's death, her title by adverse possession was good and could not be disturbed by the claims of her husband's heirs.

APPEAL FROM FLEMING CIRCUIT COURT.

October 12, 1882.

OPINION BY JUDGE HARGIS:

Henry L. Yeatman was married five times. By some of his first four wives he had children, who are the appellants. By his last wife, who had one child, the appellee, by a former husband, he had no children. They married about 1830. In 1844 Thomas R. Botts conveyed to him a house and lot in Flemingsburg for the sum of $450, which was handed in person by Yeatman to Botts. In the year 1850, Yeatman in consideration of love and affection deeded a part of the lot to the appellee and she accepted the deed. From that time it appears that his stepdaughter, the appellee, cared for and boarded him and her mother, contributing in a great measure to their comfort and maintenance.

Yeatman died in 1858. From that date his widow claimed and occupied the house and lot as her property. Her claim and occupancy appear to have been open and hostile up to her death in 1874, a period of more than fifteen years. The appellee occupied the property with her, and in view of the character of her claim and the fact that she was her only child and would be in all probability her only heir, she made lasting improvements on the house of the value of near $500 and with much affection cared for her mother, who had lived to an old and very decrepit age. At her mother's death the appellee continued in the possession, claiming the property as her own until 1875, when she brought this suit to quiet her title.

The appellants were made defendants, they having set up claim to the property as the heirs of Henry L. Yeatman and dis-

turbed the appellee's title. The appellee relied upon an adverse holding, by herself and mother, of over fifteen years and alleged that a trust had resulted in favor of her mother, who paid the consideration for the house and lot at the time of its purchase from Botts. These allegations were denied by appellants, who rested their defense upon the legal title conveyed by Botts to their ancestor. Judgment was rendered in favor of appellee, quieting her title, and the appellants bring this appeal here for rescission.

The evidence proves that Mrs. Yeatman was an industrious woman, that she made money by knitting shirts, socks, etc., and received from the state of Connecticut, where she was born, a sum of money through Senator Sherman, and that her husband admitted that her money paid for the lot. The aggregate force of the evidence is very strong in behalf of the appellee's claim that her mother's money paid for the lot, but her acceptance of a deed for a part of the lot in 1850 when they were all living together shows that they must have known at least from that period that the deed was made to Yeatman by Botts. But whether or not an acquiescence by Mrs. Yeatman while she was laboring under the disability of marriage would justify the inference that the deed was made to her husband with her consent, still the fact that she did furnish the money to pay for the lot, and often claimed during his lifetime that it was hers on that account, is potent in support of the existence of an adverse holding by her from the death of her husband. It was natural for her to claim that the lot was her's absolutely when she had furnished the money that bought it. When it is considered that the appellants made no objection to her claim for over fifteen years its hostile character can not be doubted, and we are constrained to hold that her title was perfected before she died by the lapse of time which bars the appellants' claim to the house and lot as the heirs of Henry L. Yeatman. Wherefore the judgment is *affirmed.*

E. W. Hawkins, A. T. Root, for appellants.

W. H. Cord, for appellee.

[Cited, *Reno v. Blackburn,* 24 Ky. L. 1976, 72 S. W. 775.]

GEO. W. PRITCHARD v. E. T. WARNER'S ASSIGNEE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—349.]

No Waiver of Lien by Execution of a Note.

The execution of a note does not constitute a waiver of a lien on land reserved for purchase-money.

Protection of Purchaser.

To entitle a purchaser to protection he must not only be a bona fide purchaser without notice and have paid the consideration, but must be the purchaser of the legal title as well, for even the purchaser of an equity is bound to take notice of and is bound by a prior equity, and between equities the rule is that he who has the prior equity in point of time is entitled to a like priority in point of right.

APPEAL FROM CARTER CIRCUIT COURT.

October 14, 1882.

OPINION BY JUDGE HARGIS:

On the 13th of January, 1873, Evan T. Warner bought of H. T. Stewart and W. R. Blankenship two tracts of land owned by them separately for which he agreed to pay them $9,351. He paid them some of the purchase-money and executed to them the promissory notes of Hocker, Warner & Co. for the remainder.

The appellant, Pritchard, sold his land to Stewart and Blankenship and they agreed with him to let him have as much of their claim for purchase-money on Warner as would pay him for his land.

Pritchard, Stewart, Blankenship and Warner met on the 28th day of March, 1874, and perfected the arrangement for the transfer to Pritchard by Stewart and Blankenship of enough of their purchase-money claim on Warner to pay Pritchard what they owed him for his land, the sum being $5,025, Warner agreeing that Pritchard should have a lien on the land bought by him of Stewart and Blankenship. Warner advised them that it was necessary for Stewart and Blankenship to draw orders on him for the amount and then and there wrote the orders himself, which were dated back, but for what reason does not appear clearly and which was not noticed by Pritchard, Stewart or

Blankenship when the orders were signed by them and delivered to Pritchard, who handed them back to Warner who had just written them in the presence of all the parties.

Pritchard released Stewart and Blankenship from their obligation to him for the purchase-money they owed him for his land, and Warner instead of paying Pritchard the whole sum thus equitably assigned to Pritchard executed to him the promissory note of Warner & Co. for $5,000 and paid him $25 in money and store goods. On the 29th of September, 1879, Warner executed a mortgage to his brother-in-law, Hocker, on the lands bought by him from Stewart and Blankenship for the alleged purpose of indemnifying Hocker as his surety on certain paper executed by Warner to the Farmers' & Traders' Bank of Lexington. Warner, Hocker and the bank failed and took the benefit of the bankrupt law.

In the suit by Pritchard on his note for $5,000, seeking to enforce a lien on the lands sold by Stewart and Blankenship to Warner for its payment, the assignee of the bank and Warner and Hocker dispute his right to a lien and insist that Warner in legal effect borrowed the $5,000 from Pritchard and paid it to Stewart and Blankenship and by that sort of imaginary transition of money discharged the lien on the land; that Hocker is an innocent purchaser for value, and on that score the bank as pledgee of the mortgagor ought to be given prior right over Pritchard. Many of the facts strongly affecting this whole transaction showing unfairness on the part of Warner will not be noticed; some only of the main features of the case will receive attention.

The title bonds of Stewart and Blankenship were taken by Warner to himself alone, yet the notes he executed to them for the purchase-money were signed by Hocker, Warner & Co. and the note sued on by Pritchard was signed by E. T. Warner & Co. Now Warner claims that no such partnership existed at the dates of these transactions, that he simply used these firm names in anticipation of the fact that a partnership was talked of and contemplated by them. This, to say the least of it, would give Warner and his contemplated partners all advantages of strangers with whom Warner transacted any business in case his ventures should prove disastrous or he should desire to deceive them.

He drew checks on the bank and signed the firm name of Hocker, Warner & Co. and the bank paid them. If he showed to

Hocker the notes which he took up, marked paid to Stewart and Blankenship, as an inducement to Hocker to accept the mortgage, Hocker as well as the bank had notice of the practices of Warner in using these confusing firm names, said now not to be realities when it is too late to protect persons from injury inflicted by their use.

The evidence establishes the fact that Warner paid nothing to Pritchard when the note was executed except $25 and agreed that Pritchard should have a lien on the land bought by him of Stewart and Blankenship. Stewart, Blankenship and Pritchard all testify to these facts, and they are supported by the addition made to the note at Pritchard's instance. The note had been written by Warner in the usual form when Pritchard objected to it, and Warner admits that he agreed to the addition which Pritchard dictated and which is in this language: "The money is money ordered to be paid him by Blankenship and Stewart, it being due them on account of lands purchased from them." This part of the note shows conclusively that Warner still owed Stewart and Blankenship for the land and that they ordered him to pay $5,025 of the purchase-money to Pritchard, whom they thus paid for his land sold to them. Warner, instead of paying the money so ordered, executed the note of Warner & Co. therefor, Warner & Co., as Warner swears, meaning himself alone.

The order of Stewart and Blankenship amounted to nothing more in fact than an equitable assignment of their demand on Warner for the purchase-money, and the lien followed the assignment as a necessary incident and its continuance was insured by the agreement of the parties. The execution of a new note for the purchase-money to Stewart and Blankenship would not have amounted to a waiver of their lien on the land, and we do not see, in equity and good conscience, how the acceptance of a note by Pritchard for a part of the purchase-money assigned to him can operate either as a payment, novation or waiver of the lien expressly preserved by the contract of the parties. It can not, therefore, be successfully maintained on any equitable principle that Pritchard has no lien as between himself, Warner, Stewart and Blankenship. *Honore's Exr. v. Bakewell,* 6 B. Mon. (Ky.) 67; *Bank of America v. McNeil,* 10 Bush (Ky.) 54; *Tiernan v. Thurman,* 14 B. Mon. (Ky.) 277.

The only question that remains is, Did the mortgagee, Hocker, have actual or constructive notice of the lien or is he in a position

to claim the protection of a court of equity? It is contended that Pritchard put it in Warner's power to present to Hocker the notes given by him to Stewart and Blankenship and which were delivered by them to Warner under the arrangement, and thereby lead Hocker to believe they had been paid and so impose on him.

A sufficient answer to this position is easily found. Hocker only bought an equity under the mortgage, as the legal title was and is in Stewart and Blankenship, whose right to a lien for any unpaid purchase-money due them or their assignee was indisputable, and this Hocker is presumed to have known. The rule being that to entitle a purchaser to protection he must not only be bona fide, without notice, and have paid the consideration, but be the purchaser of the legal title, "for even the purchaser of an equity," says Mr. Story, "is bound to take notice of, and is bound by, a prior equity, and between equities, the established rule is, that he who has the prior equity in point of time, is entitled to the like priority in point of right." 2 Story's Eq. Jur. (11th ed.) § 1502; *Vattier v. Hinde,* 7 Pet. (U. S.) 252, 8 L. ed. 675.

It was Hocker's duty to know, no matter what Warner represented about the payment of the purchase-money, that it was paid or the lien for it released, unless some fraud or laches on the part of the holders of the demand for the purchase-money exonerated him from such duty. If Hocker had acted with ordinary care Warner could not have misled him. When Warner presented the notes which he had gotten from Stewart and Blankenship with the statement, if he did so, that he had paid them off, there on their very face was his own name as a purchaser and certainly he ought to have inquired, if he was not in fact a purchaser with Warner, "Why did you use my name in buying this land or executing notes for it? Why have you not the legal title if you have paid for it?" These questions put to the vendors, if they had failed to elicit the truth from Warner, would have disclosed the nonpayment of the purchase-money and the existing equity between Pritchard and Warner.

To this may be added that Warner does not testify that he told Hocker that the purchase-money was paid in any other way than the facts of this record show, and Hocker takes care not to testify at all. Had he been an innocent purchaser without notice the bank and his own interest would have demanded that he testify and say he had no notice. We are clearly of the opinion that Hocker

should be treated as having actual notice of the whole transaction and his rights declared superior to those of Pritchard, who has a lien on the land described in the pleadings and is entitled to have it enforced for the purchase-money and legal interest thereon.

The promise of Warner to pay ten per cent., while it is enforcible against Warner, constitutes no part of the purchase-money equitably assigned by Stewart and Blankenship, except as to six per cent. which is the original purchase-money bond.

Wherefore the judgment is *reversed* and cause remanded for further proceedings consistent with the principles of this opinion.

E. F. Dulin, K. F. Pritchard, W. C. Ireland, for appellant.

Tarleton & Buckner, for appellees.

JAMES A. GREER *v.* P. A. HOWARD ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—350.]

Priority of Lien of Mortgage and One of Levy on Execution.

The lien of a levy on execution where made and returned, and notes of such return are shown on the records, is prior to the lien of a mortgage executed after levy made.

Rights of Purchaser of Land at Sheriff's Sale on Levy Issued on Execution.

The purchaser of land at sheriff's sale on levy and execution in order to obtain a good title is not required to furnish other evidence than such as is shown by an execution levy and return filed in the proper office followed by a regular and fair sale. He is not responsible for the loss of the execution by which the holder of a subsequent mortgage lien claims to have been deprived of notice of the levy and consequent lien. He has a right to rely on the preservation of the records by their proper custodian and their loss or destruction will not affect his rights thereunder.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 17, 1882.

OPINION BY JUDGE HARGIS:

Several executions were issued against P. A. Howard and others. They were levied and returned and on the 2d day of May, 1874, a venditioni exponas was issued directing the sheriff to sell the land

in controversy. While the writ was being executed by the sheriff, he having made several ineffectual attempts to sell the land because of the want of bidders, the appellant, Greer, loaned Howard $5,000 and took a mortgage on the land levied on to secure its payment. The mortgage was executed on the 8th and recorded and acknowledged on the 9th of July, 1874. On the 17th of August, 1874, the sheriff sold the land under the executions and the appellee, Trimble, became the purchaser at the price of $2,870.25, which he paid to the sheriff. December 11, 1875, a sheriff's deed was made to Trimble, but it was not acknowledged by the sheriff until July 29, 1878, and it was recorded July 31, 1878.

This appeal presents the question of priority between the mortgagee and execution purchaser. All of the executions and levies are lost except one on which a levy is specifically indorsed as to one tract of land followed by a general statement as to other tracts including the land in controversy. That tract is referred to as follows: "Also levied on about 240 acres of land on Slate Creek adjoining the lands of James Howard, James Fortner and James Phelps." The appellant insists that there is no levy sufficient to create a lien on the land superior to his lien under his mortgage, and the argument to sustain that position is based upon the uncertainty of the levy as quoted. But the sheriff testifies that he levied the lost executions on the land and returned them to the proper clerk's office; that he made the sale under the venditioni exponas which seems to have been regular and fairly made. The clerk testifies to the verity of the entry in the execution book which shows a full description of the lost executions with the statement under the head "return," "See execution for return." The appointment of appraisers and their appraisement of the 240 acres of land in two parcels, one of 25 acres as the homestead of P. A. Howard, and the other of 215 acres, balance of the tract, shows that it was levied on by the sheriff under one execution. These facts show satisfactorily that the last executions were levied on the land in controversy, and aid us greatly in determining the terms of the levy.

The levy that is preserved shows with reasonable certainty, when considered in connection with the facts recited, that the levy referred to in it as having been made on the land in controversy was made under the lost execution also. The minutes of the clerk under the head "Return" indicate that the return was too long to be

inserted in the small space for returns on the execution book, and that a return was actually indorsed on the lost executions which the clerk testifies were filed in his office. The lost executions on which the levy was indorsed were not taken out of the office by the sheriff after May 2, 1874, as on that day a venditioni exponas issued under which he subsequently acted in making the sale.

In support of the view that the sheriff actually levied and entered the levy on the lost executions, exists the presumption of law in favor of sheriffs and other public officers having done their duty. While it is the duty of the sheriff to indorse the levy on the execution and sign it at the time it is made, yet the levy may be proved by parol evidence, especially where it is not inconsistent with the return, and thus establish the fact of the levy which the law presumes the sheriff entered on the execution as that was his duty. The presumption of law here referred to is not intended to be carried so far as to establish the indorsement of the levy without regard to the proof in the case. It would not of itself be sufficient to uphold a lien under an execution as against a lien of record; but it is potent in a case like this where the facts and partial record evidence tend so strongly to prove the indorsement of a levy in accordance with the requirements of law.

At the time the executions were issued and levied on the land no law existed requiring the return of levies on land to be recorded as is the case now. The appellee, Trimble, in order to obtain a good title under his purchase, is not required to furnish other evidence than may be shown by an execution levy and return filed in the proper office and followed by a regular and fair sale. Nor is he responsible for the loss of the executions by which appellant claims to have been deprived of notice of the levy and consequent lien, as he as well as the mortgagee has a right to rely on the preservation of the records by their proper custodian and if they become lost or destroyed that his rights will not be affected thereby.

Had the appellant examined the execution book he would have seen that executions which bound all of Howard's property in the county had been issued and returned levied; and had he gone further and examined the remaining return he would have had notice that the identical land mortgaged to him had been "also levied on"; and it does not appear that any of the executions or returns of the levy were lost at the time appellant accepted the mortgage.

The failure of the sheriff to acknowledge the deed sooner than

he did could not have prejudiced the appellant who accepted the mortgage after the levy and before the sale. And under the circumstances of this case, coupled with the fact that Trimble was giving Mrs. Howard an opportunity to redeem her husband's land and for that reason postponed perfecting his deed by the sheriff's acknowledgment, we do not think the delay in having the deed acknowledged and recorded sufficient to operate as a waiver of his lien.

Wherefore the judgment is *affirmed.*

R. D. Handy, Peters & Brock, for appellant.

W. H. Holt, for appellees.

H. J. POOR *v.* ANN HUDSON.

[Abstract Kentucky Law Reporter, Vol. 4—349.]

Joint Execution on Two Bonds.

Where there are two bonds executed for the purchase-money upon sale of land at sheriff's sale and both bonds are due and executed by the same parties and payable to the same person, one execution may be executed on both for the entire amount due.

Validity of Deed Made to a Person Individually Instead of Being Made to Her as Administratrix.

A deed of the sheriff to a person in her individual capacity on an execution issued in a proceeding in which as administratrix she is plaintiff is not invalid for that reason and the question as to whether she thereby held as trustee is one that can not arise between her and persons not interested in the estate.

APPEAL FROM GRANT CIRCUIT COURT.

October 17, 1882.

OPINION BY JUDGE PRYOR:

The right of the appellee to recover the land in controversy is based on the deed made to her by the sheriff of Grant County in the year 1879. It seems that one Lewis Myers purchased at a sale made under a judgment in an action in equity a tract of land for the sum of $2,111.50 and for the purchase-money executed his two bonds, one payable in six and the other in twelve months. The sale was confirmed and, Myers failing to pay the purchase-money,

an execution was issued on the bonds from the clerk's office of the Pendleton Circuit Court, and delivered to the sheriff of Grant County. He levied the execution on a tract of land belonging to Myers and sold it for $1,000 and returned his execution.

Another *fi. fa.* issued on the bonds with a credit entered of the amount realized from the first sale, and on the 20th of January, 1874, was levied by the same sheriff on a tract of fifty acres of land belonging to Myers with a proper description of the land made on the return evidencing the levy. In July, 1874, the sheriff sold the fifty acres of land and it was purchased by the attorney of the plaintiff for $600, and in May, 1876, the sheriff made to Mrs. Hudson, the appellee, a deed to the land.

In the spring of 1875, after the levy and sale of the land under the execution, the owner, Lewis Myers, sold and conveyed the land to the appellant, Poor, who entered into the possession under his purchase without notice of the execution sale. The validity of the judgment upon which the sale was made and the bonds of Myers executed is not questioned, and Myers when ruled to pay the purchase-money consented that execution should issue on the bonds. It is agreed by counsel for the appellant that the execution is invalid because it issued for the aggregate amount of the two bonds, and that an execution should have been issued on each bond. The case of *Merchie v. Gaines,* 5 B. Mon. (Ky.) 126, is relied on in support of the position taken. There the execution issued on two separate judgments and from the record it appears that the execution was for costs, for a part of which one Bristow was liable and for the balance one Fowler. Fowler's land was sold under the execution and probably for Bristow's costs. The court in the opinion says: "We know of no law or rule or practice which authorize a joint execution upon two separate judgments." This is doubtless the correct rule, but here in an action in equity the party is proceeding against the purchaser for failing to comply with his bonds and pay the purchase-money. There was but one judgment, one sale, and the execution of the two bonds for the purchase-money. Both bonds were due and we perceive no reason why the execution was not properly issued for the entire amount. The court would and did require, in effect, the purchaser by the rule to pay into court the aggregate amount of both bonds and, failing to pay, the execution was issued for the entire amount of the indebtedness and interest. In this we perceive no error. The

slight discrepancy as to the amount (being only fifty cents) and that being less than the party owed, does not invalidate the sale. They were the same plaintiffs and the same defendants and the execution issued at the same term on bonds due for the purchase-money of the same land. We do not regard this as an irregularity even in an equitable proceeding to enforce the payment of bonds executed by the purchaser. The bonds were payable to the master and the executions issued in his name. During the progress of the trial the appellee offered as part of the record the written surrender by the owner, Myers, of this land for sale under the execution. The *fi. fa.* was not issued until in 1874, and the surrender was dated June, 1873, and if the date is correct the surrender was before there was any execution. The appellee offered to prove by the sheriff that it should have been dated June, 1874, instead of June, 1873, and this proof was admitted, of which appellant complains. We see no objection to the evidence and in fact the papers connected with the return, sale, etc., show the mistake regardless of the proof, and besides the sheriff returns that he levied on this land, so without the surrender the levy was good. It is also insisted that the deed is invalid because it was made to Ann Hudson individually and not to her as administratrix. The record shows that the plaintiff purchased the land under the execution and although Ann Hudson was seeking the recovery as administratrix, the deed was made to her because she in fact purchased it. Whether she holds in trust for the heirs is not a question to be raised here. The purchase and sheriff's deed invested her with title. The execution was issued in the name of Rudd, commissioner, and the land bought by the attorney for the plaintiff.

It is again urged that the appellant was a purchaser for value without notice. This equitable principle has never been applied to sales of land under execution, and the purchaser from the execution debtor, prior to the year 1878, bought at his peril. It may be a case of hardship on the part of the appellant as the land was in Grant County and the execution was issued and returned to Pendleton County. The land was clear of any incumbrance in Grant but was in lien by reason of the levy of the execution from Pendleton. By an act passed in 1878 the legislature provided that where a sheriff sold land located in one county under a *fi. fa.* from another county, he should produce the same with his return of sale thereon to the clerk of the county in which the land is for

record. This was intended to give a purchaser notice, but the effect it is to have in the event the sheriff fails to return the execution for record is not necessary to be decided in this case. Here the plaintiff in the execution was not entitled to his deed sooner as the land had not brought more than two-thirds of its value, and to give a lien by reason of the levy and invite the plaintiff or a stranger to make the purchase and then deprive him of his right because the owner has subsequently sold the land to some one else, might also be regarded as inequitable, and in the absence of a statutory provision requiring notice by the recording of the execution and return the appellant can not be regarded in the light of an innocent purchaser. Other questions have been raised going merely to some irregularities in the proceedings that can not affect the sale. See *Million v. Riley,* 1 Dana (Ky.) 359, 25 Am. Dec. 149.

The judgment below is *affirmed.*

Collins & Fenley, for appellant.

E. H. Smith, for appellee.

[Cited, *Taylor v. United States Bldg. & L. Assn., Assignee,* 110 Ky. 84, 22 Ky. L. 1560, 60 S. W. 927.]

HENRY BAILEY *v.* GREEN B. CHEATHAM ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—351.]

Conveyance to Defraud Creditors.

A vendor may act with a fraudulent intent and the vendee be entirely innocent of any fraudulent purpose, but when the vendor is insolvent and his condition well known by the vendee who accepts a conveyance of practically all of the vendor's real estate, the deed reciting that the consideration was paid in a sum more than double the indebtedness owing to the vendee, and the vendee does not place his deed on record for many months nor until the vendor makes an assignment and agrees with the vendee to hold the title as a mortgage and trust for the vendor, fraud on the part of both the vendor and vendee is shown and the chancellor's judgment so deciding will not be interfered with.

Recitals in a Deed or Mortgage as Affecting Fraud of Vendee.

The fact that a mortgage or deed reciting a consideration from mortgagor to mortgagee, or from vendor to vendee, at a greater sum than is really due, shows a concurrence of the mortgagee or vendee in the fraudulent intent of the mortgagor or vendor.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 19, 1882.

OPINION BY JUDGE PRYOR:

The amended petition filed by the appellees charges actual fraud on the appellant and for that reason his claim was postponed to the claims of the other creditors. The execution by the debtor, Cheatham, of an absolute conveyance to the appellant for a consideration expressed to have been paid when the recital was false, while not conclusive, is certainly strong evidence of fraud, and when considered in connection with the other facts and circumstances presented by the record there is but little doubt left as to the propriety of the judgment below.

The appellant had been furnishing the debtor with moneys and in other ways aiding him in running his distillery and is presumed to have known what his pecuniary condition was. He certainly had a better knowledge of the personal condition of Cheatham than any of the parties to this record, and it is a little remarkable that when the debtor is about to fail, for the first time in their business transactions, the appellant deems it advisable to take from the debtor not only a mortgage to secure what he was about to advance him, but an absolute deed for a consideration, nearly double the amount he really owed him. This conveyance he kept in his pocket for months and then placed it on record when, upon its face, if a *bona fide* transaction, it was just and proper, and if not it was a fraud upon creditors. The appellant says he believed the debtor was amply able to pay his debts and if so the stronger reason for not accepting a deed absolute on its face when it was intended only as a mortgage and to secure a fictitious liability or the payment of a large sum of money for which the debtor had received no consideration. The debtor was then insolvent and had been for years and not long after the conveyance made an assignment for the benefit of creditors. The debtor says the reason the conveyance was not placed on record at the time it was made, was for fear of alarming creditors, and he so stated to the appellant. The latter says it was to save the payment of costs in recording the mortgage, etc. The latter reason we think is not at all satisfactory with a man of business habits who is about to invest or loan money and secure it by mortgage. The appellant may have supposed that

his debtor would pay him before even the deed could be placed on record, still the facts of the case are inconsistent with any other idea than that this conveyance was intended to mislead creditors. The debtor says by the arrangement between the two when appellant sold the land and paid his debt, he (the debtor) was to have the balance of the money. The debtor has not evinced by his testimony any partiality for those of his creditors who are attacking the conveyance and while the appellant may have been innocently led into this transaction, the circumstances connected with the case must necessarily lead to the conclusion reached by the chancellor below. The parties were intimate in their business relations. The debtor was insolvent, and the creditor accepted a conveyance from him absolute on its face of all his real estate, and for a consideration expressed upon the face of the deed as paid, and for twice the amount the debtor really owed. A vendor may act with a fraudulent intent and the vendee be entirely innocent of any fraudulent purpose, but this case is not within such a rule. In the case of *Thompson v. Drake's Heirs,* 3 B. Mon. (Ky.) 565, it was held that the fact of the mortgage reciting a consideration from mortgagor to mortgagee at a greater amount than is really due shows a concurrence of the mortgagee in the fraudulent intent of the mortgagor. This is a much stronger case, for here an absolute conveyance is made, and a secret trust created by the parties by which the creditors are induced to believe that the appellant had actually paid more for the property than it was really worth; that he had made a purchase in good faith for $7,000 when it was only a mortgage to secure three or four thousand dollars. Such a conveyance was not only calculated to deceive creditors but was intended for that purpose. Upon the facts of this record, if the debtor had instituted his action to enforce the secret trust, equity would have given no relief, or if the appellant had instituted his action to recover the land from the debtor having his right of recovery in the conveyance he could have recovered, as the chancellor would have declined to give relief to a fraudulent grantor. *Wright v. Wright,* 2 Lit. (Ky.) 8.

While the appellant says he acted in the best of faith, the testimony of Cheatham, the debtor, and the character of the transaction and the insolvent condition of Cheatham at the time must control this judgment. During the progress of this case and after answer filed by the appellant it seems that in a different action

pending in the same court a part of this land, 29 acres, was sold and purchased by the appellant, Bailey, the sale having been made to enforce a lien. The lien was discharged by Bailey under his purchase and a conveyance made to him by the commissioner. This fact afterwards appeared in an amended answer filed by the appellant and before a sale was made of the tract of land in the present case. The court below disregarded the purchase made by Bailey of a part of this land in controversy which we think conferred upon him a good title to the extent of that purchase, and directed the entire tract to be sold, and one Hurley purchased it. The report of sale was made and confirmed without objection. The purchaser is not before the court on this appeal, and if he was, as there was no exception to the report of sale, he would hold the land. It also appears that in the distribution of the proceeds of sale the appellant was given the value of the land purchased by him and the remaining sum distributed. This is all the relief this court could give him if the case went back. There is no assignment of error in regard to the rents or the amount the appellant was required to pay by reason of the use of the land.

The judgment below is therefore *affirmed.*

Judge Hargis not sitting.

Ross & Kennedy, T. T. Forman, for appellant.

Reid & Stone, Thos. F. Hargis, for appellees.

JOHN COLLIER *v.* LOGAN SHARPE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—351.]

Title by Adverse Possession.

A tenant in possession of real estate can not set up a claim to title by reason of such possession, which is had under his landlord and can not be adverse to him or any one else.

APPEAL FROM BRACKEN CHANCERY COURT.

October 19, 1882.

OPINION BY JUDGE PRYOR:

The appellant is seeking a recovery in this action by reason of a lease executed to him in the year 1856 by parties who were the

agents of the heirs of one Burris. From the contents of that lease it appears that the heirs of Burris were the owners, or claimed to be the owners of a large boundary of land within Daniel Coleman's patent of 40,000 acres, and in order to hold the possession placed the appellant on the land under this lease, and provided that the appellant (tenant) was at a future time to have a portion of said land to include his tenement when made in one body, etc., the boundaries to be thereafter designated and the price to be agreed upon by the parties. Appellant entered upon this lease but left the premises in the year 1856, and now claims that he placed tenants on the land who held under and for him. The parties sued are in the possession of the land and claim to hold adversely to the appellant, and besides, the proof shows that he sold what interest he had to other parties many years prior to the institution of this action. He can not maintain his action of such a lease. There is in fact no purchase by him of the land or any part of it. There is an agreement to sell in the event the parties can agree on the price and designate the boundary, but no title vested in the appellant by reason of the lease except his right to enter and hold for the owners. Whether he can assert or claim damages is not a question here.

Judgment *affirmed.*

Clark & Simon, for appellant.

B. G. Willis, for appellees.

JACOB MYERS' ADMR. *v.* JAMES BOSLEY.

[Abstract Kentucky Law Reporter, Vol. 4—351.]

Possession of Notes Belonging to An Estate.

One in possession of notes which do not belong to him but which belong to an estate in a suit by the estate to recover them should not be permitted to set off a claim he thinks he has for services rendered the decedent. He should first have been compelled to pay over to the administrator these assets and then he should be required to prove his claim against the estate.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 21, 1882.

OPINION BY JUDGE HINES:

This is an action by appellant as administrator of Jacob Myers to recover of appellee two promissory notes of $1,000 each, executed by appellee to Jacob Myers, and wrongfully in the possession of appellee, and for judgment for those sums. Appellee's defense is that in consideration of certain services performed by him for Jacob Myers and his wife, Myers surrendered the notes to him as satisfied. The notes were given for the purchase of a tract of about one hundred acres of land sold by Myers to the appellee in 1875. Appellee and his wife, who is a daughter of Myers, resided with Myers, occupying the same house from the year 1866 up to the death of Myers in 1877, Mrs. Myers having died in 1874. The evidence shows that appellee took possession of these notes of Myers after his death from among the other notes of Myers. There is no evidence of any gift made effectual by delivery during the lifetime of Myers, without which there could be no gift and without which appellee is wrongfully in possession of the notes. The whole of the estate of Myers, not including these notes, was about $1,200. The proof showed that appellee performed services in caring for Mrs. Myers, but the fact that she died a year before the purchase of the land and before the execution of the notes raises a strong presumption that appellee held no claim at that time against Myers for such services. But, however that may be, the proof does not authorize the finding that the services were equal in value to the amount called for by the two notes. Appellee being wrongfully in the possession of the two notes which are assets of the estate, he ought not to have been allowed to set up his claim for services in a suit to recover on the notes. He should have been first compelled to pay over to the administrator these assets and then been required to prove his claim against the estate. The proof does not sustain the plea of accord and satisfaction.

Judgment *reversed* and cause remanded with directions to render judgment for the amount of the two notes and dismiss appellee's claim without prejudice to its further assertion.

Chief Justice Hargis not sitting.

William Lindsay, Hargis & Norvell, for appellant.

J. H. Halladay, for appellee.

R. D. BROWN v. W. J. STUBBLEFIELD'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 4—351.]

Estoppel of Town Trustees.

Where town trustees and citizens of the town generally petitioned the legislature for authority to sell a public street to a college for educational purposes, in 1850, and the college erected valuable buildings thereon after purchasing it, whether such sale was valid or not, the college having made such improvements and held exclusive possession thereof since 1850, is secure in its title as against the town, and is estopped from questioning such title.

APPEAL FROM CALLOWAY CIRCUIT COURT.

October 21, 1882.

OPINION BY JUDGE PRYOR:

It is not necessary to determine the constitutional question involved in this case. The proof shows that since the year 1850 the trustees of the town of Murray have surrendered all claim to the street in question by selling under the legislative power conferred by the Act of 1849, that part of the street in controversy to the trustees of the male and female institutes in that town for educational purposes. The building known as the Institute was erected in this street so as to obstruct it, except a small portion of it that was used as a passway for the benefit of the college. The extent of the boundary sold the trustees is clearly defined and they entered upon it as early as the year 1850. The party in whom was vested the legal title at that time failed to make any conveyance and in 1860 or 1870 another act of the legislature was obtained at the instance of the citizens of the town authorizing the sale and conveyance by the trustees. The trustees then executed a deed and with them Cord and wife, in whom was vested the legal title at the date of the original act, united. The trustees having entered and taken possession as early as 1850, paying the purchase-money, the vendors or the successors of those who sold the street can not after such a lapse of time, a period of more than 20 years, recover in an ejectment for want of power in them to make the sale. If this had been an open street with no enclosure and the trustees had entered under a claim hostile to the town, they would only hold to the extent of the enclosure actually made; but here the

trustees of the Institute entered, under a purchase from the trustees of the town, and after a possession by them of 20 years or greatly more than 15 years, it is attempted to be maintained that the trustees of the town can recover because they were not invested with the authority to sell. Stubblefield, the appellee here, or his heirs, purchased a part of this street of the college trustees, paid them for it and a deed was made to him by the trustees of the town. Although he accepted the deed from the town he entered under the trustees of the college, and in order to perfect his title obtained the conveyance from the trustees and from Cord and wife. His vendee, the appellant here, entered and erected his buildings or parts of them within the street, and the defense as to the recovery of the purchase-money is that the town authorities had no right to sell. The citizens of the town of Murray in conjunction with the trustees not only acquiesced in the making of these improvements in the street but they, the trustees and citizens, petitioned the legislature for authority to sell the street, and the possession and the sale has always been regarded, by reason of the erecting upon it by the trustees of the college and the sale, as being exclusively with the trustees until the sale to Stubblefield. The town authorities have asserted no claim, nor has the portion of the street in controversy been used or appropriated to the use of the town in any way since the sale in 1850, and it is now too late for the trustees of the town to make any claim to this part of the street, nor is there any pretense that they have or will undertake to disregard the sale made by them under the Act of 1849. Nor are we to be understood as adjudging that the trustees of a town by legislative authority can not, for educational purposes, donate or sell a part of its streets or alleys for college buildings, but in this case both the trustees and citizens petition for the sale, and whether valid or not the possession and claim since 1850 secures the college in its title and possession as against the trustees of the town. *Alves' Exrs. v. Town of Henderson,* 16 B. Mon. (Ky.) 131.

T. P. Cook, L. Anderson, for appellant.

Crossland & Crossland, for appellee.

SAMUEL BEATTY *v.* A. A. CURTIS ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—352, as Beattie v. Curtis et al.]

Effect of Judgment by Agreement.

Where a judgment is entered by agreement it binds the parties to it and as to claims existing between them which the defendant did

not plead when he could have done so, the claims being expressly included in the agreed judgment, such a judgment is an adjudication of all matters which were or might have been pleaded as a defense to such action.

Sufficiency of Petition for Vacation of Judgment.

A petition by a defendant to vacate a judgment is insufficient when it fails to allege any facts showing diligence in discovering the defenses he had before judgment. A defendant can not have a judgment against him vacated because he forgot or by mistake failed to consider them in the agreement to enter judgment.

Injunction Against Collection of Judgment.

Where after a judgment is entered for $1,300 against a defendant he pays $747.78 on it, but an execution is issued for the full amount of the judgment and the sheriff is about to sell the defendant's land for the debt, the defendant is entitled to have an injunction to prevent the sale of the whole of his land and the collection of the whole amount of the judgment should be enjoined.

APPEAL FROM ESTILL CIRCUIT COURT.

October 21, 1882.

OPINION BY JUDGE HARGIS:

The first suit between Curtis and Beatty was compromised and a judgment entered for the sum of $1,300. The commissioner advertised the land which was to be sold by agreement of the parties. After the judgment was rendered and before the land was advertised by the commissioner, the appellant, Beatty, paid $747.78 on the judgment. Notwithstanding this payment the appellee, Curtis, proceeded to sell the land for the whole amount of the agreed judgment, and the appellant, Beatty, brought suit in equity enjoining the sale of the land and the collection of the judgment, asking that it should be set aside and a rehearing awarded to him on the ground that he had more than $2,000 in claims against Curtis which had not been litigated in the first suit. As to these claims, if he did not plead them in the action brought against him by Curtis, he could have done so and the agreed judgment expressly embracing everything between them except the settlement of the partnership of Curtis, Moore & Beatty must be treated as an ad-

judication of all matters which were or might have been pleaded as a defense to the action.

The petition for a vacation of the judgment furnishes no grounds sufficient in law therefor. It fails to allege any diligence in discovering the defenses appellant had before judgment was rendered against him. The meaning of the petition is that he simply forgot, or by mistake failed to consider them in the agreement to enter the judgment. Besides the legal insufficiency of the allegations of the petition it is very unreasonable to suppose that appellant would agree to a judgment for $1,300 against himself when the appellee owed him more than $700 on the matters embraced by their agreement. The court, therefore, properly refused to vacate the judgment. But Beatty's injunction to the extent of $747.78 ought to have been sustained and the sale of the land for that sum perpetually enjoined. Under the circumstances of the case no damages ought to have been awarded on the dissolution of the injunction, as the appellee would have sold the whole of the appellant's land for the whole of the judgment but for the injunction.

In the branch of these consolidated cases which involves the settlement of the partnership between Curtis, Moore & Beatty the court erred in confirming the master's report. The testimony shows that the partnership was an equal one, and that Curtis and Moore furnished no money to the capital stock, nor any labor except in selling the coal after it arrived at market or was on the way. Beatty furnished the coal, had it dug and shipped, superintended everything connected therewith, and Curtis and Moore charged up and were credited, as against the partnership, everything and all the money furnished to it by either of them, then permitted to share equally in the profits. Such is not an equal partnership. Beatty is entitled first to be credited with the value of the work, labor and expenses, including his own labor and skill, in managing the affairs of the concern, which he did, had done, or furnished. Also the per cent. on each hundred bushels of coal as bankage. He was not personally charged with any of the accounts of Moore or Curtis except to the extent he may have used what they furnished or paid for his own individual benefit. Their accounts must be charged against the firm, except as stated. The evidence shows the whole amount of coal sold by the firm to be $10,026.61, and that sum should be the basis from which to take the expenses and estimate the profits of the partnership.

The boat load of coal sent to Clay's Ferry, which Curtis claims to have paid Beatty for, must be charged to the firm as a part of the general sales, and unless the books of the firm or some writing is adduced showing that Curtis did pay Beatty for this boat load of coal, the alleged payment by Curtis will be excluded. Wherefore the judgment is *reversed* and cause remanded with directions to ascertain through a report of the master, if the chancellor deems his aid necessary, the state of the accounts of each of the parties against the partnership, and the amount drawn out or received by each partner from the partnership effects and renders judgment in accordance with the principles of this opinion and on the basis of sales indicated.

For the amount which may be found due to Beatty against Curtis, a credit should be allowed on the agreed judgment and the injunction perpetuated to that extent even if the whole thereof be extinguished, as Curtis appears to be insolvent and the assignment of the judgment as collateral security to Cockrill does not cut Beatty off from any defenses he might have made at the time he received notice of the assignment, which was long after the dissolution of the partnership, sought to be settled.

H. C. Lilly, for appellant.

J. B. White, I. N. Cardwell, for appellees.

PAYSON & LYON ET AL. *v.* WALTER HOLDEN.

[Abstract Kentucky Law Reporter, Vol. 4—352.]

Lease as Evidence.

Where a written lease is referred to in the petition and its genuineness is not denied by affidavit, it may be read in evidence without its execution first being proved.

Effect of Accepting Rent.

The acceptance of rent in pursuance of a lease is not only a waiver of rights as innocent purchasers without notice, but is an acceptance of the tenant as the tenant of the purchaser according to the terms and conditions of the lease existing between the tenant and his former landlord.

Measure of Damages.

It is the province of the jury to fix the amount of damages in a suit for forcible ejection and it is only when such damages are

excessive and appear to have been given under the influence of passion and prejudice or when improper evidence bearing upon the measure of damages is permitted to go to the jury that the Court of Appeals is authorized to interfere on account of the damages awarded.

New Trial for Newly Discovered Evidence.

When a witness is present in court at the trial and by reasonable diligence a party might have discovered before the trial his evidence, no new trial will be given.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 21, 1882.

OPINION BY JUDGE LEWIS:

The first error assigned by appellant is that the court below improperly permitted the lease of the premises in controversy from Bullitt & Key, which was transferred to appellee to be read as evidence upon the trial without proof of its execution. The writing having been referred to in and filed with the petition, and its genuineness not having been denied by affidavit, or even in the answer, it was properly read as evidence. It is true the writing did not purport to be made by appellant, nevertheless, it being made by appellee the basis of his action, and its execution by the previous owners under whom appellants, Payson & Lyon, claim having been distinctly alleged, and not controverted by appellant, there was no necessity to prove its execution before offering it in evidence.

The second error assigned is that the court refused to permit appellants to show by proof that none of them had any notice of the lease. In our opinion actual notice to appellants was not necessary to enable appellee to hold the premises under his lease, or to maintain this action for forcibly ejecting him therefrom. But even if it be conceded to be so, it is shown by the evidence that appellants as agents as well as subsequent owners received rent for nearly two years at the rate fixed by arbitrators under the terms of the lease. So whether appellants had actual notice or not makes no difference. The acceptance of rent in pursuance of the lease should be held not merely as a waiver of their rights as innocent purchasers without notice, but as an acceptance of appellee as their tenant according to the terms and conditions of the lease. Whatever may be the opinion of this court as to the amount of

damages, it is the province of the jury in the exercise of sound discretion to duly consider all the facts and circumstances legitimately before them and estimate the damages according to the nature of the injury or offense. It is only when there are excessive damages appearing to have been given under the influence of passion and prejudice, or when improper evidence bearing upon the measure of damages is permitted by the court below to go to the jury that this court is authorized to interfere on account of the damages given. The circumstances of the case, as shown by the record, do not authorize us to say that the damages appear to have been given under the influence of passion or prejudice. But counsel for appellants contend and assign as an error that the court below permitted appellee to testify as to the loss of his custom, business, etc., on account of his having to remove his place of business and as to the number of employes he had, etc. No such evidence appears from the record to have been brought out in the examination in chief of appellee as a witness, but upon cross examination by appellants' counsel. The copy of the bill of exceptions, as it appears in the record, shows that "defendants, appellants, objected to any statement of plaintiff as to loss of business, custom, etc., on account of his removal" and that the objection was overruled. But it does not appear that such statement had been made, when the objection to it was made and overruled, or that it was subsequently made at the instance of appellee's counsel. But upon cross examination appellee testified as to the number of hands employed by him, as to his income while in possession of the property in controversy, and as to the relative advantages of his present and former place of business. If such evidence is incompetent, the record shows it was brought before the jury by appellants and not by appellee and, therefore, it can not be complained here. It was, however, improperly stated by appellee in his examination in chief that he paid $6 more rent at his present place of business than at his former. But that testimony does not, from the record, appear to have been objected to.

It is assigned as an error that the court below erred in the instructions given and also in refusing instructions asked by appellants. Since those given accord with the principles of this opinion hereinbefore stated and those refused do not, we do not think the court erred in respect thereto.

Upon the motion for a new trial appellants filed the affidavit of

one Wilson, whose statements might have properly gone before the jury, and possibly might have had some influence in determining the amount of damages. But as it appeared Wilson was present in court at the trial and by reasonable diligence appellants might have discovered before the trial his evidence, we do not think they were entitled to a new trial on that account.

The judgment is *affirmed.*

Wharton & Ray, W. W. Thum, for appellants.

M. Boland, Wm. T. Thurman, for appellee.

ARTIE SMITH *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—353.]

Criminal Law—Aiding and Abetting Murder.

One who is merely present and is passive and neither aids nor abets, advises or encourages the killing is not guilty of murder, but one who maliciously aids, advises and encourages the killing at the time of the shooting or with malice confederates with the party shooting and is present for the purpose of committing the offense, and the person shot is killed, the party so aiding or abetting, or who has so confederated with another to take the life of the deceased and is present at the time of the killing, is as much guilty of murder as if he had fired the fatal shot and may be indicted as principal.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 24, 1882.

OPINION BY JUDGE PRYOR:

Artie Smith was indicted in conjunction with one Jessup for the murder of her husband (George). The court below at the instance of the commonwealth instructed the jury "that any person who is present at the commission of a murder, encouraging and inciting the same by words, questions, looks or advices, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor. This instruction was given without any objection or exception by counsel for the accused, but by way of explaining the meaning intended to be conveyed by it, counsel asked the court to say: First, that when the proof only

shows a person present at the commission of a murder without disapproving or approving, it is evidence in which a jury in connection with other circumstances may infer that the party so present assented thereto, giving it his countenance and approval, etc. Second, the mere fact that the accused was talking to Jessup (who shot George) at the time he fired, is not evidence that she advised or assisted in the killing. While both of the instructions asked were erroneous, still as a qualification of the instruction given at the instance of the commonwealth that was as equally erroneous, the two instructions should have been given. That a party who countenances or approves a killing in any way is guilty of murder, is a comprehensive statement of the rule, and certainly when the party present is merely passive and neither aids nor abets, advises or encourages the killing, he can not be said to be guilty of murder. When one maliciously aids, advises and encourages the killing at the time of the shooting, or with malice confederates with the party shooting, and is present at the killing for the purpose of committing the offense or having the deceased shot, and he is so killed, the party aiding and abetting, or who has confederated with another to take the life of the deceased and is present at the time of the killing, is as much guilty of murder as if he had fired the fatal shot and may be indicted as principal. In this case there is proof of the presence of the accused with Jessup at the time of the shooting, but no positive evidence that she advised or encouraged the shooting at the time, therefore the error in telling the jury in effect that the mere presence of the accused was sufficient to convict her. What took place prior to that time between her and Jessup, if anything, relative to the killing is not necessary to be discussed, but we think it certain that the instruction defining the meaning of or the acts necessary to constitute an aider and abettor of an offense was misleading and prejudiced the substantial rights of the accused. This court held in *Thompson v. Commonwealth,* 1 Metc. (Ky.) 13, that to make one principal in a murder it is not necessary that he should inflict the mortal wound, it is sufficient if he be present aiding and abetting the act or if he advise and counsel the commission of it. There is but one offense charged in the indictment, that is, the offense of murder, and whether the one held the deceased while the other shot him, or advised and aided in the shooting is immaterial, as they are both principals and the averment of malice is properly made. The trou-

ble in this case arises in the attempt of the court to tell the jury what acts are necessary to constitute one a principal in the first degree who does not in fact fire the fatal shot. A jury will readily understand the meaning of an instruction by which they are told that a party aiding and abetting in the commission of the offense is guilty and when the court undertakes to make the rule more comprehensive or to give in detail the facts necessary to establish the guilt in such a case an erroneous ruling will necessarily result. The demurrer to the indictment was properly overruled but the instruction given for the commonwealth was erroneous, and although not excepted to, the instruction asked by the accused that had the effect to cure the error, whether so intended or not, should have been given. When it goes back neither should be given as they are both erroneous and misleading. Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings.

R. W. Slack, Joe Haycraft, for appellant.

P. W. Hardin, for appellee.

[Cited, in *Baskett v. Commonwealth,* 19 Ky. L. 1995, 44 S. W. 970.]

FRED WOOLSEY *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—353.]

Criminal Law—Perjury.

To convict a person of the crime of false swearing, it must appear to have been committed in a matter which was judicially pending, or on a 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.

APPEAL FROM GRAYSON CIRCUIT COURT.

October 24, 1882.

OPINION BY JUDGE LEWIS:

In order to convict a person of the crime of false swearing denounced by Gen. Stat. (1881), Ch. 29, Art. 8, § 2, it must appear to have been committed in a matter which was judicially pending, "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." It is, therefore, indispensable that it should be charged in the indictment that there was a legal tribunal organized or empaneled before which the defendant swore, deposed, or gave in evidence that which was false. But though it is charged in the indictment in this case that the defendant was duly sworn by Thomas, foreman of the grand jury, there is a failure to state that a grand jury of Grayson County was at the time duly empaneled or existed at all, or that the defendant gave evidence before said grand jury.

Considering as we do this is a fatal defect the judgment of the court below must be *reversed* and cause remanded with directions to sustain the demurrer to the indictment and for further proceedings consistent with this opinion.

J. P. Hobson, for appellant.

P. W. Hardin, for appellee.

L. M. DAYTON *v.* NEWPORT WATER WORKS.

[Abstract Kentucky Law Reporter, Vol. 4—354.]

Bad Answer Is Good Enough for Bad Petition.

A bad answer is good enough for a bad petition.

Burden of Proof.

In an action to recover water rental at an established rate, the burden is on the plaintiff to show that the rates had been fixed by them.

APPEAL FROM CAMPBELL CIRCUIT COURT.

October 26, 1882.

OPINION BY JUDGE PRYOR:

We have again considered the questions arising on the demurrer to appellant's answer and in going back to the petition it does not appear that any rates had been fixed by the trustees for the water furnished the city, or that it was ever furnished from the water works under the control of the trustees. It is averred that the water was furnished at the established rate. How the rate was fixed, by whom, and in what manner does not appear. The an-

swer is certainly as good as the petition, and if the admission by the appellant that he got the water cures the defect in the petition it puts in issue the right of the appellees to charge ten cents per thousand gallons, and this involves not only their authority but their action as a board. To recover, conceding the petition to be good, it was incumbent on them to show that the rates had been fixed by them, and the answer was good to that extent. Whether the city had the right to discriminate in favor of the appellant is a question that can not be decided until the issues are properly made. The former opinion is withdrawn and this substituted.

The judgment is *reversed* and cause remanded with directions to permit the parties to amend their pleadings and for further proceedings consistent with this opinion.

A. T. Root, for appellant.

J. R. Hallam, for appellee.

THOS. D. BYRAM ET AL. *v.* M. GRIMES ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—354.]

Petition to Set Aside Conveyance for Fraud.

When there is no allegation of fraud on the part of a grantee or of collusion with the grantor to cheat or defraud the creditors of the grantor and the consideration is adequate and actually paid, no question is raised as to whether the grantee was a creditor of the grantor. The remedy of the creditors of the grantor, if they have any, is against the persons receiving the money from the grantor through the grantee.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 26, 1882.

OPINION BY JUDGE HINES:

This is an action brought by appellees, creditors of T. D. Byram, to set aside, on the ground of preference, a deed made by T. D. Byram to W. A. Byram. The deed recites the consideration paid to be the sum of $4,255 of which $1,900 was paid to T. D. Byram and the remainder to seven creditors of T. D. Byram, whose names are set forth in the deed as well as the amount paid to each. There is no charge of fraud on the part of W. A. Byram nor of collusion

between him and T. D. Byram; there is no charge that the consideration as stated was not paid nor that the amount the creditors mentioned in the deed was not the full value of the land, but upon the contrary, the action proceeds upon the ground that the several amounts recited to have been paid were, in fact, paid by W. A. Byram for T. D. Byram, as the petition alleges that these several payments were preferences under the Act of 1856, and the deed is sought to be set aside upon that ground as well as upon the ground that W. A. Byram was a creditor. There being no allegation of fraud on the part of W. A. Byram or of collusion with T. D. Byram to cheat or defraud the creditors of T. D. Byram, and no intimation that the consideration was not adequate, no question can arise as to whether W. A. Byram was also a creditor, nor can any question arise as to the effect of the recitals in the deed because it is not necessary to rely upon them as evidence since the petition admits their truth. So far as W. A. Byram is concerned the case is the same as if W. A. Byram had paid the consideration direct to T. D. Byram and he had paid it to the several creditors of his mentioned in the deed and to whom W. A. Byram made the payments for T. D. Byram. Appellee's remedy was against the persons to whom these several sums were paid and not against W. A. Byram, who paid a full and valuable consideration for the land.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

Chief Justice Hargis not sitting.

Hargis & Norvell, for appellants.

W. H. Cord, for appellees.

C. K. OLDHAM'S TRUSTEE *v.* THOMAS R. HUME ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—355.]

Principal and Trustee.

A trustee holding property in trust, finding that his title is worthless, can not purchase an adverse claim and acquire a title in his individual right. It is a breach of trust for a trustee to create any relation between himself and the trust property whereby he would be induced to look to his own interests at the expense of the beneficiary of the trust.

Contract by Public Officer to Allow Deputy Sole Authority is Void.

A public officer can not contract with his deputy and his own bondsmen to permit the deputy to have and collect all the revenues of his office, but where he is a defaulter and his sureties are liable thereunder and are induced to go on his bond for the next, upon his agreeing that the deputy shall handle the revenues of the office and pay up the defalcation, the bondsmen have a right to have the money collected applied to their claims.

APPEAL FROM MADISON COURT OF COMMON PLEAS.

October 26, 1882.

OPINION BY JUDGE PRYOR:

It is evident from the entire record that the trustee, Smith, exercised all the diligence required of him as trustee in collecting, or having collected, the taxes due the state and for which the sureties were bound, and also in collecting the fees or fee bills due and owing the sheriff. Dooly says that at a meeting of the sureties in regard to the tax books and the collection of taxes for the year 1873, it was agreed that Oldham should for a while proceed to collect what he could, and this conclusion seems to have resulted from the fact that no one could then be found who was willing to undertake the collection. It is true objections were made in a short time after that, when Hume and Sale took the books and attempted to make the collections. During the entire period Smith consulted the sureties and was evidently attempting to secure all the uncollected taxes and fees for their benefit, exercising all the diligence that could be required of him as trustee. Any greater degree of vigilance would have required him to undertake in person to collect the taxes and fees, and to do this he would have been compelled to qualify as deputy sheriff and abandon his own profession. If loss originated by reason of Oldham's proceeding to collect, it was as much the fault of the sureties as the trustee, but the fact is, all of them were trying to find a collector, and their failure to do so caused the delay in getting the books from Oldham, and the loss, if any, incurred by the sureties.

When Oldham gave up the books an inventory was made of all the fees, etc., due him, and Parks collected all he could and passed the same over. The fact that Smith may have made a mistake in his statement as to the real value of the fee bills, or the amount of the fees that were good, ought not to make him responsible for

more than was collected or that could have been collected by the exercise of the proper diligence, and it is not pretended that Parks and others did not collect and account for all the fees that could have been collected. The fact that Smith failed to undertake the trust and undertake the discharge of his duties for several weeks after the assignment was written, can not affect his liability. He was not compelled to accept it, and had the right to decline to assume the obligation at any time. We perceive no reason for disturbing the judgment on the cross appeal.

We must also concur in the judgment below upon the question involved upon the original appeal and in doing so it seems to us it is unnecessary to determine the question as to whether in point of law the thousand dollars was a part of the estate of Oldham when he made the assignment, and passed to the assignee by reason of its execution and acceptance. Parks undertook to collect the revenue for the year 1874, for Oldham, the sheriff, and by the terms of the agreement between Parks and Oldham, the former was to have the exclusive right to make the collections, and Oldham as sheriff was made subordinate to the deputy. Oldham was in default as sheriff for the year 1873, and the appellees, or some of them, who were his sureties for that year were induced to become bound as his sureties for the year 1874, upon the idea that Parks would collect the revenue, excluding Oldham from any right thereto, and appropriate to their benefit all the fees, commissions, etc., that Oldham was entitled to under the contract with Parks. Oldham was to have half the commissions. It is well established by the proof in the record that this arrangement between Oldham and Parks was the inducement for some of the appellees to become liable for the second time on his bond for the year 1874. Smith, it seems, was the attorney for Oldham, and advised with the sureties as to the best course to pursue, but whether he induced the sureties to go upon the bond by reason of having secured to them the fees and commissions of Oldham under the contract with Parks does not appear, and the presumption can not well be indulged that it was by his persuasion that they became a second time responsible. Shortly after this bond was executed, and after Parks had begun his collections, the sheriff, Oldham, made the assignment to the appellant, Smith, for the benefit of creditors, and upon the petition filed for a settlement of this trust, it was held by the court below that the contract between Oldham and Parks was void, because

in violation of Gen. Stat. (1881), Ch. 81, § 1, which provides that "No office or post of profit, trust, or honor under this commonwealth, * * * nor the deputation thereof, in whole or in part, shall be sold or let to farm by any person holding or expecting to hold the same." Section 2 of the same act provides that "every contract or security made or obtained in violation of the preceding section shall be void." The contract between Oldham and Parks being void, as by its terms Oldham was excluded from any right to collect, and had no other interest than to receive one-half the fees, could not have been enforced and, therefore, it is maintained no rights passed to the assignee under the assignment to the fees collected by Parks. Under this view of the law the appellant, Smith, who was the assignee of Oldham, having paid a debt to one Broaddus, for which he was liable as the surety of Oldham, took from Oldham a check, or from Parks by Oldham's consent, for the commission Oldham was entitled to under the contract with Parks amounting to $1,000, and applied it as a payment on the Broaddus debt, refusing to recognize it as a part of the trust fund for the reason already given and for the additional reason that the rotary and fees of a public office are not assignable. It appears from the record that Smith, the trustee, gave notice to Parks that he claimed this fund as a part of the trust estate and the presumption is that he must have known the arrangement made with the sureties and Oldham. Oldham agreed with the sureties that it would be applied to his debts and they were parties to the arrangement and although a different opinion is expressed by the chancellor below, it is expressly stated by two or more of the sureties in their depositions that this agreement with Parks, that the fees and commissions should be applied to the payment of their liabilities, was the inducement for them to sign the last bond, hoping thereby to realize something to indemnify them for the liabilities already incurred. While the contract can not be enforced as between Oldham and Parks it does not necessarily follow that the sheriff is without any remedy against Parks for his part of the fees, or that the securities have no equitable claim to this fund in the hands of Parks. It was the fees and commissions the securities were entitled to under the arrangement with Oldham and this constitutes the consideration for their assuming to be responsible for the acts of Oldham as sheriff. It might as well be argued that the revenue collected by Parks and that had been accounted for by the securities could not

be reached in the hands of Oldham or Parks by the sureties because of the void contract under which the collections were made. Here is a trustee, either with or without notice of the creditors' claim, who undertakes to appropriate a fund that was set apart by the debtor for the benefit of creditors, upon the ground that the contract under which the claim of the creditors originated was void. The creditor is claiming it as a part of the estate by the contract, or if that can not be enforced by reason of his equitable claim to the fund. There was no illegality in the sureties agreeing to accept the fees and commissions as the consideration for going upon the bond, but the illegality consists in the contract between Oldham and Parks by which this fund was to be obtained, and we are not prepared to say, although the sureties may have assented to the illegal contract, that they are affected to the same extent by reason of it that Oldham and Parks were, nor are we convinced that such an interest could not have been transferred to the sureties as a means of indemnity, but it is not necessary to pursue such a discussion or to determine these questions. These sureties were involved by reason of the acts of their principal and the collecting officers who then collected the fees due and owing the sheriff under the arrangement made by the appellant for the benefit of creditors. The very fees involved in this case, or the beneficial interest to the sheriff resulted from the execution of the bond by these sureties and upon the condition that they were to have the fees and commissions to secure them.

The trustee asserted his claim to this fund in the hands of Parks in behalf of creditors and notified Parks that they were entitled to it. Parks was so impressed with the idea that the fund belonged to them that he required Smith's consent as trustee, to be indorsed on the receipt to Oldham. The latter, instead of collecting the claim for creditors as he should have done, for Parks was willing to pay it over, resists the recovery upon the ground that the contract between Oldham and Parks, under which the creditors claim, was void, and admits that since he has accepted the trust he has collected these commissions, by the consent of Oldham, and appropriated them to the payment of debts for which he was liable as Oldham's surety. If the creditors had no claim to the fund by reason of any contract, and a case was presented where the property in no event could have passed to the assignee there might then be some reason for sustaining the position assumed by the

trustee. But here the appellant, by appropriating this fund, placed himself in direct antagonism to the creditor, and obtained that from the debtor that otherwise would have gone to the creditor. Instead of asserting the claim for creditors he is claiming against them. This can not be done. A trustee holding land in trust, finding that his title is worthless, can not purchase an adverse claim and acquire a title in his individual right. *McClanahan v. Henderson,* 2 A. K. Marsh. (Ky.) 388. It is said, however, that the appellant was not a trustee of this particular fund because the contract was void between the creditor and Oldham and passed nothing. This is the very question at issue. If a trustee is allowed to appropriate to his own use that which the creditor has failed to secure by reason of an illegal contract, or because the contract is so framed as to pass nothing, it tends to encourage the trustee to take care of his own private interests at the expense of those for whom he is acting and recognizes his right to place himself in a position hostile to the beneficiary with reference to the trust fund or what is regarded as the trust fund. That Oldham did attempt to pass this fund to the creditor is certain, and that Smith, as assignee of Oldham, asserted a claim for creditors is equally certain, and he will not be allowed to acquire an interest after the assignment, so as to acquire the property in his own right upon the idea that nothing passed to the creditor, or to him as assignee for the creditor. It was decided by this court in *Covington & Lexington Railroad Company v. Bowler,* 9 Bush (Ky.) 468, that it was a breach of trust on the part of a trustee to create any relation between himself and the trust property whereby it would induce him to look to his own interests at the expense of the beneficiary of the trust. Now whether it was trust property is one of the issues here, with the creditor insisting that it is and the trustee saying that it is not, and when it clearly appears that both the creditor and debtor regarded the fund as belonging to the creditor and but for the appropriation by the trustee, however honestly he may have acted, the fund must have gone to the creditor. This case illustrates the wisdom of the rule and the necessity for holding that the trustee can not place himself in a position hostile to the beneficiaries of the fund. The trustee finding that the contract was void seizes upon that which was regarded as assigned to creditors, and by an act hostile to the creditor obtains the property that the creditor would have obtained but for the action of the trustee and

whether the creditor could have enforced his claim in a court of law or equity under such circumstances as surround this case is a question concerning which the chancellor in the controversy between the trustee and the beneficiary will not stop to inquire.

Judgment *affirmed* on original and cross-appeal.

W. B. Smith, Wm. Lindsay, for appellant.

C. F. & A. R. Burnam, for appellees.

[Cited, *Eversole v. Holliday,* 131 Ky. 202.]

JOHN W. SNAPP *v.* B. C. ORR'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 4—355.]

Conveyance to Defraud Creditors.

Where a father largely in debt conveys all of his estate to a son who lives with him, except such as is exempt from creditors and it is apparent that the sole object is to prevent the collection of the claims of the father's creditors, the conveyance will be set aside. A parol contract between the father and son by which the father agrees to pay the son in his estate for the work of years and never executed until the creditors are about to take it, is of itself proof of the fraudulent intent.

APPEAL FROM NICHOLAS CIRCUIT COURT.

October 28, 1882.

OPINION BY JUDGE PRYOR:

The testimony shows beyond controversy that the debts upon which the executions issued and the land sold, originated long prior to the execution of the two deeds by Sylvester Snapp to Wilson, and it is equally as well established that the father before and after their execution announced his purpose not to pay the debt, and his further intention to so dispose of his property as to prevent its being subjected to its payment. Whether John (the son) was present when these conversations took place is immaterial, we think, from the facts of this case. The purpose of the one may have been fraudulent and that of the other entirely innocent of any wrong, but such is not the case here. Neither of the conveyances were made by the father to his son until the father became involved and as a consideration to uphold these deeds as

against the creditors, the parties attempt to establish by each other the existence of a parol contract between them by which the father was to pay the son $13 per month for his work and take it out in land. His father had several children and lived on a small farm of 120 acres of but little value. The son continued to reside on the farm with him after he arrived at age and with his brothers worked the farm, all constituting one family. According to the proof, one of the small tracts of land was purchased by Sylvester Snapp long after this parol contract, and at a time when he was (if this contract was in fact made) largely indebted to his son for work and labor to be paid in land, and instead of having the land conveyed to the son he had it conveyed to himself. The alleged indebtedness to John for this work had, years before the deeds were made, amounted to a much larger sum than the value of the two tracts, yet no conveyances were made and no one knew of John's claim until his father became insolvent by reason of these debts, and then for the first time and after the lapse of many years this parol contract, said to have been made when John arrived at twenty-one years of age, is attempted to be made the basis for the consideration of the two deeds. They all lived together. The land was worked as it always had been, and the son suddenly becomes the owner of all the estate owned by the father except such as was exempt from execution. Such transactions, if allowed between members of the same family under such circumstances and upon such a consideration, would afford the greatest facilities for covering up the estate of embarrassed debtors at the expense of creditors. It is apparent from this entire record that the sole object in making the conveyances was to prevent the collection of these debts and parol contracts between members of the same family by which the father agrees to pay the son in his estate for the work and labor of years, and never executed until the creditors are about to take it, is of itself convincing as to the fraudulent intent. There is nothing in the act against champerty to prevent the creditors from levying on land fraudulently conveyed by the debtor, and in fact the possession here was always with the father, and if not the fraudulent deed passed no title, the son holding for the father. Besides the appellant comes into a court of equity asking relief and the chancellor finds no equity in his case and even if he had paid the mule colts or their value to the old man whether on the land or not the chancellor could afford no relief by reason of

the fraud in the land transaction, as against the creditors.

Judgment *affirmed.*

John P. Norvell, Chas. Lytle, for appellant.

JOHN R. HENDRICK ET AL. *v.* JOHN HALY ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—356.]

Party-Wall.

Where a wall holds up and supports a dwelling sold it will be presumed that it was intended to be conveyed as a part of the house and such a wall is a party-wall intended to support the buildings on either side of it.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 31, 1882.

OPINION BY JUDGE PRYOR:

If the diagram contained in the brief of counsel is correct there might be some reason for reversing the judgment, but a careful examination of the record will show that this is a mistake and, in fact, caused the granting of the rehearing by the court. If the line dividing the property is run by the calls of the deed and no regard paid to the condition and appearance of the property at the time of the sale, the appellant would be deprived of the use of the wall as it stood at the purchase for the support of his building. This, however, would be a technical as well as an unreasonable construction, for if the wall held up and supported the dwelling sold it must be presumed that it was intended to be conveyed as a part of the house; in other words, the wall as it stood was a party-wall and intended to support the buildings on either side of it, and on that part of the wall where there was no building on the east, or Haly side of the lot, it being a continuance of the wall supporting the buildings owned by the appellant and appellee, must also be held to be a party-wall and the line so run as to strike the center of the wall in controversy. This we understand to have been the judgment below. Haly in building can not so use this wall as to affect injuriously the building of appellant, but as the court finds there is no proof that this has been done the petition was properly

dismissed. The line should be a straight line beginning at the corner on Montgomery or Main street, and running so as to give the parties the use of both walls and so on to the beginning. This establishes the line as was done by the court below and the judgment is, therefore, *affirmed* on the original and cross appeal.

D. W. Lindsay, for appellants.

J. & J. W. Rodman, Wm. Lindsay, for appellees.

MINCHER ARTHUR *v.* ANN HARLAN ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—356.]

Title by Adverse Possession.

Where suit is maintained to recover land between two claimants, and a third person is in possession of the land not claiming to hold under either of the parties, he is not bound by a judgment entered in such cause.

APPEAL FROM GREENUP CIRCUIT COURT.

October 31, 1882.

OPINION BY JUDGE PRYOR:

We are of the opinion that the entry and possession by the heirs of Harlan under the Keith patent, and the writing from Keith under which Harlan claimed, authorized that writing to go to the jury as evidence of title and that the proof as to the heirship was sufficient, but there is a fatal objection in our opinion to the verdict and judgment by reason of the admission of the record in the case of *Harlan's Heirs v. Seaton,* 18 B. Mon. (Ky.) 312, as evidence of title against the appellant. If the appellees claim to have derived title by reason of that judgment, then it appears that Arthur was in possession of his land before the title was obtained, and, not being a party to that suit, we can not see how it is to be used against him. Seaton was, in fact, holding adversely to Harlan, and because the latter recovered of Seaton is no reason why they should recover against Arthur. But the effect of the admission of this record was to impress the jury with the belief that as Seaton was within the Keith patent, and Harlan's heirs recovered of him, therefore they are entitled to recover of Arthur. The lat-

ter was not a tenant of Seaton nor did he claim to hold under him in any way, and the admission of such testimony was calculated to mislead the jury. It was also error to admit the mortgage given by Arthur on the fifty-acre tract of land as evidence of the fact that he owned no other land. The mortgage shows a conveyance of only fifty acres of land as a security to the mortgagee and there is nothing in the paper conveying the idea, or raising a presumption, that he owned no other land. The instruction in regard to the Seaton claim was erroneous for it is plain that Seaton was claiming against Harlan and not under him.

The judgment below is *reversed* for the reasons indicated and cause remanded for a new trial. The affidavit of the attorney for a waiving order was properly made.

E. F. Dulin, for appellant.

B. F. Bennett, for appellees.

MORTON SCOTT *v.* NANCY E. ESTILL ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—356.]

Notes Taken for Interest in Partnership Property.

Before the payee of notes taken as the consideration of the sale of a one-fifth interest in partnership property, can recover upon them, he should show ability to convey and offer to carry to the purchaser title to the property and interest agreed to be conveyed, and if such payee does not own as much as one-fifth interest in such partnership property, the notes should be credited by the deficiency.

APPEAL FROM JESSAMINE CIRCUIT COURT.

October 31, 1882.

OPINION BY JUDGE LEWIS:

There is a decided preponderance of proof in this case that appellant purchased the interest of his sister, Nancy E. Estill, in the partnership property, in Jessamine County, Kentucky, and Madison County, Mississippi, at the price mentioned in the notes sued on. And there is no other probable way shown by which she and her husband got possession of the notes, the execution of which he admits, than that they were delivered by him. His allegation that the purchase was made conditional upon the other members of the

firm agreeing to unite with him, and that the notes were not to be binding unless they joined in the execution of them with him is not sustained by the evidence. On the contrary, it is satisfactorily shown that he made the purchase unconditionally for the joint benefit as he executed the notes in the name of himself and his brother, Samuel Scott. We think that it also appears that in pursuance of the contract and at the request of appellant, Mrs. Estill and husband made a deed to him and Samuel Scott for the property sold, and acknowledged it before the clerk of the Jessamine County Court, or one of his deputies. That Samuel Scott now repudiates the purchase, and denies that he gave to appellant a power of attorney, as the latter represented to Mrs. Estill and husband he had done, or in any way authorized him to sign his name to the notes does not release appellant. But he is as much bound as if the purchase had been made and the notes signed by him alone.

It appears that there were originally five members of the two firms, brothers and sisters, and that the property of both firms consisted of land, slaves and personalty. It is also alleged in evidence that by the terms of the copartnership those who put into the firm less than the largest amount were not to be entitled to an equal portion or interest until all were made equal out of the firm assets; that some members of the firm did in fact put into the firm, or contributed towards the purchase of the partnership property larger amounts than others, appellee, Nancy Estill, putting in the least of all. Besides, it is contended, in fact shown by the evidence, that she withdrew from the hands of the executor of her father a sum of money agreed by her when the copartnership was formed should be a portion of the partnership property, and that she appropriated to her own use a slave of considerable value belonging to the firm. It is, therefore, important to ascertain whether appellees sold and agreed to convey simply her interest in the partnership property undivided and uncertain as to amount or sold and agreed to convey an interest equivalent in value and amount to one-fifth.

In some way not satisfactorily appearing, the original deed appellees allege they executed has been lost and as it does not appear that the loss and nonappearance of the deed is attributable to appellant, or that he accepted or ever saw it after it was acknowledged or even after it was executed, it would not if produced be conclusive of the terms of the contract. Much less, therefore, is

the paper filed by appellees and alleged to be a copy of the original deed, evidence of the terms of the contract. It therefore follows that what is the amount of the interest sold to appellant for which the notes were given must be ascertained otherwise. As it is incumbent upon appellees, in the absence of written evidence, to show the terms of the contract, we think the paper presented and filed by them as a copy of the original deed and upon which they rely for that purpose, as well as their pleading, should be construed most strongly against them.

In their petition they allege that the notes were given to them for their undivided interest, which was one-fifth in the partnership property in Kentucky and in Mississippi. And in the paper purporting to be a copy of the original deed and which they file and tender to appellant in lieu of the original, it is recited that the interest sold and conveyed by the first deed was one undivided fifth of the partnership property. We think that it should, therefore, be held and considered that the consideration of the notes was the interest of appellee, Nancy E. Estill, equivalent in value to one-fifth of the partnership property at the time of the sale. Although it is recited in the paper filed with the petition that the interest sold and conveyed by he original deed was an undivided fifth, in the deed so tendered, appellees simply convey, or offer to convey to appellant her undivided right, title and interest without specifying or warranting the title to an interest of one-fifth in value and amount. We think that before appellees can recover upon the notes they should show an ability to convey, and offer to carry to appellant an undivided interest in the partnership property of one-fifth in amount and value, and if it should turn out on a settlement and adjustment of the partnership that in fact she does not own that much the notes should be credited by the deficiency as of this date.

Considering the exorbitant price agreed to be given by appellant, the construction we have given to the paper filed by appellees and to their petition harmonizes with justice and equity and certainly does no injustice to appellees. We are, therefore, of opinion that the court below erred in sustaining the demurrer to the counterclaim of appellants and in rendering judgment for the full amount of the notes, before ascertaining by reference to the master commissioner or otherwise whether appellees in fact own and can convey an interest of one-fifth in the partnership property.

The deed tendered was not such in other respects as authorized a judgment upon the notes. The notes show upon their face that the consideration thereof was "for an interest in the land and personal property this day purchased." No other interpretation of the language can be properly given than that it was the entire interest of the vendors thus sold. Yet, in the deed tendered the terms of the contract are so varied as to except from the conveyance the slave that belonged to the firm as before mentioned.

The judgment of the court below is, therefore, *reversed* and cause remanded for further proceedings consistent with this opinion.

Geo. R. Pryor, A. Duvall, for appellant.

J. S. Bronaugh, for appellees.

ELIAS WEBB *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—436.]

Evidence of Robbery—Criminal Law.

Where one charged with robbery successfully proves an alibi, the court should not have admitted evidence of an attempt made by the accused to escape from the jail. Where there is nothing else upon which to base a conviction of guilt except an attempted escape, the accused should be acquitted, but if evidence of such attempt is competent, then the accused should have been allowed to show the motive prompting him to escape from the jail.

APPEAL FROM MARION CIRCUIT COURT.

November 2, 1882.

OPINION BY JUDGE PRYOR:

The only evidence in this case conducing to establish the guilt of the accused is the attempt to escape from the jail of the county in which he was imprisoned. His attack upon the jailer and the facts connected with his attempt to escape were calculated to prejudice his case, and particularly so when he was prohibited from rebutting the presumption of guilt arising from his effort to escape by showing the motive that prompted him to leave the jail. If human testimony is to be believed it was impossible for the appellant to have committed the offense, and when the manner of obtaining the buggy is satisfactorily accounted for as well as the

presence of the accused at home, by disinterested witnesses at the time the robbery was committed, the court should have excluded from the jury all the evidence of the attempt upon the part of the accused to escape imprisonment, and besides, we think a detail of the manner of his escape and the circumstances were incompetent on the facts before us to show guilt on the part of the accused. There being nothing else upon which to base a conviction, certainly, if competent, the appellant ought to have been allowed to show the motive prompting him to leave the jail. The judgment must be *reversed* and the appellant awarded a new trial.

Hill & Rives, for appellant.

P. W. Hardin, for appellee.

P. H. WILSON ET AL. v. TAYLOR & SON ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—437.]

Trustee's Sale by Direction of Chancellor.

A sale by a trustee under authority of the chancellor for more than two-thirds of the value of the estate will not be disturbed in the absence of fraud or facts showing unfairness equivalent to fraud, and the title under such a sale will pass to the purchaser.

APPEAL FROM CAMPBELL CHANCERY COURT.

November 2, 1882.

OPINION BY JUDGE PRYOR:

The appellant in this case had placed in the hands of his trustee all of his estate, both real and personal, for the payment of his debts, with the power on the part of the trustee to sell and convey any of his estate for that purpose. The trustee being disinclined to administer the trust without the advice of the chancellor, filed a petition in equity asking to be allowed to sell and dispose of the estate. The chancellor directed a sale of the entire trust estate to satisfy the demands of creditors due and not due, and a sale was made of a part of the real estate to satisfy a mortgage due Taylor and purchased by the appellant Root. The trustee is not appealing, and the power of the chancellor over the trust estate can not be successfully questioned. The property purchased by Root was val-

ued and the latter bid more than two-thirds of its value. The sale can not, therefore, be disturbed in the absence of fraud or facts conducing to show unfairness equivalent to fraud. The policy of selling the property at the time and manner in which it was sold might be doubtful, but the chancellor having the jurisdiction to sell, the title passed to the purchaser. There was no fraud in the sale. The purchaser acted in good faith and the proof as to the inadequacy of price would not have authorized a defendant to redeem under a sale made by virtue of an ordinary execution. The appellant can accomplish nothing by a reversal as Taylor's mortgage included the right of a homestead and dower. The purchaser will hold the property and the judgment is, therefore, *affirmed.*

Geo. B. Hodge, for appellants.

Wm. Lindsay, for appellees.

E. H. TAYLOR, JR., *v.* BANK OF WOODFORD ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—437.]

No Warranty in Judicial Sales.

There is no warranty in judicial sales and a purchaser at such a sale can not secure relief in the absence of fraud or other causes sufficient to annul and set aside a judgment rendered. He has no right upon the ground of the property purchased being of no value to recover of the plaintiff in the action the price paid by him for such property.

APPEAL FROM WOODFORD CIRCUIT COURT.

November 2, 1882.

OPINION BY JUDGE LEWIS:

It appears from the petition of appellant in this case that after he purchased the bonds under the judgment rendered in another action, by The Commercial Nat. Bank of Versailles against the Louisville, C. & L. R. Co., a decision was rendered by this court in the case of the stockholders of the *Shelby R. Co. v. The Louisville, C. & L. R. Co.,* that was brought in a different court and to which neither appellant nor appellees in this case were parties, by which the sale of the Shelbyville Railroad to the other named com-

pany was set aside; and that in consequence of that decision the mortgage executed to secure said bonds became a nullity and of no effect, the result of which was that the bonds at and before the time of the sale to the appellant were unsecured and were and have ever since remained utterly worthless and of no value. Upon that ground appellant prays that said sale and purchase of said bonds be rescinded upon equitable terms. The allegation is not simply a statement of fact but is in effect a statement of a conclusion of law. For whether the bonds are or are not wholly unsecured and become a nullity and of no effect depends upon the manner in, and extent to which the decision of this court affected their validity. It is not, however, necessary here to decide whether the rescission of the contract of sale of the Shelbyville road to the Louisville, Cincinnati & Lexington Railroad Company had the effect to cancel the bonds and release the latter company from its obligation to pay them and to relieve its corporate property from the lien upon it. Because, conceding the bonds, as alleged, to be a nullity and of no effect and worthless, still those facts are not sufficient to constitute a cause of action against the appellees. It is not necessary to multiply authorities in support of the proposition that in the absence of fraud or other causes sufficient to annul and set aside a judgment rendered in another action for the sale of property and the judgment confirming the sale, the purchaser has no right upon the ground of the property being of no value, to recover of the plaintiff in the action the price paid by him therefor.

This court in the case of the *Farmers' Bank of Kentucky v. Peters,* 13 Bush (Ky.) 591, quoted and approved the following language: "It is a well settled principle that in judicial sales there is no warranty. This principle, as a general rule, holds good as to all those sales of real property made in equitable proceedings, under the direction and control of the courts, usually denominated mortgage sales, guardian's, executor's, and administrator's sales, for enforcement of vendor's, and statutory liens. * * * The purchaser takes what he gets. * * * The rule of *caveat emptor* applies in all its rigor to judicial sales of real property." Rorer on Judicial Sales, §§ 458, 459.

There is no reason why the rule should not be applied to a case like this, for here the purchaser claims all the rights of an assignee without alleging the performance on his part of the corresponding duty of diligently prosecuting his action against the obligor of the

bonds. If it be conceded that the plaintiffs in the judgment for the sale of the bonds occupy by analogy the attitude of an assignor, and are bound by an implied warranty, which is not at all the case, still the appellant has not placed himself in a position to maintain the action. By standing by and permitting the confirmation of the sale by a judgment of court that is in full force and not sought in this action to be vacated, set aside or modified, appellant has lost whatever remedy he might have had. He has no right now to nullify that judgment in the manner attempted upon the sole ground that the property purchased by him is of no value.

The judgment of the court below is *affirmed*.

A. Duvall, Hord & Trabue, for appellant.

D. L. Thornton, for appellees.

JAMES K. STONE *v.* FIRST NATIONAL BANK OF WARREN, PA.

[Abstract Kentucky Law Reporter, Vol. 4—438.]

Specific Performance of Contract.

The party seeking specific performance of a contract must show himself in no default without presenting an excuse that will justify his default. Where there are mutual covenants to be performed, by the parties to an executory contract, at the same time, before the party seeking performance can recover he must allege performance or an offer to perform before he can make the other party liable.

When Time Is Not the Essence of a Contract.

The time of performance is not always so essential in the performance of an executory contract for the sale of land as to authorize a rescission upon that ground, but it is incumbent on the party seeking performance of such a contract to show that he has done everything in his power to comply with his contract or that his failure came from some cause over which he had no control and where a good excuse for his failure is shown and he has within a reasonable time tendered performance and no injury has resulted to the other party the chancellor will enforce the contract.

APPEAL FROM CAMPBELL CHANCERY COURT.

November 4, 1882.

OPINION BY JUDGE PRYOR:

This is an action asking the chancellor to enforce the execution of an executory contract between the appellant and the appellee evidencing the sale of some real estate in the city of Newport. By the terms of the contract the appellee agreed to deliver to the appellant, within 30 days, a good and sufficient warranty deed to the property, and at the same time of the delivery of said deed the appellant agreed to give his notes for the purchase-money.

The appellee in its petition avers that since the — day of October, 1879, it has been ready, able and willing at all times to comply with the contract in every particular and so notified defendant in October, 1879, yet the defendant failed to execute his notes and mortgage, and before this suit was instituted the appellee tendered to the appellant a deed with covenant of warranty which he declined to accept, and again he tenders the deed. There was a demurrer to this petition and the demurrer overruled. The pleading is defective and the demurrer should have been sustained. It is evident that the execution of the notes was dependent upon the execution and delivery of the deed within the time provided by the contract, and an averment that the plaintiff was able and willing to perform his part of the contract of which the defendant was notified is not sufficient. It must be averred that the plaintiff delivered or tendered the conveyance within the time contracted for to the defendant, and the failure of the latter to comply, or when time is not of the essence of the contract some excuse or reason should be given why the plaintiff was unable to comply. The general rule is "that the party seeking a specific performance must show himself in no default without presenting an excuse that will justify his default." Here were mutual covenants to be performed at the same time, and before the party seeking performance in this class of cases can recover he must aver performance or an offer to perform before he can make the defendant liable. *Pollard v. McClain,* 3 Marsh. (Ky.) 24; *Campbell v. Harrison,* 3 Litt. (Ky.) 292.

The testimony in this record shows that the party who is seeking relief failed to comply with his contract by making or tendering a general warranty deed within the thirty days, and that he could not have complied for the reason that his title was defective. It appears from the pleadings and proof that the appellee was to obtain from Mrs. Johnson a relinquishment of her contingent right of dower in the property conveyed, and that this was the obstacle in the way of concluding the contract by the execution of a deed at the time it was

entered into. Whether Mrs. Johnson was entitled to dower or not is an immaterial inquiry in this case as both parties regarded her as having this inchoate right and the appellee undertook to obtain the relinquishment, and authorized its attorney to obtain it in order to perfect its title. The attorney informed the appellant, as the latter says in his testimony, that he could not obtain the relinquishment and after this conversation a second conversation was had, at the clerk's office in Newport, in which he was again told by the attorney that Mrs. Johnson would not convey, and it was then understood that the contract was off and that the appellant would continue to occupy the premises as a tenant. The substance of this conversation is not only established by the statements of the appellant and his attorney, but by the attorney for the bank. The appellant was in possession of this property at the time of the sale, having rented it from the vendor of the appellee, and agreed to continue the rental until the expiration of the year, after being informed by the attorney that he could not obtain the relinquishment. Taking the conversation as all the parties understood it, the attorney for the bank as well as the attorney for the appellant, and if a sale had been thereafter made by the bank for a better price, it is not plain that the purchaser would hold with notice even of the previous sale of the appellant. The attorney for the bank said to Stone "The trade is off. Mrs. Johnson declines to relinquish and I don't intend to run after her any more." Stone remarked, "It is all right, I can vacate after the first of January," and the attorney for the bank responded, "Very well, we have a purchaser at a better price, but how about the rents?" Stone responded, "The rent can continue as before." Besides the appellant has invested his means in other real estate, and upon the faith of the abandonment of the contract by the parties in interest. The attorney for the bank says that after the 30 days and after the conversation held at the clerk's office he obtained a deed from Mrs. Johnson and notified the appellant, who made no other excuse than that his (appellant's) wife would not relinquish her dower in the property the appellant had agreed to mortgage to the bank to secure the purchase money. This conversation the appellant denies and if established does not alter the rights of the parties. The property sold was a planing mill. The appellant was anxious to invest in real estate and to engage in business, and while time is not always so essential in the performance of an executory contract for the sale of land as to authorize a rescission

upon that ground, yet, a strict compliance in point of time must often be of great importance to those who desire to engage in a permanent business, or place their money in real estate as an ordinary investment. It is always incumbent on the party seeking the the performance of an executory contract for the sale of real estate to show that he has done everything in his power that a man of business would do in order to comply with his contract, or that his failure originated from some cause over which he had no control. It is true that he may be without an excuse, and opposite facts by his conduct and action may show that he still regards the contract as binding. If nothing had been said with reference to this deed or relinquishment of Mrs. Johnson, and the appellant perfecting his title in a reasonable time had tendered the deed, and no inquiry had resulted to the appellant, the chancellor would have enforced it.

The party offering to comply in such a case must show, however, that he has all the while regarded the contract as subsisting; if not, he will be denied relief. He will not be allowed to say on one day the contract is off, and on the next that it is in full force; such a rule would enable the party in default to comply if to his interest, and if not, to abandon the contract. The mere failure to comply with an existing contract like this in point of time without regard to the circumstances connected with it, is not sufficient to authorize the chancellor to deny the relief but to make the petition good, The excuses, which are the circumstances connected with the failure to convey, must be stated. The mere delay for a few days in its execution, and the vendee not injured by it, is no ground for denying to the vendor the equitable right to enforce it. Is that the case here? The appellee maintains that its attorney had no right to rescind the contract. In this we concur; nor do we mean to say that the attorney assumed such a responsibility. He was selected by the appellee to perfect its title and through him alone was the appellant to know whether he could or could not obtain a title. Having been informed that the title could not be obtained, the appellant certainly had the right, after the time had expired in which to comply, to regard the contract as at an end, and to look for other investments of his means. It may not have been the fault of the vendor in an equitable view of the case that caused it to make default, but when the vendee is informed that the contract is ended and no title can be made, it is too late then to revive the contract

so as to claim the equitable relief sought here. The attorney of the appellee was the agent to examine and perfect the title that the contract might be fully executed. There was no one else in this state representing the appellee. This authority is not denied but admitted by the pleadings and shown by the proof, and in our opinion the relief asked should have been denied. The cases of *Doss v. Cooper,* 2 J. J. Marsh. (Ky.) 409; *Henry v. Graddy,* 5 B. Mon. (Ky.) 450; *Cotton v. Ward,* 3 T. B. Mon. (Ky.) 304; *Tyree v. Williams,* 3 Bibb (Ky.) 365, 6 Am. Dec. 663; and *Woodson's Admr. v. Scott,* 1 Dana (Ky.) 470, all sustain the views herein presented.

The judgment is, therefore, *reversed* with directions to dismiss appellant's petition.

A. Duvall, Helm & Bigstaff, for appellant.

Wm. Lindsay, John S. Ducker, for appellee.

W. A. STUART, RECEIVER, *v.* R. M. HATHAWAY.

[Abstract Kentucky Law Reporter, Vol. 4—438.]

Liability of Sureties on Administrator's Bond.

The sureties on an administrator's bond are not liable for the proceeds of land sold under a decree or judgment although sold at the instance of the administrator.

Obligation of Sureties on Administrator's Bond.

The obligation of sureties on the bond of an administrator is to answer for the personal assets that come or ought to have come to the hands of the administrator and their liability can not be enlarged without their consent.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 16, 1882.

OPINION BY JUDGE PRYOR:

It is not necessary to determine many of the questions raised by the appeal as, in our opinion, the decision of the case must depend upon the question as to whether the appellee is liable for the proceeds of the land collected by Ray as the administrator of Pope. The legal effect of the bond upon which the appellee is sought to be made liable as the surety of Ray was determined by this court

in the case of *Commonwealth v. Ray,* Mss. Opin., delivered in April, 1878. The bond is that usually given by an administrator binding the obligors to answer for the personal assets that come or ought to have come to the hands of the administrator, and under such a bond, as decided by this court in the case cited, the surety is not liable for the proceeds of land sold under a decree or judgment although at the instance of the administrator. The administrator as such is not entitled to the money nor is it usual to direct its payment to him unless he is designated as the special receiver, and then his bond as receiver creates the liability as to the surety and not his bond as administrator. It does not appear that the administrator was ever authorized to collect this money or that he was ever made the receiver or that he sold the land, but on the contrary we infer from the record that the land was sold by the commissioner and the notes made payable to him, but whether so or not the surety is no more liable under such a bond for the proceeds of the sale of the land than he would be for the rents. See *Wilson v. Unselt,* 12 Bush (Ky.) 215. Nor is the surety estopped by reason of the judgment against the principal in the bond from making his defense. The judgment is against Ray and not against the surety, and while the surety may have been a party to the action and excepted to the commissioner's report of settlement, so far as Ray is concerned he was properly charged with all the moneys he received, whether from land or other sources, belonging to the estate, and the overruling of the exceptions was only a judgment to the effect that Ray was liable and not the surety as no judgment was obtained against the surety, and none asked, so far as appears from this record. This purports to be an action in the name of the receiver under an order of court on a judgment obtained against the principal and for which the surety is attempted to be made liable, or if regarded as more properly an action on the bond with the judgment against the principal offered as conclusive evidence of the surety's liability, still the defense may be made and the surety will be allowed to show that he is not responsible, although his principal may be. While Ray, the principal, may not have received this money in his official capacity, he will not be allowed to say that his responsibility never attached because the money ought to have been paid to another or to himself as receiver. If he received the money he is liable for it, but not so with his surety. The latter is bound by the terms of his covenant and his liability can not be enlarged without his consent.

Now it is apparent from the record that the personal assets have been accounted for, and it is equally apparent, that Ray in his settlement was charged with the proceeds of the sale of this land and that this constituted the basis of the judgment against him, and it is immaterial whether paid to him by the purchaser or under an order of the court, the surety is not responsible for it. There may be some conflict in the proof as to the payment of debts by the administrator so as to exhaust the personal assets and while we are satisfied the personal assets were accounted for by him, this court in a suit to enforce the judgment obtained against the principal will not dissect that judgment with a view of finding what fragmentary portions of it can be charged to the account of the surety. In an action showing the liability of the surety, by reason of the failure to account for the personalty, such questions would be the proper subject of inquiry.

Judgment below *affirmed*.

Williams & Brown, R. W. Slack, for appellant.

W. N. Sweeney & Son, for appellee.

MARY TURPIN ET AL. *v.* JAMES TURPIN'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 4—438.]

Enforcement of Purchase-Money Notes.

In an action for the settlement of an estate as well as to enforce the purchase-money lien on land sold, where all the parties are before the court there is no obstacle in the way of a judgment enforcing such lien.

APPEAL FROM GARRARD COURT OF COMMON PLEAS.

November 16, 1882.

OPINION BY JUDGE PRYOR:

We see no objection to the judgment below because it is for the amount of the principal of the notes with the accumulated interest up to the date of its rendition and then interest given on the aggregate amount. There was that sum due and owing when the judgment was entered and such judgments have in several instances been sustained by this court. Nor can we see how the action of the

court in auditing the notes of the purchasers of this land by the interest of those of the devisees is to prejudice their rights. The larger the credit is the less the purchasers will have to pay. The administrator is not claiming it as error, nor was it necessary for the execution of any bond by the administrator before judgment. The purchasers were before the court and there was no obstacle in the way of a judgment enforcing the lien. The appellants, the Staffords, have, however, an interest in the proceeds of the sale of this land other than that expressly devised by reason of the death of some of the devisees without leaving issue surviving them. It was the purpose of the testator to give to each one of the children one-ninth of his estate, and he expressly provides that if the devisees die without issue, his or their portion is to go back to his estate and such being the case all of the surviving children would take an interest under the will in that portion devised to the deceased brother or sister. This is an action for the settlement of the estate as well as to enforce the lien, and the devisees, who were purchasers, were not entitled to a credit of the entire interest of those who would have been entitled if living. No objections were made to the proceedings because of the misjoinder of actions, nor are we prepared to say that the action to enforce the lien was improperly joined with the action for a settlement of the estate. The amount allowed the commissioner is too much. One-half the sum was a proper allowance.

Judgment *reversed* and cause remanded for further proceedings.

C. A. Rodes, S. M. Boone, Fox & Fox, for appellants.

G. W. Dunlap, for appellees.

[Cited, in *Harvey v. Bell,* 118 Ky. 512, 26 Ky. L. 381, 81 S. W. 671.]

MARY HELM *v.* R. S. LYON ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—439, as Helm v. Lyon & Co. et al.]

Undivided Interest in Estate Liable for Debts.

Where a testator provides that his estate, consisting of five hundred acres of land is to be controlled by the widow for her benefit and that of the children, all of the children are entitled to a support from the land if sufficient for that purpose and the undivided interest of a child is liable for notes given by such child for his support.

APPEAL FROM WOODFORD CIRCUIT COURT.

November 18, 1882.

OPINION BY JUDGE PRYOR:

That the son of the appellant has a present interest in the profits of the land will not admit of controversy, and when the widow marries he becomes not only entitled to the profits but to the actual possession. This tract of land contains 500 acres and is controlled by the widow for her benefit and that of the children. They are entitled, all of them, to a support from the proceeds of this land if sufficient for that purpose. The chancellor has directed a sale of the one-third interest absolutely, and as the widow has appeared resisting such a judgment upon the ground that she can not be divested of possession, the judgment may be construed as permitting the purchaser to enter. The purchaser would not be entitled to the possession during the life of the widow if she remains unmarried, and the judgment should have required the widow, who is a trustee for the children, to pay over to the creditor of the son the income from the estate to which he is, or may be entitled, or a sufficiency thereof to pay the two notes. The use of one-third of the land per annum would doubtless be of greater value than the amount of the two notes. She must either pay these two notes out of the income which is one-third, or the chancellor will place the property in such a condition by taking possession of it as will enable him to see that the creditor is satisfied. If the income has been disposed of the chancellor can then sell the absolute estate of the son.

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

D. L. Thornton, for appellant.

Porter & Wallace, for appellees.

JOHN B. GILLESPIE *v.* T. G. BRADFORD.

[Abstract Kentucky Law Reporter, Vol. 4—439.]

Change of Nature of Action by Amendment.

One who as plaintiff in an original action proceeds to recover real estate and quiet his title thereto against the heirs, their vendees and tenants claiming an interest in certain real estate, when finding be-

fore judgment that he himself is without title, can not by purchasing the claims of the heirs who are defendants and then amending his petition in his original action have his right of recovery in the name of the heirs or under their title against those who entered as tenants or purchasers under such heirs.

Process on Amended Pleading.

Where an amendment to an original petition is filed which seeks to quiet plaintiff's title and to quiet defendant's by showing the fact that since the original petition he had purchased certain interests of defendant heirs, it is held that such amended pleading is an original and independent cause of action and upon the amendment process should have issued and where none was issued the defendant was not required to take notice of the amendment.

APPEAL FROM BRACKEN CHANCERY COURT.

November 18, 1882.

OPINION BY JUDGE PRYOR:

The history of this case as presented by the pleadings and proof shows that David Coleman was the patentee of a large tract of land lying in Bracken and Pendleton counties, and that during his life he conveyed to his son-in-law, Bengers, 5,000 acres of land, 3,000 acres of which was within the county of Bracken and 2,000 acres, or the greater part of it, in the county of Pendleton. The conveyance to Bengers was made in the year 1804. David Coleman, the patentee, died in the year ———, and after his death his son, James Coleman, or some of his descendants, by certain equitable proceedings obtained what is now claimed the title to all the unsold land of the patentee within the patent boundary both in Bracken and Pendleton counties. N. D. Coleman, who was a son of James Coleman, and a grandson of the patentee, claimed by purchase and otherwise to own all the land that had been purchased by James Coleman under the decree in the chancery court, Nicholas Coleman, by his agents, claiming the land that had been conveyed by the patentee to Bengers. The latter, or rather his heirs, Bengers being dead, instituted action for the recovery of the land and for a division. This resulted in a compromise between N. D. Coleman and the heirs of Bengers, by which Coleman became the owner of the 3,000 acres lying Bracken county, and Bengers' heirs of the 2,000 acres lying in Pendleton county. This compromise was made in 1850. In 1860 the agents of N. D. Coleman sold to this appellee,

Bradford, all of the unsold land lying in Bracken county. In running the line between the counties of Pendleton and Bracken a portion of the 2,000 acres belonging to Bengers' heirs extended into Bracken county, and the appellee, Bradford, being impressed with the idea that a fair construction of the compromise between N. D. Coleman and Bengers gave him all the land within Bracken county, instituted the present action against the heirs of Bengers, their vendees and tenants, asking for a construction of the compromise between Coleman and the heirs of Bengers; that his title be quieted and that he be put in possession. At that time the tenants and vendees of Bengers heirs were in the actual possession of portions of the 2,000 acres, and the appellant, Gillespie, had not entered as a tenant, but as a purchaser from the heirs of Bengers holding a bond for title. He is the only appellant on the present appeal. His title bond was dated in November, 1858, and called for 72 acres of the land and he had paid the greater portion of the purchase money. The heirs of Bengers filed an answer to the petition of the appellee asserting a title hostile to his, and that the land belongs to them by reason of the conveyance to their father and also by reason of the compromise made in the year 1850. The appellant also answered setting up his purchase of 72 acres from Bengers and also claims title to a small tract adjoining that purchase, under the will of his father. His father, as appears from the proof had entered on the 2,000 acres long before the purchase by the appellant of his 72 acres, and the father and son have held the possession for more than 25 years.

After the entry by appellant under his purchase he also claims to have taken possession of another portion of the 2,000 acres by extending his boundary and holding adversely to the title under which he entered. His claim, if hostile, was certainly not so open or notorious as to apprise the real owners, who were his vendees, of his intention to hold against them, nor are we prepared to say that any such adverse holding has been shown, but on the contrary the claim of the appellant under the facts of this record must be confined to the boundary upon which his father settled and enclosed, and the 72 acres purchased by him of Bengers' heirs. It is apparent from the compromise agreement between Coleman and the heirs of Bengers that the one (Coleman) took the 3,000 acres and the other (Bengers) the 2,000 acres. They were separate tracts and the terms of the agreement are so plain as to leave but little

room for construction. It is evident, therefore, that the appellee under his purchase from Coleman derived no title to the 2,000 acres, and in order to invest himself with title he undertook and did obtain a conveyance from the heirs of Bengers to the land in controversy, and then was allowed to file an amended pleading by which he was permitted to use the title of the parties under whom appellant entered and of whom he purchased the 72 acres, to enable him to recover. This amended pleading was in the nature of an ejectment and sought the recovery of the land under the title of Bengers, which the latter had sold to the appellant. The amended pleading was, in fact, an admission on the part of the appellee that the appellant had the title, and whether so or not, the record shows that Bengers' heirs had the title and that appellant had purchased from them.

The appellee no longer had a standing in court, for if Bengers' heirs had no right to maintain the action, they could not by a transfer of their title vest the appellee with such a right. This reasoning applies to the land purchased and not to the land devised by the appellant from his father. The proof shows that the father of appellant entered upon his tract and claimed it adversely to the world before appellant made his purchase of the 72 acres, and there is nothing inconsistent with appellant's right to claim one tract under Bengers and the other under his father. Regardless, however, of this question it would be an anomaly in the practice to permit the appellee, who in the original action had proceeded against the heirs of Bengers and their vendees and tenants, when finding that he was without title, to purchase the claim of Bengers, and then by an amended pleading to have his right of recovery in the name of Bengers' heirs or under their title as against those who entered as tenants or purchasers under Bengers. Besides, it appears by a subsequent amended pleading that some of the infant heirs of Bengers had never conveyed to the appellee and he was permitted to use their names in the prosecution of the action as their next friend. This was error. In fact the appellee had made out no cause of action until he filed an amended pleading to the effect that since the filing of the original action and the amendments the appellant had gone into bankruptcy and his assignee had conveyed to the appellee the land in controversy. This amendment was filed without any objection and only a few minutes before the judg-

ment of eviction was entered. The conveyance by the assignee shows that it was made subject to any claim of homestead the appellant might assert. It was an original and independent cause of action and upon the amendment process should have issued. The appellee had shown no right of recovery and was attempting not to perfect a defective title, but to acquire a title after the institution of his action so that he might recover. The appellant was not required to take notice of the amendment. The titles the appellee exhibited by his amendments were all hostile to his original claim, and that claim was without title. The entire record prevents an anomaly in pleading. The appellee institutes his action without title and ends by purchasing the title of the vendors of those who were on the land, and finally alleges that he has acquired the title of those in possession. The record claims of title are inconsistent as also are the pleadings and after a careful examination of the record we see no ground for a recovery unless the appellant upon the return of the cause should make no objection to the filing of the last amended petition which is in fact an original petition. If he sees proper to join issue with the appellee on that pleading the case can progress; if objection is made the case should be dismissed without prejudice and the appellee left to institute his action on the conveyance from the assignee in bankruptcy.

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

C. H. Lee, for appellant.

Stevenson, O'Hara & Bryan, for appellee.

I. N. BECK *v.* ED. BROWN.

[Abstract Kentucky Law Reporter, Vol. 4—437, as Beck v. Brown et al.]

New Trial for Newly Discovered Evidence.

The proceedings and report by the processioners being subsequent to the trial between the parties and judgment of the circuit court fixing the boundary of the land, does not constitute newly discovered evidence and even if the report had been made prior to the trial it would not be competent evidence for the want of notice required by law.

APPEAL FROM OWEN CIRCUIT COURT.

November 20, 1882.

OPINION BY JUDGE LEWIS:

There are several reasons, each of itself sufficient, why a new trial in this case was properly refused, and the petition asking it was properly dismissed.

The proceedings and report of the processioners being subsequent to the trial between the parties and the judgment of the circuit court fixing the boundary of the land, did not constitute "newly discovered evidence" in the meaning of the Civ. Code (1876), § 344. Even if the report of the processioners had been made previous to the trial, it would not have been competent evidence, because of the want of notice that is required by law to be given. The proceedings were merely ex parte, affording not even prima facie evidence of the boundary of the land. The evidence was in its character only cumulative of what had been offered at the trial upon the question of boundary, and consequently not such as authorizes a new trial.

The judgment must be *affirmed*.

T. D. Theobald, for appellant.

Strother & Orr, for appellee.

RICHARD D. WALKER ET AL. *v.* JAMES WALKER, SR.

[Abstract Kentucky Law Reporter, Vol. 4—440.]

Title by Adverse Possession.

Where one enters into possession of real estate in 1836, and has held the possession since that time, claiming it as his own, the verdict should have been for him as his title is good.

Recovery in Action for Trespass.

There can be no recovery in ejectment in an action for trespass.

APPEAL FROM GREENUP CIRCUIT COURT.

November 21, 1882.

OPINION BY JUDGE PRYOR:

The principal controversy in this case is as to the possession of the land. The appellee claims to have had the actual possession of

the land since 1830, and the appellant since the year 1837. Each party claims that the tenants in possession entered under them and there is proof sustaining both, not only as to the actual possession but as to the manner in which the tenants entered. They both claim to have acquired title by a possession hostile to all other claims and we have seldom seen a case where the testimony was more conflicting. The appellants claim to have purchased the land at a sheriff's sale made in 1836, and to have entered into possession at that time. Their counsel asked the court to say to the jury that if the appellants entered under this purchase in the year 1836, or those under whom they claim and have held and claimed the land as their own from that time then the law is for the defendants. This instruction was modified by the court and was made to read "if possession was taken with the knowledge and consent of the plaintiff and held and claimed since that time by the appellants the law is for them." This modification was error. If they entered in 1836, with or without the knowledge and consent of the appellee and have held the possession since that time, claiming it as their own, the verdict should have been for the defendant. The adverse entry, if made, necessarily implies a holding against the claim of the plaintiff, and upon such a possession the title is alleged to have been acquired by the defendant and the consent of the appellee to the entry can not affect the question at issue. It is true if the appellants stood by and consented to the purchase and entry on the land they would be estopped to deny the right of the defendants to hold as against them, but if the entry was in fact made with a continuous possession and claim by the defendants since their purchase, or that of those under whom they claim, their possession has ripened into a title that will prevent a recovery by the appellee. The appellee claims that he has had the possession and not the appellants, and that he entered long before the appellants and those under whom they hold, and has had a continuous possession and was in possession when appellants entered and this is really the only question in the case.

While a judgment for the plaintiff in an action for breaking the close where the defendant relies on a title superior to that of the plaintiffs will settle the question of title like a recovery in ejectment, it was improper in this case (an action for trespass) to have rendered a judgment in favor of appellee for the land. The appellee claimed to have been in the possession when the entry was made

and being in possession brought his action of trespass. He was not evicted and the verdict, if no damages were intended to be given, should have been "we of the jury find for the plaintiff."

For the reasons indicated the judgment below is *reversed* and cause remanded for further proceedings.

Roe & Roe, for appellants.

B. F. Bennett, E. F. Dulin, for appellee.

JOHN P. JOYCE *v.* THOMAS WOODS.

[Abstract Kentucky Law Reporter, Vol. 4—440.]

Power of City Council to Abate a Nuisance.

A city council has no power to declare the existence of a nuisance without a hearing being first given the owner of property affected by its action.

APPEAL FROM KENTON CHANCERY COURT.

November 23, 1882.

OPINION BY JUDGE PRYOR:

We do not well see that appellee had any standing in court after the decision of the case upon a former appeal. The nuisance may have been properly abated, that is, the reasons for the action of the council may have been sufficient to justify their action, but still the appellant was entitled to be heard, and if even decided adverse to him the right on his part to make the improvement, or remove the nuisance existed, and as no opportunity was afforded him to do this, this court in the former opinion adjudged the proceeding erroneous. It was not a case where the removal, or abatement of the nuisance required immediate action, and this court held that the council had no power to declare the existence of the nuisance without a hearing being first given the owner of the property. He clearly had the right to show that the council was in the wrong or to convince that body that no nuisance existed and for the failure to do this the judgment was reversed. By the amended pleading the appellant may have denied the nuisance or its existence, but still it decided against him, and he has been deprived of the right, by reason of the precipitate action of the council, of removing the

nuisance or complying with the order of the council. A burden can not be imposed on a citizen by way of damages, or in the nature of compensation for an alleged wrong done or committed without giving him an opportunity to make defense. In this case a nuisance is declared to exist and the appellant, upon that declaration, is required to make the improvement or to pay some one for making it. Such is not the law, and it is too late after he has been deprived of certain rights given him by the charter vesting the council with the power attempted to be exercised to offer him an opportunity to make defense.

Judgment *reversed* and cause remanded.

T. F. Hallam, for appellant.

R. D. Handy, for appellee.

[See *Joyce v. Woods,* 78 Ky. 386.]

SAMUEL THOMPSON ET AL. *v.* JOHN THOMPSON ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—441.]

Power of Executor Over Land Demised.

Where a testator devises certain land to his wife for life and directs his executor to sell other estate than that devised to the wife for life and also certain personal property and to hold the proceeds for certain of his devisees until they are twenty-one years old, the executor has no control of the land devised to the widow, either during or after the termination of the life estate.

APPEAL FROM BRACKEN CHANCERY COURT.

November 23, 1882.

OPINION BY JUDGE PRYOR:

We have been unable to find any clause in the will of the testator by which he disposed of the land devised to his wife for life. That her interest in the land is confined to a life estate all must concede and when this provision is made for her, the testator then proceeds to direct his executor to sell other estate than that devised to the wife for life, and also certain personal estate, and to hold the proceeds for certain of his devisees until they arrive at age. The executor has no control of the land devised to his wife, under the will, either during or after the termination of the life estate,

but that part of the realty and personalty over which he has the control with the power to distribute it clearly defined, and not only so, the manner of distribution, when to be made, and to whom, is equally certain. After vesting the executor with the power to sell certain lands and directing him to distribute, the testator says: "I wish my executor to loan the part of my estate belonging to James Dowdney and Magnolia Houston until they become of age; also the part belonging to James and Elmira Coomer is to be loaned until they become of age." As to the appellees, Gustavus and Mary Jane Strong (now Pierson) "I wish if they do not return to Kentucky by the time Nancy and Thornton become of age that their portion of my estate be given to Thornton and Nancy Strong." The estate alluded to was evidently that part of the estate the executor was authorized to distribute. The mind of the testator was on the funds that would be with the executor and he had in this same clause directed the manner of distribution and directed that the executor should "loan the part of my estate devised to my grandchildren until they arrive of age." The word "estate" there used could not have embraced the real estate devised to the wife for life as the executor was not authorized to sell it or to control it in any way, and could neither rent the land nor sell it so as to distribute the proceeds. The appellees were living in California and the testator, after providing for his grandchildren and directing his executor what to do with their portion of the estate, then provides if the two devisees named Gustavus and Mary Jane do not return to Kentucky by a certain time their portion of the estate to go to Nancy and Thornton Strong, that is, the portion of the estate that the executor had in his hands and was required to distribute, for the testator had made no devise of that part of the estate devised to his wife for life. If the words "my estate" had reference when applied to the grandchildren to the estate in the hands of the executor, it must have the same meaning when applied to the devise made to the appellees Gustavus and Mary Jane Strong. It is all in the same clause of the will with reference to the mode of distribution to be made by the executor and it is not pretended that the words "my estate" used in the devise to certain grandchildren embraces the real estate given the widow for life. In our opinion the re-

mainder interest in the land devised to the wife must pass an undivided estate and the judgment below is, therefore, *affirmed*.

B. G. Willis, for appellants.

H. P. Willis, for appellees.

HENRY E. SHAWHAN *v.* ELIZABETH SMITH.

[Abstract Kentucky Law Reporter, Vol. 4—440.]

Infancy Pleaded to Avoid Dower Relinquishment.

Where infancy is set up to avoid the effect of a deed relinquishing dower more than twenty years after the execution of the deed and after the old family bible in which her age was recorded is lost or destroyed and only an alleged copy is in existence showing such birth, the entry of which was made by one who married into the family, and the evidence of infancy is generally unsatisfactory, and the father of such child testifies positively that she was over twenty-one years of age when the deed was executed, should create in the chancellor's mind much doubt as to such infancy and such petition should be dismissed.

APPEAL FROM BOURBON CIRCUIT COURT.

November 23, 1882.

OPINION BY JUDGE PRYOR:

This action was instituted in September, 1879, by the appellee, Elizabeth Smith, by which she seeks to recover dower in certain lands now owned by the appellant, Shawhan, and purchased by him from the vendee of appellee's husband. The defense interposed to the action is that the appellee united with her husband in a conveyance of this land to the appellant's vendor in the month of September, 1855, twenty-three years before this suit was brought. The husband of the appellee died, however, but a short time before the claim to dower was asserted, and the statutory bar, therefore, can not affect the right of recovery. When the conveyance entered into by the appellee was produced with the defense filed, the appellee in order to avoid its effect pleaded that at the time of its execution she was an infant, and upon this reply an issue was formed and the only question in the case is, Was the appellee an infant when the deed was executed? The family Bible containing a register of the births, etc., of the family seems to have been lost, and the testimony of appellee and other members of the family is based upon what

purports to be a copy of that register transferred to Bibles in their possession. The appellee says that entries were made by her husband, he having the old Bible before him at the time. A copy was sent to the sister of the appellee, in the city of New York, whose recollection is based upon this copy and who also testifies as to the family history, giving the ages of its various members; others who are related speak of the age of their own children and have a knowledge of the age of the appellee in that way, as well as their own recollection of the date of appellee's birth. The testimony as to her being an infant at the time would be entirely satisfactory but for the statement of the father of the appellee and other facts and circumstances that throw much doubt upon the question. In the first place it is a little remarkable that the family Bible containing a correct register of the births, etc., of the members of this family has been lost, and its contents supplied by entries made in other Bibles and by those who were not members of the family except by reason of their marital relations. The father of the appellee testifies that his daughter was of age at the time she executed the conveyance and that he so informed her both before and after the institution of the action. A Bible was shown him by his daughter, Mrs. Clay, in which had been transcribed the births of the family. The entries were made in an unknown handwriting and were all wrong and to use his own expression "there was not a birth recorded right. It makes the two oldest a year younger than they really are and so on with the rest of the family." He states that his first child was born in December, 1829, and then proceeds to give the births of his several children born after that time. He may be mistaken as to the age of his daughter and is doubtless unable to give a correct history of the dates of several births of his children, but his recollection is so positive as to his daughter being of full age at the time of the execution of this deed as to indicate that he had no doubt in his own mind on the subject. He seems to entertain no prejudice or bad feeling towards his daughter, and his failure to give the age of some of his children, and the date of his subsequent marriage, while it may evidence a want of memory certainly evinces a candor in the statements that entitle his testimony to great weight in this case. Besides, it is evident from his testimony and that of at least one of his neighbors that entries had been made of dates evidencing the time of the birth of some of the children that were incorrect and made them at least one year younger

than they really were. It is apparent from the conveyance exhibited by the appellant that the appellee signed and delivered the conveyance in conjunction with her husband, and from the uncontradicted statement of the appellee's father one of the notes for the purchase-money was made payable to his daughter. Why this was done is not made to appear, nor is it material further than to show that the appellee, although then married, received a part of the consideration. Under such circumstances it is not to be presumed that the husband and wife, or either of them, would execute a conveyance and obtain appellant's money or that of his vendor, when they must have known that the wife by reason of her infancy was unable to convey, but on the contrary it is a legitimate inference from their action in the premises that at the date of the conveyance they both must have believed that the wife was able to convey. It is true no fraud on the part of the appellee is alleged or proved, but the fact of her executing the deed is very persuasive of her belief in her capacity to convey. This is unlike a case where the feme has never relinquished her dower in the land of her deceased husband. Here she admits the relinquishment in accordance with the forms and ceremonies of the law and attempts to avoid her act on the ground of her infancy at the time. The conveyance was made twenty-two years prior to the institution of the action. The family Bible in which was written, in the handwriting of her father, the date of her birth is lost or destroyed, and only copies or entries of the births of various members of the family, found in other Bibles and in the handwriting of those not members of the family except by marriage, are produced for the purpose of annulling the deed so far as it purports to pass the dower of the appellee. That these records are sustained by the statements of neighbors and relatives to some extent must be conceded, but it is manifest that changes had been made as to dates of birth by some of the members of the family, and when the father who still survives is so confident of her being of full age at the date of the deed, and the fact that she did execute it, must create in the mind of the chancellor much doubt as to the fact of the appellee's infancy when she signed and acknowledged the deed. The chancellor, when a conveyance has been fully executed, should be well satisfied, after the lapse of so many years, of the right of the feme to recover before entering a judgment depriving the appellant of the use and possession of the land, and with the only surviving parent maintaining before and after this suit

was instituted that his daughter was of full age, strengthened by the circumstance that she did in fact convey, the relief should have been denied and the appellee's petition dismissed. The issue in this case is not a legal issue. A court of equity alone had jurisdiction of the question involved and, therefore, the case is not to be treated as an issue of fact disposed of in a common-law action.

Judgment *reversed* and cause remanded with directions to dismiss the petition.

C. W. West, for appellant.

Chas. Offutt, for appellee.

WM. L. MURPHY *v.* JOHN L. BOYD.

[Abstract Kentucky Law Reporter, Vol. 4—441.]

Decisions Under Which Property Rights Are Acquired.

Opinions should seldom be overruled when to so so would disturb vital rights and interests acquired upon the faith of them.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 23, 1882.

OPINION BY JUDGE LEWIS:

In the case of *Dickey v. Thompson,* 8 B. Mon. (Ky.) 312, which was referred to in the former opinion rendered in this case and which we consider decisive of the questions involved, is to be still adhered to by this court, and the judgment of the court below must necessarily be affirmed. The court in that case, after a reconsideration of the principles involved, and a re-examination of the authorities, announced that the question should be no longer considered an open one in this court. And, therefore, even if we did not concur in the conclusion then reached, we should be disinclined to reopen the question so long ago as the year 1848, and so decisively and clearly settled, especially when to overrule the opinion in that case would disturb vital rights and interests acquired upon the faith of it, and revoke what now has become a rule of property. But since the rehearing in this case was granted, we have again examined the authorities and considered the principles involved, and in the opinion rendered in the case of *Exchange and Deposit*

Bank v. Stone, 80 Ky. 109, 3 Ky. L. 594, the case of *Dickey v. Thompson,* supra, is referred to and the doctrine therein announced affirmed and adhered to.

The opinion heretofore rendered in this case must, therefore, be adhered to and the judgment of the court below *affirmed.*

R. J. Elliott, Wm. Lindsay, for appellant.

A. P. Humphrey, St. John Boyle, for appellee.

JAMES SMITH *v.* GEO. W. MARTIN.

[Abstract Kentucky Law Reporter, Vol. 4—442.]

Easements.

One can not recover in ejectment against one having an easement even though he may own the property over which an easement exists.

Easement, How Created.

Where one is permitted in building his building to make the wall of another a part of his wall by building up to it and inserting his timbers on it for support, and the wall stands for many years, he secures and has an easement in such wall.

APPEAL FROM MASON CIRCUIT COURT.

November 25, 1882.

OPINION BY JUDGE PRYOR:

There was no objection made in the court below to the manner of the proceeding by the appellee to establish his boundary line. It is manifest that a recovery in ejectment could not have been had as the right of the appellant to the servitude or easement is clearly established; besides, no motion was made to transfer the case to the ordinary docket. The claim of title existed in both with the right of recovery in neither of the parties, and as the appellee was in the possession, or claimed to be, his action is in the nature of a bill quia timet. The controversy is as to the dividing line between the two houses. The ground upon which the two houses were built belonged to one person and the houses were built by him. He died and these litigants have derived title through his descendants or their vendees. The house of the appellee was first erected, and

it seems to us there is no reason to doubt from the proof that the wall in controversy was a part of appellee's building before the building of the appellant was in existence. The wall of the appellee's building was then made the wall of appellant's by building up to it and inserting the timbers on it for its support. In tearing down the wall, or a part of it, between appellee and appellant the carpenter says that it was appellee's wall or the wall of his house, because it was toed in the appellee's front wall and was disconnected from appellant's wall. It is attempted to be shown by the appellant that when his house was originally built it was made higher than appellee's building and this fact, if established, does not interfere with the question of boundary. While the house of the appellant was made a story higher when the building owned by the appellee was in the possession of his vendor, this did not change the location of the original division line, or affect the title to the wall originally constructed. In remodeling appellant's house and moving it up higher the wall was made to rest upon the wall of appellee and part of it on the chimney of appellee's building. The chimney was taken down for that purpose, but this did not vest appellant with the fee, but it did give him such a right as would preclude the appellee from interfering with his wall. We see but little, if anything, in this controversy affecting the rights of either party. The appellant has the right to the use of the division wall for the support of his own building and while the wall of appellant that is built above appellee's building extends over and covers a part of appellee's ground, it clearly appears it was built there by consent of the then-owner of appellee's building and when appellee purchased, he could see what constituted his building and the wall of appellant's building, and while the fee to the ground is in appellee the right to the wall above appellee's building and its use is with the appellant, as the vendee of the appellee consented to its erection. By this we do not mean to say that appellee in building his house another story would be denied the right to use the wall of appellant on which to fasten his timbers, but to adjudge that appellant is entitled to the wall for the support of his house. Besides, the proof shows that the fence or dividing line back of the two buildings is on the line, or nearly so, as established by this judgment. It had been there for years, and the posts so old as to require resetting and such a fact is very persuasive of the correctness of the ruling below. The eastern fence of the stone wall built by appellee is precisely on a line with the joint or crack

in the wall dividing the two houses. One witness says it is as near a parallel line as is possible to put it. The weight of the testimony and the circumstances relied on support the judgment below and the appellant in painting and exercising ownership over that part of the wall dividing his building from the appellee, while appellee was in the possession, was guilty of a trespass, and the continued claim as to the real boundary and the peculiar construction of the two buildings gave to the chancellor the jurisdiction to determine the true boundary line between them.

Judgment *affirmed.*

Barbour & Cochran, for appellant.

Stanton & Larue, for appellee.

GEORGE STOVALL *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—441.]

Criminal Law—Manslaughter.

An instruction is correct which informs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant in sudden heat and passion or in sudden affray and upon considerable provocation from the deceased, such as a blow or other actual trespass, and not in self-defense shot and killed the deceased, they must find him guilty of manslaughter.

Newly Discovered Evidence as Ground for New Trial.

Newly discovered evidence is not a sufficient ground for a new trial, when such evidence would throw but little, if any, light upon the case favorable to the defendant.

APPEAL FROM BALLARD CIRCUIT COURT.

November 25, 1882.

OPINION BY JUDGE HARGIS:

This appeal is prosecuted by the appellant from a judgment on a verdict of guilty of manslaughter, sentencing him to the penitentiary for the term of seventeen years.

He wrote an insulting and threatening letter to Miss Sallie Edginton, a girl about nineteen years old. She showed it to her father and a day or two after this her father saw appellant on the street, hailed him, saying he wanted to see him. The appellant stopped

and when her father got near enough he said, "I will show you how to run over or slander my family" and slapped him, it may be twice, quite hard, when appellant drew a derringer 41 caliber and shot him through the abdomen, from which he died. As soon as appellant fired he "jerked loose" and fled. The deceased was a large muscular man near sixty years old. The appellant was a medium-sized man and was not the equal of the deceased in strength.

The court instructed the jury properly as to murder, but it is contended that it erred in the second instruction which defined manslaughter, and also in the third instruction as to self-defense. In the second instruction the court told the jury, in substance, if they believed from the evidence beyond a reasonable doubt that the defendant "in sudden heat and passion or in sudden affray and upon considerable provocation from Lee H. Edginton, such as a blow or other actual trespass, and not in self-defense" shot and killed the deceased, they must find him guilty of manslaughter. This instruction is not subject to the interpretation placed upon it by the appellant's counsel, nor is it in conflict with the doctrine of legal provocation laid down in the case of *Williams v. Commonwealth,* 80 Ky. 313, 4 Ky. L. 3. In order to reduce his offense to manslaughter the instruction before us only required the appellant to show that he had been struck, or actually trespassed upon by Edginton, without regard to the degree of force with which the blow was struck or the trespass done, if either amounted to considerable provocation. The jury were left to judge whether the appellant shot in sudden heat and passion or in sudren affray upon considerable provocation, and we think rightly so because the degree of the provocation, which ought to have been considerable, is a fact which the jury should be permitted to find from all the evidence in the case. The clause "not in self-defense" was clearly in the appellant's favor. It, in effect, said to the jury, if the blow or trespass put the appellant in danger of loss of life or great bodily harm he could not be convicted of manslaughter, as in that state of case the court by the third instruction told them the appellant had the right to shoot the deceased. Besides this, there could have been no misapplication of the reasonable doubt in the case, as the court plainly instructed the jury that if they had such doubt of his guilt they should acquit, and that they could not find either degree of the offense charged in the presence of a reasonable doubt, and if they found

him guilty and had a reasonable doubt of the degree he was entitled to it.

The alleged newly discovered evidence was not sufficient under the circumstances to authorize a new trial. It would throw but little, if any, light upon the case favorable to the appellant, who, in the face of merited but not legal chastisement with the open hand by the father of the girl whom he had attempted to blackmail into submission to his lust, drew from concealment the ready and deadly pistol and shot him down. The appellant received a slight punishment in a fair and legal trial and the judgment is, therefore, *affirmed.*

Nichols & Hawes, A. J. Warden, Jr., Bugg & Wills, for appellant.
P. W. Hardin, Wm. Cromwell, for appellee.

LOUISVILLE GERMAN BUILDING & LOAN ASSN. *v.* JOHN H. WISSING.
SAME *v.* JOSEPH DUES.

[Abstract Kentucky Law Reporter, Vol. 4—443.]

Force of By-Laws of Building & Loan Association.

When a building and loan association has by by-law provided for the withdrawal of its members and fixed the portion or share to which a withdrawing member should be entitled upon his withdrawal, the repeal of such by-law in so far as it provided the basis of such settlements was inoperative and void so far as it released the association from its obligation to take back or purchase the stock of withdrawing members, becoming members after the adoption of said by-law.

Rights of Withdrawing Members of a Building and Loan Association.

Where the right to withdraw at any time upon terms that are reasonable and just is secured to members of a building and loan association by the organic law of the association, and such terms have been once prescribed and fixed, upon the faith of which, it may be, persons became members, the association can not subsequently take away the rights of such members to withdraw and take the settlement provided.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 28, 1882.

OPINION BY JUDGE LEWIS:

As the questions involved in these two cases are the same they will, in accordance with the agreement of counsel, be heard together, and this opinion shall apply to both.

By the terms of the articles of incorporation appellant, The German Building & Loan Association, organized February, 1872, was required to make provision for the withdrawal of its members and to fix the portion or share to which each should be entitled upon his withdrawal. By-laws for the government of the association were in pursuance of the articles of incorporation and immediately after the organization adopted. Amongst other provisions thereof are the following:

1. Shareholders may retire from the association in the first year of its existence provided they have received no loan and have given due notice to the board of administrators. Such notice must be in writing. The retiring member shall receive the amount of his payments after deducting his portion of losses and costs and payments due and unpaid for.

2. After the first year each retiring member is entitled to the full amount of his payments with six per cent. interest subject to the various deductions provided for above.

In 1874 an additional by-law was adopted providing for the payment by the association of one-eighth per cent. of the net earnings of each year to such shareholder who might offer his shares to the association. In February, 1879, the above quoted by-laws of 1872, as well as the one just referred to, adopted in 1874, were repealed, and in lieu thereof it was provided substantially that the association should in no case be bound to take back or purchase from its members any of their shares of stock at any price whatever, nor should it be bound when any of its stock should be offered it by any of its members to accept the same, or to pay therefor the sums actually paid in therefor with or without interest, or with or without any of the actual or supposed profits, but that in all cases it should be optionary with the board of directors to take back or purchase such stock as may be offered and at such prices and values as the said board may deem to be to the best interest of the association.

In 1873, about one year after the organization of the association and the adoption of the original by-laws, appellees became members and so continued until April, 1879, when they each gave or attempted to give the required notice of their determination to withdraw and demanded the return to them of the amounts of payments respec-

tively made by them to the association and interest thereon at six per cent., together with their respective pro rata shares of the profits or net earnings. The association by its officers having refused to pay to appellees the amounts, etc., demanded, or any part thereof, they each brought an action in the Louisville chancery court to recover the same. And on final hearing the chancellor rendered judgment in favor of the plaintiff in each case for the amount paid on his subscription of stock, being monthly payments from the organization of the association together with interest at the rate of six per cent. per annum from the date of each payment, but refused to render judgment for any part of the net earnings of the association. From the judgment in each case an appeal and cross-appeal are prosecuted. As the association was bound by the articles of incorporation to provide for the withdrawal of its members and to fix the portion or share to which each should be entitled upon his withdrawal and in pursuance thereof such provision was made in the by-laws first adopted. We are of opinion that the repeal or attempt in February, 1879, to repeal that provision was inoperative and void so far as it released the association from its obligation to take back or purchase at any price whatever the stock of withdrawing members. The rights to withdraw at any time upon terms that are reasonable and just are secured by the organic law to each member, and such terms once having been prescribed and fixed, upon the faith of which it may be appellees became members, could not subsequently be displaced by other terms so arbitrary and unjust as to practically take away the right of withdrawal. By the terms of the by-laws first adopted, the withdrawing member is entitled to the amounts of his payments with six per cent. interest thereon, subject to a deduction of his portion of the legal costs and payments due and unpaid by him. It does not appear that the return to appellees of the amounts actually paid by them upon their subscription of stock and the legal rate of interest thereon is unreasonable or unjust. It is not shown that the association is insolvent nor is there any proceeding to wind up its affairs and distribute its assets among all the members. On the contrary, the association is still in existence and in a solvent and apparently prosperous condition. Under such circumstances, appellees are clearly entitled to a repayment of the full amount paid by them and interest from the date of each payment at the legal rate. We think the notices attempted to be given by the appellees are, under the circumstances,

sufficient. In addition to the principal sums paid by the appellees and interest thereon, they seek to recover also their pro rata share of alleged net savings and profits. The resolution providing for the payment of one-eighth per cent. of the net earnings was adopted in 1874, two years after the organization of the association, and after appellees became members. And in February, 1879, before they gave notice of their intention to withdraw, or in the language of the resolution "offered their shares of stock to the society," the resolution was repealed. As the record stands it does not satisfactorily appear that there were any net earnings or profits at the time appellees brought their actions. It is true they filed with their petitions copies of annual reports made to the association by its proper officers, which upon the face show profits. But it is manifest that, as the greater part of the property of the association consists of choses-in-action, its financial condition must depend upon the actual value of its notes and bonds and what can be realized therefrom. It seems that the principal source of profits is premiums given or bid upon loans in the business, and it should be made to appear how much of said premiums have been, and can be collected. But appellees made no effort to show further than the copies of reports exhibited, whether in fact the association has made any profits, much less the precise amount thereof. Besides, the resolution referred to was not necessarily or imperatively required by the articles of incorporation, and the repeal of it, for anything to the contrary shown by the record may have been demanded by the best interests of the society, of which appellees were at the time members. We do not think the chancellor was authorized to disregard and annul the action of the association in respect thereto, especially as great injustice might thereby be done the remaining members. We do not, therefore, think that the chancellor erred in refusing to give judgment for the net earnings or profits sought by appellees.

Wherefore the judgment in each case is *affirmed* on the appeal and cross-appeal.

P. A. Gaertner, for appellant.

J. L. Clemens, for appellees.

JOHN T. MOORE, TRUSTEE, *v.* ALBERT BURGE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—442.]

Construction of Will.

Where a testator disposing of a large estate gives his widow a life estate in certain property, and bequeaths the remainder of the estate to six children, share and share alike, but provides that the share coming to a son shall be held by a trustee for him and directs that a part of the income of this share shall be paid to the son's wife, and the testator's wife dies before he does and he executes a codicil in which he bequeaths the share first given to his wife to his children, and notwithstanding he had already provided for the disposition by a residuary clause of the property devised to his wife, after her death, he proceeds to divide stocks and bonds among such children and directs that the trustee shall hold his son's share for him as other property devised to him, but provides that his home residence shall be sold by his executors and directs that the proceeds of such sale and the personalty in said residence be divided among his six children "share and share alike in perfect equality," such codicil has the effect to pass the one-sixth part of such proceeds of sale directly to such son and the same is not to be handled by his trustee.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 28, 1882.

OPINION BY JUDGE PRYOR:

That the testator in the preparation and execution of his will has expressed, time and again, a want of confidence in the business capacity of his son is made manifest in nearly every clause of the instrument, where the son is made the object of his bounty. But this fact is not sufficient to defeat the purpose of the testator in giving to this son out of the large devise made to him, a small portion of the estate over which he is to have complete control. The great pains taken by the testator in creating the trust and in determining what was to be held in trust, and his repeated declarations made with reference to it affords a strong argument in favor of the fact that in omitting to clothe the proceeds of the homestead with any trust it was his intention that it should pass to the son free from the control of a trustee. The testator realized the importance of vesting in a trustee the bulk of the estate intended for his son and for the support of the son's wife and children. That portion of the estate that he proposed to give his children and place beyond the power of disposition consisted of various business houses

on Main street. The rental of this property, when divided, was made the source from which the testator evidently expected his son and family were to derive their support. It was the most valuable estate devised and was in fact the bulk of the property devised to his son. He is careful to secure the annual income from this estate for the support of his son's family so as to require the trustee to pay one-half of that income to the wife of the son, and was not willing to confide more to the latter than was necessary for his own support. The rental from these business houses, as well as the property itself, he seems to have set apart to his children and has so secured it as to afford them a permanent support in the midst of any misfortune that might befall them. It is true that in the sixth clause of the will, he not only vests the title to the stores devised for the benefit of his son in a trustee but also the undivided one-sixth share of the residuum of his estate, and requires the trustee to pay one-half of the rents or income from the entire share of the son to the son's wife. By the seventh clause of the will the testator again declares that the one-sixth share of the residuum falling to his son shall vest in the trustee with the same conditions and limitations as mentioned in the sixth clause. In this seventh clause he includes as a part of the residuum the remainder interest of certain property devised to his wife for life, and then says that the residuum shall be divided between the children in perfect equality, the son's portion to be held in trust as already stated. A part of the estate devised to the wife of the testator for life, and that constituting a part of the residuum devised, was the family residence, and that part of the estate is the subject of this litigation. After the execution of the will by virtue of which this trust was created, so far as the son was concerned, the wife of the testator died and up to this time as the will then stood there was no question but that the entire devise to the son was in trust, and the only question presented is, Was the character of the estate changed by the codicil thereafter attached? A considerable estate was devised by the testator to his wife for life, including the family residence, and all his stocks of every kind, and as she died before the testator it became necessary, or at least he exercised the right of making a disposition of this estate. He proceeds to give to each one of his daughters, by the codicil, a large number of shares of gas stock in their own right and without any limitation, and then gives to his son Albert not quite half as many shares of the stock as he had given

his daughters, but gives him in addition the house and lot on Eleventh street in which Albert then resided, all of which is given to the same trustee in trust and upon the same conditions and limitations expressed in his will for the use, benefit, and support of his son Albert, his wife and child. The mind of the testator was evidently again called, after the death of his wife, when considering the object of his bounty, to the necessity of vesting the property devised to the son in trust for the use of the son and his family, and he required the stocks and the house and lot to be held in trust for the use of the son in the same manner as provided by the original will. He had not as yet disposed of his family residence, although it went with the residuum of his estate, under the devise made in the original will, still the testator was not willing to abide by the provisions of that instrument and evidently desired to make some change. In the first place, he wanted the residence sold after the expiration of two years from his death, and he, therefore, provided that his executors in their discretion should after two years from his death sell his residence, etc., or whenever they deemed it to the interest of his estate. Having authorized a sale of the homestead, the testator then saw proper to dispose of the proceeds when sold. It was not necessary to do this if he proposed to make no change in the mode of distribution. He had already provided in his will how the residuum of his estate should go, and the manner in which each child's interest should be held. He had declared that his residence and the stocks constituted a part of this residuum and there was no necessity of making any change unless he desired to change the manner of the holding, or to designate how each devisee should take and hold that portion of his estate devised to his wife for life. He then provided that as to the stocks devised to his son, they should be held in trust, but when empowering his executors to sell his residence, and in making a disposition of the proceeds he says: "They (the executors) shall have the right and power to sell the said realty and sell or divide among my children the personalty thereon, and the proceeds to be divided among my six children share and share alike in perfect equality. But the moneys and cash coming to my three infant daughters' share be invested at once by their guardians, etc., in secure and valid bonds, United States bonds being preferred." He then appoints his two sons-in-law his executors. If the testator had intended the trust to continue in regard to the family residence, and the personalty connected with it, so far

as the son was concerned, he would have simply conferred on the executors the power to sell and nothing more, but here "the personalty thereon and the proceeds are to be divided among my six children share and share alike in perfect equality." This discretion is given to the executors. They are not required to pay the proceeds of the homestead to the trustee, but they are required to hand over to him the stocks and that is significant of the testator's purpose. It will be found in every provision of the will but this one, he makes the wife and children of his son equal participants in his bounty with the son, but as to this devise they are entirely omitted, and that, too, when the testator had in the same codicil or the one preceding made them participants in the benefits resulting from the stocks that are placed in trust. If no change was intended to be made as to the manner of holding, the power to sell would alone have been conferred, but in the codicil the testator seems to have disposed of the property devised to his wife for life as if no previous will had been made, and when believing that he had secured to his son and his family a competent support he felt doubtless when disposing of the homestead and the personalty attached to it, that it was his duty to make an equal distribution of the proceeds among all of his children without any restriction as to their power to control it. Besides, when making this devise, immediately following it he directs the proceeds given to his children who were under age to be invested in good bonds. He was providing that their interests should be protected and could not well have overlooked, if such was his intention, the fact that it was necessary to secure the son's part of the proceeds of the residence to his wife and children, or to the support of the son through the intervention of a trustee. It is said, however, that the reason he did not make such a provision was because he had already said in the original will that the one-sixth interest, etc., devised to his son should be held in trust. If so, why did the testator in his codicil see proper to place the stocks in trust and to dispose of the estate devised to his wife for life as if no will had been made, and why did he undertake not only to confer on the executors the power to sell but to go farther and designate the mode of distribution and the parties entitled, if this had already been done?

It seems to us the legitimate interpretation of this will is as given by the court below and that Albert is entitled to the absolute estate

in the proceeds of the homestead. The judgment is, therefore, *affirmed.*

Muir & Hayman, for appellant.

Geo. Weissinger, for appellees.

FRANK B. YOUTSEY *v.* H. A. JONES ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—443.]

Sale Set Aside When Made Contrary to Agreement of Parties for Inadequate Price.

When attorneys for plaintiff and defendant agree that a sale to be made by the sheriff shall not be made before August 15, but plaintiffs caused the sheriff to make sale on July 9, without any notice to the defendant, who does not attend the sale, and buys the property at an inadquate price, such sale will be set aside and the bid be rejected.

APPEAL FROM CAMPBELL CHANCERY COURT.

November 28, 1882.

OPINION BY JUDGE PRYOR:

The attorneys for the plaintiff and defendants agreed that the sale should not be made until about the 15th of August, yet, notwithstanding this agreement and its communication to the defendants, the plaintiffs caused the sheriff to make the sale on the 9th of July, or failed to inform him not to make it at that time. This misled the defendants and their counsel, none of whom attended or knew of the sale at which the appellant bought the property of defendants for $2,000, which was appraised at $3,000 and proved by several witnesses to be worth some five or six thousand dollars, having been listed for taxes at $5,500 the year it was sold.

The court under this state of case properly rejected the appellant's bid and set aside the sale.

Wherefore the judgment is *affirmed.*

Frank C. Wright, for appellant.

KENTUCKY ELECTRIC INSTITUTE *v.* MARGARET A. GAINES.

[Kentucky Law Reporter, Vol. 4—398.]

Sufficiency of Petition on Notes.

To be sufficient a petition on notes must allege a promise on the part of defendants to pay, and where it is attempted to enforce a lien on property facts must be alleged showing such lien. An allegation that plaintiff has a lien on property is but the conclusion of the pleader.

Creation of Lien.

In order to retain a lien on real estate sold there must either be an express written contract between the vendor and vendee or the amount of the unpaid purchase-money stated in the deed, and such fact must be alleged in the petition which seeks to enforce the lien.

APPEAL FROM FRANKLIN CIRCUIT COURT.

November 28, 1882.

OPINION BY JUDGE HARGIS:

The petition fails to allege any promise or agreement by the "Kentucky High School" to pay either of the notes sued on, and it contains no averment of facts, showing that the plaintiff has a lien on the property alleged to have been sold. It merely alleges that the lien exists, which is but the conclusion of the pleader, and the facts authorizing such a conclusion ought to have been stated.

When the supposed deed, which is not even filed with the petition, was made, the Revised Statutes were in force, and in order to retain a lien according to those statutes, there must have been an express written contract between the appellant and appellee, or the amount of the unpaid purchase-money stated in the deed. *Ledford et al. v. Smith,* 6 Bush (Ky.) 129. The petition failed to allege either an express contract to retain a lien, or that the amount of the unpaid purchase-money was stated in the deed, and it did not, therefore, contain any cause of action, either for the notes or for the enforcement of the lien. The petition describes the property as having been deeded to the appellee by Cornelia P. Turnbull, and conveyed by the appellee to the appellant, yet the judgment describes the property decreed to be sold as the property deeded by Mrs. Turnbull to W. A. Gaines, and purchased from him by the appellant. The judgment does not, necessarily, embrace the same

property attempted to be described in the petition. The judgment was not, therefore, authorized by the pleadings and had it been free from error in every other respect, the judgment authorizing execution against appellant for $75, allowed to the commissioner for services he had not done and might never do, was error. The evidence in support of appellant's exception to the commissioner's report of sale shows that there was a misunderstanding between the attorney for the appellant and the attorney for appellee, and, at least, that the appellee's attorney agreed for his client that he would bid her debt, interest and costs against any competing bidder.

The agreement is alleged to have kept appellant and its attorney from taking care to secure a sale for the full value of the property, which the appellee bought for much less than her debt and interest. And as such an agreement was calculated to be misunderstood if made, as appellee alleges, we are of opinion, when considered in connection with the defects of the petition, and the inconsistency between it and the judgment as to the description of the property, that the exception to the commissioner's report should have been sustained and the sale set aside. When the suit was brought no record of the change of the name of the institution, as required by the act authorizing the change, had been made in the county court clerk's office, and for this reason the suit was properly brought against "The Kentucky High School."

Wherefore, the judgment is *reversed,* the sale set aside and cause remanded with directions to allow the appellee to amend her pleadings, and for further proper proceedings.

W. P. D. Bush, for appellant.

Ira Julian, for appellee.

WALTER J. ROBINSON ET AL. *v.* WM. S. ROBINSON.

[Abstract Kentucky Law Reporter, Vol. 4—531.]

Conveyance Held as a Mortgage.

Where a father to relieve his son from financial embarrassment took a conveyance from the son of his real estate and paid off the son's debts, amounting to $1,700, obligating himself to reconvey to the son upon payment of the debt, and the father by will provided that the son should receive back his $1,700 note, the obligation of the father to reconvey is binding upon his executors and heirs.

APPEAL FROM UNION CIRCUIT COURT.

December 7, 1882.

OPINION BY JUDGE PRYOR:

By the terms of the contract between Jesse Robinson and his son dated on the 1st of March, 1866, it was expressly agreed that after the death of his father William was to take the title to the land previously conveyed by him to his father if, in the opinion of his executors, it was proper for him to do so. It was on this condition that William divested himself of title in the first place. He was somewhat involved in debt and his father relieved him from his pecuniary embarrassment by paying about $1,700 for William and took from him a conveyance absolute on its face for his entire tract of land. It was only intended as a mortgage in the first place, as the contract of March, 1886, plainly shows. Jesse Robinson being dead, his executors have made to William a conveyance and reinvested him with title. It is said, however, that the will of his father devises this land to William's wife and children, or gives to them such an interest as precludes William from disposing of it. The fifth clause of the will of Jesse Robinson says that the title is to descend to William, his wife, and children, but that claim is inconsistent with the idea that the testator intended to make any other disposition of the land than he had agreed to do by the contract of March, 1866. The testator says that he had given up to William his note for $1,700 to make him equal with the other children and "he is to have the farm just as he holds my obligation for by the contract between him and myself." So the plain purpose of the testator was, as he has expressed himself in his will, to reinvest his son with the same title that he held at the time his son conveyed to him the land, and if not his intention, he had executed an obligation at the time of the conveyance by which he agreed that the land should be reconveyed to William. This obligation was binding upon the testator, and constituted the consideration or inducement for William to make the absolute conveyance. His father had no power without William's consent to cancel or disregard that contract, and if the will had expressly announced that it was cancelled, it could not affect William's rights under it. He could have enforced a compliance in equity against the heirs or devisees of the testator and particularly

when his executors were giving their consent. The writings speak for themselves and the parol testimony explaining the purpose or intention of the testator is all incompetent. The chancellor acted properly in sustaining the title of William to the land and the judgment is *affirmed.*

This view of the question dispenses with the necessity of alluding to that branch of the case between William Robinson and his children in regard to the deeds made to him by them.

Judgment *affirmed.*

Ken Chapeze, for appellants.

D. H. Hughes, W. P. D. Bush, for appellee.

THOS. L. JONES ET AL. *v.* NEWPORT & LICKING TPK. R. CO.

Power of Corporation to Prescribe the Terms of Disposition of New Stock.

The original stockholders in a turnpike corporation, having paid for their stock and being the owners of the property and franchises of the company, by their board of directors, have the power to prescribe the terms upon which others may become jointly interested and the price at which new stock issued may be purchased.

Legality of Stock Issued by Corporation.

Where the original stockholders in a turnpike company are the owners of all the stock issued and have paid for the same and completed their road, but at no time during many years thereafter have received any dividends or interest on their investment, they may by resolution authorize the issue of additional stock to themselves to the amount of the tolls collected during such years, and those thereafter becoming the owners of additional stock by new directors have not the power to cancel the additional stock issued to the original stockholders. The issue of such stock was valid.

APPEAL FROM CAMPBELL CHANCERY COURT.

December 7, 1882.

OPINION BY JUDGE LEWIS:

The parties to this appeal, as provided by Civ. Code (1876), § 637, stated the questions and facts upon which it depends, and presented the submission thereof to the court having jurisdiction. The appellants, who are called plaintiffs below, prayed that the

stock about which the controversy arises be declared good and binding upon the company and the defendants. Appellees, called defendants, prayed that said stock be declared invalid and not binding upon them, or either of them, and that it be annulled and cancelled.

The question presented by each party in the form of a prayer for judgment of the court is simply whether the stock mentioned is valid or invalid. From the agreed state of facts it appears that in the year 1852 the company, being organized, commenced to build their road and completed three miles thereof in 1856, and that stock was subscribed, paid and issued for that work to the amount of about $10,600.

September 14, 1867, the following resolutions were passed as shown by the records of the company: "Resolved that the present stockholders, having put in their money many years ago, and with it built the present road from which they have received no returns except what has been expended in repairing and perfecting said road, and no dividends having as yet been allowed said stockholders, that said present stockholders be allowed, and there is hereby assigned to them in lieu of dividends an additional amount of paid-up stock to the amount of the aggregate of the tolls received by the company, said stock to be apportioned, distributed and issued to the present stockholders according to the amount of stock now held by them respectively. Resolved that books be opened for subscription to the stock of the company to extend the road, to be taken as new stock, and that Charles Newnam be and he is hereby appointed a committee to superintend the same, also with power to receive subscription of the rights of way," etc.

August 6, 1869, a resolution was passed authorizing a committee to adjust the per cent. of stock that the old stockholders were entitled to, with full power to act on the subject, and that the per cent. of stock due the old stockholders to make them equal with the new ones be fixed and issued to said stockholders. August 27, 1869, the committee made a report showing the amount received and expended on the road to January, 1870, and upon that basis recommended that a dividend of at least 100 per cent. be declared to the old stockholders, and that Thos. L. Jones should receive an additional amount equal to $506.20 in settlement of his accounts. Therefore, it was resolved unanimously that additional

stock be issued to the holders of old stock in proportion to the amount that the tolls upon the old part of the road has to the old stock paid. It was also resolved that the president, secretary and treasurer prepare and execute certificates of stock to the holders of the old stock according to the terms fixed upon by said committee; and stock was thus issued to the old stockholders to the amount of double what they held before. It further appears that in February, 1881, more than thirteen years after the adoption of the resolution by the old board of September 14, 1867, and more than eleven years after the stock was actually issued, the present directors passed in regard thereto the following resolution: "Resolved that all such certificates of stock be and the same are considered unauthorized and void and the issuing thereof in nowise binding, and this company will so regard and treat the same," and from the passage of that resolution has grown the present controversy. It does not appear nor does counsel contend that the issue of stock under the resolution of September 14, 1867, was itself unjust or unequal. On the contrary, it is manifest that it would have been palpable injustice and inequality to have permitted the new subscribers of stock to have the same number of shares as the old stockholders who had subscribed and paid for their stock sixteen or seventeen years before, without having received anything in dividends or interest.

Nor is it contended that the issue of the additional stock was made fraudulently or without notice to the new stockholders, so far from it that at the same time the resolution authorizing books to be opened for new subscriptions of stock was passed, viz.: September 14, 1867, it was also resolved that in lieu of dividends an additional amount of paid-up stock to the amount of the aggregate of the tolls received by the company should be assigned to the original stockholders.

It appears that one of the appellants in this case, J. W. Schneider, purchased a considerable amount of the dividend stock after it was issued under the resolution of September 14, 1867, and now holds it. The other appellant, T. L. Jones, holds some of the dividend stock issued to him upon a settlement of his accounts, or in the language of the court below, "to satisfy a liability of the company to him" as one of the original stockholders; and also a large amount of the persons who are appellees in this suit, among them T. B. Youtsey, H. M. Healy, purchased a large portion of

the original stock, and James L. Gray is one of the new subscribers of stock.

As to the dividend stock issued to the appellant, Jones, in consideration of his services, it was adjudged valid by the court below, and no complaint is made of that judgment by counsel for the appellees. Appellant, Schneider, purchased the dividend stock now held by him upon the faith of the resolution authorizing its issue to its vendors, acquiesced in and upheld without objection by the new subscribers of stock for more than thirteen years. To permit the present board of directors, composed of and representing the new stockholders under such circumstances, to cancel and annul the dividend stock thus acquired and held by appellant, Schneider, would be contrary to every principle of justice and equity. On the other hand, neither of the appellees, Youtsey and Healy, purchasers of the original stock, or Gray, one of the new subscribers of stock, show or pretend that the dividend stock was issued to or purchased by them without notice, or that they were in any way defrauded. Unless, therefore, there is to be found in the act of incorporation, or amendments thereto, some provision prohibiting the issue of the dividend, or so-called dividend stock in the manner it was done, it is difficult to perceive upon what ground it is to be adjudged invalid, and the stock itself in the hands of innocent purchasers and holders a nullity.

In 1867, when it was resolved to open books for additional or new subscriptions of stock, the company was completely and legally organized and had been since 1852. The stockholders were the owners and in the full possession of all the rights and franchises conferred by the charter, as well as the property acquired by the expenditure of money subscribed and paid up by them years before. The company composed of and representing its stockholders was as completely the owner of all the franchises and property thus held as a person could be of property legally acquired by him. It is not nor can it be denied that the company thus organized possessed the right to issue stock towards the construction of the road, or in payment for services rendered by its contractors, agents or employes. But the right to thus issue stock presupposes the necessary power to fix the price at which to thus dispose of it. The company also had its election to open books for additional or new stock, or, in other words, to permit other persons to become

members of the corporation and joint owners of the property and franchises or not.

Therefore it necessarily follows that if other persons could not, without the consent of the original stockholders, subscribe for stock and become members of the corporation, the original stockholders certainly had the power to prescribe the terms upon which they might do so. So they had the right, before permitting others to become joint owners of their corporate franchises and property, to fix the value thereof and prescribe such terms as would secure equality and prevent injury and injustice to themselves. They made it a condition on which new stock might be issued that the original stockholders should be upon an equal footing with the new ones. They might have accomplished that object by requiring the subscribers or purchasers of new stock to pay double the face value of the stock. They had as much right to do so, as an independent owner of property has to fix the price and terms upon which he will sell the whole or part of it. But instead of adopting that mode of securing equality they chose to accomplish the same object by doubling their own stock, which is no more objectionable or illegal than the other mode. The interest or dividends upon this subscription of stock paid up years before had been applied to extending and keeping the road in repair. To remunerate themselves therefor stock was issued to an amount equal to the tolls collected and thus applied.

To say that the original stockholders, though the absolute owners of the property and franchises of the company, and legally invested with the control of it by their board of directors, still could not prescribe the terms upon which others might become jointly interested, is to put a useless and unjust restraint upon corporations. In our opinion there is no provision in the act of incorporation or amendatory acts which directly or by implication prohibits the issue of the dividend stock in the manner it was done. Acts 1850-51, Ch. 625.

Though the capital stock was by the original act limited to $25,000, the company was subsequently, by an act passed in 1853 (Acts 1853-54, Ch. 29), empowered to increase their capital stock to such an amount as they might find necessary for the completion of the road. Counsel for appellee in his petition for rehearing refers to the 6th section of the act of incorporation and contends that it in effect provides that all stock shall be paid for in full.

That section is as follows: "That the president and directors, after their election, shall make a call upon the different stockholders for payment upon their several subscriptions, which call shall be made in such manner as they shall deem right and just: Provided, that the first call shall not be over twenty per centum on the amount subscribed, and may be less, in the discretion of said directors: And, provided further, that all subscribers paying as much as twenty per centum, as aforesaid, at the first payment or call, shall be entitled to a notice of forty days upon any subsequent call."

Even if that section be subject to the construction put upon it by counsel it has no reference to the action of the company after it is once organized and the stock is fully paid up, as is the case here. Nor can it be construed as prohibiting the issue of stock to the original stockholders in the manner it was done in this case. The object of the section was to prevent fictitious subscriptions of stock and a fraudulent organization of the company, and to give power to the directors to coerce the payment of stock subscribed. But even if it could be construed to apply to this case, the original stockholders to whom the dividend stock was issued have in reality as fairly and fully paid for such stock as the new stockholders have paid up the amount subscribed by them.

In our opinion the issue of the stock under the resolution of September 14, 1867, is not prohibited by the acts of the legislature, nor in any respect illegal or unjust, but is valid, and being so the resolution adopted by the board of directors in 1881 was illegal and is void. Judgment *reversed.*

Dissenting opinion by Judge Hargis.

The agreed facts do not show that the purchasers of new stock knew at the time they purchased that the old stockholders had voted themselves double the amount of their stock; hence the new stockholders are not estopped to controvert the right of the appellants to the increase of stock for which they never paid anything, if indeed the appellants under any state of case could double their stock unless authorized by the charter to do so.

It is contended by the appellants that they had expended the dividends arising from their original stock in keeping the road in repair, and that the use of the dividends furnished a valuable consideration for the increase of their stock to $200 in amount for

each $100 of stock which they had originally subscribed. This position can not be supported because what the appellants denominate as dividends do not constitute dividends.

It took all the receipts of the fragment of road which the old stockholders had constructed to keep it in repair and from going to destruction; hence there could not have been any dividends, as dividends can only be declared after all expenses incurred in the necessary and proper repair of the road and its management are paid. Therefore, the act of the old stockholders in doubling their stock has no good or valuable consideration to support it, and it is clearly a case of the unauthorized watering of stock under circumstances of hardship.

The most plausible arguments or the worst returns of an ill-advised venture should never be permitted to justify the watering of stock, which is a power so easily wielded by the majority that the minority may be virtually deprived of their stock; and it is to be hoped that uncontrolled increase of stock by its holders without a valuable consideration therefor paid to the corporation will not be sanctioned by a precedent.

The capital of the company is limited by the charter to $25,000 to build a road more than twice as long as the portion completed by the old stockholders. If, therefore, they can increase their stock from $10,600 to $21,200 they will have swelled the stock to a sum greatly beyond the capital stock allowed by the company's charter if the remainder of the cost of the road is as much as the completed portion, and the amendment to the charter authorizing the increase of the capital stock to such amount as they may find necessary for the completion of said road does not authorize the company to double its old stock and then issue new stock in addition sufficient to finish the road. If such were the meaning of the amendment there would be no limit to the capital stock of this company, whose members might double or increase their shares many fold and still lack means to finish the road.

Besides, it seems no set of stockholders, even if every one of them agrees to it, can double or issue stock in any manner not authorized by the charter of the corporation of which they are members. The reason for this rule is that the corporation derives all its power from the legislative grant, and can exercise none other, the public being entitled to protection against trading with or being subjected to the exercise of extraordinary powers by

the corporation, whose stock may thus be made to represent capital which the corporation does not have or own in fact, and which the legislature never intended to be done. For these reasons the judgment should, in my opinion, be *affirmed*.

O'Hara & Bryan, for appellants.

William Lindsay, James B. Wright, for appellee.

[See *Jones v. Newport & L. Tpk. R. Co.*, p. 698, this volume.]

JENNIE BURTON *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—532.]

Challenges of Jurors in Misdemeanor Case.

One charged with keeping a bawdy house is entitled to challenge only three jurors peremptorily.

Proof to Establish Charge of Keeping Bawdy House.

In the trial of one charged with keeping a bawdy house the state may prove the general reputation of the house, since this class of evidence is the best of which such a case is susceptible.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 9, 1882.

OPINION BY JUDGE HARGIS:

The indictment in this case is good. Its terms need not be recited in this opinion to demonstrate its sufficiency. It is only necessary to say that the offense of keeping a bawdy house is charged against the appellant, and the facts constituting the offense are alleged specially.

The challenge to the eleven jurors made by the appellant was not peremptory, but for cause which consisted in a supposed actual bias that prevented them from trying the case impartially. She was charged with a misdemeanor and was entitled to three peremptory challenges only, and there is nothing to show that this right was exercised by her or denied by the court; and as her challenge was for cause this court can not consider it because the decision of the circuit court thereon was not subject to exception. Crim. Code (1876), § 281.

There was no error in allowing the commonwealth to prove the general reputation of her house, as this character of evidence is

the best and almost the only evidence of which such a case is susceptible.

The plea in bar is unavailing here, as there is nothing in the transcript before us except the judgment of conviction, and we are unable to tell from that what period of time she was convicted for.

The court did right in adding the qualification to the instruction asked by appellant, as the instruction when qualified left the question of the appellant's guilt to the jury determined from all the evidence.

Wherefore the judgment is *affirmed.*

Owen & Ellis, for appellant.

P. W. Hardin, for appellee.

FRANK TURNER *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—531.]

Hog Stealing—Incompetent Evidence.

Where one is charged with hog stealing, and it is shown that the hog was found on the premises of the accused, and he shows that he said to several witnesses that it was not his hog but was a stray, it is not competent evidence for the state to bring a witness living near the accused, but with whom accused had not had any conversation, to testify that he had seen the hog running about the premises of the accused and that the accused "had not told him the hog was a stray."

APPEAL FROM MADISON CIRCUIT COURT.

December 9, 1882.

OPINION BY JUDGE HARGIS:

Frank Turner was an old colored man, and was indicted for the offense of hog stealing and sentenced to the penitentiary for a period of one year. From that judgment he has prosecuted this appeal, asking its reversal. Mr. Cobb lost a hog worth about $15 some time about Christmas. It was found in February on the appellant's premises, where it had been running out openly for a month or two.

During the time the appellant said to several witnesses that it was not his hog, but it was a stray, and on one occasion refused

to sell any hogs because he said he only had four, when in fact there were five on the premises, counting the hog which turned out to be Mr. Cobb's.

In February Mr. Cobb's son went to or was passing the old negro's place, saw the hog and asked him whose it was, and he responded that it was his and that he had raised it from a pig, but on being convinced that young Cobb's father owned the hog told him that he was only joking, it was all right and he could take it.

In order to rebut the old negro's declarations that it was not his, that it was a stray, Mr. McKinney was sworn and testified, against appellant's objections, that he lived in two or three hundred yards of the appellant and saw the hog running out on appellant's place during January and February with his hogs, but that the appellant "had not told him the hog was a stray." This evidence was excepted to, and very properly so because it was clearly incompetent. It does not appear that McKinney ever talked with him about the hog or said anything to him in regard to the hog or its ownership that required the appellant to speak or subject himself to an unfavorable admission by his silence, and we can not see the relevancy of this sort of evidence which could be adduced by everybody to whom the old negro did not go and explain the manner the hog came to be on his place.

Had it been shown that it was his legal duty to tell Mr. McKinney that the hog was a stray, then the latter's testimony would have been relevant, otherwise it was illegal.

It must be remembered that the appellant is an old negro, doubtless with a scanty cabin on a small or poor piece of land, with none of the social relationships to his white neighbors that beget so much of the concerns of one neighbor by another, and that, ignorant of books and his newly acquired duties as a citizen, he ought not to be held guilty of a felony because he omitted to tell one of his white neighbors that the hog was a stray.

Nor was he bound to post the hog or be condemned. While it would have been a fact in his favor had he posted it, we do not suppose he ever heard of the stray laws, much less know their purpose. Even if he did, the only effect of his failure to observe them was against his own interest and would prevent the title to the hog vesting in him after twelve months from the day of posting it. The stray laws are for the benefit of the taker-up of cattle

or those into whose premises they may break, and are only permissive; they contain no imperative requirement to post such cattle, and no inference of guilt can or ought to be drawn from a simple neglect to comply with their provisions, and the jury should have been so told, and especially should they have been so instructed in this case where innocence is almost as strongly proven as guilt.

Wherefore the judgment is *reversed* and cause remanded with directions to grant appellant a new trial.

Smith & Mason, for appellant.

P. W. Hardin, for appellee.

GEORGE LUCKETT *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—530.]

Criminal Law—Gaming.

Under an indictment charging one for permitting gaming in a house in the joint occupancy and control of the accused and another, he can not be convicted for permitting gaming in a house under his individual control or occupancy.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 9, 1882.

OPINION BY JUDGE HARGIS:

The indictment in this case charges the appellant with permitting gaming in a house in his occupation and under his control, but each of the indictments, except one, under which it is pleaded that he was formerly tried for the same offense, charges in legal effect that the house was in the joint occupancy and control of appellant and another, and there could have been no legal conviction of him under either of them for permitting gaming in a house under his individual control or occupancy. The description of the occupancy or control of the house being essential to make out the offense under the statute, where the occupancy or control is charged to be joint, it must be proven as alleged, and where charged to be separate or individual it must be so proven; otherwise a defendant might be charged with committing the offense in one house and proven guilty by showing it to have been done in another. For instance, "A" owns two houses, one of them located

in the eastern part of the county, occupied and controlled in partnership with "B," the other situated in the western part of the county and occupied and controlled by "A" individually; on an indictment against "A" and "B" for permitting gaming in their house, "A" could not be convicted by evidence that the offense was committed in his house under his own control, and *vice versa*. So the appellant could not have been convicted under either of the indictments pleaded in bar for the offense with which he now stands charged and is convicted, except No. 1151, which was for permitting gaming in the "St. Nicholas," and the jury were properly instructed as to that indictment and conviction that if the offense charged was committed in the St. Nicholas the appellant could not be convicted for any of the period covered by that indictment.

Perceiving no error in the judgment it is *affirmed*.

W. N. Sweeney & Son, for appellant.

P. W. Hardin, for appellee.

LEO HAYDON *v.* R. L. HART.

[Abstract Kentucky Law Reporter, Vol. 4—531.]

Rights of Second Mortgagee as Against Usury in First Mortgage.

An agreement between the holder of a first mortgage and the mortgagor to pay usurious interest for an extension of time, not made of record, even if binding on the parties, can not bind the holder of a second mortgage on the land accepted without notice of any such agreement.

APPEAL FROM LINCOLN CIRCUIT COURT.

December 12, 1882.

OPINION BY JUDGE PRYOR:

The right of Mrs. Hart to purge the obligation of Grigsby and wife to Haydon of usury having been heretofore decided by this court, on the return of the cause by proper pleadings on the part of Mrs. Hart an attempt was made to ascertain the usury embraced in the obligation. The original loan was made on the 26th of April, 1869, and the sum of money actually received by Grigsby and wife was $4,000 and an obligation executed by which Grigsby

and wife agreed to pay Haydon in 3 years from that date (April 26, 1869) the sum of $5,324. That usury was embraced in the obligation can not be questioned and it was so adjudged by the court below. Haydon is now complaining so far as the judgment in his favor is concerned of the action of the chancellor in refusing to allow him ten per cent. interest on his debt after deducting the usury from the 26th of April, 1872. After the note fell due, Grigsby and wife executed to the appellant a further obligation reciting that in consideration of forbearance they would pay ten per cent. interest on the debts. This was on the 26th of April, 1872. A mortgage had been executed on the land of Grigsby and wife in April, 1869, the day on which the money was loaned to secure its payment. After the execution of this mortgage Mrs. Hart took a mortgage from Grigsby and wife to secure her debts, on the same land, and this land being insufficient in value to satisfy both debts, that of Haydon and of Mrs. Hart, the latter attacked Haydon's claim as usurious. The agreement to pay ten per cent. interest after the debt of Haydon had matured was after the conventional interest law had been enacted and it is therefore insisted by Haydon that he is entitled to enforce this extra rate of interest agreed to be paid in consideration of forbearance as a lien on the land mortgaged. If the agreement in which there is no stipulated time given for forbearance to pay the ten per cent. could be enforced as against Grigsby and wife, a question we are not called on to decide, we are satisfied it can not affect the rights of Mrs. Hart. It is not pretended that she had any notice, when she accepted the mortgage from Grigsby and wife, of the agreement made by them in April, 1872. It was not evidenced by any mortgage of record to secure and, therefore, when Mrs. Hart took her mortgage the only incumbrance upon it in favor of Haydon affecting her in any way was the mortgage executed in April, 1869, when the money was loaned. What was then due or to become due by the obligation was the sum that could be enforced and no other as against Mrs. Hart. It is not insisted that the ten per cent. could have been collected, but for the change of the contract made in April, 1872. Then upon what principle of law or equity, after the execution of a mortgage, can the parties to that instrument increase the liability of the debtor secured by the mortgage so as to affect innocent purchasers? It is said that the interest was an incident to the debt. This may be true, but this

interest was six per cent. and not ten per cent.; but after the ten per cent. law was enacted it is alleged that the parties to the mortgage by an agreement in the pocket of the creditor could increase the liability of the debtor by which a greater sum could be enforced as a lien upon the land than could have been under the original mortgage, of which the purchaser was alone required by law to take notice. This can not be and we think too plain a proposition to admit of argument. This court has decided in the renewal of notes for the purchase-money of land, that an increased rate of interest by an agreement of the parties made after the contract had been executed, can not operate as a lien so as to affect third parties. We think, however, it is but equitable under the facts of this case to adjudge as the court below did, that the execution of the agreement in April, 1872, was a renewal of the note, and, therefore, interest on the old note up to that date at six per cent., and then making it all principal and bearing interest from April, 1872, at six per cent. was proper. The judgment below is, therefore, *affirmed* on the original and cross appeal.

M. C. Saufley, Hill & Alcorn, for appellant.

Porter & Wallace, for appellee.

H. C. WARMOUTH v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—531.]

Criminal Law—Grand Larceny.

Where money is deposited with the agent of an express company for transportation to designated points and is feloniously abstracted by the agent, he is guilty of grand larceny, the title and possession being in the express company as a common carrier.

APPEAL FROM MEADE CIRCUIT COURT.

December 12, 1882.

OPINION BY JUDGE HARGIS:

The appellant was agent of the Adams Express Co., and as such receipted to various persons for money packages deposited by them with him for the company to be carried by it to different destinations for hire. After the moneys were receipted for, sealed up, and delivered to the appellant in the office of the company he

feloniously abstracted about $2,700 of the money deposited by different persons. He was indicted and convicted of the offense of grand larceny and he here complains that his offense was embezzlement and not grand larceny and his conviction was, therefore, illegal. There is no evidence in the record that the Adams Express Co. is a corporation, hence the statute of embezzlement from corporations does not apply to this case. He was the servant of the company and as such after the money had been received and receipted for by him as its agent, he feloniously converted the money which was then the property of the company to his own use, and, as we think, committed the offense of grand larceny because the possession of the money was in the possession of the company which it acquired through its agent, and in the only way its possession could be manifested in the transaction of its ordinary business as a common carrier, and the title to the money was absolute in the company to the extent that it was responsible for its loss unless resulting from the act of God or the public enemy.

Wherefore the judgment is *affirmed.*

C. C. Fairleigh, Lewis & Fairleigh, for appellant.

M. A. & D. A. Sachs, P. W. Hardin, for appellee.

H. C. SMITH ET AL. *v.* H. C. MOSS' ADMR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—532.]

Real Estate as Personalty Under the Terms of a Will.

When the testator directs his real estate to be converted into personalty it becomes impressed with the nature of personal property at his death.

Interest on Legacy.

Where the testator bequeaths a specific pecuniary legacy to be paid at the death of his wife, the legatee is entitled to interest from the date of such death, and it is error for the court to allow interest only to begin at the end of one year from the date of the widow's death.

Right to Rents Not Used by Legatee.

A testator provided that his wife should have control of the rents of his lands, such as she might consider necessary for her use. Under this provision it is held she had the right to use such rents after the debts of the decedent were paid as she might consider proper, but rents she may have collected but which were not used by her at the time of her death belonged to the testator's estate.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 16, 1882.

OPINION BY JUDGE HARGIS:

1st. It is plain from the provisions of Wm. Ferguson's will that he intended his wife, Susan Ferguson, to have control of such rents of his lands as she might consider necessary for her use, his object being to supply the necessities and comforts according to her judgment as to the amount required during her lifetime. She had the right to control and use such of the rents and hire after the debts were paid as she might consider proper; to that extent the rents and hire invested in her under the will. But the rents she may have collected or controlled and did not use, consume or part with before her death, belong to the estate of Wm. Ferguson; hence the notes for rent taken in her name but never used or disposed of by her belong to his estate, as decided by the circuit court.

Even if the rents of the Wilson tract of 48 acres, 3 roods and 13 poles of lands were paid in the purchase-money due from Wm. Ferguson at his death, it was a literal compliance with the provisions of his will that his debts should be paid out of his personal property, rents of lands and hire of slaves, before Mrs. Ferguson was entitled to control or use the rents. Whether she or the executor paid the rents or other proceeds of the estate in discharge of the purchase-money owing by the testator it can make no difference. It was the payment of one of his debts out of the property devised by him for that purpose, and we think the judgment is right on this point.

2d. By the 13th clause of his will the testator directed that certain described real estate should be sold. There is no limitation, restriction or condition placed upon the direction to sell. The expression that "If my land of the home farm can be bought by any of my children they can take it at the valuation" strengthens the imperative character of the direction to sell, instead of decreasing it, and clearly shows the testator contemplated that some of his children might wish to buy, and if they did the provision quoted was intended to secure the right to be preferred bidders at the valuation.

That he meant an absolute direction to sell is further shown by

the provision in codicil No. 1, where he authorized his executors to make deeds to all lands of his estate that may be sold. The will and codicil show:

1st. That the sale is peremptorily directed to be made.

2d. That the testator provided for his children becoming purchasers.

3d. That he directed the executors to make conveyances.

These provisions when considered together leave but little, if any, doubt of the absolute character of the direction to sell.

As the testator directed his real estate to be converted into personalty it became impressed with the nature of personal property at his death; hence Moss was entitled to the whole of his deceased wife's interest under the will of her grandfather, Wm. Ferguson; and the infant child of Moss and wife not having title to real estate by descent from Mrs. Moss, nothing descends from it to her kindred. No citation of authority is necessary to support this conclusion.

3d. The testator bequeathed to the appellant, Susan Hart, a specific pecuniary legacy to be paid at the death of his wife, who died on the 28th day of February, 1878, he having died in 1869. The appellant, Susan, and her husband assign as erorr that the circuit court refused to allow her interest on her legacy from the death of Mrs. Ferguson.

General Statutes (1881), Ch. 50, Art. 2, § 2, providcs: "If no time is fixed for the payment of a specific pecuniary legacy, it shall be payable one year after the testator's death, and carry interest after due." The circuit court fixed the period for the beginning of interest on the legacy at one year from the death of Mrs. Ferguson, and we think this was error. According to the statute quoted a specific pecuniary legacy shall carry interest after due. The testator may fix the time for its payment; if he does not the law fixes it at one year after his death. Such a legacy is due from the time it is payable, hence this legacy was due from the death of Mrs. Ferguson, the time fixed for its payment by the testator, and it consequently bears interest from that date.

The time within which the executor or administrator has to wind up and distribute the estate has nothing to do with the appellant's, Susan's, right to interest on her legacy. It might as well affect the right to interest by any other person holding a claim

which is due and payable out of the estate, which of course it does not do.

Wherefore the judgment is *reversed* as to the appellants, Hart and wife, and *affirmed* as to Smith and Boone.

W. H. Holt, for appellants.

C. Brock, for appellees.

ALSOP v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—547.]

Homicide—Indictment.

In an indictment for homicide, the fact that the deceased was an officer acting in the discharge of his duty when he was killed need not be alleged.

Homicide—Indictment.

In an indictment for homicide it is not essential that the evidence relied on to fix the malice alleged should be set forth

Homicide—Indictment.

A person indicted for homicide is not entitled to be informed by the indictment of the quality or quantity of the evidence relied on to prove his malice.

Homicide—Evidence.

A warrant addressed to the chief of police of a city and sent by the chief of police to a constable of a township, with a letter directing the constable to arrest the defendant, was admissible in evidence in the prosecution of the defendant for killing the constable while attempting to arrest defendant, where defendant knew that the deceased was a constable.

Homicide—Degree of Offense.

The fact that a warrant in the hands of a constable was defective does not reduce the offense from murder to manslaughter, where the constable was in good faith and using no more force than necessary in attempting to make the arrest.

Sheriffs and Constables—Defective Warrants.

Peace officers, in the exercise of their duties, are not required to see that warrants which come into their hands are free from defects, and because thereof permit felons to escape.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 16, 1882.

OPINION BY JUDGE HARGIS:

On information on oath, from Charles Arnz, a warrant addressed to the marshal of the city court of Louisville was issued by that court, for the arrest of appellant for the crime of forgery. It was delivered to the chief of the detective force of Louisville, and having failed to execute it, he sent it in a letter to J. S. Harrison, a constable of Jefferson county, requesting him to arrest the appellant and bring him to the city.

On the 2d day of August, 1881, two months and eleven days after the teste of the warrant, Harrison found appellant at a well near Kendall's store in Jefferson county, informed him that he had a warrant for his arrest and began to read it to him, but before finishing handed it to appellant, telling him to read it. The appellant appeared to read it, handed it back to Harrison and said: "I want to go to John Knadle's, my brother-in-law, to change my clothes, and from there to my father's, and if my father will come to town with me I will go, and if he don't I won't." Harrison said: "Well, I am not authorized to run all over the country with you; I will send and get your clothes and you can make the change." Appellant replied: "I have got nobody to go." Miss Alice Lowe, who was present, said to the appellant, "I will go and get your clothes." He made her no answer.

Harrison then took hold of him and said: "Come along, George, it is better than you should go; I don't want any fuss." He jerked loose from Harrison, and then said: "G—d d——n you, Bud Harrison! I will knock hell out of you." Harrison drew his pistol and said: "Alsop, you are armed." Appellant said: "I am not." Harrison rejoined: "Yes, you are," and appellant replied: "I have not got a thing but this knife in my hand." Harrison thereupon put his pistol in his pocket, and immediately appellant drew his pistol and shot Harrison three times in quick succession. Harrison fell at the feet of Miss Lowe, and she turned him over on his back, and appellant stepped back and said: "G—d d——n you! Will that do you?" and walked off up the pike. Harrison soon died. The appellant fled, was subsequently arrested, tried, convicted and sentenced to the penitentiary for life, from which he appealed.

The first error, which his counsel maintains was committed against him, is that the testimony relative to the warrant and the official capacity in which Harrison was acting when slain was irrelevant to the issue, because the indictment failed to charge that Har-

rison was a constable and acting in the discharge of his official duties. This question has been considered by the courts of at least two states of the Union, and the rule governing it is succinctly and plainly laid down by the text books. Wharton on Homicide (2d ed.), § 803, says: "If a constable, watchman, or other minister of justice be killed in the execution of his office, the special matter need not be stated, but the offender may be indicted generally of murder by malice prepense." Bishop on Criminal Procedure (2d ed.), § 506, expresses himself thus: "It is always necessary, in an indictment for a felonious homicide, to mention the name of the person slain, if known. But if he was an officer of the law, the fact that he was such officer, or that he was acting in the discharge of his official duties, need not be stated." In support of the text the cases of *Boyd v. State,* 17 Ga. 194, and *Wright v. The State,* 18 Ga. 383, are cited. In the former it was held not to be necessary to allege in the indictment that the deceased was an officer acting in the discharge of his duty when killed, in order to let in the proof of those facts. This doctrine had its origin in Mackalley's Case, 9 Coke 61, for killing a sergeant of London, where it was said, though not necessary to a decision of the point, that such allegations might be omitted as a general indictment; when an officer is slain is sufficient. It matters but little that the statement of the doctrine in Mackalley's case was obiter, as it has been incorporated in the text books, and is maintained by authority to such an extent as to remove all doubt of its soundness. The cases cited have been followed and approved by the courts of Missouri in the case of *The State v. Green,* 66 Mo. 631, and we feel it our duty to recognize the rule which the text book and authorities so clearly establish.

The appellant was sufficiently informed by the indictment of the nature of the charge against him, to enable him to know what was intended. He was accused of willful murder, and the facts constituting the offense were substantially stated to be that he maliciously shot and killed J. S. Harrison, with a pistol, in the county of Jefferson, on the —— day of August, 1881. What did the appellant understand was meant by such allegations when they were read to him? If he understood aright, and as any person of common understanding was bound to know, he knew that he was charged with killing a human being at a time, place, with particular means and in such a manner, if proved, as would render him

guilty of murder, whether his victim was a peace officer or private person. And it is not essential to his lawful information that the evidence relied on to fix the malice alleged in the indictment should also be set forth in it. Malice was sufficiently charged and the burden rested on the commonwealth to establish that ingredient of the offense, and whether the circumstances of the killing or the capacity of the parties rendered it less difficult, or required a smaller quantity of proof than to establish actual malice flowing from an ancient or secret grudge, it does not logically follow that the appellant was legally entitled to be informed, through the indictment, of the quality or quantity of the evidence to be relied on to prove his malice.

The next and only objection seriously urged is that the warrant, which was read as evidence to the jury, furnished no authority to Harrison to arrest appellant, and that the evidence was irrelevant and incompetent, and that the instructions relative to the point were erroneous. The warrant was legally issued, addressed and in legal form. The point made rests upon the facts that the warrant was not addressed to "any constable," and that Harrison was not deputized in writing by the marshal to execute it. Admitting that the defect existed, it was, nevertheless, the duty of the constable, if he had reasonable grounds for believing that appellant had committed a felony, to apprehend him, and the existence and possession by Harrison of the warrant and the letter accompanying it were competent and relevant to this view, as held by this court in *Saulsberry v. Commonwealth.* It tended to show the good faith of Harrison and the reasonableness of his belief that appellant had committed a felony. The mere defect in the conferring of authority upon Harrison to execute the otherwise legal warrant does not render the instructions illegal, as we think the law of the case was substantially given to the jury, except that it was too liberally given in behalf of the appellant. For, if he knew that Harrison was a constable and was in good faith using no more force than was reasonably necessary to execute the warrant, although defective, the appellant had no right in law to kill him, for the sole purpose of preventing an arrest, and the slaying of Harrison under such circumstances was murder and not manslaughter.

It was the duty of appellant to submit when he saw the warrant in the hands of a known officer, or heard it read, and look for redress to the law if illegally arrested. He could not take advantage

of the mistake and shoot down the officer when he was in no danger of loss of life or great bodily harm, other than what would necessarily follow the effort of the officer, in good faith, to arrest him with no more force than reasonably necessary to accomplish that purpose, and then claim that his offense was manslaughter, for it was murder, although the warrant was defective.

says Mr. Wharton [1 Wharton's Crim. L. (8th ed.), § 414]:

"A malicious and deliberate killing of an officer is murder, to which it is no defense that the officer was at the time endeavoring to arrest, on defective or void procedure, the defendant or his friends." This view of the case was excluded from the jury, and they were told, after being instructed, first, that if appellant maliciously killed Harrison they should find him guilty of murder, that if he unlawfully, without malice, and not in self-defense, but in sudden affray, heat or passion produced by considerable provocation, such as an actual assault or trespass to his person, killed Harrison, he was only guilty of voluntary manslaughter. The only qualification to this instruction was that if the provocation resulted from a legal arrest on reasonable grounds for believing the appellant guilty of felony, he was not entitled to have his offense reduced to manslaughter, when the jury ought also to have been told that his arrest upon the defective warrant would not reduce his offense from murder to manslaughter, if he knew or had reasonable grounds for believing that Harrison was a constable, and was using no more force than reasonably necessary to make the arrest in good faith. The abstract definition of law contained in instruction number 4, in which the court said: "A constable is a peace officer, and he may arrest a person charged with a public offense for whom he has a warrant delivered to him," could not have prejudiced the appellant because the effect and plain meaning of instruction number 2 is, that if the affray or sudden heat of passion was produced by provocation, such an assault or trespass to the appellant's person by Harrison in taking hold of him for the purpose of arresting him under the warrant, his offense is manslaughter. And we have shown before that under the circumstances of this case the slaying of Harrison, although the warrant was defective, was murder, and the jury should have been so instructed. The law does not allow a person about to be arrested on a warrant, which is legally defective, or which is being executed by an officer, in pursuance of verbal directions, when his authority to execute it should have been

in writing, in order to avoid arrest, to slay the officer, who may be acting in good faith under the warrant. An opposite rule would place the innocently-erring and faithful officer at the mercy of criminals on the merest technicality. This is not an age nor country of lordly, high-passioned and resentful barons, with servile retainers trooping at their backs, rendering it practically necessary to turn the dwellings of the country into actual castles, and constitute each man the defender of his own liberty, but it is the age of enlightened civilization and the country of courts of easy access, vested with constitutional and legal power to redress every wrong and preserve every right possessed by the citizen. Hence the necessity can scarcely ever arise, on any pretext, or for any purpose, for the citizen to take the law into his own hands, and by a kind of rude, primitive justice, belonging to a past age, protect his personal liberty from such invasion as he may consider unlawful. And when a known officer of the law, armed with a warrant, though defective, emanating from official authority, whether the charge it contains be true or false, makes known his purpose, and in good faith attempts to execute it, it is the duty of the person about to be arrested to submit to his authority, when exercised in a proper manner. This doctrine is based upon a distinction between the authority of a private person and a constable in making an arrest. The former must act upon his own knowledge, and not the report of others, unless part of the *res gestae* of such facts gave him a reasonable ground for believing that the person arrested has committed a felony. But the latter may lawfully arrest another upon the information of others, without any positive charge, or his own knowledge of the circumstances on which the suspicion or charge is founded, if such information be of such a character as would furnish the constable reasonable grounds to believe that the person charged had committed a felony. This distinction is based upon the existence of the official power and duty of the constable, with reference to such matters under the common law, and the absence of any necessity to perform such duties voluntarily by private persons. And in the exercise of their sacred duty to society, officers should not be required, on peril of their lives, either to permit felons to escape, or see that warrants, which come to their hands, are without a flaw or defect. It is better that personal liberty should be regulated by law and that law executed and submitted to in the light of civilization, and with the concessions, which every

citizen is bound to make for the good of all, than to have the vicious take advantage of defects of procedure, which technically violates his personal liberty, and shoot down the civil officers of the land under guise of law, to escape its merited penalties. Such a perversion of the security which the law throws around every citizen in the exercise of his personal liberty, as this record exhibits, merits the condemnation of courts and the just but lenient verdict of the jury which was rendered in this case.

Wherefore the judgment is *affirmed.*

Isaac Caldwell, W. R. Kinney, for appellant.

A. G. Caruth, P. W. Hardin, for appellee.

WM. SCOTT *v.* JAMES A. GRINSTEAD ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—614.]

Jurisdiction of Court Over Assignee's Estate.

Where the circuit court has assumed jurisdiction and is administering upon an assignee's estate, and a petition is filed in such court seeking a sale of land included in the assignment for the benefit of creditors, and while the petition is pending the assignor filed his petition in bankruptcy, was adjudged a bankrupt and the land assigned to him as a homestead, it is held that, the circuit court having with full and complete jurisdiction undertaken to sell the estate, the proceeding in the bankrupt court did not oust the circuit court of its jurisdiction, and a purchaser under its judgment of sale will hold the land, where no exceptions are made to the report of sale and no claim to a homestead is asserted in such court.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 4, 1883.

OPINION BY JUDGE PRYOR:

The Fayette Circuit Court had assumed jurisdiction of this case, in which was involved the distribution of the entire estate of the appellant before the proceeding was instituted in the bankrupt court. The appellant had made an assignment of all of his estate for the benefit of creditors and his assignee had filed a petition for a sale and distribution. There was embraced in the assignment the remainder interest of the appellant in a tract of land in the county of Clark, and this interest was not sold under the first

judgment rendered by the Fayette Circuit Court for the reason, doubtless, that the other estate might prove sufficient to pay the debts. The commissioner made the sale and reported that it was necessary to sell the remainder interest in the Clark county land, or it was apparent that it must be sold as the proceeds of the sale of the other property failed to pay the debts. Under the petition seeking a sale the chancellor ordered it to be made.

While this suit was pending and before the sale of the Clark county land the appellant filed his petition in bankruptcy, was adjudged a bankrupt, and the remainder interest in the Clark county land assigned him as a homestead. The Fayette Circuit Court, having prior to that time with full and complete jurisdiction undertaken to sell the estate so as to make distribution, ordered a sale of the remainder interest, which was the homestead assigned the appellant. The proceeding in the bankrupt court did not oust the circuit court of its jurisdiction, and a purchaser under the judgment of that court will hold the land. There was no exception made to the report of sale or any effort of the appellant to assert his right to the homestead in the case pending in the circuit court, and the present action by him is for the recovery of the land upon the idea that the sale by the Fayette Circuit Court is void. It is not alleged or shown that the chancellor has sold his homestead or that he was occupying it as such, but the claim is asserted by reason of the assignment alleged to have been made by the bankrupt court; and, therefore, the Fayette Circuit Court having the jurisdiction to order the sale, we see no reason why the purchaser is not invested with the title.

A further ground for setting aside the sale is that the purchase, although made in the name of Grinstead, was made really for the benefit of and by the commissioner who made the sale. This is denied by the answer, and the proof is conclusive that the property was purchased for Grinstead. The price paid was fifty dollars, and was an inadequate consideration, and some of the creditors who had the right to complain withdrew any objection to the sale by reason of the payment by Grinstead of some two hundred dollars in addition, which was applied to the payment of appellant's debts and is shown to be a full consideration for the land. It also appears that this failed to satisfy the demands of creditors. It is claimed in the brief of appellant that there is no denial of the fact that the land was purchased by and for the commis-

sioner. An examination of the pleadings will show that fact to be expressly denied, and the denial sustained by the proof. The absence of a proper description of the land does not render the sale void. It may constitute grounds for sustaining exceptions to the commissioner's report of sale, but here the land directed to be sold was in fact sold by the commissioner and the purchaser placed in possession, and the effort is now being made to oust the purchaser for want of jurisdiction in the court to render the judgment. We see no reason for disturbing the judgment below and the same is *affirmed*.

J. A. Prall, for appellant.

Buckner & Allen, for appellees.

A. H. BOWMAN'S EXRS. ET AL. *v.* J. A. BOWMAN ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—613.]

Liability of Devisees to Reimburse Executors.

A testator directed that his farm and other real estate should not be sold until his minor son should become of age, and that such real estate should be occupied as a home by his four daughters and infant son; and all the products of the farm and the stock on it were devised in the same manner, and the executors were to sell the land and personalty when the son should become of age and the proceeds be divided equally between all of his children, except that the minor son and each of the daughters were to have $1,000 more than the other children, and the proceeds were to be loaned by the executors and the income be paid to each. But it was further provided that if a majority of the four daughters asked it to be done, the executors were to sell such estate at any time prior to the son coming of age. The executors purchased certain articles for the girls expecting to pay for the same out of the proceeds from the farm, but before any proceeds were received they decided to have the property sold. It was held that from the income derived from the funds of each of said daughters after such sale, the executors should be reimbursed for the expenditures made for each before the sale.

APPEAL FROM MERCER COURT OF COMMON PLEAS.

January 4, 1883.

OPINION BY JUDGE PRYOR:

By the fifth clause of the will of Abram H. Bowman he directed that his farm in Mercer county, his home place and Johnson place

should not be sold until his son, A. Hill Bowman, arrived at age, and that the same should remain and be held, used and enjoyed as a home by his four daughters (naming them) and his infant son until that period. All the products of the farm as well as the use of the stock upon it and all farming implements were devised in the same manner for the support and maintenance of his daughters and infant son, the farm to be operated by his executors; and when the son arrived at majority everything was to be sold and the proceeds divided between all of his children, giving to these four daughters and infant son one thousand dollars each more than his other children, and providing that his son should be educated by his executors. He further directed that when the land and personalty should be sold the sum to which the daughters were entitled should be placed in the hands of a trustee and the income be paid over to his daughters, and at their death the principal estate go to their children, etc. The four daughters and infant son were entitled to the profits of the farm until the sale was made. The testator further provided that if a majority of his daughters requested a sale of the land and personalty to be made sooner (that is, before his infant son arrived at age), then the executors were required to sell and proceed to make a division of the estate as provided by his will. The first clause in the testator's will directed that his debts should be paid out of his personal estate.

In a few months after the death of the devisor his daughters required a sale of the land and the same was sold by his executors as directed by the will. The right of the daughters to require a sale is not controverted, and it is plain from the language of the will that the devisor intended to give to a majority of his daughters the right to a sale whenever they saw proper. One of the four daughters, Mrs. Rowland, married before the death of the testator and two shortly after his death, and the other was unmarried at the institution of this action. The executors, after they had qualified and by reason of the plenary power given them by the will, proceeded to apply the personal estate for the benefit of the unmarried daughters and the infant, or rather to authorize expenditures for their benefit, expecting to realize from the personal estate and the growing crops a sum sufficient to reimburse them. It appears that the estate was indebted in a much larger sum than was supposed by either the executors or the testator, and that in the payment of the debts the entire personal estate was exhausted, in-

cluding the crops upon the land at testator's death. When making his will the testator doubtless believed that his personal estate was ample to meet all of its liabilities without encroaching upon either the land or its products, but in this he was mistaken and the executors are without remedy for the money expended by them for the daughters unless the proceeds of the whole estate is bound for it, or unless the interest devised to the daughters can be subjected to its payment. The general estate can not be made liable, because it is evident that all expenditures for the benefit of the daughters out of the income of the land ended when the land was sold. It was a devise subject to the payment of debts; and besides, the benefit of the devise terminated by a sale of the land, the daughters then being entitled to their full share of the estate, and to equalize them with the other children they were given one thousand dollars more in the general division. The testator permitted his daughters to use and occupy the property until a majority of them saw proper to sell it, and having sold it there is no reason why the other children should contribute to pay such expenditures as they had incurred in the way of wearing apparel and wedding outfits, for no other reason than that they might have held the land for a longer period or that it took all the personal estate to pay the debts.

But while this is equitable as between the children there is but little justice or equity in rejecting altogether the accounts of the executors against Mrs. Ford, Mrs. Kinnard and Lucy A. Bowman. That these expenditures were actually made for the daughters is not denied, and a portion of the account against one of them was her wedding outfit; and in assuming the liabilities on account of these devisees the executors acted in the best of faith. It is urged that no payment can be made out of the proceeds of the land assigned to these particular devisees because their interest is devised to them for life only and then to their children. The income, however, they are entitled to, and whatever the income of the trust estate is the executors must have in order to reimburse them. The entire trust estate, including what has been paid over and what is due from the executors, must be loaned out by the trustee and the income paid over to the executors until their demand is satisfied, each one's interest being liable only for the amount they individually owe. The parties are all before the court, and before any personal judgment can be rendered against the executors in favor of those of the devisees who are indebted to them, they must

account to the executors for the amount they admit is owing. These parties were all able to contract and did contract for the items constituting the accounts of the executors against them; and we know of no rule of law or equity that forbids the chancellor from applying the income of a beneficiary in such a trust to the payment of his just debts. The income these devisees are entitled to and can compel their trustee to pay by action in the event of a refusal.

The chancellor should therefore ascertain the full amount owing by these three devisees, Mrs. Ford, Mrs. Kinnard and Lucy Bowman, and in requiring them to pay over to the trustee the amount owing each by the executors, should also ascertain the sum in the hands of the trustee and require him by the judgment to pay the income of each to these executors until their several demands are satisfied, and retain the case upon the docket that the judgment may be enforced as the income falls due. It is claimed as error that no personal judgment should have been rendered against the executors, as it was a petition for a settlement of the estate only and no personal judgment was asked. It appears that the money was in their hands and they could have relieved themselves of the judgment by paying it over to those entitled, and if this was the only error no reversal would be had. The devisees are not complaining of the allowance to the guardian *ad litem,* and we can not say that it was too large a sum.

This judgment is *affirmed* as to all but Ford and wife, Kinnard and wife, and Lucy Bowman. As to them the judgment is *reversed* and cause remanded for proceedings consistent with this opinion. The appellants are entitled to a judgment for costs against them, and the remaining appellees to a judgment for costs against appellants. It would perhaps be better for appellants to file an amended pleading, asking that the income be appropriated by the trustee to the payment of their debts.

Thompson & Thompson, for appellants.

Vanwinkle & Rodes, for appellees.

FANNY WILSON v. A. R. SANDERS' EXR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—612.]

Return of the Sheriff as Evidence.

Where the original petition on the notes was filed in ordinary and process issued thereon and returned by the sheriff as "executed in full," and this is shown by the clerk's entry, such entry, embracing the full return of the officer, is sufficient evidence of the service of the summons.

Burden on One Seeking Relief in Equity.

One seeking relief in a court of equity has the burden of showing the existence of every fact necessary to warrant a recovery.

APPEAL FROM BATH CIRCUIT COURT.

January 4, 1883.

OPINION BY JUDGE HARGIS:

This was an action by the appellees to obtain a conveyance of the dower lands of the appellant. It is alleged, in substance, that the appellees obtained judgments during the coverture of appellant for the sale of the lands allotted to her as dower in her first husband's estate; that a sale was made and they became the purchasers; that the commissioner reported the sale and it was confirmed, but that no deed was made. The petition concludes with a prayer for a conveyance of the land and possession thereof. The appellant answered, denying that she executed the notes or that any process was served on her in the actions in which the judgments were obtained. Issues were joined on the matters pleaded by appellant, and judgment was rendered against her, ordering a conveyance of the land by commissioner to the appellees and awarding them a writ of possession, from which she prosecutes this appeal.

It appears from the record that the original petition on the notes was filed in ordinary against the appellant and her husband, and that process issued thereon and was returned by the sheriff "executed in full," as shown by the clerk's entry upon the docket. The entry of the clerk appears to embrace the full return of the officer, and as such a return is legal and evidence of the execution of the process upon both the defendants, we think, according to Myers'

Civ. Code (1867), § 740, the entry is sufficient evidence of the service of the summons.

But the record presents the fact that after the return of the process on the original petition the cause was transferred to equity and an amended petition filed, on which no process was issued; and it must be presumed in the absence of any allegation or proof upon the part of appellees that the original petition was insufficient to authorize a judgment *in rem* against the appellant's property and that the amended petition was necessary to show her liability and to subject her land to the payment of the debts, she being a married woman. The amendment therefore must be considered as having presented a new and distinct cause of action against her not connected with the cause of action embraced by the original petition, and process was necessary thereon, and as none was issued the judgments based upon the allegations of the amended petition are void.

As the appellees were seeking to recover upon a lost record, it was their duty to have shown whether the petition or the amended petition contained the cause of action, and having failed to do this, not only the presumption of law but the circumstances of the case show that the amended petition contained the cause of action against the appellant. It follows, therefore, that the judgment in behalf of appellees is erroneous.

As the appellees are seeking relief in a court of equity the burden is upon them to show the existence of every fact necessary to warrant a recovery. Their petition alleges that the sale was confirmed, but the certified transcript of the orders and judgment filed as a part of their petition contains no order of confirmation, and as none of the order books were destroyed it is legally shown that no order of confirmation ever was entered into.

Although the answer fails to deny the allegation that the sale was confirmed, yet, as the suit is based upon the record which must prove itself, the failure to deny the allegation of the petition which is shown not to be true by the record is immaterial, because the petition considered in connection with the record upon which it is based presents no cause of action.

Wherefore the judgment is *reversed* and cause remanded with directions to allow the appellees to amend their pleadings and for further proper proceedings.

V. B. Young, J. S. Hurst, for appellants.

B. D. Lacy, for appellees.

JAS. T. HAMPTON *v.* FRANCIS LASHLEY.

[Abstract Kentucky Law Reporter, Vol. 4—613.]

Presumption on Appeal.

When a power of attorney and a deed from the attorney in fact are rejected as evidence in the trial court, and are not made a part of the record on appeal, the Court of Appeals will presume that their exclusion was proper and that the court did not err by excluding them.

APPEAL FROM EDMONSON COURT OF COMMON PLEAS.

January 4, 1883.

OPINION BY JUDGE HARGIS:

The power of attorney to James Lashwell and the deed from him as attorney in fact of P. F. Jones to Wm. B. Hampton do not appear in the transcript certified to this court. As they constitute a link in the chain of appellant's title, he could not recover in the action without their production.

They were rejected by the court as evidence, but whether properly or not we are unable to determine; but the law presumes in the absence of the alleged power and deed that they were properly rejected and that the action of the court was correct, and we are therefore constrained to presume that there was no error in their exclusion. Of course the deeds from Wm. B. Hampton and his vendees down to the appellant were properly excluded, if, as we have seen, the power of attorney and deed to Wm. B. Hampton in pursuance of it were illegal and incompetent evidence.

The peremptory instruction, as the record appears before us, was rightly given and the judgment is therefore *affirmed*. The transcript is so defectively made that we are compelled to condemn it and so order.

J. H. Hinton, for appellant.

Edwards & Smith, for appellee.

M. M. BARTLETT'S ADMR. ET AL. *v.* J. L. GRAY'S ADMR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—615, as Bartlett's Admr. v. Gray.]

Individual Purchase by Executrix.

Where one is executrix of a will and buys in property sold at the instance of creditors of the heirs, and takes the sheriff's deed as an individual and not as executrix, the presumption is that she claimed the purchase for her individual benefit and not as executrix.

Duty of Executrix to Protect the Estate.

An executrix will not be permitted to purchase the land belonging to the testator and reap a personal benefit from such purchase. Instead of standing by and permitting the lands to be sold to pay debts, she should pay off the debts and save the estate upon which she is administering, but in no event will she be permitted to reap a personal benefit by speculating in such lands.

Creation of a Trust.

Where an executrix without the consent of the heirs and devisees buys in the property of the estate, even though she takes a deed in her individual name, a trust results in favor of such estate.

APPEAL FROM GREENUP CIRCUIT COURT.

January 6, 1883.

OPINION BY JUDGE HARGIS:

The execution which was levied on the undivided interest of Scott's heirs in the Scott and Mosby patent of 9,759 acres was issued against John L. Gray as well as Lewis Postlewait and others, and Mrs. Gray, the wife of John L. Gray, and his executrix, bought the undivided interest aforesaid at the sale under that execution.

The important question therefore is, Did she buy the undivided interest of Scott's heirs as executrix or in her individual capacity? As she took the sheriff's deed to herself, and not as executrix, the presumption is that she claimed her purchase for her personal benefit, but whether she will be permitted to do so is a question.

Her testator was jointly bound for the execution debt for which the land was sold. The sale of his codefendant's interest, while it paid the debt, did not relieve his estate from at least the obligation and duty to pay his pro rata share of the execution. So we find his executrix buying the land of his codefendants at great

profit, with property of his estate, and at the same time leaving unpaid his share of the identical debt for the payment of which she bought it. Instead of standing by and seeing the lands or any part of the lands of his codefendants sold to pay his obligation and becoming the purchaser in her own private right, the executrix ought to have paid his share, and to that extent prevented the sale; and as she did not do this she will not be allowed to hold the land and leave the obligation of her testator outstanding. Such a process, had she pursued it as to all of his indebtedness for which others might have been bound as his sureties, would have left such debts unpaid by the estate but found her with the title to the property sold for their payment.

But the record is convincing that she must have paid for the land out of the property dedicated by her husband's will to the payment of his debts, and that she really bought it as executrix and had the deed made to her individually. Having done so without the consent of the heirs or devisees of her testator, and not in conformity to any provision of the will, a trust resulted in favor of the estate of her testator, as she only took a life estate under his will. It follows that the sale of the undivided interest for which the deed was made to her, under the two executions, one of which was issued against her individually and the other as executrix, did not pass the legal title to the appellee, Bennett, who was the purchaser. But, as counsel for appellants concedes his right to a lien for his purchase-money and interest, Bennett on the return of the cause will be adjudged a lien on the said undivided interest of Scott's heirs in the Scott & Mosby patent lying outside of the boundary of "the home farm" for his purchase-money, interest and subsequently accruing costs.

Neither Mrs. Bartlett nor her husband was shown to be an executor *de son tort* of her mother. Mrs. Gray in her lifetime put herself and bedding, etc., in the care of her daughter, Mrs. Bartlett, whose possession was the result of the act of her mother; and having made no claim to the bedding, etc., except as a mere depository for safe keeping, Mrs. Bartlett ought not to have been charged with its supposed value in the absence of any allegation or proof of a conversion thereof.

There is a proper mode of administering upon the effects of Mrs. Gray found in a foreign state, and we know of no law that requires Mrs. Bartlett under a rule of court to go to the expense

of transferring the bedding to Kentucky which her mother lawfully took out of Kentucky, simply because Mrs. Bartlett resides or the bedding, etc., is beyond the jurisdiction of the court.

The judgment fails to describe the land ordered to be sold. It can not be determined from the judgment where the land lies or what land is to be sold under it. The survey should have preceded the rendition of the judgment, which should be definite enough to guide the commissioner in ascertaining the land to be sold. There is no sufficient reference in the judgment to any survey or description of the land in the record to cure the defective description by it of the land.

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

E. F. Dulin, for appellant.

B. F. Bennett, for appellees.

[Cited, *Thompson v. Brownlie,* 26 Ky. L. 622, 76 S. W. 172; *Nulback's Exr. v. Read,* 25 Ky. L. 1130, 77 S. W. 204.]

THOS. H. ELLIS ET AL. *v.* SYLVESTER JOHNSON.

[Abstract Kentucky Law Reporter, Vol. 4—614.]

Sale of Remainder Interests in Property.

The remainder interests of devisees in an estate can not be subjected until the coercive process of the law has been exhausted as to the surviving partner and the executor of the testator.

Jurisdiction Over the Person.

No judgment can be entered in equity against parties until after summons has been executed for the time required by law. In the absence of notice or voluntary appearance the court has no jurisdiction over such parties.

APPEAL FROM NELSON CIRCUIT COURT.

January 6, 1883.

OPINION BY JUDGE PRYOR:

The remainder interest of the devisees, or whatever interest they had in the estate, ought not to have been subjected until the coercive process of the law had been exhausted as to the surviving partner and the executor. It is left to the officer executing the

writ to determine the extent of their liability and to proceed to execution, when this process should have been reserved by the chancellor. Nor do we see how the judgment could have been rendered against these beneficiaries, as the case was in equity until the summons had been executed on all of the parties for the time required by law. Some of them are infants, and they are not before the court on this appeal. The case was prematurely heard as to all but Thos. H. Ellis and his mother, but no motion having been made to set aside the judgment as to these appellants, and for the additional reason that they have not brought the infants before the court either as appellants or appellees, their appeal must be dismissed.

As to the widow of Benjamin Ellis she has no interest in the controversy. Her dower or right to dower is not affected by the judgment rendered. The appellee was entitled to a judgment at law as against Thos. H. Ellis as surviving partner and as the executor of his father. The motion made by Mrs. Ellis to set aside the judgment can not affect the rights of the other appellants or aid them in their appeal. Her motion was made that she might answer, and to prevent the judgment from affecting other creditors. The appeal is dismissed without prejudice as to all the appellants but Thos. H. Ellis, and as to him the judgment is *affirmed*.

Muir & Wickliffe, for appellants.

Wm. Johnson, for appellee.

BENJAMIN MAGEE *v.* MELVILLE PHELPS ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—615.]

Grounds for Vacating a Judgment.

It is not a sufficient ground to vacate a judgment and for a new trial for a defendant seeking such relief to show that he was deprived from defending because he was forced to flee from the county to avoid arrest on the charge of illicit distilling. Such a ground for a new trial is not recognized by the law.

Participant in Fraud Can Not Plead the Fraud in Defense.

Where one participates in another's fraud, the law will not afford him relief on that ground; equity in such a case leaves the parties where it finds them.

APPEAL FROM LAUREL CIRCUIT COURT.

January 6, 1883.

OPINION BY JUDGE HARGIS:

This was an action by the appellant to vacate a judgment in favor of appellees. It appears that appellee, Marion Phelps, brought suit on two promissory notes for $884.35 in the aggregate, and process was regularly executed on the appellant, Magee, who was the only defendant to the action. The appellant answered and took depositions in support of his defense, which went to the whole action.

Pending the suit Magee alleges, in the present action, that he fled the county to avoid arrest on the charge of illicit distilling, and that he was therefore prevented from defending the action as he otherwise could have done; and moreover he avers that he executed one of the notes sued on to aid appellee in avoiding the payment of his debts.

It is not necessary to analyze the evidence in support of appellant's claims against Marion Phelps, as it was his duty not to run off from the county, although the United States marshal was attempting to prosecute him unjustly. Such a ground for a new trial can not be recognized by the law. The allegation by appellant that he executed one of the notes for Phelps' share of the brandy to prevent his creditors from getting it shows that the appellant participated in Phelps' fraud, and the law will afford him no relief on that ground. He made no such defense in the action in which the judgment was rendered against him, and it is too late now to make such defense, even if it had been available in the original action.

He holds the affirmative now, and the burden is on him to make out his action for relief, which a court of equity will not afford where the grounds of relief alleged and proven is a fraud in which the complainant participated. Equity, in such cases, leaves the parties where it finds them. Hence the court did not err in refusing to vacate the judgment and grant appellant a new trial.

The suit in ejectment by appellees, based upon the sheriff's deed made in pursuance of a levy and sale of the appellant's land for the satisfaction of the judgment, can not be considered, as the court expressly refused to decide it but directed its preparation for the succeeding term.

Wherefore the judgment is *affirmed*.

G. Pearl, for appellant.

C. B. Faris, for appellees.

WILLIS ADAMS ET AL. *v.* JOHN K. MCCLARY ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—615.]

Suit to Set Aside Deed Made by Commissioner for Fraud.

The assignee of property for the benefit of creditors procured an order to sell the lands of the assignor, and a partner of the assignee made the sale to a third partner at a very low price, under a fraudulent agreement between the assignee, the commissioner and purchaser to divide the land. It was held that the assignee, commissioner and purchaser should be treated as trustees of the lands bought by one of them for the use of the assignor's creditors.

APPEAL FROM ROCKCASTLE CIRCUIT COURT

January 6, 1883.

OPINION BY JUDGE HARGIS:

John S. Adams assigned all of his property to Wm. McClure for sale and payment of his just debts. McClure accepted the trust and filed a petition against the creditors, etc., and obtained a judgment of sale of all the lands, which was made by the master commissioner, Fish, and the appellee, McClary, became the ostensible purchaser.

The evidence shows that the master commissioner, Fish, the trustee, McClure, and the purchaser, McClary, were partners in the purchase made by McClary. It discloses the fact that after the master commissioner, Fish, died a title bond was found amongst his papers, from McClary to him, for one-half interest in the eleven hundred odd acres of land which McClary had purchased at the sale of Adams' property made by Fish as master commissioner; that McClure admitted he had an interest in McClary's purchase, and on one occasion a witness heard the three discussing their interest in the land and McClure declared his interest was worth $700. It is significant that neither McClure nor McClary gave his deposition in the case to disprove these damaging facts which if true show that the law has been violated by them.

This action was brought by Adams and several of his creditors to set aside the sale and nullify the deeds made to McClary for the land so bought, and to compel the master commissioner and McClure to account for the purchase-money which had been paid by innocent purchasers of other tracts of land belonging to Ad-

ams' estate and which were sold under the decree to pay his debt. It appears that, although several tracts were sold to different persons and more than eleven hundred acres to McClary, no distribution of the proceeds were made by the master commissioner, Fish, or the trustee, McClure, or by the court, to the creditors of Adams.

The court compelled the appellants to elect which cause of action they would prosecute, whether against Fish and McClure for the proceeds of the sale, or McClary and them for the lands bought by him. Without objection, they elected to proceed against the latter and dismissed the former without prejudice. After the evidence was taken, and while the appellees' answer was on file as a defense to the action, the court sustained a demurrer to the petition and amended petition and dismissed appellant's action.

The pleadings were full and explicit in the charge of conspiracy and fraud upon the part of the appellees, McClure, McClary and Fish, in the purchase of the lands at a greatly inadequate price, and if true, as the demurrer admits and the proof establishes, we are unable to see any reason for sustaining the demurrer or in refusing the relief prayed for by the appellants.

This is not an action to vacate the judgment, but is an action to set aside the sale, which is alleged to have been fraudulently made and not discovered until within twelve months before the suit was commenced. It is the undoubted law that McClure, McClary and Fish should be treated as trustees of the lands bought by McClary, for the use of Adams' creditors, if the facts alleged and proven in the record as now prepared are true. But as the court sustained the demurrer and refused to act on the exceptions of appellees to the depositions taken by the appellants, it may be on the return of the cause that appellees will be able to introduce countervailing evidence, and therefore should be allowed to proceed with their defense from the point of filing their exceptions to the depositions as if the demurrer had not been sustained.

Wherefore the judgment is *reversed* with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

Isaac A. Stewart, G. Pease, for appellants.

W. O. Bradley, for appellees.

J. H. GARDNER'S ADMR. *v.* J. H. ROBERTS ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—614.]

Revivor of Actions.

Although the time has passed for a revivor according to the summary mode prescribed by the Code (1876), Title 11, still that mode of revivor does not impair the right to bring any necessary party before the court by other appropriate means.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 6, 1883.

OPINION BY JUDGE HARGIS:

This is the second appeal in this case. On a former appeal this case was reversed because the commissioner's report of sale had been confirmed after the death of the alleged purchaser and without any revivor of either the original or cross-action against his real representatives. On the return of the cause it appears that Gardner's heirs declined to revive the original action in their names, and his administrator resisted the efforts of Hoffman, the bank, and Roberts to do so. It seems that the heirs and administrator together not only blocked all efforts at revivor of their action, but brought the court to the point of disclaiming power to proceed with the case. The orders appealed from present an anomaly in judicial proceedings.

The court overruled appellees' motion, made in pursuance of the summary mode provided by the code, to revive the original action in the name of the heirs of J. H. Gardner, who was the plaintiff in that action. This was correct, as four years had expired from Gardner's death before the motion, based on notice, was made to revive, and according to the provisions of the code the time had elapsed within which the action might have been summarily revived. Civ. Code (1876), §§ 508, 509.

The administrator then moved to set aside the commissioner's report of sale and the appellees moved to confirm it, but the court decided it could do neither, without the heirs were before the court. The administrator, after the order was made, successively moved the court to dismiss the cross-action of the appellees and for a re-sale of the land, which were overruled, and the administrator has appealed and the appellees have prayed a cross-appeal.

It will be noted that the administrator procured a reversal of the order confirming the commissioner's report of sale, on the former appeal, because the heirs of his intestate were not parties; yet he resisted, on the return of the case, a revivor in the name of the heirs and moved to set aside the sale which may not have been to their interest, and in the setting aside of which they were as much interested legally and as necessary parties as they were in the proceedings to confirm. This action upon his part is inconsistent, while it may be intended to subserve the pecuniary interest of the heirs. But it seems to us that if the heirs were interested in the confirmation of the sale to their ancestor, they were equally interested in the proceedings to set it aside and deprive them of the real estate which, if the sale were confirmed, they would inherit from him. So the court properly overruled the appellant's motion, for the reason that the real representatives of his intestate were not parties, without reference to any other that may exist.

The appellees amended their cross-petition, in which they sought to recover the amount of their mortgage debt, and made the heirs of appellant's intestate parties. The amendment by appellees was in the nature of a bill of revivor and to bring the necessary parties before the court, which was their right and duty to do, according to Civ. Code (1876), § 23. Although the time had passed for a revivor, according to the summary mode prescribed by Code (1876) Title II, yet, as has been held by this court in *Greer v. Powell,* 1 Bush (Ky.) 489, that mode of revivor does not impair the right to bring any necessary party before the court by other appropriate means, and the court therefore properly refused to dismiss the cross-action, it not being possible or necessary to proceed to revive the cross-action against the heirs by the provisions of said title.

The court refused to set aside or confirm the sale, and as no final order has been made respecting the sale no appeal lies to the new action of the court about that matter. As the parties are anxious to avoid future litigation on the much vexed question of parties to this action, growing out of a struggle for position in the anticipatory contest over the confirmation of the sale on the merits, we suggest that as there has been a sale which is not denied, and which vests the equitable right to the house and grounds on which it stands in the heirs of J. H. Gardner, if he was the purchaser, it is the duty of the court to respect their rights and not

to sell the property bought by their ancestor unless they successfully resist the confirmation of the sale; and this they can not do without becoming parties to the original action by consent of appellees now, or unless they, as defendants to the cross-action of appellees by appropriate answer and defense, defeat the appellees in their affirmation that the sale was made and their ancestor was the purchaser, in which event the whole of the land and the house should be subjected to the liens of the parties according to their priority, about which there seems to be no controversy.

But should the appellees show the sale and purchase by J. H. Gardner in such a light as a court of equity ought to confirm it, the court should credit the amount of his bid on the debt due his estate and, if it is thereby extinguished, adjudge the appellees the amount of the mortgage and direct a sale of the remainder of the land to pay it, and leave the heirs to their pleasure as to whether they will have the sale to their ancestor confirmed.

We see no error in any of the final orders appealed from, and as we have no power to order the court to proceed with the case we will so far as it has gone *affirm* its action on the original and cross-appeal.

Tyler & Hazelrigg, for appellant.

H. L. Stone, W. H. Holt, for appellees.

[Cited, *Louisville v. Woolley,* 108 Ky. 691, 22 Ky. L. 405, 57 S. W. 499.]

JOHN F. THOMAS ET AL. *v.* BENJAMIN B. WHITTAKER'S ADMR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—616.]

Release of Sureties.

When there is litigation between A and B as to who is entitled to receive the proceeds of an insurance policy, the company pays the money into court, under direction of the court the money is loaned to A, C and D become his sureties, and by the judgment of the circuit court A is adjudged to be the owner of the money and the sureties are declared released, but on appeal the judgment is reversed, the sureties are not released; and when as a result of a second trial the fund is adjudged to belong to B, the sureties are liable to B if A fails to account to B for the money.

APPEAL FROM McLEAN CIRCUIT COURT.

January 6, 1883.

OPINION BY JUDGE PRYOR:

Pending a litigation between the appellee and one Howard as to which of the two was entitled to the benefit of an insurance policy the money was paid into court by the company, and an order made directing the receiver to loan it out and take bond with surety for its payment. The receiver loaned the money to Howard (the plaintiff) with the appellants as his sureties. The court below, upon a hearing of the case, adjudged that Howard was the beneficiary of the policy, entering a judgment to that effect, and also by that judgment canceling the bond upon which the sureties were bound. From that judgment Mrs. Whittaker appealed and this court reversed the judgment below and determined that Mrs. Whittaker was entitled to the money. The sureties resisted payment and obtained an injunction to prevent the collection of the money upon the ground that the bond was in terms canceled by the court below and that they were released from all liability. It is not pretended by the sureties that the bond was canceled in any other manner or for any other reason than that the money belonged to the principal obligator for whom they were bound; but because the judgment recites that the "bond is canceled" and ordered to be delivered up, they maintain that it must remain canceled because they were not heard on the appeal. If they were *quasi* parties to the action by the reason merely of having given the bond they were also *quasi* parties to the appeal; and as the only satisfaction insisted on is that the adjudication by the court below giving the money to their principal, we can not well see how they are to avoid liability.

The judgment giving the money to Howard and canceling the bond was the judgment appealed from, and this court determined that the judgment was erroneous and gave the money to the appellants on that appeal. The judgment below, having been reversed, was a nullity. The sureties were not necessary parties to the appeal, and if the judgment had been in favor of Howard without reference to the bond its effect would have been to cancel it, or its collection could not have been enforced until the judgment was reversed or set aside. It is conceded in argument and shown by the facts that the only way the bond was canceled or satisfied was from the language used in the judgment rendered. The sureties we think were properly made liable. The complaint that there

was no injunction and that damages should not have been awarded is equally untenable. The order of injunction was indorsed on the summons, bond executed, and the appellants are now here insisting that the court below erred in dissolving it.

The judgment below is *affirmed.*

Chas. Eaves, Williams & Powers, L. W. Gates, for appellants.

W. N. Sweeney, for appellees.

JAMES A. BIBB ET AL. *v.* NANCY HALL.

[Abstract Kentucky Law Reporter, Vol. 4—616.]

Instruction Not Objected To.

When no objection is made to an instruction asked by the plaintiff, but a mere exception is taken, no question is raised by such exception, under Code (1876), § 333, there must be both an objection and an exception.

Written Evidence Not Authenticated.

Written evidence not duly authenticated is not admissible, and where on appeal the record fails to disclose that the offered document was authenticated no error is shown by the court's refusal to admit it.

APPEAL FROM OWEN CIRCUIT COURT.

January 6, 1883.

OPINION BY JUDGE PRYOR:

The principal defense made by the appellant in this case is a plea of a former adjudication between him and the appellee in regard to the corner, or the line of their respective lands, involving the title or the possession of the land in controversy. There is ample proof in the record that the appellee was in actual possession of the disputed territory, if her boundary line embraced the land in dispute. Her farm or portions of it was rented out to tenants, and the part of the land in dispute was in the woods and unenclosed or not rented, so if her boundary embraced the land she was in possession. There is proof conducing strongly to show that the disputed territory is within her boundary, but if a previous litigation to which she was a party has settled the boundary that ends this case. The record containing the evidence of this

litigation was excluded from the jury because, as we suppose, it was not properly authenticated. There is no certificate of the clerk that it is a copy of any action that had been pending or determined in the Owen court or in any other court, and while this may not have been the reason for its exclusion it comes here in that condition, and this court must hold that it is incompetent to establish any fact affecting the rights of the parties.

The instruction asked by the plaintiff was not objected to. Exceptions were taken, but under the code there must be both an objection and an exception. Code (1876), § 333. The instructions were asked by the plaintiff, given and excepted to. This will not answer, as this court has often decided. The court properly refused to instruct the jury as to the litigation said to have been had by these parties with reference to this land, as the record had been excluded. The fifth instruction was a mere abstract proposition, and in the second instruction the court had told the jury that the land in controversy must be within the boundary of appellee's deed before she could recover, and they must also believe she was in the actual possession.

The testimony in the case authorizes the judgment for the appellee, and we find nothing in the statement of George Smoot that was incompetent or excepted to. Various plats were exhibited to the jury during the progress of the trial, and a plat in use in a litigation with Bibb to which Mrs. Hall was not a party seems to have been used. But we can not say that the exhibition of this plat affected the rights of either party, but on the contrary, from the character of the entire proof, it could not have conduced to influence the jury either way in making up their verdict. The only defense that appellant really has, if any, is in the excluded record. If that was perfected or made competent, it might, if the line in controversy was litigated in that action, constitute a bar to the present proceeding.

The judgment below must be *affirmed.*

Strother & Orr, Green & Lindsay, D. W. Lindsay, for appellants.

Geo. C. Drane, for appellee.

R. WAND v. R. D. NICHOLL.

[Abstract Kentucky Law Reporter, Vol. 4—617, as Wand v. Nicoll.]

Partition by Agreement.

Where two persons own land as tenants in common, a partition by agreement is only effective when the agreement is sanctioned by both; and a partition will not be enforced which is unfair and where it is not shown that both of the parties have fully agreed to the division.

APPEAL FROM SIMPSON CIRCUIT COURT.

January 11, 1883.

OPINION BY JUDGE LEWIS:

Even if the dividing lines between Barnett and appellant had been definitely and properly established and fixed, it does not appear that she either understood or agreed to the division. In fact, appellant seems to have been almost entirely ignored throughout the transaction. According to the evidence of Barnett, the other joint owner of the land, the division was made upon his own motion. He neither consulted nor procured the consent of the appellant because, according to his arbitrary interpretation of the deed, he considered himself entitled to one-half the number of acres regardless of value, and, as it seems from the plat, alike regardless of the number or courses of the lines and of the shape and location of the two lots.

Appellant is shown to have been at the time of the division a feeble old woman in both body and mind, and according to her testimony, which is not contradicted, she never was consulted at any time as to how the land should be divided. She did not know while the division was being made how the lines were run, nor did she even know exactly how they had been run when her deposition was taken.

The most essential and indispensable element of a contract seems to be absent from the parol agreement sought to be enforced by appellee, for she swears she never at any time consented to the division as made, or said or did anything to induce the belief on the part of any person that she either understood or agreed to the division, and there is nothing in the record to show that she did. It is true R. B. Hampton states that she sent for him, and that,

upon being told by him he would not consent to do anything unless she would agree to abide by what he did, she did agree to abide by any division he might make. But she denies she ever told him she would abide by his division of the land, and says expressly she had no agent and no one represented her in the division.

Even if the statement of Hampton be true she is not bound by his acts, for in the first place he assumed to act for Barnett as well as for appellant, and to answer to the sureties in the debt of Barnett for both. In the second place he, according to his own admission, exceeded the authority conferred upon him. All he had any authority to do, if appellant's authorized agent at all, was simply to make the division according to the rights of the joint owners under the deed. Instead of doing so he not only misconstrued the deed to the great injury of appellant but proposed that if the sureties of Barnett would give up their mortgage he would make appellant and Barnett make them a deed up to the division as they ran it or to any person they might direct. So Hampton, instead of acting solely for and in the interest of appellant in an agreement with Barnett, the joint owner of the land, undertook to act for both and to stipulate for both in an agreement with Barnett's sureties.

Appellant was entitled to a division according to the intention of the grantor as shown by the terms of the deed to her and Barnett, and, conceding Hampton's authority as agent to make such a division, he had no right to compromise or correct her rights with the debt due by Barnett, or to make the division dependent upon concessions made by the sureties of Barnett for his and their advantage.

It is satisfactorily shown that the part of the land allotted in the division to Barnett exceeds in value that allotted to appellant from $250 to $400, which, considering the actual value of the entire tract, is an excessive and unconscientious disparity. It is manifest the unequal division resulted from a misunderstanding of the deed in part, and to a disregard of both the rights and interests of appellant.

It would be going an unreasonable and dangerous length to enforce a parol agreement for the division of land made by a pretended agent who thus compromises the rights of his principal without her authority, especially when she has never been apprised

by such agent or any other person how or when the division lines have been run, or directly or indirectly agreed to such division.

The doctrine of estoppel does not apply in this case for manifest reasons. Appellant did not, previous to the purchase by appellee, agree to the division, did not know how it was made, nor did she do or say anything from which appellee might reasonably infer she had agreed to or acquiesced in the division after it was made. Besides, the deed made by the commissioner to appellee in the action to enforce the mortgage lien upon Barnett's portion of the land shows that appellee did not purchase the land according to the division sought in the present action, but what he did purchase and was actually conveyed to him was the undivided one-half of the tract of land. He now occupies the inconsistent and untenable position of seeking to recover of appellant different and more land than he purchased at commissioner's sale. Even Barnett, if his portion of the land had been unencumbered, could not in our opinion have enforced against the appellant the alleged parol agreement. The attitude of appellee is that of a bidder and purchaser at a judicial sale, seeking to recover of appellant land not sold or conveyed to him, and in virtue of a parol agreement that no other bidders at the sale were apprised of, or could have availed themselves of.

It is our opinion that the court below erred in adjudging that the division should stand as made and in directing a deed of partition to be made in pursuance of that division. Wherefore the judgment is reversed and cause remanded with directions to cancel the deed of partition and for further proceedings consistent with this opinion.

But as appellee is entitled to a division it may be had by the proper proceedings in this action. It was the manifest intention of the grantor that the division should be so made as to have the two lots as nearly equal in value as possible, and that while she desired each to have an equal number of acres of cleared and timbered land, and that one lot should be the most northern and the other the most southern half, that all other conditions should be modified when necessary to secure equality in value. The commissioners in making a division should take the land as it now is and divide it according to the above interpretation of the deed.

Milliken & Bush, for appellant.

Geo. C. Harriss, for appellee.

W. P. DEVON *v.* BALTHASA KOBIGEN ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—617.]

Competency of the Wife to Testify.

While a wife can not testify for or against her husband, she may testify for herself; and where creditors institute an action to set aside a conveyance from the husband to his wife, claimed to have been made to defraud them, the wife is a competent witness for herself.

Claim of Wife Under an Executed Contract.

Where a contract between a husband and his wife is executory merely the wife's claim must yield to the creditors; but where it is executed in good faith by reason of the prior agreement and before the creditors have seized the property by execution, attachment or otherwise, the wife's claim prevails.

APPEAL FROM PENDLETON CHANCERY COURT.

January 11, 1883.

OPINION BY JUDGE PRYOR:

If the objection made to the competency of the witness or her testimony on the ground that she is the wife of the codefendant is available, then the judgment below is erroneous. We perceive nothing, however, in the objection. The action was instituted for the purpose of canceling the conveyance made by the husband to the wife upon the ground that it was in fraud of the husband's creditors. The defense is that the conveyance was executed in performance of an agreement between the husband and wife that the conveyance should be made to the wife. The consideration as alleged is that the proceeds of the real estate of the wife paid for the land. The wife, who is a defendant, testifies to this agreement, and her statement, connected with the fact that the proceeds of her estate purchased the property, is sufficient to authorize the judgment below. It is immaterial that the wife is interested or made the agreement during marriage. She can not testify for or against her husband but she may testify for herself. Code (1876), § 606, makes as one of the exceptions "except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either, but not both, of them may testify."

The wife is corroborated by the testimony of the son, and there is no doubt but that her property purchased the land. The contract between the husband and wife had been fully executed before the creditor undertook to assert his claim against the land. The equity of the wife to a conveyance is manifest by reason of the agreement to convey in consideration that the wife's property should be applied to its payment. Courts of equity make a distinction between such executory agreements between husband and wife and cases where the agreement has been fully executed by a conveyance. Where it is executory merely the wife's claim must yield to the creditors; but where it is executed in good faith by reason of the prior agreement and before the creditor has seized the property by execution, attachment or otherwise the wife's claim prevails. As to the stock, etc., on the place there is no denial of the allegation that it belongs to the wife. *Pryor v. Smith,* 4 Bush (Ky.) 379; *Maraman's Admr. v. Maraman,* 4 Metc. (Ky.) 84; *Sanders v. Miller,* 79 Ky. 517, 3 Ky. L. 295, 42 Am. Rep. 237; *Campbell v. Campbell's Trustee,* 79 Ky. 395, 3 Ky. L. 15. We perceive no error for which this judgment should be reversed.

Judgment below is therefore *affirmed.*

D. A. Glenn, Leslie F. Applegate, for appellant.

Duncan & Barker, for appellees.

JOHN B. TILFORD ET AL. *v.* MARY BELL ALLEN.

[Abstract Kentucky Law Reporter, Vol. 4—617.]

Payment of Interest Coupons.

Where interest coupon notes signed by the husband are payable to bearer and secured by mortgage, as is the principal debt, one who, intending to prevent the foreclosure of the mortgage, pays off the coupon notes which are due and they are turned over to her, has a lien under such mortgage and may enforce it against the mortgagor.

APPEAL FROM BOYLE CIRCUIT COURT.

January 11, 1883.

OPINION BY JUDGE PRYOR:

The interest coupons annexed to the notes were signed by Bell and payable to bearer. They read as follows: "On the 10th of

January, 1879, I will pay at the Savings Bank of Louisville, Kentucky, $45, six months interest due on that day on my bond No. 3 for $1,000, issued to I. I. B. Hilliard, trustee, or bearer. Signed Thos. H. Bell." Several of these coupons were delivered to Mrs. Allen, having been purchased by her, as she alleges, of the holder. That she intended to purchase is evident from the testimony of I. L. Allen, and it is clear that she paid the amount of the coupons and they were delivered to her. This is not like the payment of interest upon an ordinary note, but is a separate obligation for a particular amount, signed by the obligor, and upon which any one holding the paper can sue. The interest was not paid out of the estate of the assignee, but the notes were taken up by the appellee and out of her money, and for the reason, as expressed in the letter by her husband, that she would hold a lien on the mortgaged estate.

She was not paying it at the instance of the assignee nor at the instance of Thos. Bell, and there is no reason assigned why she wanted to take up those coupons. It may have been that she feared if the interest was not paid the whole sum would become due and the land would be sold at a sacrifice, and supposed that they wanted to use the interest, and by advancing the money she would hold the notes as the original payee did, and that the lien would be still retained. The appellants say that they did not want the money and would have accepted the money only as a payment and in no other manner, while the appellee says that she supposed they wanted the money and accepted it, thereby substituting her to their rights so far as the lien was concerned. In the letter to appellants or their attorney the appellee says through her husband, after expressing a desire to pay the coupons due, that he wanted them assigned to his wife that she might have a claim to the amount of interest paid on the mortgaged land. Allen says he made the trade believing that his wife would occupy the same relation in respect to the coupons that the mortgagees did who held them, and that he signed an assignment for that purpose and was told that being payable to bearer it would have the same effect as if an assignment was made. The one party regarded it as a payment, and the other as a purchase or that the lien would be equal to that of the coupons unpaid on the principal bonds. It is certain that Mrs. Bell permitted her money to be used for that reason,

and upon the facts as presented we are not disposed to disturb the judgment below. Judgment *affirmed.*

Chas. C. Fox, for appellants.

Vanwinkle & Rodes, for appellee.

HENRY ENDIES' EXR. *v.* HARRIETT HARRISON ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—618.]

Creditors May Force the Sale of an Interest in Property Held by Their Debtor.

Where brothers purchase real estate and the title is conveyed to one of them, and the property is improved by both and held for nearly twenty years, the one holding the conveyance never asserting the entire ownership, can not as against the creditors of the other maintain that he alone owns the property. The interest of the other may be subjected by the creditors to the payment of their claims.

APPEAL FROM McCRACKEN COURT OF COMMON PLEAS.

January 13, 1883.

OPINION BY JUDGE PRYOR:

The conveyance from Trimble to Henry Endies was made in the year 1857, and the extension of the buildings owned by Robert Endies upon this lot, or a portion of it, was done in the year 1858. The two were brothers and had been connected in business relations for a great many years. They purchased and held real estate jointly, and sometimes, according to the statement of Henry Endies, the deed of conveyance would be taken to one instead of both. Robert, as Henry Endies admits, paid one-half the costs for erecting the buildings, and in this condition the property remained for nearly twenty years. No claim was set up by Henry Endies as absolute owner until the judgment was rendered in behalf of Robert Endies' creditors subjecting the property or Robert Endies' interest to the payment of the latter's debts. Henry Endies admits that his brother was to have one-half the property by paying one-half the purchase-money, and that this arrangement was made at the time the buildings were erected. It is unreasonable to suppose that Robert Endies would have erected buildings

and expended his own means in improving the porperty without any understanding in regard to his interest, and we can well see after the lapse of so many years that Henry Endies may have forgotten as to the manner in which his brother had accounted for his part of the purchase-money. It may have been, and doubtless was, partnership or joint funds that purchased the property in the first instance, and certainly after contributing to place such valuable buildings on the property by Robert Endies, and after the lapse of nineteen years, it would require the strongest and most satisfactory proof to satisfy the chancellor that the property had not been paid for.

After the death of Robert Endies taxes were paid upon his part of the property by his heirs or executors, and nothing is said about the ownership of the ground until after a judgment has been rendered to sell it. It is not necessary to discuss the question of *res adjudicata,* as the other facts in the case, we think, establish the right of the chancellor to sell the property.

The judgment below is therefore *affirmed.*

Marshall & Kilgore, W. D. Greer, for appellant.

L. D. Husbands, for appellees.

FRANK STRASSEL *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—618, as Strassell v. Commonwealth.]

Criminal Law—Instructions.

Where instructions in a criminal trial are given verbally and are not in the record, it can not be determined whether the accused was prejudiced by them or not. Where a written instruction was not excepted to, though erroneous, the error will ordinarily not avail the accused in the Court of Appeals.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 13, 1883.

OPINION BY JUDGE PRYOR:

It is a little remarkable that the appellant should have been the victim of an unjust suspicion in both the cases appealed here, the one an indictment for robbery and the other for malicious shoot-

ing. The suspicion seems to have been well founded, also, as the facts developed in each case conduce strongly to establish appellant's guilt. When each case was called there was no effort made to continue either on account of the absence of counsel or for the purpose of procuring witnesses. The court appointed counsel to defend the accused, who was no doubt controlled in the conduct of the trial by the facts the commonwealth had developed establishing the guilt, and saw no means of escape from a verdict of guilty.

After the trial is over the appellant for the first time suggested by way of affidavit that members of his own family could establish his innocence by proving an alibi. His brother was examined for the defense upon that question, and from his intimate and frequent relations with the police court the jury no doubt discredited his testimony. There is not a single exception in the case. It appears that the counsel for the accused and the commonwealth agreed as to the law of the case, and the jury took the facts into consideration without a written instruction. This was error if there had been an exception made, or, under the circumstances, if the accused had been convicted by reason of an erroneous instruction there might have been some ground for reversal. Here the verbal instruction is omitted from the record and we can not determine whether or not he was prejudiced by it. All the record is before us but that instruction, and if the jury were properly instructed, although verbally, this court would not reverse. An instruction, if in writing, although erroneous and not excepted to, will not ordinarily avail the accused in this court for a reversal.

The mode of conducting the trial, except so far as the constitutional rights of the accused are concerned, may be waived either by himself or counsel. He may consent to a continuance of his cause, or agree to go into the trial; or he may waive almost any error in the progress of the trial, after the jury has been empaneled, by not excepting at the time. We see nothing in the action of counsel defending the accused indicating a want of knowledge of the law or a lack of interest in the defense. The case was presided over by a judge who would not have permitted a conviction under the circumstances unless the accused was guilty, and when his attention was called to all the facts transpiring during the trial, upon the motion to set aside the verdict, he refused to sustain the motion favorably to the accused. In reading each record we are satisfied of the guilt of the accused, and whether so or not we

see no grounds for reversal in either case. This opinion applies to both the indictment for robbery and malicious shooting.

Judgment in each case is *affirmed*.

H. Clay, J. J. McAfee, for appellant.

P. W. Hardin, for appellee.

ROBERT PRICE AND FRED MATTHIS *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—618.]

Criminal Law—Indictment for Manslaughter.

Time is not a material ingredient of the offense of manslaughter, and an indictment is not bad when it charges that the offense was committed on the ——— day of ———, 188—, for by such charge it is shown that the offense was committed before the return of the indictment. Especially is this shown by the use of the terms "did feloniously * * * kill," etc.

Self-Defense.

In order to justify a killing on the grounds of self-defense, the person assailed must actually believe or be convinced that he is in danger, but he is not bound to have more than reasonable grounds to base his belief or conviction on.

APPEAL FROM HARDIN CIRCUIT COURT.

January 13, 1883.

OPINION BY JUDGE HARGIS:

The appellants were jointly indicted, tried and convicted of the offense of voluntary manslaughter, and in pursuance of the verdict were sentenced to the penitentiary for the period of ten years each, and they have appealed, asking a reversal upon a number of grounds.

It appears from the evidence that the appellants and deceased, Murphy, were in Elizabethtown the evening he was killed, drinking and tippling at different places. At one place the appellant, Matthis, was accused of attempting to get Murphy drunk for the purpose of whipping him. This he denied, and said "he" or "they" could whip him without that, but he persisted in Murphy's taking another drink when even the barkeeper had said he had enough. The three, after some altercation, went off together "arm in arm." Shortly pistol shots, cursing and threats were heard. Next morn-

ing Murphy was found dead near by, with several shots in his face and body and his skull broken.

The evidence introduced by the state shows that Matthis and Murphy began fighting, and that Matthis shot him while Price struck him and otherwise aided Matthis, who also struck the blow that broke Murphy's skull with a slat freshly torn from a fence close to the spot where the tragedy was enacted. There was countervailing evidence which tended to show that Matthis fought in self-defense and Price acted the part of peacemaker, but the evidence, considered as a whole, authorized the verdict.

It is insisted that the indictment is defective because it states that the offense was committed on the —— day of ——, 188—, and therefore does not show the offense was committed at any possible time before the indictment. Time is not a material ingredient of the offense charged, and it does appear that the offense was committed before the finding of the indictment, because the allegation charging the act constituting the offense used the imperfect or past tense, that the appellants "did feloniously * * * kill Thomas Murphy by shooting him," etc. Read with proper grammatical construction and common sense, the reader would necessarily conclude that the offense was committed before the time of the finding of the indictment, which is all that Crim. Code (1876), § 129, makes essential as to the time at which the offense was committed. *Commonwealth v. Miller,* 79 Ky. 451, 3 Ky. L. 231.

Although the commonwealth's attorney in his opening statement may have falsely stated that the appellants had fled, as there was no effort to prove the assertion and it was virtually admitted that they did not flee, it was not error to refuse to allow the appellants to prove that Matthis said the morning after the killing when he left home that he was going after a cane mill and would be back that evening.

Pat H. Carter testified fully, and the court excluded from the jury the objectionable matter called for by the commonwealth, and we can not determine what was the purpose of the attorney for the commonwealth in calling aloud for the jailer and sheriff to be brought into court. If that functionary's conduct was in contempt of the rules of the court there was a proper mode of placing the question before this court, if it affected the rights of the appellants, which has not been done. The testimony of Brownfield that Murphy's character was good in 1869, and before, was competent, as he

stated enough facts to show he ought to be able to speak of his character, which the appellants had put in issue.

Instruction No. 4 was substantially like No. 3, and as both contained the law of self-defense there is no room for complaint on that ground. The discretion belonging to belief has reference to the existence of reasonable grounds for belief which must exist in all cases to justify the use of dangerous means of self-defense. The assailed must actually believe or be convinced that he is in danger, but he is not bound to have more than reasonable grounds to base his belief or conviction on. Hence we do not think the court erred in giving instruction No. 4. The instructions, considered together, gave the appellants the benefit of the whole law applicable to the facts of this case, and placed their defense plainly before the jury for their consideration.

Wherefore the judgment is *affirmed.*

Wilson & Hobson, for appellants.

P. W. Hardin, for appellee.

JOHN W. SIKES *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—619.]

Indictment for Perjury.

An indictment for perjury is good which charges the accused with being sworn by the grand jury, and wilfully, knowingly and falsely testifying that he was not at the burying of "A" in company with "B"; nor did he leave said burying in company with "B," and that he made those statements to avoid discovering and testifying as to who it was that fired and carried the pistol and created disorder, the grand jury having under investigation the question as to who was guilty of said offense.

APPEAL FROM ALLEN CIRCUIT COURT.

January 13, 1883.

OPINION BY JUDGE HARGIS:

This was an indictment under Gen. Stat. (1881), Ch. 29, Art. 8, § 2, charging the appellant with the offense of false swearing. The substance of the indictment is that the appellant was sworn by the grand jury, and wilfully, knowingly and falsely testified that he was not at the burying of Mrs. Marshall in company with John

Gore, nor did he leave said burying in company with John Gore, and that he made those statements to avoid discovering and testifying as to who it was that fired and carried the pistol and created disorder on the occasion of the burying, the grand jury having under investigation the question as to who was guilty of said offense.

'A demurrer was filed and properly overruled, because it does not matter whether or not appellant's testimony was alleged to be material to the establishment of the charge which was being examined by the grand jury, as it was relevant and given on a subject in which he could be legally sworn, and he was sworn by an officer (the foreman) authorized by law to administer an oath. This is all the statute requires to make out the guilt of any person who shall wilfully and knowingly swear, depose or give in evidence that which is false. Gen. Stat. (1881), Ch. 29, Art. 8, § 2. As the allegations of the indictment embrace these requirements it was good.

There are no exceptions to the instructions; besides, they give the law, as above interpreted, to the jury. Wherefore the judgment sentencing the appellant to the penitentiary one year as fixed by the verdict of the jury is *affirmed.*

John H. Walker, John J. Gatewood, for appellant.

P. W. Hardin, for appellee.

COMMONWEALTH v. HICKS.

[Abstract Kentucky Law Reporter, Vol. 4—619.]

Criminal Law—Embezzlement.

A messenger charged with having embezzled one dollar entrusted to him for delivery to another, and convicted, can not be given greater punishment than that provided in cases of petit larceny. Embezzlement can not be punished as a felony unless the property embezzled is sufficient to amount to grand larceny if one was charged with its theft.

APPEAL FROM HENDERSON CIRCUIT COURT.

January 16, 1883.

OPINION BY JUDGE LEWIS:

Appellee was indicted under Gen. Stat. (1881), Ch. 29, Art. 12, § 2, which reads 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, or secrete with intent to do so, any such property, 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."

The acts constituting the offense charged are that the appellee was intrusted by one Graves with one dollar in silver coin, the property of said Graves, to be by appellee carried and delivered to C. Stapp, and before the delivery of said monoy to said Stapp appellee did feloniously embezzle and fraudulently convert to his own use seventy-five cents thereof.

To make the offense complete the money or property must be such as may be the subject of larceny. The main inquiry, therefore, is whether the term used was intended by the legislature to comprehend both grand larceny, which is a felony, and petit larceny, which is punishable only as a misdemeanor, or to be restricted to the former. By the general statutes offenses are classified as felonies or misdemeanors according to the kind of punishment prescribed, felonies only being punishable by death or confinement in the penitentiary. The punishment of each offense, whether felony or misdemeanor, is graduated according to the degree of heinousness of each offense. So that the entire chapter relating to crimes and punishments was manifestly intended by the legislature to be, and should therefore, as far as can properly be done, be construed by this court to be harmonious and consistent.

At the same time the section under which appellee was indicted was enacted, § 1 of Art. 11, same chapter, likewise became a law; and by it persons other than females guilty of larceny of goods and chattels of value less than four dollars are punishable for a misdemeanor by confinement in the county jail for a period of not less than one nor more than twelve months, or the jury in their verdict may direct the punishment to be hard labor for a period not less than one nor more than twelve months. But if the property stolen exceeds in value four dollars the offense is a felony, punishable by confinement in the penitentiary for a period of time not less than one nor more than five years, the precise punishment fixed for the offense of embezzlement described in Art. 12, § 2. In

no case of petit larceny can a female be confined in the county jail more than thirty days. But by an act approved March 20, 1876 (Acts 1876, Ch. 942), Gen. Stat., Art. 11, was amended by substituting ten for four dollars as the value of the property stolen by which to determine the offense to be a felony. But the difference in the punishment of males and females for petit larceny is still recognized and provided for.

It is clear that the legislature did not regard the offense with which appellee is charged of greater enormity than the offense of larceny, nor intend to fix a greater punishment in the one case than in the other, when the value of the money or property involved is the same. But if the term as used in Art. 12, § 2, is to be given its most comprehensive meaning it results that the offense described in Art. 12, § 2, is to be treated and punished as a felony whether the property or money be of the smallest money value or the greatest, or the offender be a male or female.

We are of the opinion that the legislature did not intend that such offenses should be punished as felonies, except when the value of the money or property embezzled is the same it is required to be, in order to make the offense of larceny a felony, and that both reason and analogy require the term larceny to be used and applied in a restricted sense. The judgment of the court below is *affirmed*.

P. W. Hardin, for appellant.

JOHN B. LASHLEY ET AL. *v.* G. B. PATTON ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—619, as Lasley v. Patton.]

Bond for Title.

Where one has a bond for a deed for two tracts of land, and after the death of the person from whom he secured the bond sues the heirs for title to one of the tracts, but made no demand for the other tract, and the land was conveyed by such heirs and has been in possession of such grantees and their grantees for more than thirty years without any notice of any claim against their title, and the bond for title has been destroyed for many years, the failure of those claiming under such bond to notify the parties who were in possession of their title, or to take any steps for its recovery for so long a time, amounts to an abandonment of their claim and a confirmation of the act of their mother in canceling the bond. They can not recover against the good faith purchasers in possession.

APPEAL FROM BOYD CIRCUIT COURT.

January 16, 1883.

OPINION BY JUDGE PRYOR:

The facts of the record indicate clearly an abandonment of title or right by the heirs of Lashley by reason of their laches in the prosecution of their claim. They held a bond for title to the home place as well as the land in controversy. They sued Howe's heirs for title to the one tract but did not sue for or demand a title to the land in dispute. The decided weight of the testimony conduces to show that the land has been in the possession of others for more than thirty years without notice of appellant's title. These parties have been holding under absolute deeds, and appellants under a bond for title that had been destroyed for many years. Besides, they allege and prove that they were cognizant during the entire period of their right to the land, and their failure to notify the parties who were in possession of their title or to take the proper steps for its recovery is such as amounts to a confirmation of the act of their mother in canceling the bond. The oldest child was 42 years of age, and the youngest nearly 30, when this action was brought, and their acquiescence in what their mother did ought to preclude a recovery. There is the testimony of one witness who purchased and entered upon this land, he says, knowing of appellants' claim, but he entered because he thought it of no consequence. These parties in possession are purchasers in good faith, and such an equity to the land as is manifested by the appellants in this case ought not to be enforced after the lapse of so many years.

There is one question, however, in this case that necessitates a reversal. John Ross, who married one of the children of John Lashley, united with them in the prosecution of this action. He was one of the plaintiffs. During the progress of the case he purchased of one of the appellees (Means) his interest in the land in controversy, and files what he terms an amended petition setting up that fact. Means filed no answer and admits by his silence the claim of appellants, unless the pleading filed by Ross is to be regarded as a substitution of Ross for Means. This he does not ask to have done, but chooses to permit the action to progress, and when finally disposed of Means obtains a judgment for the land,

which of course enures to the benefit of Ross. This can not be. Ross was not entitled to a judgment, nor was Means. The purchase of Means by Ross enured to the benefit of all the plaintiffs in the action, and only so much of the land as belonged to the other appellees should have been adjudged to them and the balance to the appellants. The appellee, Ross, had perfected the title and will not be allowed, after uniting with these appellants as plaintiff in the action, although in right of his wife, to purchase during its progress the title of the defendants and in that manner obtain the possession. He bought with a perfect knowledge, as he admits in his pleading, of the right of the appellants to the land, and was seeking to enforce their equity as well as that of his wife against the parties of whom he has purchased. That the title of Means was superior to that of his wife and her coplaintiffs did not justify him in assuming the attitude of defendant as well as plaintiff in the action, and all of the plaintiffs are entitled to the benefit of his purchase.

We perceive no objection to the action of the court in determining the issue as to the forcible entry or as to the value of the corn and oats, and except as to the costs in favor of Means. The appellees enforced the proceedings in both cases and asked the chancellor to pass upon the issues, which he has done. Upon the return of the cause the court below will ascertain what interest Ross acquired in the land by reason of his purchase from Means, and that interest must be set apart to the plaintiffs and Ross in the original action, and for the balance of the land the appellees are entitled to a judgment, and a division may be ordered with a view of each party obtaining the possession and Ross may be allowed to file an amended pleading setting up his lien by reason of his purchase from Means, and to subject the interest thus purchased to its payment unless the appellants contribute their part of the purchase money. The interest of those who contribute will not be subjected to sale. The reversal in this court must be at the costs of Means and Ross.

Judgment *reversed* and cause remanded for proceedings consistent with this opinion.

E. F. Dulin, for appellants.

W. C. Ireland, for appellees.

MATILDA WALKER *v.* J. M. LANCASTER'S ASSIGNEE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—619.]

Judgment Must Follow the Pleadings.

An action on a note for the payment of money and nothing else will not authorize a judgment to sell the debtor's land, or to create a lien upon it. The judge can only decide what is in issue as shown by the pleadings.

Liens of Creditors.

The commencement of a suit on a debt does not create a lien on the debtor's real estate; and where such debtor makes a general assignment for his creditors before a judgment is entered against him on such a debt, the creditors, including the judgment creditor, have only such a lien as the assignment creates. The judgment creditor has no priority.

APPEAL FROM NELSON CIRCUIT COURT.

January 16, 1883.

OPINION BY JUDGE PRYOR:

In this case it appears that the proceeding on the part of Mrs. Walker, although on the equity side of the docket, was only for a judgment for the amount of her debt and interest. The papers are lost but the facts are admitted of record to the effect that in the action referred to no effort was made to subject the estate of the debtor, except by an ordinary execution. It seems that the fund for which Lancaster and his sureties were liable was a trust fund, and they were notified to bring the money into court, as we suppose, and a judgment was rendered for the debt and interest and that the judgment constitute a lien on their estates, and an indorsement be made on the execution to that effect. There was nothing before the court authorizing such a judgment, and as between the parties we can not well see how any lien was or could be created unless by consent.

It further appears that the debtors had assigned their property for the benefit of creditors prior to the time at which the judgment was rendered, and certainly such a judgment can not affect either the assignee or the creditors. No execution had issued creating a lien, and the exceptions are made by both the creditors and the assignee. It is also evident that the appellant, who had been re-

ceiving her pro rata dividend for some time prior to the period in which she asserted this lien, was not relying on the judgment as giving her a preference over other creditors. An action on a note for the payment of money and nothing else will not authorize a judgment to sell the debtor's land, or to create a lien upon it. The court has no jurisdiction over the subject-matter. The notice to bring the trust fund into court did not create a lien, and if it had created an equity a prior equity had already been created for the creditors generally by reason of the assignment.

The judgment below is *affirmed.*

Muir & Wickliffe, for appellant.

Atkinson & Kelly, for appellees.

FRANCIS BERRYMAN *v.* WISSIS HISLE.

[Abstract Kentucky Law Reporter, Vol. 4—620.]

Title by Adverse Possession.

Where parties and their vendors entered into possession of real estate under deeds with well defined boundaries and have been in the actual possession for more than fifty years, the grantee of such a title is bound to take it under a contract of purchase, even though there is a link of the record title missing, and such a title is good.

APPEAL FROM ESTILL CIRCUIT COURT.

January 18, 1883.

OPINION BY JUDGE PRYOR:

We find nothing in this record upon which a reversal should be had. While the title to the land sold may not be evidenced without a missing link in the chain from the commonwealth down, still these parties and their vendors entered under deeds with well defined boundaries and the weight of the testimony shows have been in the actual possession for not less than sixty years; and under such circumstances the appellant was properly required to accept title and take this land under his contract. We see no error in the calculation made giving to the appellant the credits only to which he is entitled. It is evident the appellant is attempting to claim credits to which he is not entitled. The credit of $207 was in full satisfaction of the dower of Mrs. Howard; and for this

the appellant received a credit. Nor was there any error in refusing the filing of the amended answer for two reasons, 1st, because it came too late, and 2d, it contained no defense to the action.

The judgment below is therefore *affirmed.*

H. C. Lilly, for appellant.

Cardwell & Fluty, for appellee.

J. B. ALEXANDER & CO. *v.* SALLIE L. OWENS.

[Abstract Kentucky Law Reporter, Vol. 4—621.]

Trust Will Not Fail for Want of a Trustee.

A trust that has been created by deed under which the beneficiary has been in possession for many years can not fail for the want of a trustee.

Trustee Necessary Party to a Suit.

A trustee who has never renounced the trust, nor yet taken possession under it, is a necessary party to a suit seeking to subject the trust estate to the payment of claims.

Wife's Separate Estate Not Charged With the Payment of a Debt.

The wife's separate estate in land can not be charged with the payment of a debt created by her when the estate is conveyed to trustees for her separate use and benefit and for the benefit of her children, where under the trust created she has no power to sell the land during her children's lifetimes.

APPEAL FROM MEADE CIRCUIT COURT.

January 20, 1883.

OPINION BY JUDGE LEWIS:

By the deed of Levi Lawrence made in 1840 the tract of land sought to be subjected in this case was conveyed to Dorsey & Donney in trust for the sole and separate use, benefit and support of appellee during her natural life, and after her death to go to her children; and a provision was made in the deed for her and her children to occupy, possess and enjoy the land as a residence, which it appears she has done from about the date of the deed to the present time. By the terms of the deed the husband of the appellee was not to have any right, authority or control to or over said land or its proceeds whatever. The power was given to her to dispose of the land only in case of her death without children.

It does not make any difference, even if it be true, that the trustees have never in any way taken possession of, controlled or managed the land. The trust, having been created, can not now fail for the want of a trustee. But one of the trustees is alive and, never having renounced the trust, was a necessary party to the action; and the court below would not be authorized to subject or sell the land without making him a party, even if the pleadings and proof were in every other respect sufficient to justify a sale.

We agree that, by the failure of the appellee to deny the allegations of the petition that the note was given for necessaries, it must be taken as true. But it was executed by her while a married woman and the judgment for the amount of it was rendered before her husband's death. It is not necessary to decide whether or not the judgment thus rendered is valid and enforcible now, for the reason that if it be void the note would be still a subsisting debt. But to what extent, or whether at all, under the circumstances, her separate estate in the land has been or can be charged with the payment of the debt are different questions. In our opinion it can not, nor can the amount of the produce of the land that may be necessary for her support be so subjected.

It appears that an order of attachment was issued and attempted to be levied upon several articles of personal property found upon the land, which was claimed by her son. There is nothing to show outside of the return upon the order of attachment that appellee was in possession of the property attached; nor does the return itself show it. On the other hand, it is shown that appellee did not own any of the property attached, but that it belonged to her son. The claimant of the property was not required by the court to appear and give information concerning the property, nor was he a party to the action. Considering that it was satisfactorily shown by appellee in her response to the rule to produce the attached property, and also by the evidence taken in the case, that she was not the owner of it, we are of the opinion that the court below was not authorized to direct it sold and did not err in discharging the rule and upon a final hearing dismissing the petition.

Wherefore the judgment is *affirmed.*

H. C. Baker, T. T. Alexander, Binter & Brashear, for appellants.

T. B. Fairleigh, for appellee.

H. M. SKILLMAN *v.* J. J. FROST'S EXECUTOR ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—621.]

Dismissal of Appeal.

An appeal will be dismissed on motion where the order appealed from is not a final order.

Lien of Mortgage on Future Property.

A mortgage of property to be acquired in the future is void, and while such a mortgage may be valid as a contract to assign and not as an assignment of a present interest, such a right can not be enforced as against the creditors of the mortgagor.

APPEAL FROM FAYETTE COURT OF COMMON PLEAS.

January 20, 1883.

OPINION BY JUDGE LEWIS:

The decision rendered upon the question submitted whether the mortgage of J. J. Frost to Skillman is valid as to Frost's interest in so much of the property of Frost & Co. as was acquired July 1, 1877, is not a final determination of the right of appellant in the action from which an appeal will lie to this court, for the lower court has the power hereafter to apply the proceeds of sale of such property, when collected, to the mortgage debt of appellant, notwithstanding that decision.

But, although the appeal is premature and must be dismissed, to save further litigation this court will now render its opinion upon the question presented. The case of *Ross v. Wilson,* 7 Bush (Ky.) 29, was in many respects exactly like this one, and involved the identical question raised here. There a mortgage was executed by one Seibert to Ross conveying a stock of drugs, medicines, store, furniture, etc., then in the business and that might thereafter be purchased by or for Seibert in the usual course of business. The question raised and decided was between the mortgagee and creditors whether the mortgage was a lien upon said property subsequently acquired as against the creditors of the mortgagor.

In the opinion the court said: "The general rule is that at law a grant or mortgage of property to be acquired *in futuro* is void; and if it can be upheld in equity, we apprehend it is only valid as a contract to assign when the property shall be acquired, and not as an assignment of a present interest; and if enforcible in equity

at all, it can only be enforced as a right under the contract, and not as a trust attached to the property. And whatever equitable rights Ross may have acquired as against Seibert by the attempt to mortgage property afterward to be acquired, it is obvious that, restricted as are the rights of mortgagors under our statutes of conveyance and registration, Ross derived by the mortgages no available right to the subsequently acquired property as against the creditors of Seibert."

Previous to that case "This question as affecting the validity of an ordinary mortgage, had not, we believe, been directly presented heretofore for the decision of this court; but cases which have been supposed to involve it * * * being restricted in their application respectively to property acquired by accession, as the incident or produce of that which * * * passed by the mortgage, and to mortgages made in the exercise of powers specially conferred by charter."

The case of *Ross v. Wilson,* 7 Bush (Ky.) 29, seems to have been well considered and was followed by *Hutchison v. Ford,* 9 Bush (Ky.) 318, 15 Am. Rep. 711, and *Vinson v. Hallowell,* 10 Bush (Ky.) 538, this court going to the extent in the case in 9 Bush of holding that a mortgage of a crop to be raised on a farm during a certain term passes no title if the crop was not sown when the mortgage was executed, and the mortgagee has no claim against a purchaser for value.

Although the case of *Zaring v. Cox's Assignee,* 78 Ky. 527, 1 Ky. L. 161, appears to be somewhat in conflict with the doctrine announced in the three preceding cases, we think the opinion in these cases should be adhered to and the decision rendered by the lower court *sustained.*

C. S. Scott, for appellant.

D. G. Falconer, for appellees.

[Cited, *May v. Ball,* 21 Ky. L. 1180, 54 S. W. 851; *Jacobs v. Jacobs,* 23 Ky. L. 186, 62 S. W. 263.]

MATT O'DOHERTY *v.* M. L. LEWIS ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—621.]

Marshal's Sale Set Aside.

Where it is shown that property sold by the marshal of the city of Louisville brought only about half its value, and the marshal

failed to advertise the sale by posting an advertisement on the premises, the sale will be set aside.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 20, 1883.

OPINION BY JUDGE HARGIS:

The evidence shows that the appellant's bid, while so far as he is concerned was fair, was not over half the value of the property, and the marshal failed to advertise the sale by posting an advertisement on the premises. This fact alone, coupled with such great inadequacy of price, would have been sufficient to set aside the sale, as in a city like Louisville the most important part of the advertising was omitted. For when a house or tenement is conspicuously advertised by posting on it the advertisement, it seems that it would attract more particular attention in a city than the general mode, and when the decree requires such posting its omission will be sufficient to set aside a sale, especially where the property did not bring even half its value.

Civil Code (1876) § 773, does not apply to this case, as it was pending when the new code took effect (see § 837), and is subject to the laws in force before that event; hence the lien for taxes ought to have been disposed of by bringing the city before the court and ascertaining judicially the amount due.

Wherefore the judgmnt is *affirmed*.

Harlan & Wilson, for appellant.

Rodman & Brown, for appellees.

ELIZABETH ELMORE *v.* WM. F. ELMORE'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 4—622, as Ellmore v. Ellmore's Admr.]

Waiving Right to a Homestead.

At the death of the husband the right to the homestead passes to the widow, with the right of the infant children to occupy it jointly with her; but where the widow accepts the provisions of the husband's' will devising to her his estate she waives the right to a homestead and in that condition the children can have none.

APPEAL FROM MADISON CIRCUIT COURT.

January 25, 1883.

OPINION BY JUDGE PRYOR:

In the case of *Watson v. Christian,* 12 Bush (Ky.) 524, this court held in effect that at the death of the husband the right to the homestead passed to the widow, with the right of the infant children to occupy it jointly with her, but further held that the widow in accepting the provisions of the husband's will devising her his estate waived the right to a homestead. The widow accepted the provisions of the will in this case and therefore has no right of homestead, and if she has no homestead the children under such a state of case can have none. If the children have an interest distinct from that of the mother (the mere right to occupy it with her) then the widow could accept the provisions of the will, thereby losing her homestead, and the children claim the homestead by reason of their interest, regardless of the rights of the mother. We would then have the widow with property she had taken in lieu of the homestead occupying it, or with the right to occupy it, and the infant children in possession of and claiming in their own right the actual homestead, and this would in effect be creating two homesteads in the same estate. Where the widow, being entitled to and in the possession of the homestead, dies or abandons it, her mere failure to occupy it does not affect the rights of the children, but her acceptance of dower or any interest devised to her in lieu of homestead destroys the homestead as to both the mother and the children. Following the case, therefore, of *Watson v. Christian,* which has been recognized in subsequent cases, the judgment below was proper and is now *affirmed.*

John Bennett, for appellant.

C. F. & A. R. Burnam, for appellee.

JOHN H. WHEAT, SURVIVING PARTNER, ET AL. *v.* FRANKFORT COTTON MILLS CO. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—620.]

Liability Under Stockholders' Agreement.

Where a corporation is in need of funds to carry on its enterprise and the stockholders enter into an agreement in writing between themselves, by which they agree in proportion to their holdings to share any liability that any of them may assume to raise funds for the corporation, and some members become liable for such funds, the signers of such agreement become liable for their proportionate shares.

Interpretation of Contracts.

All contracts will be interpreted so as to arrive at the intentions of the parties to them, and the language used should receive a construction influenced by a common-sense view of the whole subject-matter and bearing of the contract between the parties.

Extent of Liability of Parties to a Contract.

Where stockholders of a corporation to raise money to carry on the enterprise sign an agreement to each become liable for his share of liability assumed by any of them for money to be used by the corporation, and such liability is assumed by members, and the corporation becomes insolvent, and it turns out that some of the stockholders signing such agreement are insolvent, the insolvency of such members will not add to the liability of the others, for each became liable not for the others but only in proportion to the stock owned, and the insolvency of such signing members will add only to the loss which must be sustained by the members assuming obligations for the corporation.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 25, 1883.

OPINION BY JUDGE PRYOR:

The parties to this appeal were members of a joint stock company known as the Frankfort Cotton Mills Co., engaged in manufacturing cotton, yarns, bags, warps, etc. The corporation was somewhat involved and also in a condition that required the raising of moneys to enable them to continue the enterprise. Wheat and Chesney were stockholders in the corporation, and were the merchants who bought supplies for the factory and sold the goods. They had been indorsing for the corporation, and feeling some uneasiness in regard to their liability refused or declined to continue liable, or raise money for the enterprise, unless they were in some manner indemnified. With a view of obtaining this indemnity to themselves as well as others of the corporation, at a meeting held by the stockholders on the 21st day of October, 1874, at the office of the company in Frankfort, the following agreement was entered into by the stockholders:

"OFFICE OF THE FRANKFORT COTTON MILL COMPANY.
"MANUFACTURERS OF COTTON, YARNS, BATTING, WARPS, SEAMLESS GRAIN BAGS, TWINE, ETC.

"Milton McGrew, *President.*

"Frankfort, Ky., October 21, 1874.

"Whereas, in conducting the business of the Frankfort Cotton Mill Company it is necessary that some of the stockholders shall indorse bills and notes payable in bank, or otherwise to raise money for the use of the company, now therefore we, the undersigned holders of stock in said company, mutually agree to and with each other that each of us shall be equally responsible with any and all who may indorse such bills and notes or either, and that if any one of the undersigned shall become liable, or have to pay anything on account of such indorsements, we each of us bind ourselves to contribute to the payment of such liability to such indorser and the holder of any such bill or note in proportion to the amount of stock in said company held by us respectively, so that each one of us shall pay his proper proportion of such liability, and that no one shall pay more than in proportion to the stock held by him. But it is agreed that such indorsements in the aggregate shall not at any time exceed the sum of thirty-eight thousand dollars.

"In testimony whereof, we, the undersigned, have hereunto set our names this 21st of October, 1874.

"Milton McGrew,
"Wheat & Chesney,
"John W. Scott,
"W. T. Scott by John W. Scott,
"Lucy W. Scott by John W. Scott,
"Mary T. Dudley by John W. Scott,
"Mary T. Skillman by John W. Scott,
"J. Walcutt,
"W. P. D. Bush,
"Charles Bromley."

Chesney, one of the members of the firm of Wheat & Chesney, died, and in January, 1878, Wheat, as surviving partner, instituted the present action in equity, alleging the insolvency of the Frankfort Cotton Mill Co., and that in the years 1877 and 1878 the firm

of Wheat, Chesney & Co. had become the indorsers, drawers, acceptors, etc., on paper of the company amounting to a sum exceeding thirty-eight thousand dollars. The notes, bills, etc., or copies, are made exhibits in this record. Wheat alleges a payment of part of this sum and the liability of the firm for the balance, and asked the chancellor to compel the appellees, by reason of the agreement filed, to contribute with the firm in the payment of this indebtedness in proportion to the amount of stock held and owned by them in the corporation. Upon the hearing of the case the chancellor below adjudged that the company was liable to Wheat & Chesney for the amount of money actually paid by them for the company, and dismissed the petition as against the other appellees, in which they were asked to be made to contribute by reason of the agreement of the 21st of October, 1874.

The insolvency of the company seems to have been conceded, and that fact is also demonstrated by the record before us, and the only question raised by this appeal is as to the liability of the joint stockholders who signed the agreement. It is insisted first that a party can not be an obligor and an obligee on the same paper. This principle can not apply here, any more than it would any other partnership transaction or joint enterprise. Partners become bound by reason of their interest in the common adventure, and where liabilities of the firm have been assumed by one partner and the partnership assets are insufficient to pay the debts, the other partner as between the two may be compelled to contribute. In a corporation like this the stockholder is only liable individually to the extent of stock subscribed, but he may increase his stock or he may by an agreement between the stockholders increase his liability.

Here Wheat & Chesney declined to continue their liability and the stockholders, who are appellees, entered into an agreement by which they agreed to become liable as between themselves for any debt the stockholders or either of them might as indorsers become liable for on account of moneys raised for the use of the company. It was an understanding to which the corporation itself was not a party, but the stockholders said to each other, "Proceed to raise the money for the use of the firm, not exceeding thirty-eight thousand dollars, and to that extent we will contribute in proportion to the amount of stock held by each." Under such an agreement we can not perceive any reason for denying to the stockholder who

has assumed such a liability for the firm, the right in equity to compel the other stockholders to contribute. The firm is insolvent and the indorser must pay the entire debt or the other stockholders share the loss with him, and we think they ought in equity to contribute by reason of the agreement entered into between them.

It is maintained also that the paper is a guaranty, and that Wheat & Chesney must have given notice of their acceptance of the offer and their willingness to become responsible for the debts of the company. There was no offer made, but an agreement fully executed by which each party became bound in proportion to his stock for thirty-eight thousand dollars in the event the stockholders or any of them assumed liabilities to that extent in the way of raising money for the company. This agreement when signed was taken by the president and deposited with the Farmers' Bank, as some of the witnesses say, to show to the bank the ability of the corporation and its evidences to pay. It was necessary to discount paper and to raise money for the purposes of the company, and when a stockholder under this agreement became liable the others who signed the paper became liable at the same time to that stockholder. This was the purpose of the agreement, as it could not have been contemplated that each stockholder must sign the paper, or have notice of the intention of the stockholders to become liable upon some paper that the company was negotiating in order to raise money. The agreement was a power of attorney, in effect, from each stockholder, saying: "You can bind us for money to be raised by the firm in a sum not exceeding thirty-eight thousand dollars and we will contribute in proportion to our stock." This did not authorize the stockholder without consulting the president of the company or those managing its financial affairs to involve the company in debt, and create liabilities that were not applied to the use of the firm or paid to those whose duty it was to apply it.

For a further defense it is insisted that Wheat & Chesney were not indorsers on some of the paper, but on some they were the drawees or acceptees, and these appellees being bound alone by the agreement their liability is measured by the letter of their undertaking. This is not a case like that of a surety who has in fact received none of the consideration for his undertaking and is therefore under no moral obligation to pay. All of these parties had a personal interest in the company and its profits. They were the

parties really in interest, and all that was done in the way of raising money enured directly to the benefit of each of these stockholders. Besides, it is plain that the intention of the parties was to indemnify the stockholder who assumed a liability on account of the firm, whether he stood as drawer, indorser or acceptor. The question is, Was the money raised for the use of the company, and as between the stockholder, whether as drawer, acceptor or indorser, was the company primarily liable? If so, these appellees should contribute. All contracts should be interpreted with a view to the intention of the parties, and the language which is used should receive a construction influenced by a common sense view of the whole subject matter and bearing of the contract between the parties. The word "indorser" was not used in a mere technical sense, but was intended to comprehend all liabilities assumed by the stockholder in raising money for the firm, and where such a liability was created on the faith of the agreement the appellees are liable.

The point upon which the court below seems to have decided the case adversely to the appellant is that the latter, at the time the written agreement was entered into, represented to the stockholders that the firm of Wheat & Chesney controlled or represented 200 shares of the stock. It is alleged by the appellees in their answer that the representation was fraudulent and made for the purpose of inducing them to enter into the agreement. Several of the appellees state that such a representation was made by Wheat at the meeting and at the time the agreement was entered into, and the weight of the testimony conduces to such a conclusion. The stock in fact stood upon the books of the company in the name of Terry, Wheat & Chesney, and that firm represented the stock originally. Terry had died and the partnership dissolved, the firm of Wheat & Chesney was created, and the stock divided between the members of the firm and the executor of Terry. Terry's estate got 110 shares of the stock, Wheat 50 and Chesney 40. The stock or the manner of its original holding appeared on the books of the company and several of the stockholders knew of Terry's interest. The representative of Terry had been in a stockholders' meeting and voted his stock not long before the agreement was entered into. The proof shows that Chesney knew of the agreement and the signature of the firm's name to the paper, and this was one of the inducements for him to consent that the firm of Wheat &

Chesney should become bound on this paper. The firm of Wheat & Chesney subsequently acquired (after the execution of the writing) the interest of Terry. Wheat denies that he made any such representation, but the testimony of Bush, Scott, Walcutt and McGrew is to the contrary, and it is doubtless true that he believed that he could control that much stock. The amount of each one's stock did not appear in the agreement, and this is a fact that must be made to appear by proof. We do not discover from the facts established by the appellees that Wheat made the statement with any fraudulent intent, and looking to the condition of the company at the time this writing was signed it is unreasonable to suppose that the firm of Wheat & Chesney, who now it is contended had no stock, would undertake to assume and continue to assume all the company's liabilities.

When it becomes necessary to ascertain the stock that Wheat & Chesney did represent as well as the other stockholders, if the facts show that the appellees were misled by what Wheat said, the equity of the case is to hold the firm of Wheat & Chesney as representing 200 shares of stock, as it would be inequitable upon appellees' own showing to make them shoulder the entire debt. We think the proof shows that the 40 and 50 shares were treated by Wheat & Chesney as partnership stock. They were representing their stock, at least when the firm name was signed, and then subsequent action shows the manner in which they regarded it. This is an adventure resulting in loss and under this agreement that is just and equitable these appellees ought to contribute and in the adjustment of their several liabilities the firm of Wheat & Chesney should be regarded as representing 200 shares of stock.

The last and only question connected with this agreement is as to the extent of the liability. It is suggested that some of the stockholders signing the agreement are insolvent and that this increases the liability. The governing rule, the intention of the parties must control, and we think a careful reading of the contract indicates clearly that the only liability assumed was in proportion to the stock owned, and that no greater sum was to be paid, the parties undertaking to indorse the paper risking the solvency of each of the parties to it. The limit of the liability is fixed by the writing. The aggregate liabilities shall not exceed thirty-eight thousand dollars, to be paid by each one in proportion to his stock.

If a greater liability has been sustained by reason of the indorsement it is by the indorser and not by these appellees; but the fact that the liability exceeds the amount fixed does not release these appellees. Our attention has been called alone to the questions raised as to the effect of this agreement, and so far as the settlement between the parties is concerned, or the claim against the corporation by any of its members, or any other defense made below, the question is left open for the reason that the chancellor denied the relief upon the ground the parties were not bound by the written agreement. The questions made as to the liability of the appellees in the writing are decided adversely to the latter.

The judgment is *reversed,* and the questions as to the condition of the company and the amount of property in the hands of Wheat & Chesney belonging to the company and unaccounted for are left open, as they must necessarily enter into a settlement of the accounts between these parties as well as in the settlement of the insolvent corporation.

W. Lindsay, A. Duvall, A. J. James, J. B. James, for appellants.
D. W. Lindsay, John L. Scott, W. P. D. Bush, for appellees.

JERRY GARVEY *v.* JOEL GARVEY ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—622.]

Indorsement Becomes a Part of a Contract.

Where one conveys land to his son, taking a note for the purchase-money to become due several years thereafter, and about one and a half years thereafter by agreement between the father and son the father wrote across the back of such note that "This note is not to be paid in my lifetime but to bear six per cent. interest in the place of ten per cent. This 30th of December, 1868," and signed the same, the indorsement creates a new contract and is a part of the note and the original transaction.

Attachment for Debt Not Due.

Where the debt for which property is attached is not due, and the clerk granted the attachment, such property was properly discharged from it.

APPEAL FROM OWEN CIRCUIT COURT.

January 25, 1883.

OPINION BY JUDGE PRYOR:

Jerry Garvey, Sr., sold to his son a tract of land in the county of Owen for the sum of $7,400, and took from him his notes for the purchase-money, executing at the same time to the son a conveyance without retaining a lien for the purchase-money. One of the purchase-money notes was for $1,850.25, executed on the 1st of March, 1867, and due on the 1st of March, 1871. In December, 1868, about one year and nine months after this note was given, this indorsement was made on the back of the note: "This note is not to be paid in my lifetime but to bear six per cent. interest in the place of ten per cent. This 30th of December, 1868. Signed. J. Garvey, Sr."

Some time after this the son, Joel T. Garvey, sold and conveyed this land to two of his (Joel T. Garvey's) sons, and the father, Jerry Garvey, filed his petition in equity asking for a judgment for his note and alleging that the conveyance to the sons of Joel Garvey was fraudulent, and done to hinder and delay creditors. Other grounds for an attachment were alleged not necessary to be noticed. The attachment was issued and levied, and upon the final hearing the petition was dismissed and the attachment discharged, from which Jerry Garvey appeals. The appellee, Joel Garvey, and his sons controverted the grounds of the attachment, and Joel pleaded that the note was given to him as an advancement, and that he made the purchase upon that condition and no other, stating at the time that he was unable to pay for the land in any other way. There is no mistake or fraud alleged in the execution of the note or the deed, and if there had been the proof outside of the writing conduced to show that it was not a gift or an advancement. There never was any delivery of the note to Joel Garvey, and there is a want of proof sustaining his theory of the case. It is further alleged as a defense, however, that the note is not due and that by the terms of the contract it was not to become payable until after the death of the obligee. This we think is shown by the testimony of old man Garvey, the appellant, and while there is no fraud nor mistake alleged in the execution of the original note, it clearly appears that it was not to become due until after the death of the old man, and in order to make the writing express the real contract the indorsement was made. This was a sufficient consideration for the entry on the back of the note, and that entry became a part of

the note and expresses the real contract between the parties; and having been made by the obligee it was not necessary to allege any mistake. The appellant not only admits what the contract was, but places it in writing under his signature, and it in that way becomes a part of the original transaction.

The rate of interest was changed by the indorsement, and this is the only change made in the original contract by it. The note was not intended as an advancement, because the old man required the son to account for the interest, and the proof shows he was not certain as to the advancements he had made, but expressed his belief that after his death the part of the estate going to Joel would likely discharge the note, but he never contemplated surrendering his control over it, nor placing the debt in such a condition as to prevent his personal representative from recovering it, if it became necessary to do so. The attempt by the appellee to convey the land to his two sons may have been and doubtless was in fraud of the rights of the appellant, but as the debt was not due and the attachment was granted by the clerk it was properly discharged, and this case would be affirmed but for the judgment below determining that the note was an advancement, the case having been adjudged for the appellee upon that ground alone. The judgment must be *reversed* and the cause is remanded with directions to discharge the attachment and dismiss the action without prejudice.

Geo. C. Drane, for appellant.

D. W. Lindsay, J. H. Dorman, Green & Lindsay, for appellees.

R. BAKER'S HEIRS *v.* W. C. GILBERT ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—621.]

Title by Adverse Possession.

An action to recover real estate will fail when the proof shows that the defendant and those under whom he claims have been in the possession claiming the property in controversy for over twenty years, and his possession has been open and notorious, with the claim of ownership made and recognized during all those years.

Record on Appeal.

Deeds or other exhibits relied on as evidence of title must be made a part of the record on appeal by an entry on the order book, or they must be made a part of the bill of evidence; and when they

are not so made a part of the record they cannot be considered by the Court of Appeals.

APPEAL FROM CLAY CIRCUIT COURT.

January 27, 1883.

OPINION BY JUDGE PRYOR:

This petition, although filed in equity, is an action in ordinary for the recovery of a small portion of land, including a mill-seat, alleged by the appellant to be within his boundary. There is no equity relied on by the appellant entitling him to relief, none alleged and no equitable ground for relief established. The appellant was required to show title, and although various deeds are copied into the record we find only two or three of them made part of the record by an order entered of record, and no bill of evidence by which they became a part of the case. The exhibits relied on as evidence of title must be made part of the record by an entry on the order book, or they must be made a part of the bill of evidence.

There is nothing, therefore, in this case authorizing these deeds to be considered, and the appellant is in court without evidence of title. Besides, if the deeds were properly in the case or a part of the record, the proof is conflicting as to the claim of those in possession. The proof shows that they and those under whom they claim have been in the possession claiming the property in controversy for over twenty years, and while the declarations of the ancestor of the appellees may and do conduce to show that he regarded the title of the appellant as fraudulent, it must be recollected that the proof on this subject is conflicting; and a possession open and notorious for a period of twenty years with the claim of ownership, made to many and recognized by those in the neighborhood as existing, ought not to be disturbed by proof of casual conversations had with the party in possession as to the nature of his title, particularly when the testimony as to the conversations is detailed after the death of the party making them. He is not present to cross-examine nor to explain his meaning, and unless the proof is convincing as to the amicable holding, the claim under an actual possession for fifteen years or more ought to prevail. So in either view of the case the judgment was proper and is *affirmed*.

H. C. Lilly & Son, for appellants.

J. & J. W. Rodman, for appellees.

W. JUDAH *v.* JACOB BICKEL.

[Abstract Kentucky Law Reporter, Vol. 4—715.]

Redemption from Judicial Sale.

While in case the chancellor, having jurisdiction of the parties and the thing to be sold, sells, the title passes and the purchasers will hold, still when a creditor who becomes a purchaser accepts the full amount of his debt from the judgment debtor or her surety, he can not hold the money and the property both, and the acceptance by him of payment of his debt amounts to an agreement to restore the property at least in a court of equity.

Rights of a Surety.

Where a surety pays the debt of his principal, and the creditor who has become the purchaser of real estate of the principal sold by the chancellor to pay the same debt accepts from such surety the full amount of his debt, the surety having paid the debt can subject the property for the purpose of reimbursing him; and if the property sells for any sum in excess of the debt, interest and costs, such excess belongs to the principal.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 1, 1883.

OPINION BY JUDGE PRYOR:

The appellant, Judah, is still insisting that he can receive from the principals, Reamer and wife, or their surety, the entire amount of his debt with the interest, costs and damages, and yet hold the property that he purchased in satisfaction or in part satisfaction of the same debt. The payment by the surety is in effect a payment for the principal, and when this case was here on another appeal counsel for Bickel wanted a correction or modification of the mandate so as to require Judah to surrender the property to Bickel upon the ground that Bickel, having paid the debt, was entitled to the property. *Bickel v. Judah,* p. 612, this volume. This court refused to modify the mandate, and for the reason that if the property was sold as directed and brought more than Bickel's debt the balance remaining, whether of the property itself or the proceeds, belonged to Mrs. Reamer. The reason might not have been assigned in the response, if any was made, but Bickel, like Judah, must stop when his debt is paid. Counsel still maintains that the effect of this decision is to nullify Judah's purchase. This is true in some sense, because the

judgment upon which the sale was made has been satisfied. The foundation is gone and the building must fall, as before stated. Suppose Mrs. Reamer instead of Bickel had gone to Judah and paid him the debt, interest and damages, can it be maintained for a moment that he could hold on to the money and at the same time retain the property he had purchased to satisfy the debt? It is immaterial whether the satisfaction is only partial or in full.

We are asked the question, If Bickel the surety had not paid the debt would not Judah as against Reamer be entitled to his rights as purchaser? There can be no doubt upon that question, and as decided in *Yocum v. Foreman,* 14 Bush (Ky.) 494, the reversal of the judgment can not affect the rights of a purchaser. He will still hold the title. But we see no analogy, and there is none, between this class of cases and where the creditor after he purchases the property in satisfaction of his debt, receives the money from the principal debtor or those liable jointly with him in satisfaction of the judgment upon which the sale was made.

A court of equity, if the creditor has obtained a conveyance, will make him surrender the title, or if no conveyance has been made, will declare that whatever rights he acquired by the purchase no longer exist. When the chancellor sells, having jurisdiction of the parties and the thing to be sold, the title passes and the purchaser will hold; but this doctrine does not go to the extent as claimed by counsel that the party after his purchase can do nothing that will entitle his debtor to a reconveyance of the property purchased. It is what the purchaser did after the sale and purchase in this case that affects his title. He certainly had the right, if he desired, to reconvey the property to Mrs. Reamer. He had the right to permit her to redeem it. He had the right to take from her his debt and interest, and this amounted to an agreement to restore the property, at least in a court of equity. Instead of doing this he takes the debt, interest and costs, from the security, and the security having paid the debt can subject the property for the purpose of reimbursing him; and when this is done the remainder follows the rightful owner, the wife of Reamer, in whom the original title was vested.

When this case was sent back this court did not know what amount of taxes had been paid by Judah, or what defense he might interpose against the equity of the parties in interest, and therefore left the case open, and particularly so for the reason

that counsel for Judah differed so widely from the views presented by this court. Judah has paid no taxes, as appears from the record, and with every dollar of his money in his pocket is claiming still more by reason of his purchase under a judgment that has been satisfied in full, otherwise than by the purchase of the land. The judgment of the court below is *affirmed* without damages.

Russell & Helm, for appellant.

Brown & Davie, for appellee.

[Cited, *Talbott v. Campbell,* 23 Ky. L. 2198, 67 S. W. 53.]

SOUTHERN STATES COAL, IRON & LAND CO. *v.* GEO. S. MOORE & CO.

[Abstract Kentucky Law Reporter, Vol. 4—716.]

Parol Proof to Vary Written Contract.

While parol proof is not admissible to vary the terms of a written contract, where a mere memorandum is made and signed by one of the parties and is intended to evidence only the quantity and price, and not intended by the parties to contain the full terms of the contract, such a memorandum will not prevent extraneous testimony. Such a memorandum does not prevent the disclosure of what took place between the parties, nor is it conclusive of what the contract was.

Facts Making Sale by Sample.

Where the seller's agent takes the buyer to his office and exhibits to him samples of pig iron for the purpose of showing him how it is coming in, and the samples are afterwards sent to the buyer for the purpose of acquainting him with the quality of the iron, and these samples are taken by the buyer's yard men as specimens of what would constitute the bulk of a large quantity to arrive, and the samples were intended to control the agent of the seller, it is certain that the purchaser who knew nothing of the product must have been influenced to enter into the contract upon the assurance that the quality would average with the samples exhibited, and in such case it is held the sale was made by sample.

Rights of Holder of Warehouse Receipt.

Where one purchases iron by sample, the iron being stored in a warehouse, and receives assignment of a warehouse receipt and advances money thereon, and the iron is refused because not as good as the samples, the holder of such receipts may retain the same until his lien for money advanced is satisfied.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 1, 1883.

OPINION BY JUDGE PRYOR:

Hull & Co., who were the agents of the Southern States Coal, Iron & Land Co. (a Tennessee corporation), having its place of business at Pittsburg, Tennessee, sold for this corporation, as is alleged, to Geo. S. Moore & Co., one thousand tons of South Pittsburg No. 1 mill iron at the price of $22.50 per ton, to be delivered at Louisville within a reasonable time, in parcels to suit the convenience of the vendors. Hull, who made the contract, had his place of business in Louisville, and so did the vendees, Geo. S. Moore & Co., and both are dealers in pig iron. The contract was entered into on the 16th of July, 1880, as is evidenced by the sale memorandum made part of the record, and that seems to have been delivered to Moore & Co. on that day.

At the time the sale was made the appellant, the corporation, had a quantity of the South Pittsburg No. 1 mill iron, in the depot yard of the Louisville & Nashville R. Co., and on the 17th of July, the day following the contract, handed to appellees (Moore & Co.), an invoice of 202 254-1000 tons of South Pittsburg iron, which at the price agreed on amounted to $3,329.29. The money was paid to Hull & Co. by the appellees and the warehouse receipt delivered to them by Hull & Co. On the 23d of July warehouse receipts for 351 tons were delivered to the appellees and the money received by Hull & Co., amounting to $5,654.92. An invoice of 171 tons with warehouse receipts amounting to $3,089.83 was delivered to the appellees and the money paid and receipted for by Hull & Co. as agents of the appellants. On the 26th of August another invoice was made of 182 tons, and on the 31st of the same month the balance of the one thousand tons was invoiced and the invoice delivered, together with the warehouse receipts, to the appellees.

The appellees declined to advance any money on the invoices of the 26th and 31st of August until they could make an examination of the iron. The whole of the iron was in the yards of the Louisville & N. R. Co., and on the 7th of September the appellees made an examination of the iron and notified Hull & Co., the agents of the appellant, that the iron was of such inferior quality, weak, close, gray and mottled and not up to the samples, that in justice to themselves they would have to reject the entire lot. The agent, Hull, insisted that he had not sold by sample and that the iron was such as he had bound his principal to deliver, and this wide variance between the seller and buyer resulted in this litigation. The

appellees have paid in full for the three lots, as designated by invoices Nos. 1, 2 and 3, and have not paid for the two last, but held the warehouse receipts for all.

It is shown by the testimony in behalf of the appellants that the name, South Pittsburg No. 1 mill, is not, as understood by the trade, descriptive of the quality of the iron, that is, No. 1 mill iron, but is applied to iron that is the product of a particular furnace, and the brand is no criterion as to the quality, except such as the particular furnace produces. That is, the brand No. 1 mill iron, the product of this furnace, would not be considered as passable No. 2, made by another furnace. It is therefore established by the testimony that the iron delivered in Louisville was the product of the furnace having for its brand South Pittsburg No. 1 mill iron, and that the quality was as good and as uniform as the product of the furnace turning out South Pittsburg No. 1 mill.

It is insisted, however, by the appellees, that by the agreement the appellant was to deliver to them 1,000 tons of South Pittsburg No. 1 mill at Louisville, and that it was sold by sample, or if not by sample, that there was delivered to them two samples of the iron labelled South Pittsburg No. 1 mill that they might before purchasing know the average quality of the iron to be delivered. This the appellant denies, and it is the principal question in the case: Were samples delivered to the appellees by the agent of appellant for the purpose of evidencing the quality of the iron to be delivered under the purchase they were then attempting to make? The appellant says that no sample was delivered for that purpose, and if there had been this sale memorandum is the sole evidence of the contract between the parties.

1st. Was this a sale by sample as to the quality of the thing sold? Hull states upon being examined as a witness that he expressly stated at the time to one of the appellees who was examining the various specimens of iron that he would not sell by sample and that it must be so understood, and in this he is corroborated by another witness. He further says that he directed the yard man to send samples of all of his iron to Moore, and this is the manner in which Moore obtained the specimens. All this transpired the day before the contract was consummated. Moore, one of the appellees, states that Hull time and again urged him to go with him to his place of business to look at the samples, and that he

purchased the iron by the samples and the entire negotiation was conducted on that idea. It is also shown that Moore was unacquainted with the product or grades of iron made by the appellant, and it is unreasonable to suppose that he would make the purchase without having some knowledge of the character of iron he was to get. He says he wanted a No. 1 quality of mill iron and that the samples delivered him were labelled South Pittsburg No. 1 mill, the averaging quality of which was the iron he wished to purchase. As soon as Moore left the business house of Hull & Co. with the samples and on the same day, Hull telegraphed to the appellant that he could sell 1,000 tons of the iron but at a less price than the appellant was asking for it, and on the next day the contract was concluded and the sale memorandum made out by Hull & Co. and sent to the appellees, viz.:

"Sale memorandum.
Sold to Geo. S. Moore & Co.
for acct. of S. S. E. I. & L. Co.
1,000 tons S. P. No. 1 mill at $20.50 cash
in Louisville. Very truly,
S. S. C. I. & L. Co. by Geo. Hull & Co."

The appellees then had in their possession the two samples of the iron labelled South Pittsburg No. 1 mill, had never seen the quality of the iron produced by the appellant and knew nothing of its description or character except from the samples then in their possession. Hull in his cross-examination, while maintaining that there was no sale made by sample, says that he took Moore to his office and exhibited the samples for the purpose of showing him how the South Pittsburg was coming in, and he further states that the samples were sent to him for the purpose of acquainting him with the quality of the iron he was receiving and selling in the market, and these samples were taken by the yard men as specimens of what would constitute the bulk of a large quantity to arrive. If these samples were intended to control the agent of appellant, who is supposed to have been familiar with the various brands, etc., it is certain that the purchaser who knew nothing of the product or the particular brand must have been influenced to enter upon the contract upon the assurance that the quality would average with the samples exhibited, and we are therefore satisfied from the testimony that there was a sale by sample.

It is again insisted that the sale memorandum is conclusive between the parties as to what the contract was, and that parol testimony will not be allowed to alter or add to its terms. The general rule is, that when parties have reduced their contract to writing no additional terms and conditions can be added to it by extraneous evidence, and if this memorandum constitutes the entire contract between the parties and was so intended at the time, the evidence showing that it was a sale by sample was incompetent. The question of intention when the contract is complete and found in the writing can not control the action of the court in admitting or refusing parol testimony unless there is an allegation of fraud or mistake, and in the absence of such a defense the writing must speak for itself.

The writing relied on in this case is a memorandum made out and signed by the vendor or its agent, showing the quantity of South Pittsburg No. 1 mill sold, and the price to be paid. When or where the iron is to be delivered, whether in one bulk or in parcels, is not stated, and the parties to the contract did not regard it in any other light than as fixing the quantity sold and the price. This action was not constituted on the contract, but an action brought by the appellant in the nature of an action for goods sold and delivered, and the memorandum exhibited for the first time by the defendant in his examination as a witness during the progress of the trial in the court below. When negotiations were entered into with a view of making this purchase the samples were exhibited to Moore, one of the firm, that he might know the quality of the iron he was about to purchase. He was permitted to take the two samples from the business house of Hull & Co. labelled South Pittsburg No. 1 mill, that the members of his firm might inspect them, and the next day with these samples in their possession they purchased of the agent 1,000 tons of the iron. The contract then was as Moore states it to be, 1,000 tons of iron equal in the average quality to the samples held by them. The fact that the samples were exhibited and delivered to the appellees the day before the sale was made can make no difference. They were delivered to and held by the appellees and constituted a part of the contract with reference to the quality of the iron the moment it was concluded. The memorandum made did not and was not intended to exclude all the negotiations between the parties or to evidence the full and complete contract between them. In the

amended petition it is alleged that by a subsequent contract the iron was to be delivered in instalments. It is evident that the entire quantity could not or was not in a condition to be delivered the next day, and a reasonable time should have been allowed the appellant (as was done) to comply with the contract. This all shows that the contract was an executory parol agreement and the memorandum made merely to show the price to be paid and the quantity to be delivered.

In the case of *Allen v. Pink,* 4 M. & W. 140, Allen purchased of Pink a horse, and the latter warranted the horse to work well in the harness. The defendant, Pink, gave to the vendee (Allen) a memorandum of the sale, as follows: "Bought of G. Pink, a horse for the sum of £7 2s. 6d. (Signed) G. Pink." In an action on the contract alleging a breach of the warranty it was insisted that the contract having been reduced to writing a parol warranty could not be added to it. The court held the action properly brought and said the memorandum was not intended to contain the terms of the contract. In the case of *Pitts v. Beckett,* 13 M. & W. 743, the same principle was assumed. In the case of *Miller v. Gaither,* 3 Bush (Ky.) 152, when there had been a written sale of a slave for the purpose of putting him in the army as a substitute for Miller, oral testimony was held competent to establish a warranty that the slave was suited for the purpose and that such a fact, when established, was not inconsistent with the bill of sale. While this may be extending the rule as far, at least, as the courts should go, it is certainly a much stronger case than where a mere memorandum is made and signed by one of the parties, intending to evidence only the quantity and price; and in these particulars it could not prevent extraneous testimony, if it was not intended by the parties as containing the full terms of the contract. The memorandum does not prevent the disclosure of what took place between them, nor is it conclusive evidence of what the contract was.

The court below, adjudging that the bulk of iron was inferior to the samples and that no title passed to the appellees as vendees, gave a judgment against the appellant for the money paid on the iron, with the interest, and this is assigned for error, the appellant insisting that the delivery of the warehouse receipts, and the payment of the money for the quantity mentioned in the invoices of July 17, July 23 and August 11, passed the title to the appellees, and their remedy, if they have any, is a recovery in damages by

reason of the breach. The money was paid in full for the quantity of iron mentioned in each of the three warehouse receipts first delivered, and a receipt executed by Hull for the money, and if there was nothing else in the case it would invest the appellees with title.

But Moore swears that the agent of the company wanted money for the company, and that he advanced the moneys as the invoices were delivered, taking the warehouse receipts as a lien to indemnify him until the entire bulk was delivered and the opportunity was afforded him of examining the iron. If the sale was by sample we see nothing inconsistent with this statement of Moore, but on the contrary it was reasonable that he should pay the money, reserving at the same time his right to reject the iron if it did not come up to the sample. This statement could not have been made by Moore with a view of relieving himself from a hard bargain. Iron was then advancing and he could have had no other motive than to have the contract complied with by the appellant. Besides, it appears that when this money was paid neither Hull, the agent, nor Moore had seen the iron, and that the money was paid under the conditions stated is entirely consistent with the facts of the case. The invoices were delivered with the warehouse receipts when neither Hull & Co. nor their clerks had seen the iron, but Hull assumed that the delivery would be in accordance with the contract. The appellant was wanting other advances than those made, and on the 21st of August the agent, Hull, wrote to his principal, saying that Geo. S. Moore & Co. wish to have the 1,000 tons delivered before making another settlement. This, we think, conduces strongly to sustain the statement made by Moore that he was to inspect the iron with the privilege of rejecting it before making payment in full. The action of Moore & Co. is entirely consistent during the period the appellant was delivering the iron in Louisville, assuming as this court has, from the facts, that the sale was by sample.

The testimony conduces to show that the greater part of the iron was inferior to the sample, and never having received the iron or any part of it under the contract, the right of the appellant to reject it had never been surrendered, and the examination made by the appellees as to the quality of the iron within a few days after the last lot was delivered must be held to be in a reasonable time, and therefore the judgment for the recovery of the money paid with the interest was proper. The counsel for appellant have

discussed much of this case upon the idea that the weight of the evidence is with the appellant. This case, although in equity, presents purely legal issues, and while there was an exception to the judgment on the motion to transfer the case from the common-law court, no objection was made to the motion and the case stands in that court as if brought originally in equity without a motion to transfer. We can not hold that the judgment below is flagrantly against the weight of the testimony, and without being able to do so no reversal can be had on the facts; and besides, we are inclined to the conclusion that the chancellor has adopted the court's view of the case if the weight of the testimony alone is to control it.

The remaining question arises as to the quantum of damages given the appellees by reason of the breach of the contract on the part of the appellant. If there was a failure to deliver such iron as was agreed upon by the contract the criterion of recovery is the difference between the price agreed to be paid and the price of the iron at the time the bulk of iron was ready for examination and inspection, or in other words ready for delivery, it being conceded that the iron was delivered in the yards of the railway company within a reasonable time. The amount of damages is fixed at fifteen hundred dollars.

It is claimed by the appellees and so adjudged by the court below that the iron was all properly rejected by the appellee for the reason that it was not of the quality sold, and that the appellees held a lien for the moneys advanced by reason of the warehouse receipts. The appellees, however, asserted a much larger claim by way of indemnity than the right of recovering the moneys advanced. They held the constructive possession of the iron by reason of the warehouse receipts. This gave them a lien for the money advanced, and when that was paid the appellant was entitled to the iron. It was appellant's property and held only subject to the lien. The appellees refused to deliver the receipts and so notified the appellant, unless the damages claimed by the appellees were also paid. They assessed the damages at a greater sum than the chancellor, and for months after the rejection of the iron they held on to the warehouse receipts, claiming a return of the purchase-money and damages. Not until about six months after the failure to comply with the contract by the appellant did they express a willingness to return the warehouse receipts on equitable grounds.

The iron was subject all this time to additional charges for storage, etc., and this was allowed the Louisville & N. R. Co. in the final adjustment of this controversy. This should have been deducted from the damages, as they were fully as much as the appellees were entitled to, less the additional storage caused by appellee's action. Whether the appellant lost by reason of a decline in the iron on account of the assertion of the claim to damages does not appear, or at least is not asked for by any pleading in the cause. On the return of the cause the appellant may be allowed to amend his pleading in this particular, and this question as to damages again considered. If additional pleadings are filed a judgment should be entered for the damages less the storage from the time the iron was rejected up to April 1, 1881, when appellees offered to restore the receipts, etc. The judgment is *reversed* as to the question of damages alone, the quantum to be ascertained as directed in the opinion, and the cause is remanded for further proceedings.

Alex. P. Humphrey, R. & L. Buchanan, for appellant.
W. O. & J. L. Dodd, E. W. Hines, for appellees.

MARY TYLER *v.* THOMAS P. JACOB ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—717.]

Vested and Contingent Remainders.

A testator placed the title to all of his estate in his executors and provided that his daughters, who were given a life estate, should have no power to sell or incumber the property; and at the death of the life tenant the estate was directed to be conveyed by the executors or paid to her descendants, if there should be any, in the same manner as it would pass by the laws of descent if the same were to descend from her. If there were no such descendants then the same should be conveyed and paid to her heirs. It was held that the real estate could not be conveyed and a good title given by the life tenant even if her children, who were all of full age, should join in such conveyance; that the grandchildren did not receive a fee by the terms of such will, but that their interests were contingent and not vested; and that in the event that any of said grandchildren should die prior to the life tenant, the children of such grandchild would not be estopped to assert their interest, even though their parent had joined the life tenant in a conveyance.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 1, 1883.

OPINION BY JUDGE PRYOR:

The will of John P. Jacob is brought here for construction, with a view of determining whether the remainder interests are vested or contingent. Mrs. Tyler, who was a daughter of the testator and a life tenant in the property devised to her, sold one of the houses assigned to her in the partition of her father's estate to the appellee, Thomas P. Jacob, by an executory contract; and upon offering to comply with her contract and tendering a deed the appellee refused to accept it on the ground that she was not invested with title. All of her children, being adults, united with her in the conveyance.

The testator's will placed the title to all of his estate in his executors, and by its provisions his daughters, who held a life estate, had no power to sell or encumber the property, and at the death of the life tenant the estate to which she was entitled or held as such was directed "to be conveyed by the executors or paid to her descendants, if there be any such living, in the same manner as it would pass by the laws of descent if the same were to descend from her. If there be no such descendants then the same shall be conveyed and paid to her heirs."

We have substituted the clause applicable to William R. Jacob, so as to make it read as a devise to Mrs. Tyler, as this clause by another provision of the will determines the extent of her interest, as well as the interest of those in remainder. The appellant, Mrs. Tyler, made valuable and lasting improvements and expended much of and perhaps more than her income in paying for them. She filed a petition in equity in the Louisville Chancery Court asking for a sale of the trust estate and this particular house in controversy to repay her the money expended for the improvements. The children, who were of full age, were parties to the litigation, as well as the executors; and the chancellor relieved this particular house of the trust feature by which the executors held it, and directed a conveyance to be made to Mrs. Tyler, who then became, so far as the parties to the record were concerned, the absolute owner. Other houses and lots had been assigned to Mrs. Tyler, and those in remainder under the will, than the house conveyed to her by order of the chancellor. It appeared in that action that the trust estate

was made much more valuable by reason of the improvements made, and that when conveying to Mrs. Tyler this house and lot the property left to pass to those in remainder was equal in value to the entire trust estate devised in the first place to Mrs. Tyler and her descendants or heirs. With the deed made to her, she sold to the appellee, and he now insists that the remainder was contingent, and that although Mrs. Tyler's children were before the court they may not be entitled to any of the trust property at her death.

This identical question, we think, was raised in the case of *Jacob v. Jacob,* 4 Bush (Ky.) 110, and *Johnson v. Jacob,* 11 Bush (Ky.) 646, and it was held in each case that the remainder was contingent, and such of the descendants of Mrs. Tyler as were living at her death would take her estate. It is said in the case of *Johnson v. Jacob* that it is contended for Mrs. Pope and Mrs. Tyler that immediately upon the death of John J. Jacob the estate in remainder vested in those persons who were then his heirs apparent. The other parties claim that the remainder is contingent, and that the absolute right to the estate did not vest until the death of the life tenant. The court adopted the latter conclusion and devoted much of the argument contained in the opinion to this branch of the case. The same line of reasoning was pursued in that case for those who claim a vested interest as is presented in the present case, and if the brief of counsel can now be considered more persuasive the court ought not to reconsider the question.

The two cases cited determine the right of property, and if in an opinion now rendered it was even held that the title vested, the purchaser would be subjected to an uncertainty as to his title when those living at the death of Mrs. Tyler, and who were not in being when the case was decided, should ask the chancellor to give them an interest under the will. Not being parties to the action, the court as then organized might well adopt the construction of the will given in the two cases cited, and decline to follow this case, if the views of appellant were permitted to prevail. If one of the children of Mrs. Tyler should die leaving children, those children, if living at the death of the life tenant, would take under the will, and the conveyance by the parent in his or her lifetime would be a nullity, and so of the judgment rendered relieving the property of the trust. The contingent remaindermen, being ascertained at the death of Mrs. Tyler, could assert their claim regardless of the ac-

tion of those who were capable of taking in the event the death of the life tenant had occurred sooner.

It seems to us also that the manifest intention of the testator was that such of the children of the life tenant as survived her at her death, or their descendants, took the remainder, and he expresses it in forcible language "after her death the property with the unexpended avails shall be conveyed and paid to her descendants, if there be any living," and to make it certain he proceeds to say "in the same manner as it would descend from her," etc. So those who would inherit from Mrs. Tyler if she was the absolute owner are the persons who take under this will at her death. The will further provides that his daughters shall have no power, or any husband they may have, to alienate or encumber the same, or to anticipate the profits; nor shall either be subject in any way to the payment of his or her debts, "and after her death to be conveyed and paid to her descendants or heirs as in said last clause directed."

The life tenant under the will makes valuable improvements on the property, and to such an extent as requires her to call on the chancellor to dispose of a part of the trust estate to reimburse her. The descendants living at the death of Mrs. Tyler and who were not a party to that action will at once question the jurisdiction of the chancellor to permit in the first place the improvements and in the second place to sell the trust estate to pay for them, and it will be no answer for the purchaser to say, "Your father or mother consented that it should be done." Those of the children of Mrs. Tyler who now consent to or were parties to that judgment, if living at the death of Mrs. Tyler, will be estopped to claim the property in the hands of the purchaser, because they induce him to buy, and not only so make to him an absolute conveyance and obtain his money or permit the life tenant to take it; but the trouble is that the child now living and asking that such a judgment be rendered may not be living at the death of the mother, and therefore at no time would have been entitled to the estate except upon the contingency mentioned in his will. Such an estate may be sold for the purposes of reinvestment under our statute, but the life tenant can not make on it improvements, although made in the best of faith and in the interest of all, as was the case here, and then subject it for sale to reimburse her or take a part of the trust estate for that purpose. It is an unfortunate condition of things so far as it affects the life tenant; but we perceive nothing

in this record that would justify the chancellor in holding that, under the will or by reason of the judgment directing a conveyance of the property to him by her, she holds the absolute title and the purchaser would be protected under it. On the contrary, those entitled to the remainder can not be known until Mrs. Tyler's death, and therefore the chancellor acted properly in declining to enforce the performance of the contract. That no state of case can be presented where the life tenant would be justified in making expenditures to save the estate for the remainderman is not necessary to be decided.

Judgment *affirmed.*

John B. Baskin, for appellant.

Goodloe & Roberts, for appellees.

[Cited, *Mercantile Bank v. Ballard's Assignee,* 83 Ky. 481.]

JOHN F. FISK *v.* H. T. SNYDER ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—716.]

Power Under Special Acts.

When an act of the general assembly conferring a special power on a county has expired by limitation, the special power conferred also ceases.

APPEAL FROM BOONE CIRCUIT COURT.

February 1, 1883.

OPINION BY JUDGE LEWIS:

This is an action by appellant upon the following written contract executed by appellees: "Know all men by these presents that we have this day employed John F. Fisk to endeavor to enforce the law generally known as the Boone County Bounty Case, which is being contested in the Boone Circuit Court by Pryor B. Cloud and others v. R. F. Coleman and others, members of the Boone County Court. This employment is to extend to the Court of Appeals if the case goes there. It is a writ of prohibition. For which services of said Fisk we hereby agree and bind ourselves to pay him the sum of $200 in September next, and if the law is enforced by final judgment then we agree to pay him an additional sum of $800. July 21, 1865."

The only question before us is as to the contingent fee of $800 mentioned in the contract. In 1864 appellees borrowed a large sum of money and used it to relieve persons of Boone county drafted for service in the United States army under a call made by the president in July of that year. In 1865 an act of the general assembly was passed empowering the Boone County Court to issue and sell the bonds of Boone county and to levy and collect on the property the county taxes in each of the years 1865 to 1872 inclusive, to repay to the appellee the money so borrowed and used by them. 1 Acts 1865, Ch. 610. This action was brought by Cloud and others against the judge of the county and justices of the peace, and a writ of prohibition was issued prohibiting and enjoining the county court from issuing the bonds and levying and collecting the tax authorized by those acts.

By that action, the one in which appellant was employed as an attorney by appellees, was involved the constitutionality of the acts and the authority under them of the county court to issue the county bonds and cause the tax to be collected. Under the contract sued on, according to any reasonable construction that can be given it, the payment of the $800 was made contingent upon the rendition of all final judgments and orders, not merely determining the acts valid but sufficient for the complete enforcement of the rights of appellees under them.

By the opinion rendered in May, 1866, by this court in the case of *Cloud v. Coleman,* 1 Bush (Ky.) 548, the acts in question were held to be invalid as to a majority of the taxpayers of Boone county, and consequently the repayment to the appellees of the large sum they were attempting to recover by the sale of county bonds became utterly impracticable, even if the county court had possessed the power to issue them. Appellees were thus forced to depend alone upon a levy and collection of a direct tax from the comparatively few of the taxpayers of the county held liable, themselves constituting a considerable proportion of the whole number liable. It was not until the July term, 1872, of the county court, that any final judgment or order was made by which the acts could be even partially enforced. At that time an order was made for the levy and collection of a tax sufficient to pay the amount due to appellees, but, although by the practical enforcement of that order some of the appellees would have been required to pay a larger amount of taxes than their pro rata portion of what was due

them, and none of them would have been fully paid, the order was never enforced.

After it was made an appeal was taken by J. C. Jenkins and others from the judgment of the Boone Circuit Court rendered in April, 1872, and a *supersedeas* was issued and served on the Boone County Court and the collector of the tax, which had the effect of staying proceedings under the order of the county court of July, 1872, until December, 1875, at which time, as held by this court, the acts of 1865 had expired by limitation, and of course the special power conferred by them upon the county court also ceased.

It has also been held by this court in the case of *Roberts v. Jenkins,* decided at the present term (80 Ky. 666, 4 Ky. L. 648), that the *supersedeas* served upon the county court and the collector did not have the legal effect to suspend the order of the county court of July, 1872; but in fact it did thus operate, and these appellees were thereby deprived of the benefit of the only final judgment or order by which the acts could have been enforced even partially, and did not arise from any negligence or fault of theirs.

Of the large sum appellees were entitled to recover, and which they could have recovered if the action in which appellant was employed as their attorney had been decided in their favor, they have received nothing, and no judgment has been or can now be rendered under which they can recover their money.

The judgment of the court below is *affirmed.*

Green & Riddell, C. H. Fisk, for appellant.

A. G. Winston, Stevenson & O'Hara, for appellees.

FANNY L. DAVENPORT ET AL. *v.* JOHN CRISP ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—717.]

Cancelation of Deed for Breach of Contract.

Where a conveyance of land is made by an old man to his grandchildren partly because of his love for them, and their agreement to remain with and care for him, his request and permission given them to go away, under his statement that he would send for them when he needed them, amounts to a waiver of any breach of their contract to stay with him, and the deed will not be canceled on account of their leaving him a part of the time under such permission.

APPEAL FROM RUSSELL CIRCUIT COURT.

February 3, 1883.

OPINION BY JUDGE LEWIS:

On the 9th of December, 1875, Alexander Wooldridge made a deed of a tract of land worth about $1,000 to appellants, who are his granddaughters and at the time under age, for the consideration, as expressed in the deed, of the natural love and affection he had for them. But April, 1877, he brought an action against them to cancel and set aside the deed.

In his petition it is alleged that at the time he executed the deed he was a very old man and so afflicted in body as to be almost helpless, with no one to assist or care for him besides an old woman unable to give him proper attention; that the consideration of the deed was an agreement on the part of his granddaughters that they, one or both, would reside with him and give him their services and attention in superintending his home and caring for him; that he requested his family physician to write the deed according to the contract stated, but that the physician, instead of doing so himself, procured an attorney to write it, who wrote it as it is, and that when presented to him he, Wooldridge, signed it by mistake, believing it had been drawn according to the contract expressing the proper and only consideration. He alleged that appellants had failed and refused to live with him and to give him the aid, comfort and assistance as they agreed to do and which was the only consideration of the deed.

He asked the deed to be set aside and held for naught. On the —— day of May, 1877, about one month after his action was commenced, Alexander Wooldridge died, and the action was revived and thereafter prosecuted by his heirs-at-law, appellees here. They filed an amended petition, and in it alleged that Alexander Wooldridge was, when the deed was made, demented and not competent to make it, and that it was procured by the fraud of the appellants and their mother, which consisted in a representation and pretense that they would stay with and wait on him until his death, when they had no intention of doing so. This petition also contained the allegations as to the true consideration of the deed, the mistake in its execution, and the violation of their contract by appellants contained in the original and reiterated in the amended petition, all of

which allegations are denied in the answer. Upon the trial the circuit court rendered judgment that the deed be canceled, and that the plaintiffs, the heirs-at-law, recover the land.

In the first place, even if sufficiently pleaded, neither fraud nor undue influence on the part of appellants, their mother, nor any one else for them, in the procurement of the deed, is shown by the evidence. Whatever was the consideration moving the old man to make the deed, whether his love and affection for his granddaughters, or an agreement on their part to live with, take care of and wait on him, or both combined, it appears to have been his own voluntary act, without fraud or undue influence on the part of appellants or any one else. In the second place, we think it is satisfactorily established that at the time the deed was made he had sufficient mental capacity to understand and to comprehend the character, effect and object of the deed he made. Beside the evidence of the family physician, whose frequent professional visits made him acquainted with his condition, the evidence in favor of his mental capacity greatly preponderates. In fact, when it is properly considered and weighed there is not much room to doubt it.

There then remains only two questions about which there can be any dispute: 1st. Whether the consideration of the deed was by mistake left out of the instrument. 2d. Whether, if the consideration was the agreement on the part of appellants to remain with, wait on and care for their grandfather while he lived, there has been a violation of that agreement that enables the heirs-at-law to avoid and to set it aside.

There is very little room to doubt that the old man was induced, partly at least, by the desire to have one or both of his grandchildren to remain with and care for him while he lived, and that he expected and believed that they would do so in case he conveyed them the land. The physician whom he requested to write it now testifies that he told him that the consideration of the deed was that they were to stay with him during his life. There is evidence of other witnesses conducing to show the same thing. But it does not necessarily follow that it was his wish or intention that it was to be put in the deed as the only consideration. Further, the physician says he does not think he told him specifically to put it in the deed, but that was his understanding of the consideration. Besides, it is shown the deed as written was read to him, and there is nothing to show that he did not understand it, or was dissatisfied with it.

The deed was made in December, 1875, and it was not until the 20th of April, 1877, that he brought the action to set it aside. There are circumstances tending strongly to show that the dissatisfaction mentioned in that suit was not altogether his own wish on the subject, for not only was his mind at the time that action was brought, in the language of the family physician, "giving down more than common," but when visited by one of the appellants during his last sickness, he told her to hold on to the deed, that he was not going to take the land away from her, and the summons served upon appellants in the action brought by him was not altogether his act. It also appears that appellants resided with him during the life of his wife for several years, and that he was much attached to them. We are of the opinion that one, if not the principal inducement for making the deed, was his love and affection for appellants.

But if it was not, and if the true consideration was, as claimed for appellees, left out of the deed, still we do not think there is sufficient evidence of a violation of the contract to authorize it canceled. There is some contrariety of proof as to the precise length of time appellants remained with their grandfather after the deed was made. But we think the weight of the evidence shows they were there until about four months before he died. But it is not material precisely how long they did stay. When they left, the cause of which does not clearly appear, it was at the instance of their grandfather, who, according to testimony not contradicted, told them they could go home and remain until he needed them, and when he did he would send for them. It is not reasonable to suppose that they did go without his permission, for there is no evidence they maltreated or neglected to show a lack of kindness to him while they remained, and one of them did at his request return during his last illness and remain with him until he died.

So, without determining whether their failure to remain with him continuously until his death would be sufficient ground for setting aside the deed, we are of the opinion that the request or consent of Alexander Wooldridge for appellants to leave and go to their home and remain until he needed and requested them to return amounts to a waiver of any breach of their contract, even if otherwise they had forfeited their right to the land.

We have little doubt of the correctness of the conclusion as to the facts of this case at which we have arrived, and are of the opinion the court erred in adjudging the deed to be canceled and

appellees to recover the land. Wherefore the judgment is *reversed* and cause remanded with directions to dismiss the petition of appellees.

J. F. Montgomery, for appellants.
Hays & Stone, for appellees.

THOS. DAVIS *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—717.]

Evidence in Homicide Case.

Where the accused offered to prove that the deceased was a violent and dangerous man when drinking, it was not error to reject such proof when there was no evidence given that the deceased was drunk, and when, besides, the accused had the full benefit of such testimony from a number of witnesses who testified that the deceased was a violent and dangerous man in stronger language than that contained in the offer made.

Instructions Construed Together.

When in the trial of a homicide case in an instruction as to the law of manslaughter the court omitted to say anything about the doctrine of reasonable doubt, but in other instructions given he fully set forth such doctrine, the instructions given will be construed as a whole and such omission will not be held as prejudicial to the defendant's substantial rights.

Instruction as to Abstract Proposition.

Where in an instruction in the trial of a homicide case a mere abstract proposition is stated with no evidence to support it, but it is more favorable to the accused than to the commonwealth, such instruction is not erroneous and does not injure the accused.

APPEAL FROM BARREN CIRCUIT COURT.

February 3, 1883.

OPINION BY JUDGE PRYOR:

The case of the appellant has been twice passed on by a jury of his county and in each instance a verdict of guilty has been returned into court. The verdict on the first trial was guilty of murder, and confinement in the penitentiary for life the punishment. The verdict now complained of finds him guilty of manslaughter and fixes his punishment at confinement in the state penitentiary for 21 years.

It is certain from the testimony in the case that the defendant was at the house of Martha Hulsey on the night and at the time Woodford Creel was killed. It is equally certain, we think, that they went there for no legitimate purpose, and that the results of their nocturnal visit was as contemplated by them; and the proof authorized the conclusion that Davis was as much guilty as either of the others. Davis had expressed his intention to kill Creel and leave the country. We have nothing, however, to do with the evidence. The jury has said that appellant is guilty and it only remains for this court to determine whether any error of law was committed during the progress of the trial, prejudicing the substantial rights of the appellant.

The appellant offered to prove that Creel was a violent and dangerous man when drinking, and this was determined to be incompetent by the court below, and under the circumstances we think such testimony should have been rejected. There is no proof that Creel was drunk, but some testimony that he had taken a drink or two and had a bottle of whiskey with him. Besides, the appellant had the full benefit of such testimony. Witness after witness spoke of his being a violent and dangerous man, and in stronger terms than is contained in the avowal made as to what would be proven by the rejected witness.

The objection to the instructions, based on the idea that as to the crime of manslaughter the judge had lost sight of the question as to reasonable doubt, ought not to prevail. The court in instructing the jury in regard to murder also told them that if they entertained a reasonable doubt of the defendants being proved guilty of any offense they must acquit him. In instruction 4, under which the conviction was had, the jury was told that if they had a reasonable doubt as to his being guilty of murder, if they should believe from the evidence that he was guilty of manslaughter (defining it) they must find him guilty. The words "reasonable doubt" are omitted in this particular instruction, but in the instruction following, No. 5, the court said: "If you do not believe from the evidence beyond a reasonable doubt that defendant cut and wounded Creel as set out in instructions Nos. 1, 2 and 4, but shall believe from the evidence that he wilfully and feloniously aided John Hulsey, * * * you must find him guilty." So it is manifest, we think, that the jury fully understood the issue submitted to them, and that they were to give the accused the benefit of a reasonable

doubt. It ran through the entire instructions in the one form or the other, and no jury could well have been selected without intelligence sufficient to enable them to understand, under the instructions, that the benefit of the reasonable doubt must be given the accused. It would be reversing the case upon the merest technicality to decide otherwise, and in effect a reflection on the intelligence of the jury trying appellant's case.

It is also said that the court erred in assuming that John Hulsey did the cutting or killing. The proof is positive that Hulsey shot the deceased after deceased was struck with the ax, and as to his guilt there is no doubt, and the court did not prejudice appellant's cause by assuming that fact. Nor was there any error in the seventh instruction. It was, to say the least of it, presenting the jury a mere abstract proposition with no evidence to support it, but was more favorable to the accused than to the commonwealth. There was proof that Davis was seen running away after the killing, and the jury might have inferred that he had abandoned his felonious purpose.

The accused was given the full benefit of the law of self-defense. The jury was told that if the mission of Davis was one of peace and that he acted only in self-defense he was entitled to an acquittal, and further that if the assault was made by Creel on either the accused or John Hulsey, and was such as endangered the life of either, or of their suffering great bodily harm, they had the right if they had no other apparent means of escape to kill Creel, and were not compelled to retreat. The whole issue was fairly presented to the jury, and under the instructions given every defense to which the accused was entitled could have been and was made by his able counsel.

The instruction as to reasonable doubt and the necessity of the jury believing that every essential fact had been established beyond a reasonable doubt was properly refused, and although sometimes given, it is but a repetition of what the jury had already been told. The facts necessary to establish guilt had been set forth in the instructions preceding it, and these facts they were to believe beyond a reasonable doubt. The instruction rejected is calculated to lead the mind of the jury from the material facts of the case, and to invite an inquiry as to the probable existence of facts that may not be material to establish the guilt of the accused. The jury trying this case we have no doubt fully understood all the issues and their

duty to the commonwealth and the accused. While the punishment is severe, it is nevertheless lenient, and we see no reason for reversing it.

Judgment *affirmed.*

J. J. C. Eubank, for appellant.

John Ritter, P. W. Hardin, for appellee.

THOMAS CAVENDER *v.* F. L. & J. C. GRAVES.

[Abstract Kentucky Law Reporter, Vol. 4—718.]

Estoppel of Wife to Recover Land.

Mere acquiescence by a married woman during her coverture in a sale by her husband of her real estate, is not sufficient to enable the purchaser to resist her recovery of the land after the death of the husband.

APPEAL FROM BALLARD COURT OF COMMON PLEAS.

February 3, 1883.

OPINION BY JUDGE LEWIS:

The foundation of appellant's claim to the land in contest is an alleged parol purchase from the first husband of appellee, F. L. Graves, during coverture, and her acquiescence in the purchase and the receipt by her of $40 of the $500 purchase-price after the death of that husband.

We do not understand the doctrine of equitable estoppel to have been extended so far in respect to a married woman as that mere acquiescence by her during coverture in a sale by her husband of her real property is sufficient to enable the purchaser to resist her recovery of the land after the husband's death. Her title to the land was evidenced by deeds recorded in the proper office, of which appellee must be presumed to have had knowledge, and the entire purchase-price paid at all during coverture was paid to the husband. She neither received any direct benefit from the sale made by her husband, nor did her failure to object to the sale or her acquiescence deceive appellant, or cause him to make the purchase under a misapprehension as to the title. Even if unsatisfactorily shown, but we think it is not, that she accepted $40 of the purchase-price after the death of her husband, it would not be sufficient to divest her of her title to the land.

The objection that there is a defect in the certificate in one of the deeds evidencing her title, as well as the other objection that she failed to file with the sheriff's deed the record of the judgment under which the sale was made, are both unavailing, because she was not required to show a complete chain of title traceable to the commonwealth.

The claim of appellant to the land, if he has any, is under her title, the alleged purchase of the land having been made and the possession acquired from the husband, who at the time held and claimed it by virtue of his marital rights only. Besides, to plead estoppel amounts to an admission in this case that she has the legal title.

The judgment of the lower court is *affirmed*.

Bullock & Bullock, and R. B. Smith, for appellant.

AMANDA MORTON ET AL. *v.* MILTON MOORE.

[Abstract Kentucky Law Reporter, Vol. 4—717.]

Commissioner's Sale of Real Estate.

A commissioner in selling real estate at public sale has no right to summarily adjudge a party insolvent and presumably unable to give the bond and surety, and therefore to reject the highest bid from such a bidder and accept the next highest bid.

APPEAL FROM FRANKLIN CIRCUIT COURT.

February 6, 1883.

OPINION BY JUDGE HARGIS:

The appellant, John H. Morton, bid $700 for the land, which was the highest bid, but the commissioner refused to accept his bid unless he would give the bond with good security required by the judgment of sale, because the commissioner knew Morton to be insolvent. Had the commissioner any power to annex such a condition to the acceptance of a bid? We think not. He was bound to accept all bids as made and knock the property off to the highest and best bidder and then if the purchaser failed to give bond and security as required by the judgment within a reasonable time it would have been the duty of the commissioner to advertise and sell the property at some future time, the derelict purchaser being sub-

ject to the process of the court for contempt. The commissioner has no right to summarily adjudge a party insolvent and presumably unable to give the bond and surety while he is crying the sale, and therefore reject or conditionally accept the bid, and unless the bond be given on the ground and before the hour of sale expires and the bidding closes, refuse the bid altogether and knock the property off to a lower bidder. Poor persons who are sensitive and entirely capable of giving bond and security for their bids within reasonable time would be driven from the arena of bidders by the trial of their solvency or insolvency in the presence of hostile bidders, by the commissioner from whose decrees they would have no present protection.

Fair competition, on equal terms to all, would be greatly disturbed by such interferences by the commissioner, and purchasers confined to those who would, upon such an abrupt demand, be able to show their ability to comply with their bids. The right to bid and have the bid accepted until it is exceeded by a higher bid does not depend upon what the commissioners may think or know about the financial condition of any of the bidders. The exercise of his judgment and discretion on that subject should be postponed to the time of accepting the bond and security offered, and then he should give the purchaser a reasonable time within which to produce the sureties and a fair opportunity to execute his bond after the sale shall have been made.

Wherefore the judgment confirming the sale is *reversed* and cause remanded for further proceedings. As to the merits of the controversy as exhibited by the old records we can not look into them unless brought before us, through the circuit court, by bill of review or suit for a new trial or to vacate or modify the judgment, this court having affirmed it, and all matters embraced by the record being *res adjudicata.*

Wm. Lindsay, T. B. Ford, for appellants.

J. W. Rodman, for appellee.

EVALINE CARTER *v.* JESSE CARTER'S ADMR.
SAME *v.* N. F. CARTER'S ADMR.

[Abstract Kentucky Law Reporter, Vol. 4—718.]

Creditors' Right in Heir's Estate.

Land descending to the heir may be aliened by the heir and a bona fide purchaser for value will hold as against the personal representative of the heir or the creditor and the remedy is by the creditor against the heir for a recovery to the extent of assets received; and he may by a proceeding in equity obtain a lien on the property of the decedent in the hands of the heir.

Suits to Settle Estates.

After the death of the father, his son and heir died and the administrator of the father's estate was also appointed as administrator of the son's estate. The son was largely involved and the father was his surety for several thousand dollars. The administrator brought a suit to settle both estates and procured an order for the sale of the father's real estate to pay such obligations and others. It was held that the other heirs, being before the court, and the action having been properly instituted, the chancellor should have proceeded to ascertain the amount of the personal estate and applying that to the payment of the debts, he should then have sold enough of the real estate to pay the balance of said indebtedness and have divided the balance of the estate between the children, charging the deceased son's estate with what the father's estate had to pay for him. All this should have been done before the son's creditors received anything.

APPEALS FROM TRIGG CIRCUIT COURT.

February 6, 1883.

OPINION BY JUDGE PRYOR:

Jesse Carter died in the county of Trigg, leaving a valuable estate, and his widow and two children surviving him. Much of his estate consisted in land that descended to his children subject to the widow's dower. His son, N. F. Carter, died shortly after his father, and F. B. Carter was appointed the administrator of both father and son, and as the representative of each filed these actions in equity in the court below to settle the two estates and to determine the rights of the heirs and creditors.

As administrator of the father he alleges the insolvency of the personal estate to pay his debts and asks a sale of his realty, de-

scribing it, or so much as may be necessary for that purpose. About $6,000 of the indebtedness of Jesse Carter consisted in liabilities he had assumed as his son's surety, and this, added to his own indebtedness, required a sale of his realty.

The son's estate was insolvent, and from a confused record it appears that the appellant, Mrs. Coleman (the daughter), has lost her entire patrimony by a judgment that gives to the individual creditors of the son a part of the proceeds of the realty descended to him, upon the idea that, being vested with the title by reason of the inheritance, no distinction could be made between the debts of the son for which the father was individually liable and those upon which the son was alone bound. Land descending to the heir may be aliened by the latter, and the *bona fide* purchaser for value will hold as against the personal representative or the creditor. The remedy is by the creditor against the heir for a recovery to the extent of assets received, and the creditor may by a proceeding in equity, if asked for, obtain a lien on the property of the decedent in the hands of the heir. See Gen. Stat. (1881), Ch. 44, Art. 1, § 10.

In this case no creditor of the father or son had instituted an action for the settlement of either estate. No partition of the realty had been made, and no lien had been created by any proceeding at law or in equity in behalf of a distributee or creditor, nor did any lien exist on this realty by reason of any rule of law or equity. While both estates were in this condition the personal representative filed the petition asking for a settlement of Jesse Carter's estate and also the son's estate, and a sale of the realty to pay the father's debts. The action was instituted under the provisions of Civ. Code (1876), Ch. 3, and the two children to whom the land descended were made parties. They had not disposed of any of the realty, and no creditor of the son by any proceeding had created a lien on the estate descended to the son for the payment of the son's debts. So there was nothing to prevent the administrator from having the real estate sold to satisfy the debts due by Jesse Carter, the father. The action of the administrator was a *lis pendens* and created a lien superior to any that might, after that time, attach against the estate of Jesse Carter at the instance of the creditors of the son. The personal representative was then entitled to have the estate, real and personal, left by Jesse Carter applied to the payment of his debts.

These debts included the liabilities of the son upon which the

father, Jesse Carter, was liable as surety. The statute cited permits a creditor to create a lien upon the property descended to the heir, by proper procedure, and here the administrator has created a lien by the action brought to subject the property to the payment of the debts of the decedent. He has pursued the remedy pointed out by the statute, and none other was required to give him a lien. If the heir could alien after suit brought and creditors attach, so as to give a preference to either over the action of the personal representative in behalf of creditors, the act authorizing such a proceeding by the action would be no protection to the estate, distributees or creditors. The action having been properly instituted and the parties before the court, the chancellor should have proceeded to ascertain the amount of the personal estate, and applying that to the payment of the debts, as to the balance of the debts unsatisfied, he should have sold enough of the real estate to pay them, including the debts due by the father as his son's surety. Then he should have divided the balance of the estate between the children, charging the brother, N. F. Carter, with the sum the estate had to pay for him, and if no division could have been made in kind he should have sold the balance and divided the proceeds, charging N. F. Carter with the amount the representative or the realty had paid on his account. All this should have been done before the creditors of the son received anything. When he accounts to his sister for what the estate has paid for him then the interest remains for the payment of their debts.

Suppose the son had been living and the administrator of his father had proceeded against him instead of his creditors, could the son after the estate had been subjected to the payment of debts for which his father was liable as surety, insist upon an equal division of the estate left without regard to what had been paid for him? A negative answer must, we think, be given to such an inquiry. The chancellor has taken hold of the estate for the purpose of making a settlement, it is true, with creditors; but the heirs are before the court, and necessarily so, because they are vested with the legal title and directly interested in the result of the litigation. The sister has an equity against the brother that she may assert because her interest in the realty is affected by the sale made of it to pay his debts, and the chancellor, having complete jurisdiction over the parties and the subject matter, will proceed to adjust the equities between them.

It appears that sales have been made of the estate or portions of it to pay these debts. These sales can not be disturbed as the purchasers are not before the court, or if so we find no exceptions to any report of sale, or any appeal from the orders of confirmation. This will not interfere with a division of the proceeds in accordance with the opinion. It was error to permit the creditors of the son (his individual creditors) to share in the distribution until the debts due by the father were satisfied and the sister made equal to her brother on account of the moneys paid for him during the litigation out of the estate descending to her from her father, no lien having been created in any mode by the son's creditors in the land left by his father. The rents of the realty should also be applied to the payment of the debts of Jesse Carter from the time the chancellor took possession of the land by his commissioner for the purpose of renting it out, or from the time it was rented by the administrator (if he rented it) under the order of court. The widow, of course, was entitled to her part of the rent.

Judgment in each case is *reversed* and cause remanded.

Dabney & Crenshaw, for appellant.

R. A. Burnett, for appellees.

ISAAC A. STEWART ET AL. *v.* LOUISVILLE & N. R. Co.

[Abstract Kentucky Law Reporter, Vol. 4—718.]

Attorney's Lien Under Statute.

An attorney, under the provisions of Gen. Stat., Ch. 5, Art. 1, § 15, is entitled to a lien for his fee in an action for damages, but such lien does not attach until there is a recovery in the action and then only upon the judgment.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

February 8, 1883.

OPINION BY JUDGE LEWIS:

Though under Gen. Stat. (1881), Ch. 5, Art. 1, § 15, an attorney at law is now entitled to a lien for the fee agreed upon, or, in the absence of a contract with his client, to a reasonable fee in an action to recover damages, yet by the terms as well as spirit of the law the lien does not attach until there is a recovery in the action, and then upon the judgment only.

In this case a compromise was made and the amount agreed upon was paid by appellee before the action was tried, and the judgment rendered was for the dismissal of the action at the costs of the plaintiff, the client of appellants. Having paid the full amount agreed by the terms of the compromise to be paid to the plaintiff in the action, appellee is not now, as the record stands, responsible to appellants for their fee, but they must look to their client.

The court below therefore properly overruled the motion for a rule against appellee, and the judgment must be *affirmed*.

S. F. J. Trabue, I. H. Trabue, I. A. Stewart, for appellants.

Wm. Lindsay, S. M. Burdett, for appellee.

JOHN A. MILLER *v.* ELIZABETH CHILDERS' ADMR. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—719.]

Construction of Will.

Where a testator provides "I will and bequeath unto my daughter, Elizabeth Childers, the tract of land I purchased of James Wilson, to her and her bodily heirs forever," it is held that the daughter was vested with an absolute fee, the words "to her and her bodily heirs forever" being words of limitation and creating an estate tail, which is converted by statute into an absolute fee.

APPEAL FROM LOGAN CIRCUIT COURT.

February 17, 1883.

OPINION BY JUDGE HARGIS:

This appeal involves the construction of the 4th and 9th clauses of the will of Jacob Miller. Those clauses are in the following language:

"4th. I will and bequeath unto my daughter, Elizabeth Childers, the tract of land I purchased of James Wilson, to her and her bodily heirs forever."

"9th. If any of my children should die without heirs their share to be divided equally among the remainder."

By these provisions Elizabeth Childers was vested with an absolute fee, the words "to her and her bodily heirs forever" being words of limitation and creating an estate tail which is converted by statute into an absolute fee.

The cases of *Deboe v. Lowen,* 8 B. Mon. (Ky.) 616, and *True v. Nicholls,* 2 Duv. (Ky.) 547, are conclusive of this case. The 9th clause does not show that the testator used the words "her bodily heirs" in any but their legal sense, and comes within the rule laid down in *Birney v. Richardson,* 5 Dana (Ky.) 424.

Wherefore the judgment is *affirmed.*

A. G. Rhea, for appellant.

Chas. S. Grubbs, for appellees.

[Cited, *Edwards v. Walesby,* 30 Ky. L. 251, 98 S. W. 306.]

L. C. HOWARD'S ADMR. ET AL. *v.* JAMES HILL ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—719.]

Specific Performance of Contract.

A contract that has not been fully agreed to and is therefore not a contract will not be ordered by a court to be specifically performed.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 17, 1883.

OPINION BY JUDGE PRYOR:

The contract between the decedent, Mrs. Smith, and Porter was only conditional, the right to the conveyance depending upon Porter's readiness to comply with the contract after the expiration of the time for which he had rented the land. He never did comply, and although asking the relief in the original petition in which he united as plaintiff with the administrator of the deceased, he voluntarily made himself a defendant and refuses to comply with the agreement. It must be conceded that Porter was not under the contract compelled to accept its terms, and that neither the decedent nor her representative could have compelled him to execute his notes and perfect the agreement. It was solely with him to comply, and never having done so, the heir ought not to be required to part with his title.

The judgment below is *affirmed.*

Weir, Weir & Walker, for appellants.

Geo. W. Jolly, for appellees.

ELIZABETH SMITH *v.* D. WILSON & CO. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—719.]

Opinion of the Court Not a Judgment.

The expressed opinion of the judge is not a judgment and therefore not final, and an appeal taken from such an opinion will be dismissed.

Debtor's Power to Mortgage His Personal Property.

A debtor may legally mortgage his personal property to secure the payment of his debts, and the wife can not prevent him from doing so or retain any rights of exemption by not joining in the mortgage on personal property alone.

APPEAL FROM FLEMING CIRCUIT COURT.

February 20, 1883.

OPINION BY JUDGE HARGIS:

Wilson & Co. and a number of the creditors of Peter Smith brought suit against him and attached his property. He had executed a mortgage in which his wife, the appellant, had joined, to Wilson & Co. on 75 acres of land known as the "Fox Springs property," but they did not seek in their suit to foreclose.

The appellant, who was in possession of the "Fox Springs property," on which some of the attachments were levied, filed an answer suggesting her willingness that the whole of it should be sold, and alleging that she was a *bona fide* housekeeper, that her husband had abandoned her and left the residence without intention of returning, and that she was entitled to a homestead in his stead, and asked that $1,000 of the proceeds of sale should be allowed her in lieu of homestead.

Upon an agreed state of facts, in effect like those alleged by her, the circuit court rendered an opinion that she was not entitled to a homestead, and without deciding any further question referred the several cases, which were consolidated, to a special commissioner to audit the debts. No sale of the "Fox Springs" was asked by Wilson & Co. and none of the attachments were sustained or decided. The appellant's possession was not disturbed, no writ of possession was ordered against her, nor was she required to surrender the possession at any time; and no execution can issue upon

the opinion of the court which is not a judgment and therefore not final. For this reason the appeal is dismissed because prematurely taken.

It has been settled by this court that a debtor could mortgage his personal property to secure the payment of his debts. *Moxley v. Ragan,* 10 Bush (Ky.) 156, 19 Am. Dec. 61. We do not think the wife can prevent him from doing so or retain any rights of exemption by failing to join in the mortgage on personal property alone. Hence the judgment refusing to allow exemptions to her out of the mortgaged personalty is correct and *affirmed,* but the appeal as to the homestead in the realty is dismissed.

W. J. Hendricks, for appellant.

W. A. Sudduth, A. Duvall, for appellees.

R. B. ENGLISH *v.* B. STUDICKER & CO. ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—721.]

Rights of a Tenant by the Curtesy.

A husband living with his children, after the death of his wife who was the owner of the homestead, becomes a tenant by the courtesy which entitles him to a homestead in it against any creditor. Being a life tenant living upon the land with his children, he is entitled to a homestead exemption.

APPEAL FROM HARDIN CIRCUIT COURT.

February 22, 1883.

OPINION BY JUDGE PRYOR:

The debts due by English and upon which judgments had been obtained originated in the years 1875 and 1878. His wife, who owned the fee in the land, had been dead for several years, and he surviving the wife was tenant by the curtesy. He lived on the land sought to be subjected with his children, and we perceive no reason why the homestead should not be assigned him. In the case of *Little's Gdn. v. Woodward,* 14 Bush (Ky.) 585, the husband was asserting no claim to the homestead but was, as in this case, a tenant by curtesy. The children there were seeking a division of the land descending to them from their mother, and it was held that no homestead passed by reason of Acts (1866), Ch. 494, from the wife to

the husband, and a distinction was drawn between the provisions of the general statutes enlarging the homestead right [Gen. Stat. (1873), Ch. 38, Art. 13], and the enactment on the same subject found in Myer's Supplement.

The husband in the case cited was not disturbed in the life estate or his right to enjoy it questioned. Here, after acquiring a life estate in the land by reason of his marital rights, the law gives him a homestead as against his creditors, not that the homestead descended or passed to him from his wife, but that on the death of his wife he became vested with such an estate in the land as entitled him to a homestead in it against any creditor. The only question in this case is, has the owner of a life estate in land, living upon it with his children, a homestead as against his creditors? This court has recently decided that question and there is no doubt if such a decision had not been rendered that the owner of a life estate is entitled to the exemption. This judgment is therefore erroneous and must be *reversed,* with directions to have a homestead assigned the appellant in the land in controversy and the purchaser will take possession of the balance. *Robinson v. Smithey,* 80 Ky. 636, 4 Ky. L. 541.

Wilson & Hobson, for appellant.

Montgomery & Poston, for appellees.

ELIZABETH YATES' ADMR. *v.* J. O. FISHER.

[Abstract Kentucky Law Reporter, Vol. 4—721.]

Fraudulent Conveyance.

Where land is bought with the husband's money and the conveyance is made to the wife it is fraudulent as to pre-existing debts, and the renewal of notes evidencing a debt does not create a debt so as to make it of date after such a conveyance is made.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

February 22, 1883.

OPINION BY JUDGE PRYOR:

What Fisher, the husband, was worth at the date of the conveyance is an immaterial inquiry. If the money paid for the land was that of the husband and the conveyance made to the wife it is fraud-

ulent as to pre-existing debts. The debt here had been created long prior to the conveyance, and the subsequent renewal of the paper with the wife as security was not a novation or payment of the balance due. The amount of the note sued on is a remnant of the original debt, and there is but little doubt that the money paid for the land was the money of the husband. The testimony of Fisher is also taken, and his own history of the time and manner in which the money was received by the wife is convincing that this property in the wife was an afterthought.

The husband, it seems, had been doing a large business amounting to many thousands of dollars per annum, and during a period of twenty-five years or more nothing is heard of this exclusive estate in the wife until his circumstances in life change. The father and uncle of the wife, from whom the money was devised, died prior to 1854 and the money was then received. The husband has been using it in his business, but, as he says, by borrowing it from the wife and paying her interest, sometimes executing his note to her and at other times not. It does not appear in this case that the money was held by the husband in trust or under any agreement to invest it, and although the effort is to bring the case within the rule laid down in Lanirim & Glenn, which has gone farther than any other case on the subject, still it is apparent that this control by the wife of her own means for twenty-five years or longer in loans to the husband originated after the wreck of the husband's business and in the effort to save something from the grasp of creditors. Judgment *reversed* and cause remanded for proceedings consistent with this opinion.

T. E. Ward, for appellant.

Turner & Turner, for appellee.

R. C. STEELE *v.* WAGER SWAYNE ET AL.

[Abstract Kentucky Law Reporter, Vol. 4—721.]

Jury Taking Pleadings to the Jury Room.

There can be no legal objection to the jury taking to their rooms the pleadings in the case, although a demurrer had been sustained to parts of them, nor is the exhibition of a lease involved in a suit prejudicial error, particularly where no objection is made by the parties thereto.

APPEAL FROM FRANKLIN CIRCUIT COURT.

February 22, 1883.

OPINION BY JUDGE PRYOR:

By the terms of the original contract of leasing between the heirs of Harris and the appellant, Steele, the latter bound himself to keep the hotel property, fixtures and furniture leased in good repair, supplying at all times such articles as may be necessary at their own expense, so as to give the lessors a net rent income of the amount agreed to be paid. As a defense to the claim for rent under the lease the appellant alleges that by a certain conveyance, by which the city of Frankfort divested itself of title to the hotel property, the vendee of the city, under whom the appellees (the heirs of Harris) claim title, bound himself to keep a first-class hotel, and that complaint having been made by the city that this obligation on the part of its vendee had not been complied with, the heirs (appellees) through their agent, C. Kelly, made a subsequent or additional agreement by which the appellant was authorized to make such improvements as would enable him to keep a first-class hotel, the heirs agreeing to deduct the improvements from the rent.

This is denied by the appellees, but they admit that they authorized expenditures in the way of improvements to the extent of $1,000, and the letter of the executor of Harris is exhibited evidencing that fact. Waiving the question as to the sufficiency of the answer, the issue was presented to the jury as made or tendered by the defendant and a verdict returned, from which it appears that they allowed appellant not only the $1,000 but a sum exceeding that amount for the improvements made. The appellant was entitled only to the improvements made subsequent to the alleged contract with Kelly, and then only such as he was not required to make by the original lease; and the verdict in this case evidences the fact that the appellant has received a credit for such extra improvements as he was authorized to make, conceding that the contract was approved by all the parties to it.

As the paper read, furnishing rooms and all like conveniences for keeping such a hotel was at the expense of the appellant under the original leasing, and the contract as shown by Steele was more in the nature of a gratuity than from any consideration going to the heirs. We perceive no objection to the jury taking to their

rooms the pleadings in the case, although demurrer had been sustained to parts of them; nor were the jury prejudiced in any way by the exhibition of the lease in the jury room, and particularly in the absence of any objection by appellant. It had been offered in evidence and was clearly competent, and therefore the jury had the right to consider it. The appellees are not complaining of the judgment, and we think under the issue made the appellant has obtained all that the jury were authorized to give.

Judgment *affirmed.*

Wm. Lindsay, E. F. Trabue, for appellant.

W. B. Fleming, Ira Julian, for appellees.

JAMES H. GALLOWAY *v.* COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—720.]

Indictment to Be Read in Homicide Case.

On the trial of a felony case the indictment is required by Crim. Code (1876), §§ 155, 219, to be twice read, once by the clerk to the defendant, which may be dispensed with by his consent, and once to the jury by the clerk or commonwealth's attorney.

Time of Reading Indictment to the Jury.

In a felony case Criminal Code (1876), § 219, requires the indictment to be read to the jury by the clerk or commonwealth's attorney and a statement of the defendant's plea thereto, next in order after the jury is sworn, but where such indictment is not read, and the plea stated at that time, but the reading and statement take place before the close of the evidence for the state, in the absence of a motion of the defendant to recall the witnesses and reintroduce the evidence, there will be no reversal, as the substantial rights of the accused are not prejudiced by the omission to read the indictment at the proper time.

Waiver by Defendant of Objections.

A defendant charged with a felony can not be heard to complain in the Court of Appeals of correctible errors made in the lower court, when he neither made objection to them nor excepted to the action of the trial court at the time.

Competency of Witnesses.

Where two or more persons are jointly indicted for the same offense, each is a competent witness for the other, unless the indictment charges a conspiracy between them; and even where conspiracy is charged each is a competent witness for the other unless there is evidence submitted which in the opinion of the trial judge estab-

lishes with reasonable certainty the existence of such a conspiracy, and the judge will determine such question from all of the evidence introduced by the state and the accused.

Res Gestae.

Declarations to be admissible as part of the res gestae must be contemporaneous with the fact; yet when they are connected with or grow out of it, they may even when made after a lapse of time be admissible.

Res Gestae—Continued.

On the trial of an accused person for murder a statement made by him a few minutes after the killing, near the place and in the hearing and presence of witnesses not called by the commonwealth, is admissible for the prisoner as part of the res gestae.

APPEAL FROM MERCER CIRCUIT COURT.

February 22, 1883.

OPINION BY JUDGE LEWIS:

Appellant, having been tried separately under a joint indictment against him and Frank Galloway, his brother, for the murder of William Southern, and convicted of manslaughter, prosecutes this appeal.

The objection that the indictment charges two distinct offenses can not be sustained. But one offense, murder, is charged, the statement that they "did conspire, confederate and agree to and did kill and murder" being equivalent to stating that the crime of murder was committed in pursuance of a conspiracy between them.

One of the errors complained of is that the indictment was not read nor the plea of the defendant stated to the jury previous to the introduction of evidence for the commonwealth, and not at any time by the clerk or commonwealth's attorney. It appears that at the close of the examination in chief of the last, but one, of the witnesses for the prosecution the commonwealth's attorney stated to the court he had failed to read the indictment and state the plea of the defendant, and then offered to do so, to which the defendant objected. But the objection was overruled and thereupon the indictment was read at the request of the commonwealth's attorney, by an attorney employed to prosecute, and the plea stated.

On the trial of a felony case the indictment is required by the Criminal Code to be twice read, once by the clerk to the defendant, which may be dispensed with by the court with his consent, and

once to the jury by the clerk or commonwealth's attorney [Crim. Code (1876), §§ 159, 219]. The record shows that the arraignment was dispensed with, and the defendant pleaded not guilty. But § 219, which requires the clerk or commonwealth's attorney to read the indictment and state the plea of the defendant to the jury, next in order after they are sworn to try the issue, was not complied with as respects either the officers whose duty it is to do so, or the time prescribed.

The language of the section is mandatory, and no party can be legally convicted under an indictment unless its requirements are substantially complied with. If the verdict in this case had been rendered by the jury without having heard the indictment read and plea stated before the conclusion of the evidence by the commonwealth we should have felt constrained to reverse the judgment upon that ground; for we are not permitted to assume or to speculate as to the probability that the jury in any given case have been fully and correctly informed in regard to or that they comprehend the issue they are sworn to well and truly try, where it appears that the mode of informing them, that the law peremptorily requires to be pursued, has been disregarded altogether.

But in this case, though not done at the precise time required by the Criminal Code, the duty was performed before the close of the evidence for the commonwealth, while it was still in the power of the court to recall the witnesses and give to the party desiring an opportunity to re-examine them. As no motion was made for the recall of the witnesses we do not perceive how the substantial rights of the appellant were prejudiced by the omission now complained of. Nor is the mere fact that the indictment was read by an attorney employed to prosecute, instead of the clerk or commonwealth's attorney, ground for reversal, having been done at the request of the latter officer in the presence of the court and of the defendant without objection made at the time.

While appellant was entitled to be tried in the mode prescribed by law, and to appeal to this court for reversal of errors to the prejudice of his substantial rights, he can not be heard here to complain of correctible errors he objected to have corrected by the lower court, or of one he failed to except to at the time the law makes it his duty to except.

The next error complained of is the refusal of the court to permit Frank Galloway, whose evidence it clearly appears was important,

to testify as a witness in behalf of appellant. Criminal Code (1876), § 234, is as follows: "If two or more persons be jointly indicted, for the same offense, each shall be a competent witness for the others, unless the indictment charges a conspiracy between them."

In the case of *Christian v. Commonwealth,* 13 Bush (Ky.) 264, this court, construing that section, held that "although a conspiracy is charged in the indictment, defendants jointly indicted are competent witnesses for each other, unless there is such evidence as, in the opinion of the court establishes with reasonable certainty the existence of the alleged conspiracy." According to that construction the question of competency in such a case as this is to be determined by the court from the evidence introduced on the trial. The inquiry, however, should not, as contended, be limited to the evidence offered by the commonwealth, but the opinion of the court should be formed from the evidence in the whole case, such weight as it may deserve being given to the evidence introduced for the defense as well as that of the commonwealth.

It is shown by the evidence that at the time the deceased was killed he was residing upon a "bottom" farm with his sister-in-law, but who owned or controlled it does not appear, and in order to open a passway to a public road was engaged in tearing down and rebuilding nearer the dwelling house a plank fence that had stood between the farm and the land of McCann, who was a brother-in-law of appellant and Frank Galloway, and with whom they resided. At the same time McCann and appellant were engaged in building a worm fence parallel to and a few feet from the plank fence deceased was building. No ill feeling is shown to have existed between McCann and deceased on account of the removal of the division fence, and why appellant and Frank became offended at him on that account, if they did so, does not appear. Though appellant and deceased were employed near each other in building the two fences from about 9 o'clock in the morning until 2 or 3 o'clock in the afternoon, when the killing was done, no harsh language or hostile demonstration on the part of either is shown to have occurred.

The commonwealth introduced no witness who saw the beginning of the difficulty that resulted in the death of Southern. One of them, his niece, testified that when she heard the first pistol shot she got up and saw, through the window of the room she was in about forty yards off, appellant standing on the right side of and

about twenty feet from deceased with a pistol in his hand and Frank about the same distance in front of him; that both of them shot at Southern, four shots being fired, and he fell about twelve feet beyond the worm fence upon the land of McCann, wounded on the right side of his head and right shoulder, and that as soon as he fell they left, going in the direction of their home.

Two other witnesses were in the house at the time, who testify to the number of shots fired, but neither of them saw the shooting nor the two parties until they started to leave. Frank Galloway was not seen upon the ground by any of the witnesses for the commonwealth until after the firing began, nor was he there until a short time before.

Two witnesses testify to conditional threats of violence to deceased previously made, their statements being substantially that Frank said he would kill him if he tore the fence away, appellant remarking at the same time and in the same conversation that he had good pistols. They also testified that they both threatened to kill deceased if he did not leave the "bottom." The evidence of McCann, who was present, and of James Galloway, the father of the appellant, who stated he was thirty-five or forty yards off, shows that deceased commenced the altercation, threatening to kill both appellant and Frank Galloway, and did actually assault the latter with a hatchet before any shot was fired. According to their evidence, the shooting was done by Frank Galloway alone, and done in his necessary self-defense, appellant not participating in it at all. The mother and sister also testified that deceased had made conditional threats against both of them.

If the evidence of witnesses for the commonwealth be alone considered the conspiracy charged in the indictment was established with reasonable certainty, and the evidence of Frank Galloway was properly excluded. But if credence be given to the evidence of James Galloway and McCann then the existence of the alleged conspiracy as well as the guilt of the appellant is negatived. We are unable to perceive how the court could, without disregarding their evidence, have excluded that of Frank Galloway. But from necessity a question like this must to some extent be left to the discretion of the judge who presides at the trial, and who is in the best position to correctly determine it. Therefore, in view of the fact that the credit for veracity of James Galloway was impeached, and both he and McCann were shown to have previously

made statements contradictory in important particulars to those they made on the trial, we do not feel authorized to say that upon the evidence admitted and heard at the trial the court erred in excluding the evidence of Frank Galloway.

But appellant complains that the court erred to his prejudice in refusing to permit the witnesses introduced to contradict James Galloway to tell all he said on the subject at the time he made the alleged contradictory statement, and also in excluding from the jury what was said to James Galloway by Frank Galloway about the killing immediately after it took place. If these rulings of the court were such as to deprive appellant of any evidence he was legally entitled to, or to destroy or impair the legitimate effect of that which was introduced in his behalf, he was prejudiced not only as to the question of competency of Frank Galloway as a witness, but also on the issue, for the excluded evidence has a bearing upon both.

The two justices of the peace who presided at the examining trial of appellant and Frank Galloway were introduced by the commonwealth, and stated in substance that James Galloway swore as a witness on that trial that he did not see who fired the first shot or any of them, because the wagon was between him and those engaged in the difficulty. This was in conflict to his statement to the jury that Frank alone did the shooting. As a matter of right appellant was entitled to all the evidence given by James Galloway on the examining trial that was relevant or tended to reconcile the apparent contradiction. But what he averred he could prove by the two justices of the peace if permitted to state all the evidence given by James Galloway on that occasion, as appears from the paper presented to the court, threw no additional light upon the question as to what he had sworn about the shooting, being substantially but a mere repetition of what had already been detailed to the jury, of which appellant got the full benefit.

While there is no valid objection to the evidence we do not see how its exclusion prejudiced his rights. Counsel contends that what was said by Frank to James Galloway should have gone to the jury as part of the *res gestae*. *Res gestae* has been correctly defined as "those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act." They must be a "part of the immediate preparations for or emanation of such act," and "not produced by the

calculated policy of the actors" seeking to manufacture evidence for themselves. 1 Wharton on Evidence (2d ed.), § 259, and authorities cited.

Though generally declarations to be admissible as part of the *res gestae* must be contemporaneous with the fact, yet when they are connected with or grow out of it they may, even when made after a lapse of time, be admissible, as when an accident happens and the injured party declares to the physician called soon after the accident how it happened, or a person immediately escaping from an assault declares who committed it. *Harriman v. Stowe,* 57 Mo. 93; *Commonwealth v. McPike,* 3 Cush. (Mass.) 181, 50 Am. Dec. 727; and so the landlord of a hotel when a party had shot himself was allowed to testify that the occupants of an adjoining room came out seemingly excited, saying something about the man having shot himself. *Insurance Co. v. Mosley,* 8 Wall. (U. S.) 397, 19 L. ed. 437; *Newton v. Mutual Benefit Life Ins. Co.,* 2 Dill. (U. S.) 154, Fed. Cas. No. 10191.

On the trial of a prisoner for murder, a statement made by him a few minutes after the homicide, near the place and in the hearing and presence of eye witnesses of the homicide who were not called by the commonwealth, is admissible for the prisoner as part of the *res gestae. Little v. Commonwealth,* 25 Gratt. (Va.) 921. In *Jordan v. Commonwealth,* 25 Gratt. (Va.) 943, the description of the robber as given by the wife of the person robbed to the officer a "few moments" (how many does not appear) after the crime was committed was admitted as part of the *res gestae.* So the declaration of a defendant as to the circumstances under which he killed a runaway slave, made immediately after the fact, are admissible in an action for trespass for killing the slave. *Hart v. Powell,* 18 Ga. 635.

Applying the foregoing definition and the principles deducible from the cases cited to this case, we think that what was said on the occasion referred to by Frank to James Galloway was improperly excluded from the jury. What was said was: "What shall I do? I could not help it. Must I not go and deliver myself up? I was sorry to have to do it. If I had not killed him he would have killed me."

According to the statement of James Galloway when the killing occurred he was thirty-five or forty yards away, and immediately after it occurred appellant and Frank Galloway came away, meet-

ing witness about seventy-five yards from the place of the killing, when the declarations were made which the court excluded. The declarations, although not amounting to a circumstantial detail which would really make them objectionable, were an illustration of the act, and if credited by the jury would conduce to show the killing was done by Frank Galloway alone and done in self-defense.

They were not contemporaneous with the principal fact, it is true. But they are so connected with it that they reasonably may be the result and consequence of the coexistent motives, while neither the time that had elapsed nor the circumstances under which the declarations were made indicate them to have been the result of deliberateness. According to the evidence of a witness for the commonwealth appellant and Frank Galloway left immediately after the shooting, and when seen by that witness were twenty steps from deceased, running, and continued to run until they got to the place where James Galloway, Sr., met them and the declarations were made to him by Frank Galloway.

The only question, therefore, left for us to consider is whether the exclusion of the evidence by the court prejudiced the substantial rights of the appellant. Its importance and bearing upon the question of conspiracy, as well as guilt of appellant, has been already stated and is decisive of the question. For we do not consider the fact that the credit of James Galloway was impeached and the evidence he did give was disregarded by the court and jury as a sufficient reason for excluding the declarations alleged to have been made to him by Frank Galloway.

It is not always the case that the entire testimony of a witness is discredited because he may be contradicted or even impeached. The maxim *falsus in uno falsus in omnibus* is merely advisory, and may be applied or not by the jury in their discretion, and certainly should not control the court on a question of competency of evidence. Counsel for appellant contend that the verdict of the jury being for manslaughter it was the duty of the court after such finding to grant a new trial on account of the error in excluding the testimony of Frank Galloway thus made manifest.

Counsel are correct to the extent that the crime of manslaughter can not be committed in pursuance of a conspiracy which is a combination by concerted action of two or more persons to accomplish a purpose. But, as held by this court in the case of *Christian v. Commonwealth,* 13 Bush (Ky.) 264, it is for the court and not

the jury to determine from the evidence as to the competency of the witnesses in such cases, and besides, as the decision of the court must in each trial precede the verdict of the jury, the first can not be controlled by the latter.

Construing instruction No. 1 in connection with No. 5 given at the instance of appellant, the objection to the former that it takes from the appellant the right to judge at the time of the necessity for killing the deceased is removed, for in the latter the jury are told that "If the accused or his brother shot and killed the deceased, believing and having reasonable grounds to believe that the deceased would then and there kill them or either of them, or inflict great bodily harm, then he is excusable upon the ground of apparent necessity," etc.

In instruction No. 2, given at the instance of the accused, the jury are told that before they can convict him of murder for aiding and abetting they must believe he was present, wilfully and maliciously aiding and abetting. The jury, therefore, was not misled by the omission complained of in the third instruction for the commonwealth.

So instruction No. 4 for the commonwealth is fully explained by No. 5, given for appellant, and the right of appellant to kill in defense of his brother, which it is objected was omitted from the former, is recognized in the latter instruction.

It is objected that instruction No. 7, given to the commonwealth, and 5, to the defendant, are qualified by adding to each substantially the following: "unless they believe from the evidence that they began the difficulty." Except from the testimony given by witnesses for appellant there is no proof as to how the difficulty began. It was therefore improper to assume as a hypothesis that appellant or his brother began the difficulty in the absence of evidence to support it.

We perceive no other error in the record. But for the two mentioned the judgment of the court below must be *reversed* and cause remanded with directions for a new trial consistent with this opinion.

Thompson & Roach, P. B. Thompson, Jr., John C. Thompson, for appellant.

Bell & Wilson, P. W. Hardin, for appellee.

[Cited, *Farris v. Commonwealth,* 111 Ky. 236, 23 Ky. L. 580, 63 S. W. 615; *Howard v. Commonwealth,* 24 Ky. L. 91, 67 S. W. 1003.]

CHAS. H. BRONSON ET AL. *v.* MARIE E. S. RANSOM.

[Abstract Kentucky Law Reporter, Vol. 4—722.]

Marshalling Securities.

Where there are two funds and one creditor has a lien upon both, and another creditor upon only one of them, the former is required to satisfy his claims out of the fund upon which the other creditor has no lien; but this rule of marshalling securities does not apply as between creditor and debtor, but only between different creditors.

APPEAL FROM KENTON CHANCERY COURT.

February 24, 1883.

OPINION BY JUDGE LEWIS:

In 1873 H. P. Ransom and his wife, M. P. Ransom, executed to Pendleton a mortgage on her real estate to secure the payment of six notes of $1,000 each, given by H. P. Ransom. Appellee subsequently became the owner of four of the notes, the other two having been paid off.

In February, 1879, H. P. Ransom, his first wife being dead, borrowed from appellee $1,000 and gave to her his note therefor. In March, 1879, they intermarried, having made an antenuptial contract. After the marriage, in July, 1879, he executed to her a mortgage upon his life estate in the real property left by his first wife to secure the payment of the note for $1,000.

This action was brought by appellee against her husband, H. P. Ransom, Grace Ransom, heir-at-law of M. P. Ransom, and her husband, C. H. Bronson, to subject the life estate so mortgaged to the payment of the debt for $1,000, and the interest in remainder of Grace Bronson to pay the debt of $4,000. The lower court adjudged that appellee has a lien upon the life estate of H. P. Ransom in the entire property for the debt of $1,000 and upon the property for the $4,000, and directed a sale accordingly. The master was also directed to ascertain and report the value of the life estate. The question whether or not the life estate money, by which we presume is meant the proceeds of the sale of it, after satisfying the debt for $1,000, can be applied to the other debt, is reserved.

The general demurrer to each paragraph of the answer of C. H. Bronson was sustained. Grace Bronson, having been only constructively summoned, did not answer. As the demurrer to the

answer involves the sufficiency of the petition, and the correctness of the judgment is also presented, it is not now necessary to decide as to the sufficiency of the answer.

The chancellor seems in rendering the judgment to have been governed by the rule as to marshalling securities, which does not apply as between creditor and debtor, but between different creditors; as when one has a lien upon the funds and the other upon only one of them the former is required to satisfy his claims out of the fund upon which the other has no lien. 1 Jones on Mortgages (1st ed.) § 875; 1 Story's Equity Jur. (11th ed.) § 640. The contention here is between appellee, the creditor, and the heir-at-law of one of the debtors, not between appellee and another creditor of the same debtor, and the rule is therefore not applicable.

It does not make any difference that appellee is the owner of both debts and the holder of both liens; for while, if both debts were against her husband only, she might probably elect to satisfy the one last created out of his life estate, she can not make such election to the prejudice of the heir-at-law of M. P. Ransom, who was dead before the second debt was created. When H. P. Ransom executed the second mortgage his life estate was incumbered by the first mortgage executed to secure the payment of a debt that he was alone liable for. But it is alleged in the petition and not denied that the six notes were given for money borrowed and used in paying for the property.

In our opinion, therefore, as the record stands, the property, including the life estate of H. P. Ransom, or enough of it for such purpose, should be sold to pay the first mortgage debt, and if there is any left his life estate in such residue, and no more, may be sold to pay the second mortgage debt.

The judgment must be *reversed* and cause remanded for further proceedings consistent with this opinion.

Stevenson, O'Hara & Bryan, for appellants.

Whittaker & Caudron, for appellee.

FRANK CARTER ET AL. *v.* PAUL I. BOOKER'S EXR.

[Abstract Kentucky Law Reporter, Vol. 4—722.]

Good Faith of Trustee a Defense.

Where a testator directs his executor to invest certain money of the estate for the benefit of another, and the executor has acted in

good faith in the exercise of a fair discretion, and in the same manner he would do in regard to his own property, he should not be held liable for any loss occurring in the management of the trust property.

APPEAL FROM WASHINGTON CIRCUIT COURT.

February 24, 1883.

OPINION BY JUDGE PRYOR:

In the year 1833 Cyrus Talbott, Sr., died in the county of Nelson leaving a last will and testament, by which he appointed Paul I. Booker, of Washington county, his executor. He left a considerable estate that he required sold and converted into money, and then invested "in the stock of some safe institution not under the control of the legislative acts of the legislature of Kentucky." Five thousand dollars was to be invested for the use of his daughter, Alice Denny, during life, the interest to be paid her, and then to go to her surviving children. Mrs. Denny died in the year 1860, leaving two children, one of them a daughter, Emma, who married appellant, Frank Carter, and they with Mrs. Laney are the appellants here. They claim by this action their part of the trust fund of $5,000, from the estate of Paul I. Booker, and the latter's representatives are defending upon the ground that he invested the fund in stock of the United States Bank of Pennsylvania, an institution not under the control of the Kentucky legislature, and that the investment when made was judicious and safe, at least thought to be so by prudent business men. He made the investments in the years 1837, 1838, 1839 and 1840. The appellants insist that the trustee in the first place had no right to make the investment in such stock, and in the second place that his negligence with reference to the fund caused its loss to the appellants, as the bank failed in the year 1841, and that appellee's intestate by the exercise of ordinary prudence might have ascertained its unsafe condition when and after he invested the money.

The investments were made more than thirty-five years before the action was brought and the appellee pleaded the statute of limitation. He also maintains that the trust fund terminated when the investments were made, and that the investments made had been approved and sanctioned by the chancellor in an action in equity to which these appellants were parties, instituted and determined in the Nelson Circuit Court.

We shall not consider the many points raised by the defense or undertake to decide those involved in much doubt, when in our opinion the case can be fully disposed of on the question of good faith and diligence by the trustee with reference to these investments. Booker, the trustee, has been dead for many years, and the particular reasons influencing him to make the investment in the Pennsylvania bank do not appear, but it is evident that when he did so he believed and had the right to believe that he was making a safe and secure investment for the beneficiaries. The responsibility of a trustee is thus defined by this court in the case of *Cross v. Petree,* 10 B. Mon. (Ky.) 413. "A trustee who, in the faithful discharge of his duty, has, in a mere matter of judgment or discretion, fallen into an error that has resulted in an injury to the persons interested in the trust, is not, in the general, responsible for the loss, where he has acted in good faith and not been guilty of gross negligence." Story's Equity Jur. (11th ed.), § 1272, says: "Where a trustee has acted with good faith in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property."

It may be argued that this general doctrine does not apply to cases where investments have been made not authorized by the chancellor nor directed in the instrument creating the trust. This must be conceded, and if no direction had been given the trustee in this particular case we should hesitate before sanctioning such an investment, either in or out of the state; and as was said by the Supreme Court of Pennsylvania in the case of Gerald's will, where money had been invested by the trustee in this same institution, the investment should have been made in pursuance of an order from the chancellor or in real or government securities. In Hemphill's case the trustees were only empowered to invest in good security, and there was no direction to purchase stocks of corporations. See Hemphill's Appeal, 18 Pa. 303. Here the trustee was directed by an express provision of the will to invest the money in some safe institution not under the control of the state government.

The testator was not willing that his property or its investment should be governed by the laws of this state, where the trustee could not have invested the money in bank stock without a direction by the will or the advice of the chancellor, but has required his

executor to leave the state and make investments elsewhere in some safe institution. The discretion was given the trustee of selecting that institution, and under such a power it would have been difficult for him to have found a more secure investment than in the stock of a good and solvent bank; and the fact that the bank in which the investment was made turns out to be insolvent does not of itself evidence bad faith. Such a discretion to a trustee to invest in the state of Kentucky would certainly prompt him in the exercise of a proper discretion to invest in the stock of one or more of the most reliable banks of the state, and the failure to do so by the light now before us might conduce to evidence the want of a sound judgment. The Pennsylvania bank was reputed to have a capital of $28,000,000 and the best business men in the city of Philadelphia deposited their money in the institution, and its paper was at a premium in the western states. There is not a single business man testifying who resided in the city of Philadelphia at that day, or elsewhere, who regarded the institution as unsound during the period at which these investments were made.

The appellee has taken the depositions of Cope, Sparhawk, Robbins, etc., all men of business capacity and commercial standing, who speak of the financial reputation of this particular bank in comparison with the other banks of the state. If the question had been asked either one of these witnesses as to the propriety of the investments at the time they were made the trustee would have been advised that it was as safe as any institution in the state of Pennsylvania; nor is there any testimony to the contrary. McElroy says he has an indistinct recollection that some one told him when he carried the money to Philadelphia for Booker (and he thinks it was Cope) that the institution was unsafe, and he so informed Booker on his return, and Booker responded that the money was where he wanted it. It is not pretended that this bank was in a tottering condition when McElroy deposited the money, and the only evidence in the case that could in any manner arouse the suspicion of the trustee was the failure to make dividends in the year 1839. Specie payment had been suspended, but the credit of the bank was not impaired, and business men had the utmost confidence in the security of the institution. Cope was at one time a director in the bank, and he says that McElroy is mistaken in saying that he suggested to him that the investment was not secure, for his advice would have been otherwise.

With the direction to invest in the stock of some safe institution out of the state, it would be a rigid rule of equity that would hold the trustee, who lived a thousand miles from where the investment was made, to know more about the condition of the bank than the business men of the city of Philadelphia where the bank was located. If he had gone to Philadelphia the information would have been given him up to 1840 and until the final breakup that its credit was not impaired, although the stock was below par during and after the year 1840. The testator knew where the trustee lived, and when he directed his funds invested out of the state he did not expect that the trustee would follow the funds with his presence to watch the rise or fall of the stock of the institution in which he might make the investment. Fluctuations in the value of stock existed then as now, and there is no such want of diligence shown by any fact in this record as should fix a liability on the trustee or those representing him. While the guardian or trustee may not convert the real estate of the beneficiary into personalty, or the personalty into realty, without the authority of a court of chancery, where he is authorized to sell and invest by the will, and that investment to be made in stocks of some institution, the discretion as to what institution shall have the fund is with the trustee, and unless he has acted in bad faith, or by his own neglect causes the loss, he is not liable. See *Thompson v. Pettibone,* 79 Ky. 319, 2 Ky. L. 341; Hill on Trustees, 560, *et seq.; Taylor v. Benham,* 5 Howard (U. S.) 233, 12 L. ed. 130.

The judgment below is therefore *affirmed* on the facts of the record as to all of the appellants.

C. S. Hill, for appellants.

R. J. Brown, Hamilton Pope, Jas. S. Ray, for appellee.

DAVIS, MOODY & CO. *v.* CITY OF LOUISVILLE.

[Abstract Kentucky Law Reporter, Vol. 4—721.]

Dedication of Street by Plat.

Where one prepares a map of an addition to a city, which is acknowledged and recorded, and on the back of such plat he also places a map and plat of an addition of the real estate adjoining that platted, and no acknowledgment is made on the back of such plat but it is recorded, it amounts to a dedication of the streets in both of said

additions; and if a street thus dedicated is accepted by the public and used as a highway, it belongs to the city and can not be claimed by one owning adjoining real estate.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 24, 1883.

OPINION BY JUDGE PRYOR:

This was an action instituted by the city of Louisville to recover of the appellants certain defined parcels of ground alleged to constitute a part of Todd street. In behalf of the appellee, the city, it is claimed that this street between 17th and 18th, its cross-streets, was dedicated to the city in the year 1818 by one Arthur L. Campbell, and occupied by the city, and the street was recognized as such by Campbell, the original owner, in various methods, and by those who hold under him. No objection was made to the mode of proceeding and the whole question determined in the one action against all the defendants.

Whether a legal or an equitable action, the only question to be decided here is, Has the city manifested its right to recover? Campbell's map of his southern addition to the city was acknowledged and recorded, and his map of the western division, including the lots in controversy, was found on the back of the map of the southern division. It is alleged in the petition that this was recorded, and that appellants in their answer deny the fact, except that it was on the back of the map that was recorded but never acknowledged. No reply was made to this part of the answer, but we think it only made the issue tendered by the original pleading, and no reply was necessary; and the case will be treated as if the issue was directly made, as in our opinion the issues are all distinctly presented. Loran's statement in his testimony is conclusive of the fact that this entire writing was of record, and the fact of its being made in the same paper, one constituting the southern and the other the western addition, is strongly corroborative of Loran's testimony. The motive for recording one was as great as the other, and we are satisfied that so far as Campbell could do so the street was dedicated to the city and that the same was recorded for that purpose. As evidence of Campbell's intention to make the dedication he executed conveyances locating the lots sold as bordering on this street and in accordance with the map of record.

The appellants maintain, however, that if a dedication was made it was never accepted by the city, and if ever accepted the right to the street is gone by the failure to use or recognize it as such by the city. The charter of the city of Louisville, in § 33 of the Act of March 9, 1868 (2 Acts 1867-8, Ch. 1012), provides that "All streets * * * and parts of same, either in width or length, or extensions thereof, in said city, heretofore laid out or extended, or which may be hereafter laid out or extended, by any person or persons, or where such person or persons shall have sold, or laid out and proposed to sell, or who shall hereafter sell, or lay out and propose to sell lots recognizing or calling for such streets * * * or parts of same, * * * shall be, and are hereby, declared as public, subject, however, to the right * * * of the city to reject the same by resolution," etc. Additions to the city in the way of lots were being made, and the city enlarging its territory constantly it became necessary to enact such a law as would amount to an acceptance of such dedications for the use of the public without any affirmative act on the part of the city, and although at the time the map of Campbell was recorded the territory embraced in it was not a part of the city it was afterwards included within the municipality, and the streets as laid out became a part of the property of the city for the public use, and particularly when lots had been sold calling for this street as the boundary. So much of the old charter as was in conflict with the new charter contains no such clause in relation to the acceptance of streets. There is nothing inconsistent in the two sections, but on the contrary they harmonize the one with the other.

The appellants in this case derive their title to this street, or a part of it, from Isham Henderson, who purchased it of one Campbell, to whom the original owner had mortgaged it. That mortgage was foreclosed and the mortgagee became invested with the title, and according to the deposition of Robinette, the conveyances to Henderson were made of the lots, describing them as found or located in the plat or map made by the original owner. Henderson's own deed, if Robinette is correct as to boundary, recognized the existence of this street, and he acquired no title to it or any part of it; and not only so, but Henderson's deeds to others recognized the existence of this street, and the ground sold by him was on

the plan designated by Campbell. So from the original owner down to the conveyances made to the vendees of Henderson this street has been recognized, until Henderson made the conveyance to Davis, Moody & Co. or their vendor.

In April, 1871, was the first time that Henderson conceived the idea of appropriating one-half of this street. Prior to that time he and his vendees and their vendees sold according to the original map, but in 1871 he sold to Rock, and Rock to Davis, Moody & Co., a part of this street, and by the conveyance makes it a thirty instead of a sixty-foot street. There are two witnesses who lived in the vicinity of this street for many years. They state that the street had been open and used as a street sixty feet in width for years by the public, and that nine or ten years before they testified Henderson began to enclose the vacant property in that part of the city, and among other lots inclosed was the lot of Davis, Moody & Co. They further state that a fence was erected on the southern boundary of the street, and that Henderson moved this fence thirty feet north, inclosing one-half of the sixty-foot street. All this testimony upon the question of dedication and its constant recognition is not only persuasive of the right of the city to recover, but shows a preponderance of testimony as against the appellants, who are here claiming without title, or from a vendor who had none.

The copy of the assessor's map is in error in the location of the lot of Davis, Moody & Co. They are made the owners of the corner lot, but when going back to the original map of the city, the name of Davis, Moody & Co. is on the lot belonging to Ropke & Haxanthamer, and the latters' name erased, and in this way Davis, Moody & Co. appear to be the original owners of the corner lot. Davis, Moody & Co. were really assessed as the owners of Ropke's lot, and if they had been assessed after the appropriation of this street by Henderson it would not deprive the public of the right to use the streets.

It is argued that this action is for the benefit of the property owners living on this street. Doubtless this is so, but this can not militate against the rights of the city to recover, and the recovery will not invest the adjoining lot owners with title to any part of the

street, but will leave it a street sixty feet in width for the use of the public as was intended by the original owner.

Judgment *affirmed.*

Russell & Helm, for appellants.

Geo. B. Eastin, T. L. Burnett, John C. Russell, for appellee.

[Cited, *Louisville v. Snow's Admr.*, 107 Ky. 536, 21 Ky. L. 1268, 54 S. W. 860.]

WALTER DAVIS v. COMMONWEALTH.

[Abstract Kentucky Law Reporter, Vol. 4—719.]

Arrest of Judgment in a Criminal Case.

The only ground upon which a judgment in a criminal case may be arrested is that the facts pleaded in the indictment do not constitute a public offense within the jurisdiction of the court.

No Reversal Where Instructions Are Not All in the Record.

The Court of Appeals has no power to reverse a judgment for an error in instructing the jury in the absence of any of the instructions given, unless those contained in the record could not under any circumstances and with any modification or explanation be the law applicable to the case. Where the record does not contain all the instructions given, this court will presume that those given, but not in the record, supplied and explained those given and contained in the record.

APPEAL FROM McLEAN CIRCUIT COURT.

February 27, 1883.

OPINION BY JUDGE HARGIS:

This record presents two questions. First, Should the motion in arrest of judgment have been sustained? Second, Did the court err in instructing the jury? In regard to the first, Criminal Code (1876), § 276, expressly provides that "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." The indictment in this case accused the defendant "of the crime of malicious shooting and wounding," and proceeds with a statement of the acts constituting the offense of malicious shooting and wounding with an intention to kill. The facts stated clearly constitute that offense.

Although the omission from the accusatory part of the indict-

ment of the words "with intention to kill" renders the accusation defective in legal description of the offense, as defined by the statute, yet the indictment stated facts which constitute a public offense within the jurisdiction of the court, and the motion to arrest the judgment was therefore properly overruled.

If the indictment had been demurrable for the defect in the accusatory part of it, still as the indictment shows that the defendant had committed a public offense within the jurisdiction of the court, and the record demonstrates that he was convicted of the offense stated in the indictment, the court did not err in refusing to arrest the judgment. *Tully v. Commonwealth,* 11 Bush (Ky.) 154, Criminal Code, § 276.

The nature and cause of the offense were fully set forth in the indictment, and a person of ordinary understanding could easily have known what was intended. We do not think the defendant was or could have been misled.

As to the alleged error in instructing the jury, there is no bill of exceptions and the record does not contain all the instructions given by the court to the jury, and according to Criminal Code, § 341, this court has no power to reverse the judgment for an error of the lower court in instructing the jury, in the absence of any of the instructions given, unless those contained in the record could not under any circumstances and with any modification or explanation be the law applicable to the case.

The single instruction before us is not in itself erroneous, unless no other instruction was given. It tells the jury, in substance, and very accurately, that if the defendant wilfully and maliciously shot and wounded J. C. Mitchell, with a pistol and with the intention of killing him, without killing him, they should find him guilty of a felony.

Other instructions were given, but as they are not contained in the record we can not know what they are, but the presumption is very strong that they contained the law of self-defense and sudden heat and passion, with directions to the jury as to their duty relative to doubt as to the degree of the offense.

Wherefore the judgment is *affirmed.*

J. C. Jenson, for appellant.

P. W. Hardin, for appellee.

[Cited, *Higgins' Admr. v. Louisville & N. R. Co.,* 18 Ky. L. 899, 38 S. W. 876.]

INDEX

[References are to Pages.]

ABANDONMENT.

See Action.

ABATEMENT AND REVIVAL.

See Judgment.

Application not made for revivor after one year and a half. William Gresham, alias Wm. Gresham Moore v. R. P. Gresham et al.....547

When right to bring party before court not impaired by fact that time for revivor has passed. J. H. Gardner's Admr. v. J. H. Roberts et al..873

ACKNOWLEDGMENT.

Wife's acknowledgment not to be simultaneous with that of husband. R. W. Knott v. G. P. B. Johnston et al.....271

ACTION.

See Courts.

Cause not abandoned until order of court made to that effect. Wm. M. Combs et al. v. John A. Wallace.....338

Joinder of action upon contract and action for fraud or negligence directly connected with contract. Samuel S. Gregg v. Wm. G. Woods..424

Judgment in consolidated cause will be treated as if there were but one action or one petition containing several counts. Henry Greene v. Thomas Southworth 82

ADMINISTRATORS.

See Executors and Administrators.

ADVANCEMENTS.

See Executors and Administrators.

ADVERSE POSSESSION.

Claim of right not asserted after another has held property for more than forty years. C. J. Bronston v. Catherine M. Davidson's Trustee et al. 672

[References are to Pages.]

ADVERSE POSSESSION—Continued.

Third person in possession, not claiming under either of two claimants, not bound by judgment entered in cause. Mincher Arthur v. Ann Harlan et al. ---------- 788

Validity of title by adverse possession. Francis Berryman v. Wissis Hisle ---------- 897

Henrietta L. Yeatman et al. v. Mary McDonald ---------- 748

R. Baker's Heirs v. W. C. Gilbert et al. ---------- 912

Validity of title held adversely for almost twenty-five years. Elizabeth Beard et al. v. J. W. Hudnall ---------- 653

Validity of title of land sold at execution sale and occupied adversely for over fifteen years. William Gresham, alias Wm. Gresham Moore v. R. P. Gresham et al. ---------- 547

Validity of title to property held adversely from 1836 to 1882. Richard D. Walker et al. v. James Walker, Sr. ---------- 809

When tenant in possession can not set up claim to title by reason of adverse possession. John Collier v. Logan Sharpe et al. ---------- 764

AFFIDAVITS.

See Attachment.

AGRICULTURE.

See Gaming.

ALIBI.

See Robbery.

ALTERATION OF INSTRUMENTS.

Alteration of note by holder and one maker, as to rate of interest, operates to discharge other obligors from all liability. Norman Gaines v. C. T. Scott ---------- 361

Proof held to sustain plea of non est factum in suit on note. First Nat. Bank of Springfield v. Charles Dawson ---------- 26

AMENDED COMPLAINT.

See Pleading.

AMENDMENT.

See Pleading.

ANIMALS.

See Railroads; Sales.

Owner of cattle can not turn them into field of another for sake of gain or to injure property, regardless of whether field lawfully fenced or not. Samuel Ellis v. Commonwealth ---------- 233

Owner of vicious cow held liable for injuries. Paul Villerre v. George Payne ---------- 70

[References are to Pages.]

APPEAL.

See Counties; Courts; Criminal Law; Exceptions, Bill of; New Trial; Trial.

Argument of counsel held not ground for reversal. City of Covington v. Margaret Glennon et al.----9

Assignments of error not embraced in grounds for new trial will not be considered on appeal. Bank of Columbia v. W. P. D. Bush----559

Court of Appeals can not look into question raised in absence of assignment of error. John Tutt et al. v. Socrates Kincaid et al.----310

Court of Appeals has no knowledge as to whether error was committed where amended petition nor affidavit for continuance not in record. Charles H. Powell et al. v. H. A. Mead----292

Court of Appeals will not disturb verdict or finding on weight of evidence. J. F. Lowe v. Henry Erleinson----57
Louisville, C. & L. R. Co. v. S. A. Ramsey----274

Court of Appeals will not pass upon error of trial court where latter is given no opportunity to correct it. John Dils v. Wm. Adkins et al.---298

Court of Appeals will reverse case only for palpable error where issue of fact submitted to jury at three trials, each resulting same way. Thomas A. Morgan v. Henry Wood----320

Deeds or exhibits as evidence of title to be entered on order book or made part of bill of evidence. R. Baker's Heirs v. W. C. Gilbert et al.--912

Defendant charged with felony can not on appeal complain of correctible errors neither objected nor excepted to in lower court. James H. Calloway v. Commonwealth----951

Dismissal on motion where order appealed from not final order. H. M. Skillman v. J. J. Frost's Exr. et al.----900

Effort to have judgment set aside held condition precedent to appeal. J. F. Barker v. Paralee Barker----203

Error in giving erroneous instruction, not assigned as ground for new trial, can not be raised for first time on appeal. Elizabeth Gutzwilder v. Adam Wagner ----371

Infancy not presumed where record fails to show it affirmatively. Wm. Patterson et al. v. Burrel Million's Admx. et al.----434

Judgment held not contrary to weight of evidence. Urso & Morsican v. Unverzagt & Smith----46

Judgment held not subject to be disturbed unless palpably against evidence. Nathan Gentry et al. v. William Abshire----81

Minimum of this court's jurisdiction of appeals is $100. J. H. Taylor v. Isaac Shawley et al.----22

Opinions to be seldom overruled when vital rights and interests would thereby be disturbed. Wm. L. Murphy v. John L. Boyd----817

Papers omitted from record are presumed to sustain judgment of lower court. John Tutt et al. v. Socrates Kincaid et al.----310

Presumption of propriety of exclusion of power of attorney and deed

[References are to Pages.]

APPEAL—Continued.

from attorney in fact as evidence. Jas. T. Hampton v. Francis Lashley ---------- 865

Statement on record to specify particular errors on which defendant means to rely. George Harned v. Harvey & Keith ---------- 437

Statute bars appeal two years after date of judgment. C. F. Broseke v. William Carton et al ---------- 540

Statutory guardian of infant appellant may move to dismiss appeal. Wm. Patterson et al. v. Burrel Million's Admx. et al ---------- 434

Time within which appeal may be taken from judgment of city court. A. L. Greer v. Isaac Spencer ---------- 358

Verdict on conflicting evidence held conclusive. Louisville & N. R. Co. v. J. B. Brown ---------- 199

When prosecuted solely for delay will be dismissed. L. M. Longshaw v. Linning & Jackson ---------- 628

ARBITRATION AND AWARD.

Contract by administrator and former agent of testator held valid. James G. Phillips v. D. W. Phillips' Admr. ---------- 78

Objection to award for indefiniteness declared not sustained. James G. Phillips v. D. W. Phillips' Admr. ---------- 78

ARGUMENT OF COUNSEL.

See Appeal; Criminal Law.

ASSAULT AND BATTERY.

See Homicide.

ASSESSORS.

See Taxation.

ASSIGNMENT OF ERRORS.

See Appeal.

ASSIGNMENTS.

See Bankruptcy.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Party held not to have prosecuted to insolvency with diligence required. T. N. Perry & Co. v. E. E. Duke's Exrx. et al ---------- 29

ASSUMPSIT, ACTION OF.

Sufficiency of pleading in action in assumpsit. John B. Williamson v. John P. Morton & Co ---------- 590

[References are to Pages.]

ASSUMPTION OF RISK.

See Master and Servant.

ATTACHMENT.

See Fraudulent Conveyances; Mechanics' Liens.

Affidavit for attachment must state that claim is just. Northern Bank of Ky. v. Henry Bell et al.----346

Bond held presumed to be sufficient. Joseph Sutton v. W. H. Perkins et al. ----76

Discharge of property from attachment when debt not due. Jerry Garvey v. Joel Garvey et al.----910

Owner of property to be reimbursed for property wrongfully taken or for damage sustained by wrongful levy. J. B. Knox v. E. B. Shannon--452

Proof of wrongful attachment in action on attachment bond. Samuel A. Miller v. McCrory, White & Co. et al.----625

When attachment against land fraudulently conveyed will be sustained. Ellen Allen v. Farmers' Bank of Ky. et al.----725

Where sale of grocery is made without change of possession and creditors are not paid, they may attach and subject property to payment of their claims. Kahn & Wolf v. A. Goodhart et al.----462

ATTORNEY AND CLIENT.

See Appeal; New Trial.

Attorney no lien where client defendant is resisting recovery of property to which he has title. Chas. Eginton et al. v. W. J. Rusk et al.---537

Attorney's statutory lien attaches only upon judgment. Isaac A. Stewart et al. v. Louisville & N. R. Co.----943

Claim of attorneys where one withdraws from contract and litigant compelled to employ another. James D. Percifull et al. v. Catherine Wilson's Heirs et al.----545

Effect of action by grantor to rescind contract of sale fully executed. Chas. Eginton et al. v. W. J. Rusk et al.----537

BAIL.

See Criminal Law.

Erroneous action of court in quashing bail bonds when "Fulton" omitted before "Circuit Court." Commonwealth v. Joe Stegala----533

Exonerated only by giving jailer dominion over accused, ordinarily by putting prisoner in jail. Michael McKinney et al. v. Commonwealth--348

Proof held not sufficient to render bail bond enforcible. Commonwealth v. Wesley Bordus et al.----17

[References are to Pages.]

BANKRUPTCY.

See Fraudulent Conveyances; Trial.

Allegations and proof necessary to hold assignor liable. Geo. W. Orme v. W. W. David 443

Effect of discharge. S. H. Smith et al. v. A. F. Gowdy's Admr. 430

Judgment against assignee held error. T. J. Miller v. B. F. Ferrell 48

Mere liability on cashier's bond does not make claim provable in bankruptcy. T. M. Cardwell v. Helen Kemple 480

Plea of discharge in bankruptcy bars personal judgment. John Boyer v. W. C. Lincoln et al. 437

Release declared not to discharge bankrupt from fiduciary obligation. George Duell's Exr. v. Louis Israel 122

Remedy of creditors held to be in bankrupt court. Thomas C. Richardson et al. v. J. A. Wycoff et al. 9

When assignee must plead bankruptcy proceedings to suspend or defeat proceedings in state court. Miles Davis' Assignee v. John Smallgood 441

BANKS AND BANKING.

Bank director under no obligation to postpone claim to that of bank and is entitled to reward of diligence as any other creditor. Northern Bank of Ky. v. Henry Bell et al. 346

BASTARDS.

See Slaves.

BETTING.

See Gaming.

BIGAMY.

Husband marrying another woman in Indiana can not be punished in this state. Commonwealth v. J. M. Ferrell 566

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Alteration of Instruments; Husband and Wife; Indemnity; Limitation of Actions; Partnership; Payment; Principal and Surety; Sales; Sunday; Usury; Vendor and Purchaser; Witnesses.

Contract held to be for interest for twelve months from date. C. F. Cunningham v. William Carrico 102

[References are to Pages.]

BILLS AND NOTES—Continued.

Conveyance of land by curtesy tenant good consideration for note, and in absence of fraud or mistake will not be disturbed. George Jenkins v. P. L. Netherland ---- 432

Delivery of one note in consideration for another is binding and may be pleaded, although not assigned. National Bank of Stanford v. S. G. Hocker ---- 416

Demand before suit held not necessary. Francis Reidbaugh v. A. P. Grover ---- 34

Effect of bill indorsed "Pay A B or order on account of G C & G." John W. Menzies et al. v. Farmers' Bank of Ky. ---- 634

Effect of subsequent indorsement of note. Jerry Garvey v. Joel Garvey et al. ---- 910

Enforcibility of memorandum attached to note after execution, promising to pay additional interest. T. B. Showalter v. Benjamin Kirk's Exrs. ---- 741

Incompetent evidence in suit on note more than ten years overdue. Henry Worthington v. John J. Miller's Admr. ---- 708

Judgment held not reversible for excessiveness of $2.10. Samuel Grimes v. John W. Williams ---- 28

Mistake of failing to indorse corporation's note corrected by suit on note and corporation held liable as indorser. Star Planing Mill Co. v. Exchange Bank of Ky. ---- 277

Petition bad which merely alleges that suit was instituted by assignee on note assigned and judgment recovered and execution issued and returned "no property found," all in due time. H. V. Puthuff v. Robt. Howe ---- 599

Petition to collect note must allege defendant's promise to pay. R. H. Goodpaster v. J. H. Richart et al. ---- 326

Presumption as to address to which notice of protest for nonpayment should be mailed. John W. Menzies et al. v. Farmers' Bank of Ky. ---- 634

Promise in note to pay eight per cent. interest is undertaking to pay that rate only to maturity. John W. Posey v. Eliza Mayer's Admr. ---- 456

Sale of use of patent right in certain territory is good consideration for execution of note, and if defective title is afterward perfected, right inures to purchaser's benefit. W. H. Dawson et al. v. Babcock & Nille, Assignees ---- 248

Sufficiency of petition on notes. Kentucky Elec. Inst. v. Margaret A. Gaines ---- 831

Validity of new promise by bankrupt to pay a debt from which he has been discharged. John W. Posey v. Eliza Mayer's Admr. ---- 456

When compromise and new note constitute new consideration sufficient to support promise. Margaret A. Beall v. David P. Bethel et al. 343

When transferrer of bill may be compelled by bill in equity to indorse. Star Planing Mill Co. v. Exchange Bank of Ky. ---- 277

[References are to Pages.]

BONDS.

See Bail; Clerks of Courts; Contempt; Courts; Execution; Principal and Surety.

BOUNDARIES.

See Deeds; Elections.

Admissibility of parol evidence in determining boundaries. W. F. Cissel v. Lawrence J. Rapier ---- 553

General boundary line is straight line passing between the two points by the nearest course. T. G. Crutcher et al. v. Shelby R. R. Dist. of Shelby County ---- 404

BREACH OF CONTRACT.

See Contracts.

BREACH OF THE PEACE.

Peace bond held not breached. Commonwealth v. Mike Mahoney, Jr., et al. ---- 133

BRIDGES.

See Franchises; Limitation of Actions.

BROKERS.

Broker entitled to commission on contract where conveyance not consummated because of owner's wife's refusal to join in conveyance. H. B. Cook v. E. D. Fryer ---- 454

Where purchaser bought land after examination thereof he can not avoid payment on ground that agent made false representations as to quality. Ben F. Frank v. W. S. Lacy et al ---- 289

BUILDING AND LOAN ASSOCIATIONS.

Association can not take away rights of members which have been secured by organic laws. Louisville German Bldg. & L. Assn. v. John H. Wissing ---- 822

Effect of repeal of by-law as to withdrawal of members and settlement with them. Louisville German Bldg. & Loan Assn. v. John H. Wissing ---- 822

BUILDING CONTRACTS.

See Principal and Surety.

[References are to Pages.]

BURDEN OF PROOF.

See Equity.

BURGLARY.

Admissibility of evidence of intent. Anthony Maden v. Commonwealth ---------- 674
Allegations in indictment for house-breaking. Anthony Maden v. Commonwealth ---------- 674
Erroneous instruction in trial of cause for house-breaking. Anthony Maden v. Commonwealth ---------- 674

BY-LAWS.

See Building and Loan Associations.

CANCELATION OF INSTRUMENTS.

See Trusts.

Deed held void for mental incapacity and undue influence. Martin Huban v. Thomas Huban ---------- 197
When deed not canceled for breach of contract made between grantor and grantees. Fanny L. Davenport et al. v. John Crisp et al. ---------- 930

CARRIERS.

Allegations necessary to render carrier liable for injury to passenger. Kentucky Cent. R. Co. v. Frank McMurty ---------- 509
Passenger's right to compensation for injury sustained and resultant injury. Kentucky Cent. R. Co. v. Frank McMurty ---------- 509
Person jumping from train can not recover for injury. Mattie Parks v. Kentucky Cent. R. Co. ---------- 552
Presumption that person boarding train is passenger. Mattie Parks v. Kentucky Cent. R. Co. ---------- 552

CEMETERIES.

Refusal of decree for continued maintenance of cemetery held proper. Mary Whipple v. Louisville Presbyterian Orphan Asylum et al. ---------- 159

CHANCERY COURTS.

See Courts.

CHATTEL MORTGAGES.

Debtor may mortgage personalty for payment of debts, regardless of wife's not joining in mortgage on personalty alone. Elizabeth Smith v. D. Wilson & Co. et al. ---------- 946

[References are to Pages.]

CITY COURTS.

See Appeal; Courts.

CIVIL ACTION.

See Sheriffs and Constables.

CLAIMS.

See Executors and Administrators.

CLERKS OF COURTS.

See Exceptions, Bill of.

Clerk and sureties liable for clerk's failure to issue execution. Horace Burton et al. v. John G. McFarland et al.----428

Liability for money coming not as to an officer. I. S. Snape et al. v. W. H. Sanford's Receiver----609

COMMISSIONS.

See Brokers.

COMPOSITIONS WITH CREDITORS.

Creditor held estopped by composition. Bank of Kentucky v. S. B. Poyntz et al.----99

COMPROMISE AND SETTLEMENT.

See Bills and Notes.

CONFESSION OF JUDGMENT.

See Judgment.

CONFIRMATION.

See Judicial Sales.

CONSIDERATION.

See Bills and Notes; Contracts; Dower; Judicial Sales; Vendor and Purchaser.

CONSOLIDATION.

See Trial.

CONSPIRACY.

See Homicide.

Sufficiency of indictment. Fred Mathis v. Commonwealth----686

[References are to Pages.]

CONSTITUTIONAL LAW.

Legislature has right to repeal act which was mere gratuity. Bryant Station & L. Tpk. Co. v. P. P. Johnson_____427

CONSTRUCTION.

See Wills.

CONTEMPT.

Chancellor's refusal to punish one for contempt committed by alleged obstruction of passway which had been ordered opened not reversible error. Nelson Urton v. John Downey_____564

Power of court to order litigant to pay into court amount of sale bond, interest and costs, and to order him committed on default. John W. Greer et al. v. Mechanics' Mut. Sav. Assn. of Newport_____439

CONTINGENT DEVISES.

See Wills.

CONTINUANCE.

See Appeal; Criminal Law.

No abuse of discretion for trial court to overrule motion for continuance where two continuances have been granted for same purpose. John Tutt et al. v. Socrates Kincaid et al._____310

When refusal of continuance on account of absence of witness not error. Kentucky Cent. R. Co. v. Frank McMurty_____509

CONTRACTS.

See Attorney and Client; Constitutional Law; Counties; Husband and Wife; Infants; Pleading; Principal and Agent; Sales; Subscriptions; Vendor and Purchaser.

Consideration either prejudicial to plaintiff or beneficial to defendant necessary to maintain action upon implied as well as on express promise. Norman Gaines v. C. T. Scott_____361

Effect and validity of memorandum as to quantity and price of goods sold. Southern States Coal, Iron and Land Co. v. Geo. S. Moore & Co. _____916

Effect of insolvency of stockholders who had entered agreement to become liable proportionately for money raised. John H. Wheat, Surviving Partner, et al. v. Frankfort Cotton Mills Co. et al._____903

Elements to be considered in determining capacity to contract. Joseph Riley v. John T. Albertson_____316

Fraud or mistake declared necessary to defense of advancement. W. H. McCown's Admr. v. John Jennings_____123

[References are to Pages.]

CONTRACTS—Continued.

Interpretation of contract entered into by stockholders. John H. Wheat, Surviving Partner, et al. v. Frankfort Cotton Mills Co. et al.....903
Necessary allegations in suit to recover for breach of contract. Crittenden County v. Elisha Conger.....485
Only party who is ignorant of mistake and against whom it operates as a surprise or fraud can obtain relief in equity. Geo. N. Brown v. D. D. Geiger.....240
Parties' intention must be gathered from writing. J. S. Price v. John Rodman.....7
Performance held sufficient. William Smith et al. v. Jacob & Smyser et al.....176
Rights of third person under contract made in his favor but not with him. Davis, Moody & Co. v. John H. Wiley.....580
Rule for construing written contract. Bramlette's Admx. v. Boyce.711
Weight of evidence based on one more or less immaterial fact. Joseph Riley v. John T. Albertson.....316
Weight of evidence on question of mistake declared to be for jury. Continental Ins. Co. v. Paul Randolph.....125
What party seeking performance of contract must show. James K. Stone v. First Nat. Bank of Warren, Pa.....796

CONTRADICTORY EVIDENCE.

See New Trial.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant.

CONVERSION.

Competency of evidence in suit by tenant against landlord for conversion. C. G. Wallace v. W. P. Monlinier.....701
Measure of damages where landlord converts tenant's crops to his own use. C. G. Wallace v. W. P. Monlinier.....701

CONVEYANCES.

See Mortgages.

CORONERS.

Compensation of physicians holding post-mortems in city of Louisville. L. D. Kastenbine v. City of Louisville.....471

CORPORATIONS.

See Banks and Banking.

Liability of stockholders under agreement to be liable proportionately

[References are to Pages.]

CORPORATIONS—Continued.

to holdings. John H. Wheat, Surviving Partner, et al. v. Frankfort Cotton Mills Co. et al. ----------903

Power of corporation to prescribe terms of disposition of new stock. Thos. L. Jones et al. v. Newport & L. Tpk. R. Co.----------834

Right of owners to increase capital and prescribe terms of sale. Thos. L. Jones et al. v. Newport & L. Tpk. R. Co.----------698

Rights of private corporation doing business in foreign state. Bramlette's Admx. v. Boyce----------711

Street railroad bonds held not to have been obtained from corporation by fraud. Covington St. R. Co. v. Amos Shinkle, Trustee, et al.----------58

Subscribers acquiescing for eleven years in action increasing stock may not question right. Thos. L. Jones et al. v. Newport & L. Tpk. R. Co, ----------698

Validity of issue of new stock. Thos. L. Jones et al. v. Newport & L. Tpk. R. Co. ----------834

CORROBORATIVE EVIDENCE.

See New Trial.

COSTS.

See Wills.

Costs held properly taxed. B. D. Marks v. Chas. A. Graham----------27

COUNTERCLAIM.

See Set-off and Counterclaim.

COUNTIES.

See Taxation.

County attorney may appeal to circuit court in own name for use of county from allowance of claim in Lincoln county, and where judgment is adverse, may appeal to court of appeals. W. H. Miller, County Attorney v. S. H. Baughman----------266

County may be sued for breach of contract. Crittenden County v. Elisha Conger ----------485

COUNTY COURTS.

See Courts.

COUNTY FAIRS.

See Gaming.

COURT COMMISSIONERS.

See Judicial Sales.

[References are to Pages.]

COURTS.

See Executors and Administrators; Officers; Sheriffs and Constables; Trial.

Court held without jurisdiction to enter personal judgment against party. Mary E. Skillman v. W. A. Atchison et al.----105

Jurisdiction of chancery court. George McCarty et al. v. Chas. Taturn et al. ----633

Jurisdiction of city court where fine in case amounts to $1200. E. L. Gonhot et al. v. Jas. M. Hipkins----458

Louisville chancery court held without jurisdiction outside of Jefferson county. James H. Craddock et al. v. J. S. Jordan----146

Misjoinder to obtain jurisdiction in another county. S. G. Reid v. John S. Cain et al. ----269

No appeal from judgment of county court rejecting claim, unless claim first presented to that court. Crittenden County v. Elisha Conger----485

No forfeiture on bond decreed in absence of bond in circuit court or minutes from examining court filed in circuit court. Commonwealth v. J. R. Barents----353

Overruling motion to transfer cause to equity docket held not error. Continental Ins. Co. v. Paul Randolph----125

CREDITORS.

See Marshalling Assets and Securities.

CRIMINAL COURT.

See Sheriffs and Constables.

CRIMINAL LAW.

See Animals; Bail; Bigamy; Burglary; Disorderly House; Escape; Highways; Homicide; Indictment and Information; Intoxicating Liquors; Judges; Larceny; Nuisance; Perjury; Rewards; Robbery.

Admissibility of declarations as part of res gestae. James H. Galloway v. Commonwealth ----951

Admissibility of evidence against fugitive where conspiracy not alleged or proved. James Mullins v. Commonwealth----527

Admissibility of statement made by accused shortly after killing, near place and before witnesses not called by commonwealth. James H. Galloway v. Commonwealth ----951

Affidavit for continuance for absent witness held subject to contradiction, and character of witness held subject to impeachment. Charles Mackey v. Commonwealth ----209

Appeals allowed only from final orders or judgments. Commonwealth v. Joe Stegala----532

[References are to Pages.]

CRIMINAL LAW—Continued.

Cause not reversed for incompetent evidence unless substantial rights of accused shown prejudiced thereby. Mary Rowlett v. Commonwealth ---571

Competency of medical practitioners to give opinions as to effect of injuries in murder case. Mary Rowlett v. Commonwealth---571

Court may direct jury to view premises where deemed necessary, regardless as to source of suggestion. William Austin v. Commonwealth ---664

Court of appeals will not reverse for error of law where record does not show accused prejudiced in substantial rights. Phil Bell v. Commonwealth ---336

Defendant held not in legal jeopardy. Ewell Tye v. Commonwealth ---206

Determination as to whether accused prejudiced by instructions. Frank Strassel v. Commonwealth ---886

Erroneous instruction held not ground for reversal. Alex. Crittenden v. Commonwealth ---193

Evidence held presumed to sustain charge. Stephen Stone v. Commonwealth ---135

Former conviction held required to be alleged. John Stewart v. Commonwealth ---138

Former conviction required to be specifically pleaded. Elijah Carter v. Commonwealth ---92

Ground upon which judgment may be arrested. Walter Davis v. Commonwealth ---969

Instruction on implied malice held erroneous. Alex. Crittenden v. Commonwealth ---193

Limiting time for argument held not ground for reversal. Thomas Sewell v. Commonwealth ---213

No reversal where instructions are not all in record. Walter Davis v. Commonwealth ---969

One charged with keeping a bawdy house entitled to challenge only three jurors peremptorily. Jennie Burton v. Commonwealth---841

Refusal of change of venue held not error. Major Hicks v. Commonwealth ---214

Reversal where record shows error complained of detrimental to fundamental rights. William Austin v. Commonwealth---664

Scope of court's instruction in criminal case. J. M. Sosh v. Commonwealth ---710

Time in which to appeal from judgment of county judge, or city, police or justice's court. L. F. Bright v. Commonwealth---647

When newly discovered evidence ground for new trial. George Stovall v. Commonwealth ---820

[References are to Pages.]

CRIMINAL LAW—Continued.

When not erroneous for court to stop counsel from argument. William Austin v. Commonwealth ---------- 664

When omission to read indictment at proper time does not constitute reversible error. James H. Galloway v. Commonwealth ---------- 951

When plea of former acquittal constitutes good defense. James S. Offutt v. Commonwealth ---------- 287

When refusal of continuance constitutes reversible error in homicide case. Isaac Turner v. Commonwealth ---------- 640

Where causes embracing personal injuries are joined, commonwealth not required to elect upon which count it will prosecute. Frost Rose v. Commonwealth ---------- 568

CURTESY.

See Limitation of Actions.

Right of husband, being life tenant, to homestead exemption. R. B. English v. B. Studicker & Co. et al. ---------- 947

DAMAGES.

See Carriers; Conversion; Intoxicating Liquors; Municipal Corporations.

When Court of Appeals authorized to interfere where amount of damages in suit for forcible ejection has been fixed by jury. Payson & Lyon et al. v. Walter Holden ---------- 771

DEBTOR AND CREDITOR.

See Trusts.

DECLARATIONS.

See Evidence.

DEDICATION.

Dedication of street by plat not acknowledged but recorded. Davis, Moody & Co. v. City of Louisville ---------- 965

DEEDS.

See Cancelation of Instruments; Estoppel; Homestead; Husband and Wife; Mortgages; Reformation of Instruments; Sheriffs and Constables.

Courses and distances controlled by natural objects mentioned in description in deed or executory contract. Wm. R. Ball v. Wilkerson Pursefull et al. ---------- 340

[References are to Pages.]

DEEDS—Continued.

Held not recorded in time to render certified copy competent evidence. W. H. Bingham et al. v. J. F. Orr et al.----169
Held to be best evidence of contract. E. Wittey v. Peter Deff----61
Meaning of word "children" in conveyance. Jordan McGinnes et al. v. Sam W. Banta et al.----721
Recital in conveyance held not competent against strangers. Michael Lankey's Admr. v. A. C. McElroy et al.----102
Recital in conveyance may be controverted by parol proof. Michael Lankey's Admr. v. A. C. McElroy et al.----102
Sufficiency of description in deed. R. W. Knott v. G. P. B. Johnston et al. ----271
Terms of bond for deed held susceptible of being explained by parol testimony. H. C. Mattingly v. Wm. C. Wathen----66
What conveyed by grant of a will. Wm. R. Ball v. Wilkerson Pursefull et al. ----340

DEFINITIONS.

See Gaming.

DEMURRER.

See Pleading.

DEPOSITIONS.

Not read when one giving it is in court and has testified. A. J. Beall v. Wm. Bethel's Admr.----567
Under the code, the withdrawal of a first deposition will not render the appellee's subsequent deposition admissible. Julia Ann Allison v. John T. Moore ----253

DESCENT AND DISTRIBUTION.

See Executors and Administrators.

Children of half blood inherit one-half as much as those of the whole blood, and children born in wedlock entered into according to negro customs are legitimate. Richard Brown et al. v. James Mundy's Admx. et al. ----270
Creditor's right in heir's estate. Evaline Carter v. Jesse Carter's Admr. ----940
Descent of infant's real estate. Matilda Vice v. D. M. Vice et al----319
Division of ancestor's realty. Elizabeth Mays et al. v. W. N. Hannah et al. ----630
Remedy of creditor of ancestor held to be by execution on judgment. Marietta Abell v. Ben F. Abell et al. ----128
Rights of widow and children under decedent's title bond. Thomas Johnson v. Flora Johnson ----744

[References are to Pages.]

DETINUE.

Judgment in action to recover personal property. S. O. Fowler v. A. A. Gordon 475

DISCHARGE.

See Bankruptcy.

DISCOVERY.

See Equity.

DISMISSAL AND NONSUIT.

Plaintiff held entitled to dismiss action. H. A. Dumesnil et al. v. City of Louisville 180

DISORDERLY HOUSE.

Dismissal of cause on appeal proper when shown that city court had no jurisdiction. Commonwealth v. William Douglas et al. 523

State may prove general reputation of house in trial of one accused of keeping disorderly house. Jennie Burton v. Commonwealth 841

DISTRESS.

See Landlord and Tenant.

DIVORCE.

Court of Appeals held not to have jurisdiction to reverse judgment of divorce. David Myers v. Marina Myers 39

Judgment for alimony in sum of $500 held proper. David Myers v. Marina Myers 39

Suit by wife for divorce held properly brought in this state. Ellen B. Dunlop v. Robert Dunlop 188

DOWER.

See Executors and Administrators; Homestead.

Dismissal of petition in which infancy is pleaded to avoid dower relinquishment where circumstances make infancy doubtful. Henry E. Shawhan v. Elizabeth Smith 814

Release consideration for contract between spouse's and husband's creditors, made through representative, assignee of spouse's. W. F. Bates v. R. S. Scobee's Assignee et al. 608

Right of wife to dower in husband's realty sold at judgment of creditors. Nancy P. Young et al. v. Lavina Strother 575

[References are to Pages.]

DOWER—Continued.

Where widow does not renounce provisions of will, she must be held to have accepted devise in lieu of dower. Chas. B. Porter's Admr. et al. v. C. W. Porter et al. ----------244

Widow's claim of dower as against creditors. J. D. Burns et al. v. H. H. Hoffman ----------549

Woman not entitled to dower in realty conveyed by husband in good faith before marriage. Sarah J. Moody v. R. H. Moody et al----381

EASEMENTS.

See Ejectment.

Party held entitled to easement in use of spring. Thomas Rountree v. John W. Lewis ----------68

Party held to have easement of passway. James V. Turner v. A. A. Goodman ----------136

Petition held bad. J. H. Hickman v. C. G. Sewell----------153

When use of wall constitutes easement. James Smith v. Geo. W. Martin ----------818

EJECTMENT.

See Trespass.

One can not recover in ejectment against one having easement. James Smith v. Geo. W. Martin ----------818

Party in ejectment suit to recover on strength of own title, not weakness of adversary's title. Elizabeth McDowell et al. v. H. B. Wiseman ----------285

ELECTION.

See Execution.

ELECTION OF REMEDIES.

See Trial.

ELECTIONS.

See Gaming; Municipal Corporations.

Where court order fixed boundary of voting precinct and it was acquiesced in for many years, public policy is against declaring order void because of lack of proper petition. T. G. Crutcher et al. v. Shelby R. R. Dist. of Shelby County ----------404

EMBEZZLEMENT.

When punished as a felony. Commonwealth v. Hicks ----------891

[References are to Pages.]

EQUITY.

Burden on one seeking relief in equity. Fanny Wilson v. A. R. Sanders' Exr. et al. ---------- 863

Court has no jurisdiction over parties not notified or voluntarily appearing. Thos. H. Ellis et al. v. Sylvester Johnson ---------- 868

Devisee held estopped by neglect to make more complete discovery. Richard Overton v. Preston Means ---------- 1

Held not to give remedy to creditor of ancestor against heir. Marietta Abell v. Ben F. Abell et al. ---------- 128

Party not relieved on ground of participating in another's fraud. Benjamin Magee v. Melville Phelps et al. ---------- 869

EQUITY OF REDEMPTION.

See Execution.

ESCAPE.

Sufficiency of indictment against jailer for suffering prisoner to escape. John Staton v. Commonwealth ---------- 374

ESTOPPEL.

See Compositions with Creditors; Equity; Licenses; Wills.

One not party to contract, by accepting benefits and acquiescing in arrangement with at least constructive notice, is estopped to set up claim to homestead rights of citizens. W. F. Bates v. R. S. Scobee's Assignee et al. ---------- 608

One uniting with others in conveyance bound by and estopped to deny recitals of deed, and estoppel runs with land. W. F. Cissel v. Lawrence J. Rapier ---------- 553

Party acquiescing in act, intimating consent by words and conduct, seeing act done, and expressing satisfaction, is estopped from thereafter objecting. John Klump v. John G. Liebold ---------- 421

Third party held estopped to claim land sold. William Jarvis v. T. P. Satterwhite ---------- 167

Where one insincerely acquiesces in an act whereby rights of others are altered, he is estopped from challenging act to their prejudice. John Klump v. John G. Liebold ---------- 421

EVIDENCE.

See Appeal; Contracts; Deposition; Fraudulent Conveyances; Homicide; New Trial; Trusts; Vendor and Purchaser; Witnesses.

Admissibility of declarations as part of res gestae. John Dils, Jr. v. Henry May ---------- 619

Questions held not leading. William Hunter's Admr. v. A. March--55

[References are to Pages.]

EVIDENCE—Continued.

Recollection of parties as to occurrences over forty years before will not destroy written evidence of title where conveyance shows full value paid and land has been held over forty years. A. Q. Goodin et al. v. Mary E. Goodin et al. ----------218

Refusal to order view by jury held proper. Louisville & N. R. Co. v. J. B. Brown ----------199

When lease read in evidence without proof of execution. Payson & Lyon et al. v. Walter Holden ----------771

Where record fails to show written document not authenticated, no error shown by court's refusal to admit it. James A. Bibb et al. v. Nancy Hall ----------877

EXCEPTIONS.

See Judicial Sales.

EXCEPTIONS, BILL OF.

Bill held improperly certified by bystanders. John Deils, Jr. v. G. A. Brown ----------13

Memoranda by clerk held not to make bill part of record. E. Padgett et al. v. Henry Mays ----------24

When bill of exceptions too uncertain and indefinite upon which to base judgment of reversal. Clifton Cockrill v. Commonwealth----------385

EXECUTION.

See Action; Descent and Distribution; Sheriffs and Constables.

Devisee's interest in real estate is subject to sale. Richard Overton v. Preston Means ----------1

Measure of recovery in proceeding by plaintiff in execution to recover upon claimant's bond. Wm. M. Combs et al. v. John A. Wallace----338

Priority of liens. James A. Greer v. P. A. Howard et al.----------755

Purchaser held to take title only to land levied on. J. B. Martin's Assignee v. John B. Martin et al. ----------195

Rights of creditors under sale of equity of redemption. Glazebrook & Bro. v. John D. Brandon ----------355

Rights of purchaser of land at sheriff's sale on levy and execution. James A. Greer v. P. A. Howard et al. ----------755

Where sheriff levies upon and sells first property chosen by defendant for exemption, debtor may recover value of property upon indemnity bond given by plaintiff. C. P. Westerfield v. P. B. Moreland ----------247

[References are to Pages.]

EXECUTORS AND ADMINISTRATORS.

See Guardian and Ward; Homestead; Limitation of Actions; Trusts.

Administrator liable for rent collected, and right of purchaser to collect begins only when sale confirmed. S. Elliott's Admr. v. S. H. Bush et al. ---------- 354

Application of statute requiring that claims against deceased persons be sworn to. Philip Arnold's Exrs. v. Commonwealth ---------- 515

Claim for interest accruing after death of decedent. William Hamilton's Admr. v. L. P. Tarlton, Receiver ---------- 371

Collection of claim against estate by one holding notes belonging to the estate. Jacob Myers' Admr. v. James Bosley ---------- 765

Court order preventing creditors from suing to collect claims against insolvent estate does not prevent right of collection in statutory manner for settling decedents' estates, and statute of limitations bars them when not presented, properly verified, within time. Ann H. Barnes et al. v. Silas T. Green et al. ---------- 235

Executor held not compelled to plead statute of limitations. Phillip Maxey et al. v. F. L. Wallhatt's Exrs. et al. ---------- 31

Executrix not to purchase testator's land, and reap personal benefit. M. M. Bartlett's Admr. et al. v. J. L. Gray's Admr. et al. ---------- 866

Individual liability of administrator misappropriating money under mistaken belief as to his right. L. S. Story et al. v. Catherine Harrison et al. ---------- 669

Jurisdiction of court over assignee's estate. Wm. Scott v. James A. Grinstead et al. ---------- 857

Liability of administrator who distributes estate without requiring refunding bond when he knows of valid claims or judgments. Belle R. Hooser v. J. H. Hooser ---------- 651

Liability of devisees to reimburse executors. A. H. Bowman's Exrs. et al. v. J. A. Bowman et al. ---------- 859

Liability of sureties on administrator's bond. W. A. Stuart, Receiver v. R. M. Hathaway ---------- 800

Liability of sureties on executors' bond for defalcation of same executors acting as trustees without bond. C. W. Warren et al. v. J. H. Benton's Trustees et al. ---------- 272

Power of executor over land demised by terms of will. Samuel Thompson et al. v. John Thompson et al. ---------- 812

Presumption as to individual purchase by executrix. M. M. Bartlett's Admr. et al. v. J. L. Gray's Admr. et al. ---------- 866

Purchaser at sale of land by trustee and beneficiaries under will not compelled to look to application of purchase-money. E. D. Smith v. A. B. Parrish et al. ---------- 502

Rights of heirs and creditors where son died after father and father was surety for son who was largely involved. Evaline Carter v. Jesse Carter's Admr. ---------- 940

[References are to Pages.]

EXECUTORS AND ADMINISTRATORS—Continued.

Surety to answer for personal assets, but liability can not be enlarged without their consent. W. A. Stuart, Receiver v. R. M. Hathaway ----------800
To what property widow entitled before assignment of dower. Fannie Jones v. Frank Jones et al. ----------412
What deemed advancements. W. S. Ross & Wife v. Elijah C. Dimmit ----------525
Where judgment decrees that each child shall share parent's estate equally, money advanced to one heir not to be charged against him so as to make his share under decree less than that of others. Thomas Newman v. Richard O. Newman ----------413

EXEMPTIONS.

See Homestead; Landlord and Tenant.

EXPERT TESTIMONY.

See Contracts.

EXTENSION OF TIME.

See Principal and Surety.

FALSE REPRESENTATIONS.

See Brokers.

FENCES.

See Animals.

FERRIES.

See Franchises.

FIRES.

See Insurance.

FLIGHT.

See Criminal Law.

FORECLOSURE.

See Mortgages.

FORFEITURES.

See Courts; Criminal Law; Usury.

FORGERY.

Requisites of indictment for forgery. H. C. Wormoth v. Commonwealth ----------670

[References are to Pages.]

FORMER JEOPARDY.

See Criminal Law; Larceny.

FRANCHISES.

See Turnpikes and Toll Roads.

Grant of lock, bridge or ferry franchise held not to preclude future legislation. Commonwealth v. John B. Stevens et al. ----------114

FRAUD.

See Contracts; Equity; Insurance; Judicial Sales; Sales; Trusts; Vendor and Purchaser.

FRAUDS, STATUTE OF.

Part performance does not take oral contract for land sale out of statute, and there can be no judgment of specific performance of such contract. C. B. Stephens v. Sarah F. Reaves ----------391

Promise to debtor and not to creditor not within statute. Davis, Moody & Co. v. John H. Wiley ----------580

Requisites of pleading where parol promise to pay debt of another is relied upon for recovery. Davis, Moody & Co. v. John H. Wiley----585

Sufficiency of allegations. Jas. A. Mitchell's Admr. v. Ray & Co.'s Assignee ----------588

Waiver of right to plead statute as defense where realty conveyed. Johnsey Brown v. P. S. Board et al. ----------453

FRAUDULENT CONVEYANCES.

See Attachment; Husband and Wife; Insolvency; Judgment.

Acts constituting fraud on part of both vendor and vendee. Henry Bailey v. Green B. Cheatham et al.----------761

Conveyance held not fraudulent. Peter Banta's Exrs. et al. v. James Terry et al. ----------44

Conveyance to defraud creditors where grantor and grantee participated in fraud and no actual consideration passed will be set aside at instance of creditor. R. E. Parker et al. v. G. T. Wilcox et al.------280

Court of equity may set aside conveyance where creditor proceeds by attachment under Code, or where there has been a return of no property found on his judgment. Vance v. Campbell et al---------368

Creditors can not subject land transferred by possession and memorandum before vendor became debtor. E. T. Shipp v. S. M. Hibbler et al. ----------691

Deed will not be canceled, in absence of proof showing fraudulent

[References are to Pages.]

FRAUDULENT CONVEYANCES—Continued.

and false representations, where terms were explained to grantor. Julia Ann Allison v. John T. Moore ---------- 253

Evidence of fraudulent conveyance between father and son. John W. Snapp v. B. C. Orr's Admr. ---------- 785

Husband, thirteen years thereafter, may not charge wife with fraudulently procuring conveyance made to her instead of to both. John Mann v. Goetlibb Louffer et al. ---------- 742

Land bought with husband's money and conveyed to wife fraudulent as to pre-existing debts, and renewal of note evidencing debt does not make its date different. Elizabeth Yates' Admr. v. J. O. Fisher---- 948

Mere inadequacy of purchase-price, where neither fraud nor collusion shown, no ground for refusal to confirm sale. R. E. Parker et al. v. G. T. Wilcox et al. ---------- 280

Mortgage by financially embarrassed debtor held valid. John Crabtree v. R. T. Burns, Receiver, et al. ---------- 112

Party deeply in debt can not convey property to defraud creditors, especially where proof shows son, grantee, paid no consideration. Jasper A. Hildreth et al. v. E. L. Shipp ---------- 325

Realty conveyance may be fraudulent to creditors who become such before delivery of deed. John Dorch et al. v. William Corum, Receiver, et al. ---------- 322

Remedy of creditors of grantor. Thos. D. Byram et al. v. M. Grimes et al. ---------- 778

Repeal of Act 1838, 3 Stat. Laws 116. Vance v. Campbell et al.---- 368

Voluntary conveyance of realty not fraudulent as to subsequent creditors. J. W. Fletcher v. Caroline Harl et al. ---------- 297

What constitutes fraudulent conveyance. John Dorch et al. v. William Corum, Receiver, et al. ---------- 322

What must be shown before transfer of property held void under bankrupt law of United States and assignee authorized to recover value. Andreas' Assignee v. Rust et al. ---------- 478

GAMING.

See Lotteries.

Indictment for making election bet held sufficient. Commonwealth v. J. B. Hunter ---------- 11

Meaning of word "tables" in law against gaming. Henry Smith et al. v. Commonwealth ---------- 223

Pool selling does not constitute a wager nor a game. Smith v. Commonwealth ---------- 224

President and directors of county fair violate law by permitting machine and contrivance used in gaming to be set up on premises under their control. Henry Smith et al. v. Commonwealth ---------- 223

[References are to Pages.]

GAMING—Continued.

Under indictment for permitting gaming in house jointly occupied and controlled by accused and another, accused not to be convicted for permitting gaming in house under his individual control or occupancy. George Luckett v. Commonwealth ---------- 844

GARNISHMENT.

Plaintiff held not entitled to judgment. John W. Brevard et al. v. L. E. Stevens et al. ---------- 37

Plaintiff not entitled to personal judgment against garnishee. Catherine Cavanaugh v. Geo. M. Fried ---------- 238

Rights of parties where garnishee fails to make disclosure satisfactory to plaintiff. Wearen & Evans v. S. B. Matheney ---------- 600

GIFTS.

See Husband and Wife.

Creditors must take notice where land of debtor is in possession of another who holds unrecorded memorandum of gift. E. T. Shipp v. S. M. Hibbler et al. ---------- 691

Party who has entered upon realty under parol gift, afterwards repudiated by the donor, not required to account for rents. C. B. Stephens v. Sarah F. Reaves ---------- 391

When evidence of gifts is sufficient to set aside will. Elizabeth Stretlow v. W. H. Vonderhide's Exr. ---------- 377

GRAND LARCENY.

See Larceny.

GUARDIAN AND WARD.

See Appeal.

Court not to order sale of infant's realty for his maintenance and education where statutory guardian does not make infant party defendant and serve him with process. James Sawyer v. Christian Guscurth et al. ---------- 498

Guardian held not liable for failure to collect legacy. John P. B. Hill and Amos Hill v. Barbara Messer and John Riggs ---------- 18

Guardian may sell realty held in fee simple by wards where life tenant joins in conveyance and ward's best interest is served, and decree of sale should provide that property in which proceeds are reinvested should be held in same manner as realty sold. John D. Harris et al. v. Dorothy Anderson et al. ---------- 230

Meaning of word "maintenance" and intention of parties held for jury. D. G. Park et al. v. L. Anderson ---------- 49

[References are to Pages.]

GUARDIAN AND WARD—Continued.

Ownership of purchaser at guardian's sale not disturbed unless fraud practiced. Wm. M. Irvine et al. v. Nancy Walker ---- 387
Proceeds of infant's estate applied for maintenance and education only in action by guardian against ward, when infant served with process. James Sawyer v. Christian Guscurth et al. ---- 498
Requisites for sale of infant's realty by guardian. Columbus Allen et al. v. Rebecca Stump ---- 493
Validity of guardian's sale when not in strict conformity to the law. John Trower v. Martha Gabhart et al. ---- 508

HIGHWAYS.

See Municipal Corporations; Turnpikes and Toll Roads.

Compensation of person improving impassable road. Lee Beaver v. Marion County ---- 577
Description of highway in indictment for obstructing same held not sufficient. Commonwealth v. T. J. Crawford ---- 14
Sufficiency of indictment for obstructing public highway. Commonwealth v. W. P. Dunivant ---- 569
When dirt road to be vacated under statute. Hugh Anderson et al. v. Jas. A. Carrick et al. ---- 312

HOMESTEAD.

See Curtesy; Dower; Estoppel.

Conveyance by husband and wife of whole estate, without limitation to rights, passes homestead, but homestead does not pass where wife merely relinquishes her dower. B. B. Vaughn et al. v. W. F. Owsley ---- 222
Exemption not to be asserted by realty owner so as to defeat lien for balance of purchase-money. William Riley, Jr. v. Charles Filmore et al. ---- 745
Lien of lender of purchase-money held superior to homestead right. C. E. Denny et al. v. Clotilda McAtee's Admr. ---- 194
Mortgage held to destroy homestead right. Kelly Sutton v. Martha A. Puckett ---- 89
No homestead right in land mortgaged by spouses, where mortgage in terms conveys homestead, and it has been foreclosed. John Boyer v. W. C. Lincoln et al. ---- 437
Nonresident held not to have homestead right. Harry P. Lemcole et al. v. Chas. G. Shaw's Exrx. et al. ---- 38
One-thousand-dollar homestead right not barred by officer's levy nor mistake in valuation. Susanna Marshall et al. v. W. F. Vanmeter et al. ---- 491

[References are to Pages.]

HOMESTEAD—Continued.

Purchase-money mortgage held to have priority over homestead right. Harry P. Lemcole et al. v. Chas. G. Shaw's Exrx. et al. ----------38

Realty sale by chancellor under foreclosure decree does not pass title to homestead, nor does title pass in sale under execution by sheriff. Joseph Queen v. Mary E. Phillips ----------363

Sufficiency of parol testimony to show, after twenty years, debt created prior to passage of homestead law. Wilson Edmonson v. Sidney Green et al. ----------433

Waiver of right by accepting devise. Elizabeth Elmore v. Wm. F. Elmore's Admr. ----------902

What constitutes purchase-money. William Riley, Jr. v. Charles Filmore et al. ----------745

Widow deriving whole estate of husband by and through his will has no claim of homestead in land. E. Best et al. v. Mary E. Burnam ----------388

Widow's homestead lien held subject to lien reserved by grantors. Margaret Walker v. H. V. Prethoff et al. ----------143

HOMICIDE.

See Criminal Law.

Admissibility of entire conversation as evidence where part is in nature of admission. James Mullins v. Commonwealth----------527

Admissibility of evidence as to action in self-defense. A. J. May v. Commonwealth. ----------396

Admissibility of evidence in trial. Alsop v. Commonwealth -------851

Admission of evidence held reversible error. Thomas Sewell v. Commonwealth ----------213

Allegations in indictment. Alsop v. Commonwealth ----------851

Competency of witness charged with being a co-conspirator. Fred Mathis v. Commonwealth ----------686

Construction of instruction containing abstract proposition. Thos. Davis v. Commonwealth ----------934

Construction of instructions omitting doctrine of reasonable doubt. Thos. Davis v. Commonwealth ----------934

Correct instruction as to finding for manslaughter. George Stovall v. Commonwealth ----------820

Definition of legal provocation. John Cook v. Commonwealth----676

Erroneous instruction as to murder and manslaughter. John Cook v. Commonwealth ----------676

Erroneous instruction on self-defense held not prejudicial. Phillip Bailey v. Commonwealth ----------178

Indictment of person aiding and abetting murder as principal. Artie Smith v. Commonwealth ----------774

[References are to Pages.]

HOMICIDE—Continued.

In indictment charging one with unlawfully shooting at another with intent to kill or wound, it must be alleged that the weapon was a deadly weapon. Commonwealth v. J. H. McElroy ---- 242

Justification on ground of self-defense. Robert Price and Fred Matthis v. Commonwealth ---- 888

One charged with wounding two persons can not be tried and convicted at one and same time unless he waives his right to object. Crockett Campbell v. Commonwealth ---- 524

Oral testimony as to dying statements held not error. Phillip Bailey v. Commonwealth ---- 178

Person indicted not entitled to be informed by indictment of quality or quantity of evidence relied on to prove his malice. Alsop v. Commonwealth ---- 851

Proper instruction as to self-defense. John Sutterfield v. Commonwealth ---- 395

Reading of indictment according to statute. James H. Galloway v. Commonwealth ---- 951

Statement held admissible as dying declaration. Charles Mackey v. Commonwealth ---- 209

Sufficiency of indictment as to time of offense. Robert Price & Fred Matthis v. Commonwealth ---- 888

When evidence of deceased's character, offered by accused, may be rejected. Thos. Davis v. Commonwealth ---- 934

When offense not reduced from murder to manslaughter because warrant defective. Alsop v. Commonwealth ---- 851

When party justified in shooting in self-defense. A. J. May v. Commonwealth ---- 396

HOUSEBREAKING.

See Burglary.

HUSBAND AND WIFE.

See Acknowledgment; Dower; Mortgages; Parties; Trusts.

Claim of wife under executed contract as against creditors. W. P. Devon v. Balthasa Kobigen et al. ---- 882

Contract by wife for sale of realty held not subject to ratification by her. Anna Chaney et al. v. Levi Flynn et al. ---- 164

Conversion of wife's profits in business or earnings into separate estate. Medora E. Brown et al. v. J. M. Casbier et al. ---- 459

Creditor no claim on land purchased by husband and conveyed to wife before creation of husband's debt. E. E. Owens et al. v. J. J. Ford et al. ---- 451

Descent of wife's interest in land held jointly with husband. James A. Boyd v. H. S. Wilson ---- 547

[References are to Pages.]

HUSBAND AND WIFE—Continued.

Enforcement of lien on wife's real estate. Thomas Hunter et al. v. F. Watts ---366

Fact that wife is feme sole does not release husband from obligation to support her. Lydia Mayo v. S. W. Ferguson et al. ---530

Failure of clerk to insert name of wife when deed recorded held not to affect rights of grantee. Elizabeth Standeford et al. v. Caspar Bates ---154

Husband and father's duty to support wife and family paramount to that of paying his debts. John K. Faulkner v. H. C. Jennings et al. ---399

Husband held owner of note. Chick & Dent v. J. H. Tucker et al.---90

Parol contracts as to wife's personalty possessed and controlled by husband not to interfere with claims of husband's creditors. Annie Dutlinger et al. v. R. D. Salmons et al. ---331

Rights of creditors in land held by mistake in name of husband although purchased with wife's money. Susanna Marshall et al. v. W. F. Vanmeter et al. ---491

Separate estate of wife can be subjected to payment of debts only by equity proceeding. Mary A. Glass v. J. A. Tevis et al.---247

What constitutes payment or gift between husband and wife to defraud creditors. John K. Faulkner v. H. C. Jennings et al.---399

Wife held not entitled to claim ownership of real estate conveyed to husband. Martha A. Wallender v. Wintersmith, Walker & Co.---83

Wife held not to have power to mortgage separate estate for debts of husband. City of Paducah v. T. A. & Eliza Duke ---46

Wife held to own property conveyed to husband. James W. Delaney's Admr. et al. v. Geo. T. Delaney et al. ---62

Wife not party to action for injury to husband's property in her manual possession. Medora E. Brown et al. v. J. M. Casbier et al.---459

Wife's land held not subject to husband's debts. Wm. H. Cox et al. v. H. S. Bishop ---110

Wife's mere acquiescence in sale of her realty by husband, during coverture, insufficient to enable purchaser to resist her recovery after husband's death. Thomas Cavender v. F. L. & J. C. Graves---937

Wife's separate estate not liable for husband's debts in absence of agreement. Harry Stuckey v. Callie Bell ---217

IMPEACHMENT.

See Witnesses.

IMPROVEMENTS.

Occupying claimant held entitled to have improvement set off against rents. Anna Chaney et al. v. Levi Flynn et al. ---164

[References are to Pages.]

IMPROVEMENTS—Continued.

Occupying claimant held entitled to reimbursement. Martin Green v. John Keltmers ---98

Rights of occupying claimant of land purchased by verbal contract. C. B. Stephens v. Sarah F. Reaves ---391

INDEMNITY.

See Mortgages; Municipal Corporations; Principal and Surety.

One holding notes to indemnify him on debt to account for excess over amount of debt secured. G. W. Dohoney v. Jas. D. Lyon et al---481

Recovery on alleged contract denied. J. S. Price v. John Rodman---7

INDICTMENT AND INFORMATION.

See Conspiracy; Escape; Forgery; Highways; Homicide; Intoxicating Liquors; Perjury; Rape.

Cutting and carrying away a certain number of trees constitutes but one offense. Commonwealth v. Joe Searls---335

Indictment for shooting and wounding held sufficient. Stephen Stone v. Commonwealth ---135

Sufficiency of charge against person named in caption, where offense not charged in indictment. Commonwealth v. A. J. Briggance et al---514

Where word feloniously is used in indictment for cutting and carrying away trees, allegation of commission of offense without owner's consent unnecessary. Commonwealth v. Thomas Curley ---263

INDORSEMENT.

See Bills and Notes.

INFANTS.

See Descent and Distribution; Guardian and Ward; Larceny.

Conduct of defendant in allowing mortgage executed during minority to be foreclosed on her majority without making defense amounts to ratification of contract. J. W. Hunter v. William Bearn et al---265

Decree not disturbed unless incapacity by reason of minority clearly appears. J. F. Dowdy et al v. Preston Bros. ---623

Judgment against infant not set aside merely because of defendant's infancy, but it must be shown that defendant had valid defense to action. James B. Camp v. Second Nat. Bank of Louisville---257

Judgment against infants held reversible for want of answer. Lon Kendall et al. v. Elias Thomason et al---175

When an infant, prosecuting cause by next friend, becomes of age before judgment is entered, defendant having answered and gone to trial without excepting, may not object to prosecution by next friend. Alexander Bramel v. Emma Cunningham ---409

[References are to Pages.]

INHERITANCE.

See Descent and Distribution.

INJUNCTION.

See Judgment; Judicial Sales; Justice of the Peace; Municipal Corporation.

Injunction as remedy to prevent trespasses and to avoid multiplicity of suits. Elizabeth McDowell et al. v. H. B. Wiseman ---- 285

INSOLVENCY.

See Partnership.

Claims may be proved before commissioner without action to establish validity. J. J. Goodnight v. J. H. Adsit et al ---- 157

Insolvent debtor presumed to know that to prefer creditors is fraudulent and to have designed what follows from his own action. Stephen Dean v. I. C. Skinner's Admr. ---- 302

Where debtor, knowing insolvency, does an act resulting in preference of creditor, such act is fraudulent and acts as general assignment of all property for benefit of creditors, and creditor need not know insolvency. Stephen Dean v. I. C. Skinner's Admr. ---- 302

INSTRUCTIONS.

See Partnership; Receiving Stolen Goods.

INSURANCE.

Oral testimony declared competent on question of mistake. Continental Ins. Co. v. Paul Randolph ---- 125

Requirement as to manner of proof of loss declared waved. Continental Ins. Co. v. Paul Randolph ---- 125

Sufficiency of proof of loss on fire policy. Aetna Ins. Co. v. J. W. Strickle et al. ---- 417

Testimony of agent as to instructions declared rightly refused. Continental Ins. Co. v. Paul Randolph ---- 125

Validity of policy where false statements made where agent knew of falsity. R. C. Mayes v. Hartford Fire Ins. Co. ---- 534

Where company refuses to pay loss claiming that insured burned property, failure of insured to make proper proof of loss within reasonable time not to be relied on as a defense. Aetna Ins. Co. v. J. W. Strickle et al. ---- 417

INTEREST.

See Bills and Notes; Executors and Administrators; Usury; Wills.

[References are to Pages.]

INTOXICATING LIQUORS.

See Nuisance.

Application of local option law. S. Hodge v. Commonwealth_____645

Definition of word under liquor-license law. Alex. Pence v. Commonwealth _____593

Druggist, regular physician, not guilty of unlawful sale of liquor where prescription made in good faith, although not written and preserved. Commonwealth v. S. J. Matthews _____385

Evidence of illegal sales. N. Bergmeyer v. Commonwealth_____648

Exclusion of evidence that sale was made in district other than named in indictment. Frank Prater v. Commonwealth _____578

Indictment for law violation good when facts constituting offense stated substantially in language of statute. Eugene Mays v. Commonwealth. _____229

Instruction telling jury to convict if evidence shows defendant to have sold, within year before return of indictment, any whiskey, brandy, wine, gin or alcohol, or mixture thereof, to a named person, is not erroneous. Eugene Mays v. Commonwealth _____229

Legality of sale where boundary lines changed after vote on local option. Frank Prater v. Commonwealth _____578

Local-option law effective as soon as certificate of examining board entered in order book of equity court. S. Hodge v. Commonwealth___645

Local-option law held repealed. James E. Gifford v. Commonwealth _____185

Offenders liable to penalties provided under tippling-house laws. N. Bergmeyer v. Commonwealth _____648

Punishment for retailing liquor where drunk upon adjacent premises. Richard Varble v. Commonwealth _____570

Sufficiency of charge of unlawful sale. Commonwealth v. Henry Knoerr _____514

Sufficiency of indictment for sale. S. Hodge v. Commonwealth____645

Sufficiency of petition for damages in selling liquors. Lamanda Howser v. James E. Watson _____324

Tavern keeper or merchant selling without license violates law. Alex. Pence v. Commonwealth _____593

When selling whiskey without license is no offense. Commonwealth v. J. W. Simrall _____334

JAILERS.

See Escape; Officers.

JOINDER.

See Action.

JOINT TENANCY.

See Husband and Wife.

[References are to Pages.]

JUDGES.

Judgment sustaining demurrer to indictment against judge for refusal to vacate bench will not be reversed in absence of showing that affidavit contains sufficient reasons. Commonwealth v. W. H. Wammock ---------- 227

Jurisdiction of regular and special judge. H. T. Beauchamp v. Commonwealth ---------- 655

Right to object because no order made showing special judge elected in statutory manner, or that verdict not returned in time, waived if not made at trial. Frost Rose v. Commonwealth ---------- 568

JUDGMENT.

See Action; Appeal; Clerks of Courts; Criminal Law; Executors and Administrators; Garnishment; Infants; Pleading; Sheriffs and Constables; Trial.

Appeal dismissed when taken from expressed opinion of judge, for such is not a judgment. Elizabeth Smith v. D. Wilson & Co. et al---- 946

Building force of judgment by agreement. Samuel Beatty v. A. A. Curtis et al. ---------- 769

Can not exceed sum asked for. S. O. Fowler v. H. H. Gordon---- 475

Court order admitting will to probate in proper form conclusive on all parties until reversed or vacated, and can not be attacked in collateral proceeding. Jeremiah Weaver's Heirs v. W. H. Weaver et al---- 258

Effect of judgment by confession. John Dils v. Wm. Adkins et al. ---------- 298

Failure to give notice of entry of judgment held not error. Urban Hayden et al. v. A. G. Crutchfield's Exr. ---------- 214

Held void for want of process. J. F. Barker v. Paralee Barker---- 203

Injunction against collection of full amount of judgment where part has been paid. Samuel Beatty v. A. A. Curtis et al---------- 769

In tax proceedings unappealed from constitutes a final adjudication. Nelson Neal et al. v. City of Louisville ---------- 466

Order purporting to set aside final judgment held void. Olivia Phillips v. Phillips & Brother ---------- 23

Plaintiff not entitled to relief not specifically demanded where no defense made. Wm. Blackburn v. Richard Mann ---------- 598

Plaintiff's right to judgment where defendant fails to answer after service of process. John Maloney v. Mahlon Smith's Admx. ---------- 577

Pleadings to show what is in issue. Matilda Walker v. J. M. Lancaster's Assignee et al. ---------- 896

Proceeding to revive action and judgment distinguished. H. Gray's Exrs. et al. v. Wm. M. Patton's Admr. et al---------- 327

Question held res judicata. William Coakley's Admr. v. Thomas Coakley ---------- 182

[References are to Pages.]

JUDGMENT—Continued.

Recovery of money paid on erroneous judgment. H. Gray's Exrs. et al. v. Wm. M. Patton's Admr. et al. ---- 327
Res adjudicata as a defense. R. C. Burns v. M. A. Stephenson et al. ---- 589
Right of judgment creditor where debtor makes assignment for creditors before judgment entered. Matilda Walker v. J. M. Lancaster's Assignee et al. ---- 896
Sufficiency of grounds for vacating judgment and for new trial. Benjamin Magee v. Melville Phelps et al. ---- 869
Sufficiency of petition for vacation of judgment. Samuel Beatty v. A. A. Curtis et al. ---- 769
Waiver by consent judgment. Bank of Columbia v. W. P. D. Bush ---- 559
When not vacated or reversed conclusive of rights of parties put in issue in action. Sol. Isenberg et al. v. Nicholas Strasser ---- 501
When petition is taken for confessed and jury is sworn and assesses the damages, right to land is res adjudicata. W. R. Dodd v. David Hays et al. ---- 426

JUDICIAL SALES.

See Execution, Executors and Administrators; Fraudulent Conveyances; Guardian and Ward; Homesteads; Sheriffs and Constables.

Commissioner held presumed to have performed duty. S. E. Calloway v. Geo. R. Green et al. ---- 121
Commissioner no right to summarily adjudge highest bidder insolvent and sell to next highest bidder Amanda Morton et al. v. Milton Moore ---- 938
Decree for sale of entire tract of land held not error. H. O. Earl et al. v. J. C. Porter et al. ---- 85
Effect of subdivision on rights of parties. W. L. Weller v. Geo. P. Bissell et al. ---- 604
Fraud held to nullify sale. Mary E. Skillman v. W. A. Atchison et al. ---- 105
Grossly inadequate consideration will be considered by chancellor in determining question of fraud. J. L. Spragins v. M. T. Russell et al. ---- 717
Improvements made on property after notice made of exceptions to be filed. John W. Griffin v. A. B. Beadle's Admx. ---- 495
Judgment of sale held nullity. John Knock v. Christ Triber et al. ---- 203
Liability of purchaser where building sold by commissioner destroyed before deed confirmed. H. G. Walters v. P. J. Blevins' Exr. ---- 309
No warranty in judicial sales and purchaser has no relief in absence of fraud. E. H. Taylor, Jr. v. Bank of Woodford et al. ---- 794
Occupant and part owner of land sold to pay debts and costs not

[References are to Pages.]

JUDICIAL SALES—Continued.

to enjoy land free of rent after sale and confirmation. J. D. Breckinridge v. H. J. Carrico ---------- 405

One execution suffices for two purchase-money bonds executed by same parties and payable to same person. H. J. Poor v. Ann Hudson ---------- 758

Party not interested can not question validity of transfer of property and is not entitled to injunction. S. D. Miller et al. v. The Nat. Bank of Lancaster et al. ---------- 662

Purchaser at judicial sale not to collect rents on realty until sale confirmed by chancellor and possession delivered. John C. Brown v. Geo. M. Berkley ---------- 359

Purchaser at judicial sale where purchase-money not paid, who is notified of resale and makes no objection, can not afterwards object. Lindsay Layne et al. v. Stephen G. Loar ---------- 484

Purchaser at judicial sale who accepts full amount of debt from debtor or surety must restore property. W. Judah v. Jacob Bickel---- 914

Purchaser held entitled to relief for deficiency in quantity of land. Thomas Elder v. Wm. Lucas' Exr. et al.---------- 47

Purchaser held to take good title. Roman Victor Browninski et al. v. J. S. Phelps ---------- 207

W. L. Rankin v. A. C. Eastin et al.---------- 173

Purchaser's rights unaffected by irregularities. W. L. Weller v. Geo. P. Bissell et al. ---------- 604

Rights of creditor held prejudiced by commissioner. Wm. Wj Boyd v. R. L. Anderson et al. ---------- 134

Rights of parties where creditor, both plaintiff and purchaser, accepts payment in full of debt, interest and costs. Bickel v. Judah---- 612

Sale not invalidated by sheriff's irregularities and illegalities where purchaser did not participate therein. Lindsay Layne et al. v. J. M. Davidson ---------- 506

Sale set aside when made contrary to agreement of parties and for inadequate price. Frank B. Youtsey v. H. A. Jones et al.---------- 830

Sale set aside where it brought only half value and advertising was inadequate. Matt O'Doherty v. M. L. Lewis et al. ---------- 901

Title of purchaser held unaffected by appeal from judgment directing sale. H. O. Earl et al. v. J. C. Porter et al.---------- 85

Validity of deed made to person individually instead of being made to her as administratrix. H. J. Poor v. Ann Hudson---------- 758

Validity of judicial sale may be raised upon exceptions filed to commissioner's report, but where none are filed sale is confirmed, and writ of possession issues, sale is final and valid. S. H. Smith et al. v. A. F. Gowdy's Admr. ---------- 430

Validity of sheriff's unrecorded sale where conveyance made five

[References are to Pages.]

JUDICIAL SALES—Continued.

years afterward, when sheriff out of office. J. L. Spragins v. M. T. Russell et al. ----------717

Where presumption of indivisibility of town lot not rebutted by answer nor proof showing division beneficial to all parties, judgment should decree sale of entire lot. J. H. Patterson et al. v. Lynch Gray ----------226

Where realty is conveyed to pay debt, with privilege of redemption, and grantor fails to pay whole debt, creditor may take possession or enforce judgment by again selling land. B. Kueborth v. H. A. Mead----408

JURISDICTION.

See Equity; Executors and Administrators; Partnership.

JURY.

See Criminal Law; Recognizances.

JUSTICES OF THE PEACE.

Execution on judgment issued upon appeal may be enjoined where court rendering same has no jurisdiction. Monterey & N. C. Tpk. Co. v. F. W. Davis ----------336

Sufficiency of summons in justice of the peace court. Matthew Wade v. Commonwealth ----------356

LANDLORD AND TENANT.

See Conversion; Executors and Administrators; Gifts; Judicial Sales; Sheriffs and Constables.

Discharge of attachment for rent held proper. Nathan Gentry et al. v. William Abshire ----------81

Effect of acceptance of rent by purchaser of leased property. Payson & Lyon et al. v. Walter Holden ----------771

Irrelevant part of petition to be stricken out. C. G. Wallace v. W. P. Monlinier ----------701

Landlord entitled to lien only on property belonging to tenant and for one year's rent. C. B. Sargent et al. v. James Farrar's Assignee et al. ----------2

Landlord held not liable for injury from failure to repair. Carrie Battres v. B. Heiss ----------103

Ownership must be in tenant before personalty will be subject to distraint. C. B. Sargent et al. v. James Farrar's Assignee et al.----2

Personal property of subtenant held liable for rent. Joseph Sutton v. W. H. Perkins et al. ----------76

[References are to Pages.]

LANDLORD AND TENANT—Continued.

Plaintiff in trespass held required to show that proceedings under distress warrant were void. Sye Connor v. Benjamin Botts.....132

Right of landlord to compensation where tenant's property sold without notice of his lien. Richard Monarch v. S. M. Dean et al.....596

Tenant held not liable to attachment for rent. George L. Helm v. William Neal 33

Tenant held to have waived exemption from distress warrant. Sye Connor v. Benjamin Botts 132

Tobacco raised by tenant held not exempt. Urban Hayden et al. v. A. G. Crutchfield's Exr. 214

LARCENY.

See Burglary; Robbery.

Express agent guilty of grand larceny when taking money deposited for transportation. H. C. Warmouth v. Commonwealth 847

Incompetent evidence in trial of one charged with larceny. Frank Turner v. Commonwealth 842

Indictment for taking and carrying away pigeons declared bad. Elijah Carter v. Commonwealth 92

Instruction as to punishment for receiving stolen property. Benj. Brown v. Commonwealth.....687

Instruction on petit larceny held required. Ed Bronaugh v. Commonwealth 137

Minor held entitled to acquittal. James Utz v. Commonwealth.....211

Statute authorizing increased punishment where former convictions alleged and proved not in violation of constitution. Matt Taylor v. Commonwealth 642

LEGITIMACY.

See Descent and Distribution.

LEVY.

See Attachment; Execution.

LICENSES.

See Intoxicating Liquors; Municipal Corporations; Peddlers.

Party held estopped to revoke license. William Jarvis v. T. P. Satterwhite 167

[References are to Pages.]

LIENS.

See Attorney and Client; Execution; Husband and Wife; Landlord and Tenant; Mechanics' Liens; Subrogation; Vendor and Purchaser.

LIFE ESTATES.

See Remainders.

Deed held to convey life estate to wife. Ben P. Smart v. Elizabeth P. Montcalm. ----------93

What constitutes waste. Narcissa Morrow v. Richard N. Morrow et al. ----------496

LIMITATION OF ACTIONS.

See Adverse Possession; Appeal.

Application of statute to action against debtor making conveyance without consideration. Cotton v. Brown ----------573

Availability of defense of statute where state partner in enterprise with other stockholders. Bardstown & L. Tpk. Co. v. Commonwealth et al. ----------516

Evidence of new promise to pay held failure of proof. Cornelius Riley v. John Hines' Curator ----------87

New promise held required to be alleged. Cornelius Riley v. John Hines' Curator ----------87

Running of statute against remainderman from death of life tenant. Elizabeth Mays et al. v. W. N. Hannah et al. ----------630

Statute against action for recovery of lands held by tenant by the curtesy runs from death of husband. A. Q. Goodin et al. v. Mary E. Goodin et al. ----------218

Statute held not defense to suit on note. John G. Johns et al. v. John P. Martin's Admr. ----------109

Statute held to begin to run from time action accrued. W. H. Bingham et al. v. J. F. Orr et al. ----------169

Unqualified devisee not to rely on statute to defeat claim of legatee against him. Dr. E. Mason's Admx. v. Thomas E. Mason----------345

LOCAL OPTION.

See Intoxicating Liquors.

LOTTERIES.

See Gaming.

Bondsmen of operator held liable to city or holders of tickets. R. W. Meredith et al. v. G. W. Barrows ----------51

[References are to Pages.]

LOUISVILLE CHANCERY COURT.

See Courts.

MAINTENANCE.

See Wills.

MALICIOUS PROSECUTION.

Malice held implied. Lydia Eddy v. L. M. Longshaw----------179
Malice held question for jury. Lydia Eddy v. L. M. Longshaw----179

MALICIOUS WOUNDING.

See Homicide.

MANUFACTURES.

See Mechanics' Liens.

MARRIAGE.

See Bigamy.

MARRIED WOMEN.

See Husband and Wife.

MARSHALLING ASSETS AND SECURITIES.

Application of rule of marshalling securities. Chas. H. Bronson et al. v. Marie E. S. Ransom ----------960

MASTER AND SERVANT.

See Work and Labor.

Recovery where risk assumed. Tom Lillard's Admr. v. Mary Houston Transp. Co. ----------705
Where employe recklessly lost life, without fault on part of employer, there can be no recovery. Tom Lillard's Admr. v. Mary Houston Transp. Co. ----------705

MECHANICS' LIENS.

Claim of lender of money for manufacturing held superior to claim of attaching creditor. J. J. Goodnight v. J. H. Adsit et al.----------157
Materialman held to have waived lien. J. J. Goodnight v. J. H. Adsit et al. ----------157
Priority of liens to mortgages. Samuel A. Miller v. McCrory, White & Co., et al. ----------625

MENTAL CAPACITY.

See Contracts.

[References are to Pages.]

MERCHANT.

See Intoxicating Liquors.

MISTAKE.

See Bills and Notes; Contracts.

MONEY PAID.

See Judgment.

MORTGAGES.

See Fraudulent Conveyances; Homestead; Husband and Wife; Principal and Surety; Wills.

Obligation of heirs to reconvey where conveyance held as mortgage. Walter J. Robinson et al. v. Wm. S. Robinson ----------832

Recital in deed of greater sum than due from vendor or mortgagor shows concurrence of vendee or mortgagee in fraud. Henry Bailey v. Green B. Cheatham et al.----------761

Report of sale declared not appealable. Samuel H. Hurst et al. v. Abraham Phillips et al. ----------101

Rights of holder of indemnity mortgage. A. J. Herd et al v. James Eversole et al. ----------597

Rights of second mortgagee as against usurious agreement in first mortgage. Leo Haydon v. R. L. Hart----------845

Signing of certificate by clerk held valid. Kelly Sutton v. Martha A. Puckett ----------89

Validity of mortgage of property to be acquired in the future. H. M. Skillman v. J. J. Frost's Exr. et al.----------900

Validity of stipulation as to insurance and rent. Samuel A. Miller v. McCrory, White & Co. et al. ----------625

Wife held to have been examined separate and apart from husband. Francis Reidbaugh v. A. P. Grover ----------34

MOTIONS.

See Appeal; Continuance; Pleading.

MUNICIPAL CORPORATIONS.

See Lotteries; Nuisance.

Applicant for license may recover money therefor from city where it fails to issue license as agreed. City of Owensboro v. Charles F. Elder ----------246

Bond of indemnity on execution from police court on real estate held void. Henry S. McDowell v. William Coleman et al. ----------152

[References are to Pages.]

MUNICIPAL CORPORATIONS—Continued.

Charter provision as to clerical services within discretion of council. John B. Williamson v. John P. Morton & Co. ----------590

Citizens' property not to be taken by city without proceedings and legislature can not constitutionally confer such power. John S. Gallagher v. John Wooster ----------722

City held liable for injury from negligence in construction of sewer. City of Covington v. Margaret Glennon et al. ----------9

Injunction against city's collection of taxes to be dissolved where owners enjoy benefits of city government. City of Henderson v. Marion Breckinridge et al.----------315

Liability of city for damages where street left in dangerous condition. City of Lexington v. William Auger, Jr., et al. ----------657

Payer under void ordinance held entitled to recover sum paid. Trustees of Town of Stanford v. W. H. Hite ----------145

Petition held required to show facts necessary to create improvement lien. Lon Kendall et al. v. Elias Thomason et al. ----------175

Policeman failing to appeal to commissioners after dismissal by mayor can not maintain action against city for salary after dismissal by alleging willingness to perform duties. W. G. Robinson v. City of Louisville---365

Property owner held required to specify wherein irregularity in street assessment consists. Harriett Delafield v. City of Bowling Green ----------71

Public improvement assessment declared fair. Wm. S. Ludlow et al. v. G. W. Rich et al. ----------124

Recovery of assessments where property not properly taxable is benefited by improvements and plaintiffs voluntarily paid same. City of Henderson v. Marion Breckinridge et al. ----------315

Validity of title of college which has purchased street from town and erected improvements on it. R. D. Brown v. W. J. Stubblefield's Admr. ----------767

Validity of town election held by town clerk. W. W. Moore et al. v. Lucien McDowell et al. ----------649

MURDER.

See Homicide.

NEGLIGENCE.

See Carriers; Master and Servant; Municipal Corporations; Railroads.

Court properly instructed jury that negligence had been proved, where plaintiff's proof established defendant's negligence and defendant offered no proof. Louisville & N. R. Co. v. John H. Wilson---------357

NEGROES.

See Descent and Distribution.

[References are to Pages.]

NEW PROMISE.

See Bills and Notes; Trial.

NEW TRIAL.

See Appeal.

Effect of amendment of petition, after new trial, on right to recover on first verdict. Abigail H. Forsythe v. M. D. Lawler ---- 382

Erroneous instruction must be included in motion for new trial. Matt Adams v. Commonwealth ---- 161

Granting of new trial where litigant absent for good cause. John Steel et al. v. J. W. Seale et al. ---- 659

Mistake of counsel held ground for new trial. John Pigg, Sr. v. John A. Whitman et al. ---- 108

Motion on ground of newly discovered evidence held not sufficient. Urso & Morsican v. Unverzagt & Smith ---- 46

Newly discovered cumulative evidence held not ground for new trial. Urso & Morsican v. Unverzagt & Smith ---- 46

Not granted for new evidence merely cumulative nor discovery of witnesses to fact upon which testimony given at trial. M. C. Marshall v. T. W. Senour ---- 594

Not granted where newly discovered evidence merely cumulative. John W. Berry v. B. F. Branham et al. ---- 592

On ground of newly discovered evidence. I. N. Beck v. Ed. Brown ---- 808

Party held entitled to new trial for newly discovered evidence. John Pigg, Sr. v. John A. Whitman et al. ---- 108

When granted for newly discovered evidence. Payson & Lyon et al. v. Walter Holden ---- 771

Will not be granted for newly discovered evidence which is merely corroborative or contradictory. H. H. Porter v. First Nat. Bank of Louisville ---- 5

NEXT FRIEND.

See Infants.

NOTICE.

See Taxation.

NUISANCE.

City council not to declare existence of nuisance without owner having a hearing. John P. Joyce v. Thomas Woods ---- 811

City held required to show public character of nuisance. City of Frankfort v. Geo. C. Watson ---- 149

Indictment for renting house for use and purpose of creating nuisance

[References are to Pages.]

NUISANCE—Continued.

must set forth facts constituting nuisance. Commonwealth v. J. W. Simrall ---------- 334
Penalty for obstructing public highway. Commonwealth v. Burlington & B. T. P. R. Co. ---------- 526

OBSTRUCTING HIGHWAY.

See Highways.

OCCUPYING CLAIMANTS.

See Improvements; Vendor and Purchaser.

OFFICERS.

See Clerks of Courts; Highways; Judicial Sales; Sheriffs and Constables.

Officer not to make contract to allow deputy sole authority. C. K. Oldham's Trustee v. Thomas R. Hume et al. ---------- 779
Power of court to require jailer to produce prisoner for trial, or, on his failure, to direct sheriff to control jail. John Staton v. Commonwealth ---------- 374

PARENT AND CHILD.

See Fraudulent Conveyances.

Custody of child determined by best interests. C. R. Burke v. Bartlett Crutcher et al. ---------- 695
Custody of child reared by grandparents and demanded by parent on remarriage. C. R. Burke v. Bartlett Crutcher et al. ---------- 695

PARTIES.

See Husband and Wife.

Provision of code as to parties. George McCarty et al. v. Chas. Taturn et al. ---------- 633
Wife with interest in realty necessary party in action seeking to subject it to payment of husband's debt, and action as to such land may be dismissed if not made party. James A. Ballard v. Benjamin Franklin, Trustee, et al. ---------- 473

PARTITION.

See Descent and Distribution; Judicial Sales.

Confidence reposed as ground for granting relief where partition unfair. Wm. S. Ludlow et al. v. E. X. Maxwell et al. ---------- 679

[References are to Pages.]

PARTITION—Continued.

Court no power to change title of interested parties or to qualify or subtract from their tenures. T. J. Black et al. v. Sallie A. Black et al.---330

Fact held not to authorize sale. C. A. McLaughlin, Jr. v. F. A. Avord ---151

Petition which is unfair and does not show agreement of both tenants in common not to be enforced. R. Wand v. R. D. Nicholl---879

PARTNERSHIP.

See Payment.

Court's jurisdiction where debtor in cross-complaint alleges another person as partner and as indebted to cross-complainant, but does not name him nor have process served. John A. Faulds v. W. B. Davis---610

Defendant in suit for settlement held not prejudiced by failure to prove material facts. Alfred Jacobs' Exrs. et al. v. James Ford---73

Effect of consent of partners to appropriation of partnership assets. William Mayfield v. R. J. Barbour---342

Instruction to jury that "a single transaction is sufficient to constitute partnership" is erroneous where existence of partnership is issue. Henry Worthington v. John J. Miller's Admr.---708

Partners agents of each other, and acts within course of business and scope of partnership are binding. John Ferguson v. L. B. Sims---472

Partner's heirs may sue and maintain action for settlement and accounting. F. M. Joplin v. Margaret Cordrey---643

Power of partner to bind firm. Davis, Moody & Co. v. John H. Wiley ---580

Reference to commissioner held required in suit for settlement. Alfred Jacobs' Exrs. et al. v. James Ford---73

Rights of partners where one partner executes note for partnership debt and pays at forty cents on the dollar. John Lindsay v. H. T. Smith ---232

What payee of notes taken for sale of one-fifth interest in partnership must show before he can recover. Morton Scott v. Nancy E. Estill et al. ---789

When estate of partner liable for partnership losses occurring after death. F. M. Joplin v. Margaret Cordrey---643

PARTY WALLS.

Presumption that wall is party-wall. John R. Hendrick et al. v. John Haley et al.---787

PATENTS.

See Bills and Notes.

[References are to Pages.]

PAYMENT.

See Trial.

Payment to one partner payment to partnership. John A. Faulds v. W. B. Davis 610

Where bank delays attempt to collect note for eight or nine years, delay tends to show settlement made. National Bank of Stanford v. S. G. Hocker 416

PEACE BOND.

See Breach of the Peace.

PEDDLERS.

Application of statute requiring peddlers to take out license. Commonwealth v. B. F. Creel 575

PERJURY.

Sufficiency of indictment. John W. Sikes v. Commonwealth 890

What must be shown to convict person of false swearing. Fred Woolsey v. Commonwealth 776

PETITION.

See Turnpikes and Toll Roads.

PHYSICIANS AND SURGEONS.

See Coroners.

PLEADING.

See Appeal; Bills and Notes; Judgment; Justices of the Peace; New Trial; Process; Trial.

Bad answer good enough for bad petition. L. M. Dayton v. Newport Water Works 777

Civil code authorizes proceedings as well as pleadings to be amended in furtherance of justice. Wm. M. Combs et al. v. John A. Wallace 338

Cure of defective pleading by verdict. Davis, Moody & Co. v. John H. Wiley 580

Defects in petition held cured. J. H. Hickman v. C. G. Sewell 153

Defendant can not, in Court of Appeals, object to filing of amended complaint where he failed to do so in court below. Louisville, C. & L. R. Co. v. S. A. Ramsey 274

Demurrer held to have been waived. City of Frankfort v. Geo. C. Watson 149

[References are to Pages.]

PLEADING—Continued.

General demurrer to whole paragraph held properly overruled. Gray & Best v. Wm. Garrison----19

Refusal to allow filing of amended answer held not abuse of discretion. James Miller et al. v. W. B. Withers----200

Remedy of defective pleading by motion. Samuel A. Miller v. McCrory, White & Co. et al----625

Reply to plea of statute of limitations as defense too late when filed after judgment. National Bank of Stanford v. Julia A. Reed et al----733

Rights of parties when nature of action changed by amendment of petition. John B. Gillespie v. T. G. Bradford----804

Sufficiency of petition of one seeking to enforce lien in suit on notes. Wm. Blackburn v. Richard Mann----598

Variance in action for breach of contract of sale held fatal. Gray & Best v. Wm. Garrison----19

Waiver of objection as to sufficiency of petition. Bank of Columbia v. W. P. D. Bush----559

Waiver of right to object to defective pleading. Davis, Moody & Co. v. John H. Wiley----585

Where original petition does not allege sale of land in writing, and proof shows sale made by bond for deed, filing of amended petition may be permitted. Jackson Fannin et al. v. Samuel Murray et al----225

POLICE COURTS.

See Municipal Corporations.

POLICEMEN.

See Municipal Corporations.

POOL SELLING.

See Gaming.

POSSESSION.

See Judicial Sales.

POST-MORTEM.

See Coroners; Criminal Law.

POWERS.

Special power conferred on county ceases when act of assembly conferring it expires by limitation. John F. Fisk v. H. T. Snyder et al----928

PREFERENCES.

See Fraudulent Conveyances; Insolvency.

[References are to Pages.]

PRESCRIPTION.

See Intoxicating Liquors.

PRESUMPTIONS.

See Appeal.

PRINCIPAL AND AGENT.

See Brokers; Partnership; Principal and Surety.

Necessary allegations in suit for breach of contract made with agent. Crittenden County v. Elisha Conger ----------485

Obligations of principal where agent takes property in payment of debt or speculates in property. G. W. Dohoney v. Jas. D. Lyon et al.--481

PRINCIPAL AND SURETY.

See Clerks of Courts; Receivers; Replevin; Sheriffs and Constables.

Binding force of note of blind surety unable to write without assistance. D. R. Maupin et al. v. B. F. Berkley----------487

Claims of sureties on notes of widow borrowing money to pay debts of husband. E. Best et al. v. Mary E. Burnam----------388

Liability of released sureties after judgment reversed. John F. Thomas et al. v. Benjamin B. Whittaker's Admr.----------875

Rights of surety after payment of principal's debt. Bickel v. Judah--612

Rights of surety who has paid principal's debt to creditor purchasing property sold judicially. W. Judah v. Jacob Bickel----------914

Surety held not entitled to foreclose indemnifying mortgage. Thomas Kirkland et al. v. John W. Burton----------86

Surety is discharged by extension of time. E. Hardcastle et al. v. W. W. Rector et al.----------4

Surety on building contractor's bond held released to amount of sum paid over. John M. Vanmeter v. J. C. Corcoran et al.----------15

Where indemnity is withheld from surety, he has defense against principal and holder. J. S. Hand v. Fretsch, Burkhardt & Co.----------380

PROCESS.

See Justice of the Peace.

Clerk's entry as evidence of service of summons. Fanny Wilson v. A. R. Sanders' Exr. et al.----------863

Constable not liable for trespass because writ, regular on its face, should not have been issued to him, where he obeys its command and serves it. D. F. Epperson v. Robert Graves----------423

Definition of word. D. F. Epperson v. Robert Graves----------423

[References are to Pages.]

PROCESS—Continued.

New process where amended petition constitutes original and independent cause. John B. Gillespie v. T. G. Bradford.....804
Power of court to amend officer's return. John Boyer v. W. C. Lincoln et al.....437
When summons unnecessary on an amended petition. W. L. Weller v. Geo. P. Bissell et al.....604

PROTEST.

See Bills and Notes.

PROVOCATION.

See Homicide.

PURCHASE-MONEY LIENS.

See Vendor and Purchaser.

QUANTUM MERUIT.

See Work and Labor.

QUIETING TITLE.

Possession held sufficient to sustain action. David Asher et al. v. William McCarty.....21

RAILROADS.

See Carriers.

Company liable for damages where horse frightened by unnecessary whistle of nearby engine and plaintiff injured thereby. Thomas J. Hudson et al. v. Louisville & N. R. Co.....477
Degree of care required of company in running trains. Louisville & N. R. Co. v. W. S. Cooper's Admr.....519
Failure of injured person to exercise care. Louisville & N. R. Co. v. W. S. Cooper's Admr.....519
Failure of railroad to give warning of approach of trains where turnpike parallels track is negligence and renders company liable for damages for resulting injury. Thomas J. Hudson et al. v. Louisville & N. R. Co. 477
Liability of company for injuries resulting from wreck. Kentucky Cent. R. Co. v. Frank McMurty.....509

RAPE.

Sufficiency of indictment. Commonwealth v. James S. Littrell....693

[References are to Pages.]

RATIFICATION.

See Infants.

REAL PROPERTY.

See Vendor and Purchaser; Wills.

RECEIVERS.

Defendant's right to prove falsity of affidavits alleging waste as ground for appointment of receiver. A. C. Chapman v. Eli Vanover....706

For farm on account of waste. A. C. Chapman v. Eli Vanover.....706

Held guilty of bad faith toward surety on sale bond. William Saulsberry v. Stephen Nethercutt, Receiver.....163

Vendee entitled to recover rents collected by receiver wrongfully appointed. Julia A. Collins et al. v. J. M. Richart et al.....283

RECEIVING STOLEN GOODS.

Erroneous instruction in trial of one charged with knowingly receiving stolen goods. Scott Young v. Commonwealth.....689

Erroneous refusal of court to give certain instruction asked for by defendant. Scott Young v. Commonwealth.....689

RECOGNIZANCES.

See Bail; Sheriffs and Constables.

In trial to recover on forfeited recognizance defendant entitled to demand that jury try issue presented. Michael McKinney et al. v. Commonwealth 348

RECORDS.

See Appeal.

REDEMPTION.

See Judicial Sales.

REFORMATION OF INSTRUMENTS.

Parties held not entitled to reformation of deed. F. J. Barbee et al v. Northern Bank of Ky. et al.....201

Party with knowledge of mistake can not rely upon it to reform instrument. Geo. N. Brown v. D. D. Geiger.....240

REGISTERS OF DEEDS.

See Husband and Wife.

[References are to Pages.]

REIMBURSEMENT.

See Executors and Administrators.

RELEASE.

See Subscriptions.

REMAINDERS.

Construction of clauses in will. J. R. Revill et al. v. Nancy Frank's Exr. et al. ----602

Construction of will. Wm. R. Joyes v. Elias D. Lawrence----538

Remainder held not subject to sale for taxes. H. A. Dumesnil et al. v. City of Louisville ----180

Remainderman held entitled to maintain action for settlement of estate. Marietta Abell et al. v. Ben F. Abell et al.----128

Vested and contingent remainders. Mary Tyler v. Thomas P. Jacob et al. ----924

When remainder interests of devisees in estate may be subjected. Thos. H. Ellis et al. v. Sylvester Johnson----868

RENT.

See Gifts; Landlord and Tenant; Wills.

RENUNCIATION.

See Dower.

REPLEVIN.

Surety on bond held released. Thomas Kirkland et al. v. John W. Burton ----86

RES ADJUDICATA.

See Judgment.

RESCISSION.

See Vendor and Purchaser.

RES GESTÆ.

See Evidence.

RES JUDICATA.

See Judgment.

RESULTING TRUSTS.

See Trusts.

REWARDS.

Collection of reward where accused induced to surrender by persuasion and not taken by physical force. W. T. Hogg v. Commonwealth-370

No appeal from order of circuit judge refusing to certify to claim for reward according to statute. Clifton Cockrill v. Commonwealth----385

[References are to Pages.]

ROBBERY.

Admissibility of evidence of attempt to break jail where accused proves alibi. Elias Webb v. Commonwealth----792
Indictment held sufficient. Levi Bolden v. Commonwealth----183
Proof necessary to convict on charge of robbery. Patrick Farrell v. Commonwealth----386

SALES.

Facts making sale by sample. Southern States Coal, Iron & Land Co. v. Geo. S. Moore & Co.----916
Fact that contract for sale of personalty is called renting contract does not make it one. Hiram Hardwood et al. v. D. H. Baldwin & Co. ----699
Fraud held to vitiate contract. Benjamin Driver v. A. Hunt et al.---169
In suit for alleged breach of warranty, plaintiff need not show that defendant knew horse not what he was warranted to be. Samuel S. Gregg v. Wm. G. Woods----424
Measure of damages for breach of contract by purchaser held to be difference between market price and contract price at time and place of tender. Saur, Schurman & Co. v. Alex. Sayres----52
Petition of buyer for breach of contract held demurrable. Gray & Best v. Wm. Garrison----19
Petition on breach by purchaser held bad on demurrer. Saur, Schurman & Co. v. Alex. Sayres----52
Rights of holder of warehouse receipt. Southern States Coal, Iron & Land Co. v. Geo. S. Moore & Co.----916
Rights of innocent purchaser for value where property conveyed without delivery of possession. D. H. Baldwin & Co. v. First Nat. Bank of Ripley, Ohio, et al. ----628
Where it is contended that instrument sued upon was given for worthless goods, and that appellant obtained assignment from seller with intent to defraud purchaser, which is denied, burden is on purchaser to prove appellant's knowledge of fraud, and if he fails to do so, and appellant is shown to be innocent purchaser, purchaser is liable. H. C. Dinkle v. Chas. B. Anderson----239

SELF-DEFENSE.

See Homicide.

SEPARATE ESTATE.

See Husband and Wife.

SET-OFF AND COUNTERCLAIM.

See Wills.

[References are to Pages.]

SET-OFF AND COUNTERCLAIM—Continued.

Answer and counterclaim, filed after final judgment, to be, on motion, stricken from files. B. Kueborth v. B. F. Pratt 440

Objection that counter claimant should not recover anything because amount was left blank is waived if not made at proper time. Clayton Miller's Exr. v. J. H. Wilson et al 541

SEWERS.

See Municipal Corporations.

SHERIFFS AND CONSTABLES.

See Judicial Sales; Officers; Statutes; Taxation.

Criminal court has exclusive jurisdiction of action by state against sheriff and sureties for failure to pay over money collected on execution on judgment on forfeited recognizance. Wm. H. Brown v. Commonwealth 10

Liability of deputy sheriff. J. C. Hays v. J. L. Sprigg et al 694

Peace officers not required to see that warrants are free from defect. Alsop v. Commonwealth 851

Petition against sheriff and sureties held not sufficient. B. B. Mullins et al. v. Pendleton County Court 95

Sale of realty by sheriff and execution of deed by successor valid. Miles Davis' Assignee v. John Smallgood 441

Sheriff held not entitled to deduct sum owing him from money collected under levy. Adam Gearhart et al. v. Lewis Pritchard 39

Sufficiency of petition against sheriff and sureties to compel balance claimed to be due county. Lewis County Court et al. v. R. B. Lovell et al. 294

Suit against sheriff and sureties held civil action. Wm. H. Brown v. Commonwealth 10

Sureties not liable for money collected by sheriff under private agreement. Woodford & Hathaway v. W. H. Perkins et al 561

Sureties of sheriff held not liable for latter's failure to levy distress warrant. L. D. Wilson et al. v. G. C. Everett et al 43

SHOOTING AND WOUNDING.

See Indictment and Information.

SLAVES.

Legitimacy of children. Peter Underwood et al. v. Alvin Underwood et al. 535

[References are to Pages.]

SPECIFIC PERFORMANCE.

See Frauds, Statute of.

Allegations necessary for party to make when seeking specific performance. James K. Stone v. First Nat. Bank of Warren, Pa.....796

Specific performance will not be ordered on contract not fully agreed to. L. C. Howard's Admr. et al. v. James Hill et al.....945

STATES.

See Franchises; Sheriffs and Constables.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

See Municipal Corporations.

Act may be unconstitutional only in part. J. J. Goodnight v. J. H. Adsit et al. 157

Effect of second section of Act of February 19, 1873. Lewis County Court et al. v. R. B. Lovell et al.....294

Repeal of statute by implication. John C. Loran v. City of Louisville. 723

STOCK.

See Corporations.

STREET RAILROADS.

See Corporations.

Facts held not defense to negligence. Newport St. R. Co. v. J. W. Johnson 35

STREETS.

See Dedication; Municipal Corporations.

SUBROGATION.

See Principal and Surety.

Payment of interest coupons where secured by mortgage. John B. Tilford et al. v. Mary Bell Allen.....883

[References are to Pages.]

SUBSCRIPTIONS.

Binding force of contract of subscription. A. R. Chick v. Randall Grain Separator Co.----435

Release of subscriber on ground of insolvency of other subscribers. William Hamilton's Admr. v. L. P. Tarlton, Receiver----371

SUMMONS.

See Justices of the Peace; Process.

SUNDAY.

Tender of consideration must precede refusal to pay note. Henry Greene v. Thomas Southworth ----82

SURVEYS.

See Boundaries.

TAXATION.

See Judgments; Municipal Corporations; Remainders; Sheriffs and Constables; Statutes.

Board of commissioners, not assessor, to hear applications of aggrieved taxpayers for correction of errors. H. A. Dumesnil et al. v. City of Louisville ----667

Board of commissioners, not assessors, to publish statutory notice of enforcement of payment of taxes. H. A. Dumesnil et al. v. City of Louisville ----667

Legal publication of notice of taxes and assessments must be alleged and proved before there can be recovery. H. A. Dumesnil et al. v. City of Louisville ----667

Mode of taxation and manner of enforcing collection to be strictly within statute. City of Covington v. People's Bldg. Assn. of Covington ----731

Pleading and proof by purchaser at tax sale held not sufficient. Henry Clay McKee v. Peter Walker----111

Purchaser at tax sale held entitled to recover. J. B. McFerran v. Charles Wilson ----17

Purchaser of realty to pay taxes against property which are unpaid and which in the contract of purchase he has received from grantor. George Kaye et al. v. City of Louisville----415

Sufficiency of petition of county creditor. A. C. Cox's Admr. v. W. L. Mudd, Sheriff, et al.----565

Tax collector held presumed to have collected all taxes listed. John Shepherd et al. v. W. C. Rose----104

[References are to Pages.]

TAXATION—Continued.

Tax receipts are private property and legislature can not compel ex-sheriff to supply lost tax-receipts. Lewis County Court et al. v. R. B. Lovell et al. ---- 294

Treasurer to collect delinquent taxes without resorting to chancellor. City of Covington v. People's Bldg. Assn. of Covington ---- 731

TIMBER.

See Indictment and Information.

TIME.

See Contracts; Homicide; Principal and Surety.

TITLE.

See Vendor and Purchaser.

TRANSFER OF CAUSES.

See Courts.

TRESPASS.

See Injunction; Landlord and Tenant; Process.

No recovery in ejectment in action for trespass. Richard D. Walker et al. v. James Walker, Sr. ---- 809

TRIAL.

See Appeal; Contempt; Continuance; Criminal Law; Deposition.

Cause not reversed because of instruction not entirely correct which does not prejudice substantial rights of appellant. Alexander Bramel v. Emma Cunningham ---- 409

Defendant to have benefit of two defenses if not inconsistent. Diana Glackin's Admr. et al. v. Andrew Glackin ---- 654

Effect of submission of law and facts to court below. A. J. Beall v. Wm. Bethel's Admr. ---- 567

Erroneous instruction to jury on discharge in bankruptcy. Lewis H. Martin v. H. H. Ferguson ---- 351

Evidence held not prejudicial. Hariett Delafield v. City of Bowling Green ---- 71

Improper consolidation of suits. Wm. H. Byrd v. Socrates Kincaid et al. ---- 314

Judgment not entered until finding made by jury. W. J. Stephens et al. v. A. C. Norton et al. ---- 474

No question is raised by mere exception when no objection made to instruction asked by plaintiff. James A. Bibb et al. v. Nancy Hall ---- 877

[References are to Pages.]

TRIAL—Continued.

Not error for court to overrule demurrer filed after answer which is not withdrawn, for answer cured alleged defect in petition. Louisville & N. R. Co. v. John H. Wilson 357

Party held entitled to withdraw defense or cause of action before submission of cause to jury. E. Padgett et al. v. Henry Mays 24

Right of jury to take pleadings to jury room and propriety of exhibition of lease involved in suit. R. C. Steele v. Wager Swayne et al. 949

Whole law of case held not required to be given to jury unless requested. Newport St. R. Co. v. J. W. Johnson 35

TRUSTS.

See Executors and Administrators; Wills.

Creditors may force sale of interest in property held by their debtor. Henry Endies' Exr. v. Harriett Harrison et al. 885

Good faith of trustee a defense when loss occurs in management of trust property. Frank Carter et al. v. Paul I. Booker's Exr. 961

Husband held entitled to have trustee convey land. B. F. Moran et al. v. Launcelot Smithers et al. 139

Liability of trustees for part of purchase-money where property lost through failure to pay residue. C. Warren et al. v. J. H. Benton's Trustees et al. 272

Order for sale made by court at instance of creditor held error. Belinda Stone et al. v. P. L. Maxey 156

Property rights where husband makes sale or gift by deed, while retaining legal title. Cotton v. Brown 573

Purchaser at sale held not required to look to application of purchase-money. B. F. Moran et al. v. Launcelot Smithers et al. 139

Result in favor of estate where executrix without consent of heirs and devisees buys in estate property. M. M. Bartlett's Admr. et al. v. J. L. Gray's Admr. et al. 866

Suit to set aside deed made by commissioner for fraud. Willis Adams et al. v. John K. McClary et al. 871

Trustee can not acquire title in own right by purchasing adverse claim when title of realty he holds in trust is worthless. C. K. Oldham's Trustee v. Thomas R. Hume et al. 779

Trustee necessary party to suit. J. B. Alexander & Co. v. Sallie L. Owens 898

Trustee not liable for loss of estate money where he used ordinary care and prudence in choosing security. David Merriwether v. Geo. W. Merriwether et al. 251

Trust land held not subject to debts of trustee. B. F. Horn et al. v. W. H. Decker et al. 171

Validity of sale by trustee under authority of chancellor where no

[References are to Pages.]

TRUSTS—Continued.

fraud nor unfairness shown. P. H. Wilson et al. v. Taylor & Son et al. ---793

When wife's separate estate not charged with her debts. J. B. Alexander & Co. v. Sallie L. Owens---898

Where attempt is made to establish resulting trust and conveyance attacked is fair on face, there being no charge of fraud, there is no presumption, since statute of resulting and constructive trusts against legal title holder; but statute shifts burden on one attacking title. Ecton et al. v. Moore et al.---735

Where grantee is in possession of land conveyed almost half a century before, proof of declarations of grantor at time of conveyance insufficient, where neither fraud nor mistake alleged to establish trust. A. Q. Goodin et al. v. Mary E. Goodin et al.---218

Will not fail for want of trustee. J. B. Alexander & Co. v. Sallie L. Owens ---898

TURNPIKES AND TOLL ROADS.

Effect of repeal of law giving city part of turnpike within its limits. Dry Creek & C. Tpk. R. Co. v. Commonwealth---517

Petition against company for damages caused by obstruction in road must allege and prove it was placed there with knowledge or permission of company, or that it was there under authority and permission of company. J. W. Ware v. Clark's Run and Salt River Tpk. Co.---249

Turnpike company, as long as it takes toll, is liable for injury caused by its failure to keep road safe and free from obstructions. J. W. Ware v. Clark's Run and Salt River Tpk. Co.---249

UNDUE INFLUENCE.

See Fraudulent Conveyances.

USURY.

See Mortgages.

Forfeiture of interest on account of usury may be waived, but if defendant defaults and fails to set up by a pleading the ground for forfeiture he waives his right. P. G. Bunger v. A. P. Hart---410

If rate in excess of legal rate be charged intentionally whole interest forfeited. P. G. Bunger v. A. P. Hart---410

Recovered only from person to whom it is paid. Geo. W. Deatly v. N. P. Ralls ---306

Recovery of time limit. Clayton Miller's Exr. v. J. H. Wilson et al. ---541

Reply in suit on note held sufficient. Samuel Grimes v. John W. Williams ---28

[References are to Pages.]

USURY—Continued.

Validity of agreement to pay eight per cent. interest on note. Wm. Utterback v. Mary K. Wilhoit et al.----507
Validity of new obligation given in discharge of old indebtedness embracing usury. Clayton Miller's Exr. v. J. H. Wilson et al.----541
Where judgment including usurious interest is, by clerical misprision, entered, it can be corrected in the lower court by motion. William Beard et al. v. J. W. McKay et al.----483

VACATION.

See Highways.

VARIANCE.

See Pleading.

VENDOR AND PURCHASER.

See Descent and Distribution; Estoppel; Homestead; Husband and Wife; Receivers.

Correctness of judgment on purchase-money note where land sold to satisfy it. Harry Crawford v. H. C. Stagner----543
Enforcement of purchase-money lien. Mary Turpin et al. v. James Turpin's Admr. ----802
Execution of note no waiver of lien on land reserved for purchase-money. Geo. W. Pritchard v. E. T. Warner's Assignee et al.----751
"Farm" held not to include certain land. H. C. Mattingly v. Wm. C. Wathen ----66
Good title must be tendered to purchaser before judgment is taken for purchase-price, and where title offered gives owner five years to vacate conveyance, purchaser is not bound to accept it. Irvine Whittaker et al. v. Green B. Millien----268
How lien may be retained on realty sold and how enforced. Kentucky Elec. Inst. v. Margaret A. Gaines----831
Lien for purchase-money not discharged because note for purchase-money has a surety. William Taylor v. John H. McMillion's Admr.----352
Lien of vendor held superior to claims of judgment creditors. James W. Morford v. James O. Browning et al.----186
Lien reserved by vendors held superior to claims of creditors of vendee. Margaret Walker v. H. V. Prethoff et al.----143
Party advancing money to pay purchase-money note entitled to purchase-money lien for amount of note. Geo. W. Deatly v. N. P. Ralls--306
Petition in action on purchase-money notes held not sufficient. John G. Sublett v. Jas. W. Stubbs----32
Purchaser held entitled to rescission for false representation. W. H. Maupin's Admr. v. W. H. Pace et al.----204

[References are to Pages.]

VENDOR AND PURCHASER—Continued.

Purchaser of land by contract has burden of proving payment. Madison Todd v. D. F. Todd et al.----349

Rescission of contract to purchase realty cancels and releases lien reserved. W. D. Sterman v. H. H. Thornton et al.----442

Right of occupying claimant under verbal purchase of real estate. Wiley P. Taylor's Gdn. v. Samuel Johnson----464

Rights of parties where title bond giving claim has been destroyed for many years. John B. Lashley et al. v. G. B. Patton et al.----893

Rights of parties where vendor by verbal contract repudiates sale and ousts purchasers. W. L. Taylor's Admr. et al. v. Jordan Bryan----607

Rights of parties where vendor gives bond for deed and receives purchase-money and later conveys property to members of family. C. L. Harris v. R. H. May et al.----700

Unless fraud or mistake alleged or proved in executing contract of purchase, statement "I am to pay" negatives idea of previous payment. Madison Todd v. D. F. Todd et al.----349

Vendor's lien for purchase-money, where vendee in possession, is upon land and not rents nor profits. Julia A. Collins et al. v. J. M. Richart et al. ----283

When purchaser is entitled to protection. Geo. W. Pritchard v. E. T. Warner's Assignee et al.----751

Where an agreement that purchase-money notes be paid in labor is lost, vendor not allowed to show by doubtful evidence that labor performed was to satisfy other claims, so as to destroy rights of present title holder. Wm. Buchanan v. D. S. Trimble----406

VESTED REMAINDERS.

See Remainders.

VIEW OF PREMISES.

See Criminal Law.

WAIVER.

See Pleading; Vendor and Purchaser.

WAREHOUSE RECEIPTS.

See Sales.

WARRANTS.

See Justices of the Peace; Sheriffs and Constables.

WARRANTY.

See Judicial Sales; Sales.

[References are to Pages.]

WASTE.

See Life Estates; Receivers.

WATERS AND WATERCOURSES.

See Deeds.

What plaintiff must show in action to recover water rental at established rate. L. M. Dayton v. Newport Water Works.....777

WILLS.

See Dower; Equity; Execution; Frauds, Statute of; Gifts; Guardian and Ward; Judgment; Remainders.

Capacity to make. R. H. Elliott et al. v. W. A. Lee et al.....557

Colored servant held not to have relinquished legacy. Minta Simmons v. Fannie Hessey.....40

Construction of. Eleanor A. Henderson's Exr. v. W. N. Henderson 172

Elizza Jane Lathram et al. v. Franklin T. Jones et al.....150

James Garrett et al. v. J. F. Royse, Admr., et al.....184

Construction. J. D. Burns et al. v. H. H. Hoffman.....549

John A. Miller v. Elizabeth Childers' Admr. et al.....944

John T. Moore, Trustee v. Albert Burge et al.....825

Mary H. Starling v. E. L. Starling's Assignee.....141

T. A. Berryman's Admr. v. D. S. Adams et al.....286

Construction of contingent devise. B. F. Crofoot's Exr. v. William T. Duvall 443

Construction of devise of realty with limitation over. B. F. Crofoot's Exr. v. William H. Duvall.....443

Construction of terms. B. F. Crofoot's Exr. v. William T. Duvall..443

Construction of will with provisions for support of invalid daughter and maintenance of family, for sale of part to pay debts, and for descent to children. Mason P. Brown v. Orlando Brown et al.....237

Devisee held not liable for rent. William Smith et al. v. Jacob L. Smyser et al. 176

Devisee held to have good title and right to convey. W. H. McKnight v. Thos. S. Kennedy.....208

Disposition of rents not used by legatee. H. C. Smith et al. v. H. C. Moss' Admr. et al.....848

Interest on legacy. H. C. Smith et al. v. H. C. Moss' Admr. et al...848

Legatee or heir can not, after thirty years, under petition to construe will, raise question of validity of probate because one legatee witnessed will and helped to probate it, if court had jurisdiction to order probate. Jeremiah Weaver's Heirs v. W. H. Weaver et al.....258

Liability for costs of proceeding to construe will. B. F. Crofoot's Exr. v. William T. Duvall.....443

[References are to Pages.]

WILLS—Continued.

Parties held owners by survivorship. W. L. Murray v. Caroline Murray et al. ---121

Realty as personalty under will. H. C. Smith et al. v. H. C. Moss' Admr. et al. ---848

Set-off against lien created upon tract of land devised. Thompson M. Peters et al. v. Francis Sword's Exr.---500

Sole question in contest of will on ground of mental incapacity declared to be as to testator's mental capacity at time of signing will. James V. Ross v. N. J. Weaver et al.---131

Undivided interest of child in estate liable for notes given by child for support under terms of will. Mary Helm v. R. S. Lyon et al.---803

Where interest in land wrongfully bequeathed is mortgaged, mortgagee has lien only on part testator could lawfully bequeath. Elizabeth Bryson et al. v. James Osenton et al.---383

Where legatee is permitted to testify, without objection, to part of will bequeathing property to him, probate not vacated years afterward in petition for construction. Jeremiah Weaver's Heirs v. W. H. Weaver et al. ---258

Wife bequeathed life estate in bank stock held required to give bond. James McDaniel's Admx. et al. v. John H. Clements et al.---96

WITNESSES.

See Appeal; Continuance; Contracts; Deposition; Homicide; Wills.

Admissibility of evidence of incompetent witness in suit to recover claim against estate. D. R. Maupin et al. v. B. F. Berkley---487

Competency of two or more persons jointly indicted for same offense. James H. Galloway v. Commonwealth---951

Erroneous for court to indicate in instruction to jury any test of credibility of witnesses. John Cook v. Commonwealth---676

Facts held to go to credibility of witness. Geo. W. Crawford v. Jacob Rice ---64

Irrelevant to prove witness' sickness and belief that death was approaching, in absence of plea or claim of insanity or mental capacity of party to testify. Charles H. Powell et al. v. H. A. Mead---292

Party to suit on note given intestate held not incompetent as witness. William Hunter's Admr. v. A. March---55

Payee incompetent to testify to statements of dead obligor or to any part of the transaction. T. B. Showalter v. Benjamin Kirk's Exrs.---741

When witness can be impeached. W. H. Arnold v. Commonwealth ---333

Wife competent witness for herself where creditors seek to set aside conveyance by husband to her on ground of fraud. W. P. Devon v. Balthasa Kobigen et al.---882

[References are to Pages.]

WITNESSES—Continued.

Witness sought to be contradicted by certain evidence should be examined concerning matters sought to be proved. Ewell Tye v. Commonwealth ---------- 206

WOODS AND FORESTS.

See Indictment and Information.

WORDS AND PHRASES.

"Farm." H. C. Mattingly v. Wm. C. Wathen---------- 66
"Maintenance." D. G. Park et al. v. L. Anderson---------- 49

WORK AND LABOR.

Court's power to reverse judgment based upon excessive and unreasonable finding by commissioner when approved by chancellor. John A. Graham et al. v. H. B. Jones---------- 503
Value of services where, in suit to recover for work done, it is admitted work was done. H. M. Hargett v. Bracken County---------- 245