KENTUCKY OPINIONS

CONTAINING THE

UNREPORTED DECISIONS

OF THE

COURT OF APPEALS

COMPILED BY
J. MORGAN CHINN
Ex-Clerk

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

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KENTUCKY COURT OF APPEALS

A. F. FREEMAN *v.* A. LEVI.

Landlord and Tenant.

Landlord's lien on goods must be satisfied before general creditors. The sale of such goods does not operate as an assignment for the benefit of creditors under Act of 1856.

Landlord and Tenant.

Where real estate under lease is not surrendered, but is left vacant, the landlord purchasing such goods may deduct from purchase price amount of rent due for time the real estate was vacant.

APPEAL FROM SHELBY CIRCUIT COURT.

June 18, 1874.

OPINION BY JUDGE PETERS:

No question is raised as to the indebtedness of Keefer to Freeman for the rent of the house in which the goods were stored; nor is it controverted that Freeman had a lien on the goods in the house, for his rent. They were fairly sold for an adequate price, including the rent for the unexpired time the lease had to run; and as Freeman had a right to have his demand for rent satisfied out of the goods, before Levi, or any other creditor could subject them to the satisfaction of their demands, the sale of the goods by Keefer to Freeman or his agent, did not operate as an assignment to the benfit of all the creditors of Keefer under the act of 1856.

The writing, evidencing the sale of the goods to Freeman by Keefer, does not stipulate for the surrender of the possession of the house by Keefer, but it may be inferred from the evidence of Ellingewood that it was surrendered; and he says in June of the same year it was rented to another tenant; that, however, does not authorize the conclusion that Freeman was to lose the rent for the time it was unoccupied. The strong presumption is that the time the house might be vacant was considered in the negotiations for the sale, as the goods were really worth more than $101, the amount of rent then actually due. It seems to us that Freeman should have $101 out of the price of the goods, that being the sum then due, and the further sum of $93.75, the rent for the three months during the time the house was unoccupied; and the residue

of the price for which the goods were sold should be paid to *Levi,* and Freeman pay the costs in the court below. Wherefore the judgment is *reversed* and the cause is remanded with directions to render a judgment as herein directed.

Caldwell, Harwood, for appellant.
A. G. Roberts, for appellee.

WILLIAM A. MOORE, ET AL., *v.* BOWMER FLORENCE.

Wills—Construction of.

Intention of testator must govern, but this intention must be gleaned from the whole of the will.

Terms of Will Construed.

Where a will conveys real estate to a named person "and to her issue," it is held that such named person takes the title in fee simple.

APPEAL FROM NELSON CIRCUIT COURT.

June 19, 1874.

OPINION BY JUDGE PRYOR:

The following is the clause of the will of William Cotton upon which the appellants base their right to recover, item 2: "I bequeath to my daughter, Catherine Ann, who intermarried with Charles A. Moore, of Bardstown, in the state of Kentucky, and to her issue, all my estate, real, personal and mixed, of every kind and description whatsoever, in the said state of Kentucky and elsewhere, with the exception hereinafter specified." Mrs. Moore died; and these appellants, who are her children, instituted this action to recover the land in controversy, alleging that by the terms of the will, their mother held only a life estate. It is alleged in the petition, and conceded by both parties, that this land passed by the will of Cotton to the devisees therein named, Mrs. Moore and her husband; the wife, claiming an absolute estate in the land by reason of the devise, on November 29, 1844, sold this land to the appellee, Florence, and made him a deed therefor. As purchaser, he took possession, and has held it since under this deed passing the fee simple title, and was in the possession at the institution of the action in March, 1873. These facts were alleged by the appellee, Florence, in his answer, and for the purposes of the demurrer must be taken as true. The demurrer thus filed reaching back to the

petition, it is insisted by counsel for appellee that the appellants, the children of Mrs. Moore, have no cause of action, and the court below, so adjudging their petition, was dismissed. Counsel for appellants maintain that the court had no right to consider the will or its contents, as it was, at best, only evidence of the right to recover, and not the foundation of the action. This, as a general proposition, when exhibited and merely referred to and filed with pleading, is true. In an action to recover land, the allegation that the plaintiff is the owner, and entitled to the possession, and that defendant holds possession without right, presents a cause of action, and although an exhibit of title may be filed, it is with the plaintiff, whether or not he will offer it as evidence, and therefore it should not be regarded upon demurrer. But when the plaintiff sets forth his title, and alleges that the defendant claims under the same deed or will, and not only so, but makes a statement of facts in connection therewith that must be taken as true, he will not be allowed afterward to controvert his title and the facts stated, so as to avoid the effect of his own admissions, without first showing by affidavit or otherwise that he was laboring under a misapprehension of the facts, when reducing them to writing. It is alleged that Mrs. Moore, the mother of the appellants, derived her title under the will of William Cotton; that by its provisions she had only a life estate in the land devised; that during her life, the mother, in conjunction with her husband, conveyed this land to the appellee. The will under which the appellants claim, is filed with the petition, as well as the deed from Mrs. Moore and her husband to the appellee. If, by the provisions of the will, Mrs. Moore had only a life estate, then she could convey no greater estate to her vendee; but if she had an estate in fee, the absolute title to the land passed to the appellee under the deed made him by Mrs. Moore and her husband; hence the solution of the question depends upon the construction given the will of William Cotton. The clause in the will under which the appellants claim, creates an estate tail at the common law, and by our statute is made a fee simple estate, passing to the devisee the absolute title. In construing a will, however, such meaning must be given the language as will carry out the intent and purpose of the party making it. This intention is to be gathered from the whole will. There were two persons living at the date of the will, who seem to have been the objects of the testator's bounty. Mrs. Moore, who claimed under the clause first quoted, and Mrs. M. Bryant, to whom the following devise was made, item 4: "It

is my will that Mrs. M. Bryant, of Natchez, shall have the brick house and lot, and the lot with an old frame house on it, both fronting on Walnut Street, in Louisville, Ky., and near the city hospital, during her natural life, and at her death to her children." These two devises contain, in substance, the whole will, and certainly all that portion of it from which the intention of the devisor is to be determined in the devise made to Mrs. Moore. The word "issue" in a will is generally to be construed as a word of limitation, and was so understood by the ancient common-law judges. The courts of this country, however, enlarge or restrict the meaning by giving to it the same meaning the testator intended, if there is anything to be found in the will authorizing such a construction. In 2 Jarman on Wills 351, it is said: "It is clear that a simple bequest to A and his issue, if the subject of disposition were real estate, would indisputably make A tenant in tail." "The word 'issue', when not restrained by the context, is constructive and synonimous with 'descendants', comprehending objects of every degree." Same vol., p. 25: "An estate tail is an estate given to a man and the heirs of his body, and will, if left to itself, descend on the death of the first owner to all his lawful issue, children, grandchildren, and more remote descendants." Williams on Real Property, p. 63. "With regard, however, to a devise simply to a person and his issue, no doubt at this day can be raised as to its conferring an estate tail." 2 Jarman 240. "A bequest to A and his issue will clearly pass an estate tail, in real property, so it will give to A an absolute interest in a personal legacy." 2 Williams on Ex'rs 727. The words "heirs of the body" or "heirs of issue" are sometimes used, and frequently decided, to be words of purchase. It is a question of intention, at least, to be determined from the whole instrument. In *Prescott v. Prescott's Heirs,* 10 B. Mon. 56; *Jarvis & Trabue v. Quigley, et al,* same book, page 105, Sharkwood, justice in the case of *Taylor v. Taylor,* 63 Pa. St. 483, says that the word "issue" in a will, is to be construed as a word of purchase or limitation, as will best effectuate the intention of the testator, gathered from the entire instrument. In that case the testator gave to his daughter, Susanna Bousall, and his mother, or in the event of the death of one of them, to the survivor, all his real estate during their lives, and in case his daughter, Susanna, departed this life having lawful issue, it was then his will that his real estate should descend to such lawful issue, their heirs and assigns, forever; and in case his daughter should depart this life before her mother, having lawful issue, then that

such issue should enjoy and inherit their mother's right from the time of her death. The learned judge says, "It is a position not open to dispute, that, if it appears either by confession or clear implication that by the word 'issue' the testator meant children, or issue living at a particular period, as at the death of the first taker, and not the whole line of succession, which would be included under the term 'heirs of the body', it must necessarily be construed to be a word of purchase." The testator gave to his wife and daughter all of his real estate during their natural lives, and in case his daughter should depart this life, leaving lawful issue, the real estate to descend to such lawful issue and their heirs forever. He immediately adds these words: "And further, it is my will if my daughter depart this life before her mother, leaving lawful issue, then such issue shall enjoy and inherit their mother's right from the time of her death." No declaration could well be more explicit, to show that by issue he meant children, for they were to inherit and enjoy their mother's right from the time of her death. There is a material distinction between the case cited and the one under consideration. In the case of Taylor, the devise to the daughter was in the first place for life only, and then to be enjoyed by her lawful issue, the testator evidently meaning children, they to inherit and enjoy from the time of her death. In the present case the devise is to Mrs. Moore and to her issue, with no language in the will restricting or limiting her estate, or from which the conclusion can be reached that he intended Mrs. Moore to have only a life estate in what he had devised. There is, however, a clause in the will that, in our opinion, indicates clearly that the testator intended Mrs. Moore to have an absolute estate. He knew how to create a life estate, and the manner in which the rights of each beneficiary could be limited. In the devise to Mrs. Bryant of the lots in the city of Louisville he uses this language: "It is my will that Mrs. M. Bryant shall have the lots, discharging them, during her natural life, and at her death to her children." It is evident that the testator intended to give to Mrs. Moore a greater estate than to Mrs. Bryant, by restricting the right of the one, and passing the absolute property to the other. If he intended Mrs. Moore to have a life estate the same language would have been used, and not such technical words as would create an estate tail, or some other estate about which the devisor was entirely ignorant. In our opinion, the word "issue" was used as synonomous with the word "heirs," or "heirs of the body," and passed to Mrs. Moore the absolute title.

This will was heretofore in this court for construction in the case of *Moore, etc., v. Millet,* on the petition of the children of *Mrs. Moore v. Catherine Moore,* the mother, asking for a sale of some of the real estate by reason of its being indivisible, and alleging that Mrs. Moore, to whom the devise was made, held the lot in her own right and as trustee for the children. They also ask for a construction of the will. The widow, her husband being dead, filed an answer, admitting the allegation of the petition, and also asking for a construction of the will, but asserting no other interest than that stated in the petition. The court below decided that the widow held only a life estate, and that judgment was affirmed by this court, and the opinion adhered to on a petition, filed for a rehearing. The point made in this court by the widow and her son, William, was, that by the terms of the will, the fee passed to them, as William was the only child living at the death of the testator, his grandfather, and the fee having been vested, the other children, subsequently born, could not take it. The court, looking to this point more than any other, and the widow, by counsel, conceding in argument that the son William held jointly with her, it was held that all the children had equal interests, and the mother only a life estate. This view of the question cannot be adhered to.

Judgment *affirmed.*

D. W. Sanders, W. McKnight, E. E. McKay, for appellants.
Muir & Wickliffe, Barr Goodloe, for appellee.

WILLIAM G. WOODS *v.* WILLIAM WOODS.

Real Estate—Recovery of Purchase Price.

When land is to be paid for at the time the amount thereof is ascertained by survey, no interest is collectable prior to survey.

Power of Vendor.

Where land is to be paid for at the time the amount thereof is ascertained by survey, the vendor has it in his power to have the land surveyed at any time; and if he fail to do so promptly, and thereby secure the principal and interest, it is his own fault.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 19, 1874.

OPINION BY JUDGE PETERS:

On February 27, 1859, William Woods, by writing, construed to sell to William G. Woods a small tract of land, described in the

writing at the price of $25 per acre, in three equal annual payments after the land was surveyed. Suit was brought by William Woods to coerce the payment of the purchase price of the land by an enforcement of the vendor's lien.

The principal defense relied on is that the plaintiff below was indebted to the defendant, both before and after said contract was made, for labor performed at his request and for him; that he was to be credited on the price of the land for labor which he had theretofore performed for, and at the request of plaintiff, and for such as he should perform for him afterwards; and that he had performed labor at a fair compensation sufficient to pay the purchase money.

No survey of the land appears to have been made until June 3, 1873, when it was surveyed under an order of court and found to contain 23¼ acres; and in July, 1873, judgment was rendered in favor of plaintiff for $581.25, being $25 per acre for the 23¼ acres found to be in the tract, and interest from the date of the judgment for the costs of the suit, and for a sale of the land on credits of six and twelve months on failure of the defendant to pay the money into court on or before August 1, 1873. From that judgment William G. Woods has appealed, and William Woods prosecutes a cross appeal.

If, as is alleged in the answer, appellant had the privilege of paying for the land, and had, in fact, paid a part of the price by labor performed for plaintiff, he should have had it inserted in the writing; and his failure to have the amount of appellee's indebtedness ascertained at the date of the contract, and a credit for it given, or some statement made in relation thereto, at the time, is a circumstance unfavorable to his claim. But, besides, his evidence of the labor performed by him for his vendor, is too vague and uncertain, both as to time and value, to be the basis of judicial action.

On the subject of the cross appeal, it is sufficient to say that, by the terms of the contract, the times of payment were to date from the making of the survey of the land; and if the running of interest is deferred to the period of the survey, appellee cannot be heard to complain, as the remedy was in his own hands.

Judgment *affirmed* on the original and cross appeal.

Munday & Parson, for appellant.
J. G. Wilson, for appellee.

H. ABRAMS *v.* S. ULLMAN, ET AL.

Practice—Malicious Prosecution.

Where an action for malicious prosecution has been reversed by the court of appeals and returned to the lower court for trial, plaintiff may not then amend his petition by filing counts for slander.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 20, 1874.

OPINION BY JUDGE PETERS:

After this court had reversed a judgment of the court below in favor of appellant against appellees, the cause was again tried in that court, and appellees having succeeded, appellant now seeks a reversal of the judgment against her. After the return of the cause, appellant produced and asked permission of the court below to file an amended petition, which was refused, and that ruling she complained of as an error prejudicial to her.

The action, as is most manifest, up to the time when the amendment was offered, had been treated as an action for a malicious prosecution, not only from the allegations of the petition itself, but from the instructions asked for by appellant on the first trial, and also from the character of the defense. It had all the characteristics of an action on the case, under the old system of pleading, for a malicious prosecution. For injury to the person, not immediate, but by a regular process of a court, see 1 Chit. Pleading 133.

The amendments tendered were evidently counts in slander, for injury to character, and the two causes of action cannot be joined, according to clauses 5 and 6, § 111, Civil Code, and as held in this court in *Dragoo v. Levi*, 2 Duvall 520.

The court below therefore ruled the law correctly in refusing said amendments to be filed.

The next question we propose to consider is the propriety of the ruling of the court below in giving an instruction in the following language on motion of appellee, Bamberger: "That it devolves on the plaintiff to prove that defendant, J. F. Bamberger, procured or helped to procure the indictment complained of, and as there is no evidence that he procured or helped to procure the indictment, the law is for said defendant, Bamberger, and the jury must so find."

The correct solution of this question necessarily requires some reference to the evidence upon which the prosecution was founded. Ullman, the partner of Bamberger, was a member of the grand jury

which found the indictment against appellant, and it was found on his statement alone to that body. The facts which he stated to them he says he derived from Bamberger, that he told him he had detected the two boys who stole the calico; that he found it in the possession of appellant; that she admitted that she bought it from the boy, N. Goldsmith, for $2.75, when it was worth twice that sum, and that he was satisfied she must have known it was stolen from the price she paid for it when she bought it. He did not state that Bamberger told him that when the calico was asked for, appellant told him she had it, how she got it, what she paid for it, that it was in a most conspicuous place in her house, and that she made no attempt to conceal it, but that all she said as to the manner of her getting it, was true, and that she also said at the time that she did not know it was stolen, and afterward reproached the boy for selling her stolen goods, all of which there is evidence conducive to establish. There is also evidence in the case that Ullman and Bamberger, both at appellant's house, after upbraiding and reproaching her for alleged dishonest conduct, threatened to prosecute her and to send her to the penitentiary at the cost to them of a "great sum." Then, with other facts proven, which we deem it unnecessary to recite, they tendered in some degree to show that the prosecution was groundless, and that Bamberger took some part in it.

We may add that appellant was not tried before Judge Price, and many facts tending to exonerate her do not appear to have been disclosed to him. Nor does it appear that the communication made by Bamberger to Ullman was in subordination to the advice of Judge Price, and the prosecuting attorney in his court.

After the instruction herein copied, follow three others in the record, but whether or not they were given does not appear. We conclude, however, they were not, as they would have been wholly unnecessary after the one commented on was given; but as there may be some uncertainty about them, we may say that we cannot approve them. In one, certain facts are enumerated from the evidence, and special importance given to them to the obscurement of others; and in another, too much importance is given to what Judge Price said to the officer who arrested Goldsmith. The last we do not consider particularly objectionable.

We approve the judgment in favor of Ullman. But for the reasons herein stated the judgment in favor of Bamberger is *reversed,*

and the case remanded for new trial and for further proceedings consistent herewith.

Mundy, for appellant.
Muir Bijou & Davie, for appellees.

R. M. MOSBY, ASSIGNEE, *v.* HATCHER, PERIN, ET AL.

Promissory Note—Plea of Payment—Evidence.

A plea of payment to a suit on a debt is good which sets up a contemporaneous contract showing that plaintiff had agreed to accept as payment the performance of certain advertising and supplying certain newspapers, which the defendant had performed and supplied.

Evidence.

Where an action at law is submitted to the judge without a jury, the court's finding on the facts will not be reversed unless it be palpably wrong.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 20, 1874.

OPINION BY JUDGE LINDSAY:

The answer herein sets up a contract entered into by Hatcher, Perin, *et al.*, with Handy, Hughes & Co., at the time of the execution of the note, by which the payees agreed to accept as part payment thereof, the performance of certain advertising, and the supplying to certain subscribers to the Democrat Newspaper, of daily and weekly issues of another city newspaper to the extent of their paid subscriptions to the Democrat. Appellees aver the performance of said contemporaneous undertaking, and ask to be credited by the agreed value thereof, as a payment on their note.

We regard this as a good plea of payment, but if it is not, then it certainly amounts to a set-off. If it be treated as a set-off the judgment is correct, for the want of a reply. If it be treated as a plea of payment, then the proof sufficiently supports it.

Bowman proves the stipulations of the contract. He was advised as to the number of subscriptions appellees agreed to fill, and the amount of advertising they agreed to do. He states that the parties having contracts with the Democrat office, had, up to the date of his deposition, over two and one-half years after the date of the note, made no complaint of the failure of appellees to fill their subscrip-

tions, or to finish their advertising. From their statements it may fairly be inferred that appellees performed their agreement; and they are not to be denied relief because they might have made more satisfactory proof.

But if all had doubts on this subject, we could not reverse on the evidence alone. There was no reason why appellant should sue. The obligors in the note in equity, and the lien of Bars did not give the chancellor jurisdiction of the contest between Mosby and the appellees. The instruction of the action in equity, and its submission to the chancellor, was, in effect, the submission of an action at law to the judge without the intervention of a jury. In such a case the judgment will not be reversed on the facts unless it be palpably wrong. Such is not the case here.

Judgment *affirmed.*

Fairleigh, for appellant.
Bramblett, for appellees.

COMMONWEALTH FOR SATTERLY, ET AL., *v.* HARRISON M. DEMAREE, ET AL.

Limitations—Pleadings—Waiver.

The statute of limitations cannot be invoked to escape liability by one who within the five years prior to the beginning of the action has recognized his obligation to pay and made payments thereon.

Pleadings—Waiver.

The failure of plaintiff to have sued upon the new promise instead of the old is cured by defendant's answer.

APPEAL FROM WASHINGTON CIRCUIT COURT.

June 23, 1874.

OPINION BY JUDGE LINDSAY:

The plea of limitation bars this action as to all the appellees except the deputy sheriff, Hall. This is not such an action as can be maintained on the sheriff's bond. He in no sense violated his official duty in collecting the two executions in favor of Demaree, nor in failing to return the money to appellant, in view of the fact that Demaree improperly sued out the executions, and had no legal right to receive the amount collected, without first releasing Neman & Co.'s attachment. The sheriff might, by recognizing appellants'

claim, impose upon himself a personal, but not an official, obligation to return the money. The right of action growing out of this personal obligation is barred by the lapse of five years without suit.

The difficulty with Hall is that within five years he has distinctly and unmistakably recognized his obligation to repay the money; and his answer shows that since the institution of the suit he has made payments on the claim. Such unequivocal recognitions of his obligation to return the money takes the case out of the statute as to him.

It is true that appellants ought to have sued on the new promise, but the error in this regard is cured by the answer. As it is evident the case went off upon the statute of limitations, we deem it unnecessary to notice the pleas of judgment, and the set-offs pleaded by Hall.

The judgment is *reversed* as to Hall, and the cause remanded for further proper proceedings. As to the remaining appellees, the judgment is *affirmed*.

W. H. Hays, for appellant.

J. W. OSBORNE & KING *v.* WILLIAM HALLEMENT.

Attachment—New Trial on Ground of Surprise.

One claiming to be the owner of a contract purchased on condition that he would advance money to the seller, and who has not done so, may be required, at the suit of the seller's creditors, to advance the money.

New Trial—Surprise.

Appellants not entitled to a new trial on the ground that they were surprised because appellee did not take the deposition of a certain witness. They were not warranted in assuming that such a deposition would be taken, but should have taken it themselves.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 24, 1874.

OPINION BY JUDGE LINDSAY:

The claim of appellee is sufficiently established by the proof. King failed to make out his plea of payment, the settlement at Doyles, and the closing up of the sale of brick on a former contract, as is made clear by the statements of appellee, and the production

by him of receipts and tickets for brick delivered on the work on Eighth Street.

King did not controvert the grounds of attachment, nor did he take any steps whatever to have it discharged. Appellee was therefore entitled under his attachment lien to have any amount that might be due from Osborne to King, subjected to the payment of his judgment. Osborne claims to be the beneficial owner of King's contract with the city of Louisville. He denies that his purchase from King was fraudulent, and states that he had paid to King, before the institution of this action, a sum exceeding the amount due from the city on the work. Taking Osborne's own statement of the case, he was to advance King funds to be expended on the work.

If he held the contract as a security, the onus was on him to show that after the amounts advanced by him were paid, there would be nothing left of the sum due from the city to be applied to the payment of appellee's claim. If he became the absolute owner of the contract, inasmuch as he admits that the consideration for the assignment was the agreement upon his part to advance money to King from time to time, he was bound to show that he had advanced the full contract price for the assignment. He neither proves, nor attempts to prove, either one of these essential facts. As the case was presented, the chancellor was bound, under the attachment lien, to satisfy appellee's claim out of the funds in his hands.

It is unnecessary, therefore, for us to examine that branch of the case, in which relief was claimed under the provisions of the Mechanic's Lien Law. Appellants were not entitled to a new trial. They failed to show that they were surprised. They had no right to rely upon appellee's taking the deposition of Osborne. If they desired the benefit of his testimony he should have offered himself as a witness. Besides, by an order made in open court, the cause was set for hearing. Appellants were bound to take notice of this order, and if they really had expected appellee to take the deposition of Osborne, this was notice to them that he had abandoned his intention to do so and they should at once have taken steps to secure his testimony. The injury received by the counsel was after the submission of the cause, and consequently could not have interfered with its preparation.

Judgment *affirmed.*

Harrison, for appellants.
Easlin & Calloway, for appellee.

HENRY DENT *v.* E. BENJAMIN.

Guardian and Ward—Adverse Interests Not Permitted.

A guardian is bound to protect the interests of his ward, and may not place himself voluntarily in a position where his own personal interests are in conflict with those of his ward.

Adverse Interests—Ward's Election.

Where a guardian buys in property at a low price where it is his ward's interest to have the property sold at a high price, such a sale may be set aside.

Ward's Election.

If such a sale is consummated the wards may either elect to treat such a purchase as having been made in trust for them, or may repudiate it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 25, 1874.

OPINION BY JUDGE LINDSAY:

It is not necessary to determine whether the alleged irregularities in the proceedings resulting in the decretal sale of the Fifth Street property, would be sufficient to justify the chancellor in refusing to adjudge a specific performance of the contract between Dent and Benjamin. After the judgment in the case of *Mankin v. Dent* had been rendered, and before the sale, Henry Dent became the statutory guardian of the infants whose property was about to be sold. He was, from the date of his qualification as guardian, bound to protect the interest of his wards, and had no right to place himself in a position, in which his own interests would be antagonistic to those of his wards.

As a bidder at the commissioner's sale, he was clearly interested in purchasing the property at the lowest possible sum. His wards were interested in having it sold at the highest market price. Here was a conflict of interest brought about by the voluntary act of Dent. It is no excuse that his life estate was being sold. He knew that it was to be sold, when he accepted the position of guardian; and having acted in the premises with full knowledge of all the facts, he cannot make his own protection a pretext for disregarding his obligation to guard the interests of his wards. Whilst in exceptional cases, guardians may be allowed to purchase the estate of their wards, when sold by order of a court of competent jurisdiction, it is always incumbent upon them to show the utmost good

faith, and that the purchase is not prejudicial to the ward. Here it is evident that the property was sold for less than its real value. It is also manifest that the lien of the infants had been released, and that Dent, the purchaser, did not, at the time, nor at any subsequent time, set apart to their credit any part of the amounts to which they are entitled. Further than this, he has failed to show that he was, at the time the lien was released and the legal title to the property passed to him, or that he is now, able to pay to his wards the amounts to which they are respectively entitled. It may be that the sureties on his bonds as guardian are solvent. Of this we know nothing. But even if they are solvent now, they may not be, when the wards arrive at age. It is perfectly clear that the wards may elect to treat Dent as holding in trust for them, and it is more than probable they will elect to do so, in the event they are unable to recover on the guardian's bond the amounts due them under the sale.

A vendee cannot be compelled to accept a title of this character. Such a title is not marketable. No reasonably prudent man would purchase the property and risk the action of Dent's children after they arrive at age. This is not a mere doubtful title. It is not good, and cannot be made good until Dent's children arrive at age, and ratify and confirm his purchase.

The chancellor properly refused to decree a performance of the contract, and properly adjudged that it should be vacated and held for naught.

Judgment *affirmed.*

Barr, Goodloe, for appellant.
Gibson & Gibson, for appellee.

D. M. BOWMAN, ET AL., *v.* MCBRAYER, TRAPNELL & CO.

Corporation, Contracts of—Evidence, Admissibility of.

Where a note does not purport to bind a corporation or point to its funds as the source from which it is to be paid, the use of the personal possessive "we" rebuts the presumption arising from the subsequent descriptive words "president and directors," and imparts an individual obligation on those signing it.

Evidence, Admissibility of.

In the absence of fraud or mistake the intention of the parties to a written contract must be gathered from the writing, and parol evidence is inadmissible to show that the appellees did not so understand the note.

APPEAL FROM MERCER CIRCUIT COURT.

June 26, 1874.

OPINION BY JUDGE LINDSAY:

In the case of *Yowell v. Dodd, et al.*, 3 Bush 581, the promise was by the "president and directors" of the corporation. The directors constituted the corporate representatives of the turnpike company, and when they spoke in their corporate capacity, the conclusion was clear that they meant to bind the corporation, and not themselves, and there was nothing in the body of the note to rebut that presumption.

In the note in this case, the use of the personal possessive "we," rebuts the presumption arising from the subsequent use of the descriptive words, "president and directors," and necessarily imparts an individual obligation upon the part of each person signing the note.

This note differs from the notes considered in the cases of *Whitney v. Sudduth, et al.*, 4 Met. 67, and *Trask v. Roberts*, 1 B. Mon. 201, in the fact that in those notes the promise was several, as well as joint, but the reasoning in those cases is clearly applicable here.

The note sued on does not purport to bind the turnpike company, nor does it point to the funds of the company as the source from which it is to be paid. In the absence of fraud or mistake, the intention of parties to a written contract must be gathered from the writing. Hence the averments of the answer to the effect that appellants did not intend to bind themselves individually, and that appellees did not so understand the note, were inadmissible.

The demurrer was properly *sustained*.

Judgment *affirmed*.

Kyle & Poston, for appellants.
J. C. Thompson, for appellees.

S. F. BUCKLEY, ET AL., *v.* RICHARD BOARD.

Real Estate, Purchaser in Good Faith—Party Not Prejudiced by a Judgment Has No Cause of Complaint.

What constitutes a valid consideration is a matter of law, and a purchaser of real estate claiming to have paid a valid consideration should show what he did pay, that the court may judge of its validity.

Party Not Prejudiced by Judgment.

A party not prejudiced by the judgment has no cause of complaint.

APPEAL FROM ANDERSON CIRCUIT COURT.

June 28, 1874.

OPINION BY JUDGE LINDSAY:

Mrs. Whittaker, the only party whose interest is affected by the judgment, did not answer the petition, nor does she appeal from the judgment. O'Hara's answer interposed no defense; he was particular to deny all the negative averments of the petition, but carefully avoided stating what consideration, if any, passed from him to Whittaker at the time the house and lots were conveyed to him. It is true he claims to have purchased in good faith, and to have paid a good and valid consideration.

What constitutes a good and valid consideration is a matter of law; O'Hara should have stated what the consideration was; and the court could then have determined whether it was good and valid. As to Mrs. Whittaker and O'Hara, the petition might properly have been taken for confessed. Buckley has no cause for complaint. He owes on the purchase of the house and lots over three hundred and twenty-five dollars. The judgment against him does not amount to that sum. The payment of the judgment entitles him to a credit *pro tanto* on his note to Mrs. Whittaker. If he desired the court to compel Mrs. Whittaker to convey in accordance with her bond for title, he should have made his answer a cross petition against her.

Neither of the appellants being in any degree prejudiced by the judgment, it must be *affirmed.*

Draffin & Portwood, for appellants.

E. M. MARSHALL, ET AL., *v.* J. M. MEYER.

Arbitration—Parties to Action—Waiver of Capacity of Surety.

Where an action to arbitrate is brought by heirs instead of by administrator, and defendant pleads to the merits and afterwards agrees to submit the cause to a master to audit and settle the accounts between the parties, and fails to demur on the ground of want of capacity to sue, he waives his right to object to such capacity thereafter. See Civil Code, §§ 120, 121, 122.

APPEAL FROM BOYLE CIRCUIT COURT.

June 30, 1874.

OPINION BY JUDGE PETERS:

The parties to this litigation agreed in writing to submit the matters of difference between them to arbitrators named in the

writing. They met at the time and place agreed upon with the arbitrators, and appellee entered upon the investigation without any objection to the legal capacity of appellants to assert the claim against him.

After the award was made, this action was brought upon the writing to submit, and appellee, instead of filing a demurrer to the petition on the ground that the administrator, and not the heirs of Mrs. Marshall, should sue, answered, and denied an indebtedness to appellants, and insisted that he was entitled to credits to a large amount which the arbitrators had failed to allow him, and for which he then professed to produce the vouchers; and by consent the cause was transferred to the equity docket, and by agreement of the parties it was referred to the master to audit and settle the accounts between them.

Mrs. Marshall had been dead about sixteen years when the parties entered into the agreement to arbitrate their matters; and the presumption would arise from the lapse of time, that her debts, if there were any outstanding against her when she died, had been paid, and what remained of the personalty belonged to her heirs. But if that were not so, and the personal representative was the proper person to enter into the arbitration and to bring the suit, appellee waived all such objections, first, by his written agreement to arbitrate these differences with appellants, and second, by answering to the merits and failing to demur to the petition, on the specific ground of want of legal capacity in appellants to sue. §§ 120, 121, 122, Civil Code. But besides all this, it appears in the record that the parties, by agreement, had the cause transferred to the equity docket, and it was then by the consent of the parties, referred to the master to hear the evidence, and to audit and state the accounts between them, thus, in effect, setting aside the award, and agreeing that the chancellor should take jurisdiction of the case, and settle their rights according to the principles of equity. The court had jurisdiction of the subject-matter of the controversy; and after the parties had made the agreements herein recited, the court below erred in dismissing the petition.

Wherefore the judgment is reversed and the cause is remanded, with directions to proceed to adjudicate the rights of the parties upon the preparation and evidence in the case, and for further proceedings consistent herewith.

VanWinkle & Rodes, for appellants.
C. C. Fox, for appellee.

S. P. WORSHAM'S ADM'R *v.* PEARSON MILLER.

Bankruptcy—New Promise to Pay—Recovery of Interest.

A promise to pay a debt after discharge in bankruptcy is upon a valid consideration and may be enforced.

Interest.

If plaintiff may recover on such a debt he is entitled to recover interest as well as principal.

APPEAL FROM LINCOLN CIRCUIT COURT.

June 30, 1874.

OPINION BY JUDGE LINDSAY:

The demurrer to the original petition was properly overruled. The promise to pay the debt after the discharge in bankruptcy is sufficiently averred, and the right to recover is based upon said promise.

There is some proof conducing to establish the promise. The statement of the intestate made to J. W. M. Miller in Atlanta, whilst of itself is insufficient to establish the promise, certainly does conduce to show that Worsham had agreed to pay the debt; and the interview between Worsham and Saufley, when considered in the light of said statement to J. W. M. Miller, would have authorized a jury to infer the making of the promise. Certainly, with such proof before the jury, the court should not have instructed as in the case of a nonsuit. The finding of the court must in this case be treated as the verdict of a jury. It was not error to give judgment for interest; if the intestate agreed to pay the debt at all, he agreed to pay all of it, interest as well as principal.

Judgment *affirmed.*

Hill & Alcorn, for appellant.
Vanwinkle & Rodes, for appellee.

J. H. PORTER'S ADM'R *v.* JOHN B. CASTLEMAN.

Covenants of Warranty—Compromise—Answer.

An action for breach of covenants that a vessel is free of liens and incumbrance, settles nothing where compromised, and which did not result in a judgment.

Compromise.

An agreement by the owner in a suit between the owner of such vessel and lien holder, to recognize the existence of a lien and pay the same by way of compromise, does not admit the validity of such lien in an action for breach of covenants.

Answer.

A party sued for breach of covenants may answer that there were no liens, notwithstanding that the covenantee has admitted and paid such liens by way of compromise and to avoid litigation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 30, 1874.

OPINION BY JUDGE LINDSAY:

Appellant complains of a breach of appellee's covenants, that the steamer, Pink Varble, was, when sold, "free of any and every lien, privilege or incumbrance." The proceedings in the district court at Memphis, Tenn., did not result in judgment, and hence do not establish the existence of the claims asserted therein by the libelants. The fact that appellee compromised with the parties asserting their claims, proves nothing, as he had the right to escape even unfounded litigation by buying his peace, and it may have been, and doubtless was, much cheaper to compromise than to make successful defense.

The answer of Castleman, so far as he attempts to deny the existence of the liens in favor of Downs, etc., is as specific as are the allegations of the petitions; and appellants cannot complain that their general averments to the effect that there were such liens, were not taken for confessed. The testimony of Johnson does not establish a contract of affreightment between the parties of the Pink Varble and any of the parties claiming to be salvors of the cotton taken from the wreck of the W. A. Caldwell. The best evidence as to the nature of the agreements between the master of the Varble and Downs and Johnson are the receipts given to each of them. These receipts were not produced, nor is there anything in the record explaining their contents. The whole testimony tends to show that Downs, Johnson and the officers and crew of the Varble were the joint salvors of the cotton, and that it was carried to Memphis on their joint account. There is certainly no such contract proven as would bind the boat. This view of the case makes it unnecessary to examine the remaining questions presented in the agreement. It is clear that appellee is not bound to

make good the loss resulting to appellant from every claim that parties may choose to assert against the boat.

Judgment *affirmed.*

Havlan, Wilson, for appellant.
Boyle, for appellee.

N. E. VAUGHAN AND WIFE *v.* H. C. MELONE.

Principal and Agent—Duty of Agent—Adverse Interests.

An agent must look after the interests of his principal. It is inconsistent with his duties to purchase his principal's property for his own benefit.

Duty of Agent.

Nothing short of fraud by the principal or imperative necessity will justify an agent in placing himself in an attitude hostile to his principal's interests.

APPEAL FROM SHELBY CIRCUIT COURT.

June 30, 1874.

OPINION BY JUDGE LINDSAY:

Melone neither alleges nor proves that he was induced to enter into the contract with appellants by reason of their assurance that Bates had agreed "to wait on them two years for the debt," nor does he allege or prove that Bates had not so agreed.

Whilst it is no doubt true that Melone intended to befriend Vaughan and wife, it is nevertheless true that by his contract with them he became their agent, charged with the duty of renting out the mortgaged property and of collecting and applying for their benefit, and in satisfaction of their debts, the accruing rents.

He was not bound to protect the mortgaged property by paying Bates judgment; but it was inconsistent with his duties as agent to purchase the property for his own benefit. By doing so he antagonized his interest to that of his principal; and there is nothing in the record tending to show that he was compelled to make the purchase in order to protect himself. His claim against appellants was only about thirteen hundred dollars ($1,300), according to his own showing; and in the absence of proof to the contrary, we may well assume that the one hundred seventeen (117) acres of land was ample indemnity to him, even if he had let the livery stable prop-

erty go; nothing short of fraud by the principal or imperative necessity will justify an agent, who is a *quasi* trustee, in placing himself in an attitude hostile to the interest of his constituent.

Neither fraud nor imperative necessity is shown in this case; Melone has a lien upon the livery stable property for the amount paid on the Bates judgment, also the amount paid in satisfaction of the vendor's lien, and for such balance as may be due him after the account for debts paid under the contract evidenced by the mortgage, and the rents received on the mortgaged property, shall be settled; and if the livery stable property fails to satisfy any portion of the last mentioned claim, these appellants' interest in the 117 acres of land may be subjected to such judgment and also the judgment of reasonable compensation to Melone for his services as agent.

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

Jeff Brown, A. G. Roberts, for appellants.

Harwood, for appellee.

C. M. & J. W. WHIPP *v.* FRANK WOLFORD, ET AL.

Notes for Purchase Money—Priority—Mortgages.

The priority of purchase money mortgage notes does not depend upon the time such debts fall due.

Mortgage.

A mortgage to secure a number of notes maturing at different times secures all, and there is no priority.

Parties to Action.

All the holders of such notes must be made parties to foreclose, and the rights of each may be determined therein.

APPEAL FROM CASEY CIRCUIT COURT.

June 30, 1874.

OPINION BY JUDGE PRYOR:

All the notes executed for the purchase money of the land operated as a lien upon it, and were equally secured. We have been unable to find any case where the priority of liens was made to depend upon the time the claim or note evidencing the debt fell due. When mortgages are executed to different parties at the same time to se-

cure different debts, and recorded, that mortgage where the right to foreclose first exists, by reason only that the note secured thereby first matures, can have no priority over the mortgage where the debts are not due. If not so, this equality of security by way of lien would be destroyed; and the rule be established that the note first due must be first satisfied out of the property intended to secure all, and without any preference whatever given by the writing creating the lien. It is true that the assignee obtaining a note not matured when assigned, has notice that the other heirs' notes are due, for the reason that their liens are retained in the deed; but he has notice also that all of the notes are equally secured, the writing giving no preference to the one over the other. The party whose note is due has the right to proceed at once to enforce his lien or to obtain his personal judgment, and this is the only advantage he has over those whose lien notes have not matured. In attempting to enforce his lien all other parties holding lien notes must be brought before the court in order that they may assert their equities; and whilst the chancellor cannot subject the property to the payment of any lien note not due, still he will protect the rights of the holder by selling the land subject to the liens evidenced by the notes not matured. This is the equitable position assignees of such papers occupy with reference to each other. They take the paper in which all are equally secured by the lien retained, and no sale will be made in favor of one without securing the rights of the other. If the party whose note is due enforces his lien, he can purchase the whole or a part of the land subject to the lien not due, but will not be permitted, by his own act or by reason of his note first falling due, to deprive others of any equity equal in any respect to his own. Where the vendor of the land or another holds all the lien notes, and he undertakes to enforce the lien for only a part of the lien debt, the judgment is to sell absolutely without receiving any other lien in his favor or selling subject to any, as he is in a condition to purchase only so much as will pay his debt due, leaving the balance to satisfy the other liens; and besides the question of priority does not arise. He will not be allowed to encumber the title by selling subject to his own liens. Offering to sell, he must make to the purchaser—or place the chancellor in a condition to do so—a clear title to what he buys. This is the distinction between cases where one holds all the lien notes, and where they have been assigned to different parties. The holder of all the notes is in a condition to protect himself, whilst in a case like this, equity

alone can afford relief. *Broadwell v. King,* 3 B. Mon. 449; *Burrus v. Roulhac's Adm'r,* 2 Bush 39; *Enson v. Bisque,* Mss. Opinion of Sept. 11, '72.

Judgment *affirmed.*

Owsley & Burdett, for appellants.
VanWinkle, for appellees.

M. C. SLAUGHTER, ET AL., *v.* CITY OF LOUISVILLE.

Public Improvements—Discretion of City Council—Power.

The discretion of the city council in determining what street improvements are to be made cannot be controlled by the courts.

Power of Courts in Such Cases.

When taxation is imposed for a constitutional object the courts cannot adjudicate either upon the justice or policy of such imposition. Courts cannot legislate.

Conclusions Pleaded.

To aver that the cost of a public improvement amounts to a practical confiscation of property is only an averment of a conclusion.

Taxation for Improvements.

The right of the courts to determine when taxation is so excessive as to amount to confiscation is undoubted, but will only be exercised where legislative power has been palpably abused and the same is clearly shown.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 30, 1874.

OPINION BY JUDGE LINDSAY:

The petition sets out a state of facts tending to show that the improvement ordered to be made is not a matter of immediate necessity either to the general or local public. This was a question, however, for the general council of the city to determine, and its discretion is not subject to the control of the courts. The power of municipal corporations to improve their streets cannot be questioned. The time at which the improvements shall be made is a matter of local governmental policy, to be determined by the legislative department.

When taxation is imposed for a constitutional object, the judi-

ciary cannot adjudicate upon its policy or justice without inspiring a function clearly legislative in its character.

Here the ordinance provides that the subject of local taxation shall be taxed in accordance with the provisions of the city charter; and under this charter this court has time and again decided that uniformity and approximate equality of street taxation are clearly attainable.

Appellants allege that the contemplated improvement cannot be made, except at "such a cost as will amount to a practical confiscation of their property." It is apparent that this is but the averment of a legal deduction. What constitutes "a practical confiscation" is a question for the court to decide and it must be decided from the facts appearing in the record.

Appellants do not state the value of their property nor the probable cost of the work; nor does it necessarily follow from any and all facts stated that the work, although necessary at this time, will not, when done, enhance the value of their property in an amount equal to the tax they are required to pay.

Whatever right the judiciary may have to interfere for the protection of the citizen when taxation becomes so excessive as to amount to exploitation under the forms of law, it is manifest that this right should not be exercised except in cases in which it is palpable that the legislative power of taxation has been so abused that the taxpayers are being spoliated and their property arbitrarily taken in violation of that fundamental principle of our government "that absolute arbitrary power over the lives, liberty and property of freedmen exists nowhere in a republic."

The petition under consideration makes out no such state of case. The demurrer was properly sustained, and appellants failing to amend the chancellor did not err in dismissing the petition.

Judgment *affirmed.*

Cochran, for appellants.
Burnett, for appellee.

GEORGE SCOTT *v.* DAVIS, STARTS & CO.

Debt—Defense—Statute of Frauds.

If defendant only agreed to stand good for payment and the goods were bought by another on his own account, he is not liable on such an agreement unless the same is in writing.

Defense.

Where goods were contracted for by Anderson, the fact that they were charged to Scott did not create any liability on Scott, and a subsequent promise by Scott, unless in writing or made before delivery was completed, would not bind him to pay for such goods.

Where in a contract between Anderson and Scott the latter agreed to pay for such goods, but failed to do so, the seller could not recover from Scott.

Evidence.

Such written contract between Anderson and Scott is not admissible in evidence in a suit by the seller to collect from both Anderson and Scott.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

June 30, 1874.

OPINION BY JUDGE LINDSAY:

Scott's defense assumes two phases: He denies that the material was sold and delivered to him, or on his credit, or that he agreed to pay any portion of the price therefor, except as directed by Marshall and Anderson. He also claims that any agreement to pay, that may have been made by him was a promise to answer for the debt of Marshall and Anderson, and insists that he cannot be bound thereby unless it be shown that the agreement was in writing. This last defense is not directly raised by the pleadings, but inasmuch as appellees ignore Marshall and Anderson, and sue Scott as the original purchaser, the latter can rely on the statute of frauds in case such a ground of defense is developed by the proof.

It is unnecessary to review the testimony. It is sufficient to say that there was evidence before the jury, conducing on one hand to establish appellees' claim, and on the other to make good appellant's defenses.

Instruction No. 5, given for appellant, is a correct exposition of the law of the case, upon the hypothesis that the credit was extended to Scott, and the material delivered upon his agreement to pay. Instructions Nos. 1, 2 and 3, given for appellees, were calculated to mislead, and are not entirely consistent with instruction No. 5. It is clear that the material was contracted for by Anderson; and yet these in effect declare, that if the credit was given to Scott, whether Anderson had the right to represent him or not, or whether Anderson professed to have such right, and Scott afterward at any time agreed to pay for it, that the law was for appellees, unless Anderson, either with authority bought for Scott, or without authority

bought for him, ratified his purchase, and accepted the material purchased. The mere fact that appellees charged to Scott, and determined to look to him for pay, did not create a liability on his part. The debt would, notwithstanding all this, be that of Anderson or of the firm of Marshall and Anderson; and a subsequent promise by Scott to pay it, would not bind him unless it was in writing, or unless it was made before the delivery of the material was completed, and was intended to substitute him for Marshall and Anderson as the principal debtor. Instruction No. 5, as before stated, gives the law upon this branch of the case, with accuracy and precision. Instruction No. 4 is still more objectionable. Scott, in a settlement with Marshall and Anderson, may have charged them with the amount due to appellees on the building materials, knowing at the time that the same had been charged on the books of appellees to him; yet, notwithstanding all this, and the further fact that the materials were ordered to be used on his house, it does not necessarily follow that he is liable to appellee. If Davis, Starts & Co., of their own motion charged the material to Scott, merely because they were unwilling to credit Marshall and Anderson, they cannot connect this unauthorized act upon their part, with the subsequent action of Davis in a transaction with which they had nothing to do, and were in no wise connected, and thereby create a liability against him that otherwise would not exist. The facts recited in the instruction may conduce to show that Scott was in fact the real debtor from the beginning by reason of an agreement of some kind with appellees; but they are not conclusive of the question; either as to the agreement or its legal effect.

If Scott contracted with Marshall and Anderson to pay appellees the balance due them, and failed to do so, they (Marshall and Anderson) may sue him for his breach of contract; but appellees cannot take advantage of a transaction to which they were not parties, and in which, so far as the facts set up in said instructions conduce to show, they had no interest.

The court properly excluded from the jury the written contract between Scott and Marshall and Anderson. It does not appear that this contract was ever shown to appellees, and hence they could not have contracted with reference to its contents. The oral proof as to the statements made to them relative to the agreement between Scott and Marshall at the time the sale of the material was being negotiated, was admissible, to enable the jury to determine as to the exact terms of said sale, but the written contract, which

they never saw, could throw no light upon this subject. Appellant had no right to demand an inspection of appellees' books; such a proceeding involved an unreasonable intermeddling with the private books and papers of another.

There is no objection to the action of the court, in modifying and refusing instructions asked by appellant. For error in giving instructions for appellees as hereinbefore pointed out, the judgment is *reversed* and the cause remanded for a new trial, upon principles consistent with this opinion.

Lee & Romad, for appellant.
Russell & Helm, for appellees.

JOHN B. DAVIS *v.* JOHN GAULT, SR., ADM'R.

Landlord and Tenant—Statute of Frauds—Counterclaim.

Where a tenant, by written lease for five years agrees to pay each of three joint landlords a stipulated rental, and where to induce one of such lessors to sign the lease the tenant agrees to pay him an extra amount and writes a letter to such landlord agreeing to such extra payment, and afterward makes such extra payments, he cannot by counterclaim recover back such extra rent in a suit instituted on such written lease.

Statute of Frauds.

The letter signed by the tenant is sufficient to take his promise to pay the additional rent for five years out of the statute of frauds.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 30, 1874.

OPINION BY JUDGE COFER:

Two distress warrants were sued out by John Gault against John B. Davis for two instalments of rent claimed by Gault to be due him from Davis for property in Louisville, called the Washington Foundry, and levied on two steam engines as the property of the defendant. The demands for the rent were controverted by answer, in which it is claimed that Davis, the appellant, had paid of the rent up to October 1, 1872, to Gault, $1,247.21 more than by the terms of the lease were then due him; which he pleaded as a counterclaim, and also claimed a large amount by way of damages for the taking his property by distress when no rent was due, as is alleged, and for costs. The Washington Foundry was the joint property

of Gault, Inman and Mrs. Anna E. Bell; they, by a written contract, leased it in the fall of 1876 to Davis, for five years from January 1, 1868, at the annual rent of $8,100, one-third of which was to be paid in quarterly instalments to each of the owners; and Davis gave personal security for the payment of the rent. In Gault's reply to the counterclaim, he denies that the distress was illegal or excessive, and denies that the business of Davis has been injured by reason of said distress, and concludes his reply as follows: he denies that the defendant had paid him $1,247.21 or any part thereof more than the defendant owed him by the terms of the rent, etc.; and he denies each and all allegations of said counterclaim; and having fully answered, he asks that said counterclaim be dismissed, for costs and for general relief. The law and facts were submitted to the judge, and judgment having been rendered in favor of Gault, Davis has appealed to this court. From the evidence, it appears that in addition to $2,700 per annum paid to Gault in quarterly instalments for the years 1868, 1869, 1870 and 1871, Davis paid to him the sum of three hundred dollars per annum for each of those years; which, with the interest for delays on some of the payments, perhaps made up the sum of $1,247.21 for which credit is claimed.

On the trial Gault was sworn as a witness on his own behalf, and stated Mrs. Bell and Inman having signed the written lease, Davis brought it to him to sign; he refused to sign it, and told Davis that he would not take the amount stipulated in the lease to be paid him for his part of the rent; that he would not take less than $3,000 per annum for his part of the rent; that Davis replied that the lease was already signed by the other owners of the property, and he did not wish to have it changed, but if he would sign it he would pay him the additional sum of $300 per annum for his part of the rent during the term, and he then signed it, Davis having undertaken and promised to pay him $3,000 per annum for his part of the rent; that this agreement was not known to Davis and himself, to his knowledge, but that he had told Mrs. Bell and William Inman before they signed the lease that he would not take $2,700 per annum rent for his part of the property; this agreement was verbal; that afterwards Davis, in a letter to him, acknowledged the promise and agreed to pay him, which letter, dated in April, 1868, is copied in the record. Davis, by his attorney, objected to the evidence of Gault, and to the introduction of the letter written by him to Gault in which he acknowledged his agreement to pay the additional $300

per annum rent, as incompetent; but the court below overruled his objections and admitted the evidence, to which Davis excepted.

If the written lease between the parties had set forth the whole of their contract, parol contemporaneous evidence would not be admissible, to contradict or to vary the terms of the writing. Greenleaf on Evidence, § 275. But in this case the agreement to pay the $300 additional rent is not in parol only, for Davis in the letter referred to says:

"Our private understanding I intend vigorously to observe; that is, that you receive from me $300 per year in addition to the other," etc. In a previous part of the same letter he had stated that the rent, as evidenced by the written lease, was $8,100 per annum, which would be $675 to Gault every three months, so that the agreement to pay the additional $300 per annum is in writing, signed by Davis; and besides, the contract was in part executed; the $1,247.21 claimed were paid in execution of that contract; and in a controversy between Gault and Davis we do not perceive the legal principle upon which the latter could recover it back from Gault.

As to the remaining $300, for which the distress is in part made, there is a direct promise in writing to pay the same, which takes it out of the operation of the statute against frauds and makes it obligatory on appellant to pay the same.

Wherefore the judgment is *affirmed.*

Mundy, for appellant.
Reid & Carey, for appellee.

KENTUCKY IMPROVEMENT COMPANY *v.* ROBERT D. BARR.

Landlord and Tenant—Recovery of Damages.

Where there are two papers executed by the same parties, at the same time upon the same subject, they must be construed as one contract.

Damages for Breach.

Where a landlord agrees to make repairs as soon as practical and fails to do so, he is liable to the tenant for the damages he sustains on account of such failure.

APPEAL FROM GREENUP CIRCUIT COURT.

June 30, 1874.

OPINION BY JUDGE PRYOR:

The appellant leased to the appellee a valuable merchant mill and

the farm upon which it was located, for a number of years, at nine hundred dollars a year, payable semi-annually, the contract of leasing containing the following provision: "That the rent shall be reduced to three hundred dollars per year, for the time that the dam may be out of repair by being washed away or badly damaged. On the same day this writing was executed, an additional covenant or covenants were entered into, by way of explaining the meaning of the original lease, as well as imposing additional obligations on the parties. This writing contains this clause: "It is agreed and understood by the party of the first part, that if the dam is badly damaged or washed away, it is to be repaired by the party of the first part as soon as practicable, and at their cost and expense." The two writings constitute the entire contract between the parties, and must be construed as such. The appellee instituted his action in the court below, alleging that the dam was badly damaged and that some of it had been washed away in the month of June, 1868, and was not repaired until October, 1869; that the appellant failed to comply with its contract by repairing the dam as soon as practicable and that on account of this refusal and failure on its part to perform the stipulations and comply with the terms of the lease, he was deprived of the water power necessary to run his mill, and thereby greatly damaged. There were many witnesses examined upon the issue made, the answer traversing appellee's claim, and the testimony to some extent conflicting. The weight of the testimony, however, is with the appellee, and authorized the judgment, if an action can be maintained for this particular breach of the covenant, by "the failure of appellant to repair the dam in a reasonable time." It is insisted by counsel for appellant, and is the main ground of his defense in the case, that the agreement between the parties fixed the amount of damages to which the appellee was entitled in the event the appellant failed to repair the dam. The writing provides that the rent shall be reduced from nine hundred dollars to three hundred dollars for the time the dam may be out of repair by being washed away or badly damaged. If there was no other provision in the contract with reference to this obligation to repair, conceding that the repairs were to be made by the company, the law would imply that it should repair the dam in a reasonable time; and during this period, the mill having necessarily to cease operation, or at least liable to do so by reason of the defect in the dam, the parties themselves provided that the rent, during this period, whilst the dam was being repaired, should be only three hundred dollars. If,

in the present action, there had been an absence of proof conducing to show that the dam was not repaired in a reasonable time, the only remedy the appellee had to indemnify his loss was by this reduction of the rent. This property was rented principally for the profits arising from the running of this mill; and it was never contemplated by the parties, and is certainly no part of the contract, without reference to its explanatory provisions, that the company could take its own time in repairing the dam, although the effect might be to stop the mill entirely, and still require the appellee to pay three hundred dollars rent.

Such is not its spirit or meaning and no such legal construction can be given it. The parties, however, with a view, doubtless, of avoiding trouble in regard to this clause of the writing, by an additional covenant made on the same day and perhaps at the same time, go on to stipulate in effect, that, although it had been agreed that whilst the dam was being repaired the rent should be reduced to three hundred dollars, still the company must bind itself to repair within a reasonable time, or as soon as practicable, and this clause was inserted: "It is agreed and understood that if the dam is badly damaged it is to be repaired by the party of the first part (the company) as soon as practicable, at its cost and expense." This explanatory provision settles, in express words, the intent and meaning of the parties, and gives the proper legal construction of the instrument, so far as it applies to this particular covenant.

The appellant having failed to repair the dam within a reasonable time, although it was practicable to do so, the appellee, being damaged thereby, was clearly entitled to recover upon this breach of the covenant.

It is urged that the court below erred in permitting testimony as to the capacity of the mill to grind, and the amount of custom appellees had upon the question of damages. We cannot well see how a jury could form any estimate of the damages except upon this character of proof, and the two instructions given upon the subject were eminently proper.

The judgment is *affirmed*.

Dulin, for appellant.
Phister, for appellee.

M. FRAZER *v.* J. C. MERRELL.

Pleading—Execution—Error in Name and Description.

When the plaintiff avers that he is the owner of certain described real estate and entitled to the possession thereof, an answer that it is untrue that plaintiff is the owner and entitled to possession is not equivalent to a general denial, and does not put plaintiff to the proof.

Execution.

The mistake of the clerk of court in issuing an execution returnable at the wrong time did not affect its validity.

Error in Name.

Where land is levied upon as the property of Ball and sold as the property of Baugh, the irregularity, while furnishing ground to quash the levy, does not render the levy and sale void and could not be taken advantage of in a collateral proceeding.

Error in Description.

An execution and sale not describing the land so it could be identified is defective and void.

APPEAL FROM LAWRENCE CIRCUIT COURT.

September 3, 1875.

OPINION BY JUDGE COFER:

We do not regard any of the objections urged by the counsel for appellant as to the validity of the levy and sale under appellee's execution, as maintainable.

The first paragraph of the answer was not sufficient to put the appellee upon the proof of his title. The statement in that paragraph is that it is untrue that the plaintiff is the owner and entitled to the possession. If the plaintiff was the owner but was not entitled to possession, or if he was entitled to possession but was not the owner, the answer would still be true, that he was not the owner and entitled to possession. If it was designed to put the appellee to proof of his title, the answer should have contained a denial that he was the owner or entitled to the possession.

The first objection to the validity of the title under which the appellant alleges that the appellee claims the land, is that the execution was issued August 18, 1862, and made returnable March 1, 1863. The act of March 15, 1862, provided that executions issued on replevin bonds executed after the passage of that act, should be made returnable to the first Monday in March, 1863. The replevin bond upon which the appellee's execution issued is not in the record; but

the appellant alleges that it was issued on a replevin bond, and it commands the officer to collect the sum of $70.78, with interest from May 15, 1862. Replevin bonds bear interest from their date, and we must presume that it bore the date from which interest is directed to be collected. The mistake of the clerk in directing the execution to be returnable on the first day instead of the first Monday in March, did not affect its validity.

The land was levied on as the property of Ball, and was sold as the property of Baugh. This irregularity might possibly have furnished ground upon which to quash the levy and sale in a direct proceeding for that purpose, but did not render either the levy or sale void, and could not, therefore, be taken advantage of in a collateral proceeding.

We concur with the circuit court in the opinion that judgment in the two cases of *Kenners v. Baugh* were void. There is no such description of the land adjudged to be sold as would enable the officer or the purchaser to identify it. It is described in one petition as "lying and being in Lawrence County on Rooe Creek, and known as the Bronson Tomlin patent," in the judgment as the land described in the petition; and in the commissioner's report as the land described in the judgment. In the other case the land is described as lying in Lawrence County, being the land on which Baugh then resided. It no where appears what number of acres the tract contained, or was supposed to contain; and no reference is made to any record or muniment of title from which a description could be obtained. Appellee may, from familiarity with the neighborhood, have known that the land sought to be sold in one or the other or both of these cases, was the land on which his *fi. fa.* was levied; but he could not possibly have gained any such knowledge from the record of either case, so far as the appellant is concerned, as it is but little if any more specific than those in the cases of *Kenners v. Baugh.*

We can learn from the record that some of the debts due to Kenners were a lien on a part of Baugh's land, but whether upon that part claimed by the appellee we are unable to ascertain. So far as these debts were a lien on the land now in contest, the appellant has a right to be substituted for Kenners; and if such claim had been set up it might have been enforced in this suit; but that not having been done, we cannot reverse the judgment on that ground, but must leave the appellant to assert it, if he chooses, in a new action.

The facts alleged in the cross petition against Kenners do not constitute a cause of action. They did not become warrantors of the

title to the land and if they had, the cross petition would still be defective.

Judgment *affirmed.*

Apperson & Reid, for appellant.

CITY OF PADUCAH *v.* NATHAN KAHN.

Taxes, Lien of—Pleading.

The levy by city tax collector creates a lien on all the property levied upon for the whole amount of taxes due from the delinquent.

Levy.

While purchasers of real estate from persons owing taxes pursuant to the charter, § 12, art. 5, are liable only for the taxes upon the property purchased, those who purchase after levy made are liable for all the taxes due from the delinquent owner at the time of levy.

Pleading.

It is not necessary to plead an amendment to the charter, for the court is bound to take notice of it without any pleading.

APPEAL FROM McCRACKEN CIRCUIT COURT.

September 8, 1874.

OPINION BY JUDGE COFER:

The levy made by the city tax collector on the lots, created a lien for the whole amount of taxes due from Mrs. Brown. The first proviso in sec. 12, art. 5, of the charter, that purchasers of property from persons owing taxes shall be liable only for the taxes upon the property purchased, does not apply to this case, but only to the lien which existed by reason of the assessment of the taxes. If no levy had been made, the appellee would not have been liable for more than the taxes upon the lots; but under the levy a lien existed for the whole amount due from the then owner. The sale, though void, did not discharge the levy.

We perceive no error in refusing to allow appellant to file an amended petition setting up the amendment to the charter. The court was bound to take notice of it, if applicable to the case, and there was no necessity for pleading it. The presumption is that Mrs. Brown had no personal property in the city, or it would have been levied on as it was the duty of the collector to do; and this presumption is strengthened by the failure to prove the fact upon an issue directly and distinctly made on that point. But the court erred in

refusing to render judgment against the property for the whole amount of taxes due; and for that error alone the judgment is *reversed,* and the cause remanded for judgment as herein indicated.

Yeiser, for appellant.
Marshall & Bloomfield, for appellee.

SAMUEL FINLEY *v.* PAUL B. RUSSELL & WIFE.

Husband and Wife—Rent of Wife's Real Estate.

Where the husband rents the wife's real estate for not more than three years at a time and receives the rent in goods, the receipt of such goods pays the rent whether the wife consents thereto or not.

Wife's Money.

If the wife's money is borrowed of her or of her husband acting as her agent, the borrower cannot afterward be heard to say that the money belonged to the husband, nor can he be allowed to credit the same on the husband's indebtedness to him.

APPEAL FROM MARION CIRCUIT COURT.

September 9, 1874.

OPINION BY JUDGE PRYOR:

The instructions in this case are erroneous so far as they apply to the right of the husband to appropriate the rents due from the lands of the wife. If the husband rented the house and lot, and at the time agreed with the renter to take goods from him in satisfaction of the rent, and the goods were taken or purchased by the husband under the contract, it was to that extent a payment of the rent, whether the rent was credited on the account or not. Sec. 1, Act 2, Husband and Wife, provides that the husband may rent the real estate of the wife for not more than three years at a time, and receive the rents, etc. If, then, the contract of renting was made, he paid in goods, and the goods were delivered, it was a payment on the rent whether the wife consented or not.

The rent of the wife's land will not be subjected to the payment of the husband's debts, but when the husband has already rented the land (if not for a longer time than three years) and received the rent, whether in money or property, the wife cannot afterwards assert a claim for it, against the tenant. As to the money of the wife, if borrowed by the appellant, of her or her husband, as her

agent, with a promise to pay the wife, and a recognition of it by the borrower, as here, he will not be allowed afterwards to say that it belongs to the husband, or to credit it on the latter's indebtedness. We see no error in the instruction in this branch of the case nor any error in regard to the question made as to the improvements on the wife's property.

The judgment, however, for the reason indicated, is *reversed* and cause remanded with directions to award the appellant a new trial and for the further proceedings consistent with this opinion.

W. B. Harrison, for appellant.
J. R. Thomas, for appellees.

BEN BOTTS *v.* COMMONWEALTH.

Criminal Law—Proof of Conspiracy—Instructions—Self-Defense.

It was not error to refuse to admit proof that immediately after defendant stabbed the deceased and had himself been shot, that other parties proposed to go into the room where defendant was, "and if he was not dead to finish him."

A conspiracy by others to kill defendant after he had fatally stabbed the deceased would not tend to justify the killing. It could not be material so far as appellant was concerned whether such conspiracy then existed or not.

Instructions.

It was error for the court to instruct the jury that although they may believe from the evidence that the deceased and the defendant, a short time before deceased was killed, had a quarrel, and that afterwards deceased armed himself with an iron weight with the intention to assault the defendant, yet if they believe from the evidence, beyond a reasonable doubt that the defendant, at the time he stabbed the deceased, brought on the conflict in which the deceased was killed, and first assaulted said deceased in said conflict, and stabbed him, he is guilty of murder.

Right of Self-Defense.

If the defendant and the deceased met without design or contrivance on the part of defendant, he would not necessarily be guilty because he commenced the conflict. If they met otherwise than by design of the defendant, and he found himself in apparent danger without any fault on his part at the time, his right of self-defense was unaffected by any previous altercation.

APPEAL FROM POWELL CIRCUIT COURT.

September 10, 1874.

OPINION BY JUDGE COFER:

The appellant was indicted and tried in the Powell circuit court for the murder of Geo. Williams, and was found guilty of manslaughter, and sentenced to two and a half years' imprisonment in the penitentiary. He now complains of that judgment, and seeks a reversal on numerous grounds, of only two of which this court has jurisdiction. Criminal Code, § 334.

He offered to prove by a witness that immediately after he had stabbed the deceased, and had himself been shot by Hardwick and Tracy, that one Curry and Tracy proposed to Hardwick to go into the room where the prisoner lay wounded by the shots, "and if he was not dead to finish him." This appears to have been after the fatal stab had been given, and the deceased had gone out of the room when it occurred. The evidence seems to have been offered under the belief that it would tend to establish a conspiracy between Curry and Tracy and the deceased, to kill appellant, or do him some great bodily injury. It was not material, so far as appellant was concerned, whether such conspiracy existed or not, for its existence would not, of itself, have excused him for the killing of Williams, nor could any after-declarations of Tracy or Curry, or both, have shown, or tended to show whether he believed, and had reasonable ground to believe, at the time he stabbed Williams, that he was himself in danger of losing his life, or of suffering great bodily injury. He had a right to rely upon anything done by either Curry or Tracy before the stabbing which tended to show his own danger at the time; but what they did afterwards can not affect the question whether he at the time believed, and had reasonable ground to believe he was in peril. Neither his actual or apparent danger at the time, can be shown by subsequent acts or words of others.

It is complained that the court erred to appellant's prejudice, in giving instructions, and in refusing to give two asked by him. We see no valid objections to any of the instructions given except the fourth, which is in these words: "The court instructs the jury that although they may believe from the evidence that the deceased and the defendant, a short time before deceased was killed, had had a quarrel, and that afterwards deceased armed himself with an iron weight with the intention to assault the defendant, yet, if they be-

lieve from the evidence, beyond a reasonable doubt, that the defendant, at the time he stabbed the deceased, brought on the conflict in which the deceased was killed, and first assaulted said deceased in said conflict, and stabbed him, he is guilty of murder." When parties have had an altercation and are afterwards separated, and one of them voluntarily renews the quarrel and brings on a conflict, he cannot, in such conflict so brought on by his own conduct, avail himself of the law of self-defense until he first abandons the conflict in good faith. But, as we understand this instruction, the idea conveyed by it is, that no matter how the parties met after the first quarrel, whether by accident, or by the design and contrivance of the deceased, yet if, when they met, appellant brought on the conflict, that is, made the first assault, he is guilty. If they met and the quarrel was renewed by the appellant, and a conflict was thus brought about by him, he is guilty; but if they met without design or contrivance on his part, he would not necessarily be guilty because he commenced the conflict. If they met otherwise than by the design of appellant, and he found himself in apparent danger without any fault on his part at the time, his right of self-defense was wholly unaffected by the previous altercation. Under the instruction as given, the jury may have supposed that no matter what his danger was at the time, nor whether he was in any way in fault, he had no right to strike until he was first assaulted, although he may have been so menaced as to create reasonable apprehension for the safety of his own life. The first instruction asked by appellant, improperly assumed that others were acting in concert with the deceased, a fact which ought to have been left to the jury, and was therefore properly refused. The second instruction was calculated to mislead and confuse the jury and was properly refused. The first instruction, however, intimated a desire on the part of appellant to have the jury instructed in regard to the supposed combination between Curry, Tracy and the deceased; and as it was the duty of the court to instruct the jury on the law of the case, the court ought either to have so modified the first instruction as to make it conform to the law, or to have given another instruction. We might not refuse because of the failure of the court to instruct on the collateral point unless a proper instruction was offered; but as the case must be reversed for the error already indicated, we deem it proper to indicate what we think a correct practice on this subject. The jury should have been told in substance that if the defendant believed, and had reasonable grounds to believe that he

a judgment by default can be entered and a jury sworn to enquire of damages. The judgment of the court below is reversed and the cause remanded with directions to transfer the case, on the motion of either party, to the ordinary docket.

H. C. Lillys, for appellants.
VanWinkle and Reide, for appellees.

JOHN H. MILLER *v.* JACOB H. MILLER.

Suit to Prevent the Use of Name.

Where two persons in the same business have the same name, the court cannot compel one of them to change his sign or name.

APPEAL FROM McCRACKEN CIRCUIT COURT.

September 11, 1874.

OPINION BY JUDGE PETERS:

The facts alleged do not indicate that appellee, in preparing his sign, attempted to simulate to that of appellant. They are not identical, but as dissimilar as they reasonably could be, in view of the fact that the initials of the Christian names, and the surnames of the parties are the same, and that they are engaged in the same occupation. A person seeking the place of business of appellant would be much more likely to be deceived by the identity of their surnames, than by the similarity of the residue of their signs. Therefore, to afford appellant the relief he seeks, it would be necessary to require appellee to change his name or his occupation, which is wholly beyond the power of the court.

The judgment must be *affirmed.*

Bigger & Moss, for appellant.

ISAAC PATTERSON, ET AL., *v.* DAVID C. SNYDER.

Mental Capacity—Character of Witness to Will.

In an attack upon the mental capacity of a testatrix it is not sufficient to show merely that she was a person of naturally low order of intellect.

Moral Character of Witness.

The moral character of a witness to a will is not in issue when the witness is not called in a trial to contest the will.

judgment must therefore be *affirmed.* Judge Cofer did not sit in this case.

Williams & Baker, for appellants.
R. Y. Bush, Eli H. Brown, for appellee.

WM. POLLARD'S HEIRS *v.* JAS. MORRISON'S ADM'R.

Parties—Pleadings—Recovery of Real Estate—Ejectment.

No default can be taken against persons named only in the body of the complaint.

Pleadings.

Pleading which seeks to recover land must describe it with reasonable certainty. An averment that plaintiff is the owner of 31,000 acres of land, except six thousand acres previously sold, but which does not describe the six thousand acres, is insufficient.

APPEAL FROM HART CIRCUIT COURT.

September 12, 1874.

OPINION BY JUDGE PRYOR:

It having been heretofore decided on motion of the appellee that the unknown heirs of Pollard, Steel and Rolston, were not before the court, the only appellants left in the case are Pickett, O. E. Clark, W. S. Caswell, William Tharp, James C. Loyden, Q. James, and B. West. These appellants, except Tharp, were not parties to the action for the reason that their names are not found in the caption. The code of practice requires that the petition must contain the style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants. This has not been done in the present action and a judgment by default should not have been rendered against those whose names appear in the body of the petition only. Tharp, however, filed an answer, and this made him a party defendant. The action is in the nature of a bill *quia timet,* as well as for the recovery of the land in controversy. The petition claims that the appellee is the owner of 31,000 acres of land, except six thousand acres previously sold, lying within the patent boundary. There is no allegation in the petition that the portion of the land sold is not in the possession of the defendants, or that their possession is outside of the part sold, and within or on that portion of the patent boundary belonging to the appellee. No description or

JOSEPH GORMLEY *v.* J. B. ALEXANDER, ET AL.

Purchase of Real Estate—Relation of Trust and Confidence Between Partners—Commission.

Where the secret agent of the vendor agrees with associates to become a co-purchaser, he can derive no peculiar benefit to himself on account of a secret understanding with the seller.

Trust and Confidence.

The relation of trust and confidence existing between co-purchasers, whatever advantage one secures by his agreement with the seller, inures alike to all of them.

Commissions.

A co-purchaser of real estate, notwithstanding the relation of confidence between purchasers, may recover a commission from the seller of such real estate earned before he became associated with the other purchasers.

APPEAL FROM BULLITT CIRCUIT COURT.

September 12, 1874.

OPINION BY JUDGE COFER:

The question presented by this record is whether Gormley shall, as against his co-purchasers, compel the payment of the full price agreed to be paid. Alexander has no interest in the question, for he is in no event to get more or less that $61,750 for the property.

When Gormley agreed to become one of the purchasers, neither of the others knew, or had the slightest reason to suspect, that he had any interest adverse to them, except what they may have been bound to infer from the fact known to some of them, and therefore presumably to all, that he had been Alexander's agent, and might therefore reasonably be expected to be entitled to ordinary compensation for his services.

The only information they had of the value of the property was what they had gotten from Alexander and Gormley. They say they confided in the latter; and the fact that they bought the property upon his representations alone, furnishes most convincing evidence that it was true.

When he agreed to join the others in the purchase, he became bound, not only to act in good faith with them, but was bound in good conscience not thereafter to make profit out of them in a manner and to an extent of which they were not only ignorant, but of which they could not have had the slightest suspicion. He in

substance bought the property at $65,000 and put it into the joint concern at $100,000. If he had made a secret contract with Alexander for the property at $65,000, and concealing that fact, had conveyed it to his associates at $100,000, retaining an interest, it is clear that he could not have compelled payment, any more than a partner who buys, in his own name, commodities which he puts into the firm, can compel payment at an advance on the actual account.

From the time he agreed to become a co-purchaser he could derive no peculiar or exclusive benefit to himself, on account of a secret understanding with Alexander. When he entered into an agreement to join in the purchase, the sale had not been perfected, and his right to the $25,000, as between himself and Alexander, dates from the execution of the contract of February 23. At that time a relation of trust and confidence existed between himself and his associates, and whatever advantage he secured by his arrangement with Alexander, of which they had no knowledge, inured alike to the benefit of all the associates. This conclusion seems to be sustained alike by principle and authority.

Gormley's right to the five per cent. commission rests upon different grounds. One of his associates, at least, knew he had been Alexander's agent, and as it was his duty to so inform the others, it ought to be assumed that they all knew it, and if they did not, it does not seem to be more than his services were worth, and was not, therefore, profit made by him at the expense of his associates. The services having been rendered before he became associated with appellees, his right to the commission is clear, and the rule which refuses compensation to a partner for services rendered to his firm does not apply.

The judgment of the circuit court conforms to our conclusions, and is, therefore, *affirmed*, on both the original and cross appeal.

J. T. Bullitt, for appellant.
R. H. Field, for appellees.

HENRY MAYS *v.* WILLIAM C. BEATTY.

Real Estate—Possession Under Preemption Claim—Bill of Exceptions.

While it may be true that the occupant of real estate under preemption entry has no such title that he may transfer the same by sale, he can legally pass his possession to another.

Bill of Exceptions.

Where there are numerous blanks in a bill of exceptions, the court of appeals cannot determine which instructions were given or which refused.

APPEAL FROM ADAIR CIRCUIT COURT.

September 12, 1874.

OPINION BY JUDGE LINDSAY:

It is stated in the *caveat* that Beatty was in the actual possession of the two tracts of land, at the time appellant caused the same to be surveyed, and that he was claiming a pre-emption right to each of them, the fifty-acre tract by virtue of his own actual occupancy, and the one-hundred-acre tract by virtue of his purchase from Hicks. It is true Hicks had not procured a plat and certificate of survey; but it is averred that he actually appropriated the land, and that he turned his possession over to Beatty's tenant. It is further averred that appellant obtained the possession by buying out such tenant.

It may be true that until a plat and certificate of survey have been procured, the occupant has no such title as he can transfer by bargain and sale; but he can certainly pass his possession to another, who will have the right to convert the amount under which the occupant claims, into a patent, by making the entry, and by procuring plat and certificate of survey. It is further alleged that appellant had notice of all these facts; and that he fraudulently attempted to procure title to the land, by means of his warrant, entry and survey.

Upon the trial of the action evidence was introduced by both parties. The bill of exceptions fails to show that it contains all the testimony. There are numerous blanks, intended to have been filled by the insertion of exhibits and depositions, but which have never been filled. We have no means of ascertaining which instructions were given or refused. There are blanks in the bill of exceptions that were intended to be filled by the insertion of certain instructions given, and others asked for and refused, but they were never inserted. Following the bill of exceptions are certain papers, purporting on their face to be exhibits, depositions and instructions, but we cannot determine from anything before us that they constitute any part of this record.

Under such circumstances this court cannot consider these papers. We must, therefore, *affirm* the judgment of the circuit court.

Garnett & Stuart, for appellant.
A. J. James, for appellee.

HENRY CREASON *v.* NANCY HARRINGTON, ET AL.

Limitations—When Runs—Contents of Last Will—Evidence.

Where a widow has only a life estate in real estate, without power to sell, the statute of limitations only begins to run against the owners of the fee, after the death of the widow.

Evidence.

For what is sufficient proof of the contents of a will destroyed by fire after being probated, see opinion.

APPEAL FROM MARSHALL CIRCUIT COURT.

September 14, 1874.

OPINION BY JUDGE PRYOR:

The devisor died in or about the year 1845, and the vendees of the land from his widow have been in undisturbed possession of their purchase since the years 1847 and 1848. The statute of limitation constitutes no defense to the action, and the right of the appellees to recover depends alone upon the provisions of the will of their father. If the widow was only entitled to a life estate, without any power to sell, the statute did not commence to run against the children until her death. This took place in the year 1865, and therefore the lapse of time presents no bar to the recovery.

The will of Harrington was destroyed by the burning of the clerk's office, when it had been recorded after probate, and the only mode of arriving at its contents is from the parol testimony offered by the father. The will was proven in the year 1846, and destroyed in the year 1848, a period of twenty years and more prior to the time the witnesses are called on to testify as to its contents; and their statements as to its provisions must necessarily be to some extent unsatisfactory. This land was sold by the widow, who was also executrix, before the destruction of the will, and before the conveyances were made by her passing the absolute fee simple estate. The witnesses for the appellees say that the widow was to hold the estate during life or widowhood. If such were the contents of that instrument, it is unreasonable to presume that the deeds made to the purchasers could have attempted to pass the absolute estate, or that these vendees would have invested their money in an estate that, from the provisions of the will, as contended for by the appellees, must terminate at the death of the widow, and liable to end at any time in the event of her marriage. It is also remarkable that, although the widow married in 1851, these appellees, being then entitled to the

estate, if their versions of the provisions of the will be the true ones, should have slept upon their rights for fifteen or twenty years, with the occupants on the land sold by the mother without right, and never attempted to regain the possession. Some of them, it is true, were infants, others of full age, and with a full knowledge, as they now insist, of their right to the land. The witnesses by whom they prove the contents of the destroyed paper were near relatives, and directly interested in having their rights secured; but still, no suit has been prosecuted for the recovery of this land until after an occupancy of it by the vendees for near twenty years, and when the youngest of the children has arrived at the age of thirty or forty. These circumstances conduce strongly to the conclusion that the widow had the power to sell, and must cause the chancellor to hesitate before depriving the appellants of property they have occupied and claimed to own for more than twenty years.

It is shown, however, by several witnesses for the appellant, that the will contained a provision empowering the widow, who was executrix, to sell so much of the land as was necessary to pay the debt. One of the witnesses examined a copy of the will in the possession of the widow at the time he bought an interest in the land; another was present when the will was written, and heard it read; and still a third attested the will itself; and although this witness may allude to circumstances calculated to excite suspicion as to his recollection of the provisions of the will, yet he is sustained fully by others who speak of its contents, and by Copeland, who swears that Smith was present when the will was written. This witness, Copeland, was living with Harrington when the latter died, and gives a definite statement of the personal property owned by the devisor at his death. He left no personal estate subject to execution, and not enough for the comfortable subsistence of his wife and children. The preponderance of the evidence is that he had no personal estate out of which his debts could have been paid. The land owned by him was at the time of his death worth not more than three hundred and fifty dollars, and perhaps less. He owed near two hundred and fifty dollars, not including his funeral expenses. His widow mortgaged some of the land to pay a part of the debts, and no doubt sold the whole of it to pay the indebtedness of the estate. She may have sold more land than was necessary to pay all the debts; still, the power to sell was given her by the will, and whether her conveyance is as executrix or as widow, the legal presumption, after such a lapse of time, must be that she was exercising her right to sell by reason of the will of her

husband. An authority as executor to sell land for the payment of debts, if necessary, makes the executor the judge of the necessity; and though there is no deficiency, a sale will be valid. *Coleman v. McKinney*, 312 J. J. Marsh. 246. There is no doubt, then, that the appellant, in 1858, applied to some of the appellees to purchase their interests. The will had then been destroyed. The land had increased in value. The contents of the will were the subject-matter of dispute; and if a life estate existed in the widow only, the appellant's title was gone. He may have well offered to purchase under the circumstances, to prevent litigation, if nothing else, but this act on his part cannot be regarded as a waiver of his right, sustained as it is by the facts and circumstances of the case.

The judgment is *affirmed* on the cross appeal and *reversed* on the original appeal, with instructions to the court below to dismiss appellees' petition.

Gilbert, for appellant.
Wake, for appellees.

ROSA GARDNER *v.* O. WILLIAMS.

Pleading Conclusion.

Where there is no averment that an intestate died childless nor that his father is not living, the statement in the petition that appellant is "the only heir at law" is only the statement of a conclusion of law.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 14, 1874.

OPINION BY JUDGE LINDSAY:

We cannot say that appellant shows herself entitled to any portion of the proceeds of the sale of the realty in question. The intestate was twice married. There is no averment that he died childless, nor that his father is not living. The statement in the petition that appellant is "the only heir at law" is but the statement of a conclusion of law.

The proof shows that the intestate had numerous brothers and sisters; and it is not shown that any of them are dead. There is no reason why the court should presume that all are dead except appellant, and further that they all died childless.

Appellant gets under the judgment appealed from as much as she has shown herself entitled to, if indeed she is entitled to anything.

Judgment *affirmed.*

Armstrong & Fleming, for appellant.
Lee & Ladam, for appellee.

JAMES HARRIS *v.* COMMONWEALTH.

Homicide—Self-Defense—Instructions—Manslaughter.

An instruction is proper which charged the jury "that if the accused believed and had reasonable grounds to believe at the time he shot the deceased, that he was in immediate danger of losing his life, or great bodily harm from the deceased, he had the right to do what under all the circumstances seemed necessary to him to protect himself from the impending danger, even to the taking of the life of his adversary."

Instructions—Manslaughter.

It was proper for the court to instruct the jury that if they believed the accused guilty but had doubt of the degree of guilt, they must find him guilty of manslaughter, for if he was guilty it was murder or manslaughter.

APPEAL FROM BOURBON CIRCUIT COURT.

September 16, 1874.

OPINION BY JUDGE PRYOR:

After a careful consideration of the instructions given in this case, we have been unable to find any error to the prejudice of the accused of which he has the right to complain. Instruction No. 1, given at the instance of the defense, tells the jury "that if the accused believed and had reasonable grounds to believe at the time he shot the deceased, that he was in immediate danger of losing his life, or great bodily harm from the deceased, he had the right to do what under all the circumstances seemed necessary to him to protect himself from the impending danger, even to the taking of the life of his adversary." This part of the instruction was certainly as favorable to the accused as the facts upon which it was based authorized; but the court, by this instruction, goes further and says "that this belief of danger might be entertained not only from what took place at the time of the killing," but from all the accompanying circumstances,

coupled with the manner, hearing, language, conduct and condition of the deceased before and at the time of the killing, thus giving to the accused the full benefit of every action on the part of the deceased toward him or any one else at the time of the killing, or prior thereto, calculated to create the belief that the accused was in danger. Such a comprehensive instruction might well be given in a case where one was being pursued or threatened by a desperate or dangerous man; but in the present case, without reciting the testimony, we must say that the latter branch of the instruction should have been omitted.

Instruction No. 2 tells the jury "that the law allows in the defense of one person, such means as are necessary, or reasonably seem to him to be necessary, and in the selection of such means he must of necessity exercise his own judgment; and if the jury believe from the testimony, that, at the time the prisoner shot the deceased, he had reasonable grounds to believe, and did believe, that the only means to prevent the infliction of great bodily harm then impending, was to shoot the deceased, they ought to acquit." We perceive no valid objection to this instruction. The jury are told that the prisoner must have believed that his only means of escape was to kill his adversary, before he could be excused; and he must not only entertain this belief, but he must have reasonable grounds for so believing. The modification of the instruction as designed by counsel for the defense, makes the guilt or innocence of the accused depend upon the fact "that the means used reasonably seemed to the accused to be necessary to save himself, whether warranted by the evidence or not." Where the accused acts from what to him seemed necessary action, he acts at his peril; but where he does believe that he is in danger, and has reasonable grounds for so believing, he is excusable. The jury has already been told by instruction No. 1, as well as the instruction asked to be modified, what constituted self defense; but counsel, by transposing the words used in instruction No. 2, given by the court, and placing them at the close of the instruction asked for by them, have asked the court to say to the jury that if the means used by the accused to save himself reasonably seemed to him to be necessary, they must acquit. This was calculated to mislead, and was not the law, without the qualification contained in instructions 1 and 2, given for the defense. There is but little analogy between this case and the case of *Meredith v. The Commonwealth,* reported in 18 B. Mon. 40. In the latter case, the accused had not only been threatened, but assaulted, and a gun pointed at the accused by the deceased

at the time the shot was fired. In this instance, the court, in the instruction, made the guilt of the accused depend upon the fact as to whether he could or not have safely retreated, and thereby save his life; whereas he had the right, if he believed he was in danger of losing his life, and had reasonable grounds for so believing, to shoot, although it afterwards appeared that he might have avoided the danger without even injuring his adversary.

The fact that the jury were told that if they believed the accused guilty, but entertained a doubt as to the degree of guilt, they must find him guilty of manslaughter, was proper; for if guilty, it was murder or manslaughter.

The court properly repeated the testimony as to the conduct of the deceased on the day of the killing. It seems that he had been quarreling with one or two others, but what he said or did had no connection with reference to the accused, and is in no manner calculated to cause a belief by the latter that he would be attacked by deceased. The judgment must be *affirmed.*

Brent & McMiller, for appellant.
John Rodman, for appellee.

S. HASKEAD *v.* A. W. MALLORY.

Real Estate—Adverse Possession—Grantee's Knowledge of Claim.

A possession is not adverse where the person holding it looks for title to another under whom he holds.

Grantee's Knowledge of Claim.

Where the real holder of title conveys it to another who knows that one in possession is asserting a claim, he takes the title subject to any defense such claimant may have.

APPEAL FROM TODD CIRCUIT COURT

September 16, 1874.

OPINION BY JUDGE COFER:

We do not think the circuit court abused a sound discretion in allowing appellee's amended petition to be filed, especially in view of the fact alleged therein, and not denied, that appellant's deed, to attack which, as champertous, seems to have been the principal inducement to the filing of the amendment, had only been filed a few days before.

That both Martin and appellee knew and recognized the fact that Cidcock held the legal title, and that Martin looked to him for title up to the time of his alleged sale to appellee, is clearly established by the evidence. That such a possession is not adverse is well settled. *Gossom v. Donaldson,* 18 B. Mon. 185. The agreement by which Martin sold his interest in the land to appellee, expressly recognized Cidcock as holding the title; he took possession to hold until the title could be procured from Cidcock; and there is nothing to indicate a change in the character of appellee's holding prior to the date of the deed from Martin in 1869.

The conveyance from Cidcock to appellant was made in 1867, while appellee held under the arrangement with Martin, and was looking to Cidcock for title, and were not champertous, but appellant had notice of the character of appellee's claim, and took the legal title subject to any equity in Martin, or in his vendee; so that appellant stands in precisely the same position that Cidcock would have stood if he, instead of appellant, had been sued.

It is alleged in the amended petition that at or about the date of the sale of the land to Martin, Cidcock gave him a title bond, agreeing therein to convey the land to said Martin. This allegation is not denied, and as appellant knew Martin was in possession, and that appellee had entered under him, he holds the legal title subject to the superior equity of appellee. But as he holds subject to the equities of appellee, because he stands in the position of Cidcock, he, for the same reason, has the same rights that Cidcock would have had; and as Cidcock could not have been compelled to convey until he was paid for the land, it was error to bar appellant's right without payment to him of the unpaid purchase money, which the evidence shows was agreed, in 1861, to be twenty-five dollars. But when that sum, with interest from January 1, 1862, is paid, appellant ought to be adjudged to convey the land to appellee.

For the error indicated, the judgment is *reversed,* and the cause is remanded for further procedings as herein directed.

Terry & Perkins, for appellant.

J. K. P. VANARSDALE, ET AL., *v.* JOHN F. DRY, ET AL.

Infants—Process—Motion to Modify Judgment.

Civil Code, §§ 81 and 579, prescribe the manner of service of process on infants less than fourteen years old, and where not brought into court in the legal way a motion to modify or set aside judgment as to them should be sustained.

APPEAL FROM LINCOLN CIRCUIT COURT.

September 18, 1874.

OPINION BY JUDGE PRYOR:

One of the appellants, J. P. Vanarsdale, at the time of the rendition of the judgment on the attempted service of process, was under fourteen years of age and therefore was not in court, by reason of the summons, either actually or constructively. The code of practice provides that the court rendering a judgment shall have power after the time at which it is rendered, to vacate or modify such judgment "for erroneous proceedings against an infant, etc., where the condition of such defendant does not appear in the record, nor the error in the proceedings, also for errors in a judgment shown by an infant in twelve months after or being at age." Civ. Code, Sec. 379. It is not made to appear in the proceedings that the infant appellant, P. P. Vanarsdale, was at the time under fourteen years of age, and, therefore, he had the right to be heard by reason of Subsec. 5, Sec. 579, Civ. Code. Sec. 81, Civ. Code, prescribes the manner in which process shall be served on an infant under fourteen years; and it is not pretended that this appellant was in court by a summons in accordance with this section. A judgment was rendered against him in the absence of any service of summons, appointment of guardian *ad litem,* or answer.

There seems to have been no objection made to the proceeding to vacate the judgment, the answer and cross-petition in the original action, and if made might not have been available; still, the proper mode is by a separate action in the nature of a petition to modify or vacate the judgment. There is no question but what the appellant, J. P. Vanarsdale, was entitled to relief, as the judgment would not in any manner affect his rights. As to Smith and wife, they cannot be regarded as in court by petition. Their answer is not made a cross-petition, nor is there any statement in it prescribing a cause of action. The statement in the answer to the cross-petition of J. P. Vanarsdale, that they adopt his statements and seek the same relief, cannot be regarded as a cross-petition or a proceeding for relief. The judgment on this pleading should not, however, be permitted to affect their rights; and if they can so amend their pleadings as to present grounds for relief upon the return of the cause, they should be permitted to do so. The sale of the land under the judgment proves no title whatever to the purchase of that interest owned by the appellant. The land was purchased by the mother, who was

a party to the action, and instrumental in procuring the judgment. The transfer to Dry vested him with no better right than the original purchaser acquired; and besides, he was himself substituted as plaintiff in the action. Neither Dry nor the administrators of their vendees acquired any title to the interest of the appellant in the land.

The judgment must therefore be *reversed,* and cause remanded with directions to refer the case to the commissioner in order to ascertain the amount of personal assets in the hands of the administratrix, with which to pay the debts of the intestate; and after applying the same, or crediting the whole indebtedness by the amount, the interest owned by the appellant in the land will be subjected to the payment of his part of any remaining indebtedness, requiring the purchasers, Dry, or his vendees, to account for his part of the rent whilst they have had possession, to be deducted from the amount for which he is made liable. Dry should be substituted to the extent he was paid, to the rights of the evidence, and the interest of the appellant in the land should be sold to satisfy any sum found to be due by him. The judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

George R. McKee, for appellants.
Hill & Allcan, for appellees.

JAMES DEANER *v.* FRANCIS STORME.

Judgment—Separate Causes of Action.

The rendition of judgment on an amended petition in less than twenty days after the service of process is erroneous, but can only be corrected by motion in the court below.

Separate Causes of Action.

If two notes that are liens on land are both due, they may be declared on in one petition, but they constitute different causes of action

APPEAL FROM LARUE CIRCUIT COURT.

September 18, 1874.

OPINION BY JUDGE PRYOR:

The rendition of the judgment on the amended petition in less than twenty days from the service of the summons, although erroneous, was but a clerical misprision, and can only be corrected by motion in the court below. Civ. Code, § 578.

Although both notes are liens upon the land, they constitute separate and distinct promises to pay. If both had been due, they both might have been declared on in the original petition, but still they constitute different causes of action.

It is made clear from the proof that no such contract as is set up in defendant's answer was made between the parties. The judgment is *affirmed.*

Read & Twyman, for appellant.
W. H. Chelf, for appellee.

F. HENRY & Co. *v.* B. T. BENNETT AND WIFE.

Improvement of Wife's Real Estate—Fraud of Creditors.

An insolvent debtor may not take funds due his creditors and improve his wife's real estate.

Fraud on Creditors—Wife's Participation.

Where the wife knows of the insolvency of her husband and knows he is using money due his creditors to improve her real estate, she is held to have participated in the fraud; and while she cannot be deprived of her title secured before insolvency, the court will cause the rents of such property to be applied upon creditors' claims.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 18, 1874.

OPINION BY JUDGE COFER:

The lots in the contest were purchased in 1864, and paid for long before the creation of the appellants' debt, and at a time when B. T. Bennett was apparently in prosperous financial conditions; and there is, therefore, no reason for imputing a fraudulent intention on his part in causing the title to be conveyed to his wife. The improvements put upon the lot fronting on Putnam street, were erected in 1867, also prior to the creation of appellants' debt, and when the circumstances of Bennett may have justified such expenditure for the improvement of his wife's property.

But the house on the lot fronting on York street was erected after the creation of the appellants' debt, and at a time when both husband and wife must have known that the former was insolvent. He had just mortgaged the Monmouth street property to McIntosh for over $8,000, and the property of the firm of which B. T. Bennett

was the only responsible member, was sold under legal process for debt, either before the commencement of the house on York street, or while it was in course of erection. This house and other improvements put on the lot, cost probably not less than $5,000. B. T. Bennett was, at the time this was done, hopelessly insolvent. He had, from 1864 to 1870, secured to his wife the title to real estate which, with its improvements, was worth, as he himself proves, at least $10,000. Can a husband thus enrich his wife at the expense of creditors? We think not. Nor can he get his effects beyond the reach of the chancellor by such shifts as that attempted in this case.

The house on York street was built, not only with the consent of Mrs. Bennett, but at her urgent solicitation. She knew her husband was insolvent, and that in equity and good conscience the money expended on the house ought to have been used to pay debts, and she must, therefore, be held to have participated in the fraud intended by her husband. But she cannot, on that account, be deprived of the title acquired in 1864, to the lot, but the court can and will take the property which she is now renting, and cause it to be rented out to pay the appellants' debt. *Athey, et al., v. Knotts,* 6 B. Mon. 24; *Robinson v. Huffman and Wife,* 15 *B. Mon.* 65; *Shackleford, Assignee, et al., v. Collier, et al.,* 6 Bush 149.

But it is insisted for Mrs. Bennett that she refused to sign the mortgage on the Monmouth street property, unless her husband would agree to build the house on the York street property, and that he did agree to do so in consideration of the release of her potential right of dower. We are not satisfied that any such agreement was made, but if made, it would weaken, rather than strengthen, her case. The debt for which the mortgage was given was less than $9,000; and a demand by the wife, and agreement by the husband, to build for the wife a house worth $5,000, in consideration that she would release her dower in property mortgaged for $9,000, is itself strong evidence of a fraudulent combination between them to cheat creditors.

The judgment dismissing appellants' petition is *reversed,* and the cause is remanded with directions to cause the lot fronting on York street and its improvements, to be rented out until a sum sufficient to satisfy the appellants' debt, interest and costs is realized.

Hawkins, Boden, for appellants.
Benton, Jones, Hornshell, for appellees.

B. B. WYATT *v.* W. D. TINSLEY, ET AL.

Injunction—Damages.

When an injunction is dissolved the court may in its discretion call a jury to assess the damages sustained by those against whom the injunction was procured.

Damages.

When the use of money is enjoined, the rate of damages does not exceed ten per cent.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

September 19, 1874.

OPINION BY JUDGE PRYOR:

The dismissal of the answer and cross-petition of Tinsley was a dissolution of the injunction, as upon that proceeding the restraining order issued. When an injunction is dissolved, the code expressly provides that the court shall assess the damages, and may in its discretion, empanel a jury for that purpose. When money is enjoined, the rate of damages shall not exceed ten per cent. on the amount released by the dissolution. No recovery of damages can be had on the bond. The party may recover the money enjoined, if lost by reason of the injunction, but no damages on the amount enjoined; so he may recover the value of the property if lost by reason of the injunction, but cannot recover damages for its use, hire or rent unless such damages have been assessed by the court at the time the injunction is dissolved. In this case it is not pretended that the money enjoined was lost, or the interest upon it, but on the contrary, the petition admits its collection; and the only damages that could be recovered would be the special damages not exceeding ten per cent., if such damages had been assessed by the court. No averment having been made, no recovery can be had. There is, therefore, nothing in the plaintiff's case and the court below very properly dismissed it. See Civ. Code, § 325. The evidence in the case shows beyond question that the notes held by the appellee, Tinsley, and pleaded as a set-off, had long prior thereto been settled and accounted for. The judgment is therefore *affirmed* on both the original and cross appeals.

P. H. Darby, for appellant.
S. Marble, for appellees.

GEORGE RAYMOND'S EX'R *v.* J. V. FROMAN.

Real Estate Conveyance—Bond—Warranty—Assignment of Bond.

Persons executing a bond to convey real estate, containing a warranty that the land described therein contains 300 acres, are bound to make good a deficiency in the acreage of the land sold.

Assignment of Bond.

One who assigns a bond in which there is contained a warranty that the land described contains a designated number of acres, and thereafter joins with the assignee in a warranty deed and receives a part of the purchase price, is liable for a deficiency in acreage named in the bond and deed.

APPEAL FROM BULLITT CIRCUIT COURT.

September 20, 1874.

OPINION BY JUDGE PRYOR:

We perceive no reason for any complaint by Raymond's personal representative on account of the judgment in this case. Raymond had represented the land by his bond to Myers as containing three hundred acres, and this bond had been assigned to Briscoe, the latter having sold the land to the appellee. It is true that Froman had no cause of action against Raymond by reason of his bond to Myers, and if this was the only ground of responsibility on the part of the appellant, no recovery could be had. But Raymond united with Briscoe, who was the assignee of the bond, the former having executed to Myers in a deed to the appellee, in which it is recited that the terms of the bond were "that the tract contains three hundred acres or over;" and in consideration of one thousand sixty-three dollars and ninety-five cents, paid to Raymond, the two, Raymond and Briscoe, conveyed the land to Froman. There is not only the representation as to quantity contained in the deed, but the consideration is paid by the purchaser to Raymond, the vendee of Myers. If Raymond had only united in the deed with Briscoe so as to pass the legal title without binding himself by any covenant and without any consideration, no liability would exist; but here he united in the representation made as to the number of acres, also in the warranty of title, and receives the purchase money; and his liability for the deficit scarcely admits of controversy.

The judgment is *affirmed.*

A. H. Field, for appellant.

Thompson, for appellee.

JOHN R. BOOTHE, ET AL., *v.* SARAH SHROUT'S ADM'R.

Practice—Deficient Record.

Where the clerk's certificate shows that part of a deposition is missing from his office and hence not included in the record, the court of appeals will presume that the judgment below is correct.

APPEAL FROM NICHOLAS CIRCUIT COURT.

September 22, 1874.

OPINION BY JUDGE COFER:

A part of one of appellee's depositions is missing from the record, and the clerk certifies that it is missing from his office; and as the decision of the case depends wholly upon questions of fact, we are bound by a well-established rule, often recognized by this court, to presume, in the absence of a part of the evidence heard by the court of original jurisdiction, that the judgment is right.

Wherefore the judgment is *affirmed.*

Thomas F. Hargis, for appellants.
E. C. Phister, for appellee.

CITY OF PADUCAH *v.* A. S. JONES'S ADM'X, ET AL.

City—Street Improvements—Payments for.

The city is liable for such improvements of a public street as are ordered by it; and if there is a contract between the contractor and the owners of the real estate by which the owners are to pay for such work or any part thereof, the city to avoid payment must set up such contract by way of answer.

APPEAL FROM McCRACKEN CIRCUIT COURT.

September 22, 1874.

OPINION BY JUDGE COFER:

We perceive no error in the judgment against the city. The evidence does not, in our opinion, establish the existence of a street across the "reserved ground," either by express or implied recognition by appellee or its vendors.

The city, having directed the improvement to be made, cannot escape payment to the contractor on the ground that there was no street at the place where the work was done. It was the duty of the

mayor and council, and not of the contractor, to know whether or not there was a street at the place directed to be improved. Nor can the city, under the pleadings in this case, escape the payment of any part of the sum now due the contractor.

It is true he agreed to look to the owners of property for all the work done under private contracts, and it is also true that Harris, who seems to have owned one-fourth, and Norton, who seems to have owned two-thirds of one-fourth of the reserved ground, signed contract, but one of the appellees, Jones, sued the railroad company and Morrow for the whole amount due for the entire work done on this part of the street. Having alleged facts which rendered the city liable in case the owners of the property were not, it was the duty of the city to set up such defense as it had, and if it meant to rely for exoneration on the fact that a part of the work, the price of which was sued for, was done under private contract, it should have set forth the facts in its answer.

There is no allegation in the answer that Norton or Harris had signed the private contract; and there was, therefore, nothing on which to base the action of the circuit court in deducting the amount of their supposed liability from the amount shown by the estimates to be due to Jones. The petition showed that Morrow had signed the contract; the evidence shows that he had paid his share of the assessment; and the judgment was right, both as to him, and also as to the deduction made for the payment made by him.

But as Norton & Harris signed the contract, and were probably liable to Jones' administratrix for their share of the work done on the reservation, the city ought to be allowed to amend its answer, and set up that fact, if it offers to do so in a reasonable time; and the plaintiff should also be allowed to amend her petition, if she desires to do so, so as to make Harris & Norton parties, and so as to enforce any lien that may exist on their interest in the land.

Wherefore the judgment is *affirmed* on the original, and *reversed* on the cross-appeal, and the cause is remanded for further proceedings in accordance with this opinion.

D. A. McGaugill, for appellant.
P. D. Yeiser, for appellees.

WILLIAM HOWELL *v.* WILLIAM S. EDWARDS, ET AL.

Conveyance to Defraud Creditors—Mortgage of Grantee to Innocent Purchasers—Validity—Election.

An innocent mortgagee of land mortgaged by the grantee, in a deed made to defraud the creditors of the grantor, is entitled to have his debt paid out of the land before the same can be made subject to the creditors' claims.

Creditors' Claims.

While an innocent mortgagee of lands, mortgaged by a grantee of a deed made to defraud grantor's creditors, is entitled to receive his money, the creditors of such grantor are entitled to receive the amount in excess of the mortgagee's claim.

Parties to Creditors' Action.

Where the grantee, in a deed made to defraud creditors, has conveyed the land, neither he nor his grantor are necessary parties to a creditor's action to recover the excess over the sum due an innocent mortgagee of such grantee.

Election of Creditors.

Where the grantee of a deed made to defraud creditors, mortgages the land to an innocent party, and in a foreclosure the land is sold, creditors entitled to the excess of purchase money after the payment of the mortgage may elect to take personal judgment against the owner of the land or have the land sold.

APPEAL FROM GREEN CIRCUIT COURT.

September 22, 1874.

OPINION BY JUDGE PRYOR:

The evidence shows beyond controversy that the conveyance by James Lewis to his son, James W. Lewis, was in fraud of the rights of creditors; but the mortgages afterward executed by the son to Johnston and Hodges were executed in good faith; and the payment of these mortgages and these assignments to Edwards, including the right of the latter to foreclose, seems to be equally as clear from fraud. All these parties, including Edwards, so far as the makers of the deed and mortgages are concerned, must be regarded as innocent purchasers, and the claims due by reason of the mortgages first satisfied.

Howell, the appellant, was the owner of all these judgments, and, when adding together the amount of each, it produces a sum giving the chancellor jurisdiction; besides, there is no demurrer for the want of jurisdiction, and if there had been we see no reason why

the appellant could not have asked a court of equity to remove the incumbrances upon the property by reason of the fraud without first resorting to his execution at law in the circuit court. The constable had returned all these executions, no property having been found, evidencing the fact that there was no personal estate out of which the debts could be made. The debtor had made a fraudulent conveyance of his land to his son, and this land was encumbered by mortgages also alleged to be fraudulent, or to have been satisfied by payment from the fraudulent vendor. If he had levied the execution on the land he still would have had to resort to a court of equity to reach the funds that are now sought to be recovered, or to have removed the encumbrance upon the land. Although these mortgages are held to be valid, the original conveyance being fraudulent, the chancellor will not turn his back upon the creditor so long as any part of the fraudulent property or its proceeds can be found in the hands of either the fraudulent vendor or vendees, but cannot subject it when acquired in good faith for a valuable consideration by innocent parties. Neither the vendor of the land, his heirs or administrators were necessary parties to the action; neither had any right, title or interest in the land. The vendor could not recover it or its proceeds from the vendee, and if not, no recovery could be had by his heirs or personal representatives. The conveyance divested the owner of all right and title to the property; and none but creditors could attack it upon the ground of fraud. The vendor could not by petition rely upon the fraud, and ask that it be subjected to the payment of his honest debts; it must be done by the creditor. The son, James W. Lewis, held this land in trust for creditors; he held the legal title, the equitable right being in those to whom the father was indebted. It is true that the son was an obligor in the original notes and judgments, still, it is evident that the conveyance was made to him for the reason that he could best place it beyond the reach of those entitled to it. He paid the father for the land with the father's money and disposed of his other property regardless of the rights of creditors. The land sold under the mortgage for near six hundred dollars more than would satisfy the debt due to Edwards. The latter sets up no claim to this overplus; nor does F. S. Lewis, the purchaser, who is made a defendant and served with process, deny the right of the appellant to subject the land or its proceeds to the payment of this debt. It is maintained by appellant that the land is subject to the payment of his claim. James W. Lewis is, or was at the time of the institution of this action, in

possession of the land, although it had been previously purchased by F. S. Lewis. Under the suit of Edwards to foreclose his mortgage, James W. Lewis had been, by the sale, divested of his right to the land, and, upon the payment of the sale bonds, F. S. Lewis was entitled to a deed. The execution that issued upon this sale bond was an ordinary fief; and this land was levied upon and sold by the sheriff as the property of James W. Lewis. This was error, and passed no title to Edwards for the reason that the land belonged to F. S. Lewis, he having been the purchaser in the suit to foreclose. The chancellor might have ordered the land sold to pay the debt, but Edwards had no right, after the sale to F. S. Lewis, to have the land sold as the property of James W. Lewis under an ordinary execution so as to defeat the claim of the appellant. He had the right to his mortgage debt, but not to sell the land of F. S. Lewis or James Lewis or James Lewis' son, as the land of James W. Lewis, and particularly when the appellant was making an effort to subject it by this proceeding in equity to which Edwards was a party, as the property of James Lewis' son by reason of the fraud. The court below should have subjected this land to the payment of appellant's claim, giving preference, however, to Edwards for his money due on the sale bond with the interest. The land having been purchased by F. S. Lewis, and the proceeds, after paying the mortgage debt, being the property of James Lewis and held in trust by the son for creditors by reason of the fraud, the appellant, to the extent of F. S. Lewis' indebtedness for it, had the right to subject it to the satisfaction of his claim. He should be allowed at his election to take a personal judgment against F. S. Lewis or have the land sold. The discharge in bankrupcy of James W. Lewis from the payment of his debts is no bar to this proceeding. It is not to subject his property, but the property he holds in trust for others. The judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

William Howell, for appellant.
William W. Chelf, for appellees.

JOHN C. GADDIS & CO. *v.* T. T. RAMSEY.

Partnership Property—Receiver's Sale—Sale Under Attachment Judgment, Form of.

Where a receiver is appointed and sells partnership property, bringing the money into court, such sale is valid.

Sale Under Attachment.

Where there has been a sale of partnership property by receiver, the sale of the same property under an attachment against one of the partners is invalid.

Judgment.

In a suit by the purchaser of partnership property at receiver's sale, against the purchaser at an attachment sale against one of the partners, a judgment is proper giving the plaintiff the property, if it may be found, and if not for its value.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 23, 1874.

OPINION BY JUDGE COFER:

On August 29, 1870, J. G. Kearns filed his petition in equity in the Harrison Circuit Court against Robert Powell and Johnson & Hardy, alleging in substance that he and Powell had theretofore been in co-partnership in the lumber business at Cynthiana; that they owned a lumber yard at that place and other property which was in the possession of Powell, and a steam circular sawmill situated in Grant county; that he, Kearns, on August 20, had entered into a contract which read as follows:

1. "J. G. Kearns is to take the business, including mill, lumber yard at Cynthiana, all stock, etc., and all debts due the partnership, and is to complete and carry out all contracts made by the firm, and is to become responsible for and settle all debts due by the firm, so that Robert Powell is to be entirely relieved of all liability on account of said partnership.

2. "Said Kearns is to give security acceptable to the firm creditors, so that they will release Powell from responsibility.

3. "The above stipulations are to be carried out and fulfilled within two weeks from this date; and until they are carried out and fulfilled neither party shall sell or dispose of any of the partnership property."

Kearns also alleged that he was ready and willing to execute the agreement, and had offered to give security to the creditors as he had agreed to do; but that Johnson and Hardy had refused to release Powell, on the ground that they held other notes on the firm amounting to about $2,000; that these notes were for debts contracted by Powell for his own account before the formation of the partnership, and for which he had given the firm notes. He was still ready and willing to carry out the agreement and pay the amount for which the

firm was liable, but not the amount which Powell owed individually. He prayed that Johnson and Hardy might be forced to surrender the firm notes executed by Powell for his own indebtedness, and that the partnership affairs might be settled.

On September 5, Powell filed his answer and cross-petition against Kearns in the clerk's office, and on September 7 gave Kearns notice thereof, and also notice of an application to the judge of the circuit court at Chambers for an injunction enjoining Kearns from removing or selling the partnership property.

It was alleged in the answer and cross-petition that the debts for which the notes to Johnson & Hardy were executed had been assumed by the firm of Powell & Kearns; that Kearns, in violation of the agreement, had taken possession of the firm effects at Cynthiana, and had sold a part, and threatened to dispose of the whole for his own use to the exclusion of Powell, and in fraud of the creditors of the firm, to prevent which he prayed for an injunction and the appointment of a receiver to take charge of the partnership property and to collect the debts due the firm, and for a settlement of the partnership.

On September 19, the appellants, Gaddis & Co., claiming to be creditors of Powell and Kearns, brought an action in the Campbell circuit court, seeking a judgment against Powell and Kearns and Muggridge, who, it was alleged, was also a member of the firm, and sued out an order of attachment which they placed in the hands of the sheriff of Grant county, who returned it with the following endorsement: "Executed September 22, 1870, by handing J. G. Kearns a copy of this order, and levying on J. G. Kearns' steam circular saw mill, consisting of boiler engine, saw, bands and all the fixtures thereto belonging, taken and levied upon as the property of defendant, J. G. Kearns, in satisfaction of this attachment."

On November 11, 1870, an order was made in the action in the Pendleton Circuit Court, referring it to the master; and it was "further adjudged, by consent, that Perrin, as commissioner and receiver, take possession of all the partnership property in this county (Harrison) and Grant county * * * and sell the same at public auction." In obedience to this order the receiver on December 1, 1870, sold the saw mill, when the appellee, T. T. Ramsey, became the purchaser. The sale was reported and confirmed, and appellee took possession of the mill.

The suit in the Campbell Circuit Court progressed until November 28, 1871, when there was a trial and verdict for the appellees

against Powell, Kearns and Muggridge; but the court, of its own motion, set aside the verdict as to Powell and rendered judgment for the amount of the verdict against the other defendants, sustained the attachment, and adjudged a sale of the attached property. Under this order the sheriff of Grant county sold the steam saw mill and appellants became the purchasers. The sale was reported, and on motion of appellants it was quashed, and the sheriff of Grant county was ordered to repossess himself of the mill, and to sell it under the former order, which he did, and the appellant, on March 21, 1872, again became the purchaser.

It appears that the sheriff of Grant county never took possession or control of the mill, under the order of attachment, until after the first sale made by him was quashed, which was on February 15, 1872, but that it had been in possession of appellee from the date of his purchase at the commissioner's sale, under the judgment in the case of *Kearns v. Powell,* in Harrison.

On March 7, 1872, before the second sale of the mill by the sheriff of Grant county was reported to the court, the appellee filed in the office of the clerk of the Campbell Circuit Court his petition under Sec. 257, Civil Code, in which he sets up claim to the mill and fixtures, under his purchase at the receiver's sale under the consent order in the Harrison Circuit Court, and asked that his claim be investigated, which was done; and the law and facts having been submitted to the court, judgment was rendered in favor of the appellee for the mill, if to be had, and if not, then for $2,000, its adjudged value, and from that judgment Gaddis & Co. have appealed.

Various objections are urged against the judgment, only a part of which need be particularly noticed. It is insisted first, that the appellee never was properly in court, but we think otherwise. The filing of his petition in the clerk's office neither made him a party to the action, nor entitled him to have his claim investigated; but it appears that "on motion of T. T. Ramsey, claimant of the attached property herein, it was ordered that his said claim be investigated before the court," and the parties waived a jury, and submitted the law and facts to the court. This order, though not formal, was sufficient to give the court jurisdiction to hear and decide upon the validity of appellee's claim.

It is next insisted that as the sale had been made, and appellants had purchased the mill before appellee's petition was presented, it was then too late for the court to investigate his claim. Sec. 527, Civil Code, provides that "any person may, before the sale of at-

tached property, or before the payment to the plaintiff of the proceeds thereof, or any attached debt, present his petition, verified by oath, to the court, disputing the validity of the attachment, or stating a claim to the property, or an interest in, or lien on it under any other attachment, or otherwise, and setting forth the facts on which his claim is founded, and his claim shall be investigated." Under this provision it is not too late, as long as the fund arising from the sale is under the control of the court, for a claimant to present his petition; and until the sale of property has been reported, and confirmed, the property itself is still subject to the order of the court, and there can be no doubt of the power of the court to order it to be delivered to a claimant who manifests his title to it, even where it has been purchased by a stranger to the proceedings.

The appellants were only preferred bidders for the mill, and had no absolute claim to it in virtue of the purchase, and cannot defeat the claim of appellee on that ground.

It is next argued, that as appellants' attachment was levied before the order was made in the case in the Harrison Circuit Court referring the case to the master for settlement and to sell the property, the lien created by the levy overreaches the *lis pendens* in that case, which, it is claimed, was created only by the order of reference and sale. The decision of this question would depend upon the question whether the petition of one partner, and the answer of the other, both seeking the aid of the court to settle the partnership, and the appointment of a receiver to take charge of the partnership property, would create a *lis pendens* as to such property. The pleadings certainly amounted to a consent on the part of both members of the firm that the court should assume control of the property; it was their property and they had a right to come into court to have it applied to the payment of firm debts; and they certainly had that right so far as appellants were concerned, for they seem to have known and sanctioned what Powell did, at least at the time of his application to the judge for an injunction. But, however this may be, the appellants have failed to show such a right in themselves to the mill as will enable them to defeat the claim of the appellee.

The mill was the property of the firm of Powell and Kearns, for the executory agreement of August 20, never having been carried out, by a compliance with its terms by Kearns, the title to the mill remained in the firm. As partnership property it was subject first to the payment of firm debts; and the title of the firm could only be divested by a sale by the firm, or by a judgment for firm debts,

and in order to divest the title by a judgment for its sale to pay such debts, such proceedings must be had as will bind all the members of the firm.

The appellants have not obtained a judgment against Powell, and therefore never could have acquired, under the judgment, the title of the firm to the mill. The judgment being against Kearns alone, the only interest the appellants could have acquired was whatever interest Kearns had in the mill, and as his individual interest of firm debts; and he would only have what might remain after firm creditors were paid, and as it appears that the firm assets will not pay the firm debts, it results that appellants acquired no title to the mill, and that its seizure at their instance and its detention by them were wrongful. The court properly adjudged the mill to belong to appellee; and as appellants had caused it to be taken from his possession, without right, it was proper to render the alternative judgment for the mill if to be had, and if not, for its value. Wherefore the judgment is *affirmed*.

D. S. Hornshell, for appellants.
W. W. Cleary, for appellee.

E. A. LYNN *v.* J. S. LYNN.

Limitations—Release from Execution—Injunction—Pleading.

Where no execution has been issued on a judgment for more than seven years, under the provisions of Rev. Stat., chap. 97, § 12, no execution may lawfully issue.

Pleading.

Where a defendant to an action for injunction against the issuance of an execution relies upon the non-intercourse proclamation of the President of the United States, dated August 16, 1861, as an excuse for his failure to have execution, he must show clearly that he was a resident of a state in rebellion at the time the proclamation was issued. A pleading is to be taken most strongly against the pleader.

Injunction.

Injunction will be issued to prevent execution on a judgment standing without execution for more than seven years, in the absence of a valid excuse for failure to have an execution during such time.

APPEAL FROM UNION CIRCUIT COURT.

September 23, 1874.

OPINION BY JUDGE COFER:

The appellant having obtained judgment at law against appellee

as surety for Vaughn on May 15, 1862, caused execution to issue thereon, which was returned no property found. No other execution was issued until February 26, 1872, a period of nine years, nine months and thirteen days, when the appellee filed his petition in equity seeking a perpetual injunction of the judgment on the ground that he had been released by the failure to issue execution for a period of more than seven years. Sec. 12, Chap. 97, Revised Statutes.

To this petition the appellant filed answer, alleging, in substance, that he removed to, and became a citizen of and resident in the state of Texas during the year 1860, or 1861, and had resided there ever since; that Texas was one of the seceded states engaged in war with the United States during the late Civil War, and praying that the injunction be dissolved. The appellee demurred to the answer; and the demurrer being sustained, and appellant failing to plead further, the injunction was made perpetual, and this appeal is prosecuted to reverse that judgment.

It is insisted by counsel for appellant that as he was a citizen of and resident in the state of Texas, and that state was engaged in war with the United States, while this state adhered to the cause of the United States during the war, the time of his residence in Texas, up to the close of the war, should be deducted from the time that elapsed between the issuing of the first and last execution.

We do not think the answer is sufficient to raise that question. The place of appellant's residence before this removal to Texas is not stated, but as he brought his suit in this state, and recovered judgment in 1862, we must assume that his residence was here up to the time of his removal to Texas. He says he removed to Texas in 1860, or in 1864. But the precise time not being stated we must, in obedience to the rule that an ambiguous or uncertain plea shall be construed most strongly against the pleader, assume as the time of his removal that which is most unfavorable to him.

The non-intercourse proclamation of the president of the United States was issued August 16, 1861, forbidding all intercourse between the states adhering to the government of the United States, and the states in rebellion, of which latter, Texas was one. If the appellant voluntarily left the state of Kentucky after the date of this proclamation, and went to Texas, he cannot now set up that absense, and the existence of the war, as a reason why the statute of limitations should not run against him; and as he has failed to state at what time he went, we must presume he went after August 16,

1861. The judgment sustaining the demurrer was therefore right. There can be no doubt that the failure to cause execution to issue on the judgment for a period of seven years, discharged appellee from liability, on account of the judgment against him as surety.

Wherefore the judgment is *affirmed.*

K. Chapeze, for appellant.
S. C. Hughes, for appellee.

MARY PORTER *v.* R. H. FIELD.

Married Women—Subrogation.

When a married woman is not liable on a note because of coverture, her surety on such a note, who pays the same, cannot recover from her. Since her creditor could not recover from her, her surety cannot.

APPEAL FROM BULLITT CIRCUIT COURT.

September 23, 1874.

OPINION BY JUDGE LINDSAY:

At the time Field became surety on the note to Dawson, Mrs. Porter owned no property, except the balance due on the Hoagland notes. These notes Field held in trust, and for the sole use of said Mary Porter, to be paid over to her in such sums as she might require. Her individual receipts were to be sufficient to relieve Field of the trust so far as the sums so paid were concerned. It is evident that Mrs. Porter did not intend to change this separate estate by the execution of the note to Dawson. But if she did there was but one way she could charge it, and that was by directing Field to pay the debt, and then execute to him her individual receipt as provided for in the deed of trust. This she did not do. It results, therefore, that Mrs. Porter was not personally bound to Dawson, because, being a *feme covert,* she could not bind herself by the execution of the note, and that her property was not bound to Field for the reasons already given.

Whatever may have been the legal effect of the conveyance by Field to Mrs. Porter, it did not raise a personal liability upon her part for a debt for which she was not theretofore bound, nor did it relate back to the date of the execution of the note to Dawson, and render separate estate (or the proceeds thereof), converted into general estate by such conveyance, liable to him, upon the ground that the horse purchased from him was a necessity.

As Dawson could not have asserted a claim against Mrs. Porter's property, Field cannot, under the doctrine of subrogation, subject it to the payment of his claim. He occupies no better attitude than Dawson did before Field paid the debt. But further than this, the testimony conduces to show that Mrs. Porter had no special use for the horse bought from Dawson. The entire estate of herself and husband did not much exceed one thousand dollars in value, and they then owned two horses. Judgment *reversed* and cause remanded with instructions to dismiss appellee's petition.

As Mrs. Porter does not prosecute a cross-appeal, no attention need be paid to the dismissal of her cross-action.

A. H. Field, for appellant.
R. H. Field, for appellee.

THOMAS Z. MORROW *v.* HENRY R. CLOUCH, ET AL.

Infants as Plaintiffs—Jurisdiction—Technical Defense.

Whether infants are represented by statutory guardians or not, where an action is brought for them to protect their estate the court has jurisdiction to hear and determine the same.

Technical Defense.

A purely technical defense will not be allowed to prevent infants from being deprived of their rights.

APPEAL FROM PULASKI CIRCUIT COURT.

September 23, 1874.

OPINION BY JUDGE PRYOR:

It is immaterial whether the appellees were represented by a statutory guardian or not; the infants were parties, plaintiffs, in the action by *prochein ami,* presenting a state of facts that, if true, not only authorized but required the interposition of the chancellor. Both the guardian, Bachelor, and his surety, Morrow, were non-residents, and the estate of the infants liable to be lost. A settlement was made by Bachelor showing an indebtedness of several hundred dollars. He had left the state without making any provision for its payment, with the consent, upon his part, that Parker should be made the guardian; and it is now too late for him to question the right of Parker as guardian or as the next friend of these infants to have their small estate secured. No notice of this

intention of the court to remove him was necessary, when he himself had consented that it should be done, and that Parker should be substituted in his place. The attachment was levied on the property of the surety, and we think in the mode required by the code by leaving the order of attachment with the occupant. The father of the two young ladies living in the property was the renter from Morrow, and had the actual control, and, we might add, the possession at the time. That Morrow was a practising attorney in the court, appointing Bachelor guardian is no defense to the action. He voluntarily uses his name in an illegal manner, by which Bachelor is enabled to obtain the custody of these children and their small patrimony. Their money is used by a firm of which he is a member. The guardian is insolvent or refuses to account to the wards, presenting every reason why the chancellor should hold the surety responsible. The defense offered is purely technical and must be disregarded in a case like this. Morrow was a non-resident when this action was instituted and the attachment was therefore sustained. The judgment should direct the time, terms and place of sale as well as the mode of advertising. This has not been done and for this cause alone the judgment is *reversed* with directions to enter a judgment directing the lot to be sold as provided in Sec. 253, Civil Code.

The commissioner should advertise at least fifteen days before sale at the court house door and three other public places in the vicinity of the lot, unless there is some special act in regard to such advertisements applicable to the county.

R. M. and W. O. Bradley, Thomas Z. Morrow, for appellant.
Denton & Curd, A. J. and D. James, for appellees.

JOHN W. HAZELRIGG, ET AL., *v.* JAMES H. MCGUIRE.

Contract to Rebuild a Mill—Rents—Condemnation of Mill property by the State.

Where the owners of mill property agree that a third person may rebuild and repair a mill and reimburse himself out of the rents and use of the mill, and after it is rebuilt the state condemns it and takes it, the person rebuilding it is entitled to participate in the money due from the state on account of such condemnation.

APPEAL FROM MORGAN CIRCUIT COURT.

September 24, 1874.

OPINION BY JUDGE LINDSAY:

The proof does not establish a contract upon the part of Hazelrigg, and Barber's heirs and representatives to pay McGuire in money for the erection of the new mill; but it does tend very strongly to show that they agreed that if he would rebuild the mill he might hold, use and control it until he was repaid the expense incurred, out of the accruing rents.

There can be no doubt that Barber's representatives were willing and anxious to have the mill built on this condition; and although Hazelrigg absolutely refused to advance any money, and insisted that if McGuire built the mill he must do it at his own risk, the circumstances proven all show that he approved the steps taken by McGuire, advised with him as to changes made in the new mill, and pointed out necessary repairs. It is not to be presumed that a sane man would build an expensive structure upon the lands of another without some arrangement for compensation. The proof in this case justified the court below in concluding that the owners of the realty accepted McGuire's proposition to look to the use of the mill for compensation.

The idea of holding McGuire responsible for the burning of the old mill is evidently an afterthought, and the proof wholly fails to show any culpable negligence on his part.

The condemnation, by the state, of the mill seat, deprived McGuire of the opportunity of running the mill until the rents reimbursed him his outlay. It in effect terminated his lease. To that extent it was the taking for public use of his property. He was interested with Hazelrigg and Barber's heirs in the property to the extent of his unsatisfied claim, and was to that extent entitled to participation with them in the amount paid for the water power by the state. The attempt to distinguish between McGuire's claim upon the mill houses and the water power is too finely drawn to be seriously regarded in a court of equity.

The conflicting accounts between the parties, growing out of the side issues introduced, seem to have been correctly settled, and as the sum allowed McGuire is not too great, the judgment in his favor must be *affirmed*.

John W. Hazelrigg, for appellants.
J. J. W. Rodman, for appellee.

CHARLES GARDNER *v.* J. H. HAYS, ET AL.

Survey of Land.

Under the provisions of the act of 1815 (2 Morehead & Brown 1023) those claiming title pursuant to a survey registered within a year will prevail over claimants under a prior survey not registered for years after the subsequent survey was made.

APPEAL FROM WARREN CIRCUIT COURT.

September 24, 1874.

OPINION BY JUDGE PRYOR:

The survey of Covington was made in the year 1836, and was not registered until November, 1858. Hays' survey was made in the year 1840, and registered the same year, the patents issuing thereon in June, 1841. The survey made by Covington was long prior to that by virtue of which appellees claim, and by the 9th section of the act of 1815, the title, when perfected by grant, relates back to the date of the survey. If this 9th section controlled this case there could be no doubt of the appellant's right to the land. But by the 8th section of the same act every certificate of survey, together with the warrant, must be lodged in the register's office within one year from the date of making the survey, and if this is not done, by the provisions of Sec. 11, same act, "the title conveyed by such grants shall, in contest with other claimants, be considered valid from the date of the registry only." The claim of the appellant must therefore be considered as inferior to that of the appellees, the patent issuing on the survey under which the latter claims in the year 1841, and the patent exhibited by appellant issuing in the year 1859, there being no registration of the survey until 1858. The court does not determine that the patent of Covington is void, but that it is prior in date to that of Hays and must yield to the latter by reason of the expressed provisions of the 11th section of the act of 1815. *2 Morehead & Brown 1023.* The patent to Hays calls for only twenty acres of land, but the boundary embraced by it includes about fifty acres. This of itself is not sufficient to invalidate the patent, and as conceded by counsel for appellant, the validity of a patent issued in accordance with the statute cannot be questioned in a proceeding like this. The fact that the boundary of the patent includes a greater number of acres than that mentioned in the survey will not authorize this court to pronounce it void. The facts in this case also con-

duce strongly to show that Covington had abandoned his claim; and if not, the trial of the appellee is superior to his.

Judgment *affirmed.*

J. R. Underwood, for appellant.
J. W. Goin, for appellees.

JAMES TRABUE, ET AL., *v.* ISA G. GROVER AND PARKER.

Attorneys—Collections Not Paid Over—Agency.

A petition against attorneys for money collected by them and "for the further reason that they had not used due diligence as attorneys," is not sufficiently specific to authorize a recovery for damages on account of negligence.

Agency.

Where attorneys receive accounts for collection and place them in the hands of another to collect, such other person becomes the agent of such attorneys; and if he collects money thereon and fails to pay it over, such attorneys become liable to pay the same to the owner.

APPEAL FROM OWEN CIRCUIT COURT.

September 24, 1874.

OPINION BY JUDGE LINDSAY:

Appellants sued appellees for moneys collected as attorneys at law. The concluding paragraph of the petition, in which it was stated that if any of the claims placed in appellees' hands had not been collected it was "for the reason that they had not used due diligence as attorneys," was not sufficiently specific to authorize a recovery for damages accruing on account of culpable negligence in that regard; and it was in effect an admission that some portion of the claims had not been collected. Under their pleadings, therefore, appellants could only recover for moneys actually collected, and not, upon that basis, for the full amount of the claims placed in appellees' hands. The judgment in effect determines that appellees collected no greater amount than by their answer they in terms admit they had collected.

This was error. The execution book shows that the sheriff collected the debt of $152 against Stephens, and the debt of $78 against Smith. The deputy sheriff, who was put upon the witness stand by appellees, swore that he had paid the money collected on these judg-

ments over to someone, and that the payments were not made to any of the appellants. Parker admits that he collected some amount from this deputy but does not recollect the amount. This proof, coupled with the fact that appellees have taken no steps to coerce the money out of the sheriff's hands, was sufficient to authorize the court to charge them with the amount of said two debts. Parker says that he placed the debt against Robertson in the hands of T. N. Lindsay, an attorney of Franklin county. The proof is clear and conclusive that this debt was paid in full to Lindsay, who was Parker's agent. No attempt is made by appellees to show what Lindsay did with the money. The presumption that it was paid over by him to one of them is so strong that a court is compelled to act upon it. But if it were not, as Lindsay was their agent, a payment to him will be pleaded as a payment to them. The testimony fails to establish the collection of any other claims, but appellees must be charged with the amounts admitted by them, and also with the debts against Stephens, Smith and Robertson's estate. There is no denial of appellees' claim for fees; and besides, it is supported by proof. It should be allowed them as a credit against the additional amounts herein directed to be charged against them. Judgment ***reversed*** and cause remanded for a judgment conformable to this opinion.

S. F. J. Trabue, for appellants.
A. P. Grover, for appellees.

CHARLES A. DIMMIT *v.* CHARLES M. FLEMING, ET AL.

Bill of Exceptions—Partition—No Report Made.

Where a pleading is rejected and the pleader fails to make such pleading part of the record by bill of exceptions or otherwise, no question is presented to the court.

Partition—No Report—Abandonment.

Where a partition suit is brought and commissioners appointed to partition land, and no report is made by them for eight years, and the owners did not take possession of lands said to have been given them therein, but treated the land as undivided and bought and sold interests therein as undivided, such partition is held to have been abandoned, and a new partition may be had.

APPEAL FROM MASON CIRCUIT COURT.

September 25, 1874.

OPINION BY JUDGE LINDSAY:

The court rejected the answer of appellant, and he failed to make the rejected paper part of the record, by bill of exceptions or otherwise. We cannot, therefore, act upon the assumption that the paper copied in the record is the answer offered to be filed. Hence a discussion of this branch of the case is needless. *Young, McDowell & Co. v. Bennett, et al.,* 7 Bush 474. We can perceive no good purpose that would have been accomplished by consolidating this with the action of *Robert P. Dimmit v. Charles E. Dimmit, et al.* The effect of this proceeding is merely to carry into execution the judgment for partition rendered in the old suit of *Dimmit v. Dimmit.* It is true the details of the last judgment are not exactly in accordance, but the changes were rendered proper, and possibly necessary, by changes in the situation and circumstances of those owning interests in the land. It is manifest that the partition made by the commissioners under the first judgment could not have been perfected. It was made in 1858, nine years before the institution of this action. The report of the commissioners was never filed in court. The paper itself is lost. There are no marks or traces left of the boundaries established in 1858, if indeed any were established; and the surviving commissioners swear that, at this late day, to divide the land so as to even approximate the partition then made, would not be sanctioned by the confirmation of the court. It was not accepted or acted upon by the parties in interest. It is not in proof that any of them entered upon and enclosed, or in any way possessed himself or herself of the identical parcel to which he or she would have been entitled under it. Appellant certainly did not approve or ratify the partition. He has purchased several of the interests of his brothers and sisters, and in each and every instance has accepted conveyances in which the estate purchased is described as an undivided interest, and all these purchases have been made subject to the attempted partition. It is a well established fact that the old suit, and all the proceedings under it, were long since abandoned by all the parties in interest, and hence its consolidation with these actions would have tended to protract the litigation. The testimony as to the fairness and equality of the last partition is conflicting, but upon a careful analysis it seems to us that it preponderates in favor of the commissioners' action, and we do not feel authorized to disturb the judgment of the court merely because the different parcels were not located to suit each of the parties in interest. It is notorious

that this cannot often be done, and in this case the substantial rights of appellant have not been disregarded. There is no sufficient proof of a secret understanding between Pearce and Mrs. Poytz as to who is to be the ultimate owner of some of the parcels allotted to Mrs. Poytz; but if there were, we do not see that it would affect the equality of the allotment. The failure of one of the commissioners to be sworn was more than compensated by the opportunity afforded appellant to cross-examine him, when put upon the witness stand.

Judgment *affirmed.*

H. Taylor, Thomas J. Throop, for appellant.
E. C. Phister, for appellees.

ROBERT HAYWOOD *v.* COMMONWEALTH.

Criminal Law—Indictment—Instructions.

An indictment for assault and battery with intent to kill is sufficient when it is substantially in the language of the statute.

Instructions.

An instruction is held erroneous where the court charged the jury that "If the jury are satisfied from the evidence, to the exclusion of all reasonable doubt, that the accused * * * did stab Lewis Gregory with a knife with the intention at the time of such stabbing to kill the said Gregory, and that not in the necessary self-defense of the accused, then such stabbing is willful and malicious, and the jury will find the accused guilty of willful and malicious stabbing and fix his punishment by confinement in the penitentiary so that it be not less than one, nor more than five years." It was held that to make this charge good it should have been qualified by adding after the words "not in the necessary defense of the accused" the words "nor in sudden heat and passion."

APPEAL FROM CARTER CIRCUIT COURT.

September 26, 1874.

OPINION BY JUDGE PETERS:

Robert Haywood was indicted in the Carter Circuit Court for having "unlawfully, wilfully and maliciously stabbed" Lewis Gregory with intent to kill him, was found guilty by the jury which tried him, and sentenced to one year's confinement in the penitentiary; and his motion for a new trial having been overruled, he has appealed to this court.

It is insisted by his attorney that the indictment is insufficient. It charges that the offense was committed as follows: "The said Robert Haywood, on October 13, 1873, in the county and circuit aforesaid, did unlawfully, wilfully and maliciously cut, thrust and stab Lewis Gregory with a knife, with the intent to kill said Gregory, from which wounds said Gregory lingered, and lingering died not, etc."

This indictment was found under Sec. 2, Art. 6, Chap. 28, R. S.; and the offense is described, substantially, in the language of the statute: that if appellant did the stabbing wilfully and maliciously he incurred the penalty of the statute, and the indictment must therefore be regarded as sufficient.

It is next insisted that instruction No. 1, given on motion of the attorney for appellee, is erroneous and prejudicial to appellant, which motion is in the following language: "If the jury are satisfied from the evidence, to the exclusion of all reasonable doubt, that the accused, in Carter county, and before the finding of the indictment, did stab Lewis Gregory with a knife with the intention, at the time of such stabbing, to kill the said Gregory, and that not in the necessary self-defense of the accused, then such stabbing is wilful and malicious, and the jury will find the accused guilty of wilful and malicious stabbing, and fix his punishment by confinement in the penitentiary so that it be not less than one, nor more than five years."

The parties had been quarreling in the house, and angry words had passed between them there; Gregory had passed out of the house, whether voluntarily or having been pushed out by appellant does not satisfactorily appear; but there is evidence conducing to show that about the time Gregory was stabbed he had gotten a brick or stone, and was near enough to appellant to strike him with it.

If, as was held by this court in *Rapp v. Commonwealth,* 14 B. Mon. 494, the wounding be not in self-defense, but done in sudden heat and passion, without previous malice, it is not a felony punished by the section referred to, but is a misdemeanor punished by Sec. 1, Art. 17, Chap. 28, R. S.

Looking to the evidence in this case, and in view of the fact that the accused might have been convicted of the lesser offense under this indictment, said instruction should have been qualified by adding after the words "not in the necessary self-defense of the accused" the following words: "nor in sudden heat and passion," and thereby

offered to the jury the opportunity of giving to the evidence or statement of facts contained in appellant's affidavit, and which was admitted as evidence, such weight as they might consider it deserved.

Instruction No. 2, as asked for by appellant, was properly refused; because it gave undue prominence to a particular portion of the evidence, and withdrew the attention of the jury from other portions equally worthy of their consideration.

But for reasons stated, the judgment must be *reversed* and the cause remanded with directions to award a new trial and for further proceedings not inconsistent herewith.

J. R. Bates, for appellant.
John Redman, for appellee.

E. NAHM *v.* JAMES ADEN.

Malicious Prosecution—Instructions—Argument.

It is no justification for a defendant in a suit for malicious prosecution to show that he was advised by officers and detectives to procure a warrant for plaintiff's arrest.

Malicious Prosecution.

In a suit for malicious prosecution, if the defendant in procuring plaintiff's arrest acted maliciously and without probable cause, plaintiff is entitled to recover.

Instructions.

An instruction which requires the jury to find for the plaintiff in a malicious prosecution cause if the defendant in procuring the plaintiff's arrest did not have probable cause for doing so, is erroneous, for before plaintiff is entitled to a judgment he must show that his arrest was procured maliciously and without probable cause.

Time of Argument.

The court in its discretion has power to limit the time that shall be given for argument in a cause tried therein, but should not abuse such discretion.

APPEAL FROM WARREN CIRCUIT COURT.

September 26, 1874.

OPINION BY JUDGE COFER:

While the first and second instructions asked for by appellant do not seem to be objected to, yet, as the same thing, in substance, is embraced in the eight instructions given at his instance, we do not see that he was prejudiced by the refusal of the court to give

the first and second. The court was asked in the third and fifth instructions offered by the appellant, to tell the jury, in substance, that if he went to the police judge who issued the warrant, and made a statement of the facts connected with the loss of his money, for stealing which appellee was arrested, and the judge issued the warrant "on his own discretion," they ought to find for the defendant; and in the fourth instruction the court was asked to say that if the appellant "laid the facts of the robbery of his store before Hillman, a professional detective and police officer, and that said Hillman directed defendant to get the warrant and controlled the detention, arrest and search, they must find for the defendant, provided they further believe that defendant stated to said Hillman the facts of the robbery as he actually knew them to exist."

Waiving other objections to these instructions, we think they were properly refused, because under them the jury would have been authorized to find for the defendant, although they may have believed he had not the slightest reason for believing the appellee had been guilty of the crime imputed to him, and may also have believed that appellant was prompted alone by malice toward him. The appellant cannot excuse himself because others may have been as regardless of appellee's rights as he has, if he in fact acted without probable cause, and with malice, in causing the warrant to issue and the arrest to be made. The mistake or bad faith of others, through officers and "professional detectives," cannot defeat the appellee's right to redress, if he has been maliciously arrested without probable cause. The sixth instruction asked by appellant was properly refused. The jury had been permitted to hear the evidence as to appellee's character, and it was needless to tell them they might consider it; and it would have been error to tell them that if he was of bad character, it should mitigate their verdict. Whether the facts affecting appellee's character should mitigate the verdict was a question for the jury, and not for the court.

We see no substantial error to the prejudice of appellant in any of the instructions given at the instance of appellee, except in the ninth, which, as copied into the record, reads as follows: "The court instructs the jury that if they believe from the evidence that the defendant caused a warrant to issue against the plaintiff on December 11, 1872, and said Aden was arrested and held deprived of his liberty by reason of said arrest, and that said warrant was procured without probable cause, they must find for the plaintiff in any sum not exceeding $5,000."

This instruction required the jury to find for the plaintiff upon proof of want of probable cause, and was, therefore, erroneous, and may have misled the jury, although the law on this point was correctly laid down in the succeeding instruction. To authorize a recovery in such a case as this there must be both malice and want of probable cause. The court, at the instance of appellant, defined "probable cause," and we see no substantial objection to that instruction. But whether it be right or not, it was given as asked and appellant cannot complain of it. We cannot determine upon anything in this record that the court abused a sound discretion in limiting the time to be occupied in arguing the case to the jury. The court must of necessity have a very wide discretion in such matters. It may often be absolutely necessary to limit the time for argument, and while this power should be cautiously exercised with a view to the importance of the cause and the volume of the evidence and instructions and the state of the docket, the existence of the power cannot be doubted.

For the error in giving the instruction numbered 9, the judgment is *reversed* and the cause remanded with directions to award appellant a new trial, and for further proceedings not inconsistent with this opinion.

Wright & McElroy, J. A. Mitchell, for appellant.
R. Rodes, for appellee.

DENNIS ALLEN *v.* WALLAN SMITH.

Real Estate—Title Bond—Occupancy.

A person seeking to recover real estate must do so, if at all, upon the strength of his own title.

Possession.

Where a title bond was issued 88 years before any real claim is made under it, and where the holder is not in possession and has not been, his claim is too uncertain to recover the land from a descendant of the owner who has been holding the land adversely to all the world for a great period of time.

APPEAL FROM NELSON CIRCUIT COURT.

September 26, 1874.

OPINION BY JUDGE PRYOR:

It is not pretended that the appellee is invested with the legal

title to the land in controversy; and his equitable right is based alone upon the bond for title executed by the patentee, William Allen, to Owings, in the year 1780, upon which the legal title could not be obtained at this late day, if the heirs of Allen were before the court. Nearly a century has elapsed since its execution, and the only actual possession of any part of this land ever held by the appellee or those under whom he claims, was about forty years prior to the institution of this action; and from the evidence it is doubtful whether this possession was that of the appellee and those under whom he claims, or the possession of those claiming under David Allen. This possession was only for a short period, as when Allen left the cabin or premises they seem to have been occupied as much by the one party as the other. In fact, there has been no entry or occupancy of this land by the appellee, his assignors or tenants, for near half a century; and as before stated, the proof makes it doubtful whether this occupancy was under appellee's claim or under those hostile to it. John Allen, a grandson of David Allen, erected a house on this land and lived in it. His claim was hostile to appellee.

The title exhibited is worthless; and the chancellor is asked to turn one out of possession for another demanding it, who has neither the right of possession nor any greater or better title. The appellant, it is true, relies on his possession alone for his title; but this possession is superior to the claim of one who has neither the possession nor the right of possession, and is in no condition, either in a court of law or equity, to invest himself with title. The appellee must also recover upon his own title, although his adversary may exhibit no evidence of title. This bond for title 88 years old could give no right of entry to the appellee even against the original patentee or his heirs, and creates no equitable right as against those hostile to the claim under it. The judgment is *reversed* and cause remanded with directions to dismiss the appellee's petition.

N. R. Grigsby, for appellant.
Muir & Wickliffe, for appellee.

SAMUEL BLACK, ET AL., *v.* JOHN WALKER, ET AL.

Cities—Public Improvements—Power—Defense.

Cities, in conformity with their charters, have power to cause alleys and streets to be improved either upon petition or without it.

Public Improvements.

An alley is a public highway.

Defense.

It is no defense to a suit brought by a contractor to recover assessments for improvements made, that the real estate assessed had been assessed for other public improvements.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 26, 1874.

OPINION BY JUDGE PRYOR:

There is no doubt but what the alley improved is a public alley, and if the improvement made is authorized by the city charter, and its provisions complied with, there is no reason why the property-owners should not be responsible for the costs. That the city council failed to improve to the extent asked for by the petitioners is no reason why they should be relieved from the tax; the council had the power to order the improvement without any petition, and having done so in the manner provided by the charter, the tax should be enforced. The contract was made and performed by the appellants in strict compliance with the law, and no reason appears for withholding from them their money. The rule of the charter is that the costs shall be charged to the quarter-square binding on the improvement, 13th and 17th streets, designated by some as alleys and others as streets; if streets, there is no difficulty in making the assessment as provided by the charter and ordinance. The assessment as made in this case is against the property fronting or binding on the improvement, as provided by the old charter. The ordinance directing the mode of taxation must be complied with. Where the apportionment is improperly made, it is the duty of the court to correct it. Sec. 12, city charter, provides that the general council, of the courts in which the suits are pending, shall make all corrections, to do justice to the parties concerned. If the ordinance has been complied with in every other respect, as has been done in this case, and the property-owner is made to pay too much by the apportionment, the chancellor should make him pay only the amount for which he is liable. That the property included in the quarter-square has been taxed to make other improvements is no reason why it should be exempt from taxation in this case. In this case the city had the power to make the improvement. The contractors have performed their contract and must have their money. The

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

Alex G. Booth, for appellants.
J. T. White, T. L. Burnett, for appellees.

MARION BURBRIDGE, ET AL., *v.* H. W. VARNON'S EX'R.

Committee of Lunatic—Bond of Committee.

Where a person is serving as committee of a lunatic and while so serving petitions the court for and receives authority to sell property of such lunatic in connection with two other persons, the three being styled commissioners, and the sale is made and the money collected by the committee from the buyers of the property or from the other members of the commission, the committee is liable to account for such money.

Bond of Committee.

A person becoming surety for a committee of a lunatic, where such committee, in connection with two other persons styled commissioners, to sell personal property of such lunatic, sells such property and collects the money therefor, is liable on his bond whether the committee collects the money or fails to do so, when it was his duty to collect and preserve such funds.

APPEAL FROM SCOTT CIRCUIT COURT.

September 26, 1874.

OPINION BY JUDGE LINDSAY:

In November, 1846, Marion Burbridge was, by the verdict of a jury and the judgment of the Scott Circuit Court, found to be a lunatic, and Oscar H. Burbridge was appointed her committee, and gave bond as such with his father, Robert Burbridge, as surety.

Marion Burbridge was then the owner of a large estate consisting of land, slaves and personalty, the income from which seems to have been more than sufficient for her support. On March 1, 1850, the legislature passed an act for her benefit, which authorized the judge of the Scott Circuit Court to decree a sale of the slaves of the said Marion Burbridge, if, upon a petition filed and sworn to by O. H. Burbridge, her trustee, and upon oral and other proof it shall appear to the interest of said Marion Burbridge for such sale to be made; and he may make such further orders and decrees in the cause as may seem to him advisable to secure properly and

safely the proceeds of sale, by requiring bond, with security, from her trustee or committee, and may also appoint, if necessary, some other person to act as trustee in place of Oscar H. Burbridge. Sess. Acts 1849-50, p. 226. In pursuance of this act, a decree was rendered on November 20, 1850, directing a sale of the slaves, and appointing O. H. Burbridge, Jesse S. Sinclair, and John W. Sinclair as commissioners to make the sale. They sold the slaves and made report thereof to the August term of the court, 1851. The sale was on a credit of two years, and amounted to the sum of $10,230. The court, in the order of sale, reserved full power over this cause, the proceeds of sale, and the disposition thereof. On March 1, 1853, the case was referred to the master commissioner, to settle with Oscar Burbridge his accounts as committee of Marion Burbridge, and report the same to court, and it was also ordered that Oscar Burbridge and Jesse S. Sinclair be appointed commissioners to collect the sale money for the slaves, and loan out the same, on good security being given. The commissioner, Jesse S. Sinclair, was required to execute bond therein for the faithful performance of his duties. On the day after this order was made, the master reported a settlement with O. H. Burbridge, which showed a balance in his hands at that date, of $564.76. In this settlement, no account was taken of the proceeds of the sale of the slaves, which, however, had not then been collected. No other order seems to have been made in the case until May 29, 1861, when the following was entered: "This day O. H. Burbridge, in response to the rule herein, appeared, and with H. W. Varnon as his surety, executed and acknowledged his bond, which is approved; and it is ordered that this cause be referred to the master commissioner, George E. Prewett, with directions to state and settle the accounts of said O. H. Burbridge, committee of said Marion Burbridge, and report to court."

On May 19, 1862, the commissioner reported that he had been unable to bring the committee to a settlement. On May 20, 1865, a rule was made against O. H. Burbridge requiring him to appear in court on the first day of the next ensuing term of the court to show cause, if he could, why he should not be removed from his office of committee. Failing to appear in response to the rule he was removed, and Jesse S. Sinclair was appointed and gave bond and qualified as committee in his stead. On the same day the commissioner filed a report in which he again reported his inability to bring O. H. Burbridge to settlement, and recommended

that he should be removed, not for any wilful negligence on the part of the committee, but from the fact that he was so largely engaged in business (and now in a distant state), that it was impossible for him to devote proper attention to this matter.

On May 19, 1868, this suit was brought by Jesse S. Sinclair for himself, and as committee of Marion Burbridge, against O. H. Burbridge, and his surety, H. W. Varnon. It is alleged in the petition, after a recital of the more important of the foregoing facts, that the sale money for the slaves was all collected by O. H. Burbridge and the plaintiff, Sinclair; that no settlement, binding upon all concerned, had been made between them, but that a settlement satisfactory to themselves had been made; and that said O. H. Burbridge, as committee as aforesaid, would fall in debt to the said Marion Burbridge about $10,000; that on May 28, 1861, O. H. Burbridge, by the order of the court, executed a bond as committee of Marion Burbridge with H. W. Varnon as his surety, which is also here filed, and which he is advised binds the said Varnon for all moneys received by the said O. H. Burbridge, as committee aforesaid, for the faithful discharge of his duty as committee, and the performance of all orders and decrees of this court touching the trust in his hands; that Burbridge is insolvent, and the amount in his hands will be lost, unless Varnon is held liable for it; that various unavailing efforts have been made to procure a settlement with O. H. Burbridge; and praying for a settlement of the accounts of said Burbridge and Jesse S. Sinclair in order to ascertain how much each is liable for, and for judgment against O. H. Burbridge and his surety, H. W. Varnon, for whatever sum might be found due from Burbridge.

In his answer, Varnon admits that it is probably true as alleged, that said sale money was all collected and received by said Burbridge and Sinclair, but whatever amount came into the hands of said Burbridge was received and collected by him, as commissioner, under the authority of the decree and orders made in the proceeding for a sale of said negroes, and not under, or by virtue of any power or authority he may have had as committee of said Marion. He states that all the money and estate that came to the hands of said Burbridge, as committee of said Marion, has long since been settled, accounted for and paid over, and whatever amount may, upon settlement, be found owing said Marion, he will owe not as committee, but as commissioner.

He also states that O. H. Burbridge, in compliance with the rule

before adverted to, "did, in the year 1861, execute an additional bond in lieu of the original bond executed by him in 1846, as the committee of said Marion; and said additional bond, stipulating, in substance, the faithful performance of said Burbridge of his duties as committee of said Marion, was executed by this defendant as his surety." He refers to said bond, and makes it part of this answer, and he submits the question of its effect, construction and operation, to the decision of the court. He denies, as advised, that said bond binds him, or renders him in any way liable for any part of the proceeds of the sale of said negroes. He refers to all the records and papers of all the various suits, motions and proceedings which have been instituted in this court, relating to the estate and property of said Marion Burbridge, and makes the same part of this answer, and he admits that O. H. Burbridge has become insolvent.

The case was subsequently referred to a commissioner, and a report was made showing an indebtedness on the part of O. H. Burbridge on account of money received by him for sale of the slaves under the decree of 1850, the sum of $9,169.85, and that there was a balance in his hands, received from other sources, of $456.20. It was admitted on the record that O. H. Burbridge was solvent in 1861, when the bond was executed with Varnon as surety. Upon this state of fact the cause was heard in the circuit court, and judgment was rendered against both Burbridge and Varnon for the sum of $456.20 and against O. H. Burbridge for the sum of $9,169.85, received from the sale of slaves, and the petition as to this latter sum was dismissed so far as Varnon was concerned. The only question on the appeal is as to the correctness of the judgment discharging Varnon from his alleged liability for the latter sum. On a former hearing in this court the judgment was affirmed on the ground that the petition was defective, because it did not set out the conditions and stipulations of the bond on which appellee was surety for O. H. Burbridge; but upon a careful re-examination of the petition and answer, we are of opinion that any defects which existed in the petition are cured by the answer, in the references to the bond made therein which we have already quoted.

It is insisted for appellant that the committee, O. H. Burbridge, must be taken to have held the money which came to his hands from the sale of the slaves under the decree of the Scott Circuit Court, as committee of Marion Burbridge; or if he did not, then,

as he was both complainant in the proceedings to sell the slaves, and committee under the appointment in 1846, it was his duty to have gotten the fund into his hands as committee, so that in any event he and his surety ought to be held liable. On the other hand it is contended that, as Burbridge was appointed a commissioner, in conjunction with Sinclair, to collect the money and loan it out, and as it is nowhere shown that he ever held it as committee, his surety is not liable. The bond recites that Burbridge had been required by the court to execute bond, and then stipulates that O. H. Burbridge, as committee of Marion Burbridge, shall faithfully discharge the duties of his station as committee as aforesaid, perform all orders and decrees of the Scott Circuit Court in said case, and pay all money that may come to his hands when required by said court. This bond was executed under a rule to give bond, which issued in the case in which a sale of the slaves had been decreed, and binds the committee to perform the orders and decrees made in that case and to pay over all money that might come to his hands. The bond being executed in that case, must be construed in the light of the record; and when this is done it seems to us clear, not only that it was intended to secure any money which he might receive, but that it amounted to a recognition by the court of his right and duty to hold the money as committee. Counsel for appellee are mistaken in supposing that the committee had no right, as such, to the money arising from the sale of the slaves. The act expressly recognizes his right to control the fund just as he could other estate of the lunatic. It is true, the act gives the court power to make all needed orders for securing the fund, but the mode of doing so is prescribed by the act itself. The court was not vested with general power to secure the fund as to it might seem advisable, but the authority is to make orders to secure the fund by requiring bond with security from her trustee or committee. This was all the power the act gave to the court over the proceeds of the sale; and that the intention of the legislature was that it should go into the hands of the committee, is made still more manifest by the succeeding clause, which gives the court power to appoint, if necessary, some other person to act as trustee, in the place of said Oscar H. Burbridge, the word trustee being used in the act as synonymous with committee. So long as O. H. Burbridge remained in office as committee, the act contemplated that he should control the fund, subject only to the right and duty of the court to require surety of him, and, if necessary to secure the fund, to remove him and ap-

point another; and although he collected the money originally under the order of the court which styled him "commissioner," yet he would have been responsible for it on his former bond as committee.

He was committee when the money came to his hands, and as he had a right to it as committee, he must be taken to have so held it all the while. He was solvent when the bond with appellee as surety was given, and must be presumed then to have held the money in hand or to have loaned it out, and it results that appellee is responsible for it. But if we are mistaken in this, and he is to be taken as holding up to this time as commissioner, the execution of the bond in this case shows that both the court and the committee regarded him as having a right to it as committee; for if he had not, the bond was wholly unnecessary in the case in which it was given, for there could have been no other liability to secure by it. He had a right not only to hold the money he had himself collected, but a clear right to compel Sinclair to pay over to him so much of it as he had collected, subject alone to the power and duty of the court to require sufficient bond. It was then his plain duty to get the fund into his hands as committee, and as he was then solvent it must be presumed he did so. But even conceding that he did not do so, it was certainly his duty to do it, and he is responsible on his bond for neglecting to do so. It would hardly be contended, if a third person had held this fund, and had been in a failing condition, and the committee had been aware of that fact and had failed to make any effort to secure the fund, that he would not have been liable for its loss. The fact that the committee was himself the debtor (if he be treated as holding the money as commissioner) can make no difference; it was as much his duty in a faithful discharge of the obligations of the trust to secure what he himself owed, as it would have been to secure it if a stranger had been the debtor. He had instituted the proceedings and procured the sale, and ought to have looked to the security of the fund. The court was proceeding against him and would, no doubt, of its own motion, have compelled him, while he was yet solvent, to bring the money into court, and was actually endeavoring to do so by repeated efforts to get a settlement. In this state of the case, appellee, by executing the bond in question, put it in the power of the recusant committee to hold on to the money, and must have understood that such would be the effect of his bond. He knew he was giving a bond in the case in which a decree had been rendered for the sale of the

slaves; there was no other fund in that case to be secured by the bond, and there is not even a hardship in now holding him liable. Wherefore the judgment dismissing appellants' petition as to the sum of $9,169.85 is *reversed* and the cause is remanded with directions to render judgment against the appellee, H. W. Varnon, for that sum, with interest thereon at the rate of 6 per cent. per annum from the first day of January, 1868, until paid.

J. F. Robinson, W. S. Darnaby, for appellants.
Breckinridge, Buckner, for appellee.

L. F. BOULWARE, ET AL., *v.* J. H. LOUDEN, ET AL.
WILLIS HENDERSON *v.* S. F. BOULWARE.
ELI LOUDEN, ET AL., *v.* S. F. BOULWARE, ET AL.

Attachment—Priority—Pleading Conclusion.

Where plaintiff begins attachment proceedings against a defendant under a wrong name and had to begin over again, his first action does not give him priority over those filing attachment proceedings after his first suit was begun.

Pleading Conclusion.

A pleading must set forth facts, and no issue of fact is raised where conclusions are pleaded.

APPEAL FROM OLDHAM CIRCUIT COURT.

September 28, 1874.

OPINION BY JUDGE LINDSAY:

Henderson's attachment was six days the junior of that of Boulware, and even if it be true that the necessary amendment to their affidavits affected the question of priority, the fact that Henderson had been proceeding against James S. instead of James H. Louden up to the time of the correction made by these amended affidavits, and that he had then to commence his action *de novo,* prevents him from claiming anything on this account. Hence, on Henderson's appeal against Boulware the judgment is *affirmed.*

The proof shows beyond all doubt that before Mrs. Louden consented for her husband to receive her estate, he agreed to invest at least a portion of it in the fifty-four acre tract of land that the court refused to subject to the payment of her husband's debts.

She fails, however, to show that the agreement related to the remainder of the attached land.

On the appeal of *Boulware and Henderson v. Mrs. Louden and her children,* and on their cross-appeal against Boulware and Henderson, the judgment is also affirmed. The petition of Eli Louden shows no right of action in him. He says that "James Louden being indebted to the government of the United States for internal revenue tax, in the sum of $———, that the land in controversy was seized and sold," etc. The averment that James Louden was so indebted is but the statement of a conclusion of law. He should have stated the facts from which the deduction was drawn. If Louden pursued any calling or vocation, or owned any property specifically taxed by the general government, these facts should have been stated; as it is, no issue of fact could be raised in the most material averment in his petition. His claim was properly disregarded. On his appeal the judgment is also *affirmed.*

John Rodman, William Correll, George C. Drane, for appellants.
J. M. Harlan, for appellees.

MARY OWENS, ET AL., *v.* SIMON HOLT, ET AL.

Trust—Suit to Declare Trust in Land—Innocent Purchasers.

An agreement between a husband and wife, by which the wife furnishes her husband money to invest in land for her and her children, placed of record in one county is not notice to persons in another county.

Innocent Purchasers.

Where a husband takes the money of his wife, which he has agreed by written agreement of record in one county he will invest in real estate for her, and buys land in another county, taking the title in his own name, and afterwards sells the land to persons having no notice of the trust created by the agreement, such purchasers take title freed from such trust; and their title cannot be defeated in a suit to declare the trust brought by the wife after the death of her husband more than twenty years after such purchases are made.

APPEAL FROM BALLARD CIRCUIT COURT.

September 29, 1874.

OPINION BY JUDGE PRYOR:

The agreement upon the part of Thomas H. Owens, the husband, to hold or invest the proceeds of the wife's land in trust for her and

her children, was made on January 17, in the year 1850, and recorded in the clerk's office of the Henry County Court. One of the covenants contained in this instrument was "that Owens, the husband and trustee, would, before any one of the children of Mary Owens (his wife), arrived at the age of twenty-one years, purchase lands in trust for the sole use and benefit of his wife and her children," etc. He received of the purchase money thirteen hundred dollars on the day or about the time the deed was executed. The parties were then living or about to make their permanent home in the county of Ballard. Owens, with a view of investing this money, as the proof conduces to show, had already purchased a tract of land in the latter county from James Husbands, and taken from him his bond for title. This purchase, so far as appears from the bond, was in his own right, and for the reason, if no other, that the trust had not, at that time, been created. He took possession of this land, and held and occupied it as his own from the date of the purchase in 1849 until August, 1858, when he sold the land, or the quarter portion of it, to one Bland, and executed to him his bond for title, at the same time delivering to him the possession. In October, 1869, Bland sold the land to Holt, the appellee, executing a bond for title, and placed him in possession.

On April 8, 1871, the present action in equity was instituted by Mrs. Owens and her children, the father being dead, against Holt and Husbands, alleging that the proceeds of the land held by Mrs. Owens in trust, had been executed by him in the land purchased of Husbands, and that Husbands had never executed a conveyance, and asking the chancellor to enforce the trust by compelling Husbands to convey to them, and to require Holt, the purchaser from Bland, to restore the possession. It appears from the proof in the case that Owens, although he received the money from the sale of his wife's land in the year 1850, and had made the purchase of Husbands the year previous with the intention of making the investment, failed to do so; and Husbands was compelled to institute his action at law upon the notes, and afterwards resorted to a court of equity to enforce his lien. Owens, in the meantime, had been engaged in purchasing and speculating in stock, and had, prior to his death, purchased and sold real estate of much more value than the amount of money held by him in trust. This trust fund, however, constituted the basis of his operations, and was the only capital he had for purposes of speculation. His efforts seem to have been to increase his portion by the use of this money, expecting, no

doubt, that he would realize enough in a few years to make the investment as required by the deed of 1850. His payments to Husbands on this land were made some of them in pork, others in money, all, no doubt, realized from the use of this trust fund. He was in the possession of this large tract of land; and this, connected with the thirteen hundred dollars, gave him a credit that enabled him not only to speculate in live stock, but to make purchases and sales of other lands. His intentions, however, to make the investment in this land, and the fact that he had no other means, if conceded, with which to make the payments, cannot affect the rights of innocent purchasers.

It had been twenty-one years from the date of the deed creating the trust until this action was instituted claiming that the money was invested in the land. No record evidence of its existence was to be found in the county of Ballard; and what written evidence of title was to be found in that county consisted of Owen's bond for title in his own name, the suit at law for the purchase money; the action in equity to enforce the lien pending against Owens and no one else, the occupancy and claim of Owens in his own right, the sale by him to Bland in his undivided character, the sale and conveyance in the same way, the claim of his widow for dower in this same land, and its allotment after his death. All these facts, connected with the entire absence of any notice to purchasers, or even assertion of an equity on the part of the appellants until after the death of Owens, establish as pure and complete an equity in Owens to those who were making an inquiry in regard to the title as could well exist.

This appellee had paid his money for the land. His vendee has also made his payments and that without notice of the trust. The wife's equity, as against the husband or his estate, still exists; but so far as the equitable right to the land is concerned, her claim must yield to that of the appellee. As a general rule, in a contest between equities the older equity prevails, but this doctrine cannot apply in a case like this for the reason that the equity of the purchaser is superior to that of the wife, and in deciding between equities the court must be controlled by equitable principles. The wife might have an equity as against the husband's estate equal or superior to that of a creditor, but has no equity to enforce a trust that, in its effect, exists only by parol, and has been sleeping for twenty years, against an innocent purchaser who is in possession and has paid his money. The testimony of Mrs. Owens to the effect that she intended to

claim the land, is denied by Holt; but if true, could not effect the claim of Bland or a purchaser from him. Owens, by his covenant, was not required to invest the trust fund when received; but was to purchase land and have it conveyed in trust before the children or any of them arrived at age. The parties to the deed evidently contemplated that Owens would use the money, and looked to his covenant to make the purchase at any time prior to the oldest child arriving at age. This accounts for the failure to make the investment at the time the money was received, and although it might have been his intention to do so, he seems to have abandoned it, entertaining, as he no doubt did, the belief, that an investment at any time within the period allowed by the covenant, would be a compliance with its provisions. The judgment of the court below dismissing the petition must be *affirmed.*

E. Q. Bullock, L. D. Husband, for appellants.
J. and J. W. Rodman, for appellees.

T. C. BIDWELL, ET AL., *v.* JAMES FACKLER.

Statute of Frauds—Specific Performance—Description in Deed.

No action at law or suit in equity can be maintained to enforce a verbal contract for the sale of real estate, and hence the court cannot decree specific performance of such a contract.

Description in Deed.

Where a description in a deed is so vague and uncertain that the vendee cannot learn from it what land he takes under it, the deed is void for uncertainty.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

September 29, 1874.

OPINION BY JUDGE PETERS:

This court has held that the effect of the statute against frauds and perjuries is that no action at law, or suit in equity can be supported to enforce a verbal contract for the sale of land. The statute, therefore, withholds the remedy for an enforcement of the verbal contract for the sale of the land; the appellants cannot enforce a specific execution thereof, there being no consideration passing to appellee.

But independent of the statute, there are other reasons why the demurrer should have been sustained.

The deed tendered in this case by appellants was not accepted; they fail in their petition to allege that they have a clear legal title to the land, and are able to make such a title to appellee. They do not allege that Porter had purchased the interest in the land from Mrs. Duvall, who, according to the recitals in the deed, is one of the children and heirs of John McFarlan, deceased, and entitled as such to one share in the land. It is merely alleged that Porter is entitled to two shares, and that Tompkins and wife had conveyed one share to him, but how or from whom he derived title for the other share is not alleged.

Besides description of the land as set forth in the deed is too vague and uncertain. The vendee cannot learn from the deed what land he takes under it, for the deed recites that the land must thereafter be surveyed to ascertain the boundary of the land, and its quantity, and no specific description is set forth in the petition.

One of the persons named as grantor is alleged to be a minor, and no indemnity or assurance is given that he will ratify the contract after he arrives at full age; and although he is named as a grantor in the body of the deed, he has not signed or acknowledged it.

The petition was therefore insufficient and the demurrer to the same properly sustained. Wherefore the judgment is *affirmed*.

Sweeney & Stuart, J. W. Kincheloe, for appellants.
Williams, Haswell, for appellee.

ABE BUFORD *v.* TAYLOR & FAULKNER.

Suit on Account—Joint Suit on Separate Causes of Action.

Where a contract to sell lumber to a firm is made and partly executed by the delivery of lumber, the seller refusing to make any further deliveries on such contract, but he did deliver the same on an agreement of a third person, the owner of the building which was being built with such lumber, a suit cannot be maintained on account against said firm and the owner of such building.

Action on Joint Promise.

No recovery can be had upon proof of a several promise by one of the defendants in a joint action against all.

APPEAL FROM FRANKLIN CIRCUIT COURT.

September 30, 1874.

OPINION BY JUDGE COFER:

Appellees contracted to sell a bill of lumber to Buckley, to be

used by him in the erection of a house for appellant, which Buckley had undertaken to build. The contract with appellant bound Buckley to furnish all necessary material for the house, and appellees contracted with Buckley, and looked to him alone to pay for the lumber sold him, but it afterwards became known that Wakefield, without the knowledge of either appellant or appellees, was interested with Buckley in building the house for appellant, and was liable to appellees as a partner of Buckley. After appellees had furnished a small part of the lumber they had contracted to deliver, Buckley became insolvent and made an assignment; and appellees, being unwilling to deliver the residue upon his credit, or upon his or Wakefield's credit, if they then knew he was a partner of Buckley, notified Buckley and appellant that they would refuse to deliver any more lumber under the contract with Buckley unless appellant would undertake to order and pay for it.

Asserting that appellant had, when notified by them that they refused to deliver any more lumber unless he would pay for it, agreed with their agent, Roberts, that he would do so, appellees brought this action at law as upon the joint promise of appellant, Buckley and Wakefield. The account sued on is made out against all the defendants, and includes the lumber delivered before and after appellant's alleged promise to pay. Buckley and Wakefield, admitting their liability, failed to plead, but appellant answered, denying that he, as an individual, or co-jointly with his co-defendants, or either of them, had either purchased or received of appellees any of the articles named in the account, and by an amended answer he set up and relied upon the statutes of frauds and perjuries, in bar of the action against him.

Upon a trial of the issues thus formed, the jury found a joint verdict against Buckley, Wakefield and appellant, for $1,939, for which judgment was rendered, and appellant's motion for a new trial having been overruled, he prosecutes this appeal to reverse that judgment.

It was decided by this court in *Gopom v. Badgett,* 6 Bush 97, that "there is no provision in the code abrogating the well established principle that the plaintiff in an action can only recover upon proof of the cause of action alleged in his pleadings;" and it was accordingly held that in an action upon a joint promise, no recovery could be had upon proof of a several promise by one of the defendants. Such discrepancy between the contract alleged and the contract proven, was not held to be a variance between the allega-

tion and the proof, and therefore immaterial unless it had mislead the adverse party to his prejudice, although it was a failure of proof fatal to the action.

The contract sued on in this case is alleged to have been made by appellant, jointly with Buckley and Wakefield, and the contract proven as to appellant is the separate and subsequent promise by him to pay for the lumber already sold to his co-defendants. There was no new contract on the part of Buckley and Wakefield, and what appellant agreed to do was that he would pay what they were already bound for, and was therefore separate and distinct from their undertaking. It was, therefore, error to instruct the jury, as was done, that if they should believe from the evidence that the appellant alone, or jointly with others, ordered the lumber sued for, and that the credit was given to him, and the lumber was shipped to him, or to others for his use, they should find for the plaintiffs.

We do not deem it necessary now to decide whether the action could have been maintained against appellant alone if it had been brought before his separate promise to pay for the lumber.

For the error indicated the judgment is *reversed* as to appellant, Buford, and for a new trial and further proceedings not inconsistent with this opinion.

Turner & Thornton, for appellant.
John L. Scott, for appellees.

PADUCAH GULF RAILROAD CO. *v.* B. E. ADAMS.

Waiver of Right of Change of Venue—Joining of Causes of Action.

A party may waive his right to a change of venue, by voluntarily consenting that no change of venue would be applied for, in order to obtain a continuance.

Joining of Causes.

Claims arising from injury to person and property may be united in one action.

APPEAL FROM GRAVES CIRCUIT COURT.

September 30, 1874.

OPINION BY JUDGE PRYOR:

The right to a change of venue had been waived by reason of the continuance of the cause at a former term, and we are not disposed

to adjudge that the court had no discretion on the subject, after the appellant had voluntarily consented that no change of venue would be applied for, in order to obtain a continuance. The plaintiff had the right, at any time prior to a decision thereon, to withdraw his motion for a new trial. This could not have prejudiced the appellant, as it not only had the opportunity, but did, in fact, make a similar motion by its counsel, the overruling of which by the court below is now complained of. Sec. 111, Code of Practice, expressly provides that claims arising from injury to person and property may be united in the same action.

There was no error in the instructions given. Judgment *affirmed.*

W. W. Tice, for appellant.
R. K. Williams, for appellee.

THOMAS A. MORGAN *v.* HENRY WOOD.

Pleadings—Demurrer—Continuance—Instructions.

A demurrer to the reply, going back to the answer in which the set off is relied upon, raises the question of the sufficiency of the answer.

Continuance.

A continuance on the ground of surprise on the part of defendant will not be allowed where such defendant has not been diligent in procuring his evidence.

Instructions.

An instruction to the effect that the plaintiff is entitled to recover as a part of his damages for loss of time and loss of employment, is erroneous when there is no averment in his complaint of any such loss.

APPEAL FROM THE DAVIESS CIRCUIT COURT.

September 30, 1874.

OPINION BY JUDGE PRYOR:

The demurrer to the reply going back to the answer in which the set-off is relied on, raises the question as to the sufficiency of this pleading. The allegation in the answer is "that the plaintiff is indebted to the defendant in the sum of $697, for money advanced or paid for his plaintiff's use," etc., omitting the averment that the money was paid at the instance and request of the plaintiff.

The reply traverses the allegation that the money was paid for the use of the plaintiff, except the amounts admitted. This should

have been held to be as good pleading as that of the original answer. The amended reply, however, cures the defect in the original answer by denying that certain items of money paid, were paid at the special instance and request of the plaintiff, thus making the issue on this branch of the case, upon which the appellee could, by proper proof, be made responsible. This amended reply is also evasive, and fails to deny the allegations of indebtedness, etc. One of the items is that the plaintiff received from the defendant 1,000 pounds of bacon. The reply denies that he got 1,000 pounds, but claims that he did get 500 pounds; whether he got more than 500 pounds is not stated. He may have received 1,000 pounds, whilst he is only admitting 500. If the pleading, after denying the delivery of 1,000 pounds, had said that plaintiff received 500 pounds, and no more, this would have been sufficient, and as to the items for money, had denied that the defendant paid to A for the plaintiff, or his use at his, the plaintiff's, request, the sum of forty-three dollars or any part thereof, the pleading would have been good.

The court acted properly in refusing to continue the cause by reason of the alleged surprise on the part of the defendant, as it was the latter's duty to have had his witnesses present when the case was called for trial upon all questions affecting the issue that might be made during its progress. He had, in fact, taken depositions sustaining his own character and assailing that of the plaintiff, and must have known after making the attack upon plaintiff's character, that his own would be impeached if it could be done, and besides, the depositions were produced and read upon the hearing that constituted his grounds for a continuance. He was also living in the country when the case was tried, and he could have called on his neighbors or those knowing him to testify by the exercise of any sort of diligence. The instructions were proper, except that part of instruction No. 1 in which the jury were told that the plaintiff was entitled to recover such damages as may have resulted to the plaintiff from having to leave his home, and loss of employment, etc. There is certainly no allegation of any loss of employment made in the petition and no proof of any such damage upon the trial. It was therefore error on the part of the court in instructing the jury as to the right of recovery by reason of any such loss. It may be that the evidence in the cause as to the value of the crop authorized the jury to render the verdict they did; still there was conflicting proof as to the value of the crop, and the verdict might have been for a less amount or more; still this court is un-

able to determine in what manner the jury considered the loss of employment, and its effect upon them when estimating the damages the plaintiff had sustained. If considered by the jury at all, and we must perceive it was, as the court here instructed them in regard to it, it was error, and for this reason the judgment of the court below is reversed and cause remanded with directions to award to the defendant a new trial, and to allow either party to amend their pleadings, and for further proceedings consistent with this opinion.

L. P. Little, James H. McHenry, for appellant.
Owen & Ellis, for appellee.

R. W. WOOLLEY *v.* LESLIE COMBS.

Railroad Company—Stock Subscription—Sale of Franchises.

When a railroad company is out of business because of the sale of its franchises, it still exists for the purpose of collecting what is due it and paying its debts.

Liability of Stock Subscribers.

Stock subscribers are only liable on their subscriptions for stock in a railroad company to raise funds to pay debts, where such company has gone out of business; and there must be debts by the company before there is any liability.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 30, 1874.

OPINION BY JUDGE LINDSAY:

It appears from Woolley's answer, as amended, that the Lexington and Danville Railroad, with all its appurtenances, and with all the rights and franchises of the company, was sold in 1858 under a decree of the Fayette Circuit Court, rendered in the case of Purnell & Sizemore against said corporation.

This sale did not wholly destroy the corporation. It still had an existence so far as was necessary to enable it to collect its debts and pay off its liabilities. But its legal existence was perpetuated only for the benefit of its unpaid creditors, and for the purpose of settling the relative rights of its stockholders. It had the right to compel the payment of so much of the unpaid subscriptions for capital stock as might be necessary to discharge its indebtedness, but no more.

The claim against Woolley is for an unpaid subscription for stock. The judgment in favor of Higgins and Gillis did not change its character. After judgment he could not have resisted their right to collect, but when they re-assigned to the railroad company, it held the claim just as it held other claims for such subscriptions, except that it had been reduced to judgment. Combs, as the creditor of the defunct corporation, has no right to collect a greater amount from Woolley than the corporation could compel him to pay.

If he was sued by the company he might answer that it had been practically destroyed by the sale of its road franchises, privileges, etc., and that it owed no debts, and hence that he was under no obligation to pay. Combs's right to sue Woolley depends upon whether or not the company owes him. If it does not, he can assert no claim against Woolley, no matter how much the latter may be indebted to the company. Combs sets up the judgment in favor of Grinstead, obtained in 1865, afterwards assigned to him as the evidence of the railroad company's indebtedness to him.

Woolley pleads facts heretofore stated as amounting to the destruction of the corporation, for all except the purposes mentioned, denies that it owes Combs anything, and charges that the judgment upon which his action is founded was obtained by fraud. He says that Combs was the last president of the railroad company; that he was in office in 1858, when its road franchises, etc., were sold; that since that time there has been no meeting of the directory; that Combs, holding a pretended claim against the company, transferred it to Grinstead with the understanding and agreement that he (Grinstead) was to sue on it, and have process executed on Combs as the president of the company, who was to let judgment go by default; and that then Grinstead was to assign the judgment to Combs; and he avers, in terms, that this agreement was carried out and the judgment obtained in 1865, seven years after the collapse of the company. If these averments be true, and they are admitted by the demurrers, then it is plain the judgment was obtained by fraud and that it is utterly void. Appellee insists that the company does not complain, and that Woolley, its debtor, has no right to make any such defense. Ordinarily this would be true, but as the company is practically out of existence, with no right to collect from its stockholders unpaid subscriptions for stock, except to pay its own debts (no matter what may be the relative rights of the stockholders by each other), the real issue in the case is whether it is indebted to Combs, and in this issue Combs and Woolley alone

are interested. If the company owes nothing, then Woolley is not bound to pay any one. If it owes Combs then he must pay at least enough to satisfy his claim, if he owes that much. In such a state of case, if Woolley were not allowed to question the validity of Combs's judgment, he might be compelled to pay a debt the company did not owe, when he was under no legal liability to the company, or to any one else.

It therefore necessarily follows that the judgment sued on by Combs does not conclude him, and if he can successfully assail that judgment, Combs must fail in his action, unless by supplemental pleadings he brings the railroad company into court, and establishes his original claim against it. For these reasons the court below erred in adjudging Woolley's answer, as amended, insufficient. Judgment *reversed* and cause remanded with instructions to overrule appellee's demurrers, and for further proceedings consistent with this opinion.

Breckenridge, Buckner, for appellant.
W. B. & George B. Kinkead, for appellee.

COMMONWEALTH, ET AL., *v.* G. W. TAYLOR, ET AL.

Sheriff—Damages for Lack of Care—Proof.

It is the duty of a sheriff to take into his possession goods levied upon, and if the property is such that he may not do so he should place it in charge of some person for whose action he is willing to be responsible.

Proof.

In a suit brought by an execution plaintiff against the sheriff for loss of goods after levy, plaintiff is not bound to prove negligence, but when he proves the levy, the value of the goods, and their loss, the defendant, to escape liability, must prove that he was not negligent.

APPEAL FROM HANCOCK CIRCUIT COURT.

September 30, 1874.

OPINION BY JUDGE COFER:

It is the duty of a sheriff who levies an execution upon personal property capable of manual possession, to take it into his possession and put it in a place where it is reasonably secured; or if it is not in such condition, or of such nature that he can take actual possession of it, he should either place it under the charge of some one for whose

vigilance and good faith he is willing to become responsible, or to proceed without unnecessary delay to sell it, and if he fails to do so without sufficient excuse, and the property is lost, he is liable to the plaintiff in the execution for any loss he may sustain in consequence of the loss of the property levied on; and when sued, as in this case, for allowing the property to be lost, the levy, loss of the property, and insolvency of the execution defendant being admitted, the sheriff and his sureties are *prima facie* liable for the value of the property, if of less value than the debt, interest and cost, and if of equal or greater value, for the amount due on the execution.

It does not devolve upon the plaintiff in such a case to prove negligence on the part of the officer, but having proved the value of the property levied on, he is entitled to judgment, unless the officer shows that the property levied on was lost without fault on his part. He cannot excuse himself by showing ordinary diligence; he is bound to show diligence in the performance of his official duties, and cannot escape in a case like this if his negligence, however slight, has resulted in the loss of the property levied on.

If the tobacco was not in a condition to be removed, he should have proceeded at once to advertise and sell, unless prevented by other official duties, or by some cause which would have been sufficient to excuse him in case he had failed to make a levy. But instead of doing so he failed, at the instance of the execution defendant, for a period of eighteen days, to advertise at all. This was such a dereliction of duty, if unexplained, as ought to have rendered him liable for the loss of the tobacco.

There is no attempt in the evidence to excuse the delay in selling, except that it had been at the instance of the execution defendant. If the indulgence was granted to him, the sheriff must be taken to have confided in him to keep the tobacco securely, and if loss ensued, he, and not the execution plaintiff, must bear it. Giving to the evidence the most favorable construction which the court below could have put upon it, we think the finding is unsupported by it, and the judgment is therefore *reversed,* and the cause is remanded for further proceedings.

Kincheloe & Jolly, for appellants.
Sweeney & Bush, for appellees.

C. J. JEWELL *v.* A. G. HOWARD, ET AL.

Real Estate—Survey—Conveyance.

Where the owner of real estate has the boundaries thereof fixed by survey and then conveys to a purchaser according to such boundaries, who conveys same to a person, for a valuable consideration, who has no notice or knowledge of a mistake in the acreage first conveyed, the first grantor has no cause of action against the last purchaser.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 30, 1874.

OPINION BY JUDGE LINDSAY:

After appellant sold to Givens he caused the tract of land to be surveyed, and the boundaries to be marked and the corners established. The mistake of which he now complains is that one line is ten poles longer than is shown by the survey, and hence that the tract contains about seven acres more than appeared from the calculation of the surveyor. Appellees bought from Givens without notice of this mistake. They bought to the marked boundaries and to the corners established by appellant. He conveyed to them instead of to Givens, and his deed conveys all the land within the marked boundaries. The corners and calls of the survey are set out in the deed, but by mistake one line is described as 64½ poles in length instead of 74½. Appellees do not ask for the correction of their deed. They are in possession, and are satisfied with their title. Appellant seeks either to disregard this deed, or to have the court determine that, because of the mistake of the survey, the corners, the marked boundaries, and the established corners, must yield to the statement of distances. This would be to reverse the rule upon which this court has always acted. If appellant has any remedy (a matter we do not decide), it is against Givens, and not against the appellees.

Judgment *affirmed.*

Judge Cofer did not sit in this case.

Sweeney & Stuart, for appellant.
Owen & Ellis, for appellees.

W. E. SNODDY *v.* WILLIAM JOHNSTON.

Guarantors—Liability to Purchaser of Note.

Persons who sign their names on the back of a note that has never been held by them to induce a person to purchase the note, thereby become guarantors thereof. Whether they are bound jointly or severally is a question of fact to be determined by a jury.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 1, 1874.

OPINION BY JUDGE LINDSAY:

This court adheres to the doctrine of the case of *Arnold v. Bryant*. All the testimony permitted by the court to go to the jury tends to show that neither Johnston nor Nuremberger ever held the note (upon the back of which they indorsed their names) as assignees. It is also evident that they wrote their names across the back of said note to induce Snoddy to purchase it, and it therefore follows that they intended to become bound to him for its payment in some way.

As they were not assignees of Doern & Co., the legal presumption is that they intended to bind themselves as guarantors. In the absence of all information by Snoddy of a contrary intention upon their part, he had the right to act upon such presumption and to treat them as such. Whether or not they did so intend to bind themselves, and if they did not, whether Snoddy had information to that effect, are questions of fact to be decided by the jury. Whether, if they contracted as guarantors, they contracted to be bound jointly or severally, is also a question of fact which the jury had the right to determine.

The proof permitted by the court to go to the jury, certainly tended to show that Johnston & Nuremberger contracted to be bound to Snoddy as guarantors, and appellant did not so utterly fail to show that their contract was joint as to authorize the court to take the case away from the jury on that account.

It was in proof that Snoddy agreed to purchase the note upon condition that Doern would procure Johnston & Nuremberger to endorse it. It was also in proof that Johnston had stated that he endorsed the note upon the understanding that Nuremberger was also to endorse it. Johnston says that he signed after Nuremberger, and that he did so to accommodate Doern. The proof tends to show that both he and Nuremberger signed for Doern's accommodation. Johnston states further that he had no agreement with Nuremberger to guarantee the payment of the note, but he does not deny that he expected to be jointly bound with Nuremberger in some way. As before stated, as neither Johnston nor Nuremberger had ever held the note as assignees, and as there is no proof that Snoddy had information that they did not intend to be bound as guarantors, he had the right to act upon the legal presumption

arising from these acts and to treat them as such. Coupling with this presumption the testimony allowed by the court to go to the jury, we are of opinion that if the jury had found them jointly bound, the court would not have been authorized to set aside the verdict upon the ground that in this particular it was not supported by sufficient evidence.

The amended petition was properly stricken from this case. After appellant had voluntarily filled up and sued upon the joint contract of guaranty, he should not be allowed (without averring and proving fraud or mistake) to abandon his chosen petition, and claim that Johnston & Nuremberger had contracted with him, separately and individually.

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

Seymour & Abbott, R. W. Wooley, for appellant.
Muir & Bijou, for appellee.

H. D. OWENS, ET AL., *v.* MICHAEL SMITH.

Lease Contract—Failure to Get Possession.

A lessor cannot be permitted to obtain an advantage by reason of his own wrong in not surrendering possession of leased premises to his lessee, when he has agreed to do so.

APPEAL FROM HARDIN CIRCUIT COURT.

October 1, 1874.

OPINION BY JUDGE PETERS:

There is no evidence that the contract for the rent of what is described as the Watkins place was entered into between Warfield and appellee with any intention on the part of either of them to hinder or obstruct any of Warfield's creditors in the collection of their debts. McGill and Geehogan appear to have been indemnified as his sureties, or at least they accepted the security he gave them as ample indemnity, although the land mortgaged to them had been leased to appellee before the mortgage was executed, of which they had at the time actual notice.

The stipulation in the contract that appellee failed to get possession of the Watkins place at the time designated, cannot be so construed as to make it operative for the benefit of appellants; such

was not the intention, and if he can avail himself of it he would thereby get a premium for failing to surrender possession of the place at the time he was bound by the terms of his contract with Warfield to do. Appellant is not prejudiced by the judgment and the same is *affirmed.*

Brown & Murray, for appellants.
Montgomery & Wilson, for appellee.

F. MONTGOMERY, ET AL., *v.* WILLIAM GARDNER.

Mill and Mill Seat—Sale of by Parol Contract.

Where a mill and mill seat are not only sold, but three acres of ground surrounding it, "so long as the property was used as a mill," such mill and mill seat is a part of the real estate, and no action can be maintained upon a parol contract for its sale.

APPEAL FROM NELSON CIRCUIT COURT.

October 1, 1874.

OPINION BY JUDGE PRYOR:

It is maintained by the appellants that the mill and mill seat are personal estate, and as such passed by the sale to the appellee.

The mill and mill seat were not only sold, but three acres of ground surrounding it, so long as the property was used as a mill. If a water mill, as we suppose it was, when sold as such, with the mill seat, it must be regarded as a part of the realty, and no action can be maintained upon a parol contract for the sale of it.

There is no equitable feature in the case that would authorize any other judgment than that rendered disregarding the sale.

The judgment of the court below is *affirmed.*

Muir & Wickliffe, Johnson, for appellants.
J. W. Thomas, for appellee.

SAMUEL MILLS *v.* WILLIAM R. EARLY.

Sale of Land—Description—Judgment.

Land sought to be subjected to sale to satisfy a debt must be described in the petition so that the commissioner to make sale can identify the land from an examination of the petition and papers in the suit. A judgment for plaintiff on such a defective petition will be reversed.

APPEAL FROM OHIO CIRCUIT COURT.

October 2, 1874.

OPINION BY JUDGE PETERS:

The land sought to be subjected to sale to satisfy appellee's debt is not sufficiently identified by the description given in the petition. It is represented in the petition as "Beginning at a point on the north fork of Adam's fork of Rough creek in Ohio county, being on the east side of the north fork and the south half of 354 acres of land conveyed to William B. Early by deed dated March 19, 1870, recorded," etc., to which reference is made in the petition; but that deed is not filed as an exhibit. The clerk states there is no such deed in the papers. It is alleged that by the terms of the conveyance to defendant, a lien was retained for the unpaid purchase money, and a deed from Early to appellant is copied in the record, but it is not made a part of the petition, nor is it alleged that appellant accepted it. Said deed was made a part of the answer which appellant filed in the case, but appellee demurred to that answer, and his demurrer was sustained, so that it is not to be considered. The judgment directs the master to sell the land in the petition mentioned, or so much thereof as may be necessary, etc., which requires the commissioner to determine judicially, by going to the clerk's office and hunting the title papers, what land he must sell. This power the court cannot confer on him.

The judgment should have contained such a description of the land as would have informed the commissioner of the precise tract or parcel of land he was required to sell, without reference to any evidence of title not in the papers of the suit, imposing on him no other duty than to sell the land specifically set forth in the judgment. This question has been repeatedly decided by this court heretofore.

Wherefore the judgment is *reversed* and the cause is remanded with directions for further proceedings consistent herewith.

Massie & Chapeze, for appellant.

Sweeney & Ellis, for appellee.

A. E. PORTER, GUARDIAN, *v.* E. P. NEAL, ET AL.

Motion for New Trial—Conflicting Evidence.

Where the record fails to show clearly when a motion for new trial was made, the court of appeals will presume it to have been made within the proper time.

Conflicting Evidence.

When the evidence is conflicting the court of appeals will not disturb the judgment on that account.

APPEAL FROM WARREN CIRCUIT COURT.

October 2, 1874.

OPINION BY JUDGE PRYOR:

The verdict of the jury was rendered on April 3, 1873 (Thursday), and the motion for a new trial, as the record recites, was made on April 6, 1873. This date was Sunday, and therefore there must be some mistake as to the day on which the motion was made. If made on the fifth, it was in time, but if on the sixth or seventh it was too late.

It could not have been made either on the fifth or seventh; and as the rule is technical, and the substantial rights of the parties cannot be affected by correcting each error as appears upon the record, we must indulge the presumption that the motion was made within proper time. The answer of the defendants is a plea of payment, and not a set-off, and therefore could be pleaded to the claim of appellant conceding that the action had been instituted in his fiduciary capacity. The petition does not show that the claim declared on is payable to appellant as a fiduciary, and the word guardian is merely a description *personae,* and there is no reason why a set-off could not have been pleaded as well as the plea of payment.

As there was conflicting proof on the question as to whether or not the parties had agreed to credit the cattle money on the note, this court would not disturb the judgment on that account. As to the rent note of Pates & Bro., the proof from both parties shows that the real amount to be credited was never ascertained, and no acceptance made of it as a payment. The parties disagreed as to the amount to be deducted from this note for the improvements, and for that reason, among others, failed to conclude that settlement.

The instruction of the court to the effect that the jury could allow no claim for rent unless the same was taken and accepted as a payment by plaintiff, would have been proper if there had been evidence upon which to base it. There was no evidence showing that this note was received as payment, but, on the contrary, the proof conduces to show that the amount of the rent had never been agreed on by reason of the disagreement in regard to the improvements. For the reasons indicated, the judgment is *reversed* and cause re-

manded with directions to award a new trial, and for further proceedings consistent with this opinion.

H. T. Clark, for appellant.
J. A. Mitchell, for appellees.

D. R. BURBANKS, JR., ADM'R., *v.* D. R. BURBANKS, SR., ADM'R.

Purchase of Real Estate—False Representations to Induce One to Buy—Warranty—Judgment.

When a vendor of real estate, to induce one to buy, states that he will purchase an adjoining lot and protect the building sold from being obstructed by the erection of other buildings, such statement is not a false representation as to an existing fact, but a mere promise not incorporated in the deed and does not entitle the vendee to a rescission of contract.

Warranty.

One cannot recover for breach of covenants of warranty until he is disturbed or the covenants are broken.

Form of Judgment.

A judgment is invalid when it provides that plaintiff shall recover principal and interest "in gold coin or its equivalent in legal tender notes," but fails to determine what constitutes such notes.

APPEAL FROM HENDERSON CIRCUIT COURT.

October 2, 1874.

OPINION BY JUDGE LINDSAY:

It is insisted that the answer, together with the amendment offered, presented a state of case requiring either a recission of the contract or an abatement from the purchase money due.

A conveyance had been accepted. There is no such state of facts alleged as would authorize the chancellor to rescind an executed contract upon the ground of fraudulent misrepresentations at the time of the sale and conveyance. The amendment is that the plaintiff's intestate induced D. R. Burbanks, Jr., to make the purchase, by fraudulently representing to him that he would purchase a portion of Holloway's lot, and thereby complete the title to the party wall, and protect the building from being obstructed by the erection of other buildings on said adjoining lot, and that he had failed to keep and perform this agreement. This was not a fraudulent

and false representation as to an existing fact, but a mere promise or undertaking to do that which was necessary to perfect the title. The purchaser was then about to accept. Besides this, it was an oral agreement not incorporated in the deed, and therefore not to be treated as part of the contract.

It appears that the purchaser was fully apprised of the defects of title as to the party wall, and of the fact that the vendor did not own the original lot; and yet, with a knowledge of these facts, he accepted the conveyance. He must, therefore, be held to have accepted the covenants of warranty as sufficient guarantees of title and possession. The covenant has not as yet been broken. The widow of Burbank, senior, has asserted no claim to dower. There is no averment of insolvency of the vendor's estate, nor that his heirs and distributees are insolvent, or now residents of this commonwealth, nor that the distribution of the personalty and the partition of the realty, left by the vendors among his distributees and heirs, will in any way impair the guarantee of title and possession contained in the general and special covenants of warranty set out in the deed. Under such a state of case the chancellor cannot interfere.

The alleged oral agreement to purchase and hold the adjoining lot cannot be enforced, because the parties failed to incorporate it into the written evidences of what the contract of sale was. The court, therefore, did not err in refusing to allow the amended petition to be filed, nor in rendering judgment, notwithstanding the facts set up in the original answer.

The form of the judgment, however, is fatally defective. It provides, as it should, that appellee shall recover the amount of his note, principal and interest, in gold coin or its equivalent in legal tender notes, but it fails to determine what constitutes the equivalent in legal tender notes of the amount of the gold coin due. As the judgment now stands, when the sheriff goes to collect the execution that may have issued upon it, or the commissioner to sell the house and lot, it will be necessary to judicially determine what number of dollars in legal tender notes will equal the amount thus due in gold coin.

This is not a matter of calculation. It is necessary, before the calculation can be made, to determine as matter of fact the discount upon legal tender notes, or the premium upon gold. Of course a question like this cannot be left to the judgment of a ministerial officer. The court should have ascertained the relative value of gold

and legal tender notes at the time of the payment, and have then adjudged that the judgment for gold coin might be discharged by the payment of a fixed sum in legal tender notes, bearing interest in legal tender notes, the interest running from that day. Wherefore the judgment is *reversed* and the cause remanded for a judgment conformable to this opinion.

Clay & Coleman, for appellant.
Vance & Merritt, for appellee.

TULLY CHOICE, ET AL., *v.* J. Q. A. KING.

Interest—Defective Judgment—Suit on Note.

In a suit on a note plaintiff cannot recover ten per cent. interest by showing that defendant promised to pay that rate, where the agreement was not in writing.

Defective Judgment.

A judgment directing the sale of real estate failing to direct the commissioner how much money he is to raise by the sale, is void. Such a judgment cannot be amended by order of the court after the parties had ceased to be in court for any purpose other than the execution of the order of sale.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 2, 1874.

OPINION BY JUDGE COFER:

Although the appellee alleges that he was by agreement to have 10 per cent. interest and the amount of the note sued on, as that agreement does not appear to have been in writing, it was error to render judgment for more than 6 per cent. interest.

The judgment directing a sale of the land does not direct the commissioner how much money he is to raise by the sale. If it be said that the court had already ascertained the amount by the previous judgment, we answer that that judgment was against only a part of the appellants, and as to the others there was no direction whatever in the record as to the amount for which the sale was to be made. Nor was this palpable defect in the judgment cured by the order styled an amended judgment made at the October term, 1873. That judgment declared more to be due than was in fact due, and was made after the parties had ceased to be in court for any

purpose other than the execution of the order of sale made at a previous term; and as they had no notice of it, it was void.

This order was directed, and the commissioners, in obedience to it, sold for more money than was due on the judgment previously rendered against a part of the defendants, and was therefore void as to them and as to the other defendants. The amount to be made by the sale never was ascertained except by the void order of October, 1873, made less than ten days before the sale was made, and the sale was therefore void as to them.

Wherefore, for the errors mentioned, the personal judgment against appellants, E. S. Choice and Tully Choice, and the judgment for sale of the land, and the order confirming the sale, are *reversed* and the cause is remanded for further proceedings.

We have not acted on the motion made by or for the appellants, Patter and wife, to dismiss the appeal. As to them, because the appeal, having been taken by an attorney of this court, we must presume he had authority to do so, and the only mode by which the question of his authority could have been raised was by affidavit and rule on him to show by what authority he prosecuted the appeal.

J. M. Bigger, for appellants.
L. D. Husband, for appellee.

LOUISVILLE & NASHVILLE R. CO. *v.* JOHN M. MAY.

Damages—Negligence—Instructions—Weight of Evidence.

Where, in a suit for damages resulting from the negligent acts of the defendant, the court charges the jury that it should consider all the facts and circumstances proven in the case, it was authorized to take into consideration the condition of the drawhead; and the court did not err in refusing to give an instruction as to the condition of such drawhead.

Weight of the Evidence.

Where there have been two concurring verdicts, the court of appeals will not reverse a judgment on the weight of the evidence.

APPEAL FROM WARREN CIRCUIT COURT.

October 3, 1874.

OPINION BY JUDGE LINDSAY:

The court did not err in refusing instruction No. 8, asked by appellant. The appellee was bound to use ordinary care, and the

jury were so instructed, and in determining whether he did use such care, the jury were told by instruction No. 14 that they should consider all the facts and circumstances proven in the case. This authorized them to take into consideration the condition of the drawhead; to have called special attention to the drawhead, as was intended to be done by the refused instruction, would have been to give its condition undue importance. Instruction No. 12, given on motion of appellee, is not subject to the criticism in which counsel indulge. The adjectives "gross" and "willful" apply to and qualify "carelessness" as well as "negligence," and this fact must have been palpable to the jury.

We cannot reverse this judgment upon the facts. Appellant proves more than mere inadvertance upon the part of the fireman, who was operating the engine at the time of the accident. If the speed of the locomotive was suddenly increased, when the two cars to be coupled were in a few inches of each other, it was an act of gross negligence, if not of positive recklessness.

The fact of the increase of speed is disputed by two or more witnesses; it was for the jury to determine the question.

They accepted and acted on the version given by appellee, and as this is the second finding in his favor we do not feel authorized to interfere.

Judgment *affirmed.*

Hines & Porter, for appellant.
J. A. Mitchell, for appellee.

S. Q. M. MAJOR *v.* R. C. WILLIAMS, ET AL.

Trust Estate—Husband and Wife—Payments by Trustee—Approval of Bond of Trustee.

Where an estate is left in trust for the benefit of a daughter, the trustee cannot claim credits for money advanced to the husband of such daughter.

Payments by Trustee.

When by will an estate is left to a daughter, and her brother is made trustee, and the daughter and trustee and other members of the family live together in the family homestead, and such trustee expends large sums of money in supporting all the members of such family, on account of his affection for them, and uses the income of the members of such family and even more than their income in doing so, he cannot claim credit against the daughter's estate on account of such excessive expenditures.

Bond of Trustee.

The bond of a trustee, where an estate in trust is created by will, must be approved by the court and not by the clerk.

APPEAL FROM SHELBY CIRCUIT COURT.

October 3, 1874.

OPINION BY JUDGE PRYOR:

The court, in the determination of this controversy, has confined its investigation to the judgment rendered in favor of Catherine M. Williams, except in so far as it is claimed by the appellant that the indebtedness of her husband, R. C. Williams, to him, should be applied to the payment of the debt due by appellant to his wife. The attempted settlement between the appellant and R. C. Williams of their individual accounts, embracing many thousand dollars, and containing numerous receipts and vouchers, tends only to confuse and obscure the real object in the prosecution of this action, viz., the settlement of the accounts of the appellant as the executor of the father, and conduces in no manner to aid the court in ascertaining the interest, if any, of Mrs. Williams in her father's estate. No argument or statement, by brief or otherwise, pointing out any errors in these individual accounts, has been made by either side; and as they are foreign to the issue raised by Mrs. Williams, the case will be considered with reference solely to the claim of the latter.

The judgment also being separate and distinct, the parties to the record can hereafter prosecute their appeal, as this judgment leaves these questions undisposed of. We are not disposed to follow the commisioner in his adjustment of the accounts between the appellant and the appellee, Mrs. Williams, as the case can be disposed of without reference to the manner in which these accounts have been stated. The testator, the father of the appellant and Mrs. Williams, owned at his death an estate including land, slaves and personalty valued at twenty thousand dollars. He was indebted, as the evidence shows, in the sum of about three thousand dollars on his own account, and liable for as large a sum, or more, as the surety of the appellant, who was left his executor. The appellant qualified as such in the year 1855, and never at any time has made a settlement of his accounts, the object of this action being to procure a settlement.

The testator left his widow and five children surviving him. By

his will he devised to his daughter, Catherine, now Mrs. Williams, a legacy of two thousand dollars over and above her distributable share, placing the whole of her interest in the hands of her brother, John B. Major, as her trustee. None of this estate or any part of this legacy was ever paid to the trustee or controlled by him in any way. Mrs. Williams was about 16 years of age at the death of her father, and seems never to have had any guardian. Her mother, the widow of the testator, was in feeble health, and had been for years unable to walk, and by the provisions of the will was to have a liberal allowance for her support and maintenance. The executor sold the land, by a proceeding in equity, for the payment of debts, and out of the proceeds seems to have paid the indebtedness of the estate as well as his own, for which his father was liable as surety. No vouchers, or at least but few, were retained by the executor evidencing his payments, and therefore he was in no condition, by reason of his own laches, to receive such credits as he claimed in his settlement made with the commissioner in the present case.

After the sale of the land, the only real estate left was the residence of the testator in the city of Frankfort, where all the family continued to live together and to use, own and control the property in common, the appellant contributing liberally to the support of the family out of his own means, aided by the proceeds of the hire of the negroes, the estate of the mother, and what little money was left of the real estate after the payment of debts. Mrs. Williams continued to reside with the family after she arrived at age, and for several years after her marriage that took place in 1862. She was the principal housekeeper for many years, economical in her habits, but provided for liberally by her brother, the appellant, in all her wants, no doubt as a compensation, to some extent, for her services, but more by reason of his affection for her than anything else, and with no intention of consuming her pecuniary legacy in the expenditure.

It is not unreasonable to allow to her mother the one-third of the proceeds of the land, by reason of the provisions of the will; and deducting that from this sum, and the value of the personalty, Mrs. Williams would then have been entitled, after deducting the indebtedness for which the executor has been credited, as far as he has produced vouchers, to about $962; and to this add the amount of the legacy, making in all $2,962, to which she was entitled in March, 1857. The commissioner in his settlement has committed an error, on page 191 of record, in subtracting Mrs. Major's one-

third from the value of the land and personalty. The value is fixed at $7,216.21, and taking from this $2,405.40, Mrs. Major's interest, leaves a balance to be divided between the five children of $4,810.81, instead of $2,810.81, as reported. The appellee, Mrs. Williams, being entitled to $2,962 the interest on this sum, together with her interest in the hire of the negroes, would yield an income of not less than $250 per annum. This income, together with the expenditures by the mother in the support of the family, would not more than support and maintain the sister in the circle in which she moved. Giving to the executor this interest or income for his expenditures for Mrs. Williams, and the sum of $380, the difference between what is found due appellees by this judgment and that in the commissioner's report, it results in as correct a settlement of the controversy as can be arrived at upon the basis presented by the pleadings and proof.

The executor's burden was relieved greatly by the expenditure of the mother's interest in the support of the family, and although he may not have received full compensation for his liberal, and in many instances improvident, expenditures made for the comfort and welfare of his brothers and sister, the fault is to be attributed to his own kindness and indulgence in his endeavor to gratify their many wants. The trust fund cannot be disposed of by the chancellor in that way. The release executed by the husband is no bar to the wife's recovery, although she seems afterward to have ratified the act. The estate was in trust, no settlement had been made or money paid to her causing the execution of this release. She was also a *feme covert,* and whilst she may have been under a moral obligation to appellant by reason of his kindness to, and expenditure of money for her husband, still she was under no legal obligation to pay, and in no condition, by reason of her coverture, to make such an agreement or to waive her right to the trust estate; and for the same reason the claim of the appellant against her husband cannot be set off against the judgment for her benefit in the present action.

There were expenditures made by the appellant in improving the family residence that were necessary to preserve it, and a charge made against him by reason of some estate held by his mother in her own right in the state of Ohio that was error; but the giving to him all the income of the sister, as well as the difference between the amount found due by him on settlement, is correct; and in this judgment he has received all that the chancellor can contribute to

reimburse him from this trust fund. It is insisted by counsel for the appellees that appellant should be required to account for the value of the slaves, for the reason that he should have sold them and not the land for the payment of the debts. The devisees were nearly all of age when the will was made. The mother had a large interest in the estate. John Major, the trustee of Mrs. Williams, in conjunction with all interested, advised the sale of the land. It was unproductive and of but little value, whilst the slaves were valuable and would produce a greater income than the land, and it was no doubt to the interest of all at that time, to sell the realty and not the slaves.

The removal of the trustee was proper, but the clerk should not have been invested with the power to accept a bond with surety from a new trustee. The bond must be executed and approved by the court. The allowance to the attorneys, if to be paid out of the judgment in favor of Mrs. Williams, is exorbitant; if one-half is to be paid by the husband out of his own means, and we so presume by reason of his litigation with appellant, it is then proper. The trustee, upon qualifying, should be directed to pay a reasonable fee to attorneys, to be fixed by the court. The judgment in favor of Mrs. Williams is *affirmed,* and also *affirmed* on her cross-appeal.

G. W. Craddock, for appellant.
C. M. Harwood, John L. Scott, for appellees.

JACOB W. FUNK *v.* SILAS MILLER.

Principal and Agent—Disavowal of Unauthorized Acts of Agent.

When an agent compromises his principal's claim against a debtor, the principal, to avoid such a settlement, must disavow his agent's acts within a reasonable time after learning thereof.

Reasonable Time.

A principal's repudiation of the acts of his agent is not within a reasonable time when not made for more than five months after he learned of such acts and more than a year after they were taken.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 3, 1874.

OPINION BY JUDGE LINDSAY:

According to Funk's own testimony, he was notified in March, 1868, that Shroett & Bush had compromised with Miller. About

the middle of the summer of 1868 he ascertained the terms and conditions of the compromise. Whether he obtained this information before or after the proceedings against Schroett & Bush to coerce from these the amount paid by Miller, does not appear. It is certain, however, that he did not notify Miller of his intention to repudiate the action of his agent in making the compromise until January, 1869, when the suit to set aside the order dismissing his action was instituted.

Conceding, then, that Funk's letter did not authorize Shroett to compromise for less than $1,500, and that he was not apprised of Schroett's violation of instructions when he was attempting to compel him to pay over the money, one thing is clear, that with full information as to all the facts, he remained silent from about the 15th of July, 1868, until January, 1869. Up to the last named date, Miller had received no intimation that Funk was dissatisfied with a compromise that had been fully consummated more than eight months before.

A party is bound to disavow the unauthorized acts of his agent as soon as he reasonably can after they come to his knowledge; otherwise his assent or ratification will be presumed. If he neglects for an unreasonable time to repudiate them, he makes the acts his own, and is bound by them to the same extent that he would have been if the agent had had previous authority. Here the principal failed to disavow his agent's contract for five and one-half months after acquiring full knowledge of all its conditions.

Considering the fact that the contract was consummated more than a year before appellant received this information, it was a case demanding prompt and immediate repudiation and notice thereof to Miller, if he did not intend to ratify it. Under such circumstances, a delay of more than five months was unexcusable; and the court would have been bound to tell the jury that, as matter of law, appellant's ratification must be presumed.

It is not error, therefore, to instruct peremptorily in favor of appellee.

Judgment *affirmed.*

J. B. Cochran, for appellant.
Thompson & Booth, for appellee.

W. H. ROBERTS *v.* D. F. CURLE, ET AL.

Judgment by Default—Injunction.

Where one fails to defend when sued upon a note, he cannot enjoin the collection of the judgment for a defense that existed and of the existence of which he had knowledge before the judgment was rendered.

APPEAL FROM BARREN CIRCUIT COURT.

October 5, 1874.

OPINION BY JUDGE LINDSAY:

Appellant failed to defend when sued on the note. He seeks to enjoin the collection of the judgment for a defense that existed, and of the existence of which he had full knowledge, before the judgment was rendered. Sec. 14 of the Civil Code of Practice, forbids in express terms the interference of the chancellor in such a state of case. *Ross v. Ross,* 3 Met. 274.

When the judgment at law shall have been satisfied, appellant may have a cause of action against either the payee in the note, or the owner of the judgment, under the provisions of Sec. 2, Chap. 42, R. S., or of Sec. 2, Chap. 47, Gen. Stat.

Which of these parties will then be liable to him is a matter that cannot properly be determined on this appeal.

Judgment *affirmed.*

W. H. Botts, for appellant.
Bohannon & Carter, for appellees.

V. K. HINES *v.* P. B. MCCORMICK.

Suit on Notes—Defense That Notes Were Given to Defraud Creditors—Statute of Limitations.

It is no defense to a suit on notes to set up an unlawful arrangement between the parties to defraud creditors. Such a defense comes in bad grace from a defendant who has been a party to such a fraud.

Statute of Limitations.

Where a right of action accrued in 1864, and the defendant left the state in 1866 and became a non-resident, the statute of limitations will not run in his favor while absent, and his occasional return for temporary purposes, without the knowledge of plaintiff, will not change the rule.

APPEAL FROM BUTLER CIRCUIT COURT.

October 6, 1874.

OPINION BY JUDGE COFER:

That $4,500 was the price agreed to be paid by the appellant for the Wilson notes is established by a decided preponderance of the evidence. This being established, it is not very material whether the receipt of the 6th of January, 1865, was fairly or unfairly obtained, or whether it was written as it now is, or has been changed since. There is no pretense that the whole debt has been paid, except on the assumption that the price agreed to be paid was $3,000, instead of $4,500, as we adjudged it to have been.

The effort to show that the arrangement between the parties was an attempt to defraud the creditors of the appellee, not only comes with bad grace from appellant, but utterly fails upon the evidence.

The plea of the statute of limitations is not sustained. The right of action accrued on the 10th of March, 1864; the appellant removed from this state in October, 1866, and has been a non-resident ever since. His occasional return to this state for temporary purposes, without the knowledge of appellee, will not entitle him to the benefit of the statute. *Ridgeley v. Price,* 16 B. Mon. 409; *Bennett, et al., v. Devlin, et al.,* 17 B. Mon. 353.

That appellant had property in this state, known to appellee, which might have been attached, does not prevent a suspension of the running of the statute during his absence from the state. It cannot be said that his absence did not obstruct the prosecution of an action against him. As well might it be said that a fraudulent deed was no obstruction or hinderance of creditors. It is true appellee might have attached appellant's property, and it is equally true that a creditor may disregard a fraudulent deed made by his debtor; yet it has never been held that such deed on that account did not obstruct or hinder creditors in the collection of their debts.

When a cause of action like this, "accrues against a resident of this state, and he, by departing therefrom * * * obstructs the prosecution of the action, the time of the continuance of such absence from the state * * * shall not be computed as any part of the period within which the action may be commenced." Sec. 9, Art. 4, Chap. 63, R. S.

That appellant's departure did obstruct the prosecution of the action, notwithstanding he had property here subject to attachment,

we have no doubt. The creditor was not bound to resort to the extraordinary proceeding by attachment, but had a right to wait until by personal service, he could not only reach his debtors' property, but could also obtain a personal judgment.

We perceive no error in the record, and the judgment is *affirmed.*

H. T. Craik, for appellant.
J. Ricketts, for appellee.

S. CRABTREE AND WIFE *v.* A. & S. ROSENFIELD.

Judicial Sale—Description of Land.

Where husband and wife live on the wife's land the fact that the husband owns an adjoining tract makes it no part of the homestead.

Description of Land.

A judgment for the sale of land will be reversed when neither the judgment nor the petition upon which it is rendered contains a description of the land.

APPEAL FROM DAVIES CIRCUIT COURT.

October 6, 1874.

OPINION BY JUDGE PRYOR:

The parties are living on the wife's land, and the fact that the husband owns an adjoining tract makes it no part of the homestead.

The judgment, however, fails to describe the land to be sold; nor is there any description whatever in the petition. For this reason it must be *reversed,* and the cause remanded with direction to permit the appellee to amend his pleadings, and for further proceedings consistent with this opinion.

Ray & Walker, for Appellants.
Riley & Jolly, for appellees.

E. H. O'DANIEL, ET AL., *v.* COMMONWEALTH.

Forfeited Recognizance—Suit on Weight of Evidence—Statute.

Where the evidence in a trial to recover on a forfeited recognizance is conflicting, the court of appeals will affirm the judgment of the lower court, for when the law and evidence is submitted to the trial court his finding has the same effect as the verdict of a jury.

Statute.

Pursuant to Crim. Code, § 94, if the defendants in a suit on a forfeited recognizance before judgment is entered surrender the defendant into court, the court has power to remit the whole or a part of the sum named in the bail bond; but setting up in an answer that they are willing to arrest the accused is not equivalent to actual surrender.

APPEAL FROM MARION CIRCUIT COURT.

October 8, 1874.

OPINION BY JUDGE PETERS:

Upon the return of these causes from this court, appellants filed a joint answer, which, by agreement was to be taken as their answer in both cases, and they were heard together, the law and facts having been submitted to the court.

In the answer, after reciting much irrelevant and immaterial matter, it is alleged in substance that Flanagan, the prosecutor, caused P. B. O'Daniel to be arrested on the charge of forgery in two cases, first that he had forged the names of Thomas Sherkcliff and E. H. O'Daniel as his sureties to a note to said Flanagan for $600.00, and second, that he had forged the names of E. H. O'Daniel, Joseas O'Daniel, and C. M. O'Daniel as his sureties to a note to said Flanagan for $1,000; that said P. B. O'Daniel was taken before C. A. Johnston, police judge of Lebanon, and by him placed in custody of said Flanagan as guard; that while said P. B. O'Daniel was in the custody of said Flanagan, and greatly intoxicated, Flanagan caused his deposition to be taken, and he proved that the persons whose names appeared on said notes as his sureties, authorized him to sign their names; and that said appellants signed said bail bonds to release P. B. O'Daniel from the confinement caused by said Flanagan; that after said Flanagan had taken the deposition of said P. B. O'Daniel as aforesaid, and had procured said bail bonds, and had abandoned the prosecution, E. H. O'Daniel and Thomas Sherkcliff having been summoned as witnesses to appear before said police judge at the time fixed, did attend and were ready to prove that their names were forged to said notes, but that Flanagan did not attend to prosecute, nor did P. B. O'Daniel attend in discharge of his recognizance.

The appellants further allege that P. B. O'Daniel is a resident of the county of Marion, had been in the presence of said police judge repeatedly since the forfeiture of his recognizance, was on the jury at the last term of the Marion Circuit Court, has never been indicted,

nor further prosecution for the alleged offenses, can be produced in court at any hour, and that they will produce him in court to answer said charges when made. They allege that said prosecutions against P. B. O'Daniel were gotten up by Flanagan, to extort from him the money on an unjust debt; that said P. B. O'Daniel was then in court as a witness for Flanagan, to prove that the persons whose names appear on said notes as sureties authorized him to sign their names, suit having been brought against them on said notes; that the commonwealth had lost nothing, as said P. B. O'Daniel could be at any time produced.

A jury having been dispensed with, the court rendered judgment against the appellants in each case; and this court is now asked to reverse those judgments.

On the trial some singular developments were made, but as the civil cases are yet to be tried, we forbear any comments on them, and content ourselves by saying that the evidence on the issues presented in the answer is conflicting, and in such cases this court cannot interpose, as the conclusions of the judge, when the law and facts are submitted to him, must have the same effect as the verdict of a jury.

Sec. 94, Crim. Code, provides that if, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail bond. If instead of merely saying P. B. O'Daniel was in court, appellants had surrendered him into court to answer to the charge, that course might have satisfied the court and ended the proceeding; but as appellants failed to adopt that course, and judgments have gone against them, this court has no power to relieve them.

Wherefore the judgment must be *affirmed.*

Thomas & Russell and Avitt, for appellants.
John Rodman, T. N. Lindsey, for appellee.

MAYSVILLE & LEXINGTON RAILROAD CO. *v.* JOHN SHAY.

Damages—Measure of Damages—Instructions—Negligence.

In a suit for damages against a railroad company for killing stock, the measure of the damages is the value of the stock killed and not such damages as the jury might believe plaintiff entitled to.

Instructions.

An instruction is erroneous which charges the jury, in a suit for damages against a railroad company, that if the horses were on the road far enough ahead of the cars to enable the engineer to stop the train or to retard the train's progress so that the horses could be driven off, and defendant failed to stop or retard the train, it was responsible for the value of the horses killed. Such an instruction did not even require that the horses should have been seen or have been in a position to be seen by the engineer.

Negligence.

All that is required of railroad employees in case horses are on the right of way in a position to be seen by them, is ordinary care and diligence, such as ordinary men or men of ordinary care and diligence would have used under like circumstances.

APPEAL FROM BOURBON CIRCUIT COURT.

October 8, 1874.

OPINION BY JUDGE COFER:

The jury were told in the first instruction given for appellee, that they should find for him such damages as they might believe from the evidence he was entitled to, instead of the value of the horses killed, which was the only criterion of recovery. They were also told in the same instruction, that if the horses were killed by appellant's cars, they should find for the appellee unless they believe that such killing was unavoidable. They should have been told that they should so find, unless they believe from the evidence, that those in charge of the train had used such care to avoid injuring the horses, as ordinary persons would have used under like circumstances.

The jury were told in the second instruction that "if the horses were on the road far enough ahead of the cars, to enable the engineer by proper means to stop the train before it reached the horses, or to retard the train's progress so that the horses could be driven out of all danger of collision, and defendant failed to stop or retard the train, the defendant was responsible for the value of the horses killed." This instruction did not even require that the horses should have been seen, or have been in a position to be seen by any one on the train, but if they came on the road when the train was so far away that it might have been stopped before reaching them, then the jury were told that appellee was liable.

We do not understand it to be the duty of those running trains to do more than to keep a prudent look-out for stock, and when it

is discovered on the track to take reasonable precautions to avoid injuring it. No general rule as to the particular things to be done can be laid down; that which would be a prudent precaution in one case, might be culpable negligence in another. Those running trains must act in view of the circumstances of such case, and whatever ordinary care and diligence dictates in view of the speed of the train, the condition of the road, the character of the ground on either side, and the habits of stock when on or near the track of a railroad when a train is approaching or passing. If stock is on the track, its opportunities to get off, and the probabilities, in view of all the circumstances, that it will do so, are matters to be taken into the account; and if, in view of all these things, there seems to be a greater probability that it will get off, than that it will remain on the track, those running the train may proceed, taking the usual methods of sounding the whistle, or ringing the bell to alarm the stock from the track; but if, notwithstanding the greater probability that it would leave the track and the precautions are taken to induce it to do so, it remains on the road and is killed, the company is not liable.

The third instruction for appellee does not correctly lay down the standard of such diligence and care as is required in such cases. All that is required of railroad employees in such cases, is ordinary care and diligence, that is, such care and diligence as ordinary men, or men of ordinary care and diligence would have used under like circumstances.

The judgment is *reversed* and the cause is remanded for a new trial.

R. H. Hanson, for appellant.
Thomas F. Hargis, for appellee.

R. B. EDELIN, ET AL., *v.* LAWRENCE BRADLEY, ET AL.

Pleading—Written Instruments.

Where a writing is the foundation of action, it must not only be filed, but so much of it set forth in the petition as will show that plaintiff, by reason of the acts or omissions on his part and on the part of the defendant, is entitled to relief. The facts essential to plaintiff's cause of action must be stated in the petition.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 8, 1875.

OPINION BY JUDGE PETERS:

This action was brought by appellees against appellants on a writ-

ing denominated by the pleader "A Bill of Acceptance," and it is alledged in substance in the petition that Porch & Cook, on the 11th of February, 1874, drew a bill of acceptance on one J. M. Bryant for $1,025, due four months after date, negotiable and payable at the Bank of Kentucky, in Louisville, Ky., accepted by said J. M. Bryant, and endorsed by appellants, Edelin, Huffaker, Shy and W. E. Snodely; that before its maturity the appellees caused it to be discounted in the bank, and on the day of its maturity they had it presented to the Bank of Kentucky, in Louisville, for payment, the place designated therefor in said bill, when and where payment was refused, and said bill was duly protested for non-payment, and due notice of protest was delivered to the drawers and all the endorsers. They filed the bill and the notarial protest with their petition, and made them parts of the same. They furthermore allege, in substance, that after the bill was protested they paid off and took up the same, and that they thereby became the legal holders and owners of it; that the cost of protest amounted to $2.25; that no part of said bill and fees for protest had been paid, but that the whole thereof was due and owing to them, and they pray judgment, etc.

Appellants demurred to the petition, and their demurrer having been overruled, and failing to answer further, judgment was rendered against them, and they have appeared to this court.

The only question presented is, do the facts stated in the petition constitute a cause of action? It has been so often decided by this court that where a writing is the foundation of an action, the writing must be filed, and so much of it set forth in the petition as will show that the plaintiff by reason of the acts or omissions on his part, and of those on the part of the defendant, is entitled to an action and to relief, that it certainly cannot be necessary to cite the authorities. Has that been done in the case before us? As appellees allege, they are the legal holders and owners of the bill, but who are or were the payees thereof? On that subject the petition is silent.

If there was no payee, the writing is neither a bill of exchange nor a promissory note; but if it is made payable to any one, then with that addition to what is said of it in the petition, it would have all the essentials of and is in fact a bill of exchange. And there being a payee or payees, who is the owner or are the owners, the facts should have been alleged to show that they had parted with their title, and that appellees had become invested therewith. But these necessary facts are not set out in the petition, and it is therefore defective; nor

is that defect remedied by referring to and filing the writing which is the foundation of the action as a part of the petition.

Sec. 118 of the Civil Code requires that the facts constituting the plaintiff's cause of action shall be stated in the petition. And in construing this section of the Civil Code this court has said that the petition must contain in its own body, and not merely by reference to another paper, a statement of the facts constituting the cause of action. *Hill, for the use of Wintersmith, v. Barrett, et al.*, 14 B. Mon. 67; *Collins, et al., v. Blackburn, Ibid.* 203. See also, *Riggs, et al., v. Maltby & Co.*, 2 Met. 88.

It is further objected to the petition that the allegation in relation to the presentation of the bill for payment and the notice of protest, are insufficient to charge appellants.

In *Brown & Son v. Hall*, 2 A. K. Marsh 599, it is said in a judgment taken by default, the material and traversable allegations of the declaration must, no doubt, be taken as true; but those which are not material or traversable cannot be so taken; and the days alleged when the bill was presented and the notice of protest was given, are of the latter character.

Had the defendants pleaded, the plaintiffs might have shown that the bill was presented and the notice of the protests given on days different from those alleged, and, of course, under the averments that the bill was duly presented, and that notice of protest was given in due time, it would have been competent for him to show that these things were done in reasonable time.

These averments, therefore, and not the days when the presentment of the bill alleged to have been made, or the notice of protest given, are material; and consequently the former, and not the latter, are to be taken as true. It seems, therefore, that the allegations of the time of presentment of the bill for payment, and of the notice of protest, must be regarded as sufficient, while it is safest to state the time as well as manner of giving the notice.

But for the reasons stated the judgment must be *reversed,* and the cause remanded with directions to sustain appellants' demurrer to the petition, and for further proceedings consistent herewith.

Gibson & Gibson, for appellants.
Dupey & Middleton, for appellees.

S. SALOMAN *v.* P. B. JONES.

Suit at Law—Motion to Transfer to Equity Docket—Waiver.

Where a suit is brought on a note and the defense is made on the ground of mistake in its execution, the defendant should move to have the cause transferred to the equity docket.

Waiver.

Where a defense is made in a suit on a note, that there was a mistake in its execution, and the defendant fails to have the cause transferred to the equity docket, he waives his right to have the cause tried as an equity cause.

APPEAL FROM BOURBON CIRCUIT COURT.

October 8, 1874.

OPINION BY JUDGE LINDSAY:

Appellant defends the action upon the ground of mistake in the execution of the note sued on. The mistake and its character are sufficiently averred, and if the proof should support the plea, it will show that the note should have been so drawn as to bind The Kentucky Gas Carbonizing Company, and not the appellant, the manager of said company.

Even if appellant's defense be treated as equitable in its nature, it was not essential that at the time he filed his answer he should move to transfer the cause to the equity docket. If he had moved to do so, then the appellee might have required the bond provided for in Sec. 11, of the Civil Code. Failing to move to transfer, he loses the right to have the issue tried as in equitable proceedings. If neither party shall ask to have an equitable issue tried by the chancellor, the error as to the character of the proceeding is deemed to be waived, and the action must proceed to trial, under the rules governing ordinary actions.

Hence the failure of appellant to move to transfer to equity was no ground for demurrer. The answer presents a complete defense, and the questions of fact arising thereon must be determined by a jury.

Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

Brent & McMillan, for appellant.
Thomas F. Hargis, for appellee.

HENRY MAGILL *v.* R. D. WATSON, ET AL.

Action to Recover Personal Property—Averments in Petition.

In an action to recover possession of personal property the petition must allege the value of the property sought to be recovered.

APPEAL FROM DAVIES CIRCUIT COURT.

October 9, 1874.

OPINION BY JUDGE LINDSAY:

Although this action was prosecuted by equitable proceedings, it is in all its characteristics an action to recover the possession of specific personal property. The petition described the certificates of deposit with as much accuracy as it was possible under the circumstances to do; but it was defective in failing to allege the actual value of the thing sought to be recovered.

This defect, however, was not objected to, and would now be unavailing if the judgment of the chancellor had cured it. The evidence as to the possession by appellant without right of the certificate of deposit for four thousand dollars, and as to the right of appellant to recover, is clear and conclusive; but the judgment must be reversed, because it fails to conform to the provisions of Sec. 360, of the Civil Code of Practice. It fails to assert the value of the property to be recovered, and is not in the alternative, as it should be. Appellant fails to make out his claim to the balance due on the capital stock in the Southern Bank of Kentucky. His cross-petition was properly dismissed.

The judgment in favor of appellees is *reversed,* and the cause remanded with instructions to amend their petition, should they offer to do so within a reasonable time, and in case such amendment is made, then for a judgment conformable to this opinion.

Judge Cofer not sitting.

Sweeney & Stuart, for appellant.
Ray & Walker, for appellees.

WILLIAM H. HAYNES *v.* ISHAM BOLIN.

Appeal—Bill of Exceptions—Pleadings.

Court of appeals will not consider evidence said to have been submitted to the trial court when the same is not made a part of the record by a bill of exceptions.

Pleadings.

Where there is a bad answer to a bad petition, the judgment will not be reversed at the instance of the party who first committed error in his pleadings.

APPEAL FROM RUSSELL CIRCUIT COURT.

October 9, 1874.

OPINION BY JUDGE COFER:

This was an ordinary action, and there is no bill of exceptions showing what evidence was heard by the circuit court; and although there is a large amount of what purports to be the evidence heard by that court, we cannot, as we have very often decided in similar cases, consider it at all upon the appeal. The case must, therefore, be decided on the pleadings. The judgment for appellee was for less than the amount of the note sued on, and the judgment must be affirmed as to him, his set-off having been controverted by the reply of appellee.

It is insisted for appellee, who prosecuted a cross-appeal, that the answer to his amended petition setting up an account against appellant, is insufficient, and that it should have been taken for confessed, and judgment rendered for the amount of the account. If the amended petition had been in the usual form of a petition on an account, we should have regarded the answer to it as insufficient as to most of the items; but when we consider the amendment, we are of opinion that the answer was as good as the petition; neither are sufficient, but as both parties have proceeded upon bad pleas, and they and the court have treated them as sufficient, and tried the case on its merits, we cannot reverse the judgment at the instance of the party who first committed error in his pleading.

The usual form of a petition on such an account would be to charge that the defendant was indebted to the plaintiff for cash loaned, services rendered, and so forth, setting out the particulars "all of which was done, furnished, etc., at the special instance and request of the defendant," etc.; but the allegation in this case is that the defendant, "in the sum of $734.19 for services, items, and charges set forth and contained in the bill of particulars herein filed as a part hereof, marked A, asks leave to file this amended petition, because the defendant justly owes him every dollar of said account A, subject to a credit for boarding which, upon fair settlement, will leave defendant largely indebted to this plaintiff in addition to, and over and above the note sued on." No judgment

could have been rendered on such a pleading, if wholly unanswered, and the utter impossibility of doing so legally is made still more manifest, if possible, by the prayer with which it concludes, which is, that he "prays judgment as in his original petition, and also on this account, or so much of it as may be found due him, and for all proper relief." So far from taking such a pleading for confessed, the court could not have made it the basis of a judgment if unanswered, and if the judgment for appellee exceeded the amount of the note sued on, we would be compelled to reverse it. Perceiving no available error to the prejudice of either party, the judgment is *affirmed* on both original and cross-appeal.

Owsley & Burdett, for appellant.
Collins & Hays, for appellee.

T. D. COSBY, ET AL., *v.* LUTHER T. FENLOCK, ET AL.

Infants—Sale of Real Estate—Descent.

The interests of infants in real estate cannot be sold except by following the steps pointed out in the statute.

Descents.

Where land is derived by descent from the mother, the real estate of an infant, by the law of descent, passes to the next of kin on the mother's side.

APPEAL FROM HART CIRCUIT COURT.

October 9, 1874.

OPINION BY JUDGE PRYOR:

The interest of the infants in the land could not be sold except in the manner pointed out by the statute. A bond should have been executed, commissioners appointed, and report made as prescribed by the statute, under a petition filed by the statutory guardian.

Unless it is alleged and proven that the interest of each party in the land does not exceed in value $100, this formula is dispensed with and the land may be sold on the petition of any party interested, by making all others parties to the proceeding.

The grandfather of the deceased infant was also entitled to his share in the land. The land was derived by descent from the mother, and in such cases by the law of descent the real estate of the infant passes to the next of kin on the mother's side.

The husband and father of the infant was, however, entitled to curtesy. The unity of possession existed as between all the children of Cosby, and the possession in fact by one, or a tenant under him, was the possession of all.

No title to the interest of the infant defendant passed by the sale under the judgment. The judgment is *reversed* and the cause remanded for further proceedings not inconsistent with this opinion.

H. C. Martin, for appellants.
George Danan, for appellees.

M. LEIBER *v.* MARY HAGGERTY, ET AL.

Deed—Fraud or Mistake of Draftsman—Evidence—Possession.

Before a person can recover real estate not included in a deed, because of a claim that it was not included on account of the fraud or mistake of the draftsman, he must establish the truth of such charge by a fair preponderance of the evidence.

Possession.

In order to show adverse possession of real estate it must be made to appear that the person claiming to be possessed had in fact the possession manifested by some act or fact sufficient to indicate to others that fact. There must be some open demonstration of actual occupancy, or at least of intended use, whereby the person bargaining for it may have the means of ascertaining that it is in the adverse possession of another.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 9, 1874.

OPINION BY JUDGE PETERS:

The controversy in this case grows out of conflicting claims to fractional parts of lots adjoining business houses of the parties in Paducah, derived from one common source, and the loss of which by either will materially affect the value of their property.

By appellees it is admitted that its deed does not cover or include the property, but it is contended that it was omitted by the fraud or mistake of the draftsman. It is clearly established by the evidence that the original draft of the deed from Watts, Given & Co., the owners of the property, to appellees was prepared by J. Campbell, and sent to one of the grantors therein named, who was to procure its execution; that that draft was not signed; but another deed was

drawn by Bann, a clerk in the house of the grantors, executed by them and put to record. In the one prepared by Campbell, he states pretty confidently in his testimony the fractional parts of said lots were included, and he is corroborated by the testimony of Hughes, the cashier of the branch of the Bank of Louisville, at Paducah, with whom Campbell, the president of said branch bank, consulted, and between whom there were frequent conversations on the subject.

On the other side, the deposition of D. A. Given, a member of the late firm of Watts, Given & Co., was taken, who proves that he negotiated and consummated the trade on the part of his firm for the sale of the houses to appellees; he further proves that he agreed to sell the corner property, consisting of three store rooms fronting on Broadway, and the warehouse immediately in the rear, for $65,000, and the new warehouse owned by J. W. Shriver & Co., on Market street for $15,000; this proposition was accepted and carried out; that he never tried to sell the fractional part of the ground, and never intended it in the sale made by him; that he measured the warehouse property in the rear of the Broadway stores to ascertain if the house covered 100 feet, and according to his recollection he gave Judge Campbell the measurement and boundaries written probably in pencil, so that he might be governed by it; that the deeds were written and immediately upon being handed him, he inclosed one to Shriver, at New Orleans, to be signed and returned, intending, when he received it, to sign and acknowledge the others; that they were lying on his desk, and he was about to sign them when T. F. Ferrell, who was in the office, looked over the deed and remarked that if he was in his, the witness's place, he would not let his wife sign it, for the reason, as he said, that the deed as drawn up made his wife guarantee the title, etc., instead of relinquishing her dower, and her individual property might be liable for a defect of title. He then called Mr. Robb, and directed him to copy the deed verbatim, except to leave out the names of the wives of the grantors, and at the close to insert the usual clause of relinquishment of dower, all of which was done, and the deeds signed, acknowledged, stamped and delivered to the proper parties for record.

Robb's deposition was taken, and he proved that he copied the deed, and it was only changed as stated by Given, and Given and Robb are sustained by Terrell. The evidence, therefore, in the case, is not sufficiently clear and satisfactory of either mistake or fraud in the deed to authorize the chancellor to modify or change it. But it is insisted that appellees were in the actual adverse possession of

the vacant fractional parts of said lots at the time appellant purchased, and his deed is void under the act against champerty. The possession of land which will render the conveyance of the same land champertous and void, must be an actual adverse possession, manifested by some act or fact sufficient to indicate to others that the person claiming to be possessed, had in fact, the possession. There must be some open demonstration of actual occupancy, or at least of intended use, whereby the person bargaining for it may have the means of ascertaining that it is in the adverse possession of another. *Cardwell v. Sprigg's Heirs,* 1 B. Mon. 369; *Moss, et al., v. Scott,* 2 Dana 275; *Lillard v. McGee,* 3 J. J. Marsh. 549.

Appellant, in seeking to be informed whether appellees were invested with title or claimed the ground, would naturally look to the deed under which it claimed, and when he shall have examined that document he will have found that the estate purchased by appellees is defined by lines and distances, scrupulously exact even to inches, and excluding the fractional parts now claimed by him. These fractional parts are not fully inclosed with the houses purchased by appellees. There is only a part of a fence on them, and there are no acts or real facts proved to indicate an adverse possession in appellees. The deed under which it derives title to property adjacent, is dated the 15th of November, 1867. Appellant's deed is dated the 25th of February, 1868. There is no claim of possession by appellees prior to November 15, 1867. Between that time and the date of appellant's deed, the record discloses no act of notoriety on its part, and no fact indicating an intention to enter upon and hold these controverted parts of lots adverse to Watts, Given & Co., and in the absence of such evidence appellant's deed must prevail. Wherefore the judgment is *reversed* and the cause is remanded with directions for further proceedings consistent herewith.

G. W. Craddock, for appellant.

L. D. Husbands, for appellees.

W. R. COVINGTON *v.* MARY B. SCOTT.

Judgment—Clerical Misprision—Motion.

A clerical misprision is the erroneous entering or recording of a judgment rendered by a court, and may be corrected by motion.

Judgment Correctly Entered.

A judgment correctly entered but which is erroneous cannot be corrected by motion, but must be appealed from.

APPEAL FROM WARREN CIRCUIT COURT.

October 9, 1874.

OPINION BY JUDGE LINDSAY:

There is nothing upon the face of the judgment of August 13, 1864, indicating an error upon the part of the clerk in entering it in the order book. It is true it speaks of the sum ordered to be paid into court, as the amount of these notes, when as matter of fact the petition set up four notes; but it further appears that the circuit court judicially determined that the payment into court of said sum, discharged the lien on the land sold by Simpson's executor to Covington, and that it made up the full balance of the purchase money due by Covington. It is possible that this judicial determination was erroneous, and that upon appeal the judgment of the circuit court would have been reversed; but the mistake of the court in ascertaining and adjudging the amount of the indebtedness was an error of judgment, and not a clerical misprision. We understand a clerical misprision to be the erroneous entering or recording of the judgment actually rendered by the court. An error of this character will always be corrected upon motion, when there is anything in the record to correct by, and it is immaterial whether the mistake be occasioned by the court or the clerk; but when the judgment actually rendered is correctly entered or recorded, it can, in no case, be treated as a clerical error, although it may be manifestly erroneous.

Appellee, in her notice, does not assume that there was any mistake made by the clerk, but that there had been a mistake made in the calculation of the interest due on the notes sued on. It is palpable from the record, that this calculation was not made by the clerk, and that the mistake in this regard (if one was made) was the mistake of the parties or of the court, in ascertaining the amount due, and that it was in no sense a clerical error. The circuit court did not adjudge that there was a clerical misprision, but that Covington had not paid into court the full amount of his indebtedness, and therefore it further adjudged that he should pay to appellee the further sum of $820, with interest from August 13, 1864. This was substantially a reversal of so much of the judgment rendered nearly nine years before, as determined that the full amount due on the notes had been paid into court, and the lien thereby discharged. It is not pretended that the circuit court has any such power as this.

The judgment of February 19, 1873, is *reversed* and the cause remanded with instructions to dismiss the motion.

A. Duvall, J. P. Bates, for appellant.
A. James, for appellee.

JOHN UPSHAW *v.* LEVI JACKSON.

Vendor's Lien—Descent to Heirs.

Where notes given for the purchase of real estate expressly reserve a lien on the land, such land may be subjected to the payment thereof, even when it has descended to vendee's heirs.

APPEAL FROM FULTON CIRCUIT COURT.

October 10, 1874.

OPINION BY JUDGE PETERS:

It is not perceived by the court that the judgment is for more than the principal and interest due on the two notes sued on after deducting all proper credits.

In the deed made by appellee to appellant and Hugh S. Upshaw for the land, for which the notes were executed, on which this suit was brought, a lien for their payment is expressly reserved, and the judgment is to subject the land therein conveyed to the payment of the debt. It is true that by the terms of the judgment appellee is authorized to sue out an execution on his judgment before selling the land, and if he can thereby make his debt, the land will not be sold. It appears from the evidence that estate sufficient to pay the debt descended from the father of appellant, who was the original debtor to satisfy this and any other debts remaining unpaid.

Perceiving no error in the judgment prejudicial to appellant, the same is *affirmed.*

T. O. Goalder, Major & Jett, for appellant.
A. J. James, for appellee.

MORG LONG *v.* C. H. SPILLMAN.

Jurisdiction—Real Estate—Title Bond—Description—Judgment.

When the title to real estate is involved in an action, the circuit court has jurisdiction, and there is a right of appeal from its judgment even though there is only $13.10 involved.

Title Bond.

Where a person has been in possession of and paid the taxes upon real estate for nineteen years, and has not received a conveyance because she feared her creditors, and to protect her against them her vendor failed to make conveyance, her real estate is subject to the demand of creditors.

Description—Judgment.

A judgment ordering the sale of real estate will be reversed where the real estate is not described except as "the house and lot in the pleading mentioned." Such a judgment is also erroneous when it fails to direct the manner in which the sale shall be advertised.

APPEAL FROM MERCER CIRCUIT COURT.

October 12, 1874.

OPINION OF JUDGE LINDSAY:

The parties interested and the attorneys engaged in this case, have exhibited equal energy, and perseverance worthy of a more important cause.

The title to the house and lot occupied by Lucinda Long, and claimed by the appellant, is directly called in question, and therefore the circuit court had jurisdiction, although the claim asserted amounts to only $13.10. For the same reason an appeal lies to this court. Sections 15 and 16, Civil Code of Practice; *Smith v. Moberly & Wife,* 15 B. Mon. 70.

It seems that the lot was purchased in 1851, and that the debtor, Lucinda Long, at once entered upon the possession, and that she openly held, used and controlled it up to the time of the institution of this action in October, 1870. It further appears that during all this time she paid taxes on it, appellant paid no taxes and exercised no supervision or control over the lot, so far as is shown by the record, except on one occasion, when Lucinda abandoned the possession for a short time on account of a general misunderstanding with her.

Appellant's only evidence of title is the title bond of Passmore, which she holds; but the fact that she does hold said bond is explained by her statements to Passmore, that she did not desire the title conveyed, because Lucinda was in debt, and she feared that her creditors would turn her out of doors.

Considering these explanations and the nineteen years of possession by the debtor, Lucinda, the court did not err in adjudging that appellant held the bond for title in fraudulent trust for her, and that

the house and lot was liable to be subjected to the payment of appellee's debt.

The judgment is erroneous, however, in two particulars. It fails to describe the realty adjudged to be sold, except by designating it "The house and lot in the pleading mentioned." This leaves the commissioner to determine judicially what house and lot is mentioned in the elaborate and by no means concise statements of fact, which the parties deemed it necessary to make in order to present their cause of action and the defenses relied on.

Further than this, the judgment fails to direct the manner in which the sale of the house and lot shall be advertised. It provides that it "must be advertised according to law." The law does not fix the manner of advertising lands sold under the judgment of the chancellor. This matter is left entirely to his discretion, and unless this judgment directs the commissioner how he shall advertise, it is necessarily erroneous.

The motion to dismiss the appeal is overruled, and the judgment *reversed* and the cause remanded for the correction of the errors herein pointed out. Inasmuch as appellant's judgment for costs in this court will greatly exceed appellant's claim, she should be allowed, in case she asks leave to do so, to have said judgment, or so much thereof as may be necessary, set off against said claim, and the necessity for the sale of the realty, thereby avoided; but appellee will be entitled to his costs in the court below.

Jas. D. Hardin, C. A. & P. W. Hardin, for appellant.
Spillman & Spillman, for appellee.

R. L. GARVIN *v.* H. S. SHOWDY, ADM'R.

Final Judgment—Power to Change.

When, in a suit by an administrator against heirs and creditors to settle an estate as insolvent, an issue is made between a creditor and the estate, which is referred to and reported by a master, who hears the evidence, and upon exceptions being filed to the report, it was heard and overruled by the court and judgment entered against the claimant, such judgment is final and the trial court has no power after the term of court ends to permit the creditor to withdraw his claim and then modify his judgment.

APPEAL FROM HART CIRCUIT COURT.

October 12, 1874.

OPINION BY JUDGE PETERS:

It appears from the bill of exceptions and agreement of the parties that appellee, as administrator of P. G. Rowlete, deceased, had instituted a suit in the Hart Circuit Court against the heirs and creditors of said decedent, to settle the estate as insolvent. Appellant, on his petition filed in that suit, was made a defendant, and presented the same demand against decedent's estate, upon which this action was brought, and sought judgment therefor. His claim, with others, was referred to the master to hear proof and to be reported on. After hearing the evidence, the master reported adverse to appellant's claim, and he excepted to so much of the report as rejected his claim. At the May term, 1872, of the Hart Circuit Court, his exceptions were heard by the court and overruled. At the following November term of the court, he procured leave of the court to withdraw his claim for the purpose of prosecuting a suit at law on it against appellee, and the court at the same time so modified the injunction inhibiting the creditors of said intestate from prosecuting several suits for their respective demands, as to permit appellant to sue at law on his demand. These facts appear from the bill of exceptions and the agreement of the parties.

The first question for consideration is whether the order overruling appellant's exceptions to the master's report, and confirming the same, in a final order. The court certainly therein adjudged that appellant has failed to establish his claim, and the litigation between him and appellee as to that matter was terminated; and that being the case, the power of the court over that order, being final in its character ceased at the expiration of the term at which it was made, and the permission given by the court to appellant to withdraw his claim and prosecute an action at law on it, could not deprive appellee of the right to rely upon the judgment rendered in the former suit between the same parties for the same cause of action, as a bar, and which as such must be availing.

Judgment *affirmed.*

Bohannon & Carter, for appellant.
J. W. Garvin, for appellee.

W. K. DENNY *v.* ALMA MILLER.

Slander—Pleading Defenses—Record—Evidence—Character of Plaintiff —Competency of Parties as Witnesses.

Each separate defense must be set forth in a separate paragraph, each must be complete in itself, and the averments of one cannot aid the deficiency of others.

Pleading Defense.

An answer in a slander suit which admits that the slanderous words were spoken, but which avers that the defendant but repeated words of another, which at the time he believed were true, is bad which fails to aver that the speaking of the words was without malice.

Record.

An answer tendered by appellant and rejected by the court, not made a part of the record by bill of exceptions or order of court, is not a part of the record and will not be considered.

Evidence.

It is error for the trial court to permit witnesses, over objections, to give their opinion as to the effect of the speaking by appellant of slanderous words, upon the character and feelings of plaintiff. The witnesses should have been confined to the statement of facts, leaving the jury to form its own opinion as to their effect.

Character of Plaintiff.

Injury to character is the gravamen of an action for slander and goodness of plaintiff's character may always be proven in aggravation, just as bad character may be shown in mitigation.

Competency of parties as witnesses.

In an action where an infant is a party the defendant is not a competent witness, under the statute providing that in an action or special proceeding, in which the adverse party is an infant, where such infant does not testify, the other party is incompetent.

Evidence.

In a suit for slander it was error for the court to exclude evidence offered by the defendant showing that he had explained to some persons that the statements made by him were based upon the fact that another had been guilty of the offense. Such evidence would tend to show that defendant had no intention to injure the plaintiff and should have been allowed.

APPEAL FROM LINCOLN CIRCUIT COURT.

October 12, 1874.

OPINION BY JUDGE COFER:

A verdict and judgment having been rendered against the appellant in an action for slander, and his motion for a new trial having

been overruled, he has appealed and seeks a reversal upon various grounds, which will be stated and disposed of in the order in which they arose. The answer of appellant contained five paragraphs. The appellee filed a general demurrer, but whether it was noted and treated as a demurrer, is the first question to be decided.

Before proceeding to a discussion of the question, we remark that each separate defense is required to be set forth in a separate paragraph (Sec. 125, Civil Code); and that each paragraph must be complete in itself (27 Barb. 376); and that the merits of one paragraph cannot, on demurrer, be brought in aid of the allegations of another, without appropriate reference is made in the paragraph demurred to, to such other averments (18 Barb. 260).

In the paragraph to which the demurrer was sustained, the appellant admitted the speaking of words charged in the petition, but attempted to avoid liability by averring that he repeated that which one Joseph J. Jones had told him; that he believed the statements so made to him by Jones were true, and that at the time of speaking the words he gave Jones as his authority; but it is not denied in this paragraph that the words were spoken in malice by the appellant, nor is it averred that Jones spoke the words with malice.

If it be conceded that one who hears a slander and repeats it, giving the name of its author at the time, is not liable if he did so without malice, still the paragraph in question was insufficient to bar the action. The words spoken are admitted to have been false, and being slanderous, were *prima facie* actionable; and although appellant may have heard them from Jones, and may have believed them to be true, yet if he uttered them with actual malice he would be liable. It was therefore necessary to aver that the speaking of the words were without malice. *Williams v. Greenwade & Wife,* 3 Dana 432; 2 Chitty's Pleadings 506.

Nor can this paragraph be sustained on the ground that the appellant spoke the words charged in good faith, in the discharge of a social duty, in an effort to discover the authors of crime. In order to do this it ought to appear from the pleading, that he made the communication privately and in good faith, to discreet persons, for the simple purpose of procuring their advice and aid and stimulating their vigilance in discovering the truth regarding the supposed crime, and in the detection of its perpetrators, and that he gave no more publicity to the statement than was reasonably necessary for that purpose. *Grimes v. Coyle,* 6 B. Mon. 301; *Williams v. Greenwade & Wife,* 3 Dana 432.

These facts are substantially set forth in another paragraph, but as these paragraphs do not purport to be pleas in bar, but are expressly pleaded in mitigation, they furnish no basis upon which to predicate instructions to the jury authorizing them to find for the appellant.

The amended answer tendered by appellant and rejected by the court is not made part of the record, either by bill of exceptions or order of court, and is not a part of the record; and we cannot, therefore, decide that the court erred in refusing to allow it to be filed.

The court, against the objections of appellant, allowed the appellee to give in evidence the opinion of several witnesses as to the effect of the slanderous words of appellant upon her character and feelings, and to prove that Cardwell Campbell's son, who is charged with the words, for uttering which the appellant was sued, and who had seduced her, was an elder in one, and the appellant was an elder in another branch of the Presbyterian Church. This was error. The witnesses should have been confined to the statement of facts, leaving the jury to form their own opinions as to their effects. Evidence calculated to arouse either political, religious or church prejudices, should have been carefully excluded from the jury.

The appellant also objected to proof of the good character of appellee, but the court overruled the objection, to which an exception was taken, and counsel for appellant now insists that the court erred in so ruling. Injury to character is the gravamen of the action of slander, and goodness of character may be proved in aggravation, just as badness of character may be shown in mitigation. *Williams v. Greenwade & Wife*, 3 Dana 432.

The rejected deposition of Mip Hester was incompetent. The disgusting details of her wrongs and sufferings could have served no legitimate purpose in this case. They did not tend to prove any fact in issue between the parties, and the rejection of her deposition did not prejudice the rights of appellant.

The appellant was not a competent witness. The statute (Sec. 25, Chap. 37, General Statutes) provides that no party shall be allowed to testify by virtue of Section 22, in any action or special proceeding where the adverse party is an infant, unless the infant testifies in his own behalf. The appellee was an infant, and did not testify on her own behalf, and appellant was, therefore, clearly a competent witness in his own behalf. It was error to refuse to allow the appellant to prove by Miller that, in his opinion, it was unfortunate for appellee that he had told what Jones had told him. The jury, and not the

witness, should decide that question; but, besides this, the proposed evidence was predicated upon the assumption that appellant had told just what Jones told him, while one of the questions in the case was whether he had in fact told the story as he heard it from Jones, or not.

The only issue presented by the answer was made by the first paragraph, which was in these words: "The defendant, W. K. Denny, answers plaintiff's petition, and denies that the words spoken were spoken by the defendant of and concerning the plaintiff. But he admits that he spoke the words hereinafter stated." All that he denied by this paragraph was that the words were spoken of or concerning appellant; that they were spoken is admitted. The application of them to appellee is the only thing denied, and was the only thing necessary to be proved, and if this was proved she was entitled to a verdict, and the instruction so told the jury. It was unnecessary to tell them that they must also believe the words were spoken with malice. This was denied; and if it had been, the speaking of the words, which was not denied, raised a presumption of malice; and proof that the words were spoken of appellee with the presumption of malice arising from the false charge of crime, was sufficient to entitle her to a verdict. It would have been better, however, if the court had told the jury that the appellant admitted the speaking of the words, but denied their application by them to appellee, and if they believed from the evidence he did apply them to her, they should find for the plaintiff.

As the judgment must be reversed for error in admitting incompetent evidence, and the instructions given are voluminous, and those asked by the appellant and refused are too erroneous to be discussed within the bounds of an opinion, we will content ourselves with a simple statement of the principles of law regarded as applicable to the case.

Such words in the petition as are slanderous should be set forth in an instruction, and the jury should be told that if the defendant, in uttering them, applied or intended to apply them to the plaintiff, they should find for her such sum as, under all the circumstances of the case, they should deem right, not exceeding twenty thousand dollars, the amount claimed in the petition; but unless they believed the words were applied to her, they should find for the defendant; and that if they should find for the plaintiff, they should, in determining the amount of their verdicts, take in consideration, on the one hand such facts and circumstances in evidence as tended to prove, and

such on the other hand as tended to disprove, an intention on the part of the defendant to injure the reputation of the plaintiff.

There was no issue of malice, or no malice in the case. The existence of malice prompting appellant, if he applied the words to appellee, was properly to be considered by the jury; but instructions predicated upon a part of the evidence tending to show, on one hand, an intention to injure her good name, and on the other to show that appellant's motives were good, and that he had no special intention to defame her, should not have been given. Whether a particular state of fact tends to prove or to disprove bad motives on the part of the appellant, is the proper subject for argument, but is not a proper predicate for instructions by the court, which should be confined as closely as possible to the issues made by the pleadings.

To predicate an instruction on part only of the evidence relating to the particular point embraced in the instruction, is calculated to give that part of the evidence special prominence, to withdraw attention from, or to subordinate other evidence which they ought to consider.

The exclusion of the evidence tending to show that appellant had explained to some persons that the statements by him were based upon the fact that another had been guilty of the offense, unless he had made such explanation to all to whom he had communicated the slanderous words, was error. The only legitimate use of such evidence was to show that the appellant had no intention to injure the appellee, and while if he had gone to all to whom he had repeated the slander and explained the mistake, the inference from that fact would have been stronger than from an explanation to a part only of such persons, yet the difference would have been in degree only.

The fourth instruction given at the instance of the appellant, to the effect that evidence of all feeling between Cardwell Campbell's son, and the appellant, was not competent to prove an intention on the part of the appellant to injure the character of the appellee, should not have been given. Appellee, though not the child of Cardwell Campbell, was a member of his family, and appellant was charged with having said that he had seduced her, and by the implication, at least, he had sent her away and procured an abortion to be produced upon her person, an evidence of ill-feeling toward him was competent, as tending to prove an intention to defame and injure her character. But the jury could have been cautioned not to allow any injury that may have been done to Campbell Cardwell, to increase their finding for appellee.

For the errors indicated, the judgment is *reversed* and the cause is remanded for a new trial, upon principles not inconsistent with this opinion.

G. H. Breck, William Chenault, for appellant.
Dunlap, C. F. Burnam, R. M. & W. A. Bradley, for appellee.

JOHN M. READY, JR., ET AL., *v.* D. R. COLLINS.

Guardian and Wards—Sale of Real Estate—Supplemental Proceedings.

A proceeding for the sale of the wards' real estate where such wards were not made parties is ineffectual to divest them of title.

Supplemental Proceedings.

Where in an original proceeding to sell a ward's real estate, no good title is conveyed because the ward was not made a party thereto, a supplemental proceeding pursuant to the statute of September 30, 1861, (Myer's Supp. 424) may result in a judgment of the court confirming such sale and conveyance.

APPEAL FROM GARRARD CIRCUIT COURT.

October 13, 1874.

OPINION BY JUDGE COFER:

The original proceedings by the guardian were clearly defective. The infant owners of the land were not parties to the record, and the judgment and sale would not have invested the appellee with their title. They were parties, however, to the supplemental proceedings, which seem to have been in all respcts according to the statute of the 30th of September, 1861, Myer's Supp. 424. All that is required by that act, is that the guardian shall file an amended petition making his wards either plaintiffs or defendants, reciting the facts of the former proceeding, judgment and sale, and averring that the sale, as made, was beneficial, and had redounded to the interest of the infants; and upon proof being made of the truth of the statements of the petition, the court had power to render a judgment confirming the former judgment, and the sale made under it, which, when done, would have rendered the judgment and sale as valid and binding in all respects as if the original proceedings had been in every particular according to the requirements of the law. The evidence leaves no room to doubt that the sale was beneficial to the infants, and it is clear that a judgment confirming the sale might and ought to have been rendered, unless there was such defect in the title, or incumbrance on the land, as to entitle appellee to avoid the sale on that ground.

No commissioner's report was necessary in this supplemental proceeding, either to show the net value of the real and personal estate of the infants, or its annual profits, or that their interests required the sale, or would be promoted by it. Such matters as are required to be stated in the petition and proved to the satisfaction of the court, may be proved by any competent evidence, and a report by commissioners was not necessary. Nor does it matter that a part of the proceeds of the sale of the land will be required to pay the debts of Mrs. Ready, or to satisfy the claim of the life tenant; indeed, if all the proceeds should be required for those purposes, the infants may own other estate which will be relieved from liability for the debts of their mother that will be paid out of the money arising from this sale, but whether so or not is not important. The only thing appellee has a right to demand, is that he shall get good title to the land he bought, and this he can now get beyond any doubt, by a judgment confirming the former judgment, and the sale made under it. Nor can he avoid the sale because no bond of the guardian is in the record; the court must presume that a proper bond was taken, and its subsequent loss cannot affect the validity of the supplemental proceedings. But if the bond cannot be found on the return of the cause, the court should require the guardian to execute a new bond, and upon his failure to do so, should order the purchase money to be collected by the receiver, and held under orders of the court until such bond is given.

The appellee was bound to take notice of any defect in the title or incumbrance on the land disclosed by the title papers on file in the case. *Huber v. Armstrong's Widow and Heirs,* 7 Bush 591. The deed from Davis to Miss Ready was on file, and shows the nature and extent of the reservation contained therein, and as it was appellants' duty to know it, it is their misfortune if they did not know it.

The court, therefore, erred in dismissing the amended petition of appellants and refusing to confirm the sale, and the judgment is *reversed* and the cause is remanded with directions to confirm the sale, and for further proceedings consistent with this opinion. The cost of the proceedings on the amended petition, except the taking of depositions by appellee concerning the reservation in the deed from Davis, should be paid out of the proceeds of the sale.

R. M. & W. O. Bradley, Owsley & Burdett, for appellants.
Felix G. Fox, for appellee.

GEORGE MCLEOD'S ADM'R *v.* HENRY AMENT'S ADM'R.

County Court Jurisdiction—Administrator De Bonis Non.

When the county court has appointed an administrator de bonis non of an estate, he has exhausted his power, and cannot make an order on a day thereafter appointing a co-administrator.

Administrator De Bonis Non.

An administrator de bonis non not interested in the estate as an heir or creditor has no sufficient interest in the funds to be allowed to raise a question as to whether the former executor had proper authority to use a part of the trust funds to enclose the graveyard where the decedent is buried.

APPEAL FROM BOURBON CIRCUIT COURT.

October 13, 1874.

OPINION BY JUDGE COFER:

The county court exhausted its power to appoint an administrator *de bonis non* of Henry Ament, by the appointment of appellee; and the order made on a subsequent day, appointing appellant a co-administrator, was void.

As administrator of Henry Ament, the appellant had a right to recover the unexpended balance of the fund set apart for inclosing the grave yard and erecting monuments over the graves of the testator and his relatives.

Whether the court erred in directing a part of the fund to be used in enclosing the graveyard, and the residue to be distributed, is a matter in which appellant does not appear from the record to have such an interest as to entitle him to question the correctness of that part of the judgment. As administrator of the former executor, he clearly has no such interest. If he had an interest in the fund as distributee, he should have set forth such facts as would have shown that interest; and not having done so, the only question on the appeal is whether the judgment against him for the money was right. He and his ancestor had kept this fund in their hands for about twenty years, and he is charged with simple interest only, and was not, therefore, entitled to commission on the fund.

Perceiving no error in the judgment, it is *affirmed.*

Marshall & McLeod, for appellant.
Cunningham, Tourney, for appellee.

JULIUS A. SMITH'S ADM'R *v.* LOUISVILLE BENEVOLENT & RELIEF ASSOCIATION.

Administrator, Maintenance of Action—Decedent's Association Membership.

Where a decedent died prior to any distribution of the proceeds of an association of which he was a member, and before the members were empowered by law, in the event of a dissolution, to retain the property among themselves, the administrator cannot maintain an action against the living members for contribution.

Decedent's Association Membership.

Where, under the rules of an association of which decedent was a member it was provided that at the death of a member his wife or mother would be entitled to certain named benefits, it is held where the wife died prior to her husband, but decedent's stepmother survived him that such stepmother is not entitled to such benefits.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 15, 1874.

OPINION BY JUDGE PRYOR:

The administrator of Julius A. Smith can maintain no action against the appellee or its members for contribution, for the reason that his intestate died long before there was any distribution of the proceeds of the association (if any has been made), and before the members of the association were empowered by legislative enactment, in the event of a dissolution, to retain the property among themselves.

At Smith's death, by the terms of the charter, as a consideration for what he had paid, and by reason of his membership, his relations, such as are designated by the charter, become entitled to certain benefits. The widow is to have twenty dollars per month, and if no widow or child, his mother is entitled to the same benefits. In the present case, Smith died without leaving a wife or children, but leaving surviving him a stepmother, who, in conjunction with his administrator, is prosecuting this action. There was no legal or natural obligation on the part of Smith to support and maintain his stepmother, and the relation between them was not such as would entitle her to the beneficent provision of the act in question. One may stand in *loco parentis* to another, and as such become responsible for the maintenance and education of the child for the reason that the latter is held out to the world as one of the family. So the intestate might have been made liable for the support and main-

tenance of a stranger when based upon a sufficient consideration. The mere moral obligation, if any, to maintain in either case would not authorize a recovery against the intestate, and it was never contemplated that the clause of the charter in question entitled those occupying the relation of stepmother to its beneficial provisions. There was neither a natural nor legal obligation on the part of Smith to maintain the appellant (his stepmother); and as he having died without leaving any such kindred as those mentioned in the charter and who were alone entitled to the benefits, the money paid by him into the association passes to the surviving members. The judgment is therefore *affirmed.*

Armstrong & Flemming, for appellant.
Russell & Helm, for appellee.

SARAH E. HANNA'S ADM'R *v.* JELSON M. HANNA'S ADM'R.

Infants—Parties to Action—Guardian Ad Litem—Administrator.

Where defendants to a cross-petition to sell real estate are infants, and no guardian ad litem is appointed for them, a judgment for cross-petitioner ordering the sale of the infants' real estate is erroneous and will be reversed.

Administrator.

An administrator or other trustee when called upon by a pleading to show receipts and disbursements of his trust, should, by a court of equity, be compelled to respond before being permitted to proceed with his cause.

APPEAL FROM SCOTT CIRCUIT COURT.

October 15, 1874.

OPINION BY JUDGE COFER:

The children of Jelson M. Hanna were all infants when appellee filed his answer and cross-petition against them, seeking to foreclose his mortgage on the land, and also to sell the land to pay any balance that might be due to him on a final adjustment of the accounts between the parties; and no guardian *ad litem* having been appointed to defend for them in respect to the matters set up in the cross-petition, the judgment rendered to sell the land was, for that reason, erroneous.

It is distinctly charged in the amended petition filed by appellants, that appellee had taken charge of and sold the personal property

mentioned in the mortgage, and that the proceeds thereof were more than sufficient to pay the mortgage debts. This is not denied in terms or in substance; and on the pleadings, as they stood at the trial, the court should have rendered judgment canceling the mortgage, and declaring the debts secured by it to have been paid.

The appellee was called on to state what property he had sold, and what disposition he had made of the proceeds; to this he made no response whatever. He was the agent of his intestate in selling the personal property mortgaged to him and others, and it was his duty to keep an account, and when called on to state what property he had sold and how much he sold it for, and what disposition he made of the proceeds, he should have made a full exhibit, and ought not to have been allowed to proceed on his cross-petition until he did so. He had no right to seal his own lips, and then insist that he should only be charged with whatever could be proved against him by the widow and minor children of his deceased principal. He occupied a position of trust and confidence, both on account of his former agency and of his office of administrator; and his adversaries had a right to demand a full disclosure. He knew the facts they did not, and the chancellor will not allow him to drive them to the proof of facts which he knows and is bound to disclose.

Interest should have been charged on the amount of all sales of property made by appellee during the life of Hanna, from the date of the sale. This was not done. The whole price of the mare and colt sold for $300 should have been charged with interest from the date of sale, and no deduction should have been made of the $85 paid to John Hanna for keeping them. That was paid by a credit on a debt John Hanna owed to the intestate, and which is not charged to appellee.

Appellee is credited by the account of H. J. Stakely, which he paid with notes of his intestate against Stokely, with which he is not charged. He should have been charged with both notes. The evidence in regard to the amount of corn, and the number of hogs sold by appellee, does not satisfy us that he should have been charged with anything more than he was charged with on this account; but as the cause must be remanded for further proceedings, we refer to the subject only to say that it is not to be considered as concluded by this.

The amended petition of appellant charged with reference to the whiskey transaction, that appellee had in his possession all the notes, receipts, invoices, bills of lading, and policies of insurance relating

to the purchase, shipment and sales; and he is called upon to exhibit them, and to make a full statement of the amount of whiskey shipped to Texas, to whom and where it was shipped, to whom it was sold, at what price, how much money was paid on the same, by and to whom, and at what time, whether any money is yet due, and from whom, and what steps, if any, have been taken to collect it, to exhibit the partnership books, if any, and also to exhibit all papers of any kind, including letters and correspondence, touching the said partnership and its business.

In response to this amended petition appellee says he went to Texas and ascertained the names of each of the eleven persons with whom Hanna had left parts of the whiskey for sale, and that he called upon them for a full statement of their agency, and fails to suggest that he failed to obtain from any one of them the information he sought. He then proceeds to name six of the eleven agents, and to state how much whiskey was left with each, and that he received no money from three of them, to wit: Rust, Moss and Woodall; but as to the others he does not state whether they paid him any money or not. The remaining five agents are not named, nor is any reference made to them, except that the payments made by them had been fully stated in his original answer. All that is said on this subject in the original answer is, that he had collected the sum of $5,000 without saying of whom, or whether those who paid it, or any of them, were owing anything more or not. He says he sent an agent to Texas to look after the matter, but what the agent did, besides bringing back to Kentucky twenty barrels of whiskey at a cost of $460, he does not say. It may be that the agent made collections, or sold whiskey and received the price, and still all that is in the answer of appellee may be true.

Knowing the names of the agents, and how much whiskey each had received, and how much money each had paid to him, appellee should have stated these facts in response to the demand of the appellant, and the chancellor should have refused to attempt a settlement with him of the partnership accounts until it was done. Withholding the names of those from whom he made collections put it out of power of appellants to show that he had failed to account for all he received; the parties were not, therefore, upon equal terms, but the trustee, by withholding information in relation to the trust which he confessedly possessed, and which he was asked to communicate, was in no condition to demand relief; and the chancellor

might well have refused him any relief until he had made the required disclosure, and ought to have done so.

The appellee says all the contracts with the agents of the firm were to pay for the whiskey in gold, and as he does not disclose what kind of money he received, it ought to be assumed that the $5,000 admitted to have been collected was in gold, and he should have been charged with the premium on it, unless he paid it to McGibbon on the firm note at par. The uncollected balances due from agents in Texas belong not to appellee, but to the firm, and he should have made full disclosure, that the representatives of Hanna might have the means of charging him in the event that any part of such balances may be collected hereafter.

The judgment in favor of appellee and directing a sale of the land of his intestate to pay the balance therein ascertained, is *reversed,* and the cause remanded with directions to appoint a guardian *ad litem* for the infant defendants to the cross-petition, and to allow the appellee to make response to the demands for a disclosure contained in the amended petition of appellant, if he offers to do so in a reasonable time, and then to allow reasonable time for further preparation, and in case he declines to make the disclosures to dismiss his cross-petition, and to render judgment against him for the balance in his hands as administrator.

J. T. Robinson, for appellant.
Buckner & Prewitt, for appellee.

MARTIN JUDY *v.* JOHN S. SWINNEY.

Contract—Mutual Covenants—Pleading—Proof.

When covenants in a contract are mutual and to be performed at the same time, neither party can maintain an action without averring a tender; and in cases where the first act is to be done by the defendant, plaintiff must aver his readiness to comply.

Pleading—Proof.

Before a party to a contract can introduce proof excusing him from performance, because prevented by the act or conduct of his adversary, he must first aver such fact in his pleading.

APPEAL FROM BOURBON CIRCUIT COURT.

October 15, 1874.

OPINION BY JUDGE PRYOR:

It is well settled that when the covenants are mutual and to be

performed at the same time, that neither party can maintain an action without averring a tender; and in cases where the first act is to be done by the defendant, the plaintiff must aver his readiness to comply. Chitty lays down the rule as follows: "There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other." Chitty's Pleadings 353.

In the present case the cattle were to be obtained by one party and paid for by the other, and no place being fixed for the delivery, the law is that the residence of the vendor is where the contract is to be executed. If the appellant, in this case, had his cattle ready at his residence for delivery, he could not have been compelled to comply on his part without a payment to him of the money, and on the other hand could have maintained no action against the appellee without averring that he had the particular description of cattle, as well as the number, ready for delivery at the time and in the manner provided by the contract. There was then as much necessity for appellee to have been at the residence of appellant to receive and pay for the cattle, as it was for the latter to have them ready for delivery. If the cattle had been in the barn lot on the day, no performance could have been made by the appellee, as he does not aver that he was at appellant's residence, and when there was ready and offered to perform his part of the contract. The party complaining must show that he has complied or offered to comply before he can make his adversary liable for any default upon his part. The petition as amended fails to state a cause of action, and the demurrer should have been sustained.

It is insisted by the appellee that there is evidence conducing to show that his failure to attend and comply with his contract was by reason of some act on the part of the appellant, by which he was prevented or excused from so doing. Whether such facts exist it is not necessary now to determine, as there is no allegation in the petition under which such proof could be introduced.

The judgment is *reversed* and cause remanded with directions to award the appellant a new trial, and for further proceedings con-

sistent with this opinion. The appellee, if he can do so, should be allowed to amend his pleadings.

Brent & McMillian, for appellant.
A. M. Swope, for appellee.

B. F. TURNER, ET AL., *v.* J. W. MARTIN.

Landlord and Tenant—Possession.

Where a tenant agrees to take the store room of his landlord subject to a contract between the landlord and a person who was engaged in making improvements thereon, he is not entitled to possession before the contractor completes the improvements unless the delay is the result of unreasonable interference by the landlord. The landlord is not entitled to collect any rent until possession is given to the tenant.

APPEAL FROM CLARK CIRCUIT COURT.

October 16, 1874.

OPINION BY JUDGE LINDSAY:

We understand the stipulation in the contract between Turner & Martin that the latter "agrees to take the store room subject to the contract existing between John Graham and the said Benjamin Turner," to mean that Martin was not to have the possession until Graham completed the improvements and repairs he was then making on the house. Martin, therefore, cannot recover damages from Turner for the delay of Graham, unless it was the result of improper or unreasonable interference by Turner.

Martin fails in his cross-petition to allege any such unreasonable or improper interference. But his cross-petition is still further defective. He states that by reason of being kept out of possession, his drugs, medicines, etc., were greatly injured; but he fails to state the character of or extent of such injuries, or to state any fact connecting the injuries with his failure to obtain possession. But waiving the defects in his pleadings, Martin has no shadow of right to recover for the wages paid to his clerk during the five months intervening from November 1, 1870, to April 1, 1871. There is nothing in the record tending to show that he was compelled to keep the clerk, nor is there any reason assigned why the clerk, if kept, could not have followed some vocation instead of remaining idle during all this time.

Even if Martin was kept out of possession by the improper conduct of Turner, still he is not entitled to recover from Turner the five months rent. He had paid no rent himself, and therefore in no event could he recover on this phase of the case, more than the difference between the contract price and the actual rental value of the house; and there was no proof made or attempted to be made, that such actual value was greater than the contract rate.

Martin could in no possible state of case be entitled to a judgment against Mrs. Turner. For these reasons the judgment appealed from must be *reversed.*

Turner was not entitled to collect rent until Graham, who was his employe, delivered the possession to Martin; and if Martin has paid for the whole time he occupied the premises, Turner should have no judgment.

Judgment *reversed* and cause remanded for further proceedings upon principles consistent with this opinion. Upon the return of the cause Martin should be allowed to amend his answer and cross-petition if he offers within a reasonable time to do so.

J. Simpson, for appellants.
C. & T. M. Eginton, Huston & Buckner, for appellee.

E. J. GREEN *v.* WILLIAM CATES.

Sale of Real Estate—Title Bond—Warranty—Purchaser.

Where a title bond is assigned the implied warranty is, not that the land is free of incumbrance, but that the assignor has title to the bond.

The purchaser of a title bond is bound to take notice of its contents, and where reference is made therein to notes that constitute a lien on the land described in the bond, he is held to take such bond subject to such notes.

APPEAL FROM GRANT CIRCUIT COURT.

October 16, 1874.

OPINION BY JUDGE LINDSAY:

The evidence conduces to show that Cates understood the agreement of the 20th of August, 1865. If he did, his written acknowledgment that Green had complied with his undertaking ought to conclude him, there being neither averment nor proof that said acknowledgment was procured by fraud or executed by mistake.

But if it be true that Green agreed to transfer to Cates the bond

for title, still it by no means follows that he is bound to remove the incumbrance created by the note executed to Plunkett and assigned by him to Hudson. Upon this assignment of a title bond, the law does not imply a warranty of title to the land described. The implied warranty is that the assignor has title to the bond.

It seems from Cates' answer to the action of Hudson's administrator, that it appeared upon the face of the bond that a note for two hundred dollars was executed by Fenwickes to Plunkett, and he seeks to avoid the lien because said note does not bear even date with the bond. The bond was enough of itself to put Cates upon inquiry. But further than this Fenwickes swears that he informed Cates of the existence of the note, and that it had not been paid before the purchase of the bond from Green.

Under the circumstances of this case, to authorize a judgment for Cates against Green, it is necessary to show that pending the negotiations betwen them, Green expressly represented to Cates that the purchase price due from Fenwickes to Plunkett had been fully paid, or made such other representation as in law amounts to a warranty of title, not to the bond but to the land itself, and this is what this court meant when it said in its former opinion, that Green might, in view of his representations, be liable for the costs of the suit, or possibly for indemnity against the incumbrance.

The evidence fails to show representations by Green amounting to either a fraud or warranty of title. It was therefore error to render judgment against him.

The judgment appealed from is *reversed* and the cause remanded with instructions to dismiss Cates' cross-petition so far as he seeks relief against Green.

Lindseys, for appellant.
J. M. Collins, for appellee.

RICHARD HUTCHINSON, ET AL., *v.* PETER JETT, GUARDIAN.

Guardian and Ward—Suit on Guardian's Bond—Parties—Pleading—Judgment Excessive.

Where in a suit on a former guardian's bond it is averred that a new guardian has been appointed, it will be presumed by the court of appeals that the former guardian had resigned or been discharged.

Parties to Suit.

It is not necessary to sue in the name of the state to recover on a guardian's bond. Such a suit should be brought in the name of the ward by his next friend or guardian.

Pleading.

The petition in a suit on guardian's bond must set forth in terms or substance the conditions in the bond which is the foundation of the action, and making the bond an exhibit cannot take the place of such averments.

Excessive Judgment.

A judgment in a suit on a guardian's bond is excessive which is for a greater sum than demanded by the petition.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 16, 1874.

OPINION BY JUDGE COFER:

The allegation of the petition that appellee had been appointed guardian of the ward not being denied, it must be presumed that Davidson had resigned, or had been removed. He was appointed by the same county court that appointed the appellee, Davidson, and it must be presumed in favor of the correctness of the action of the court, that the office had, in some way, become vacant.

It was not necessary to sue in the name of the commonwealth, for any one may sue on a guardian's bond as the next friend of the ward, at any time before he attains his majority. Sec. 10, Chap. 48, General Statutes. And by the provisions of Sec. 30, Civil Code, "every action must be prosecuted in the name of the real party in interest."

The action could not, however, be prosecuted in the name of the guardian, but should have been in the name of the ward by her guardian, or next friend. Sec. 53, Civil Code; *Anderson v. Watson*, 3 Met. 509. Section 33 of the code only applies to suits on contracts made with, or in the name of the guardian, for the benefit of the ward.

The original petition is also defective in failing to set forth in terms, or in substance, the conditions and covenants in the bond which is the foundation of the action. The only reference to the bond in the petition, is that Davidson "gave bond as guardian as aforesaid, with the defendant, Richard Hutchinson, as his surety," which bond is filed and made part of the petition marked "B. D."

It has been an established doctrine of this court, recognized by an unbroken line of adjudications commencing with the case of *Hill for Use of Wintersmith v. Barrett, et al.*, 14 B. Mon. 67, that the petition shall state the facts constituting the cause of action, and that admitted facts necessary to a complete cause of action, although con-

tained in a writing filed with, and as a part of the petition, cannot be supplied by reference to such paper. This rule is necessarily alike for convenience and safety, and should be adhered to.

The amended petition is defective also. It contains no averment that the former guardian had received the additional sum shown by the exhibit filed with it; but the averment is that it is shown by said statement that the defendant has drawn from said government the sum of $979.47. This is not equivalent to an averment that he had received such sum.

If there had been a prayer in the original petition for a judgment for interest on the fund in the guardian's hands, the judgment would not have been for too much; and if the original petition had been good, there could have been no reversal for the defect in the amended petition, but as there was no such prayer, the judgment was for more than the pleadings authorized.

Wherefore the judgment is *reversed*, and cause is remanded with directions to allow the appellee to amend his petition, and for further proceedings.

J. W. Rodman, for appellant.
W. Jett, for appellee.

JOHN HANSON *v.* E. W. LEA.

Landlord and Tenant—Improvements by Tenant.

Where improvements are made by a tenant who sells out to another, the purchaser succeeds only to the rights of the tenant, and cannot claim possession and ownership by adverse possession as against the lessor.

APPEAL FROM BRACKEN CIRCUIT COURT.

October 17, 1874.

OPINION BY JUDGE LINDSAY:

Black was certainly the tenant of Lea. The proof conduces to show that the improvements made by Black were upon the leased premises. Harrison brought out Black's improvement. He says he knew nothing about Black's lease, and that he merely paid him for his work; yet it seems that he would be satisfied with nothing short of a *livery of seizin*. He paid Black the thirty dollars upon the premises in controversy, and declined to pay him anywhere else.

The conclusion is almost irresistible that Harmon entered under and by virtue of his purchase from Black. Such being the case he stands in no better attitude, as to Lea, than Black would have stood, had he held to the possession until after the expiration of his lease. The facts stated brings the case clearly within the statutory definition of a forcible detainer, which is, that "A forcible detainer is the refusal of a tenant to surrender to his landlord the land or tenements demised, after the expiration of his term." Civil Code of Practice, Sec. 500.

The instructions given on the petition of appellee were authorized by the evidence, and they conform to the law of the case as herein stated.

The instruction asked by appellant was properly refused, if for no other reason, that it assumed as an established fact that Harmon was in the adverse possession of the land when Black entered as the tenant of Lea. The jury should have been allowed to determine that fact from the evidence, and besides, before the instruction could have been given, an adverse possession should have been defined.

We find no error in the record prejudicial to appellant.

Judgment *affirmed*.

Throop & Son, for appellant.
B. S. Willis, for appellee.

S. Y. CRAIG *v.* SAMUEL BRAME, ET AL.

Burden of Proof—Pleading.

The burden of proving the existence of an agreement that a contract was to be void upon certain conditions, where such agreement is not embodied in the contract in suit, is on the party averring that there was such an agreement.

Pleading.

Before a party to a suit is entitled to prove a rescission of contract, he must have pleaded the same.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 19, 1874.

OPINION BY JUDGE COFER:

We do not think any of the facts relied upon by the counsel for appellees to sustain the judgment of the court, have been established

by the evidence, to say nothing of the very doubtful question whether the answers present a defense to the action. The burden of proving the existence of the alleged agreement that the contract was to be void unless the sum of $975 was paid on the 17th of December, and its fraudulent omission from the bond, was on the appellees, and we think they have failed to sustain it. A majority of the witnesses who testify on this subject testify that no such agreement was made, and disprove the alleged missending of the bond by Pitman. The evidence shows that Brame's sons read from a copy written by Wolfork, and Pitman wrote the new bond after him, and then that it was twice read in the hearing of Samuel Brame, once by Pitman and then by Brame's son, who, notwithstanding he had some difficulty in reading it, could hardly have made the mistake of reading from it a whole sentence that never was in it.

We have no hesitation whatever in deciding that no surcharge-ment was made. The supposed rescission to which much of the evidence is addressed is not pleaded, and if it had been the evidence fails to establish that proposition. Anderson admits that he had heard of the purchase made by Craig and Pitman before he bought, and he fails even to attempt to show that he took any steps whatever to ascertain what their rights were, but seems to have acted in utter disregard both of their rights and his own security. Pitman lived in a short distance of him, and could no doubt have been seen on any day between the 17th and 21st of December, and had he been consulted Anderson could have learned the truth, or if he had not, it would not now be permitted to be set up against him. The position in which he now finds himself is the legitimate result of his reckless disregard of the rights of others, and cannot be weilded to work further injury to them. The court erred in dismissing the appellant's petition, and the judgment is therefore *reversed,* and the cause is remanded with directions to render a judgment specifically enforcing the contract of the 8th of December, 1871, between Samuel Brame and Craig and Pitman in favor of Craig, and to appoint a commissioner to ascertain and report the reasonable value of the rents, and the damages occasioned to the land by waste since appellee, Anderson, has been in possession. He will not be entitled to compensation for improvements, if any, put on the land.

L. D. Husband, for appellant.
J. W. Harlan, for appellee.

JAMES MELLANEY *v.* JOHN C. YOUNG.

Suit on Contract—Counterclaim—Pleading.

A counterclaim for damages growing out of a contract is bad which fails to state the amount of damages sustained, or to demand a recovery of any stated sum.

Pleading.

Before a breach of contract can be relied upon as a defense to an action to collect the contract price, it must be pleaded by the defendant.

APPEAL FROM FAYETTE CIRCUIT COURT.

October 19, 1874.

OPINION BY JUDGE LINDSAY:

Appellant's answer can not be regarded as presenting a good counterclaim. After avering certain of his contract breaches by appellee, appellant says he has been injured thereby, "to the extent of" blank dollars. Again he says that in order to put the cistern in repair, he was compelled to expend blank dollars, and he concludes by praying for judgment in the way of damages for the sum of blank dollars. It was not necessary to reply to this answer. If the petition had been dismissed, no judgment could have been rendered in appellant's favor on his counterclaim. It is true he shows breaches of contract on which an action would lie, but in view of the rule that the jury cannot give more damages than are laid at the end of the declaration, appellant, upon his pleadings, could have recovered nothing.

The breaches of contract avered may be regarded as presenting a defense to appellee's action, and to the extent that damages on account thereof are proved, there should be no recovery.

The first ground of defense is that appellee failed to finish the house within the agreed time; the 2nd. that he failed to put pressed brick in the front walls; the 3rd. that he failed to put on the coats of plastering; the 4th. that he did not put on the coats of paint; the 5th that the cistern was not built according to contract; the 6th. that appellant was not to pay the balance due on the house until he collected certain claims from the city of Lexington.

As to the 1st. and 2nd. grounds of complaint, there is absolute failure to prove any damage whatever. As to the 4th. ground, the proof shows that at least two coats of paint were put on all that portion of the house appellee was bound by his contract to paint. As

to the 3rd. ground, the proof is conflicting, but it rather tends to show that the house was plastered according to contract. The proof does not show that the work on the cistern was not well done, but that the plan upon which it was constructed was a bad one. There is nothing to show that appellee was responsible for the plan.

Appellant does not prove that appellee was not to be paid until the debts due him from the city of Lexington were collected. The testimony upon this branch of the case was at least equipoised, and the *onus* was upon appellant to establish the agreement to postpone the payment of the debt, which otherwise would be due upon the completion of the house.

As to the damages for failing to make the stairs of the house as high as the contract required, and for failing to make the tops of the windows circular in form, and as to the defect in stairway, and in setting the grates, it is sufficient to say no such breaches of the contract are set up and relied on in the answer.

We perceive no reversible error in the judgment. It is therefore ***affirmed.***

Huston & Mulligan, for appellant.
M. C. Johnson, for appellee.

JOHN A. CARTER, ET AL., *v.* E. H. NORWOOD'S ADM'R, ET AL.

Guardian and Ward—Guardian's Defense.

A guardian is not liable for the debts contracted by the ward without his knowledge and consent.

Guardian's Defense.

Where a guardian, after the death of his ward, pays the ward's estate to the heirs instead of paying alleged creditors of the ward, he must show in defense that the heirs were entitled to the money and that the claims asserted by the creditors are invalid.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 20, 1875.

OPINION BY JUDGE PRYOR:

The guardian of E. H. Norwood is attempted to be made liable for monies paid by him after the death of his wards to the heirs of the latter instead of his personal representative. The guardian and heirs are before the court in an action by the administrator to settle

the estate. The question arises whether the funds in the hands of the guardian were liable for the debts contracted by the ward. If not, the guardian, having paid over the money, is entitled to make the defense. The debts, when created, must have been such as would have made the guardian liable therefor out of the ward's estate during the latter's life; and if so, we see no reason why, when sued for this alleged wrongful appropriation, he may not show that the heir was entitled to it as against the claimant. If necessary for the payment of debts, the administrator is entitled to the money; if not, the heir should be allowed to retain it.

The deceased was an infant when these debts were contracted, and had no right to create them without the consent of the guardian. His whole estate consisted of only six hundred dollars. He had been employed as clerk or salesman in one of the leading business houses of the city, and by the influence of his guardian with his employees, his wages were being increased. He became discontented with his position, and contrary to the advice and consent of his guardian, undertook to seek other employment. The appellees, without the consent or authority of the guardian, saw proper to sell the decedent's goods, and now claim and that they were necessaries. The proof shows that they were evidently looking to the wages of the young man to pay their claims upon him. He was able to work and support himself, and the chancellor at no time, contrary to the wishes of the guardian, would have required the latter to surrender the principal of the ward's estate for the purpose of having it invested in clothing. The readiness of appellee to furnish the young man with what he considered the necessaries, was an inducement for him to disregard the advice of his guardian, and enabled him to select his own character of employment.

There is no reason for this judgment against the guardian. He was not liable for the debt prior to the death of the ward, and should not in this action be made to respond when not necessary to pay debts. As to the claim for board of Vooheries, it seems that the heirs who have this money concede that the claim of Vooheries was for necessaries, and to that extent the heirs receiving the money upon a proper state of pleading, may be compelled to pay, in the event the funds in the hands by the administrator are insufficient. Another objection to the judgment is that no claim is verified as the law requires. In this case it also appears that after the payment of this money by the guardian, the administrator, who was a creditor, filed his petition not only to settle the estate, but to establish his own

claim. He makes all the heirs and the guardian defendants to his action. The chancellor sees that the administrator is in direct antagonism to the rights of the heirs, and they being directly interested in the result of the litigation, he acted properly in overruling the demurrer to the answer. It does not appear that any objection was made to the defense by the heirs, for the reason they had made no affidavit as required by the amendment authorizing heirs and devisees to defend in certain cases, and if there had been, it can not have affected the right of the parties. The judgment is *reversed* and cause remanded with directions to sustain the exceptions to the claims of Sheckler, Armstrong, Dubois, Jenkins, Kirkland, Blanchard, Warner and Brown; these claims should not be allowed. The claimant, Voohries, should be allowed to verify his claim.

James Harrison, for appellants.

Martin McKnight, William E. McAfee, George B. Eastin, for appellees.

JAMES BLACKWELL *v.* W. D. HUNTER.

Agency—Sale of Real Estate.

Where an attorney in fact is the agent of A and collects a check for his principal, he cannot be compelled to account for and pay over the proceeds to B on an alleged claim of B that the money is due him from A for the purchase of real estate.

APPEAL FROM OWEN CIRCUIT COURT.

October 21, 1874.

OPINION BY JUDGE LINDSAY:

The cause of action set out in the petition is that Blackwell, as the attorney in fact of Hunter, collected for him a check drawn in his favor by Hugh Bradley, and refused to account for and pay over the proceeds.

When Hunter was sworn as a witness in his own behalf, he stated that Blackwell held the check as agent for Bradley, and that he (Hunter) refused to receive it, claiming that he had sold his land to Bradley for money, and that he would receive nothing else in payment. It is evident from Hunter's own testimony, that he never was actually or constructively in possession of the check, and that Blackwell held it all the while as the agent of Bradley. Hunter signed the power of attorney to enable Blackwell to collect the check, merely

because it was so drawn as to make his signature requisite for that purpose, and not because he owned or pretended to own it.

After Blackwell returned from Covington with the money, Hunter distinctly recognized the fact that the money was not his, and was not held by Blackwell as his agent, by entering into a new agreement with him relative to the price to be paid for the land. The court below should have instructed as in one of a non suit, because the plaintiff's own testimony showed that he was not entitled to a recovery on the cause of action set up in the petition.

But if Blackwell be treated as holding the money for Bradley, charged with the duty of paying it to Hunter, and it be admitted that he could be sued by Hunter without joining Bradley as a co-plaintiff, still Hunter can not recover on the proof. The promise of Blackwell, as the agent of Bradley, is supported by no consideration. It is not proved that either Bradley or Blackwell are, or ever were in the actual possession of the land. The contract of sale has never been reduced to writing, and therefore Bradley can not compel Hunter to execute it, and even in this action Hunter does not offer to convey. If the judgment appealed from is allowed to stand, Hunter will receive the agreed consideration for the land, and will retain the title, leaving Bradley without any written evidence of his purchase, and therefore powerless to compel a conveyance; and worse than all that, the party compelled to pay the consideration is one who never had any interest in the transaction, except as agent for the purchaser, and who may be without remedy against any one. The instructions given on appellant's own motion, do not conform to our views of the law, and are less favorable to him than they should be. The motion for a new trial should have prevailed. The finding of the jury is against all the testimony, and in the face of the instructions of the court.

Judgment *reversed* and cause remanded for a new trial upon principles consistent with this opinion.

T. N. & D. W. Lindsey, for appellant.
George C. Drane, H. P. Montgomery, for appellee.

ARMSTRONG & TAYLOR *v.* WILLIAM M. REYNOLDS.

Sale of Personal Property—Delivery—Unrecorded Mortgage.

A valid sale of growing tobacco may be made without delivery of actual possession where not susceptible of actual delivery.

Unrecorded Mortgage.

An unrecorded chattel mortgage made in good faith, not with a view to defraud other creditors, is valid between the parties and against all purchasers of the chattels described, having notice of the pledge or mortgage, except purchasers from a creditor who had no notice.

APPEAL FROM BRACKEN CIRCUIT COURT.

October 21, 1874.

OPINION BY JUDGE COFER:

A valid absolute sale of the tobacco in contest in this case, might have been made without a delivery of the actual possession to the vendee, because the tobacco was growing in the field at the time the contract was made, and was, therefore, not susceptible of actual delivery. *Robbins v. Oldham,* 1 Duvall 28; *Cummings v. Griggs & Hays,* 2 Duvall 87; *Morton v. Ragan & Dickey,* 5 Bush 334.

If the transaction was not a sale, but simply a mortgage or pledge to secure a debt due to the appellee, and to indemnify him as surety for Tapp, and was made in good faith, and not with a view to defraud the other creditors of the mortgagor or pledgor, it was valid between the parties to such transaction, and against all purchasers having notice of the pledge or unrecorded mortgage, except purchasers under the exception of a creditor who had no notice, such purchasers being protected notwithstanding they had notice, because of the innocence of the execution. An unrecorded mortgage is not void, as counsel for appellants seems to regard it, but is as valid as against persons having actual notice of its existence (with the exception just noticed) as if it had been recorded. *Morton v. Robards, et al.,* 4 Dana 258; *Lowe & Whitney v. Blinco,* Mss. Opinion, September, 1874.

The appellant, Taylor, had actual notice of the bill of sale before he had the execution of himself and his partner levied on the tobacco, and was therefore in no condition, when sued for the conversion of the tobacco, to resist appellee's claim to it on the ground that the writing had not been recorded.

The only question in the case was whether the transaction was actually fraudulent, and this seems to us to have been correctly presented to the jury in the instructions given by the court.

Both the instructions asked by the appellant's counsel were properly refused, the first because it assumed that there was a fraudulent intent of the parties, and that it was evidenced by the fact

that appellee may have permitted Tapp to sell a part of the property named in the writing. The jury should have been left to decide whether that fact was evidence of a fraudulent intent. The reasons which justified the refusal to give the second instruction have already been given.

Conceiving no error to the prejudice of the appellants, the judgment is *affirmed* with damages.

John N. Furber, for appellants.
Thomas A. Currman, for appellee.

PAUL STOCKTON, ET AL., *v.* BANK OF LOUISVILLE.

Appeals, Parties to—Bankruptcy.

A person who was not a party in the cause below cannot appeal from a judgment rendered.

Bankruptcy.

The discharge of a person in bankruptcy from the payment of his debts does not operate to invest a person holding a part of his property, with title therein; such property may be made subject to pay debts due creditors.

APPEAL FROM CLINTON CIRCUIT COURT.

October 21, 1874.

OPINION BY JUDGE LINDSAY:

The 2nd section of the act approved March 6, 1868, makes it the duty of the appellant or their counsel to refer in their endorsement required to be made on the record filed in this court, to the judgment sought to be reversed, designating the page of the record where it may be found, and the term at which it was rendered, and to state whether the appeal was granted in the court below. In the endorsement in this case, the judgment rendered at the September term, 1872, is to be found on pages 184 to 189 of the record so referred to in terms, and their said endorsement concludes as follows: "and all final provisions, judgments and orders in the case previous thereto." This portion of the endorsement does not conform in any degree to the act cited, and therefore must be disregarded. The only judgment appealed from is that found on the pages mentioned, rendered at the September term, 1872, of the Clinton Circuit Court.

We do not find that Phillips Waller or Neal are in any way af-

fected by said judgment. Hence no further attention will be paid to their appeals. H. W. Tuttle, who styles himself assignee of Paul Stockton, was not a party to the action in the court below, and there is nothing before this court from which we can conclude that he occupies the fiducial relation he claims. There is no reason, even if he be the assignee in bankruptcy, why he shall prosecute this appeal. Not being a party to the action in the lower court, its judgment can not prejudice his rights.

If Stockton had become a bankrupt after the judgment was rendered, his assignee, upon the production of the proper evidences of his appointment and qualification, would be allowed to prosecute an appeal from a judgment injuriously affecting the rights and interests of the bankrupt. But if he desired to contest in this action the claims of Stockton's creditors, he should have made himself a party in the circuit court, were the cause not pending for more than two years after Stockton was adjudged a bankrupt. For these reasons, even if there were legal evidences before us that Tuttle is the assignee of Stockton, he would not be heard upon this appeal.

A careful and critical review of all the testimony leaves no doubt upon our mind that Rebecca Davis was holding in fraudulent trust for Stockton, an interest in the property seized under the attachments sued out in this action, and that the sums in the hands of the sheriff arising from the sales of this property, and also in the hands of her executor, which were directed to be applied to the payment of appellee's debt, do not amount to more than the value of Stockton's interest in the property so held.

The discharge of Stockton from the payment of his debts, by the bankrupt court, did not operate to invest Rebecca Davis with title to the property she was holding for him. His creditors still had the right to subject this property to the payment of their debts. If it was taken into custody by the state court, the assignee in bankruptcy, upon application, would have had the right to be made a party, and would have been allowed to recover the proceeds of his sale, and then to distribute the amount so recovered among the creditors of Stockton who might prove their claims in the bankrupt proceedings. But he did not apply, and appellant, who had notice of Stockton's petition in bankruptcy, and of his ultimate discharge, did not ask to be allowed to make his assignee a party, nor did she ever suggest to the court who the assignee was. Had she done this, possibly the court would have required the appellee to make him a party.

She failed to take any steps to compel the assignee to assert his rights, and now that Stockton's property, held in fraudulent trust by her, has been applied to the payment of Stockton's debts, her executor appeals to this court to relieve her estate from the danger of again being compelled to account for this same property to said assignee. In other words, the executor asks to be relieved against the dangers of liability resulting from the plain and palpable laches of his intestate.

We are unable to ascertain from the record, how the chancellor knew that Paul Stockton was the principal devisee of Rebecca Davis, deceased, but as that fact, if it be a fact, can cut no figure in the determination of the question before us, it is immaterial whether his information was or was not correct.

For the reasons stated the judgment is *affirmed.*

A. J. & D. James, for appellants.
Winfrey & Winfrey, Owsley & Burdett, for appellee.

E. H. O'DANIEL, ET AL., *v.* J. P. FLANNIGAN, ET AL.

Witnesses—Impeachment.

It is competent for a party to prove that a witness has made statements out of court contrary to what he has testified to in the trial, and thus impeach the witness.

Impeachment.

The examination of impeaching witnesses must be confined to the general reputation of the person sought to be impeached, and such witnesses will not be permitted to testify as to particular facts.

APPEAL FROM MARION CIRCUIT COURT.

October 21, 1874.

OPINION BY JUDGE PETERS:

Mills, who was examined as a witness for appellee, proved that he never did, in a conversation with Robert Hamilton, at the gate or anywhere else, say that E. H. O'Daniel had insulted him when speaking to him in relation to the note sued on. This statement was made on cross-examination, Mills having proved for appellee that he met with E. H. O'Daniel near the court house gate in Lebanon, and asked him when Flannigan would get his money, and that O'Daniel then told him to rest easy, that as soon as he could wind up Pie's

estate, Flannigan should have his money. The matter testified to by Mills was relative to the issue, and the object of the cross-examination was to call his attention directly to the subject to afford him the opportunity of explaining the circumstances under which he made the statement to Hamilton, if made at all; and having denied that he had made any such statement to Hamilton, it was competent for appellants to prove that the witness had made statements out of court contrary to what he had testified to on the trial, to impeach him. 1 Greenleaf on Evidence, Sec. 462. The court below, therefore, erred in sustaining the objections to Hamilton's evidence. On the subject of the evidence offered by appellants to impeach the credit of P. B. O'Daniel, it may suffice to say that the examination of the impeaching witnesses must be confined to his general reputation, and will "not be permitted as to particular facts; for the reason that every man is supposed to be capable of supporting the one, but it is not likely that he should be prepared to answer the other, without notice; and unless his general character and behavior be in issue, he has no notice." 1 Greenleaf on Evidence, Sec. 461. The court below properly refused to permit appellants to introduce evidence as to particular criminal acts of P. B. O'Daniel.

Instruction No. 5, given to the jury for appellee, is misleading and erroneous. That instruction not only directs the attention of the jury to the testimony of Mills, and thereby gives it special importance, but it requires the jury to ascertain what was Mills' understanding and belief of certain statements made by appellants, or some of them, and then they were to make their verdict according to their conclusion as to how Mills understood and believed all or a part of said statements, instead of making it upon all the evidence heard on the trial.

Instructions "No. 1 and 2," as asked by appellants, were more properly refused because they excluded from the consideration of the jury the mental condition of Flannigan at the time, and for the further reason that there is evidence in the case that appellants themselves denied that they had executed the note sued on, and he may have acted on erroneous information received from them.

Those numbered 3 and 4 were properly refused because they make the liability of appellants for the debt depend upon proof of their authority to P. B. O'Daniel to sign their names to the note before it was signed, and excludes from the jury evidence of their acknowledgment of his authority afterwards, or of their subsequent ratification of his act of signing their names. Nor did the court err in

refusing No. 5 as asked by appellants, because it had been given substantially in Instruction No. 2, asked for by appellee. The phraseology of that instruction, however, is objectionable. The word "recognized," as used in the instruction, is too indefinite. The party must have in language admitted the authority of P. B. O'Daniel to sign their names to the note, or acknowledged their obligation to pay the note. Only such admissions or acknowledgments are sufficient to bind the parties making them.

For the reasons stated the judgment must be *reversed* and the cause remanded for a new trial and for further proceedings consistent herewith.

Harrison & Knott, for appellants.
Russell & Avitt, C. S. Hill, for appellees.

M. ELLIS, ET AL., *v.* MARY BAKER.

Real Estate—Title Bond of Married Woman.

While a title bond executed only by a married woman is not enforcible, when she receives the purchase price and purchases other property with it, a court of equity will not permit her to retain both the purchase money and the property sold on such bond.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 21, 1874.

OPINION BY JUDGE PRYOR:

There is no doubt but what Mrs. Ellis, upon the payment of the money for which her lot was sold, was entitled to the rights of Sutton, the purchaser, all of which appears from the orders made in the case. The question then arises as to how Barker obtained the title. This lot had been sold and purchased by Sutton to satisfy a debt due by Mrs. Ellis to McDonald. Mrs. Ellis, in order to save the lot, sold it to Baker, or if sold prior thereto, received the money, a part of which satisfied the McDonald debt, and although the record shows that the money was paid by Mrs. Ellis, it was really paid by Baker, who held the bond of Ellis and wife for title. Swope was the attorney for all the parties in connection with the payment of this money, and it being paid by Baker, the attorney under the authority of Mrs. Ellis and Barker had the order made directing the deed to be made to Baker, so Baker was in fact substituted as purchaser, he paying the purchase money; and not only so, but he paid the entire consid-

eration for the lot, and with the money, Ellis and wife, after paying the McDonald debt, purchased another house and lot which they now occupy.

The bond of a *feme covert* for title cannot, it is true, be enforced; but when she receives the money and purchases other real estate, the chancellor will not favor her so much as to give her the land she sold and permit her to retain what she purchased. There is no equity in this case for the appellant. Baker relieved the property purchased by Sutton from the McDonald debt, and was substituted to the rights of both Mrs. Ellis and Sutton by reason of this payment. The order made for the deed at a time when the case was off the docket was made by the demands of the parties, and if not, Baker is entitled to a deed. The appellant must do equity before asking it.

Judgment *affirmed.*

Ray & Walker, for appellants.
Sweeney & Stuart, for appellee.

ANDREW BUDDY AND WIFE *v.* W. W. PHIPPS AND JOHNSON.

Mortgage Foreclosure—Redemption.

Where the real estate of the husband is sold on mortgage foreclosure and bought in by the creditor and conveyed by him to the wife of the debtor and paid for by her out of means not secured from the husband, there is no fraud on the creditors of the husband, and such property is not liable for his debts.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 23, 1874.

OPINION BY JUDGE PETERS:

The property now sought to be subjected to the payment of the debts of Phipps and the representatives of Johnson was purchased by Levin Lughes, under a judicial sale to pay Darenx and Johnson, to whom the property had been mortgaged and who had judgments of foreclosure. It sold for enough to pay Darenx's debt and perhaps a small part of Johnson's. King, the attorney of Johnson, was present at the sale, representing his client, and if it brought less than it was worth it is the fault or misfortune of Johnson, for his attorney proves he knew Lughes was bidding for Mrs. Buddy, and on that account stopped bidding. After the sale, Mrs. Buddy, as is shown by the evidence, borrowed $800 of Sites, and about $200 of

Mrs. Sanders, and paid Lughes the price he paid for the property; and he conveyed the same to her, having received a conveyance from the master; and in order to secure Sites, Mrs. Buddy mortgaged the property to him, and he in this suit seeks a foreclosure of his mortgage. Mrs. Sanders, as she proves, has been paid her money back by Mrs. Buddy, except $20. The conveyance by Lughes to Mrs. Buddy is not embraced by the statute against fraudulent conveyances. That statute operates on conveyances made by the debtor. In this case Buddy was divested of the title by a judicial proceeding, and was no party to the conveyance.

There is no evidence that A. Buddy furnished any part of the money to his wife to aid her in paying for the land and procuring the title to be made to her; but it appears that on her credit alone the purchase money was raised. Sites and Mrs. Saunders loaned her the money on her credit. By the rules of the common law it is very clear that if A. Buddy, the debtor, had furnished the money to his wife to pay for the property, and procured the title to be made to her with the fraudulent intent to remove it from the reach of prior creditors, that the transaction would be condemned and the property subjected; but that is not the case here. The friends of the wife, and not her husband, furnished her the money to redeem real estate sold in part to pay the debt of one of the creditors now complaining that his attorney saw it sold, and if the purchasers had retained the title, it is not pretended that it could be reached by these creditors; but after he had obtained the legal title he permitted the wife of the debtor to redeem it, which she is enabled to do by the aid of friends, and not with the money of her husband, as is satisfactorily shown; and we are not aware of any rule of law or equity that will deprive her of the estate. The creditors are in no worse condition than if Lughes had retained it, and the profits of the estate may have enabled her to pay the borrowed money. It is proper to state that Phipps has failed to produce the evidence of his debts against A. Buddy, although such indebtedness is controverted and put in issue by the answer of Mrs. Buddy.

Wherefore the judgment in favor of Phipps, and in favor of Preswood and wife, and Rollins and wife, are *reversed,* and the cause is remanded with directions to dismiss the cross-petition of the last named parties against Mrs. P. Buddy at the costs of cross-petitioners, and for further proceedings consistent herewith.

E. L. Bullock, for appellants.
G. H. Morrow, for appellees.

ANDREW RANDALL, ET AL., *v.* ELIZABETH T. RANDALL.

Judgments—Mortgage—Description of Real Estate.

It is error to render a personal judgment against infant defendants.

Judgment.

The law does not prescribe how judicial sales, where mortgages are foreclosed, shall be advertised, and it is error for a judgment to fail to designate the manner in which such sales shall be advertised.

APPEAL FROM KENTON CIRCUIT COURT.

October 24, 1874.

OPINION BY JUDGE LINDSAY:

It was error to render a personal judgment against the infant defendants.

The judgment fails to describe the realty adjudged to be sold, except by reference to the description set out in the petition and in the copy of the mortgage on file. This left the commissioner to determine judicially which lots or parts of lots were to be sold. The judgment directed the commissioner to advertise the sale according to law. The law does not prescribe how judicial sales, where mortgages are foreclosed, shall be advertised. It is error in such cases for the chancellor to fail to prescribe the manner in which the sale shall be advertised. It is not necessary to consider the remaining questions presented by the appeal.

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

O. B. Hallam, Carlisle & Forte, for appellants.
Stevenson & O'Hara, for appellee.

KANAWHA & OHIO COAL CO. *v.* A. D. HUNT, ET AL.

Judgment—Process—Cause of Action.

No valid judgment can be taken against a party not served with process and who does not appear to the action.

Cause of Action.

A party seeking to recover as the assignee of another must do so, if at all, on the cause of action set up by his assignor, and not on a separate cause of action he may have independent of the rights he secured by the assignment.

APPEAL FROM KENTON CIRCUIT COURT.

October 24, 1874.

OPINION BY JUDGE COFER:

The authority of Smith to bind appellant was distinctly denied in the answer, and was not proved. The appellant also distinctly denied that any settlement had ever been made, and also denied any indebtedness to the appellee, Hunt, and none was proved, the master's report being based alone, as it appears, upon the writing sued on, which, for want of proof of Smith's authority, was no evidence of indebtedness on the part of appellant.

Jackson never was made a party to the suit, and if he had been, he was not entitled to a judgment. His answer, which was allowed to be filed as if he had been a defendant, was made a cross-petition against the appellant, who was his co-defendant, and no process thereon having been served, and appellant never having appeared to the cross-petition, the judgment in his favor was void. Nor can the judgment in his favor be upheld on the ground that it was for a part of the demand sued for by Hunt, and assigned by him pending the action to Jackson. Hunt sued on the writing signed by Smith, and Jackson has recovered a judgment on notes of appellant executed to him; and an entirely distinct cause of action is set up for the first time in Jackson's cross-petition.

If Jackson would recover as the assignee of Hunt, he must recover on the cause of action set up by his assignor; and if he seeks to recover on the notes filed with his answer and cross-petition, he should proceed in a separate action.

Wherefore the judgments are *reversed,* and the cause is remanded with directions to strike Jackson's answer from the files, and for further proceedings.

J. C. Carlisle, for appellant.
Benton & Benton, for appellees.

HENRY PAYNE *v.* JOHN FARR.

Personal Property—Sale—Innocent Purchaser.

A contract of sale of personal property, where the title is retained in the seller until paid for, will not enable the seller to recover the property from an innocent purchaser from his vendee.

ANDREW RANDALL, ET AL., *v.* ELIZABETH T. RANDALL.

Judgments—Mortgage—Description of Real Estate.

It is error to render a personal judgment against infant defendants.

Judgment.

The law does not prescribe how judicial sales, where mortgages are foreclosed, shall be advertised, and it is error for a judgment to fail to designate the manner in which such sales shall be advertised.

APPEAL FROM KENTON CIRCUIT COURT.

October 24, 1874.

OPINION BY JUDGE LINDSAY:

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The judgment fails to describe the realty adjudged to be sold, except by reference to the description set out in the petition and in the copy of the mortgage on file. This left the commissioner to determine judicially which lots or parts of lots were to be sold. The judgment directed the commissioner to advertise the sale according to law. The law does not prescribe how judicial sales, where mortgages are foreclosed, shall be advertised. It is error in such cases for the chancellor to fail to prescribe the manner in which the sale shall be advertised. It is not necessary to consider the remaining questions presented by the appeal.

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

O. B. Hallam, Carlisle & Forte, for appellants.
Stevenson & O'Hara, for appellee.

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No valid judgment can be taken against a party not served with process and who does not appear to the action.

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APPEAL FROM KENTON CIRCUIT COURT.

October 24, 1874.

OPINION BY JUDGE COFER:

The authority of Smith to bind appellant was distinctly denied in the answer, and was not proved. The appellant also distinctly denied that any settlement had ever been made, and also denied any indebtedness to the appellee, Hunt, and none was proved, the master's report being based alone, as it appears, upon the writing sued on, which, for want of proof of Smith's authority, was no evidence of indebtedness on the part of appellant.

Jackson never was made a party to the suit, and if he had been, he was not entitled to a judgment. His answer, which was allowed to be filed as if he had been a defendant, was made a cross-petition against the appellant, who was his co-defendant, and no process thereon having been served, and appellant never having appeared to the cross-petition, the judgment in his favor was void. Nor can the judgment in his favor be upheld on the ground that it was for a part of the demand sued for by Hunt, and assigned by him pending the action to Jackson. Hunt sued on the writing signed by Smith, and Jackson has recovered a judgment on notes of appellant executed to him; and an entirely distinct cause of action is set up for the first time in Jackson's cross-petition.

If Jackson would recover as the assignee of Hunt, he must recover on the cause of action set up by his assignor; and if he seeks to recover on the notes filed with his answer and cross-petition, he should proceed in a separate action.

Wherefore the judgments are *reversed,* and the cause is remanded with directions to strike Jackson's answer from the files, and for further proceedings.

J. C. Carlisle, for appellant.
Benton & Benton, for appellees.

HENRY PAYNE *v.* JOHN FARR.

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October 24, 1874.

OPINION BY JUDGE LINDSAY:

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

O. B. Hallam, Carlisle & Forte, for appellants.
Stevenson & O'Hara, for appellee.

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OPINION BY JUDGE COFER:

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Jackson never was made a party to the suit, and if he had been, he was not entitled to a judgment. His answer, which was allowed to be filed as if he had been a defendant, was made a cross-petition against the appellant, who was his co-defendant, and no process thereon having been served, and appellant never having appeared to the cross-petition, the judgment in his favor was void. Nor can the judgment in his favor be upheld on the ground that it was for a part of the demand sued for by Hunt, and assigned by him pending the action to Jackson. Hunt sued on the writing signed by Smith, and Jackson has recovered a judgment on notes of appellant executed to him; and an entirely distinct cause of action is set up for the first time in Jackson's cross-petition.

If Jackson would recover as the assignee of Hunt, he must recover on the cause of action set up by his assignor; and if he seeks to recover on the notes filed with his answer and cross-petition, he should proceed in a separate action.

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Judgment.

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October 24, 1874.

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

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APPEAL FROM KENTON CIRCUIT COURT.

October 24, 1874.

OPINION BY JUDGE COFER:

The authority of Smith to bind appellant was distinctly denied in the answer, and was not proved. The appellant also distinctly denied that any settlement had ever been made, and also denied any indebtedness to the appellee, Hunt, and none was proved, the master's report being based alone, as it appears, upon the writing sued on, which, for want of proof of Smith's authority, was no evidence of indebtedness on the part of appellant.

Jackson never was made a party to the suit, and if he had been, he was not entitled to a judgment. His answer, which was allowed to be filed as if he had been a defendant, was made a cross-petition against the appellant, who was his co-defendant, and no process thereon having been served, and appellant never having appeared to the cross-petition, the judgment in his favor was void. Nor can the judgment in his favor be upheld on the ground that it was for a part of the demand sued for by Hunt, and assigned by him pending the action to Jackson. Hunt sued on the writing signed by Smith, and Jackson has recovered a judgment on notes of appellant executed to him; and an entirely distinct cause of action is set up for the first time in Jackson's cross-petition.

If Jackson would recover as the assignee of Hunt, he must recover on the cause of action set up by his assignor; and if he seeks to recover on the notes filed with his answer and cross-petition, he should proceed in a separate action.

Wherefore the judgments are *reversed*, and the cause is remanded with directions to strike Jackson's answer from the files, and for further proceedings.

J. C. Carlisle, for appellant.
Benton & Benton, for appellees.

HENRY PAYNE *v.* JOHN FARR.

Personal Property—Sale—Innocent Purchaser.

A contract of sale of personal property, where the title is retained in the seller until paid for, will not enable the seller to recover the property from an innocent purchaser from his vendee.

APPEAL FROM BOURBON CIRCUIT COURT.

October 24, 1874.

OPINION BY JUDGE COFER:

Without deciding whether there is such a bill of exceptions as would warrant us in reversing the judgment, if it appeared to be erroneous, we feel bound to affirm it. If every fact the evidence even tends to prove be treated as established, still the verdict and judgment are right, for there is no evidence whatever upon which an instruction authorizing the jury to find for the appellant could have been predicated.

The evidence does not even tend to prove that the appellant was, by the terms of the contract of sale, to retain the title until the check was paid, and if it did, we have decided at this term in *Vaughn v. Hopson,* overruling *Patton v. McCane,* 15 B. Mon. 555, that a stipulation in the contract of sale of personal property, that the title is to remain in the vendor until the property is paid for, will not enable the seller to recover the property from an innocent purchaser from his vendee. Wherefore the judgment is *affirmed.*

A. M. Swope, for appellant.
Brent & McMillan, for appellee.

REUBEN ARD, ET AL., *v.* ELIZABETH BURTON, ET AL.

Practice—Quieting Title.

Where no objection is made, in the circuit court, to the form of the action or to the misjoinder of actions, it is too late to make such objections on appeal.

Quieting Title.

Where appellees have shown both title and possession in themselves, they are entitled to have such title and possession quieted.

APPEAL FROM GARRARD CIRCUIT COURT.

October 26, 1874.

OPINION BY JUDGE LINDSAY:

There is nothing in the record tending to show that any portion of the lands covered by the patent to J. R. Burton was in the actual possession of appellants, or their ancestor, or any one else, at the

time either of the entry or survey, or at the time the patent was issued. We cannot, therefore, hold said patent to be void. It is manifest that no part of the land claimed by appellees is embraced by the patent to Coburn Crutchfield, of date of February 17, 1837. To make said patent cover such land, or any portion of it, it is necessary to include within its boundaries 535 instead of 200 acres, and the last line will have to be extended 378 poles beyond the calls of the survey. It is not to be presumed that any such mistakes as these could have been made by the surveyor who made the survey upon which said patent was issued. Appellees did not, in the circuit court, object to the form of the action, nor to the improper joinder of the several causes of action. It is too late to raise these questions in this court. While it is not generally necessary in actions for the recovery of realty, that the defendant shall manifest his title, still, in this action, as the patent under which appellees claim covers the land in controversy, it was necessary that appellants should show a superior outstanding title; otherwise appellees were entitled to relief.

If this be treated as an action to quiet title, the cause of action is made out. It is not denied that the plaintiffs are the widow and heirs at law of James R. Burton, deceased; hence the legal title held by him under his patent from the commonwealth passed to them by the laws of descent. They aver that immediately after the patent was issued, J. R. Burton, the patentee, took possession of the land and that "They, as his widow and heirs, have been holding, occupying and claiming the same since his death, under his title." Appellants attempt to deny this essential allegation, as follows: "They deny that plaintiffs have been holding, occupying and claiming the same since said James R. Burton's death, under his or any other title." The effect of this plea is merely to deny that they have held under the title of James R. Burton, deceased, or under any title, and not to deny the specific and material allegation of possession. Again they state *arguendo* that they and those under whom they claim have had actual possession under the Crutchfield patent for more than thirty-odd years, and hence they say that "plaintiffs never have had possession of one inch of the land." This conclusion, which can scarcely be regarded as the averment of a fact, is made by appellants to depend upon the principal averment, that is, "that they and those under whom they claim had all the while actual possession under the Crutchfield patent." Now, as said patent does not cover any portion of the land, this affirmative

averment of a fact inconsistent with appellee's allegation of possession is not made out.

It follows, therefore, that appellants have failed to deny specifically the allegation of possession, and have failed to avoid by pleading and proving a fact inconsistent therewith. Hence appellees, having shown both possession and the legal title in themselves, are entitled to have their said possession and title quieted.

Judgment *affirmed.*

R. M. & W. O. Bradley, for appellants.
T. Z. Froman, for appellees.

ADAMS EXPRESS COMPANY *v.* W. C. GOODLOE.

Bill of Exceptions—Extension of Time for Filing.

When the court by consent of the parties extends the time for presenting a bill of exceptions to the 10th day of the month, but appellant presents them on the 8th day of the month, at a time when appellee's attorney was absent and had no opportunity to examine it, the court of appeals will not consider it.

APPEAL FROM FAYETTE CIRCUIT COURT.

October 27, 1874.

OPINION BY JUDGE PRYOR:

On May 31, 1872, time was given the appellant until the first day of the next February term to present the bill of exceptions. On February 3, the time was extended until the tenth day of the term by consent, and on February 28 the exceptions were signed and ordered to be made part of the record. This all appears from the order made in open court in the case. The judge, in the bill of exceptions signed, states "that by consent of parties the time for the production and filing the bill of exceptions is extended ten days and that on February 8, 1879, the defendant produced to the court his bill of exceptions and asked that they might be made part of the record, which is done." It is evident that the appellees consented that the extension might be made until the tenth day of the term, and there is no inconsistency between this order and the statement by the court in the bill of exceptions as to the time. If produced on the tenth day of the term, it was the duty of counsel, by reason of the order, to have been present on that day, and if he failed to do so, he could not afterwards complain that he had no opportunity of

examining what had been tendered by his adversary as the evidence in the case.

The order of the court must be regarded as the best evidence of the consent by appellee, and particularly when there is no real conflict as to the time when the evidence was to be produced between the recital in the order and the statement of the judge. The bill of exceptions was handed to the judge on February 8. This was not in accordance with the consent order, and to hold the contrary would have kept the client or his counsel in court every day until the tenth, looking out for the filing of the bill of exceptions. Nor does this work any hardship on the appellants. The case was tried in August, 1872. There is no reason assigned why the time for filing was extended till the first day of the next February term. It is to be presumed, however, that the reason assigned was sufficient. Still, on the first day of that term, no bill of exceptions is filed or tendered, and now when from the record it is filed at a time when appellee was not present, and when not required to be present, then appellant should not complain when the paper offered as the bill of exceptions is disregarded. The case of *Smith, et al., v. Blakeman,* 8 Bush 476, is conclusive of this case. It is true the parties may make a correct order by which they will be governed; but in this case the correct order protects the appellee from the injustice that might result to litigants if the party complaining of a judgment is allowed, at any time to render and file his bill of exceptions. Judgment *affirmed.*

Z. Gibbson, for appellant.
John B. Huston, for appellee.

BOARD OF COUNCILMEN OF UNIONTOWN *v.* B. C. DAVID, ET AL.

Dedication of Real Estate to Public Uses—Acceptance.

Where a plat is filed purporting to dedicate a town lot to the public use, but before it is accepted by the public, the donor has withdrawn his proposal, the town fails to secure any title thereto.

APPEAL FROM UNION CIRCUIT COURT.

October 28, 1874.

OPINION BY JUDGE LINDSAY:

It may be assumed that the plat of 1848 was made matter of record upon motion of E. K. James, and that this was done with

the assent of Mrs. David, who was beneficially interested in the realty laid off into town lots. It may further be assumed as an established fact, that David sold lots of this plat, and that purchases were made by persons having knowledge of the fact that the square now in controversy was known and designated as "The Public Square." If said public square was in the nature of a street or passway, or of a wharf, or of a common in which all the citizens of the town would have the right of actual use, and in which their interests would be in the nature of incorporeal hereditament, it would follow that by the publication of the plat and the sale of lots under it, David would have pledged to each purchaser a vested right in and to the dedication so proposed to be made; and for the protection of the persons so purchasing, an acceptance of the proffered dedication by the municipality would be implied.

It is evident, however, that no one understood that the lot was to be sold for either of the purposes indicated, or, indeed, for any kindred purpose. If it had been formally accepted by the town it would necessarily have been devoted to some general public use, such as that of a park or pleasure ground, or as the site of town buildings or for some use in which all the people were interested. It is evident, therefore, that those who purchased lots from David or James have no peculiar interest in the alleged dedication, and that they hold no rights of property therein not common to every one else residing in the town.

It is necessary, therefore, in order to make out title in the municipality, to show an acceptance by it of the proffered dedication. There is no proof tending to show an acceptance prior to about 1859 or 1860. Long before that time (in 1855), David had clearly manifested his withdrawal of the proposal to dedicate the lot to the town. He did this by publishing the lithographic map, upon which this square was subdivided into building lots. It is true he declined to sell off these lots, but appellant shows by her own witness that he so refused because he expected ultimately to dedicate the lot to the use of the county of Union, in case the county seat should be removed to Uniontown. Upon the whole case, we are of opinion that there is no sufficient evidence of an acceptance by the town of the proffered dedication prior to 1855, when the proposal was withdrawn. But if this was a matter of doubt, we would nevertheless affirm the judgment. The petition does not aver possession in the town, and the proof shows beyond peradventure that appellees held actual adverse possession of the lot when this suit was instituted.

The prayer is that appellees shall have the title of the town quieted, and that appellees be compelled to convey. If the dedication was complete, a conveyance is unnecessary. To maintain a suit in equity to have title to real estate quieted, it is necessary to aver and to prove that the complainant holds the legal title to, and is in the actual possession of such realty. In this case, the complainant in effect admits it does not hold the legal title. It does not claim to be in possession, and by its own witnesses shows beyond all doubt that the possession is in the parties sued.

The judgment dismissing the petition must be *affirmed*.

Vance & Merritt, for appellant.
D. H. Hughes, A. J. James, for appellees.

JOHN G. WILLS *v.* W. S. FRANKLIN.

Will—Rule of Construction.

Where there is a devise over in the event of the death of the preceding devisee, it refers to the event happening during the life of the testator.

APPEAL FROM CLARK CIRCUIT COURT.

October 28, 1874.

OPINION BY JUDGE PRYOR:

The proper construction of the clause of the will in controversy is that if one of the devisees should die in the lifetime of the testator, his children, if any, should take his property, and if not, it should pass to the surviving devisees. The rule is that where there is a devise over in the event of the death of the preceding devisee, it refers to the event happening during the life of the testator, and this rule must prevail here, as there is no other period to which the language of the will refers. If the testator had said in the event of the death of the devisee without children, it would have referred to or the contingency would depend on the death of the devisee without children. There is no such language, however, in the will, and as some time must be fixed in determining the devisee's interest, it is plain that the period of time referred to at which the event was to happen in order to defeat the claim of the appellant, was his death during the life of the devisor.

The appellant, therefore, had a complete title to the land ex-

changed with appellee, so far as it could have been conferred upon him by the devisor.

Hughes v. Hughes, 12 B. Mon. 115. The judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

J. Simpson, for appellant.

JAMES TRIMBLE *v.* FARMERS' BANK OF KENTUCKY.

Attorney's Fees—Promissory Notes.

A stipulation in a promissory note that if it should become necessary to collect it by legal proceedings the obligors would pay a reasonable attorney's fee and costs of collection, is not enforcible.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 29, 1874.

OPINION BY JUDGE COFER:

The appellee sued the appellant and others, on a promissory note for $2,151.17, which contained a stipulation that if it became necessary to collect it by legal proceedings, the obligors would pay a reasonable attorney's fee and cost of collection. This stipulation is set out in the petition, and it is alleged that it had become necessary to collect the note by legal proceedings, and that a reasonable attorney's fee therefor is $100.

The appellant having failed to answer, judgment was rendered by default on the 13th day of February, 1874, for the amount of the notes and one hundred dollars and cost. On the 16th day of February, the appellant tendered an answer and moved the court to set aside the judgment, and permit the answer to be filed, to which appellee objected, and his motion having been overruled, he excepted and made the proffered answer a part of the record by bill of exceptions, and now complains that the court erred in refusing to set aside the judgment and allow his answer to be filed, and also, that the court erred in rendering judgment against him.

The answer tendered by appellant refers to and adopts an answer tendered at the same time by other defendants, and among other defenses set up in the answer thus referred to, is a denial that one hundred dollars is a reasonable attorney's fee for the collection of the note, and also an averment that the stipulation to pay an at-

torney's fee in case suit had to be brought on it, "is invalid, illegal and inoperative."

We have heretofore decided that if a party sought to be charged with the payment of an attorney's fee on a contract like this, and appears, and resists a judgment, no judgment can be rendered against him on account of such stipulation. The appellant did not object in this case before judgment was rendered, but he did, by adopting the answer of his codefendants, in which the legality of that part of the demand was directly called in question, indicate unmistakably that he did not consent to that part of the judgment; and as the court still had power to set aside or modify the judgment, his motion should have been sustained on that ground, if on no other.

None of the answers tendered appear to have been sworn to, and they were properly rejected for that reason, if for no other. But as the judgment must be reversed for the error already indicated, the appellant should be allowed to make any legal or equitable defense he may have.

Wherefore the judgment against the appellant is *reversed* and the cause is remanded for further proceedings consistent herewith.

Turner & Gorrison, for appellant.
Apperson & Reid, for appellee.

ELIZABETH MARK, ET AL., *v.* WILLIAM LITTLE, ET AL.

Infants—Service of Process Upon—Description of Real Estate—Judgment.

No judgment can be legally rendered against infants in a proceeding to sell their lands where no guardian ad litem is appointed to defend them.

Judgment.

A judgment for the sale of land should set forth an accurate description of the land to be sold so that it may be identified by reference to the judgment.

APPEAL FROM BATH CIRCUIT COURT.

October 29, 1874.

OPINION BY JUDGE COFER:

No guardian *ad litem* was appointed to defend for the infant defendant on the cross-petition of the administrator against them and the creditors of the intestate, R. W. Mark, and no judgment could, for that reason, be legally rendered on the cross-petition to sell the

land. As the judgment was to sell the whole tract and for more than the debt due to the plaintiff, Little, the judgment directing a sale was erroneous and prejudical to the rights of the infant appellants, who could not be thus divested of title without defense by a guardian. Sec. 55, Civil Code.

The only description of the land sold is as follows: "A tract of land lying and being in the county of Bath, on the waters of Flat Creek, which was sold and conveyed by the obligee, Anna E. Laughlin, to the said R. W. Mark by deed * * * now of record in the Bath County Court clerk's office, a copy of which is herewith filed as part hereof, and is here referred to for a more full and complete description of the same. * * * That there are in said tract of land 71 acres, 1 rod and 28 poles." Although the deed is copied into the record by the clerk, there is nothing to show that it was filed with the petition, or in the record, but assuming that it was on file when the judgment was rendered, we think the better and sater practice is to set forth in the petition and in the judgment, and certainly in the latter, an accurate description of the land to be sold, so that it may be identified by reference to the judgment, which is the only paper the commissioner should have to look to in order to determine what land he is authorized to sell. The practice of selling lands by loose and indefinite description is calculated to produce confusion and uncertainty in the boundaries of land, and to increase litigation and render land title insecure. It is true that it is not probable that such evils would result in this case, but we can not, on that account make this an exception to a necessary general rule.

Whether this suit was prematurely brought or not is a question not necessary to be decided, for as no objection was taken in the circuit court upon that ground, it has been waived; and if this be not the case, still, as the administrator had a right to sue for a settlement at any time, and as he has done so by his cross-petition, the court may proceed to sell upon taking the necessary preliminary steps to authorize a judgment against the infants for a sale of the land.

Wherefore the judgment is *reversed,* and the cause is remanded with directions to set aside the judgment ordering a sale of the land and the order confirming the sale, and to set aside the sale and cancel the sale bonds, and for further proceedings not inconsistent with this opinion.

Nesbitt & Gudgell, for appellants.
Lacy & Hunt, for appellees.

ELIZABETH WINGATE *v.* VIRGIL GARRISON, ET AL.
ELIZABETH WINGATE *v.* GEORGE KALE, ET AL.

Real Estate—Conveyance to Defraud Creditors—Action to Set Aside Conveyance.

One who is insolvent may not convey his property as a gift to a member of his family and thus defraud his creditors; such a conveyance will be set aside.

Action.

A creditor whose claim has not been reduced to judgment, may sue on the same, and also to set aside a fraudulent conveyance, in one action.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 30, 1874.

OPINION BY JUDGE LINDSAY:

On the 30th of January, 1865, Dr. J. W. Knight conveyed to his daughter, Mrs. Wingate, who was residing with him, his house and lot in the city of Louisville, together with all his household and kitchen furniture.

The conveyance left the grantor without any visible property whatever. He was, at the time of its execution, practically insolvent. He had no other estate, and was indebted to the devisees of Martha Garrison, deceased, and of Philip Meyer, deceased, in large sums of money. He had been for many years a practicing physician, but by reason of his age, and of his habits of drinking to excess, his practice had ceased to be remunerative. Mrs. Wingate, the grantee, had resided with her father for about twenty years; except her daughter, now Mrs. Harris, the grantee and the grantor constituted the entire household. There was no marked or perceptible change of the mode of housekeeping after the conveyance. The grantor continued to reside in the house until his death in 1871. The circumstances proven all tend to show that Mrs. Wingate had no means of any kind in 1865, when she professes to have paid for this house and lot and furniture $12,000 in cash. As to Garrison's devisees, they all being infants, she was an incompetent witness; with her testimony excluded, there is practically no proof that she paid anything for the property.

The evidence produced by appellees as to the conveyance by Dr. Knight of all his visible estate, as to his insolvency, and as to Mrs.

Wingate's want of ability to pay, connected with the relationship of the parties, and the further facts that the grantor continued to reside in the house, and that there was no change in the manner of conducting the household matters, was sufficient to make out a *prima facie* case of a voluntary alienation by the grantor in fraud of appellees' rights. Mrs. Wingate might have contented herself with the denial of the material allegations of the two petitions, but she did not see proper to do so. She entered into an elaborate explanation of the circumstances, under which the conveyance was made, and of the necessity of some provision being made for the personal comforts of the grantor, and of the necessity of some one taking charge of the domestic affairs of the household. This explanation is utterly inconsistent with the idea that the conveyance was merely the consummation of actual business transactions.

Mrs. Wingate in her answer states that she had from 1846 up to 1865 advanced to her father large sums of money. She does not state except by implication that the advances were made upon the promise of her father to repay them. Nor is there any specific averment of such a state of facts, as show, necessarily, that she intended to require, or that her father expected to repay to her the money advanced. Her testimony does not present a much stronger case of indebtedness than her pleadings, except that she says she held a note for $3,000 advanced in 1846, and $550 advanced in 1854. She claims that she kept a memorandum of the other indebtedness by entries in a blank book. Giving to her statements the most favorable construction, it seems that the $12,000 cash payment on the property was made up of a $3,000 note that had been due for about nineteen years, of a $550 note that had been due over ten years, and of various other items for house rent collected, and for property invested by the grantor, which were evidenced only by memoranda.

On the 30th day of January, 1865, all these claims were barred by the statute of limitation except the note of $550. It is true the grantor was morally bound to pay them, notwithstanding the great lapse of time, and that other creditors can not complain that he recognized this moral obligation. But when we find him regarding his moral duty in regard to debts due to his daughter, and thereby securing to her and to himself a home during the remainder of his life, and making no provisions whatever for the payment of infant *cestui que* trust, whose money he had spent, it is difficult to conclude that the conveyance was made and executed in the discharge of a high moral obligation, the conviction is almost irresistible that these

sole claims were resurrected from the past, to give color to a transaction that the parties hoped would enable the daughter to continue in a position to minister to the comforts and growing wants in the old age, and rapidly coming helplessness of the father.

We do not doubt that Mrs. Wingate received some amount of money from the estate of her deceased husband, but it is almost impossible that it should have been so managed and controlled as to clothe her and her daughter, and also to accumulate to the amount claimed to have been due her at the time she received the conveyance of her father's house and lot. The more natural conclusion is, and the testimony, all considered together tends to show, that the money received by her was gradually expended for the use and purposes of the household of which she was a member. Mrs. Wingate had no idea that her father would ever be reduced to poverty. She felt secure of a home for herself and daughter, and therefore expended, or permitted others to expend her money for the common comforts of the family without expectation or desire of repayment. Under such a state of case, the conveyance can not be upheld to the prejudice of *bona fide* creditors.

The actions were maintainable without a judgment and return of no property found against the fraudulent grantor. He died before judgment. His estate is insolvent, and there has been no administration upon it. Appellees had the right, under the circumstances, to establish their debts against the heirs at law of Dr. Knight, and in the action instituted for that purpose to attack the conveyance to Mrs. Wingate. Such practice has been allowed even whilst the grantor was still alive, and as it is admitted that Dr. Knight's estate it utterly and hopelessly insolvent, there was no reason whatever for requiring appellees to engage in expensive and useless litigation with its representatives, merely to prepare for the ultimate attack upon the conveyance to Mrs. Wingate. There can be no serious question that the devisees of Garrison and of Meyer are entitled to the amount allowed them respectively. Meyer's devisees have no claim to the interest devised to Mrs. Meyers, afterwards Mrs. McMahon. If Dr. Knight failed to pay such interest over to her, the right of action therefore is in her personal representative, and not in the other devisees.

The two judgments are *affirmed.* On the cross-appeal the judgment of Meyers' heir and devisees is also *affirmed.*

Bullitt & Bullitt, Harris, C. J. Clark, for appellant.
Lee & Rodman, for appellees.

C. K. RUSSELL *v.* JAMES LYNN.

Practice—Waiving Objections—Evidence.

Where no objection was made and no exception taken to the giving of instructions, no question as to them is presented on appeal.

Evidence.

In actions ex contractu when the evidence clearly preponderates against the verdict, a new trial should be granted.

APPEAL FROM KENTON CIRCUIT COURT.

October 30, 1874.

OPINION BY JUDGE PETERS:

To the instruction given to the jury no objection was made and no exception taken by appellant, and this court can not on that account review the action of the court below, giving said instruction, even if it were erroneous, as the error was waived by failing to except to it at the time. No citation of authority is necessary on this point. Nor was there any exception taken to the opinion of the court in admitting the evidence of the Rusts to go to the jury and that question was waived.

But the verdict of the jury is against the decided weight of the evidence.

In actions ex contractu, when the evidence preponderates so decisively against the verdict as it does in this case, a new trial should be awarded. *Kirtley v. Kirtley,* 1 J. J. Marsh. 96.

Wherefore the judgment is *reversed* and the cause is remanded for a new trial and further proceedings consistent herewith.

R. D. Handy, for appellant.

HENRY RUDWIG *v.* JACOB CRUM.

Judicial Sale of Real Estate—Mistake in Description—Power of Court to Correct—Judgment.

Where the court has ordered the sale of various tracts of real estate, designated by numbers, some of which were improved and valuable and others unimproved and less valuable, and by mistake in the sale and purchase thereof one buys what is supposed by the parties to be the valuable parcels for a high price and another buys at a low price what is supposed to be the unimproved parcel of land, while in truth by mistake the descriptions were erroneous, and the purchasers did not receive what they bought, such error is one of fact and may be corrected upon the supplemental petition of a purchaser filed in said cause.

Power of the Chancellor.

The chancellor on a proper issue made for the purpose upon facts established, may correct a decree of a former term wrongfully entered through mistake or fraud.

APPEAL FROM LOUISVILLE CHANCERY COURT

October 31, 1874.

OPINION BY JUDGE PETERS:

Two appeals are presented to this court from the Louisville chancery court, on two transcripts of records, and are both docketed. *Rudwig v. Crum,* No. 1. *Rudwig v. Crum,* No. 2.

No. 1 is a suit brought by Henry Crum against Fergerson, Dawson and Rudwig, and in his petition the plaintiff alleges that the defendants, Fergerson and Dawson, sold and conveyed to Rudwig a tract of land in Jefferson county for $18,500, all of which was paid down except $1,150, for which Rudwig executed his two promissory notes for $575 each, one payable in one and the other in two years thereafter, with interest from date; that in the conveyance the grantors reserved a lien on the land to secure the payment of said notes, which notes they had assigned to him; that one of them was past due; and he prayed for a foreclosure of the lien to which he was entitled by reason of the assignment, and for a sale of land to pay his debt. One Bryant was subsequently made a defendant, and he filed an anwer which he made a cross-petition, and alleges that he sold and conveyed the same land to Fergerson and Dawson; that they then owed him $5,000 of the purchase money, evidenced by their note, and to secure which he had in the deed made to them retained a lien; that his note was past due; and he prayed for a foreclosure of his lien and for a sale of land enough to pay his debt.

Rudwig answered the original and the cross-petition, not controverting Bryant's lien; but he charges that he had not purchased from Fergerson and Dawson all the land they purchased from Bryant; that they yet had 171½ acres of the land they bought of Bryant. He asked that the 171½ acres should be first sold, and that only so much of his should be sold as would pay the residue of the debt to Bryant, if any part should remain unsatisfied; and he made his answer a cross-petition against his vendors for that purpose.

In his answer to Crum's petition, after admitting the lien retained in the deed to him for the security of the debt he owed, and the assignment of the notes to Crum, he avers that Fergerson and Dawson promised and understood when he purchased of them, that

they would remove Bryant's lien, and claims that he will be entitled to a credit on his debt for so much of his land as may be sold to pay Bryant's debt, and by appropriate pleadings for the relief.

Bryant conveyed the land to Fergerson and Dawson by distinct parcels, describing such lots by metes, bounds and numbers from 1 to 6, inclusive, all bounds embraced in one deed, reciting that lot No. 1 contains 100 acres, No. 2, seventeen and one-half acres, No. 3, 50 acres, No. 4, 240 acres, No. 5, 50 acres, and No. 6 one acre.

The case was first heard on the cross-petition of Bryant; the court adjudged to Bryant his debt, and that he had a lien, and after directing the terms and place of sale, the court directs the marshal to sell the property, by lots as they are now divided, beginning with lots on tracts No. 1, then No. 2, then No. 3, then No. 6, then No. 5, then No. 4, unless the first lots sold bring enough to pay off and to satisfy said debt, interest and cost, and the case was remanded as to the petition and cross-petition of Rudwig.

On the 28th of June, 1872, the marshal made his report of the sale to the court, in which he reported Henry Rudwig the purchaser of lot No. 1, at $5 per acre, lot No. 3, at $4 per acre, and lot No. 6, at $5 per acre, and Jacob Crum the purchaser of lot No. 4, at $17.50 per acre, and lot No. 5, at $15 per acre; that Rudwig has complied with the terms of the sale by executing three notes for $438.50 each, with Isenburg as his security; and that Jacob Crum has executed three bonds for $147.50, each with George Crum as his security. Crum's notes are less than his purchase, but are for enough, when added to Rudwig's, to satisfy the decree under which the land was sold. By direction of the parties and their written consent herewith filed, he took the bonds on that day.

The written consent of all the parties is also filed in the case for a confirmation of the marshal's report of sale, without lying a week for exception. And on the 5th day of July, 1872, said report of sale was approved and confirmed by the court, and the commissioner was directed to make a deed to the purchaser.

The sale was made on the 27th of May, 1872. On the 7th of March, 1873, Jacob Crum appeared in court and declined to accept the deed to him prepared by the commissioner, and the court directed the commissioner to withhold the deed till the further order of the court. And on the 14th of the same month, Henry Rudwig moved the court to set aside the last named order.

In July, 1873, the court below directed the commissioner to make deeds to Jacob Crum and Henry Rudwig, as ordered by decree in

case No. 26,193 in the same court. In a few days thereafter Rudwig moved the court to set aside the last named order until after the trial of the case in this court of Jacob Crum and Henry Rudwig on appeal. That may be an error in the style of case, but the court overruled his motion in October, 1873. This order appears to have been made on the motion of plaintiff by attorney, ordering that a writ of possession be awarded him for lots 1, 2, 3 and 6, to which Rudwig excepted.

Upon a rule against Rudwig and his security to show cause why they should not pay the money into court due on their bonds, Rudwig responded at great length, but his response being adjudged, and the rule made absolute, he excepted and appealed to this court; and now he complains that the court below erred, first, in ordering the commissioner to make a deed to Jacob Crum and to Henry Rudwig as in case No. 26,193; second, in awarding to the plaintiff in this suit a writ of possession for lots 1, 2, 3 and 6; and third, in adjudging his response to the rule against him and his security insufficient, and making the rule absolute.

These questions being presented in appeal No. 1, and being involved inseparably in the decision of the question arising on the appeal between the same parties, we will proceed now to consider No. 2 in connection with the first, as the cases were heard together.

On the 7th of March, 1873, Jacob Crum filed a petition in the Louisville chancery court against appellant, in which, after referring to the suit of *George W. Crum v. Fergerson and Dawson,* and Bryant's judgment on the cross-petition in the case, and the sale under that judgment, he alleges that Fergerson and Dawson conveyed to Rudwig the several tracts of land marked in red lines on the plat filed with his petition on No. 1, 2, 5, and 6, supposed to contain 294 acres, 3 roods and 25 poles; that Bryant, their vendor, in addition to those parcels, conveyed to them two other parcels of land designated on said plat as No. 3 and 4; that Bryant's lien was exclusive as to the last named lots; that the court below ordered the sale of those two lots first, and if they did not sell for enough to satisfy his debt, then so much of the other lots should be sold as would be required to pay the residue of Bryant's debt; that the decree was drawn by the attorney of Bryant, who believed that lots No. "4 and 5" represented the land that Rudwig purchased of Fergerson and Dawson, but he was mistaken, as the lots on which J. W. Crum had no lien were represented by No. "3 and 4," and by the mistake of said attorney these lots were named last in the order of sale, instead

of first; that the mistake occurred by pursuing the order in which the several lots are mentioned in the deed of Bryant to Fergerson and Dawson; that it was the intent and purpose of all the parties interested, Rudwig included, to sell first the parcels of ground not embraced in the deed of Fergerson and Dawson to him; that the marshal of the Louisville chancery court sold the several parcels of land in the order in which they are named in the decree; that by Bryant being present, and understanding as he did that lots Nos. 1, 2, 3 and 6 represented the land upon which he held the exclusive lien, he bid them in at $5 and $4 per acre, and Rudwig having the same belief and understanding that lots No. 4 and 5 represented the land he had purchased of Fergerson and Dawson, bid them in at $15 and $17.50 per acre; that Rudwig, at the time of the sale, declared that it was his purpose to buy in the same land he had previously bought of Fergerson and Dawson; that the land so purchased was improved by a dwelling house, orchard and vinyard, which made it valuable.

But by the misunderstanding of all the parties, the improved land, in fact, represented by Nos. 1, 2 and 6, Rudwig permitted to be sold for from $4 to $5 and bid for Nos. 4 and 5 at $17.50 per acre, when No. 4 was unimproved, hilly and very inferior land. Bryant transferred his bid to Rudwig, whereby he became the purchaser of all the land. After the expiration of more than two weeks, Rudwig, finding that he was unable to give the requisite bonds for the purchase money, proposed to appellee to transfer his bids on the land he had purchased from Fergerson and Dawson, which land he represented at the time to be designated by lots Nos. 4 and 5. He, relying on the representation of Rudwig, and believing that said numbers embraced the improved lands with the houses, orchards and vinyard, from an examination he and George W. Crum made of them with Rudwig, during which he, Rudwig, showed them lot No. 1, on which said improvements are located, and represented to them that it was lot No. 4, also showing them the boundary of lot No. 4, he induced the appellee to take his bids, which he consented to do, laboring under a mistake as to the lots represented by said numbers, produced by the false and fraudulent statement of appellant, made to him in relation thereto, and executed his three bonds with George W. Crum as his security for $—— each, for the price of said lots bid by Rudwig. He has now paid off and taken up the one which first matured; but he had not discovered the mistake till within one week from the time he exhibited his petition.

He prayed that the mistake be corrected for a conveyance to him of lots Nos. 1, 2, 5 and 6, and if that could not be done then he prayed the sale be set aside and the lots ordered to be resold, and for all proper relief.

In an argumentative answer, containing about twenty pages (manuscript), Rudwig denies that Bryant had an exclusive lien on lots Nos. 3 and 4, and denies that George W. Crum had any lien on lots Nos. 1, 2, 5 and 6 to secure the payment of the two notes executed by said Rudwig to Fergerson and Dawson, and by them assigned to said Crum, or that he ever had such lien, or that the court below ordered lots on which Bryant had an exclusive lien to be first sold to pay his debt.

He denies that when Bryant's attorney drew the decree for the sale, that he understood or believed that lots Nos. 4 and 5 represented the property Rudwig purchased of Fergerson and Dawson, and there, by mistake, inserted lot No. 4 last in the order for the sale, or that the court had any intention of ordering a sale of the property in a manner different from that expressed in the judgment. He denies that it was the expressed intention of the parties interested to first sell the lots on which Bryant had an exclusive lien, and that a mistake was committed in writing out the judgment by describing the lots in the decree as they are numbered in the deed of Bryant to Fergerson and Dawson. And he then avers that Bryant held a lien on all the lots; and the court adjudged that all should be sold to pay his debt, if necessary, and orders them sold as set forth in the judgment, without regard to any intention of the parties; that the marshal was ordered to sell said lots beginning with 1, then 2, then 3, then 6, then 4, and 5, successively, and to sell all unless enough was realized to pay said lien before all were sold; that the manifest intention of the court was to sell the most valuable lots first, that enough might be realized to satisfy Bryant's lien without regard to the numbers, and to avoid the sale of the whole of the land; that the marshal sold the lots in the order in which they are named in Bryant's deed.

He admits that Bryant was the purchaser at the marshal's sale of lots Nos. 1, 2, 3, for $4 and $5 per acre, and that he purchased lots Nos. 4 and 5 at $5 and $17.50 (as is in the transcript before us), which last named lots he had no interest in; but he denies that Bryant, when he purchased, understood or believed that the lots bid in by him were those on which he had an exclusive lien, and denies that he then understood that lots 4 and 5 were the same he had pur-

chased from Fergerson and Dawson. He admits that it was his express intention to buy in the land he had previously bought of Fergerson and Dawson, on which were situated the dwelling house, orchard and vinyard, and for that reason he agreed to assume for Bryant; and that Bryant transferred his bids for lots 1, 2 and 6 to him, and he thereby did become the purchaser of said lots. He avers that the lot No. 4 was and is worth the full price he bid for it, and denies that it was unimproved, hilly and inferior land. He also denies that he proposed to appellee to transfer his bids on the lots he purchased from Fergerson and Dawson, and represented to him at the time that lots 4 and 5 represented the land purchased by him from the last named individuals, and that he was induced to take them because he relied on the truth of those statements. He charges that Jacob Crum was in fact the owner of the notes executed to Fergerson and Dawson by appellant although they were assigned to George W. Crum, and that he was induced to assume his bids, and become the purchaser of lots Nos. 4 and 5 as a means of saving his debts, because no lien, as he knew, existed on said lots, for the payment of the notes. He also knew that Fergerson and Dawson were insolvent; and he files, as part of his answer, the written agreement made between himself and Joe and Jacob Crum, marked "B," as evidencing the truth of his statement.

He says in his answer that he had no more knowledge of the situation of the several lots of land as numbered in case No. 24,937, and set out in the survey filed in this case, than appellee; that a survey in this case was necessary, and it was made to ascertain which numbers belong to each plat, and he is yet in doubt which survey is correct, the plat theretofore filed, or exhibit "A" filed with his answer; that when he transferred his bids to appellee all the land had been sold, and he was the purchaser of the lots No. 4 and 5 only, and could not transfer more than he had purchased. The sale of the land by the marshal was made on the 27th of May, 1872, and on the 25th of June, 1872, he made the agreement with the Crums, evidenced by "Exhibit B," by which Jacob assumes his bids for lots Nos. 3 and 4, with the right reserved to himself to redeem them if he refunded the money to said Crum by the time the last instalment was due; that at the time of answering only the first instalment was due and paid, and his right to redeem still existed; that subsequent to this agreement with Crum, he contracted with Bryant to take lots 1, 2, 3 and 6; that on the 28th of June, 1872, the marshal, by agreement of all the parties interested, made his

report of the sale to the court, reporting Jacob Crum as the purchaser of lots 4 and 5, and appellant as purchaser for lots 1, 2, 3 and 6; and that said report of sale was confirmed more than sixty days before this suit was instituted.

He admits that he was on the land with Jacob and George Crum before the sale of the marshal, and before he had any interest in the land except as stated in case 24,937, but whether the lot he was on was 1 or 4 he had not sufficient knowledge or information to form a belief, except from a survey which has since been made in this suit. He had no survey showing the number as set forth in decree in case 24,937, nor any better means of knowing the numbers than appellee, and therefore denies that he fraudulently misrepresented the numbers of lots even before he had any interest as purchaser at the judicial sale. But he avers that lots 4 and 5 are worth more than the sum bid for them, and the amount of the two notes he executed to Fergerson and Dawson, and if he fails to redeem them, said two lots can be sold for more than he bid for them, and the Crums will be fully indemnified.

This elaborate extract is made from the answer in order that the manner and the extent of the denial of the direct averment in the petition on which the claim for relief is based, may be fully and clearly comprehended.

Appellant does not deny that he told the appellee that lots Nos. 4 and 5 represented the land he bought of Fergerson and Dawson, nor that he told him the improvements were on those lots; nor does he deny that the appellee made the purchase on the faith of the truth of the statements made to him by appellant. He only denies that he fraudulently misrepresented to him the numbers of these lots, presenting in the preceding part of the sentence the reasons for the conclusions. But giving to every word and the whole context the most liberal construction, the material allegations are not traversed by the answer. The denial is not that he did not make the statements, but that he did not make them fraudulently; and that may and is most probably true, for the record will impress upon the reader the conviction that all the parties below under a mistake as to the numbers of lots on which the improvements were located.

But if the allegations of the petition were sufficiently controverted by the answer, the fact of the mistake is established by a weight of evidence that is overwhelming. The great difference in the value of the land, and the fact that the less valuable lots sold for more than three times as much as the most valuable lots, is a very power-

ful fact in support of the appellee's claim to relief, and the marshal who made the sale, Bryant, and W. H. Crum, who were interested in the sale and present when the mistake was made.

But it is insisted that the judgment in the first case is final; and the chancellor cannot revise and reverse the vice-chancellor's decree. We understand the proceeding by Jacob Crum as a supplemental petition to the first suit, in the nature of a bill of review, instituted in the same court in which the decree was rendered, to correct that decree for the mistake of fact. That the chancellor may on a proper issue made for the purpose and the facts established, correct a decree of a former term wrongfully entered through mistake or fraud, is too well established by authority to be questioned. *Garner's Admr., v. Strode,* 5 Littell 315; *Brewer v. Bowman,* 3 J. J. Marsh. 492.

Nor is it material by what name the proceeding is called; if the facts set forth in the pleading are such as to show that there was a clear mistake in entering the judgment, and the complaining party is adjudged to take a tract of land he did not contract to buy, and to lose the one he did buy, and the mistake was natural and discovered after the term at which it was entered, it is clearly and satisfactorily established that the court which rendered the judgment has the power to correct. *Basye v. Beard's Exr., et al.,* 12 B. Mon. 581.

But it seems to us that the action of the chancellor may be sustained on another ground. Jacob Crum purchased, not at the sale, but afterwards; and although the sale was confirmed by the court, conveyances were not made; and the evidences establish the fact that G. Crum should pay for the land which the chancellor by his last deed ordered to be conveyed to him, and in the number and the conveyance was in fact carrying out the sale as it was made and confirmed. Wherefore the orders complained of in record No. 1 are not prejudicial to appellant, and are affirmed; and the judgment in No. 2 is *affirmed.*

J. S. Butler, for appellant.
Muir Biper, Davie, for appellee.

SARAH CRAWFORD *v.* W. M. COMBS.

Husband and Wife—Attachment—Sufficiency of Petition.

In an attachment suit against the husband a wife may enter her appearance and make defense in the name of her husband for the benefit of herself and minor children.

Sufficiency of Petition.

A petition on an account states no cause of action which declares that the defendant is indebted to plaintiff blank dollars, evidenced by an account filed amounting to blank dollars, and prays judgment for blank dollars.

APPEAL FROM POWELL CIRCUIT COURT.

October 31, 1874.

OPINION BY JUDGE LINDSAY:

The wife was properly allowed to enter her appearance and make defense in the name of her husband, and for the benefit of herself and her infant children. She controverted the appellee's right to the attachment, and asked that it should be discharged. The court erred in refusing her prayer in this regard.

As to the account sued on, appellee presents no cause of action. He says that Crawford is indebted to him blank dollars and cents, for groceries, whiskey, etc., evidenced by an account filed, amounting to blank dollars and cents, and that he ought to recover blank dollars and cents, and prays judgment for said amount. If the petition had been confessed appellee could have recovered nothing. Such a petition will not sustain an attachment.

As to appellee's liability as surety on Crawford's bond as master commissioner, he merely claims that he is in danger of being ultimately compelled to pay $151. He does not aver that he has ever paid one cent. If it be a fact that he is liable, his claim against Crawford is in the nature of a debt not yet due. He has the right by attachment to secure himself, but the attachment could not be issued by the clerk until it was first granted, by the circuit court, or the judge thereof, or by the judge of the county court. The attachment in this case was issued by the clerk without having been granted in the manner indicated. It is therefore unauthorized and void.

The judgment sustaining it is *reversed* and the cause remanded with instruction to set aside said judgment, and to discharge the order of attachment. As the property was taken from the possession of the wife, the court should turn over the proceeds to her. Appellee may proceed with his action in other regards, and may sue out a new attachment, if grounds therefor are now in existence.

The question as to whether the wife can hold the attached prop-

erty or its proceeds when properly proceeded against need not be decided.

J. B. White, for appellant.

JAMES BENNETT *v.* J. D. SMITH'S ADM'R.

Decedent's Estate—Parties to Petition to Sell Real Estate.

The heirs of a decedent must be made parties to a petition of an administrator to sell real estate to pay debts, and where they are named as defendants, but join the administrator as plaintiffs, an order of sale procured in such action will not be set aside.

APPEAL FROM MADISON CIRCUIT COURT.

November 4, 1874.

OPINION BY JUDGE PETERS:

In the original suit brought by the administrator of J. D. Smith, deceased, his heirs were not made parties; but by an amended petition the heirs with their guardian united as plaintiffs with the administrator, and while the petition is not sworn to, the plaintiffs therein are no less bound by its allegations; and if they were made by the attorneys without their authority they will be responsible to those they profess to represent, the attorneys having signed the amended petition.

It is manifest from the statements of the administrator and the report of the master that the personal assets were insufficient to pay the debts of the intestate, and that a sale of at least a part of the real estate was necessary for that purpose. In such cases Sec. 465 of the Civil Code, authorizes the personal representative, an heir, devisee, legatee, distributee, or creditor of a deceased person, to institute an action by equitable proceedings for the settlement of his estate, and if the personal representative or heir may institute an action for the purpose they certainly may join in the prosecution of such an action when it shall be necessary, as in this case, that such an action shall be prosecuted. And although the creditors may not be specially named as defendants, still, by presenting their claims and proving them before the master, they make themselves defendants to the action.

As, therefore, the sale of a part of the real estate of the intestate was necessary for the payment of his debts, and as his heirs have

joined as plaintiffs in the suit to procure the sale of the town lots described, they will be concluded by the judgment of sale, and their title will pass to the purchaser at the judicial sale by the deed of the court's commissioner.

The court below, therefore, did not err in refusing to set aside the sale, and the judgment is *affirmed.*

Chenault & Bennett, for appellant.
Turner & Smith, Bronston, for appellees.

JOHN H. RICHARDSON *v.* JOHN P. RICHARDSON.

Judgments Set Off Against Each Other—Jurisdiction.

Judgments for the recovery of money may be set off against each other, but the circuit court has no jurisdiction to enjoin the collection of judgments rendered by a justice of the peace.

Independently of the provisions of the code (Civil Code, § 470) courts of chancery have jurisdiction to set off one judgment against another when injustice and wrong are about to result to one of the parties on account of the insolvency or non-residence of the other.

APPEAL FROM ESTILL CIRCUIT COURT.

November 4, 1874.

OPINION BY JUDGE COFER:

The appellant having recovered six judgments in the court of a justice of the peace on notes for fifty dollars each, the appellee brought suit in equity in the circuit court of the county to enjoin the judgments, on the ground that the notes were not his acts and deed, and that he owed the appellant nothing, and the court on final hearing perpetually enjoined the collection of the judgments.

Sec. 314, Civil Code, provides that an injunction to stay proceedings on a judgment or final order of the court shall not be granted in an action brought by the party seeking the injunction, in any other court than that in which the judgment or order was rendered or made.

It is, therefore, clear that the circuit court had no jurisdiction in this case to enjoin appellant's judgments, and so much of the judgment as attempts to do so must be reversed. If the appellee is the owner of the judgment rendered in the circuit court against appellant in favor of the distributees of Moab Freeman, and appellant is a non-resident of this state, and anything remains due on that judg-

ment, he may by appropriate proceedings in the proper court have it set off against the judgments in appellant's favor in the justice's court. Sec. 407, Civil Code.

We cannot determine from anything in this record whether the appellee is, or claims to be the owner of that judgment; but if he is the owner, he ought to be allowed to amend his pleadings on the return of the cause, and have the judgments offset one against the other, if the circuit court has jurisdiction at appellee's instance to so decree.

Section 407, Civil Code, provides that "judgments for the recovery of money may be set off against each other, having due regard to the legal and equitable rights of all persons interested in both judgments. The set-off may be ordered upon motion, after reasonable notice to the adverse party, where both judgments are in the same court, or in an action by equitable proceedings in the court in which the judgment sought to be annulled by the set-off, was rendered." The judgments which the appellee seeks to annul by the set-off are those against him in the justice's court; and it would seem that this section requires the proceedings for that purpose to be instituted in that court.

But courts of chancery have jurisdiction, independent of the code of practice, to set off one judgment against another, when injustice and wrong are about to result to one of the parties on account of the non-residence or insolvency, of the other. *Merrill v. Souther & Fowler*, 6 Dana 305; *Allnut, et al., v. Winn*, 3 J. J. Mar. 304.

If, therefore, the appellee is the equitable owner of the judgment against appellant in the case of Sally Freeman, *et al.*, against him, and the latter is a non-resident, the appellee may be allowed to amend his pleadings so as to set up that judgment, and have so much of it as may remain unsatisfied after deducting such credits as appellant may be entitled to, set off against the judgments against appellee in the justice's court.

But even then no enquiry can be made into the validity or justice of those judgments. That subject is concluded; and if it were not, the appellee could not complain. In the suit of Sally Freeman, *et al.*, against appellant he was charged with the notes on appellee, and they go to make up a part of the amount of the judgment. If appellee owns the judgment, of course he must account for the notes, and if he does not, he must pay the notes, for which appellant has been required to account, to the distributees of Moab Freeman. The appellant is also entitled to credit the judgment

against him, for the advances made by him to the various beneficiaries under the deed of trust from Freeman to him, with interest from the date of the payment. That judgment entitles him to credits therefor by its express terms, and as appellee was a party to that suit and judgment, he is bound by all its terms; and if he were not, appellant would still be entitled to the credits.

He had the legal title to the land under the deed of trust, and had authority to make the advances by its terms; and having done so without actual notice, as far as appears, of the sales to appellee, and some of the payments having been made before appellee purchased the shares of those to whom they were made, he holds subject to deductions out of the judgment for all the advances made to any of the beneficiaries prior to the date of the judgment against appellant. The three notes still held by appellant, if executed by the appellee for rent, and charged to the former in the settlement, should also be deducted, principal and interest, from the judgment. Unless the appellee shall offer to amend his pleadings within a reasonable time so as to conform to the directions of this opinion, his injunction should be dissolved, and his petition should be dismissed; but as appellant concedes in his answer that appellee ought not to be compelled to pay the three notes tendered therewith, they should be cancelled before the petition is dismissed.

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

A. W. Quinn, for appellee.

BASIL BAILEY *v.* MILTON LYKINS.

Waiver by Appearance.

A defendant in a suit for forcible detainer, who has appeared and defended in the justice court, cannot in the circuit court take advantage for want of proper service of the writ.

APPEAL FROM LEWIS CIRCUIT COURT.

November 5, 1874.

OPINION BY JUDGE LINDSAY:

It is not necessary to decide whether or not a constable has the right to execute a warrant for forcible detainer.

In this case the appellee appeared at the trial in the county, and

made defense. He cannot, therefore, take advantage in the circuit court, upon the traverse, for want of proper service of the writ. *Philips v. Harmon, et al.*, 1 Dana 468; *Williamson v. Boucher*, 7 J. J. Marsh. 252. The judgment of the justice or of the circuit court may still be carried out by the sheriff, and the rights of the appellee could not have been prejudiced by the summoning of the jury, or the service of the writ by the constable. The judgment of the circuit court quashing the warrant and the service thereof is *reversed*, and the cause remanded for a trial of the issue raised by the traverse.

George M. Thomas, for appellant.

JOHN A. KANOPKA *v.* JOHN JAQUETT.

Real Estate—Conveyance—False Representations.

Where a grantee is induced to buy real estate and take conveyance thereof by the false representations of an insolvent grantor, that he is the owner thereof, although the contract is executed, the warranty in the deed is no indemnity, and he is entitled to relief to the extent that his vendor had no title to the land conveyed.

APPEAL FROM PENDLETON CIRCUIT COURT.

November 6, 1874.

OPINION BY JUDGE PETERS:

Taking the allegations of the answer as true, which must be done for the purposes of the demurrer, and it appears that appellant purchased a small tract of land from appellee at its full value; that appellee at the time represented to appellant and assured him that he had a clear and perfect title to the whole tract of land, and appellant, relying on the representations made to him by appellee, accepted a conveyance for the land, believing that he thereby acquired a perfect and clear title to the land; but that he has since discovered that said representations made to him by appellee were false; that he represented that he owned three-fifths of said land, having purchased the interest of Sarah Tippett and Mary E. Williams. But that upon examination he finds that there is no record evidence of such purchasers, and that he has not acquired their titles to their portions of said land, and that appellee is insolvent.

Although the contract may be executed, still, as appellant has pointed out the particular defects in the title, of which he was igno-

rant at the time the conveyance was made, and alleges that he was induced to accept the conveyance by the misrepresentations of appellee, who is insolvent, whereby his warranty is no indemnity for the defect of title, he shows himself entitled to relief to the extent that his vendor had no title to the land.

Young v. Hopkins, et al., 6 T. B. Mon. 18. Wherefore the judgment is *reversed* and the cause is remanded with directions to overrule the demurrer to the answer, and for further proceedings consistent herewith.

C. H. Lee, for appellant.
John H. Fryer, for appellee.

O. C. BOWLES *v.* JOHN N. WATKINS.

Judgment in Foreign State—Pleading to Invalidate.

Where it is sought to invalidate a judgment taken in a foreign state, the petition, to be good against demurrer, must aver facts showing that the court rendering such judgment had no jurisdiction. The pleading of mere conclusions is not sufficient.

APPEAL FROM PIKE CIRCUIT COURT.

November 7, 1874.

OPINION BY JUDGE PRYOR:

This is an attempt to invalidate a judgment obtained in a Virginia court, subjecting the lands of James Hamilton, deceased, to the payment of his debts. Whether the court rendering the judgment had jurisdiction to sell does not appear, nor is it ever stated in what court the proceeding was instituted, or what was the character of this pretended judgment.

If the court had no jurisdiction to sell the land, and the appellees no claim against the estate, the sale passed no title to the purchaser. As the court below was called on to disregard the judgment of the Virginia court and as this pretended judgment is made the basis of appellant's right to recover, there should be some allegation showing a want of jurisdiction over the property sold or the parties entitled to it. The appellant had not purchased all the interest when this sale was made. The court below acted properly in sustaining the demurrer to the petition, but gave the court no means of ascertaining the right of the Virginia court to sell; and the statements upon this

subject are only the conclusions of the pleader without the facts upon which they are based.

Judgment *affirmed.*

Apperson & Reid, for appellant.
A. J. Auxier, for appellee.

SAMUEL HALL *v.* RUSSELL HAMILTON.

Perjury—Grand Jurors Competent Witnesses.

Where in a civil suit one is charged with perjury in making a statement under oath before the grand jury, a member of the grand jury is competent to prove what the statement was.

APPEAL FROM FLOYD CIRCUIT COURT.

November 7, 1874.

OPINION BY JUDGE PRYOR:

Although the allegations of the petition fail to present a cause of action, the defect has been cured by the answer, in which it is admitted that the defendant charged the plaintiff with the crime of perjury, in making a statement under oath before the grand jury, that he, the defendant, had stolen plaintiff's pocketbook and money, when he, the plaintiff, knew that the statement made was false. Upon this issue the case went to the jury, and the only question necessary to be considered is "was a member of the grand jury, before whom the statement was made, competent to prove what that statement was

Sec. 109, of the Criminal Code, was enacted for the protection of the grand jurors in their deliberations upon matters, on the discharge of their duty as such, but even a grand juror who has testified falsely in giving testimony before his fellow jurors, may be indicted for perjury, and his statement made, proven by members of the same body. Sec. 111, Criminal Code. By Sec. 110 of the same act, a member of the grand jury is competent to show that the witness examined upon the final trial of the case, for which the indictment was found, had made statements to the grand jury, which were different from those made by the witness on the final hearing. In this case the complaint is that the appellee charged appellant with swearing to a lie before the grand jury, and there is no reason why, when the plaintiff is asking an investigation himself as to the truth or falsity of the charge, that those who heard his statements should

have their mouths sealed as to what transpired with reference to the charges made. There is no question of public policy involved, nor any rule of law, that we are aware of, that makes a grand jury incompetent in such a case. The law requires secrecy in certain cases upon grand juries, by the express provisions of the code, but in all others the grand juror has the right to speak, and is no more protected than any other witnesses would be. The issue as to whether the plaintiff swore falsely was fairly presented to the jury by the witnesses, and the judgment must be affirmed.

J. R. Bates, for appellant.
Apperson & Reid, for appellee.

J. M. LEWIS, ET AL., *v.* WILLIAM RICHARDS, ET AL.

Attachment—Levy—Lien—Purchaser.

If a lien is created by a writ of attachment such lien is lost when returned by the sheriff without a levy.

Purchaser.

A debtor may lawfully sell his property and a purchaser may buy it before any levy is made on it or has attached to it, and if the sale is in good faith for a valuable consideration it will be upheld even though the purchaser and seller knew there were creditors seeking to collect their claims.

APPEAL FROM ROWAN CIRCUIT COURT.

November 7, 1874.

OPINION BY JUDGE PRYOR:

The lien, if any, created by the attachment, was lost when returned by the sheriff. It never was levied on any property, and the return made by the sheriff is that it was executed on H. B. Myers. This constitutes no levy, and the lien, when the attachment was returned, ceased to exist. Nor was there any attachment or garnishee issued on the amended petition, and if there had been, the equity of Lewis was superior to that of appellee, for the reason that the latter had already purchased and paid Myers for his interest in the land. There is no such evidence in the record that would authorize the conclusion that Lewis and Myers had combined to defraud Richards Lewis. He may have known of the efforts on the part of Richards to make his debt, still this did not preclude Lewis from making his or purchasing

Myers's interest in the property. Richards had no lien on it, or any right to it superior to any or of the other creditors. The judgment of the court below is *reversed*, and the cause remanded with directions to dismiss appellees' petition as against both the appellants.

Reid & Stone, for appellants.
Nesbitt & Gudgell, for appellees.

JOHN WILLIAMS *v.* A. C. GODSAY.

Suit on Note—Defense—Evidence.

Where a suit is brought on a note, the answer pleading payment, and that plaintiff accepted payment in confederate money in full payment, and the illegality of confederate money is pleaded in reply, it was necessary for defendant to show by proof that at the time and place of payment the military power and jurisdiction of the confederate states predominated, or that the payment was voluntarily received by plaintiff in satisfaction.

Evidence.

It was error to refuse to permit plaintiff to testify as to such matters in his own behalf.

APPEAL FROM PERRY CIRCUIT COURT.

November 9, 1874.

OPINION BY JUDGE PETERS:

This action was brought by appellant against Austin C. Godsay, Granvill Coumbs, and Nicholas Williams to collect five hundred dollars for loans of money, with the interest from 1859, and for which the defendants executed their note. In this petition appellant alleges that appellee, Godsay, brought to him Confederate money, and represented that it was good and current money, and by false and fraudulent representations, induced him to take bills and notes on the Confederate states in payment for his debts, which were at the time worthless, and its circulation actually prohibited by law; and that by means of said false and fraudulent representations, he, said Godsay, got possession of the note. Wherefore he prayed judgment for the amount of his debt.

The borrowing of the money and the execution of the note, as alleged in the answer, has been paid off and fully discharged; and it is also alleged that it was paid with notes on the Confederate states of America at the special instance and request of the plaintiff, and

that when the payment was made the parties were inside of the Confederate lines, and the country where they were was then under the control of the Confederate government, and Confederate money was then and there current funds.

To the answer, a reply was filed setting forth in detail the circumstances under which the appellant was induced or compelled to receive the Confederate money in satisfaction of his debt. No objections appears to have been made to the reply, and the demurrer to the answer having been overruled, the parties went to the trial on the pleadings as herein stated, and a verdict and judgment having been rendered for the defendants, the plaintiff below has appealed.

Although the execution of the notes was admitted in the answer, it appears from the bill of exceptions that appellant introduced appellee, Godsay, as a witness to prove that he loaned him the money, and that he, with his co-obligers, executed their note therefor. But after proving those facts, he went on to prove for himself that having paid about $72.50 of the note in Kentucky bank paper, he paid off the balance, partly in interest bearing notes of the Confederate states, and partly in Confederate bills to the full amount of said note, which payments, as he proved, were made at the special instance and request of appellant at his own house, and that he accepted said Confederate notes and bills in payment and full satisfaction of said note, and gave up the note. Appellant then asked to be permitted to testify as to the new matter not asked by him and proved by Godsay in his own behalf; but the court overruled his request.

The circulation of Confederate currency within the military lines and jurisdiction of the United States was forbidden by its laws, and was illegal; but the non-combatant citizen was compelled to regulate his conduct by the laws and public policy of that power which might predominate over him for the time being, and the currency that was recognized by the laws and military authority of the Confederate states as money, and its circulation encouraged by its policy, and which did so circulate within its military lines, and jurisdiction as a valuable and not a vicious or illegal consideration, especially when voluntarily received and used. *Martin v. Hortin, et al.*, 1 Bush 629.

As appellees in their answer were not content to rely upon the allegation of payment and possession of the note, as at least *prima facie* evidence of the fact, but choose to state how and in what the payment was made, it was necessary for them to show by proof that at the time and place of payment the military power and jurisdiction of the Confederate states predominated; or that the notes and bills

were voluntarily received by appellant in satisfaction of his debts. And as appellee, Godsay, as new matter, proved facts necessary to sustain the defense, the court below erred in refusing to permit appellant to testify as to such new matter in his own behalf.

Sec. 673, Civil Code. For that error the judgment is *reversed* and the cause is remanded for a new trial and further proceedings consistent herewith.

H. C. Lilly, for appellant.
L. N. Cardwell, for appellee.

R. M. WEBB *v.* M. B. MOSELY.

Guarantor—Notice of Acceptance of Guaranty—Reasonable Time.

Where a person by letter not addressed to any particular individual guarantees the credit of another, such guarantor has the right to be informed within a reasonable time, when any one should accept it, and not receiving such notice he is not bound.

Reasonable Time.

Where a written letter of guaranty is acted upon in November, 1870, and the guarantor is not notified of the acceptance of his guaranty until August, 1871, such a notice is not given within a reasonable time.

APPEAL FROM ESTILL CIRCUIT COURT.

November 10, 1874.

OPINION BY JUDGE LINDSAY:

The letter upon which it is sought to hold Mosely bound as guarantor for Bell, bears date October 8, 1870.

Webb claims to have furnished to or for Bell, machinery and material to the amount of $1,676.76. According to his own version of the transaction, he accepted the proposition set out in Mosely's letter, at least as early as November 1, 1870, and continued to furnish material and machinery up to April, 1871. Mosely was not notified of the acceptance until after the middle of August, 1871.

As a matter of law, the delay in giving notice of the acceptance was unreasonable. The letter was not addressed to any particular individual. It authorized any person or firm to act in the matter. Mosely had the right to be informed, when any one should accept it. "Otherwise he would not know who was becoming his creditor."

A party giving a letter of guaranty has the right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially is it important in the case of a continuing guaranty, since it may guide his judgment in recalling or suspending it. *Douglass, et al., v. Reynolds, Byrne & Co.,* 7 Peters 113.

The letter in this case is in some respects in the nature of a continuing guaranty. The reasonable presumption was that the materials and machinery would not all be furnished at the same time, nor by the same party. Hence Mosely had the right to expect that the persons who should accept, would not only give him notice of their acceptance within a reasonable time thereafter, but would inform him as to the extent of their acceptance. He was under no obligations to make inquiry as to whether his offer had been accepted nor as to who the acceptor was, or who the acceptors were. The parties who intended to hold him liable for the debts of Bell were bound by law to give him such notice as would bind him. Here the appellant took no steps to give notice until long after all the material and machinery had been furnished, and the mill completed. But withholding the notice, he deprived the guarantor of the right of recalling or suspending the guaranty. He placed it out of his power to take any steps to secure himself, which possibly he might have done notwithstanding Bell's insolvency. But it is immaterial whether he could or could not have secured himself. In order to bind Mosely, the law required Webb to notify him of his acceptance. He failed to do so within a reasonable time, and he cannot now perfect and render binding, that which in law never become a contract, by showing that Mosely could not have been injured by his failure to give the notice. It is not a question as to whether Mosely was or was not injured by the laches of Webb, but whether the alleged contract upon which Webb sues, as matter of law ever became a contract.

We are satisfied that it did not. The judgment of the circuit court must therefore be *affirmed.*

T. N. Allen, J. R. Morton, for appellant.
Breckenridge & Buckner, for appellee.

WILLIAM CHAMBERLIN *v.* DUDLEY YOUNG.

Ejectment—Judgment.

Where by the terms of the judgment it is left for the clerk or sheriff to determine judicially what land is claimed in the petition for possession, such judgment is void for uncertainty. The determination of what land plaintiff was entitled to the possession of, was for the court, and should be incorporated in the judgment.

APPEAL FROM PENDLETON CIRCUIT COURT.

November 11, 1874.

OPINION BY JUDGE LINDSAY:

The petition describes by metes and bounds the 110 acres of land claimed by appellee, and charges that appellant, without right, holds, possesses and detains about 15 acres in the southeast corner of said 110-acre tract.

The jury found for the appellee the land claimed in the petition. The verdict is sufficiently specific. A writ of habere facias, directing the sheriff to place appellee in possession of all the land, not exceeding fifteen acres, held by appellant in the southeast corner of the boundary of the 110-acre tract, could be executed. But the judgment rendered on the verdict is void for uncertainty. It is in the language of the verdict. It leaves either the clerk or the sheriff to determine, judicially, what land is claimed in the petition. This fact should have been determined by the court, and its determination should have been incorporated into the judgment. The judgment should describe the land with sufficient certainty to enable the ministerial officers to execute it, without reference to the pleadings.

We see no error in the action of the court up to the finding by the jury. There was proof conducing to show that Jennings entered under appellee, that Duncan entered under Jennings, and that Chamberlin entered under Duncan. If such were the case, appellee could recover without showing title in himself.

Chamberlin denies that he is the tenant of appellee, and therefore was not entitled to notice to quit the possession. If Chamberlin held under an oral contract of purchase, entered into either by himself or Jennings, and desired to have the questions of rents, profits, and improvements settled by the chancellor, he should have set up his claim, and asked to have the cause transferred to equity. It is too late after verdict to raise this question.

For the error as to the form of the judgment, it is *reversed*. The

cause is remanded with instructions to render judgment on the verdict, in the manner and form herein indicated.

A. R. Clark, for appellant.
W. W. Ireland, for appellee.

JAMES MATTINGLY *v.* NANCY LEE'S ADM'R.

Wills—Probate—Sale of Real Estate—Judgment.

After a will directing the sale of land is probated, and before the probate of such will is annulled upon the appeal of those contesting its validity, it is legal for the executor to sell the land as directed by the will, and such sale will be upheld.

Judgment.

A judgment directing the sale of real estate by an executor or administrator, is invalid which fails to prescribe the time that the property should be advertised for sale.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 11, 1874.

OPINION BY JUDGE PRYOR:

The sale of the land to the appellant was made after the probate of the will, and before it was annulled upon the appeal by those contesting its validity; in fact, no step had been taken by those hostile to the will for the purpose of setting it aside at the time the administrator with the will annexed and the appellant entered into the contract.

A part of the purchase money was paid, and the possession of the land allowed to the latter, who has continued to occupy the land since that time, and is now in the possession. In the case of *Wood's Admr., v. Nelson's Admr., et al.*, 9 B. Mon. 605, it was held that the probate of a will before a competent tribunal was such a judgment as that sales made by the executor or administrator could not be invalidated by a subsequent reversal. The latter clause of Sec. 14, Art. 2, Chap. 37, Rev. Stat., cannot be made to apply to the present case. It provides "that pending a suit or procedure to set aside or reject a will, there shall be no power to sell the lands or slaves of the deceased except by a decree of court." When this sale was made no such proceeding was pending; and besides, this same section provides that all "lawful acts done by an executor or adminis-

trator, although the will from which the power to act is shown is afterwards declared invalid, shall remain valid and effectual, and only restricts the power of the executor or administrator, with the will annexed in case where an action to reject the will is pending." This provision of the statute, instead of invalidating the acts of the administrator, legalizes all his lawful acts done whilst the judgment of probate remained *unreversed,* in the absence of any proceeding intended for that purpose.

The probate of the will gave the administrator, with the will annexed, the power to carry out its provisions, and there can be no question but what the purchaser in this case could compel the present administrator, with the will annexed, to comply with the contract made by the administrator under and by virtue of the provisions of the first will, although that paper had been declared invalid.

The rejected paper, as well as the one probated as the true will, authorized a sale of the land, and although the mode and terms of sale were not identical, still the direction to sell was absolute and unconditional in each paper; and a mere departure from the terms of sale by the executor or administrator under either paper, in no manner affecting the substantial rights of those interested or the title of the purchaser, will not authorize the chancellor to disregard it. "The testator's directions, with regard to the manner of the sale, may be reasonably varied by the executor, where such variance is calculated to facilitate or expedite the accomplishment of the purpose of the testator, and will work no injury to the estate or parties interested. *Richardson, et al., v. Haydon, et al.,* 18 B. Mon. 242. The act of February, 1866, Myer's Supp. 716, authorized this estate to be ordered into the hands of the sheriff, and to be administered by him; and for the performance of such a duty he is liable on his official bond. The appellant, although he alleges that the boundary of his land is defective, does not point out in what this defect is, nor does he pretend to assert that he is not in possession of all the land sold him.

The title being such as he must accept, the judgment would not be disturbed but for the failure to prescribe the terms of sale, etc., in the judgment.

The judgment directs the land, or so much as may be necessary, to be sold at the court house door in Owensboro, after advertising it at three public places in the county, one of which is to be posted in the vicinity of the land. The credit is to be of nine and eighteen months, taking bond with surety, etc. It is true this is unlike the

sale of attached property, where the law requires the time and place of sale to be mentioned in the judgment, or in actions to foreclose a mortgage on real property, where the sale is not to be on less time than three or more than twelve months, or in instalments equivalent to not more than twelve months' credit on the whole. But the chancellor, in rendering the judgment, has failed to prescribe the time that the property should be advertised for sale, and the commissioner is thus left to exercise his own discretion in this regard. Such a discretion the chancellor alone can exercise, and not the commissioner. The judgment is *reversed* and cause remanded with directions to enter a judgment as herein indicated.

Ray & Walker, for appellant.
W. S. Darnaby, J. T. Robinson, A. Duvall, for appellee.

E. C. & H. A. PFINGST *v.* THOMAS E. WILSON, EX'R.

Judicial Sale—Exceptions to Report of Sale—Bidders.

Where a judicial sale is regular in every way, and reported to the court, it is no ground for sustaining exceptions to it that the property did not bring as high a price as it would if again offered.

Bidders.

A bidder interested in the sale who does not attend or bid cannot complain that the property was sold at too low a price.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 11, 1874.

OPINION BY JUDGE PETERS:

The only question presented on this appeal is whether the court below erred in sustaining appellee's exceptions to the report of the sale made by the marshal, of the real estate described in the pleadings, and opening the biddings on the offer of appellee to advance $2,000 on the price at which appellants were reported to have purchased the property.

By the judgment under which the property was first sold, the marshal was ordered, after advertising according to law and the rules of the court, to sell upon credit of six, twelve, and eighteen months, so much of the real property of the said "Louisville Chemical Works" as may be necessary to satisfy the judgment in favor of said Masonic Savings Bank.

There is no complaint that there was any irregularity or omission of duty on the part of the marshal in making the sale; but it is insisted that there was a misunderstanding as to what would pass by the sale; that bidders did not understand what would pass by the terms "real property" in the judgment. To sustain the exception to said report, the affidavits of Welman, the marshal, and of W. B. Hamilton were read. The first named stated that at the sale and while the property was being cried off, some one, he thinks W. B. Hamilton, inquired whether the fixtures would go to the purchaser, and he replied he did not know, that he believed the property would have sold for more money than it did, if it had been known that the fixtures would have passed to the purchaser. He also stated that he believed the leaden chamber could be removed without injury to the building. In a second affidavit, he stated that he then recollected that at the sale W. B. Hamilton asked him whether the fixtures in the building would be sold under the decree, and he replied "I am ordered to sell the real estate and improvements; it is for the court to decide what the improvements are, I do not know."

Hamilton stated that he was present, and while the property was being cried off he inquired of the marshal, as he wished to purchase, whether the fixtures on the premises would go to the purchaser under the sale, and the marshal replied he did not know. He also stated that if he had purchased the premises, he would have particularly desired the fixtures thereon; and if he had known they would have passed, he would have bid more for the property than it brought; and that the doubt whether the fixtures would pass to him prevented him from bidding. How much more he would have bid if he had had the desired information he does not state. But appellee, who was interested in the sale, and for whose benefit as a creditor of the Louisville Chemical Works, the property was in part sold, was not at the sale; being a party he must be presumed to have known what the judgment was, or what would pass by the sale under it; if he did not, it was his duty to have applied to the court for an explanation, or specific directions to the marshal what he was to sell; or if he had applied to a legal adviser for information, and had been misinformed or deceived by his counsel, he would have been in a more favorable attitude. But there is nothing in the record to show that he used any efforts to inform himself on the subject about which he now complains there was a mistake or misunderstanding, until after the sale of the property.

Appellee might have learned that the purchasers probably could,

or would make a profit on their purchase. There was no misconduct or irregularity on the part of the officer making the sale, nor unfairness or fraud practiced by appellants; nor is the difference in the price bid by them and the advanced price offered by appellee so great, considering the value of the property, as to impart fraud. It was said by this court in *Stump v. Martin,* Mss. Opinion: "It would be trifling with the stability of judicial sales, as well as the rights of purchasers, to permit those who were present at the sale, or who ought to have been there, to interfere after the sale was made, and open the bidding for no other reason than that since the sale an advanced price had been offered for the property." Hence this court has always been unwilling to go so far in any case as to say that the chancellor has the power to set aside a sale made by his commissioner merely because he could make a better bargain. In this case no reason is offered for setting aside the sale and opening the bidding but that appellee now offers to pay more for the property, while he offers no excuse for being absent when the sale was made, and permitting the loss in the price for which the property should have sold.

Wherefore the judgment sustaining the exceptions to the marshal's report, and setting aside the sale to appellants is *reversed* and the cause is remanded with directions to confirm the report of sale to them for further proceedings consistent herewith.

Gazlay, Reineck, for appellants.
George Weisenger, for appellee.

AETNA INSURANCE CO. *v.* MARY A. BURNS.

Insurance Policy—Bill of Exceptions.

Where a fire insurance policy provides that the company shall not be liable where loss occurs when the building insured is vacant, the insured cannot collect on such policy when the building was vacant at the time of the fire and for weeks prior thereto.

Bill of Exceptions.

When the bill of exceptions is filed and no exceptions to the order of filing are taken, no question as to them is raised.

APPEAL FROM CAMPBELL CIRCUIT COURT.

November 13, 1874.

OPINION BY JUDGE PRYOR:

One of the express stipulations of the policy is that if the building

insured becomes unoccupied, the policy is suspended, or to be of no force and effect so long as the property is left in that condition. The building, as the proof shows, was unoccupied at the time it was destroyed by fire, and had been for several weeks. There is no evidence showing that the appellant or its agent had any notice of its having been vacated, or that any contract was entered into by which the appellee had the right to abandon it and still claim the benefit of the insurance in case of loss; and even if notice had been given the company of the intention of the appellee to leave the building, it was not the duty of the company to furnish a tenant or to protect the building from the torch of the incendiary. The appellee had the right to abandon her house, but when she did so forfeited all right to the insurance money, if destroyed by fire (as was the case here) during the period in which it was unoccupied. The appellee states that at the time she insured, she informed the agent that she would leave the premises temporarily; but at the same time accepted a policy with the express written stipulation that if destroyed when not tenanted, the company was not liable. It was the duty of the appellee to have furnished a tenant or occupant when she left, and particularly, when according to her own statement, there was danger of its being destroyed or burned by some of her enemies. A written contract between parties is entitled to but little consideration, if such facts as are sworn to by the appellee and her sister are held sufficient to change the whole character of the written undertaking.

Under the proof in this case the jury should have been told that if the building had been left unoccupied for —— weeks by the appellee, and during that period, and whilst there was no one occupying the premises, it was destroyed by fire, they should find for the defendant. There might be some question made as to the bill of evidence, but for the order of the 3rd of July, 1873. The bill of evidence having been filed on that day; the appellee, by counsel, came into court, and instead of excepting to the order filing exceptions if he intended to take advantage of it, moved the court to correct it, and the court overruled this motion. The appellees tendered what purported to be another bill of evidence, that is not signed by the judge; and although made part of this record, it cannot be considered or treated as any part of it. The judgment of the court below is *reversed* and cause remanded with direction to award the

appellant a new trial, and for further proceedings consistent with this opinion.

A. D. Smalley, for appellant.
T. W. Webster, A. T. Root, for appellee.

JOHN W. ZEIGLER AND WIFE *v.* JOHN W. MEANS, ET AL.

Judgment—Sale of Mortgaged Property—Foreclosure.

A judgment that plaintiffs are entitled to recover is not a judgment in personam.

Sale of Mortgaged Property.

Where certain parties hold liens on a part of the real estate covered by a subsequent mortgage, which is foreclosed, they are entitled to judgment that other property of the defendant covered by the mortgage be first sold and the proceeds applied to the payment of the mortgage debt before the sale of the real estate upon which they hold liens.

APPEAL FROM BOYD CIRCUIT COURT.

November 13, 1874.

OPINION BY JUDGE COFER:

The judgment is not *in personam* against Mrs. Zeigler. The language is not that the parties named recover of her, but that "they are entitled to recover," etc. No execution can issue on such a judgment, and she is not prejudiced by it.

The mortgages passed the whole estate of Mrs. Zeigler in the real estate described in them, except the equity of redemption, and she thereby waived the homestead right, if she had any. *Wing Clark, et al., v. Hayden,* Mss. Opinion, September, 1874.

The evidence impeaching the validity of the acknowledgment of the mortgage to Pine is wholly insufficient to overturn the certificate of the clerk. The only evidence tending to prove that she did not acknowledge the mortgage as required by law is the testimony of Mrs. Zeigler herself, and in this she is flatly contradicted by Hampton, the clerk who took the acknowledgment. Besides her own testimony, there is no evidence whatever to establish the alleged coercion by her husband. The other mortgages are not attacked by either pleading or evidence.

Brown & Brown & Rice have vendors' liens on two fractions of lots sold by them respectively to Mrs. Zeigler; and these lots and

that conveyed to her by Hampton, seem to lie adjoining each other, and together make up the site upon which the hotel and out buildings are situated, and are all included in the mortgages. The court directed the personal property to be sold first, and the proceeds thereof to be applied to the satisfaction of the mortgage debts, and that the lots conveyed by Brown & Rice should be next sold, or so much of them as should be sufficient to pay the amount adjudged to them, and the balance due on the mortgage debts not paid by the proceeds of the personal property. The lot conveyed by Brown, or so much of it as shall be necessary to pay the purchase money due to him, is ordered to be sold; but there is no direction to sell the whole of this lot if the personal property and the balance of the proceeds of the lot conveyed by Brown & Rice fails to satisfy the mortgage debt, but such residue is directed to be raised by a sale of the Hampton lot, or so much of it as may be necessary for that purpose.

The lot conveyed by Brown and Rice to Mrs. Zeigler lies next to the lot she purchased from Hampton, and between it and the lot purchased from Brown. The whole of this lot is directed to be sold, but only so much of the lot purchased of Brown is directed to be sold as will pay the purchase money due to him. If less than the whole should pay Brown and the personal property and the Brown and Rice lot do not sell for enough to pay the balance due upon the judgment, it directs the balance to be raised by selling all or a part of the Hampton lot; and thus the defendants' property may not only be sacrificed, but any part of it not necessary to pay the debts may be rendered worthless by being cut into small parcels separated from each other. The judgment should have directed that the Brown lot be sold to pay first, the purchase money due on it, and secondly, to pay any balance due on the mortgage debts not paid by a sale of the personalty. If this proved insufficient to pay the balance of the mortgage debts, then the Brown & Rice lot should have been sold, or so much of it as would satisfy their lien, and the balance still remaining due on the mortgages; and if this failed to satisfy all, then the Hampton lot, or so much of it as should be necessary, should be sold.

A sale made even in this manner may result in sacrificing the appellants' property, but this cannot be avoided except by the consent of Brown for himself and as survivor of Rice, to have a lien only on a part of the property. He has a right to have that part sold separately, unless the other creditors will consent that he may be

paid in full account of the sale of the whole, and the appellants will consent that the whole may be sold together, and any excess over the debts be paid to them.

For the error indicated the judgment is *reversed,* and the cause remanded for a judgment in conformity to this opinion.

Moore & Jones, for appellants.
A. Duvall, for appellees.

J. V. CONN *v.* WILLIAM ANDERSON, ET AL.

Bankruptcy—Jurisdiction—Parties—Pleading.

A creditor has the right to sue a debtor in the circuit court notwithstanding the pendency in bankruptcy against him, but it is the duty of the court to refuse to proceed to judgment until such proceeding shall terminate.

Parties—Pleading.

If the bankrupt court refuses the debtor a discharge, or if after his discharge he fails to plead it, the plaintiff in the circuit court may take personal judgment against such bankrupt.

Jurisdiction.

The circuit court has no jurisdiction over the trustee in bankruptcy; where the trustee does not choose to assert his right in the state court he may have the action dismissed as to him.

APPEAL FROM CARROLL CIRCUIT COURT.

November 13, 1874.

OPINION BY JUDGE LINDSAY:

Conn had the right to sue Anderson notwithstanding the pendency of the proceeding in bankruptcy. But as the petition suggests the existence of such proceedings, it is the duty of the court to refuse to proceed to judgment until they shall terminate. If the bankrupt court refused Anderson a discharge, or if, after obtaining a discharge, he shall fail to plead it, then the circuit court has the power to render a personal judgment against him. The circuit court also has the power to foreclose the mortgage. It is true, Conn may be enjoined from proceeding with his suit, by the bankrupt court, but even after that is done the jurisdiction of the state court remains. The bankrupt court may operate upon Conn, and compel him to suspend proceedings or to dismiss his suit, but it can not take away from the circuit court its jurisdiction in the premises.

The only party over whom the circuit court has no jurisdiction is Harrison, the assignee. If he does not choose to assert his rights in the state tribunal, he may have the action dismissed as to him. It was proper to make him a party, and thus give him an opportunity either to avail himself of the jurisdiction of the circuit court to obtain relief, or to apply to the bankrupt court, and compel Conn to come into that court and establish his debt, and enforce his mortgage.

The joint special demurrer as to the jurisdiction of the circuit court should have been overruled. The judgment dismissing appellant's petition is *reversed* and the cause remanded with instruction to overrule the said demurrer. If Harrison so desires, the court should dismiss the action as to him.

Further proceedings will be had conformable to this opinion.
Craddock, Trabue, W. B. Winslow, for appellant.

PRESS PRINTING CO. *v.* J. SOULE SMITH.

Statute of Frauds.

Where a person is indebted on promissory notes and while still indebted he enters into a contract with appellant whereby for a valuable consideration appellant undertook to pay appellee's debt, such contract is within the statute of frauds; and such appellee cannot recover against appellant and at the same time hold the evidence of indebtedness of the debtor whose debt appellant agreed to pay.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 14, 1874.

OPINION BY JUDGE PETERS:

The substance of the allegations of the petition is that the Observer and Reporter Printing Company being indebted to appellee in the sum named in the petition, and for which he holds its note; that while so indebted, the Observer and Reporter Printing Company made a contract with appellant, whereby, for a valuable consideration, it undertook and promised to pay appellee's debt on the first named company; and that subsequently appellant promised him to pay his debt upon the consideration aforesaid; and upon that promise appellee sued. To the petition appellant demurred, and its demurrer having been overruled, and failing to answer, further

judgment was rendered against it; and from that judgment this appeal is prosecuted.

It is not alleged that upon the promise of appellant to pay appellee's debt, he discharged the Observer and Reporter Printing Company from its liability to pay him. He still retains its note, and may at any time bring suit and coerce payment from the Observer and Reporter Printing Company. Nor does it appear that said company has credited appellant by the amount of appellee's debt. Taking, therefore, the allegations of the petition as true, as is done for the purpose of the demurrer, the debt of the Observer and Reporter Printing Company to appellee is still a subsisting and an enforceable debt. Consequently the promise to pay the debt by appellant is in fact a promise to answer for the debt of another, and is directly within the inhibition of the statute.

Whether or not the petition would have been good if it had alleged that appellant was indebted to the Observer and Reporter Printing Company, and in consideration of said indebtedness it had promised and undertaken to pay the debt of the latter to appellee, and he had accepted it as his debt and released his debt on the other company, we do not decide. But the reasoning of this court in *Jones v. Walker*, 13 B. Mon. 356, and in *Lieber, Griffin & Co. v. Levy*, 3 Met. 292, tends strongly to that conclusion.

If the Observer and Reporter Printing Company had united as a plaintiff with appellee, we see no reason why the suit could not have been prosecuted in their names for the benefit of appellee. But we cannot avoid the conclusion that the petition is insufficient, and does not state a cause of action against appellant; and the demurrer should have been sustained. Wherefore the judgment is *reversed*, and the cause remanded for further proceedings consistent herewith.

T. Waters, for appellant.
John Shelby, for appellee.

JAMES COCKRELL *v.* A. B. HAINLINE'S ADM'X.

Evidence—Res Gestæ.

A statement of a party as to why he is borrowing money from a witness to the effect that he desires it to pay a note is not admissible in a suit on such note when made in the absence of the plaintiff. Such a statement is not a part of the res gestæ for it was not made at the time the money was claimed to have been paid and the payment was the transaction.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

November 15, 1874.

OPINION BY JUDGE PETERS:

On the trial of this cause in the court below, the appellee introduced W. A. Thomas as a witness, who proved that before the death of Hainline, the witness was in Mt. Sterling with him, and he came to witness with a $5 bill in his hand, and witness loaned him $70, Hainline then telling him he wanted to pay Cockrell $75. It was proved that Cockrell was not present when the money was loaned; appellant objected to the statements made by Hainline to the witness in his absence; but the court below overruled his objection, admitted the evidence, and he excepted.

It is insisted on the part of appellee that these declarations of Hainline are admissible as forming a part of the *res gestæ*. To make them such they must have been contemporaneous with the main fact under consideration, and so connected with it as to illustrate its character. The declarations must have been made at the time of the act done, and so harmonize with it as to constitute but one transaction. 1 Greenleaf on Evidence, Sec. 108. The declarations, as proved by Thomas, were not made at the time the money was paid; the payment was the transaction. After the declaration Hainline and the witness separated; they went into different houses. The declarations or announcement to the witness of the purpose for which he wanted the money was a mere abstract statement, disconnected with the main transaction, which may or may not have transpired at all, and unless the act is done there can be no *res gestæ*. The court below therefore erred in admitting the evidence.

Mrs. Hainline, the widow of the obligor in the note, was examined as a witness for appellee, and appellant objected to her as being incompetent. Sec. 24, Chap. 37, General Statutes, does not disqualify her from testifying in this case. We think she and the son of decedent are both competent witnesses. As to her statement about the open letter received from appellant, she said it was a note or a verbal message, and did not say which; but the evidence was not objected to, and the question of its competency is not before us.

No objections are perceived to the instructions. But for the error pointed out, we feel constrained to *reverse* the judgment and re-

mand the cause for a new trial, and for further proceedings consistent herewith.

W. H. Holt, for appellant.
Apperson & Reid, for appellee.

URIAH SHINKLE *v.* CITY OF COVINGTON.

Damages—Evidence—Instructions.

In a suit for damages against a city it is not error for the court to refuse to admit evidence to show that the city council was notified that hitchings on the wharf were insufficient. The liability of the city does not depend upon knowledge of the city officers that such hitchings were not sufficient.

Instructions.

In a damage suit against the city on account of damages sustained because of the city's failure to maintain safe hitchings in connection with its public wharf, it is error for the court to charge the jury that it was the duty of the plaintiff to use reasonable care such as prudent men would observe. The plaintiff was only bound to use ordinary care in securing the boat to the shore and like diligence after he became aware that the post had given way to save the boat from sinking.

APPEAL FROM KENTON CIRCUIT COURT.

November 16, 1874.

OPINION BY JUDGE COFER:

We perceive no material error in the rulings of the court in refusing to admit the excluded statements of the appellant's witness, Hyde, nor in refusing to allow appellant to prove by Hunter that he had notified the city council that the hitchings on the wharf were insufficient. The liability of the city does not depend upon the knowledge of the city authorities that the hitchings were insufficient, but upon the question whether they were in fact insufficient.

Having established a wharf, and invited boats to land at it, and charged wharfage for the use of the wharf, the law implies an undertaking on the part of the city to provide for fastening ordinarily and reasonably secure; and the liability of the city results from the implied undertaking; and as want of knowledge of the insufficiency of the fastenings would have been no defense to the action, there was no necessity to prove that the city council had such knowledge.

The second instruction asked by the appellee and given by the

court is in these words: "It was the duty of the plaintiff to use reasonable care, such as a prudent man would observe in the management of his affairs, in the location of and attaching his boat to the shore, and in preventing the sinking thereof; and if the jury believe from all the evidence in the cause, that the plaintiff's boat was sunk by any neglect or omission on his part, of such reasonable care as aforesaid, they must find for the defendant." By this instruction appellant was required to use such care as a prudent man would have used, and the jury were told that "if the boat was sunk by any neglect or omission on his part, of such reasonable care as aforesaid (*i.e.*, such care as a prudent man would have used), they must find for the defendant." The appellant was only bound to use ordinary care in securing the boat to the shore, and like diligence after he became aware that the post had given way, to save the boat from sinking. Ordinary care is not such care as prudent men use, but such as is used by ordinary men or men of common or ordinary discretion. A man may be guilty of some neglect or omission, and yet may use ordinary care and diligence. If appellant and his employes in charge of the Isaac, used ordinary care and diligence in making her fast, and in endeavoring to save her after she broke loose, and she was lost notwithstanding, the appellee is liable.

The fourth instruction asked by the city should not have been given without some qualification. The evidence tended to prove that the post to which the Isaac was fastened was the only one on the wharf within reach of the place where appellant's float lay. The city, by establishing the wharf, invited the owners of boats to land at it, and they had a right to hitch to such objects as they found for that purpose; and even if appellant planted the post, and knew it was insufficient, he had a right to hitch to it and look to the city for indemnity, if he found no other within convenient reach of the place occupied by his float. The fifth instruction should also have been qualified so as to embrace the item that although appellant may have known the post was insufficient, yet if no other was near enough to his place of landing to be reached by the lines or chains ordinarily used on such craft as his, he had a right to hitch to such as he found within reach.

The instruction given by the court in lieu of the first asked by appellee was misleading. It was not necessary to the city's liability that it should, by its wharf master, have received the plaintiff's boats. If they were landed by appellant at the wharf, and made fast to such hitchings as were found within reach of the place of

landing, they were at once at the risk of the city, so far as their safety depended on the sufficiency of the fastenings without any act on the part of the city or any of its officials or servants.

As the judgment must be reversed for errors in instructing the jury, it is not only unnecessary, but would be improper, that we should decide whether or not the court erred in refusing to grant a new trial on the ground that the verdict was palpably against the weight of the evidence.

For the errors indicated the judgment is *reversed,* and the cause is remanded for a new trial upon principles consistent herewith.

J. T. & C. H. Tisk, for appellant.
R. A. Athey, for appellee.

N. C. MARSH *v.* M. H. BREEZE, ET AL.

Partnership Property—Dissolution—Creditors.

A partner after dissolution of the firm is entitled to a lien on the real estate of the partnership, which had been bought and improved by the partnership, for a debt due him from his late partner, and this lien is superior to the lien of creditors whose claims arose after dissolution against the surviving partner.

APPEAL FROM BRACKEN CIRCUIT COURT.

November 17, 1874.

OPINION BY JUDGE PETERS:

Appellee, as trustee for Henry Ogden, brought this suit, alleging that said Ogden and appellant were partners in merchandising in the village of Milford, Bracken county, and while so engaged they bought of William P. Ditty a certain town lot, described in the title bond of said Ditty, filed as a part of the petition; that he had never conveyed the same to his vendees, although all the purchase money had been paid therefor; that after their purchase Ogden and Marsh erected valuable improvements on said lot, consisting of a store-house, saloon and tobacco warehouse, the improvements costing greatly more than the lot; that the property is not susceptible of division; that Ogden had conveyed all his property for the benefit of his creditors, and appellee had been appointed trustee, and he prays for a sale of the property, etc.

Steadman and others, creditors of Ogden, and beneficiaries under

his deed of assignment, by their petition pray to be made co-plaintiffs with the trustee of Ogden, and ask to amend the original by stating that Ogden and Marsh did not purchase the lot described in the original petition, as co-partners in the course of trade under their partnership name, but that they purchased it, and now hold it as against Ogden, and that the same is not subject to the rules regulating the disposition of partnership property, and withdraw so much of their original petition as alleges that it was bought and held as partnership property.

Marsh in his answer denies that the property was not partnership property. He avers that he and Ogden entered into partnership September 1, 1866, to carry on the business of merchandising, and purchased the lot and erected the buildings thereon with partnership funds, the houses having been built for the use of the firm and for carrying on the business of the partnership; that on March 11, 1868, they dissolved the partnership by mutual consent, and it was agreed by them that Ogden should take all the assets of the firm, pay all its debts, and give up to him the amount of his account with the firm, being $660, and pay him $3,265, the amount of capital put into the firm by him, and interest at 10 per cent. per annum till paid; that Ogden had paid him $2,387 before he made his deed of assignment, and his trustee had paid him $31.25 since; and that the balance of his debt and interest is due and unpaid. He claims a lien on the lot and houses for his debt, and asks for a sale thereof, and that his debt be first paid, and denies the allegations of the amended petition of Steadman, etc. The court below adjudged he had no lien, that he stood in no better attitude in relation to this property than the subsequent creditors of Ogden for debts created since the dissolution of their partnership. And of that judgment Marsh complains.

The debts of the late firm of Marsh and Ogden appear all to have been paid, except the debt due to Marsh; and as to the justice of it there is no controversy. The houses were erected and the lot purchased for the purpose of carrying on the business of the firm, and it was used for that object alone as long as the firm existed; and when it dissolved, Marsh, by parol only, agreed that Ogden should have the partnership effects on condition that he would pay its debts, the debt to Marsh included.

Although the lot had been paid for, Ditty, the vendor, had never conveyed it to the purchaser, and Marsh for the firm paid the entire price. In *Galbraith v. Gedge and Brothers,* 16 B. Mon. 630, this

court said: "We are inclined to think, that the real property held in the joint names of the firm as partnership stock, should be regarded, at law, in the absence of any agreement or undertaking to the contrary, as held and owned by them as tenants in common, subject to the ordinary incidents of tenancies in common. But that, in equity, it should be considered as held by them in trust as partnership property, subject to the ordinary rules applicable to partnership personal property—as liable to the satisfaction of the claim of each partner upon the others, and as liable to the satisfaction of the debts of the partnership. After the satisfaction of the claims of the several partners, and of the debts of the concern, the residue of the real estate will be considered, where the partners have not impressed upon it the character of personalty, as belonging to the partners, both in equity and at law, as tenants in common, and it will be subject to division and several appropriation among them."

According to this ruling this property, which belonged to the late firm of Marsh and Ogden, was held as liable to the satisfaction of the claim of Marsh, and should be applied first to the payment of his debt, the firm owing no other debt. Nor is the ruling of this case in conflict with *Divine, et al., v. Mitchum,* 4 B. Mon. 488.

But by the terms of the judgment the whole of this real estate is sold, and the proceeds are applied to the payment of Ogden's debts, under his deed of assignment, by which he conveyed only the one-half of said real estate to his trustee for the benefit of his creditors. The language of the deed is that he, Ogden, bargains and sells, aliens and conveys, to James Whipp the following described real property, viz., the one undivided half of a lot in Milford, in Bracken county, Ky., purchased from W. P. Ditty, etc. The creditors, therefore, under the deed, if no debt had been owing to Marsh, could only demand the sale of one-half of the lot and improvements, or would be entitled to the one-half only of the proceeds. In any view of the case, therefore, the judgment is erroneous, and must be *reversed;* and the cause is remanded with directions to satisfy and pay to Marsh the amount of his debt out of the proceeds of the sale of said lot and improvements, and appropriate the residue thereof to the other creditors of Ogden.

B. G. Willis, for appellant.
John N. Furber, for appellees.

DANIEL MONARCH, ET AL., *v.* JOHN P. YOUNG, ET AL.

Counterclaim—Damages—Evidence—Measure of Damages.

In a suit to collect the price of machinery sold, the defendant cannot recover on his counterclaim where there is no proof showing the amount of damages sustained by reason of the failure of plaintiff to deliver the machinery promptly.

Measure of Damages.

Remote and uncertain damages cannot be recovered under a counterclaim filed in a suit for the purchase money of machinery.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 18, 1874.

OPINION BY JUDGE PRYOR:

If the peremptory instructions can be regarded as erroneous, it could only have affected the question of costs, and from the evidence in the case we are inclined to concur with the court below that no cause of action had been made out on the counterclaim. There was no evidence that the appellant had sustained any damages, except such as might be implied by the failure of the appellees to the cross-action, to furnish the machinery in the time required by the contract. The damages on this branch of the case, if any were sustained, are too remote and uncertain, the true criterion being the difference between the price agreed to be paid by the contract and what appellant was compelled to pay by reason of the failure of appellees to comply.

The evidence shows that appellants paid $185 more in whiskey for the machinery not furnished, than what they had agreed to pay the appellees in money. Whether the whiskey thus furnished was of more value than the $1,000 does not appear; nor is it shown that this extra price in whiskey was the result of the failure of appellees to furnish the machinery. The evidence of appellant shows that those who furnished the machinery were, under the original contract, to perform part of the work, and although it may not have been the particular part not purchased, still the only damages sustained by appellant, according to his own showing, is that the rent of the distillery was worth so much per month, and therefore he is entitled to recover the amount of rent from the time the machinery was to be furnished until it was actually delivered. The statement of the proposition is of itself conclusive against the right of recovery. No direct damages have been shown. What expenses were incurred,

or the amount paid the hands out of employment, or that were not employed at other work, is not made to appear. There is nothing in appellants' defense. The judgment *affirmed*. Judge Cofer not sitting.

G. W. Williams, for appellants.
Sweeney & Stuart, for appellees.

THOMAS H. FOX, ET AL., *v.* APPERSON & REID.

Commissioner's Sale of Real Estate—Set-Off—Compensation of Commissioner—Usury.

Where there are several tracts of land to be sold by a commissioner the court should order them sold separately.

Set-Off.

A debt due from an executor cannot be pleaded as a set-off against an individual debt.

Compensation of Commissioner.

Pursuant to Gen. Stat., chap. 75, § 14, the allowance to a commissioner for making sales of land cannot exceed ten dollars per tract.

Usury.

Compounding interest at the lawful rate, once a year, is not usurious.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

November 19, 1875.

OPINION BY JUDGE COFER:

While we might not be inclined to reverse because the judgment fails to direct the commissioner to sell the three tracts of land separately we regard it as the safer and better practise when several tracts are to be sold under one judgment, to direct them to be sold separately.

The second paragraph of the answer contains no statement of facts to show that usury had been intentionally charged on Apperson's debt. Instead of drawing his own conclusion, the pleader should have stated the facts that the court might be able to judge the correctness of the deduction made from them.

The third paragraph was insufficient as a set-off in two respects. (1) The demand attempted to be set up is a debt due from the appellee, Apperson, as executor of his father, and was therefore not available as a set-off against a debt due to him individually. No

reason is given why the demand attempted to be pleaded as a set-off might not be enforced against the appellee in his official character; and in the absence of some averment, such as insolvency or non-residence, showing that the demand could not be made available in a direct action against the executor, it cannot be pleaded in a suit for the recovery of a debt due to him in his own right. The averment that the executor had promised to pay did not alter the case. Such a promise, unless in writing, is not enforcible. It was not alleged to be in writing, and must therefore be taken to have been in parol.

(2) But, again, it was not an available set-off because any right of action which might exist is a joint right in those who, according to the averments of the answer, were the owners of the land alleged to have been rented and sold by the elder Apperson.

Compounding interest at the lawful rate not oftener than once a year is not usurious; but it is alleged in the second amended answer that interest was compounded annually at the rate of 10 per cent. per annum from January 1, 1870, until January 1, 1874, on the $180 note which it is alleged was included in the note sued on. The law making 10 per cent. lawful interest went into effect on September 1, 1871; it therefore appears that the note contains usury to the amount of 4 per cent. per annum on $180 from January 1, 1870, to September 1, 1871.

The court erred in making an allowance of $50 to the commissioner for making the sale. Sec. 14, Chap. 75, Gen. Stat., provides that the allowance to a commissioner for making sales of land shall in no case exceed $10 per tract.

This conclusion renders it unnecessary to decide whether the judgment was premature, or whether there was a personal judgment against Mrs. Fox.

For the errors indicated the judgment is *reversed*, and the cause is remanded for further proceedings not inconsistent herewith.

Thomas Turner, A. J. James, for appellants.
A. Duvall, Apperson & Reid, for appellees.

JOANA MELTON, ET AL., *v.* WILLIAM M. CAIGILL, ET AL.

Trustee—Title in Trustee—Equity.

Where a trustee has been invested with the legal title to real estate the beneficiaries of the trust cannot maintain an action of ejectment to recover the land. They must resort to a court of equity to enforce their claims.

Equity.

Where purchasers of real estate, believing their title secure, have placed valuable improvements thereon, it would be inequitable to permit those claiming title to secure such improvements.

APPEAL FROM GRAVES CIRCUIT COURT.

November 19, 1874.

OPINION BY JUDGE PRYOR:

The trustee, Caigill, having been invested with the legal title, we cannot well see how the beneficiaries of the trust can maintain the action of ejectment for the recovery of the land or lot in controversy. In fact, they have no legal remedy, and must resort to a court of equity to enforce their claim. When coming into a court of equity asking relief, they must be required to do equity, and ought not to ask the aid of the chancellor in giving them several thousand dollars expended by others in improving their property, worth not exceeding $350. The improvements made upon the lot were placed upon it in good faith, and with the sanction of a court of equity. The purchasers believed they had acquired a perfect title, not only by reason of the action of the trustee who was invested with the legal title, but by the judgment of the court confirming his acts in the premises. A fair price was paid for the lot and there was no proof of fraud or unfair dealing connected with the transaction. The purchasers have made lasting and valuable improvements in buildings erected on the ground purchased, of the value of several thousand dollars, when the lot itself was not worth exceeding $350.

Under such a state of facts it would be unconscientious, as well as inequitable, to give the appellants these improvements or their interest therein without any compensation to the appellees. A court of law has closed its doors to any such relief, and they now make this unjust and unconscientious demand of a court of equity. The chancellor will not listen to such an appeal. The appellants must either pay the appellee the enhanced value of this lot by reason of the improvements made upon it, or take the money in the hands of the trustee paid on the purchase confirmed by the judgment. They should be required to elect, and if they elect to take the money in the hands of the trustee, their remedy is against him and his sureties. The proof shows the sureties are amply able to pay the debt. If they elect to pay the enhanced value of the lot by reason of the improvements to the extent of their interest, they will be allowed to do so, and when the money is paid a reconveyance should be or-

dered. The court will fix the value on the basis that Mrs. Melton has a life estate in the lot. If the appellees elect to take the lot, the purchasers will be entitled to the purchase money in the hands of the trustee.

The judgment of the court below is *reversed,* and cause remanded for further proceedings consistent with this opinion.

R. K. Williams, for appellants.
L. Anderson, for appellees.

MARTIN MCFALL *v.* COMMONWEALTH OF KENTUCKY.

Criminal Law—Insanity—Instruction.

Insanity of a defendant at the time of the commission of a crime is a complete defense.

Where there is evidence produced in a criminal cause that the defendant was at the time of the offense on the verge of delirium tremens, and where instructions are asked, the court should instruct the jury that if they believed from the evidence that the defendant at the time of the commission of the crime, was not sane, and could not, because of mental incapacity, know right from wrong, whether that incapacity was caused by drink or not, they should acquit.

APPEAL FROM WOODFORD CIRCUIT COURT.

December 8, 1874.

OPINION BY JUDGE LINDSAY:

McFall was indicted for a breach of the peace. The proof disclosed an aggravated assault upon the person of his wife.

It was proved by a practicing physician that a day or two after the assault, McFall was apparently on the verge of *delirium tremens,* and that he was very much frightened. In the opinion of the witness he was not then responsible for his acts. Another witness proves that he saw him the morning after the assault, and that he seemed to be dodging, and frightened. It is further proved that on the same morning, McFall was found in a dark room, and that he "looked cowed and frightened, and was dodging."

Upon this proof, the defendant asked that the jury be instructed that if they should believe that "the defendant, at the time that it is alleged he assaulted his wife, was not sane, and could not, because of mental incapacity, know right from wrong, whether that incapacity was caused by drink or not, they ought to acquit." The

court refused so to instruct. In so refusing it erred. We know of no instance in which it has been held that a person who is so far insane as not to know right from wrong, is criminally responsible for his acts. The cause of the want of mental capacity is immaterial. The temporary aberration of the intellect, caused by drunkenness, does not excuse; but when from excessive indulgence, the drunkard becomes a lunatic, incapable of distinguishing between right and wrong, he must be treated as other insane persons.

It is not for this court to determine as to the sufficiency of the proof to sustain the plea of insanity. There was some evidence tending to sustain it, and therefore the defendant should have had the benefit of the instruction asked.

For the error indicated the judgment is *reversed* and the cause remanded for a new trial, upon principles consistent with this opinion.

Edward Wallace, for appellant.
John Rodman, for appellee.

WILLIAM MCGLASHEN *v.* COMMONWEALTH.

Criminal Law—Sale of Whisky by a Physician.

A defendant cannot claim exemption from the penalty denounced by law against selling intoxicating liquors because he is a physician.

Sale of Whisky by Physician.

A physician may make a sale of intoxicating liquors, if made in good faith and for medical purposes only. Such physician cannot legally sell for any other purpose.

APPEAL FROM BULLITT CIRCUIT COURT.

December 8, 1874.

OPINION BY JUDGE LINDSAY:

The grounds relied on for a new trial were: 1st, that the court misinstructed the jury; and 2d, that the verdict was against the evidence. With the last ground this court has nothing to do. Appellant claims exemption from the penalty denounced by law against retailing intoxicating liquors in Bullitt county, because he was a practicing physician.

The court instructed the jury that if such was the case, and the whiskey was sold in good faith and for medical purposes only, they should acquit. This was all appellant could ask; to allow physicians

to sell for other than medical purposes would be to disregard the plain provisions of the law.

Judgment *affirmed.*

R. J. Meyler, for appellant.
John Rodman, for appellee.

MARY LONG, EX'X, *v.* WELLINGTON HARLAN, ET AL.

Promissory Note—Defense—Gift.

Where the payee of a note retains it until her death and it then passed to her executrix, evidence that the testatrix said at one time that all she wanted was the interest during her life and after her death it (the note) was to be Mrs. Easthman's, is not sufficient to sustain a claim of Mrs. Easthman to ownership of the note.

APPEAL FROM BOYLE CIRCUIT COURT.

December 9, 1874.

OPINION BY JUDGE PRYOR:

The note of Harlan and Easthman is made payable in one year from its date with interest. It contains no stipulation by which the note is to be surrendered, or any evidence upon its face indicating an intention to give the note or its proceeds to the wife of one of the obligors. The promise, if made, to give the money could not be enforced, and the statements contained in the answer present no defense to the action. The testatrix retained the possession of the note until her death, and it then passed to the appellant as her executrix. The evidence of her intention to make the gift, negatives any other consideration for the promise than the relation existing between testatrix and the wife of Easthman. There was no delivery of the note or its proceeds to any one for the use of the party asserting this right against the executrix.

The demurrer should have been sustained to the answer; but as there was no exception made to the judgment overruling it, it becomes necessary to look to the evidence, and in that there is nothing to be found upon which this alleged gift can be maintained. The only witness for the defense says that the testatrix said all she wanted was the interest during her life, and after her death it was to be Mrs. Easthman's. This only evidences an intention to give, and the evidence for the appellant indicates clearly that if she ever

intended to make such a disposition of the note it was afterwards abandoned.

The judgment of the court below is *reversed,* and cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with the opinion.

Durham & Jacobs, for appellant.

J. H. DODDS *v.* BANK OF LOUISVILLE.

Fraudulent Conveyance of Real Estate.

Where an insolvent debtor, after eleven o'clock at night, conveys his real estate to grantee who knows he is in failing circumstances, and no cash is paid for such conveyance, but grantor accepts three notes, the first of which does not mature for three years, such conveyance is in fraud of creditors and will be set aside.

APPEAL FROM GRAVES CIRCUIT COURT.

December 9, 1874.

OPINION BY JUDGE LINDSAY:

Cook conveyed to Dodd on the 9th day of August, 1860. The deed was proved and lodged for record between the hours of 11 and 12 o'clock p. m., August 15, 1860. The consideration for the sale and conveyance was $4,050. No part thereof was paid in cash.

The first payment, $1,000, was not to be paid until December 25, 1863. The second payment, $1,000, was to be made December 25, 1864, and the third and last payment, $2,050, on December 25, 1865. Two days after the conveyance to Dodd, Cook openly announced his failure in business and made an assignment to McClure for the benefit of his creditors.

The conveyance to Dodd was assailed upon the ground that it was fraudulent, and made and accepted with the intention to hinder and delay Cook's creditors in the collection of their debts. That such was Cook's intention does not admit of doubt. That the effect of the sale, even if the notes had been turned over to Cook's creditors, would have been to delay them in realizing the value of the land, from three to five years, is equally clear.

If Dodd was aware of Cook's intentions, and participated in his plans with such knowledge, then he can not hold the land, and the judgment of the chancellor is proper. In his answer of November 13, 1863, Dodd says that at the time of the transaction he knew

that Cook and Nance were somewhat involved in debt, and that Cook informed him that he would have to sell the land to meet his debts. With this knowledge he purchased, without paying one cent in cash, and upon such credits as practically put it out of the power of Cook to use the notes given, in the payments of the debts by which he was being pressed.

The explanation of Dodd, and the conduct of himself and Cook are utterly irreconcilable. It can not be that the land was sold and purchased to enable Cook to pay debts. The effect of the sale and purchase was practically to put it out of his power to make either the land or the land notes available for any such purpose. Considering the knowledge of Dodd as to Cook's embarrassments, and the transaction in which he participated, the conclusion can not be escaped, that the parties intended to do that which necessarily followed the sale, in case it is allowed to stand, i. e., to hinder and delay the creditors of Cook, in the collection of their debts.

This was a legal fraud, and the chancellor properly relieved against it. The claims set up by Dodd in the later pleadings filed by him were evidently resurrected for the purpose of the litigation. If Dodd had regarded Cook as being indebted to him in August, 1860, he would not have executed his notes for the purchase price of the land. There is no reason given why the land was not taken in satisfaction, or in part satisfaction of the old partnership indebtedness, if, as matter of fact, Dodd intended to assert it as a claim against Cook. Further than this, he would not have paid off the two notes first due to the trustees of McClure; and more than all this, he would not have waited until November, 1865, five years after the litigation began, to set up his claim.

Upon the whole case, the judgment is right, and it must be *affirmed.*

A. W. Kingman, for appellant.
R. K. Williams, for appellee.

A. R. GREEN *v.* WESLEY WHALLEY.

Married Women—Contracts to Pay Money Void—Description in Judgment.

A contract of a married woman to pay money is void, and while she may, after she ceases to be a married woman, consent that her real estate be ordered sold to pay said debts, where she does not then make a new promise to pay such debts no personal judgment can be taken against her.

Description in Judgment.

A judgment ordering the sale of real estate must contain such a description of the land as will enable the commissioner and purchasers to find it without reference to papers and exhibits on file in the case.

APPEAL FROM BATH CIRCUIT COURT.

December 10, 1874.

OPINION BY JUDGE LINDSAY:

The promises made by appellant whilst a married woman were not only not enforceable, but when treated as contracts to pay money, were absolutely void. She may have recognized, or, in fact, ratified said contracts after she became discovert, and still not be bound by them. To make them personally binding upon her, it was necessary that she should, after becoming discovert, enter into new contracts, and distinctly and unequivocally agree to pay the sums of money theretofore loaned, paid, or advanced at her instance and request. By her answer of September 20, 1873, appellant admits the execution (whilst a married woman) of the note for $1,024.80, and the payment by appellee to Armstrong, at her request, of $413.49. She also admits the execution of the note for $259. Her answer concludes in these words: "She hereby consents that a judgment may be rendered to sell the said lands to pay the said debts of plaintiff, that said debts are just, and she is willing that her said lands may be sold, or enough thereof to satisfy the plaintiff by said debts."

It is evident from this language, that appellant merely intended to consent that the lands referred to should be subjected to the payment of debts recognized by her to be just, although not collectible from her. Whilst recognizing the justice of appellee's claims, she not only does not, in terms, promise to pay them, but does not intimate that she is willing to be personally bound for their payment. It was, therefore, error to render a personal judgment against her.

The judgment decreeing a sale of the land is defective in failing properly to describe it. It is described as a tract of land levied upon by the sheriff of Rowan county, lying in said county of Rowan, and which is also described fully by the deed of conveyance filed by the defendant, A. R. Green.

This court has repeatedly held that a judgment directing the sale of real property, should so describe it as to enable the commissioner

to sell, and purchasers to find and identify it, without reference to papers and exhibits on file in the cause.

Judgment *reversed,* and the cause remanded for further proceedings not inconsistent with this opinion.

Reid & Stone, J. & J. W. Rodman, for appellant.
Nesbitt & Gudgal, for appellee.

J. B. OWSLEY *v.* REUBEN WILLIAMS.

Contracts—Parties to Action—Pleadings.

Where a partnership is indebted on a note, and dissolves, and one of the partners and another executed a written contract with the withdrawing partner that they would pay the debts of the partnership to the amount of $4,107.41, a creditor of such partnership cannot sue on the contract without making the retiring partner a party.

Where a dissolving partnership is indebted to A on a note and at such dissolution B, one of the partners, and C enter into a contract with the retiring partner to pay the debts of the firm up to $4,107.41, before A can recover on such contract he must in a court of equity make all of such persons defendants and may, by showing the insolvency of the retiring partner, be subrogated to his rights and recover the amount due him, but in such a proceeding he must aver and show that B and C are still bound to the retiring partner under their contract.

APPEAL FROM LINCOLN CIRCUIT COURT.

December 10, 1874.

OPINION BY JUDGE LINDSAY:

The petition disclosed these facts: Owsley & Rochester, partners and merchants, were indebted to Williams $500, evidenced by their promissory note due February 27, and bearing 10 per cent. interest.

The partnership was dissolved, and Owsley, with the appellant, J. B. Owsley, executed to Rochester this covenant:

"We agree to pay the indebtedness of Owsley & Rochester to the amount of $4,107.41; less $180.32 on debt below to Fletchemier." A list of debts, including that of Williams, is incorporated in the covenant. Williams sues on covenant. He does not make the payors of the note or either of them parties. He avers that they are both insolvent, and alleges that the Owsleys have not kept and performed their said covenant, because they have failed and neglected to pay to him the amount of his debt; but he does not state that they have

not in some other way paid and satisfied the full amount of $4,107.41 they undertook to pay for the firm of Owsley & Rochester.

The petition ignores the fact that the covenant of the Owsleys was to and with Rochester. Williams is not a party to it. There is no privity between him and the Owsleys. They were indebted to Rochester. They agreed to satisfy their indebtedness to him, by paying certain debts for which he was bound, including the debt of Williams. The contract was not made for the benefit of Williams. He still holds the note of Rochester, and still looks to him for payment. If Rochester and the Owsleys had canceled their agreement, Williams would not have been affected thereby. He would still have held his debt against Rochester and Owsley.

If the Owsleys are still bound to Rochester in an amount sufficient to pay Williams, then in view of the insolvency of Rochester, he may, in an action in equity, to which the payors of the note are made parties, be subrogated to Rochester's rights, and have the amount still due to him from the Owsleys applied to the payment of his debt; but in such a proceeding, the averment that the Owsleys are still bound to Rochester in some amount is indispensable. There is no such averment in the petition under consideration.

There is nothing in the case of *Carvin & Co. v. Moberly, et al.*, 1 Bush 48, inconsistent with this view of the law. In that case no such question was raised, and hence it was not necessary that the first branch of the case should be fully stated by the court. The contest was with regard to the execution of the collateral covenant, and the court directed its attention to the questions arising thereon.

The demurrer to the petition should have been sustained. Judgment *reversed*, and cause remanded for further proceedings. Appellee should be allowed to amend his petition if he offers to do so.

M. C. Saufley, for appellant.
Hill & Alcorn, for appellee.

COMMONWEALTH, ET AL., *v.* M. N. DEPANE.

Criminal Law—Money as Bail.

Money may be paid to the trustee of the jury fund, and a certificate of such payment be filed with the clerk in lieu of bail in a criminal case. The money thus deposited belongs to the defendant where he pays it, and by surrendering himself into custody at any time he is entitled to the money and the clerk must pay it out on his order.

APPEAL FROM LINCOLN CIRCUIT COURT.

December 10, 1874.

OPINION BY JUDGE PETERS:

The 84th section of the Criminal Code provides that wherever the defendant is admitted to bail in a specified sum, he may deposit said sum with the trustee of the jury fund of the county in which the trial is directed to be had, and take from the trustee a certificate of such deposit, upon delivering which to the officer in whose custody he is, he shall be discharged.

This is the only law, of which we are aware, which authorizes the discharge of prisoners from custody by a deposit of a sum of money. That deposit must be of the sum specified, and the officer having the prisoner in custody is only authorized to discharge him upon the delivery to him of the certificate of the trustee of the jury fund that the deposit is made with him.

Adams might, at any time after the money had been deposited with the clerk of the circuit court, have required the surrender of the money to him by said clerk. The clerk had no legal right to retain it, and when he received it, he held it subject to the order of Adams, the defendant; and the commonwealth acquired no claim on it whatever. The clerk was not its agent; by receiving the money he became the debtor to Adams for the amount, and Adams, by his assignment, could have transferred his right to his assignee, and a creditor would attach it and have it applied to the satisfaction of his debt. This appellee did to indemnify him for the horses stolen from him by Adams, the owner thereof. The commonwealth has manifested no right to the money, and the judgment in favor of appellee has prejudiced none of its rights or of the rights of Miller, the custodian.

The amendment to Sec. 61, of the Criminal Code, confers the power on the clerk of the circuit court, after the term, to take the bail in the absence of the judge; and after there has been a commitment by the court, and the amount of bail fixed, in such cases the clerk of the circuit court may take the bail in the absence of the judge. This is the extent of his power, and it is as logical to say that the trustee of the jury fund could take the bail under this authority given to the clerk, as to say the latter could receive the deposit and certify the fact to the officer having the defendant in custody, and thereby effect his discharge.

Wherefore, as the judgment is neither prejudicial to Miller nor the commonwealth, let it be *affirmed.*

George W. Dunlap, John Rodman, for appellants.
Breckenridge & Fox, for appellee.

A. HARPENDING v. COMMONWEALTH.

Taxation—Deduction of Indebtedness.

A person assessed for taxation on money is entitled to have deducted therefrom the amount of his indebtedness.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 10, 1874.

OPINION BY JUDGE PETERS:

In 1873 appellant, under the equalization law, listed with the assessor for Caldwell county, $1,200 for taxation. The supervisors for said county raised the amount to $20,000. He then applied to the court of said county to have the amount reduced to $5,000, which the court refused to do, and he has appealed to this court.

On the trial appellant was examined as a witness in his own behalf, and proved that at the commencement of the war he purchased seven United States bonds of the denomination of $1,000 each, and had $4,000 in United States currency; that having concluded to organize a national bank in Princeton, Ky., he went to New York, and friends there agreed to furnish him what money he might want for that purpose; that with the money he had and what he borrowed in New York, he was enabled to purchase $27,000 of United States bonds; that he went to Washington City to deposit the bonds and to get the national currency, but on his arrival there he found the expenses to be incurred were too great, and he abandoned the purpose of organizing a bank, sold six of his United States bonds, and retained the 21 which he then had; that his friends in New York subsequently furnished him with money, which, with the proceeds of the six bonds he had sold, made about the sum of $20,000, all of which is loaned out, and secured by mortgages on real estate in Caldwell county, Kentucky, and of said sum $15,000 are borrowed, and for which he was indebted.

By an act of the legislature approved January 9, 1852, it is made the duty of the assessors of this commonwealth, after having taken

the list of all property required to be specifically listed, to require each person on oath to fix the amount he or she is worth from all other sources, on the day to which said list relates, after taking out his or her indebtedness from said amount, etc.

2 Rev. Stat. 253. This indebtedness of appellant, from his statement under oath, appears to be just and owing for a valuable consideration, and such as he had a right to have taken from the fund loaned out, and that he should be required to pay tax on the residue thereof, being $5,000.

Wherefore the judgment is *reversed* and the cause is remanded for a judgment to be rendered in conformity to this opinion.

James R. Hewlett, for appellant.
John Rodman, for appellee.

D. M. GRIFFITH *v.* LAFAYETTE BEACKER, ET AL.

Insolvency—Preference of Creditors—Sale of Real Estate—Innocent Purchaser.

Where an insolvent debtor and his surety sell and convey the insolvent's real estate, to prefer debts upon which the surety is bound, the surety knowing of such insolvency and the purpose of the sale and receiving the consideration to carry out such purpose, the proceeds of such sale are subject to the payment of general creditors.

Sale of Real Estate—Innocent Purchaser.

Where a conveyance of real estate is made by an insolvent in contemplation of insolvency and for the purpose of preferring a creditor, while the effect is to transfer all the property to all the creditors, whether the preferred creditor knew the purpose or not, still, where the purchaser is innocent and pays a fair consideration, the sale will not be set aside, but the court will direct the proceeds of such sale to be applied to pay all the creditors.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 10, 1874.

OPINION BY JUDGE PRYOR:

It is a fact conceded in argument, and if not, appears clearly from the record, that in May, 1870, S. M. Wing was not only embarrassed financially, but insolvent. He made an assignment during that month to W. T. Brown of all his estate for the benefit of his creditors, and with a view of satisfying their demands so far as his

property could be made available. A few weeks prior to this conveyance in trust, he made a sale of an undivided moiety of a tract of sixty acres of land to W. H. Griffith, for the sum of six thousand dollars, four thousand dollars of which, as recited in the deed, was paid in hand, and the balance to be paid in two equal instalments. W. H. Griffith, the purchaser of the land, was not a creditor of Wings, and seems to have purchased the land in good faith and for a full and fair consideration.

The appellees, previous to the sale made by Wing to W. H. Griffith, had instituted an action in the Daviess circuit court to recover of Wing a large sum of money, and after the conveyance of the land to W. H. Griffith by Wing, filed an amended petition, in which they allege that the sale to W. H. Griffith was made in contemplation of insolvency, and with a design to prefer creditors, that is to prefer the said Daniel M. Griffith, who is made a defendant to the amended petition; that no money whatever was paid by W. H. Griffith to Wing, as the deed recited; but that the said Daniel M. Griffith was bound as the security, drawer or endorser of said Wing for the recited consideration paid, of $4,000.70, or that the said Wing was indebted to him in said sum, or a part of it; and that the real consideration was the assumption, settlement or payment of that sum, or a part of it, by the said W. H. Griffith to and with the said Daniel M. Griffith as an indemnity against his, the said Daniel's, liability for Wing, or said Wing's indebtedness to him; and the said W. H. and Daniel M. Griffith are called on to state and disclose the true nature of the transaction.

The parties all lived in the same town or its vicinity when these transactions took place. Daniel M. Griffith was liable jointly with or as endorser for Wing to a large amount. He sold the land to W. H. Griffith for Wing, took the notes for the deferred payments, as well as the drafts or bills representing the four thousand dollars, into his own possession. The notes were endorsed to him by Wing, and the acceptances payable to his, D. M. Griffith's order. The bank cashiers were directed when the paper matured upon which the appellant was liable jointly with Wing, to apply these acceptances of W. H. Griffith to its payment. Anderson, one of the cashiers, is of the opinion that W. H. Griffith directed the application of the money; but in this he is evidently mistaken, as W. H. Griffith swears that he had nothing to do with the paper after the delivery to D. M. Griffith except to renew, and that he never knew how the money was to be applied; and besides the acceptances being payable to the or-

der of the appellant, he alone could direct the application of the money.

The notes for the deferred payments were assigned to appellant about the same time, and he admits in his answer that this was done to pay debts for which they, Griffith and Wing, were jointly liable, and had contracted as partners, and that he had the right so to apply the money, for the reason that the land sold was partnership property. That the land sold belonged to them as partners, or that the debts owing by them were partnership debts, is in no manner sustained by the proof; but on the contrary, the manner in which this sale of the land was made, and the notes and acception given, conduces clearly to show that appellant was endeavoring to save himself from loss by applying the proceeds of the land to the payment of debts for which he was jointly liable with Wing. If Wing was regarded by appellant as solvent, why were the notes transferred to pay their joint liabilities, and why were the acceptances made payable to the order of appellant, who was not entitled to any part of the money?

Wing was a good business man, understood fully the nature of business transactions; and there was no security for the transfer of the notes, and certainly none for making the acceptances payable to the order of appellant, when the paper in bank had not matured, and he is as much liable for the bank debts as Wing. Wing had been protected in the bank of which appellant was a director for a large sum of money ten days prior to the time at which these transfers of the notes were made. The cashier of the bank was apprised of Wing's embarrassments, and appellant being a man of business habits, and in the habit of endorsing for Wing, must have had from the manner in which the transaction of sale took place, some reason to believe that there was a necessity for having indemnity by reason of this joint liability. Yet it is a little strange that Wing and Griffith should have been paying their debts, or preparing to meet them before maturing, when Wing was then under protest in bank.

But does this knowledge, or want of knowledge on the part of the creditor preferred, affect his liability to restore what he has received under the act of 1856? Such has not been the construction of that act by this court; but it is made to depend upon the insolvency of the debtor, and the object the latter had in view in making the preference. If made in contemplation of insolvency and for the purpose of preferring a creditor, it has the effect to transfer all the property to all the creditors, whether the preferred creditor knew the purpose

of the debtor or not. *Temple, Barker & Co. v. Poyntz, et al.*, 2 Duvall 276. In this case the sale was made by appellant for Wing to W. H. Griffith in order that the proceeds of the sale might be applied to the discharge of the debts owed jointly by appellant and Wing to the banks, as well as other creditors. This was the purpose Wing had in view, and the facts also show that appellant was not only aware of this purpose, but was the chief instrument in accomplishing it. The appellant no doubt supposed that he had the legal right to have the debts preferred in the manner in which they were discharged, and whilst there is no moral wrong in securing such a preference, still, by the express language of the statute, if made by the debtor in contemplation of insolvency and with the design to prefer, it subjects all of his estate to the benefit of creditors.

The sale of the land in this case was made with the view of applying the proceeds to the liabilities of Griffith and Wing. The petition charges that the consideration for the sale was to indemnify appellant in his liability for Wing, and to prefer him as a creditor; and although the sale of the land is asked to be disregarded, and to operate as a transfer of the debtor's estate, the chancellor is also asked to make all such orders as will secure the application of the assets of Wing to the payment of the debts of creditors, and for other proper reliefs. Appellant is a party defendant to the pleading. The sale, from the proof, although made in contemplation of insolvency, was made to an innocent purchaser, and the preferred creditor who made the sale for this purpose of preference, by the consent of the debtor, instead of getting the land, takes the proceeds; and upon such a state of facts, although the sale of the land may be upheld, the creditor, who is a party defendant, making the sale and applying the proceeds so as to credit the preference, is clearly embraced by the statute. In the case of *Temple, Barker & Co. v. Poyntz*, 2 Duvall 276, it was adjudged that the sale was not made in contemplation of insolvency, and further that there was no proof that any assignment of the proceeds were made in contemplation of insolvency, or that the assignees so understood.

In the case of *Davis v. Jackson, etc.*, the money was loaned to pay the debt on which Davis was liable, the loan made at the time the mortgage was given. Suppose in that case, Davis, instead of loaning the money, had taken the proceeds of Hawkins's property and paid it. Can there be any question but what it would have been within the statute of 1856? We think not. The allegation is, that the sale was made to prefer appellant. This fact is clearly estab-

lished, and when shown, the prayer for general relief authorized the judgment.

Judgment is *affirmed* on both the original and cross-appeal.

Sweeney & Stuart, for appellant.
G. W. Williams, for appellees.

JOHN MILLER *v.* JAMES GAITHER, ET AL.

Quieting Title—Possession.

In order to obtain a judgment quieting title to real estate in a court of equity the plaintiff by himself or tenant must be in possession of the real estate.

Possession.

The right to possession of real estate can only be determined in an action at law, and cannot be determined in a court of equity.

APPEAL FROM HARDIN CIRCUIT COURT.

December 11, 1874.

OPINION BY JUDGE PRYOR:

This is intended to be action by the appellant to quiet his title and possession to a tract of four hundred acres of land purchased by him of one Hunt, and his right to maintain it, cannot be doubted if the allegations of the petition constitute a cause of action. It is essential in a case like this, in order to obtain the aid of the chancellor, that the party seeking the relief should be in the possession of the premises by himself or tenant, else his possession cannot be said to have been disturbed, nor a possession quieted that does not exist.

The mere right to the possession will not suffice, as the remedy is ample by an action at law. In this case the appellant claims only a constructive possession, and is asking the chancellor to interfere, not to quiet an actual possession, but to enable him to perfect his title, by settling the question as to a disputed boundary and giving to him the possession. His vendors, or those under whose title he claims, had been defeated in an action of ejectment, asserting the same title upon an issue involving the identical question of boundary as presented in this case; and the appellant, who claimed a constructive possession by reason of his deed from Hunt, alleges that he attempted to take the actual possession of the disputed land by his tenant, Harris, and that this tenant was expelled from the possession

in a proceeding of forcible entry and detainer by the appellees, who claimed the land, and had, by virtue of their claim, a tenant in the actual possession.

The appellant's vendor had also instituted another action or actions for the recovery of the land, and these proceedings ended in a compromise. What that compromise was, is not alleged. The appellant, as well as his vendor, failing to have any possession, and also failing to manifest any right to the possession in their actions at law, or to maintain a possession acquired by a forcible entry, are now seeking to establish their right of entry and possession by the aid of a court of equity. If appellant has the legal title and the right to entry, he can maintain his action of ejectment, and a court of equity where he has no possession, will not assume the jurisdiction or the right to search for these lost clauses and lines for the purpose of perfecting a title or enforcing an alleged right of possession. If the appellant has the equitable title, as he maintains he has, and the right of possession, there is no obstacle in the way of recovery in the proper form.

The judgment of the court below is *affirmed,* the petition presenting no cause of action. Judge Cofer not sitting.

W. B. Read, for appellants.
R. D. Murray, for appellees.

JOHN MAXEY *v.* COMMONWEALTH.

Criminal Law—Homicide—Malice.

If one kills another without cause the law implies malice; but malice cannot be implied from every deliberate cruel act committed by one person against another, for if the killing is in sudden heat and passion, the crime is manslaughter and not murder. No malice can be implied where the killing, though intended, was done in sudden heat of passion.

APPEAL FROM BARREN CIRCUIT COURT.

December 11, 1874.

OPINION BY JUDGE PRYOR:

Instruction No. 5, given at the instance of the attorney for the commonwealth, was misleading, and especially upon the facts appearing in the case. There was no eye witness to the killing, and the jury could not well determine the condition or attitude of the

parties, the one to the other, at the time. If one kills another without cause, the law implies malice, and in every case of homicide unexplained, malice must be presumed to have existed in the breast of the guilty party; but malice cannot be implied from every deliberate cruel act committed by one person against another, however sudden, for if the killing is in sudden heat and passion, the crime is manslaughter, and not murder. The man intends to kill when he stabs in sudden heat of passion, and no malice is to be implied in such a case; and to embrace the legal proposition contained in instruction No. 5 to a jury, is calculated to impress the mind of the jury that every killing, under any circumstances, unless in self-defense, implies malice.

Instruction No. 1, given at the instance of the defense, is more easily understood by a jury and needs no explanation. The legal mind can understand the legal import of instruction No. 5, but one not skilled in the law might conclude that instruction No. 5 was in conflict with instruction No. 1. The jury should have been told, also, that in their deliberations on the facts, if they believed beyond a reasonable doubt that the accused was guilty, and also doubted as to the degree of the offense, they must find him guilty of the lesser offense. The jurors, or some of them, under the instructions, may have doubted as to whether the offense was murder or manslaughter, and yet they were not told what their verdict should be in such a state of case. The court is required to give the law of the case. *Blair v. Commonwealth,* 7 Bush 227.

For the reasons indicated the judgment of the court below is *reversed,* and the cause remanded with directions to award a new trial, and for further proceedings consistent with this opinion.

Sims, Bowles & McQuown, for appellant.
W. H. Botts, for appellee.

GEORGE JENKINS *v.* D. D. GOODAKER, ET AL.

Real Estate—Boundary Line—Depositions.

Depositions taken by one party in a former cause between the same parties, in which title to the same land was involved may be read in evidence by the other party.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 12, 1874.

OPINION BY JUDGE COFER:

While there is uncertainty as to the true location of the appellee's lines, we think the evidence preponderates in their favor, and certainly there is no such preponderance against them as would warrant this court in reversing the judgment of the court, which is certainly entitled to as much consideration as the verdict of a jury.

The depositions read by appellees were taken by the appellant in his own behalf, in a former suit between the same parties, in which the appellees' title to the land now in controversy was involved, and were competent evidence. In that suit the appellees were compelled to make out title in order to recover, and as appellant disputed the title alone on the ground that their boundary did not include the land in contest, the controversy was practically the same in both cases, and while the judgment may not be an estoppel, it is evidence of a very high character against the appellant to prove that appellees' boundary includes the land in dispute. In that case appellees had no right to an injunction, except the court was of opinion on the facts that their boundary embraced the land, and so the judgment perpetuating the injunction was an express determination that it did embrace it.

It seems to us that the judgment was clearly right, and it is *affirmed.*

G. W. Duvall, for appellant.
P. H. Darby, for appellees.

JAMES MCGUIRE *v.* JOHN MCGUIRE.

Breach of Contract—Damages—Assignment—Parties to Suit—Pleading.

Where a written contract is not assignable, an assignment will pass an equitable right only, and where suit is brought on such contract for its breach the assignor must be made a party.

Pleading—Waiver.

The failure to make a person a party when it appears on the face of the petition that he should be a party, is a cause for demurrer, but when no demurrer is filed such objection is waived.

Pleading—Proof.

Before plaintiff can recover for breach of a contract he must not only aver and prove defendant's failure to comply with its terms, but he must aver and prove that he himself complied with or was ready to carry out his agreement.

APPEAL FROM LEE CIRCUIT COURT.

December 12, 1874.

OPINION BY JUDGE PETERS:

The written contract between Webb and appellee was not by law assignable, and the assignment to appellant passed to him only an equitable right; and as the legal right remained in Webb, he should have been made a party to the action either as plaintiff or defendant. Sec. 30 and 31, Civil Code.

This appeared on the face of the petition and the failure to make him a party was a cause of demurrer, which should have been specified as a distinct ground of demurrer. But where an objection for the want of necessary parties is not made by demurrer, it shall be deemed to have been waived. Sec. 121, Civil Code.

The writing sued on imposed on Webb a personal duty, from which he could not relieve himself by assigning it to a third party, and substituting him to perform the duty, unless appellant assented to the substitution, agreed to look to the assignee for the performance of Webb's part of the contract, and released him. In order to maintain the action, appellee should have alleged the foregoing facts in direct and positive terms, and not leave them to be inferred from some other facts stated argumentatively, as is done in this petition, which for that reason would have been bad on demurrer; but we regard the defect cured by the answer, in which he says that he had logs in the mill yard at the time appellee bought the mill, such as he was bound to furnish under his contract with Webb, but that plaintiff failed and refused to saw them, or any logs furnished him by defendant after he purchased the mill from Webb; and he says that if plaintiff had signified to him that he intended to carry out the Webb contract, he would have furnished the logs as agreed upon, evidently waiving and making no objection to the substitution of appellee in the place of Webb.

We now proceed to consider whether the instructions given to the jury by the court and excepted to by appellant, were a correct presentation of the law of the case. In the first the jury are told, in substance, that if they believe from the evidence that appellee bought out Webb's interest in the mill, and that appellant assented to the purchase, and that appellant failed to deliver as many logs in the mill yard as said mill would saw, with the hands furnished by appellee to saw and take care of the lumber, and of the description

named in the contract, then they will find for appellee the amount they believe from the evidence he has been damagd by reason of said defendant's failure to furnish said logs, unless they believe from the evidence that the plaintiff released said defendant from his contract to deliver said logs under said contract, before he had violated the same, or unless they believe from the evidence that the plaintiff refused to permit the defendant to deliver the logs according to his contract, or unless they believe from the evidence the defendant delivered the logs according to his contract. There are several obvious objections to this instruction. First, it assumes, as a foundation for the recovery, that the plaintiff had all the hands at the mill ready to cut and take care of all the logs that the mill was capable of sawing, and withdraws the consideration of that fact from the jury. Second, the plaintiff's right to recover is not made to depend at all on his readiness and willingness to saw the logs to be furnished by defendant, but on the failure of defendant to furnish the logs, whether plaintiff was willing and ready to saw them or not. Third, although the jury might have believed from the evidence that the plaintiff had, before suit was brought, released defendant from his obligation to deliver logs, still they were told that if he had released defendant before he had violated his contract, that the release was not available. Certainly after defendant had violated his contract, and before it had expired (if he in fact had violated it), the plaintiff could have released him from his further obligation to deliver logs, and such release would protect him from the time it was made. But he could have released defendant from the consequences of the breach of his contract as well after as before the breach, and make the release cover the past and future. This qualification of the instruction was too limited.

The second instruction given is obnoxious to the same objections pointed out to the first. Under the evidence in the case, instruction No. 3, as asked by appellant, should have been given.

Wherefore the judgment is *reversed* and the cause remanded for a new trial, and for further proceedings consistent herewith.

William Preston, for appellant.
H. C. Lilly, for appellee.

JOHN E. PILANT *v.* DAVID WILSON.

Infancy—Settlement—Pleading.

Where an infant, who is a party to a contract of settlement, fails to set up such infancy, he is bound by the terms of such settlement the same as if not an infant.

APPEAL FROM CALDWELL COURT OF COMMON PLEAS.

December 12, 1874.

OPINION BY JUDGE LINDSAY:

Appellee does not deny the performance during the years 1867 and 1869 of the work and labor charged for, but he pleads as matter of defense that, at the end of 1869, appellant abandoned the contract under which he was then working, and that the parties entered into a new agreement, covering the years 1870 and 1871, which agreement has been fully performed. The making of this new agreement, which is proved beyond question, was in effect a full settlement between the parties as to the years 1867, 1868 and 1869.

As appellant was then an infant, he might have avoided the effect of this settlement by relying on his infancy; but he did not see proper to do so. In his original petition he does not mention the fact of his infancy; and in his amended petition, filed after the settlement had been pleaded, he seems to have studiously avoided the assertion of any right he may have had, by reason of his non-age. As the pleadings stood, the action was properly tried as though both parties had all the while been adults. In this view of the case, the court did not err in giving instruction No. 2, asked by appellee, nor in refusing Nos. 3 and 4, asked by appellant.

Infancy to be made available for the purpose of escaping the consequences of a contract, must in some way be set up and relied on. It was not so set up and relied on in this case, and hence appellant cannot complain at being treated by the court as an adult.

Judgment *affirmed.*

George W. Duvall, for appellant.
James Hewlett, for appellee.

C. A. MCLAUGHLIN, ET AL., *v.* FRANK A. AVOID, ET AL.

Appeals—Bill of Exceptions.

Time to prepare a bill of exceptions may be extended to the succeeding term of the court but not beyond such succeeding term.

APPEAL FROM KENTON CHANCERY COURT.

December 12, 1874.

OPINION BY JUDGE LINDSAY:

It is recited in the judgment in this case that the cause was heard upon the oral and written proof.

Sec. 11 of the act establishing the chancery courts for the counties of Kenton, Campbell, etc., Vol. 1, p. 75, Acts of 1871, provides that in certain contingencies, the court may hear oral evidence on the trial of any action or proceeding in equity, and that "such evidence and all exceptions thereto, may be made part of the record by bills of evidence and exceptions, as now provided by law in ordinary cases."

The judgment appealed from was rendered on the 29th of June, 1872. The first mention of a bill of exceptions, as shown by the record, was on the 7th day of February, 1873. This was certainly not in the term at which the judgment was rendered, and unless the terms had been changed since the passage of the act of March 20, 1871, two terms had intervened. The motion then made was that leave be given until a succeeding term to prepare and file a bill of exceptions.

On the 14th of April, 1873, time was extended until the 18th day of that term of the court, and on the 30th day of April further time was given until the second Monday in June, 1873. June 9, the time was further extended until the sixth day of the term. Afterwards extensions were made until the December term, 1873, when the paper styled a bill of exceptions and copied into the record was finally ordered to be made part thereof.

Sec. 364, Civil Code, provides that the exception must be made in the time of the decision complained of, "and that time may be given to reduce the exception to writing, but not beyond the succeeding term." In this case no time was asked or given to reduce the exceptions to writing until after the expiration of the term. No motion was made until a succeeding term, and the court had then lost all control in the matter.

But if this were not so, the court certainly had no power to extend the time to still another term. *Porter v. Juny,* Mss. Opinion, July, 1856; Myer's Code, p. 481. *Kennedy & Bro. v. Cunningham,* 2 Met. 538.

We cannot consider the paper on file termed a bill of exceptions,

and as the payment is authorized by the pleadings, we must presume that it was sustained by the evidence heard by the chancellor.

Judgment *affirmed.*

Stevenson & O'Hara, for appellants.
J. G. Carlisle, for appellees.

WILLIAM E. MILTON, ET AL., *v.* C. W. CASTLEMAN, ET AL.

Practice—Negligence.

A party to a cause who neglects to attend and look after his interests cannot, in the absence of fraud or statements of his adversary misleading him, complain that his cause was submitted and disposed of in his absence.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 14, 1874.

OPINION BY JUDGE LINDSAY:

The evidence in this cause does not show that C. W. Castleman was at any time the agent, in a legal sense, of the appellants, or of any of them. That he voluntarily assumed the management of the litigation attending the contest over the two papers left by A. B. Taylor, which purported to be his last will, is perfectly clear, and that he manifested great interest and industry in preparing the case and in superintending the trials in court, cannot be doubted. As his wife was one of the parties in interest, these facts do not necessarily conduce to prove that he was the agent of the Miltons. He could not look after his own and his wife's interests without also, to some extent, acting for them. He corresponded with them freely, as it was natural that he should, in view of the fact that they were engaged in a common cause, but there is no statement or admission in his letters, from which we can determine that he was reporting to them as agent. In no instance did he ask them for advice or instruction. He upbraided some of them for their want of attention to the contest, and insisted that they should take steps to induce their own attorneys to manifest more interest in, and give more attention to the litigation.

We are of opinion that the Miltons left the management of the contest to Castleman, because he was living in Fayette county, and because they had confidence in his zeal and industry, and not on

account of any contract of agency with him, either express or implied. It is manifest that after the year 1861, the interest of all the parties to the contest having abated, the case seems to have lingered on the docket for about eight years. It might well have been dismissed for want of prosecution.

During all this time, nothing is heard from the appellants, except on one occasion, when they claim that they made inquiry of Kinkead and Castleman as to the probability of a compromise. Long anterior to this, Castleman and his wife had relinquished all their claim to the Taylor estate to their children. They had the legal right, so far as the Miltons were concerned, to purchase from White and wife. Neither of them were bound in law or in good morals to notify the Miltons that they were about to so purchase. Nor were they under obligations to prosecute for them the contest in the circuit court. Appellants had long since virtually abandoned it. It seems that the Miltons had no counsel present when the contest was finally determined. This was not the fault of Castleman. It was certain that they did not entrust to him the duty of employing counsel to represent them. The proof shows that they selected and employed their own attorneys.

It is not shown that Castleman did or said anything to mislead the Miltons or their attorneys, as to the trial of the contest. The case was called in open court, was postponed and finally submitted to a jury. Appellants or their counsel might have been present if they had so chosen. Their absence was not brought about by the fraud of Castleman. It was the result of negligence or want of interest in the matter in controversy. To allow them now to show the profits of the purchase made by Mrs. Castleman, and not to compel the party reaping the benefit of a breach of duty by an agent to surrender to a principal whose interests had been betrayed, would be to reward gross negligence.

The judgment of the chancellor must be *affirmed.*

Breckenridge & Buckner, for appellants.
Huston & Mulligan, for appellees.

WILLIE HARMON, ET AL., *v.* JOHN M. HIGGINS.

Decedents' Estates—Heirs—Duty of Court—Remedy.

When heirs receive anything from an estate as distributees, they are to that extent bound personally to pay decedent's debts, and such heirs may be sued for the debts of their ancestor.

Duty of Court—Remedy.

Where an administrator has been removed and a creditor of the decedent seeks to recover from heirs, his remedy is by an action in equity against the heirs. Such an action should be transferred to the equity docket.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 14, 1874.

OPINION BY JUDGE LINDSAY:

The notes sued on in this case do not bind the children and heirs at law of W. P. Harmon, deceased. If they received anything from his estate, as distributees, they are to that extent bound personally to pay his debts. If any estate descended to them as heirs at law, it may be subjected in their hands to the payment of his debts. Heirs at law may be sued for the debts of their ancestor. An action at law may be prosecuted against them when sued jointly with the personal representative. Sec. 6, Chap. 40, Rev. Stat., Sec. 6, Chap. 44, Gen. Stat. In this case the removal of the administrator put it out of the power of appellee to sue under the provisions of said Sec. 6, Chap. 40, Rev. Stat. His remedy was, therefore, by an action in equity against the heirs alone. *Ellis v. Gosney's Heirs,* 1 J. J. Marsh. 346.

As his remedy is in equity, and as the heirs at law are both infants, the chancellor should not subject them to the hardships of having any real estate that may have descended to them, seized and sold under execution. By reason of their non-age, they have not the legal capacity to pay or repay the judgment, nor to superintend the sale, nor to redeem, in case their lands be sold for less than two-thirds the appraised value.

The court should have transferred the case to the equity side of the docket, and the appellee have been required to amend his petition and set out the estate he desired to subject to the payment of his debts, and it should be sold by the chancellor, through his commissioner, and not turned over to the sheriff. *Hagan's Heirs v. Patterson,* Mss. Opinion, summer term, 1874. In this case the want of assets or estates discovered, is alleged by the appellants. There is no proof on the issue thus raised. It was, therefore, error to render the judgment. It is *reversed* and the cause remanded. Appellee should be allowed to amend if he desires to do so. In such case further proper proceedings will be had.

W. H. Calvert, for appellants.

ALBERT G. HAWES, ET AL., *v.* MATHEW GARRISON'S DEVISEES.

Infants—Real Estate—Power of Trustee to Sell—Purchaser.

A trustee when empowered to do so may sell the real estate of minors, without the intervention of the chancellor.

Purchaser.

The purchaser of the real estate of minors, sold by a trustee, is not required to see to it that the purchase money is properly applied.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 15, 1874.

OPINION BY JUDGE COFER:

It was decided in *Lewis, et al., v. Harris, et al.,* 4 Met. 353, that the rights and powers of trustees with reference to estates held for the separate use of married women, were not affected by Sec. 17, Art. 4, Chap. 33, of the Rev. Stat.; and as before, a trustee might, when so empowered by the writing creating the trust, sell such estate without the intervention of the chancellor, and he may do so now. That case is decisive of the question of the trustee's power to sell the land in contest in this case.

So far as the children of Mrs. Thorckmorton are concerned, the trustee had a clear power to sell, and his deed passed whatever interest they had in the land; and we concur with the chancellor that Sec. 23, Chap. 106, Rev. Stat., relieved the purchaser from all responsibility for the reinvestment of the proceeds of the sale.

The construction contended for by counsel for the appellants would restrict the operation of that section within much narrower limits than seems to be required by the language employed and the mischief intended to be remedied by its adoption. The statute seems never to contemplate that the purchaser shall be bound to look to the application of the purchase money, except he is expressly required to do so by the conveyance or devise by which the trust is created.

Indeed, we incline to the opinion that independent of the statute, the purchaser would not have been bound to look to the application of the purchase money. *Sims v. Lively,* 14 B. Mon. 348.

Conceiving no error to the prejudice of the appellants, the judgment is *affirmed.*

Lee & Rodman, for appellants.
J. S. Pirtle, for appellees.

E. J. OVERBY *v.* EDNA CURRY, ET AL.

Real Estate—Adverse Possession—Husband and Wife.

Where the wife acquires title and possession of real estate, the fact that she was married did not vest the husband with any possession that could ripen into title in himself adverse to the claim of the wife.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 16, 1874.

OPINION BY JUDGE PRYOR:

The lots in controversy were in the possession of Holmes, through whom the appellee, Edna Curry, claims to have derived title, as early as the year 1851. The ground enclosed by Holmes included lots 34, 35, 46 and 47, a part of lot No. 46 belonging to one Lindsey, who after the death of Holmes conveyed to Mrs. Curry. These lots in controversy, 34 and 35 being enclosed with the lots in the possession of Holmes, and in his actual possession at his death, were known as one lot, and called by some the Holmes lot. Such lot, however, was plainly marked and designated on the plat of the town. Holmes, at his death, devised this lot, describing the property it adjoined, to Mrs. Curry, who at the time was in the possession and claimed to own, hold and possess in the same manner, and has been in the continued possession since the device. She claims to hold under Holmes; and to adjudge that it was in the husband's possession, would be to make him an adverse claimant against his own wife. If the husband had taken the possession in his own right, by entering upon the lot under a claim of title in himself, then the possession could not be said to have been in the wife; but in this case the wife acquired the title and entered into the possession under it; and the fact that she was a married woman did not vest the husband with any possession that could ripen into a title in himself adverse to the claim of the wife. The husband, in this case, never asserted any title in himself, or any other possession than that acquired by the title in his wife, and this possession only strengthened her title. *Young, et al., v. Adams,* 14 B. Mon. 102; *Kirk v. Nichols's Heirs,* 2 J. J. Marsh. 469.

The judgment dismissing appellant's petition was proper. Judgment *affirmed.* Opinion modified by erasing three lines on first page of original opinion.

Calvert & Morrow, for appellant.
Richard Syles, for appellees.

BENJAMINE STINNET *v.* JOHN LOWNEY, ET AL.

Bill of Sale of Personal Property—Fraud of Creditors.

The sale of chattels, in the possession of a third party, who has the right for a limited time to hold it, is not fraudulent; nor is such sale of a growing crop fraudulent where the possession is retained by the vendor. A sale of one's interest in a chattel owned with another, who has possession either in himself or a joint possession with the vendor, is not in fraud of creditors.

APPEAL FROM LOGAN CIRCUIT COURT.

December 16, 1874.

OPINION BY JUDGE PRYOR:

The writing exhibited with appellant's petition evidences a sale of McMillen's tobacco then in his barn, to the appellant, to be taken possession of when the latter saw proper to send for it. The contract further recites that the tobacco was at the time delivered in the vendor's barn. The facts are, that the appellant never removed the tobacco from the barn, and whilst there the crop was levied upon by the sheriff under an execution against the vendor, McMillian. The appellant, in order to avoid this levy by the officers, the creditor maintaining that as the actual possession of the tobacco was not delivered at the time of the sale, it was fraudulent as to him, has attempted to show that a constructive possession was all that could be acquired, by proving that the tobacco was in such condition when sold, as to prevent a delivery without injuring the crop, or greatly lessening its value. It was doubtless too dry on the day it was purchased to be handed without damaging it, but this fact does not bring it without the rule, and it is only in cases where the thing sold is not susceptible of delivery that the exception is made. There could be no fixed rule in the application of the principle involved, if the mere fact of injury to the article sold, if removed, constituted the exception. The quantum of damage it must sustain, or the character of injury producing the damage in removing, would be so indefinite and uncertain, that if regarded at all, must result practically, at least, in abolishing the doctrine that actual possession must accompany such sales in order to defeat the claims of creditors. We think there is nothing in this view of the case taken by counsel, although presented in a very plausible manner.

The evidence, however, shows that the tobacco sold to appellant was a portion only of a joint crop owned by the father and son, the son owing the one-third and the father the remainder. The crop was

in the tobacco house, undivided, on the 29th of December, 1871, when sold to the appellant. The father and son lived on the same farm, and the possession of the one, so far as the tobacco was concerned, was the possession of the other. They were joint owners, and one had no right to sell to satisfy his own debt, the interest of the other; yet he might dispose of his own interest, and when sold, the title vested in the purchaser; but with no right to enter and take possession of the whole crop without the consent of the joint owners. There was a constructive delivery on the day of sale, and all the title having passed out of McMillian, the actual possession was then in the son, who held as the bailee of the vendee.

In this case the son of the vendor was directed by the appellant to sell the tobacco for him. He was acting as the agent for the appellant, and had the actual possession of the tobacco. When this agency was created does not appear, nor is it material in this case, as when the sale was made divesting the vendor of his interest in the tobacco, the possession of the other joint owner was the possession of the purchaser. The sheriff had no right to take the possession of the crop and sell it. He might have sold the interest of the debtor in the crop; and if the execution was in his hands in full force prior to the sale made to appellants, it created a lien that would give priority over the purchaser. The execution is not part of the record, and therefore this question cannot be determined. A sale of a growing crop, and the possession retained in the vendor, is not fraudulent as to creditors, for the reason that it is not susceptible of delivery. The sale of a chattel in the possession of a third party, who has the right for a limited time to hold it, is not fraudulent for the same reason. *Robinson v. Oldham,* 1 Duvall 28; *Butt v. Caldwell,* 4 Bibb 458; *Daniel, et al. v. Morrison's Ex'r, et al.,* 6 Dana 182.

So a sale of one's interest in a chattel owned with another, who has the possession either in himself, or a joint possession with the vendor, is not fraudulent as to creditors, for the actual possession is then with the joint owner retaining his interest, and he holds for the vendee. The question as to the action of the court in granting a new trial cannot arise on the record.

It may be that the verdicts first returned were against the evilence, and this being one of the grounds relied on, and the evidence not in the record, this court cannot determine that the court erred in granting a new trial. The peremptory instruction should not have been given.

The judgment is *reversed* and cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

Caldwell & Browder, for appellant.
J. H. Bowden, Charles S. Grubbs, for appellees.

W. A. HERREL *v.* J. O. PORTER, ET AL.

Pleading—Adverse Possession of Coal Lands.

The statement in a pleading that the pleaders are the heirs of a named person, is but a conclusion. The pleaders should aver the death of the ancestor and their relation to him, so that the court may determine whether they are heirs or not.

Adverse Possession.

Where the surface of land is owned by one party and the coal beneath by another, mere possession by the surface owner is not adverse to the owner of the coal, unless there be some right asserted by the surface owner of such a character as to warrant the presumption that it was known or should have been known by those owning the coal.

APPEAL FROM BUTLER CIRCUIT COURT.

December 16, 1874.

OPINION BY JUDGE COFER:

The appellees allege that they are heirs of V. M. Porter, but this is a mere conclusion of law. *Lame, et al, v. Hays, et al.*, 7 Bush 50, and authorities there cited. But the petition also contains an allegation that they are the owners of the coal reservation sued for, and if it had stopped there, it would have been good.

But reference is made in the petition to a deed from Work and Porter to Martin, for the land under which the coal is situated, and this deed being made a part of the petition, and the reservation of the coal therein made being the foundation of the appellees' claim, it appears from the petition that the title to the coal was then in Work and Porter. Having shown this, the petition, to be good, should have shown how the appellees became invested with the title thus shown to have been in Work and V. M. Porter, and having failed to show this, or to attempt to do so except by the allegation that the appellees are heirs of V. M. Porter, the petition is insufficient. They should have alleged Porter's death and the relation they bore to him, and then the court could have decided whether, as matter of law,

they were heirs of V. M. Porter. Failing in this, the petition is fatally defective.

If Martin sold and conveyed the land without reserving the coal, as was done in his deed from Work and Porter, and his vendees, immediate and remote, entered on the land under deeds purporting to convey the whole estate in it, and held and claimed it for fifteen years adversely to all others, the statute of limitations presents a bar to the right of the appellees, unless they are within some of the savings in the statute. But as appellant owned the surface, and others seem to have owned the underlying coal, his possession was not adverse to the owners of the coal until, by some open and notorious act, he manifested his intention to claim the whole estate in the land. If he entered under a deed purporting to convey the whole estate in the land, and put it upon record, this was such an act as would ordinarily be prima facie evidence of an intention to claim the whole, and his possession would thence forward be adverse to the owners of the coal. But the mere possession and claim of the surface was amicable, until some act done indicating an intention not to hold amicably; and an act to be effectual for that purpose must have been of such character as would warrant the presumption that it was known, or should have been known by those owning the coal. There is nothing in this record from which an adverse holding can be inferred, but both parties should be allowed to amend their pleadings if they offer to do so within a reasonable time, and to make further preparation.

The appellee, Elvis Porter, does not seem to be a party in the caption to the petition, and is not, therefore, a party to the suit.

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

B. L. D. Guffy, John L. Scott, for appellant.
M. J. Porter, for appellee.

SAMUEL LUSKS *v.* D. M. ANDERSON AND WIFE.

Decedents' Estates—Competency of Witnesses.

Devisees are competent as witnesses in a contest between the executor and a third party asserting a claim against the estate.

Competency of Witnesses.

A party to the action against the executor is not allowed to testify, except as to facts occurring after the death of the decedent, unless the personal representative should call on such witnesses to testify as to transactions or conversations occurring with the decedent prior to his death.

APPEAL FROM GARRARD CIRCUIT COURT.

December 17, 1874.

OPINION BY JUDGE PRYOR:

There is nothing in the chapter on evidence, General Statutes, rendering the devisees incompetent as witness in a contest between the executor and a third party asserting a claim against the estate. A party to the action against the executor is not allowed to testify, except as to facts occurring after the death of the decedent or parent, unless the personal representative should call on witnesses to testify as to transactions or conversations occurring with the testator or decedent prior to his death, etc. In that event, the party to the action may also testify as to such specific transactions or private conversations. In this case the devisees were introduced to prove the delivery of the property to the appellee by the testator, from which the jury might have inferred that it was delivered in satisfaction of the debt, and also offered to prove by these witnesses the declarations of the testator as to the purpose in view in giving this property to the daughter, viz., "that it was in satisfaction of the debt."

These declarations, made by the testator in his behalf, were incompetent, regardless of the statute, and all that was competent, the appellee in her testimony admitted to be true, viz., that she received the horse, colt, money, etc. Therefore the appellant has no right to complain. The appellant, on cross-examination made the appellee his witness, and established by her the reception of the property from her father; but the witness went further and stated that it was in consideration of the debt declared on. This witness being a party to the action, and prosecuting it for the recovery of money to which she was entitled, was not competent to prove these facts unless called on to make the statements by the adverse party, the executor. She was examined in her own behalf, to testify only as to a conversation between herself and another witness introduced by the appellant for the purpose of contradicting that witness, and the appellant then making her his witness as to facts occurring before the death of her father, must abide by the consequences. Besides, appellant proved

by William Lusk the delivering of this same property to the appellee, and the jury had before them all the facts that they could legitimately hear. The husband could not testify against the wife, nor were his declarations that the money had been paid her, competent upon the issue made.

Judgment *affirmed.*

George W. Dunlap, for appellant.
Burdett & Hopper, for appellees.

R. H. KELLY *v.* N. J. KELLY.

Marriage—Annulment.

A suit to annul a marriage obtained by force or fraud cannot be sustained by only the admission of the defendant.

APPEAL FROM TODD CIRCUIT COURT.

December 18, 1874.

OPINION BY JUDGE COFER:

While a suit to annul a marriage obtained by force or fraud is not a suit for a divorce, and does not therefore fall within the letter of Sec. 3, Art. 3, Chap. 52, of the General Statutes, which enacts that "no petition for a divorce shall be taken for confessed, or be sustained by the admissions of the defendant alone, but must be supported by other proof," yet such suit does fall within the obvious scope and intention of the statute, and should for the most weighty reasons be held to be embraced by it. The manifest purpose of the statute was to prevent parties dissatisfied with their marriage relations, from obtaining judgment of separation by collusion. If by changing the form of the action, and alleging fraud or force in obtaining the marriage, the plaintiff would be entitled to a judgment annulling the marriage relation, unless the allegations of the petition are denied, the road would be open to that influx of divorce suits which in some states has been found so prejudicial to good morals, social order, and the peace and happiness of families. It has long been the settled policy of both the legislature and judicial departments of the government of this state, to discourage proceedings for dissolving the marriage relation, and to grant divorces, and annul marriages only when it appeared by evidence brought before the court, that there were sufficient reasons for so doing.

The appellant not only alleges the marriage of himself and the appellee, but he files, as a part of his petition, certified copies of the license for and certificate of his marriage, and although the facts alleged, if proved, would have entitled him to a judgment declaring the marriage void, yet, as they were not proved, the chancellor properly refused to take the petition pro confesso, and the judgment dismissing it is *affirmed.*

S. W. Kennedy, for appellant.
H. T. Willoughby, for appellee.

H. G. PETREE *v.* G. TERRY.

Husband and Wife.

The husband is entitled to the earnings of his wife and to the products of her lands, in the absence of any ante-nuptial contract.

APPEAL FROM TODD CIRCUIT COURT.

December 18, 1874.

OPINION BY JUDGE PETERS:

It does not appear that the tobacco was not grown on the land of Mrs. Waters, to the products of which her husband was entitled. It does appear that dower has not been assigned her out of the real estate of her former husband, and as it is proved that she is acting as guardian for her children, all of whom are minors, it may be attributed to her own delinquency that the land of her wards has not been set apart to them. The husband is entitled to the earnings of his wife, and in this case he is entitled to the product of her lands, as she has not a separate estate in them. The children of the former marriage lived in the family, and if they labored, and their services were worth more than their support, they or their guardian must look to him for whom their services were rendered for compensation.

There is no evidence of an ante-nuptial contract, nor of any contract sufficient to protect the earnings of the wife or the products of her land from the liabilities of the husband. Nor does there appear to have been any efforts in that way until troubles come; and then come the earnest appeals to the courts for relief, which they have no power to give, but which the parties themselves could once so easily have secured. If married women desire to manage their

own affairs as femes sole, the statute points out the mode for them to pursue. That right was Mrs. Waters's, but she has not possessed herself of it.

The judgment must be *affirmed*.

H. G. Petree, G. Terry, for appellant.
J. & J. W. Rodman, for appellee.

DUNLAP HOWE'S G'D'N *v.* JOHN DARNELL, ET AL.

Agency—Evidence.

The mere fact that one who is a son-in-law sometimes transacts business for his father-in-law is not sufficient to raise an inference that an agreement for forbearance made by him was in fact made as the agent of the father-in-law who owned the note.

APPEAL FROM FLEMING CIRCUIT COURT.

December 19, 1874.

OPINION BY JUDGE COFER:

The only question in this record in any way affecting the merits of the case, is whether an agreement for forbearance was actually made by any one having authority to make it. If any such agreement was made at all, it was made by Gotherman with Dr. Yantis, who had no interest in the note, and whose agreement, if binding, must be binding on the ground that he was the agent of Howe, and as such had authority to make the agreement.

Yantis is Howe's son-in-law, and sometimes attended to business for him, and had the note in his possession, and left it with D. Wilson & Company, bankers, for collection, or for the payment of the interest, and to be sued on unless the interest was paid.

If it be conceded that Yantis did make the alleged agreement with Gotherman to forbear to sue, if interest, at the rate of 10 per cent. was paid up to date, and also, that such an agreement, if made by Howe, or by Yantis, with authority from Howe, would, if made without the assent of the appellees, have released them, we are still of opinion that the court erred in dismissing appellant's petition as to them, because there is, in our opinion, no sufficient evidence that Yantis had authority to make the agreement.

There is no proof or attempt to prove express authority to Yantis to make the agreement; and if he had authority it must be inferred

from the fact that he was Howe's son-in-law, and sometimes transacted business for him, and had this particular note in his hands for collection, and that his act in receiving the money from Gotherman was ratified by Howe. The only legitimate inference from the facts that Yantis had the note and that Howes ratified the collection made by him, is that he had authority to collect the whole or any part of the note. It would be going too far to presume from the fact that Yantis was the son-in-law, and sometimes transacted business for Howe, without any evidence as to the kind of business, that he had authority to make the alleged agreement. This conclusion on the facts, renders it unnecessary that we should consider other questions made by the appellants.

The judgment dismissing the petition as to the appellees, Harper and Darnall, is *reversed,* and the cause is remanded with directions to render judgment against them for the amount of the note, subject to an additional credit for $20.60, as of date January 31, 1872, being the excess they paid over legal interest to that date.

William S. Botts, for appellant.
E. C. Phister, for appellees.

JAMES GRAHAM *v.* J. R. MOORE AND WIFE.

Wills—Title to Real Estate.

Where it is provided in a will that "the real estate herein devised to said Lee Ann Smith, now Moore, I direct in case of marriage, to be entirely free from the control or disposition of her husband, and not in any way subject to his debts," the devisee, after marriage, her husband joining with her, may convey all the title of the devised real estate to her purchaser.

APPEAL FROM WARREN CIRCUIT COURT.

December 19, 1874.

OPINION BY JUDGE PRYOR:

The fifth clause of Burnam's will provided that "the real estate herein devised to said Lee Ann Smith, now Moore, I direct, in case of marriage, to be entirely free from the control or disposition of her husband, and not in any way subject to his debts." Lee Ann Smith, the devisee, having married John R. Moore, her husband and herself have united in a deed to the appellant for a part of the real estate devised to her under the 9th clause of the will; and the ap-

pellant claims that by reason of this provision of the will they are unable to make title. By an act concerning separate estates of married women, approved January 16, 1868, it is provided in substance that where separate estate is conveyed or devised to a married woman for her separate use, without the intervention of a trustee, and without any restriction upon the sale or conveyance thereof during coveture, the right of said married woman to sell and convey the property should be the same as if the said property had been conveyed or devised to her absolutely, without any separate use being expressed; but her separate use shall continue in the proceeds of such sale. See General Statutes, page 532. If this devise be regarded as passing to Mrs. Moore a separate estate, and we are of the opinion it does, it is clear that the husband and wife, by reason of the act referred to, can make to the appellant title, and whether regarded as general or separate estate, all the title the wife acquired by the will passed by the deed, and the purchaser must pay the money.

One of the notes by its stipulations makes the interest payable annually, and the question is whether interest shall run upon this interest from the time it was payable, or whether it then becomes a part of the principal.

The court is equally divided in opinion on this branch of the case, and the judgment of the court below is therefore *affirmed* on both the original and cross-appeal.

No damages will be awarded, as these parties have agreed as to the amount to be paid in lieu of damages, as appears by an endorsement on the record, and this is left for appellee to enforce.

Hines & Porter, for appellant.
H. T. Clark, for appellees.

P. C. Ross *v.* E. A. G. Ross.

Husband and Wife—Note of the Wife to Husband.

The note of a married woman does not bind her personally. It cannot bind her personal estate unless signed by herself and husband and executed for necessaries for herself or family.

Note of Wife to Husband.

Where a note is executed by the wife to the husband, to be enforced there must be some contract back of it authorizing the chancellor to interfere to prevent a fraud or great wrong to the husband. The note itself in such a case does not evidence a consideration.

Note of Wife to Husband.

If at all, it is only in exceptional cases when the note of a married woman can be made the foundation of an action in favor of her husband.

APPEAL FROM McCRACKEN CIRCUIT COURT

December 19, 1874.

OPINION BY JUDGE LINDSAY:

The ground relied on by appellee and cross-appellant, for obtaining a divorce, is that her husband had, prior to the filing of her original petition, behaved towards her for more than six months in such a cruel and inhuman manner, as to indicate a settled aversion to her, and to destroy permanently her peace and happiness.

The evidence does not show that the parties lived together as harmoniously and affectionately as could have been desired. Appellant was not free from blame, but no such conduct upon his part is proved, as would authorize the granting of the relief sought. Incompatibility of temper, dissimilarity of taste, and want of affection upon the part of both parties, are pretty conclusively established; but the ground for divorce set out in the petition is not made out.

The scene at the hotel, after the divorce suit had been commenced, so graphically described in the pleadings, was brought about by the disregard by the appellee of the order of court, and appellant seems to have used no more violence than was necessary to protect his person from the assaults of his wife.

The petition for divorce was properly dismissed, and the judgment upon the cross-appeal is *affirmed*. Appellant complains that the chancellor erred in refusing to afford him relief on account of the note for $8,000 bearing date April 6, 1865. The note of a married woman does not bind her personally. It does not bind her general estate unless signed by herself and husband, and executed for necessaries for herself or family.

Mrs. Ross had no separate estate of any kind when the note was executed. Her separate estate in the property she owned in April, 1865, was not called into existence until January 30, 1866, when the act of the legislature authorizing her to do business as a *feme sole,* and giving to her the sole and exclusive control of her said property, was passed and approved. There is nothing in this act indicating an intention to make valid and binding upon Mrs. Ross or her property, acts or contracts which theretofore did not bind

the one or the other. If the collection of said note can be enforced, it must be for some reason authorizing the interference of the chancellor, independent of the general statutes relating to married women, and their rights and responsibilities, and of the special act of January, 1866.

Appellant, in support of her claim to relief, cites us to the case of *D. Livingston v. M. & E. Livingston, et al.*, 2 John. Ch. 537. In that case it was established that the husband and wife agreed that the husband should purchase, in the wife's name, a lot of ground, and build a house thereon, and that the cost of erecting the new house should be paid out of the proceeds of a house and lot then owned by the wife, she agreeing that the last named house and lot should be sold for that purpose when the new house was completed.

The husband complied literally with his part of the agreement, and the wife dying suddenly, before the old house was sold, Chancellor Kent decreed in an action of the surviving husband against the infant children and heirs at law of the wife, that it should be sold, and the moneys arising from the sale, be brought into court to abide its further order. We may assume that such part of the money so invested as was necessary, was applied to the payment of the expense incurred in erecting the new house. Under the circumstances of that case, the agreement between the husband and wife negatived the presumption of law that otherwise would have arisen, that the purchase of the lot in the name of the wife, and the erection of the house, was intended as an advancement and provision for her.

The contract, although oral, was partly executed, which took it out of the statute of frauds and perjuries, as construed by the New York courts, and the chancellor decided that under a New York statute entitled "an act concerning infants," he had the right to enforce it. It is very difficult from the opinion to ascertain the exact ground upon which the chancellor rests his judgment. We assume, however, that it was upon the idea that his wife, if living could not hold both houses and lots, that if she relied on her coveture as a protection against the enforcement of her agreement to unite in the sale of the first house and lot, she would not be allowed, in equity, to keep the second, and that her heirs at law being merely volunteers, occupied no better attitude than their mother would have done.

In the case under consideration, there is no evidence whatever tending to establish a contract of any kind between Ross and his wife. No explanation is given as to the circumstances under which

the note was executed. No consideration is proved or attempted to be proved, and so far as the testimony is concerned, the note cannot be enforced, either at law or in equity, without the application to the note of married woman to her husband, of the rule of law, that a writing imports a consideration. Of course, in such a case, that rule has no application. The note itself does not evidence an agreement of any kind, except the promise by the wife upon demand to pay to the husband $8,000, or to give to him the Wolf lot. The consideration for the promise is not set out. To bring the case within the rule acted on in *Livingston v. Livingston,* if that case be regarded as a safe precedent, it was essential to show an agreement between the husband and wife of some kind.

It is not enough to show that the husband had permitted the wife to invest personal estate, to which he might have asserted claim, in real estate and take the title to herself. Such permission would ordinarily be treated as an advancement to, or provision for the wife. In this case, the wife seems to have been the business partner, and if not the legal owner, the ostensible owner, and the actual possessor and controller of the personalty. She acquired by her industry and management, the entire estate; she always claimed it, and her husband always recognized her claim; and when she invested the moneys so held and claimed in realty, both the husband and wife seemed to regard the transactions as ordinary and usual matters of business.

It is difficult, therefore, to infer that the consideration for the execution of the note was the consent by the husband, that the wife should do that which the proof conduces to show he all the while conceded she had the absolute and undoubted right to do, with or without his consent.

Further than this, appellant does not allege that there was an agreement of any kind, (other than that set out in the note) between himself and his wife. After reciting the facts that large sums of money had been invested in realty, and the titles all taken to his wife, he says: "At this juncture of affairs, and to show that defendant was not really giving to his wife all their means, and as an evidence that he still had an interest therein, and in consideration of money thus expended by him for property, the title of which was conveyed to her, she on April 6, 1865, executed to him her individual note," etc.

If the note was to show or to evidence an agreement between Ross and his wife, the agreement itself, and not the evidence thereof,

should have been pleaded. The note of a married woman can be made the foundation of an action in favor of her husband, if at all, only in exceptional cases. This is not one of those cases. Hence, if the note be only an exhibit, or an evidence of a contract or agreement, the contract or agreement which must be the foundation of the action, should be set out so that the court may determine whether the evidence or exhibit establishes its existence.

The next paragraph of the answer and cross-petition of December 11, 1872, shows that the petition to the legislature to have Mrs. Ross empowered to do business as a feme sole, had no connection with the execution of the note. Appellant says that it was about these times that that matter began to be talked of beween "the parties."

But if we have not given to the evidence the proper weight, still, under the pleadings in this cause, no relief can be afforded. Even in equity, it is only under peculiar circumstances that the husband can have relief against his wife. It is not enough that to refuse relief will work a great hardship. The right to relief must be based upon an express promise or agreement by the wife, which is unconscientious for her to refuse to perform, and even then, if the property or estate she may have acquired upon the faith of the promise can be restored, the promise will not be enforced.

In this case the party seeking relief does not set up in his pleadings an express promise. He states facts from which he insists such a promise may be implied. Such pleading would be insufficient in any case, and the rules will not be relaxed in an action by a husband against his wife.

Upon the whole case we are of opinion that the evidence is not sufficient to authorize the intervention of the chancellor. We are further of opinion that the pleadings are fatally defective, and for that reason no relief could be afforded even if the proof made out a case.

Judgment *affirmed.*

R. K. Williams, for appellant.
J. B. Husbands, L. D. Husbands, for appellee.

THOMAS DIXON, ET AL., *v.* ROBERT WALLACE, ET AL.

Statute of Limitations—Non-Residence of Defendant.

Where fifteen years and one month have elapsed from the date of the last credit on a note and a plea of the statute of limitations is set up, the burden is on the plaintiff to avoid the operation of the statute.

Non-Residence of Defendant.

Where a suit is brought on a note more than fifteen years after the date of the last payment on it, and where the defendant a part of the time resided out of the state, but made frequent visits back home, where plaintiff might have sued her, her removal from the state did not suspend the running of the statute of limitations.

APPEAL FROM FLEMING CIRCUIT COURT.

December 19, 1874.

OPINION BY JUDGE LINDSAY:

From the date of the last credit on the note sued on, up to the institution of this action, there was a period of fifteen years, one month and a few days.

Mrs. Wallace lived out of this state for about seven years, but she frequently visited Flemingburg, and her visits were open and known to the appellant, Dixon. He might have sued her on any of these visits, if he had chosen to do so. Her removal from the state did not, as matter of fact, obstruct him in coercing the payment of the debt by legal proceedings, and did not, therefore, suspend the running of the statute. *Ridgeley v. Price,* 16 B. Mon. 409. Dixon swears that Mrs. Wallace frequently promised to pay the note within fifteen years next preceding the institution of the action; but she deposes that she did not make such promises, and that she did not even know that the note was outstanding. Upon this question the testimony is equipoised.

The lapse of time presents, *prima facie,* a bar to the action. The onus was upon appellants to avoid the operation of the statute. They failed to do so. Hence the judgment dismissing their petition is correct.

Judgment *affirmed.*

W. H. Card, for appellants.

HARRISON & SHELBY *v.* W. O. BARKSDALE'S ADM'X.

Partition of Real Estate—Suit to Settle Insolvent Estate.

The fact that an interested party to a partition suit is dissatisfied with the partition as made, and offers to buy the whole at a given price is no ground to set aside the partition.

Suit to Settle Insolvent Estate.

Where there are accounts to settle, in a suit to settle an insolvent estate, the case should be referred to a master, and where this is not done the court of appeals will not undertake to enter into an investigation of the items involved.

APPEAL FROM TODD CIRCUIT COURT.

January 5, 1875.

OPINION BY JUDGE COFER:

The appellee had a right to have the homestead set apart, unless doing so would materially affect the value of the residue of the tract; and it was incumbent on those who insist that such will be the result to show the fact by satisfactory evidence, which has not been done. Nor can we decide upon anything in the record that the two and five-eighths acres laid off to be sold would have been more valuable if it had been laid of on any other part of the tract, or in different shape.

The offer of the appellants to pay $1,200 for the whole tract furnished no reason why the whole should have been sold, for in the first place, no matter what appellants may have been willing to pay, the actual value, and not their estimate of the value, was the true criterion for the government of the court; and in the next place, there was no guaranty that they would have given what they proffered to give.

We are not satisfied that the administratrix was not legally chargeable with more than she was charged with in the judgment; but we will not reverse on that ground at the instance of these appellants.

In suits to settle insolvent estates, it is peculiarly the province of the master to ascertain the items and amounts with which personal representatives should be charged; and when it is sought to charge them with more than they have accounted for, it is the duty of the party seeking to do so to have the case referred; and when, as in this case, this has not been done, we will not undertake to enter into the investigation of a long list of items, and to state an account, in order to ascertain whether there may not be some trifling omissions or inaccuracies in the details of the account.

"The practise of finally hearing causes involving the settlement of accounts, without the intervention of the master and the aid of his report, is not only burdensome to the lower court, and to this

court, but is unsafe to litigants." *Roberts' Ex'r v. Dale, et al.*, 7 B. Mon. 200.

As it was the appellants' duty to ask such reference, and to have given the court the aid of a report by the master, and as it is uncertain whether the judgment is not right, we will not reverse it at their instance.

Judgment *affirmed.*

Petre & Reeves, for appellants.
G. Terry, for appellees.

EASTERN KENTUCKY RAILWAY COMPANY *v.* WILLIS GHOLSON.

Damages—Instructions.

A railroad company is not liable for killing animals on its right of way when its agents use ordinary care and diligence to prevent such killing.

Instructions.

An instruction which makes a railroad company liable for damages in killing stock, if it were possible for the engineer or fireman to have seen the stock by the use of the highest possible degree of diligence, is erroneous.

APPEAL FROM GREENUP CIRCUIT COURT.

January 5, 1875.

OPINION BY JUDGE LINDSAY:

The court erred in modifying the first instruction given for the railway company. The modification makes the company responsible for killing and injuring the stock, if it was possible for the engineer or fireman to have seen them by the use of the highest possible degree of diligence.

Whilst railroad companies are liable in cases like this for ordinary neglect, they are not bound to use the utmost possible diligence.

The question is whether the agents in charge of the locomotive, having due regard for the safety of the train and passengers, and for the business of the company, could, by such care and diligence as reasonably prudent men in like circumstances generally use, have discovered the cattle in time to check the train, and thus have avoided the accident.

The owners of the stock cannot complain that the company does not keep a watch at the mouth of the tunnel to keep stock out of it.

It has no right to negligently kill or injure stock on its road or in its tunnel; but it is not bound to herd stock, allowed by the owners thereof to graze along the line of its road.

Instruction No. 2, given for appellant, is erroneous. The statute so modifies the common-law rule as to make railroad companies liable for injuries to stock inflicted through ordinary negligence. It is not necessary that the negligence shall be either wilful or reckless. This instruction should have been refused. For the error in modifying instruction No. 1, the judgment is *reversed* and the cause remanded for a new trial, upon principles consistent with this opinion.

E. T. Dulin, for appellant.
A. Duvall, for appellee.

ALFRED BAILEY'S ADM'R *v.* W. R. THOMPSON.

Evidence—Account Books—Copies.

Account books duly authenticated may be introduced in evidence in a suit, but copies of such account books cannot be so introduced.

APPEAL FROM LEWIS CIRCUIT COURT.

January 5, 1875.

OPINION BY JUDGE LINDSAY:

Subsec. 5, Sec. 25, Chap. 37, of the Gen. Stat. authorizes a party litigating with a personal representative, with regard to transactions had with the decedent, to testify as to the correctness of the original entries, if made by himself, when the claim or defense is founded on a book account; and if he authenticates the account book and entries, they (the book and entries) may be admitted as evidence in the case. Upon the trial of this cause, it was not proved that appellee kept regular books. If he did keep such books, he did not offer them in evidence. His defense is founded upon an account, purporting to be a correct copy, taken from an account book between himself and decedent. The statute does not authorize the introduction of copies taken from an account book. The book itself, when properly authenticated, may go to the jury, but there is no authority for admitting copies made from the book.

An inspection of the book may be essential to enable the jury to determine as to whether the entries were made contemporaneously with the transaction of which they are evidence. The testimony of

the litigant is not conclusive of this question, and was not intended so to be by the legislature. Further than this, the litigant should be confined in his statements to the making of the original entries in the book. He has no right to state, as he did in this case, that the account is correct, independent of the book and the entries therein. It was error to permit the copy from the book to be read to the jury as evidence. The judgment is *reversed* and the cause remanded for a new trial upon principles consistent with this opinion.

B. F. Bennett, for appellants.
George M. Thomas, for appellee.

W. J. WALKER *v.* G. W. CRADDOCK.

Suit on Judgment—Pleading.

A petition on a judgment, to be sufficient, must aver that the judgment sued on was unpaid at the time the suit was brought.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 6, 1875.

OPINION BY JUDGE COFER:

It is not alleged that the judgment, satisfaction of which is sought in this suit, was unpaid at the time the suit was brought; and the petition is, therefore, insufficient, and the judgment in this case must consequently be reversed.

As any inaccuracy of the judgment may be corrected upon a return of the cause, it is not necessary to decide whether such inaccuracy is error to be corrected here, or misprision to be corrected in the court below.

The judgment is *reversed* and the cause is remanded with directions to allow the appellee to amend his petition and for further proceedings.

John L. Scott, for appellant.
G. W. Craddock, for appellee.

Garnishee—Pleading.

To authorize a judgment against one served as a garnishee it must be averred that the garnishee defendant is indebted to the attachment defendant, and it is not sufficient to aver that one verily believes that such garnishee is indebted to such defendant.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 6, 1875.

OPINION BY JUDGE PETERS:

Appellees, in their petition, alleged that Mike Buckley has no property subject to execution, and their said debt of $174.05 will be endangered by delay of judgment and return of no property. Wherefore, they pray an attachment against the defendant, Mike Buckley; and they further state that they verily believe that James Fitzpatrick is indebted to the defendant, Mike Buckley, in a sum sufficient to fully pay their said debt. Wherefore these plaintiffs pray that said James Fitzpatrick be made a party to the proceedings, and that summons as garnishee be issued against the said James Fitzpatrick, that he may disclose on oath, and in court, the amount of his said indebtedness to said defendant, Mike Buckley; and these plaintiffs pray judgment against said defendant, James Fitzpatrick, in whatever sum he may be owing said Mike Buckley, and for all other proper relief. These are all of the allegations against Fitzpatrick contained in the petition. And the judge of the Franklin county court merely certifies that the petition was sworn to before him by the plaintiffs.

On that petition and verification, the defendants, Buckley and Fitzpatrick, were served with a summons, and an order of attachment was served on Fitzpatrick.

The defendants failed to answer; the petition was taken for confessed against both of them, and judgment rendered against Mike Buckley for the debt claimed in the petition, with interest from September 27, 1873, till paid, and costs. The attachment was sustained, and judgment rendered against Fitzpatrick for the debt, with interest from the date above named, and the costs of the suit. And from that judgment the defendants in the court below have appealed.

The petition is not sufficient to authorize a judgment against Fitzpatrick. Unless he was indebted to Buckley, appellees had no cause of action against Fitzpatrick. It was, therefore, the material fact to make out a case against him, and it should have been dis-

tinctly and unequivocally charged so that a denial in the answer would have put in issue that fact, whereas a denial of the allegation as made would only put in issue whether or not appellees verily believed Fitzpatrick owed Buckley $174.05. *Williams v. Martin, et al.*, 1 Met. 42.

Further, in order to sustain the attachment, it should have been stated in the petition or the affidavit, in direct terms or in substance, that the plaintiffs' claim was just, and that they verily believed they were entitled to recover the amount set forth. *Scott v. Doneghy*, 17 B. Mon. 321; *Worthington v. Cary, et al.*, 1 Met. 470.

Wherefore the judgment is *reversed* as to Patrick, and the cause remanded for further proceedings as to him not inconsistent with this opinion, and the judgment against Buckley is affirmed.

W. L. Jett, for appellants.
J. L. Scott, for appellees.

SILAS JONES'S HEIRS *v.* NELSON JONES, ET AL.

Administrator—Suit on Bond—Parties Plaintiff.

Where an administrator settles his accounts and has left in his hands a sum for distribution to the heirs of his decedent, but does not distribute, a joint suit may not be maintained by the heirs, but each has a separate cause of action against such administrator and his bondsmen.

APPEAL FROM OWEN CIRCUIT COURT.

January 7, 1875.

OPINION BY JUDGE PETERS:

In 1858 the appellee, Nelson Jones, administered on the estate of Silas Jones, deceased, and executed bond, with Richard L. Jones as his surety, for the faithful discharge of his duties as such.

In 1861 the appellee, Nelson Jones, settled his accounts as administrator as aforesaid, and a balance of $979.15 were found in his hands for distribution among the heirs of his decedent.

In October, 1874, this suit in equity was brought jointly by the appellants as the heirs of the intestate against the administrator and his surety on the administration bond, to recover their respective shares of the amount ascertained by the settlement aforesaid to be in the hands of the administrator.

On the calling of the cause, appellees moved the court for a rule

against the appellants to make them elect which of them would prosecute the suit, the rule being asked on the alleged ground that there was a misjoinder of plaintiffs. The rule was granted, and appellants immediately entered their appearance thereto, and declining to make any election, their petition was dismissed, and they have appealed.

There is no effort in the petition to surcharge the settlement made by the administrator, and no allegation that other assets had come to his hands, or that a further settlement was necessary; but it is a suit by the heirs to recover their several parts or shares of a definite and certain sum of money in the hands of the administrator. If the suit had been sought to settle the estate, or to surcharge the settlement previously made, the appellants doubtless might have united as co-plaintiffs. But where a settlement has been made, to which there appears to be no objection, and by which the amount that each distributee is separately entitled to receive, is for all practicable purposes ascertained, each one's right of action is separate and independent of the others. There is no such unity of interests in the plaintiffs as authorized them to sue jointly; the judgment could not have been joint, since each plaintiff would be, in a proper proceeding, entitled to a several judgment for the amount due him or her respectively. Nor can the rights of the parties in this respect be changed by bringing the suit in equity.

Judgment *affirmed*.

JAMES HUFFSTETTER, ET AL., *v.* STANLEY MOORE, ET AL.

Decedents' Estates—Claim—Married Women.

Where a claim of a married woman has been allowed by the administrator and not questioned either by him or the heirs in a proceeding to sell real estate to pay debts to which they were parties, they will not be allowed in a petition for a settlement of the estate to question its validity.

Married Women.

While a married woman may plead coverture in her own behalf, such disability cannot avail her adversaries who were themselves under no disability.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 8, 1875.

OPINION BY JUDGE COFER:

The administrator of David Huffstetter set up in the award in

favor of Mrs. Crouch a debt against the estate of his intestate, and thereby ratified and made it valid so far as he could do so; and he made the heirs and distributees parties, and put it in their power to impeach the award if they chose to do so; but they have failed to interpose any available objections to it, if any exist.

In the petition for a settlement of the estate, the administrator recognized the award as valid, and sought to sell real estate to pay the debts of his intestate, including this, and thereby put the claim of Mrs. Crouch in suit, which suspended the statute of limitations as effectually as if she had sued on it herself. The other heirs (the administrator being one), stood silently by without objecting to the award until the statute had barred the original cause of action, and then for the first time signified their objection. If they had attacked the award by their answers, filed within a reasonable time after it was set up by the administrator, Mrs. Crouch might have resorted to her original cause of action; but having failed to do so until her right of action is gone, it would be a fraud upon her now to attack the award, and thus prevent even an inquiry into the justice of her original claim.

That she was a *feme covert* might have enabled her to avoid the award if she had elected to do so; but her disability cannot avail her adversaries, who were themselves under no disability.

The award precludes all inquiry into the original cause of action.

Judgment *affirmed.*

Thomas Kennedy, W. Newell, for appellants.
Thomas F. Hargis, for appellees.

JAMES L. HARRIS *v.* P. J. HONAKER.

Arbitration—Written Agreement.

Where by the terms of a written agreement of parties to refer to arbitrators the matters in dispute between them, it was only in case of disagreement between the arbitrators that the umpire selected by them was to act, where there was a disagreement, the parties are entitled to the decision of the umpire alone, and the arbitrators have no further right to participate.

APPEAL FROM HENRY CIRCUIT COURT.

January 9, 1875.

OPINION BY JUDGE COFER:

By the terms of the written agreement of the parties to refer to

arbitrators the matters in dispute between them, it was only in case of disagreement between the chosen arbitrators that the umpire selected by them was to act, and when such disagreement occurred the parties had a right to the decision of the umpire alone made upon his own responsibility according to his own judgment. *Royse's Adm'r., et al., v. McCall,* 5 Bush 695; *Daniel v. Daniel,* 6 Dana 93.

When the arbitrators disagreed, they should have withdrawn from any further participation in the matter, and have left the umpire to make his decision; and the fact of their disagreement, and that the decision was that of the umpire, should have been stated in the written award, which should have been signed by all. Instead of doing this, one of the arbitrators seems to have united with the umpire in making the award, which may be the result of mutual concessions between them instead of being the decision of the umpire alone.

Judgment *affirmed.*

Webb & Masterson, for appellant.
DeHavon & Carroll, for appellee.

LEVI FORTNEY *v.* JESSE MOORE.

Real Estate—Judicial Sale—Redemption from Sale—Sale Bond.

In order for one to make out a title to land through a sheriff's deed, such person must show the execution and judgment on which it issued, or a bond of equal dignity of a judgment by judicial sanction.

Sale Bond.

Where a bond is taken by a commissioner for the balance of the purchase money of land sold, but which is not reported to the court, a title secured through an execution on such bond and sale thereunder by the sheriff is not good, and will be set aside.

APPEAL FROM MUHLENBURG CIRCUIT COURT.

January 9, 1875.

OPINION BY JUDGE PETERS:

This record presents some very extraordinary features. Eli Fortney, it appears, was the owner of the tract of land in controversy, and being indebted to one George W. Short in various sums of money, mortgaged the land to secure the payment of said debts.

Short filed his petition in the Muhlenburg circuit court against said Fortney to foreclose said mortgage, and to subject the land to

the payment of his debts. Pending the suit said Short died, and it was revived in the name of Joseph Short, his executor, and a judgment was then rendered foreclosing the mortgage, and ordering a sale of the land or so much thereof as should be necessary to pay the debts owing to Short, all of which are specifically set forth; and then the judgment read as follows:

"That said land be sold at the court house in Greenville on a court day, to the highest bidder, on a credit of four and eight months, with interest from date, the purchaser giving bond with good security, having the force of a judgment payable to said executor," etc.

The master, who was directed to make the sale, reported to the court that he did, on the 29th day of August, 1864, it being county court, and after having advertised as required by said decree, sell at the court house door in Greenville, the 200 acres of land in the decree mentioned, and Levi Fortney became the purchaser at the price of $604, and executed bond with William H. Fortney as security, due in six months, bearing interest from date, all of which is respectfully reported. Signed, Jesse H. Reno, commissioner.

The bond is not made a part of the report. But a bond dated August 29, 1869, purporting to have been executed by Levi Fortney, William Fortney and Eli Fortney, due six months after date, for six hundred and four dollars, and payable to Jesse H. Reno, commissioner, is filed. And the copy of an order made in said case is filed in the following words: Jesse H. Reno, commissioner, reported to court his sale of land in this action, and the same was ordered to be confirmed, and thereupon Jesse H. Reno, as commissioner, produced and acknowledged in open court a deed from himself, as commissioner, to Levi Fortney, which deed was examined, approved and endorsed by the court, and ordered to be certified to the proper officer for record. That deed was recorded in the proper office.

The bond, executed by Levi Fortney and his sureties, having matured, and they having failed to satisfy the same, an execution was sued out on it in the name of Reno, commissioner, against all of the payors, and placed in the hands of the sheriff of Muhlenburg county, who levied it on the land in controversy, and the same was sold by him to appellee, Jesse Moore, on the 27th day of October, 1867, at the price of $432.47, it having been valued on the day of sale by two housekeepers selected for the purpose at the sum of $1,600.

This suit was brought by Levi Fortney to set aside the sale or

to be permitted to redeem the land by refunding to Moore the price paid for it by him on the various grounds set forth in his petition. The relief sought is resisted by Moore, who, in his answer, traversed all the material allegations of the petition; and by cross-pleadings he asks to be put into the possession of the land under his purchase, and for a judgment for rents. Eli Fortney, by appropriate pleadings, asks judgment against Levi Fortney and Moore, for a surplus of 73 acres of land in the tract, over and above what was sold. Levi Fortney's petition was dismissed with costs, and he seeks a reversal of that judgment.

A question of primary importance and preliminary to those so elaborately discussed by counsel on both sides, is presented at the threshold of the investigation, and that is as to what is the character of title that appellee acquired by his purchase at the sheriff's sale.

In order to make out a title to the land through the sheriff's deed, the appellee must show the execution and the judgment on which it issued, or a bond raised to the dignity of a judgment by judicial sanction. The sale bond on which the execution issued has never been returned and reported to the court. The one which the commissioner reports he took was executed by Levi Fortney and William H. Fortney as his surety, different from the one on which the execution issued.

That one was executed by Levi Fortney, with William H. Fortney and Eli Fortney as sureties. Besides, he reports that having advertised the land as required by the decree, he sold it and took a bond from the purchaser, due in six months, but fails to state to whom the bond was made payable, or that the sale in other respects conformed to the requirements of the decree; and by an examination of the decree it is found that the sale was required to be made on a credit of four and eight months, instead of which the commissioner sells the land on a credit of six months, and takes the bond payable to himself, when he was required by the judgment to take bonds payable to G. W. Short's executor. It seems that the report of the commissioner was confirmed, which may be regarded as an approval by the court of the change of the terms of the sale made by the commissioner, and also of the bond which he reported he took from the purchaser, which, according to that report, was not the bond on which the execution issued, under which the land was sold. Consequently the execution was unauthorized, and Moore acquired no title by the sheriff's deed.

But even if that objection did not exist, we are satisfied from the evidence that Eli Fortney tendered the money paid by Moore for the land with 10 per cent. interest thereon, within the time prescribed by law to redeem the land.

In either aspect of the case, the judgment must be reversed and the cause remanded with directions to render judgment against Levi and William H. Fortney in favor of Jesse Moore for the sum of $432.47, with interest at the rate of 6 per cent. per annum from October 28, 1867, until paid, and to fix a certain day by which the money is to be paid. On failure to pay the same within the time prescribed, the land, or so much thereof as shall be required to pay said debt, interest and costs of sale, shall be sold for cash in hand at the court house door in Greenville, on the first day of a circuit or county court after properly advertising said sale. The sheriff's deed to said Moore for said land shall be set aside. *Reversed* for further proceedings consistent herewith.

Charles Eaves, for appellant.
J. C. Thompson, for appellee.

B. A. JESSIE *v.* FANNIE E. FARMER, ET AL.

Husband and Wife—Real Estate—Purchase—Set-Off.

Where land is purchased by the husband with the wife's money and conveyed to her, a purchaser from her cannot by buying claims against her husband set them off against the purchase money he owes the wife.

Husband and Wife—Fraudulent Conveyance.

When land is purchased by the husband and conveyed to his wife, the greater portion of the purchase money being furnished by the wife, such conveyance could not be in fraud of the husband's creditors who became such long after the real estate was so purchased.

APPEAL FROM SHELBY CIRCUIT COURT.

January 12, 1875.

OPINION BY JUDGE PRYOR:

We have been unable to discover even the semblance of fraud on the part of Nichols or his wife upon the facts appearing in the record; but on the contrary, the appellant, with a full knowledge of the rights of the wife, purchased the claims of Huss and others, that he might apply them in payment of the note for the land.

He sold the land originally to Nichols, and made the conveyance to Nichols's wife. This sale and conveyance were made in the year 1868, and the debts attempted to be set off were not created until the year 1870. The conveyance made in 1868 had for its consideration the money of the wife arising from the proceeds of the sale of her land in the county of Owen. This money was invested in the purchase of appellant's property under the express agreement between Nichols, his wife and the mother of the latter, by which they consented to a sale of the Owen land, that the proceeds might be invested in the Shelby property for the benefit of the wife. The money was in good faith so applied, and the deed made to the wife by the appellant, who now claims that it was in fraud of the husband's creditors.

It might be conceded that the husband advanced as much as two hundred dollars out of his own means, or even more, and still the conveyance to the wife made in 1868 could not be said to be fraudulent as to debts created in 1870. The deed of 1868, as well as the deed made to appellant and accepted by him, gave him full notice of the wife's claim; and whilst the deed of 1868 could not operate to defeat the claims of creditors whose debts had been created prior to that time, if the consideration had been paid by the husband, in the present case no fraud can be perceived, as the deed was made before the debts had an existence, and the consideration or the greater part of it, actually paid by the wife. The identity of the land sufficiently appears from the judgment. Judgment *affirmed.*

G. N. Robinson, for appellant.
Caldwell & Haewood, for appellees.

C. P. CLEMMONS *v.* JESSE MOORE.

Trusts—Established by Parol.

To establish a parol trust the facts constituting such a trust must be specifically and clearly set forth in the petition and if denied must be proved certainly.

APPEAL FROM MUHLENBURG CIRCUIT COURT.

January 12, 1875.

OPINION BY JUDGE PETERS:

To establish a parol trust, the facts constituting such a trust should be specifically and clearly set forth in the petition, and if denied

should be proved with great certainty. In this case the evidence is very conflicting; and if it does not preponderate against the appellant, it falls far short of the clearness and certainty which in such cases is required to authorize judicial action.

Several business transactions transpired between these parties after the alleged agreement to hold the land by Moore for Clemmons, in some of which writings were executed. In one, appellant executed to appellee a mortgage on a crop of tobacco; and still the alleged agreement to permit appellee to redeem the land, the most important of all, was left in parol.

The legal title to the land was in appellant, Clemmons, or if not it was held by Gilliam, and it was subject to levy and sale under the execution. Indeed that is not questioned by the pleadings.

We have been unable to discover upon what principle appellant can be relieved.

Wherefore the judgment be *affirmed.*

James Ricketts, for appellant.
J. C. Thompson, for appellee.

BEN A. CARRICO, ET AL., *v.* CHARLES GREENWELL.

Liens—Enforcement of Liens on Real Estate.

Where there are senior and junior liens on the same real estate, and the senior lien holder sues to foreclose, the junior lien holders are entitled to be made parties if they ask to be and may file cross-petitions to recover on their own liens, but they are not entitled to file answers to the petition of the senior lien holder and defend his suit.

APPEAL FROM BULLITT CIRCUIT COURT.

January 12, 1875.

OPINION BY JUDGE LINDSAY:

Greenwell was proceeding to enforce a vendor's lien. Appellants held, or claim to hold, junior liens on the same property. They can interpose no defense to Greenwell's action. They had the right to set up their liens, by making themselves parties to his action, and it would have been proper for the chancellor to delay proceedings in Greenwell's favor until they could, by reasonable diligence, prepare their cross-actions for trial. The only ground, however, upon which they could demand such delay, was that they were proceeding to prepare their said cross-actions with legal diligence. Such is not

the case here. They proposed to file answers to Greenwell's petition, but they did not make them cross-petitions against their debtor, Carrico, nor against the parties to whom Carrico had sold portions of the land. If the court had permitted their answers to be filed, the result would have been to impede Greenwell, and yet appellants would not, without further pleadings, have been in condition to proceed to obtain any relief whatever.

In view of these facts the chancellor did not abuse a sound discretion in refusing to make them parties. As they are not parties they have no right on this appeal to question the sufficiency of the service of process.

Judgment affirmed.

R. H. Field, for appellants.
W. Wilson, for appellee.

JAMES BRIDGFORD v. MANHATTAN FIRE INSURANCE CO.

Insurance Policy—Insurable Interest—Principal and Agent.

When a tenant acting for himself and his landlord takes out a policy of insurance on a building and contents, the contents belonging to the tenant and the building to the landlord, and the policy is delivered to the tenant and is by its terms made payable to him, and he informs the agent of the facts of ownership and the agent then amends the policy by making it payable to the landlord and tenant in proportion to the ownership of each, and the premium is paid, the company is not in a position to deny its liability on account of the policy being made payable to the two persons.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 13, 1875.

OPINION BY JUDGE PRYOR:

On September 15, 1872, the Manhattan Fire Insurance Company of New York issued, and by its agents delivered to George A. Scott a policy of insurance, by which, in consideration of the premium in hand paid, it agreed to insure "George A. Scott, for the period of one year, against loss or damage by fire to the amount of $2,500, viz., $2,000 on the two-story brick metal-roofed building, and $500 on merchandize, hazardous and not hazardous, principally tinware contained therein occupied by the assured as a store and shop, situate No. 90, on the south side of Water street, Portland,

Louisville, Kentucky. Loss, if any under this policy on building, payable to James Bridgford, Esq."

Among the terms and conditions annexed to the policy, and made part of the contract of insurance, are the following: First, "If the interest of the assured in the property, whether as owner, trustee, consignee, agent, mortgagee, lessee or otherwise, be not truly stated in the policy, then it is to be void;" second, "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void; third, "It is a part of this contract that any person, other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, unless he shall hold his commission, signed by the officers of the company or its duly authorized agents."

On July 30, 1873, the building and contents were destroyed by fire. The company paid to Scott the value of the contents of the building, but refused to pay to Bridgford the insurance on the building, or any sum whatever, by reason of his loss. This action was then instituted by Bridgford, uniting Scott with him, as plaintiff to recover of the company the sum of $1,880, the value of the building.

It is alleged in the petition that Bridgford was the owner of the building, and that Scott, as his tenant and agent, made the contract of insurance and paid the premium. It is further alleged that the agents of the company knew when they made the contract of insurance with Scott, that Bridgford was the owner in fee of the property; that it was so represented to them by Scott, and the latter was only interested to the extent of the value of the merchandise in the building; that it was the intention and meaning of Scott and the company's agent that the insurance on the building was for the benefit of Bridgford, and that the interest each had in the property he fully and truly represented to the agents at the time; that by mistake or ignorance the name of Bridgford was omitted from the policy.

The answer filed by the company denies any mistake in the execution of the contract, or ignorance on the part of its agents or the assured as to the rights of Bridgford. It is also denied that Scott insured the property as the tenant or agent of Bridgford, and the latter having insured the building in his own name, without dis-

closing the character of his title or that Bridgford was the real owner, neither Scott nor Bridgford are entitled to a judgment. The court below, taking this view of the question presented, dismissed the petition, and Bridgford appeals to this court.

It is conceded that Bridgford owned the building when the contract of insurance was made, and the proof shows that Scott was his tenant, holding the property for no definite period, only at the will of his landlord. The only property the tenant had in the building was some tinware of the value of five hundred dollars. The facts connected with the insurance are inconsistent with the conclusion that the agents of the company were in ignorance as to the real owner, or without knowledge as to the object in view when the allegation was made in the policy, by which Bridgford became the insured of the building, and Scott of its contents. Scott, who, it seems, effected this insurance for Bridgford at the instance of a solicitor for the local agents of the company, but whose authority to act both the agent and the company deny, was dissatisfied with the policy at first issued, as it gave to him the benefit of the insurance on the building instead of Bridgford, the real owner. It appears that when the policy was delivered to Scott by the solicitor that he declined to receive it. This objection having been made to the solicitor, or the party pretending to act as such, and upon the request of Scott that the policy should be altered so as to make Bridgford the insured of the building, the solicitor took the policy from him and had the alteration made by the local agent of the company, so as to make it read, "Loss, if any, * * * on building payable to James Bridgford." After the alteration was made Scott accepted the policy and paid the premium to one of the local agents.

The solicitor obtaining this insurance for the local agents had no recollection of being informed by Scott why he desired the alteration made in the policy; nor does he recollect that anything was said as to Bridgford being the owner of the building. The agent of the company making the alteration seems to have been as ignorant of the real owner as his solicitor, and when handed the policy with the request to make the alteration, made no inquiry as to why the change was desired or what interest either Scott or Bridgford had in the property insured. Scott was not present when the policy was fixed up, or the alteration made, this being done by the local agent at the instance of his solicitor, and taking their recollection of the facts, they were both in entire ignorance of the rights or purpose of the parties for whose benefit the contract of insurance was made.

Scott's statement, connected with the circumstances attending the transaction, is entitled to more consideration than the mere want of knowledge or recollection of facts upon the part of appellee's agent. He avers that he directed the insurance of the house to be made for Bridgford, and accepted it as such from the solicitor who had the change made by the local agent.

At the time the insurance was effected Scott had no interest in the building. He was tenant under a rental contract with Bridgford, holding the property at the will of the latter. All the property he had in the building was some tinware of the value of five hundred dollars, and this was insured in the same policy. He was under no obligation to insure for Bridgford except as agent. It does not appear that he was indebted to him in any way and had effected the insurance as an indemnity. He could have derived no benefit from the insurance on the building. That it belonged to Bridgford is conceded, and no motive can be assigned for this action on the part of Scott, except as is made known by his own statement "that he insured the property for the owner," and this part is manifest from the policy itself.

Although the solicitor, under the proof in this case, may not be regarded as the agent of the company, still he was soliciting insurance at the instance or by the consent of the local agent; and the circumstances conduce strongly to show that this agent knew the object of the insurance at the time he altered the policy, and that Bridgford was the real owner. The policy upon its face indicated that Bridgford had an interest in it, and a knowledge by the agent of the interest of that intent is manifested by his action after the building was burned. He made out or assisted Scott in preparing the proof necessary to enable Bridgford to get his money, in which it is recited that Scott owned the tinware and Bridgford the building. The claim to the loss sustained by the destruction of the building was asserted in Bridgford's name, and according to the statement of the local agent, he knew the day succeeding the fire that Bridgford owned the building, and attempted to adjust the loss with Bridgford at $1,880.

The amount of this loss was also ascertained at the instance of the agent in his endeavor to have the property rebuilt. The agent admits that he agreed with Bridgford that $1,880 should be considered the value of the property, but says that he had no power to bind the company or adjust the loss. Although he may not have been clothed with the authority to make a final adjustment of the

claims asserted by Scott and Bridgford, his conduct is inconsistent with the idea that he was ignorant of the purposes for which the alteration was made. The agent was also solicitous that the company should pay the money for the reason, as he says, the refusal might affect his business; but we are inclined to the opinion that if the insurance had been made by Scott in his own name, and without disclosing the interest of Bridgford and his purpose to insure for Bridgford, it would have been such a palpable violation of the regulations of the company as would have deterred the agent from interceding in his behalf or that of Bridgford. The fact that the rules of the company require that the name of the true owner shall be disclosed, or rather the insured being required to disclose the extent of his interest, if he is not the real owner, cannot be held to protect the appellee from responsibility in a case like that. The company's local agent and his solicitor having undertaken to make this contract, the latter acting for the local agent as well as the assured, if the writing is to be reformed upon the ground of a mistake alone in its execution, the facts and circumstances are so strong as to the intention of both parties, and as to what the real contract was, that the chancellor ought not to hesitate to say that the building was insured for Bridgford and as his property. The proof is so clear as to leave no reasonable doubt; and circumstances shown to have existed, have overwhelmed the testimony by which their existence is attempted to be separated.

In the case of the *National Fire Insurance Company of Baltimore v. Crane,* 16 Maryland 260, a case similar in many respects to the one being considered, the relief was denied the plaintiff upon the alleged mistake, for the reason that James L. Gray and brother, to whom the policy issued (loss, if any, payable to Crane & Co.), were the beneficial owners of the property, or had an interest in it, and the object was only to protect Crane & Co., in advances made to the Grays for a large sum of money. The court, in that opinion, says: "There is nothing in the condition of the property, in regard to ownership, or in the object to be accomplished, which could raise the presumption that it must have been the intention of the parties to insure some interest that W. Crane & Co. had in the property, and not that of the Grays." The reasoning of the court in that case indicated clearly that if the facts had been developed as they appear in this record the relief would have been granted.

If Scott had been the real owner of the property, and the agent of the company at his request had made the loss, if any, payable to

Bridgford, we see no reason why Bridgford could not have maintained the action; and the policy in this case having been issued in the first place to Scott alone as the assured, and the agent, before the policy was accepted, having been informed that Bridgford was the owner, and was to be the assured instead of Scott, and the alteration being made for that purpose, in the manner it appears in this policy, it is clear that Bridgford, being the real owner, has a right of action against the company.

Newman v. The Springfield Fire & Marine Insurance Company, 17 Minnesota 123. There is no evidence in the case authorizing this court to assume that the insurance was effected by Scott without Bridgford's knowledge, nor can we perceive why the latter's failure to testify is to affect his rights. He was not present when the contract was made, but swears to his petition, in which it is alleged that Scott made the insurance for him, and as his agent, and in this he is fully sustained by the testimony in the case. The appellee has received and now holds the premium paid on this insurance, and should not be allowed to say upon the facts of this record that appellant is not entitled to recover because Scott had no title to or interest in the building. The facts of the record indicate that the agent of the appellee recognized the equity and justice of appellant's claim, but his interest was subordinate to those who had the right to control his action. The judgment is *reversed* and cause remanded with directions to render a judgment for the appellants for the sum of $1,880, with interest from the date the insurance money was payable.

John M. Harlan, for appellant.
William Remecke, for appellee.

JAMES BURDEN, ET AL., *v.* JAMES B. THROCKMORTON.

Partition.

Where the owner of three-fourths interest in a tract of four hundred twenty-six acres of ground sells his interest, and instead of conveying his undivided interest, conveys a stated number of acres which was assumed to be his whole interest, his purchaser will not be disturbed in the land he received provided it is found in a partition proceeding that the remaining one-fourth interest in value can be carved out of the tract not conveyed to such purchaser.

APPEAL FROM ROBERTSON CIRCUIT COURT.

January 13, 1875.

OPINION BY JUDGE PRYOR:

There is nothing in the record showing that Mordecai Throckmorton was ever divested of title to his interest in the tract of land claimed by appellants. He may have received more of his father's estate than the other children, but there has been no settlement of the estate or any proof exhibited showing its character or value. The death of one of the children left the land in controversy to be divided between the four surviving children, Mordecai being one of them. At the time he sold to Burden he was the owner of one-fourth of the whole tract of land, that contained in all four hundred twenty-six acres, and shortly after the sale acquired by purchase the interest of two of his brothers, by which he became the absolute owner of three-fourths of the whole tract. This title to three-fourths of the land Mordecai obtained prior to the conveyance made to the other appellants. The conveyance to Burden defined the boundary of his purchase, leaving three hundred twenty-six acres of land out of which to allot to appellee his one-fourth interest. There was then no reason for disturbing the sale of the land to Burden, or in requiring him to account for rents, unless the one hundred acres conveyed to him was worth greatly more (not including the value of the improvements placed upon the land by him) than the remaining portion of the tract.

The chancellor, under the circumstances, ought not to disturb Burden's purchase unless it is made to appear that an equal division of the land cannot be made without it, and as one-fourth of the whole tract is only to be allotted, Mordecai having owned the other three-fourths, we see no reason for depriving Burden of any part of his purchase. As to the other appellants, they must abide the loss, if any. There was never any adverse holding on the part of their vendor.

The judgment below is therefore *affirmed* as to all the appellants but James Burden; and as to him the judgment is *reversed* and cause remanded, with directions to allot to the appellee his interest out of the three hundred twenty-six acres, if by so doing he can obtain his one-fourth in value of the land. The appellee is entitled to his costs

against the appellants, except Burden, and he has his judgment for costs against appellee.

J. A. Buckler, J. & J. W. Rodman, for appellants.
B. G. Willis, for appellee.

J. L. CLEMMENS *v.* J. S. CONNELL, ET AL.

Mortgage Foreclosure—Liens—Attorney Fees—Rents.

In a mortgage foreclosure where there are second liens and their holders are parties and all matters are adjudicated, the priorities of liens settled and the property sold and the second lien holders whose securities are inadequate make no effort to have a receiver appointed to collect rents, they have no cause of action against either the mortgagor or mortgagee for such rents.

Attorney's Fees.

An undertaking to pay an attorney's fee in the event the creditor is compelled to sue, is in the nature of a penalty against which the debtor will be relieved in equity. However, if the debtor pays such fee he cannot recover it back.

APPEAL FROM SHELBY CIRCUIT COURT.

January 14, 1875.

OPINION BY JUDGE COFER:

Whatever may have been the rights of the appellant on the liability of Mrs. Clayton in relation to the rent of the mortgaged premises, it seems to us that it is too late after judgment of foreclosure to litigate that question. The appellant knew before the judgment was rendered, all that he now knows affecting Mrs. Clayton's liability. It may be true that he did not know before a sale was made that it would not realize enough to pay both the mortgage debts and the amount for which he had a lien, but he had a right, as the holder of a junior lien, to contest the whole or any part of the mortgage debts, or to urge any equitable reasons that may have existed for an abatement in the amount due the prior incumbrance, and it was his duty to do so before judgment, unless he intended to take the risk of realizing the whole of his debt out of that part of the proceeds of the sale that remained after satisfying the mortgages. Having seen proper to stand by with a knowledge of all the facts in regard to the charge now asserted against Mrs. Clayton, until a sale was made and confirmed, he must abide the consequences.

But if this was not the case, we see no legal or equitable ground upon which to charge Mrs. Clayton with the rents. All the parties were before the court in time for the appellant to have caused the land to be put into the hands of a receiver, whereby the rents, the loss of which he complains, could have been saved. Mrs. Clayton would have been liable, if she had taken possession as she had a right to do; but we are wholly unable to perceive upon what ground she was either legally or morally bound to take possession in order to secure a fund for the appellant, which it was in his power, as much as in hers, to secure for himself. She was already secured, and did not need either to enter the possession of land she may not have been in condition to use or control, or to assume the responsibility of making it yield the rent for which she would have been compelled to account. And especially is this true in view of the fact that, although she had a prior right to the rents, the appellant, having all the parties before the court, could have procured an order committing the land to the hands of a receiver. Indeed, he is the only person who was certainly in a condition to have compelled both Connell and his tenant to surrender.

It is not by any means certain that Mrs. Clayton could have possessed herself of the land without the aid of the court. It is certain that she could not lawfully have done so until sometime in March, 1872, and it is, to say the least, doubtful whether she could have gotten possession after that without a resort to legal proceedings. Was she bound to do this for the benefit of the appellant? Most clearly not. The appellant has already, by his suit, subjected the property to the control of the court; and we are inclined to the opinion that Mrs. Clayton not only had no right to take control of the property, but that the appellant was the only person who could have compelled its surrender. It is true Mrs. Clayton had the legal title and prior right to the possession and to the profits; but it is also true that after suit brought by an incumbrancer, the property was under the control of the court, and the rights of the parties were all subordinate to the power of the chancellor to make such orders as were demanded by the interest of all; and if Mrs. Clayton had moved on her own account for the appointment of a receiver, it is clear that her motion would have been denied, because she could not have shown that the security for her debt was probably, or even possibly insufficient. Sec. 329, Civil Code.

After the suit was commenced and the parties were summoned, if Connell or his tenant were in possession, the chancellor alone should

have been applied to, and as the appellant was the only person in danger of suffering loss on account of the insufficiency of the property as a security for the debt, he should have taken action, if he desired to secure the rents. If he had applied for an order directing the receiver to take charge of and rent the property, and Mrs. Clayton had resisted, the authorities cited by the appellant would have been applicable, but none of them hold a prior lien liable to a junior incumbrancer for mere neglect to take possession.

The sale of the mortgaged property was a satisfaction of the debts of the mortgagees against Connell, and discharged him from liability to them as completely as if he had paid their debts in money; and if any usury was embraced in either debt, the person to whom it was paid became liable to Connell, and not to the appellant, who, being a creditor of Connell, had no right to compel the payment to him of usury due to Connell. It is true appellant alleges that he did not know until after the sale had been confirmed that there was any usury in the debts, the effect of which is that he did not know it until the usury had been paid by Connell, and he thereby acquired a right of action against the person receiving it to recover it back. But the evidence fails to sustain the allegation that the existence of the usury was not discovered until after the judgment was rendered, and even conceding the appellant's right to recover it after judgment, if, in fact, he did not sooner discover its existence, he fails to make out a case for relief on this ground.

As we have heretofore decided, an undertaking to pay an attorney's fee in the event the creditor is compelled to resort to legal proceedings for the collection of the debt is in the nature of a penalty, against which the debtor will be relieved in equity; but it does not thence follow that if the debtor pays the stipulated fee that he can recover it back, or that any other condition of a common debtor can avoid such an obligation by a mere informal objection to the judgment without pleading, or a previous intimation in any form that he resists the payment, when no objection is made by the debtor.

But as we have before said, the appellant is not a creditor of Connell. Connell owes him nothing, and as the appellant bought subject to the mortgages which contained stipulations to pay attorney's fees, and as it is neither unlawful nor immoral to pay or to receive such fees, there is no hardship in the treating these undertakings of Connell to pay as valid against the appellant, especially as Connell makes no objection, and the appellant made none in any such way as to

raise the question of the validity of the agreement between the mortgagees and himself.

Wherefore the judgment is *affirmed* on the original appeal, and on the cross-appeal of Mrs. Clayton. The judgment on the supplemental petition is *reversed*, and the cause is remanded with directions to dismiss the supplemental petition as to her with costs.

Cummins & Willis, for appellant.
Caldwell, Harwood, for appellees.

CHRISTIANNA VINEGAR *v.* ANDREW JACKSON.

Pleading—Insufficient Answer.

Where a plaintiff avers he is the owner and entitled to the possession of real estate, an answer is bad which denies that the plaintiff is the owner and entitled to the possession, for the answer might be true and yet the plaintiff may be the owner of the land.

APPEAL FROM OWEN CIRCUIT COURT.

January 14, 1875.

OPINION BY JUDGE COFER:

We do not regard the answer of the appellant as sufficient. She denies that appellee is the owner and entitled to the possession of twenty-four acres and one rood of land in her possession.

This answer may be true, and yet the appellee may be the owner of the land sued for. It would be strictly true if he was the owner, but was not entitled to possession, and it would be equally true although he was the owner and was also entitled to the possession, if, in fact, there was not as much land in the tract as it was alleged to contain. Two material allegations, ownership and right of possession, are grouped together with an allegation of the quantity of land in the tract, and these averments are denied as a whole. The allegation as to quantity was mere description, and whether there was that exact number of acres or not, the appellee had a right to recover whatever was in the tract if he was the owner, and entitled to the possession, and to hold the answer good, would be to hold that a mistake in an untrue allegation of mere matter of description, would defeat the plaintiff's right of recovery.

In any view we have been able to take of the matter, the court properly disregarded the answer.

Judgment *affirmed.*

Strother & Orr, for appellant.
Grover & Montgomery, for appellee.

C. W. FIELD *v.* COMMONWEALTH.

Tax Collector—Approval of Bond—Removal from Office.

A tax collector duly appointed and who files a bond approved by the judge cannot be deprived of his office because of insufficient bond until he has had an opportunity to show the bond to be sufficient or has failed to furnish additional bond within a reasonable time after being ordered to do so.

APPEAL FROM JEFFERSON COUNTY COURT.

January 15, 1875.

OPINION BY JUDGE COFER:

By an act of the general assembly, which became a law on the 24th of February, 1873, the judge of the Jefferson county court was authorized to appoint a back tax collector for said county, to hold his office for the term of four years. The second section of the act required the person appointed to execute a covenant to the commonwealth, with sureties to be approved by the judge of the county court in the manner and form required of sheriffs for the collection of the revenue, and to renew the same annually at the February or March term of the court.

The appellant having been appointed to the office, gave the required bond and entered upon the discharge of his duties, but when he gave the bond, or whether he had renewed it since, does not appear in the record; but we infer from facts appearing in the record that he was not in default on account of a failure to renew his bond as required by the act.

Prior to the 28th of September last, but how long does not appear, the county judge awarded a rule against the appellant, returnable on that day, to show cause why he should not be required to give additional security as back tax collector.

To this rule the appellant responded, among other things, that his bond, already given and approved by the court, was sufficient, and in support of the sufficiency of his bond, he filed with his response, affi-

davits tending to prove that the sureties on his bond owned estate subject to execution worth from $95,000 to $100,000 over and above their debts and liabilities. He also tendered affidavits, and offered to prove by a witness alleged to be present in court, that the whole amount of taxes placed in his hands for collection amounted to about $107,000; that he had already accounted to the treasury for over $40,000 of that sum, and that he could not probably collect out of the remaining $67,000 more than the sum of $10,000, before the March term of the court, when he would be bound to renew his bond. No evidence was offered on the part of the commonwealth to show that the pecuniary condition of either of appellant's sureties was in any respect different from what it was when they were accepted, or that they were not worth as much as had been stated by the appellant, and the affiants whose affidavits were tendered; nor was there any evidence contradicting the statement as to the amount of taxes originally placed in his hands for collection, or the amount already accounted for.

But the court having refused to hear the evidence offered by the appellant as to the amount of taxes in his hands uncollected, and the amount he would probably be able to collect before March, when he is required by law to renew his bonds, he tendered two persons as additional sureties, who swore they were the owners of property subject to execution, worth in the aggregate $42,000 over and above their liabilities; but it appeared from the books of the assessor of Jefferson county that these persons had only listed their property for taxation at $7,000, and the court refused to accept them; and the appellant failing, as the order recites, "to give bond sufficient to satisfy the court," it was ordered "that the office of collector of back taxes of Jefferson county be and is hereby declared vacant on account of said failing to give additional security as required," and from that order this appeal is prosecuted.

The act creating the office of collector of back taxes for Jefferson county, places the incumbent upon the same footing with sheriffs, and subjects him to the same restrictions and penalties to which sheriffs are subjected by the general laws; and it was therefore competent for the county court to inquire into the sufficiency of the appellant's bond, and to require him to give additional security if his sureties were found insufficient. Sec. 25, Chap. 100, Gen. Stat., p. 783.

Such a proceeding may be commenced upon the personal knowledge or belief of the judge; but unless commenced upon his own

knowledge or belief, it should be based on an affidavit, and the question of the sufficiency of the bond should be first tried and determined; and if it is found insufficient, reasonable time should be allowed within which to obtain additional sureties. In this case no order was made requiring additional security until the 5th of October, and on the same day, and in the same order, the appellant was attempted to be removed from office for not doing an act, for the doing of which no time whatever was given after the decision of the court requiring it to be done, although time until the next day only was asked for that purpose.

This was unduly harsh, and would, if permitted to stand unreversed, not only deprive the appellant of his office without a moment of time after the court had made its order requiring additional security within which to give it, but would also deprive the commonwealth of an officer deemed important by the legislature, for there is no authority in the act, or elsewhere that we are aware of, to appoint a successor or fill the vacancy.

But the burthen was on the commonwealth to show that the bond which had been accepted was insufficient; and as no evidence has been offered, the order requiring additional security should not have been made. And if it had appeared that the sureties on the bond were insufficient, and the defendant had failed to give additional security, it is a matter of grave doubt whether the court had power to declare the office vacant; but as the question does not necessarily arise in this case, we mention the doubt we entertain only for the purpose of saying expressly that its consideration is waived. *Brown, et al. v. Grover, Admr., et al.,* 6 Bush 3.

We have heretofore decided in *Bartly v. Fraine, et al.,* 4 Bush 375, that upon the application of the sureties of a sheriff for additional security, if such additional security is required by the court to be given, the sheriff may be removed from office if he fails to give it within a reasonable time; but this was held in view of Sec. 19, Art. 8, of the Constitution, which provides that "The general assembly shall direct by law how persons who now are, or may hereafter become securities for public officers, may be relieved or discharged on account of such suretyship."

The evidence in the record satisfies us that appellant's bond is amply sufficient, and the judgment requiring him to give an additional bond, and declaring the office vacant, is *reversed* and the cause is remanded with directions to dismiss the rule.

Russell & Helm, for appellant.

ELLEN MARTIN v. GEORGE W. MARTIN.

Injunction—Motion to Modify.

When a cause is submitted to the court on motion to dissolve an injunction it is error for the court to make final disposition of the order of injunction by perpetuating it, or to determine the issues involved in the action, such issues not being submitted on such motion.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 16, 1875.

OPINION BY JUDGE LINDSAY:

On the 25th of October, appellant filed a demurrer to appellee's petition, and also filed notice, and moved the court to dissolve the temporary injunction. Both parties filed various *ex parte* affidavits, and by consent the cause was set for trial on the 7th of November; and it was also agreed that the demurrer, and the motion of appellant to dissolve the injunction should be continued until that day for hearing.

On the 8th of November the cause was assigned to the 9th day of January, 1874. On said last named day, an order was made which shows that the motion of the defendant then pending in the cause was heard in part; and there not being time to conclude, the further hearing of the same was postponed until the following Monday.

The motion referred to must be the motion to dissolve the injunction, as there was no motion pending in the action. The bill of exceptions not only confirms this conclusion, but states in terms that it was the motion of the defendant to dissolve and discharge the injunction of the plaintiff. That was filed by the court. Such being the case, the only judgment or order the court could properly render or make, was either to sustain or overrule the motion, or if proper so to do, the injunction might have been modified. Sec. 323, Civil Code of Practice.

It was error, upon the hearing of the motion to dissolve, to make a final disposition of the order of injunction by perpetuating it, and still more manifest error to determine the issues involved in the action for a new trial, those issues not having been submitted to the court for adjudication. Judgment *reversed* and cause remanded for further proper proceedings.

Jeff. Brown, for appellant.

LOUISVILLE & NASHVILLE R. Co. *v.* COMMONWEALTH.

Criminal Law—Appeals.

Where an appeal is taken in a criminal case the record must be lodged with the clerk of the court of appeals within sixty days after the judgment is rendered, and where not filed within that time it will be dismissed on motion.

APPEAL FROM MARION CIRCUIT COURT.

January 16, 1875.

OPINION BY JUDGE PETERS:

This is an indictment for a misdemeanor. Appellant's motion for a new trial was overruled on the 19th of August, 1874, and a final judgment rendered against it the same day, and an appeal granted to this court; but a copy of the record was not lodged with the clerk of this court till the 8th of December, 1874; and a motion is now made by the attorney-general to dismiss the appeal, because the record was not lodged with the clerk within the time prescribed by law.

Sec. 343, Criminal Code, provides that the appeal should be prayed during the term at which the judgment was rendered, and shall be granted upon the condition that the record is lodged in the clerk's office of the court of appeals within sixty days after the judgment.

In *Commonwealth v. McCready,* 2 Met. 376, this court held that this section of the code is imperative, whether the appeal is prayed by the commonwealth or the defendant; and in *Commonwealth v. Adams,* 16 B. Mon. 338, it is said that if the record be not lodged in the clerk's office of this court within sixty days after the judgment the appeal cannot be maintained. From the language of the section of the Criminal Code quoted, independent of the judicial construction put upon it, this court has no discretion. The motion must be *sustained* and the appeal be dismissed.

Rountree, for appellant.
John Rodman, for appellee.

WILLIAM BELL, ET AL., *v.* W. W. BRYANT.

Practice—Pleading—Lien of Landlord on Produce, etc.

A petition is bad on demurrer when it fails to aver that the debt is due or that the condition exists which makes it due.

Lien of Landlord.

While under the statute the landlord has a lien on the produce of the premises rented under certain conditions, such a lien is lost if such property is removed from such rented premises.

APPEAL FROM SHELBY CIRCUIT COURT.

January 16, 1875.

OPINION BY JUDGE PETERS:

At the time the petition was filed, the debts claimed by appellee were not due, and he prays for a judgment when his debts are due, against "all the defendants, provided the said assignees shall not surrender a sufficient amount of said oats to pay his debts, and all proper relief."

There was a demurrer to the petition, which was overruled, and a judgment rendered against Bell and Harbison, the assignees for the debt claimed.

Conceding that appellee had an exclusive lien on the oats, the produce of the premises rented, before judgment, could have been rendered in his favor against appellants, he should have amended his petition, and alleged that the rent was then due and unpaid, and as his prayer for a judgment was conditional, that the oats were not surrendered to pay his debt, which he alleged were sufficient for the purpose. He should also have alleged that the oats or a sufficiency thereof had not been surrendered. Consequently the demurrer was improperly overruled, and the judgment must be reversed for that reason. It is deemed proper to express an opinion whether appellee's lien existed on the oats after they were removed from the premises.

If the lien existed it was by statute. By an amendment to Art 2, Chap. 56, of Rev. Stat., title Landlord and Tenant, approved February 16, 1858, 2 Rev. Stat. 99, it is enacted that Sec. 14, Art. 2, Chap. 56, title Landlord and Tenant, be and the same is repealed, and in lieu thereof it is enacted that a landlord shall have an exclusive lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or under tenant, found upon the rented premises, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than four months.

The lien secured by this statute, by its terms, is upon the produce

of the farm or premises rented, the fixtures, the household furniture and other personal property of the tenant or under-tenant found on the rented premises, etc. If the property described be removed from the rented premises, the landlord's lien is lost, and his condition is no better than that of other creditors.

The judgment must, therefore, be *reversed* and the cause remanded with directions to sustain appellant's demurrer to the petition, and for further proceedings consistent with this opinion.

Caldwell & Harwood, for appellants.
A. E. Roberts, for appellee.

JAMES E. BROWN *v.* GEORGE SCHULER.

Landlord and Tenant.

By consenting that his tenant may sub-lease the premises, the landlord does not release his tenant from liability or accept the sub-lessee as his tenant.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

January 16, 1875.

OPINION BY JUDGE PRYOR:

There is no evidence in the case showing that the appellee accepted Gray and Henry as his tenants, or agreed to look to them for the rents, and release the appellant Brown from any liability therefor. The consent of appellee was obtained in order that Brown might sublet the premises to Gray and Henry, as the latter had no right to lease them without the consent of the appellee. The statute requires the landlord's consent before his tenant can lease the premises to a third party, and if his consent is a release of the first tenant from responsibility for rent, this statute intended as a protection to the landlord, had not only failed to accomplish its purpose in thus protecting his rights, but (if the law is as maintained by appellant) operates to annul by implication the contract of renting without his consent. The sub-tenant, by the express provisions of the statute, were liable to the appellee for the rent, as well as the original tenant, Brown, and the fact that the appellee received rents from those who were liable to pay, is no evidence to authorize the conclusion that they were by an agreement with appellee and Brown substituted and accepted as tenants, and Brown released. If such was the contract why the necessity of having appellee consent that

Brown might lease to these parties, for if they were to be the tenants, and not Brown, the contract of leasing, instead of being made by Brown, could have been made by the appellee. The only reason for this consent by appellee was that Brown had no power to sublet without obtaining it. All that appellee seems to have done was to receive the rent from these sublessees, who were liable to him as well as Brown; and the fact that he did receive the rent from those he could have compelled to pay is no reason why Brown should be released.

That he took from these parties less than the amount of the original renting was a favor to them as well as the appellant. There was no consideration for this reduction, except the kindness or liberality on the part of the appellee, who seems not to have exacted the full amount of the rent by reason of the hard times. Nor was Brown released, by the acceptance of a part of the rent from the sheriff by the appellee, when by the statute the latter might have insisted upon the payment of a year's rent before the goods were removed. It was not the duty of the appellee to protect the interest of the appellant, or to seek to collect from the sheriff any part of the rent. Appellant was liable to him, as well as these sublessees, and it was the duty of those liable to pay this rent to see that the sheriff first satisfied the landlord's claim. The amount collected from the sheriff only lessened the sum for which appellant was liable.

In the case of *Stimmel & Bryant v. Waters*, 2 Bush 282, the answer alleged that the sub-tenant had been recognized as such by the landlord, and that rents had been received, etc. This court says in that case that if appellee accepted Mrs. Bryant as his immediate tenant, the first lessee was discharged, etc. So, also, is the case where the tenant underlet the premises, and the landlord accepted the under-tenant as his tenant, and collected, etc. Taylor's Landlord and Tenant, 379. In this case there is no evidence sufficient to establish such an acceptance, or any agreement to release the appellant. The landlord, by the Revised Statutes, could have recovered his rent either by a distress warrant or by an action at law; and by Sec. 9, of the same statutes, page 93, he has the same remedy against the under-tenant that he has against the original lessee. The fact that he collected the rents or attested the contract between the first tenant and the under-tenant, or both combined, does not release the first tenant.

The filing of the amended petition was evidently upon a mistake of facts. All the writings are exhibited, the original lease, the consent of appellee to the subleasing, and the lease from Brown to Gray

& Henry. There was no cancellation of the original agreement, and it was proper to permit the filing of the second amended pleading in order to explain the mistake committed in the first amendment. This explanation is fully made and sustained by all the facts in the case. This is no case of an estoppel, and the only question presented is whether the appellee is bound by a mistaken state of facts in a pleading sworn to, when by a subsequent pleading the mistake is alleged and clearly established by the proof. There is no question but what this can be done, and the court below acted properly in permitting the mistake to be corrected, and in rendering a judgment for the rent.

Judgment *affirmed.*

Lee & Rodman, for appellant.
Isaac Green, for appellee.

A. L. GREER *v.* E. R. GARD.

Specific Performance of Contract—Judgment.

Where plaintiff asks for judgment requiring defendant to carry out his contract and convey to him certain real estate, or that the court should cause such conveyance to be made by a commissioner, the court has no authority to render judgment against the defendant for the value of the land.

Judgment—Jurisdiction.

When specific performance is demanded requiring defendant to convey to plaintiff certain real estate, and the court renders judgment requiring such conveyance and appointing a commissioner to make the same, such judgment is final and the court has no jurisdiction thereafter to change such judgment. The court retains jurisdiction thereafter in said cause only for the purpose of executing the judgment.

APPEAL FROM KENTON CIRCUIT COURT.

January 19, 1875.

OPINION BY JUDGE LINDSAY:

By the amended petition of January 8, 1870, appellee practically abandoned the cause of action set up against the two Greers and Simrall in his original petition.

By his said amended petition he sought to specify enforcement of an alleged contract with A. L. Greer by which the latter, in consideration of the assignment to him of the right to operate a certain brick machine in the counties of Kenton, Campbell and Fayette, un-

dertook and agreed to convey to appellee six acres of land situated in the state of Illinois, and in the vicinity of the city of Chicago. He averred that the title to said land was held by Thomas Greer in trust for A. L. Greer, and prayed that A. L. Greer and wife and Thomas Greer and wife "be adjudged to convey said title to the plaintiff (him), by a deed with covenants of general warranty, and in case of a refusal to do so after a reasonable time, then that this court do order and direct such conveyance by its commissioner, and that he be directed to insert in such conveyance such covenants of warranty as plaintiff is entitled to under said contract, and for his costs and proper relief."

By another amended petition, filed July 9, 1870, appellee set out the manner in which Thomas Greer became invested with the title to the six acres of land, and prayed as in the first amended petition.

In this state of the pleadings, on January 19, 1871, the chancellor rendered a judgment dismissing appellee's petition as to Simrall and Thomas Greer, and adjudging that A. L. Greer should make or cause to be made to Gard a good title to the six acres of land in Illinois, and in case he failed to do so, the judgment provided that an order would be made to ascertain the value of said land, and a judgment rendered against Greer for the amount it might be found to be worth. This latter part of the judgment was not warranted by the pleadings. Gard asked for no such relief; and as the case stood it may well be doubted whether the court had jurisdiction to render any such judgment.

Gard seems to have realized this difficulty, and on March 30, 1871, he moved the court for an order directing the master commissioner to convey to him by deed the property in Chicago, as described in the pleadings and judgment. On April 15, 1871, this motion was sustained, and an order made directing the master to convey, and adjudged to Gard his costs.

This was a final order in the action. The alternative judgment of January 19, which was interlocutory in its nature, was merged into this last named judgment. Gard had elected to take a conveyance of A. L. Greer's title to the Chicago property in satisfaction of his claim, and upon his own motion the chancellor adjudged to him the relief desired. The cause remained upon the docket for the sole purpose of executing the judgment last rendered.

The subsequent order of the court, entered on March 19, 1872, was wholly authorized; and the judgment of December 12, 1873, is, therefore, necessarily erroneous, independent of the court of au-

thority in the court. The said last named judgment is not supported by the pleadings in the case. It gives to the appellee a character of relief he does not ask. The plea of the statute of limitation bars the appeal from the judgment rendered on April 15, 1871.

The order of March 19, 1872, and the judgment of December 12, 1873, are erroneous and are both *reversed.*

The cause is remanded for the enforcement of the judgment of April 15, 1871, in such manner as the court below may deem just and equitable to the parties, and not inconsistent with the spirit of said judgment. Upon the cross-appeal, the judgment is *affirmed.*

R. D. Handy, for appellant.
Stevenson & O'Hara, for appellee.

AGNES MCLURE *v.* GEORGE WOLFE, ET AL.

Husband and Wife—Estate of Wife—Chattels.

Marriage invests the husband with absolute title to all the chattels of the wife not held as separate estate whether owned at the time of or acquired after marriage, and where goods are bought in the name of the wife and paid for with her money, yet as at the time she had not been empowered to hold property or to trade as a feme sole the title vested in her husband, and was subject to be seized to pay his debts.

Chattels.

If chattels are sold to the wife by a third person for her separate use and come to the possession of the husband, the legal title vests in him, and he will hold it as trustee for the wife.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 20, 1875.

OPINION BY JUDGE COFER:

Although the goods purchased of Miller are shown to have been bought in the name of Mrs. McLure, and were paid for with her means, and never reduced to possession by her husband, yet, as at the time of the purchase she had not been empowered to hold property, or to trade as a *feme sole,* the title vested in her husband, and the property became his, and was, therefore, subject to seizure and sale to pay his debts. The post-nuptial agreement between her and her husband that she should hold the property as her separate estate,

may have given her an equity as against him, but was wholly inoperative as to the husband's creditors.

If, instead of purchasing the goods of Miller with her funds, the same goods had come directly to Mrs. McLure from the estate of P. N. Bradley, it would not need either argument or authority to prove that the title would have vested in her husband; and that the articles were purchased in her name and paid for with her money cannot change the rule.

The case of *McClanahan v. Beasley,* 17 B. Mon. 111, is not like this case. There the slave in contest was sold to Mrs. Hopper as her own separate estate, and this fact, the court held, vested her with an equitable right to the slave, and made her husband a trustee for her. In this case Mrs. McLure does not seem to have had a separate estate, and she therefore had no such equity as made her husband a trustee. To hold that the mere fact that the goods were purchased in her name, with her money, made her husband a trustee, would be to set at naught the long settled and universal rule that marriage invests the husband with absolute title to all the chattels of the wife not held as separate estate, whether owned at the time of or acquired after marriage. The purchase from Miller in the name of Mrs. McLure, without a stipulation in the contract that the goods should be held by her as her separate estate, vested the absolute title in her husband as fully and as completely as if the purchase had been made in his name, and no agreement between the husband and wife could divest him of the title so as to defeat his creditors. Mrs. McLure was then incapable of holding personal property in her own name, nor could her husband hold it for her, unless when it came to his hands it was separate estate in the technical sense.

The case of *Miller and Wife v. Edwards, et al.,* 7 Bush 394, which is also relied on by counsel for the appellant, is unlike this case. The furniture attached in that case was purchased with money given by Mrs. Miller's mother, to purchase it for her separate use; and it seems to have been so purchased and recognized by the husband. The notes attached were held by a third person for Mrs. Miller, and were payable to her for her separate use; and upon the principles decided in *McClanahan v. Beasley,* might well be held not subject to the husband's debts, because they were the separate estate of the wife; and being her separate estate, the husband was held, on that account alone, to be a trustee for the wife. But in *Miller and Wife v. Edwards, et al.,* the decision was still more obviously right upon

another ground. The creditors of the husband had come into a court of chancery to subject that which in equity and good conscience belonged to the debtor's wife, and which they could not reach without the aid of the chancellor. In such cases it is well settled that the creditor will be postponed until equitable provision is made for the wife. *Tobin's Gdn., v. Dixon and Wife,* 2 Met. 422; *Sims v. Spalding,* 2 Duvall 121.

The rule is that if chattels sold to the wife by a third person for her separate use, come to the possession of the husband, the legal title will vest in him, and he will hold it as trustee for the wife. *McClanahan v. Beasley,* 17 B. Mon. 111. But otherwise, the title and beneficial interest will vest absolutely in the husband, discharged from all equities in the wife. The *ex parte* proceeding to have Mrs. McLure empowered under the statute to act as a *feme sole,* did not vest her with any right to the goods in contest, the sole object and effect of that proceeding being to remove the disabilities of coverture. But if the judgment would otherwise have operated to vest the title in her, it could not do so in this case, because the execution came to the hands of the sheriff and created a lien on the property on the 6th of March, and the decree was not rendered until the day after. In any view we have been able to take of the case, the judgment is right, and is therefore *affirmed.*

J. C. Walker, John Roberts, for appellant.
William Mix, for appellees.

CITY OF LEXINGTON *v.* J. H. BAKER, ET AL.
J. H. BAKER, ET AL., *v.* KENTUCKY UNIVERSITY, ET AL.

Cities—Improvement of Streets—Ordinances—Contracts.

The city council has the power to improve the streets, imposing the burden equally upon all the citizens, and make contracts by its authorized agents, and although there may be a departure from the specifications contained in the ordinance, having accepted and approved the work, it must pay for it by making it a burden upon all.

Ordinance—Contracts.

Where an ordinance provides for the improvement of a street and for the payment therefor by the property holders whose property borders on such street, before the property-owners can be made to pay for such work it must be shown that the contract and specifications are in accordance with the provisions of the ordinance, and be approved by the council and not be left to the discretion of the engineer alone.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 20, 1875.

OPINION BY JUDGE PRYOR:

On the 7th of May, 1867, the city council of Lexington passed an ordinance directing certain streets of that city to be graded and macadamized at the cost of the owners of the lots or parts of lots fronting on said streets. Sec. 3 of the ordinance provides that the city engineer shall proceed "to make a survey of said streets, or parts of streets, establish the proper grades, and furnish the mayor with proper specifications for the work." By Sec. 6 of this ordinance, the report of the committee on improvements was adopted, requiring the streets to be macadamized from curb to curb, designating the manner in which it was to be done, as well as the size and depth of stone, each street to be macadamized from "curb to curb, with six inches of small sledged, and six inches of cracked rock, making twelve inches in the center of the street, and to gradually slope to four inches at either curb."

On the 4th of July, 1867, the council ordered that the details of the improvements, such as width of streets, gutters, etc., be left with the committee on improvements and repairs, and the city engineer. It is to be inferred from the record that these streets directed to be improved were at the time the recognized streets of the city, and the direction to ascertain the width of the streets was for the reason that it must necessarily constitute a part of the details of the contract. The mode, specifications and character of the macadamizing was prescribed by the council in adopting the report of the committee on improvements, and made part of the ordinance.

A contract was made by the city with the appellee, Baker, and the improvements made and accepted by the council. It is now insisted that as there was no mode or specifications adopted by the council and prescribed in the ordinance for the grading of these streets, that body had no power to delegate this right to the engineer. It does not appear from any ordinance or resolution adopted by the council that the character or kind of grade had been ascertained; but the whole legislation on this subject was confined to the engineer and the committee on improvements. These agents of the council were authorized, in effect, to make at their discretion such improvements, by way of grading these streets, as in their judgment best promoted the interest of the city and property holders. There is no material distinction between the present case, so far

as the question as to the grading of these streets is made, and that of *Hydes & Goose, Assignees, v. Joyes,* 4 Bush 464, and the principle recognized in that case must be applied to the one under consideration. The city council alone, by the 11th section of the charter, had the power to have the streets graded preparatory to macadamizing, and are to determine the necessity for such an improvement, as well as its kind and character. Whether the improvement is to be directed by ordinance or resolution, or by the unanimous vote of the council or a bare majority, can make no difference. The same reason applies for the recognition of the contract in the one case as the other; the power being vested in the council alone cannot be delegated to others.

If the report of the engineer in fixing the grade, is injurious to the property holder, and is required to be acted on by the council before the work is undertaken, those of the citizens compelled to pay for the improvements have an opportunity of making known their objections and defeating the passage of the ordinance. On the other hand, if it be conceded that their power can be delegated, the engineer acting as the agent of the council may create any expenditure in making the improvement, however onerous on the taxpayer, and there is no escape from its payment. "The amount of improvement, as well as its kind and character, must be ascertained before it is done."

It is maintained, however, that the lot owners are liable for the cost of macadamizing, for the reason that the report of the committee on improvements contained all the necessary specifications for this work, and was adopted by the council and made part of the ordinance. The objection made as to the manner in which the ordinance was passed constitutes no defense. The mayor is the presiding officer of the council, and the record shows that every member of that body, except the mayor, voted for its passage, and the latter recognized its validity by signing the minutes of the proceedings adopted it, and in announcing, as he must have done, that the ordinance had passed, thus giving not only his implied, but express assent to the action of the council in passing it, and is as effectual as if it appeared from the record that his vote had been cast. *City of Lexington v. Headley, et al.,* 5 Bush 508.

If the contract made by the mayor is in pursuance of the ordinance, containing such specifications as are therein prescribed, there is no reason why the lot owners should not be required to pay. The contract made with the appellee requires the mettle to be twelve

inches in center, eight inches at edge, and ten inches half way between center and edge, three feet next curb to be paved with stone set on end eight inches deep. The ordinance required the stone to be twelve inches in center, and to slope to four inches at either curb. The difference between the ordinance and contract is, that by the ordinance, the depth of stone is to be four inches at either curb, and by the contract eight inches, and in addition, three feet next to curb to be paved with stone eight inches deep, and ten inches of stone half way between the center of the street and its edge. The work, as required by the specifications of the contract, would necessarily increase the cost of the improvement and thereby impose a tax upon the lot owners, not by reason of the ordinance, but by reason of a contract made by the mayor. A slight variance between the ordinance and contract might not constitute any defense to an action against the lot owner, as some of the details incidental to its execution could not necessarily be anticipated, but when the change is such as to increase materially the burden upon the lot owners, as in this case, it comes within the rule established in the case of *Hyde & Goose, Assignee, v. Joyes,* and no recovery can be had in this action against the lot owners. There is no proof in the record showing the difference in the cost between the work specified in the ordinance and that in the contract; but it may be legitimately inferred that it would add to the expenditure not less than twenty per cent. The city council, having the power to improve the streets, imposing the burden equally upon all the citizens, making a contract by its authorized agent, although there may be a departure from the specifications contained in the ordinance, and having accepted and approved the work, must pay for it by making it a common burden upon all.

The judgment of the court below is *affirmed* on both appeals. *The City of Lexington v. Baker, et al.,* and *Baker, et al., v. Kentucky University, et al.*

M. C. Johnson, T. K. Hunt, for appellant.
Waters, John B. Huston, Breckenrdidge, Buckner, for appellees.

W. W. HULINGS *v.* WILLIAM MARTIN.

Statute of Limitations—Jurisdiction.

The statute of limitations continues to run until an action is commenced in a court having jurisdiction.

Jurisdiction.

The beginning of an action in a county where defendant does not live and the service of process on him in a county where he lives, other than the county in which the action is brought, gives the court no jurisdiction, and the commencing of such an action will not prevent the statute of limitations from running.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 21, 1875.

OPINION BY JUDGE COFER:

Process was served upon the appellee in Jefferson county, and the common pleas court had jurisdiction of the case. Sec. 106, Civil Code.

The law and facts were submitted to the court, and the facts stated in the answer were admitted to be true; and as it does not appear from the record what evidence was heard on the trial, it must be presumed that the evidence, if any was heard, authorized judgment to be rendered for the appellee.

If it be assumed that the facts stated in the answer and admitted to be true, constituted all the evidence heard on the trial, then the judgment rendered was more favorable to the appellant than he was entitled to. It is not important upon what ground the court dismissed the petition, if the dismissal was right on any ground, the judgment must be affirmed.

One of the facts stated in the answer and admitted to be true, is that the appellee resided in Shelby county when the suit was commenced, and that this was known to the appellant at the time. Whether the Jefferson common pleas court would acquire jurisdiction depended wholly upon the accident whether the appellee would come into the county, so that a summons might be served on him there. Until process was served in Jefferson county, that court had no jurisdiction; and when it acquired jurisdiction, and not until then, did the action suspend the running of the statute; and as more than fifteen years had then elapsed after the action, the note was barred.

It is not a question whether the appellant prosecuted his action in good faith; this might be admitted without in any way affecting the question. Until an action was commenced in a court having jurisdiction, the statute continued to run; and as the Jefferson court of common pleas had no jurisdiction of the person of the defendant except by service of a summons in that county, its jurisdiction never

attached until the summons was served. If the action had been commenced in Shelby at the time the petition was filed in Jefferson, and process had not been served until the time at which it was served in this case, the question of diligence and good faith in prosecuting the action would have arisen, for as appellee's residence was then in Shelby, the court of that county would have had jurisdiction from the filing of the petition; and a summons issued in good faith there would have suspended the statute. Secs. 106, 107, Civil Code.

Judgment *affirmed.*

John B. Cochran, for appellant.
Dupey & Middleton, for appellee.

M. J. BREWER *v.* C. MERCKE.

Married Women—Garnishee.

A married woman who is a member of a firm indebted to A but who is not empowered to bind herself as provided by the statute, cannot be required to answer as a garnishee at the suit of A's creditors. Not being bound to A she cannot be required to answer to his creditors.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 21, 1875.

OPINION BY JUDGE LINDSAY:

It seems that T. G. Brewer & Co. were indebted to Moore by simple promissory note, in the sum of two hundred fifty dollars.

Mrs. M. J. Brewer was a member of the firm of T. G. Brewer & Co. Upon a rule to show cause why she should not be compelled, as a garnishee, to pay the amount of said note into court, Thomas Brewer responded that at the time the alleged indebtedness to Moore was incurred, and at the time the note to him was executed, and ever since, she was and still continued to be a *feme covert,* and she pleaded and relied on her coverture.

The record shows that the cause was heard upon the sufficiency of this response. There is nothing before us from which it can be inferred that evidence of any kind was heard.

The court adjudged the response insufficient, and the rule against Mrs. Brewer has been made absolute, and an attachment awarded. This was error. Although Mrs. Brewer seems to have been the

partner of her son, it does not appear that she had been empowered to bind herself by contracting as a *feme sole.*

Her contract with Moore was not enforceable, and the note held by him, so far as she is concerned, is a nullity. Her coverture would defeat a recovery by the holder of the note, and the creditors of Moore certainly can claim nothing from Mrs. Brewer that Moore himself could not compel her to pay. The order appealed from is reversed, and the cause remanded with instructions to dismiss the proceedings as to Mrs. Brewer.

A. L. Pope, for appellant.
Green & Kohn, for appellee.

GEORGE M. ADAMS *v.* OLIVIA COLLIER.

Dower—Husband and Wife—Lien for Purchase Money—Notice.

Where a husband pays a valuable consideration for land, acquiring the legal title without notice of the rights of a lien holder, the widow is entitled to dower.

Lien—Notice.

Where real estate is sold and a bond for a deed is executed and afterwards the bond is transferred, and the grantor sells and conveys such real estate, the purchaser having notice that his grantor has not paid for the land and of the lien of the seller, such purchaser takes the land subject to such lien, and his widow's right of dower is subject thereto.

APPEAL FROM KNOX CIRCUIT COURT.

January 21, 1875.

OPINION BY JUDGE LINDSAY:

Wood sold the tract of land to Renfro, and executed to him a bond for title. Renfro executed his note to Wood for the purchase price of the land.

Wood sold and transferred this note to appellant, Adams. Afterwards Renfro sold to Collier. The proof conduces to show that Collier undertook and agreed to pay off the note held by Adams. After all this, and without the consent or knowledge of Adams, Wood, at the request of Renfro and Collier, conveyed the land to Collier, retaining no lien to secure the payment of the amount due to Adams.

Collier being dead, his widow claims that this conveyance invested her husband with the legal title to the land, free from any lien, and that her right to dower at once accrued, and is not affected by the subsequent recognition by her said husband of the existence of Adams's lien.

Her claim would be valid if the husband had paid a valuable consideration for the land, and acquired the legal title without notice of the rights of Adams. But this is not the case. Wood understood from Renfro and Collier that the latter was to pay the debt due to Adams.

The assignment to Adams of the note to Renfro, invested him with the lien then existing in favor of Wood to secure its payment. Wood had no right afterwards to surrender this lien. The party to whom the surrender was made, having notice of Adams' equity, could not resist its enforcement. Mrs. Collier claims through her husband, and her claim is subject to all the infirmities of her husband's title. The court below erred in holding that her right to dower is superior to Adams's lien. Judgment *reversed,* and cause remanded for a judgment conforming to this opinion.

Green & Adams, M. C. Johnson, for appellant.
J. W. Rodman, for appellee.

OWEN & MILLS *v.* E. P. HUMPHREY, ET AL.

Lease Contract—Arbitration—Fraud.

Where in a lease contract the rent is to be six per cent of the valuation, to be made each five years by two arbitrators, one to be appointed by each party, with a clause that if they fail to agree on a valuation, that fixed by the assessor was to be taken, a party to such contract is not entitled to have such valuation fixed by a court where no fraud is charged, and neither party has failed to appoint an arbitrator in good faith.

Lease Contract—Arbitration.

When the rent in a lease depends upon the valuation of the realty, to be determined by arbitrators, or in case of their failure, the valuation fixed by the assessor is to be taken, and the arbitrators in good faith cannot agree, the assessor's valuation determines the amount of rental to be paid.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 22, 1875.

OPINION BY JUDGE PETERS:

In order to obtain a proper construction of the parts of the lease relating to this controversy, they should be read together, as if they formed but one paragraph or sentence. They are as follows:

"And at the end of the first and second five years, the lot is to be valued at a fair valuation by two disinterested persons, mutually chosen, and endorsed or entitled to this lease, and the party of the second part binds himself to pay six per cent. per annum on such valuation, as rent, during the five years succeeding each valuation.

"And it is further agreed that if the valuations are not made at the periods herein provided for, the valuation made by the city assessor for that year shall be the same upon which the six per cent. per annum is to be paid."

It must be conceded that if either party should persistently refuse to choose a disinterested and suitable person to act with such person chosen by the other party, at the time specified for making the valuation, or should choose a person that he knew would not agree to a fair valuation, and choose such person with the design to prevent a fair valuation, or otherwise to obtain an unjust advantage, certainly a court of equity might properly be resorted to for the purpose of having a fair and just valuation made of the property.

Where parties have agreed upon a particular mode of adjusting controversies in relation to property, determining disputes and ascertaining and fixing values, as in this case, such agreements should be encouraged; and courts should not interfere except to enforce performance or to prevent one party from obtaining fraudulent advantage of the others. After stating in the petition that on the 1st of January, 1874, appellee called the attention of appellants to the particular clauses in the lease in reference to the mode provided for fixing the amount to be paid for the rent of the premises for the succeeding five years; that they then made an effort to agree upon the rent, appellees allege that they then chose W. R. Thompson, and appellants chose John L. Henning to fix the valuation on the property; that these gentlemen met several times, but were unable to come to an agreement; that Mr. Thompson then proposed that they should leave the matter to some third person, and abide by his decision; that Mr. Henning declined that proposition, and that Mr. Thomp-

son proposed to split the difference between them and fix the valuation of the lot at $375, which was also refused.

They further allege that said covenants in said lease are of great value and importance to them; that in no other way can it be ascertained what rent they are to receive; and that they have done everything in their power to obtain a fair valuation of the premises. Every offer of compromise has been rejected, and the gentleman appointed by appellants to act for them refused to accede to each and every offer made by Mr. Thompson, looking towards a settlement between them. They say they are and have ever been willing to carry out the same, and have shown their efforts to do so; that defendants neglected for a long time to appoint some one to act for them, and only did so upon repeated solicitations by plaintiffs, and further that Mr. Henning made no proposition towards a settlement of the wide difference of opinion between himself and Mr. Thompson, but refused to accede to each and every offer made by him; that there is a controversy between them and the defendant, concerning the proper construction of the following clause in said lease, as well as the clauses hereinbefore set out; and then follows the last claim already copied herein.

They then pray for a specific performance of said covenants and agreements for a valuation of the premises, for a construction of the terms of said lease; that the value of said premises be fixed; that defendant be decreed to pay plaintiffs six per cent. per annum on said valuation during five years, commencing the 1st of January, 1874, and for their costs and for all proper relief.

This extended extract is made from the petition, that the facts may distinctly appear upon which the aid of the chancellor is invoked. There is no charge of fraud on the part of appellants; it is not alleged that the gentleman selected by them was incompetent to make the valuation for the want of judgment or knowledge of the value of property in the city, or that he was from any other cause an improper person to refer the matter to. No misconduct is alleged against him, and the only complaint of him is that he had fixed a low valuation on the property, and declined to accede to any proposition made by Mr. Thompson. That he certainly could have been consistent with the utmost good faith, for having valued the property at what he conscientiously believed a fair price, it was quite natural that he should adhere to it; and his refusal to change his opinion cannot be construed into disqualifying persistency or want of integrity. Nor is any misconduct charged against appellants. It appears from the

averments in the petition that they were somewhat tardy in selecting a man to make the valuation; but no rent was due till the 1st of April, 1874, and they may have supposed that a valuation made by the time the rent was due would be sufficient.

The concluding clause of the lease herein quoted appears to have been inserted to meet the very contingency which has happened. It expressly provides that if the valuations are not made at the periods herein provided for, viz.: at the end of the first and second five years, the valuation made by the city assessor for that year shall be the same on which the six per cent. per annum is to be paid. This agreement contains no exceptions. In the contingency provided for the parties themselves have selected the final arbiter, and to him must they go, unless sufficient reasons are shown for resorting to another tribunal. It is not alleged even that the "city assessment" is not a fair appraisement, and how "such appraisements are generally regarded," we have not the means of knowing, as the record contains no evidence on that question. But parties have made that valuation the criterion by which the rent is to be fixed, and no sufficient reason has been presented for changing it.

Wherefore the judgment must be *reversed* and the cause remanded with directions to dismiss the petition.

Clemmons & Willis, for appellants.
E. W. C. Humphrey, for appellees.

CITY OF LOUISVILLE *v.* JOSEPH HALL, ET AL.

Dedication of Highway—Streets.

When grantors own land not platted, and convey the same as a tract, referring in the deed to a named street and to the location of portions of the land on either side of such street, but not making the street a boundary, they do not thereby dedicate the street to the public. The reference to the street in the deed was a mere matter of description.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 22, 1875.

OPINION BY JUDGE LINDSAY:

It does not appear from the record that Elm street had been laid out by the heirs at law of Ferguson, nor that it had been located across their lands, with their consent, by the city or by any adjoining land holder.

They sold to the Halls an entire tract of land, describing it as the land conveyed to their ancestor by the Bank of the United States. The reference to Elm street, and to the location of portions of the land conveyed on either side of said street, was mere matter of description. In selling to the Halls, the vendees had no interest in dedicating a street to the public, and the purchasers had no interest in requiring any such dedication.

If they had conveyed the land lying north of the supposed location of Elm street to one party, and that lying south to another, calling in the deeds for the street as a boundary to each tract, then the title to the street could not have been passed, and the law, for the benefit of the purchaser, would have implied a dedication of the street to the public.

In this case the title to all the tract of land, including the proposed site of Elm street, passed to the Halls, and their right to the street is as free from the supposed divestiture by dedication, as was that of the vendors.

Judgment *affirmed.*

T. L. Burnett, for appellant.
Russell & Helm, for appellees.

WESLEY HOGGINS *v.* ELIZABETH ELLISTON.

Final Judgment—Appeal—Administrator Purchasing Trust Property.

An appeal can only be taken from a final judgment, and where two days after rendition a motion is filed to set it aside, the court, so long as the motion was pending, had full power over the judgment; and not being disposed of, the judgment was not final.

Administrator Purchasing Trust Property.

An administrator, who is a creditor of an estate and entrusted with the sale of property to pay debts, cannot legally become the purchaser of such property unless the entire transaction is characterized by the utmost good faith.

APPEAL FROM KENTON COUNTY COURT.

January 25, 1875.

OPINION BY JUDGE LINDSAY:

It seems that Hoggins did not, of his own accord, pay usurious interest on the notes due and owing by Elliston at the time of his

death. Mrs. Elliston, the sole devisee of her husband, on all occasions manifested the desire that the contracts of her deceased husband for the payment of interest should be carried out to the letter, and it may be safely assumed that all the usury paid by Hoggins was paid at her instance.

It is by no means clear, however, that he paid on the debts due to Worthington & Adams, the full amount of the principal and legal interest. A comparison of his bank account, with the hotel book kept by Arlien, rather tends to show that he did not; and we cannot, from the record before us, determine that the court below erred in refusing to allow him credits for the $275 and $50 items, claimed to be interest paid on these debts. It seems that the $45.76 claimed to be usurious interest paid on the debt to Howe ought to have been allowed, as also the $45 interest paid to the bank. The error of $90 on the stable account should have been corrected. Mrs. Elliston in her deed admits the judgment in full of $13,000 and without an averment of mistake or fraud this admission should be accepted as conclusive. Hoggins should have been credited by $585.45, the amount of the note satisfied out of the moneys receive on the lot sold to Hardebecke.

The allowance to Hoggins as administrator is deemed reasonable; the exceptions thereto of both parties were properly overruled. As Mrs. Elliston was compelled to have the county court settlement corrected by a suit in equity, the fees paid therefor should not have been allowed the administrator. Hamilton is not a party of this appeal; we cannot, therefore, pass upon the allowance made to him.

While Mrs. Elliston may not, by reason of the lapse of time, be allowed to prosecute her own appeal, a question we do not decide, still she can have her exceptions to the master's report inquired into for the purpose of setting off, against errors in her favor, those committed to her prejudice, and thereby, if possible, preserve her judgment.

The court erred in refusing to charge Hoggins with the sum of $810.50, made up of the items of "One mule, $135, one gray horse, $75, pony, $100, two ponies and buggy, $292.50, and a lot of brandy, $208." It is not disputed that all this property came to the hands of Hoggins, nor that he sold it for the sums charged. He insists that the sales were made at different times, and that the money went into the hotel fund, and was from that fund transferred to his bank account, and there charged against him. There is nothing in the record showing that such was the case. The onus is upon him to

show that he was so charged with these sums, yet he utterly fails to do so.

The error in failing to charge him with said $810.50, more than balances errors committed to his prejudice; and hence the judgment of the 5th of January, 1871, cannot be disturbed.

Before proceeding to investigate the controversy arising out of the sale of the stable property, it is necessary to determine whether or not this judgment was final, and whether it disposed of all the matters in controversy. The order fails to show that the cause was then submitted for judgment. The court merely disposes of the exceptions to the commissioner's report. This report makes no reference to the stable transaction, except that Hoggins was charged with the agreed purchase price $13,000. The claim of Mrs. Elliston to one-half the profit realized on the resale, is not mentioned either in the commissioner's report or the judgment.

Besides this, if the judgment would otherwise have been regarded as final, it cannot be so treated under the circumstances of this case, for the reason that two days after it was entered Mrs. Elliston moved to set it aside. So long as this motion was pending, the court had full power over the judgment, and we find it had not been disposed of.

When the cause was submitted for final judgment on the 8th of December, 1871, the court and the parties seem to have regarded the order of judgment of January, 1871, as interlocutory, or at least as not a complete disposition of the matters in controversy; and this fact is evidenced by the failure of appellant to object to the last order of submission. He was certainly in court at that time. We find him excepting to the judgment rendered six months thereafter on the 13th day of June, 1872.

Considering the relations existing between Hoggins and Mrs. Elliston, it is doubtful whether any sale by the latter to the former should be upheld, if profit to any considerable amount should be realized thereon. Hoggins was the administrator of an estate, all of which had been devised to Mrs. Elliston. He exercised complete control over all her property, real and personal. Every cent of money realized from the business carried on by her, was paid into bank to his credit, and he allowed to use it at his discretion. In the judgment of debts owing by the estate, when Mrs. Elliston sold real property, the proceeds were at once placed at the disposal of Hoggins, and in all matters of business she seems to have subordinated her opinions to his judgment.

He held a mortgage upon the hotel property for an amount she could not pay without selling real estate; and accordingly the stable property was put upon the market, and Hoggins entrusted with the negotiations necessary to accomplish a sale. He held this property for a time at from $1,600 to $1,800. He failed in an attempt to sell it at a public auction; and finally he changed his attitude as friend agent and confidential adviser of Mrs. Elliston, and purchased the property for himself.

Two years afterward he sold one-half of it for within a small amount of what he paid for the whole property. The mere statement of these facts presents to the mind the conviction that such a transaction should not be upheld, unless it was characterized by the utmost good faith; and it clearly appears that the sale was unconditional, the vendor retaining no interest inconsistent with the conditions of the deed. Here it appears that Mrs. Elliston did retain an interest in the property. Hamilton swears that she stated in the presence of Hoggins that she was to have one-half of the profit realized when the property should be resold, and that she desired that this agreement should be incorporated in her conveyance, but that he advises her to take a separate writing evidencing this contract. Mervin swears that Hoggins told him that this was his contract, and that he had given Mrs. Elliston a writing to that effect. The loss of the writing is sufficiently accounted for. Hoggins insists that his agreement was oral, and that he was not to divide the profit unless he sold the property before obtaining possession. He fails to prove any such limitation, and the proof conduces to show that the agreement was reduced to writing. In such a case as this, nothing should be presumed in favor of the trustee who has realized such a profit out of a purchase made from the party having confidence in him. It may be unreasonable to suppose that Hoggins agreed to divide the profit at any time he might sell; but it is equally so to suppose that Mrs. Elliston contracted for one-half the profits without stipulating that he should sell at some time. It is sufficient that there was an agreement to divide the profits realized by a sale of the property, that a sale of the portion of it was made, within a reasonable time, and that great profit was realized. These facts make out appellee's right to relief.

Appellant was credited by the amount paid Mrs. Elliston, also by the amounts paid for the additional grounds purchased, also by the amount paid to look up the title, and by the amount expended in making improvements; to this extent the basis of settlement is cor-

rect. But the court erred in assuming that the unsold portion of the property is worth as much as was realized by the sale of the one-half that has been disposed of, and it erred further in compelling Hoggins to purchase Mrs. Elliston's interest in the one-half not sold. After the sale of the first half Mrs. Elliston is entitled to one-half the rents accruing on the one-half not sold. This claim for rents should be set off against Hoggins' claim made up as before indicated. For any balance that may remain on the rents Hoggins should be required to account. When this is done, the unsold half will be regarded and treated as profit, in which the parties own equal undivided interests.

If the parties or either of them so desire, the court may adjudge it to be sold and the proceeds to be divided equally between them. If neither of the parties desire a sale, then Hoggins will be treated as holding the title to the unsold half of the property for the benefit of himself and Mrs. Elliston.

The judgment of the 5th of January, 1871, is *affirmed*, but the judgment of June the 13th, 1872, is *reversed* and the cause remanded for further proceedings consistent with this opinion.

Carlisle & O'Hara, for appellant.
J. W. Stevenson, for appellee.

LEWIS LENTZ, ET AL., *v.* LOUISVILLE & JEFFERSON COUNTY ASSOCIATION.

Mortgage Foreclosure—Exhibits—Parties to Action—Ratification.

Only the mortgage and obligation it secures, or copies thereof, need be filed in a suit to foreclose. No evidences of the mortgagor's title need be filed.

Parties to Action—Ratification.

Where a trustee holds a mortgage for bondholders, a majority of such holders may require him to enter suit; and whether such a suit was properly brought in the name of the trustee alone or not, the ratification of the foreclosure sale by a majority of the bondholders removes any doubt of the validity of the title of the purchaser.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 25, 1875.

OPINION BY JUDGE COFER:

We know of no rule of law or of practice which requires a mort-

gagee suing to foreclose a mortgage, to file with his petition the muniments of the mortgagor's title. The mortgage sought to be foreclosed was filed, and certainly the validity of the judgment is not affected by a failure to file other evidence of title.

The holders of a majority of the bonds have compelled the trustee to sue, or, upon his refusal, they themselves could have sued; and as such majority has ratified the sale, we are unable to perceive any reason why the sale is not as valid as if procured at their request.

Without deciding whether the suit was properly brought in the name of the trustee alone, we are satisfied that the ratification of the sale by the holders of a majority of the bonds has removed any doubt that might otherwise have existed as to whether appellants have acquired a title free from any claim by those bondholders who have not assented to the sale. But if it was conceded that these bondholders are not bound, and that they might hereafter assert their lien unless they are paid, it would furnish no ground for vacating the sale. The majority have elected to affirm the sale, and have thus placed themselves and the other holders in the same position they would have been in if those now ratifying had originally required the sale to be made.

This places the holders of the minority of the bonds in a position in which they are bound to accept payment of their bonds when tendered. If, then, the appellants doubt whether they may not still assert their lien, if they are not paid by the trustee, they may take steps to protect themselves from loss by suggesting their apprehensions, and asking the court to either allow them to retain enough money to pay the bonds held by those not assenting to the sale, or to compel the trustee to bring them into court to receive payment.

The common creditors of the corporation had no lien upon the land and were neither necessary or proper parties to the suit.

There is no evidence in the record to sustain the fifth exception, and if there was, the subsequent ratification by the corporation and the holders of three-fourths of the bonds, and the fact that the property sold for more than enough to pay in full all the bondholders, would cure any objection that might otherwise have existed because of a failure to sell at the hour designated in the judgment and advertisement.

Judgment *affirmed.*

J. B. Cochran, for appellants.
Rozell, Weissenger, Pinkney & Green, for appellee.

C. VANDERGRIFFT v. ARIS COX, ET AL.

Will—Limitations.

Where a testator bequeaths a life estate to his widow, but does not dispose of the fee of his real estate, but places the property in the hands of an executor to manage and sell at the death of his widow and divide the money among his children, such fee descends at his death to his heirs.

Limitations.

When a testator disposes of his personal property, making no disposition of his realty, but does provide that his executor shall sell the same at the death of his widow and distribute the proceeds among his children, and his children of full age convey the real estate, for a fair consideration, to a purchaser who takes possession and holds it adversely to all the world for more than thirty years, his title is good. The statute of limitations also is a bar to an action to recover the land from him.

APPEAL FROM HENRY CIRCUIT COURT.

January 26, 1875.

OPINION BY JUDGE LINDSAY:

By the will of Samuel Thorn, his widow, Nelly Thorn, took a life estate in one-third of his landed estate, or in the rents and profits arising therefrom.

The fee simple estate in his land was not disposed of at all. He provided that the rents and profits of the land not embraced by the life estate, to be taken by his widow, should be equally divided between his two daughters, Peggy Cox and Nancy Brown, and in case of their death, among their children, in such manner as his executors might deem most conducive to their benefits. The power of managing the landed estate was given to the executors, and at the death of the testator's wife, they were directed to sell it and such personal property as might remain in their hands, and divide the proceeds among his two daughters and their children in such way as might appear to them the most likely "to do them good."

The land itself is not devised at all. Neither the daughters nor their children take any estate in it untler the will. The executors were merely invested with the power to manage, and finally to sell. It therefore necessarily results that the title descended to the heirs at law of the testator.

Under the deeds from Mrs. Cox and Mrs. Brown, Vandergrifft entered, taking possession of the entire tract of land. He has been

in possession for over thirty years. He did not enter as a tenant in common with these appellees or any of them. Whether the conveyance from their mother be valid or invalid, is immaterial. The fact that he claimed under it shows that he was holding adversely to her, and conduces to show that he held adversely to her children.

She became discovert more than thirty years before her death, and the youngest of the appellees become an adult nineteen years before the institution of this action. The fifteen year statute of limitation effectually bars this action, even if it were conceded that the legal title to the land, or any part of it, passed to these appellees under their grandfather's will. But as we have already seen, such was not the case.

The judgment of the court below is erroneous. For the reasons given, it is *reversed* and the cause remanded with instructions to dismiss appellees' petition.

Webb, Montfort, J. & J. W. Rodman, for appellant.
DeHaven & Carroll, George C. Drane, for appellees.

S. B. REDD & BRO. *v.* MARY E. WALKER, ET AL.

Street Improvements—Ordinance and Contract.

Where a city ordinance and the improvement contract under it provide for the improvement of a carriage way twenty-six feet wide, and the contractor constructs such improvement thirty-four feet wide, the city cannot compel the abutting property owners to pay for such improvement.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 28, 1875.

OPINION BY JUDGE LINDSAY:

The ordinance and the contract restricted the width of the carriage way of Maple street, between 17th and 18th streets, to twenty-six feet, and provided that room for sidewalks twelve feet in width should be left on either side. Notwithstanding all this, the contractors constructed the carriage way about thirty-four feet in width, and left only seven or eight feet on either side for sidewalks. This was an open, palpable, unmistakable departure from the provisions of the ordinance and contract.

The departure was such as to deprive the city of the power to

compel the property owners to pay the cost of the improvements. The city charter, Sec. 12, provides that in no event shall the city be liable to pay for such work, unless it has the right to enforce the cost against the property receiving the benefit.

The contractor, by his violation of his contract, deprived the city of the power to enforce the payment of the cost of improving Maple street against Mrs. Walker's property. He cannot, therefore, complain that relief against the city is denied him.

Judgment *affirmed.*

R. C. Davis, for appellants.
G. P. Arbegast, for appellees.
T. L. Bennett, for Louisville.

WILLIAM TILMAN v. ABNER CAREY.

Foreign Judgments—Defense.

Where a judgment is rendered in Ohio, the court having jurisdiction over the subject-matter and parties, no defense can be interposed to a suit brought upon it in Kentucky which would have constituted a defense in the original action in Ohio.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 28, 1875.

OPINION BY JUDGE PETERS:

After a careful examination of the record in this case, we are unable to perceive any error in the proceedings in the court below that will authorize a reversal of the judgment.

It appears in the record that appellant was actually served with summons in the proceedings in Ohio, and that the court that rendered the judgment had jurisdiction of the subject-matter of the action. The judgment must, therefore, be regarded here as conclusive of the rights of the parties. Appellant cannot go behind that judgment, and now plead matters in defense which would have constituted a defense to the original action in Ohio. We do not construe the judgment of the justice of the peace of Ohio as exceeding his jurisdiction. It is only for $300 and costs, which costs are the mere incident to the judgment; besides, if the judgment had exceeded

said sum, the plaintiff could remit the excess. And it is not a reversible error. 1 Swan & Critchf. R. S. Ohio 788.

The judgment must be *affirmed.*

Hawkins, for appellant.
Fearsons, for appellee.

WALTER & STRUCK *v.* R. W. WOOLEY, ET AL.

Landlord and Tenant—Mechanic's Lien—Parties—Limitations.

The landlord must be made a defendant in an action to foreclose a mechanic's lien against real estate for improvements which have been made thereon by the tenant.

Limitations.

Where the landlord was not made a defendant in foreclosing a mechanic's lien against his property for improvements erected by the tenant, until more than one year after such work was done and until after the tenant was dispossessed, no recovery can be had against the landlord's real estate.

Limitations.

No action can be maintained to foreclose a mechanic's lien after twelve months have elapsed from the date of the completion of the work or furnishing the materials.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 28, 1875.

OPINION BY JUDGE PRYOR:

If, as maintained by the appellants, the mechanic's lien, by reason of the law applicable to the city of Louisville, is superior to the lien of the landlord for his rents (a question not necessary to be decided in this case), it must be conceded that the provisions of the enactment creating this lien must be complied with in order to give this preference. The building, as erected by the appellant, became a part of the realty, or such a fixture as could not be removed by the tenants under the contract, as shown, without the consent of the owners of the soil; and if placed upon the premises with or without the implied or express consent of the landlord, the lien must be enforced against him as well as the tenant. The tenant may be and is a necessary party, in order that he may admit or contest the validity of the claim, and assert his right to the use; but the landlord is the party

against whom, or upon whose property the lien attaches; and he is, therefore, for the purposes of enforcing the lien the real party in interest.

The lease in this case was a matter of record; and the property upon the premises gave to the landlord an indemnity to that extent upon the failure of the tenant to pay his rent. He feels secure in this rent by reason of these improvements, and may not desire on this account to exact a prompt compliance with the payment of the monthly instalments owing by the tenant. In this case, the landlord whose realty is about to be subjected to the payment of the mechanic's lien, is not made a party to the action until the 7th of March, 1873. The nature and extent of appellants' lien was filed in August, 1872, for lumber and carpenter's work, furnished and performed up to the 8th day of March, 1872. The evidence of Exkstenkemper shows that this work was done three years prior to February, 1874, and one of the appellants states that it was finished the 1st or 2d of March, 1872. More than one year had elapsed after the completion of the work before the appellees were made parties to the cross-petition of appellants. The lien may be asserted provided such petition be filed within one year from the completion of the work or the furnishing the materials. "No lien shall exist in favor of any person or persons by virtue of this act, who shall not have proceeded within the time aforesaid to enforce the same." Acts of City of Louisville, page 925.

The lease of the tenant had been forfeited prior to the time at which the appellees were summoned or made parties to the cross-petition; and when they come to take possession, or have the right to the possession, it is insisted for the first time, that a part of the realty is liable for the appellant's claim; and whether so or not, the appellees who owned the soil and the buildings upon it had no notice of this lien by reason of any summons in an action to enforce it, until more than one year after the work had been done, and not until they had obtained a judgment for restitution. It is true the tenant owed the debt, but it was the landlord's property that was attempted to be sold by reason of the act in question in order to discharge it; and the failure to attempt to enforce the lien within a year as against him, released the property, if liable for its payment. From the evidence in the case the tenant had no right to remove this building, and as it was attached to the dwelling house, although used as a bar room, we are not disposed to adjudge that it was such a fixture as the tenant could remove. Besides, it is shown that the

erection of these improvements constituted, to some extent, the consideration moving the appellees to execute the lease, and that they were looking to the value of such improvements as a partial compensation for the use of the property. There is no reason assigned for the failure to make the appellees parties to the proceeding within the time provided by the statute.

The lease was a matter of record, and by its terms was liable to be forfeited at any time, upon the failure of the tenant to comply with the conditions annexed. The interest of the tenant terminated when the lease was forfeited, and the appellants were then enforcing their lien against the property of the appellees, who were not before the court. The latter were as much or more interested than the tenant, the former owning the fee, and the latter the right to the use only. If this use could be subjected, or the building itself, by reason of the tenant having built it, when the tenancy expires, and the attempt is to enforce the claim against the owner, we see no reason why he may not avail himself of the provisions of the statute and say: "You have no right to enforce this lien against me after the expiration of twelve months from the completion of the work," and particularly when, if the tenant was still in possession, the appellee's were necessary parties. The lease was forfeited before any summons issued against the appellees, and the right of the tenant (if he had such right) to remove the fixtures, no longer existed. If two own an interest in real estate, one for years and the other in remainder, if there is a claim against the estate that may be enforced by him within a certain time, and the interest of the one owning the particular estate terminates when he alone is a party to the action, if the tenant in fee is afterwards made defendant, the pendency of the action against the one owning the lesser estate would not preclude the owner of the fee from pleading the statute of limitations, or from having the benefit of a statute denying all liens where the action is not prosecuted within twelve months. The cause of action or lien cannot be said to have been asserted as against appellees or their property, until the filing of the amendment making them parties. As owners, they had the right to remove the lien, and as both the tenancy and lien were gone when they were sought to be charged, or their property made liable, the chancellor cannot now subject this property to the payment of appellants' claim.

Judgment *affirmed.*

L. N. Dembitz, for appellants.
James S. Pirtle, for appellees.

JOHN P. CRONNIE, ET AL., *v.* HENRY MONSH, ET AL.

Implied Contract—Construction.

Where in a written contract a person agrees that he will, during the year, furnish ice to a dealer, at an agreed price, and the purchaser agrees to pay such price for so much of the ice as might be delivered to him, the law implies an agreement upon his part to receive and pay for the ice.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 29, 1875.

OPINION BY JUDGE LINDSAY:

The written agreement entered into by Cronnie and Monsh on the 1st day of April, 1870, bound Cronnie to furnish to Monsh northern ice for the year 1870, at fifty-five cents per hundred pounds, or eleven dollars per ton. It bound Monsh to pay at said rates for the ice delivered to him at stipulated intervals, and in all other respects to comply with the terms of said agreement.

Contemporaneous with the execution of this written agreement, Monsh, with Hilger, executed and delivered to Cronnie a bond in the penal sum of one thousand dollars, by which he was obliged to pay on said ice, and in all other respects to keep and perform his part of the agreement.

There is no express stipulation incorporated into either of the writings, binding Monsh to demand and receive ice at the agreed price; and Cronnie insists that on account of the want of such an express agreement on the part of Monsh, the contract is void for the want of mutuality.

When all the language used by the two parties in the two writings is considered together, it is manifest that notwithstanding their failure to state in express terms that Monsh was to receive and pay the stipulated price for some quantity of ice, yet in point of fact he did so agree. In the case of a mutual written agreement, the express stipulation with reference to any particular point, connected with the subject-matter by one party, raises under the circumstances of such a case as this, a corresponding implied contract by the other. When Cronnie agreed in writing that he would, during the year 1870, furnish to Monsh ice at an agreed price, and Monsh undertook to pay said price for so much of the ice as might be delivered to him, the law implied an agreement upon his part to demand, receive and pay for a quantity of ice, exceeding, at the least, the quan-

tity or weight recited in the agreement, as the standard by which the price was to be fixed and determined. The writings before us are doubtful in their import, but in such cases, when a rational and not improbable construction can be given to a contract, it will be adopted, in order that it may be held to have some effect.

But Cronnie objects further, that if it be conceded that Monsh was bound by the contract to accept ice and pay the agreed price, the quantity he was to receive is left wholly a matter of conjecture, and therefore that the contract should be treated as void and inoperative for the want of certainty.

Where a writing, without the aid of extraneous proof, evidences an enforceable contract, it "may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties." 1 Greenleaf on Evidence, Sec. 277.

Appellant, by his answer, sets out the surrounding circumstances, in the light of which the writings under consideration are to be read, in order to determine the quantity of ice Monsh agreed to receive and pay for. He says Monsh applied to him to purchase so much northern ice, and no more, as he could, by the running of one ice wagon, retail to his customers in the city of Louisville for and during the year 1870. He shows the object and purpose Monsh had in buying the business in which he was engaged, and the disposition he intended to make of the ice for which he was contracting. It is true these facts do not appear in the petition and amended petition to which appellant demurred; but as, according to our construction of the writings, the pleading of Monsh entitled him to recover at least nominal damages, and therefore the general demurrers were properly overruled, the answer of Cronnie may be considered to illustrate the propriety of the rule of allowing obscure and uncertain writings to be read by the light of surrounding circumstances.

As the court below did not err in overruling the general demurrers, the judgment appealed from must be *affirmed*.

Gibson & Gibson, G. V. Hanks, for appellants.
John M. Harlan, B. H. Allen, for appellees.

C. J. CLARK, ET AL., *v.* DAVID ENOCH.

City Council—Record as Evidence—Evidence.

The record of the proceedings of the city council is the best evidence of such proceedings, and parol proof cannot establish a fact required to be made a matter of record.

Evidence.

Oral testimony is not admissible to show that which the city records state is not true.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 29, 1875.

OPINION BY JUDGE PRYOR:

The proceedings of the general council ordering the work executed by the appellee, are all regular and in accordance with the provisions of the city charter; and the only ground of defense relied on by the property-holders, that has been urged with any degree of plausibility, is that the legislative records of the city, as originally made, show that the contract declared on, or upon which the liability of the appellants originated, was made with one William Terry, and not with the appellee. In order to make out this defense one or more witnesses are introduced, who say they inspected the records after the contract is alleged to have been made; and from them it appeared that the contract for the work done was made with Terry, and approved as such by the council; that after the institution of the action they again examined the record, and found the name of Terry erased, and that of the appellee substituted. When this change was made it does not satisfactorily appear; but it does appear that the original contract was made with the appellee, and not with Terry, this fact being evidenced by the exhibition of the contract itself upon the hearing in the court below. If such an omission or mistake was made, it was only a clerical error, and if corrected we cannot see how the rights of appellants have been affected by it.

It is certain that the appellee made the improvement, and equally so that the original contract was made with him; and the council, in approving the contract, could not have approved it as made with Terry, for the reason that no such contract, so far as appears from this record, ever existed. It is insisted, however, that the record of the city legislature is the best evidence of this fact, and in this proposition we concur with counsel. If it appears from the record that it was made with Terry the appellee cannot maintain this action. The record, as exhibited, shows that the contract was made with the appellee, and there is no evidence in the case to contradict it. If the proceedings of the city council and the verity of its ordinances is made to depend more upon the testimony of those who have inspected the record than the record itself, there is but little

necessity for any legislative action, and no security for the rights of those based upon this high character of proof. It is recognized as a general rule of evidence that parol proof cannot be substituted to establish a fact that is required to be made a matter of record, and in this case the right of recovery (although the appellee may have done the work) is made to depend upon the action of the council of record, showing that they ordered the work and approved the contract; and without this character of proof the appellee would be without remedy against either the city or property holder.

When the appellee comes with this kind of evidence, his right, as is maintained by appellants, to recover of the property holder, although sustained by evidence of record, must yield to the secondary evidence consisting of the statements of those who have examined the records, and state that they have been altered by erasing the name of Terry and inserting that of appellee. No fraud is charged against the latter, but oral testimony was introduced to show that which the record states is not true. Such evidence, however creditable it may be, is clearly inadmissible to defeat the recovery in this case. The proof of Shanks shows that Eleventh street was marked out and opened; and if so, it is still a street, although obstructed. The evidence also conduces to show that notice was given the property holders as required by the city charter; that as some complained of not receiving notice, a second inspection of the work was made, and that the engineer or his assistant attended on each day. In regard to these issues of fact there is conflicting proof, and for this reason, if no other, this court will not disturb the judgment, and the same is now *affirmed.*

Bullitt, Bullitt & Harris, Young & Boyle, for appellants.
Badger & Haritz, T. L. Bennett, for appellee.

WILLIAM S. ABERT *v.* W. J. BERRY.

Attorneys at Law—Parties Conducting Their Own Causes—Weight of Evidence.

A party litigant may appear by himself or by counsel. He may be required by the court to elect to either take charge of his defense, or permit it to be done by his counsel.

Weight of Evidence.

Where the evidence is conflicting and has been passed upon by the court and jury, the court of appeals, unless manifest injustice has been done, will not interfere.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 30, 1875.

OPINION BY JUDGE PRYOR:

A party litigant can appear by himself or counsel, and in the trial of the cause, should be required to undertake the management of the case himself, or entrust it to his attorney; and, therefore, the court below acted properly in giving the appellant his election to conduct the defense in his own behalf, or permit it to be done by his counsel. The preponderance of the testimony is not so great on the side of the appellant as to authorize a reversal upon that ground. The appellee swears that the appellant was one of the partners when the contract in regard to the fee was entered into, and although he may have been mistaken in this, from the statement of the appellant we must conclude that their partnership was not then in existence; still there is proof conducing to show a joint employment of Nelson & Abert, and that a division of the fee, as proposed by Berry, who had instituted the actions, should be construed to mean one-half to Nelson & Abert, and the remaining half to the appellee. The evidence is conflicting, and has been passed on by both the judge and jury below, and in such a case, unless manifest injustice has been done the unsuccessful parties, this court will not interfere.

The testimony regarded by appellants as incompetent, if excluded could not have changed the result.

The judgment is *affirmed*.

W. S. Abert, for appellant.
T. M. Webster, John S. Ducker, for appellee.

WILLIAM E. RUSSELL *v.* CUMBERLAND & OHIO R. CO.

Corporations—Vacation of Charter—Subscription Contracts.

A private citizen cannot maintain an action to vacate or perfect the charter of a corporation. Such action can only be maintained by the commonwealth and by the attorney-general.

Subscription Contracts.

Where counties subscribed for stock in a railroad corporation prior to the Act of April 9, 1873 (Gen. Stats., p. 843), said act has no application to such subscription contracts. Said act is not so far retroactive in its operation as to interfere with consummated contracts.

APPEAL FROM MARION CIRCUIT COURT.

February 2, 1875.

OPINION BY JUDGE LINDSAY:

A private individual cannot maintain an action to vacate or perfect the charter of a corporation. Such actions must be prosecuted by the commonwealth and by the attorney-general, or under his sanction and direction, by an attorney representing the commonwealth, and actions to vacate or repeal a railroad charter can only be instituted and maintained by order of the legislature, except where otherwise expressly provided. Secs. 530, 531, Civil Code of Practice.

Appellant fails to state the time or times at which the counties of Marion, Taylor and Green subscribed for stock in the Cumberland and Ohio Railroad Company. If the subscriptions were fully consummated, and the contracts therefor fully perfected before the passage of the act of April 9, 1873, entitled "An Act for the protection of counties, cities, etc., subscribing for stock in railroads, turnpikes, and other improvements" (Gen. Stat., p. 843), then said act does not apply to such contracts, and the railroad company cannot be compelled to execute the bonds therein provided for, as a condition precedent to its right to demand the bonds of said counties in payment of their respective contracts of subscription for stock. Said act is in the main prospective, and certainly is not so far retroactive in its operation as to interfere with consummated contracts. Neither was it intended to be an amendment to the charter of this or any other railroad company. Potter's Dwarris on Statutes and Their Construction 162, and note 9; Cooley's Constitutional Limitations 370, and authorities cited. *Aspinwall v. Daviess County,* 22 How. (U. S.) 364; *The Cumberland & Ohio R. Co. v. The Judge of Washington County Court,* Mss. Opinion, 5 Ky. Opinions 519, 580. It may be that the contract with Robinson, to furnish cross-ties, is not as advantageous to the company as it might have been made, and that Robinson was not the lowest and best bidder, and that in letting it out, the officers of the company acted in bad faith to bidders, and injuriously to the stockholders, and yet we do not see that the courts have the right to interfere. It is not charged that the contract was the result of a fraudulent combination between Robinson and the officers of the company; and unless there was fraud on both sides, the courts cannot deprive Robinson of the ad-

vantages of a contract that was honestly and fairly entered into by him.

We are of opinion that the petition sets out no cause of action against any of the appellees, and that the general demurrers were properly sustained, and the petition properly dismissed.

Judgment *affirmed.*

C. S. Hill, for appellants.
H. C. Pendill, Harrison & Knott, R. H. Rountree, for appellee.

J. B. COVINGTON, ET AL., *v.* C. G. SHANKLIN.

Will—Construction.

Where a clause in a will provides that "should any one of my children depart this life without issue of their body, it is my wish that their part of my estate revert to their surviving brothers and sisters," it is held it should be construed to mean the death of the legatee (child) after that of the testator and before the time of distribution, or when the legacy may be reduced to possession.

APPEAL FROM TODD CIRCUIT COURT.

February 2, 1875.

OPINION BY JUDGE PRYOR:

The will of Beverly Stubble, under which these appellants claim, gives to each one of his children as they arrive at age or marry, the one-ninth part of his estate, except the land owned by him at his death. This is given to his wife during her life or widowhood, and if she again marries she is limited to a certain number of acres described by the provision of the will. The executors, in the event of the wife's marriage, were directed to sell all the land except that part the widow had a right to retain, and pay the proceeds over to his children; and not only so, but after his wife's death they were directed to sell that portion devised to her, and pay over the proceeds to his children. He had converted this real estate into money by three particular clauses of his will, and this money to be paid in equal portions to his children, without any restriction whatever. After making the devises above, the testator then adds the following clause: "Should any one of my children depart this life without issue of their body, it is my wish that their part of my estate revert to their surviving brothers and sisters."

When considering the directions given his executors as to the payment of the money or proceeds of the land to his children, the thought, no doubt, suggested itself as to what disposition should be made of the portion going to one of the children if he or she should die before the time arrives at which the executors are to pay over to this child his or her part of the estate; and intending that the directions should be plain and explicit, and that his children should enjoy the estate, he inserted that provision of the will giving the portion of the deceased child or children to the survivors. The devisor, when directing this money to be paid over to his children and giving to each one-ninth part of his estate, never intended to so restrict the devise as to make the title of the devisee doubtful, and to depend upon issue born and alive at the death of the devisor. The contingency provided against was the death of the child when the executors came to make the distribution, or when the children were entitled to the estate.

The case of *Birney v. Richardson and Ford,* 5 Dana 424, is analogous in every particular to the one before us. In that case the rule for construing a similar clause in the will of Thomas Richardson was as follows: "In such a case, the simple, unexplained words, 'dying without issue,' will, according to a general and well established rule, be construed as meaning the death of the legatee after that of the testator and before the time of distribution, or when the legacy may be reduced to possession." The death must be during the particular estate, and such should be the construction in this case, for the additional reason that the testator had made absolute gifts of portions of his estate to some of his children, and by his will, in order to equalize his children, required those to whom he had given this estate to surrender it, and upon their failure to do so, they were excluded from the benefits of its provisions. This the children who had the property converted to, and surrendered what they owned in order to accept the provisions of the will. There had been no limitation placed upon the right of the children over the property already given, nor did the devisor intend to restrict it by the provisions of his will.

The appellee, however, manifests no title to the land in controversy. The will recorded in Tennessee is no evidence of title in this state, unless proven in the manner pointed out by the statute. As the record is now presented, the appellants being the brothers and sisters of William Raymond, or claiming through them, are entitled to the land as against the appellee. Upon the return of the

cause, the appellee should be allowed to amend his pleadings and present his title, if he is able to do so. This court considering it proper on the facts of the case to construe the clause of the will in controversy, in order to prevent further litigation in the event the title of the appellee is made to appear, the judgment is *reversed* and cause remanded for further proceedings consistent with the opinion.

Petrie & Reeves, for appellants.
Terry, J. & J. W. Rodman, for appellee.

PETER KAIBER *v.* ANN M. HARRIS, ET AL.

Tax Sales—Penalties—Decedent's Real Estate.

Before a person buying real estate at a tax sale can legally exact the penalties prescribed by the statute, he must show that the statutes have been complied with in levying such taxes and in making such sale.

Decedent's Real Estate.

A tax sale made under a tax bill against a named person's estate does not comply with the statute; such bill and sale should be made in the name of the heirs who inherited the real estate, and not against the estate.

APPEAL FROM KENTON CIRCUIT COURT.

February 3, 1875.

OPINION BY JUDGE COFER:

In a proceeding which, from the imperfect record before us, we suppose to have been for a settlement of the estate of H. C. Harris, the appellant presented to the master commissioner a claim against the estate of said Harris for $511.41. This claim was based on the fact that real estate formerly belonging to Harris had been sold by the collector of city taxes in Covington for unpaid taxes, and purchased by the appellant in December, 1869, at the total sum of $191.78, upon which he claimed, by way of penalty, the sum of $319.63, which is at the rate of 50 per cent. per annum from the date of the sale to the filing of the claim with the commissioner.

The master allowed and reported in appellant's favor the amount actually paid by him in discharging of the city taxes, with 6 per cent. per annum interest. To this report the appellant filed exceptions, because the whole amount of his claim had not been allowed;

and the court having overruled his exceptions and decreed a distribution of the fund, he has appealed.

The charter of the city of Covington requires the assessor to affix against the name of each inhabitant the amount of his real estate in said city, with a proper description by number and situation, and requires the city clerk to make out a tax bill against each person assessed with taxes, specifying thereon such item of taxation, the value thereof, and the tax imposed. It also provides that tax bills shall be placed in the hands of the city collector, and if not paid, authorizes him, after advertising, to sell the real estate of the taxpayer. Real estate so sold may be redeemed by the owner at any time within three years, by paying to the purchaser the amount of his bid with 50 per cent. thereon if redeemed within one year, and if not redeemed within that time, by paying 50 per cent. per annum.

It is under these provisions that the appellant claims to be entitled to the enormous penalty which he insists on in this case. Such penalties will not be enforced unless he who claims them can show a strict compliance with all the requirements of the statute bearing upon the subject.

The tax bills under which the appellant purchased are copied into the record, and they fail to show even a substantial, much less a strict compliance with the requirements of the city charter. The assessments were all made after the death of Harris and should have been made against those who succeeded to his title, in order to comply with the requirement that assessments shall be against the owner of the property assessed, and both the assessment and the tax bills should have contained a proper description of the property assessed. The assessment does not appear in the record, and we have no means of knowing whether it was properly made or not, or indeed, whether any assessment was in fact made; but the tax bills are made out, not against the owners of the property, but against the "H. C. Harris estate," and therefore gave the collector no authority to sell the property which then belonged to persons not named on the tax bill as owners.

There are other objections which are equally fatal to the appellant's claim to a penalty now amounting to more than 150 per cent; but it is not deemed necessary to consider them, as that already named is sufficient.

Judgment *affirmed.*

R. D. Handy, W. D. Rankin, for appellant.
R. Richardson, for appellees.

SALLIE W. DUERSON, ET AL., *v.* W. W. GARDNER, ET AL.

Mortgage—Pleading.

Where a mortgage is acknowledged by a married woman in accordance with the statute, and when its contents have been explained to her by the officer before whom acknowledged, before she can have such mortgage canceled she must aver and prove facts showing that it was not read and explained, or that it was not acknowledged, or other facts to avoid the instrument.

Pleading.

If it appears that the wife had no power to divest herself of title, facts should be pleaded setting up such want of power.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 5, 1875.

OPINION BY JUDGE PRYOR:

It is made to appear from the petition of appellant that the creditors of the bankrupt have an interest in the proceeds of the note in controversy; and the bankrupt court having assumed the jurisdiction, and undertaken to administer for the benefit of creditors, and to make distribution, we see no reason for the state court to interfere in order to determine who of the bankrupt creditors are entitled to it. They are, in fact, in the bankrupt court, and a state court, upon such a state of case, will not entertain or assume the jurisdiction.

There is nothing in the petition manifesting a right on the part of appellant against the assignee in bankruptcy, or the creditors of the bankrupt. It is alleged that the note was delivered to Parks, and afterwards a mortgage executed by the husband and wife upon the wife's note, to secure certain debts, when the real object was to receive other debts, and have conveyed to the wife certain estate as a consideration for the note to the extent the proceeds were applied. The allegation that the mortgage was obtained by fraud will not suffice. The wife has acknowledged a writing in accordance with the provisions of the statute, when its contents have been explained to her by the officer taking the acknowledgment; and before her petition to cancel such an instrument can be entertained, she must allege and prove facts showing that it was not read and explained to her, or that she never acknowledged it, or other statements that, if true, would avoid the effect of the instrument. The legal presumption is that she signed the mortgage and acknowledged it in the manner

prescribed by law, and the allegation that it was obtained by fraud and misrepresentation is not sufficient to negative such a presumption.

The facts should be stated. Parks may have made the representation, yet if the wife executed a mortgage for other purposes than those originally intended, read and explained to her by the clerk, it is certainly binding on the wife. If it appeared that the wife had no power to divest herself of title, such allegations would be necessary, as an acknowledgment before the clerk could not make it a valid instrument. The allegation that it was or is the wife's separate estate will not do; the facts should be alleged showing how this separate estate was created in an attempt to negative the right of the wife to mortgage it. If the note was executed to the wife for the proceeds of her land, she had the power, in conjunction with her husband to mortgage it, unless there was such a separate estate in the land, or one created as to the note, so as to prevent the husband and wife from disposing of it; and if so, the facts should be stated, that the court may determine the question.

There is, therefore, nothing in the petition showing that creditors of the bankrupt or the assignee have no right to the note. If a bankrupt transfers the property of another to his assignee without the consent of the party owning it, then in possession and claiming to hold as against the rightful owner, he may be sued in any court having jurisdiction over the parties and the subject-matter of the action. The mortgage is not part of the record, but the conclusion cannot be that it was signed and acknowledged by the husband and wife. If it appeared that the note had accomplished its purpose, and there was a balance due the appellant in the hands of the assignee, the state court, unless there was some other defense than that he has assigned, would compel him to pay it over. Nothing of this sort appears.

Judgment *affirmed.*

D. W. Sander, Pirtle & Caruth, for appellants.
A. Barnet, for appellees.

HENRY WEITZEL *v.* FRED NOVER.

Patent Rights—Defense on the Ground of Fraud.

When a right to manufacture and sell a patented article is conveyed by one not entitled to convey, and hence fraudulent, before the purchaser can avail himself of the fraud as a defense to an action to collect the purchase price, he must offer to return what he has purchased.

APPEAL FROM KENTON CIRCUIT COURT.

February 5, 1875.

OPINION BY JUDGE PRYOR:

The original answer and amendments admit the delivery of the fasteners to appellant, and their use by him. There is no controversy as to the contract of sale; but it is maintained that there was a fraud practised by appellee in selling these fasteners, when the right to manufacture and sell was in one Putman, by reason of a patent giving to him the exclusive right to manufacture the article. If the fraud was perpetrated as alleged, and constitutes a defense for the appellant, before he can avail himself of it he must offer to return what he has purchased, and not retain it, or pay some one else for it. Putman had his remedy against the appellee for an infringement upon his patent right, and had already, as the record shows, recovered a large sum against the firm of which appellee was a member, or in such way connected; and the value of the articles sold may be embraced in that judgment, or, if sold afterwards, the appellants should have returned, or offered to do so, the articles he obtained from appellee. If it belonged to Putman, appellant should have made him a party to the action in order that the right of property might be determined.

The judgment is *affirmed.*

B. Richardson, for appellant.
George G. Perkins, for appellee.

R. W. DAVIS *v.* CITY OF COVINGTON.

Cities—Repair of Sidewalks—Liability for Damages.

While it is the duty of a city to keep its sidewalks in repair and free from obstructions, it does not guarantee that they will be so kept at all times, under all circumstances; such city is only liable when it has notice, or when the defect has existed long enough for it to acquire information, and fails to use ordinary diligence in removing the obstruction.

APPEAL FROM KENTON CIRCUIT COURT.

February 5, 1875.

OPINION BY JUDGE LINDSAY:

Although it is the duty of the city government of Covington to

keep its sidewalks in repair, and free from obstructions, yet its duty in this regard is not so absolute and imperative as to render the city a guarantor that the sidewalks will be kept clear of obstructions at all times, under any and all circumstances. Before the city can be held liable in a civil action for damages resulting to any person, because of its failure to keep its sidewalks clear, it must be made to appear that the city, after notice, or after reasonable time within which to acquire information, failed and neglected to use ordinary diligence in removing the obstruction.

Instruction No. 1, of which appellant complains, conforms to this view of the law, and is unobjectionable in its phraseology. It correctly states the doctrine as to contributory negligence in a case where the breach of duty complained of is negative in its character. It is not pretended that the city was an active agent in inflicting the injuries sustained by appellant; and if any act of negligence upon his part operated as the immediate cause of the accident, he cannot recover from the city.

Judgment *affirmed.*

W. I. Dudley, for appellant.
John T. Harrison, Carlisle & Foote, for appellee.

JOHN SANDERSON AND WIFE *v.* SUSAN E. HAYS, ET AL.

Lunatics—Conveyances.

The deed of a lunatic is not void absolutely, but is susceptible of confirmation by the lunatic when restored to sanity.

APPEAL FROM KENTON CHANCERY COURT.

February 6, 1875.

OPINION BY JUDGE LINDSAY:

The testimony establishes very clearly that prior to 1844, and up to and after 1848, and in fact up to the present time, the mind of Mrs. Hays was and has all the while been seriously impaired, so much so, that she was in 1844 and in 1848 incapable of binding herself by a conveyance of her land, even though it may have been executed in strict conformity to the statutes regulating the mode in which conveyances of real estate shall be made and executed by married women.

The circumstances all tend to show that Wolfe, the original pur-

chaser, was cognizant of Mrs. Hay's condition at the time he accepted the original, and also when he procured the execution of the second deed.

This case does not come within the rule indicated in the cases of *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 236; *Shirleys v. Taylor's Heirs*, 5 B. Mon. 99, and *Hopson v. Boyd*, 6 B. Mon. 296. In the first of these cases the alleged lunatic confirmed his deed after he had been restored to a sound mind, and the most that the court decided was that a conveyance executed by an insane person is not void absolutely, but is susceptible of confirmation by the lunatic when restored to sanity.

In the second case, a replevin bond was executed by a party who was acting as the agent of a supposed lunatic. Upon this bond an execution was sued out and levied upon a tract of land. The heirs of the lunatic sought to set aside the sale made under this levy upon the ground of their ancestor's lunacy. The court held that inasmuch as the judgment upon which the first execution issued was regular and valid, that the replevy was for the benefit of the debtor; that there was no fraud, oppression or unfairness in taking the bond or in making the sale; that the sale of the land was necessary to pay an honest debt, and was for a fair price, and advantageous to the lunatic. There was no sufficient reason shown for the interposition of the chancellor.

In the third case, the contract was free from fraud and unfairness, and was seemingly advantageous to the lunatic; and therefore the court decided that it should be upheld.

In the case under consideration, an insane married woman was induced to join with her husband in conveying away her patrimony. The husband, who should have protected the wife's interest, received and appropriated the whole purchase price. The sale was not intended to be for the benefit of the wife. Nothing whatever was secured to her out of the price paid for the land, and there is no reason, legal or moral, why she shall not now be allowed to avoid a transaction which was a fraud upon her rights, and which operated to reduce her to absolute want.

We are constrained to approve the judgment of the chancellor.

Judgment *affirmed*.

Pryor & Chamber, for appellants.
R. D. Handy, for appellee.

J. G. ARNOLD, ET AL., *v.* WILLIAM MAXWELL, ET AL.

Usury—Usury Under the Form of Commissions.

Interest in excess of ten per cent is usurious and cannot be recovered.

Usury Under the Form of Commissions.

Where the borrower receives less than the face of the loan, and is charged commissions and attorney's fees for negotiating the loan by the loanor, and for extensions of time, and it is made to appear that some of such charges are in fact collected as interest, they will be treated as usurious and cannot be recovered.

APPEAL FROM KENTON CIRCUIT COURT.

February 6, 1875.

OPINION BY JUDGE PETERS:

Conceding that the money loaned was Arnold's, and that by the contract with Foot he was entitled to 2 per cent. on the amount for negotiating the loan, still it is obvious that a greater rate of interest than 10 per cent. per annum was charged for the loan for the first and second year, and by Sec. 5 of an act entitled "An Act to amend Chap. 53 of the Revised Statutes, Title, Interest and Usury, approved March 14, 1871, 1 Sess. Acts, 1871, p. 62," the whole interest was forfeited.

The first note executed for the money borrowed was for $1,300, bearing 6 per cent. on its face, when it is admitted that appellees got only $1,222. So they paid interest on $78 that they did not get. And if the 2 per cent. claimed by Foot for negotiating the loan be allowed as proper, still they paid $52, as interest, and by paying that sum in advance, it exceeded the 10 per cent. which might have been legally charged.

The mortgage stipulated for the payment of an attorney's fee in case suit was brought for a foreclosure. In a few days after the first note matured, suit was brought to foreclose the mortgage, as was to be expected from the stipulation to pay the bounty for that service, and the fee was claimed therefor. Then a second charge is made for negotiating an extension of time for payment with Arnold, and a fee of $25 was paid to Foot for an abstract of appellee's title to the mortgaged property. The transaction presents the appearance of a device to procure the payment of interest at a

rate greatly in excess of 10 per cent per annum, and, to say the least of it, bears the impress of hardship and oppression.

The judgment must, therefore, be *affirmed.*

J. G. Carlisle, for appellants.
Simmons & Schmidt, Roberts, for appellees.

ANDERSON DUDLEY *v.* COMMONWEALTH.

Criminal Law—Homicide—Instructions.

Where three persons are jointly indicted for murder, and in the separate trial of one it is shown that he was present at the killing, and called on one of the others to kill the deceased, and struck him himself, even though the blow of the other perhaps was fatal, he is guilty as a principal and the court correctly refused to instruct the jury that the guilt or innocence of the defendant was to be determined by that of the other who struck the fatal blow.

APPEAL FROM FAYETTE CIRCUIT COURT.

February 8, 1875.

OPINION BY JUDGE PETERS:

Appellant having been indicted with Henry Henderson and Ki West for the murder of Patrick Riley, was in a separate trial found guilty of manslaughter by a jury, and his punishment fixed at fifteen years confinement in the state prison. The court below having overruled his motion for a new trial, and rendered judgment in conformity to the verdict of the jury, he has appealed to this court.

The learned attorneys for appellant insist that the court below, in instructing the jury, erred in failing to state to them in clear and explicit language that the guilt or innocence of appellant was to be determined by that of Henderson, who was, according to their theory, the principal.

All three of the persons named were indicted as principals, and it is clearly and satisfactorily shown by the evidence that appellant was present and actively participated in the combat. He not only called on Henderson, who perhaps struck the fatal blow, to kill Riley, but struck him with a stone on the head or neck himself, so that if the mortal wound was not inflicted by appellant's own hand, it was done with his avowed approval, and in anticipation of his own purpose. Instruction No. 3, given by the court on that point, was as favorable to appellant as he was entitled to have it. And after a

careful examination of the instructions given and refused by the court below, we have been unable to find any error prejudicial to appellant, and as no other grounds are relied upon for reversal except the refusal of instructions asked by appellant, and the giving of some objected to by him, the judgment must be *affirmed.*

Morton & Parker, Buford, for appellant.
J. W. Rodman, for appellee.

MISSISSIPPI CENTRAL RAILROAD COMPANY *v.* D. J. MUNCHISON.

Written Contract—Defense of Fraud in Execution.

Before plaintiff can be relieved from the terms of a written contract he must aver and prove facts showing his right to such relief. A judgment rendered in his favor against a railroad company for trespass will be reversed when not sustained by evidence.

APPEAL FROM FULTON CIRCUIT COURT.

February 11, 1875.

OPINION BY JUDGE PRYOR:

The appellee admits the execution of the writing exhibited in the appellant's answer, by which the former relinquished to the latter the right of way to the extent of one hundred feet for the construction of its railroad. It is now insisted that the writing, or its execution, was obtained by fraud on the part of appellant's agent; and upon this issue, the jury, from the facts and under the instructions given, rendered a verdict for $1,000 damages.

We have been unable to discover from the proof either fraud or mistake in its execution. The appellee signed the relinquishment, or rather directed the agent of the company to affix his name to it, after it had been fully explained to him. The most of this paper was printed matter, containing the terms and extent of relinquishment, and with this in the agent's hands, and the names of others affixed, and every opportunity afforded appellee to know what he was doing, he had his name affixed, and now says that he only relinquished eight feet of ground; and not only so, but he permits the company to make the bed of the road through his entire tract, and when completed instituted this action of trespass against the company for an alleged unlawful entry on his land.

The facts are so inconsistent with appellee's theory of the case

that, independent of the positive proof on the part of the appellant contained in the writing exhibited, as well as the statements of the agent and those who heard appellee's talk in regard to what he had done, there would be much hesitation in sustaining such a verdict. If the company has directed those in its employ, or without such direction, if, in the necessary construction of the work, and as incidental to it, the hands of the company have injured the land of appellant outside of the boundary relinquished, he has his remedy. He was certainly not entitled to recover for any trespass within the 100 feet for an injury to the soil within this boundary.

The judgment is *reversed* and cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

J. M. Bigger, for appellant.
H. A. Tyler, for appellee.

CITY OF PADUCAH *v.* L. Y. CRAIG.

Damages for Killing Dog—City Ordinance.

Where a city ordinance in its penal provisions provides that dogs unmuzzled may be killed, but the language of the ordinance is such as to apply only to the dogs of persons in said city, and does not in terms apply to non-resident owners, the city will be liable to such non-resident owners whose dogs are killed by city officers under such ordinance.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 12, 1875.

OPINION BY JUDGE LINDSAY:

The ordinance under which the city of Paducah claims that it had the right to cause the dog of appellee to be killed, provides that the mayor may, in his discretion, issue a proclamation ordering all dogs running at large within the corporate limits of the city to be muzzled, and to remain muzzled during the continuance of such time as the mayor may prescribe. It then provides that "all persons owning a dog or dogs in said city failing to comply with the provisions, and permitting his dog or dogs to run at large without being muzzled, the city marshal or any policeman is authorized to kill said dog or dogs." It is evident from this language used, that the penal portion of this ordinance is confined to the dogs of persons in said city.

It does not, in terms, apply to dogs owned by persons living out of the city, and as it inflicts the "death penalty without due process of law" its application will not be extended by implication. It results therefrom, as the answer of the city does not controvert the fact that appellee resides outside of the city limits, that it caused and procured his dog to be killed, that it presented no defense to the action. Every material averment stood uncontroverted, and the only issue to be tried was as to the value of the dog.

Upon that issue appellee was entitled to conclude the argument. The court did not err in giving and refusing instructions, and we cannot say that the value fixed upon the dog is so outrageous as to indicate that the jury was influenced in their action by passion or prejudice.

Judgment *affirmed.*

J. Q. A. King, for appellant.
L. D. Husbands, for appellee.

KELLEY SUTTON *v.* WILLIS HANCOCK.

Mortgaged Chattels—Removal—Attachment.

The removal, concealment or sale of mortgaged chattels gives the mortgagee a right of attachment only when the removal, sale or concealment endangers his ultimate security. He is not entitled to an attachment when enough property remains to amply secure him.

APPEAL FROM HENDERSON CIRCUIT COURT.

February 12, 1875.

OPINION BY JUDGE PETERS:

It is not every removal, concealment, or sale of a part of mortgaged property that will authorize the mortgagee to sue out an attachment against such property. It is only "for the security of his rights," Sec. 273, Civil Code, that the mortgagee may attach, and unless there is danger that so much of the mortgaged property will be removed, sold, or concealed as to endanger the ultimate security of the mortgage debt, he is not justifiable in suing out an attachment.

It does not appear in this case that the property not removed was

not amply sufficient to secure the appellant's debt, and for that reason, if for no other, the court properly discharged the attachment.

Wherefore the judgment is *affirmed*.

S. S. Sizemore, for appellant.
H. T. Turner, for appellee.

J. F. HARRIS *v.* J. G. HOLLOWINGS'S EX'R.

Usury—Pleading.

It is not necessary that a defendant plead the payment of usurious interest. If such facts are made to appear by plaintiff's statement they are sufficient, and defendant is entitled to credits on the debt to the amount of such usurious payments.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 12, 1875.

OPINION BY JUDGE LINDSAY:

Appellee's petition and exhibits show that the principal sum ($9,000) was by the contract of loaning to bear interest at the rate of eight per cent. per annum. The payment in advance of the first half of the yearly instalment embraced two per centum of usurious interest. The interests Nos. 1, 2, 3 and 4 that were paid at maturity, each embraced two per centum of usury, and so with notes Nos. 5, 6, 7 and 8, consolidated into the note for $1,429.69, bearing date March 28, 1872. Note 12 also embraced the same amount of usury, and we may presume from the petitions that Nos. 9, 10 and 11, each of which was so tainted, were each paid off in full. It is manifest, therefore, that if the usurious interest so paid had been credited on the principal sum at the date of such judgment, the judgment against appellant would have been for a much smaller amount. It was not necessary that appellant should plead the payment of usurious interest, and ask to be credited by them. They each and all appear from appellee's statement of his own case.

The statute in force in 1868, when the contract was entered into, provided that all contracts and assurances, made directly or indirectly for the loan or forbearance of money or other things, at a greater rate than legal interest, should be void for the excess. The amount loaned, with legal interest, may be recovered on any such contract or assurance. 2 Rev. Stats. 63. This is the limit of the

power of the courts to render judgments on such contracts, and they are bound to refuse to exceed such limit, when the facts are made to appear; and it is immaterial whether they are presented by the plaintiff or the defendant.

In law, each payment of usurious interest must be applied to the extinguishment of the principal debt, and as appellee, by his petition, furnished the court with the data from which to ascertain the amount legally due upon the contract, it was error to give judgment without applying the proper legal credits.

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

Thomas E. Moss, for appellant.
Henry Burnett, for appellee.

GROVER & BARKER SEWING MACHINE CO. *v.* N. A. GIBSON.

Written Contract—Admissibility of Evidence.

The consideration for the execution of a note may be shown by oral testimony, but such is not admissible to show that an unconditional promise to pay, reduced to writing, was not to be performed in a given state of case, unless fraud in reducing the contract to writing is alleged and proved.

APPEAL FROM HENDERSON CIRCUIT COURT.

February 13, 1875.

OPINION BY JUDGE LINDSAY:

Appellee avers that the consideration for the note sued on is a sewing machine, and the promise and agreement upon the part of the agent of the appellant to instruct his wife in the art and mystery of operating the machine. He avers further that the contract was that in case the agent failed to so instruct his wife within six months after the making of the contract, then he was to surrender the machine and receive back his note.

This portion of his answer should have been disregarded. It is an attempt to add to a written contract, without an averment of fraud or mistake in reducing it to writing. The consideration for the execution of a promissory note may be shown by oral testimony, but it is not allowable to show by such testimony that an unconditional promise to pay, reduced to writing, was not to be performed in a

given state of case, unless fraud or mistake in reducing the contract to writing be alleged and proved.

Appellee should have made the partial failure of consideration complained of, a counterclaim. It is not available as a defense, unless it be so relied on. The court erred in permitting the statements of the agent, Wilson, to be proved. They were no part of the *res gestæ*. He was not in the employ of the company when the statements purport to have been made, and they were proved as testimony in chief, and not for the purposes of impeaching his credibility. Judgment *reversed* and cause remanded for further proceedings consistent with this opinion.

Thomas E. Ward, for appellant.

THOMAS GREER *v.* JOHN WARBURTON'S EX'R, ET AL.

Judicial Sale—Purchaser of Real Estate—Estoppel.

One who buys real estate subject to a mortgage cannot remain quiet during a sale made as the result of foreclosure until after such sale is confirmed, and then more than eight years after an innocent purchaser has possessed it, have the sale set aside for any technical reason, or for any cause which from the records he knew or ought to have known at the time of the sale.

APPEAL FROM KENTON CIRCUIT COURT.

February 13, 1875.

OPINION BY JUDGE PETERS:

Appellant purchased from Thompson before the 20th of June, 1862, the day on which the judgment was rendered foreclosing the mortgage, and ordering a sale of a sufficiency of the property to satisfy the debt. Many of the facts relied upon in the numerous petitions so often repeated for relief, were known to him before the final judgment was rendered; and if they were not all known to him, he was ignorant of them from a failure to use proper and reasonable diligence.

He purchased a part of the property sold at the judicial sale; that sale was confirmed more than three months afterwards by appellant's sanction, as must be presumed, because he accepted a conveyance of the property purchased by him at that sale, and the same is still held under it.

Perrin's directions to the master as to the manner of making the

sale, were conformable to the law on the subject, while if he had pursued those proposed by appellant, he would have done so in violation of law; but even if it were not so, it is difficult to perceive how appellant is prejudiced thereby. His purchase from Thompson was subject to the mortgage incumbrance; and if the estates sold in Covington had brought less than the debt for which it was mortgaged, the estate in Cincinnati, which was also mortgaged to secure the same debt, must have been sold, but as a part only of the Covington property was sold for enough to pay the debt, appellant got under his purchase from Thompson the unsold property in Covington, and the house and lot in Cincinnati.

As to the unpropitious time for making the sale on account of the depressed prices of property growing out of the war, the purchasers of the property were not parties to the suit, and they were not instrumental in procuring the sale; besides, appellant had purchased from Thompson only a short time before the judgment for the sale was rendered. He made, as appears, a most advantageous purchase; and it may be that he would not be willing, on account of the depressed prices then growing out of the war, to give up his purchase.

But having purchased before the judgment of foreclosure and sale, and having notice of the pendency of the suit, if it was improper from any cause to make the sale, he should have asked to be permitted to come into the suit, and then make his objection; but he stood by and saw the sale made, and the purchases confirmed to the best and highest bidders, without exception or complaint for nearly eight years after the property has changed owners, and perhaps risen in value considerably, and then seeks to increase his speculation at the expense of innocent purchasers for value.

Wallace, the commissioner, proves that the original deed or mortgage was in the papers of the suit when he made the sale. All the objections to the deed on account of interlineations and erasures were known, or ought to have been known, then and before appellant made his purchase in Chicago. He resided in Covington, the muniments of Thompson's title were all where he resided, the original mortgage was in the last-named city in the records of the court. We must presume that before he made the purchase he examined into his vendor's title, and made himself thoroughly acquainted with it; and if he did not, he should not be permitted to throw the consequences of his own laches on innocent holders.

Moreover, it is not and cannot be controverted that Thompson

owed the debt to Warburton's executors; when or under what circumstances the alterations in the deed complained of were made, is not satisfactorily shown. The preponderance of the evidence is that the deed was twice acknowledged by the grantors, and that it was acknowledged in the condition it was in when the judgment was rendered for a foreclosure of the mortgage.

In any view of the case, therefore, the judgment must be *affirmed.*

Carlisle & Foote, for appellant.
Benton & Benton, for appellees.

W. W. HULINGS, ET AL., *v.* H. C. MCDOWELL, ET AL.

Receiver's Bond—Trust Estate—Pleading.

Before persons may maintain a suit against a receiver and his bondsman they must aver that they are creditors, and also that the fund sued for is not subject to the jurisdiction of the court in the receivership proceedings. A fund being administered by the chancellor cannot be sued for, recovered and appropriated in another suit by a portion of the parties to whom the fund belongs.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 15, 1875.

OPINION BY JUDGE COFER:

It appears from the petition in this case that prior to the 25th of May, 1863, George E. H. and Henry W. Gray made an assignment of their property, or at least of some of it, to Alfred Harris, in trust for their creditors; that Harris commenced suit in equity in the Louisville chancery court to sell some or all of the trust property, and to settle the trust. In that case judgment was rendered to sell a lot of ground embraced in the assignment or deed of trust, and it was accordingly sold on the 25th of May, 1863, for the sum of $900, and two bonds, for $450 each, were given by the purchaser for the price, both of which were collected by Thomas P. Smith, late receiver of the chancery court. The money thus collected was paid into a bank designated as the depository for funds in court. It was made the duty of the receiver to enter all money collected by him as receiver in a book which he was required to keep, to the credit of the particular case to which the money belonged; but Smith failed to enter to the credit of the case of Harris's trustee against Gray's

creditors, the sum of $481.20, collected July 21, 1864, on one of the bonds given for the price of the lot.

The appellants (plaintiffs) also allege that among the creditors of said George E. H. and Henry Gray were A. F. Clark, Jonathan Clark, Willis Frances, and Slaughter, Carpenter & Co.; that by the last report of the commissioners of the court in said case of Harris's trustee, which was approved, there was due and owing said persons, after deducting the dividend distributed by said report, the follownig sums, to wit: to A. F. Clark, the sum of $203.25, to Jonathan Clark, the sum of $646.20; to W. Francis, $247.39; to Slaughter, Carpenter & Co., $128.45, and that these persons had all assigned their interest in said cause of Harris's trustee, to W. W. Hulings, one of the plaintiffs, and that all of said sums remain due and wholly unpaid.

It is then averred that Smith, as receiver, executed a bond with the appellees and some others as his sureties, covenanting that he would faithfully discharge all the duties imposed on him by the rules of court; and as showing a breach of this covenant, it is further averred that Smith failed and refused to make the proper entries of the collection of the aforesaid sum of $481.20 on the proper books in his office, and that the direct inevitable consequence of such failure was that said sum of $481.20, which should have been distributed among the creditors in the case of Harris's trustee, and would have been so done, but for said fraudulent acts of said Smith as receiver, were paid out in other cases in which said Smith had collected money and appropriated it to his own use; that said Smith fraudulently failed to enter said payment of $481.20, for the purpose of using the same in payment of claims in other cases in which he was a defaulter.

To this petition the sureties of Smith answered, setting up and relying upon certain proceedings had in the Louisville chancery court in reference to the accounts of Smith as receiver; and they also denied that they had any knowledge or information sufficient to form a belief that the persons named in the petition as such are or were creditors of George E. H. and H. W. Gray.

The plaintiffs demurred to the second paragraph of the answer, which contained both the matters relied upon as a defense, to which we have first adverted, and their demurrer having been overruled, they elected to abide by it, and their petition was dismissed and they have appealed.

The only questions presented in argument were as to the constitutionality and effect of the act of assembly, under which the proceed-

ings relied upon in bar of the action were had; but it must be apparent that if the petition does not contain a statement of facts constituting a cause of action, no question as to the sufficiency of the answer can arise, and it seems to us equally clear that if that part of the answer demurred to contains a defense, no matter whether it be the particular defense intended by attorneys to be reached by the demurrer or not, that the order overruling the demurrer must be affirmed.

Unless the appellants are creditors of Grays, they do not claim to have a cause of action on Smith's bond, and hence it was necessary that they should allege that they were creditors; and as that allegation was a material one, the appellees had a right to deny it if they could; and if they were ignorant of the facts, they were not bound either to deny the allegation or to admit that it was true, but might deny that they had any knowledge or information sufficient to form a belief, whether the alleged fact was true or not, and this they did.

It is insisted, however, that the record of the case of *Harris's Trustee v. Gray's Creditors* would have shown whether the allegation was true or not, and as that record was accessible to the appellees, it was their duty to examine it, and either to admit or deny the allegation, as the result of an inspection of the record might warrant. The appellants referred to the record, which they say will show that they are creditors, and made it a part of their petition, and if they had filed a copy with the petition, or at any time before the appellees filed their answer, and it had appeared from the record that appellants were creditors, we incline to the opinion that they could not have answered by simply denying any knowledge or information as to a fact thus conclusively established. But if this were not the case, we are still of the opinion that the petition was insufficient.

The appellants do not allege that they are the only creditors of Grays, but by saying that among the creditors were certain named persons, they show that there were other creditors besides those named.

It does not appear from the petition what were the terms of the assignment made by Grays. The petition therefore failed to show that the appellants were damaged one cent by the alleged delinquencies of the receiver.

It also failed on other grounds to show a cause of action. It does not appear whether the assignment was made for the benefit alike of all creditors of Grays. For all that is alleged, there may have been

preferred creditors who were unpaid, and whose debts would consume the whole fund, and in that case the appellants had no interest in it.

Unless, conceding all the allegations of a petition to be true, it is certain that the plaintiff has a right to recover, unless defeated by a plea of confession and avoidance, the petition is insufficient. An answer by the appellees that there were other creditors who were entitled in preference to the appellants, would have shown that they had no right to recover; and yet such an answer would neither controvert any fact alleged nor confessed and would avoid the appellants' case. It results that the petition was defective on this point.

Another objection equally fatal to the appellants' case is, that it does not appear but that the suit of Harris's trustee against the creditors of Grays, still pending, and the fund sued for are still subject to the orders of the court in that case, and it would be strange indeed if a fund, being administered by the chancellor, could be sued for, recovered and appropriated in another suit by a portion of the parties in the suit to which the fund belongs.

It is true, as a general proposition, if the rule is not universal, that a fund in the hands of a receiver cannot be sued for without leave of the court, until the court has disposed of it and ordered it to be paid out.

Other objections to the sufficiency of the petition exist, but it is deemed unnecessary to discuss them.

We decline to express an opinion as to either the constitutionality or effect of the act of assembly referred to, because there is no necessity for it in this case, and anything we might say on that subject would be extra-judicial, and for the further reason that because of the sufficiency of the second paragraph of the answer taken as a whole, and because of the insufficiency of the petition, we would be compelled to affirm the judgment although we might decide the act to be unconstitutional, or that it did not, if constitutional, operate to bar a suit on the receiver's bond.

Wherefore the judgment is *affirmed*.

Fred B. Cochran, for appellants.

Mix & Boothe; Barr, Goodloe & Humphreys, for appellees.

WOOLSWORTH HANDLE WORKS *v.* S. LITTLEFIELD.

Principal and Agent—Evidence.

The statement of an agent that he is acting as such is not competent to prove the agency unless brought home to the principal.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

February 16, 1875.

OPINION BY JUDGE PRYOR:

The evidence before the jury did not authorize the verdict. There is no proof showing that either Hogg or Wanimer had authority from appellant to assume the debt due or owing appellee by Hogg. The statement made by Hogg that he was the agent of appellant is incompetent as against the latter, and so in relation to Wanimer. The power, if given to Wanimer, conferred upon him no authority from the company to settle this debt; and although it is shown that he exhibited another letter of attorney more comprehensive than the one found in the record, still there is no evidence that appellant ever executed it. The statement of an agent that he is acting as such is not competent to prove the agency unless brought home to the principal. The evidence of Chester is that the agent had no such authority, either verbal or in writing; and the only evidence before the jury was the statements of parties who preferred to be agents, with an entire absence of proof showing that any such agency existed, except such as is to be found in the paper made part of the record. The judgment is *reversed*, and cause remanded with direction to award the appellant a new trial, and for further proceedings consistent with the opinion.

W. D. Greer, for appellant.

ISAAC COOPER, ET AL., *v.* C. F. THOMAS, ET AL.

Damages—Measure of Damages—Exceptions.

In a damage suit plaintiff is entitled only to recover for damages sustained prior to the commencement of his action.

Measure of Damages.

In an action for damages for injury to a building, the plaintiff is entitled not only to recover the cost of repairing the injury, but also for any diminution in the value of the use of the property resulting from such injury.

Exceptions.

To be available on appeal an exception to the action of the court in giving instructions asked for by appellees, must be taken at the time, and not after the motion for new trial had been overruled.

APPEAL FROM KENTON CIRCUIT COURT.

February 18, 1875.

OPINION BY JUDGE COFER:

Even if the refusal of the court to strike out that part of the petition indicated by the motion of appellants, or its refusal to allow the amended answer offered by them to be filed, was erroneous, yet the error did not prejudice their rights, or prevent them from having a fair trial. The court, in instructing the jury, told them that they could not find for the appellees except for damage sustained prior to the commencement of the action.

The barrier put up by appellants to prevent the snow and ice from falling off the church on to appellees' house was not erected until after the commencement of the action, and evidence showing its sufficiency was therefore properly rejected as irrelevant.

The appellants failed to except to the action of the court in giving instructions asked for by the appellees until after their motion for a new trial had been overruled.

The objection made by appellants to the giving of the instructions is not sufficient, because, as said by this court in *Poston v. Smith's Ex'r,* 8 Bush 589, it "is not such an exception as is required by the Code, for the reason that no exception is made available until the court renders the decision upon the legal question involved, and then it is proper to make the exceptions." The same distinction was recognized in *Cox v. Winston,* 3 Met. 577.

The only instruction asked by the appellants and refused by the court was properly rejected. It required the jury, before they could find for the appellees, to believe from the evidence that the injury to their house was in consequence of the defective construction of the church edifice, and it restricted the recovery to the cost of putting the building in the same state of repair it was in before the injury occurred.

It was immaterial whether the falling of the snow and ice on to appellees' house was occasioned by defective construction or not. No matter how well or how carefully appellants' church may have been erected, they were responsible for the actual damage sustained by the appellees in consequence of the falling of large bodies of snow or ice off their house, on to the house of their neighbor.

If appellees had a right to recover anything, they had not only a right to be reimbursed the actual cost of repairing the injury done in consequence of the fall of snow and ice, but also to recover for

any diminution of the value of the use of the property, resulting from such injury. The evidence tended to prove not only that the value of the use was actually diminished by the injury done, but that it was also diminished by the impending danger during the whole of the winter season.

The injuries to the appellees' property were of that character, which it is the peculiar province of the jury to estimate; and as they not only heard the evidence which is before us, but made two visits to the buildings, and had an opportunity to judge for themselves of the nature and extent of the damage done, we cannot say that their finding was exorbitant.

Wherefore the judgment is *affirmed.*

Benton & Benton, M. J. Dudley, for appellants.
Charles Eginton, for appellees.

MCCLELLAN MANZEY, ET AL., *v.* WILLIAM H. GIRVIN, ET AL.

Decedents' Estates—Property Set Off to Widow.

Where a decedent left suviving him children by a former marriage, also a widow and children by her, and during the life of the widow certain personal property was set off to her as exempt, and the widow then died, the children of her body alone were entitled to such property.

APPEAL FROM McLEAN CIRCUIT COURT.

February 19, 1875.

OPINION BY JUDGE COFER:

Shelton Manzey died, leaving a widow and two infant children residing with her, and also three adult children by a former marriage. Certain articles of property, belonging to the estate of the deceased husband, were set apart by the appraisers as exempt from distribution; and the widow having died shortly thereafter without having disposed of the property, leaving her two infant children surviving her, and the oldest, a daughter, having married since her mother's death, she and her husband, and all of the daughters of Shelton Manzey by his first marriage, brought this suit against the other infant child of Mrs. Manzey, and the other children of said Shelton, for a partition of the property which had been set apart by the appraisers of his estate.

The circuit court being of opinion that the property should be treated as a part of the estate of Shelton Manzey, adjudged that his five children were each entitled to an equal share thereof, and from that judgment the infant has appealed, and his counsel insists that the other child, who was an infant at the death of her mother, having married, he is now entitled to the whole of the property.

Both Manzey and his widow died before the General Statutes went into effect, and the rights of the parties in this case must be governed by the provisions of the Revised Statutes, and the amendments thereto. By the provisions of Sec. 11, of Chap. 30, of the Revised Statutes, the property directed to be set apart to the widow of an intestate vested in her, for the use and benefit of herself and the infant children of the intestate residing with her.

Being vested with the title to the property for the use and benefit of herself and infant children, Mrs. Manzey, no doubt, had authority to dispose of it, but not having done so, it vested at her death in the two children for whose benefit she held it, and should be divided between them to the exclusion of the other children of her husband.

Wherefore the judgment is *reversed,* and the cause is remanded with directions to dismiss the petition so far as J. T. Girvin and wife are concerned, and to divide the property set apart by the appraisers of the estate of Shelton Manzey, which remained in possession of the widow at her death, equally between the plaintiffs, W. H. Girvin and wife, and the defendant, McClellan Manzey.

J. C. Jonson, for appellants.

EMILY NELSON, ET AL., *v.* GEORGE W. ROSE, ET AL.

Decedents' Estates—Release of Claim to Defraud Creditors—Dower.

A person having a claim against an estate cannot release it or give it away, so as to defeat the right of his creditors.

Dower.

Before a judgment can be rendered awarding dower to the widow, the children must be parties to such action.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 20, 1875.

OPINION BY JUDGE COFER:

The appellant, Emily Nelson, has no legal right to complain that

the debt due her from the estate of her husband has been subjected to the payment of her debts to the appellees. If the fund had been released by her to her children she has no longer any legal interest in it; and if it still remains hers there seems to be no reason why her creditors should not subject it to the satisfaction in part of their debts.

She does not say when or upon what consideration she abandoned her claim to the debt due her from the estate, and we cannot concur with her counsel that she had a right voluntarily to surrender the claim to her children, so as to defeat the rights of her creditors. Nor can we perceive any legal ground upon which she can resist the effort of her creditors to subject her dower interest to sale to satisfy their judgments. If she had made an effectual surrender of her dower before the appellees commenced their suit, or if she was not entitled to dower, she is not prejudiced by the judgment subjecting it to sale. The children, if they had been served with process, might have raised the question whether she was entitled to dower, or they might have shown that she had made a valid surrender of her dower to them; but as they are not served with process, they are not affected by the judgment subjecting it to sale.

But they were necessary parties, and should have been brought before the court before a judgment was rendered to allot her dower, for this is a subject in which they have a joint interest with their mother, and no allotment of dower can be legally made until they are brought before the court. Although some of the children are infants, and not having been before the court below cannot appeal from the judgment without the intervention of a next friend in this court, which has not been had, yet there is enough in the record to show one of them, Matthews Nelson, is an adult, and as he is an appellant, and had a right to be before the court before an order was made to allot dower to his mother, the judgment must be *reversed* for the error in making the order before the heirs of H. L. Nelson were brought before the court.

So many of the heirs as were twenty-one years of age on September 8, 1874, the date at which the record was filed in this court, have entered their appearance and need not be served with process; but those under that age at the time should be brought before the court, and they should be allowed to present any defense they may have to the action.

We perceive no error in the judgment against Moore, which judgment is *affirmed*. But the order directing dower to be allotted is

reversed, and the cause is remanded for further proceedings in conformity to this opinion.

Weir & Son, for appellants.

M. G. POPE *v.* JOHN TERRY'S EX'R AND CITY OF LOUISVILLE.
S. C. HEPBURN *v.* SAME.

Highway—Street Improvement—Assessment—Damages to Adjoining Property by Improvement.

Where a grantor conveys to a turnpike company a right of way, the consideration being the improvement of grantor's property by the building of a turnpike, and the further fact that grantors should be allowed to travel thereon without paying toll, and afterwards said turnpike becomes a city street, the contract between the grantor and the company does not so bind the public as to exempt her heirs and vendees from paying assessments for improving such street.

Damages.

In a cross-petition for damages against the contractor and city, where it is not averred that the street has been so constructed or the work so done as to cause the water to flow over her lands, no cause of action is stated.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 23, 1875.

OPINION BY JUDGE LINDSAY:

The principal ground of defense relied on in these two causes is that Baxter avenue is not a "public way" within the meaning of that term as used in Sec. 12 of the city charter. It certainly is a road or public highway. It is within the corporate limits of the city. It is by the express language of said section subject to the management and control of the city, provided the right to manage and control it can be exercised without an invasion of some private right. The purchase from the turnpike company invested the city with the title to the road or highway as against that corporation. It only remains to be determined whether Merton's heirs have any such interest in, or title to the roadbed as precludes the city government from managing, controlling and improving said avenue pursuant to the provisions of the city charter.

Mrs. Caroline H. Preston, by deed of conveyance, regularly executed and delivered on March 26, 1832, granted, bargained and

sold to the Louisville Turnpike Company "the right and privilege and fee" to the strip of sixty feet of ground upon which it subsequently constructed its road. The consideration for the conveyance was one dollar in hand paid and the advantage the construction of the turnpike road would be to the grantor's lands. This conveyance has since been repeatedly recognized by the heirs of Mrs. Preston, who have claimed and accepted all the advantages accruing to them from the conditions of the grant, including that of an alleged oral agreement that they should be allowed to pass and repass upon the road without the payment of toll. We will not stop to inquire as to the exact nature of the estate the company acquired in the roadbed by virtue of this conveyance. It certainly did acquire for the benefit of itself, and its lawful successors, a use in and a right of way over the land, to be held and enjoyed forever, or so long as the use or right of way should be devoted to the purposes of a public highway. The city is the lawful successor of the turnpike company. It is now devoting and it purposes for all time to come to devote the strip of ground to the purpose for which it was granted. It has merely exercised the right of transforming a turnpike road into a street, over which Preston's heirs and all other persons are allowed to pass without the payment of toll. The city, in the exercise of an expressly delegated power, purchased from the turnpike company its use in, or right of way over this ground. If the company had refused to sell, the city would have had the power and authority to acquire title by the condemnation of such estate in the lands as was held and owned by the turnpike company. Sec. 10, City Charter.

The city was not bound to purchase, nor would it have been compelled to condemn any greater estate than was necessary for the accomplishment of its ends. A use in the lands is all that is requisite, and, therefore, if it be true, as matter of law (a question which we do not decide), that the fee remains in Preston's heirs, still the city holds such an estate in the land as to authorize it to manage, control and improve Baxter avenue, as other public ways are managed, controlled and improved under the provisions of its charter. The duty imposed upon the turnpike company by the 12th section of its act of incorporation, of keeping its road in repair, was intended for the public good, and not for the benefit of those grantees, who might be induced to grant to it the right of way. The city has now undertaken the performance of this duty, and is proposing to provide for the payment of the expense thereby incurred in the manner prescribed by the 12th section of its charter. The contract

between the turnpike company and Mrs. Preston does not so bind the public as to exempt her heirs and vendees from the burdens imposed upon property holders in the city for the improvement, reconstructing and the keeping in repair the public streets upon which their property binds.

So soon as the city, in the exercise of its power, acquired title to the turnpike road, and converted it into a street, every person owning real property constituting part of any quarter-square binding on such street, became at once liable to be assessed for the cost of any improvement that the city might deem it necessary and proper to make in the original construction, or in the reconstruction of the new public way.

Mrs. Pope made her answer a cross-petition against the contractor and the city, and asked a judgment for damages upon an alleged counterclaim growing out of the manner in which Baxter avenue had been improved. "She says that plaintiff making the improvement of Baxter avenue so constructed it so that all of the surface matter running on said avenue from the intersection of Broadway and Baxter avenue south, and from the city limits north, will empty into and run through that part of her lot which lies next to the Newbury turnpike." She then describes the manner in which the water runs through her land, the difficulty of controlling it, and her inability to protect her property against its alleys. She claims that "she has already been injured at least $1,000 by said surface water, which has been thrown upon her lands as aforesaid."

Terry's representatives demurred to this cross-petition so far as it sought relief against them, and their demurrer was sustained. The city answered, and upon final hearing the cross-action against it was dismissed without prejudice. The cross-petition as to Terry's executors was fatally defective. Although it is alleged that the improvement was so constructed as that the surface water running from the intersection of Broadway on the south, and the city limits on the north "will run through" Mrs. Pope's lands, it is not alleged that the street has been so constructed or the work so done as to cause the water to flow upon her lands. The cross-petition does not show that the grade of the turnpike road has been altered so as to change the flow or increase the volume of the surface water, nor that anything done by the contractor or by the city has caused one drop of water to flow over appellants' land, that would not have flowed over it if the work had not been done.

Mrs. Hepburn sets up the same character of cross-action. She

says that the street is so constructed that certain surface water "will empty into and run across her aforesaid land," to her great damage, etc., and that the improvement now causes all the water on Baxter avenue to run on and through her land. Her cross-petition, like that of Mrs. Pope, is defective, and the demurrer of Terry's executors was properly sustained. The cross-actions attempted to be asserted against the city, even if its answers cure the defects in the cross-petitions, are not germaine to these proceedings. Appellants do not set up a state of facts showing that they have joint causes of action against the contractor and the city; therefore a judgment against the city could not be set off against either of the contractor's claims. Besides, the proof shows that if either appellant has sustained damage, it is a consequential injury resulting from the work itself, and not from the manner of its execution. It shows further that if any such damage has been sustained, it results in part from the grading and passing of East Broadway street in Henning's and Speed's Highland addition. Neither the cross-petitions nor the proof can be regarded as making out against the contractor a claim to damages in behalf of either of appellants. There is still another reason why these claims should not have been asserted in these actions. They are for unliquidated damages, which ought in all cases to be assessed by a jury. The chancellor should not undertake to settle such questions in any state of case unless they are so intimately connected with the subject-matter of the main issue that he cannot avoid doing so.

The amendment to Sec. 125, of the Civil Code, was not intended to authorize such cross-actions as these in proceedings in equity. The claims asserted by the cross-plaintiffs against their co-defendants, do not necessarily affect the actions of Terry's executor, and do not owe their existence (if they do exist) exclusively to the work done and performed by the contractor. We do not regard them as the proper subjects for cross-actions, under the circumstances of these cases.

Without expressing an opinion as to the sufficiency in law of either of the cross-petitions, or as to the character of the proof offered to sustain them, we adjudge that their dismission without prejudice does not so injuriously affect the substantial rights of the appellants as to authorize the reversal of the judgments complained of.

Appellants raise no material issue by their pleadings except the two already considered. The judgments against them must, there-

fore, be *affirmed* upon their appeals as to Terry's executors, and also as to the city of Louisville.

Barr, Goodloe & Humphrey, for appellants.
Caruth & Lieber, Y. L. Bunnell, for appellees.

WILLIAM PRESTON, ET AL., *v.* CHARLES OBST.

Street Assessments—City's Exorbitant Assessments—Pleading and Proof.

Private property cannot be confiscated through exorbitant assessments, but it is always presumed that the property taxed is benefited at least to the extent of the assessment, and the taxpayer resisting the collection on this ground must aver and prove facts showing that his property is not so benefited.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 23, 1875.

OPINION BY JUDGE LINDSAY:

The first objection urged to appellee's claim is that the ordinance provides for the improvement of only a portion of the alley. Sec. 12 of the city charter authorizes public ways to be improved "as may be prescribed by ordinance," and there is no limitation upon the power of the general council to designate by ordinance what part of the public way shall be improved.

The second objection urged is that the ordinance or resolution assessing and apportioning the cost among the property owners, was erroneous, because the tax district did not comprise one-fourth of a square. This error was corrected by the vice-chancellor; but appellant insists that he had no power to make the correction, because the apportionment is in the nature of a legislative act. The taxes necessary to pay the cost of a street improvement are not imposed by the general council nor the courts. The legislative enactment, to which the municipality owes its existence, rewarded by any municipal ordinance, imposes upon the property owners the duty of paying their proportions of the expense "incurred in making an improvement, when it has been made pursuant to the provisions of the city charter." *Broadway Baptist Church, et al., v. McAtee & Casselly, et al.,* 8 Bush 508. In apportioning the costs among the taxpayers, the general council ascertains who are liable to pay and the amount imposed by law upon each person who is liable. The correction of the apportionment and the ascertainment of who are legally liable to the tax, are the performance of acts *quasi*-judicial

in their nature, and may be properly performed by the chancellor. In the Broadway Baptist Church case, the apportionment was held to be a ministerial act, subject to judicial revision. 8 Bush 508. The limits of the tax district were corrected according to the plan indicated by appellant's, Preston's, principal witness, and redounded greatly to her advantage. We regard the apportionment as correct, and are of opinion that neither of the appellants can complain on account of the action of the chancellor in that regard. No objection was made to the apportionment of the assistant engineer as a special commissioner, and no reason personal to him is now suggested why this report should not have been confirmed and made the basis of the vice-chancellor's apportionment.

The third objection is that a personal judgment ought not to have been rendered, and that no interest should have been allowed. The question as to the personal liability of the taxpayer was considered in the Baptist church case, and this court held him to be personally liable. Under the peculiar provisions of the city charter, such being the case, when he refuses to discharge a personal liability, he has no right to complain at being required to pay interest from the date of his default.

The fourth objection is that the assessment is so exorbitant as to show a virtual confiscation of Preston's lots. The presumption, in all cases, is that the property taxed is benefited, at least to the extent of the assessment against it. The taxpayer, resisting the payment of his tax on the ground that it is not so benefited, must raise the issue by his answer. .No such issue is raised in this case. Appellant Preston insists that he should have recovered on his counterclaim. He says that he was greatly damaged by the wrongful acts of appellee, which consisted in his entering upon appellant's lots adjoining the alley, and in erecting embankments and supports for the fill constructed in the alley, and in leaving on said adjoining property great quantities of earth. At most, the entry upon the unoccupied lots would entitle appellant to the nominal damages, and the proof that he adduced tends to show that the placing and leaving earth on the lots was an advantage, rather than an injury, to them, Neither of the appellants prosecuting an appeal on this record are entitled to a reversal. Wherefore the judgment against Preston, Gross, Schmitt, Meyler and Eckstel Kemper, Bede Kemper, Litch, Otto, Haag, Vonseggen & Jefferson, and each and all, are *affirmed.*

Barr, Goodloe, Humphreys, for appellants.
Hanson, M. Grain, for appellee.

SALLIE DUNCAN *v.* MARY E. DORSEY, ET AL.

Contracts Made with Infants—Enforcement.

A contract made with an infant cannot be enforced for the sale of his real estate by proving the declarations of the infant, prior to his arriving of age, to the effect that the consideration had been fully paid, and without showing that the contract was beneficial or that the wants of the infant required the sale to be made.

APPEAL FROM HARDIN CIRCUIT COURT.

February 23, 1875.

OPINION BY JUDGE PRYOR:

John E. Dorsey being one of the parties in possession of the property claimed by appellant, and a defendant to the action, and against whom a recovery is sought, was an incompetent witness; and if competent, the whole testimony, when considered, did not authorize a dismissal of the action. The appellees are attempting to enforce this contract made with an infant for the sale of his real estate, by proving the declarations of the infant prior to his arriving at age, to the effect that the consideration had been fully paid, and without showing that the contract was beneficial, or that the wants of the infant required that the sale should be made; and even if these facts appeared, the chancellor would hesitate before determining that under such circumstances the sale by the infant should be confirmed. The guardian of the infant had means in his hands at the time this sale was made sufficient to supply all his demands, and he seems not to have been consulted as to the propriety of making the sale.

It is also remarkable, considering the testimony of John Dorsey as in the case, that all these payments should have been made to the father of the appellant when he was under age, and the chances taken for his making the conveyance after arriving at his majority, and the more so when the purchaser failed even to take a receipt for the payment, when he assumes to have paid the whole amount. Such proof of payment, in any case, would be regarded with suspicion, and the chancellor, before he would enforce such a contract made with one under age, must have evidence more satisfactory than is to be found in this record, both as to payment and ratification. The evidence shows conclusively that the infant obtained a horse of the value of $150. This amount should be accounted for.

The judgment is reversed and cause remanded with directions to adjudge to the appellant, and her mother, also, who has dower in the

same, the one undivided half of the house and lot in controversy, and requiring the parties in possession, defendants to the action, to account for the rent, whilst they have had possession of the beneficial use of the property, allowing them such sums as were expended in making necessary repairs, if any were required to preserve the property from decay. From the rents will be deducted the sum of $150, with interest from the time the horse was received, and if these rents will not satisfy the same, the interest of the infant will be rented out until the same is paid, or if the property is indivisible the whole property can be sold and the proceeds divided according to the rights of the parties.

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

Judge Cofer not sitting.

W. H. Merriatt, for appellant.

JAMES S. JACKSON, ET AL., *v.* A. J. GRAVES, ET AL.

Attachment Bond—Damages—Malice—Measure of Damages.

Punitive damages cannot be recovered in a suit on an attachment bond, except upon proof showing that obtaining the attachment was malicious and without probable cause.

Measure of Damages.

Where in a suit on an attachment bond the plaintiff fails to show that defendant in obtaining the attachment acted with malice and without probable cause, but where the attachment was dissolved solely on the weight of the evidence, the measure of damages that may be recovered is the damage to his property by reason of the seizure or such actual damages as was the result of the seizure.

APPEAL FROM DAVIESS CIRCUIT COURT.

February 24, 1875.

OPINION BY JUDGE PRYOR:

It is manifest from the evidence that the original action instituted by the appellants to recover of the appellees damages by reason of an injury to appellants' mill and dam, was not induced by reason of any malice on the part of appellants. The right of recovery was only defeated by a preponderance of testimony on the part of the appellees; and the testimony was so equally balanced on the issue,

as to have authorized the court to have sustained the verdict, if rendered for either party. It is not every failure to make out a cause of action by the proof, that evidences malice on the part of the plaintiff; and certainly none can be presumed to exist where the right to recover is made manifest by the witnesses for the plaintiff, and the cause of action defeated only by the weight of evidence being for the defendant.

The only issue in this case authorizing punitive damages arises from the allegation that the obtaining of the attachment was malicious and without probable cause. It is not pretended that a recovery is sought by reason of any malice in the prosecution of the action; and it was, therefore, error to have instructed the jury that the plaintiffs were entitled to recover the extraordinary costs, including attorney's fees, expended by them in the defense of the original action instituted against them by the appellants. They were entitled to recover their cost in the defense alone of the attachment, in the event of proof showing malice and a want of probable cause.

The question presented by this record is, did the appellee succeed in establishing malice and want of probable cause on the part of appellants in obtaining the attachment? If the appellants, on the trial of their action, having given such evidence of their right to recover as would preclude the idea of its prosecution without cause, may nevertheless have obtained the attachment in order to seek and harass the appellees, when they knew that no grounds existed for adopting this summary proceeding, if this latter conclusion can be arrived at, there might be some reason for sustaining the judgment of the court below; but when it is conceded, as it must be in this case, that the action was prosecuted in good faith for the recovery of damages, and that the cause of action was fully made out by appellants' proof, we perceive no reason why, under the circumstances, appellants should not have believed that it was necessary to obtain an attachment in order to secure whatever judgment they might obtain. The testimony of one of the appellees is to the effect that no malice could have existed on the part of appellants, as they were entire strangers to each other.

That they were strangers to each other, and the appellants were entirely ignorant as to the pecuniary condition of the appellees, except the information given them by one of the appellees at the time the attachment was levied, clearly appears. The appellees, at the time, were leaving, or about to take from the county and state all the visible property, and all the property they owned, so far as

known to appellants, for the purpose of selling it. They had no other property in the country, and appellants, having, as they supposed, a cause of action based upon the testimony of those who were not discredited on the trial, acted as prudent men would have acted by obtaining an attachment in order to secure their claims. A delay on their part in prosecuting an inquiry to ascertain the solvency of the appellees would have resulted, if they were entitled to a judgment, in their losing or abandoning their claim in the logs that were then being taken from the state.

It does appear from the evidence that the claim asserted was for a greater sum than they were entitled to recover. The amount of damage sustained, if any, was then unknown to the appellants, and in instituting their claim and obtaining an attachment, they became liable on their bond to pay the appellees all damages they might sustain, in the event their action was wrongful. That the attachment was not issued for good cause has been determined by the verdict and judgment in the original action, and the discharge of the attachment. The appellees were entitled to recover such damages as they sustained by reasons of the attachment. The whole record of the action of the Jacksons against the appellee was admitted by consent as evidence in this case; and if the facts elicited on that trial had been offered in an action for malicious prosecution, as showing probable cause, there would be no doubt but what the defense would have been complete. The presumption must arise on the facts in this case that the appellants were prosecuting their action in good faith, and there is no evidence on the part of appellees rebutting this presumption.

It cannot be said in this case that there is an entire absence of probable cause, and that malice on the part of the appellants towards the appellees caused them to have the attachment issued; but on the contrary, not only does it appear that the claim of the appellants was sustained by three or four witnesses, and perhaps more, but that prior to obtaining the attachment the appellants consulted counsel, and submitted to them the whole facts of the case, and upon their advice the action was instituted and the attachment obtained. There is nothing in the record showing that this proceeding was instituted in bad faith, or the representations made to counsel untrue, for what appellants stated was made to appear by the testimony heard upon the trial; and although this testimony sustained the issue made, it was adjudged to be more than counterbalanced by that of his adversaries. The facts were such that if the jury had rendered a ver-

dict for the appellants, the attachment would have been sustained, the whole facts presenting a case where the plaintiffs have failed to succeed, not for the want of proof to sustain his claim, but for the reason that the testimony of the defendant preponderated over that of the plaintiff; and failing in his action, the attachment was discharged. The appellees failed to show a want of probable cause, whilst the appellants established its existence.

For this reason, our instruction should have been given excluding the consideration of the issue made by the original petition and answer from the jury. The question of probable cause is more a question of law than of fact; and where one is acting on the information of others, as in this case, when bringing an action or obtaining legal process, and is attempted to be made liable for a malicious prosecution, and the facts are such as the case should go to the jury, the jury should be instructed "that they are bound to presume that the defendant believed in the truth of the information on which he acted, unless it clearly appears from the evidence that this evidence was false, and that the defendant knew it to be so. 1 Hilliard on Tort 461.

There is no conspiracy or combination alleged to exist between appellants and their witnesses to injure the appellees or their property; and if this action can be maintained upon the proof offered to sustain the allegation of malice and want of probable cause, or even the want of probable cause alone, the result would be that this cause of action would arise in every case when a party proved to be unsuccessful in his action, and his attachment for that reason discharged. The amended petition filed by appellees presents the only cause of action in this record for which a recovery can be had. All the appellees can recover under it is the damages to their logs by reason of the seizure or such actual damages as was the result of the seizure. *Mitchell v. Mattingly,* 1 Met. 237. If the logs could not be sold by reason of the delay caused by the seizure, and they declined in value, the difference would be the value of the logs when seized and what they could have been sold for, including the cost of caring for them.

For the reasons indicated the judgment is *reversed,* and cause remanded with directions to award the appellants a new trial, and for further proceedings consistent with the opinions.

Sweeney & Stuart, Taylor, for appellants.
Williams & Brown, for appellees.

JOHN CASSELL'S HEIRS *v.* A. GAZELLO'S EX'R.

Statute of Limitations—New Promise.

There can be no recovery upon a debt upon a new acknowledgment of indebtedness after the debt has been barred by the statute of limitations; but the moral obligation to pay the debt will furnish the consideration of a new promise.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 24, 1875.

OPINION BY JUDGE PETERS:

The court has read more than once the ingenious and plausible petition presented by counsel for appellants for a re-hearing, in which it is insisted that the acknowledgment of Cassell of his indebtedness to Gazello is not made to the latter, and there is no promise to him to pay the debt proved.

Counsel do not make distinction between a demand actually barred at the time the acknowledgment is made, and the acknowledgment of a subsisting debt at the time.

In *Bell v. Rowland's Adm'rs,* Hard. 301, the earliest case in which the court entered upon a discussion of the statute of limitations, and reviewed the English and Virginia authorities on the subject, adopted the rule that in order to take the case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at the time (coupled with the original consideration), or an express promise to pay it, must be proved to have been made within the time prescribed by the statute; and that rule has been adhered to from that time to this in similar cases.

In Harrison v. Handley, 1 Bibb 443, the rule adopted in *Bell v. Rowland's Adm'rs, supra,* is approved, and the court then said: "Where the limitation has run, to get clear of it the whole burden of proof is thrown on the plaintiff to prove a good and subsisting debt, and a promise to pay, within the period prescribed to his action," showing conclusively that the rule prescribed is applicable alone to cases where the bar is complete.

In *Head's Ex'r and Ex'x v. Manner's Adm'rs,* 5 J. J. Marsh. 255, this court, Chief Justice Robertson delivering the opinion, gave the reason for the rule. He says:

"After the debt had been barred by time, the debtor, by pleading the statute, can prevent a judgment against him on the original contract. The contract is then dead. It can never be revived. The

debt, so far as it was merely legal, is extinguished. But as there may be a moral obligation to pay, the debt, not the original contract, may be revived by a new contract based on this moral consideration."

All the authorities to which we have been referred are cases to which the statutes have attached, in the language of Judge Trimble, and we are not aware of any case in which the rule has been applied where the original cause of action was not barred.

Under the old system of pleading to a plea of the statute of limitations, the plaintiff could by replication, traverse the plea; or if the original cause of action was barred, he could avoid the effect of the plea by alleging an express promise to pay within five years from the commencement of the action.

In *Trousdale's Adm'r v. Anderson,* 9 Bush 276, it is said: "When the right to recover upon the original contract is barred by the statute of limitations, and there has been a new promise to avoid this statutory bar, it constitutes a different cause of action, and upon which the action must be brought." And in such a case the new promise must be made, not to a stranger, but to the creditor or some one acting for him, and upon which the creditor is to act and confide.

The limit of the rule is to that class of cases where the debt was barred; if the rule is applicable to debts that are not barred, it is strange that it cannot, or has not been sustained by the production of or reference to some adjudicated case.

The petition is *overruled.*

Allen & Allen, for appellants.
Twyman, for appellee.

JAMES MILES *v.* COMMONWEALTH.

Criminal Law—Indictment.

An indictment for executing a forged note is fatally defective, when it fails to allege that the note was not a genuine note, or that the accused knew it to have been a forgery.

APPEAL FROM CAMPBELL CIRCUIT COURT.

February 25, 1875.

OPINION BY JUDGE PRYOR:

The indictment is fatally defective. There is no allegation or statement that the note executed on September 13, 1871, was not a

genuine note, or that the accused knew it to have been a forgery when he exchanged it for the note originally given. It is stated, by way of inducement, etc., that the accused falsely represented the note to be a year issue note, but it nowhere appears by any allegation that it was not such a note as the appellant represented it to be. The facts alleged, if conceded to exist, constitute no public offense, and the motion to arrest the judgment should have been sustained.

The judgment is *reversed* and cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with the opinion.

John S. Ducker, for appellant.
J. Rodman, for appellee.

JOHN W. KIDWELL, ET AL., *v.* R. T. HOUSTON.

Real Estate—Conveyance—Courses, Distances and Monuments.

Where a boundary line is to be determined between two land owners, courses and distances called for in the deed must yield to monuments or local objects called for in the description.

APPEAL FROM PENDLETON CIRCUIT COURT.

February 26, 1875.

OPINION BY JUDGE COFER:

The appellee claims title to the land in contest in this case under a deed from Daniel Coleman to John Montjoy, dated July 4, 1792, and the appellants claim it under a deed from James Coleman, one of the heirs of Daniel Coleman, to Alvin Montjoy, bearing date in 1825.

The circuit court decided that neither party had shown an available paper title, and we concur in that decision. John Montjoy entered under his deed claiming to the boundary thereof long before Alvin purchased, and was, therefore, in constructive possession to the extent of his boundary, and as neither party was able to show an actual possession of the *locus in quo* until the appellants entered thereon, within less than fifteen years before this action was commenced, the controversy had to be decided by ascertaining the true boundary of the deed to John Montjoy, up to which his constructive possession extended, in virtue of his occupancy within the boundary of his deed.

The deed call is to run from the mouth of little Kincade creek "N. 15 degrees, E. 380 poles, to a stake in the line of Coleman Goodwin, and thence S. 86 degrees, W. 485 poles, to two lynns" near Licking river. The land of Coleman Goodwin is conceded by all to lie south of that conveyed to John Montjoy; and it is also clear from the evidence that the north line of Goodwin and the south line of Montjoy run together a part of the distance of each. The evidence tended to prove that Goodwin's east line runs N. 30 degrees W., and if continued would run to the mouth of little Kincade creek, where John Montjoy's east line begins, and that Goodwin never had a line east of the point claimed by the appellants as their northeast corner. As John Montjoy's deed calls for a stake in Goodwin's line, the course called for in his deed must yield, if necessary to reach that line, unless the line as actually run to Mountjoy was located at some other place. If Goodwin's northeast corner is where appellants claim it to be, then, nothing else appearing, John Montjoy's line cannot run east of that corner, and the course called for in his deed must yield to the local object called for, to wit, a point in Goodwin's line.

The jury should, therefore, have been told, in effect, upon this point in the case, that the true line of John Montjoy ran from the mouth of the creek to a point not further east than Goodwin's northeast corner, and that unless the appellants were in possession of land on the west side of a straight line from the mouth of the creek to Goodwin's northeast corner, they should find for them, unless they believed from the evidence that the line when originally run was actually surveyed at some other place, in which event they would find such actual location to be the true line; and if appellants were in possession of land west of that line and north of Goodwin's corner, they should, as to that, find for the plaintiff.

The instructions given, especially the first asked for by the appellee, did not conform to this view of the law. In that instruction the jury were told, in effect, that if the deed to John Montjoy covered the land, they must find for the plaintiff. This was misleading. No one disputed that to run by its calls the deed would embrace the land; and when told that if the deed covered the land they should find for the appellee, the jury may have taken the instruction to mean what its language, taken literally, imported, and especially so in view of the refusal of the court to give the instruction asked for on this point by the appellants.

This error was not cured by the fifth instruction given by the

court. The evidence failed to disclose any monuments on the ground, which are called for in the deed, but there was evidence tending to show ancient marks on the line S. 30 degrees E.; and instead of telling the jury that they should "regard the marks and monuments upon the ground rather than the courses and distances called for in deeds and other writings," they should have been told as before indicated that the line as originally run was the true line, and that if run at a place different from that indicated by the course called for, the latter must yield.

The instruction asked by the appellants was substantially correct, and although not as explicit as it might have been, should have been given. For the errors indicated the judgment is *reversed,* and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

W. W. Ireland, A. J. James, for appellants.
J. W. Menzies, J. N. Furber, A. Duvall, for appellee.

J. L. CLEMMONS *v.* J. S. CONNELL, ET AL.

Mortgages—Junior Incumbrancer—Attorney's Fees.

Where attorney's fees are claimed by a mortgagee in a suit to foreclose his mortgage, a junior incumbrancer may, by pleading and proof, object to the attorney's fees and have the court to pass upon the same.

APPEAL FROM SHELBY CIRCUIT COURT.

February 26, 1875.

OPINION BY JUDGE COFER:

We cannot concur with counsel that the appellant had no opportunity to interpose objections to the attorney's fees claimed by the mortgagees, until the court came to render judgment in the case.

He might have done so either by his original petition, by an amended petition, or by a reply; for although the answers and cross-petitions sought no relief against him personally, they affected his interest as a junior incumbrancer; and he might have set up any defense that existed in favor of the mortgagor, and if he meant to resist the claim for attorney's fees should have done so by plea, and would then have been entitled to be relieved against those claims, unless some sufficient equitable reason for denying such relief could have been shown.

This court has never held that such agreements are void, but simply that they will be relieved against as imposing a penalty on the debtor for default in paying his debt, and, being regarded as a penalty, may be relieved against in the same manner and upon the same principles upon which relief will be given against other penalties of a like character.

Petition *overruled.*

Clemmons & Willis, for appellant.
Caldwell & Harwood, for appellees.

E. L. CANTRILL *v.* J. C. POOR, ET AL.

Appeal Bond—Clerical Errors in Appeal Bond.

Where an appeal bond is styled "Appeal from a judgment of T. R. Barnett, Judge, Green quarterly court," but it is recited in the body of the bond that it is taken from the judgment of the Green county court, a mere omission by the draftsman, it is held that a recovery may be had on such bond, notwithstanding such defect.

APPEAL FROM GREEN CIRCUIT COURT.

February 27, 1875.

OPINION BY JUDGE PRYOR:

It is evident that the appeal bond executed by appellee was not only intended, but was a bond executed in the circuit court, or rather before the clerk of that court, to supersede the judgment rendered in the quarterly court. The bond is styled "Appeal from a judgment of T. R. Barnett, Judge, Green quarterly court;" but in the body of the bond it is recited that the appeal is from the judgment of the Green county court, a mere omission by the clerk or draftsman, at best. Still, leaving the writing upon its face to show plainly the interest of the parties, and the court from which the appeal was taken, the demurrer admits the statements in the petition to be true. The bond is made part of it; and we think there is no doubt as to its sufficiency and the liability of the surety in the event the party appealing failed in the action.

If the bond was not even filed with the petition it would be no ground for demurrer; but the record shows that it was made part of the petition, and is now in the record. In *Kendall v. Russell,* 5 Dana 501, an authority referred to by counsel for the appellee, it is said: "The parties should be bound for what they intended to be

bound, and no more." This, we think, is good law, and it being manifest that these parties intended to execute a bond to obtain an appeal from the quarterly court, and did, in fact, execute it, the judgment is *reversed* and cause remanded with directions to overrule the demurrer to the petition, for further proceedings consistent with this opinion.

W. H. Chelf, for appellant.
J. C. Rush, for appellees.

HARRIET VAUGH, ET AL., *v.* J. H. NEELEY.

Judicial Sale—Mortgage Foreclosure—Judgment—Descriptions.

A judgment for the sale of land will be reversed where it does not in itself contain such a description of the land as will enable the master to find it without reference to the title papers.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

February 27, 1875.

OPINION BY JUDGE PETERS:

The evidence is insufficient to authorize the interference of the chancellor on the ground that the appellant, Harriet Vaugh, was, by duress or intimidation, induced to execute the mortgage. Nor can the contract be avoided on the ground that it was a compounding of a felony. Neeley swears that he never made any such charge against O. C. Vaugh, that he neither obtained nor applied for a warrant against him on any charge whatever.

Haggard proves he was a justice of the peace for Cumberland county, has some vague recollection of having issued a warrant against O. C. Vaughn, but has no recollection of what the charge was against him; he supposes it was issued upon the application and affidavit of some one, perhaps Neeley, but cannot certainly say; the process, whatever it was, has never been returned. And Baker, the constable, had some kind of process against him, but cannot say what it was, as he never read it. He went to Vaughan's once, and walked away and did not execute it. There is nothing, therefore, definite. or approximating to that certainty upon which to found judicial action.

But the judgment must be reversed for a failure to identify the land to be sold. This court has repeatedly held that a judgment for

the sale of land must, in itself, contain such a description of the land as will enable the master to find it without reference to the title papers. In this judgment, the master directed to sell the land described in the mortgage, or so much thereof as will pay the debt. And when that instrument is examined, it purports "The following described property," viz., lying on the left hand side of the Burksville & Lexington road about one mile and a fourth south of Burksville, beginning at the division line between Martin Baker and James Gilmon, at the river, thence, to the old Henry Carg corner, on the river, thence, to a branch on the left hand branch of said road, thence, with the meanders of the branch, to the division line, thence, with said division line to the beginning.

No courses nor distances are given; no place is identified as the beginning corner, and it would be impossible to find the land even with or without a surveyor. No quantity is named.

The judgment must be *reversed* and the cause remanded with directions for other proceedings consistent herewith.

Spenser & Allen, for appellants.
Craddock & Walker, for appellee.

J. L. SULLIVAN, ET AL., *v.* DANIEL NORRIS.

Contracts—Agency.

An agent cannot collect what is due his principal by discharging his (the agent's) own debts; the debtor in such a case cannot discharge his indebtedness to the principal by crediting himself with an amount owing to him by the agent.

APPEAL FROM HARRISON CIRCUIT COURT.

February 27, 1875.

OPINION BY JUDGE PRYOR:

The testimony on the part of the appellee established the fact that there was about one thousand pounds of tobacco in the lot that appellee was claiming, belonging to James Norris.

On the part of the appellants, there was proof conducing to show that nearly one-half of the tobacco claimed by the appellee belonged to James Norris. That appellee was the owner of the tobacco was expressly denied by the answer, and yet the jury were told that if the defendants (appellants) received the tobacco in the account of

sales filed with the petition to sell for the plaintiff (appellee), they must find for the paintiff the amounts for which the said tobacco was sold, less the costs, charges, etc.

This instruction, under the proof, was erroneous, for the reason that, although the appellants may have received the tobacco to sell for the appellee, still, if any part of it beonged to James Norris, the appellants had the right to apply the proceeds to that extent to the payment of what James Norris owed them.

The jury, from this instruction, was compelled to find for the appellee the whole of the proceeds of the tobacco, whether it belonged to him or not, and particularly when the court refused to instruct the jury that if the appellee was not the owner of the tobacco they must find for the defendant. The question as to who owned the tobacco, or the extent of James Norris's interest in it, was taken entirely from the jury, when it was conceded by appellee that he owned one thousand pounds, and when proof had been heard on the part of appellants tending to show that he had a greater interest.

As this question was taken from the jury, or not submitted to them, neither the appellee nor the court had the right to determine that question, and to adjudge, by abating the amount of the verdict, that what James Norris said in regard to this matter was true, and that the other witnesses were mistaken. This may have been the case, but if so, it was a question for the jury. The jury should have been told that if this tobacco belonged to the appellee, and was sold by appellants for the appellee, that the latter was entited to recover; or if the tobacco was intrusted by appellee, with James Norris as his agent, to sell or have sold, and the same was sold by appellants, the latter is liable to appellee for the amount of the proceeds unless the same had been paid to James Norris.

The jury, as the proof now appears, should also have been told that although they may believe from the testimony that James Norris was the agent of appellee, and had this tobacco sold for him by appellants, that appellants had no right to appropriate the proceeds to the payment of what James Norris owed them, and that such payment, if made, did not preclude the appellee from recovery, unless he consented that the payment should be thus made, or after it was made, ratified it.

An agent has no right to collect what is due his principal by discharging his (the agent's) own debts, and this rule applies, whether the party making such a payment knew he was the agent at the time

or not. If, from the evidence, any part of the tobacco belonged to James Norris, to that extent the appellants could apply the proceeds.

Judgment *reversed* and cause remanded with directions to award the appellants a new trial, and for further proceedings consistent with this opinion.

J. N. Turber, A. Duvall, Ward, for appellants.
E. Whittaker, for appellee.

ROBERT DEDMAN, ET AL., *v.* SAMUEL B. SCARCE.

Appeal—Bill of Exceptions.

An unsigned bill of exceptions is of no force or effect, and cannot be considered by the court of appeals.

APPEAL FROM WOODFORD CIRCUIT COURT.

March 23, 1875.

OPINION BY JUDGE LINDSAY:

The paper copied into the record, and termed by the clerk the "Bill of Exceptions," lacks the signature of the judge who presided upon the trial of the action. In this condition it does not conform to the provisions of Sec. 367, Civil Code of Practice. The defect is one of substance, and not merely of form.

The order of court, showing that appellant tendered a bill of exceptions, which was signed by the court and ordered to be filed and made a part of the record herein, neither cures the defect, nor authorizes this court to treat the paper as a bill of exceptions. As was held in the case of *Allsup v. Hassett*, 12 B. Mon. 128, this paper, upon its face, lacks an essential requisite of the instrument described in the order, and if absolute credence is to be given to the record entry that the bill was signed by the judge, then it is certain the paper copied by the clerk is not the paper so signed, and ordered to be made a part of the record. It is useless to speculate as to the possibility of the name of the judge having been erased or obliterated. There has been no attempt made to supply a defaced or an obliterated record. There is no pretense that this paper is not now in the exact condition it was when ordered to be filed; and the extraneous evidence presented by appellants show that it is in exact condition.

If the order should be treated as a consent order that the paper should be revised by appellee's counsel, and afterwards signed by the

judge, it would avail nothing. This agreement was not complied with, and the courts have no power to compel appellee to comply with it.

In case of *Kelsoe v. Ellis,* 10 B. Mon. 36, the judgment was rendered on the last day of the term. The paper intended as a bill of exceptions, and which was by agreement left open for correction, was not intended to be made part of the record, by the mere signing and sealing by the judge. The order contemplated that the bill, when corrected, signed and sealed, should be recorded. The recording was to be the final test of the paper's verity. We may presume, that then, as now, the orders of the last day of the term stood over and were not signed, until the first day of the succeeding term. In such a case, a bill of exceptions, put as any other order, entered erroneously, or not reciting accurately the facts upon which the determination was based, might be corrected before being signed. The orders, including the corrected bill of exceptions, were signed, and this court declined to allow the verity of the bill to be impeached by affidavits presented here for the first time. When appellant made the alleged agreement with appellee, through his counsel, he placed himself at the mercy of his adversary. The moral obligation resting upon appellee to comply with the agreement, is a matter with which we have nothing to do. The courts cannot enforce it. The agreement cannot operate as an estoppel. An incomplete record cannot be perfected by and through an estoppel. The unsigned bill cannot be made part of the original record by the bill, reciting the facts transpiring at a subsequent term.

We are compelled to determine that there is no bill of exceptions in the record, and must, therefore, *affirm* the judgment of the circuit court.

Turner & Huston, for appellants.
Porter & Wallace, for appellee.

S. E. HARDWICK *v.* DANIEL CROW, ET AL.

Married Women—Contracts.

The assignment of notes made by a married woman cannot convey title to the notes.

Contracts.

When the disabilities of a married woman are removed, she cannot be compelled to execute a contract entered into during the existence of her coverture.

APPEAL FROM POWELL CIRCUIT COURT

March 23, 1875.

OPINION BY JUDGE PETERS:

At the time the two notes on Crow were assigned by appellant to appellee, Clark, she was laboring under the disability of coverture, as she was when the house and lot were sold by Clark to her, and when she contracted to sell her land to Crow; and for the same reason that the contract for the sale of her land to Crow was set aside, the assignment made by her of the notes she held on Crow to Clark should have been set aside. When her disabilities were removed, she could not be compelled to execute a contract entered into during the existence of her coverture. The court, therefore, erred in rendering judgment against her for the amount of the two notes on Crow assigned by her to Clark.

As to so much of the judgment as allowed Crow credit for the $100 paid by him to Clark on his account for rents, it is approved. The evidence conduces to show that she put Crow in possession of the land, and the payment to Clark was by her direction; and it should be regarded as a payment to her. While a court of equity will relieve her of her contract with Crow because of her coverture, the court will not aid her to impose a wrong on him. He seems to have acted in good faith, and should be credited with the money paid for her benefit.

The judgment in favor of Clark for the amount of the two notes assigned to him on Crow, and the costs of the suits therein named against appellant, is *reversed*, and the cause is remanded with directions to dismiss Clark's petition against appellant.

Turner & Holt, for appellant.
J. B. Huston, for appellees.

TAFT & SON *v.* L. BARRETT & WIFE.

Conveyance to Defraud Creditors.

A voluntary and fraudulent conveyance, through another, by a husband to his wife, is void as against creditors of the husband, notwithstanding that the debt due such creditor was incurred after the date of such conveyance.

APPEAL FROM CAMPBELL CHANCERY COURT.

March 23, 1875.

OPINION BY JUDGE COFER:

The appellants brought this suit in the chancery court of Campbell county against Lawrence Barrett and his wife, Ellen Barrett, alleging that they had recovered a judgment at law against Lawrence and John Barrett for a bill of lumber, on which they had caused an execution to issue, directed to the sheriff of Campbell county, who had returned it no property found.

They further allege that on the 31st of January, 1870, Lawrence Barrett and his wife, without consideration, and with a view of defrauding the creditors of the said Lawrence, and with the intention to afterwards obtain credit for the lumber purchased by the said Lawrence and John Barrett of them, conveyed to one Collins a certain lot of ground situated in Newport, and on the next day the said Collins reconveyed the lot to Mrs. Barrett.

They sought to subject the lot to the satisfaction of their judgment. It appeared from the petition that the debt which was the basis of the appellants' judgment, was created in March, June and August after the date of the conveyance, and Barrett and wife demurred to the petition; and the demurrer having been sustained and the petition dismissed, this appeal is prosecuted to reverse that judgment.

The allegations are that the deeds were both voluntary, and actually fraudulent. Those averments must, for the purpose of the demurrer, be treated as true, and this being done, we have no doubt but that the petition was sufficient.

The first section of the act to prevent fraudulent conveyances, Chap. 40, Rev. Stat., declares "that every gift, conveyance, assignment, transfer of, or charge upon any estate, made with intent to delay, hinder, or defraud creditors, purchasers, or other persons shall be void as against such creditors, purchasers or other persons." Every conveyance falling within the purview of this section is void as to all creditors, whether prior or subsequent. *Edwards, et al., v. Coleman,* 2 Bibb 204.

The second section of the same chapter provides that every gift, conveyance, etc., without valuable consideration therefor, shall be void as to all the existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter contracted.

Under the English statute of 13 Elizabeth, which contained no such provision as that contained in the second section of our act, it was long made a question whether voluntary conveyances were not on that account alone fraudulent as to subsequent creditors.

In *Sexton v. Wheaton & Wife,* 8 Wheaton 229, it was insisted for the appellants that the statute of 13 Elizabeth was still in force in the District of Columbia, and that under that act a voluntary conveyance was *per se* fraudulent and void as to subsequent, as well as prior creditors; and chief justice Marshall thought it necessary to review the English cases in which that statute had been construed in order to show that the courts there had, but not without much doubt and hesitation, come to the conclusion that such conveyances were not void merely on account of being voluntary. No such question can now arise in this state, but the construction given to the English statute serves to make the meaning of our own clear. Indeed, the language would seem to imply that a fraudulent conveyance, although made to the wife or child of the grantor, is to be held void as to creditors.

The language is that if made without valuable consideration, it shall not on that account alone be deemed fraudulent as to subsequent creditors. When a conveyance is actually fraudulent, it falls within the denunciations of section one, and the circumstance that it is also voluntary, cannot avoid the consequence of the fraud in fact.

That a fraudulent conveyance is void as to all creditors of the grantor is not only maintainable upon the principles applicable to the English statute, and on account of the language of our act against fraudulent conveyances independent of authority, but this court has repeatedly recognized this rule. *Casby v. Ross,* 3 J. J. Marsh. 290; *Lyne, et al., v. Bank of Ky.,* 5 J. J. Marsh. 545; *Enders v. Williams,* 1 Met. 346; *Duhme & Co. v. Young, et al.,* 3 Bush 343; *Lowry v. Fisher, et al.,* 2 Bush 70. We are, therefore, of the opinion that the court erred in sustaining the demurrer to the petition. Wherefore the judgment is *reversed,* and the cause is remanded, with directions to overrule the demurrer, and for further proceedings.

E. W. Hawkins, G. R. Tearson, for appellants.
H. L. Smalley, for appellees.

from the plaintiff to the defendant. If the killing is admitted or proved, and there is no evidence as to the facts attending the occurrence, the plaintiff would be entitled to a verdict. When the defendant undertakes to rebut the *prima facie* presumption created by the statute, the jury should be left to decide on all the evidence offered, whether negligence and carelessness have been disproved. The presumption of law is not necessarily rebutted or overcome whenever evidence is introduced as to the circumstances under which the injury was done. The company must, in order to overcome the presumption, offer such evidence as will beget a belief in the minds of the jury that its agents and servants used such care to avoid the injury complained of as men of ordinary prudence and judgment would have used under similar circumstances, when their own interests were involved.

The appellee was permitted to prove his own declaration made before the killing of the colt, as to its pedigree. This was error. While pedigree may be proved as tending with other facts to show the value of stock, it must be proved by such evidence as would be competent to prove any other fact in issue in the cause; and it would have been just as competent to prove by the appellee's previous declarations the value of the colt, or any other fact relative to the case.

The appellant, while using the road, was liable in the same manner and to the same extent as if it had been the owner thereof.

For the errors indicated, and none other, the judgment is *reversed*, and the cause is remanded for a new trial, upon principles not inconsistent with this opinion.

P. T. Green, H. M. Buford, for appellant.
Morton & Barker, Smith & Shelby, for appellee.

J. B. MARTIN *v.* COMMONWEALTH.

Criminal Law—Indictment.

It is not sufficient in an indictment for obtaining money by false pretenses, to aver that the representations made were false, but it must be alleged in addition that the defendant knew them to be false.

APPEAL FROM ADAIR CIRCUIT COURT.

March 25, 1875.

OPINION BY JUDGE COFER:

It is not sufficient in an indictment for obtaining money or prop-

erty by false pretenses, to allege that the representations made were false, but it should be alleged in addition that the defendant knew them to be false. Nor can the necessity for such allegations be dispensed with by the averments that the representations were unlawfully and feloniously made. These allegations serve no other purpose except to show the intent with which the representations were made.

Nor is the general allegation that the representations were false, sufficient. The representations made should be stated in the indictment, and it should then be charged that they were false, and were known by the defendant to be false. That the representations are false did not necessarily make the defendant liable to a prosecution for a public offense.

It is charged that the defendant represented that he had caught two of the robbers of the Columbia Deposit Bank, and had them in jail in another state, and required one hundred dollars to bring them to Adair county, which said statements were false. This may be true, and it may also be true that the defendant had arrested and committed to jail in another state two persons whom he supposed to be two of those engaged in robbing the bank; hence the necessity to allege that he knew the representations he made were untrue.

An indictment is never sufficient which does not exclude every rational hypothesis consistent with the innocence of the accused. The motion of the appellant to arrest the judgment should have prevailed, because the indictment did not state facts constituting a public offense.

Judgment *reversed* and cause remanded for further proceedings.

Winfrey & Stewart, for appellant.

John Rodman, for appellee.

FRANK TAYLOR v. COMMONWEALTH.

Criminal Law—Sufficiency of Indictment—Confessions.

In charging assault and battery with intent to kill, an indictment is not defective for failing to state that the person assaulted did not die.

Confessions.

Voluntary confessions should be allowed to go to the jury; to exclude confessions from being admitted as evidence it should be made to appear to the court that the motive of hope or fear must have been directly applied by a third person to induce them, and must have been sufficient in the judgment of the court to overcome the mind of the prisoner, to render the confession unworthy of credit.

APPEAL FROM KENTON CIRCUIT COURT.

March 25, 1875.

OPINION BY JUDGE PETERS:

The first reason urged by the learned attorneys for the appellant for a reversal of the judgment, is for an alleged insufficiency of the indictment in omitting to state therein that Cook, the person wounded, did not die from the wounds then and there inflicted.

The same question was before this court in *Burns v. Commonwealth*, 3 Met. 13; and after stating the general requisites of an indictment as prescribed by the Criminal Code, the court decided that an indictment for wilfully and maliciously shooting and wounding another with an intention to kill, the words "so that he did not die thereby" being omitted, was sufficient either upon a demurrer, or on a motion in arrest of judgment.

It is next urged that the court erred in admitting evidence of the confessions of appellant to go to the jury. The doctrine on that subject seems to be that in order to exclude confessions, the motive of hope or fear must be directly applied by a third person to induce them, and must be, in the judgment of the court, sufficient, so far as to overcome the mind of the prisoner, to render the confession unworthy of credit. 1 Greenleaf on Evidence 220.

In this case the confessions made by appellant to the two witnesses introduced to prove them, were made voluntarily; they were not asked for by Francis, the police officer; and to Dr. Hall he made them without any threats, persuasions or proimses on his part. The doctor proves that he asked appellant if he did the cutting, and he replied he did it to keep from being shot, or after he had been shot at. The witness could not state which form of expression he used. Under the rule the evidence was admissible.

If there was any error in the instructions given to the jury, it is not assigned as a ground for a new trial, and it is, therefore, excluded from the consideration of this court, as was held in *Hopkins v. Commonwealth*, 3 Bush 480, and other cases.

Wherefore the judgment must be *affirmed*.

Major & Jett, for appellant.
John W. Rodman, for appellee.

A. GUM *v.* G. M. ADAMS & CO.

Practice—Abatement—Exceptions to Evidence.

Where it appears from the evidence that one who is not a party, is a partner of the plaintiff, defendant by motion and rule should have required the plaintiff to make such person a party plaintiff or dismiss his suit, but having failed to do so he waived his right.

Exceptions to Evidence.

Exceptions to evidence not made grounds for a new trial, pursuant to Civ. Code, § 372, will not be considered by the court of appeals.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 26, 1875.

OPINION BY JUDGE PETERS:

As to the first paragraph of the answer, which seeks an abatement of the action because Hugh W. Adams was not a plaintiff, it is sufficient to say that when it appeared from the evidence that he was the partner of the plaintiff, G. M. Adams, appellant should have, by motion and rule, required G. M. Adams to make him a plaintiff or dismiss his suit; but having failed to apply for or obtain a rule to that effect, he waived his right. *Carpenter v. Miles,* 17 B. Mon. 598. Counsel for appellant seem to be laboring under some mistake as to the evidence of Hugh W. Adams. The witness proves that he saw the original entry made on the books of the firm, by which Green was credited by the $95, and proved he had some knowledge of the transaction, and that the credit was afterwards, by mistake, given to appellant. The evidence was, therefore, competent.

The letter of McGuire and the testimony of Pilcher were competent to contradict the statements of McGuire, who was the principal witness relied on to prove payment of the debt sued for, if for no other purpose. Besides, the exceptions to the evidence are not made a ground for a new trial, and under Sec. 372, Civil Code, on account of that omission this court cannot consider that objection.

Perceiving no error in the proceedings in the court below prejudicial to appellant, the judgment is *affirmed.*

Morton & Parker, for appellant.
Huston & Billingsley, for appellee.

JAMES HART *v.* C. P. MATTINGLY.

Bill of Exchange—Endorser's Liability.

Where a bill of exchange, endorsed by A is negotiated at the bank as between A and the bank, A is a principal; and where B for the accommodation of A endorses with him a new bill of exchange as a renewal of the first one, B's liability is that of endorser for A, and if he should have to pay the bill might recover the whole amount from A.

APPEAL FROM NELSON CIRCUIT COURT.

March 26, 1875.

OPINION BY JUDGE COFER:

This action was brought by Mattingly against Hart, seeking to charge him as a prior endorser on a bill of exchange for $1,250, which had been held by the Commercial Bank at Lebanon, and taken up by Mattingly, who was the last endorser thereon.

The record developed the following facts: On August 24, 1871, Queen & Bro. drew a bill of exchange for $1,250, payable to J. F. Queen and C. P. Mattingly at ninety days, addressed to Queen Brothers & Co., who accepted it, payable at the Commercial Bank at Louisville. The bill was endorsed by the payees, and discounted by the Commercial Bank at Lebanon, and not being paid at maturity, was protested, and notice given to all the parties to the bill.

Queens, who seem to have been then upon the verge of bankruptcy, desired to renew the bill, and with this view, on the day of its maturity, William Queen, who was a member of both firms, drew a bill for the same amount as the old one upon Queen Bros. & Co., in favor of L. F. Hayden and J. F. Queen. This bill was accepted by the payees, and Mattingly was applied to to endorse it also, but declined to do so. One of the Queens then applied to the appellant, Hart, to endorse for them, which he did, and the bill was sent to the bank at Lebanon as a renewal of the former one; but the bank declined to accept it without the name of Mattingly or some one else regarded by the bank as a satisfactory endorser.

After the last bill had been received at the bank and declined by it, a friend of Mattingly, who had learned that it would not be accepted unless he endorsed it, wrote to him, and advised him that as he was bound on the old bill, and would have Hart before him on the new one, he had better endorse it.

In this letter was enclosed to Mattingly, for Hart, a note from the writer of the letter, warning Hart to keep off Queen's paper. Mat-

tingly delivered the note, and, as Hart testified, they then talked fully about the financial condition of the Queens, and that upon being asked by him whether the bill had been discounted, Mattingly said he did not know, and did not know where it was. He further testified that he then told Mattingly that he hoped it would not be discounted, and that Mattingly told him to say nothing about the bill. A few days after this conversation took place, Hart left home for the south, and did not return until after the bill had matured, and been sued on by the bank.

After the receipt of the letter advising him to endorse the bill, and suggesting that if he would do so Hart would be first liable on it, and after the conversation with Hart, in which Hart says he expressed to Mattingly the hope that the bill would not be discounted, Mattingly went to the Queens and told them that he had been informed that the bill would not be accepted unless he, Mattingly, endorsed it. Queens then wrote for the bill, and it was sent to them and endorsed by Mattingly, and accepted by the bank in payment of the old bill.

Aside from the inference to be drawn from the refusal of Mattingly to endorse the second bill when applied to for that purpose, the record shows that at the time of the conversation with Hart about the bill and the financial condition of the Queens, he knew they were insolvent.

Upon appropriate issues and evidence tending to prove the substance of the foregoing facts, the court instructed the jury, in effect, to find for the plaintiff, which they did; and judgment having been rendered thereon against Hart, and his motion for a new trial having been overruled, he has appealed.

The Commercial Bank at Lebanon was the holder of the first bill, and as between the bank and Mattingly, it was his debt. It makes no difference in this respect that Mattingly had endorsed for the accommodation of Queen, he was, as to the bank, a principal debtor. Being thus indebted to the bank, Mattingly would, as to any person not bound on that bill, be a principal in any subsequent renewal; and it is quite clear that if Hart had endorsed the new bill at the instance of Mattingly, and had taken it up, he could have received from him the amount so paid, no matter what might have been their relative positions on the bill. In that case Hart would have been the accommodation endorser of all those who were bound on the old bill and were parties to the new bill.

How, then, does the attitude of the parties in this case differ from

that in the case first put? It is true that Hart did not endorse in the first instance at the request of Mattingly; but this, we apprehend, is not indispensable in order that Hart may be treated as having endorsed for the benefit of Mattingly.

A cannot become a surety, or an accommodation endorser, for B, without B's request, express or implied; but if, before the bill had been accepted by the bank, Mattingly became aware that Queen, for whom he had become liable, had procured Hart to endorse a bill intended to be used to take up the one on which his liability was already fixed, and that the bank had refused to accept it unless he would endorse it, and he did endorse it after Hart, in order to have it accepted in discharge of his existing liability, he stands as to Hart in the same attitude in which he would have stood if Hart had originally endorsed the bill for his accommodation, and at his request.

The instructions given by the court did not conform to the views herein expressed; and the judgment is therefore *reversed*, and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

Muir, Wickliffee, for appellant.
A. J. James, for appellee.

C. & O. R. Co. *v.* BARREN COUNTY COURT.

Special Charters—Power of the Legislature to Amend.

Where, by legislative enactment in granting a charter or public franchise, the power to amend is reserved, the legislature may amend such charter, even though investments have been made under the same which may be affected by such amendment.

APPEAL FROM BARREN CIRCUIT COURT.

March 30, 1875.

OPINION BY JUDGE LINDSAY:

We do not decide as to the power of the legislature, independent of the act of 1856, to pass the act of amendment under which this litigation arose. We conceive that the existence of the act of 1856 supersedes the necessity for deciding that question.

The case of *Aspinwall v. Daviess County Court* was not cited as illustrative of legislative power to repeal or amend acts of incorpora-

tions, but to show that the proposition to subscribe by Barren county, had not become so far an executed contract, anterior to the enactment, as to be protected by the clause of the federal constitution prohibiting states from passing laws impairing the obligations of contracts, and to distinguish this case from the case of the presiding judge of the Washington county court and this appellant.

We are of opinion, and so decide, that the act of 1856 reserves to the legislature the right to amend all charters (subject to the limitations of the proviso that no amendment shall impair other rights previously vested) in which a contrary interest is not plainly expressed. We do not hold that the contrary interest can only be plainly expressed by being in terms "expressly relinquished," but that in as much as the intent must, in the language of the statute, be "plainly expressed," where it is not so relinquished, the provisions of the charter must be such as are irreconcilable, with the power to amend; otherwise it will not be evident, it will not clearly appear, it will not be easily understood, that the general power to amend or repeal is not reserved. We do not regard the provisions of appellant's charter as irreconcilable with the power reserved to the legislature by the acts of 1856.

We recognize the potency of the argument of the majority of the court in the Slack case, *Slack, et al., v. Maysville & Lexington Railroad Co.*, 13 B. Mon. 18, upon a kindred question, but do not regard that argument as conclusive of the question to be decided in this case.

There was no power to repeal or amend the Maysville & Lexington Railroad charter, reserved by the legislature, either in express terms, or by legal implication. Hence the court said, *arguendo,* that as soon as individuals had subscribed and expended their money on the faith of a charter valid at the time, there was an interest irrevocable by mere legislative act. In this case, individuals, counties and municipalities have subscribed and expended their money, with full notice of the reserved power of the legislature to alter or amend the charter.

We appreciate the consequences that may flow from an abuse by the legislature of the power reserved by the act of 1856. Whether the evil consequences will more than balance the good, is a question to be determined by the legislature, and not by the judicial department of the government. With the courts, it is a mere question of legislative power, and not of public policy, and "a demonstration of the evil consequences to flow from the abuse of a particular power,

does not demonstrate the non-existence of that power." *Supra*, 13 B. Mon. 15.

The petition for a rehearing must be *overruled*.

H. C. Pindell, for appellant.
Rodman, A. Duvall, for appellee.

MOORE & MASON *v.* ISAAC SPARKS.

Highway—Dedication—Acceptance by the Public.

A dedication to the public of a highway is not complete until there is an acceptance by the public. A public highway may be established covering a strip of land tendered by the owner for a public passway, without a formal acceptance.

Acceptance by the Public.

After the continued and uninterrupted use of a passway by the public for a period of time, sufficient to perfect a title by prescription, coupled with the fact that the local public has at all times exercised the right to keep the passway in repair, an acceptance may be presumed.

APPEAL FROM JESSAMINE CIRCUIT COURT.

March 31, 1875.

OPINION BY JODGE LINDSAY:

A dedication to the public does not become complete and perfect until there is an acceptance by the public. The appointment by the county court of overseers for an open passway, the exercise of control over such passway, or the direct regulation of it as a public road, in any way, will amount to an acceptance; and an indictment will not lie against an individual for obstructing a passway, until the public authorities assume the duty of keeping it in repair. *Gedge, et al., v. Commonwealth*, 9 Bush 61. But it does not follow that the public may not acquire title to a strip of land, tendered by the owner for a public passway, without a formal acceptance, and without assuming the absolute duty of keeping it in repair. The New England cases throw but little light upon this subject. The New England townships are generally liable to civil suits for damages arising from their failure to keep their public roads in repair; and this fact furnishes a satisfactory reason why private individuals shall not have the power, without their express consent, to impose upon them the duty of keeping in repair a new and undesirable highway. It seems to be the law

in England that the formal acceptance by the public authorities is not necessary, and that the general use by the public for a great length of time is equivalent to an acceptance. 30 Eng. L. & Eq. 207; 1 Man. & G. 392.

We see no good reason why, under our laws, after a continued and uninterrupted use by the public for a period of time, sufficient to perfect a title by prescription, coupled with the fact that the local public has at all times exercised the right to keep the passway in repair, an acceptance may not be presumed. We do not, however, regard it as indispensable to decide the question upon this appeal. According to appellee's testimony, the passway under consideration was a public one, or else the public used it under a license from the owners of the soil. The record does not show that appellee claimed openly, any interest in the strips of land, or exercised over it any act of ownership, different in character from that claimed and exercised by such other persons living in the neighborhood as found it convenient or necessary to use the passway.

We are unable to determine that the closing of the road deprives appellee of the exercise of any of his private and individual rights.

Petition *overruled.*

J. B. Hunston, J. S. Bronaugh, for appellants.
B. T. Buckner, for appellee.

JOSEPHINE CLARK, ET AL., *v.* WILLIAM TUCKER.

Married Women—Judgment.

Where several married women were sued jointly with their husbands and others, and a joint personal judgment is rendered against all, such judgment is erroneous as to the married women, and since the judgment is joint it must be reversed as to all.

APPEAL FROM McLEAN CIRCUIT COURT.

March 1, 1875.

OPINION BY JUDGE COFER:

Several of the appellants, who are married women, and were such when this action was brought and when the bond sued upon was executed, were sued jointly with their husbands and others, and a joint personal judgment was rendered against all. This was error as to the married women; and as the judgment is joint it must be reversed as to all.

As there may be a retrial, we have deemed it proper to notice some of the errors complained of in giving and refusing instructions.

In the second instruction given, the court told the jury, in substance, that if the appellee applied to cross in appellants' ferry-boat with his wagon and team, and the boat, at the time, was in charge of the boy, John Samuels, or that he was and had been crossing passengers in the boat with the knowledge of the regular ferryman, and the appellee's team was drowned in consequence of the want of strength or precaution on the part of the boy, they should find for the plaintiff.

The first part of this instruction made the appellants liable if the appellee applied to cross in the ferry, and found the boy in charge of the boat, and the team was lost on account of the want of strength and care on his part. This was error, because it did not submit to the jury the question whether the boy was there, with the knowledge or consent of the regular ferryman, for the purpose of taking charge of the boat and ferrying persons or property across the river. That the boy was found in charge of the boat was not enough to render the owners of the ferry answerable for his misconduct or his want of strength to manage the boat.

If he was put there by the appellants or their ferryman, to act as ferryman, they would be liable; but if he was not placed there by them or the ferryman he had no authority to act for the owners, and they are not liable. That the boy had been crossing passengers in the boat with the knowledge of the ferryman, may have been some evidence that he was in charge of the boat with his knowledge, but was not conclusive of the question; and it was error to tell the jury that if they found that the boy had "been crossing passengers in the boat with the knowledge of the regular ferryman," the appellants were liable for the loss of the team if it occurred in the manner claimed.

The allegations recited in the fifth instruction are mere allegations of matters of evidence, and not being material to the cause of action were not confessed by the failure to deny them.

Judgment *reversed* and cause remanded with instructions to award the appellants a new trial.

J. M. Bickers, for appellants.
L. W. Gates, for appellee.

W. P. FOGLE *v.* J. M. FOGLE'S EX'R.

Wills—Legacies to Be Paid on Certain Conditions.

When the testator provides for a distribution of his estate among his children, when each arrives at the age of thirty years, such children cannot receive the principal of such legacies until they are thirty years old, but the executors may advance to each their portion of the income of the estate for their maintenance.

APPEAL FROM MARION CIRCUIT COURT.

March 2, 1875.

OPINION BY JUDGE PETERS:

The better to secure his estate to his children, and to protect them from the arts of designing and experienced speculators, with whom the testator knew they must, in their intercourse with the world, come in contact, he doubtless added the eighth clause of his will, in which he says: "All the bequests, devises, and legacies that are made in this will are not to be paid or delivered to my four children, Willie P., Mattie B., Bettie P., and James L. Fogle (should the contingency happen by which he should get anything), before they each arrive at the respective ages of thirty years."

When this will was before this court on a former occasion for construction, in the opinion then delivered, it is said that they (the executors) are not, by the strict language of the will, prohibited from paying "a part of the legacies" to the devisees before they respectively arrived at the ages of thirty years. The most, if not all, of the testator's children, except his son, John D. Fogle, were under 21 years of age. Two of them are daughters, and, considering his large estate, and the ages and situation of his children, it would have been unreasonable to suppose that he intended to leave his infant children without the means of maintenance and education, and withhold from his daughters the annual profits, as well as the principal, of what he intended for them, till they reached thirty years of age.

Such a construction should not be given to the will as would withhold even the income or annual profits of the devises and legacies from the devisees, unless the language of the will imperatively required it. But while we do not think the executors can withhold the whole of the estate devised to the testator's children till they respectively arrive at thirty years of age, still there is a large discretion left to them.

In this case there is no complaint that they are not willing to pay

over to the appellant the annual profits of his part of the estate, or that they refuse to make reasonable advancements to him to engage in some proper pursuit or business, which is likely to prove profitable, and for which he is qualified. But he seeks to enforce the payment of the whole devise to him because he had arrived at the age of twenty-one years, and complains that the time fixed in the will for payment is unreasonable and unlawful.

His father was under no legal obligation to give him any part of his estate, and if he could, by his will, have permitted him, he certainly had the right to postpone the time of the enjoyment of a part of his bounty nine years. He doubtless believed that he was serving the best interest of his son so to provide; and we have no inclination, if we had the power, to change in any particular the disposition the testator has made of his estate.

Wherefore the judgment is *affirmed*.

Russell & Averitt, for appellant.
W. B. Harrison, for appellee.

L. SMITH, ET AL., *v.* MATILDA WATSON, ET AL.

Infants—Sale of Real Estate—Petition for Conveyance.

Where it is shown by infants that no bond was executed for the sale of their land, or that they or their guardian had received no part of the purchase money, notwithstanding the order of the court recites that a bond was given, the proceeding to sell in so far as it affected the infants was void, and a conveyance under such sale should not be made.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

March 2, 1875.

OPINION BY JUDGE PRYOR:

The report of the commissioner fails to state that the interest of the infants required a sale of the land. It also appears that no bond was executed prior to the rendition of the judgment, or even afterwards.

The answer of the appellees to the petition of the purchaser, asking for a conveyance of the land, denies that any bond was ever executed, or that they had received, or their guardian for them, any part of the purchase money.

The order of court recites that a bond was executed; but this bond,

when the issue as to its execution is distinctly made by the appellees, is not produced, nor is it shown that any was ever executed except the recital in the order. The proceeding, so far as it affected the infants, was void, and the court below should have refused a conveyance. The judgment is reversed and cause remanded for further proceedings consistent with the opinion.

A. J. James, Scott Walker, for appellants.

MRS. H. CLAY FOX *v.* SAMUEL TIPTON.

Judgment—Sale of Real Estate—Description.

A judgment ordering the sale of real estate, which in itself fails to describe the particular real estate, is erroneous and will be reversed.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

March 5, 1875.

OPINION BY JUDGE PETERS:

The judgment, as copied in this case, orders a sale of so much of the personal property of Mrs. H. C. Fox, exempt from execution, as will be sufficient to pay the plaintiff the sum of $146.21, with interest from January 1, 1873, until paid, and the costs. And for any balance that might remain unpaid after exhausting the personalty, a sale is ordered of so much of the landed estate of said Mrs. H. C. Fox as may be required to pay the same.

We think there is evidently a mistake in the copy of the judgment before us, and that the word "not" preceding the word exempt was omitted by the copyist, and should be so regarded. But it does not appear in the record that Mrs. H. C. Fox has personal estate sufficient to pay the debt; indeed, it may be inferred from what does appear that she has not personal property subject to execution sufficient to pay said judgment; and it may be necessary, therefore, to sell a part of her real estate. And as this judgment contains no description of any of her real estate except that she has lands in the counties of Clark and Montgomery, which, as has often been decided by this court, is too general and uncertain, imposing the burden on the commissioner of going into the country, after searching out from the record of titles the location and description of her land, of locating it, and then deciding what part, if all should not be required, should be sold, making his duty partly judicial as well as ministerial.

As, therefore, there is no particular description of the land in the judgment, which would identify it and enable the commissioner, without resort to other means, to ascertain the identical land to be sold, the judgment is erroneous.

If it becomes necessary to make the requisite identity of the land, the court can send out his master, with the surveyor, and lay off by metes and bounds from one end or side of the land so much as may be deemed necessary to pay the debt and cost, including the surveyor's fee and the allowance to the master.

For the error alone of failing to define precisely, in the judgment, the land to be sold, if a sale of land should be necessary, the judgment of the court below is *reversed,* and the cause is remanded for a judgment and for further proceedings consistent herewith.

If there is no mistake in the copy of the judgment before us, and the word "not" before exempt is omitted, that omission will be corrected on the return of the cause.

A. J. James, for appellant.
Apperson & Reid, for appellee.

JOHN F. ROGERS *v.* MARGARET E. ROGERS.

Divorce—Custody of Children—Power of Court to Modify Orders—Value of Attorney's Services.

Under the law the right of the father to the custody and control of his children is superior to that of the mother, but the chancellor may subordinate this right when it is to the interest of the children to give the custody to the mother, and the legal right of the father will not be enforced to the prejudice of the children.

Power of Court to Modify Orders.

In a divorce proceeding the court has power to modify its order as to the custody of children and allowances for their benefit.

Value of Attorney's Services.

In a divorce proceeding, on an application for payment of attorney's fees for representing the wife, the court, having knowledge from an inspection of the record of the amount and kind of services rendered, may resort to its personal knowledge to fix the value of such services.

APPEAL FROM FRANKLIN CIRCUIT COURT.

March 6, 1875.

OPINION BY JUDGE LINDSAY:

Taking into consideration the amount of the appellant's estate and

the probable cost of maintenance of his late wife and his children, we cannot say that the allowance made by the circuit court was excessive. Certainly $100 for the support of three persons from August to February is not unreasonable, and is much less than would ordinarily suffice for that purpose. Although there is no evidence in the record except the record itself, of the value of the services of the appellee's counsel, the value of such services as appear from the record to have been rendered, is as well known to the court as to any other persons, and the court, like a jury, may resort in such cases to its own knowledge of facts which are of a general character, and within the knowledge of men generally.

It would certainly not be necessary to prove before a jury of farmers the value of ordinary farm labor; but upon proof of the labor and its amount and kind, the jury would be authorized from the personal knowledge to fix its value. So in this case, the court having knowledge, from an inspection of the record, of the amount and kind of services rendered by appellee's counsel, may resort to its personal knowledge to fix the value of such services.

Nor can we say that the court erred in adjudging to the appellee one-half of the personal effects of the appellant. His whole personal estate would not amount, according to his answer, to more than $200 or $300, and one-half of this will be but a scanty provision for Mrs. Rogers and the two younger children, and is not more than should have been allowed her.

We have no revisory power over the interlocutory orders made in reference to the property, either in the judgment or in the subsequent order, and it would, therefore, be improper to express an opinion as to whether the court properly adjudged a lien on the appellant's land, or restrained him from selling any of his property until the further order of the court.

While it is true that, as matter of strict law, the right of the father to the custody and control of his children is superior to that of the mother, yet the chancellor had always subordinated this legal right to the weightier consideration of the interest of the children, and he will not allow the legal rights of the father to be enforced to their prejudice. Our statute recognizes and adopts this long and well-settled rule in equity, by requiring the court decreeing a divorce to have principally in view the interest and welfare of the children in making orders for their care and custody. The children whose care and custody the court awarded to appellee are both females, and are aged ten and five years respectively; and it is proper they should be

with their mother, whose care and watchfulness cannot be supplied by the father, who, as the evidence shows, is a physician, and necessarily much from home, and who is without any one residing with him to nurture and care for the children in his absence. The evidence shows the mother to be a fit person to have the care and control of them; while the facts disclosed by the record lead us to doubt whether the appellant, as he is situated, would be a suitable person to raise them in a proper manner. Certainly it was not to their interest to take them from their mother and send them to reside with the appellant, where, as far as appears from the evidence, they would be without a protector in his absence. The court will at all times have power to make additional orders if it should become necessary to do so in order to enable the appellant to see his children as often as would be just to him and them, and may at any time, if their interest should require it, give them into the custody of their father. This constant power of the court over the children is ample to secure his rights, if at any time the mother should disregard the order already made by the chancellor, which is as specific as the nature of the case enabled him to make it.

Judgment *affirmed*.

G. W. Craddock, for appellant.
L. Hord, for appellee.

JOHN W. FINNELL *v.* SIMON VANARSDALL.

Damages—Personal Injury—Pleading Defense—Recovery.

In a suit for damages on account of assault and battery, where the defendant raised no issue by his answer except the amount of damages, it was not error for the court to refuse an instruction except as to the measure of damages.

Recovery.

A party may recover exemplary damages without averring malice, in an action for an unlawful injury to the person.

APPEAL FROM MERCER CIRCUIT COURT.

March 8, 1875.

OPINION BY JUDGE LINDSAY:

The answer filed by appellant, and upon which he went to trial, presented no defenses to the action, and raised no issue except as

to the measure of damages. It contains no statement that at the time he struck appellee, he had unlawfully set upon him, nor that he had then and there threatened violence, and exhibited an intention to set upon him, having a present ability to carry the threat into execution. If appellant merely used force to repel force, he knew the fact to exist from the beginning, and should have pleaded it.

The court did not abuse a sound discretion, in refusing to allow the amendment to be filed. It recites no circumstance that was not known to appellant when he answered, and no excuse was offered for the delay in setting up the circumstances therein detailed. Besides, the amendment violates the rules of pleading, by giving a history of the difficulty between the parties from its inception, instead of setting up the facts constituting, or supposed to constitute grounds for defense.

The instructions given the court could not have prejudiced appellant. His guilt stood confessed, and he had no right to ask instructions except as to the measure of damages. The law upon this subject was correctly given to the jury. A party may recover exemplary damages without averring malice, in an action for an unlawful injury to the person. The circumstances under which it was inflicted may go to the jury, and be considered in fixing the amount of the recovery.

We see no reversible error in the case before us.

Judgment *affirmed.*

Kyle & Poston, for appellant.

J. B. & P. B. Thompson, T. C. Bell, for appellee.

HERMAN HASKAMP'S EX'X *v.* S. J. WALKER, ET AL.

Cities—Improvement of Sidewalks—Cost of Improvements.

The city is liable for the cost of public improvements, where a tax on adjoining property has not been legally imposed.

Improvement of Sidewalks.

The city has power to make either the original construction or the repairs of sidewalks a charge on the adjacent property.

Cost of Improvements.

The entire cost of original construction is to be apportioned upon all the lots fronting such improvement, but the cost of repairs is to be assessed separately so that each lot will be chargeable with the cost of the repairs done on its own front, without reference to the cost of repairs in front of other lots.

APPEAL FROM KENTON CIRCUIT COURT.

March 8, 1875.

OPINION BY JUDGE COFER:

When this case was in this court on the appeal of the city, we held that it did not appear from the petition that the owners of property were not liable, and as the contract between the appellant's testator and the city stipulated that if a tax was levied in accordance with the charter, on the property in front of which the work was done, he would receive such assessment, and collect the tax in full satisfaction for the work. We hold that in order to make the city liable, it should appear from the petition that the tax had not been legally imposed, and as this did not appear, the demurrer of the city should have been sustained.

It does not necessarily follow, however, because the petition did not show a cause of action against the city, that it was good as against the owners of lots. But we are of opinion that the petition presents a case upon which, nothing else appearing, the lot owners are liable. That the city council had power to make either the original construction or the repairs of sidewalks a charge on the adjacent property is clear, the only question made being whether that power has been effectually exercised.

Section 8 of the city charter defines the manner in which contracts and assessments shall be made for the original construction of sidewalks, and Sec. 9 prescribes the mode in which repairs shall be ordered, and the manner of assessing the cost against the adjacent property. The cost of the original construction of sidewalks is required to be apportioned among the owners of lots fronting thereon, unless such owners shall do the work within the time and in the manner prescribed. In respect to repairs the charter provided that whenever the sidewalks shall be out of repair, the council shall have power to order and direct the same to be repaired at the expense of the owner of lots opposite to the places where the repairs shall be made.

Under these provisions, it would seem that the entire cost of the original construction is to be apportioned upon all the lots fronting such improvement, but the cost of repairs is to be assessed separately, so that each lot will be chargeable with the cost of the repairs done on its own front, without reference to the cost of repairs in front of other lots.

The ordinance under which the appellant's testator did the work

which gave rise to this litigation seems, from some of its language, to have been intended to embrace both repairs and original construction; but in providing for paying the cost of the work, in the event it was not done by the owners of lots, it directed that it should be done at the cost of the owners of lots fronting on the work, to be apportioned among them according to the number of front feet owned by each.

As the council had no power thus to apportion the cost of repairs required to be done, but had such power as to new work, we must, in the absence of anything in the record showing that the work sued for was repairs, presume that it was done in making new sidewalks, and therefore that the ordinance was, to that extent, under Sec. 2, Act of February 24, 1865, valid, and that appellees are liable, under the ordinance, for that cost of the work done in front of their lots, if in fact the testator did the work in constructing new, and not in repairing old sidewalks.

We are, therefore, of the opinion that the petition stated facts constituting a cause of action against the owners of lots, and that the appellant has a lien on the lots to secure the payment of her debt, unless it shall turn out that the claim is for repairs.

The judgment dismissing the appellant's petition on demurrer, as to Walter and Martin, is *reversed,* and the same is remanded with directions to overrule their demurrer, and to allow either party to amend their pleadings within a reasonable time, and for further proceedings not inconsistent with this opinion.

R. Simmons, Ira Julian, for appellant.

Fisk & Fisk, for appellees.

W. G. KIRK *v.* JOHN REYNOLDS.

Suit on Contract—Specific Execution—Tender of Deed.

Where a suit is brought for a specific execution of contract and the petition shows plaintiff is not in a condition to perform his part of it, and fails to aver that he has the legal title to the land, or tenders a deed to his vendee, such suit must fail.

APPEAL FROM ESTILL CIRCUIT COURT.

March 9, 1875.

OPINION BY JUDGE PETERS:

The pleadings in this case do not authorize the judgment rendered.

The plaintiff below expressly charges in his petition that his contract for the purchase of the land was only executory with G. W. Howell, whose title to the land was possessory. Having had the continuous adverse possession for more than twenty years, he further avers that G. W. Howell is dead, and the legal title to the land was at the time in the heirs of said Howell, all of whom are made defendants, and through whom he seeks to perfect his title.

Moreover, he avers that the price he agreed to pay Howell for the land was $225, of which sum he paid down $200, the remaining $25 to be paid when a title was made to him for the land. And he neither alleges that the title had ever been made to him, nor that he had paid the residue of the purchase money. There is some evidence in the cause conducing to prove that he paid all the purchase money; but such evidence of payment, without a direct averment to that effect, is wholly unavailable. A commissioner's deed purporting to convey the title of Howell's heirs to appellee, Reynolds, is found in the papers; but there is no allegation in the petition that the legal title had been conveyed to Reynolds; nor is there any mention made of the existence of such a deed in the pleadings. Even, therefore, if the deed was effectual to pass the legal title to Reynolds (a question we do not decide), before Reynolds could use the deed to show the fact, he must allege that he has the title.

But there is still another fatal objection to the judgment. Reynolds brought this suit for a specific execution of the contract and he shows by his own peition that he was not in a condition to perform his part of it, and never avers he has the legal title to the land, or tenders a deed to his vendee, which, as has been repeatedly decided by this court, he must do before he can ask the chancellor to help him, and enforce his lien. Wherefore the judgment is *reversed* and the cause is remanded for further proceedings. Reynolds should be allowed to amend his pleadings, and on his failure to do so in reasonable time his petition should be dismissed.

J. B. White, for appellant.

A. W. ROUTT'S ADM'R. *v.* W. W. BERRY.

Justice of the Peace—Jurisdiction in Appeal from Justice.

Where the amount sought to be recovered in a justice court is only $11.60 the circuit court has no jurisdiction to entertain an appeal.

APPEAL FROM BATH CIRCUIT COURT.

March 10, 1875.

OPINION BY JUDGE PETERS:

This action was commenced by warrant from a justice of the peace, by which appellee was summoned "to answer a claim of A. W. Routt," the holder of an order amounting to $11.60, and judgment having been rendered against the defendant in the warrant, he appealed to the quarterly court. He was unsuccessful in the quarterly court, and appealed to the circuit court, where he succeeded, and this appeal is now prosecuted by the personal representative of the plaintiff in the warrant, he having died intestate since the action was commenced.

It appears in the record that the original warrant was amended by inserting the words "amounting to fifty dollars for balance on wheat." When this amendment was made is not satisfactorily shown, but it was made before the trial in the justice court, for an account was filed by appellant against appellee for $50 balance on wheat.

In *Burbage v. Squires*, 3 Met. 77, this court held, upon the trial of the appeal, the cause of action must be the same as that expressed in the warrant, and it must be a cause of action over which the justice had jurisdiction. In this case it will be conceded that the cause of action for the increased demand set forth by the amendment in the warrant was one over which the justice had jurisdiction. But was it the same cause of action as that set out in the original warrant? We think not. The action was founded on an order having the characteristics of a domestic bill of exchange, and to hold the drawer and endorsers responsible, the holder must use due diligence in presenting it for payment, and notice of nonpayment should be given to the parties. When the action on the order was abandoned and a recovery sought on an account for wheat sold and delivered, the original cause of action was changed.

As, therefore, the amount demanded in the original warrant was the matter in controversy, and that being less than fifty dollars, the court has no jurisdiction of the case.

Wherefore the appeal is *dismissed*.

Nesbitt & Gudgel, for appellant.
Reid & Stone, for appellee.

VIRGIL HEWETT, ET AL., *v.* LOUISVILLE & NASHVILLE R. CO.

Surety Bonds—Liability of Sureties—False Representations of Holders of Bonds.

Sureties to a corporation for the good conduct and fidelity of an officer through whose hands its moneys are to pass, are to be treated with entire good faith, and where such corporation, knowing that its bonded officer is failing to account for its money, in answer to inquiries of the bondsmen represent that the money is being accounted for, it cannot recover on such bond for defalcations occurring after such reprentations were made.

APPEAL FROM HARDIN CIRCUIT COURT.

March 10, 1875.

OPINION BY JUDGE LINDSAY:

The court below erred in refusing to allow appellants to file that portion of their amended answer offered August 20, 1874, that purported to amend paragraph No. 4 of their original answer.

They therein directly aver that on the 26th of June, 1872, they applied to the railroad company for information as to the state of the accounts of Morris, and that the company then fraudulently represented to them that his accounts were correct, and that he was ahead on his payments to the company. They aver that at this time appellee knew that Morris was indebted to it, and that this fact was fraudulently concealed from them because the railroad company desired to keep him in its employment. If these averments are true, the company not only committed a fraud in misrepresenting the true state of Morris' accounts, but was also guilty of a fraud on his sureties, by retaining him in office after it discovered that he was not paying over the moneys received by him as agent, in the manner and at the time required by the terms and condition of his employment.

Sureties are at all times to be treated with good faith, and especially is that the case where they are sureties to a corporation for the good conduct and fidelity of an officer, through whose hands its moneys are to pass. 1 Story's Equity Jurisprudence, Sec. 215; *Graves v. Lebanon Bank,* Mss. Opinion.

When a corporation discovers that one of its bonded officers is misappropriating, or failing to account for moneys coming to his hands, it cannot remain passive and rely for indemnity for future peculations upon the insolvency of his sureties. Good faith and

common honesty require that it shall at once remove him from office. If it fails to do so, it is as much guilty of a fraud upon his sureties as if, before they became his bondsmen, it had concealed from them the fact that he had therefore been guilty of like conduct, under similar circumstances. If the company was guilty of the fraud charged in this amendment, it cannot recover for any moneys that came to the hands of Morris after June 26, 1872.

For the error in refusing to allow the amendment to be filed, the judgment must be *reversed*. We perceive no other error in the proceeding in the lower court. The cause is remanded with instruction to grant a new trial, and for further proceedings not inconsistent with this opinion.

Judge Cofer did not sit in this case.

Brown & Murray, for appellants.
W. H. Chelf, L. Cook, for appellee.

HENRY FISHBACK *v.* SULLIVAN & BURTON.

Real Estate Conveyance—Representations—Relief.

Where two grantors being children of an intestate from whom they inherited land, sell and convey the same to an innocent purchaser, and represent to him that a third heir, who would have an interest in the land if living, is in fact dead, when he is alive, such purchaser is entitled to a credit of one-third of the purchase price and should be allowed to retain it as indemnity against the claim of the absent heir, or else to have the contract of purchase rescinded.

APPEAL FROM BOURBON CIRCUIT COURT.

March 11, 1875.

OPINION BY JUDGE LINDSAY:

The deed of conveyance from Julia O'Bryan and John F. O'Bryan, purports to convey to Fishback the fee simple title to the whole of the tract or parcel of land therein described.

Fishback swears, and all the testimony touching that subject tends to show, that at the time he accepted the deed it was represented to him that O'Bryan, who, if alive, is one of the heirs at law of Mrs. Honey, was then dead, or that he had been absent from the state, and had not been heard from for more than seven years. Fishback avers in his cross-petition that neither of these statements were true; that Michael O'Bryan is still alive, and hence that he acquired,

under the conveyance, title to only two-thirds of the parcel of land. He further asserts, and there is nothing proved to the contrary, that he purchased the land and paid out his money, in good faith, and without notice of the alleged frauds, by and through which Mrs. Honey became invested with the title. He prayed either that he be credited by one-third of the purchase price agreed to be paid, and allowed to retain it as indemnity against the claim of Michael O'Bryan, or else that the contract of purchase be rescinded upon equitable terms.

It is proved that both the grantors in the deed are insolvent. It is not proved that Michael O'Bryan is dead, nor that he has been absent from the state, without being heard from for more than seven years. It is evident that appellees, Sullivan and Burton, both believe that he is still alive, as they each made him a party to their action, and proceed against him by constructive service of process. In such a state of case it is manifest that Fishback is entitled to some character of relief. If the appellees, Sullivan and Burton, see proper to permit the sale by the two O'Bryans to Fishback to stand, then they cannot object to allowing him credit for the one-third of the amount agreed to be paid for the whole property, they being allowed to subject the remainder of the purchase money, and also the one undivided one-third of the realty, to the payment of their claims.

If they insist on subjecting the whole property, then they must allow Fishback to have a rescission of the contract of purchase, and consent that after satisfying such rents as may have accrued against him, he shall have judgment for the amount paid on the purchase, with interest, and that he shall have a prior lien on a two-thirds undivided interest in the property to secure the payment of his claim.

There is not a shadow of doubt that the property was purchased and paid for, to the extent that the amount agreed to be paid to Clay was satisfied by the debtor, Honey, and that he caused it to be conveyed to his wife to protect it against the claims of his creditors. The right of appellees to subject it, or its proceeds, to the payment of their claims, cannot, therefore, be questioned, but in enforcing their rights, they cannot disregard the rights of Fishback, who, as before stated, is an innocent purchaser.

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

Thomas Kennedy, for appellant.
R. H. Hanson, Paton, for appellees.

MOORE & MASON *v.* ISAAC SPARKS.

Public Highways—Established by User—Obstruction—Injunction.

A passway may become a public highway by continuous and uninterrupted use by the public.

Obstruction—Injunction.

One who uses a public highway cannot enjoin its obstruction unless he is able to show a special injury to himself, and he is then entitled to relief, not because a public highway has been obstructed, but because of the special and peculiar damages he sustains.

APPEAL FROM JESSAMINE CIRCUIT COURT.

March 11, 1875.

OPINION BY JUDGE LINDSAY:

Appellee states in his petition that he and his grantors have held and used the passway in controversy, and the land covered by it, adversely to the pretended title of the appellants, for nearly forty years last past before the commencement of this action, and under a claim of title in fee, exclusive of any other right. He does not pretend in his testimony that his grantors sold and conveyed to him, in express terms, a right to pass over this land. If he acquired the right to a passway under his purchase, he took it as an appurtenance to the lands purchased. Appellants' statements in their deposition are irreconcilable with the idea that the alleged passway is or ever was a private passway, held and owned by him alone. He says that commencing nearly forty years ago, the public used the passway for fifteen or twenty years in conjunction with himself; that although the people of the neighborhood did not take sufficient interest in the road to aid in its repair, they and the public used it as well as himself; and that they used it without permission from him, and whenever they pleased, and had done so for years. He says that "no person seemed to set up any claim to it, nobody claimed it, or asserted any right to it; no one was exercising any control of it. I suppose it had been used as a public road, and they just assumed control without opposition."

The proof shows that the passway was kept in repair by the voluntary action of parties interested in passing over it, but that the most of the repairs have been made by appellee. It is evident, however, that he had no greater right to, or larger interest in the road than any other person who saw proper to use it. The weight of the testimony offered by appellee is to the effect that it was re-

garded as a public road, and that it had been so long located, and its borders so well defined that a dedication of the right of way to the public might be implied. If such is the case, appellee had no greater right to, or interest in the passway than any other individual. Appellants, by fencing it up, committed a public nuisance, and they cannot be restrained at the suit of a private individual, unless the complainant is able to show a special injury to himself, and he is then entitled to relief, not because a public highway has been obstructed, but on account of the special and peculiar damages inflicted upon him by its obstruction. Angell on Highway, Sec. 285. The fact that one travels the road frequently and is greatly inconvenienced by the obstruction will not authorize an injunction in the absence of some special injury. High on Injunction, Sec. 528; *McCown, et al., v. Whitesides,* 31 Ind. 235; *Barr & Yeiser v. Stevens, et al.,* 1 Bibb 292.

The only ground of complaint established by appellee is that the obstruction of the road subjects him to the inconvenience of having frequently to travel an increased distance. As we have already said, this inconvenience does not constitute a ground for the intervention of the chancellor. Judgment *reversed* and cause remanded with instructions to dissolve the injunction and to dismiss the petition.

J. S. Bronough, J. B. Huston, for appellants.
B. F. Buckner, for appellee.

AMANDA D. DRAKE *v.* THOMAS BRADLY.

Husband and Wife—Estate of Wife—Liability of to Pay Debts.

A wife's general estate is not liable for the debts of the husband, but is liable for those of the wife incurred before marriage, and for those contracted after marriage on account of the purchase of necessaries for herself or any member of her family, her husband included, as shall be evidenced by writing signed by herself and husband.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 12, 1875.

OPINION BY JUDGE PETERS:

The antenuptial deed of Drake to appellant did not convert her property into separate estate. The only effect it could have was to deprive him of the right he might otherwise have acquired by his marriage with the grantee; and by Art. 2, Chap. 47, Rev. Stat., her

general estate is not liable for the debts of the husband contracted before or after marriage, but is liable for those of the wife incurred or contracted before marriage, and for such contracted after marriage on account of necessaries for herself or any member of her family, her husband included, as shall be evidenced by writing signed by herself and her husband.

Appellees account is for goods sold to the husband and charged by his directions to his wife; and while the articles charged, or the most of them, may have been necessaries, still, as appellant never undertook to pay for said goods in writing with her husband, her estate is not liable for the debt of appellee.

Wherefore the judgment is *reversed* and the cause is remanded with direction for further proceedings consistent herewith.

Morton & Parker, for appellant.
H. B. Higgins, for appellee.

MARY VALLANDINGHAM, ET AL., *v.* G. B. IGO.

Practice—Pleading—Evidence.

Where in an action for collection of a debt payment is not pleaded as a defense, evidence of payment is not admissible.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 12, 1875.

OPINION BY JUDGE COFER:

The record of the suits in the name of Christian were not admissible as evidence against the appellant. In the first case there was non suit, and the record under the issue made in the pleadings was not competent evidence for any purpose whatever. The second case was dismissed on motion of Christian, and he had leave to withdraw the note, which shows that there was no decision on the merits. *Harris v. Tiffany & Co.*, 8 B. Mon. 225. This record did not, therefore, support the plea in bar, and should not have been allowed to go to the jury, and especially with an intimation from the court that it was *prima facie* evidence that the debt had been paid, and cast upon the appellant the burden of proving that it had not been paid.

The appellee did not plead payment, and evidence of payment is therefore inadmissible; and if payment had been pleaded, we are

unable to perceive that the record would have tended to establish such a defense.

The court also erred in instructing the jury that if they found from the evidence that by any arrangement between Berkley and defendant the note had been satisfied and discharged, they should find for the defendent. There was no issue authorizing such an instruction. The second instruction given at the instance of the appellee correctly defined the law to the jury.

The facts relied upon in the answer, so far as Mrs. Vallandingham was effected by them, were defensive only; and the statute of limitation could not operate to deprive the appellee of his defense.

Judgment *reversed,* and cause remanded for a new trial.

J. R. Morton, for appellants.

J. B. Huston, for appellee.

HENRY KRAMER *v.* COMMONWEALTH.

Criminal Law—Homicide—Threats—Evidence of Bruises on Defendant —Evidence—Self-Defense Defined.

In a charge of murder where threats have been made by the deceased against the life of the defendant and some of them communicated to defendant, all are admissible as evidence.

Evidence of Bruises on Defendant.

In a charge of murder, where self-defense is relied upon, evidence of bruises on the defendant shortly after the offense is committed, is admissible.

Evidence.

When in a murder trial it appears that a short time before the killing the deceased had been placed under bond on application of defendant, to keep the peace and be of good behavior to defendant, the record of such proceeding is admissible to show the tendency of defendant to resort to the law rather than to violence and because it served to illustrate the character of deceased.

Self-Defense.

Under the defense of self-defense in a murder charge, the rule is that when one believes and has reasonable ground to believe that he is in danger of immediately losing his life, or of sustaining great bodily injury at the hands of another, he has a right to do whatever is apparently necessary for his own security. He must act rationally, in view of all the facts and circumstances, but if these are such that there is no other apparent safe means of escaping the danger, he may legally slay his adversary.

APPEAL FROM CAMPBELL CIRCUIT COURT.

March 13, 1875.

OPINION BY JUDGE COFER:

Henry Kramer, having been found guilty of manslaughter and adjudged to be confined in the penitentiary for twenty-one years for the killing of his brother, Auguste Kramer, by shooting him with a shot gun, seeks a reversal of that judgment.

The evidence tended to prove an old grudge between Henry and Auguste, which probably originated from the seduction of the wife of the former by the latter. About a month before the final tragedy, Auguste went to where Henry was sitting in company with some ladies, and asked to borrow his accordeon; and being told by his brother that it was broken, he said it was not; and upon Henry's repeating the statement, Auguste, in a rage, said to him that if he would come out into the lane, which was near by, he would kill him, that he would not fight him in the yard, but if he would come into the lane he would fight and kill him. On this occasion the conduct of Henry was passive, and gave no indication of a purpose to injure his brother, or to even engage in a quarrel with him.

On the day of the homicide, and only a short time before it occurred, the brothers were in a difficulty, and Auguste was about being taken to prison when Henry offered to take him home, and induced the officer not to arrest him, giving as a reason that he was then under bond to keep the peace. When they reached home and were at the supper table, a quarrel sprang up between them, but what was said is not proved. Their mother, who seems to have been the only other person present, says they quarreled in English, and being a German she could not understand the language used. They got up and went into the yard, where, as the mother swears, Augeste struck Henry with a broom stick. Very soon after this Auguste ran to the house of a neighbor only a few yards distant and asked for a knife, saying, "Henry will not fight fair. He wants to kill me, and I want a butcher knife. I will have to knife him." But failing to get a knife, he said Henry was hurting his mother, and started and ran toward the house where Henry and his mother were, and took up a stone as he went, and when near to the house, he and Henry began to throw stones at each other. Whether there was a cessation in the throwing of stones before the shooting does not appear, but after they had exchanged throws, Henry seized a shot gun and shot twice, inflicting one or more wounds.

After evidence had been offered tending to prove these facts, the appellant proved that Auguste, in January before the homicide was committed, had threatened to kill him, but that the threat not appearing to have been communicated to him, the evidence that it had been made was excluded, and an exception having been taken, that action of the court is now called in question.

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The same witness who testified to the threats which were excluded, also testified that the appellant, when placed in jail on the charge of murder, had bruises on his head and arms; but this evidence was also excluded. When taken in connection with the evidence of Mrs. Kramer, the testimony as to bruises on the person of the appellant was not only competent, but important, and should have been allowed to remain before the jury.

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Whether the recital in the judgment in that case that the deceased had threatened to do violence to the prisoner, is competent evidence that such threats had actually been made, is not so clear; and if there was no other evidence of threats, we should hesitate to admit that part of the record, but under the circumstances of this case, we think the whole should have gone to the jury to have such weight as they thought it entitled to.

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It is not every fault that will deprive a person of the right of self-defense. Insulting or provoking language or gestures may be faults, but clearly do not deprive the person using the language of making the gestures of his right to defend himself against danger to his life or limb. Nor will an assault, or even a battery, always have this effect. If A assaults B, and then withdraws in good faith from the encounter, all danger of a renewal of the assault being entirely passed, and B then attacks A, the latter may lawfully defend himself, notwithstanding his antecedent fault in making the first assault.

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The true rule is that when one believes, and has reasonable ground to believe that he is in danger of immediately losing his life, or of sustaining great bodily injury at the hands of another, he has a right to do whatever is apparently necessary for his own security; he must act rationally, in view of all the facts and circumstances surrounding him, but if these are such that there is no other apparent and safe means of escaping the impending danger, he may slay his adversary, and will be excusable.

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The true rule is that when one believes, and has reasonable ground to believe that he is in danger of immediately losing his life, or of sustaining great bodily injury at the hands of another, he has a right to do whatever is apparently necessary for his own security; he must act rationally, in view of all the facts and circumstances surrounding him, but if these are such that there is no other apparent and safe means of escaping the impending danger, he may slay his adversary, and will be excusable.

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The ninth instruction asked for by the appellant assumes, as true facts, that which the jury should have been permitted to decide,

and is also objectionable because it is based upon a part only of the evidence.

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

W. A. Abbott, for appellant.
John Rodman, for appellee.

H. J. POOR *v.* THOMAS STEVENSON, ET AL.

Practice and Pleading—Bad Petition May Be Cured by Answer—Demurrer.

Where a petition is defective, but is answered on the merits, such defect may in some cases be cured.

Demurrer.

Where a defective petition is made good by an answer, and the petitioner demurs to the answer, it will reach back to the petition.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 13, 1875.

OPINION BY JUDGE PRYOR:

We do not understand the position assumed by counsel to be a correct rule of pleading, but, on the contrary, directly in conflict with the practice, as well as all the rules of pleading. Where a cause of action is defectively stated, as in the failure to allege that a party of unsound mind was in that condition on the day the writing sought to be cancelled was executed, and the defendant by answer denies that he was of unsound mind on the day and at the time he signed the writing, this last pleading has made an issue for the plaintiff that he himself should have made, and cures the defect. The pleader, when his petition is defective, should never demur to the answer for the reason that the demurrer goes back to the petition unless the answer has made the petition good.

In this case, if the answer had been defective, the plaintiff should have demurred because, although the answer is bad, the petition is cured by it. Where the petition is bad, and the defense is desirous to experiment with the case in order to see what the court or judge will do with his client, it is best not to demur, but to traverse the petition with an answer that is no better than the petition; and if the case is lost a motion to arrest the judgment must prevail. It is

true, the good pleader dislikes to file a bad plea, but if he prefers pleading over, the result is that the petition is made good. If the petition is defective the defendant must stand by his demurrer to avail himself of the defect in the declaration, or file a plea that is no better than the declaration, or be careful not to aid the original pleading. If he cures the defect by pleading over, his demurrer amounts to nothing. It is true there are some petitions in which matters of substance are failed to be alleged that cannot be cured by plea or answer; but such is not the case in the pleading before us. The demnurrer was before us when the case was considered. The petition is *overruled.*

A. R. Clark, for appellant.
C. H. Lee, for appellees.

L. O. SCHMIDT & Co. *v.* THOMAS P. LARDER, ET AL.

Mortgage of Personalty in the Possession of a Bailee—Delivery of Possession.

A sale of personal property left in the possession of the seller or his bailee after sale, is fraudulent as to creditors; but where the bailee, at the instance of the seller, delivers the property to the purchaser, or agrees to hold the same for the vendee, it is an actual delivery and is not a sale fraudulent as against creditors.

APPEAL FROM MADISON CIRCUIT COURT.

March 13, 1875.

OPINION BY JUDGE PRYOR:

The whiskey in controversy was in the actual possession of the bailee of Larder when the mortgage to the appellee was executed. It might be regarded that such a possession was not decisive as to creditors, and the case not within the doctrine of constructive fraud, the possession being with the bailee and not with the actual owner. It is not necessary to determine this question. The bailee of Larder had the actual possession. He was holding the whiskey for Larder; and on the day the mortgage was executed, the evidence shows that the actual possession was delivered to the appellee. The whiskey was in the cellar of McKee, the bailee. Larder, the appellee, and others were in the cellar examining the whiskey or to see that it was there, when the bailee, by the consent of Larder, and at the instance of the appellee, agreed to take charge of the

whiskey and hold it for the latter. McKee then became the bailee of the appellee, and his possession, that was actual, was the possession of the appellee.

If the whiskey had been on the premises of Larder and in his possession, a mere declaration by the parties that the whiskey was appellees' and in his possession would not suffice. In such a case there must be an actual delivery, a taking away, for if left in the actual possession of the vendor after sale, it is fraudulent as to creditors. If, however, the whiskey or property is in the actual possession of a third party as bailee, and a sale is made, the bailee agreeing to hold for the vendee, it is an actual delivery and change of possession. The vendee may not desire to remove it. The property passes to him by the purchase, and the actual possession is not in the owner but in a third party. It cannot, then, be said that the possession is in the vendor. Judgment *affirmed.*

J. W. Caperton, for appellant.
W. B. Smith, for appellees.

BETSEY CALDWELL, ET AL., *v.* MARSH CALDWELL, ET AL.

Suit to Set Aside Conveyances of Real Estate—Joint Suit—Waiver.

Where two conveyances are made at different times to different persons for separate tracts of ground, there should be separate suits to set them aside; but since the statute, Civ. Code, § 114, provides that unless objection is made in the court, the error in improperly joining two actions in one is waived, no objection having been made in the court below none can be made in the court of appeals.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 13, 1875.

OPINION BY JUDGE PETERS:

This suit in equity was brought by appellees, the widow and the only child and heir of William Caldwell, deceased, against appellants and Robert Caldwell, to set aside two deeds made by said decedent a short time before his death, the one to appellants, who were his mother and sister, and the other to Robert Caldwell, who was his brother, for real estate situate in the city of Lexington, on the ground of the want of sufficient mental capacity, at the time, on the part of decedent to make said deed; that said deeds were executed without

any consideration, and that they were procured to be made by the fraud and undue influence of the grantees in said deeds.

The court below sustained the deed to Robert Caldwell, and set aside the deed to appellants, the mother and sister of decedent, and they prosecute this appeal from that part of the judgment. Appellants insist that, as the deeds convey two distinct parcels or lots of ground to different parties, a joint suit could not be maintained, and the petition should have been dismissed because there was a misjoinder of the causes of action. That may be true; but Sec. 113, Civil Code, provides where that objection exists, the court may at any time before defense made on motion of defendants, strike out any cause or causes of action improperly joined; and Sec. 114, *Ib.*, provides that unless the objection is made as provided in Sec. 113, the error shall be deemed as waived.

The objection was not made in the court below, and the question cannot be raised in this court. The consideration for the conveyance from William to Betsey and Mary Caldwell recited in the deed, is that they furnished nearly or quite all the money with which to purchase the house and lot owned by him, etc., except that furnished by his brother, Robert Caldwell. The conveyances for the property, there being two, are dated March 7, 1862, and July 23, 1864, respectively; and it is shown by the evidence that to within two years before the death of Mrs. Caldwell, he was an industrious man of good habits and a good bricklayer, receiving high prices for his labor. Some of the witnesses speak of his having received as much as $5 or more *per diem* for work. He might very soon have paid for the property by his labor at the prices he was in the habit of receiving for it. When he made the purchases, the evidence does not show where appellants lived, or in what they were engaged.

Mr. Messick proves that he knew Betsey in 1836, and when he first knew her, he supposed she was worth some $500 or $600; about 1839 he says she loaned him $150; that he was a grocer; she traded with him and paid him promptly; he does not know when she removed to Lexington, when he first knew her she lived in the country, on a rented place; he did not know she was living in Lexington until four or five years before he testified, and he knew nothing of her owning any property since she removed to Lexington.

James Sellers proves he formed the acquaintance of appellants about the close of the war; that they then lived in the property in controversy, and he rented and lived in a part of the house three or four months; that the old woman rented out a part of the house,

and in that way got some support; he had known William Caldwell to give her money for marketing, and William bought Mary two dresses while he was there; he never knew either of them to work for wages, and he knew no source from which they derived an income except by the rent of the house.

Robert Caldwell's deposition was taken; he proves receipts were given by Scott for payments made on the property, and were all to William Caldwell except one for $240, which was to himself; that the receipts were all in the possession of Betsey Caldwell when this suit was commenced, except the one for $240. He fails to prove, and is not examined to the point, that his mother or sister had any money with which to pay any part of the purchase money, or labored to earn money.

Sykes proves that William Caldwell borrowed of him $300 to make a payment (perhaps the first) to Scott for the property, and he paid him the borrowed money with the interest. And Robinson, who is a subscribing witness to the deed to Robert Caldwell, proves he was present in the early part of the day when that deed was made, and heard Robert and William talking about the amount each had paid for the property, Robert contending that he had paid more than William, and the later denying it and insisting he had paid most; and it was finally agreed that Robert should pay the balance owing to Scott for the property. That argument having been made, the deed was executed to Robert. That took place in the house where appellants were, and it is not shown that either of them there claimed that they had paid any part of the purchase money.

In addition to all this proof of payments by William Caldwell at the time the deed was made to his mother and sister, he was with them and away from his wife. He was greatly enfeebled by disease in body and mind, and died within a very few days after he signed the deed; he was dependent on them for such nursing as he had, and was in a condition to be easily influenced and impelled to submit to the wishes and commands of his mother, and Mr. Gibbons's deposition strongly fortifies this conclusion. After stating that William Caldwell was in a very feeble and emaciated condition, he says soon after he went to the house the first time, his mother spoke up while he was talking to him, and said how she was going to have the deed made, but he silenced her, and told her that only he and her son must talk. He wrote both deeds; the one to Robert he wrote in the morning, and promised to return and write the other in the evening, and he was so low he was afraid he would die before he could return

in the evening. A deed made under such circumstances would be scrutinized, and must be regarded with the gravest caution. But when the consideration is expressed to be for having advanced all or nearly all of the purchase money to the vendor, and upon investigation it turns out that the grantees paid no part of the purchase money, and had none to advance, the deed under such circumstances cannot be sustained.

From all the evidence in the case we must conclude that William Caldwell paid the residue of the purchase price for the property not paid by Robert, and that the conveyance to appellants was without consideration. Wherefore the judgment is *affirmed.*

Smith & Shelby, Z. Gibbons, for appellants.
Huston & Mulligan, for appellees.

LOUISVILLE SOAP MANUFACTURING CO. *v.* WILLIAM A. RICHARDSON.

Landlord and Tenant—Repairs.

The landlord cannot be required to make repairs unless he has expressly agreed to do so.

APPEAL FROM JEFFERSON CIRCUIT COURT.

March 14, 1875.

OPINION BY JUDGE PRYOR:

Unless the landlord binds himself by an express agreement to that effect, the tenant, whether for life, for years, or at will, cannot compel him to repair. "The tenant takes the premises for better or for worse, and cannot involve the landlord in expense for repairs without his consent." Taylor's Landlord and Tenant 229.

"A lessor, as such, in the absence of some covenant or agreement to that effect, is not bound to make repairs on the premises, nor to compensate the lessee for repairs made by him." 1 Waterman on Real Property 325.

A tenant is bound for stipulated rents, though the premises should be destroyed by inevitable casualty. *Ridding v. Hall, et al.,* 1 Bibb 536.

The landlord is not bound to repair in any case except by force of an express agreement. 3 Duer. 464.

There is no covenant in this case on the part of the appellee to repair. The demurrer was properly sustained, as the answer presented no defense. Judgment *affirmed.*

Young & Boyle, for appellant.
A. Barnett, for appellee.

J. LIEBER, ET AL., *v.* S. D. WILSON, ET AL.

Mortgage to Defraud Creditors—Burden.

When a mortgage is attacked upon the ground of fraud by a creditor, the burden is on the parties to such mortgage to show what the consideration was.

APPEAL FROM McLEAN CIRCUIT COURT.

March 16, 1875.

OPINION BY JUDGE PRYOR:

There can be no question as to the right of Wilson to mortgage his crop of corn and tobacco to his brother-in-law, J. H. Linvin, if made for the purpose of securing a valid subsisting debt.

The appellant was a stranger to the instrument, and in no manner connected with the transaction. When attacked upon the ground of fraud, the burden was on the parties to the mortgage to show what the consideration was. It was within their power, if a *bona fide* transaction, to remove all suspicion that might be entertained in regard to the purposes for which it was executed. This they have wholly failed to do. J. H. Linvin, the mortgagee, says that he and Wilson had a settlement on the street the day the note was executed. He does not recollect how this debt was created, except that Wilson had been getting in his debt for some time; he fails to remember the amount of his account on Wilson, and gives no intelligent or satisfactory account of the manner in which the eight hundred dollar debt originated.

The statements made by the father, son and son-in-law, when carefully examined and considered, show no consideration for the execution of the mortgage; but on the contrary, they produce a conviction that the real object for its execution was to enable Wilson to avoid the payment of his just debts. The father says that the consideration was money loaned, one mule, corn and bacon. Whether he refers to the eight hundred dollar mortgage or the three hundred, does not appear, and whether to either or to both, the court is

still left in ignorance as to the amount of money loaned or the quantity of corn and bacon furnished; and besides, the party making the loan ought himself to be able to give some definite statement in regard to it.

As an evidence of the manner in which these important transactions are lost sight of by these parties, the father says that the mortgage to him by the son-in-law for one thousand dollars was satisfied by the execution of a joint note of the son-in-law and wife, his daughter, whilst the latter says that he satisfied it by paying the money. There is nothing in the record showing that their business was so extensive as to induce the belief that these transactions might have been forgotten; but the facts clearly indicate that men of ordinary business habits, and with limited means, would be able to give a plain and clear statement of such important business affairs. The execution of the various mortgages, and the relation of these parties, connected with the unsatisfactory statement as to the consideration, leave but little doubt as to the purpose in view by the execution of the mortgage in controversy.

The judgment is *reversed*, and the cause remanded with directions to sustain the attachment and disregard the mortgage, so far as it affects the claim of appellants, and for further proceedings consistent with this opinion.

J. C. Jonson, for appellants.
George A. Prentice, for appellees.

HUSTON & MULLIGAN *v.* JOHN R. BLACKWELL.

Attorney's Fees—Value of Legal Services.

In determining the value of legal services rendered by an attorney, the magnitude of the case and the importance of the questions involved, as well as the ability and skill of counsel in conducting it, and the benefits the client has derived by reason of the employment, must all enter into the estimate of the value of such services.

APPEAL FROM MADISON CIRCUIT COURT.

March 16, 1875.

OPINION BY JUDGE PRYOR:

The preponderance of testimony is not only with the appellants as to the amount and value of the services rendered by them, but the verdict of the jury is against all the evidence in the case. The low-

est estimate placed on the value of the services rendered is by a witness for the appellee. This witness fixes the value at $500, yet the jury rendered a verdict for only three hundred dollars. The principal object of the litigation was to rescind a contract for the sale of real estate of the value of near twenty thousand dollars, upon which seven thousand dollars had been paid.

Huston, one of the firm of Huston & Mulligan, residing in the city of Lexington, was employed to aid resident counsel in the prosecution of the case. His long experience in the practice of his profession, as well as his acknowledged ability as a lawyer, was the inducement for employing him on a case of vital importance to the appellee. The services were rendered by him in conjunction with associate counsel not only in the court below, but in this court, resulting in the successful prosecution of the action by the appellee in both courts. The witnesses in the case were all lawyers in full practice, and many of them conversant with the history of the litigation in which the services were rendered. Their testimony, standing uncontradicted, was all the light the jury had in leading them to a conclusion as to the value of the services rendered. The mere physical or mechanical labor performed by counsel, the value of which the jury might of their own knowledge determine, is entitled to but little consideration in ascertaining the value of the services in a case like this. The magnitude of the case and the importance of the questions involved, as well as the ability and skill of counsel in conducting it, and the benefits the client has derived by reason of the employment, must all enter into the estimate to be made of the value of the services performed.

The judgment of the court below is *reversed*, and cause remanded with directions to award a new trial, and for further proceedings consistent with the opinion.

W. B. Smith & Huston & Mulligan, for appellants.
Chenault & Bennett, for appellee.

ROBERT MCALLISTER, ET AL., *v.* JAMES BRYAN, ET AL.

Conveyance of Real Estate—Deed.

Where a deed to real estate is duly delivered to the grantee, it carries title and its destruction does not empower the grantor to make a second deed, for he then has nothing to convey.

APPEAL FROM GREENUP CIRCUIT COURT.

March 17, 1875.

OPINION BY JUDGE PETERS:

The evidence preponderates very decidedly to the conclusion that Robert McAllister furnished the money with which the land claimed by Mrs. McAllister was paid for. At the time five hundred dollars of the purchase money was paid, and which was paid by him, the land was conveyed to him by Bryan, the vendor, and the deed acknowledged by Bryan and wife before Corum, the clerk of the county court of Greenup county, whose deposition is in the record. He not only proves the acknowledgment of the deed, but also proves the payment of $500 of the purchase money at the time by Robert McAllister. By that conveyance McAllister was invested with the legal title. The burning of that deed, and the execution of a second deed by Bryan to Mrs .McAllister did not divest him, and invest her with the title. Bryan, when he attempted to make the second deed, had nothing to convey, having parted with his title by the former deed.

As to the ruling of the court below on the report of Corum, the commissioner appointed to supply the part of the record lost, or destroyed, it is sufficient to say that exceptions were taken to the report of said commissioner, which were overruled by the court, and there the matter appears to have ended. No exception was taken to the judgment of the court overruling the objections to the commissioner's report, and they must be treated by this court as waived.

On the subject of the cross-appeal of Mrs. Sarah McAllister, we remark that Bryan, Morton, Winn and Catherine McAllister are appellees in the appeal of Robert McAllister and Malcom McAllister against them. It does not appear from the endorsement of the names of the appellees on the record that Sarah McAllister is even an appellee; but if she were, she could not prosecute a cross-appeal against other appellees.

Wherefore the cross-appeal of Sarah McAllister against Bryan and others is dismissed and the judgment is *affirmed,* on the appeal of R. McAllister and wife against Bryan, Morton, Winn and Catharine McAllister.

George E. Roe, A. Duvall, for appellants.
E. C. Phister, W. C. Ireland, for appellees.

WILSON & SPENCER *v.* W. O. HAMPTON, ASSIGNEE.

Partnership Assignment—Parties in Suit.

Where a partnership consists of three persons, two of whom unite in making an assignment of the assets of the firm for the benefit of creditors, an action to collect debts due the firm by the assignee and remaining partner is properly brought and will not be dismissed because of misjoinder of parties plaintiff.

APPEAL FROM BOYD CIRCUIT COURT.

March 18, 1875.

OPINION BY JUDGE COFER:

No question can properly arise in this case as to the effect of the assignment, made by Wilson and Andrews, of the assets of the firm of Wilson, Andrews and Company, for the benefit of the creditor of the firm. The members of the firm, including Stockwell, who did not unite in the assignment, having joined with the assignee in suing for the debt, claimed against the firm of Wilson & Spencer. It is not material whether the right of action was in the firm or in the assignee. Nor could Spencer make that question material by alleging that Stockwell had not united in nor assented to the assignment. If his failure to unite in the assignment or to assent to it, rendered it ineffectual to vest the right to the assets in Hampton, as assignee, then the right remained in the firm; and Hampton and the firm having united in the action, there can be no doubt that one or the other was entitled to judgment; and no matter which may have the right, the judgment will protect Wilson and Spencer against the assertion of the same demand in another action, in the name of the firm or of the assignee.

Judgment *affirmed.*

K. F. Prichard, Alf H. Gable, for appellants.
W. C. Ireland, for appellee.

WILLIAM M. COOKE & WIFE *v.* TRUSTEES OF WINCHESTER.

Taxation by Towns—Personal Property Where Taxed.

The situs of notes, accounts and all species of indebtedness is the home of the creditor, and where such creditor resides within a town such property may be taxed by the town.

APPEAL FROM CLARK CIRCUIT COURT.

March 18, 1875.

OPINION BY JUDGE LINDSAY:

The 9th section of an act to amend the several acts in relation to the town of Winchester, approved February 16, 1867, authorized and empowered "the trustees of said town * * * to tax annually, all property and choses in action of the citizens of said town, which they were required to give in for state taxation, not exceeding twenty-five cents on each one hundred dollars thereof."

The 1st section of an act to further amend the several acts in relation to the town of Winchester, approved March 18, 1870, provides "That the board of trustees of the town of Winchester shall have power and authority to assess annually, levy and collect a tax on all real and personal estate within the limits of the town, not exceeding fifty cents on each one hundred dollars worth of property." By the act of 1876, it is evident that choses in action, held, owned and possessed by citizens of the town, could be taxed regardless of the debtor's place of residence. "It may be fairly inferred that the object of the act of 1870 was to increase the revenues of the town, as the maximum rate of taxation was doubled." Such being the case, it is not probable that the legislature intended to defeat, or impede the accomplishment of the end it had in view, by diminishing the subjects of taxation.

The power of the trustees to tax personal property is restricted to such as is within the limits of the town. If choses in action, held by citizens and payable to them at their place of residence, are within the town, then such personal property falls within the class subjected by the act to taxation. The situs of notes and accounts, and, in fact, of every species of indebtedness, and of all kinds of evidences of indetedness, is the home of the creditor. This is the general rule, and it must control in this case, unless the language of the act requires a different interpretation.

Appellants refer us to the case of *Trigg v. Trustees of Glasgow*, 2 Bush 594. In that case the attempt was made to tax choses in action, money, and mercantile interests in Louisville. Trigg was interested in a mercantile establishment in a distant city. Such choses in action, money and other interests as belonged to and were connected with that establishment, had an actual location at another and different place from the residence of the creditor, and were, therefore, without the application of the general rule just stated.

In the case of the *City of Louisville v. Henning & Speed*, 1 Bush 382, the power to tax was upon the cash value of the real and personal estate and slaves within the city. This language was held, and properly held to apply alone to such personal estate as by the general laws of the state was assessed for state revenue at the cash value. Choses in action and other evidences of indebtedness were never so assessed, hence they were not embraced by the legislative delegation of the taxing power, under which the city of Louisville was proceeding. In this case the grant of power is to tax all real and personal estate within the town. The choses in action held by appellants are personal property; they are within the town of Winchester, and they therefore constitute a proper subject of taxation.

Judgment *affirmed*.

J. Simpson, for appellants. L. B. Grigsby, for appellees.

ALEXANDER CARROLL *v.* W. F. COLLINS.

Purchaser of Real Estate—Knowledge.

Where one about to purchase real estate hears that his grantor has already conveyed it to a named person, makes no inquiry of such person, but purchases upon the vendor declaring he has not conveyed, and the public records showing no conveyance, he cannot be protected for the want of knowledge of the prior sale. He should have made inquiry of the person whom he had heard had bought it.

APPEAL FROM BELL CIRCUIT COURT.

March 18, 1875.

OPINION BY JUDGE PETERS:

Appellant admits in his answer that a rumor had reached him that A. Goodwin had sold the land to appellee, but that Goodwin told him he had not done so, and that he had examined in the clerk's office to ascertain whether a conveyance had been made to appellee, and finding none, he concluded there had been no sale, and he therefore purchased.

He did not rely on what Goodwin told him on the subject of the sale, as his conduct shows, and from the action of Goodwin in this record he certainly, if he knew him as he must have done, could not have confided in his statements. He had heard enough about the sale to appellee to put him on inquiry in relation thereto,

and he should, therefore, have gone to appellee, from whom he could have learned the facts. And having failed to do so, his purchase cannot be protected for the want of knowledge of the prior sale, of which he had heard, and could have, by proper diligence, known all about.

The deed to appellee recites a valuable consideration, and if appellee has not paid the amount, he can be compelled to pay it.

Judgment *affirmed.*

Green Adams, J. & J. W. Rodman, for appellant.
Tinsley & Dishman, for appellee.

JOHN STEVENS v. J. H. QUISENBERRY, ET AL.

Bond to Replevy Judgment—Execution—Practice.

Replevin bonds executed by a part only of the defendants in an execution will be quashed on motion of the obligee.

Practice—Quashal of Bond.

The question of whether a surety has been released by the acts or omissions of the plaintiff cannot be raised by an answer filed to a motion to quash a replevin bond.

APPEAL FROM CLARK CIRCUIT COURT.

March 18, 1875.

OPINION BY JUDGE COFER:

The appellant, John Stevens, having obtained a judgment at law in the Clark circuit court, against J. H. Quisenberry and his surety, James Chorn, Quisenberry and his son, J. T. Quisenberry, executed before the clerk of the court a bond replevying the judgment for three months. Before it fell due, Stevens' attorney notified the clerk that his client would not accept the bond, and directed that no execution should issue on it. At the succeeding term of the court, having given notice to that effect to J. H. Quisenberry and Chorn, Stevens moved the court to quash the bond on the ground that, as Chorn had not signed it, he was not bound to accept it.

Chorn appeared to the motion and filed a lengthy response, in which he set forth various reasons why the bond should not be quashed, the substance of which was that he was only surety for

J. H. Quisenberry, and had given notice to Stevens to sue, and that Stevens and his attorney had been guilty of such laches in not causing execution to issue on the judgment before the replevying bond was completed by the signature of the surety as released him from all further liability. The circuit court overruled the motion, and Stevens has appealed.

It has been settled by repeated decisions of this court that replevin bonds, executed by a part only of the defendants in an execution, may be quashed at the instance of the obligee. *Stevens v. Wallace,* 5 T. B. Mon. 404; *Fulkerson v. Caldwell,* 1 J. J. Marsh. 496; *Southern Bank of Kentucky v. White & McMahan,* 1 Duvall 290. The court, therefore, erred in overruling the appellant's motion, unless the right to have the bond quashed could be defeated by the matters set up in the response, and relied upon to show that Chorn had been released by the acts or omissions of Stevens or his attorney after the judgment was rendered.

The motion to quash the bond was a summary proceeding, in which no pleading was necessary on either side, the notice serving alone to point out the grounds relied upon by the plaintiff. The questions raised by the response were not germane to the subject of the motion, but were in the nature of a plea in avoidance, and made no issue whatever on the ground of the motion as stated in the notice.

The appellant had a right to have his motion sustained, and when that is done, Chorn may, if an execution is issued against him, enjoin it and have the question of his release tried and decided. The overruling of appellant's motion leaves him in a condition where he cannot have his rights decided, except in the informal and irregular manner in which it was done on the trial of the motion. If he had taken out execution on the bond, that would have been an acceptance of it, and Chorn would then have been undoubtedly released; if he had allowed the bond to remain without moving to quash it, Chorn could not have been reached; and he was, therefore, bound to pursue the course he did, or consent to the loss of his debt, unless he could coerce it out of the obligors in the bond.

The response was in the nature of an application for a perpetual injunction against all further attempts to hold Chorn liable on the judgment, which could not, in our opinion, be properly tried in the summary manner in which motions of the nature of that made by Stevens are heard and determined.

We expressly reserve any expression of opinion, whether, on the

facts in the record, Chorn is or is not released; but for the error in overruling the appellant's motion, the judgment is *reversed* and the cause is remanded, with directions to quash the bond.

J. Simpson, for appellant. Breckenridge, for appellees.

BEN K. SLEET, ET AL., *v.* LOUISVILLE, CINCINNATI & LEXINGTON R. Co.

Judicial Sales of Personalty—Execution on Railroad Company.

The sheriff cannot levy upon and sell timbers delivered to a railroad company and placed upon its line where the timber was about to be and some of it was being used in repairing a bridge constituting a part of its track.

Property of Railroad Company.

The property of a railroad company not constituting an integral part of its track or rolling stock is subject to execution, but where it is a part of the track or rolling stock the creditor must resort to a court of equity for relief.

APPEAL FROM BOONE CIRCUIT COURT.

March 19, 1875.

OPINION BY JUDGE LINDSAY:

The petition shows that the timbers levied on and sold by the sheriff had been delivered or placed immediately upon the line of the railroad, and that they were about to be, and that some of them were, in fact, being used in repairing a bridge, constituting part of the track of the road. Under such circumstances, these timbers will be regarded as part of the railroad track. They were not, therefore, subject to seizure and sale under execution.

A chancellor cannot sell a public improvement of the character of a turnpike or railroad until he has ascertained that the indebtedness of the corporation owing it is so great that it cannot be discharged in a reasonable time, by the application to that purpose of its tolls or profits. *Winchester & Lexington Turnpike Road Co. v. Vimont,* 5 B. Mon. 1. The law treats a railroad as an entirety. Public policy protects the entire road from seizure and sale by a sheriff. Having no power to sell the entire road, of course he cannot seize and sell a fragment of it.

The property of a railroad corporation, not constituting an inte-

gral part of its track or of its rolling stock is subject to execution; but when that character of property is exhausted, the creditors must resort to a court of equity for relief.

The demurrer to appellee's petition was properly overruled, and the injunction properly perpetuated.

Judgment *affirmed.*

Gleen & Carlisle, for appellants.

B. H. BRISTOW *v.* A. H. BOWMAN, ET AL.

W. A. MERRIWEATHER, ET AL., *v.* SAME.

Street Improvements—Assignment of Contract—City Charter.

A contract to improve a street entered into pursuant to the provisions of a city ordinance after advertisement for bids, may be assigned by consent of the city and this does not constitute a new contract.

Apportionment of Cost.

Where under a city ordinance and contract the cost of a public improvement is to be assessed among adjoining lot owners, an increased price being chargeable against corner lots, and such improvement is made through unplatted ground, no increased price can be assessed on the theory that when platted some of the lots will be corner lots.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 16, 1875.

OPINION BY JUDGE COFER:

These appeals, although prosecuted on separate records, involve the same questions, and will be disposed of in a single opinion.

In pursuance of an ordinance regularly passed by the general council of the city of Louisville, and approved by the mayor, for the improvement of Eighteenth street, in said city, advertisement was made for bids for doing the work, and separate contracts therefor, including in each a single square, were awarded to George W. Hider, who entered into written contracts with the city, stipulating that he would perform the work according to the requirements of the contracts within nine months from the date of their approval by the general council, or within such additional time as might be directed or permitted by the council; the city, however, reserved the right to suspend the work at any time.

The contracts were approved by the general council on the 17th of October, 1872, and without having done any work under either of them up to that time, Hider, on the 13th of March, 1873, entered into an agreement with the appellees, Bowman & Co., which is endorsed on the back of his contracts with the city, and is in these words:

"This endorsement witnesseth, that the within contract is hereby transferred to Bowman and Kerr, with James Callahan as surety, and they, the said Bowman and Kerr and James Callahan, acknowledge themselves bound by the same terms and upon the same conditions in every way as George Hider, the contractor, and J. C. Dennis, his surety, were bound, and they, Hider and Dennis, relinquish to Bowman and Kerr all their right, title and interest herein."

This writing was signed by the mayor, surety, Callahan, and by Hider, and attested by the city engineer, and was reported to and approved by both branches of the general council.

Bowman and Kerr, under the style of Bowman & Co., did the work specified in the contracts with Hider, and brought these suits on apportionment warrants against the owners of adjacent property for the price of the work done under the contracts, and judgments having been rendered in their favor, these appeals are prosecuted from those judgments. Numerous grounds of defense were set forth and relied upon in the answers, only two of which are insisted on here.

1. The city charter requires "that contracts for work and material shall be awarded to the lowest and best bidder for all work done by city authority"; and it is claimed that the contract entered into between Bowman and Kerr, Hider and the city, was a new contract for work to be done by city authority, and not having been let to the lowest and best bidder after advertisement duly made, is invalid in view of this provision of the charter; and several authorities are cited to sustain this position.

Hider's contract was not assignable, and he could not legally transfer it to Bowman & Co., without the assent of the city, and the only effect of the action of the mayor and council in regard to the matter was to give the consent of the city to the assignment. It is clear that none of the parties intended that it should have the effect of canceling the old and making a new contract, and that they all understood it as merely a transfer of Hider's contract to Bowman & Co.; and to decide that the transaction was not what all the

parties to it intended and understood it to be, and what the language used imparts that it was, would be to decide that no contract made with one man to improve a street could, under any circumstances, be transferred to another. We are unable to perceive any reason founded in legal analogy or in consideration of public policy, which would pronounce such a transaction illegal if fairly entered into.

The cases relied upon by counsel for the appellants are unlike this. In *Mitchell v. City of Milwaukee, et al.*, 18 Wis. 99, the contract was let to the owner of the adjacent property at three cents per yard, and he having failed to do the work as required, it was re-let without advertising or competition, to a third person at forty-two cents per yard, and the court held that a re-letting, without advertisement, was a violation of a provision of the charter of Milwaukee, similar to that just quoted from the charter of Louisville. Here was clearly a new contract, and it was, no doubt, correctly held to be void. In this case there was no new contract, so far as the city was concerned; the city was bound from the execution of the contract with Hider, and yet remains bound by the same contract. All the city has done was to consent to the transfer of an existing contract to another person. So far as the record shows, Hider was not only bound to do the work he had contracted to do, but the city was bound to allow him to do it, and would have been bound to apportion the cost against the owners of adjacent property.

In the case of Mitchell against Milwaukee, the contractor had committed a breach of his contract, and the city was thereby released from all obligation to permit him to do the work. That contract was at an end, and the contract entered into was a new contract.

It does not matter whether Hider and his surety were released from liability on the contract or not, and therefore the other authorities relied upon by the counsel for the appellants are not in point. If it were conceded that Hider was released, it would not follow either that the city or property holders were released, or that the transfer of the contract to appellees was the making of a new contract to improve 18th street.

2. The appellants' ground all lies west of Eighteenth street, and has not been laid out into squares, and has no streets running through it at right angles with that street, and they have, therefore, no corner lots; but in making the apportionment against each of them, they were charged 25 per cent. additional as upon corner lots 30

feet wide and 200 feet deep. We are of opinion that this was incorrect. *Dulaney & Co. v. Bowman & Co.*, Mss. Opinion.

It is only when the ground has been divided into squares that the charter authorizes an additional assessment upon corner lots, and as the appellants pointed out in their answer, this specific error in the apportionment it should have been corrected. It is true the error amounts to but little, but the amounts are sufficient to prevent the cases from falling within the maxim that the law does not regard small matters.

Wherefore the judgments against the appellants, Bristow, Merriweather, and Cain and wife are each *reversed*, and the causes are remanded with directions to correct the apportionment as herein directed, and then to render judgment for the amounts thus ascertained to be due.

A. E. Wilson, Barr & Goodloe, Humphreys, for appellants.
Russell & Helm, T. L. Bennett, for appellees.

J. S. ALVES, ET AL., v. CITY OF HENDERSON.

Bonds of City Marshal—Liability of Sureties.

Where the law requires the city marshal to execute two bonds, one conditioned that he will account to the city for taxes collected each year and the other conditioned that he will account for all moneys coming into his hands in discharging his general duties, etc., and such officer fails to account for money collected on execution by him, only the sureties on the general bond are liable and not those on the bond relating to the collection of city revenues.

APPEAL FROM HENDERSON CIRCUIT COURT.

February 13, 1875.

OPINION BY JUDGE COFER:

The charter of the city of Henderson provides for the execution by the marshal of two bonds, corresponding in some, if not in all respects to the bonds required by the general law to be given by sheriffs.

The bond filed with the original petition was Gayle's official bond, as contradistinguished from his revenue bond; and his sureties on that bond are alone liable for his failure to pay over to the city treasurer money collected on executions placed in his hands in favor of the city.

The bond filed with the amended petition, although its terms are comprehensive enough to include the money sued for in this action, was taken under Sec. 9 of Art. 9 of the charter, and was intended to secure the revenue of the city, which might come to the hands of the marshal from taxes, penalties, etc., which he was directed or authorized by law to collect and receive. This we understand to include only such money as he might collect in virtue of his office as collector for the city, and not such as he might collect under final process issued by a court, and which might have been collected as well by any other collecting officer of the county. Unless there was some such distinction as this in the mind of the legislature, there would seem to have been no reason for requiring the first bond; and this view is strengthened by the fact that the second bond is required by a provision of the 9th article, which is entitled "Assessment and Collection of Taxes," and relates alone to the mode of assessing and collecting taxes, and the property and persons subject to taxation.

Sec. 10 of that article prescribes the qualification of the marshal's sureties on the bond provided for by the preceding section, and provides that they shall be jointly worth a sum equal to the aggregate amount of revenue to be collected for the year; and Sec. 11 provides that the city shall have a lien on the property of the marshal until he "obtains a quietus for all revenue and public dues for which he is bound." Money collected on fi. fa. is not either revenue or public dues, within the meaning of these terms as used in this connection, nor is the term quietus ordinarily applied to an acquittance for money collected on executions; but these terms are all such as are commonly used only in the revenue laws in relation to that which is technically public revenue.

The first sentence of the section under which the bond on which appellants are sureties provides that the city marshal shall, by virtue of his office, be collector of the taxes, and then follows the requirement that he shall in May or June of each year execute bond to the city, etc.

These considerations point clearly to the conclusion that the bond in question was only intended to secure the reveue proper of the city, and that only the sureties in the bond required by Sec. 16 of Art. 6 are responsible for defalcations, such as are sued for in this case.

The court, therefore, erred in not carrying the city's demurrer to the answer of the appellants back to the petition, which, for the reasons herein given, failed to state facts constituting a cause of

action against the sureties in the bond filed with the amended petition.

Wherefore the judgment is *reversed* as to J. S. Alves and L. H. Lambert, and the cause is remanded with direction to dismiss the petition as to them.

Clay & Coleman, for appellants.
Vance & Merrit, Truner & Trafton, for appellee.

A. HAM AYER *v.* JAMES WALTRIP'S ADM'R, ET AL.

Pleading—Amendments.

Under § 161, Civil Code, the court is authorized to allow amendments to pleadings, conforming the pleadings to the facts proven, when to do so will not substantially change the claim or defense, but a defendant who has answered and given some proof to sustain it, cannot go on the witness stand and swear to an entirely different state of facts and then expect the court to allow him to amend his answer to conform thereto, especially when he offers no excuse for his failure to rely upon his original answer.

APPEAL FROM McLEAN CIRCUIT COURT.

February 16, 1875.

OPINION BY JUDGE LINDSAY:

Sec. 161, Civil Code of Practice, authorizes the courts to allow amendments in furtherance of justice, by conforming the pleadings to the facts proved, when the amendment does not change substantially the claim or defense. But where, as in this case, a defense has been set up by answer, and the defendant then puts himself upon the witness stand, and swears to facts utterly irreconcilable with his answer, it is an abuse of discretion to allow him to abandon his original, and set up a new defense, under the pretext of conforming his pleadings to the proof. And more especially is this so when he offers no reason or excuse for his failure to rely on his original answer, upon the facts to which he deposed as a witness, and which, if true, were known to him when he first answered. Further than this, when the amended answer was permitted to be filed, his pleadings then contradicted each other, and no attempt was made to explain the contradiction. The court had no means of determining which of the two answers was true, and outside of the

proof might have set one off against the other, and disregarded both. But independent of the pleadings, the weight of the testimony is against the claim asserted by appellee.

Bryant's statement that appellee told him that the conveyance by Waltrip was a contrivance to avoid the payment of the grantor's debts is uncontradicted, except by appellee himself. All the circumstances proved, tend to show that the conveyance was so intended; and the payment of money, in the presence of Wall, is calculated to confirm rather than to weaken this conclusion. Appellees are unable to tell how much money (whether $500 or $600) he paid to Waltrip, and Wall swears that he was sent for, and was present to see the money paid. After the pretended purchase, the crops raised on the land were divided between the vendor and vendee; and when Waltrip died, not one cent of the amount paid to him in the presence of Wall passed to his administrator, and no account is given of his having in any way appropriated the money during the short time he lived after its pretended payment to him.

Judgment *reversed* and cause remanded, with instructions to subject the land to the payment of appellant's claim.

J. C. Jonson, for appellant. Geo. A. Prentice, for appellees.

ADAMS EXPRESS CO. *v.* J. J. GUTHRIE.

Public Carriers—Special Contract—Burden of Proof.

When it appears by the proof that a special contract was made with a carrier for the delivery of freight under circumstances of fairness and good faith, the burden is on the shipper to show that the contract ought not to be enforced because unfair and of its having been imposed upon him in a way that prevented him from examining it and understanding it.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 18, 1875.

OPINION BY JUDGE PETERS:

In the opinion delivered by this court in this case, when it was here on a former occasion, it is said it is only necessary that the carrier shall satisfactorily prove that a special contract was made, under circumstances indicating fairness and good faith; and it is

then incumbent on the shipper to show that the contract ought not, for some of the reasons indicated, be enforced against him.

It appears from the evidence that Curran, Goodwin, Walker & Co., a firm of merchants in the city of New York, were made by appellee his agents to contract for the transportation of the package of goods, for which this suit was brought, to him in Paducah, Ky., with appellant, and in making them his agents, he did not restrict or limit them to any particular form of contract for the transportation of said package. The evidence conduces to show that they contracted with appellant to transport said package to appellee on the terms and according to the stipulations contained in the writing filed in the case, and made part of John J. Cullen's deposition, and in which it is expressly stipulated that appellant is not to be held liable for any loss or damage to said property while being transported by it to its destination, arising from dangers of railroad, ocean or river navigation, steam, fire in stores or depots, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or its servants.

If the agreement in paper "B," relied upon by appellant, was entered into by the agents of appellee with it, it must be regarded as the contract of the parties, unless it was not made freely and understandingly on the part of said agents; and it devolved on appellee to show that fact by evidence. The delivery of the paper "B" by appellant to Curran, Goodwin, Walker & Co, and the acceptance of it by them as the agents of appellee, is *prima facie* evidence that the terms and stipulations therein contained were agreed upon by the parties, and is binding on them Appellee cannot avoid it, unless he shows that said writing was imposed upon his said agents, in a way that prevented them from examining said paper, and understanding its contents. As instructions "Nos. 1, 2 and 3" given to the jury at the instance of appellee, do not conform to the law of the case as expounded by this court, they should have been refused by the court below, and the judgment must be *reversed* and the cause remanded for a new trial, and for further proceedings consistent herewith.

Thomas E. Moss, for appellant.

L. D. Husbands, Marshall & Bloomfield, for appellee.

J. BOONE, ET AL., *v.* J. N. B. HARDWICKE'S ADM'R.
J. BOONE, ET AL., *v.* T. C. BARN'S ADM'R.

Suit on Injunction Bond—Recovery.

A requirement in an injunction bond that the obligors would pay and satisfy any modified judgment that might be rendered is mere surplusage, since the judgments were not enjoined. The only obligation on said bond was to pay all costs and damages that might be awarded in case the injunction should be dissolved.

Measure of Damages.

Only such damages caused by the delay in selling the land may be recovered on a bond given for an injunction against such sale and the recovery can then only be had unless assessed at the time the injunction was dissolved as required by the statute.

APPEAL FROM POWELL CIRCUIT COURT.

March 20, 1875.

OPINION BY JUDGE LINDSAY:

The petition upon which Barzella Grooms obtained the order of injunction, restraining appellees from proceeding to sell the tract of land adjudged to be sold in satisfaction of their claims against Madison Grooms, shows that she did not ask that they, or either of them, should be restrained from proceeding to enforce their judgments as against their debtor.

The prayer of the petition is that they shall be restrained "from selling said land." The order of injunction is not copied in the record, but we must presume that it was such an order as was asked for, and that, notwithstanding its existence, the appellees were free to pursue their personal remedies against their debtor, being restrained only from selling the tract of land. The bonds required by the clerk were not such as he ought to have taken. There was no necessity for the appellant and her sureties to stipulate that they would satisfy the judgments in favor of appellees against the third party, Madison Grooms, nor that they would satisfy any modified judgment that might be rendered. As these judgments were not enjoined, these stipulations were mere surplusage. Covenants resting on no consideration are not authorized or required by law. The only enforceable stipulation in the bond is the agreement to pay all costs and damages that might be awarded in case the injunction should be dissolved. Sec. 307, Civil Code of Practice.

Appellees, therefore, have no right to recover on these bonds more

than they were damaged by being delayed in selling the land, and not that amount, unless it was assessed as required by Sec. 325 of the Civil Code of Practice, at the time the injunction was dissolved, and by the court rendering the judgment dissolving it.

The judgments are *reversed* and the causes remanded for further proceedings not inconsistent with this opinion.

Apperson & Reid, for appellants. H. C. Lilly, for appellees.

A. T. AULICK AND WIFE *v.* T. P. FISHBACK, ET AL.

Lost Wills—Competency of Jurors.

In a trial to establish a lost will a challenge of a juror should be sustained where it is shown that the juror's mother was a cousin of the testator and also related to both parties to the suit.

Admissibility of Evidence.

Where in a petition to establish the terms of a lost will a paper filed with the petition is not a copy of the will but was written by the draftsman from memory more than eight months after the will was prepared and after he had last seen it, it is not competent to be read to the jury for any purpose. Such a writing might be referred to by the draftsman to refresh his recollection as a witness but is not evidence to be read to the jury.

APPEAL FROM BRACKEN CIRCUIT COURT.

March 3, 1875.

OPINION BY JUDGE COFER:

About the 3d of April, 1871, Josiah Fishback, a citizen of Bracken county, made and published a last will and testament, with all the formalities required by the statute of wills. Some weeks after the will was made, Fishback being then in feeble health, and having no immediate family residing with him except his son, John P. Fishback, then thirteen or fourteen years of age, left his home in charge of a family that resided with him, and went to the house of his sister in Pendleton county, where he died on the 7th of July following.

Some time after his death his son, John P. Fishback, by his statutory guardian, filed in the Bracken county court a petition, in which he alleged the execution of the will, and that it had been lost. He filed with his petition what he alleged to be a copy of the will, and making his sister, Mrs. Aulick, and her husband defendants, sought

to have the contents of the will ascertained and admitted to record. The case was heard in the county court, and the paper filed with the petition was, with slight modifications, declared to be the last will and testament of Josiah Fishback, and as such was admitted to record.

From this judgment Aulick and wife prosecuted an appeal to the circuit court, when a trial by jury was had and a verdict rendered that the paper as probated in the county court was the will of Fishback; and a judgment having been rendered on the verdict, Aulick and wife have appealed to this court.

A panel of the jury having been demanded, and such party having stricken from the list the names of the jurors, the remaining twelve were called, when the appellants objected to one of them on the ground that he was related by consanguinity to both parties, when the juror stated that his mother was a cousin of the decedent, Josiah Fishback; but the court overruled the appellants' objection, to which they excepted.

Our statute has prescribed the qualification of jurors, but has not designated the causes of challenge, and resort must, therefore, be had to the rules of the common law.

That a juror is of kin to either party within the ninth degree is cause of challenge. 3 Blackstone 363; *Dailey v. Gaines,* 1 Dana 529. Whether, if a juror be equally related to both parties, it will in all cases be good ground of challenge, we need not decide; but under the peculiar circumstances of this case, we have no doubt but the challenge should have been allowed. The father, brothers, sister, and nephew of the decedent, all of whom were related to the juror, were the principal witnesses for the appellees, while but few, if any, of the appellants' witnesses were related to either party.

It is probable that under such circumstances the juror would, from an involuntary partiality for his kindred, be inclined to look more favorably upon their testimony in all matters in which their statements might conflict with the statements of strangers, called as witnesses on the other side. Under such circumstances it is no disparagement of the juror to say that it is not probable that he was an impartial trier of the facts of the case.

It is true the court may not have known the facts rendering it peculiarly improper that the juror should sit in the case, but the appellee or his counsel and guardian must have known it, and should have withdrawn him, or consented that his name should be stricken

from the list; and having failed to do so, the court, when apprized of the facts, should have granted a new trial.

The paper filed with the petition was not a copy of the will, but was written by the draftsman from memory, eight or ten months after the will was prepared, and after he had last seen it. This paper was allowed to be read to the jury as evidence against the objections of the appellants. It was certainly not competent, and should not have been read to them for any purpose, nor should it have been allowed to go before them in any manner. It was not legal evidence, either of the fact that a will had been made or of its contents, and it could not have had any effect not prejudicial to the appellants. The only legitimate use to which the paper could have been put was to refresh the memory of the witness who wrote it, and no other witness should have been allowed to use it even for that purpose.

We see no impropriety in allowing the draftsman to look at it to refresh his memory, but when he had done so he should have spoken from memory, and not from the paper. That the memorandum was made after the lapse of several months, does not seem to us to be a sufficient reason for refusing to allow the witness to look at it, for as it is from memory, and not from the paper, that he is allowed to speak, it would seem that it is immaterial by what means the facts are recalled to his mind. But the fact that it was not made until after a considerable time had elapsed would be a proper subject to be considered by the jury in weighing his testimony.

The judgment should have set forth in full, the will as found by the verdict, instead of referring to the verdict for modifications of the will as recorded.

We cannot decide whether on the evidence the jury should have found that the will had been revoked. Under the law as it now stands we must give to verdicts in will cases the same weight that we do in other civil cases. Sec. 27, Chap. 113, General Statutes. As the evidence on this point is of such a character that a verdict either way could not be disturbed by this court, if the question had arisen in an ordinary action, we are not authorized to disturb it in this case.

For the errors indicated the judgment is *reversed,* and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

A. R. Clark, A. Duvall, for appellants. B. G. Willis, for appellees.

A. BOYD, ET AL., *v.* A. D. THOMAS, ET AL.

Appeal—Limitations Presented by Plea.

The three years limitation which bars an appeal to this court must be presented by a plea and cannot be made available by being incorporated into a brief.

Time to File Plea.

The Court of Appeals on its own motion may give appellee time in which to file a plea of the limitations barring an appeal after three years.

APPEAL FROM BATH CIRCUIT COURT.

March 24, 1875.

OPINION BY JUDGE LINDSAY:

The three years limitation that bars an appeal to this court must be presented by plea. It cannot properly be incorporated into a brief, and thereby made available. The manner in which it is here presented does not seem to be objected to by appellant, but as the record of the case does not show that the statute was pleaded, we cannot assume that appellant has waived his right to object.

The court, of its own motion, sets aside the hearing, to give appellees an opportunity to file a plea in case they desire to do so. The case will remain open until the 10th of April, when it will be again submitted.

Nesbitt & Gudgell, for appellants. Reid & Stone, for appellees.

BOARD OF TRUSTEES OF COLUMBIA *v.* T. H. CURD, ET AL.

Officers of Towns—Marshal.

Before a town marshal can be compelled to pay over public money some party entitled to receive it must make demand therefor.

Town Trustees.

Town trustees have no right to the possession of the public funds and are not proper parties to demand them from the marshal.

APPEAL FROM ADAIR CIRCUIT COURT.

March 31, 1875.

OPINION BY JUDGE PRYOR:

There is no allegation of a demand of the marshal by any party

entitled to the money alleged to be in his hands. Before a collection officer can be compelled to pay such moneys, some party must be designated to whom the payment is to be made, unless the charter in this case regulates the manner of payment. If to be paid to the town treasurer, he must make the demand, and this fact must be alleged. The trustees have no more right to the possession of the funds than the marshal who collects them; and a payment by him to a trustee would not release him from responsibility. See *Owens v. Ballard County Court,* 8 Bush 611. Judgment *affirmed.*

Winfrey & Winfrey, for appellant.
Alexander, Dickinson, for appellees.

WM. M. HIBBARD *v.* W. S. WATSON, ET AL.

Invalid Execution—Constable Not Bound to Return an Invalid Execution.

There is no liability on a constable's bond for failing to return an invalid execution.

Election of Causes.

It is error for the court to require a plaintiff to elect which of the causes of action set forth in his petition he will prosecute.

APPEAL FROM BALLARD CIRCUIT COURT.

April 2, 1875.

OPINION BY JUDGE COFER:

The record of the case in which the execution against Woolfork issued, shows that no judgment was ever rendered in that case, and consequently that the original execution was void; and it results that the replevy bond taken under it was, at any rate, invalid as a statutory bond, and no execution could lawfully issue upon it. As the execution placed in the hands of Watson issued on that bond, and was consequently invalid, the failure to return it did not subject the constable or his sureties to the statutory liability imposed on constables for failing to return executions.

When ruled to elect which of the causes of action set forth in the petition as amended he would prosecute, the appellant elected to proceed for the failure to return the execution, and from that time forward, that was the only cause of action in the petition; and as it

was sufficiently answered by the allegation that the execution was invalid, and the answer was sustained by the record, the petition as to that branch of the case was properly dismissed.

But the appellant excepted to the order requiring him to elect which of the causes of action he would prosecute, and the judgment should be reversed if the rule to elect was improperly made.

Both causes of action arose out of alleged violations of Watson's bond, and we are unable to discover any reason why they could not be united in the same petition. A recovery upon one would be a satisfaction of the other; but on the face of the petition both were good, and neither should have been stricken out; but the plaintiff should have been allowed to go to trial on both, and to prove both if he could, and recover the highest amount to which he would be entitled on either cause of action made out by the evidence; and if he failed to prove more than one cause of action, he should have been allowed to recover on that.

The order requiring the appellant to elect which of the causes of action he would prosecute, is *reversed,* and the cause is remanded for a new trial upon the cause of action set up in the amended petition.

W. P. Bishop, for appellant. E. I. Bullock, for appellees.

J. R. UNDERWOOD, EX'R, &c. v. JNO. BURTON.

Decedent's Estates—Judgment of a Foreign State Binding in Kentucky.

Where a judgment establishing a claim against an estate has been entered in a foreign state it will be final here unless there is some defense offered that did not exist in the state where entered. The holder of such a judgment cannot be required to establish his claim here, but his claim consists of the sum adjudged due him in the judgment.

APPEAL FROM BARREN CIRCUIT COURT.

April 10, 1875.

OPINION BY JUDGE PRYOR:

The settlement of the estate of James Brown, the elder, involved the settlement of other estates and partnerships in the state of Virginia, over which the courts of Kentucky had no jurisdiction, either of the subject matter or the parties interested. The estate of Bur-

ton could not have been settled in Kentucky, and the only remedy that his heirs or devisees had, in order to obtain an adjustment of the accounts of James Brown as the executor of the will of Burton, was by a proceeding in the courts of Virginia. To require such a proceeding in Kentucky would not only be impracticable, but without any legal sanction. A majority of the executors of James Brown, the elder, had qualified in Virginia, the place of their testator's residence; and there was no one else against whom the heirs and devisees of Burton could proceed to recover their patrimony.

The proceeding, however, in Virginia was instituted by James Brown's executors for a settlement of his estate, and a settlement of his accounts as the executor of the will of Burton. To this proceeding Burton's devisees were made defendants, and asserted their claim as such to the money and property that had passed to James Brown, as executor, and for which he had never accounted. The Virginia court ascertained the definite amount due John Burton, the appellee in this case, and gave him an unconditional judgment for the money. The court reserved by the judgment the right of determining the personal liability of the executors of James Brown, and also directs the sale of certain property, in order that distribution may be made. It is alleged by the appellee that he had received nothing upon his judgment in Virginia; and if he has, the Kentucky executor and trustee should make it appear, as this is the character of defense he should be allowed to make.

After a litigation of thirty or forty years in Virginia with two of the executors of Brown, in order to determine what the appellee was entitled to, it is now insisted that all these matters should be relitigated in Kentucky in an action against the Kentucky executor. If this executor is allowed to thus resist the claim of the appellee, or to plead the statute of limitations, it is, in fact, annulling the judgment of the Virginia court, and enabling the Kentucky executor to sell the trust estate in Kentucky, and pay over the proceeds to the Virginia executors, and heirs or devisees of James Brown, with whom appellee has been litigating, and against whom the judgment sought to be enforced was obtained. The present claim of the appellee is based on that judgment, and it must be regarded as final, unless there is some defense offered by the present appellant that did not exist in Virginia, affecting the merits of the controversy. No such defense is relied on in this case. The estate of Brown must be regarded as a unit, and the executors of his will, however numerous, constitute only one representative.

If the two executors in Virginia had settled with Burton without the intervention of a court of equity, it would have been binding on the Kentucky executor, in the absence of any defense showing that some injustice had been done the estate. We do not mean to say that the Kentucky executor could make no defense. He would be allowed to show payments, if any, made by him, or to make any other defense to the merits known to the Virginia executors. The Virginia executors may yet show, even after judgment, a payment reducing the amount by the Kentucky executors, but to require that the claimant must establish his original claim as against the estate when once reduced to judgment, in attempting to make his money out of an executor in a case like this, who was not before the court, would defeat the ends of justice and enable such litigation to continue without limit. This party appellee, has been kept out of his money for more than half a century by the default of the executors of his father's will; and the representatives of that executor ought now to pay the money, if the estate of their testator is sufficient for that purpose.

As to the interest of the appellee in the estate of James Brown, Jr., in the lands in Kentucky, there can be but little question. The lands in Kentucky were conveyed to the appellant and others in trust for certain specified purposes, viz., for the payment of certain liabilities, and among them the claims of the devisees of Burton. After the execution of the trust, the trust property consisting of these lands belonged to James Brown. He owned the estate, subject to the incumbrances created by this deed. It is true that the trustees were invested with the legal title; but this did not deprive the grantee or his heirs of the right to the land left after paying the debts. At the death of James Brown this interest would have passed by descent to his heirs; and certainly he had the right to dispose of it by will. His will, made in 1841, gave his estate to his seven children, James Brown, Jr., being one of them. Burton was a half brother of James Brown, Jr., and whilst he may not have any of the blood of James Brown's son in his veins, he has some of the blood of James Brown, Jr., and for this reason is permitted by the statute to inherit. We cannot see the force of the argument by appellant that this property, such as was left of it, passed only to such of the heirs as were or might be living when the trust is finally settled, such is not the language of the deed, and if James Brown, the elder, had any interest in it, this interest passed to his devisees. The administrator of James Brown, Jr., is not a necessary party. As such

he has no interest in this trust estate and no creditor of James Brown is asserting any claim to his interest by attempting to subject it.

The only difficulty we have had in determining this case, is upon the cross-appeal of the appellee. The Virginia court gave to the appellee a judgment for the principal debt, with the interest, the commissioner's report showing what the interest was. We see no reason why a debt bearing interest may not be made principal by the judgment when rendered. This has often been done in Kentucky, and there are strong reasons for applying the rule here. This the court would do if such intention could be gathered from the Virginia judgment. It is based upon the commissioner's report showing the principal debt, and also the interest, the two being kept separate. This is no judgment for the principal and interest added, but a judgment, in effect, for the debt and interest. It was not intended to compound the interest by this judgment, and it may be questionable whether such a judgment could have been rendered under the law of that state. The court below has given no interest on the interest from the date of the commissioner's report in Virginia, but has given interest only on the principal. When the final judgment was rendered in 1869 by the court below, the interest was then made principal and the whole amount made to bear interest. This, we are satisfied, was proper, and under the facts of the case such a judgment should have been rendered.

The offer to pay the money into court on the principal was properly refused. The same should be applied first to the interest; and if appellant's theory be correct, this $27,000 was all interest; if so, it should have been first paid, and to determine otherwise would be regarding that large sum as a principal debt not bearing interest, and that the debtor had the right to apply his payment to the debt that was bearing interest. This would be the correct practice if such were the facts of the case, but it is not pretended by appellant that this large sum is a part of the principal debt, but only interest, and if so it should have been first paid. This question, however, is now immaterial, as it is all made principal by the judgment rendered. The appellant, as the Kentucky executor, brought this action to hasten the settlement of this large trust estate, for the reason of the manifest injustice done the parties interested, by the long and protracted litigation in Virginia. This appellee has been kept out of his money for more than sixty years, and whilst the neglect or laches is not to be attributed to the action of the appellant, but to

those who have been directly interested as fiduciaries in Virginia, the litigation must end. The judgment of the court below is *affirmed* on the original and cross-appeal.

I. R. Underwood, for appellants. Lewis & Bales, for appellee.

A. T. STEPHENSON *v.* STEPHEN LILLARD, ET AL.

Conveyance of Real Estate—Suit on Lien Notes—Right of Vendee to Rent Land—Right of Innocent Tenant.

Where land is sold on deferred payments and lien notes taken, and the purchaser before foreclosure of such lien, rents the land to an innocent tenant, who gives his notes for the rent, plaintiff in such foreclosure has no lien on such notes.

APPEAL FROM MERCER CIRCUIT COURT.

April 13, 1875.

OPINION BY JUDGE PRYOR:

The appellant, Stephenson, by his action in equity filed in February, 1871, only sought to enforce his contract for the sale of the land to J. W. Lillard, by asserting his lien as vendor. Lillard had obtained the possession of the land from the tenant of Stephenson; but whether this possession was surrendered by the consent of the latter does not appear, nor do we think it material in determining the question involved in this case. The price to be paid for the land was $29,359.50, payable in three instalments, and upon the first instalment the appellee, Lillard, was to give one Ford as surety. This he failed to do, but after he obtained the possession, paid on this first note the sum of six thousand dollars, which sum was accepted by Stephenson, and upon Lillard's failure to pay any more of the purchase money, the action to subject the land was instituted. Lillard was evidently in no condition to pay for the land, and prior to the termination of the action had obtained his discharge in bankruptcy.

That the lien for the purchase money could be enforced is not questioned, but it is insisted by Stephen Lillard that the appellant had no lien for or upon the rents of the place, and no lis pendens in order to subject the rent at the time he became the owner of the rent note. No attachment was obtained by appellant, or the money garnisheed in the hands of Ford, the renter, nor is there any allega-

tion of fraud between the father and son with reference to the transfer of the rent note; but the whole right of recovery on the part of Stephenson is made to depend on the question as to whether or not there was a lis pendens as to the subject-matter when Ford rented the land, and when the note was passed to Stephen Lillard. If there was no lien existing upon the rents of the land, we cannot well see how or in what manner the petition filed to subject the land to the payment of the purchase money is to be regarded as an action pending to enforce the claim for rent. The vendee, Lillard, had the right to sell the land or to rent it, the party thus contracting with him, taking the property subject to the judgment of the chancellor enforcing the lien.

Conceding that a state of facts might have existed authorizing the chancellor to take the power from the vendee and rent it out before final judgment, yet, if the vendee had himself rented it to another, and transferred the rent notes, the assignee would hold subject only to be divested of the rent from the time the purchaser under the judgment of sale was entitled to the possession. As between the parties to the action, the chancellor might enforce his order and require the vendee to abstain from committing waste, and in some cases, where the land is being materially impaired in value, may take the possession and rent it out. Whether such an order can be made as between vendee and vendor is one of doubt, and not necessary now to decide. It is certain, however, that the vendee has the right to rent the premises, and if he assigns the rent notes, the vendor, having no lien on them or the rent, must lose it or be vigilant in reducing his purchase money to a judgment, and thereby end the claim of the vendee and his tenant by selling the land. In this case there was no lis pendens or claim asserted to the rent, or the right to have the land rented out, until the month of November, 1871, when it is admitted by appellant that the renting to Ford took place in the first week in September, preceding, and is proven by Ford and others that he rented the land on or about the first of August, 1871. The notice to Lillard was that at the November term a motion would be made to rent the land out, without assigning the grounds therefor, and even if the basis of the motion had been given in the notice, we do not see how it could be made or considered a part of the record until filed in court.

It was, in fact, an amended pleading setting up a different and distinct ground of action not mentioned in the original pleading, nor necessarily one of the incidents to such a proceeding. The land

being insufficient to satisfy the debt, the appellant, for causes stated, might have debts due Lillard garnisheed in the hands of the debtors of the latter, or he might (if the theory of counsel be correct) have filed an amended pleading, alleging that the property was being materially impaired or its value greatly impaired, so as to obtain an order renting the land out. This would have been a different remedy, as well as a different cause of action, from the original proceeding, and where other equities had in the meantime intervened in favor of those not parties, the minor equity created by such an amendment must be regarded as subordinate.

If the appellant, by reason of the failure of Lillard to comply with the contract by giving surety on the first note, had asked for a rescission and a restoration of the possession, there might be some reason for regarding the action as a lis pendens; but when he is attempting to sell the land as Lillard's, certainly, as between himself and third parties, who have in good faith rented the land and paid the rent, or assignees who have purchased the rent notes, he can look only to a sale of the land for his debt.

The evidence is that the land was rented in August, and the writing executed in September following, that Stephen Lillard obtained the rent note by surrendering to his son a note he held on him for $2,000. We think Ford rented the land in good faith. He paid a fair price for the land, and his rent money was placed under the control of the court. The facts may look suspicious with reference to the transaction between father and son, but if so, there is no charge of fraud, or even any claim to the rent note until after the case was submitted. The land was rented and the note held before any motion was made to rent the land out, this motion constituting the only lis pendens in regard to the rent. It was new matter, and could not relate back to the filing of the original action, so as to affect the rights of third parties. Having rented the land, and an order having been made that, in effect, deprived him of possession, Ford's only remedy was to enjoin the appellant from having it enforced, and his costs should have been allowed him. The proof established beyond controversy that the land was rented by Ford, and that he paid a full equivalent for it.

The judgment is, therefore, *affirmed* on the original and *reversed* on the cross-appeal of Ford, with directions to enter a judgment

in his favor against appellant for his costs. *Stone & Warren v. Connelly, et al.*, 1 Met. 653.

John T. Spillman, R. M. & W. O. Bradley, for appellant.
T. C. Bell, P. B. Thompson, Sr., Thompson & Thompson, for appellees.

GEORGE F. FULLER v. LOUISVILLE GAS CO.

Gas Meters—Contract to Furnish Gas.

Where meters furnished to measure gas used are not correct within that degree of accuracy practicable to attain and defendant has charged and collected from plaintiff an amount beyond the gas used, plaintiff is entitled to recover.

Evidence.

Before evidence of the quantity of gas used by one tenant in a given house should be allowed to go to the jury to show that another tenant of the same house used a less amount of gas, it should be made to appear that both tenants burned gas for an equal period of time in an equal number of burners, etc., and such evidence will never be allowed to fix the test of the quantity of gas used when the test by meters is as nearly accurate as it is possible for human ingenuity to attain.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

April 15, 1875.

OPINION BY JUDGE PRYOR:

The instructions given presented the whole law of the case to the jury. The jury was told for the plaintiff that under the contract, it was the duty of the defendants to furnish, as nearly as practicable, as many feet as it received payment for. By the third instruction, that if the meters of the defendant, used in the measurements of gas to plaintiff, were not correct within that degree of accuracy which was practicable to attain, and that defendant has charged to and collected from plaintiff an amount beyond the gas which he received, they should find for the plaintiff to the extent of such overcharge and collection; and further, that plaintiff's agreement to accept gas by meter measurement does not affect his right to a measurement as nearly correct as practicable. This third instruction explained fully to the jury what was meant by Instruction No. 2, in which they were told that it was the duty of the defendant to measure the gas with reasonable correctness.

It was shown by all the witnesses on the subject that reasonable accuracy in the measurement was not only all that could be required, but all that could be attained, and by most, if not all, who testified on this point, that the meters used were as correct in measuring gas as it was possible to make such instruments. Nor can we perceive any error on the part of the court below in refusing to permit the testimony offered as to the quantity of gas consumed in 1868 and in 1869 to go to the jury. After the meter with which the gas had been measured had been fairly tested, the plaintiff offered to prove that from November, 1868, to April, 1869, the same business had been conducted in the opera house as was conducted from September, 1870, to May, 1871, the last named months constituting the time during which the appellant used appellee's gas; that from November, 1868, to April, 1869, the house required the same average amount of gas and light weekly; and that the same meters, or others similar and tested in the same way, had been used; further, that the defendant's bills for gas during the first measured period varies several thousand feet each month.

It is not shown that the appellant was then the proprietor of the opera house, or had, during that time, contracted for gas from the company; but on the contrary it is to be inferred from what appellant offered to prove that some one else was then controlling the house, and although it is stated that the house required the same light, and that there were the same number of burners used each period, it is not stated that the gas was in fact used the same length of time, or that the party in possession between November, 1868, and 1869, was as careful in shutting off the gas, or in economizing its use, as appellant had been. It was an effort to show that the measurement was incorrect or the meters defective by proving, or offering to prove, that two or three years previous there had been a discrepancy in the gas bills against the proprietor of the same house, without ever stating that the gas had been burned for the same length of time with the same number of burners. The house might have required as much gas, and still not as much have been used. This character of evidence, if even admissible when the facts appear as indicated they should, in order to make them competent, would be entitled to but little weight when compared with the test made by men of science, and were certainly incompetent as offered to the jury.

If the facts offered to be proven were such as they are construed to be by counsel in argument, viz., that the same meters with the

same business and light, for the same length of time, in the same house, and controlled by the proprietor or his agents, in the same manner, made the variance in the measurement suggested, there would then be no reason why such evidence should not go to the jury upon the issue made. There was no offer to show that the gas was burned the same number of nights, or the same number of hours each night; and to permit such proof would be to measure appellee's gas by the mere opinions of men as to the quantity that would probably be consumed during any given period, and this, by comparing the quantity used by one man during one period, with the quantity used by another in the same house at a different period, but occupying it the same length of time. Such a test would not be relied on, and there is no reason for adopting it, when there is a test approximating as near accuracy as it is possible for human ingenuity to attain.

The judgment of the court below is therefore *affirmed*.

M. Mundy, for appellant.
Barr & Goodloe, Humphreys, for appellee.

COMMONWEALTH *v.* MINA BURSCHULZ, ET AL.

Criminal Law—Intoxicating Liquors—Indictment.

In charging a sale or gift of spirituous and vinous liquors to intoxicated persons, it is necessary to name the persons.

Indictment.

In charging a sale of liquors to minors, such minors must be named and it must be averred that the sale was made without the special written direction of the father or guardian of such minor.

APPEAL FROM HANCOCK CIRCUIT COURT.

June 8, 1875.

OPINION BY JUDGE COFER:

The indictment in this case does not sufficiently charge a breach of the coffee house bond on which it is based.

The particular facts should have been stated, as that the defendant, Burschulz, sold or gave spirituous and vinous liquors to named persons, who were at the time intoxicated and acting in a disorderly way. A charge that she so sold or gave liquors to persons not named is too general, and would not enable the defendant to pre-

pare for an intelligent defense, or to plead a judgment on the indictment in bar of a subsequent prosecution.

The charge that she sold spirituous and vinous liquors to minors, is defective for the same, and for the additional reason that it is not charged that such selling was without the special written direction of the father or guardian of such minor.

There is no law forbidding or prescribing the manner or conditions upon which such liquors may be sold to free negroes; and consequently no degree of particularity could have made the attempted charge of a breach in that regard good.

The indictment is also fatally defective in failing to charge that the alleged selling and giving to persons who were drunk and disorderly, and to minors, was in the defendant's coffee house or on the premises thereof.

Judgment *affirmed*.

John Rodman, for appellant. Murray & Powers, for appellees.

COMMONWEALTH *v.* GEORGE NORTON.

Bail Bond—Surrender by Bondsmen—Release from Liability.

To release a bondsman on a bail bond the bondsman at any time before a forfeiture may surrender the defendant to the jailer of the county in which the offense was committed, accompanied with a certified copy of the bail bond to be delivered to the jailer who must detain the defendant and give a written acknowledgment of the surrender.

APPEAL FROM KNOX CIRCUIT COURT.

June 8, 1875.

OPINION BY JUDGE COFER:

George Norton, being in custody, charged with unlawfully and maliciously stabbing and wounding, gave bail, with the appellee as his surety, for his appearance at the then ensuing term of the Knox circuit court; and having failed to appear, his bond was forfeited and a summons issued thereon which was served on the surety, who responded that between the time of executing the bond and the term at which he undertook that Norton should appear, fearing that he would leave the commonwealth, he obtained a copy of the bail bond, and found the said Norton in the power of the sheriff of

Knox county, under arrest for malicious stabbing; that he delivered a copy of the bond to the sheriff, who arrested Norton at his (appellee's) instance, to be taken to jail; that the court before which Norton was returned had him put under guard to be held for trial, and that while he was so under guard, and before the sheriff was permitted to deliver him to the jailer under the arrest made at appellee's instance, Norton made his escape from the guard.

The commonwealth demurred to the response, but the demurrer was overruled and the proceeding dismissed.

"At any time before the forfeiture of their bond, the bail may surrender the defendant, or the defendant may surrender himself to the jailer of the county in which the offense was committed; but the surrender must be accompanied with a certified copy of the bail bond, to be delivered to the jailer, who must detain the defendant in custody thereon as a commitment, and give a written acknowledgment of the surrender; and the bail shall thereupon be exonerated." Sec. 81, Criminal Code.

We are not aware of any other provision of law under which bail may be exonerated before a forfeiture of the bond. Having become bound for the appearance of Norton, he was at appellee's risk until he should be placed in the custody of the jailer; and he could not rid himself of that responsibility by placing a copy of the bond in the hand of the sheriff and causing him to arrest the defendant. The law did not make it the duty of the sheriff to take Norton into custody, so as thereby to exonerate his bail, and the sheriff was, therefore, the agent of the appellee, and not the representative of the commonwealth.

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

John Rodman, for appellant.

R. J. HAYS *v.* JOHN TWYMAN.

Principal and Surety—Release of Surety.

Any enforcible agreement by which a creditor gives indulgence to the principal without the consent of the surety, releases the surety.

Release of Surety by Action of Creditor.

The act of the creditor in staying an execution which was a lien on the principal's property without the surety's consent releases the surety to the extent of the sum that could have been made out of such execution.

APPEAL FROM BARREN CIRCUIT COURT.

June 11, 1875.

OPINION BY JUDGE COFER:

That any enforcible agreement by which a creditor gives indulgence to the principal debtor without the consent of the surety, absolves the latter from any obligation to pay the debt, is too well settled to require either argument or the citation of authority; and it is equally clear that the discharge of the surety does not depend in any degree upon the question whether the indulgence given his principal in fact operated to his prejudice. It is sufficient that the action of the creditor has altered the terms of the sureties' obligation, by tying his own hands, if but for a single day, so that he cannot legally proceed to enforce payment.

The evidence in regard to the alleged motion is not entirely satisfactory; but we incline to the opinion that it preponderates against the appellant. Yates' testimony is strengthened by the admitted fact that he was a comparative stranger to appellant, which renders it not very probable that he gave him the pig without reference to the desired indulgence. Appellant knew that the appellee was only surety, and law and good conscience alike demanded that he should do no act prejudicial to appellee, and that the acceptance of the pig and the granting of indulgence at the same time, when considered in connection with the positive testimony of Yates that he gave and appellant accepted it in consideration of forbearance, must turn the scale against the latter.

But if we are mistaken in regard to the facts before referred to, we think the act of staying the execution clearly exonerated the appellee. The evidence shows that the greater part, if not all the debt, might have been made out of Yates. The execution had created an inchoate lien on all his property subject to execution, and that lien inured to the benefit of the appellee, but was lost by the act of the appellant; and to the extent that such lien was waived by the return, it is well settled that the surety is released.

It is true, as argued by counsel, that the sheriff might have levied upon the property of appellee and compelled him to pay the debt, and that he had a right to pay and take an assignment of the execution, and then cause it to be levied; but it is likewise true that the sheriff was not bound to levy on the property of the surety until he had exhausted the principal; and while it was appellee's duty

to pay the debt, it was the appellant's duty after the lien was created to let the sheriff go on, without interference on his part, to collect the debt.

The appellee was bound to risk the action of the sheriff, but he had a right to have that officer go forward to coerce payment and to take the chances that in doing so he would first levy on the property of the principal. If the sheriff had been permitted to go on, and had levied on the appellee's property, then it would have been his duty to pay the debt and take steps to secure himself, but until payment was about to be coerced from him, he might wait in confidence that the lien created on his principal's property would be preserved, and the execution levied on the property, or that he would be enabled to preserve it himself by paying the debt when he learned the execution would not otherwise be levied.

We think the weight of the evidence shows the whole debt could have been made out of Yates if the execution had not been stayed; and whatever uncertainty there may be on this subject must operate against the appellant, whose voluntary act has made the inquiry necessary.

It does not matter whether Yates is now solvent or insolvent. The release of appellee does not depend upon that question. The appellant had an incipient lien which has been lost by his own act, and the property on which the lien existed would most likely have paid the debt.

A creditor is bound to act toward a surety in the utmost good faith. The surety's obligation is purely legal, and ought not and cannot be increased to the slightest degree by the creditor without releasing the surety.

Judgment *affirmed.*

J. S. Barlow, Jr., J. Ritter, for appellant.
Lewis McQuown, W. H. Botts, for appellee.

B. P. MITCHELL *v.* JAMES WOODLINGTON, ET AL.

Principal and Surety—Indemnity of Surety.

Where the surety takes a mortgage to indemnify him against loss by reason of being surety he can give no cause of action against his principal before paying the debt unless his indemnity is insufficient or it becomes necessary to sue to prevent mortgaged property from being removed, disposed of, or injured.

APPEAL FROM CALDWELL CIRCUIT COURT.

June 15, 1875.

OPINION BY JUDGE LINDSAY:

A surety may maintain an action against his principal to compel him to discharge the debt or liability for which the surety is bound, after the same has become due, and in certain contingencies may sue to obtain indemnity before the debt or liability becomes due. But where, as in this case, he takes a mortgage by way of indemnity, at the time the liability is incurred, he can have no cause of action against his principal, unless his indemnity is insufficient, or unless it is necessary to sue to prevent the mortgaged property from being removed, disposed of, or injured, until he discharges the debt or liability for which he is bound.

The warrant and statement in this case shows that Woodlington held an indemnity. There is no suggestion that it was not amply sufficient to secure him. It also shows that he had paid nothing on account of his suretyship, and no reason whatever was assigned for asking the interposition of a court of equity. When his attachment was discharged, he was left in court without even an apparent right of action against Mitchell.

The fact that he paid the debt, or a portion of the debt, after the institution of the action, could not authorize a judgment in his favor without an amendment to his statement setting up the fact of payment; and this amendment would not have been made after the court had properly determined that the order of attachment was wrongfully sued out. Proof of this subsequent payment was inadmissible, as the case stood at the time of the trial. Judgment *reversed,* and cause remanded with instructions to dismiss appellees' warrant, without prejudice.

George W. Duvall, for appellant. James R. Hulett, for appellees.

V. HALL *v.* LEBANON & MAYSVILLE TURNPIKE CO.

Damages—Defective Bridge—Negligence.

Where defendant's bridge was out of repair and by reason thereof an animal fell through it and such animal in falling frightened plaintiff's horse but did not come in contact with it, plaintiff cannot recover from the owner of the bridge for injury received to himself or horse, as the injury to plaintiff and his property was not the natural consequences of negligence of allowing the bridge to become out of repair.

APPEAL FROM MARION CIRCUIT COURT.

June 21, 1875.

OPINION BY JUDGE LINDSAY:

The destruction of the wagon which appellant was driving, and the personal injuries he sustained, were neither the natural nor proximate result of the defect in appellee's bridge.

The natural and proximate result of that defect was the injury and fright of the animal that fell through the bridge; and possibly, if that animal, in endeavoring to escape from danger, or whilst under the influence of the fright produced by the defect in said bridge, had come in contact with the wagon or with appellant, the injuries thereby inflicted might not have been considered too remote to constitute a cause of action. But here the injuries were the result of the fright of the animal that was being driven by appellant, which fright he says was superinduced by the action of the animal that fell through the bridge. The injuries complained of may be said to be the consequences of appellee's neglect; but they certainly were not the natural consequences thereof. They arose directly from the extraneous cause, the fright and conduct of the animal being driven, and not from the alarm and action of the one falling through the bridge. To sustain appellant's cause of action, it would be necessary to apply the rule insisted on by Patch, in his case against the city of Covington. *Patch v. City of Covington,* 17 B. Mon. 722. That rule is, "That whenever injury occurs, directly or consequently, from the wilful neglect of corporate duty, an action is clearly maintainable by a party especially injured, irrespective of the events or parties that intervene." Said rule was condemned by this court in that case, and we see no reason why it should be applied in this case.

The conclusion thus reached avoids the necessity of inquiring into the action of the circuit court, in compelling appellant to elect as to which of the original defendants he would proceed against.

The demurrer was properly sustained and the petition properly dismissed.

Judgment *affirmed.*

Russell & Averitt, for appellant. Harrison & Knott, for appellee.

P. T. ALLIN, ET AL., *v.* JOHN ROBINSON'S EX'R.

Homestead Exemption.

Two homestead exemptions cannot be claimed in the same real estate.

Owner of Life Estate.

The debtor claiming the exemption must be the owner of the property, including the dwelling house, not a joint owner nor an owner in common with others. The owner of a life estate is entitled to the exemption.

APPEAL FROM MERCER CIRCUIT COURT.

June 28, 1875.

OPINION BY JUDGE PETERS:

The act to exempt homesteads from sale for debt, approved the 10th of February, 1866, provides that, in addition to the personal property then exempt from execution on all debts or liabilities created or incurred after the first day of June, one thousand eight hundred sixty-six, there shall be exempt from sale under execution, attachment, or judgment of any court, except to foreclose a mortgage given by the owner of a homestead, or for purchase money due therefor, so much land, the dwelling house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars. Myer's Supp., pp. 714, 715.

The debtor claiming the exemption must be the owner of the property, including the dwelling house and appurtenances, not a joint owner, nor an owner in common with others of a farm. Mrs. Mary Robinson, under the will of her late husband, took a life estate in the whole tract, and is "the owner" of the present interest; she would unquestionably be entitled to a homestead right in the dwelling house and appurtenances, as she is occupying and claiming them as her home. She has not alienated her right therein to her son, W. C. Robinson; he occupies under her, and although it is, or may be in deference to the testamentary request of her husband, still Mrs. Robinson may at any time assert and enforce her right to the exclusive possession and enjoyment of all the land, houses, etc., during her life. And at her death it is not at all certain that W. C. Robinson would be the owner of the dwelling house and appurtenances. He certainly is not "the owner" now. And unless he is the present owner, in the legal and proper sense of the term,

he cannot be entitled to the homestead exemption; if he is, then there may be two homestead exemptions on the same real estate at the same time, which never was contemplated nor intended by the statute. To the extent, therefore, that William C. Robinson is adjudged to be entitled to a homestead in the one-quarter of the tract mortgaged by him to Alexander and wife, the judgment is *reversed* and the cause is remanded with directions to dismiss the claim of W. C. Robinson for a homestead in the real estate mortgaged by him to Alexander and wife and for further proceedings consistent herewith.

T. C. Bell, for appellants. Kyle & Poston, for appellee.

AARON COX *v.* COMMONWEALTH.

Criminal Law—Arrest of Judgment—Demurrer.

In a criminal charge the defect in an indictment should have been taken advantage of by demurrer.

Arrest of Judgment.

A motion for an arrest of judgment in a criminal case will not be sustained when a public offense is charged in the indictment.

APPEAL FROM GREEN CIRCUIT COURT.

June 29, 1875.

OPINION BY JUDGE PRYOR:

The defect complained of in the indictment should have been taken advantage of by demurrer. The judgment will not be arrested when a public offense is charged. To steal hogs is larceny, and the guilty party is subjected to punishment. If the offense is not stated with that particularity to make it a good indictment the accused must demur. The facts as stated, if true, make the party guilty of a criminal offense; and it is only in a case where the indictment fails to charge any offense that the motion to arrest the judgment can be sustained. The evidence conduces to show that the hogs strayed from the possession of the alleged owner. The court, in Instruction No. 5, assumes that the hogs were stolen, and the abstract proposition of law, as there presented, requires the accused to explain his possession or his guilt is established. It also directs the attention of the jury more particularly to this cir-

cumstance, the fact of possession, than any other fact in the case. The instruction should not have been given, but the fact of the possession submitted to the jury, like any other fact in the case. Undue importance should not be given to any part of the testimony in a criminal prosecution.

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

John W. Lewis, Winfrey & Winfrey, James W. Gorin, for appellant. John Rodman, for appellee.

A. G. TALBOTT, ET AL., *v.* BANK OF KENTUCKY.

Bills and Notes—Bank's Negligence in Failing to Collect—Liability.

Where nothing appears showing that the maker of a note or the acceptor of a bill has been discharged as to the note or bill or that either has become insolvent, a petition against a bank for negligence in failing to take steps to bind the endorsers fails to state a cause of action against the bank, because it is not shown that plaintiff has suffered any loss.

APPEAL FROM MERCER CIRCUIT COURT.

September 2, 1875.

OPINION BY JUDGE COFER:

This action was brought by the appellee against the appellants, Talbott and Jones, June 19, 1862, upon a note executed by them to the appellee's branch bank at Danville, August 24, 1861, for the sum of $8,627.26, due one hundred and thirty days after date.

The appellants answered, in substance, that Talbott was liable to the bank as endorser of a bill of exchange received by him from G. B. Moss & Co., in payment for a lot of mules sold to them, which bill he had sold and endorsed to the bank; that Moss & Co. took the mules to the south, and sold them on credit, and returning about the time their bill matured, they offered to discount to the bank notes and bills received by them for the price of the mules, in order to take up their bill held by the bank, but this offer was declined; that it was then agreed that Talbott should take up the bill by executing to the bank his note for the amount, with the appellant, Jones, as surety, and should receive from Moss & Co. the notes and bills they held, and leave them with the bank as collateral security

for the note; that pursuant to that agreement the note sued on was executed by the appellants, and the notes and bills held by Moss & Co. were endorsed by them to Talbott, and by him to the bank; that the bank undertook to collect the notes and bills, and to apply so much of the proceeds as should be necessary for that purpose, to the satisfaction of the notes sued on, and pay over to Talbott the residue; that all the parties on said notes and bills were solvent, and the amounts thereof could have been collected by reasonable diligence, but that the bank had been guilty of gross negligence in regard to two of them, to wit, a note for $667.38, and a bill for $2,953.14, both payable at New Orleans, Louisiana, February 1, 1862, and both of which were by law placed upon the footing of foreign bills of exchange, and required proper presentment and demand of payment, and in case of non-payment, protest and notice to the payees and endorsers in order to hold them bound; that no steps had been taken by the bank to collect either the note or bill, or to fix the liability of the payees and endorsers thereon.

They relied upon these facts as a counterclaim, and prayed judgment against the bank for the amount of the note and bill. In reply, the bank denied that the notes and bills, or any of them, were received as collateral security for the payment of the note sued upon, but admitted that the proceeds, when collected, were to go to the credit of Talbott on the note. It denied all negligence, and claimed that the notes and bills were received to be collected solely for Talbott's accommodation, and without any compensation whatever.

No matter what may have been the character of the bank's holding, or what interest it had in the notes and bills, or what the degree of the negligence of which it may have been guilty, before it can be made liable, to Talbott, it must be shown that he had sustained some loss in consequence of the negligence complained of, and unless this has been made to appear, the judgment dismissing his counterclaim must be affirmed.

All the endorsers, including Moss & Co., have been released from liability; and it clearly appears that if all had been held liable by due presentment and protest of the note and bill and notice of their dishonor, the great part, if not the whole, of each could have been collected. But, although all the endorsers may be released, it does not follow that Talbott has sustained any loss, or that he is entitled to recover against the bank, even conceding that it has been guilty of gross negligence in failing to take the steps necessary to hold

the endorsers liable. For aught that appears in the record, the maker of the note and the acceptor of the bill may be forced to pay them.

Neither want of presentment, protest or notice will discharge the maker of a note, or the acceptor of a bill. They each stand in the same relation to the holder, and their undertaking to pay is absolute, and their liability does not depend upon presentment, protest or notice, or upon all of them together. *Rice v. Hogan and Thompson,* 8 Dana 134; *Bank of the United States v. Smith,* 11 Wheat. (U. S.) 171; *Wallace v. McConnell,* 13 Peters (U. S.) 136; *Foden & Slater v. Sharp,* 4 Johnson (N. Y.) 183; *Watkins v. Cronch & Co.,* 5 Leigh (Va.) 567; *Bowie v. Duvall,* 1 Gill & J. (Md.) 175.

If the makers of the note or the acceptor of the bill had money at the place of payment at the maturity of his obligation to pay it, he might, when sued, rely upon that fact to exonerate him from damages and costs; or if the note or bill was payable at a bank, and he had placed funds there to meet it, which were lost by the failure of the bank, or had in any other way sustained damages by the failure of the holder to demand payment, he would be exonerated from liability to the extent of the loss or injury thereby sustained.

There is no allegation in the counterclaim in this case of any fact showing that the maker or acceptor has been discharged as to the whole or any part of either the note or bill, or that either has become insolvent, and there is, therefore, nothing to show that Talbott has suffered any loss for which he was entitled to recover.

There is nothing in the record to show that anything has been paid beyond the sums credited in the judgment.

Judgment *affirmed.*

Thompson & Thompson, for appellants.
M. J. Durham, for appellee.

K. F. MOORE, ET AL., *v.* COMMONWEALTH.

Officer—Acts of De Facto Officer Binding.

The official acts of a de facto officer are valid so far as they affect either public or private interests.

Collateral Attack.

The official acts of an officer de facto cannot be questioned in a collateral proceeding.

APPEAL FROM LINCOLN CIRCUIT COURT.

September 3, 1875.

OPINION BY JUDGE PRYOR:

The response to the rule issued in this case was properly held to be insufficient. The appellant says that Lytle, the county judge, received at the election a majority of the votes cast for that office; and the returns showing this fact, he was commissioned by the governor. It is now insisted that he was not eligible, for the reason that he was acting or was in fact the postmaster of the town when his election took place, and therefore his acts as county judge are void. The authorities make a distinction between an officer de facto and a mere usurper, and when he holds his office under color of legal right his action in discharging its duties must be held valid so far as it affects either private or public interests. In this case Lytle had all the evidence, so far as the public was concerned, of an undoubted right to hold the office of county judge, and the effort to invalidate his acts or declare his office vacant in the collateral proceeding cannot be maintained.

The fact that the warrant upon which the party was arrested is defective, cannot defeat the recovery on the bond, if the party was before the officer charged with a public offense of such a character as authorized the officer to take a bond for his appearance. It is violative of the conditions of such a bond when the party fails to appear.

Judgment *affirmed.*

W. H. Miller, for appellants. Jno. Rodman, for appellee.

CITY OF NEWPORT *v.* HENRY C. TIMBERLAKE.

Cities—Improvement of Streets.

In order to enforce street assessments on property-holders for the improvement or repair of public ways it must be pleaded and proven not only that the city had the power to make such assessments but that in making them it has substantially followed the mode prescribed by the law. If the power to make the assessments depends upon the existence of certain facts, it must be averred and proven that said facts existed.

APPEAL FROM CAMPBELL CHANCERY COURT.

September 4, 1875.

OPINION BY JUDGE LINDSAY:

The appellant's petition is fatally defective. In order to enforce municipal taxation for the improvement or repair of public ways, it must appear not only that the municipal authorities had general power to make such assessments, but it must also appear that the mode prescribed for making such impositions has been substantially followed; and if the power to make the assessment depends upon the existence of designated facts, it must be shown that those facts existed.

We do not find any authority in appellant's charter for charging propertyholders with the cost of grading streets in Newport, except what is attempted to be conferred by the 6th section of the act of 1864, which is to say the least of it, of doubtful constitutionality.

But this section, like all the other acts on this subject, only gives the city government power to charge propertyholders with the cost of any part of the improvement of streets upon petition of the owners of a majority of the front feet on the street or part of a street to be improved, or when the making of such improvement is voted for by two-thirds of the members of the city council. It was, therefore, necessary in order to charge the appellee, that it should be alleged that the improvement had been petitioned for by the owners of the greater number of front feet abutting on it, or that it was ordered by a vote of two-thirds of the members of the council.

Unless one or the other of these conditions existed, the council had no power to charge the appellee with any part of the cost. It appears in the record that the ordinance directing the improvement was voted for by two-thirds of the council; but as there is no such allegation, the proof is unavailing. The allegation that the council "in pursuance of law, provided by ordinance duly and regularly passed on the ——— day of ———, 1872, for the improvement of Harris street," is but a conclusion of law drawn by the pleader. Whether the ordinance was duly and regularly passed depends upon the question whether its passage was petitioned for, or if not, upon its having been voted for by two-thirds of the council, and this applies as well to the act of 1864 as to any other of the various acts to which we have been referred.

Nor is the necessity for alleging such facts as show that the council had authority to charge the appellee, dispensed with by Sec. 3, of the Act of 1863, which provides that in suits by the city to enforce tax liens under that act, certified copies of the delinquent bills show-

ing the taxes, penalties and costs claimed, shall be deemed prima facie evidence of the correctness of the claims asserted. It is by no means clear that this provision relates to a claim against the owner of real estate for improving adjacent streets; but however that may be, the provision in question was not intended to, and does not dispense with the necessity for showing in such suits, by appropriate allegations, that the council had power to make the assessment sought to be enforced. In cases to which that provision applies, the facts showing the authority of the council to make the assessment or levy sought to be enforced, and showing the liability of the defendant to pay it, being alleged, certified copies of the tax bills are made prima facie evidence of the correctness of the claims; but they cannot serve the double purpose of allegation and proof of pleading and evidence, but are, like any other species of evidence, available only in support of appropriate pleading.

These conclusions render it unnecessary to discuss other questions presented in the argument of counsel.

Judgment *affirmed.*

E. W. Hawkins, W. Boden, S. Geister, for appellant.
F. M. Webster, for appellee.

L. T. MOORE, ET AL., *v.* WM. SUERD.

Appeal—Time in Which Taken.

In ascertaining the time in which an appeal is to be taken to the circuit court, the day on which the judgment was rendered and the day on which the appeal is taken are both to be counted.

APPEAL FROM PIKE CIRCUIT COURT.

September 4, 1875.

OPINION BY JUDGE PETERS:

It is apparent that according to the rule for the computation of time, as prescribed in *Chiles v. Smith's Heirs,* 13 B. Mon. 460, and subsequent cases, the appeal in this case was not taken within sixty days.

The judgment was rendered by the Pike quarterly court on the 24th of March, 1874, and the appeal was taken to the circuit court for Pike county on the 23d of May, 1874. By including the 24th of March, 1874, in the computation, that being the day on which the judgment was rendered in the quarterly court, and the 23d of May,

1874, the day on which the appeal was taken, they make sixty-one days, consequently the appeal was not prosecuted within sixty days, as required by Sec. 852 of the Civil Code, and the judgment of the court below must therefore be *affirmed*.

Moore & Jones, for appellants. O. C. Bowles, for appellee.

JAS. M. FORSYTHE, JR., *v.* AARON ALEXANDER'S EX'X.

Will—Life Estate—Distribution to Children.

Where a widow by will is given a life estate, with the burden of supporting and educating the children out of the estate, she had no power to give the whole estate to one of the children or to expend it to her own use.

APPEAL FROM MERCER CIRCUIT COURT.

September 4, 1875.

OPINION BY JUDGE PRYOR:

It is manifest from the provisions of the will of A. H. Alexander that no greater estate passed to his wife than an estate for life, with the burden imposed upon her (out of the estate) of supporting and educating his children; and for this purpose she had the right to use and dispose of it according to a sound discretion. She had no power to give the whole estate to one of the children, or to expend it, by appropriating the proceeds to her own use. If a stranger had been empowered to use and dispose of the property for the benefit of the children according to his sound discretion, it cannot be pretended that he could have given to one child a double portion or excluded others from any interest in the estate.

The discretion given was as to the manner and character of the maintenance and education she should give the children whilst under her control, and was not intended to vest the wife with the absolute title to the estate, or to enable her to prefer one child to another in making a distribution between them of the property. She was empowered by the 4th clause of the will to make advancements to the children during the continuance of her life estate, or so long as she remained a widow; but she is enjoined, by an express provision of this clause, to charge the property so advanced at a fair valuation. If the devisor intended to give the property to the wife, or to enable her to dispose of it as between the children in any manner

she saw proper, there would have been no necessity for enforcing upon the wife the duty of charging each child with the advancement made. The 5th clause of the will requires an equal distribution of the estate, or what remains unexhausted, between the children, and this clause, taken in connection with the previous clauses of the will, means equality between the children in the distribution of the whole estate. The advancements to be made by the wife, and with which the children should be charged, are such as are made by the widow over and above their education and support.

The discretion with reference to advancements means that the wife may give during her widowhood to such of the children as she may see proper; but the property so given the child is to be charged, in order that the children in the final distribution of the estate may be made equal. The answer of the appellants in this case allege the death or insolvency of the sureties in the bond of the executor. The executrix is a non-resident, and has made advances to the other children greatly in excess of the amount advanced to Mrs. Forsythe, and the note in controversy is all that is left of this large estate. If these alleged facts are true, the appellants are entitled to relief. The cause should have been left to the commissioner to ascertain these facts, and to report the condition of the estate, in order that the chancellor, if the facts exist as alleged, may, by his judgment, secure the money to those entitled after the termination of the life estate.

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

C. A. & P. W. Hardin, for appellant.
J. B. & P. B. Thompson, for appellee.

A. M. HUME *v.* P. GUILFOYLE.

Judicial Sale of Real Estate—Judgment—Notice of Sale.

Where real estate is ordered sold the judgment should direct how and where the sale shall be made and the length of time it shall be advertised, and where real estate ordered sold consists of separate tracts not adjoining they should be ordered sold separately.

APPEAL FROM CAMPBELL CHANCERY COURT.

September 4, 1875.

OPINION BY JUDGE PETERS:

In November, 1872, appellant and others sold to Guilfoyle two

lots in the city of Newport for the price of $1,300, of which $550 were paid in hand, and for the unpaid balance Guilfoyle executed three notes for $250 each, payable respectively in eight, sixteen and twenty-four months from date. A conveyance of the lots was made on the same day the notes were executed, with the reservation of a lien on them to secure the payment of the notes for the unpaid purchase price.

The note which first matured was promptly paid, but the next one was not paid, and appellant brought this suit to coerce its payment by an enforcement of his lien on the lots. In the petition the lots are not only described by their numbers on the plan of the city, but the deed was filed as a part of the petition, describing by their abuttals. No defense was made to the suit, and a judgment was rendered in favor of appellant against appellee for $250, with interest at the rate of six per cent. per annum from the 21st of November, 1872, till paid, and the costs of suit. It was also adjudged that appellant had a lien on the property described in the petition, and the master was ordered to sell so much of said property as should be necessary to satisfy the judgment, publicly, to the highest bidder, on a credit of six months, at the court house door in Newport, Kentucky, on a day to be fixed by him, taking from the purchaser bond with good security for the purchase money, bearing interest from the day of sale, payable to himself. The time, place, and terms of sale were to be advertised according to law, etc.

It appears from the report of the master that the lots were sold together, although they did not adjoin, and brought $309.80. Appellant still having a note, unsatisfied, and his lien being exhausted, seeks a reversal of his own judgment, and Guilfoyle, the appellee, deeming that the property has been sold at a great sacrifice, by cross-appeal asks for a reversal of the judgment.

As appellant procured the judgment that was rendered, and as the judgment itself was not prejudicial to him, but the injury, if any be sustained, resulted from the manner in which the judgment was executed, and he failed to except to the master's report of sale, which was confirmed without objection, this court cannot afford him any relief, and the judgment on the original appeal must be affirmed.

But the condition of the cross-appellant, Guilfoyle, is different. Conscious of his indebtedness, he made no defense; but he did not thereby waive any error in the judgment and proceedings prejudicial to him. Although the lots are specifically described in the pe-

tition, no description is given in the judgment; but for their identification reference is made to the petition; and the report of the sale made by the master identifies the lots sold by their numbers, location, and size. While, therefore, this court would not feel authorized to reverse the judgment for the reason only that it did not contain a sufficient description of the property sold when the report of the master showed that the lots specified in the petition and title papers filed were sold by him, still we deem the judgment erroneous in other respects, and the manner of its execution by the commissioner unauthorized and prejudicial to Guilfoyle.

The law requires that reasonable notice of the time, terms and place of the sale of property shall be given, but it does not prescribe the mode of giving such notice; hence, in cases of this character, it is the duty of the court rendering the judgment to direct therein how and where the sale shall be made, and the length of time it shall be advertised. In the judgment complained of these important matters are left to the discretion of the commissioner.

Moreover, it appears from his report that although the lots did not adjoin, they were sold together. There was no offer to ascertain whether one of the lots or a part of one of them would sell for enough to pay the debt; and it is apparent from the diminution of the price at which the lots sold at the commissioner's sale compared with the price Guilfoyle contracted to pay for them, that the manner of advertising the sale, or the manner in which it was conducted, or both, must have caused the sacrifice.

Wherefore the judgment is *reversed* and the cause is remanded with directions to set aside the sale upon equitable principles, and for further proceedings consistent herewith.

Whittaker & Ray, for appellant.
T. M. Webster, Stevenson & O'Hara, for appellee.

SAVINGS INSTITUTION OF HARRODSBURG *v.* G. J. JOHNSON, ET AL.

Compromise of Suit—Newly Discovered Evidence.

A compromise between litigants will not be set aside, where not induced by fraud, simply because one of the parties discovers thereafter that he could have proven certain facts of which at the time of the compromise he had no knowledge.

APPEAL FROM MERCER CIRCUIT COURT.

September 4, 1875.

OPINION BY JUDGE LINDSAY:

Prior to the day upon which the compromise conveyance of June 22, 1866, was accepted by the savings institution, said institution had sued Sims and Jesse Deshazer to set aside the deed executed to them by Gabbart, and to subject to the satisfaction of the judgment upon which Sims and Deshazer were jointly bound, the tract of two hundred fifty acres of land covered by said last-named deed. It has also sued the two Deshazers, and was seeking to set aside as fraudulent the deed from Jesse to William, and to subject to the payment of the judgment for which Jesse Deshazer, Bottom and others were bound, the two hundred fifty acre tract of land covered by this conveyance.

In each action the averment of fraudulent collusion between the vendors and vendees in the two conveyances was made, and upon these averments issues had been made up. The proposal to compromise came from the savings institution, and Jesse Deshazer was the last of the parties to accede to it. In consideration of the conveyance to the savings institution of the two hundred fifty acre tract of land, and the payment by Deshazer to Sims of $600, he was released from all liability to the said institution on account of either or both of the judgments heretofore mentioned.

Appellant seeks to avoid this compromise so far as Jesse Deshazer is concerned, 1st, because since the 22d of June, 1866, it has discovered evidence that the conveyance to Wm. Deshazer was fraudulent, and 2d, because it has discovered that the conveyance to Sims and Deshazer was intended by Gabbart to secure them from damage on account of their joint liability in one of the judgments, instead of being intended to secure Deshazer on account of both judgments against him, as recited in the deed of compromise.

As to the first ground it is only necessary to say that the institution had reason to believe that the conveyance from Jesse to Wm. Deshazer was fraudulent; otherwise it would not have instituted the action to set it aside. Pending that action, the parties had the legal right to compromise the matters in controversy, and the compromise cannot be set aside because facts have since been discovered, which, if known to the savings institution at the time, would have probably induced it to persist in the prosecution of its suit. If such were the law, compromises in cases of this character would be without mutuality.

The party charged with the commission of the fraud would be bound in any event, but the party charging fraud would have the right to disregard the compromise wherever he might discover the evidence necessary to sustain the charge.

This is not a case in which a party was induced to compromise by reason of false and fraudulent representations. Here the party charged with the fraud denied it, and the plaintiff not being satisfied that he could establish the charge, proposed a compromise, which was accepted and acted upon without change or modification. Such a compromise will not be disturbed on account of subsequent developments. If the second ground be material, still it is not supported by sufficient evidence. Sims states indirectly that Gabbart conveyed to him and Deshazer for the purpose of securing them on account alone, of the debt upon which they were jointly bound. But the deed of June 22, 1866, to which he was a party (being one of the grantors), contradicts this statement. Waiving the consideration of other grounds of defense, we are satisfied that on the grounds considered, the chancellor properly dismissed appellant's petition.

Judgment *affirmed.*

Thompson and Thompson, for appellant.
C. A. & P. W. Hardin, for appellees.

JNO. MCSWINNEY'S ADM'X v. WM. G. MCCAY.

Appeals—Final Orders—Limitations.

Appeals may be taken to the court of appeals within three years from final judgments or orders.

Order Granting New Trial.

No appeal can be taken from an order granting a new trial.

APPEAL FROM KENTON CIRCUIT COURT.

September 11, 1875.

OPINION BY JUDGE COFER:

If it be conceded that the order taking the appellant's petition for confessed is a final order, which the court had no power to set aside at a subsequent term, it does not follow that the order setting it aside can be appealed from before a final decision of the cause.

The law does not authorize an appeal from every order or judgment, but only from such as put an end to the litigation, or at least

to some distinct portion of it capable of being separated from and decided independently of the residue. Orders made in a cause which are merely steps in its progress toward a final decision, although final in the sense that they are beyond the control of the court after the end of the term, can only be reversed upon an appeal prosecuted from a final judgment in the case.

All the errors of the court in orders made in the progress of the cause are available, if prejudicial to the party appealing, to reverse the judgment. Neither of the orders appealed from put an end to the litigation in the cause, or to any separate and distinct part of it capable of separation from the residue. If an appeal lies from either, then it would follow that unless prosecuted within three years from their respective dates the appeal would be barred by the statute limiting appeals to three years.

Such appeals are unnecessary, because the circuit court not having finally disposed of the case, the party may yet obtain in that court all the relief claimed, and the errors now sought to be corrected would become unimportant.

McCall v. Hitchcock, 7 Bush 615, was an action prosecuted, under Secs. 579-581 of the code, to obtain a new trial. A new trial was granted, and from that judgment an appeal was prosecuted to this court, where the appellee moved to dismiss the appeal on the ground that no appeal would lie from a judgment granting a new trial. In disposing of that motion, the court said: "It is conceded by the appellee's counsel that no appeal will lie, under Sec. 15, of the Civil Code, from an order granting or refusing a new trial, upon a motion in the same action, made in the usual mode under Secs. 369, 371 and 372 of the Code; but it is contended that the judgment appealed from being the termination of a new and distinct action, litigating the right of the appellee to enforce his judgment in the previous action, which right was divested by the last judgment, the principles on which judgments or orders made upon ordinary motions for a new trial have been held not to be final, have no proper application to this case."

We regard this distinction as correctly taken. The judgment is not a mere interlocutory order, subject to be set aside by the same court at a subsequent term, nor simply a ministerial act; nor could it be reversed, as an ordinary motion for a new trial may be, on an appeal from the judgment in the original action.

Both court and counsel seem to have regarded it as clear that no appeal will lie from an order granting a new trial, when made

upon motion in the action in the ordinary mode, until after a final determination of the cause; and we still adhere to that opinion.

Wherefore the appeal is dismissed.

Fisk & Fisk, for appellant. J. G. Carlisle, for appellee.

WM. MCCARLEY'S EX'R *v.* J. O. PERKINS AND WIFE.

Mortgage Waives Right to Homestead Exemption.

Persons who execute a mortgage on their real estate thereby waive their right to a homestead exemption on such property.

Appeals.

When an appeal is granted by the court rendering a judgment the record must be filed in the clerk's office of the court of appeals ninety days after judgment rendered, subject to the power of the court to extend the time not later than the first day of the second term after judgment, but an appeal may be granted by the clerk of the court of appeals at any time within three years from the date of judgment.

APPEAL FROM LOGAN CIRCUIT COURT.

September 14, 1875.

OPINION BY JUDGE COFER:

The opinion of this court in the case of *Robbins, et al., v. Cookendoffer,* Mss. Opinion and the authority therein cited, are conclusive of this case. The mortgage executed by Perkins and wife purports to convey their whole estate in the lot, and was a waiver of the homestead exemption. The judgment exempting a homestead was, therefore, erroneous.

The appeal in this case was granted by the clerk of this court, and is not affected by the fact that the record was not filed on or before the first day of the second term after the judgment was rendered. When an appeal is granted by the court rendering the judgment, the record must be filed in the clerk's office of this court ninety days after the judgment was rendered, subject to the power of the court to extend the time for filing not later than the first day of the second term after the rendition of the judgment, or the appeal will be dismissed on motion of the appellee. Sec. 879, Civil Code. But when an appeal has been granted by the court below, and has been dismissed, or the record has not been filed within the time

required by Sec. 879, an appeal may be granted by the clerk of this court at any time within three years from the date of the judgment. Secs. 876 and 884, Civil Code. This latter course was pursued in this case, and the appeal cannot be dismissed.

The judgment setting apart to the appellees a homestead is reversed, and the cause is remanded with directions to render judgment subjecting the whole property, or so much thereof as may be necessary for that purpose, to the satisfaction of the judgment.

A. G. Rhea, for appellant. Berry & Grubbs, for appellees.

J. G. ARNOLD *v.* PETER SMITH.

Judicial Sale of Real Estate.

A judgment for the sale of real estate will be reversed where it fails to direct the manner of its advertisement.

City Assessments—Judgment.

Where the cost of a public improvement is assessed by the city council against a lot, it is error to render a personal judgment against the lot owner.

APPEAL FROM KENTON CHANCERY COURT.

September 15, 1875.

OPINION BY JUDGE LINDSAY:

It was error to fail to direct in the judgment the manner in which the sale should be advertised.

The cost of the work was assessed by the city council against the lot owned by Arnold. It was, therefore, error to render a personal judgment against him.

The petition avers that the ordinance directing the improvement to be made "was duly published in a newspaper circulated in the city of Covington, and being the same paper in which the ordinances passed by said council were then published. We cannot say that this mode of printing and circulating the said ordinance is not covered by the provisions of Sec. 6 of the act of March 2, 1850.

Arnold had no title to, or interest in the material in the pavement. His counterclaim, therefore, was properly dismissed.

For the two errors indicated the judgment is *reversed*, and the cause remanded for further proceedings consistent with this opinion.

Carlisle & Fotte, for appellant. Stevenson & O'Hara, for appellee.

HENRY MINNIS v. COMMONWEALTH.

Intoxicating Liquor—Sale of.

A defendant charged with the unlawful sale of intoxicating liquors is not permitted to prove that before the sale was made it was the opinion of his employer that such a sale was legal.

Practice—Exceptions.

Where no exceptions were taken to the action of the court in giving and refusing to give instructions, the record cannot be so amended by agreement of attorneys to show that such exceptions were taken.

Bill of Exceptions.

An original bill of exceptions cannot be made up after the expiration of the term unless there is an order of court giving time for that purpose. The court loses all power in the matter unless it be the power to correct the bill so as to make it conform to the record.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 23, 1875.

OPINION BY JUDGE LINDSAY:

The circuit court did not err in refusing to admit evidence as to opinions expressed to the defendant or his employer, to the effect that he might retail liquors without subjecting himself to the penalties denounced by law against those engaging in such business, without first obtaining authority so to do.

The record as originally made up, does not show that the action of the court in giving and refusing instructions was excepted to at the time. After the case had been brought to this court, and argued by counsel, the record in the circuit court was, by agreement, so corrected as to show that exceptions were regularly taken; and this amended record has been filed in this court, subject to objections made at the time by the attorney-general.

It is not pretended that there is or was anything in the record upon which this correction could be founded. It was evidently made from the recollection of the attorneys and the judge. An original bill of exceptions cannot be made up after the expiration of the term, unless there is an order of court giving time for that purpose. Neither can the bill be amended after the expiration of the term. The court loses all power in the matter, unless it be the power to correct the bill so as to make it conform to the record; and we do not decide that it has that power. Nor do we think the consent of the parties authorized the correction in this case.

After the appeal has been prosecuted to this court, the attorney-general became, by operation of law, the representative of the commonwealth, and we are of opinion, that the attorney for the commonwealth, in the circuit court, could not bind him by an agreement to change the record upon which the appeal was prosecuted.

We must, therefore, decide that the amended transcript filed June 19, 1875, is not properly a part of the record.

This conclusion necessitates an *affirmance* of the judgment.

H. M. Buford, Breckenridge & Morton, for appellant.
John Rodman, for appellee.

J. B. MARTIN *v.* COMMONWEALTH.

Criminal Law—Indictment.

After verdict and judgment of conviction in a criminal case the indictment should be construed literally to sustain the finding of the jury.

Bill of Exceptions.

It is necessary not only that the judge sign the bill of exceptions, but that it shall be filed with the pleadings as a part of the record. Unless it is so filed it does not become a part of the record.

APPEAL FROM ADAIR CIRCUIT COURT.

September 25, 1875.

OPINION BY JUDGE LINDSAY:

We cannot say that the indictment in this case does not state facts constituting a public offense. After trial, verdict and judgment, the indictment is to be construed liberally to sustain the finding of the jury. In this case it is averred by the commonwealth, that the defendant represented to Winfrey, Bradshaw and others, certain things as existing facts, and that by and through such representations he obtained in money one hundred dollars. It is further averred that he intended by such representations to perpetuate a fraud upon said parties, and charged that the statements made were untrue, and so known to be by defendant at the time they were made. We may also infer from the indictment that the Bank of Columbia had been robbed, and that the parties defrauded were interested, either as stockholders in said bank, or as citizens desirous of suppressing crime in having the robbers brought to justice.

The action of the court below in overruling the motion in arrest of judgment in this case is not a ground for reversal. We cannot inquire into the remaining questions raised in the argument; there is no bill of exceptions in the record.

There is a paper copied which seems upon its face to have been intended for a bill of exceptions; but there is no order of court directing it to be filed. It is necessary not only that the judge shall sign the bill of exceptions, but that it shall be filed with the pleadings as part of the record. Sec. 367, Civil Code of Practice. Unless it be so filed, it does not become part of the record, and the clerk, in making out a transcript for this court, has no legal authority to copy it. As the paper in question was improperly copied into the record before us, we cannot take notice of its contents.

The judgment appealed from must be *affirmed*.

Winfrey & Winfrey for appellant. T. E. Moss, for appellee.

ISAAC GIBSON *v.* MARTHA MARPLES.

Attachment—Ownership of Property.

Where goods are attached by creditors of a person, the wife of the debtor may defeat the attachment by showing that the property attached is hers.

Parties to an Appeal.

When property attached is shown to belong to another and the attachment is discharged for that reason, the attaching creditor by appealing from such judgment not making the debtor a party to the appeal, the court of appeals has no jurisdiction to inquire into the action of the court in discharging the order of attachment.

APPEAL FROM CASEY CIRCUIT COURT.

October 1, 1875.

OPINION BY JUDGE LINDSAY:

Gibson sued Elmore Marples, and took out an order of attachment against him, and garnisheed certain of his alleged debtors. Martha C. Marples, his wife, interpleaded, and claimed that she was the owner of the choses in action, which had been thus attached. Pending the litigation she was divorced from her husband.

Upon hearing, the orders of attachment were discharged, and Mrs. Marples held to be the owner of the attached notes. Gibson

appeals from this judgment, but prosecutes his appeal against Mrs. Marples alone.

Elmore Marples, the debtor, not being an appellee, we cannot inquire into the propriety of the action of the court below in discharging the order of attachment. To this extent, therefore, the judgment cannot be reversed. Gibson has no claim to the debts adjudged to Mrs. Marples, except such as grew out of his attachments. This claim was terminated by the order discharging them, and as we cannot revive it, we can afford him no relief on this appeal.

Judgment *affirmed.*

Hill & Alcorn, for appellant. James E. Hays, for appellee.

JOHN T. WHITE *v.* G. HAYDEN'S ADM'R.

Judgment—Fraud.

Fraud to vitiate a judgment must relate to the manner in which it was obtained and not to the foundation upon which it rests.

APPEAL FROM WAYNE CIRCUIT COURT.

October 5, 1875.

OPINION BY JUDGE COFER:

The agreement alleged to have been made in regard to a credit for commissions was entered into, if at all, at the time the note, which was the basis of the judgment, was given, and any defense the appellant had on account of that agreement, arose before the judgment sought to be enjoined was rendered. The case, therefore, falls directly within the provisions of Sec. 14, Civil Code.

The allegation that the judgment was obtained by fraud seems to be based alone on the alleged fact that the appellee sued and took a judgment for more than was due him. This is no ground for vacating a judgment. It is not enough that the claim sued upon was false. Fraud to vitiate a judgment must relate to the manner in which it was obtained, and not to the foundation upon which it rests.

Judgment *affirmed.*

A. J. James, for appellant.

SAMUEL KESTER *v.* W. C. WHITAKER.

Limitations—Pleading.

In order for a plea of limitations to be good the pleader must aver facts showing that the cause of action sued upon accrued more than the statutory period before the commencement of the action.

APPEAL FROM SHELBY CIRCUIT COURT.

October 7, 1875.

OPINION BY JUDGE COFER:

Where there is no danger of loss to a party having a demand against another who has recovered judgment against him and is insolvent, the chancellor will take jurisdiction to decree a set-off; but as insolvency is the foundation of equitable jurisdiction in such cases, it must be proved like any other material fact.

The appellant had a judgment at law against the appellee, and the only jurisdiction a court of equity had to molest him in the use of legal process for its enforcement, arose out of the appellant's alleged insolvency; and as this was denied and not proved, no set-off should have been adjudged; but as the appellee sought judgment against the appellant for the debt claimed, judgment should have been rendered, if a case was made out showing that he was entitled to recover.

These defenses were attempted to so much of the action as sought a personal judgment, viz.: 1. A denial of the items of the account; 2. Limitations; 3. Former adjudication. As to the first, we think the evidence warranted the court in finding, as a fact, that a portion of the alleged indebtedness had once existed. With the reference to the second the statute of limitation was not availably pleaded. The language is, "that the firm of Brown & Whitaker was dissolved in the year 1860 or in 1861, and any claim they have or may have had against this defendant is barred by the statute of limitation;" and he pleads and relies upon said statute as a bar to the claim set up in plaintiff's petition. In order to make a good plea of the statute of limitations, as in every other character of defense, the facts necessary to constitute it must be alleged. It should always be alleged that the cause of action, to which the plea is intended to be an answer, accrued more than the statutory period before the commencement of the action, and the period relied upon should be stated. This was not done in form or in substance. It may be true that the firm was dissolved more than five years before the institu-

tion of the action; but it does not follow that the cause of action accrued then or previously. The services may have been in part rendered after the dissolution, or the debt may not then have been due. Upon the most liberal construction the plea is bad.

In answer to the third, the record of the former action of *Kester v. Whitaker* is not made a part of this record, and we cannot say that the matters sued for in this case were adjudicated in that action. But as that record is here, we have looked into it, and find that the only item set up in the answer in that case was for services in collecting the money there sued for, and that item was rejected by the court in this case.

We think the court should have rendered judgment for appellee for $135, with interest from the date at which it was applied as a credit on the judgment, but erred in adjudging a set-off.

The judgment is *reversed*, and the cause remanded with directions to render a personal judgment against appellant as indicated, and to dissolve the injunction in toto.

J. C. Beckham, for appellant. J. C. Walker, for appellee.

L. F. SAUNDERS, ET AL., *v.* R. H. GALE, ET AL.

Change of Venue—Objections and Exceptions.

Where no exceptions were taken to an order of the court changing the venue of a cause and no objections made to the jurisdiction of the court to whom it was sent, no question can be raised in the court of appeals.

APPEAL FROM OLDHAM CIRCUIT COURT.

October 9, 1875.

OPINION BY JUDGE COFER:

There was no objection made or exception taken to the order changing the venue to the Oldham circuit court; nor was there any motion in that court to remand the case or objection taken to its jurisdiction. The Owen circuit court had jurisdiction to make the order, and no exception having been taken at the time, any error the court may have committed in making the order before making further efforts to obtain a special judge in that court, was waived. The Owen court having had jurisdiction to make the order of removal, the Oldham circuit court had jurisdiction to render a judgment.

Sec. 16, of Chap. 13, of the Revised Statutes, which provided that there should be but one order of removal of the same cause, at the instance of the same party, had no application to this case. The order of removal was not made at the instance of either party.

The court allowed the master commissioner one hundred dollars for making sale of the land adjudged to be sold. The land was sold for $5,497.25, and bonds therefor were taken payable to the commissioner.

The bonds being payable to the commissioner, it will be his duty to execute bonds, unless he has already given bond as receiver, and to collect and disburse the money. The allowance is not unreasonable, and does not exceed the amount which the statute authorized the court to make. The record itself affords sufficient evidence to show that the allowance was not unreasonable.

Perceiving no error to the prejudice of the appellants, the judgment is *affirmed*.

L. F. Saunders, for appellants. J. D. Lillard, for appellees.

JAMES F. HAYDON, ET AL., *v.* BAMBERGER, BLOOM, ET AL.

Recording Deeds—Taxes Paid Thereon.

A deed is invalid as against creditors unless acknowledged or proved according to law and lodged for record and recorded in the clerk's office. No deed shall be held to be legally lodged for record until the tax is paid thereon.

Fees Paid.

Until the fees are paid for recording a deed it is not legally lodged for record, even though left with the clerk, but where the clerk actually records a deed upon which the fees have not been paid it is valid as against purchasers and creditors from the date it was recorded.

APPEAL FROM FRANKLIN CIRCUIT COURT.

October 9, 1875.

OPINION BY JUDGE PETERS:

Sec. 31, Chap. 24, General Statutes, p. 261, provides that no deed shall be held to be legally lodged for record until the tax be paid thereon.

Sec. 9 of the same chapter provides that "all deeds and mortgages and other instruments of writing, which are required by law

to be recorded, to be effectual against purchasers without notice, or creditors, shall be recorded in the clerk's office of the court of the county in which the property conveyed, or the greater part thereof, shall be."

Sec. 10. "No deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration without notice thereof, or against creditors until such deed shall be acknowledged or proved according to law, and lodged for record."

Sec. 11. "All bona fide deeds of trust or mortgage shall take effect in the order that the same shall be legally acknowledged or proved, or lodged for record."

The deed of mortgage, which is the subject of litigation in this case, was executed and acknowledged by the grantor on the 21st of July, 1873, and lodged with the clerk on that day for record. It was actually recorded on the 30th of July, 1873, and the tax was not paid until the 21st of April, 1874. By the provision of the statute cited, it was not legally lodged for record until the tax was paid; that is, it could not be valid against purchasers for a valuable consideration without notice, or creditors, until it was acknowledged or proved according to law, and lodged for record, that is, legally lodged; and that could not be done until the tax was paid. The acknowledgment and lodgment of the mortgage with the proper clerk did not operate as constructive notice of its existence to purchasers and creditors until the tax was paid; but upon the payment of the tax it would be effectual from the date of such payment, although the instrument was only lodged with the proper officer for record, and not actually recorded.

If, however, the instrument is acknowledged, and left with the clerk for record, and he actually records it, although he has not received the tax, he thereby becomes responsible himself for the tax, and the instrument would have the same effect from the date of the recording of it as it would have had if the tax had been paid on that day. There is a difference between the lodgment of a deed of trust or mortgage for record, and the actual record of such instruments. In the one case, purchasers and creditors are not held to notice until the tax is paid; in the other case, they are charged with notice from the day the instrument is recorded. In this case, as the tax was not paid until after the mortgage was recorded, and the suit was brought within six months after its registration, it was not barred.

It appears that Penn and T. F. Haydon were bound as the sureties of C. B. Haydon for large sums of money; and to secure their original loss on account of said suretyship, said C. B. Haydon executed a mortgage to them on a house and lot at Peak's Mill, and his half of a growing crop of corn and tobacco; and this suit was brought by the creditors of C. B. Haydon and Brother, a late firm trading under that name for a distribution of the mortgaged property, under Art. 2, Chap. 34, General Statutes.

There can be no doubt that the debts on which T. F. Haydon and Penn were bound, and for which C. B. Haydon attempted to secure them by said mortgage, were pre-existing, and the deed was made in contemplation of insolvency and to prefer the mortgagees over the creditors.

The refusal of the court below to permit James F. Haydon and C. B. Haydon to file amended answers, does not seem to have been excepted to; and the error, if any existed, was waived.

The homestead right of the mortgagor and family is protected by the judgment of the court. Nor do we perceive that appellants are prejudiced by the directions given by the court below to the master.

As, therefore, no error is perceived prejudicial to appellants, the judgment is *affirmed*.

Herd & Trabue, for appellants. J. W. Rodman, for appellees.

PETER COCHRAN, ET AL., *v.* J. H. HAYS, ET AL.

Local Option Election—Contest of.

An election held in a given district to determine whether intoxicating liquors shall be sold therein cannot be contested under the provisions of the general election law.

Opening the Polls.

The Constitution provides that elections shall be held between 6 o'clock a. m. and 7 o'clock p. m., but it does not follow that the result is unlawful where the polls are not opened until after six o'clock.

APPEAL FROM BULLITT CIRCUIT COURT.

October 11, 1875.

OPINION BY JUDGE PETERS:

One of the grounds specified in the notice to contest the election held in the Pine Tavern district in Bullitt county, to determine

whether the sale of intoxicating liquors should be prohibited in said district, is that the judges at said election failed to open the polls at six o'clock A. M. The other is that there were fraudulent votes cast against said proposition. We are not aware of any law authorizing the contest of an election of this character, if, indeed, a mere test of the opinions or wishes of the qualified voters of a district on any given question can be called an election according to the statutory definition of the word.

But besides that objection, appellants have failed to show any just grounds of complaint. They assume, as a matter of law, that the officers of an election are required to open the polls by six o'clock A. M., when the constitutional provision on the subject is that all elections by the people shall be held between the hours of six o'clock in the morning and seven o'clock in the evening. Sec. 16, Art. 8, Const. of Kentucky. The election complained of was commenced between six and seven o'clock in the morning, certainly, according to the evidence, not later than seven o'clock in the morning, and was continued until seven o'clock in the evening, which was a compliance with the law.

There is no evidence that there were fraudulent votes cast for or against the proposition.

The judgment must be *affirmed*.

Strauss & Megler, for appellants. R. H. Field, for appellees.

W. G. MILLS, ET AL., v. W. H. CHELF.

Sale of Real Estate—Rescission of Contract—Married Women.

Where real estate is sold on a title bond to the husband and by his direction the bond was payable to the wife, the wife cannot by pleading that she was a married woman at the time procure a rescission, nor can the husband and others who signed the purchase money escape liability on account of said married woman's connection with the sale.

Judgment on Note Not Due.

Where a note at the time the amended petition was filed was not due and no supplemental petition was filed, showing that such note became due before judgment, no judgment can legally be rendered on the same.

APPEAL FROM MARION COUNTY COURT.

October 12, 1875.

OPINION BY JUDGE PETERS:

In December, 1871, appellee commenced his action in ordinary in the court below, against Mary M. Mills, W. G. Mills and F. Raley, on a note executed by them to him on the 26th of December, 1870, for two hundred dollars, and due on the 4th of April thereafter, with interest from date.

Mary M. Mills and W. G. Mills filed a joint answer, in which they allege that the note sued on, with three others, one for four hundred dollars due the 23d of December, 1871, one for five hundred dollars, due the 23d of December, 1872, and one for the last-named sum due the 23d of December, 1873, was executed by the said Mary M. Mills as principal on all of said notes, with her husband, the said W. G. Mills, and the said F. Raley as her sureties on the note for $200 due the 4th of April, 1871; that on the note for $400 due the 23d of December, 1871, her father, C. Sanders, and on the two notes for $500 each, her husband is her surety.

The notes were executed for the purchase price of a house and lot in Lebanon, purchased by Mrs. Mills from appellee, and for which he executed to her a title bond, which is filed as a part of the answer. They allege that at the date of said contract, Mrs. M. Mills was the wife of W. G. Mills, and rely upon the coverture to defeat the action as to her, as such action is prejudicial to her interests, and they pray for a rescission, and to that end they ask that the case may be transferred to a court of equity.

M. G. Mills and F. Raley say in their answer that they are only the sureties of Mrs. Mills on the note, and that if she is released from its payment, or the contract is rescinded as to her, they should also be discharged. A general demurrer was filed to the answer and sustained, and no further defense having been made, the cause was continued as to Mrs. Mills, and judgment rendered against W. G. Mills and Raley, from which they appealed to this court, and succeeded in reversing it.

Upon the return of the cause to the court below, the demurrer to the answer was overruled; and Chelf filed an amended petition, in which he alleges that on the 25th of December, 1870, William G. Mills contracted to purchase a certain house and lot from him in Lebanon, Ky., at the price of $1,600, and executed four notes

payable at the respective dates and for the several amounts herein before stated; that said Mills was then insolvent, and it was therefore agreed by them that $600, part of the purchase money, should be secured to him by personal surety, and in fulfilment of that agreement F. Raley signed the note for $200 as surety, and C. Sanders signed the note for $400 as surety, and the remaining two notes for $500 each were secured by a lien retained on the house and lot; and that the name of Mary M. Mills was signed to all of said notes at the instance of her husband, William G. Mills.

Chelf avers that the contract for the sale of the property was made with said William G. Mills for the benefit of his wife, but that said W. G. Mills took the notes and signed them himself, and procured the other obligors thereon to sign them, and he thereupon executed the title bond filed with the answer, binding himself to convey the property to Mrs. Mary M. Mills at the special instance and request of her husband.

He alleges that he has a good title to the property, tenders a deed with covenant of general warranty, acknowledged before the proper officer, with the relinquishment of the potential right of dower of his wife, and sets forth his derivation of title.

William G. Mills, in his answer to the amended petition, denies that he made the purchase of the house and lot, and denies that he applied to, or procured Raley & Sanders, or either of them, to sign said notes as his surety, or in any other capacity. He alleges that his wife made said purchase against his wishes and solicitations; that if he made any communications to the plaintiff on the subject of said purchase, it was as the agent of his wife, and not for himself; that he may have made some communications to plaintiff on the subject, but that they were made as the agent of his wife, which was well known to plaintiff; and he alleges that his wife procured Raley and Sanders to sign the notes as her sureties, and that he signed all of said notes as her surety also, for the reason that it was necessary to make them binding on his wife. He filed three letters addressed by Chelf to him as a part of his answer, to show that Chelf regarded his wife as the purchaser of his property, and prays that he shall not be held bound by the contract, if it shall be adjudged that it is not obligatory on his wife on account of her coverture; and to obtain relief he makes his answer a cross-petition.

Sanders, in his answer, admits he executed the note for $400, and says that he signed it solely as the surety of Mary M. Mills, and by her request, and not at the request of her husband, M. G. Mills. He

denies that W. G. Mills purchased said house and lot, but affirms that the same were purchased by Mary M. Mills, and that she having made the purchase, he executed a bond to her for the title. He made his answer a cross-petition against Mrs. Mills and Chelf, and prays that if Mrs. Mills relies on her coverture, and the contract cannot be enforced against her on that account, he may be discharged from liability as her surety.

Mrs. Mills, in her answer to Chelf's amended petition and to the cross-petition of her husband and Raley and Sanders, avers that she purchased said property against the wishes and over the objections of her husband, and that it was at her solicitations that Sanders and Raley signed the notes to which their names severally appear as sureties for her, and not for her husband. She denies that the plaintiff had ever tendered a deed to her, and pleads her coverture as a bar to any recovery against her.

Raley's answer is the same in substance as that of Sanders. The plaintiff below put in a reply to the several cross-petitions, which we deem unnecessary, and is a mere elaboration of his amended petition.

On final hearing the petition as to Mrs. Mills was dismissed at appellee's costs, and judgment was rendered in favor of appellee against M. G. Mills and F. Raley for two hundred dollars, with interest at the rate of six per centum per annum from the 25th of December, 1870, till paid, and against said M. G. Mills and C. Sanders for four hundred dollars, with interest thereon at the rate of six per centum per annum from the last-named day till paid, and his costs, and in favor of appellee against William G. Mills, for the sum of $500, with interest from said last-named day till paid; and it was adjudged that appellee has a lien on the house and lot for the amount of the last-named note, and also for a note for a like sum due on the 25th of December, 1873, with interest from the 26th of December, 1870, till paid, which was not due when the amended petition was filed, but which was then due.

It was, therefore, further adjudged that said house and lot, a particular description of which was given, be sold at public outcry at the courthouse door in Lebanon, Ky., on the first day of a county or circuit court for said county, on credit of six, twelve and eighteen months, or enough thereof to pay the sum of $1,600, with the costs of appellee and Sanders and Raley. Proper and specific directions are given the master, who is directed to make the sale, as to the manner the same was to be advertised, and to whom the bonds for

the purchase money were to be taken, which were to bear interest from date.

From that judgment W. G. Mills, Raley and Sanders have appealed. In the opinion delivered by this court, when the case was here on the former appeal, it is said if the husband should make a contract jointly with the wife, and agree that the deed should be made to the latter, the contract could then, doubtless, be enforced against the husband, or if the present contract were made at the instance of the husband for the benefit of the wife, it may be that the contract would be regarded as that of the husband, and a chancellor would enforce it. Whether the husband can bind himself as the surety of the wife was not then necessary to decide. But the judgment was reversed, and the cause sent back with directions to the court below to overrule the demurrer to the answers, to transfer it to the equity docket, and to allow amended pleadings.

Appellee, in his deposition, admits the writing of the letters to W. G. Mills filed by him with his answer, but says he never saw Mrs. Mills, or spoke to her on the subject of the sale of the house and lot; that he had several conversations with William G. Mills on the subject of the sale, in which he spoke of the attachment of his wife to the property; that finally he met with said Mills in Lebanon, when the terms of sale were agreed upon between them, and Mills then said he wanted the bond for title made to his wife, and wanted the deed made to her; that it was a part of the agreement that for $600 of the purchase money he was to have two notes, one for $200 and one for $400, executed with good personal security; that said Mills told him he would pay him for the property out of the proceeds of his livery stable, which he was at the time keeping with one Doyle; and he proves that he contracted for the sale of his property with William G. Mills with the assurance from him that he was to pay for it, and gave his within obligation to make the conveyance to the wife by the request of Mills.

These statements are uncontradicted by any evidence in the case. Mills could not have acted as the agent of his wife; there is no effort to prove that he acted in that capacity in making the purchase; and it is not proved, nor even alleged, that Mrs. Mills had any means whatever to pay for the property. The conclusion cannot be resisted that William G. Mills made the contract with appellee for the purchase of the property, and for some reason not material to the merits of this controversy, intended to have the title conveyed to his wife; and the court below properly adjudged that as between Wil-

liam G. Mills and appellee, it should be enforced, and the notes signed by Raley and Sanders respectively were obligatory on them.

But we cannot approve the judgment as rendered. The note for $500, which matured on the 25th of December, 1873, was not due when the amended petition was filed on the 18th of June, 1873. No amendment nor supplemental petition has been filed since the last named period, and consequently there is no allegation that said note was not paid. When said amendment was filed appellee had no cause of action on that note, and since then, from anything that appears, it may have been paid. The mere filing of a writing evidencing a debt will not authorize a judgment on it. It must be alleged that there is a debt due and unpaid, and the facts stated showing the indebtedness. That is not done in this case; and indeed the allegations are scarcely sufficient to authorize a judgment on the note for $400 and the one for $500 due the 25th of December, 1872. For the error herein suggested (none other being perceived prejudicial to appellants) the judgment is *reversed,* and the cause is remanded with directions to permit appellee to amend his petition, and for further proceedings consistent herewith.

C. S. Hill, J. W. Rodman, for appellants.
A. J. James, W. H. Chelf, for appellee.

DAVID STODDARD *v.* FLEMINGSBURG & POPLAR PLAINS TURNPIKE ROAD CO.

Damages—Recovery for Injury—Negligence.

It is the duty of a turnpike company to keep its road free from obstructions and upon its failure to do so must answer in damages resulting from an injury by reason of its neglect of duty.

Duty of Turnpipe Company.

When an obstruction such as a road roller is left standing on the roadway late in the afternoon, without the knowledge or fault of the company or its agent and before the company had a reasonable opportunity of knowing of the obstruction, the company cannot be held liable for damages to a traveler on the road whose horse scared at the obstruction and ran away, especially where it is shown that the obstruction remained in the road only over night.

APPEAL FROM FLEMING CIRCUIT COURT.

October 13, 1875.

OPINION BY JUDGE PRYOR:

The evidence in this case upon the part of the plaintiff in the court below (appellant in this court), shows that the wooden roller was seen near the traveled portion of appellee's road late one evening about sundown, and the next morning was seen in an adjacent field, being then in use by its owner; that early in the morning succeeding the day in which it had been left on the roadside, the appellant was driving on the road when his horse became frightened at the roller, and the result was a serious injury to appellant by being thrown from the vehicle in which he was riding. It is shown that there was an embankment of from four to six feet near this part of the road, but nothing in the proof showing that it was dangerous, and not in a condition for all the ordinary purposes of travel; on the contrary, the proof shows that the cause of the accident was the scare of the horse at the roller on the roadside. There is no evidence that any of the officers of the road had notice that the roller was within the boundary of the road; nor does it appear that it had been there long enough for those superintending the road, by the exercise of the proper diligence, to have ascertained the fact.

It does appear from the evidence on the part of the appellee, that the toll-gate keeper passed the owner of the roller at the time the latter was unhitching his horses, when about to leave it on the roadside. This was late in the evening preceding the morning on which the accident happened. It seems that this agent of the company was only employed to keep the toll-gate, and occasionally beat rock upon the road. It was no part of his duty to remove obstructions from the road; nor was the nature of his employment such as to authorize the court to say that notice to him was notice to the company. Nor does it even appear that the toll-gate keeper had any notice, except the fact that the owner of the roller was taking his horses from it as the gate keeper passed the road. It is the duty of turnpike companies to keep their roads free from obstructions, and upon their failure to do so must answer in damages resulting from an injury by reason of this neglect of duty. Yet when an obstruction is placed upon the road without the knowledge or fault of the company or its agent, and before the company had a

reasonable opportunity of ascertaining that the obstruction existed, for an injury to the traveler resulting by reason of it, the company is not responsible.

Upon the appellant's own testimony, no verdict, if rendered, could be sustained. The evidence on the part of the defendant, and which seems to be admitted in argument, about which, however, there can be no controversy, is that the owner left the roller in or near the fence adjoining the road near sundown one evening, and removed it between sunrise and eight o'clock the next morning. It can hardly be said that in a case like this, where no one connected with the management of the road had notice of the obstruction, that the company should be deemed guilty of negligence. A court or jury has the right to look to the nature of the country through which the road runs, the amount and character of travel upon it, in order to determine the question of negligence. A turnpike company is not an insurer of all who go upon its road against all the accidents incident to travel. The road must be free from obstructions and in a condition to answer all the ordinary purposes of travel. There are locations on a road where more pains should be taken to prohibit the traveler from danger than at others; a defect in a road running through a town or densely populated village might be regarded as dangerous, when the same defect upon a turnpike running through the country would be held not to be so. 2 Hilliard 399. Although these questions are for the jury to determine, if there is no negligence on the part of the party charged, the court, as in other cases, should instruct the jury to find for the defendant. We are satisfied that upon the facts of this case a verdict could not be upheld. It is, therefore, immaterial whether the instructions were proper or not; the defendant was entitled to the finding.

Judgment *affirmed.*

Cord & Alexander, John Rodman, for appellant.
Phister & Andrews, for appellee.

LOUISVILLE CITY RAILWAY CO. *v.* PRESTON JOHNSON'S ADM'R.

Damages—Instructions—Negligence.

It is the duty of a street car company to select only drivers and agents qualified to perform their duties with care and prudence, and it is the duty of such agents to exercise care and diligence to prevent injury to others.

Instructions.

Where a child was injured by being struck by a street car an instruction is erroneous which tells the jury that the defendant is not liable if the driver of the car did not see the child, or could not by ordinary diligence have seen it. The right of recovery cannot be made to depend upon the sole question as to whether the driver saw the party injured or by ordinary diligence could have seen him.

Negligence.

A street car company is not liable for injuring a person attempting to cross its track, even though the driver of the car saw the person or by ordinary vigilance might have done so, unless when seen by the driver the person injured was in a position where a prudent driver ought to have had sufficient cause to believe the car must have run upon him unless checked.

APPEAL FROM JEFFERSON CIRCUIT COURT.

October 15, 1875.

OPINION BY JUDGE PRYOR:

The motion for a new trial was left undetermined by the court below when the former judgment was rendered, and upon the return of the cause that court was directed to enter a judgment for the appellees, unless in the opinion of the court a new trial should be granted. The grounds or reasons for a new trial were set forth in writing, and the motion made in proper time.

All the instructions asked for by both appellant and appellee were refused, and instructions given in lieu thereof by the court, to which exceptions were taken by both parties. The second instruction reads, "Ordinary negligence is the want of such diligence and care as a prudent person would, in such a situation and under the surrounding circumstances, have observed to prevent accident to others."

This instruction, we think, is not liable to objection. The cars owned by the appellant are running constantly over the streets of a large city; and when persons at each crossing are constantly passing, it is made the duty of the appellants engaged in this business to select drivers and agents with reference to their competency and the nature of the employment, and none but careful and prudent men should be chosen to drive or manage its teams in carrying passengers; and this duty arises not only from the necessity of securing the safety and comfort of passengers, but to protect the citizen, whose right to be upon the street is unquestioned, from the danger

of being injured by reckless or careless drivers. Nor does such an instruction make the appellant an insurer of the lives of those, whose own negligence causes the injury. The meaning of the instruction is that appellant's agent must exercise the same care and diligence that a careful and competent driver would have exercised under the circumstances.

Instruction No. 6 says to the jury that if they believe from the testimony that Preston Johnson was not hurt by the street car, or if hurt by the street car, he caused the hurt by his own negligence in running under the mules or car, and the driver did not see him, or could not by ordinary diligence have seen him, the verdict should be for the defendant. This instruction was erroneous. The right of recovery is made to depend upon the question as to whether the driver saw the party injured, or by ordinary diligence could have seen him, and the natural or legitimate inference must necessarily be that if the driver saw the boy, or could have seen him, he was responsible.

The seventh instruction tells the jury that "If the boy attempted to cross the street in front of the car, and the driver was attending strictly to his duty and did not see him, such negligence on the part of Johnson exonerated the appellant from liability." There was no testimony in the case that the driver saw the unfortunate boy prior to the accident, or that the latter was in such a position with reference to the driver that he could have been seen by him. The weight of the testimony indicated that if the injury was done by the car, it was by one of the hind wheels. Only one witness speaks of his being struck by the front wheel. This witness also states that the boy was making an effort to cross the street, and was not touched by the mules, but first struck by this front wheel. Although the appellant may have seen him, or by the exercise of ordinary vigilance could have seen him, still the company is not liable unless when seen by the driver Johnson was in a position where a prudent driver ought to have had sufficient cause to believe the car must run upon him unless checked. If the boy attempted to cross the street directly in front of the car, he placed his own life in peril, and the company is not responsible, unless by the exercise of such care as a prudent driver would have exercised under the circumstances, that accident could have been avoided. And in determining this question the jury must necessarily look to the position of both the injured party and the driver at the time the accident occurred.

The answer in this case also puts in issue the right of the appellee

to maintain the action. It is denied that she is the administratrix of Preston Johnson. The letters of administration were not filed with the petition, nor until after the answer was made. It does not appear that these letters were offered in evidence. The judgment of the court below is *reversed* and cause remanded, with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

Mundy & Parson, for appellant. R. H. Blain, for appellee.

S. H. SHANKS, ET AL., *v.* R. M. PITMAN, ET AL.

Husband and Wife—Secret Trust—Right of Creditors.

Where a husband after marriage took possession of his wife's money and agreed with her to invest it in lands for her benefit, but bought lands taking title in his own name and after many years mortgaged it to creditors, the wife's claim is subordinate to the claim of creditors who loaned their money to the husband without any knowledge of the secret claim of the wife.

APPEAL FROM LINCOLN CIRCUIT COURT.

October 16, 1875.

OPINION BY JUDGE PRYOR:

There can be no doubt but that the husband agreed in parol with the wife after the marriage, to invest her money in land and have the title secured to her. This post-nuptial agreement seems to have been recognized at the time the settlement was made by the wife's guardian, and the money and choses in action belonging to her paid and assigned to her husband. The husband disregarding his promises to the wife after receiving her estate, never secured her in the right to enjoy the little patrimony left her by her father, but by reckless trading, connected with his dissipated habits, not only squandered his own estate, but all that he had received by her. He was considered in prosperous circumstances when the marriage took place, and this tended to lull inquiry on the part of the wife, and perhaps induced the husband to forget his pledges to her. This parol contract was made in the year 1867; and the husband at that time was invested by the settlement and transfer made by the guardian, with a competent title to all the wife's choses in action. He invested this money shortly after in land for his own benefit,

or at least in his own name; and no attempt to enforce this claim in law or equity against the husband by the wife, seems to have been made until the year 1874, when the husband's estate was sought to be made liable to the payment of his debts. No notice of this hidden equity on the part of the wife was brought to the knowledge of creditors, nor had they any reason to believe that such a claim existed; on the contrary, the husband had taken possession of the wife's estate, and invested it in land in his own name, his right to which was of record in the chancery court, where his title as purchaser had been recognized and confirmed.

The money for which the notes were executed to the appellant was loaned the husband upon the faith of this property, and a mortgage executed upon it to secure the payment. He had sold or exchanged a part of this land for other land, the wife uniting with him in the deed, upon renewed promises to secure her; and whilst he again seems to have been unmindful of his obligation, there can be no equity in such a case on the part of the wife against appellant's claim. The right to the land was not only in the husband, but he purchased it with money and notes that, so far as third persons were concerned, belonged to him. If the equity of the wife can be enforced at all, she could only assert her claim as a creditor of the husband, and in a contest with creditors, the appellant shows a lien upon the property by the mortgage executed to secure the notes.

In Latham v. Glen, the wife was permitted to hold the property against creditors because the husband had executed a conveyance of the property to the wife, in discharge of his equitable claim upon him, before the claims of creditors had been asserted. In this case the husband has created a lien upon the property in favor of the creditor before the wife's equity is asserted; and the fact that the husband has only an equitable title to the land does not enlarge the equity of the wife or defeat the lien created by the mortgage upon it, to secure appellants' debt. This court said in the case of *Maraman's Adm'r v. Maraman,* when the husband had sold the wife's land and slaves, at the same time executing his notes to his wife for a part of the money received by him, with a promise on the part of the husband that he would secure her in the amounts they called for, that the natural tendency of her conduct was to give the husband credit with others who knew nothing of the agreement between them. As she has come into equity for relief, sound policy seems to forbid that the claim, which has no legal validity, shall be placed

upon an equal footing with the legal demands of creditors. This question originated in the settlement of the husband's estate that was insolvent, and the equitable claim of the wife postponed until the demands of creditors were satisfied. *Maraman's Adm'r v. Maraman,* 4 Met. 92.

In the case of *Pryor, Assignee, v. Smith, et al.,* 4 Bush 380, where the husband had sold the wife's land, and at the time agreed to invest for her the amount realized from this sale in another tract that he was at the time contracting for, the husband having purchased the land with the deed made to himself, became insolvent; and in a controversy between the wife and the husband's creditors, this court said, "These transactions constituted a complete conversion and reduction of her estate in the land by her husband to his possession; and generally, where this is done, a court of equity will not interpose to provide for the wife to the exclusion of the claims of creditors." In the present case the husband had not only secured the legal title to the choses in action of the wife, by the assignment to him from the guardian, but after reducing them to possession, purchased with these notes land in his own name, and then executed the mortgage upon it to appellant for money borrowed for his own purposes. This was such a conversion of the wife's estate by the husband as made him the absolute owner, and the wife's equitable claim upon him subordinate to the claims of creditors. The judgment of the court below is *reversed,* and cause remanded for further proceedings consistent with this opinion.

T. P. Hill, M. C. Saufley, for appellants.
R. C. Warren, W. G. Welsh, Durham & Jacobs, for appellees.

R. S. VAUGHAN'S G'D'N *v.* J. L. BURKHART.
SAME *v.* CITY OF LOUISVILLE, ET AL.

Landlord and Tenant—Eviction.

Where the tenant is evicted before his rent becomes due, the landlord cannot recover for the unexpired term from the date of eviction.

Eviction.

Where a tenant has a written lease on the wife's real estate executed by the husband and wife, he may legally hold the estate against the lessor and his vendee. Such tenant under such circumstances can hold the estate against one who inherits it before the expiration of the lease.

Eviction.

Where a tenant holding a lease during the term becomes the purchaser of the real estate his leasehold interest merges in his fee simple title and the relation of landlord and tenant ceases to exist.

Taxes.

The perpetual lien for taxes secured by clauses found in a city charter, means only that the lien exists so long as the right to collect taxes can be enforced, and such collection cannot be enforced after five years.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 19, 1875.

OPINION BY JUDGE PRYOR:

If the tenant is evicted before his rent becomes due, there can be no doubt but that the landlord would be denied the right to recover for the unexpired term from the date of eviction to the termination of the lease; and when the holding by both the lessee and lessor was manifest, the party entitled might assert his claim for the entire rent. This question does not arise in the present case. The appellee, Burkhart, had acquired an interest in the realty for the period of five years by reason of the lease from the ancestors of the appellants. The realty belonging to the wife, she, having united in the lease with her husband, vested the tenant with the right to hold the estate against both the husband and wife and their vendee, until the lease expired. If they had sold the land, the tenant could not have been evicted by the purchaser, and we see no reason why the appellants, who inherited this realty from the mother, is in a better condition than she would have been if she had sold the land. After the death of the mother, the appellees held under their title, and when they undertook to sell the property, and did in fact sell it, the purchaser acquired all their interests. The sale was not made subject to the lease; and if an entire stranger to the land had bought, he would have acquired a complete title. If so, the tenant, being the purchaser, the lesser estate was merged in the greater, and he became entitled to the rent. The appellee was not a party to the action brought to sell the realty, and although willing, no doubt, that a sale should be made, when he became the purchaser the property was his absolutely, and the relation of landlord and tenant no longer existed. It was, therefore, proper to deduct the amount of rent unpaid from the purchase price.

The lien of the city upon the property of the citizen was intended to secure the payment of the taxes. The law prescribed the mode of making the assessment and collecting the taxes; and the legislature never designed that the city should have a perpetual lien on the real estate or other property within its boundary for the payment of its tax claims. If five years is no bar to the recovery, there is no limitation to be found. The city ought not to be allowed to permit the purchaser of property within its limits to be disturbed in his right by the production of these state claims for taxes, for the reason that its officers have neglected their duty; but on the contrary, it should be held to that sort of vigilance as would tend to secure the citizen in his title. The perpetual lien recognized by a clause of the city charter, means only that the lien shall exist as long as the right to collect the taxes can be enforced.

There is no time fixed by the charter when the claim for taxes shall be asserted, and therefore the General Statutes, page 628, must apply to this case. "An action upon a contract not in writing, signed by the party, express or implied, an action upon a liability created by statute when no other time is fixed by the statute creating the liability, an action for a penalty, etc., shall be commenced within five years next after the cause of action accrues." It does not appear when the assessment for the taxes was made, but it must be presumed that it was at the time and manner provided by the charter. The judgment for the taxes for the year 1868 was, therefore, erroneous, as neither the appellants or the purchaser was liable for these taxes; nor could the property have been subjected to their payment. The judgment is, therefore, *reversed* to the extent only of the judgment for taxes for the year 1868. Cause remanded for further proceedings consistent with this opinion. The judgment for the rent in favor of Burkhart is *affirmed*.

Emmet Field, for appellant. Edwards & Seymoure, for Burkhart.

W. G. WADE *v.* FIRST NATIONAL BANK OF FRANKLIN.

Promissory Note—Representations to Induce Signature.

It is the duty of a creditor to deal with one who becomes bound to him as surety for his debtor in the utmost good faith, but he is not bound to make unsought disclosures of the amount of the principal's indebtedness.

Usury.

To receive usurious interest in advance is as much a violation of the statute as to contract for its payment at a future time.

APPEAL FROM SIMPSON CIRCUIT COURT.

October 21, 1875.

OPINION BY JUDGE PRYOR:

That part of the answers in which it was attempted to set up the fact that the bank had loaned to Collier, Taylor & Co., a sum exceeding ten per cent. of its capital stock then paid in, did not show that the loans referred to were exclusive of discounts of bona fide bills of exchange drawn against actually existing values, and of commercial paper actually owned by them, and consequently did not show that the bank had violated the provisions of Sec. 29 of the National Currency Act. The demurrer to that part of the answer did not, for this reason, raise the question whether a note or bill taken for loans made in violation of that section could be enforced. There is nothing in either answer sufficient to avoid the note or bill on the ground of fraud or misrepresentation, or of the suppression of facts, which it was the duty of the bank to communicate. One of the misrepresentations relied upon in the answer to the petition on the bill are that the cashier, a few minutes after the appellant had signed the bill, represented to him that said bill was but the renewal of an old note for $2,000; that a member of the firm of Collier, Taylor & Co., made the same representation to him before he signed the bill; and that he was thereby induced to sign it; and that said representations were false. Of course false representations made by one of his principals cannot have the effect to absolve him from his obligation to the bank, and the representations of the cashier having been made after he signed, it cannot have induced his signature which was already made.

The amended answer in one of the cases which attempts to avoid liability on the ground that the bank suppressed information as to the amount of the indebtedness of Collier, Taylor & Co., to it, does not state facts sufficient to show that it was the bank's duty to give information on that subject; nor was the appellant authorized to assume that their indebtedness did not exceed ten per cent. of the paid up capital of the bank. As we have already seen, it nowhere appears that the bank had loaned them any more than it had a legal right to loan, and it cannot be held to have been the duty of the officers of the bank unasked to disclose the amount of its customers' indebtedness to it.

We recognize to its fullest extent the duty of a creditor to deal

with one who becomes bound to him as surety for his debtor in the utmost good faith; but this duty does not go to the extent of requiring unsought disclosures of the amount of the principal's indebtedness. The appellant nowhere avers that he made inquiry of any of the officers of the bank as to the amount of the indebtedness of Collier, Taylor & Co. to it, or even that he would have refused to endorse for them if he had known what it was. Nor is he exonerated from liability on account of the alleged payment of usury. He does not even allege that he was ignorant of the rate of interest being paid.

We perceive no error in either judgment to the prejudice of the appellant. The answers of the appellant do not charge the payment of usury upon the debts evidenced by the note and bill, to the extent to which credits were allowed by the court below. The substance of the allegations on this point is that the bill and note were given for loans, and that the bank, at the time, collected interest at the rate of twelve per cent. per annum, and that within two years then last past, the firm of Collier, Taylor & Co. had paid to the bank in usurious interest, a sum exceeding the amounts sued for. There is no allegation that any usury had been paid upon either the bill or note, or upon any previous notes or bills for the same debts, except that paid at the time of discounting the bill and note sued on; and the amount of interest and usury then paid was all appellant had a right to have credited on them, respectively.

Counsel for the bank insists that even this cannot be allowed, because he says the forfeiture of interest, consequent upon charging more than the legal rate, is a penalty imposed by an act of congress, and that state courts cannot enforce such a penalty. We concede that the state courts have ordinarily no jurisdiction to enforce the penal statutes of the federal government; but we think it does not follow from this that a party sued in a state court upon a contract in violation of a penal law of the United States, may not set up the illegality of the contract as a defense. Under the act of congress, the payment of twelve per cent. annually at the time of borrowing the money was illegal, and the money so paid may, at the election of any person bound on the note or bill, be treated as a payment pro tanto thereon. But the contract was equally in violation of the laws of this state; and the payment of usury may be applied as payment on the principal of the debts without the aid of the act of congress.

We do not concur with counsel that the state statute does not

apply to a case where interest, instead of being charged, is reserved at the time of making the loan. The word "charge" used in our statute was intended to cover every phase of an usurious transaction. To hold otherwise would be to convict the legislature of the extreme folly of so framing a highly penal statute as to enable even the most unsophisticated usurer to evade its provisions at pleasure. We are clearly of the opinion that to receive usurious interest in advance is as much a violation of the state statute as to contract for its payment at a future time.

For the error in allowing the appellant credits for usury, paid prior to the time of the execution of the note and bill, the judgments are *reversed* on the cross-appeals, and the causes are remanded for new trials upon principles not inconsistent with this opinion. The judgments are *affirmed* on the original appeals.

W. P. D. Bush, for appellant. R. Rades, for appellee.

C. A. M. YARBRA *v.* JAMES SPECHT.

Practice—Exceptions.

The failure to have the court pass upon exceptions taken to the introduction of evidence is a waiver of all objections to evidence.

Bill of Particulars.

A defendant has a right to demand a bill of particulars before he answers, but where he answers without one he waives his right to raise the question.

Bond for Costs.

The failure of a non-resident plaintiff to give bond for costs at the time of commencing suit, was ground for dismissing it, but when on defendant's motion the plaintiff was ruled to give bond and did so, no motion having been made to dismiss, defendant waived his right to raise any question as to the failure to give such bond in the first instance.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 23, 1875.

OPINION BY JUDGE COFER:

Although the appellee should have sued in the common pleas court, the failure of the appellant to move to transfer the cause to that court was a waiver of that irregularity.

The evidence proves that the appellant was a non-resident when

the suit was commenced, and the fact that he was served with process here does not rebut that evidence. Much of the evidence was incompetent, and might have been excluded; but the exceptions of the appellant to that evidence do not seem to have been acted upon, except as to the deposition of the appellee; and the failure to have the court below to pass upon them was a waiver of all objections to the evidence.

It seems that the exceptions to the appellee's own deposition were sustained (though we find no such order in the record), and the order sustaining the exceptions was afterwards set aside. This is complained of, but again the appellant has failed to except. None of the evidence having been excluded, but all taken being before the court, it was ample to warrant the judgment rendered. The appellant has a right to demand a bill of particulars before he answers, but having answered without one, it is now too late to raise that objection.

The appellant having been proved to have been a non-resident when the suit was commenced, the attachment was properly sustained. There is no evidence whatever that appellant ever resided upon the land levied on and adjudged to be sold; the evidence is conclusive that he resided in Tennessee when the suit was commenced; and he has, therefore, wholly failed to show a right to a homestead exemption. There was no sufficient ground made out for a new trial. If the appellant had evidence to take, he should have asked for a continuance instead of waiting until a judgment was rendered, and then moving for a new trial. If he desired to rely upon the statute of limitations, he should have pleaded it, and if he could not plead it without a bill of particulars, he should have asked for a rule to compel the plaintiff to furnish one.

We do not find that the appellant set up any demands against the appellee, and there was, therefore, none to be credited on the demand for which he was sued. The failure to execute bond for costs at the time of commencing the suit would have been ground for dismissing it; but upon the appellant's motion, the appellee was ruled to give bond, and did so; and no motion was at any time made to dismiss on that ground; and it is too late to raise the question for the first time in this court.

The appellant having been served with process, and having appeared in the action, the bond mentioned in Subsec. 2, Sec. 44,

Civil Code, was not required to be executed. Perceiving no error in the judgment it is *affirmed.*

John C. Walker, W. C. Whitaker, for appellant.
Clemmons, Willis, for appellee.

AUG. WEHRLEY, ET AL., *v.* R. H. COURTNEY, TRUSTEE, ET AL.

Judicial Sales of Real Estate—Duty of Purchaser to Investigate Title.

Judicial sales of real estate are made without warranty, and it is the duty of a purchaser at such sales to investigate the title before the sale is confirmed, and where he fails to do so and it turns out that there are some unpaid taxes due, he must bear the consequences.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 27, 1875.

OPINION BY JUDGE PETERS:

At a judicial sale of certain lots in the city of Louisville on the 8th of June, 1874, appellants became the purchasers thereof. On the 12th of June the marshal made his report of the sales to the court. On the 6th of July, 1874, the report was approved and confirmed without exception; and on the 8th day of the last named month, deeds were executed by the master, acknowledged, approved, and ordered to be certified to the clerk of the Jefferson county court for record.

Appellants having failed to pay their bonds for the first instalment of purchase money, rules were awarded against each of them and their sureties to coerce payment, to which they each responded, in substance, that said sales were made as of unincumbered property; that the attorney of the plaintiff in the suit handed them printed bills on the day of sale, prepared specially for the occasion, giving particulars concerning the property, and requesting them to bid on the same; that extra efforts were made by the parties in interest to make the property bring its full value; that it did not appear in the decree of the chancellor, nor in the advertisements of the marshal of the sale, nor in the printed bills of those for whose benefit the sales were to be made, that the property was not sold as unincumbered property, and that they understood, and did believe when they purchased that they were to get an unincumbered fee simple title to the lots; but that since they purchased they had discovered that there were

a large amount of taxes assessed on said property for the years 1872 and 1873, due and unpaid, and which were a charge on the property purchased by them, amounting to near or quite $1,000 in all, which they were compelled to pay and had paid to the proper collecting officer; and they asked that they might have credits for the amounts paid by each on their respective bonds for the first instalments, and professed to be willing and ready to pay the balance thereof, and perhaps had previously paid all except what they sought to retain for the taxes. The responses were adjudged insufficient by the court, and the rules made absolute, and that judgment they ask this court to reverse.

It is not stated in this response that appellants did not know before the sales to them were confirmed, that the property purchased by them was liable for the unpaid taxes assessed upon it, and if they did not know it, it does not appear that they had used any diligence, or made any effort from the date of their purchases to the time of the confirmation, which was a month, to ascertain the condition of the title. They knew, or must be treated as knowing, that judicial sales are made without warranty of title, and it was their duty to investigate the titles and the condition of the property before the sales were confirmed; and having failed to do so they must bear the consequences.

The action of the court in confirming the sales is a final judgment, from which an appeal will lie, and concludes the rights of parties and privies until it is vacated or reversed.

Wherefore the judgment is *affirmed*.

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

Byron Bacon, for appellees.

MISSISSIPPI CENTRAL R. CO *v.* JOHN DAVIS.

Railroad Company—Eminent Domain.

The statute gives jurisdiction to the county court to hear exceptions filed to the award of commissioners in a proceeding by a railroad company to appropriate a right of way and the transfer of such a cause to the common pleas court by consent of both parties will not give such probate jurisdiction to hear such cause.

Jurisdiction of Court—Eminent Domain.

The statute gives the county court exclusive original jurisdiction of proceedings by a railroad company to appropriate a right of way and no other court can exercise any such original jurisdiction. Original jurisdiction cannot be given by consent upon a court having only appellate jurisdiction.

APPEAL FROM HICKMAN CIRCUIT COURT.

October 30, 1875.

OPINION BY JUDGE LINDSAY:

The charter of the Mississippi Central Railroad Company provides that if from any cause the company shall be unable to procure by contract the necessary right of way, earth, stone, etc., wanted for the construction of its road, the county court of the county in which the property wanted is situated shall appoint three commissioners to value the same, and makes it the duty of said commissioners to ascertain the compensation to be paid to the owner, and to report the same, with a description of the property, to the county court. Upon the filing of the report of the commissioners, it is made the duty of the clerk to issue a summons against the owners to show cause why the report shall not be confirmed; and in case either the company or the owner of the property shall except to the report, a jury is to be summoned, and the questions made by the exceptions are to be tried in the county court; and from the judgment rendered in the case either party may have an appeal or writ of error to the circuit court.

Commissioners were appointed by the Hickman county court in accordance with the act; and having reported the amount of compensation to be paid by the company to the appellee for the right of way through his land, he appeared in the county court and filed exceptions, and by consent of the parties the case was removed to the Hickman court of common pleas without a trial and judgment in the county court.

A trial was had in the common pleas court, and a verdict and judgment were rendered in favor of the appellee for nearly five times as much as was reported by the commissioners, and from that judgment the company has appealed.

Counsel for the appellant insists that the common pleas court had no jurisdiction of the proceeding, and that none could be conferred by the consent of the parties.

The act creating the common pleas court provides that it "shall have original jurisdiction of all civil business by suits at law, suits in equity, motion or otherwise, and in all other matters and things of which the circuit courts of this commonwealth have jurisdiction, except that said court shall not have any criminal or penal jurisdiction; said court shall have the same appellate jurisdiction that the circuit courts of the commonwealth have in civil actions, and

traverses of writs of forcible entry and detainer." It was argued that there is nothing in this section giving the common pleas court appellate jurisdiction, and that as it had no appellate jurisdiction, no jurisdiction could be conferred upon it by consent.

There was no appeal from the county court, and we need not decide whether if the case had been tried in the county court, an appeal would be to the common pleas court. The charter gives the county court exclusive original jurisdiction of this proceeding, and therefore neither the circuit nor the common pleas court could have any other than appellate jurisdiction, unless original jurisdiction can be conferred by the consent of the parties upon a court which has by law only appellate jurisdiction. That this cannot be done is, we think, clear upon principle and authority. When a court has no jurisdiction of the subject matter of the action or proceeding, there is an entire absence of power to render a judgment; and as power for this purpose can only be conferred by law, the express consent of parties can no more confer jurisdiction upon a court created by law, than such consent can create a new court. *Lindsey, et al., v. McClelland,* 1 Bibb 262; *Banks v. Fowler,* 3 Litt. 332; *Ormsby v. Lynch,* Litt. Sel. Cas. 303.

It is true these cases were decided with reference to the jurisdiction of the general court, which was a court of special and limited jurisdiction, while the circuit and common pleas courts are courts of general jurisdiction. But in proceedings like this, the jurisdiction of the circuit court, as well as of the common pleas court (if the latter has any), is special and limited; i. e., it is appellate only. That original jurisdiction cannot be enforced by consent upon a court having only appellate jurisdiction in the particular case, was in effect decided in *Davis v. Davis,* 10 Bush 274.

As the common pleas court had no jurisdiction, it is unnecessary to consider other questions presented in argument. The judgment is *reversed,* and the cause remanded with directions to set aside the judgment, and to remand the case to the county court.

J. M. Bigger, Steel & Steel, for appellant.
E. G. Bullock, for appellee.

J. C. CALHOUN, ET AL., *v.* FOWLER LEE & CO.

County Sheriff—Collection of Execution—Liability of Bondsmen—Pleading.

A petition seeking to hold a sheriff and his bondsmen liable for the failure of such officer to make a levy pursuant to an execution in his hands is fatally defective when it does not aver that the debt or any part of it has been lost nor any allegation that plaintiff has sustained any damages by reason of the failure of the sheriff to collect the amount of the execution.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 30, 1875.

OPINION BY JUDGE COFER:

This was an action against a sheriff and his sureties to recover damages for his failure to collect the amount of an execution in the name of the appellee against J. C. Gentry & Co., which was placed in his hands between the date stated in the teste and return day for collection.

It is alleged that while the fi. fa. was in the sheriff's hands, Gentry & Co. had sufficient property in the county known to the sheriff subject to the execution to satisfy the same; yet he wrongfully and negligently failed to make the amount of said execution, or any part thereof, and returned it not satisfied, whereby the plaintiffs alleged they were greatly damaged; and they prayed for judgment for the amount of the execution. An answer was filed and a trial had, which resulted in a verdict and judgment for the amount claimed; and the defendant's motion for a new trial having been overruled, they have appealed.

The petition is fatally defective. There is no allegation that the debt or any part of it has been lost; nor is there any statement of facts to show that the appellee has sustained damages in consequence of the failure of the sheriff to collect the amount of the execution.

It is a general rule that such damages as may be presumed necessarily to result from the breach of contract need not be stated with great particularity in the petition; but if the damages be not necessarily implied, nor the extent of them, it will be requisite for the plaintiff to state the injury particularly in order to apprise the defendant of the facts intended to be proved, so that he may be prepared to meet them. Newman's Pleading and Practice, 438; 1

Chitty on Pleadings 338; *Squier v. Gould,* 14 Wend. 159; Sedgwick on the Measure of Damages, 576.

In *Commonwealth, for the use of J. C. Cooper, v, Bartlett's Ex'rs,* 7 J. J. Marsh. 161, which was an action for a false return, this court said: "That a constable is liable for a false return, will not be questioned; but to render him liable on that account, the declaration should state the nature of the return made, and then charge its falsity, and show the injury resulting. In that case, as in this, there was an allegation of a technical breach of the bond; but there was no allegation to show the injury resulting therefrom; and the declaration was held to be fatally defective on that, as well as upon other grounds.

These authorities show that the petition in this case is insufficient; and it results, therefore, that the court erred in overruling the motion for a new trial; wherefore the judgment is *reversed,* and the cause is remanded with directions to allow the appellees to amend their petition, if they offer to do so within a reasonable time.

J. M. Bigger, for appellants.
J. Campbell, L. D. Husbands, for appellee.

JOHN BARRET, ET AL., *v.* JOHN MOSSIE.

Landlord and Tenant—Lien of Landlord on Produce.

A landlord has a lien on the produce raised by his tenant, and a bona fide purchaser of such produce after its removal from the leased premises is bound to take notice, at his peril, of the existence of such lien.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 2, 1875.

OPINION BY JUDGE LINDSAY:

The General Statutes, Chap. 66, Art. 2, Sec. 13, secures to a landlord "a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one years rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. But if such property be removed openly from the leased premises, and without

fraudulent intent, and not returned, the lien of the landlord shall be lost as to it, unless the same be asserted by proper procedure within fifteen days from the day of the removal." There is no exception made in case of a removal of the incumbered property from the leased premises, in favor of a bona fide purchaser, as was the case with the 16th section of the 2d article of the 56th chapter of the Revised Statutes.

It must be assumed that this exception was purposely omitted from the General Statutes, and we understand the law as it now exists to require even a bona fide purchaser of property removed from the leased premises to take notice at his peril of the existence of the landlord lien. Such being the law, it results that Barret & Co. took title to the tobacco purchased from Hart, subject to the superior lien of the landlord, Markly.

The latter asserted his lien by proper procedure within fifteen days from the time the tobacco was removed from the leased premises. Barret and Co. could not have the sheriff's levy quashed because it showed that the officer was uncertain as to whether he had levied on the tobacco sold by the tenant, Hart. Appellants refused to point out said tobacco; and having intermingled it with Klien's own property, they cannot complain that the officer may not have been able to identify the tobacco seized as the lot delivered to them by the tenant of the appellee. A landlord's lien cannot thus be defeated.

The proof heard by the circuit court authorized the judgment directing the sale of the tobacco; but we do not think the sheriff's return on the order of sale, to the effect that appellants had refused to surrender the attached property, warranted a judgment in personam against them, in view of the condition of the pleadings in the case.

This return may furnish the basis for a proceeding against appellants for a contempt of the court, or it may be regarded as evidence of a conversion by them of the attached property, and enable the appellee, by amended pleadings, to present a cause of action in his favor against them. But there is now no pleading in the action to support the judgment appealed from. It is, therefore, *reversed,* and the cause is remanded for further proper proceedings.

Owen & Ellis, for appellants. W. N. Sweeney, for appellee.

DAVID W. BARR *v.* JAMES JENKINS.

Principal and Surety—Assignor—Diligence of Assignee.

An assignee of a note must show diligence in the proceedings against the obligors to entitle him to recover against his assignor upon a return of no property on the execution against the payors.

Diligence of Assignee.

Due diligence is a matter of law. It consists in pursuing the legal remedy against the obligor to and after judgment at such time and in such manner as by law he was authorized to do.

Diligence of Assignee.

The failure to sue out an execution on the judgment for eighteen days, in the absence of any excuse offered and the failure to deliver it to the sheriff for four days after its issue, does not show that degree of diligence required to hold the assignor.

APPEAL FROM HARDIN CIRCUIT COURT.

November 10, 1875.

OPINION BY JUDGE PETERS:

This action was brought in the court below by James Jenkins against David W. Barr, his assignor of a note on Philip Hargan and others, and having recovered judgment against Barr, he has appealed to this court.

The note assigned to Jenkins by Barr was due the 25th of December, 1862, and the first circuit court for Hardin county, where the obligors in the note lived, commenced in April, 1863. After the maturity of the note, suit was instituted by Jenkins, and the summons was served in time for judgment to have been rendered at that term of the court; but on account of the disturbed condition of the country, and the presence, or rumored approach of guerrillas, the court adjourned before the case was reached, and it was continued to the next term; and at that term judgment was rendered on the 23d of December, 1863. An execution issued thereon on the 12th of January, 1864, and was placed in the hands of the sheriff four days afterwards, making twenty days from the rendition of the judgment to the suing out of the execution, and four days more until it reached the hands of the sheriff.

The first and principal question to be decided is, Has the appellee shown that degree of diligence in the proceedings against the obligors in the note to entitle him to recover against his assignor, upon a return of no property on the execution against the payors?

The law required that in order to charge his assignor, the assignee must use ordinary diligence to collect the debt from the obligor; and in *Bard v. McElroy's Adm'r,* 6 B. Mon. 416, ordinary diligence in its lowest degree is defined to consist in pursuing the legal remedy against the obligor to, and after judgment, at such time and in such manner as by law he was authorized to do, without resorting to any extraordinary means of expediting it. In that case a failure to sue out an execution by the assignee for seventeen days, or for seven days after it might have issued on the judgment, without any excuse for the delay, was held to be such a want of diligence as discharged the assignor from liability to the assignee.

In *Sayre v. Bayless,* 1 B. Mon. 304, it was held that judgment having been rendered on the 3d of July, 1839, an execution issued on the fifteenth, and not placed in the officer's hands until the 22d of the same month, with a tardiness manifested in prosecuting the suit to judgment, exonerated the assignor from responsibility to his assignee. It is said in the opinion that the assignee should not only use due diligence in the commencement of the suit, but also in following up and prosecuting the same to a final termination, and then in suing out execution thereon.

The failure to sue out the execution on the judgment rendered on the 23d of December till the 12th of January is unaccounted for; it was not within that time demanded; the clerk says the costs could have been taxed in ten minutes, and in ten minutes more the execution could have been issued; and there is no reason shown, or excuse offered for the failure to sue out the execution when it was due. Nor is the failure to place the execution in the hands of the officer for four days after it issued sufficiently accounted for.

Due diligence is a question of law, and upon the facts of this case we are constrained to the conclusion that appellee has not manifested such diligence as entitled him to recover of his assignor. Wherefore the judgment is *reversed* and the cause remanded to dismiss the petition.

R. D. Murray, for appellant.

WEBSTER COUNTY COURT *v.* JAMES H. YATES.
SAME *v.* S. B. WALLACE, ET AL.

County Bridges—Appropriation—Contract.

Where $2,000.00 was appropriated by the county court to build a bridge, the commissioners under such order had no power to bind the county to pay more than the sum appropriated.

APPEAL FROM WEBSTER CIRCUIT COURT.

November 12, 1875.

OPINION BY JUDGE PRYOR:

No exceptions seem to have been taken to the mode of prosecuting the appeal to the circuit court, or at least, the bill of evidence does not show that it was the same heard in the county court. The case will, therefore, be considered as if tried de novo in the circuit court. The expenditure authorized to be made by the commissioner under the order of the county court for the construction of the bridge was $2,000. A contract was made by them with James Yates, by which he agreed to build the bridge for the amount appropriated by the county court. This contract was reported to the court, and terminated all the authority conferred upon the commissioner by the order making the appropriation. It seems that the entire work upon the bridge was done at the instance of the commissioner, for the reason that the specifications for the structure, and upon which the contract was based, were not such as would have resulted in the erection of a safe and substantial bridge. It appears, however, from the testimony of some of the witnesses, that a safe bridge could have been built for the amount of the appropriation, and by the special finding of the jury that the cost of the bridge as built ought not to have exceeded $2,000.

It is unnecessary, however, to discuss the effect of this testimony, or to determine what should have been the action of the court below upon this special finding. The commissioner had no right to go beyond the limit fixed by the order under which they acted in making the contract, and any agreement or direction by which extra work was done, increasing the sum beyond $2,000 was unauthorized and not binding on the county court. These commissioners were made special agents by the court to enter into a contract with parties who would build this bridge for $2,000, and when it was ascertained that the sum appropriated was not sufficient for that purpose, an application should have been made to the county court to increase the appropriation and authorize the extra work. The county judge would no doubt have convened the magistrates of the county and at a special term the appropriation could have been made. These magistrates, when thus assembled, are the financial agents of the county and authorized to make such expenditures (when the sum to be expended exceeds fifty dollars) as may be required to make these county improvements. The commissioners in this case under-

took the exercise of a power that belonged exclusively to the court of claims, and their action in the premises cannot bind that body, or raise an implied promise on the part of the county or those representing it to pay for this extra work.

In the case of the *Harrison County Court v. Smith's Adm'r,* 15 B. Mon. 155, it was held that where the county judge had ordered an improvement to be made, the county court composed of the justices were not bound by this order to pay for the jail, for the reason that the county judge had no power to create the debt; and that in making such appropriations the justices of the peace shall compose a part of the county court, and with the same organization required to lay the county levy and to transact the financial business of the county. If the county judge has no such power, it cannot be claimed that these commissioners were clothed with any greater authority. The judgments of the court below in favor of both the appellees, Yates and Oglesby, are *reversed* and the cause remanded with directions to dismiss the appeal.

Hughes Cook, Bailey, for appellant.
T. M. Baker, M. C. Givens, for appellees.

R. STAFFORD, ET AL., v. T. J. CAMPBELL, ET AL.

Replevin Bond—Release of Surety.

Where there is no execution on a replevin bond for more than fourteen months the surety will be released.

Waiver.

Where it is sought to hold a surety where execution has not issued for more than a year on a replevin bond, because the surety consented and procured indulgence from the plaintiff, the evidence must clearly show the consent by the surety.

Judicial Sales of Real Estate.

An execution under which a levy and sale of real estate is made is void for uncertainty where the sheriff's return on the execution shows that he "levied on 1,500 acres of land given up by John Stafford." Land so described cannot be identified and a levy and sale thereunder is void.

APPEAL FROM JOHNSON CIRCUIT COURT.

November 12, 1875.

OPINION BY JUDGE LINDSAY:

The answer of appellees is, in effect, a cross-petition, in which

they set up the fact that John Stafford was, at the time of the institution of the action, the holder of the legal title, and in the actual possession of the land in controversy; and they seek, by way of relief, to have his title and possession quieted. They pray that the cause be transferred to the equity side of the docket. The reply to the cross-petition distinctly recognizes the change in the character of the proceeding wrought by the filing of appellant's pleading; and from that time forward, the parties all treated the action as a suit in equity, as it was proper they should do.

Appellees claim under an execution sale; their claim necessarily concedes that John Stafford held the legal title to the land. The proof shows that there were parties upon and in possession of the land, claiming to hold under Stafford. This fact, however, need not have been proved, as it is set up in the petition, and relied on by appellees as a ground for relief.

If the levy and sale under the execution were void, then appellees should have failed in their action, and appellants should have had relief upon their cross-petition.

It is conceded that John Stafford was a surety on a replevin bond. The record shows that at one time there was no execution on said bond for more than fourteen and one-half months. By operation of law, this delay relieved Stafford from the obligation of the bond. Appellees attempt to show that this delay, in the prosecution of their claim, was had at the instance and request, and upon written agreement to Stafford to remain bound.

The only evidence tending to support this hypothesis is the statement of James M. Rice, to the effect that James Franklin, a principal in the replevin bond, "procured witness to visit Prestonsburg for the purpose of procuring indulgence on the replevin bond, which indulgence was given, but only upon conditions of the written consent of the securities, which consent was given in the latter part of spring or early summer of 1839, and was filed with the fi. fa. which the sheriff then had in his hands and returned to the clerk's office of the Floyd circuit court.

It is to be inferred from what the witness says, that the consent was in writing; such being the case, the writing should have been produced. If it is lost, and we may presume it is, then appellees should have proved its contents. This they do not attempt to do. Rice does not pretend to tell what the conditions of the writing were. He does not intimate the extent of the indulgence desired by Franklin, nor the length of time the plaintiff in the judgment agreed

to indulge, nor the character of indulgence the securities agreed in the writing should be extended. As the statute gives to sureties in replevin bonds an absolute discharge from all liability upon such bonds where the creditor fails for a year to sue out execution with a view to the collection of his debt, the consent upon their part to delay, should not be construed to deprive them of the right to avail themselves of this statutory right, unless it appears expressly, or by implication, that they agreed to waive it, or assented to a suspension of proceedings for more than a year. *McCauley v. Offutt,* 12 B. Mon. 386.

This doctrine is recognized in the subsequent cases of *Furber v. Basset,* 2 Duv. 433, and *Prather v. Harlan & Thompson's Admr.,* 6 Bush 185. Those cases were taken out of the operation by the contemporaneous facts attending them, but the doctrine itself was not sustained. The court below should have held that the execution under which the levy and sale were made was void.

In addition, the levy and the sheriff's return are void for uncertainty. The sheriff indorsed on the execution that he "levied on 1,500 acres of land given up by John Stafford, to be sold at the court house door in Prestonsburg, on the 13th day instant, it being county court day, December 2, 1841."

November 21, 1842, another sheriff, the successor to the sheriff who made the levy, returns on a writ of venditioni exponas. "The land taken on former fi. fa. was offered for sale at the court house door in Prestonsburg, and sold for $25 * * * and James M. Rice, plaintiff's attorney, being the highest bidder, became the purchaser."

If these two returns be made the foundation, it is evident that the land seized and sold cannot be identified by oral proof, unless the witnesses are allowed to speak from personal knowledge or information wholly disconnected from and independent of any fact set out by the sheriffs.

In order to support execution sales, and to protect purchasers at such sales, the returns of officers have always received the most liberal construction. But in no case has a return been held good, unless it stated some fact, with the aid of which the court might, upon proof of extraneous facts, locate the land, and determine, with reasonable certainty that it was the identical land sold.

In this case the officers do not refer to the patent under which the land was originally claimed, nor as to what lands the tract levied on and sold adjoins, nor the person or persons, if any, who

then lived on the land, nor the watercourse or watercourses upon which it lies, nor the county or even the state in which it is situated.

When in 1852 (ten years after the sale) the deputy sheriff executed the conveyance, it is evident he must have relied on his personal recollection of the transaction. He certainly received no information from the returns on the execution. If he and all others having personal knowledge of the levy and sale had been dead in 1852, it is manifest that appellants could not then have obtained title, either from the sheriff then in office, nor from a court acting upon legal and competent testimony.

To uphold the sale and conveyance in this case, would be practically to determine that written returns by sheriffs in sales of land under execution are not important, but that the whole matter may be left to repose in the recollection of persons connected with or cognizant of the facts attending each sale.

We need not notice the remaining questions raised by the appellants. For the reasons indicated, the court should have dismissed appellees' petition, and adjudged that they had no claim to the land, and have quieted the title and possession of appellants so far as said claim of appellees is concerned.

The judgment is *reversed* and the cause remanded for a judgment conformable to this opinion.

J. R. Botts, for appellants. Apperson & Reid, for appellees.

JAMES W. MILNER AND WIFE *v.* JAMES HATFIELD, ET AL.

Bond for Costs—Non-resident Plaintiffs.

Non-residents who are plaintiffs are required to give bond for costs, but where there are two persons who are plaintiffs, one a non-resident and one a resident, no bond can be required from the non-resident.

APPEAL FROM McLEAN CIRCUIT COURT.

November 13, 1875.

OPINION BY JUDGE PETERS:

There were two plaintiffs to the action, and but one of them a non-resident, according to the facts stated in the affidavit filed. The language of the statute is when a non-resident or any corporation shall institute an action in any court, whether suing in his own right, or as the representative of another, he shall, before the com-

mencement thereof, give bond, evidently meaning that when the non-resident is the only plaintiff in the action, he shall give bond with surety resident in this case, etc. But when there are two plaintiffs, and one of them is a resident of the state, neither the letter nor spirit of the statute requires a bond for cost to be executed. And perceiving no error in the judgment the same is *affirmed.*

J. C. Jonson, for appellants. Owen & Ellis, for appellees.

B. W. BROADDUS, ET AL., *v.* JAS. D. EASTER.

Partition Fence—Maintenance Agreement.

A verbal agreement by adjoining landowners to each maintain a designated portion of a partition fence does not run with the land and is not binding on the grantees of either of the parties to such agreement.

Agreement.

An agreement between the owners of adjacent lands for erecting and keeping up a division fence, only runs with the land, when reduced to writing and signed, acknowledged and recorded as prescribed by the statutes.

APPEAL FROM ESTILL CIRCUIT COURT.

November 18, 1875.

OPINION BY JUDGE COFER:

Neither the pleadings nor the evidence disclose any contract or agreement in reference to the alleged division fence, sufficient to render the appellants liable under Secs. 1 and 2, Art. 3, Chap. 55, General Statutes.

The agreement set up in the petition is alleged to have been made between Jesse Benton, who owned the farm where the plaintiff now lives, and Beverly Broaddus, or Edward J. Broaddus, the father of the defendants, who owned the land where the defendants now live.

The defendants deny that any such agreement had ever been made, and the only evidence offered to prove its existence was that many years ago, in the lifetime of Jesse Benton, under whom plaintiffs claim, and in the lifetime of Edward Broaddus, under whom defendants claim, a conversation was had in the spring of 1853, between said Benton and Broaddus, in which they agreed that the

division fence between their land was right. There was no agreement made between said Benton and Broaddus; but they spoke of an agreement between Beverly Broaddus and Jesse Benton made before that time, and said said agreement was right. It also appeared that each party had kept up his part of the fence since that time.

The defendants excepted to this evidence, and it should have been excluded. Such an agreement did not run with the land; and as there was no evidence that the defendant had any notice of it, and had acted with reference to the agreement, from which arose an agreement on their part to adopt the contract between Benton and Beverly Broaddus as an agreement between themselves and the plaintiff, the court should have instructed the jury to find for the defendants as requested in their fifth instruction.

An agreement between the owners of adjacent lands for erecting and keeping up a division fence does not run with the land, unless reduced to writing and signed and acknowledged, or proved and recorded as prescribed in Sec. 1, Art. 3.

Wherefore the judgment is *reversed,* and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

H. C. Lilly, J. B. White, for appellants.

HIRAM LUNSFORD AND WIFE *v.* LEWIS STAMPER, ET AL.

Wills—Indebtedness.

The indebtedness of a person does not prevent him from disposing of his property by will, but his devisees take their interests subject to the payment of the testator's debts.

Suits by Creditors.

Creditors cannot reach and dispose of the interests of devisees by a judicial proceeding to which such devisees were not parties.

APPEAL FROM LEE CIRCUIT COURT.

November 19, 1875.

OPINION BY JUDGE LINDSAY:

Notwithstanding Jameson Irvine may have been in debt at and before the time of his death, he had the right, under the statute, to dispose of his estate by last will and testament. His devisees took their respective interests, it is true, subject to the payment of the testator's debts; but his will having been duly published, and regu-

larly and legally put to record, they each took under it the title devised; and the creditors could not reach and dispose of the interest of either of them by a judicial proceeding to which he or she was not made a party.

Davis Irvine took no more than a life estate in the realty devised to him. The remainder was devised to the present appellant Mrs. Nancy Lunsford, his infant child. She was not made a party defendant to either the action of Bowman or that of Park, the executor of Monegal. Hence the judgments in their favor and against the executors of the testator and his children, could not affect her title as devisee.

The executions to be issued on these judgments were directed to be levied, first of assets in the hands of the executors, and then of estate that had descended from the deceased debtor to his children named therein. Nothing descended to Mrs. Lunsford. She took under the will, and as we have already said, she was not a party to the action in which the judgments were rendered. The execution sales passed to the purchaser merely the life estate of her father. He purchased back no greater interest, and sold nothing more to his vendee. It does not matter that he attempted to sell and convey the fee. He had no right to sell any such estate; and he could not prejudice the legal right of the infant remainderman by attempting to sell it. His vendees, whether immediate or remote, are charged with notice of the title of Mrs. Lunsford. It was matter of record, and the regularly probated will of Jameson Irvine was notice to the world.

The statute of limitation interposes no obstacle to the action of Mrs. Lunsford. She was not entitled to the possession of the lands sued for until the death of her father, the life tenant, and he did not die until 1872.

Judgment *reversed* and cause remanded for a judgment in favor of the appellants for the possession of their lands. In order to determine the questions of rents and improvements, the parties should be allowed, in case they so desire, to take further proof.

A. W. Turinn, for appellants. H. C. Lilly, for appellees.

TURNER & GUDGEL *v.* LICKING RIVER LUMBER & MINING CO.

Navigable Streams—Right to Use.

A person has a right to use a navigable stream to float his logs in and he is not liable for injury to others in doing so where he is not guilty of negligence or carelessness.

APPEAL FROM MORGAN CIRCUIT COURT.

November 23, 1875.

OPINION BY JUDGE COFER:

The appellants' petition is fatally defective, and the appellee's demurrer thereto should have been sustained. Licking River, being a navigable stream, the appellee had a right, independent of the charter of the corporation, to use it for floating its logs to such point as it might desire, and could only be made liable for injuries to others, shown to have resulted from its careless or negligent use of the common right to use the river for purposes of navigation.

It is neither alleged in general terms that it was guilty of negligence or carelessness, nor are any facts alleged from which either is necessarily to be inferred. Nor does it appear that the injuries complained of by the appellants resulted from any wrongful act or omission of the appellee. It is true they say that by reason of the wrongful acts of the defendant, one boat and its cargo was damaged to the amount of $780, and that another boat was sunk, and they were thereby damaged the sum of $800; but they state no facts which show any connection between any wrongful act of the appellee and the injuries of which they complain. Whether the logs were against appellants' boats, or the boats ran against the logs and were injured, or whether the logs blocked up the channel of the river so that the boats could not pass, or whether the injury happened in some other way, is not stated.

The petition being insufficient to support a verdict for the appellants, if one had been rendered in their favor, it is unnecessary to consider any other question. Judgment *affirmed.*

Jno. T. Hazelrigg, J. E. Cooper, for appellants.
J. G. Carlisle, for appellee.

SAMUEL MAY, ET AL., *v.* A. P. LACY.

Attorney and Client—Appeals.

An attorney at law does not, by virtue of his employment to conduct the prosecution or defense of an action in the circuit court, have the right to prosecute an appeal to the Court of Appeals.

APPEAL FROM WOLFE CIRCUIT COURT.

November 24, 1875.

OPINION BY JUDGE LINDSAY:

An attorney at law does not, in virtue of his mere employment to conduct, or to assist in conducting the prosecution or defense of an action in the circuit or other inferior court, have the right to prosecute an appeal from the judgment therein to this court.

The appellants here swear that they did not authorize either of their attorneys to procure a copy of the record, in the cases of *Samuel May, et al., v. James Eaton, et al.,* for the purpose of prosecuting an appeal to this court. In this regard they are not contradicted by any one. Hazelrigg swears that he did not order the transcript. In this he is contradicted by Lacy and other witnesses. But there is no proof whatever tending to show that he had any authority in the premises. The payment of the $5 to Hensley is explained by May, and both May and Hazelrigg show that they then denied his liability to pay the fee bill herein sought to be enjoined.

As Hazelrigg had no right or power, express or implied, to bind appellants by his supposed order to the clerk, and as appellee's right to collect the fee bill rests solely upon the alleged action of Hazelrigg, it seems to us clear that the temporary injunction should have been made perpetual.

Judgment *reversed* and cause remanded for a judgment conformable to this opinion.

William L. Hurst, for appellants. Rodman, for appellee.

WM. BLACKERTER *v.* COMMONWEALTH.

Criminal Law—Indictment.

While only one offense may be charged in an indictment, the mode and means of committing that offense may be stated in the alternative.

Appeals.

The court of appeals has no power to reverse a judgment of conviction on indictments for an error in overruling a demurrer.

APPEAL FROM WASHINGTON CIRCUIT COURT.

November 26, 1875.

OPINION BY JUDGE PRYOR:

Each count in the indictment charges a public offense. Sec. 271 of the Criminal Code 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 motion to arrest the judgment was, therefore, properly overruled. Sec. 125, Criminal Code, provides that "An indictment, except in the cases mentioned in Sec. 126, must charge but one offense; but the mode and means of committing that offense may be stated in the alternative." The counts united in this indictment are not embraced within the exceptions, nor are they such offenses as can be joined in an indictment as provided by Sec. 126.

By Sec. 164, a demurrer is proper when more than one offense is charged in the indictment, except as provided in Sec. 126. This objection by demurrer may, however, be avoided by dismissing one of the counts of the indictment as provided by Sec. 168. Although the attorney for the commonwealth failed to dismiss either count, still this court has no power to reverse a judgment of conviction on indictments for felonious acts or misdemeanors for an error in overruling a demurrer. Secs. 334 and 348, Criminal Code.

The instructions were more favorable to the appellant than the commonwealth. The jury was told that Mobley must have been guilty of the malicious stabbing, and that the appellant was present, aiding and abetting in the commission of the offense, before they would find him guilty. They were also told that the accused had the right to interfere to preserve the peace and to prevent the commission of a felony; and if the party stabbed was about to commit a felony by taking the life of Mobley without cause, the accused had the right to use such means as was necessary to prevent it. Upon the facts, we are inclined to the opinion that this last instruction should not have been given; and therefore the appellant cannot complain.

The judgment is *affirmed*.

Russell & Averitt, for appellant. Thomas E. Moss, for appellee.

JAS. SPARKS *v.* CHAS. HEMPHILL.

Contracts—Assignment of Contracts to Furnish Board.

A contract to pay board, like contracts for personal services, is not transferable without the consent of the promisor.

Contracts to Furnish Board.

A person cannot be required to accept as a boarder any one who might become the purchaser of a contract entered into by the boarding-house keeper with the assignor of the contract.

APPEAL FROM JESSAMINE CIRCUIT COURT.

November 27, 1875.

OPINION BY JUDGE COFER:

The appellant entered into a contract with Robert L. Wilmore, by which he purchased from him thirteen barrels of whiskey at $2.25 per gallon, to be paid for in board.

The appellee, who is a creditor of Wilmore, sued out an attachment against his property, and caused the appellant to be summoned as a garnishee. The attachment was sustained, and the benefit of the contract with the appellant for board was adjudged to be sold, and was purchased by the appellee. The appellant excepted to the report of sale; and his exceptions having been overruled, and the sale confirmed and adjudged to vest in the purchaser the right to demand and receive the board contracted for by Wilmore, this appeal is prosecuted to reverse the order of confirmation and the judgment for the sale.

The contract to pay in board, like contracts for personal services, is not transferrable without the consent of the promisor, so as to vest any right whatever in the transferee. We think it is quite clear that appellant cannot be required to accept as a boarder any one who might become the purchaser of Wilmore's interest in the contract. If the court could, by its judgment and sale, vest in the purchaser a right to demand that he should be boarded by the appellant, then the appellee may transfer his right to another, and vest in him a like right, and so on as often as it may suit the party holding the contract to pass it to another.

Nor would the case be altered if, as assumed by the court below, the appellant is a tavern keeper. Tavern keepers cannot be compelled to take boarders. They are bound to entertain transient persons; but they are no more bound to receive boarders than are private persons; and consequently their contracts to furnish board are

no mort transferrable than similar contracts made by private persons.

It may be that the appellant might have rested upon his right to refuse to receive any one whom he did not desire to have as a boarder, and that his rights in that respect would not be precluded by the judgment and sale; but he has a right to ask this court to relieve him, and is not bound to run the risk that it may be decided that he has, by his silence and acquiescence, consented to the transfer of his obligation to the purchaser.

If, as counsel for the appellee claims, the contract between Wilmore and the appellant was fraudulent, and appellant participated in the fraud, the remedy is to attack the transaction by appropriate pleadings, and have the contract set aside, and compel the appellant to account for the value of the whiskey received from Wilmore in payment for the board agreed to be furnished.

The order confirming the sale, and the judgment directing it to be made, are *reversed,* and the cause is remanded.

Breckenridge and Shelby, for appellant. Anderson, for appellee.

E. SAYRE, ET AL., *v.* JAS. P. SQUIRES, ET AL.

Supersedeas Bonds—Suits on—Measure of Recovery.

A supersedeas bond was conditioned that the obligors would pay all costs and damages that might be adjudged against them in the action and pay all rents or damages which might accrue on property of which appellants were kept out of possession by reason of the appeal. Held, that a petition to recover on the bond was defective which failed to aver that the costs and damages awarded had not been paid.

Measure of Recovery.

In a suit on a supersedeas bond there can be no recovery on account of appellee being kept out of possession of land involved in the suit, when in the suit there was no judgment entitling appellee to possession, but only an order for the sale of the land.

APPEAL FROM BOURBON CIRCUIT COURT.

November 27, 1875.

OPINION BY JUDGE COFER:

The appellants sued Joseph and Andrew Wilson, and caused attachments to be issued against the property of the latter, which was levied on two hundred acres of land belonging to him. They recov-

ered judgment in personam for the demands sued for, and orders sustaining the attachments and for a sale of the land. From the orders sustaining the attachments and ordering the land to be sold, Wilson prosecuted an appeal to this court; and in order to suspend the sale pending the appeal, they executed a supersedeas bond in the usual form. This court affirmed the orders appealed from, and the land was sold, but did not realize a sum sufficient to satisfy the judgments. Appellants then brought this suit on the supersedeas bond against the appellees who were sureties therein. They alleged that about two and a half years elapsed between the time when the land would have been sold if the judgment for a sale had not been superseded, and the affirmance of the judgment by this court; that during that time Wilson remained in possession of the land, and in consequence of bad husbandry and waste, its value was depreciated to the amount of twenty-five dollars per acre. They also alleged that the rent of the land during the time the supersedeas was in force was reasonably worth the sum of $2,500; and they prayed for judgment against the appellees for these sums, or so much thereof as would satisfy the residue of their judgments.

Did the petition contain a statement of facts constituting a cause of action? The answer to this question must depend upon a proper construction of the covenants in the bond, which were first, that the obligors would pay to these appellants all costs and damages that might be adjudged against Wilson on the appeal, and second, that they would pay all rents or damages, which, during the pendency of the appeal, might accrue on any of the property of which the present appellants were kept out of possession by reason of the appeal.

Under the first covenant, the sureties became liable for the costs adjudged in this court against Wilson, and for such damages as this court awarded on the affirmance. *Chandler v. Thornton, et al.*, 4 B. Mon. 360. It is not alleged that any part of the costs in this court remains unpaid, or that any damages were awarded; and there is, therefore, no cause of action on the first covenant.

The second covenant bound the sureties to pay all rents or damages which might accrue on any property of which the present appellants were kept out of possession by reason of the appeal. It is clear that they were not kept out of the possession of the land by reason of the appeal. They never had the possession or the right to possession. It has been adjudged that they had a right to have the land sold; and the supersedeas suspended the exercise of that right.

According to the allegations in the petition, they suffered loss in consequence of the execution of the bond; but that loss is not embraced by the covenant of these appellees, and their liability, being created alone by their bond, must be measured by its provisions. *Ferguson, et al., v. Tipton, et al.,* 1 B. Mon. 28.

It is doubtless true, upon the assumption that the allegations in the petition are true, that these appellants have suffered damages in consequence of the execution of the bond, but the appellees, not having undertaken to answer for that description of damages, are not liable. The fault, if there be one, is in the form of the bond, and as it is in conformity to the requirements of the statute, Sec. 887, Civil Code, it would seem there was no authority for requiring a bond, the provisions of which would have indemnified the appellants against the damages of which they complain.

The decision of the circuit court was in conformity to these views and must be *affirmed.*

Brent & McMillan, for appellants.
Cunningham, Finney, for appellees.

THOMAS CURRENT *v.* CLAUD CANTRILL, ET AL.

Damages—Instructions—Negligence—Proximate Cause.

To make a defendant liable for damages caused by his negligence, the negligence complained of must be the proximate cause of the injury, and an instruction not recognizing this rule is erroneous.

APPEAL FROM BOURBON CIRCUIT COURT.

December 1, 1875.

OPINION BY JUDGE PETERS:

The evidence is somewhat conflicting, and the judgment cannot be reversed by this court unless the law, as expounded by the court below to the jury, was erroneous and prejudicial to appellant, and that is the only question presented by the appeal, as no exceptions seem to have been taken to any of the evidence offered on the trial by appellees.

In the last paragraph of instruction No. 1 given to the jury on the motion of appellees, they were told, in substance, that if they believed from the evidence that the defendant, while threshing plaintiff's wheat, omitted to use upon his engine such known and

usual device and contrivance as were usual and customary on machines of similar character to prevent the escape of sparks from said engine, and their wheat was ignited by a spark that escaped from the engine and thereby destroyed, they ought to find such damages as the plaintiffs sustained by reason of the omission.

By this instruction the liability of the appellant is fixed by his failure to use upon his engine such device and contrivance as were usual and customary on machines of that character, whether the use of such device and contrivance would have prevented the destruction or not. He should have been made liable to appellees for the value of their wheat upon the belief of the jury from the evidence that the wheat would not have been burned and lost if the customary and usual device and contrivance had been applied to their machine to prevent the escape of the sparks. Or to express it differently, if appellant failed to use the spark arrester, or such preventive of the escape of sparks from the smoke stack as was generally used with such machines, and appellees' wheat was burned and destroyed by his failure to use such preventives, in that event he would be liable. To make a party responsible for negligence, the negligence complained of must be the proximate cause of the injury. Sherman & Redfield on Negligence, Sec. 9, p. 7.

To the second instruction given, the same objection exists as to the first. We see no objection to the instructions given by the court in substitution of those asked for by appellant. There are no exceptions to the ruling of the court in admitting or in refusing to admit evidence. But for the error in giving the two instructions as asked by appellees without the qualification herein suggested, the judgment is *reversed,* and the cause is remanded for a new trial and for further proceedings consistent herewith.

Cunningham & Turney, Breckenridge & Shelby, for appellant.
A. Duvall, R. T. Davis, Huston & Mulligan, for appellees.

JNO. K. TOMLINSON *v.* DANIEL W. PHOENIX.

Reward for Arrest.

Where two persons actively participate in causing the arrest of a person for whose arrest a reward is offered, the one disclosing where the offender was and having a warrant issued for his arrest, and the other acting under the warrant making the arrest, each is entitled to one-half of the reward.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 1, 1875.

OPINION BY JUDGE PRYOR:

Both of the parties to this controversy were instrumental in securing the arrest of the party for whose apprehension the reward was offered. The one disclosed the locality where the offender lived, and had a warrant issued for his arrest, and although this warrant was for a trivial offense, it was issued for the sole purpose of having the party arrested and placed in custody, that he might be remanded to Kentucky and tried for the greater offense. The other, acting under the warrant, and at the peril of his own life, with a knowledge of the purpose for which it was issued, made the arrest and lodged the accused in jail. They were both active participants in causing the arrest, and the one as much entitled to the reward as the other.

The judgment is, therefore, *reversed* and the cause remanded with directions to the court below to adjudge that the appellant and appellee are each entitled to one-half of the reward (two hundred and fifty dollars). The same will be certified to the auditor of public accounts as required by Sec. 5 of Chap. 1, General Statutes.

W. E. Selecman, for appellant.

LOUISVILLE & NASHVILLE R. CO. *v.* JNO. N. BROWN'S ADM'R.

Damages—Wilful Negligence—Carrier's Liability.

Where a railroad company by its engineer, machinist or its agents whose duty it is to care for and supervise the machinery, knew that a boiler was unsafe for use and voluntarily failed to remedy the defect, and it exploded, injuring or killing its employe, it is wilful negligence and the company is liable for the damages sustained.

Recovery.

Where a railroad company is guilty of wilful negligence, an employe injured as a result thereof is entitled to damages not only to include compensation, which is the value of claimant's power to earn money, but the jury may also increase the damages by way of punishment for the wrong committed, looking to the character of the offense, the conduct of the parties and the attendant circumstances.

APPEAL FROM LOGAN CIRCUIT COURT.

December 1, 1875.

OPINION BY JUDGE PRYOR:

In the trial of this case the fact seems to have been overlooked that it was a proceeding under the statute for the recovery of punitive damages on account of the death of appellee's intestate, caused by the wilful neglect of the appellant or those in its employment. This cause of action was unknown at the common law, and is created alone by statute that authorizes a recovery on damages, including not only compensation, but also punishment for the wrong committed. The right of recovery is sought, not for the reason that the party charged has failed to exercise ordinary care, but has failed to take even the slightest care and precaution for the safety of those in its employment. The questions arising in this case have heretofore been considered by this court in the cases of the *Board of Internal Improvement of Shelby County v. Scearce,* 2 Duv. 576; *Louisville & Portland Canal Co. v. Murphy, Admr., et al.,* 9 Bush 522; *Louisville, Cincinnati & Lexington R. Co. v. Case's Admr.,* 9 Bush 728; *Same v. Cavens' Admr.,* 9 Bush 559.

In all these cases wilful neglect has been said to be equivalent to intentional wrong or a recklessness evidencing the absence of all care and precaution for the safety and protection of others. A railway company may be guilty of ordinary neglect, or of even a still greater degree of neglect in failing to repair machinery attached to its cars for the transportation of freight and passengers; and whilst a liability would exist because of this want of care to the party injured, the company would not necessarily be guilty of wilful neglect. In such cases a liability to passengers injured would arise not only by reason of the failure to exercise ordinary care, but for the want of that extraordinary care the carrier assumes to exercise when undertaking to transport passengers. A mere defect from which, in the judgment of those skilled in such matters, no injury would likely occur, and a failure to remedy which would incur a liability at common law, does not constitute wilful negligence. If the defect in the machinery is palpable and perilous, and this fact is known to the company or its agents, or by the exercise of proper precaution they could have ascertained the defect, and that it was such as would endanger the lives of those on its train if not remedied, then the presumption of wilful neglect might arise when an injury occurred by reason of the failure to repair or neglect of duty.

In the present case, if the boiler or machinery was defective, and the defect was of such a character as to render it unsafe for use by those engaged to run the train, and the appellant or its engineer or machinist knew this fact, or by the exercise of ordinary vigilance could have ascertained it, and voluntarily failed to remedy the defect, the company should be held liable, if by reason of the defect the injury occurred; or if the company, by its engineer, machinist or those whose duty it was to care for and supervise the machinery knew that the boiler was unsafe for use, the liability would exist. It is also the duty of the company to employ competent engineers upon its trains, but if one employed does not possess the requisite skill, the appellant cannot be said to be guilty of wilful neglect in making the employment, unless the want of skill was known by the company, or should have been known by reason of his neglect or want of skill while in its employ.

This action being for wilful neglect (and no others can be maintained under the statute, as the deceased was an employe on the train at the time of his death) is sustained by the evidence, and the appellee is entitled to recover punitive damages. Such damages not only include compensation, which is the value of the deceased's power to earn money, as in the case of *Case's Admr.*, cited above, the death being immediate; but the jury may also increase the damages by way of punishment to the party for the wrong committed; and in fixing the punishment they must look to the character of the offense, the conduct of the parties, and all the attendant circumstances connected with the commission of the wrong. We perceive no reason why the wealth of the defendant may not be shown to the jury, as well as the fact that the deceased was a man of family; still we are inclined to the opinion that undue prominence should not be given to a particular branch of the case by making it the subject of an instruction. It should go to the jury like the other evidence of facts and circumstances connected with the commission of the offense. Sedgwick on The Measure of Damages 492. The instructions given for the appellee being inconsistent with the facts here presented, the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

A. G. Rhea, Russell Houston, S. Rodes, for appellant.
Bate & Williams, James P. Bates, D. M. Wright, for appellee.

A. I. COCOUGHNER, ET AL., *v.* COMMONWEALTH, ET AL.

Collection of Taxes—Sheriff—Defense.

It is the official duty of the sheriff to comply with the order of the county court and collect the public revenue, and the plea that he was not sheriff by reason of his failure to execute his bond at the proper time, or by reason of his refusal to execute it at all for the collection of a special tax, constitutes no defense for him or his sureties.

Public Office.

Prior to the expiration of the term of office of a sheriff and while he is still living, not having resigned his office, the office does not become vacant until declared so in a proper proceeding.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 2, 1875.

OPINION BY JUDGE PRYOR:

In the case of the Mercer county court against Gabbart's administrator, it was held that the increase of the levy after the execution of the bond imposed no additional duty on the sheriff. The sheriff of Washington county was legally required to collect the county levy and public dues of that county, although in the form of a special tax, imposed to pay off the interest on the county bonds. The charter of the Cumberland & Ohio Railroad Company imposed this duty upon him, if by reason of his official position he would not otherwise have been compelled to make the collection. It was the official duty of the sheriff to make the collection, and the plea that he was not sheriff by reason of a failure to execute his bond at the proper time, or by reason of his refusal to execute the bond at all for the collection of this special tax, cannot avail him or his sureties. The office was not vacant until declared so in a proper proceeding. *Brown, et al., v. Grover, Admr., et al.,* 6 Bush 1.

It being the duty of the sheriff to collect this tax, it was incumbent upon him in this action to allege and show what moneys he had collected, and the parties that were insolvent, if any, in order that the court might know the extent of his defense. He says that he paid over all he collected, without saying how much he collected, of whom he made the collection, or giving any reason why he failed to collect all the tax, or a statement of those who had failed to pay. Having been ordered by the county court to make the collection, he had the right to continue to collect after his term of office expired. He did collect as much as thirteen or fourteen thousand dollars,

and now insists that he had no list of the parties required to pay tax, or notice that an order for him to collect had been made. These facts are inconsistent with his action in making such a large collection, and constitute no defense. The court will presume that he knew of the order, and had the list of the parties charged with the tax, as he admits that he proceeded to collect the tax, and did, in fact, collect nearly one-half of it. That seems to have been paid over, and no doubt he collected more than was accounted for, as the evasive answer filed clearly indicates. No judgment was rendered by the court below for the amount of the taxes enjoined, or for the ten per cent. damages to which the appellees were entitled. The appellants were not entitled to a trial by jury, as the facts set forth in the answer constituted no defense.

It is not alleged in the answer that any of the taxpayers are insolvent, or that all of the tax could not have been collected. The parties, as is evident from the defense, are withholding all information as to the sheriff's action in the premises in order to evade the judgment. The appellants were not made to pay any damages, and ought not to have been allowed the commission.

Judgment *affirmed.*

Harrison & Knott, for appellants. W. H. Hays, for appellees.

M. KEEBER *v.* MARY HENDERSON.

Promissory Note—Collector.

A person having the possession of a promissory note for the purpose of collection, has no authority to make a contract on behalf of the owner to surrender it to another.

Attorney at Law.

The mere possession of a note by an attorney at law does not import more than that he has authority to collect.

APPEAL FROM HENDERSON COURT OF COMMON PLEAS.

December 2, 1875.

OPINION BY JUDGE COFER:

The paper executed by Anderson shows that the appellant then understood that he held the note for collection; and the appellant was bound to know that, having it for that purpose, he had no right to make any contract on behalf of the appellee to surrender the note

to him. And he seems then to have so understood the matter, because he took from Anderson an agreement to endeavor to raise the money to pay it over to the appellee.

He does not allege that he then supposed Anderson was the owner of the note; but says it was placed in his hands, and that Anderson "represented to him that he had full power, right and authority to collect, control, or dispose of it." He must, therefore, have known that the note did not belong to Anderson, and that he held it for the appellee. Knowing this fact, it was his duty to learn what authority Anderson had in the premises; and having trusted to his statement, he cannot now escape liability without showing that Anderson had the authority which he claimed.

If Anderson had claimed to be the owner of the note, and the appellant, trusting to that statement, had dealt with him in the manner in which he did, it may be that the appellee, having indorsed her name on the note, and thereby put it in Anderson's power to deceive him, the appellee would be compelled to look to Anderson. But as the appellant knew that the note did not belong to Anderson, he dealt with him at his peril. The mere possession of a note by an attorney at law does not import more than that he has authority to collect it; and if the obligor deals with him beyond the ordinary mode of making payment, he is in precisely the same situation as any other person dealing with an agent whose powers are limited.

Judgment *affirmed.*

Vance & Merritt, for appellant. M. Yeaman, for appellee.

ABE BOYD, ET AL., *v.* C. H. ADAMS, ET AL.

Guardian and Ward—Rent of Real Estate.

When wards live with their mother it is legal for the guardian to permit the mother to rent out a building owned by the wards and apply the rents to the maintenance of the wards, and where she so applies the rents the wards cannot hold the guardian liable on account thereof.

APPEAL FROM McCRACKEN CIRCUIT COURT.

December 4, 1875.

OPINION BY JUDGE LINDSAY:

The proof is clear that the guardian authorized the brother of appellees to collect the rents that might accrue on their real estate,

and that she agreed to rent the same out, collect the rents, and apply them when collected to the support and maintenance of her children. The testimony does not show that the mother failed to keep her agreement, nor that she did not collect as much rent as it was possible to secure under the circumstances of the case; and it is certain the appellees continued to reside with her, and were supported, clothed and sent to school. As this agreement involved merely the expenditure of the income of the wards, the guardian had the right to make it. It met with the approval, and was made with the mother of those who now complain that it was improvident. Under such circumstances, it will require a very strong case, of abuse of discretion, of a useless expenditure of money, to authorize the court to hold the guardian and his sureties liable. *Bybee v. Thorp and Wife,* 4 B. Mon. 313.

The judgment of this court, heretofore rendered, requires the guardian to account for full four years rent, and allows him for no expenditures not actually made.

Petition *overruled.*

L. D. Husbands, A. Duvall, for appellants.
J. W. Bloomfield, for appellees.

LUCY MCCAME'S ADM'R, ET AL., *v.* ALEX. MCCAME'S ADM'R.

Gifts Causa Mortis.

A gift causa mortis is not made out by a statement by the giver two or three days prior to his death and at the time he delivered certain personal property to a friend, "that he wanted him to take charge of his effects," and said he wanted it for the boys, meaning his grandchildren.

Causa Mortis.

To convey title by a gift causa mortis, the language and acts of the giver must indicate more than his intention in the future to give—it must be a gift in the present.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

December 7, 1875.

OPINION BY JUDGE PRYOR:

The evidence in this case fails to establish either a gift inter vivos, or causa mortis. Only two witnesses speak of the facts upon which the alleged gift is based. Both of these witnesses say that the

intestate, a few days prior to his death, was very anxious to see McHenry Meador (the appellee), and that when the latter arrived at the house, John C. Meador, the witness, states, he was present when the money was delivered to McHenry Meador, and the latter was told by the intestate that the money was to go to his grandchildren. Strother, another witness (the physician), who was present at the same time, says that this took place two or three days prior to the old man's death; and that as soon as McHenry Meador reached the house he was told by the intestate that he wanted him to take charge of his effects. He also called on McHenry Meador and the witness, at the same time, to count the money. The witness counted the money; it was $3,650 in gold and $6,735 in currency. This witness also states that when he delivered the money to Meador, he told him he wanted it for the boys.

It was the purpose of the intestate to place his effects in the hands of McHenry Meador, and he may have intended, and no doubt did intend that his grandchildren or the boys were to have this money, but reserved to himself the right to make a disposition of it in the future. The object on the day it was delivered to Meador was only for the purpose of securing it as a part of his estate. He was then in a helpless condition, and felt, no doubt, that it was insecure to have that much money in his custody. He made no gift of it to his grandchildren or to the boys, but indicated that such was his intention at some future time. He fails not only to use language denoting a gift, but leaves it altogether a matter of uncertainty, if a gift is to be implied, as to how the grandchildren are to take, or the manner in which the distribution is to be made.

One of the witnesses also understood him to use the word boys instead of grandchildren; if so what boys he had reference to is left altogether to conjecture; and if we were to indulge in speculation as to his purposes, it would be equally as proper to determine that his son was included, as well as the grandchildren. The money was to go to his grandchildren, or he wanted it for the boys, are words that ought not to be construed as a gift causa mortis, under the facts of this case. The intestate was at the time delivering his effects into the hands of another for keeping, and with no avowed purpose of passing the title directly or at his death to any named person, and certainly should not be held as a gift to those whose identity is established, not from the mouth of the donor, but from the opinions of the witnesses. This character of proof is too vague and uncertain upon which to pass the title to property. The chancellor should

be well satisfied from the proof as to the existence of the gift before he undertakes to divest the widow and heirs of their legitimate claim or interest in such an estate. It is not to be presumed that the intestate would dispose of a large personal estate in this manner; and in the absence of more satisfactory evidence establishing the gift, we must adjudge that none was made. The judgment is *reversed* and cause remanded with directions to charge the administrator with these amounts of money as part of his intestate's estate. 2 Kent's Commentaries 438, 444; *Payne, et al., v. Powell, et al.,* 5 Bush 248. Judge Cofer not sitting.

G. W. Williams, J. W. Lewis, J. C. Walker, for appellants.
Kincheloe, Eskridge, for appellee.

LOUISVILLE CITY RAILROAD CO. *v.* ANTONIE BROTZGE.

Damages—Negligence—Street Railways.

It is culpable negligence for a street car company operating its cars in a populous city to fail to have on its cars a sufficient number of employes to discharge the duty it owes to the public to use ordinary care to avoid injuring others, and if one person cannot perform the duties of both driver and conductor so as not to endanger the safety of others, it should employ more hands.

Negligence.

Notwithstanding the fact that one crossing a street-car track may be guilty of contributory negligence, it is the duty of the driver of a street car to use reasonable diligence to prevent injuring such person.

Negligence.

Where a child is playing in the street, and is on the street-car track, and the driver of the car fails to use reasonable diligence in seeing the child or in arresting the car before it ran upon the child, the company is liable.

Negligence.

Where a child three or four years old is in the street upon the street-car track, if through carelessness the driver fails to see it, and the car strikes and injures the child, the company is liable if the driver, by exercising reasonable diligence, could have seen it and avoided the injury.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 8, 1875.

OPINION BY JUDGE COFER:

Antonie Brotzge, an infant about three and a half years old, by

his next friend, brought this action in the Jefferson court of common pleas for injuries sustained in consequence of being run over by one of the defendant's street cars. The defendant denied that the alleged injuries were caused by its negligence, or by the negligence of its agents or servants, and averred that if the plaintiff was injured at all, it was in consequence of his own negligence or carelessness. Verdict and judgment were rendered for the plaintiff, and the defendant has appealed.

The evidence showed that the plaintiff was playing in the street near his father's house, and went upon the defendant's road track, and was there run over by one of its cars and seriously injured. When he was first seen on the track, the car was distant from him about one-half a square, moving at the usual rate of speed; the driver then had his back turned toward his team, and seemel to be making change for a passenger; and it does not appear that he changed his position or looked ahead of his car until after the plaintiff was knocked down and run over. A witness who saw the plaintiff and the car when they were about a half-square apart, tried to attract the attention of the driver, but failed to do so and hollowed to the plaintiff to come off the track, and he started; but before he could get away the train was upon him, and he was injured as stated.

The appellant asked five instructions, all of which were refused, except the first. In the second instruction asked the court was requested to tell the jury that the burden was on the plaintiff to prove that the injury was caused by the negligence of the driver, and that there was no other culpable cause of the injury. If the injury was caused by the negligence of the driver, the plaintiff was prima facie entitled to a verdict; and if there was any cause cooperating with such negligence which would exonerate the defendant, the burden was on it to prove such exculpatory fact, and not on the plaintiff to disprove it.

In the third instruction the court was asked to say to the jury that if the plaintiff was playing in the street traversed by the defendant's railway, and ran upon the track in front of the car and was injured, the law was for the defendant, unless they believed from the evidence that the driver saw the plaintiff's danger and could have avoided injuring him. This instruction was properly refused. It made the liability of the company to depend, not upon the question whether the driver was guilty of negligence, but upon his having seen the plaintiff in time to avoid injuring him. The

jury would have been required, under that instruction, to find for the defendant, unless it appeared that the driver saw the plaintiff in time to stop the car before reaching him, although they might have believed the driver was guilty of negligence in not discovering him on the track in time to stop the car. Whether there was negligence in this respect should have been left to the jury.

The fourth instruction is liable to the same objection. The fifth is in these words: "If the jury believe from the evidence * * * that at the time of the contact between defendant's car and the plaintiff, the driver's attention was directed to the inside of the car to make change, or to perform any other duty assigned him by defendant, as driver of its car, and being so engaged did not see the plaintiff on the track in time to avoid the injury (the accident not happening at a regular or usual crossing), such failure to see the plaintiff under these circumstances was not such negligence in him as would render defendant liable in this action." The defendant had no right to impose on the driver duties, the performance of which would prevent him from using ordinary care to avoid injuring persons or property on the track, and if it did so, while that fact might be an excuse in morals, so far as the driver was concerned, it was no excuse in law for either employer or employe, when sued by a third person for negligence. If the defendant imposed duties upon the driver which prevented him from discharging the duty which he and it owed to the public to use ordinary care to avoid injuring others, this was such a palpable disregard of both legal and social duty as was little short of criminality, and instead of being an excuse for the injury, might well have been treated as an aggravation.

Those who undertake to run cars upon the streets of a populous city are bound to take ordinary care to avoid injuring persons on the streets; and if one person cannot perform the duties of both driver and conductor so as not to endanger the safety of others who have as much right as the owners of streets cars to use the streets, they should employ more hands. The duty to avoid injury to persons must be first attended to, and any duty imposed by the defendant on its driver which interfered with that paramount duty is in and of itself culpable negligence. Whatever may be the true doctrine as to contributory negligence by infants suing for injuries resulting from the alleged negligence of the defendant, and whether or not negligence of the parent in allowing a child devoid of discretion to be exposed to danger, is to be imputed to the child, the de-

fendant in this case has no just ground to complain of the instruction upon this point. The court told the jury that if the plaintiff was but three or four years of age and was permitted to go upon the street unattended, and he ran upon the railway in front of the car and was injured in consequence of having thus exposed himself to danger, or that he contributed to the injury, he could not recover unless the driver, notwithstanding the conduct or contributory negligence of the plaintiff, could, by the use of reasonable diligence, have avoided injuring him. It was certainly the duty of the driver at all times and under all circumstances to use reasonable diligence. What will amount to such diligence in one case may be culpable negligence in another, the amount of vigilance and precaution required to constitute reasonable diligence increasing or diminishing according to the danger to be apprehended.

The jury, by their verdict, determined that the driver did not use reasonable diligence; whether the failure was in not seeing the plaintiff, or in not arresting the car before it ran upon him, is immaterial. The defendant was liable in either case. If, through want of proper care, the driver failed to see the plaintiff, the company is liable if he could, by reasonable diligence, have seen him and avoided the injury; and this the jury have found; or, if he did see him, they have found that he might, by reasonable diligence, have averted the injury, notwithstanding the plaintiff may also have contributed to the injury. We are, therefore, of opinion that the court did not err to the prejudice of the appellant, and the judgment is affirmed.

Mundy & Parsons, for appellant. Gibson & Gibson, for appellee.

THOMAS MARTIN, ET AL., *v.* G. B. TAYLOR'S ADM'R.

Execution of Note on Sunday—Statute.

The law will not enforce a contract made in violation of its mandate.

Statute—Defense.

Under a statute providing that "No work or labor should be done on the Sabbath day unless the ordinary household offices of daily necessity, or other work of necessity, or charity," held that no recovery can be had on a promissory note which is signed and delivered by the obligors on Sunday and that fact was known to the obligee when he accepted it on Sunday.

APPEAL FROM ANDERSON CIRCUIT COURT.

December 9, 1875.

OPINION BY JUDGE COFER:

This was a suit on a note executed by the appellants to the appellee's intestate. The appellants answered, "that said note was made, executed, delivered and accepted on the 28th of May, 1871, which was the Christian Sabbath, and that its making, delivery and acceptance on said Sabbath day, was so known to have occurred and been done on said day by said G. B. Taylor." They aver that neither said G. B. Taylor nor either of these defendants were members of any religious society or church or order that observed any other day of the week than Sunday or the Christian Sabbath as a day of worship and rest.

To this answer a demurrer was sustained, and the only question for decision is whether that ruling was right. In *Ray, et al., v. Catlett & Buck,* 12 B. Mon. 532, the question whether a contract made on Sunday was enforcible or not came first before this court. That case arose under the act of 1801, Stat. Laws 1275, which provided that if any person, on the Sabbath day, should himself be found at his own or any other trade or calling, or should employ his apprentices, servants or slaves in labor or other business, whether for profit or amusement, except the ordinary household offices of daily necessity, or other work of necessity or charity, he should be deemed guilty of a public offense. In construing that statute in the case supra, the court said: "We are not prepared to decide that the mere execution and delivery of a note, or its mere acceptance, on Sunday, is laboring in any trade or calling, unless it be a part of some other transaction done also on Sunday, which may be regarded as labor in some trade or calling. And if the mere execution and delivery of a note could be deemed such labor, we are satisfied that its mere acceptance could not, and the person accepting it would not be involved in any consequence of a breach of the law by the other, unless he knew that the note had been made, as well as delivered on Sunday."

As it did not appear that the obligee knew when he accepted the note that it had been made on Sunday, it was held that it was not void. The phraseology of the Revised Statutes, in force when the note in contest was executed, differs somewhat from that of the act of 1801. The latter statute provided that "No work or labor

should be done on the Sabbath day, unless the ordinary household offices of daily necessity, or other work of necessity, or charity." 1 Rev. Stat. 400. Under the Revised Statutes, whatever could be denominated "work or business" was prohibited on the Sabbath day, unless it was the ordinary household offices of daily necessity, or other work of necessity or charity.

It was accordingly held that swapping horses on Sunday was within the statute, although it did not appear that such transactions were of the trade or calling of either of the parties. *Murphy v. Simpson,* 14 B. Mon. 420. In *Dohoney, et al., v. Dohoney,* 7 Bush 217, it appeared that the note was signed on a Sunday by one of the obligors while it was in the hands of a co-obligor; but it did not appear when it was delivered to the obligee, or that he had any knowledge that it had been signed on Sunday, or had participated in any violation of the statute; and it was held that, according to the decision in *Ray, et al., v. Catlett & Buck,* and other decisions under our own, and similar statutes in other states, on the subject, the allegal acts of the obligors in the note did not affect its validity in the hands of the obligee, who did not himself violate the law.

It will be observed that in *Ray, et al., v. Catlett & Buck,* it is intimated that the execution and delivery of a note on Sunday was a breach of the law; and in *Dohoney v. Dohoney,* the act of signing a note on that day is called an illegal act. As it did not appear that the obligee knew of that illegal act or participated in it, it was held that he did not himself violate the law, thus plainly intimating that if he had participated in the execution of the note on Sunday, he would have violated the law, and the note would, as a consequence, have been void.

The statute declared that no work or business should be done on Sunday, and it is impossible to say that when one person has written and signed a note, and another has accepted and held it as evidence of an indebtedness, that they have done no work or business on that day. If they have done either, the statute has been violated. Something has been done which the law forbids, and for the doing of which a penalty is denounced, and it is a familiar principle that the law will not enforce a contract made in violation of its mandate.

It having been averred that the note sued on was signed and delivered by the obligors on Sunday, and that this fact was known to the obligee when he accepted it, and that he not only thus participated in the illegal act of the obligors, but himself violated the

statute by accepting on Sunday a note he knew was made on that day, the answer presented a defense to the action, and the court erred in sustaining the appellee's demurrer. The judgment is *reversed* and the cause is remanded with directions to overrule the demurrer, and for further proceedings.

Thomas C. Bell, for appellant. D. W. Lindsey, for appellee.

ROBERT ABELL, ET AL., *v.* JOHN V. CARTMELL.

Trustee—Infants—Purchase of Real Estate for Infants.

Where one member of a family buys in real estate for all at a low price by prevailing on other prospective buyers not to bid for the reason that he wanted to buy to protect infants, such purchaser becomes trustee for such infants, such purchaser has a lien for purchase money advanced by him, but holds the title for the benefit of the infants for whom he bought.

Notice of Trust by Purchaser.

One who buys real estate from the holder of the record title thereof, but who has notice that his grantor holds such title for the benefit of infants, takes only the interest of the grantor, and the rights of such infants are not affected by his purchase.

APPEAL FROM UNION COUNTY COURT.

December 10, 1875.

OPINION BY JUDGE LINDSAY:

Mrs. Abell was the owner in fee of a valuable tract of land in Union County. To secure the payment of several debts owing by her husband, she joined with him in the execution of mortgages upon her said land.

Actions in equity were instituted to enforce these mortgages, and after the death of Mrs. Abell, and after her children and heirs-at-law had been made parties to the proceedings, a consolidated judgment of foreclosure was regularly rendered. At the sale made by the commissioner pursuant to that judgment, Phipps, the husband of the eldest daughter of Mrs. Abell, purchased the entire tract of land at the sum of $4,200, less than one-half its value. He represented at the time to various persons who were present for the purpose of bidding, that his object was to bid the land in for the benefit of the infant children of Mrs. Abell, and it was in consequence of these representations that he was enabled to make the

purchase at the price stated. The proof shows that there were bidders present who would have paid the judgment debts for about one-half the entire tract.

It is not questioned that the circumstances attending the purchase of Phipps were such as to constitute him in equity a trusee for the children of Mrs. Abell. Phipps sold and conveyed the land to Cartmell. After the death of the former, which took place a short time after the sale to Cartmell, seven of the eight children of Mrs. Abell instituted this action against the latter. They set up all the facts necessary to establish the existence of the trust upon the part of Phipps, and charge that Cartmell purchased from him with notice of that trust. They seek to have their equitable rights determined and established, and pray for such relief as the circumstances of the case entitle them to receive.

The first material question to be settled is whether the answer of Cartmell is sufficient to put in issue the allegation that he bought with notice of the equitable rights of these appellants, as against Phipps.

The allegation of the petition is that when Phipps made said deed to Cartmell, and long before that, he, Cartmell, knew all the fraudulent facts therein stated aforesaid, and knew well that the land thus deeded to him belonged to these plaintiffs, and knew that Phipps had bid off the land at the sale aforesaid for these plaintiffs' use and benefit, as aforesaid, and that Phipps was holding the land in trust for the use and benefit of these plaintiffs; and they state, notwithstanding defendant Cartmell's knowledge of the facts, and statements herein made long before the deed was made by Phipps to him, that he, Cartmell, fraudulently accepted said deed and took possession of, and still holds possession of said land.

We have here the direct, specific and unmistakable averment that Cartmell, at and before his purchase, knew that Phipps had bid off the land for the plaintiffs' use and benefit, and that he was then holding it in trust for them. It is referred to by Cartmell in this manner. He denies that at any time before his purchase of said land, and taking the legal title thereto, or paying the purchase money thereon, he had any understanding or agreement with Phipps concerning plaintiffs or their right, title or interest in said land, or that he ever had any intimation that plaintiffs, or any of their friends, claimed any right or interest in said land, or any part or parcel in Phipps' purchase; and he here states more solemnly that never until after the deed to Phipps, and in the latter part of the summer of 1870, did he

ever entertain any idea of purchasing said land, and even then the purchase was against his will and made under constraint and to save a debt, and keep from pressing Phipps on a debt incurred in the spring of 1870.

The substance of the denial thus made is the affirmative statement, that he, Cartmell, had no understanding or agreement with Phipps concerning the right, title or interest of the appellants in the land, and that he had, at no time, had an intimation, that they, or any of their friends, claimed any right or interest in it, or any part or parcel of the purchase made by Phipps. It may be true that he had no agreement or understanding with Phipps on the subject mentioned, and that no one had ever intimated to him that appellants or any one for them claimed any right, title or interest, in the land, or in the purchase made by Phipps; and yet he may have known that Phipps bid off the land for their benefit, and was at the time of his purchase holding the title in trust for them. If he had knowledge of either of these facts, he had information enough to put a reasonably prudent man upon inquiry; and his agreements or understanding with Phipps, and his want of information as to whether the infant brothers and sisters-in-law of Phipps, were claiming under a purchase made avowedly for their benefit, are immaterial matters. *Wallaces v. Marshall, et al.*, 9 B. Mon. 156; Strong's Equity Jurisprudence (2d ed.) 400.

As the proof established the existence of all the facts necessary to constitute Phipps a trustee for the appellants, and as the material averment that Cartmell purchased from him with notice of the trust, is not sufficiently controverted by the answer, it results that the judgment dismissing the petition of appellants, and thus denying them relief of any kind, cannot be maintained.

But as the parties to the action, as well as the circuit court, seem to have regarded the answer as good; as the cause was tried and disposed of upon its merits; and as the deposition of Cartmell shows that he is able and willing to make the denial sufficient, and then to verify his answer upon the return of the cause; he should be allowed to amend, unless appellants are entitled to relief upon the proof, without regard to the defect in appellee's pleading.

In the determination of this issue, we will waive the decision of the question raised as to the competency of Cartmell as a witness, and consider his testimony as that of a party to an action legally qualified to testify.

Peter Abell, the father of the appellants, who has no pecuniary

interest in the matter in litigation, swears that some time in the interval between the purchase by Phipps and the sale to Cartmell, he told the latter that Phipps had bought the land at the commissioner's sale for his (Abell's) children. He thinks this conversation took place two, three or probably four months before the purchase by Cartmell. In a second deposition, and after Cartmell had given his deposition and testified to facts inconsistent with some of the circumstances detailed by Abell when first sworn, he says he is satisfied that the conversation was had with Cartmell earlier in the year of 1870 than he had first stated. He says that it took place in an upper room in the storehouse of Cartmell, he thinks as early as April, and states that persons were at the time sitting around the stove in the lower or principal storeroom.

Cartmell swears positively that he had never heard from any one before he purchased from Phipps, that the latter had purchased the land for the Abell children. He does not deny that Peter Abell had the alleged conversation with him, but says that it was had in October, 1870, more than a month after Phipps had conveyed to him. There is testimony in the record conducing in some degree to show that Cartmell is right as to the time the conversation took place. He did not commence to occupy the storehouse till the latter part of May, 1870. His clerks recollect that he and Peter Abell did have an interview in the upper room in October, 1870. They swear that Abell was not at the storehouse after Cartmell took possession in May, 1870, except in August and October of that year.

Some stress is put upon the fact that Abell speaks of the storehouse as "his," Cartmell's, house.

Although Cartmell did not commence business until late in May, 1870, the storehouse was open, and mercantile business was being carried on in it in April, 1870, by a brother of appellee, whom he afterwards succeeded in business. It is, therefore, neither impossible nor improbable that the interview in the upper room of the storehouse may have taken place in April, although Abell may have mistakenly spoken of the house as "his," appellee's. If it took place in the latter part of May, when appellee was in possession of the house, it does not necessarily follow that Abell is mistaken in saying or intimating that there was fire in the stove. Such a circumstance is not so improbable as to be regarded as conclusive of a question growing out of a difference of recollection as to date.

It is doubtless true that the clerks have no recollection of seeing Abell at the storehouse in 1870 except in August and October, and

it is very probable that neither they, nor either of them, did see him at any other time, and this is the most they prove. That Abell speaks of the storehouse as "his," Cartmell's, house, is a matter entitled to but little weight. Abell says that he was in the upper room of the storehouse on several occasions during the year 1870, and that one of them, the time at which he informed Cartmell of the facts attending the purchase of the land by Phipps, was as early or earlier than the month of May.

When the accuracy of the recollection of Abell and Cartmell as to dates is tested, it will be seen that, at the least, the one is as liable to be mistaken as the other. In his deposition given on the 5th day of April, 1872, Cartmell, speaking of his interview with Abell on October 18, 1870, says, "This was the first time that I ever heard it intimated that the Abell heirs or Peter Abell claimed that George Phipps owed them for anything, or that they were interested in the purchase of the land in any way." In his deposition given on the 12th day of September, 1872, he says "that the first person who told him that Phipps had purchased for the Abell children was I. A. Spalding. He told me something about it in my storehouse. I don't remember the date exactly. I think Mrs. Spalding was the first person that ever told me anything about it." In one or the other of these statements the memory of the witness was evidently at fault.

Without undertaking to decide whether Abell, who has no actual pecuniary interest in the matters in controversy, or Cartmell, who has, is most likely to have recollected aright as to the date of an admitted interview, we will examine into the circumstances in proof, outside of Abell's evidence tending to show that Cartmell bought with notice of the trust.

Phipps was the brother-in-law of these appellants, who, with his wife, were the owners in fee of the land when sold by the commissioner. They were infants at the time of the sale. Phipps purchased the land for less than one-half of its value. These facts were all known to Cartmell at and before the time of his purchase from Phipps. Cartmell became the surety of Phipps on the bonds he was required to execute to the commissioner who sold the land. At the time of the sale and the execution of these bonds, he was engaged in business, with Phipps as his partner.

Taking all these facts into consideration, and giving due weight to the further fact that Cartmell was fully apprised of the value of the land, of the price paid by Phipps, and of the relationship exist-

ing between him and the infant owners at the time of the sale and purchase, it is almost impossible to escape the conclusion that Cartmell had some information touching those facts connected with the purchase, and converting Phipps into a trustee, which, to say the very least, were known to every bidder present at the time and place the sale and purchase were made. The legitimate and rational deduction from established facts is strengthened by the fact that there were good and sufficient reasons to induce Cartmell to make the purchase from Phipps, notwithstanding his knowledge of the trust.

Phipps was indebted to him in a sum exceeding six thousand dollars. His health was failing rapidly, and the agreed facts in the record show that witnesses would prove that Phipps was insolvent at the time he bought the land at the commissioner's sale, and also growing worse at the time he sold the land in contest to Cartmell. Appellee, in one of his depositions, attempts to show that he might have secured his debt on Phipps without purchasing the land; but in his answer he says that the purchase was against his will, and made under constraint to secure a debt, and keep from oppressing Phipps on a debt incurred in the spring of 1870.

The legitimate inference to be drawn from these facts, all of which are either uncontroverted or satisfactorily proved, is that Cartmell had notice of the equity of these appellants, and that he purchased notwithstanding that notice, because the purchase was the most available means by and through which to save a doubtful claim against an insolvent and dying debtor. Against this conclusion we have the evidence of Cartmell; but he is met with the evidence of Peter Abell, who swears that he in person notified him of the claim which the appellants are now asserting, long before the date of his purchase.

We are constrained to adjudge that appellants have made out a case entitling them to relief. The character of that relief we will now indicate. They are not entitled to rents. Peter Abell, the father of appellants, was entitled to a life estate in the lands; that estate went to Phipps under his purchase from the commissioner, The law will not hold Phipps bound as trustee for the benefit of these appellants, other than to secure to them such interest as that they held in the land when sold, subject to the paying of the judgment debt. It may have been error to sell any part of their estate in remainder until it had first been ascertained that their father's life estate would not sell for a sum sufficient to satisfy the mortgage debts, but that error cannot now be corrected.

As Cartmell cannot be compelled to account for rents, neither should he be allowed interest on the sum bid by Phipps for the land. Cartmell owns under the conveyance from Phipps and wife, the interest that descended to Mrs. Phipps, being an undivided one-eighth of the land. He holds a lien on the entire tract to secure the judgment of $4,209.18, the sum bid by Phipps at the decretal sale.

On the return of the cause, the chancellor will adjudge a sale of so much of the land as may be necessary to pay said sum. In so much of the tract as it may not be necessary to sell, the seven appellants and Cartmell will each own an undivided one-eighth interest, subject to the life estate of Peter Abell, which is and will remain the property of Cartmell. The appellants will be entitled to their costs in this, and in the circuit court.

We have not considered the store bills due from Peter Abell or his wife to Phipps. If they were Peter Abell's debts, Cartmell gets the benefit of them, to the extent that the life estate of the debtor in the land in controversy is valuable. If they were not so evidenced as to make a charge upon her separate estate, her children cannot be compelled to pay them.

The judgment appealed from is *reversed* and the cause remanded for further proceedings consistent with the principles of this opinion.

K. Chapeze, J. S. Taylor, W. P. D. Bush, for appellants.
John Rodman, Caswell Bennett, D. H. Hughes, for appellees.

LOUISVILLE & NASHVILLE R. CO. *v.* D. W. SANDERS, ET AL.
SAME *v.* WADE.

Damages—Vindictive Damages.

Where the shippers of live stock, under the rules of the railroad company, are only entitled to passes for one attendant for each two cars of live stock shipped, but who were ignorant of such rule, and are given passes by the agent of the company for a greater number of attendants than allowed by such rule, which are not recognized by the conductor of the company's train, who without rudeness or force requires such extra passengers to get off the train, the company is liable to them for their actual damages caused by being put off, but the company is not liable for vindictive damages.

APPEAL FROM SIMPSON CIRCUIT COURT.

October 12, 1875.

OPINION BY JUDGE PRYOR:

These two cases, involving the same questions, will be considered together.

There is no evidence in either of the records authorizing the jury to give vindictive damages, or upon which an instruction was proper requiring such a finding. It is evident that the agent of the appellant at Franklin violated the rules of the company in permitting each of the appellees to carry with them, free of charge, an additional passenger on the freight train transporting their stock. The evidence conduces to show that the conductor of the freight train, on which these appellees were passengers, when attempting to enforce the regulations of the company in requiring the extra passengers to get off the train or pay, believed he was acting in the discharge of his duty to his employers. It does not appear that he entertained any malice or ill will toward either of the appellees, or that he had any cause for doing them an intentional injury. He was positive in the assertion that they, or the parties with them, must leave the cars or pay the usual fare; and the appellees were equally as firm in their determination to ride free of charge, by reason of the pass given them by the company's agent at Franklin.

Such trains are not carriers of passengers, and when the conductor found those upon the train who were there as passengers, or at least in violation of the rules of the company, it was not only his privilege, but his duty, to know by what authority they claimed the right to travel on his train. There was no abusive or insulting language used, or physical force resorted to, in order to remove appellees from the train; but the latter, concluding either that they had no right to be upon the train, or that they would leave the cars and look to the law for redress, left the train, and shortly after instituted these actions. Some of the witnesses state that the conductor appeared in the car where the appellees were, accompanied by two or more of the hands on the road; but it also appears that this was the car in which they remained when not on duty; and besides, there is no testimony showing that they took any part in the dispute between the conductor and appellees.

The facts indicate clearly that the conductor, in good faith and without any malice or desire to injure appellees, announced to them that they must leave the car or compensate the company for carry-

ing them; and on the other hand, it is equally as certain that the appellees believed they had the right to pass over the road by reason of the pass or ticket issued to them by the company's agent. This freight agent at Franklin had given them what is denominated a free pass or ticket to go with their stock on the freight train to Louisville, and not only so, but to take with them each an assistant. By the regulations of the company, one person only is entitled to go with two cars of stock, and two with three cars, etc. These parties had only two cars of stock each, and had no right to an extra hand. They, however, were not in fault, unless they knew when they accepted this free ticket that the agent had no authority to give it. The party signing the pass was the general freight agent of the appellant at Franklin, the point from which the stock was shipped, and the present litigation is to be attributed to his dereliction of duty in disregarding the rules of the company. He had full authority to make contracts for the transportation of live stock, and by the regulations of the company, the owners of stock, or their agents, were permitted to go upon these freight trains, but not more than one person with two cars.

As between the company and the agent, these rules must govern, but as to third parties who contract with this general agent within the scope of his authority, or in regard to that character of business he was authorized to execute or transact for the company, the fact that he had disregarded its rules and regulations in the transaction of this business, will not shield the company from the claims of those who, in good faith, have trusted the agent in making contracts with him about matters within the scope of his employment. Although the prices for freight may be regulated and fixed by the company, as well as the number of hands the owner is entitled to have on the trains with his stock, still, if the agent who had been invested with the authority to make these contracts should agree to transport live stock or other freight for a less price than authorized by the company, or should permit more than one person to accompany two cars of stock, it is too late, after the stock and its owners are upon the trains and the contract of the carrier being executed, for the company to say that the agent with whom the parties contracted had no authority to make such a contract, without showing that those dealing with the agent knew of his bad faith toward the company. In the absence of this knowledge, the agent, so far as his acts are to affect the parties, must be regarded as vested with the right to bind his principal with reference to his, the duties that the

agent must necessarily discharge by reason of his employment: "The principal is bound by all the acts of his agent, within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him." Story on Agency, pp. 153-154, and note.

The only question for the jury to determine on the facts of this case in order to make the appellant liable, is, Did the appellees know when they made this contract with the appellant's agent at Franklin, that he was violating the rules of the company in permitting two persons to go upon the cars with stock instead of one. There is no question but what such an agreement or contract was made with the agent, and that in making it he transcended his authority and disregarded the rules of the company. If the appellees were ignorant of the rules of the company, having made the contract in good faith, they are entitled to recover damages by way of compensation, and nothing more. This is no case for punitive damages. Although the fault is to be attributed to appellant's agent, there is neither malice, oppression or such aggravating circumstances connected with this case, as to require punishment to be inflicted upon appellant in the way of damages. One of appellant's agents had contracted with the appellees for the passage of the latter and their employes from Franklin to Louisville, and another agent of the company, acting in good faith and for the reason that the contract of the first agent was in direct violation of the rules of the company, refused to carry them; and upon this refusal, and the declaration that they or those in their employ must get off the train or pay, the appellees left the cars.

Although this case, as made out, may be regarded as a tort, there is really but little difference, so far as the question of damages is concerned, between the action as instituted and an action on the contract for failing to carry the appellees to Louisville, as the company had agreed to do by its agent. All that the appellees are entitled to recover is for the actual injuries sustained. "There are many cases of tort where no question of fraud, malice or oppression intervenes, and in these cases the measure of compensation is a matter of law. In actions of tort, where there has been no wilful injury, the plaintiff can only recover the damages necessarily resulting from the act complained of." The rule is, that where gross fraud, malice or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severe verdict,

at once impose a punishment on the defendant and hold up an example to the community. Sedgwick on the Measure of Damages, pages 475, 476 and 477 and notes annexed. If this was not the principle by which this case is to be determined, the question of interest on the part of the agent charged with the commission of the wrong, must necessarily tend to mitigate the damages. He acted in the consistent discharge of his duty to his employes, and inflicted no personal violence upon either of the appellees, nor did anything else than to inform them in a positive manner that the regulations of the company must be obeyed.

A verdict of $2,000, in such a state of case, cannot be sustained; but on the contrary, the appellees must be confined in their recovery to compensation, as the facts now appear. The loss of time they sustained, as well as the extra expense incurred, if any, by having to go upon other trains, may be considered in estimating the damages. The evidence shows that they left the train at or near a depot where they found a passenger train, upon which they took passage for Louisville. It was improper to permit testimony to be introduced as to the condition of the cattle, there being no such claim alleged in their petition. Most of the instructions were given upon the idea that the appellees were entitled to recover punitive damages, and were, therefore, erroneous. If the freight agent of the company at Franklin gave to the appellees and those with them a pass to go with appellees' cattle free of charge, and appellees were ignorant of the fact that the agent was violating the rules of the company, they are entitled to recover the damages to be confined alone to compensation. It is admitted or shown by appellant's own proof that the agent at Franklin was the general freight agent of the company at that place, and that he signed the permit or pass by virtue of which these appellees undertook to ride upon appellant's cars. The two judgments are *reversed,* and cause remanded with directions to award the appellant a new trial, and for further proceedings consistent with this opinion.

R. Rodes, Russell Hanston, for appellant.
W. P. D. Bush, for appellees.

COMMONWEALTH *v.* DAVID MAY, ET AL.
SAME *v.* LOTT, ET AL.
SAME *v.* BROWN & KENNEDY.

Criminal Law—Indictment—Grand Juror.

It is error in the court to set aside an indictment because of the fact that one of the grand jurors by whom it was returned was under the statute incompetent.

Appeals.

The statute limiting the right of appeal to the court of appeals to cases where the amount involved in the judgment is less than fifty dollars, has no application to criminal cases.

APPEAL FROM THE HARDIN CIRCUIT COURT.

January 6, 1876.

OPINION BY JUDGE LINDSAY:

The court below erred in setting aside the indictments in these prosecutions. The fact that one of the grand jurors by whom they were returned was, under the statute, incompetent, did not authorize that action. *Commonwealth v. Patrick,* Mss. Opinion; *Commonwealth v. Smith, et al.,* 10 Bush 476.

This court has jurisdiction of these appeals. The penalty prescribed by the statute for selling or giving intoxicating liquor to a minor without proper authority is a fine of fifty dollars. Section 1, Art. 22, Chap. 28, General Statutes, provides that "the court of appeals shall have appellate jurisdiction over the final orders and judgments of all other courts of this commonwealth, unless otherwise provided herein." Sec. 2, of the same article and chapter, provides that, "no appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than fifty dollars, exclusive of costs."

We have, heretofore, expressed the opinion and acted upon the idea that these provisions did not apply in criminal proceedings; but upon reconsideration, we are convinced that the language of Sec. 1 is comprehensive enough to embrace all proceedings, criminal and penal as well as civil.

Judgment *reversed.*

T. E. Moss, for appellant.

SMITHERS & HIGDON *v.* COMMONWEALTH.

Criminal Law—Intoxicating Liquors—Sale by Druggists.

Compounds of medicines with alcoholic liquors, made in good faith as medicines for medical use and not as a device to avoid the law regulating or prohibiting the sale of liquors, are not prohibited by the law, and a druggist may make and sell them for use as medicine without violating the law.

APPEAL FROM GRAYSON CIRCUIT COURT.

January 7, 1876.

OPINION BY JUDGE COFER:

The second instruction given by the court made the guilt of the defendants depend alone on the question whether they mixed ardent spirits with drugs and sold the compound to be drunk on or adjacent to the premises where sold. It is a fact of which courts may take judicial cognizance that many medicines made and sold as such and in good faith are compounded with alcoholic liquors. If such compounds are made and sold in good faith as a medicine, and not as a device to avoid the laws regulating or prohibiting the sale of liquors, the seller commits no offense. *Anderson v. Commonwealth,* 9 Bush 569. Whether the appellants were *bona fide* druggists and the article proven to have been sold by them was sold in good faith to be used as a medicine, or was compounded and sold in that form as a mere device for eluding the legal consequences of selling liquors in violation of law, should have been submitted to the jury by proper instructions.

If the appellants were not *bona fide* druggists, or intended what they sold to be used as a beverage, or knew that it was being so used by those to whom they sold it, they are guilty of a violation of law; but if they were such druggists, and in good faith believed the compound had useful medicinal properties, and sold it as medicine without intending to evade or violate the law, and sold it only to such persons as they believed desired it as a medicine, and not because it contained spirituous liquors, they should be acquitted. Any other rule would encroach upon the legitimate sphere of the druggist, and improperly interfere with the necessities of those who may be sick. No other error is perceived.

Wherefore the judgment is *reversed,* and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

Robbins & Haynes, Conklin & McBeath, for appellants.
T. E. Moss, for appellee.

J. L. VANDIVIER, ET AL., *v.* WINCHESTER BUILDING & ACCUMULATING FUND ASSOCIATION.

Usurious Interest—Who May Recover.

Usurious interest paid can only be recovered by the person who pays it. A surety when sued upon a note cannot plead usury paid by his principal either as a set-off or counterclaim.

APPEAL FROM CLARK CIRCUIT COURT.

January 10, 1876.

OPINION.

Usurious interest paid can only be recovered back by him who paid it. Consequently a surety, when sued upon a note, cannot plead usury paid by his principal on the note as either a set-off or counterclaim. He may plead it as partial payment, and in that way get the benefit of the payment, but it devolves on him to prove the alleged payment; and if he offers no evidence to sustain the allegations of his answer, and the cause is submitted on the pleadings, judgment must be rendered for the plaintiff for the full amount of the debt sued for, if the alleged payment of usury be the only defense. Nor will the burden of proof be thrown upon the plaintiff by an allegation in the answer that the fact of payment of usury is within the knowledge of the plaintiff alone.

The rule of chancery practice which casts upon a party the proof of facts alleged or presumed to be exclusively within his knowledge, did not devolve upon the complaining party the duty to disprove a matter of avoidance pleaded in the answer. The note sued upon made out the plaintiff's case, and if the defendant wished to reach the plaintiff and compel disclosures in support of the defense, he should have taken the course pointed out by the code of practice, or have taken the depositions of its officers. The court had power to set aside the submission and allow further preparation, but we are unable to see that there was any abuse of discretion in not doing so.

The record of the term does not show upon what ground the motion to set aside the submission was based, but this appears in the proceedings of the next term. The ground relied upon as appears by the affidavit of the appellant was that the cause was prematurely submitted by mistake of his counsel, but in what that mistake consisted is not stated. We infer, however, that the mistake referred to was the belief of counsel that the answer contained a set-off or

counterclaim. This court cannot say that there is error in refusing to set aside a submission because one of the parties has misinterpreted his own pleading. There may possibly be cases in which such a course would be proper, but we can hardly imagine one in which this court would reverse the judgment of an inferior court for refusing to do so.

There having been no evidence of the alleged payment of more than ten per cent. interest, the other and more important question argued by counsel does not arise in this case.

Judgment *affirmed.*

L. B. Grigsby, for appellants. James Simpson, for appellee.

JAMES WALSH v. JAMES M. POWERS.

Damages—Pleading—Proof.

Unless plaintiff seeks to recover punitive damages, it is not necessary to prove that the injury complained of was inflicted either purposely or wantonly.

Pleading.

In actions for injuries to the person neither motive, interest nor the circumstances under which the injury was inflicted need be pleaded.

Pleading.

In actions for injuries to person an averment of the extent of the injury and the manner of its infliction is sufficient.

APPEAL FROM OWEN CIRCUIT COURT.

January 11, 1876.

OPINION BY JUDGE LINDSAY:

It was not necessary in this case to order or prove that the injury complained of was inflicted either purposely or wantonly, unless the complainant desired to recover punitive damages; and even in that view, proof of circumstances of aggravation would have been sufficient, upon a simple averment of negligence.

In actions for injuries to the person, neither motive, interest, nor the circumstances under which the injury was inflicted need be stated. An allegation of the extent of the injury, and the manner of its infliction is sufficient, and when it is the result of negligence or carelessness the charge is sufficient if made in general terms. *Louisville, Cincinnati & Lexington R. Co. v. Case's Admr.*, 9 Bush 728; 1 Chitty's Pleading 388; 2 Ib. 650; *Chiles v. Drake*, 2 Met. 146.

Instruction No. 2 correctly defines the rule by which proper compensation is to be determined in such a case as this. *Louisville, Cincinnati & Lexington R. Co. v. Case's Admr.*, 9 Bush 728. The instruction asked by appellant was properly refused. Admitting his entire innocence of an intention to injure the appellee, yet as he acted negligently, he must compensate the latter for the injury resulting from such negligence.

Judgment *affirmed.*

J. D. Lillard, for appellant.
A. P. Grover, H. P. Montgomery, for appellee.

OLIVER WADDLE *v.* COMMONWEALTH.

Criminal Law—Instructions—Exceptions.

In a criminal case where no exceptions are made to instructions given at the instance of the commonwealth, objections are waived and will not be considered by the court of appeals.

Sufficiency of Indictment.

The court of appeals has no power to reverse a criminal cause on account of the trial court's error in overruling a demurrer to an indictment.

APPEAL FROM BUTLER CIRCUIT COURT.

January 13, 1876.

OPINION BY JUDGE COFER:

The instructions given at the instance of the commonwealth were not excepted to by the defendant; and this court has so repeatedly held that unless exceptions are taken to the giving of instructions in criminal trials, they are waived, that we do not now feel at liberty to hold that exceptions are unnecessary.

This construction of the Criminal Code was adopted as early as 1860 in the case of *Clem v. Commonwealth*, 3 Met. 10, and in *Burns v. Commonwealth*, Ib. 13, and has been repeatedly recognized and acted upon since that time, and the matter has thus been placed beyond the power of this court. If the ends of justice demand a change in the practice in this regard, the legislature alone is competent to make it. The indictment seems to us to be sufficient even on demurrer, but whether so or not we have no power to reverse for error in overruling a demurrer to an indictment. Sec. 334, Crim. Code.

The court did not err in refusing to arrest the judgment. The indictment stated facts constituting a public offense within the jurisdiction of the Butler circuit court, and under section 271 the judgment could not be properly arrested. It was not necessary to describe the manner in which or to indicate in the indictment at what part of the house the alleged breaking and entry were made.

The defendant did not object to the jury being allowed to separate; and if he had, this court would have no jurisdiction to consider the propriety of that action on the part of the circuit court.

The variance between the name given on the indictment and judgment and that in the verdict was not material, and especially is this true in view of the fact that in one of his own instructions the defendant called himself by the same name by which he is called in the verdict.

We perceive no error available on the record for a reversal of the judgment, and it must therefore be *affirmed*.

B. L. D. Guffy, A. Duvall, for appellant.
T. E. Moss, for appellee.

JORDAN THOMAS *v.* S. S. ROWLETT, ET AL.

Married Women—Separate Estate in Lands.

A conveyance to a married woman, her heirs and assigns forever, free from the use and control of her said husband, where the warranty is in the same words, is sufficient to create a separate estate.

Estoppel.

The statute does not permit a married woman to sell or incumber her separate estate, nor can she estop herself of the right to claim it, by such representations as would estop other persons free from statutory disability.

APPEAL FROM OWEN CIRCUIT COURT.

January 13, 1876.

OPINION BY JUDGE LINDSAY:

The conveyance from Jones is to America Rowlett, her heirs and assigns forever, free from the use and control of her said husband, and the warranty is in the same words. The language is such as to create a separate estate. The mortgage to the appellant does not, therefore, bind Mrs. Rowlett.

The first amended petition offered, at most only sets out a state of facts, which tended to estop Mrs. Rowlett to claim the land as separate estate. But as a feme covert, under the provisions of the Revised Statutes, could not sell or encumber her separate estate, neither could she divest herself of the right to claim it by such acts or representations as would, in cases of persons free from the statutory disability, create an estoppel in pais. The court, therefore, did not err in refusing to allow this amended answer to be filed. The second amended answer was not offered until the cause was ready for hearing, and no explanation was offered for the delay. We cannot say that the court abused a sound discretion in refusing at the time to allow it to be filed.

As Mrs. Rowlett and her husband and Bourne are the only parties made appellees, we need not inquire as to the propriety of the action of the court, as to co-sureties of appellant.

No attack was made upon the conveyance to Bourne.

The judgment must be *affirmed.*

J. D. Lillard, for appellant. E. E. Settle, for appellees.

JAMES R. HIGHLY v. COMMONWEALTH.

Criminal Law—Reversal.

There can be no reversal for an error in instructing or in refusing to instruct the jury, unless all of the instructions given by the court are contained in the bill of exceptions.

Admissibility of Evidence.

In a murder trial where the defendant is charged with killing one person evidence is not admissible showing that the defendant also killed another person, where not admissible as a part of the res gestae.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 19, 1876.

OPINION BY JUDGE COFER:

Sec. 335 of the Criminal Code provided that a judgment in a criminal prosecution "shall not be reversed for an error of the court in instructing or in refusing to instruct the jury, unless the bill of exceptions contains all the instructions given by the court to the jury, and unless it shall thereupon appear that the law applicable to the case was not correctly and fairly given to the jury."

The bill of exceptions in this case does not contain any of the instructions given by the court, but it contains a statement to the effect that the court instructed the jury as to the law of murder, but failed to instruct them as to the law of manslaughter. It is the duty of the court on trial of a prisoner for murder to instruct the jury as to the law of manslaughter, especially in a case like this; but whether the statement in the bill of exceptions would warrant us in reversing the judgment on that ground alone it is not necessary now to decide.

After the commonwealth had proved the shooting of Mountjoy by the appellant, and after a witness had stated that he had also shot one Davis, the witness was asked: "What did Highly shoot and wound Davis for?" The appellant's counsel objected to the question, but the court overruled the objection and permitted the witness to answer, to which the appellant excepted. The witness stated that when the shooting commenced (that is, when the appellant commenced shooting at Mountjoy) Davis ran out at the back door and came around the house to the front, and was passing by the house toward the road when the prisoner shot him, the ball entering his mouth and coming out near his ear.

The evidence should not have been admitted. The prisoner was not on trial for shooting Davis, and the evidence admitted on that subject was calculated to prejudice his substantial rights, by strengthening the evidence of malice furnished by the other facts and circumstances in evidence in the cause. The evidence of the shooting of Davis was not admissible as a part of the *res gestae*. The prisoner was being tried for the alleged murder of Mountjoy, and if acquitted might have been immediately put upon trial for wounding Davis, and if he had been, he could not have pleaded the acquittal in the first prosecution in bar of the second.

We are, therefore, of the opinion that for the error indicated the judgment must be reversed, and the cause remanded for a new trial.

The instructions not having been made a part of the record by bill of exceptions or otherwise, we do not reverse for error in giving or refusing instructions; but as the case must go back to be retried it is proper to call attention to some omissions in the instructions copied and sent up by the clerk, and which purport to have been given in the cause, and to suggest that if these are the only instructions given they failed to give to the jury the whole law of the case.

The jury should have been told that if on all the evidence they had a reasonable doubt whether the prisoner had been proven guilty, they should find him not guilty; the converse of the instructions fol-

lowing that in which murder was defined should also have been given, as well as the law of manslaughter and of self-defense; and the jury should also have been told that if they found the defendant guilty, but had, on all the evidence, a reasonable doubt whether he was guilty of murder or manslaughter they should find him guilty of the latter crime.

Judgment *reversed.*

D. Ellis Conner, for appellant. T. E. Moss, for appellee.

MATHEW BRANHAM *v.* COMMONWEALTH.

Criminal Law—Evidence.

In a criminal case where the defendant was charged with the larceny of a watch, it was error for the court to refuse to permit the defendant to prove that before he knew he was suspected of the crime, he exhibited the watch to persons and inquired of them whether they had lost it and whether they knew to whom it belonged and stated to them that he had just picked it up in the yard and desired to find the owner.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 20, 1876.

OPINION BY JUDGE LINDSAY:

We need not consider the question raised as to the variance between the proof and the indictment.

The court instructed the jury that they could not find the appellant guilty unless they believed from the evidence that the watch charged to have been stolen was "a German silver hunting case watch." This is the exact description given in the indictment. If the jury disregarded this instruction, and found against the evidence, the circuit court had the right and power for that reason to grant appellant a new trial, but this action of that court in this regard is not subject to the revisory power of this court.

The appellant offered to prove that on the morning the watch is alleged to have been stolen, and before he was suspected of the theft by any one present, and before he knew or could have known that the owner of the watch suspected him, and before any search had been made, that he exhibited it to two persons and asked one of them if he had lost it, and both of them if they knew to whom it

belonged, and stated that he had just picked it up in the yard, and desired to find the owner.

The court refused to allow those facts to go to the jury. This was error. The exact question was decided by this court in the case of *Tipper v. Commonwealth,* 1 Met. 6, and also in the subsequent case of *Carter v. Commonwealth* in an unpublished opinion. In the last-named case the court examined the common-law authorities and was satisfied that they sustained the doctrine announced in the Tipper case.

Judgment *reversed* and cause remanded for a new trial upon principles consistent with this opinion.

Owen & Ellis, for appellant. T. E. Moss, for appellee.

LEONARD FARMER *v.* CALVIN HOWARD.

Attorney and Client.

It is not within the legitimate professional duties of an attorney at law, within his employment to defend one charged with a crime, to persuade witnesses against defendant not to appear against such defendant.

APPEAL FROM HARLAN CIRCUIT COURT.

January 20, 1876.

OPINION BY JUDGE LINDSAY:

The appellee by his answer denied that he employed appellant to defend him, and also denied that he did render any legal services in his defense. It may be conceded that the proof preponderates in favor of the alleged employment, but it does not show, outside of the testimony of appellant, that any services were rendered.

Appellant swore that he was present when the defendant was arrested for perjury; that he defended the said Howard; that he got the most important witness against the defendant not to appear against said defendant at the request of the defendant, he knowing from his statements that the proof would show the defendant guilty; that he did not bribe the witness, but got him not to prosecute the case any further.

The services thus rendered were doubtless beneficial to the appellee, but it strikes this court that they do not fall within the legitimate professional duties of an attorney-at-law, who is an officer of

the courts in which he practices and a quasi officer of the law, and who acts in all things connected with his profession, under an oath that he will faithfully execute to the best of his ability the office of attorney according to law.

Appellant insists in his brief that the court below ought not to have compelled him to answer the questions which brought out the foregoing statements. He was a voluntary witness in his own behalf. The matter sought to be proved was germane to the issue on trial. The only ground upon which he could have been excused from answering was that he would be compelled thereby to disclose the fact that he had violated the law, or committed a breach of professional duty. If he considered that he had done either of these things and had declined to answer on that ground, we have no doubt the circuit judge would have excused him.

The verdict of the jury is not palpably against the weight of the evidence, but if it were, as the testimony of the appellant shows, that instead of asking the courts to assist him in obtaining the reward promised for the services he swears he rendered, he should be content to have them let the latter rest where it now is.

The judgment must be *affirmed.*

L. Farmer, for appellant. John Disham, for appellee.

RICHARD ADAMS *v.* WILLIAM DELCHER & SON.

Appeals—Jurisdiction of Court of Appeals.

Pursuant to the provisions of the Act of 1858 the court of appeals has no jurisdiction of an appeal where the amount in controversy, exclusive of costs, is less than fifty dollars.

APPEAL FROM BOYD CIRCUIT COURT.

January 24, 1876.

OPINION BY JUDGE PETERS:

This appeal is prosecuted by appellant from a judgment in his favor for $43.75, with interest from the 11th of November, 1874, (the date of the judgment) till paid, but he was adjudged to pay appellees their costs by them expended in the court below, and also from the refusal of the court below to reconsider and to change the judgment of the day before allowing to appellees their costs on the appeal to the circuit court and refusing to adjudge to appellant his costs in said court against appellees.

The first question presented is, "Has this court jurisdiction of the case?" By an act of the legislature approved February 9, 1858, the 15th section of the Civil Code was amended, and the jurisdiction of this court was increased over all judgments in actions for the recovery of money or personal property, where the value in controversy is fifty dollars or over that amount. Sec. 17, Civ. Code, provides that costs are not to be included in estimating the value necessary to give jurisdiction to the court of appeals. Sec. 2, Art. 22, Chap. 28, General Statutes, p. 311, provides that no appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property if the value in controversy be less than fifty dollars, exclusive of costs.

Appellant's demand for which he brought his original suit in the police court of Ashland was $46.25, and the recovery in that court was $45. On an appeal to the quarterly court the judgment was affirmed, and on the appeal to the circuit court that judgment was reduced to $43.75. It is obvious that at no time the value in controversy has reached $50, exclusive of costs, and it is difficult to perceive how this court can get jurisdiction of the case unless the statutes cited be totally disregarded, or unless the court will assume that as the costs, which are a mere incident to the judgment, are adjudged to appellee, they exceed $50. The shadow would thus be substituted for the body and substance of the matter in controversy, and upon that ground assume jurisdiction where the legislature never intended to confer it, a power which we certainly cannot assume to exercise.

This court having no jurisdiction the appeal is *dismissed*.

W. C. Ireland, J. W. Hampton, for appellant.
Elliott & Prichard, for appellees.

JAMES SAFFELL, ET AL., *v.* CITY OF FRANKFORT.

Taxation—Sale of Real Estate at Tax Sale.

Proceedings to sell property for taxes must substantially conform to the statute; the omission of any step deemed essential to protect the taxpayer renders a tax sale void.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 25, 1876.

OPINION BY JUDGE COFER:

The charter of the city of Frankfort gives ample means of en-

forcing the payment of taxes due the city, and there was no necessity, and therefore no right to come into equity to enforce payment. *Johnson v. Louisville,* Mss. Opinion. Whether the appellants can hold the property discharged from the lien, if any, resting upon it when they purchased from Haley, is a question which does not arise in this case. If the city has a lien which might be enforced against them in a court of equity it can be enforced by pursuing the mode pointed out in the charter.

There seems never to have been an advertisement of the storehouse and residence for sale for the taxes for the year 1870. It is a well-established rule that proceedings to sell property for taxes must be in substantial conformity to the statute, and that the omission of any step in the proceeding deemed essential for the protection of the taxpayer renders the sale void. The advertisement required by the charter was intended for the benefit of the owners of property, and the alleged sales for taxes without advertising are void, and being void the sales do not affect the rights of either party or the remedy of the city.

If the sales had been merely voidable at the election of the owner of the property, the city could have enforced payment by suit in equity, for in that case it would have been without any other remedy.

The judgment is *reversed* and the cause is remanded with directions to dismiss the petition. Judgment *affirmed* on cross-appeal.

W. H. Sneed, for appellants. Lindsey, G. C. Drane, for appellee.

JOHN HACKWORTH *v.* WILLIAM R. THOMPSON, ET AL.

Attachment—Sale of Real Estate Under Attachment—Description.

A judicial sale of real estate attached, sold by order of the judgment, is void where no specific description of the real estate is included in the judgment.

APPEAL FROM LEWIS CIRCUIT COURT.

January 26, 1876.

OPINION BY JUDGE PETERS:

By the return of the sheriff it appears that the attachment was levied on 1,200 acres of land on Briery Creek in Lewis County in the possession of John Hackworth. In the judgment the land is described precisely as it is in the return on the attachment. The levy

made by the officer would be sufficient to create a lien on the land. But a specific description is not given in the judgment. The master must go on Briery Creek in Lewis County, and inquire where the 1,200 acres of land are located which Hackworth had in possession on the 1st of December, 1868; and if his information be correct on such inquiry, he may sell the right tract of land; but if he is misinformed he may sell an entirely different tract, and the land of some other person. Before the judgment of sale is rendered the court should have sent his master out with the surveyor, if need be, and have the 1,200 acres of land that the sheriff levied said attachment on, identified by metes and bounds, and report the same to the court; and the judgment then should contain the description of the land as reported, so that the commissioner could, with the judgment, go on the land and explain to bidders and purchasers the land to be sold, its form, location, and identity.

The question as to the homestead right is not raised by the pleadings, and of course not adjudicated by the court below, and this court therefore has nothing to do with it on this appeal.

But for the reasons stated the judgment of the court below is *reversed,* and the cause is remanded for further proceedings consistent herewith.

W. H. Cord, for appellant. A. Duvall, for appellees.

V. D. MCMANAMA *v.* ISABELLA CAMPBELL, ET AL.

Redemption from Sale of Real Estate—Agreement to Extend Time for Redemption.

The owner of land sold on decree may redeem it from sale within a year, but where the purchaser at such a sale for a consideration agrees to give the owner a longer time and breaks the agreement and procures a deed from the sheriff, the owner may set such deed aside and be allowed to redeem within the time agreed upon between the parties.

APPEAL FROM GRANT CIRCUIT COURT.

January 26, 1876.

OPINION BY JUDGE PRYOR:

It is alleged in substance in the amended answer that before the expiration of the year in which the appellant had the right to redeem, it was agreed between himself (the defendant) and the plain-

tiffs that the time for redemption should be extended until the first of March, 1873, in consideration that the defendant would at that time pay to the plaintiffs the sum of one hundred dollars in addition to the amount that would be due on the execution; that the plaintiffs, prior to that time, and in violation of the agreement, obtained from the sheriff a deed to the land, and are now asserting their right to recover the possession by reason of said deed, etc. He asks that he be allowed to redeem and the deed be cancelled.

If such was the agreement between the parties the appellees were not entitled to a deed until the expiration of the time at which the appellant was allowed to redeem, and having violated their agreement by accepting the deed, or having it executed to them by the sheriff before they were entitled to it, cannot defeat appellant's equitable right because of his failure to tender the money. This agreement, if made, was binding on the parties and the appellees having procured the deed prior to the 1st of March violated the contract and released the appellant from the necessity of making a tender. It was, in effect, saying to appellant, "You shall not have the land although you may be willing to pay the money," and besides, the deed, having been made before the time for redemption expired, passed no title to appellees. That it was so made is admitted by the demurrer, and all the allegations of the answer and amended answer must be taken as confessed. The appellant is now asking to enforce the agreement, and he should be permitted to redeem if the statements of his answer are sustained by the proof. The court erred in refusing to permit appellant to file his amended answer offered at the May term, 1875. It is too late to object to the manner in which the last pleading was supplied after the answer was filed, even if it be regarded as error.

The judgment is *reversed* and cause remanded with directions to award appellant a new trial, and for further proceedings consistent with this opinion. *Stapp v. Phelps*, 7 Dana 296.

J. J. Laudnun, for appellant.
J. M. Collins, E. H. Smith, for appellees.

GEO. C. HARLAN, ET AL., *v.* FIELDIN HARDIN, ET AL.

Conveyance—Officer Before Whom Deed Acknowledged.

The certificate of an officer that a deed was acknowledged before him, when he is not authorized to take acknowledgments, furnishes no evidence of the execution of the deed.

Evidence.

Before a copy of a recorded writing can be read in evidence it must appear that the original was authenticated in the mode provided by the statute.

Recording of Deeds.

The clerk is not authorized to record a deed without direct proof of its execution, although such deeds may sometimes be admitted in evidence as ancient writings.

Evidence.

The declarations of a person while in possession of land are admissible to prove the character of that possession.

APPEAL FROM GREENUP CIRCUIT COURT.

January 27, 1876.

OPINION BY JUDGE COFER:

At the time the deed from Keith to Harlan purports to have been acknowledged there was no law of this state authorizing mayors of cities to take and certify the acknowledgment of deeds. The first act of assembly giving such authority was passed in 1796, and went into effect January 1, 1797. 1 Statute Laws 439, Sec. 3. The mayor of Philadelphia having no authority to take the acknowledgment, his certificate furnished no evidence whatever of the execution of the deed, and gave the clerk no authority to record it. Nor could the clerk admit it to record as an ancient deed.

Copies of recorded writings are only admissible in evidence because the statute so declares, and before such copy can be read it must appear that the original was authenticated in the mode provided by the statute, for until that does appear the copy does not fall within the terms of the statute making copies evidence. Sec. 34, Chap. 28, Gen. Stat.

We do not know of any law authorizing clerks to record deeds without direct proof of their execution, although they might be admissible in evidence in court as ancient writings. It is not enough to render a writing admissible in evidence that it appears to be more than thirty years old; it must also appear that it is unblemished by alterations, and that it comes from such custody as to afford a reasonable presumption in favor of its genuineness; and that it is otherwise free from suspicion. 1 Green. Sec. 21. Whether an instrument offered under this rule is admissible depends wholly upon a common-law rule of evidence, and is a judicial question which

clerks have no power to decide. The court did not, therefore, err in rejecting the copy offered in evidence by the appellants. Nor did the court err in refusing to allow the opinion of this court in the case of *Harlan's Heirs v. Senton,* or the mandate therein to be read to the jury. The opinions of this court are not made of evidence of the facts therein recited for any purpose whatever, and so far as they decide questions of law they should be read to the court and not to the jury.

It is doubtful whether the writ of possession in case of *Harlan's Heirs v. Senton,* and the officer's return, were not admissible as conducing to show the extent of the appellants' claim and how they entered upon the land, and that the previous possession of Senton's was to their benefit; but there was no conflict in the evidence in regard to the manner in which they obtained possession, or the extent to which they claimed, and the refusal of the court to allow the writ to go to the jury cannot have prejudiced the appellants. It is evident that the contest was as to the possession and adverse claim of Dorch, and that the right of appellants was substantially conceded to all the land except that which the appellees claimed to have been in the possession of Dorch; and they claimed that the appellants had neither title to or possession of that, not on the ground that it was not claimed by them, but on the ground that their title had been tolled by the long continued adverse possession of Dorch. That this was regarded by both parties as the main ground of controversy is evident from the instructions asked.

Under such circumstances the appellants could not have been prejudiced by the refusal to admit the writ of possession and return, the only effect of which would have been to corroborate the uncontradicted parol evidence that they were in the actual possession of a part of Keith's patent claiming the whole. The court instructed the jury that if they were in the actual possession of any part of the patent boundary claiming to the extent thereof then they were in possession of the whole, and were entitled to a verdict unless Dorch had been in the actual adverse possession of the land when the cutting was done for a period of fifteen years.

The court did not err in modifying the second or in refusing the third instruction asked by the appellants. If Dorch had been in the adverse possession of the land for fifteen years before the supposed agreement to surrender he had become invested with title, and he could not be divested by an unexecuted parol agreement to surrender. The evidence in regard to his alleged agreement to surrender

and his recognition of the appellant's title was admissible for the purpose of rebutting the evidence offered by the appellees as to the character of his holding, but for no other purpose.

The declarations of Dorch while in possession of the land were admissible to prove the character of that possession, and the court did not err in permitting them to be proved. The instruction given seems to us to have been more favorable to the appellants than the law warranted. It was in effect assumed that the appellants were owners of the tract of land and had right to recover unless Dorch and those claiming under him had acquired title to it by possession.

We perceive no error to the prejudice of the appellants and the judgment is *reversed.*

Moore & Bennett, for appellants.
E. C. Phister and E. L. Dulin, for appellees.

WM. H. PELTON *v.* CITY OF HOPKINSVILLE.

Damages—Contractor—City Not Liable.

Where an improvement is being constructed in the city by an independent contractor, the city is not necessarily bound to answer for the carelessness or negligence of such contractor.

Liability of City.

If the work of constructing a city improvement is of such a character as to be likely to result in injury to persons or property even when skilfully performed, for any injury resulting from the dangerous character of the work and not directly from the negligence of the contractor the city may be liable.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

January 29, 1876.

OPINION BY JUDGE LINDSAY:

The contractor, Dozee, was an independent contractor. The fact that Molls was to superintend the work, with power "to reject any work and material in his opinion deemed imperfect and not agreeing with the plans and specifications" of the contract is not inconsistent with this conclusion. *Robinson & Pettit v. Speed, et al.,* Mss. Opinion, 1875.

The court should have instructed the jury upon this assumption, and not left it an open question as was done by instruction No. 3.

The city is not necessarily bound to answer for the carelessness or negligence of the contractor. If the work or any portion of it was of such a character as to be likely to result in injury to person or property even when skilfully performed, then it was intrinsically dangerous, and for any injury resulting from the dangerous character of the work, and not directly from the negligence or carelessness of the contractor, it may be held to answer.

But unless the work was of the dangerous character indicated, as the contractor was an independent one, the duty of the city to guard against his negligence in the obstruction of the streets, sidewalks and crossings, was of the same nature with its duty to look after and guard against the negligence of any other person. It is liable for injuries caused by its neglect or omission to keep the streets, sidewalks and crossing free from obstructions placed in them by the contractor or his servants; but as this liability must be based upon negligence, the appellant cannot recover unless the work was intrinsically dangerous, or unless the corporation had notice of the obstruction, or the circumstances were such that it, by using the exercise of reasonable diligence, could have had such notice, and then negligently failed to remove it.

The first and second instructions asked for appellant were properly refused. In each of them it was assumed that Dozee was the servant of the city, instead of an independent contractor. The concluding portion of instruction No. 3, given by the courts, was misleading, and prejudicial to appellant.

The jury should have been told that notwithstanding the liability of the contractor, in the state of case set out, still, if the crossing was obstructed, and the city had notice thereof, or could by the exercise of reasonable diligence in the discharge of its municipal duties have had such notice, and yet negligently failed or omitted to remove the obstruction, it was liable to answer for the injury.

Instruction No. 3 asked by appellant should have been given instead of the instruction No. 5, which the court did give. *Louisville, Cincinnati & Lexington R. Co. v. Case's Admr.*, 9 Bush 728.

For the single error pointed out above the judgment is *reversed* and the cause remanded for a new trial upon principles consistent with this opinion.

Sanders & Clark, for appellant.

H. A. Phelps & Son, E. P. Campbell, Harry Ferguson, for appellee.

W. H. DULANEY, ET AL., *v.* BOWMAN, ET AL.

Cities—Street Improvements—Contract for.

City councils may contract for street improvements without being petitioned therefor by taxpayers and property owners.

Assessments of Property.

Lot owners assessed for adjoining street improvements, where made in compliance with the ordinance and contract and completed according thereto, must submit to an assessment of such lots to pay the cost of such improvement.

Confiscation.

While the courts have power to arrest taxation, to prevent confiscation of property, such power will not be used, except to prevent legalized spoliation under the guise of taxation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 29, 1876.

OPINION BY JUDGE COFER:

By an ordinance passed by the general council of the city of Louisville, and approved by the mayor on the 11th of September, 1872, it was ordained that Eighteenth street, from the south side of Kentucky street to the center of Oak street, be improved by grading the same according to the provisions of an ordinance approved on the 5th of May, 1875, entitled "an ordinance concerning the improvement of streets, and curbing the same with stone curb and corner stones at the intersection of streets and alleys, block paving the gutters, making foot crossings, and paving the carriage way between the gutters with macadam pavement; the work to be done at the cost of the owners of ground fronting Eighteenth street on the east to one-half the distance to Gaulbert street, and on the west side to the depth of 210 feet, the work to be contracted for by squares."

The work from the center of Harney street to the center of Gallagher street, one square, was let to G. W. Hider, who gave bond, and on the 2nd day of October entered into a written contract with the city to do the work according to the provisions of the ordinance of the 11th of September, 1872, and the 5th of May, 1870, and to complete the same within nine months from the date of the contract. In March, 1873, the contract was transferred by Hider to the appellees, Bowman & Co., with the assent of the general council.

Bowman & Co. did the work according to the specifications of the ordinances mentioned in the contract, and it was received by the city,

and an apportionment of the cost among the owners of adjacent lots and ground was made by the city engineer, and approved by the general council, apportionment warrants were issued in accordance with the requirements; and the appellants, W. H. Dulaney and G. F. Downs, who owned lots on the east side of Eighteenth street, and Mrs. M. J. Dulaney, wife of W. H. Dulaney, who owns as general estate the ground on the west side of Eighteenth street from Harney to Gallagher street, having refused to pay the assessments against them for that part of the cost of the street improvement apportioned against them respectively, this suit was brought for the purpose of enforcing an alleged lien in favor of the appellees, Bowman & Co., and to sell the lots and ground of the appellants, Downs & Dulaney, and of Mrs. Dulaney, to satisfy the claims against them respectively.

The appellants all denied that the ordinance of the 11th of September ordaining the work to be done was passed at their instance or request; they also denied that said ordinance was legally passed by the general council, or that it is legal or valid, or that the contract was a legal or valid contract; and they denied that the apportionment of the cost of the work was legal or properly made, or that they are, or either of them is liable for any part of the cost of said work.

Mrs. Dulaney and her husband, as to the ground owned by her, say that she owns by descent from her father 173 acres of land adjoining and on the west side of Eighteenth street; that said land is and has been for many years past continuously used for agricultural purposes, and has not been divided into lots or devoted to city purposes; that it was not brought within the city limits at the request of herself or her husband; that the extension of the city limits so as to bring said tract of land within them was not necessary and was unreasonable; that she does not derive any greater advantages by said extension than were enjoyed before it was made; that her land is not required and is not necessary for city purposes; that the chief object of the extension was to increase the revenue of the city without regard to her interest; and that the effect of a recovery by the contractors will be to subject her property to burthens for the benefit of others without benefit to her. They also allege that for many years before, and up to within a short time of the doing of the work the price of which is sued for, there was a turnpike road where Eighteenth street now is, which was owned and kept in repair by a turnpike company; said tract of land bordered on the turnpike, and by means of that road access could be had to the tract of land; that

the city brought so much of the turnpike as was within its limits but refused to keep it in repair.

In view of the fact that the land of Mrs. Dulaney is used only for agricultural purposes, and the alleged lack of any benefit resulting to her from the improvement, it is claimed that the assessment as to her is in violation of that part of section 14 of article 13 of the constitution of Kentucky, which reads as follows: "Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."

The vice chancellor rendered judgment decreeing a lien on and a sale of the property of Downs & Dulaney and wife, and they have appealed.

The charter of Louisville, passed in 1870, provides for constructing and reconstructing streets where the entire territory through which such streets pass has been defined into squares by principal streets, but does not provide for assessments to pay for improving or repairing streets where squares are not thus laid off. *Caldwell, et al., v. Rupert, et al.,* 10 Bush 179; *Craycrafts v. Redd & Bro.,* Mss. Opinion, April 18, 1874.

But by an act of February, 1872, it is provided that the general council should have power to provide by ordinance or resolution for the improvement of public ways where the contiguous territory is not defined into squares by principal streets; that act also provides that in such cases the ordinance or resolution shall prescribe the depth on both sides of the street to be assessed for paying the cost, and the apportionment is required to be according to the number of square feet owned by the parties respectively within the depth prescribed by the ordinance. Sec. 9, Success's Charter and Ordinances, p. 71. The charter as originally passed, and which was, on this point, applicable alone to territory defined into squares, provided the same basis of apportionment except that corner lots to the width of not more than thirty feet, and to a depth to be prescribed by ordinance, were required to be taxed twenty-five per cent. more than other lots.

The territory east of Eighteenth street was defined into a square, but that on the west was not, and in making the apportionment the northwest and southwest corner lots were assessed at twenty-five per cent. more than any others, but on the west side of the street the whole was assessed at the same rate because it did not compose a part of a square. East of the street the territory was assessed to

one-half the depth of the square extending from Eighteenth to Gaulbert street, and as those streets do not run parallel to each other, the distance to which the taxing district extended back from Eighteenth street was not the same on all the lots, the distance at the northwest corner being 180 feet and at the southwest corner 311 feet.

It will thus be observed that the original charter and the amendment of February, 1872, were both resorted to for rules to govern the assessment. On the east side the assessment extended one-half the distance from Eighteenth street to Gaulbert street, and corner lots were assessed twenty-five per cent. more than other lots as required by the original charter, while on the west side the assessment was extended back 210 feet as prescribed by the ordinance passed under the amendment to the charter.

This seems to us to have been correct. The original charter and the amendment must now be construed as one act, and when so construed the requirements are as to defined squares that the assessment shall be by the fourth of a square, and as to territory not so defined the general council is left to fix the depth to which it shall extend.

The appellees had a lien on the ground assessed, for although it is not given by the act of February, 1872, when that act is considered by itself, yet it was given by section 12 of the original charter for the cost of improving public ways, and when by amendment of the charter other ways were authorized to be improved at the cost of the owners of property, a lien exists under section 12, for the latter are as much public ways as those authorized by the original charter.

It is insisted that because the depth to which the assessment extended on one side of the street is greater than that to which it extended on the other, that the assessment is, therefore, unequal and a violation of the rule that taxation must be uniform. Exact equality in taxation is not always attainable, and it is not perceived how it could have been more nearly attained than it has been in this case. The assessment was on the square foot, and each lot owner was required to pay a proportion of the cost equal to the proportion which the number of feet owned by him bore to the whole number of feet in the boundary taxed. No reason is perceived why the general council should have so laid out the district on the west of the street as to make it contain exactly the same number of feet contained in one-half the square on the opposite side. The evidence shows that if the street next west of Eighteenth street was extended through to Gallagher street, the square bounded by Harney, Eighteenth street,

Gallagher and the street west of Eighteenth street would be 420 feet deep from Eighteenth street west, and it may safely be assumed that if the street is ever extended that will be the size of the square.

Section 7 of the city charter provides that no ordinance shall be passed by the general council until it shall have been read in each board at two several meetings, and free discussion allowed thereon, unless that provision should be suspended by a vote of two-thirds of all the members elect to the board in which the proposed ordinance is pending. The proceedings of the board of aldermen show that the ordinance for improving Eighteenth street "was read once and ordered to be read a second time; and the second reading being dispensed with by a vote of two-thirds of the members elect, the same was passed." Yeas, 9; nays, 0.

This seems to us to have been a literal compliance with the charter provision. To dispense with the second reading was to dispense with provision that the reading should be at two several meetings, for if the reading at any time be dispensed with this necessarily dispenses with such reading at a subsequent meeting; having dispensed with the second reading entirely, it cannot have been necessary to recite on the record that such reading at the next or some subsequent meeting was dispensed with.

The charter requires ordinances for the improvement of public ways, when not petitioned for by the owners of a majority of the square feet of ground liable to be assessed for such improvement, to be voted for on their final passage by yeas and nays, and to receive the vote of a majority of the members elected to each board of the general council. The ordinance for the improvement of Eighteenth street was passed, but the ordinance of the 5th of May, 1870, which prescribes how improvements shall be made, and which is referred to both in the Eighteenth street ordinance and in the contract, was not so passed; and it is agreed that the assessment is for that reason illegal. The ordinance of the 5th of May is not an ordinance for the improvement of a public way, and is not the kind of ordinance referred to in this provision of the charter; it simply prescribes how improvements of certain kinds or classes shall be made.

If that ordinance had never been enacted at all, or had been repealed, or if the Eighteenth street ordinance had referred to a report of the city engineer for the kind and specifications of the work, or to an identified paper, not even of an official character, it would have been sufficient. Nor do we concur with counsel for the appel-

lants that the Eighteenth street ordinance is invalid because ordinance 377 had not been formally repealed.

The provision in the charter of 1870 that the ordinances then in force should remain in force until repealed, did not render an express repeal necessary, nor give to those ordinances the dignity or force of state statutes. The only object of the legislature in enacting this provision was to prevent the repeal of such parts of the old charter as were repugnant to the new, from operating, as it might otherwise have done, to repeal the ordinances passed under it.

The charter provides that "improvements, as applied to public ways, shall mean all work and material used upon them in the construction and reconstruction thereof, and shall be made and done, as may be prescribed by ordinance, at the exclusive cost of the owners of lots in each fourth of a square, etc. Under this provision all construction and reconstruction of the public ways of the city are required to be done at the cost of the owners of lots in each fourth of a square, i. e., the lots in each fourth of a square must be taxed to pay for the construction and reconstruction of the public ways adjacent to such fourth of a square; and as the law contemplates the improvement of the whole street at the cost of lot owners, it results of necessity that each fourth of a square must be assessed for its proportion of street intersections.

The ordinance required the contracts for the improvement of Eighteenth street to be by squares, i. e., all that part of the street for improving which the lots in the adjacent squares were liable, should be included in one contract, and one-half the width of Harney and Gallagher streets was therefore properly included in the contract in this case.

The contract and ordinance for improving Eighteenth street provided for the construction of foot crossings across that street; but instead of putting them across it they were constructed longitudinally with Eighteenth street extending half-way across Harney and Gallagher streets. This was not a compliance with either the ordinance or the contract, and it is insisted, therefore, that the lot owners are not liable for any part of the work done. These foot crossings at the contract price cost $106.37, and their cost is included in the apportionment against the appellants and in the decree of the vice-chancellor.

No objection was taken in the answer to this item, nor to any other, except by the general denials recited in the beginning of this opinion. The engineer's report of the apportionment in which each

item of the work done is separately and plainly stated, seems to have been filed with the petition; and it was appellant's duty to set forth in their answers any deviation from the terms of the contract which they meant to rely on to reduce the amount of the recovery. The work having been accepted by the city, the lot owners were certainly bound to pay for so much of it as was in fact done according to the ordinance and contract, and if any part of it was not so done, that fact should have been set up as a partial defense, and the charge for it might have been recouped from the contract price of the whole work. But as the appellants chose to rely upon a defense to the whole action, they are not entitled to the benefit of a partial defense not made.

We do not mean to be understood as deciding that mere defects in the execution of work of this kind can be inquired into after the work has been received by the city; all we mean to say is that if an item of work stipulated for is not done at all, or is done wholly outside of the requirements of the ordinance and contract, the lot owners may present that fact as a defense pro tanto.

Both the ordinance and contract sufficiently indicate the kind of improvement to be made on the carriage way. They both require macadam pavament, which is distinguished from "Telford macadam pavement" by the ordinance of the 5th of May, 1870.

The city council is made the exclusive judge of the necessity and propriety of making any street improvement which it has authority to contract for; and we need not, therefore, stop to inquire whether the old turnpike which formerly occupied the present site of Eighteenth street was sufficient for the public use or for the comfort and convenience of the owners of property situated on it.

The only remaining question deemed necessary to be particularly noticed is whether the land of Mrs. Dulaney is exempted from the assessment on account of its location and use. The evidence shows that for a considerable distance south of Harney street the ground east of Eighteenth street had been laid out into squares separated by principal streets, and the squares subdivided into lots, many of which have been sold and improved; it also shows that lots between Harney and Gallagher on Eighteenth street, and directly opposite to the land claimed to be exempted as farm land, are worth from fifteen to twenty-five dollars per front foot, and that Mrs. Dulaney's land has been considerably enhanced in value by the improvement. Her land is only separated by an ordinary street from the exterior

limits of property owned and used exclusively as city property, and which is to all intents and purposes a part of the city.

While we have repeatedly held that town taxation may be arrested by the judiciary on the ground that it is, in effect, the taking of private property for public use, we have constantly said, in effect, that such attempted taxation must be a flagrant outrage or palpable wrong before the courts can interfere. *Cheaney v. Hooser,* 9 B. Mon. 330; *City of Covington v. Southgate,* 15 B. Mon. 491; *Louisville v. Courtney,* Mss. Opinion.

The court must be able to see clearly and without danger of mistake that the execution is not in any proper sense a tax, but is in fact but legalized spoliation under the guise of taxation. It is impossible to say on the facts in this record that it is palpable that Mrs. Dulaney's land has been subjected to burthens without benefit to her. The evidence shows the contrary, and we cannot say that to compel her to pay the assessment would be the taking of her property for public use without compensation.

Wherefore the judgments appealed from are all *affirmed.*

R. J. Elliott, for appellants.
Russell & Helm, for appellees.
T. L. Burnett, for Louisville.

JOHN R. BRADLEY *v.* COMMONWEALTH.

Criminal Law—Assault with Intent to Kill—Indictment.

An indictment for assault and battery with intent to kill is good even though it does not contain an averment that it was done without previous malice.

Arrest of Judgment.

A motion to arrest judgment will only be sustained when the indictment fails to contain a statement of facts constituting a public offense within the jurisdiction of the court.

APPEAL FROM FLOYD CIRCUIT COURT.

February 1, 1876.

OPINION BY JUDGE COFER:

The indictment in this case was evidently found under Sec. 1, Art. 17, Chap. 29, of the General Statutes, which provides that "if any person shall, in sudden affray, or in sudden heat and passion, with-

out previous malice, and not in self-defense, shoot and wound another person with a gun or other instrument, loaded with ball or other hard substance, without killing such person; or shall, in like manner, cut, thrust, or stab any other person with a knife, dirk, sword, or other deadly weapon, without killing such person, he shall be fined," etc.

The indictment contains an allegation that the appellant did unlawfully in sudden affray and not in self-defense, cut, thrust, and stab George E. Keens with a knife, etc.; but does not contain any allegation that it was done without previous malice;" and it is contended that the omission is fatal, and that the court erred in refusing to arrest the judgment.

The court is only authorized to arrest judgment when the indictment does not contain a statement of facts constituting a public offense within the jurisdiction of the court. Sec. 271, Cr. Code. The only inquiry on this branch of the case, therefore, is whether, the allegation that the cutting was without previous malice being omitted, the indictment contains a statement of facts constituting a public offense within the jurisdiction of the court. That it does is, we think, beyond dispute. The facts stated show that the defendant is guilty of the common-law offense of assault and battery, even though there may not be sufficient averments to constitute an offense under the statute. We are, therefore, of the opinion that the court did not err in overruling the motion to arrest the judgment.

But if the indictment is only good as an indictment for an assault and battery, the instructions given were erroneous in respect to the punishment which the jury were told they should inflict in the event they found the defendant guilty. It is, therefore, necessary to decide whether the indictment is good under the statute.

The existence of malice could neither excuse or mitigate the offense denounced by the section under which the indictment was found; and it cannot, therefore, have been necessary for the protection of the defendant or to enable him to prepare for his defense that the existence of malice should be negatived by the indictment. The only purpose the legislature could have intended to accomplish by the use of those words was to distinguish the offense punished by that section from the crime described in section 2 of article 6 of the same chapter.

We therefore conclude that the indictment is good under the stat-

ute. No specific objections to the instructions given have been pointed out, and perceiving none ourselves the judgment is *affirmed.*

A. Duvall, for appellant. T. E. Moss, for appellee.

MARTIN & BALL *v.* SHELBY & DALTON.

Practice—Instructions Now Made a Part of the Record.

Instructions offered but refused to be given by the court do not become a part of the record by a mere recital in an order of the court that they were asked and refused. They must be made a part of the record either by the court's order or by bill of exceptions.

APPEAL FROM BALLARD CIRCUIT COURT.

February 2, 1876.

OPINION BY JUDGE COFER:

Instructions Nos. 1, 2, 3, 4 and 11 asked by the appellants and refused by the court are not made a part of the record, although the order of court recites that they were asked and refused, and that the appellants then excepted to the refusal. The rule is that instructions refused do not become a part of the record by a mere recital in an order of the court that they were asked and refused.

Being refused, they are the private papers of the party offering them, and never came to the custody of the clerk as a part of the record unless expressly made part of it by the order or by bill of exceptions; but instructions recited on the record as given thereby became a part of the record, and when identified by the certificate of the clerk may be considered by this court.

To instructions numbered 6 and 7 given by the court, the appellants excepted, and these we may consider as a part of the record, but they seem to us to have been correct. Instructions 8, 9 and 10 were given on motion of appellants.

The verdict does not seem to us to be so palpably against the evidence as to warrant a reversal on that ground. Two juries have found against the appellants on the evidence, and if the propriety of their finding was even more doubtful than we think it is, we should not feel authorized to interfere.

Judgment *affirmed.*

Reeves & Brown, Thomas, for appellants.

W. G. Bullitt, Bugg & Bishop, for appellees.

JAMES C. TOWNSEND *v.* W. O. BRITT.

Practice—Bond for Costs—Dismissal of Action—Waiver.

The defendant has the right to have an action against him dismissed when a non-resident plaintiff fails to give bond for costs, but by failing to move a dismissal he waives the right.

Notice by Surety to Sue.

Where not waived by the creditor a written notice to sue must be served on him by a surety, if such surety desires him to sue the principal.

APPEAL FROM GRAVES CIRCUIT COURT.

February 2, 1876.

OPINION BY JUDGE LINDSAY:

Although the defendant had the right at any time before judgment to have the action dismissed, because the non-resident plaintiff did not give bond for costs when he commenced his suit, yet as no such motion was made in the court below, the question cannot be raised in this court for the first time.

It is immaterial whether appellant did or did not notify appellee to sue in the Tennessee courts. It is sufficient for the purposes of this action that he did not make a successful defense in the Tennessee courts. And as we cannot reverse the judgment of the court, we need not inquire as to the effect of appellee's laches before said judgment was rendered.

The proof does not show that the appellee waived written notice as to the desire of appellant that he should proceed with legal diligence to collect his judgment out of the property of the principal debtor. The most that appellant swears on this subject is that appellee "did not require me to give him a written notice, and he did not say he would or would not sue." If he had said he would sue, that might have been construed into a warrant of written notice, but his failure to say what he would do will admit of no such deduction. In the case of *Hamblin v. McCallister,* in 4 Bush 418, when the surety offered to give written notice, the creditor said, "I do not require a written notice; I waive a written notice, a verbal notice is all that is necessary." Then as no such notice was given before judgment, as required appellee either to sue or to proceed with legal diligence after judgment to collect his debt, it is necessary to inquire whether legal notice to proceed to its enforcement was given after the rendition of the judgment.

Appellant swears, "I did instruct Britt by a letter to go on and make his money after judgment." It is not proved that Britt received this letter, but we will assume that he did. Appellant does not state how long after judgment it was that the letter was written.

An execution was sued out about six months after the date of the judgment. It was levied on a tract of land, the only property owned by the principal debtor, subject to levy and sale. There was no unnecessary delay, after the suing out of this execution, until the land was offered for sale. It was not the fault of appellee that it would not sell, and he was not bound to indulge appellant until the levy could be enforced by a sale.

From anything that appears in this record, appellee sued out his execution, as soon as he received appellant's letter, if he ever did receive it. The court below did not err in allowing the Tennessee record to be read on the trial of the cause. The exception shows that it was then on file.

The judgment of the court below is *affirmed.*

Stubblefield & Smith, for appellant. W. H. Miller, for appellee.

HUSTON, JOHNSON & Co. *v.* T. J. STROW.

Mortgage—Rents of Mortgaged Real Estate—Receiver.

The mortgagor of real estate is entitled to receive the rents, and the tenant having leased such premises and paid the rent for the term or having agreed to pay it to the owner, cannot be required to pay such rent to the mortgagee before he receives title through foreclosure.

Receiver.

The mortgagee in an action to foreclose may have a receiver appointed to collect the rents and take charge of the property, where it is shown that the mortgaged property is in danger of being lost, removed or materially injured and that the property is probably insufficient to discharge the mortgage debt, but when no receiver is appointed the mortgagee is not entitled to such rents.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 7, 1876.

OPINION BY JUDGE PETERS:

One Morton being indebted to appellee in the sum of $5,000 due the 10th of July, 1870, executed to appellee a mortgage on a store-

house and lot in Paducah to secure the debt; Morton retained possession of the property, and on the 1st of October, 1870, after the condition of the mortgage had been broken, leased it to Huston, Johnson & Co., who entered as the tenants of Morton, and continued to occupy until the premises were sold in the fall of 1874, under appellee's judgment of foreclosure; and not selling for enough to satisfy appellants' debt, interest and costs, he instituted this action to compel appellants to pay him a reasonable rent for the premises from the 26th of March, 1874, until the same were sold under his judgment, he having notified them that he would look to them for the rent from said date. The law and facts having been submitted to the court, and a judgment having been rendered in favor of appellee against appellants for the rent as claimed, they have appealed to this court.

Appellants first leased the premises from Morton from the 1st of October, 1870, till the 1st of January, 1872, and paid the rent to Morton, from whom they leased with the knowledge and without objection on the part of appellee. They then rented from Morton for two years from the 1st of January, 1872, and paid the rent to him without objection or complaint from appellee; and on the 1st of January, 1875, they again rented the premises for one year at the price of $800 per annum, all of which they had paid Morton before the 26th of March, 1875, a part having been paid in repairs on the premises.

Sec. 329, of the Civil Code, provides that in an action by a mortgagee for a foreclosure of his mortgage and sale of the mortgaged property, a receiver in like manner may be appointed, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

The right of the mortgagor to remain in possession of the mortgaged premises until the same is sold, and to enjoy the use, profits, or rents, or until an action is brought for a foreclosure, and a receiver be appointed, upon it being made to appear that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that there is a probability that the property is insufficient to pay the debt, is clear and manifest.

The remedy pointed out by the statute in such cases is direct, plain and effectual. But appellee chose a different course, one not

sanctioned by positive law nor sustained by precedent. And we therefore conclude the relief granted him by the court below was unauthorized, especially as it is shown that appellants had paid the rent to Morton before they were notified. Wherefore the judgment is *reversed* and the cause is remanded for further proceedings consistent herewith.

King & Gilbert, T. E. Moss, for appellant.
P. Palmer, for appellee.

THOMAS A. DORSEY *v.* JAMES H. SEARS.

Husband and Wife—Liability of Wife for Necessaries.

Where goods are purchased on the wife's credit by the husband and were necessaries for the family, the estate of the wife may be subjected to pay for them.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 10, 1876.

OPINION BY JUDGE PRYOR:

The evidence is conclusive that the goods were purchased upon the credit of the wife and were necessaries for the family. The word necessaries includes not only such articles as were purchased by the wife, but such as were purchased by the husband and charged to the wife for his use.

The husband purchased clothes that were suitable to his condition in life, and of no greater value than the wife with her small estate could afford to expend upon him. He was insolvent. The account was charged to the wife, and every article purchased or with which she was charged were necessaries for the family. It was not necessary that she should have given her obligation with the husband at the time she bought the goods. After the account fell due the husband and wife executed their joint note for the money, and the credit having been given to her, the estate of the wife should have been subjected to its payment. The merchant and his clerk both make out a clear case under the statute, and the only evidence relied on to rebut their statements is that of the husband, and his statements conduce to corroborate their testimony.

In purchasing boards to cover part of the building owned by the wife, the husband gave to the merchant an order in the wife's name

to pay the vendor in goods and charge to the wife. This could not have been done if the credit was given to the husband or the latter looked to for payment of the account. Contracts made by the husband for his own purposes, such as the purchase of stock or the renting of lands, may not come within the rule, but as the facts are presented in this record there is no reason for shielding the estate of the wife from the payment of these goods.

The only appeal on this record is that of Dorsey against the appellee. The judgment dismissing the petition as to Dorsey is *reversed* and cause remanded with directions to subject the estate of the wife to the payment of the debt.

Thomas Kennedy, for appellant. Hargis & Norvell, for appellee.

NOAH ROUSE *v.* COMMONWEALTH.

Criminal Law—Reasonable Doubt—Instruction—Perjury.

An instruction in a criminal case is erroneous which fails to say to the jury that before it can convict it must believe the existence of recited facts beyond a reasonable doubt. Saying to the jury it must acquit if it has a reasonable doubt as to the guilt of the accused does not dispense with the necessity of charging it that it must believe from the evidence beyond a reasonable doubt that such facts existed before it could find the accused guilty.

APPEAL FROM CAMPBELL CRIMINAL COURT.

February 11, 1876.

OPINION BY JUDGE PRYOR:

The leading instruction in the case given in behalf of the commonwealth and the one reciting the facts authorizing a conviction, fails to say to the jury that they must believe the existence of these facts beyond a reasonable doubt. They were told that if they had a reasonable doubt as to the guilt of the accused they must acquit; still this did not dispense with the necessity on the part of the court in telling the jury that they must believe from the evidence beyond a reasonable doubt that such facts existed before they could find the accused guilty. The instruction is proper with this omission supplied.

The jury may believe the accused guilty and still have some doubt as to the existence of a material fact necessary to a conviction. In this case it is alleged in the indictment that the accused as a witness in the civil action made oath that the promise on the part of New York to pay was at the dinner table; and whether he made such a

statement or not being involved in much doubt, shows the importance in telling a jury on a case like this not only what facts are necessary to establish guilt, but that they must believe the existence of those facts beyond a reasonable doubt. Under the proof in this case the jury should have been told that if the promise to pay was made to Rouse at the dinner table or elsewhere they must acquit, as it is uncertain from the proof that the statement as to where the promise was made was confined to the conversation at the dinner table.

It was also improper for the juror in the civil action to state on this trial what he regarded as the material evidence in the civil case; this was for the court and jury trying the accused to determine, and not the witness. This is a criminal case. In the civil action that had been litigated and the right of recovery established, the accused was a witness, and upon his testimony, as the proof conduces to show, a verdict was rendered for the plaintiff; and now in a criminal action against him, with the witnesses in the civil action or those who know the nature of the defense appearing as witnesses for the commonwealth, he has been found guilty of perjury. His character for truth is sustained by his neighbors. The machine was in the possession of the parties, who were made liable in the civil action, and had been for several years. The wife had made a partial payment on it of ten dollars, and it is admitted that the balance has not been paid, the only question being that the husband insists that the wife was the purchaser, and she alone responsible. This court has no power to reverse a judgment of conviction because it is against the evidence, and it is only alluded to in order to show the importance of giving to the accused the benefit of a reasonable doubt as to the existence of every material fact necessary to conviction.

The accused is entitled to a new trial. Judgment *reversed* and cause remanded with directions to award a new trial and for further proceedings consistent with the opinion.

Duncan Roberts, for appellant.

R. W. Nelson, T. E. Moss, for appellee.

WILLIAM WITT *v.* MAY WILLISON.

Married Women—Judgments—Jurisdiction.

Judgments against married women and infants when they are before the court by virtue of process in cases over which the court has jurisdiction are not void, but are binding, though erroneous, until reversed; but such married women or infants may appeal from such judgments within one year after the removal of the disability.

APPEAL FROM CAMPBELL CHANCERY COURT.

February 16, 1876.

OPINION BY JUDGE PRYOR:

The appellee, together with her husband, was made a defendant to the action instituted by Vaughan in the year 1846, and actually served with process. The object of that action was to compel the husband and wife, together with the other defendants, to convey to him the land in controversy. The court rendered a judgment in that action granting the relief, and requiring the parties to make the conveyance. Upon their failure to convey, the commissioner of the court was ordered to make to Vaughan a deed passing to the latter all the title of the appellee and the other defendants, which was done. Vaughan and his vendees have been in the possession of this land since 1843, or upwards of thirty years. This action was not instituted until January, 1874, and whilst the statute of limitations might not have affected the rights of the married woman, still the judgment of the court was binding until reversed, and her only remedy was by an appeal to correct the erroneous judgment or by bill of review instituted within proper time. The judgment was not void, as the court had jurisdiction of the subject-matter and the parties. *Dawson v. Litsey,* 10 Bush 408; *Bourne and Wife v. Simpson,* 9 B. Mon. 454; *Downing's Heirs v. Ford, Sallee, et al.,* 9 Dana 391.

Judgments against infants and *femes covert* when they are before the court by virtue of process in cases over which the court has jurisdiction, are not void, but are binding until reversed. An appeal must be taken within three years next after the rendition of the judgment, unless the party appealing was an infant married woman, or of unsound mind at the time of its rendition; then they may appeal within one year after the removal of the disability, although the three years may have lapsed. Civil Code, Sec. 884. By the Revised Statutes a writ of error should be sued out within three years after judgments, and if the party was laboring under a disability he had two years after its removal in which to prosecute the writ. It has been adjudged that a writ of error and a bill of review for errors apparent on the record are equivalent remedies, and that a bill of review is barred when the right to a writ of error is lost. *Mitchell, et al., v. Berry, et al.,* 1 Met. 602. The appellee's disability was removed in January, 1871, and this action, if it is to be taken as a bill of review, was not instituted until January, 1874. Her right to a writ of error or bill of review was then barred.

The judgment is *reversed* and cause remanded with directions to dismiss the petition.

E. W. Hankins, for appellant.
W. S. Albert, J. R. Hallem, for appellee.

L. D. THOMPSON, ET AL., *v.* H. L. W. BRATTON, ET AL.

Married Women—Disability.

The disabilities placed upon married women are for their protection and they cannot be divested of their title to real estate unless the requirements of the statutes authorizing them to alienate their lands are substantially complied with.

APPEAL FROM GRAVES CIRCUIT COURT.

February 18, 1876.

OPINION BY JUDGE PETERS:

The disabilities placed upon married women by the law are mainly for their protection and well being, and they cannot be divested of their title to real estate unless the requirements of the statutes whereby they are authorized to alienate their lands are at least substantially complied with.

The deed under which appellants claim the land was acknowledged by Mrs. Jones, who was at the time a married woman, before W. W. Carr, who certifies the acknowledgment under his hand as acting and sole presiding judge of the county court of Macon county aforesaid, the 8th day of July, A. D. 1857. He fails to certify it under his hand and seal of office as required by Sec. 22, Subsec. 2, Chap. 24, 1 Rev. Stat. 282-3.

This section just named provides that a deed of a married woman, to be effectual, shall be acknowledged before some of the officers named in the preceding section and recorded in the proper office; and subsection 2 thereof gives the form of the certificate of acknowledgement, and requires the seal of office to be affixed to it, which we have already seen was omitted from the deed under which appellants claim. As appellants claiming under Bratton failed to show title in themselves, the judgment is *affirmed.*

L. Anderson, for appellants. R. K. Williams, for appellees.

W. B. DUNCAN, ET AL., *v.* GEORGE GRIFFY, ET AL.

Transfer of Courses to Federal Court—Security.

Where the conditions exist to authorize the transfer of a cause from the state to federal court, the applicant for transfer must at the time of making his application, offer good surety that he will enter said cause in the federal court and file copy of papers as required by the Federal Statutes.

APPEAL FROM HICKMAN COURT OF COMMON PLEAS.

February 18, 1876.

OPINION BY JUDGE LINDSAY:

This appeal is from an order of the court of common pleas, overruling the motion of the appellants to transfer the cause to the circuit court of the United States for the district of Kentucky.

The motion was based upon the provisions of section 639 of the Revised Statutes of the United States. The appellants are citizens and residents of states other than Kentucky; the appellees are citizens and residents of said last named state. It is claimed that the amount, in dispute, exclusive of costs, exceeds the sum of five hundred dollars.

In order to have a reversal in such a case, the petitioner must at the time of filing his petition offer in the state court good and sufficient surety for his entering in the circuit court of the United States on the first day of its session copies of the process against him, and of all pleadings, depositions, testimony and other proceedings in the cause, etc. The record before us does not show that appellants offered any such surety, or in fact any surety at all. This condition precedent not having been complied with, the common pleas judge properly *overruled* the motion for the removal.

Further than this it was necessary that the appellants should make it appear to the satisfaction of the court that the amount in dispute, exclusive of costs, exceeded the sum of five hundred dollars. The amended petition of appellees filed at the time the motion was made, showed that the amount in controversy at the time appellants were made parties was less than $400. We have no bill of exceptions showing what evidence the court heard on this subject whilst the motion was pending, and we cannot, therefore, adjudge that it was made to appear that the amount in dispute brought the cause within the provisions of the act of congress.

For these reasons, either of which is sufficient, the order overruling the motion for the removal is *affirmed.*

Steele & Steele, for appellants. E. Q. Bullock, for appellees.

MARGARET ROGERS, ET AL., *v.* MARION BURBERIDGE'S COMMITTEE, ET AL.

Revivor of Causes of Action—Notice of Revivor.

A cause may be revived by rule or notice to those representing a deceased litigant, but the notice must be served at least ten days before the revivor can be made and must name the parties.

APPEAL FROM SCOTT CIRCUIT COURT.

February 19, 1876.

OPINION BY JUDGE PRYOR:

If the construction is given the act of the 19th of January, 1866, amending Sec. 437 of the Civil Code, as insisted by counsel for appellant that it should be given it, the practical result would be that no revivor could be had until the second term of the court succeeding the death of the party. The party desiring the revivor would be required to obtain the rule at one term, and upon service it could be revived at the next term. This mode of revivor with such a construction, instead of affording a more speedy remedy for reviving actions, would retard litigation and cause more delay than a revivor by an ordinary action. The manifest meaning of the amendment, although singularly expressed, is that the revivor may be had by rule or notice, the object being that those representing the decedent shall have ten days notice of the intention to revive before the revivor can be made.

The notice, however, to revive the judgment rendered in March, 1871, as well as the original action, is clearly defective. It fails to show or state the name of the party against whom the judgment was rendered or the action pending. The notice is to revive a judgment against the appellants obtained at the March term, 1871, for the sum of $456.20, without naming the party against whom judgment had been obtained, and the same objection applies to the notice for reviving the action. The notice given would indicate that the judgment had been rendered in the name of Tilford's committee against William E. Rogers's Ex'r and Mary E. Rogers, the parties against

whom it was intended to revive the judgment and action. This court in the absence of the briefs of counsel, or a knowledge of facts outside of the record, could not ascertain from the notice that a judgment had been rendered against Varnon or an action instituted against him.

As to the revivor of the action against the devisee, Mrs. Rogers, it appears that at the time the notice was signed and served, no such action was pending in the Scott circuit court. After the rendition of the judgment and the appeal to this court, the Scott circuit court was divested of all power over the case, and not until the mandate of this court had been filed was the power of the Scott circuit court over the case restored. Nor was any action pending on the day the motion was to have been made, and if made on that day, it could not have been entertained, as the right of the lower court to take any action in the premises depended alone upon the filing of the mandate.

As the case must go back, it is proper to notice other objections made by counsel. Burberidge was not a necessary party to the motion to revive. By the express provisions of the act of 1866 the revivor may be against the personal representative and against his heirs, devisees or legatees, jointly or severally, and besides actions may now be instituted, jointly or severally, against the parties bound. The court below had the power, if the preliminary steps had been properly taken, to revive the action and also to render a judgment against the executor and devisee. In *Hagan, et al. v. Patterson,* 10 Bush 441, the party was compelled to proceed alone against the heir in a court of equity, and for that reason it was held that it was proper for the chancellor to determine what property had descended to the heir instead of leaving it to the judgment of his ministerial agent. In a case like this, the right to prosecute a joint action against the representative and devisees cannot be questioned, the right being conferred by the statute, and we see no reason why the judgment was not proper.

The mandate directing the judgment to be entered against Varnon was evidently an oversight, and the technical objection cannot prevent a judgment against the representative and devisees. For the reason indicated the judgment as to Mary E. Rogers and her husband, William E. Rogers, is *reversed* and cause remanded for further proceedings consistent with this opinion.

A. Duvall, for appellants.
J. F. Robinson, W. S. Darnaby, for appellees.

CITY OF COVINGTON *v.* JOHN N. FURBER.

Codification of City Charter—Power of Legislature—Compensation of Commissioners.

The legislature has power to provide for the codification of a city charter and may legally provide for the compensation of commissioners to do the work, such compensation to be paid by the city.

APPEAL FROM KENTON CIRCUIT COURT.

February 19, 1876.

OPINION BY JUDGE COFER:

By an act approved January 13, 1872, the General Assembly appointed the appellee and four others commissioners to revise and codify the charter of the city of Covington, and made it the duty of the city to pay to said commissioners reasonable compensation for their services under the act. The appellee brought this action against the city to recover compensation for his services as commissioner, and obtained a judgment therefor, and the city has appealed.

There is no evidence that the city or city government desired the passage of the act, or in any way assented to or accepted the services for which compensation was claimed, or took any definite action in regard to the matter until after the work had been completed and submitted under the provisions of the act supra to a popular vote, and rejected by the people of the city.

The only question made by counsel for the city, which we deem it important to notice at any length, is whether the General Assembly had power under the constitution to appoint commissioners to revise the charter of the city and to bind the city to pay them for their services without the consent of the inhabitants or government of the city.

Counsel insists that the work of the commissioners not having been performed at the request of the city, and the work having been rejected by a popular vote, the city derived no benefit from it and cannot therefore be constitutionally required to pay for it. It was decided by this court in *Slack, et al., v. Maysville & Lexington R. Co.*, 13 B. Mon. 26, that the legislature has power to coerce contribution by a local community to objects of local necessity or convenience, and that this may be done without a petition from any one, or upon the solicitation of the representative of the local community, or upon the general knowledge and judgment of the legislature.

The legislature had power to decide for itself and without con-

sulting the city authorities or the representatives of the city to determine whether the charter of Covington should be revised, and having decided that it should it had a right to impose upon the city the burden of making the required revision, on the same ground that it had power to charge the city with any other matter which in the judgment of its members was required by the interests or convenience of the local public, provided it is not apparent that the object to be accomplished is not one in the accomplishment of which they have no particular interest. *Cheaney v. Hooser,* 9 B. Mon. 330.

This court cannot say that it is apparent that the people of Covington had not a particular interest in the object sought to be accomplished by the act providing for a revision of the charter of that city. Nor will the fact that the charter prepared by the commissioners appointed by that act was rejected by the people relieve the city from paying for its preparation. The revision of the charter was a matter relating to the interest of the local public, and was designed for its benefit. The legislature did not derive its power to pass the act from the city or its people, and the validity of the act could not be affected by the popular vote rejecting the work of the commissioners.

The evidence as to the value of appellee's services fully warranted the judgment. Judgment *affirmed.*

John P. Harrison, for appellant. J. N. Furber, for appellee.

W. F. BRAMEL'S ADM'R, ET AL., *v.* JAMES H. BRAMEL, ET AL.

Mental Capacity—Deeds and Gifts.

A parent has the absolute right in disposing of his property to give to some of his children all of it and to others nothing, but when he is old and infirm and not able to understand or comprehend how he is disposing of his property, such facts may turn the scale and establish his mental incapacity to dispose of his property.

APPEAL FROM FLEMING CIRCUIT COURT.

February 23, 1876.

OPINION BY JUDGE COFER:

The two deeds executed by W. F. Bramel on the 27th of January, 1870, embraced all his estate of every description, except one note on W. T. & J. A. Bramel for about $950, one on Dixon for about $460, and one on Taylor for $325, and an old hearse, a few cabinet maker's tools, and a small lot of lumber, the last three items estimated by the appellant at $50.

W. T. & James A. now claim $500 of the $950 note belonged to one of them, and that their father gave them the balance of that note and the $460 note on Dixon, and the note on Taylor as well as the hearse, tools and lumber.

Before making the deeds and these alleged gifts, W. F. Bramel had property worth over $4,000, and was indebted only a little more than $500. He had five children, two sons and three daughters. For some years before his death the sons had used a part of his farm and do not appear, at least for a portion of the time, to have paid any rent; they seem to have transacted their father's business mainly, and to have collected debts due to him, and to have kept his accounts and made settlements with those having dealings with him. On the night before the deeds were made they went to the house of Dixon, where their father had been living a great portion of the time after he ceased, in 1867, to keep house, and on that occasion Dixon executed the note for $460. W. F. Bramel was then in quite feeble health, but on the next day he was taken by one of his sons to the house of Taylor, some miles distant. Dixon swears that he went relunctantly and cried on leaving his house and said he was unable to go; some of the members of the family of Taylor swear that when he reached their house he was greatly prostrated and suffered severely, and they had serious apprehensions that he would not live until morning.

One of the sons accompanied the old man to Taylor's, and the other went at his instance, as both swear, to procure the draftsman who wrote the deeds. No reason is assigned for removing the father from the home of his daughter. Nor does it appear that she or her husband had any intimation that conveyances were to be made or that they had ever been informed that he had any such purpose in view at any time. The draftsman and the father-in-law of James A. Bramel arrived at Taylor's the next day, and the deeds were drawn and one of the notes was assigned, and an indorsement made on the $950 note that $500 of it belonged to James, and assigning the residue to him and William. Taylor was the brother-in-law of W. F. Bramel, and as other facts in the record show he and his family were on the most intimate terms with the old man; yet they seem not to have known anything of the nature of the writing being drawn, and to have been ignorant of their character for some time afterwards.

The old man remained at Taylor's from the time the deeds were executed until in July, when he was removed to the house of the

father-in-law of James, where he died in the following September. At the time the deeds were made Dixon resided in Flemingsburg, the county seat af Fleming county, and where, we may safely presume, a draftsman could have been procured and the deeds acknowledged, but the old gentleman in his feeble condition was removed to the county of Mason, and we may assume that a clerk was sent for to take and certify the acknowledgment. No reason is assigned why the deeds were not drawn and executed at Dixon's, or why their intended execution was made known to the other children.

There is a large amount of evidence respecting the mental and physical condition of W. F. Bramel at that time. All the witnesses agree that he was much emaciated and extremely feeble, and Taylor and his wife and other members of Taylor's family, as well as many other witnesses, swear that his mind was so impaired that he was incapable of taking a survey of his estate and of disposing of it according to a fixed plan of his own; while many others say he was competent to do so, and some say his mind was as good as it ever had been. From the statements of the witnesses as to his mental condition it would be difficult to decide whether he had such capacity as to enable him to make a valid disposition of his estate. But when the evidence bearing directly upon that point is considered in connection with other evidence in the record, we have felt no hesitation in coming to a conclusion.

His removal from his accustomed home in the house of his son-in-law and daughter in Flemingsburg, where a draftsman could doubtless have been had, and where the deeds could have been acknowledged, to the county where a draftsman and clerk had to be sent for at some distance, the concealment from his daughter of the fact that the conveyances were to be made, and the condition of the grantor at the time, are alone sufficient to arouse grave suspicions that some unfair advantage was intended.

Add to these the further facts that W. F. Bramel is shown by all the evidence to have had the warmest affection for all his children; that his daughters are proven to have been worthy of his love and in need of his bounty; and that if he understood what he was doing and did it of his own volition, he was putting it out of his power to give them anything whatever; and it is difficult to believe that these conveyances were understandingly and willingly made.

This conclusion is strengthened by other facts in the record. The deed to the land recites that it is made in consideration that the grantees would pay a debt of $535 secured by a mortgage on the

land, and the further consideration that they would support him during life and pay his funeral expenses, and of indebtedness to them for services rendered in the accumulation of the land. The evidence fails to show any services rendered by the grantees after they attained their majority, in paying for the land, or that they performed any unusual amount of service for him at any time, but rather tends to show that they were his debtor after they became of age.

The deed to the personal property recites that it is made in order to make the sons equal to the daughters in the distribution of his estate. The evidence shows beyond dispute that no advancements, beyond a very small amount, had been made to either of the daughters. Instead of making all equal, the two sons get near $2,000 each, while the three daughters are not shown by the evidence in this record to have received all together one-fourth of that sum. It is true that James and William swear to large advancements to all the girls; but when required to state in detail in what those advancements consisted they wholly fail; and it is entirely apparent from their own testimony that no advancements, beyond a few dollars, were ever made to any one of them.

The evidence also shows that after the deeds were made and the notes assigned, the old gentleman repeatedly said that he intended to secure, or had secured to Mrs. Strode $1,000, and intended if he got well enough to get out, to buy a small parcel of land for Mrs. Glasscock, and have it secured to her. Yet at the time he made those declarations, if he knew what he had embraced in the deeds and assignments, and what estate he had at the date of their execution, he must have known he had not the means with which to do so.

He had no motive to put false recitals in the deeds, and if he did not know they were false in some respects, especially that in the deed of the personal property, he lacked capacity to make a valid disposition of his estate. If he knew they were false and yet executed the deeds with those statements in them, that fact would, in view of the state of his health, and the circumstances under which he acted, be convincing evidence that the deeds were not his voluntary act but influenced by a power he was unable to withstand.

We recognize in its fullest extent the absolute right of a parent of disposing mind to dispose of his property among his children in such way as his judgment or even his whims or caprices may dictate, but when an old, frail and sick man makes a grossly unequal distribution—one which is in conflict with the dictates of natural affection, with nothing in the relation between him and his children or in their

respective circumstances and conditions in life which seem to justify it, if the burden of showing affirmatively that he was capable and fully understood what he was doing is not cast upon those who assert such disposition, it is at least incumbent upon them to explain fully and clearly every circumstance tending to cast suspicions upon the fairness and candor of their own conduct. When under such circumstances as exist in this case, the conveyances relied upon contain upon their faces false recitals, the belief of which would incline the mind to execute such conveyances, the evidence that the disposition was fully understood and intended should be clear and convincing. *Harrell, et al., v. Harrell, et al.,* 1 Duvall 203.

The conveyances and assignments under which the appellees claim should be set aside, and an account should be taken of advancements; the appellees should be credited with any sums paid to or for W. F. Bramel, and for any balance due them they are entitled to a lien on the land. After ascertaining the amount of the estate and advancements, the five children of W. F. Bramel should be made equal, by the distribution and division.

Judgment *reversed,* and cause remanded for further proceedings in conformity with this opinion.

E. C. Phister, for appellants. Card & Alexander, for appellees.

E. E. SPENCER *v.* CARRIE SPENCER, ET AL.

Will—Construction.

Where a will bequeaths a life estate in real estate to three persons and after probate two of such devisees die, the third is entitled to a life estate in all of the land and the owner of the fee cannot take the possession until after the death of the life tenant.

APPEAL FROM LOGAN CIRCUIT COURT.

February 25, 1876.

OPINION BY JUDGE PETERS:

This controversy arises out of the second clause of the will of J. W. Spencer, which is in the following language:

"That the remainder of the land reverting to me at my mother's death, including the dwelling house and all other buildings upon the land, I will to my brother and sisters, E. E. Spencer, Mary Jane Tisdell, and Martha Simmons, to be held and used by them

during their lives, and at their death to revert to my nephew, Wesley E. Simmons; but in case of his death before reaching his majority it shall revert to my father's family or heirs."

The testator had in the first clause of his will devised to his wife one-third of said tract of land absolutely, and this suit was originally brought by his widow against the other devisees for partition.

Before the institution of the suit Mrs. Martha Simmons had died, and during its pendency Mrs. Mary Jane Tisdell died. One-third of the land was partitioned, and set apart to Mrs. Carrie Spencer, the widow of testator, which is satisfactory to all parties. But E. E. Spencer being the survivor of the three life tenants under the will, claims the whole of the remaining thirds of the tract during his life, and W. E. Simmons, the devisee in remainder, claims that upon the death of Mrs. Tisdell and Mrs. Simmons he had a right to the immediate possession of the two-thirds to which they were entitled under the will. The court below having adjudged to him said two interests, E. E. Spencer prosecutes this appeal.

We cannot concur in the conclusion of the circuit judge. According to the language of the will the land given to his brother and sisters was to be held and used by them during their lives, and was to revert to his nephew at their death, or at the death of his brothers and sisters; for the pronoun "their" evidently refers to them, the brother and sisters, and includes all of them. Moreover, the testator gives the land to them "to be held and used by them during their lives;" he makes no provision for a surrender of part of the land on the death of one or two of the life tenants. The devise is to them as a class of the whole interest, and as long as any one of the class survives that survivor must hold and enjoy the estate.

Wherefore so much of the judgment as deprives E. E. Spencer of any part of the remainder of the land after setting apart to Mrs. Carrie Spencer her portion thereof during his life is *reversed,* and the cause remanded for further proceedings consistent herewith.

W. E. Simmons must pay the costs of this appeal.

James H. Bowden, for appellant. A. G. Rhea, for appellees.

WILLIAM STONE ALBERT *v.* A. HARRIS.

Judgment—Process.

A judgment taken without notice served or an appearance by a defendant is void.

Taxation.

Under a city charter providing that the city has a lien upon all property for general city taxes to be enforced by judgment of the mayor's court upon conditions named a sale of such property pursuant to such a judgment is ineffectual to convey title, except in cases where every prerequisite to such a judgment appears in the record.

APPEAL FROM CAMPBELL CHANCERY COURT.

February 29, 1876.

OPINION BY JUDGE COFER:

Judgment without notice of any kind, and without opportunity to defend is void in American jurisprudence, and especially so when a person whose property is thus proceeded against is attempted to be barred, by a judgment thus obtained, of any defense he may have unless he presents it before a sale is made in execution of the judgment.

When such extraordinary and arbitrary proceedings are relied upon to divest a citizen of his property, it should appear that every requisite of the statute had been strictly complied with.

Section 12 of the act of February 18, 1860, to amend the charter of Newport, provides that general city taxes shall be levied after a return of the assessment; and section 13 provides that the city shall have a lien upon all property for general city taxes levied thereon, which may be enforced by judgment of the mayor's court without process, when it shall appear by the tax bill filed in said court, and such other evidence as the records of the city may furnish, that the taxes have been regularly levied, that the tax-payers are delinquent, that the tax bills have been regularly returned by the collector from the first to fifteenth of October in each year, endorsed, and that he has found no personal property to distrain for said taxes.

The jurisdiction of the mayor's court to adjudge sales for the payment of taxes is specially limited and extraordinary, and every prerequisite to such a judgment should appear in the record thereof. Unless the enumerated pre-requisites appear, it does not appear that the court had jurisdiction, and its judgment is void.

The record of the judgment recites that "The plaintiff (the city of Newport), by her attorney, having filed an office copy of her tax bill against the defendant for the said year 1871, and moved for judgment, and it appearing that said tax has been regularly levied against the said lot No. 38, T. N. B. V., to the city of Newport for said year 1871, that the payor thereof is delinquent, and the same

remains unpaid; that said tax bill has been regularly returned by the collector from the 1st to the 15th of October, 1871, and that as the collector has found no personal property to distrain for said tax, penalty and the costs, it is now adjudged," etc. No tax bill is copied into the record, although the mayor certifies that the whole proceedings, as it appears upon his record, is contained in his transcript, which is made part of the petition in this case, and a copy of which is before us.

The judgment recites that a tax bill was filed in the mayor's court, and that it appeared that the tax had been regularly levied, but it does now say how it appeared that the levy was regular. The charter says it must "appear by the tax bill filed in said court, and such other evidence as the records of the city may furnish, that the taxes have been regularly levied." A general tax could only be regularly levied after the property was assessed, (Sec. 12) and the levy was required to be made by ordinance. No tax could, therefore, be legally levied until an assessment was made, and an ordinance passed declaring the levy and the amount of tax on each one hundred dollars' worth of property (Sec. 5, Act February 6, 1858). It was, therefore, necessary that it should appear from the assessment, the ordinance making the levy and the tax bill, that the levy had been regularly made before the mayor's court had jurisdiction to adjudge a sale.

Nor do we find in the record either a statement in the judgment or other evidence that any penalty had been or could have been legally assessed. The charter gave the council power to add penalties not exceeding 5 per cent. for a failure to pay on or before the first of August of each year, and the mayor's judgment imposes a penalty of 20 per cent., but it does not appear that such penalty had ever been authorized or directed by the city council.

The tax and penalty amounted to $15.30, but the collector sold for $21.05. This sum was made up, as appears, of the tax and penalty, $15.30, mayor's cost, $1.25, allowance to commissioner for selling, $1.50, attorney, $2.50, clerk, 50 cents. It does not appear that either the general assembly or the city council had authorized these items of cost to be taxed, and the sale was, therefore, for $8.55 more than seems to have been warranted by law.

The charter required the commissioner making the sale, to make report thereof to the mayor's court, but if any such report was made it does not appear in the record, and the mayor having certified that the transcript furnished by him is full and complete, we can come to

no other conclusion than that the report which the record recites as made was merely verbal. Such a report was a nullity, and the deed made by the president of the council passed no title. We are, therefore, of the opinion that the appellant failed to exhibit title to the lot and that he has not shown a right to the relief sought.

But the court erred in rendering judgment to sell the lot. The appellant did not ask such a judgment. He was in possession, and the court should have dismissed his petition instead of adjudging a sale, the effect of which may be to dispossess him. This he did not ask and may not desire.

The judgment is, therefore, *reversed,* and the cause is remanded with directions to dismiss the petition. No judgment will be rendered for cost in this court.

W. S. Albert, for appellant. E. W. Hawkins, for appellee.

PETER MURPHY *v.* THOMAS MCROBERTS.

Executor—Ejectment—Heirs.

A personal representative empowered to sell land by the terms of a will has no right to maintain an action of ejectment against those in possession. The title to such land is in the heirs and they must be made parties to such a suit.

APPEAL FROM PENDLETON CIRCUIT COURT.

February 29, 1876.

OPINION BY JUDGE PRYOR:

We have been referred to no authority by counsel for the appellees giving to the personal representative empowered to sell land by the will of the devisor the right to maintain an action of ejectment against those in possession. In this case there is a mere naked power to sell, and the legal title to the land is in the heirs of the devisor. A power of attorney to sell and convey passes to the attorney no such title as will enable him to maintain ejectment. Nor does it appear that the petition of the heir in this case to be made a party was ever acted on. There was no answer filed to that petition, nor was the heir made a party plaintiff by an order of court.

The administrator in this case had settled his accounts many years prior to the institution of the action and the heirs had released him, according to his own statement, from complying with that provision

of the will directing a sale of the land. He may have acted as the agent of the heirs, and with the authority to sell may have assumed the power to control the realty; but he was vested with no such title as enabled him to maintain ejectment. We are rather inclined to the opinion, however, that the parties in the court below regarded the filing of the petition of Henry Guess as making him a party to the record. There seems to have been no objection to its filing, and as the appellants, by their answer, asked that the heirs should be brought before the court, the case should be heard on his petition. Upon the return of the case he should, by an order of court, be made a party plaintiff, with leave to amend so as to unite the other heirs with him and to give a more definite description of the land.

We see no interest that the administrator, with will annexed, had in the controversy unless the heirs or those interested should require that he should execute the trust, and it is only from the fact that the petition of Guess was filed without objection, and the inference from the facts that he was regarded as a party to the record by the appellants, that he be allowed to amend his petition. Although he may have been regarded as a party, we are not disposed to uphold the verdict upon the pleadings as they now appear. The case must go back for further preparation.

The judgment is *reversed* and cause remanded with directions to award appellants a new trial, and for further proceedings consiistent with the opinion.

C. H. Lee, for appellant. W. J. Perrin, for appellee.

MARIAH AVERY *v.* J. M. ELDER, ET AL.

Decedent's Estates—Widow—Suit of Creditor.

Where there is no administration of a decedent's estate and a suit is brought against the widow who has taken the property no recovery can be had where no averment is made that the personal property of decedent received by the widow was of greater value than she had a right by law to have set apart to her, before the payment of debts.

APPEAL FROM CLINTON CIRCUIT COURT.

March 1, 1876.

OPINION BY JUDGE PETERS:

Although it is alleged that W. C. Avery died intestate, it is not alleged that no administration had been granted on his estate, nor

is appellant sued as executrix de son tort, but she is sued as the widow, and it is alleged that after the death of her husband, she took into her possession all of his personal estate, worth over the amount of the judgments of appellees. It is also alleged that decedent was a soldier of the U. S. government in the late war and that appellant received the amount due him for a horse, for his back pay and the bounty due him for his services in the army to a greater amount than would be sufficient to satisfy said judgments. But it is not alleged in the petition that the personal estate of decedent, which was received by the widow, was of greater value than she had a right by law to have set apart to her before the payment of debts. As to the back pay and bounty received by her for the services of her husband in the late war, this court has repeatedly held that in such cases where the government has paid the money to the widow, or to the children of a soldier, it becomes the money of the widow, or children, and is not subject to the debts of the deceased soldier.

The allegations of the petition, therefore, are not sufficient to authorize a recovery against appellant in any aspect of the case presented. Wherefore the judgment is *reversed* and the cause remanded with directions to dismiss the petition.

J. T. Montgomery, for appellant.
J. A. Brents, for appellees.

T. L. ANDERSON *v.* A. A. GRADY, ET AL.

Appeals—Jurisdiction.

The court of appeals has no jurisdiction of an appeal taken from an order of the court which was not a final order.

Final Judgment.

A final judgment is one which finally determines the rights of the parties.

APPEAL FROM BARREN CIRCUIT COURT.

March 2, 1876.

OPINION BY JUDGE COFER:

The orders appealed from in this case are not final orders within the meaning of section 15 of the Civil Code; and this court, therefore, has no jurisdiction of this appeal. If the appellant desired to rest his case upon his demurrer he should have so intimated to the

circuit court, and allowed such judgment to be rendered as that court deemed right, and then have prosecuted his appeal from the judgment.

Until the action is disposed of by a judgment finally determining the rights of the parties so far as the circuit court is concerned, no appeal will lie.

Appeal *dismissed.*

J. H. Lewis, for appellant.

MARY F. STROWD *v.* STANLEY & SON, ET AL.

Husband and Wife—Husband's Rights in Wife's Land—Married Women —Husband's Creditors.

Under the statutes the husband has the power to rent the wife's land for not more than three years at a time and receive the rent. He may mortgage the crops on such land resulting from his own labor.

Married Women.

If a married woman desires to secure the fruits of her own labor or accumulations, she must in conjunction with her husband pursue the mode pointed out by the statute authorizing her to trade as feme sole.

Husband's Creditors.

Secret transactions between husband and wife, when the wife is not authorized to trade as a feme sole, are not to be regarded with favor nor allowed to defeat the husband's creditors.

APPEAL FROM WARREN CIRCUIT COURT.

March 2, 1876.

OPINION BY JUDGE PRYOR:

The conveyance to the wife of one of the tracts of land gives to her a general estate, and as to the other title it is in the husband. The husband has the power by an express provision of the statute to rent the wife's land for not more than three years at a time and receive the rent, and if so, we cannot well see why he may not mortgage the crop upon it resulting from the proceeds of his own labor or that of his wife. The husband is entitled to the wife's earnings, and if she desires to secure the fruits of her own labor or what she may accumulate in the way of personalty she must in conjunction with her husband pursue the mode pointed out by the statute author-

izing her to trade as feme sole. *Uhrig, et al., v. Horstman & Sons,* 8 Bush 172.

The husband states that he purchased the land upon which the tobacco was raised and paid for it in corn, and a mare and colt, except $130, upon the promise by the wife that she would refund him the money and take the land, which she did; that he expected her to pay for it when he made the purchase with her money. Such transactions between husband and wife, with no evidence of record to notify purchasers and creditors of the claim of the wife, are not to be regarded with much favor, and particularly when the creditor has sold to the husband and wife goods that were no doubt necessary for the comfort of the family. While the general estate of the wife will not be sold except as authorized by statute for debts created by herself and husband, still the products of the general estate will be, for the reason that the husband is entitled to the rent, and for the additional reason in this case that the goods furnished by the appellees contributed to the support of the family.

There is no record evidence of any authority to invest the wife's money in this land or to create a separate estate in the wife, and from the proof in the case we are not disposed to give it the character of separate estate in order to defeat the claims of creditors. The horses with which the crop was cultivated cannot be adjudged to belong to the husband, although they may have been claimed by the wife, in a contract between the wife and the creditors of the husband. It may be that the wife is entitled to the land as against the husband, and if so she should take such steps as will secure it against the claims of future creditors.

The judgment is not prejudicial to the appellant, and must be *affirmed.*

H. J. Beauchamp, for appellant.
J. H. & J. M. Wilkins, for appellees.

ANDREW KINSER, ET AL. *v.* A. J. ROBERTSON, ET AL.

Mortgage—Husband and Wife.

A voluntary conveyance to the wife will not defeat a creditor who took a mortgage from the husband after such conveyance to secure a debt created before the conveyance was made.

APPEAL FROM METCALFE CIRCUIT COURT.

March 3, 1876.

OPINION BY JUDGE COFER:

The mortgage to the appellant is valid as to A. J. Robertson, and the conveyance to his wife being voluntary and subsequent in date to the creation of the indebtedness to Mrs. Kinser, is void as to her, and the debt having been created before the passage of the homestead law we perceive no valid reason why the mortgage may not be enforced.

The liability was created in 1863 or 1864. The execution of the note and mortgage did not extinguish the old liability, but merely furnish evidence in a different form of the existence of the debt. *Lowry v. Fisher, et al.*, 2 Bush 70; Kibbey v. Jones, 7 Bush 243.

The court, therefore, erred in dismissing the petition as to Mrs. Robertson, and the judgment is *reversed* and the cause is remanded with directions to render judgment directing a sale of so much of the land embraced in the deed from W. W. Robertson to Mrs. M. F. Robertson as will satisfy the debt sued for and the interest thereon and the cost of the suit.

Garnett & Dehoney, for appellants.

A. H. HENNINGER *v.* CHARLOTTE HENNINGER.

Divorce—Wife Insane.

Where the husband in his petition for divorce avers that his wife had been judicially found to be of unsound mind, he is not a competent witness against her.

APPEAL FROM ROBERTSON CIRCUIT COURT.

March 7, 1876.

OPINION BY JUDGE COFER:

The appellant was married to the appellee in Claremount, Ohio, in 1838. He alleged that they lived together as husband and wife until in 1862, when she left him, and that they have lived separate and apart without cohabitation ever since; that in 1866 he removed to what is now Robertson county, in this state, and had resided there continuously up to the commencement of this suit, July 9, 1873; and upon the ground that they had lived separate and apart without co-

habitation for five years, he sought a divorce from the bonds of matrimony.

There is no competent evidence of the time of their separation. The appellant gave his own deposition, in which he says they separated in 1862, and have lived separate and apart ever since. This deposition was not excepted to, but should be rejected by the court of its own motion. Neither husband or wife is a competent witness against the other. The appellant, in an amended petition, alleged that the appellee had been judicially found to be of unsound mind, and this furnishes an additional reason why he was incompetent as a witness.

Aside from the appellant's deposition, there is no evidence when they ceased to live together, or that when he came to Kentucky they separated with an intention not to live together again. For aught that appears, except from some incompetent declarations of the appellant which he introduced as evidence, there was no such separation as is contemplated by the statute until she came to Kentucky in 1870; and even then, the evidence strongly conduces to show that she was insane. Counting from the time of her arrival in this state to the time of the commencement of this suit, the parties have not been shown to have lived separate and apart as much as five years. During the greater part, if not all of that time, the appellee was insane.

We concur with the court below in the conclusion that the appellant is not entitled to a divorce.

Judgment *affirmed.*

J. A. & C. M. Buckler, for appellant.

METCALFE COUNTY COURT *v.* J. G. SCOTT, ET AL.

Corporation—Bonds for Costs.

A county is not a corporation within the meaning of the statute requiring all corporations to give bonds for costs when instituting actions in court.

APPEAL FROM METCALFE CIRCUIT COURT.

March 8, 1876.

OPINION BY JUDGE COFER:

A county is not a corporation within the meaning of Sec. 3, Chap. 26, Rev. Stat., requiring that when any corporation shall institute

an action in any court, it shall, before the commencement thereof, give bond with surety to pay all costs that accrue either to the opposite party or to the officers of the court.

Counties are corporations only in a restricted sense. They are public corporations created by the state as agencies in the administration of civil government, and are, therefore, parts of the state government; and it cannot be supposed that the legislature intended to impose upon them the burden of giving bond with surety before they would be permitted to institute actions necessary to the proper exercise of their functions.

The statute was intended to protect the defendant in suits instituted by private corporations, and to secure to the officers of the state payment for services rendered in suits prosecuted by such corporations, but does not apply to public corporations. The court, therefore, erred in sustaining the motion of the appellees and in dismissing the action because no bond for costs had been given.

Judgment *reversed,* and cause remanded with directions to overrule the motion, and for further proceedings.

J. W. Compton, Sandidge & Allen, for appellant.
A. J. James, for appellees.

JOHN TOMERLIN *v.* G. TERRY, ET AL.

Conveyance of Real Estate—Liability of Grantor.

While there may be an implied agreement upon the part of a grantor who received the price to refund to the grantee the amount overpaid under the contract of sale, this obligation does not embrace a nominal grantor who joins in the deed but receives no part of the purchase-price.

APPEAL FROM TODD CIRCUIT COURT.

March 10, 1876.

OPINION BY JUDGE LINDSAY:

The deed from Blakey & Terry shows upon its face that Terry was only a nominal vendor, and that he merely joined in the conveyance to pass the legal title out of himself. It shows that Blakey conveyed in his character of trustee for Mrs. Bibb. There is no complaint of a breach of warranty of title. The complaint is that there is a deficit in the quantity of land conveyed.

There may be an implied agreement upon the part of those who sold the land and received the price paid therefor, to refund the amount overpaid, under the terms of the contract of sale, but as Terry neither did nor could have received any portion of this excess, and as Blakey received nothing as an individual, there could have been no implied undertaking upon their part, or upon the part of either of them, to refund to appellants.

As Blakey was sued as an individual, and as Terry was not liable in any capacity, the court properly dismissed appellant's petition.

Judgment *affirmed.*

Perkins & Perkins, for appellant. Terry & Kennedy, for appellees.

ABNER MINTON *v.* L. W. BEARD.

Conveyance of Real Estate—Judicial Knowledge.

The court judicially knows that a named county is in the state of Kentucky and that a named town is the county seat.

Inadequate Price.

The mere inadequacy of price is not cause for setting aside a judicial sale of real estate, when conducted in good faith and there is no proof showing unfairness or irregularity; but when inadequacy is coupled with the fact that no description of the land was given in the advertisement of sale, to enable bidders to know what they were buying and whether they are buying free of liens or not, a sale will be set aside.

APPEAL FROM BUTLER CIRCUIT COURT.

March 14, 1876.

OPINION BY JUDGE PRYOR:

Although the petition is defective no demurrer was entered by the appellant, but an answer filed curing the defect by placing directly in issue the want of title. The case upon this issue was tried, and such a title exhibited by the appellee as enabled him by his deed to pass to the appellant a perfect title. The court judicially knows that the county of Washington is in this state, and that the county seat is Springfield. Therefore the presumption at once arises and is conclusive upon the facts of this record that the will of Walton was admitted to probate in this state. The will of Walton passes to the wife a fee simple estate in the land. The other objections to the title made by appellant are not available.

It seems to us, however, that the exceptions to the commissioner's report of sale should have been sustained. There is no description in the notice of sale of the land to be sold or the amount of the judgment to be made, and while these facts, disconnected from any other consideration, might not invalidate the sale, when taken in connection with the great inadequacy of price, the chancellor should have ordered a resale. The party had entered upon the land, having purchased it at the price of four hundred seventy-five dollars, and made improvements upon it, and had paid three hundred dollars of the purchase money; and his vendor in this proceeding becomes the purchaser and obtains a deed to the whole tract for one hundred dollars, leaving his vendee still indebted to him in the sum of seventy-five dollars. The chancellor will not disturb a sale for the mere inadequacy of price when it appears that the proceedings have been conducted in good faith; and there is an absence of proof in the record showing unfairness or any irregularity in the proceeding.

In this case it does not appear from the advertisement how much money is to be raised by the sale, nor is there any description given of the land so as to invite bidders, except by a reference to the deed filed in the record and tendered by the appellee. The party intending to purchase upon an inspection of this deed finds a lien retained for a part of the purchase money, and is likely not to know whether this lien will be superior to his rights if he purchases, and certainly cannot tell whether it is the same lien for which the land is to be sold without investigating the whole record. These facts, connected with the inadequacy of price, should be held sufficient to set aside the sale. The appellant is not entitled to a rescission of the contract and under the proof the judgment of sale was proper. For the reasons indicated the judgment confirming the report of sale is *reversed* and cause remanded with directions to cancel the deed to the appellee and order a resale of the property, and for further proceedings consistent with this opinion.

B. L. D. Guffy, for appellant. William Ward, for appellee.

JOHN A. STIFF, ET AL., *v.* F. M. STIFF, ET AL.

Guardian and Ward—Bondsmen's Liability.

The sureties, in each bond where a guardian is under two separate bonds, are liable to the ward for any money which came to the hands of their principal, whether received before or after the date of the bond upon which they are sureties.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

March 14, 1876.

OPINION BY JUDGE COFER:

The sureties in each bond are liable to the ward for any money which came to the hands of their principal, whether received before or after the date of the bond upon which they are sureties. *Elbert v. Jacoby,* 8 Bush 542; *Boyk v. Gault, et al.,* 3 Bush 644.

The credit for the board and clothing of the ward was properly rejected. During the years 1861, 2 and 3, and a portion of the year 1864 the ward's father was living, and the guardian was not appointed until August, 1864. During the lifetime of the father he was liable for the board and clothing of the child; and if the appellant is not to be deemed to have boarded and clothed him as an act of hospitality, his claim for compensation was against the father, and not against the child, and especially so as he had not then been appointed guardian.

The evidence shows that from 1864 to the time when the appellant, John A. Stiff, was removed from his office of guardian, the appellee was abundantly able to earn, and did earn as much as his board and clothing were worth. The answer does not contain a counterclaim or a set-off, and no reply was necessary.

Perceiving no error, the judgment is *affirmed* as to all the appellants except Leonard Cashman. He does not appear to have been served with process, and did not appear in the action.

The judgment as to him is *reversed*, and the cause is remanded, for further proceedings.

J. G. Haswell, for appellants. R. H. Bowmer, for appellees.

R. S. HUDSON, ET AL., *v.* THOMAS S. HUDSON, ET AL.

Sale to Defraud Creditors—Preference of Creditor.

An insolvent debtor cannot legally sell property to one creditor for the purpose of preferring him to the exclusion of his other creditors and in contemplation of insolvency.

APPEAL FROM PULASKI CIRCUIT COURT.

March 16, 1876.

OPINION BY JUDGE PETERS:

At the times of the sales of the whisky and other personal property

by Thomas S. Hudson to William Hubble, who had manifested some uneasiness on the subject, and the night before the sale by Thomas S. Hudson of the whisky there in Louisville to him, he went to where John P. Hudson lived, who was a partner in the whisky, and spent the night with him to prevail on him to agree to a division of that whisky, and on the same day the agreement was made Hubble purchased it from Thomas S. Hudson. He afterwards purchased from him one yoke of oxen, eight head of cattle, two mules, one wagon, and one mare, at the agreed total price of $496, all of which he credited on the indebtedness of Hudson to him. The live stock and other personalty retained by Hudson were of little value compared with the value of that sold to Hubble.

Besides his indebtedness to Hubble, he owed a number of other debts, amounting to a large sum, considering his means, and he was unable to pay them. He proves he was pressed by his creditors before and at the time of the sales to Hubble, and had no money; and J. P. Hudson proves that he told Hubble that the partnership debts of Thomas S. Hudson and himself were not paid; and he then told him that said debts must be paid, and Thomas S. Hudson's only chance to raise money was by a sale of the whisky in Louisville, and that he was bound to sell it at some price to pay his debts. Besides Hubble and Thomas S. Hudson were brothers-in-law, and Hubble was in a situation to know the failing circumstances of Hudson.

From the evidence in the case all of Thomas S. Hudson's property, real and personal, left after the sale to Hubble, was insufficient to pay his debts and he was insolvent at the time. We are, therefore, constrained to conclude that the sale was made to Hubble by Thomas S. Hudson for the purpose of preferring Hubble to the exclusion of his other creditors and in contemplation of insolvency.

Wherefore the judgment dismissing the petition is *reversed* and the cause is remanded for further proceedings consistent herewith.

T. Z. Morrow, for appellants. A. J. James, for appellees.

LULA HUFF, ET AL., *v.* HENRY DEHAVEN, ET AL.

Conveyance of Real Estate—Mental Capacity—Undue Influence.

A father having mental capacity and where no undue influence is used upon him may legally convey the major portion of his real estate to one child to the exclusion of the other children.

Executor De Son Tort.

An executor de son tort is liable to the rightful representative of a decedent and not to the heirs or distributees. The claims of the heirs are postponed to the rights of creditors.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

March 17, 1876.

OPINION BY JUDGE PRYOR:

The proof in the case conduces to show that the appellee, Henry Dehaven, had labored upon the farm of his father for many years; that he was industrious and economical in his habits; and there is nothing unreasonable in his having accumulated a few thousand dollars during a period of twenty or thirty years. He was entitled by contract with his father to an interest in the annual profits of the farm, and having devoted his whole life to the accumulation of means for his father as well as himself, the fact that the latter conveyed to the son his homestead fails of itself to establish either a want of capacity on the part of the father to make the conveyance, or the undue influence of the son in procuring it.

The old man in 1868 had then on hand in money, notes and government bonds as much as eight thousand dollars that he then distributed between his children and grandchildren. He executed to his son a bond for title to the land long before the deed was executed. The bond was in his (the father's) handwriting, and the execution of the deed was but carrying out his intentions evidenced by his own written signature and by his declarations made prior to as well as long after its execution. Isaac Dehaven seems to have been a man of more than ordinary brains and qualifications, and up to his death retained his mental vigor sufficiently at least to enable him to fully comprehend the nature and character of his estate and to dispose of it understandingly. In fact, there is but slight evidence tending to show that his mind was at all impaired, and none evidencing the exercise of any undue influence over him by his son. The evidence of some of the heirs who are contesting the appellees' right to the land show the character of services the son rendered the father and the obligation resting upon the latter to give to this son more than the other children. The court below acted properly in dismissing appellants' petition.

As to the personal estate it is unnecessary in the present case to determine whether the appellee has fully accounted for it or not. A delimitation of that question would not preclude the administrator

of Isaac Dehaven from instituting an action to recover the personalty or its value. Only two years had elapsed from his death to the institution of the present action, and the heirs have no cause of action against the appellees to make them account for the personal estate (if any) wrongfully disposed of and that belonged to the father.

The fact that the appellees allege there are no debts against the estate cannot alter the rule. An executor de son tort is liable to the rightful representative, and not to the heirs or distributees. The claims of the heirs are postponed to the rights of creditors, and if one heir can so dispose of the personal estate of the executor, or having it in possession fails to account, he is liable to an action by the other heirs for its amount, and compelled to distribute. The claims of creditors would be in effect disregarded, and the heirs allowed to consume or dispose of the whole estate without regard to his rights. If the chancellor will compel the heir to distribute in such a case, he will be allowed to distribute without the aid of the chancellor, and no administration made necessary. The heirs or some of them have the right to administer, and this is the only legal or equitable step to be taken in order to have a suit for a settlement, that the chancellor may determine who is entitled to the fund. *Vance's Adm'r v. Vance's Heirs,* 5 B. Mon. 521. Judgment below is *affirmed.* Judge Cofer not sitting.

Kinchloe & Eskridge, for appellants.
Williams & Brown, for appellees.

O. S. WILLIAMS *v.* G. W. WARNER, ET AL.

Mortgage—Preference of Creditor.

A mortgage or sale of property not at the time subject to the claims of creditors cannot be set aside at the instance of creditors.

APPEAL FROM GARRARD CIRCUIT COURT.

March 17, 1876.

OPINION BY JUDGE LINDSAY:

It is not averred that the mortgage executed by George W. to John Warner, was actually fraudulent.

The only claim, therefore, that appellant can assert to the proceeds of the corn, must arise out of the averment that it was executed in contemplation of insolvency, and to prefer John W. Warner and

Robinson to the other creditors of the mortgagor. This averment is distinctly and unequivocally denied. The only proof conducing in any degree to sustain it is the agreed fact that the mortgagor had no property, or very little property subject to levy and sale under execution, at the date of the execution of the mortgage.

When it is considered in connection with this fact, that the property mortgaged was not, itself, subject to the payment of appellees' debts, it is difficult to perceive how the preference given could bring the case within the reason of the statute of 1856. This court has heretofore held, and still adheres to the doctrine, that a mortgage or sale of property not at the time subject to the claims of creditors, cannot be set aside under the provisions of the act in question. *Lisby, White & Cochran v. Perry & Clayton,* 6 Bush 515.

It may be that a sale or mortgage of a growing crop, made with the intent to commit an actual fraud, can be disregarded when the crops mature; but that question does not arise in this case, as no actual fraud is charged. It does not matter that John W. Warner, was paid nothing as surety for George W. He has the right to have the proceeds of the mortgaged property applied to the payment of the debt for which he is bound as surety.

From all that appears in this record we may infer that George W. Warner purchased the land from Robinson before the debt to appellant was contracted. Such being the case, he has the right to pay for said land and hold his homestead as against such debt, and equity will not compel Robinson to refuse payment, and resort to his lien on the land.

Judgment *affirmed.*

Burdett & Hopper, for appellant.
John A. Anderson, for appellees.

WILLIAM M. GREEN *v.* LUCINDIA WILSON.

Decedent's Estates—Personal Property.

The title of personal property of an intestate vests in his personal representative as soon as he qualifies and it becomes his duty upon appraisement to set aside to the widow or infant children articles of personalty exempted from distribution. The widow in such a case has no cause of action to recover property not thus set aside for her.

APPEAL FROM RUSSELL CIRCUIT COURT.

March 18, 1876.

OPINION BY JUDGE COFER:

The title to the personal estate of one who dies intestate, vests in his personal representative as soon as he qualifies. When appraisers are appointed it is their duty to set apart to the widow, if there be one, or if there be no widow, then to the infant children of the intestate, if any, the articles of personal property exempted from distribution, if on hand; and in lieu of such as are not on hand, to set apart money or other property as directed by the statute. As soon as the designated articles are set apart, or other property is set apart in lieu of them, the title vests in the widow, if there be one, and if not, in the infant children. But when the designated articles are not on hand, the widow acquires no right to other property in lieu of them unless it is set apart to her by the appraisers.

In this case the appraisers seem to have set apart to the widow as many of the designated articles as were found on hand, and in lieu of those not on hand they set apart to her money, and for that she must look to the funds in the hands of the administrator. She, therefore, had no right to recover against the appellant, even though he unlawfully converted the corn in contest in this case. The corn was not set apart to her, and if it belonged to the intestate the title was in the administrator, who alone could sue for its conversion. She is entitled to receive from the administrator the amount of money indicated by the appraisers, in lieu of exempted articles she did not get; and he is liable to her if he has funds, or if there are funds which he ought to get, with which to pay her, but she cannot maintain this action for property not set apart to her.

The court, therefore, erred in overruling the appellant's demurrer to the petition.

Judgment *reversed* and cause remanded with directions to sustain the demurrer, and dismiss the petition.

J. F. Montgomery, A. J. James, for appellant.
William S. Stone, James E. Hays, for appellee.

LEET, CRUTCHFIELD, ET AL., *v.* D. C. ROBERTSON.

Attachment—Payment—Sale to Defraud Creditors.

Where parties agree that the question as to whether the attachment should be sustained shall be submitted to the court and parol evidence heard on the motion to dissolve, if it was irregular for the court to hear that branch of the case, the irregularity was waived by the agreement.

Payment.

One cannot pay his debts by offering to pay them in horses at a price fixed on them by himself, and an offer to do so not accepted will not relieve the debtor or his sureties.

Sale to Defraud Creditors.

Where property of an insolvent debtor is sold by him to a creditor for one-third of its value, the fact affords some evidence that the sale was pretended and was to defeat his creditors.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 21, 1876.

OPINION BY JUDGE PETERS:

The record shows that the question as to whether the attachment should be sustained was by consent submitted to the court, and parol evidence heard on appellants' motion to discharge it. If it had been otherwise irregular to hear that branch of the case, then that irregularity was waived by consent of the parties.

It certainly did not absolve Crutchfield from his obligation to pay the debt he owed Tichner by offering to pay it in horses at a price fixed on them by himself, or in other commodities not desired by his creditor, nor did such offer relieve his surety or furnish him with any excuse for placing his effects out of the reach of his creditors.

It is manifest from the evidence that the prices which Saunders claims to have paid for the horse by purchase, and for the wood and lumber Leet claims to have purchased, were little more than one-third of their fair value, and there was no visible change of possession of any or either of the articles after the asserted sale; and it further appears from the evidence that Crutchfield was apprehending trouble on account of the debts for which appellee was his surety, of which Saunders was apprised, as Vanover proves, and circumstances point very strongly to the conclusion that Leet was not ignorant of them.

From the facts as exhibited we cannot doubt that the pretended

sales were made for the purpose of removing the property from the reach of Crutchfield's creditors, and especially to protect it from the payment of the debts on which appellee was his surety.

Judgment *affirmed.*

Ray & Walker, for appellants. Owen & Ellis, for appellee.

NEWTON WAINSCOTT *v.* COMMONWEALTH.

Criminal Law—Evidence of Dying Declarations.

To be admissible as evidence dying declarations must be made under a sense of impending death. There must be an impression of almost immediate dissolution.

Evidence.

A defendant in a charge of homicide, asserting self-defense, should be permitted to prove the state of his clothing and the bruised condition of his face on the evening succeeding the affray.

APPEAL FROM OWEN CRIMINAL COURT.

March 21, 1876.

OPINION BY JUDGE LINDSAY:

Certain witnesses, against the objections of the appellant, were allowed to prove statements made by the deceased, relative to the circumstances attending the shooting and wounding from which he died. The question is whether these statements were admissible as dying declarations.

William Clifton proves that the deceased said all the time he did not think he would recover. He said as soon as shot, "I am shot and killed. I will never get well. I do not think I will ever get well." Another witness proved that he said he was badly hurt, and that he was badly shot, and still another proved that he said he did not think he could get well and still another that he said he believed he would die.

This is the substance of all that is proved relative to the opinion or belief of the deceased as to his condition. There is nothing to show that his physician, or any other person informed him of the nature of his injuries or of the danger of impending death. It is essential to the admissibility of dying declarations that they shall be made under a sense of impending death. There must be an impression of almost immediate dissolution. If it appears that the deceased

at the time of the declaration had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, it is inadmissible. Nor is it enough that he believed that he would not recover. There must also have been a prospect of immediate dissolution. 1 Greenleaf on Evidence, Sec. 158. The exclamation made at the time of the shooting, and when the deceased was necessarily ignorant of the nature and extent of his wounds, is not sufficient.

None of his statements show that he regarded his speedy death as the necessary result of his injuries. He seems to have believed that he would ultimately die. He did not think he would recover, but he is not proven to have spoken at any time under a sense of almost immediate dissolution. The proof does not show that at the time he was speaking there was a prospect of speedy death. If the deceased was attended by a physician, his testimony would have thrown much light upon this branch of the case; but he was not examined as a witness. We are constrained to conclude that the proof as to the opinion of the deceased with regard to the character of his wounds, and the probability of his speedy death was not such as to authorize his statements to be proved to the jury, and that the objections of the appellant should have been sustained.

The appellant has no right to complain on account of the exclusion of the evidence touching the experiments made, as to whether the report of the pistol could be heard at the distance testified to by one of the witnesses examined by the commonwealth. It was proper to allow the commonwealth to prove that the appellant fired off a pistol, on the morning of the shooting. That fact tended to show that he was armed when the affray with the deceased commenced.

The proof of his announcement, made on the same morning, as to what he intended to do on that day, ought to have been excluded. He made no reference to the deceased, nor to William Clifton, and there is nothing in proof to show that he then entertained hostile feelings toward either of them.

The appellant should have been allowed to prove the state of his clothing and the bruised condition of his face on the evening succeeding the affray. His plea of self-defense rested upon proof conducing in some degree to show that the deceased had thrown him upon the ground, and was assaulting him, when the shooting was done. These facts were pertinent to that issue; and as it was not proved or charged that he had soiled his clothing, or had been in-

jured at some other time and place, the evidence should have been permitted to go to the jury, for what it was worth.

We perceive no objection to the action of the court in giving instructions to the jury. For the errors indicated in admitting and rejecting evidence, the judgment is *reversed* and the cause remanded for a new trial upon principles consistent with this opinion.

Grover & Montgomery, J. D. Lillard, for appellant.
O. D. McNamara, T. E. Moss, for appellee.

W. A. HICKMAN *v.* F. L. HALL, ET AL.

Appeals—Practice—Duty of Appellant.

An appellant filing a transcript of the record in the clerk's office of the court of appeals must endorse thereon or on a paper filed therewith the names of all the parties, appellant and appellee, and where he fails to do so and only one of the parties to the action in favor of whom judgment was rendered, is named as appellee, who has only a nominal interest in the controversy, the appeal will be dismissed.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 23, 1876.

OPINION BY JUDGE COFER:

This appeal is prosecuted in the name of W. A. Hickman alone, against F. L. Hall. As repeatedly decided, Hickman and Hall are the only parties to the appeal, and the only persons who can be affected by any decision made by this court upon this appeal.

It is the duty of the appellant or his counsel, upon filing the transcript of a record in the clerk's office of this court, to endorse thereon or on some paper to be filed therewith, the names of all the parties, appellant and appellee, as the case is desired to stand on the docket of the court. Act to Amend Sec. 879, Civil Code, approved March 6, 1868.

Hall was only a nominal party, and the plaintiffs below do not seem to have been prejudiced by the dismissal of the petition as to him, and if they were, the judgment could not be reversed upon an appeal prosecuted by Hickman alone.

The appeal is, therefore, *dismissed.*

Roy & Walker, for appellant. Williams & Brown, for appellees.

J. J. SANDERS'S ASSIGNEE, ET AL., *v.* M. DUVALL.

Mortgage—Foreclosure—Lien for Purchase Money.

The owner of real estate cannot by mortgaging it defeat a bona fide claim for balance money when the creditor by express provision reserved a lien on such real estate.

Parties to Action to Foreclose Mortgage.

The legal title to real estate does not pass to a purchaser at judicial sale and conveyance where the holders of the legal title were not made parties in the case resulting in such judgment and order of sale.

Assignee in Bankruptcy.

An assignee in bankruptcy is not like an ordinary assignee who takes such rights as his assignor had, but he also represents the creditors of the bankrupt and is entitled to enforce all their equities.

APPEAL FROM SHELBY CIRCUIT COURT.

March 23, 1876.

OPINION BY JUDGE COFER:

Whites purchased a tract of land of Crawford and it was sold under a judgment enforcing a vendor's lien for purchase money, and Snook became the purchaser. Snook paid the purchase money and sold the land, or the benefit of his purchase, to Sanders. Sanders paid the first and second instalments of the purchase money, and his note for the third and last instalment was assigned by Snook to Duvall.

Duvall sued Sanders to enforce the payment of the note by a sale of the land, and no deed having been made to Snook in execution of his purchase at the decretal sale, it was agreed between Snook, Sanders and Duvall that a deed should be made by a commissioner in the suit of Crawford against Whites, directly to Sanders, in which a lien should be retained on the land in favor of Duvall to secure the payment of the note he held on Sanders.

A deed was accordingly made which recited the judgment in favor of Crawford, the sale under it, and purchase by Snook, and that the court had ordered the conveyance to be made to Sanders; it also acknowledged the payment in full of the purchase money; but the record of the case of Crawford against Whites shows that the purchase money referred to as paid was not the purchase price agreed to be paid by Sanders to Snook.

By an arrangement between Sanders and Duvall, the suit of the latter was dismissed, and Sanders executed a new note for the

amount then due, and pursuant to the order of the court directing the conveyance to be made to Sanders, the following clause was inserted in the deed, viz.:

"It is, however, distinctly understood and agreed by the party of the second part that Maime Duvall has and holds a lien on the above described tract of land to secure the payment of the note of J. J. Sanders to Maime Duvall for $2,674.20, dated March 12, 1872, payable twelve months after date, with interest at 10 per cent. per annum as appears by agreement of parties and orders of court herein."

The order of court referred to was made on the day the deed bears date, and directed a lien to be retained in favor of Duvall. That order was made pursuant to the written statements of Sanders and Snook filed in the case. Sanders's statement was that he had purchased the land of Snook and paid the purchase money, except the last instalment, for which Duvall held his note by assignment from Snook; and he asked that a deed be made to him securing the note to Duvall, to which he said he was advised Duvall consented.

Snook, in his statement, asked the court to order the land to be conveyed to Sanders upon his paying Duvall's debt or giving to him a lien upon the land to secure it, if that should be acceptable. The deed bears date March 14, 1872. October 5, 1872, Sanders mortgaged the land to Kinkade and Wise to secure them as his sureties in a debt of $1,184.60 he owed one Hanna. In July, 1873, Duvall brought suit to enforce the lien attempted to be secured to him in the deed. To that suit Kinkade and Wise were not made parties.

September 2, 1873, Sanders made an assignment to Kinkade and Wise of all his property for the benefit of all his creditors, but to pay first after the expenses of the trust, including compensation to the trustees, "the preferred debts of Maime Duvall, the amount of which is about $2,500, and a debt due to A. Hanna for $1,180, with interest, both of which are secured by mortgages; that is to say that there are mortgages on the land of the party of the first part to secure the payment of same. The mortgage to Kinkade and Wise, after setting forth the object of its execution contains this clause: "subject, however, to a lien for the balance of purchase money due on said land to M. Duvall, Sr., for about twenty-five hundred dollars."

In September, 1873, Duvall obtained judgment by default against Sanders for the amount of his note, and to enforce the lien asserted on the land under the deed from the commissioner to Sanders. A sale was made under that judgment and Duvall became the purchaser. The sale was reported to the March term, 1874. Between

the date of Duvall's judgment and the sale under it, Sanders was adjudged a bankrupt, and the appellant, Gardner, was appointed his assignee.

At the March term, 1874, Ballou, a creditor of Sanders and Kinkade and Wise, and the assignee in bankruptcy, filed exceptions to the sale and it was set aside; but no order was made directing a resale. A resale was, however, made when Kinkade and Wise became the purchasers, April 13, 1874. Upon the coming in of the report of that sale the purchasers and the assignee in bankruptcy filed exceptions to it upon grounds set forth in a petition of the latter filed September 7, 1873, against Duvall, Kinkade and Wise.

That petition sets forth the adjudication of bankruptcy, the appointment of the plaintiff as assignee, the suit by Duvall, the judgment and sale under it, and purchase by Kinkade & Wise; the mortgage and the assignment to them, and claimed that Duvall had no lien, that there were unsecured creditors of Sanders holding debts to the amount of $5,000, and praying that the sale be set aside, and for an injunction enjoining Duvall from selling the land under his judgment.

Kinkade and Wise answered, admitting the truth of the allegations of the petition, and asked that the sale should be set aside upon the grounds stated in the petition but professing a willingness to complete the purchase if they could procure a good title. Duvall answered and set out in detail the facts respecting the attempt to secure to him a lien on the land by the provisions in the deed to Sanders, and insisted on the sufficiency thereof to give him such lien, and he averred that if the lien was not secured by the deed the failure was the result of mistake and he prayed that it might be corrected so as to effectuate the intention of the parties.

The circuit court, on hearing the cause, dismissed the petition of the assignee, and overruled the exceptions to the report of sale, and this appeal is prosecuted by the assignee and Kinkade & Wise to reverse that judgment and order.

It is not alleged that the land sold for less than its value, or that Kinkade and Wise now have any claim upon the land under their mortgage. The debt claimed by Duvall is not controverted, nor is it disputed that it is for a part of the purchase money which Sanders undertook to pay to Snook for the land. No fraud or unfairness is alleged, and the principal grounds relied upon for a reversal are that Duvall had no lien, and that Kinkade & Wise were necessary parties

to the suit of Duvall to subject the land to his debt. We will dispose of the latter question first.

Kinkade & Wise held the legal title to the land, and should have been made parties; but what is the effect of the omission to do so? One effect would be that the legal title would not pass to the purchasers under a judgment, sale, and conveyance made in that case; and this, it seems to us, would be all, unless it may have been calculated to produce a sacrifice of the land in the mortgages to the prejudice of Sanders. The judgment sale and conveyance to satisfy Duvall's lien, if he had one, would pass to the purchaser the rights of both Duvall and Sanders. The rights of Kinkade and Wise could not be affected, and they might have proceeded on their mortgage to subject the land to sale to pay first Duvall's lien, if any, and then to pay what might be due to them, and this the purchasers could not have successfully resisted.

So far as Sanders was concerned, having failed to make defense or to require Kinkade and Wise to be made parties, he had no just cause of complaint; and Kinkade and Wise as mortgagees have none, for they assert no claim under their mortgage which must now be regarded as satisfied. The judgment for a sale was rendered before the adjudication in bankruptcy, and the assignee has no ground for complaint unless he stands in a better position than the bankrupt.

Had Duvall a lien? Duvall is not a party to the deed, and is not the vendor of Sanders. The deed acknowledges the payment in full of the purchase money, but makes mention of the purchase by Snook and the order of court directing the conveyance to be made to Sanders, and also of the order directing a lien to be retained to secure Duvall, and that order, we have already seen, was based upon the written statements and request of Snook and Sanders. It was the intention of both Snook and Sanders to secure Duvall by a lien, and Snook only agreed to allow the deed to be made to Sanders on condition that such lien was secured and accepted by Duvall. Before the deed was made Duvall, as the assignee of Snook, had a lien, and it is not claimed that Duvall intended to surrender it; and if a lien was not secured it was because all parties made a mistake in choosing a mode of doing so, and against such a mistake the chancellor would, if necessary, grant relief.

But Sanders having not only recognized the lien in his mortgage to Kinkade and Wise, and his deed of trust to them, in which he refers to Duvall's as preferred debt, but having stood by and allowed

judgment to go enforcing that lien, he was precluded before he was adjudged a bankrupt from disputing the validity of the lien.

We do not, therefore, deem it necessary to decide whether the commissioner's deed, if taken alone, gave an enforcible lien or not, unless notwithstanding Sanders was unable to controvert it, his assignees in bankruptcy may do so. We concur with the counsel for the appellants that an assignee in bankruptcy is not like an ordinary assignee who takes any such rights as his assignor had, but he also represents the creditors of the bankrupt, and is entitled to enforce all their equities. *Shackleford, Assignee, et al., v. Collier, et al.*, 6 Bush 149. As a result of this doctrine an assignee in bankruptcy is invested with all the rights, legal and equitable, which the bankrupt or any creditor of his had at the date of adjudication whereby either could have secured assets to the bankrupt or for the payment of the creditor, and he is also vested with a right to recover any money or effects parted with by the bankrupt in violation of the bankrupt law, although no creditor could have reached it. This we think is the extent of the rights of an assignee in bankruptcy.

It does not appear in this record that any creditor of Sanders could, at the date when he was adjudged a bankrupt, have impeached Duvall's judgment. It is not claimed that his debt was not just, or that the judgment was procured by fraud, or that it was even inequitable. What equity, then, had any of Sanders's creditors to have the sale set aside and the judgment for a sale enjoined? The insolvency of Sanders gave them no such equity, unless the judgment came within the provisions of the act of 1856, and if they had such right, which does not appear, it has not been set up or relied upon. It is not alleged, nor does it appear that the judgment was in contravention of the bankrupt act. The suit was commenced and judgment obtained, enforcing an alleged lien September 6, 1873, and Sanders was adjudged a bankrupt January 22, 1874, more than four months thereafter.

It seems, therefore, that the lien, if it had no existence prior to the judgment, was valid against the assignee and that he has failed to show in any aspect of the case that he has a right to have the sale set aside.

The only objection that could have existed to the title derived under the judgment in favor of Duvall would have arisen from the mortgage to Kinkade & Wise, and as that appears to be satisfied, and they were the purchasers and can acquire a complete and valid

title by a deed from a commissioner, the judgment is *affirmed* as to all the appellants.

Caldwell & Harwood, for appellants.
W. C. Bullock, for appellee.

ABE BOYD, ET AL., *v.* C. H. ADAMS, ET AL.

Costs—Taxation by Clerk of Court of Appeals.

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APPEAL FROM McCRACKEN CIRCUIT COURT.

March 24, 1876.

OPINION BY JUDGE LINDSAY:

Section 32, chap. 26, General Statutes, authorizes clerks to tax as costs "one copy of any pleadings or exhibits obtained by the successful party or parties." This provision applies to all clerks, and must, therefore, include the clerk of this court. Copy of the record on file is substantially a copy of the pleadings and exhibits in the cause, and it comes within the letter and spirit of the section referred to.

The one file is not the property or record of the appellant. It is a public record, over which he has no control. He may have a copy of it, in order that he may prepare his appeal for hearing, and if he succeeds in reversing the judgment appealed from, the expense legally incurred in obtaining said copy may be taxed as costs in his favor. The costs of no more than one copy can be taxed, however numerous the appellants may be.

The motion to correct the taxation of costs in this case is overruled.

L. D. Husband, A. Duvall, for appellants.
J. W. Bloomfield, for appellees.

JAMES S. JACOBY *v.* JAMES G. NEAL, ET AL.

Highways—Viewer's Reports—Description of Route.

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We do not, therefore, deem it necessary to decide whether the commissioner's deed, if taken alone, gave an enforcible lien or not, unless notwithstanding Sanders was unable to controvert it, his assignees in bankruptcy may do so. We concur with the counsel for the appellants that an assignee in bankruptcy is not like an ordinary assignee who takes any such rights as his assignor had, but he also represents the creditors of the bankrupt, and is entitled to enforce all their equities. *Shackleford, Assignee, et al., v. Collier, et al.*, 6 Bush 149. As a result of this doctrine an assignee in bankruptcy is invested with all the rights, legal and equitable, which the bankrupt or any creditor of his had at the date of adjudication whereby either could have secured assets to the bankrupt or for the payment of the creditor, and he is also vested with a right to recover any money or effects parted with by the bankrupt in violation of the bankrupt law, although no creditor could have reached it. This we think is the extent of the rights of an assignee in bankruptcy.

It does not appear in this record that any creditor of Sanders could, at the date when he was adjudged a bankrupt, have impeached Duvall's judgment. It is not claimed that his debt was not just, or that the judgment was procured by fraud, or that it was even inequitable. What equity, then, had any of Sanders's creditors to have the sale set aside and the judgment for a sale enjoined? The insolvency of Sanders gave them no such equity, unless the judgment came within the provisions of the act of 1856, and if they had such right, which does not appear, it has not been set up or relied upon. It is not alleged, nor does it appear that the judgment was in contravention of the bankrupt act. The suit was commenced and judgment obtained, enforcing an alleged lien September 6, 1873, and Sanders was adjudged a bankrupt January 22, 1874, more than four months thereafter.

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It does not appear in this record that any creditor of Sanders could, at the date when he was adjudged a bankrupt, have impeached Duvall's judgment. It is not claimed that his debt was not just, or that the judgment was procured by fraud, or that it was even inequitable. What equity, then, had any of Sanders's creditors to have the sale set aside and the judgment for a sale enjoined? The insolvency of Sanders gave them no such equity, unless the judgment came within the provisions of the act of 1856, and if they had such right, which does not appear, it has not been set up or relied upon. It is not alleged, nor does it appear that the judgment was in contravention of the bankrupt act. The suit was commenced and judgment obtained, enforcing an alleged lien September 6, 1873, and Sanders was adjudged a bankrupt January 22, 1874, more than four months thereafter.

It seems, therefore, that the lien, if it had no existence prior to the judgment, was valid against the assignee and that he has failed to show in any aspect of the case that he has a right to have the sale set aside.

The only objection that could have existed to the title derived under the judgment in favor of Duvall would have arisen from the mortgage to Kinkade & Wise, and as that appears to be satisfied, and they were the purchasers and can acquire a complete and valid

title by a deed from a commissioner, the judgment is *affirmed* as to all the appellants.

Caldwell & Harwood, for appellants.
W. C. Bullock, for appellee.

ABE BOYD, ET AL., *v.* C. H. ADAMS, ET AL.

Costs—Taxation by Clerk of Court of Appeals.

The clerk of the court of appeals, like the clerks of other courts, is authorized to tax as costs one copy of any pleadings or exhibits obtained by the successful party.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 24, 1876.

OPINION BY JUDGE LINDSAY:

Section 32, chap. 26, General Statutes, authorizes clerks to tax as costs "one copy of any pleadings or exhibits obtained by the successful party or parties." This provision applies to all clerks, and must, therefore, include the clerk of this court. Copy of the record on file is substantially a copy of the pleadings and exhibits in the cause, and it comes within the letter and spirit of the section referred to.

The one file is not the property or record of the appellant. It is a public record, over which he has no control. He may have a copy of it, in order that he may prepare his appeal for hearing, and if he succeeds in reversing the judgment appealed from, the expense legally incurred in obtaining said copy may be taxed as costs in his favor. The costs of no more than one copy can be taxed, however numerous the appellants may be.

The motion to correct the taxation of costs in this case is overruled.

L. D. Husband, A. Duvall, for appellants.
J. W. Bloomfield, for appellees.

JAMES S. JACOBY *v.* JAMES G. NEAL, ET AL.

Highways—Viewer's Reports—Description of Route.

The viewer's report upon which a new highway is ordered opened must contain a description of the road by courses and distances and to comply with this rule the points of its commencement and termination should be fixed by some visible objects sufficient to determine their exact locality.

APPEAL FROM HARDIN CIRCUIT COURT.

March 27, 1876.

OPINION BY JUDGE LINDSAY:

Although the petition shows that at the time of the last settlement there remained in the hands of the sheriffs, in the way of a surplus of county dues, the sum of $1,590.63, it does not show that up to the time of the institution of this action, the county court had authorized or empowered any person to collect said sum from the sheriff, or that it had made any orders whatever concerning its safekeeping. Until some such order is made, and the sheriff is required to pay the money over, either to the county treasurer, or if there be none, then to some person designated by the county court, he cannot commit a breach of his bond. Until some person is authorized to collect the fund, there can be no demand made upon the sheriff; and until there is a demand and a failure to pay, no cause of action can arise against him and his official sureties. *Owen v. Ballard County Court,* 8 Bush 611.

There is no cause of action stated in favor of Davenport. He sues as the assignee of Tabb. It is alleged that Tabb is a county creditor to the amount of $———. But it is not stated that this claim, if it amounted to any sum whatever, had been allowed by the county court, nor that the sheriff had ever been directed to pay it.

The demurrer was properly sustained, and the petition properly dismissed. Judge Cofer did not sit in this case.

Judgment *affirmed.*

Wilson & Bell, for appellants. James Montgomery, for appellees.

JOHN FLYNN *v.* PATRICK CARROLL, ET AL.

Real Estate—Adverse Possession—Husband and Wife.

A person having entered into possession of real estate by virtue of his wife's title cannot assert adverse possession as against his wife or her heirs.

APPEAL FROM FAYETTE CIRCUIT COURT.

March 29, 1876.

OPINION BY JUDGE PRYOR:

The mere assertion of claim by the party in possession that he

is the owner of the property does not constitute an adverse holding. It is evident from Horan's own showing that he entered upon the property by reason of his marital relation, and held under the wife's title. What the character of proof was in the original action by the appellees against Horan does not appear, but the latter's answer indicates that he was without right or title, and might as well have alleged in order to create an adverse holding that the property descended to him and not to the children. Having entered by virtue of his wife's title and the property descending to the children, he must be considered as their tenant, and the appellant (his tenant) is liable for the rent, and particularly as the action to recover the property was pending when he entered, actual notice having been given him of appellees' claim. If the husband had leased this property in his own name, during the life of the wife, the tenant, if the husband had died and not the wife, could not have defeated the wife's claim for rent, in the event he held over, by reason of the alleged parol agreement relied on by the husband in his answer. If alleged in the answer that the husband, by a parol gift from the wife, had acquired the title, it could not be regarded as an adverse holding; nor are we inclined to the opinion that the answer filed constituted anything more than this character of defense. The original case, no doubt, was disposed of on the idea that the husband entered under the deed to the wife and claimed only by reason of his marital rights, and that at her death no such claim as that asserted in the answer could be regarded as vesting him with title or as an adverse holding. The husband alleges that he bought the lot, and the wife agreed to have it conveyed to him. The proof, no doubt, showed that he held under the wife. His holding was not adverse to the appellees, and the instructions given were proper. As the law of the case is with the appellees on the merits, it is unnecessary to determine whether or not the bill of evidence shows that all the instructions are contained in it.

Judgment *affirmed.*

R. A. Thornton, for appellant. Morton & Parker, for appellees.

BARNARD KIMBLEY, ET AL., *v.* S. A. JACKSON.

Sale of Personal Property—Lien of Purchaser for Advancements—Notice—Practice.

One who advances money on a contract to purchase personal property is entitled to a lien on such property as against the vendor or others purchasing such property with notice of such advancement.

Practice—Motion for New Trial.

To aver, in a motion for a new trial, that the judgment is against the law, is not sufficient to call in question the correctness of instructions.

APPEAL FROM OHIO CIRCUIT COURT.

March 31, 1876.

OPINION BY JUDGE COFER:

The appellee alleged that he purchased the tobacco of Smith and Davis, and subsequently the appellants purchased of them the same tobacco; that hearing of their purchase he immediately, and before they had paid any part of the purchase money, gave them notice of his purchase and of the amount he had advanced upon it; and that they, after being notified, received the tobacco and refused to refund to him the amount he had paid.

It is not material to decide whether the title passed to the appellee or not; he had, as against his vendors, a lien on the tobacco for his advances made on the faith of his purchase, and appellants having received notice of the lien before they had paid the purchase money, were bound by the lien and were properly adjudged to answer for it.

They are not in a position to claim protection as innocent purchasers. Although it was irregular to instruct the jury to find for the plaintiff, the appellants are not entitled to a reversal. Their grounds for a new trial do not question the correctness of the instruction of the court. They specified but two grounds for a new trial: 1st, that the judgment is against the law, and is not sustained by the evidence; 2nd, that their witness was detained by rain and did not reach the court until the trial was completed.

The first ground relied upon only raises the question whether the judgment is sustained by the evidence. The evidence was clearly sufficient. "That the judgment is against the law" is not sufficient to call in question the correctness of instructions. Grounds for a new trial should indicate the error complained of so as to call it to the attention of the court. But it is impossible from the grounds filed to discover what particular error is complained of. That the judgment is against the law may more properly be regarded as intended to question the sufficiency of the petition than the correctness of instructions.

The second ground is insufficient. The appellants must have known before the trial was commenced that their witness was ab-

sent, and should have moved for a continuance or postponement until they could have him present. This they did not do. They went into trial without objection and cannot have a new trial on the ground that they were not ready.

Judgment *affirmed.*

Walker & Hubbard, for appellants.
McHenry & Hill, for appellee.

THOMAS MONTAGUE *v.* SILAS WOLVESTON.
THOMAS FOREMAN *v.* GRINSTEAD & BRADLEY, ET AL.

Judicial Sale—Bidders—Competition.

A judicial sale of real estate will not be set aside because of an agreement between two or more persons to unite in the purchase, unless it is shown that such agreement was entered into with the fraudulent intention to stifle bidding and thereby obtain the property at a sacrifice.

Ground for Setting Aside Sale.

The fact that after a judicial sale has been made, one may offer to bid a higher price if the property be again offered, furnishes no ground for setting aside the sale made.

APPEAL FROM FAYETTE CIRCUIT COURT.

April 4, 1876.

OPINION BY JUDGE COFER:

To decide that the agreement between Wolveston and Brown to buy the livery stable property and divide it between them vitiated the sale, would be virtually to decide that any agreement between two or more persons to unite in the purchase of property at a judicial sale is unlawful. Such agreements are common, and unless entered into with the fraudulent intention to stifle bidding and thereby to obtain property at a sacrifice, are not unlawful.

Neither Wolveston nor Brown was under any obligation to bid at all, and there is nothing in this record to show that either would have done so without the agreement made between them. Such agreements, if made bona fide, so far from being calculated to cause the sacrifice of property have an exactly opposite tendency.

Persons either unable or unwilling to buy the whole property offered for sale may, by combining, increase rather than diminish com-

petition. For ought that appears in this record such may have been the case in this instance. The statement of Brown that the property was worth $8,000 and he would be a bidder if made, placed him under no obligation to become a bidder, and it does not appear that the action of any other person was in anywise influenced by such statement. There is nothing to show that Wolveston would have been a bidder or that he was under any obligation to become one. There is, therefore, nothing to show that either Wolveston or Brown would have bid at all but for the arrangement by which they became jointly interested in the purchase.

The price realized for the stable property was, at the least two-thirds of its value, and the court, in the absence of evidence of fraud or unfairness, would not have been warranted in setting aside the sale. Although no one would at first offer to take less than the whole tract of land, and pay the balance of the judgments not satisfied by the sale of the stable property, yet, after a bidder had offered to take the whole tract and pay that sum, it was the duty of the commissioner to again inquire whether any one would take a less quantity and pay the debt, and until he did so he had no authority to call for advances in the amount. The first offer should have been "Who will take the tract and pay the balance of the judgments?" and when a bidder was found willing to do that, then and not until then, inquiry should have been made to ascertain whether any one would pay the balance for less than the whole. The commissioner already had no authority to sell for more money than would pay what remained unsatisfied until he had ascertained that no one would bid that amount for less than the whole tract.

The offer to give an advance of $1,500 on the price for which the stable property sold did not authorize the court to set aside the sale. *Stump v. Martin,* 9 Bush 285. While such a cause would undoubtedly benefit the debtor in this instance, the precedent it would establish would as undoubtedly operate to the prejudice of debtors whose property was thereafter offered for sale. One of the surest guaranties for fair prices is to be found in stability in such sales. We perceive no error in either judgment, and both are *affirmed.*

Kinkead & Duvall, for Montague.

Z. Gibbon, for Foreman.
W. D. Boswell, for Wolveston.

AGNES EDWARDS, EX'X, *v.* WILLIAM S. EDWARDS, ET AL.

Decedent's Estates—Diligence of Executor.

An executor is not held to the exercise of more than ordinary diligence in securing the debts due the testator, and diligence does not require him to sue upon claims at the first term of court after he qualifies.

Liability of Executor for Failing to Collect.

If there is unreasonable delay by an executor in attempting to make a collection, and by reason of such delay the estate lost by it an executor is liable.

APPEAL FROM GREEN CIRCUIT COURT.

April 4, 1876.

OPINION BY JUDGE PRYOR:

It is evident from the proof in the cause that the money for which the notes of J. C. Edwards were executed constituted a part of the fund received from Underwood; and the executor having charged himself with the whole of that fund, it would have been erroneous to have added to it the amount of the notes, as insisted should have been done by the appellees. The only question of importance presented in the case is as to the liability of the executor for failing to institute an action upon these notes at the first term of the court held after the notes came into his possession. There can be no doubt but that he had ample time to have brought his action and recovered a judgment, and if he is held to the same degree of diligence that is required of an assignee of a note, the liability exists.

The embarrassed condition of the obligor was known to the executor and also to the mother at the time the money, or part of it, was loaned; and for this reason the executor seems to have feared that such steps on his part as the attempt to coerce the money by suit would result in the institution of actions against the debtor by his other creditors, and lessen the chances for making the debts due the estate. His brother had promised him to discharge the notes so soon as the result of a mule adventure was made known, and relying upon this as one of the modes of recovering his debts, he thought best not to sue. An executor is not held to the exercise of anything more than ordinary diligence in securing the debts due to the testator, such diligence as an ordinarily prudent man would use with reference to his own affairs.

This sort of diligence, we think, has been shown in this case. It

was only seven months from the time the appellant qualified as executor until the debtor made an assignment of his property for the benefit of all of his creditors. He was insolvent at the time the executor qualified, and the latter holding debts of his own against his brother, and the other creditors who are presumed to have exercised some diligence in the collection of their own debts, failed to institute any legal proceedings to make their money. It is no lack of diligence in failing to sue upon claims held by him as such at the first court succeeding his qualification. A state of case might exist where the representative was in the possession of such facts that one of ordinary caution would know the debt would be lost unless some step was taken to secure it. A failure then to take the proper steps to make the debt would render him liable. The executor might have obtained a lien by issuing an execution on a judgment obtained at the first term of the court in the present case; but this degree of diligence is not required of him unless he is in the possession of facts showing that his debts would be lost unless such a remedy is pursued.

The fact of his brother being insolvent was no reason why he should have made the effort to be in advance of other creditors. In the exercise of his judgment he thought he could best secure the debt by looking to the promises of his brother. Nor has the estate been damaged by this action on the part of the executor. The debtor was as much indebted when the executor qualified as when he made the assignment; and not only so, but the character and value of his estate had not been changed. The fact that the wife of the debtor had a part of the land conveyed to her in lieu of her contingent right of dower, did not affect the rights of creditors so far as appears from the record; but for the relinquishment, the estate would have sold for less and thus reduced the amount to which the creditors were entitled. An unreasonable delay in the attempt to coerce a debt by an executor by reason of which the estate lost it, would make the executor liable; but in this case we see nothing in the cause presented by the executor showing a disregard of the interests of the estate, or that might not have been adopted by a prudent man in the conduct of his own business.

The expenditure of the seventy-one dollars was made at the instance of the mother, and should have been charged to the estate. It was also error on the part of the court below, when directing a distribution of the estate according to the provisions of the will, to leave the question undetermined as to what the rights of the devices were, namely the amount due from the executor, if anything,

to each of the devisees so as the devisee so entitled might have his execution. This, of course, applies only to those of the devisees who are asking a judgment or distribution. The executor should not have been charged with the notes on J. C. Edwards, or having been charged with them in his original inventory, should have been credited by them. He is only liable so far as these notes are concerned for what he collected on them. This is the only error we perceive in the record except the failure to ascertain what each devisee was entitled to, and how much had been paid them, etc. Judgment *reversed* and same remanded for a judgment consistent with this opinion.

Affirmed on cross-appeal.

W. H. Chelf, A. J. James, for appellant.
Towles & Hudson, Alexander & Dickinson, for appellees.

R. Y. DANIEL *v.* J. W. STEERMAN.

Sale of Personal Property—Contract—Delivery.

Although a contract for the sale of goods is complete and binding in other respects, the title remains in the vendor if any material act remains to be done before delivery to distinguish the goods sold or to ascertain the price or to fit them for delivery, unless what remains to be done devolves upon the purchaser and the possession is given him either actually or constructively.

APPEAL FROM OHIO CIRCUIT COURT.

April 5, 1876.

OPINION BY JUDGE COFER:

Under the provisions of the contract between the appellant and appellee, the title to the tobacco in contest remained in the latter. Although a contract for the sale of goods be completed and binding in other respects, the title remains in the vendor, and the goods at his risk, if any material act remains to be done before delivery to distinguish the goods sold, or to ascertain the price, or to fit them for delivery, unless what remains to be done is to be done by the purchaser, and the possession is delivered to him either actually or constructively.

The tobacco in contest was not delivered, nor was it ready for delivery, and the price was not ascertained. The tobacco was to be as-

sorted, tied up into hands, and delivered by the vendor; and until these things were done the title remained in him.

The appellant's remedy was by action for a breach of the contract, and not for the recovery of the tobacco. The court, therefore, properly instructed the jury to find for the defendant. Nor was there any error in afterward allowing the defendant to introduce evidence as to the value of the tobacco which had been taken possession of by the appellant, or in the assessment of the value by the jury.

Judgment *affirmed.*

McHenry & Hill, for appellant.
Walker & Hubbard, for appellee.

S. M. HEWITT *v.* J. H. RICHART.

Vendor's Liens—Pleading.

When purchase-money remains unpaid at the time land is conveyed the grantor has no lien on the land unless it is stated in the deed what part of the purchase-money remains unpaid.

Pleading.

A petition to enforce a vendor's lien on real estate is fatally defective which alleges only that a lien exists in plaintiff's favor. This is a mere conclusion.

APPEAL FROM BATH CIRCUIT COURT.

April 5, 1876.

OPINION BY JUDGE LINDSAY:

No personal judgment was rendered against Mrs. Sarah M. Hewitt, but her land was adjudged to be sold to satisfy the amount apparently due on the note sued on, including interest at the rate of ten per cent. per annum.

It is averred in the petition that John D. Young, the vendor of the land, had conveyed to Mrs. Hewitt. The petition does not state facts showing that the appellee holds a lien upon the land to secure the payment of the note. The only averment on the subject is, "Plaintiff states that a lien exists in his favor on said forty acres, 2 roods and 30 poles of land for his debt with interest thereon, etc." This is but the averment of a legal conclusion.

When the deed from Young to Mrs. Hewitt was executed and delivered the Revised Statutes were in force. Sec. 26, Chap. 80, Rev.

Stat., provided, when purchase money remained unpaid on land at the time a conveyance was made, the grantor should not have a lien for the same unless it was expressly stated in the deed what part of the consideration remained unpaid; and this limitation upon the rights of the vendor was held in various cases to operate as well in favor of the vendee as of creditors and purchasers.

The petition does not show that it is stated in the deed to Mrs. Hewitt that the sum evidenced by the note sued on remained unpaid, at the time of its execution. The deed is referred to as being of record in the proper office in Bath county, but a copy is not filed in the cause. It is impossible, therefore, from appellee's petition and exhibits, to determine that the legal conclusion averred by him is correct. It is true the note states that it is "mentioned in the deed already delivered." This recital might be sufficient evidence to sustain the necessary allegations if it had been made in the petition, but in the absence of such allegations and of the deed itself, it is not sufficient to authorize the sale of the appellant's lands.

Judgment *reversed.* Upon the return of the cause, appellant will be allowed to answer and make defense.

B. D. Lacy, for appellant. J. S. Hunt, for appellee.

WILLIAM DAVENPORT *v.* JAMES UNDERWOOD, ET AL.

Former Adjudication.

Where plaintiff's right to hold a bank liable for conversion was fully adjudicated in the federal court, a court of competent jurisdiction, and there was judgment against him, he cannot have the same issue adjudicated in the state court. The judgment of the federal court not appealed from is conclusive.

APPEAL FROM LOGAN CIRCUIT COURT.

April 5, 1876.

OPINION BY JUDGE LINDSAY:

The questions of law involved in this case are practically the same as those settled by this court by the last opinion delivered in the case of *The Society of Shakers v. Underwoods, et al.* The facts are the same, except that the district court of the United States, sitting as a court of bankruptcy, rejected the claim of Davenport, whilst it held the assignee of the Bank of Bowling Green liable for a portion

of the claim asserted by the Shakers. In that proceeding Davenport stated his claim as follows. He averred that the bank, "was and still is jointly and truly indebted to this deponent in the sum of nine thousand two hundred seventy dollars ($9,270), being for deposit of nine one-thousand-dollar Warren county bonds, Nos. respectively 37, 62, 40, 44, and 45 B. and 5, 6, 22, and 34 C., which bonds were wrongfully converted by said bank to its own use without deponent's knowledge or consent."

An examination of the petition in this case will show that the appellant is here seeking to recover from the appellees the value of these identical bonds, upon the ground that they were converted by the bank, with their knowledge, or that they by their gross neglect, permitted and enabled the bank to convert them.

As said in the case of the Shakers, "We regard it as plain that appellants' petition does not authorize a recovery for a greater sum than the value of such of their (his) bonds on special deposit as were sold and appropriated to the uses and purposes of the bank."

Appellant elected to test the preliminary and fundamental question in his case, that is, the conversion by the bank of his bonds, by a proceeding against the assignee of the bank in a court of competent jurisdiction. After the issue had been made up and the evidence heard, that court adjudged that none of his bonds had been converted by the bank. It dismissed his claim upon that ground, and allowed the Shakers a portion of their claim because the proof showed, that the proceeds of a portion of their bonds had gone to the credit of and had been appropriated by the bank to its uses and purposes.

This unreversed judgment of the district court is conclusive as to the question of the conversion by the bank of Davenport's bonds. It estops him to assert in any court, for any purpose, that it did convert them. He cannot have a retrial of the question of fact in the state courts, any more than he can in the federal courts. The judgment in the district court is not analogous to a verdict and judgment in favor of one of several co-trespassers. In a case of that sort, the plaintiff may concede the innocence of one, and still recover against any one or more of the other wrongdoers. But in this case, the liability of appellees depends wholly upon the guilt of the bank. If it did not convert appellant's bonds, then he can recover nothing against them, no matter how negligent they may have been in the discharge of their duties as presidents and directors of the bank.

We have already seen that the record shows that the question of conversion by the bank has, by a court of competent jurisdiction, been

conclusively and finally settled adversely to his claim. Hence it is impossible for him to make out a state of case authorizing a recovery in this action, in view of the principles announced by this court in its opinion in the Shaker case. We are, therefore, of opinion that the circuit court properly overruled the general demurrer to the amended answer of appellees, and properly overruled the special demurrer to the second paragraph of said answer.

Such being the case, it follows that the circuit court properly instructed the jury to find for the appellees.

Judgment *affirmed.*

Hines & Porter, for appellant. J. R. Underwood, for appellees.

CHARLES GRAVES *v.* T. D. COLLINS & SON.

Mechanics' Liens—Attaching of Liens.

Mechanics and material men are allowed liens upon the buildings erected by them, or out of their materials and upon the estate of the debtor in the land upon which the building stands, but the mere promise by the purchaser that he will use the material in the construction of a building does not give to the material-man a lien on such land.

Attaching of Liens.

The lien of a mechanic or material-man attaches to the building and land upon which it stands when the labor is performed and the material is used in the construction.

APPEAL FROM MARION CIRCUIT COURT.

April 6, 1876.

OPINION BY JUDGE LINDSAY:

Mechanics and material-men are allowed by statute a lien upon the buildings erected by them or out of their material, and upon the estate of the debtor in the land upon which the building stands, upon the idea that their labor or property has conduced to better its condition or to enhance its value.

The mere promise upon the part of the purchaser that he will use the material in the construction of a building, does not give to the material-man a lien upon the land upon which he agrees to erect it. In this case, except to the extent of five or six dollars worth of lumber, put into a hen house, no portion of the lumber sold by appellee

to Graves was used in improving or bettering the condition of the realty against which the lien is asserted.

It was, therefore, error to subject said realty to the payment of the whole of appellees' claim. Judgment *reversed* so far as it enforces the asserted lien, and cause remanded for a judgment conformable to this opinion.

J. D. Belden, for appellant. Russell & Averitt, for appellees.

R. J. DANIELS, ET AL., *v.* G. B. DOCKERY.

Sheriff May Maintain Trover for Conversion of Personal Property.

A sheriff who levies an execution upon personal property may maintain trover for its conversion.

APPEAL FROM OHIO CIRCUIT COURT.

April 6, 1876.

OPINION BY JUDGE COFER:

A sheriff who levies an execution upon personal property may maintain trover for its conversion while in his possession, or in the possession of his bailee. *Williams, et al., v. Herndon,* 12 B. Mon. 484. In this respect the rights of the sheriff are at least equal to the rights of any other bailee; and as an ordinary bailee may maintain trover in his own name and recover the value of the property converted, a sheriff may do so.

It is not in terms alleged that the execution was in force when the levy was made, but it is alleged that it was levied, and the date of the execution is given and copies of the execution and levies are filed and made part of the petition, from which it appears that the levy was made on the same day on which the execution issued.

It is not distinctly alleged that the logs levied on were the property of Romans, but it is alleged that they were levied on as his property. And besides this, the defendants denied that the logs were the property of Romans and thereby cured any defect that may have existed in the petition on this point. And although the petition may not have been sufficient on demurrer, we think that it is so after verdict.

The logs were cut and delivered in the creek by Romans, and were prima facie his property; and it devolved on the appellants to show that they belonged to Daniels; whether the evidence was sufficient

for that purpose was a question for the jury, and we cannot say that their finding was palpable against the evidence.

The appellee was, as already decided, entitled to maintain the action, and it follows that he had the same right of recovery which he would have had if he had been the absolute owner of the logs; and consequently he had a right to recover damages for the unlawful conversion as well as for the value of the property converted.

Judgment *affirmed.*

McHenry & Hill, B. L. D. Guffy, A. Duvall, for appellants.
Thomas G. & William Ward, for appellee.

H. C. DOUGLASS, ET AL., *v.* SAMUEL STONE, ET AL.

Husband and Wife—Sale of Wife's Real Estate.

A mortgage of the wife's land, she holding a general estate, to secure the debt of her husband, executed jointly by herself and husband, is valid.

Description of Property in Judgment.

A judgment decreeing the sale of real estate in a mortgage foreclosure must contain a reasonably accurate description of the real estate sufficient to enable the master to identify the land he was directed to sell, without searching the records.

APPEAL FROM BOYLE CIRCUIT COURT.

April 8, 1876.

OPINION BY JUDGE PETERS:

The land mortgaged was certainly the property of Mrs. Douglass, she having the legal or general estate therein, and the debt secured thereby appears to have been the debt of her husband. Nevertheless a mortgage of her land executed jointly by herself and husband was valid under the statute, as held by this court in *Smith, et al., v. Wilson,* 2 Met. 235, and approved by their court in *Johnston v. Ferguson,* Ib. 503, and in the still later case of *Sharp's Adm'r v. Proctor's Adm'r & Heirs,* 5 Bush 396. The efficiency of the mortgage of the wife's land as a security for the debt is, therefore, an adjudged question.

The description given of the land in the petition sought to be sold is two undivided sixths of a tract of land containing one hundred acres lying in Boyle county, state of Kentucky, one mile west of the

Danville and Hustonville Turnpike Road, about four miles from Danville, and being the land allotted to Mrs. Emily Harby by commissioners of the Boyle county court for dower in the lands of her husband, Enoch Harby, deceased; and the report of the commissioners is filed as a part of the petition, the dower land being lots Nos. 7 and 8 as designated on the plat of division. The description of the land is not as definite in the mortgage as it is in the petition.

To the suit to foreclose the mortgage no defense was made. On the 3rd of September, 1873, the cause was finally heard, and a personal judgment was rendered against H. C. Douglass for the debt, interest and costs, and it was further adjudged that the equity of redemption of defendants, H. C. Douglass and S. E. Douglass, or either of them, in the mortgaged property mentioned and described in the proceedings and the deed of mortgage on file, given by them to the plaintiff to secure the payment for which judgment is above rendered, should be thereby foreclosed. It is adjudged that so much of said property as will pay to the plaintiff said sum with interest at said rate from said date until the day of sale and costs of this action and expenses of sale, including $25 allowed commissioner for making sale, and to be taxed as costs, be sold, etc.; and then directions are given when, where and how the sale shall be advertised and made.

On the 22nd of December, 1873, the master returned his report of sale to the court, in which he reports "he exposed to public sale the property in" the judgment mentioned on Monday, the 20th of October, 1873, that being county court day, before the court house door in Danville, Ky., after having first duly advertised the same. He then describes the manner he admitted the sale, and concludes by saying he first offered less than the entire property but not receiving sufficient bids therefor to satisfy the judgment, he sold the entire property directed to be sold, and Samuel Stone being the highest and best bidder became the purchaser thereof at the price of $769.68.

The description of the land as given in the judgment is wholly insufficient to enable the master to identify the land he was directed to sell; nor could he by any paper in the suit find the tract out of which he was to sell two-sixths. He might, from the report of the commissioners who allotted to Mrs. Harby dower in her late husband's real estate, find "lots 7 and 8;" but when he went on the land he would not be enabled from that alone to find the dower land; and from what end or side of said two lots the two-sixths thereof was to be set apart to Mrs. Douglass is still more uncertain; the judgment is too uncertain and indefinite, and cannot, for that reason, be sus-

tained, as has been held by this court heretofore. *Lawless v. Barger, et al.*, 9 Bush 665.

Moreover the allowance to the commissioner is more than the statute allows him for making the sale.

Wherefore the judgment is *reversed* and the cause is remanded for further proceedings consistent herewith.

Fox, Grigsby & Fox, for appellants.
Durham & Jacob, for appellees.

LOUISVILLE & NASHVILLE R. Co. *v.* JAMES WILKERSON.

Damages for Breach of Contract—Carriers.

Where a carrier of passengers undertakes to transport a passenger from one point to another it is bound to stop its train and permit such passenger to get off at the point to which it has agreed to carry him, and failing to do so is liable to him for breach of its contract.

Personal Injuries.

When a passenger whom a carrier has agreed to transport to a certain point leaves the train before it stops at such point and is injured, the carrier is not liable for damages on account of such injury.

Measure of Damages.

The fact that a carrier violates its contract to transport a passenger to a certain point by failing to stop at such point, does not warrant such passenger in leaving the train while it is under headway and if he did so and in consequence is injured he is without remedy. He can hold the carrier for breach of its contract only, but not for his own folly.

APPEAL FROM MARION CIRCUIT COURT.

April 11, 1876.

OPINION BY JUDGE LINDSAY:

The demurrer to the first paragraph of appellee's petition was properly overruled. If appellant undertook, as a carrier of passengers, to transport appellee from Lebanon to the Nelson farm, it was bound to stop its train and allow appellee to get off at his point of destination, and if it failed to do this, such failure was a breach of contract, for which it is answerable in damages.

The demurrer to the second paragraph was properly sustained. It is not material that appellant violated its contract in failing to stop its train. This failure did not warrant appellee in leaving the train

whilst it was under headway. If he did so, and in consequence of his own folly received personal injuries, he is without remedy therefor. He can hold the company responsible for its breach of contract, but not for the consequences of his own temerity.

It was error in the court to allow appellee to introduce on the trial evidence as to the injuries he thus received, and also as to the sickness of his wife, and as to the effect his injuries had upon her. The measure of the damages to which appellee is entitled, if he is entitled to recover at all, is correctly set out in instruction No. 4, given for appellant, and no proof should have been heard that did not tend to elucidate the questions incident to the element of damages therein stated.

Instruction No. 1, given for appellee, is correct except as to the measure of damages. It is error in such a case as this to tell the jury that they may assess damages at such sum as they may believe the plaintiff is entitled to. It leaves this important question to be determined in accordance with the opinions and feelings of the jurors, instead of by the rules of law. To this extent this instruction and instruction No. 4, given for appellant, are inconsistent. This is a case of mere breach of contract, and exemplary damages cannot be awarded. When the incompetent testimony is excluded, and instruction No. 1, given for appellee, is corrected as indicated, said instruction and instruction No. 4, given for appellant, will present the whole law of the case.

Instruction No. 7, asked by appellant, was properly refused. It is for the jury, uninfluenced by the court, to pass upon the credibility of competent witnesses.

Upon the cross appeal the judgment is *affirmed,* but upon the appeal of the railroad company it is *reversed.* The cause is remanded for a new trial upon principles consistent with this opinion.

Ruussell & Huston, R. H. Rountree, for appellant.
J. D. Belden, for appellee.

ISOM DODD, ET AL., *v.* JOHN RYNEARSON'S ADM'R.

Contract of Married Woman Void as to Her, Binding on Other Signers.

While a contract of a married woman, such as under the statute does not bind her or her estate, is void as to her, it is valid upon persons who sign it, not under disability.

APPEAL FROM MERCER CIRCUIT COURT.

April 11, 1876.

OPINION BY JUDGE PETERS:

Mrs. Sarah Dodd was a married woman when she signed the note, and the contract is not such as under the statute a married woman can bind herself or estate for, consequently, as to her the contract was void; but although it was void as to her it was valid and binding on Isom Dodd, Floyd Burks and George Bradshaw, who labored under no disability. And they were not the sureties of Mrs. Sarah Dodd within the meaning of the statute, because she was not capable of binding herself, and the debt was the debt of the other persons who signed the note, not as sureties but as principals, there being no one bound for whom they could become surety. *Gaines's Adm'x v. Poor,* 3 Met. 503; *Short v. Bryant,* 10 B. Mon. 10.

Judgment *affirmed.*

Kyle & Poston, for appellants. T. J. Polk, for appellee.

IRVINE T. GREEN *v.* D. T. SMITH'S TRUSTEE, ET AL.

Landlord and Tenant—Lien of Landlord.

The lien of a landlord on the proceeds of the premises and on fixtures and household furniture of the tenant owned by him after possession, cannot be for more than one year's rent nor for rent which has been due for more than 120 days.

APPEAL FROM MADISON CIRCUIT COURT.

April 11, 1876.

OPINION BY JUDGE COFER:

A landlord has a superior lien on the proceeds of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or under-tenant, owned by him after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred twenty days. Sec. 13, Art. I, Chap. 66, Rev. Stat.

Whether the renting was by the year or by the half year, makes no difference. The rent was to be paid half yearly, and when the first note was executed that amount was then due, and when the deed of

trust was made, it had been due for more than 120 days, and the landlord's lien had already been lost.

Judgment *affirmed*.

T. J. Scott, for appellant.
E. W. Turner, A. R. Burnam, for appellees.

T. W. SAMUELS, ET AL., v. ALEX. SAYERS, ET AL.

Eminent Domain—Abandonment of Right—Adverse Possession.

One holding possession of real estate under a railroad company which secured it for railroad uses under the right of eminent domain, but abandoned it, cannot successfully assert title by adverse possession against the rightful owner.

APPEAL FROM NELSON CIRCUIT COURT.

April 13, 1876.

OPINION OF JUDGE PRYOR:

At the time Arnold took possession of a portion of the right of way relinquished to the railroad company by Greathouse, it was for the purpose of erecting thereon a building for the purposes of the company, and for the accommodation of those traveling upon its road, in other words it was a way station created for the benefit and convenience of those being within its immediate locality. Arnold entered on the land in controversy under the railroad company, the latter holding under Greathouse. Weaver held under Arnold and Sayer under Weaver; and we do not well see how the appellees can now rely on an adverse holding as against Greathouse or his vendees. Arnold erected his building by the permission of the company. Sayer has done the same thing, and does not pretend to exhibit any other title or right of possession than that derived originally through and from the railroad company.

The company had the right to use this ground or right of way for all the legitimate purposes of the road; but in this case it has abandoned the possession or use of the way station, and left the building and ground within the thirty feet (except the road bed) in the possession and without the enclosure of the appellees, who are cultivating the land and claiming to hold it as against the rightful owner. Such a transfer of the possession by the company, if intended for the private use of Sayer or his vendor, was a forfeiture of the right,

and the owner could at once maintain his ejectment. There is no power on the part of the company to dedicate the fee or its use to any other purpose than such as necessarily pertains to the use and employment of the road by the company. It appears, however, that the appellees agree to surrender the possession when required by the company, and as they are asserting their right to hold the ground as against the appellants, and are now using it for their own private purposes, the company having abandoned the station, there is no reason why the appellants should not recover.

The case is now in a court of equity, and as the erection of the buildings was in the first place proper and for the legitimate use of the road, the chancellor in rendering his judgment should give to the appellees a reasonable time in which to remove their buildings and fencing from off the land in controversy and render a judgment deciding that the appellants are the rightful owners of the land in controversy. The railroad company appealed from the judgment below, and being made an appellee has had the right, if there had been a judgment against it, to have the company substituted as an appellant. There is no judgment, however, against the company. The questions on the cross petition of Sayers against the company are undisposed of, and the right of property in appellants is not questioned by the railroad company. The name of the railroad company is stricken from the record as appellee. The judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

E. E. McKay, for Samuels. Muir & Wickliffe, for appellees. William Johnson, for L. & N. R. Co.

GILLIE A. GLOVER *v.* MARY CARTER, ET AL.

Wills—Construction of Will—Heirs—Children.

When by will the testator uses the words to a person "and his heirs by his present wife to have and to hold to him and his heirs by his present wife forever," it is held that the word heirs is used in the sense of children and that the person named and his children took a present absolute estate in the land devised.

APPEAL FROM BATH CIRCUIT COURT.

April 14, 1876.

OPINION OF JUDGE LINDSAY:

The testator gave his lands to James F. Glover and his heirs by

his present wife, and concluded the desire with these words, "to have and to hold to him, the said James F. Glover, and his heirs by his present wife, forever."

Appellant insists that, by the common law, these words would create an estate in special tail in James F. Glover, and that our statute eo instanti and of its own force transformed it into an estate in fee simple. It will never be assumed that a testator or grantor intended to create an estate tail unless his language leads naturally and legitimately to that conclusion. If the instrument will allow another construction, not involving the necessity of distorting or straining the obvious meaning of the expressions used, the courts will incline to adopt it as the correct one. *Breckenridge & Wife v. Denny et al.*, 8 Bush 523.

It is manifest here that the testator intended to vest the children of James F. Glover, and his then wife, with a present and absolute estate in the land devised. He used the words "heirs" in the sense of children. Of this there can be no doubt. We do not think the devise will admit of the construction that James F. Glover took a life estate, with remainder to his children. The case of *Jarvis & Trabue v. Quigley*, 10 B. Mon. 104, does not support that view. The court said in that case that the conveyance to the sole use of the wife and her children, in being and expecting, might be understood as giving to the wife an interest in common with her children, but that such was not the necessary construction, and it was repelled by the other provisions of the deed.

In *Foster v. Shreve*, 6 Bush 519, it was held that the mother took a life estate with remainder to her children, upon the idea that she was the only grantee mentioned in the caption of the deed. The children were not parties to the deed, and could not take a present interest. But as it was evident that they were intended to be beneficiaries under it in some way, the court harmonized its provisions by holding that the mother took an estate for life with remainder to her children.

In the case of *Cessna, et al., v. Cessna's Admr.*, 4 Bush 516, the bond was executed to W. W. Cessna and his lawful children. The court held that the father and children were joint vendees and held in equity as tenants in common. Treating the words "heirs" as synonymous with "children" the provisions of the second clause of the will of R. C. Moore, deceased, are of exactly the same legal import with the bond to W. W. Cessna and his lawful children. The two instruments should, therefore, receive the same construction.

We conclude that James F. Glover and his two children by the present appellant, were holding the lands devised to them by the testator as tenants in common at the time of his death. The appellant as his surviving widow is entitled either to dower, or to a homestead out of his one undivided third of said lands. The judgment denying her any interest whatever in the realty of her deceased husband is *reversed*.

The cause is remanded for further proceedings, and for a final judgment not inconsistent with this opinion.

V. B. Young, Nesbitt & Gudgell, for appellant.
B. D. Sacy, Apperson & Reid, for appellees.

JAMES COY *v.* JAMES MUNIER.

Mandamus—Adequate and Complete Remedy.

Mandamus cannot be resorted to when plaintiff has appropriate legal remedy, complete and adequate.

APPEAL FROM NELSON CIRCUIT COURT.

April 15, 1876.

OPINION BY JUDGE LINDSAY:

This is not a case for a mandamus. The statutes furnished the appellee with a remedy, complete, specific and adequate. He is the holder by assignment of a claim against the county of Nelson. It has been allowed by the court of claims, and the appellant, the sheriff of said county, has been directed to pay it out of the county taxes, levied for a given fiscal year, and its amount, together with the name of his assignor, is upon the list of the claims furnished to the sheriff by the clerk of the county court.

If appellee has demanded payment and it has been refused, he may have recovery against the appellant and his sureties for his demand, with ten per centum upon the amount due, and he may proceed by suit in the circuit court, or by motion in the county court. Sec. 7, Art. 2, Chap. 27, General Statutes.

Although, in this state, a writ of mandamus is an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law, yet it will not be granted as a matter of course in any instance in which the party

aggrieved has an interest in compelling the officer to do or refrain from doing the act so enjoined upon him. It should generally be refused when he has some other appropriate remedy. *Goheen v. Myers,* 18 B. Mon. 426. It should never be granted when he has a legal remedy that is specific and complete.

The judgment awarding the writ in this case is *reversed* and the cause remanded with instructions to dismiss appellee's petition.

C. T. Akinson, for appellant. Muir & Wickliffe, for appellee.

C. L. JOHNSON *v.* BOARD OF TRUSTEES OF HARRODSBURG.

City Councilmen—Liability for Damages—Policeman.

City councilmen who have appointed a policeman are not liable for the damages resulting from an improper arrest made by such officer.

APPEAL FROM MERCER CIRCUIT COURT.

April 18, 1876.

OPINION BY JUDGE PRYOR:

The liability of appellees is made to depend alone upon the appointment by them of Gallagher to the position of policeman, and his retention in that position after the alleged wrong had been committed. We know of no principle by which the trustees or the city are to be made responsible for an improper arrest made by a city officer under the general authority given him by virtue of the appointment. They did not order the arrest of the party or direct his imprisonment after the arrest was made. Such arrests are often improper, but when made, as in this instance, by the officer upon his own responsibility, we cannot well see how third parties are to be held liable. There is no allegation that the trustees were required to take a bond from the policeman in order to insure indemnity for the anticipated wrongs of the latter, nor do we presume that such was their duty under the charter. The petition as amended presenting no cause of action, the judgment must be affirmed.

John B. Major, J. J. McAfee, for appellant.
Kyle & Poston, for appellees.

JAMES H. MAZE *v.* ELIJAH CLARK.

Real Estate—Title by Adverse Possession.

Where one has been in the undisturbed possession of real estate by actual inclosure for more than fifteen years prior to the beginning of an action against him for such land, claiming it as his own, his title cannot be defeated.

APPEAL FROM BATH CIRCUIT COURT.

April 19, 1876.

OPINION BY JUDGE PRYOR:

If the appellee has been in the undisturbed possession of a part of the land in controversy by actual inclosure for more than fifteen years prior to the institution of the action claiming it as his own, it defeats the appellant's right of recovery to that extent, or if the division line between the appellee and Wright places the disputed territory within the boundary of appellee, it defeats the action. The only question presented by the record is as to the location of this dividing line; and if this boundary is fixed by the deed of partition, it must govern the rights of the parties. The appellant claims under Wright, and the lines and corners as fixed by the deed from Clark to Wright must control this case, unless it is shown that the appellee has, by actual inclosure, been in the possession of the land adversely for such a time as will present a statutory bar. The first instruction asked by counsel for appellant should have been given.

The judgment below is reversed and cause remanded with directions to award a new trial and for further proceedings consistent with this opinion.

Nesbitt & Gudgell, for appellant.
V. B. Young, Reid & Stone, for appellee.

JOHN STEVENS *v.* JAMES CHORN.

Surety on Note—Notice by Surety to Collect.

A notice by a surety upon the holder of a promissory note requiring him to collect the note is in effect a notice to institute suit and to enforce the collection of the judgment when the debt shall have been put in judgment.

Attorney and Client.

Where an attorney is employed to collect a debt due his client he has no authority to release sureties thereon.

APPEAL FROM CLARK CIRCUIT COURT.

April 22, 1876.

OPINION BY JUDGE LINDSAY:

James Chorn being the surety for John H. Quisenberry on a note payable to W. M. Stevens, delivered to the latter on the 28th of July, 1873, a written notice requiring him to "collect" said note.

Suit was instituted and judgment recovered on the note at the next term of the circuit court. Before execution could be issued on this judgment, the attorney of Stevens was informed by a deputy circuit court clerk that the judgment had been replevied in the office, and for that reason did not direct an execution to be issued. It turned out that Chorn had not signed the replevin bond accepted by the clerk. Upon the discovery of that fact and before the bond became due, Stevens, by his attorney, repudiated it, by an entry in writing upon the memorandum book, and forbade the clerk to issue an execution upon it. At the first term of the court thereafter, he entered a motion and finally obtained a judgment quashing said bond. After the bond had then been quashed, Stevens was about to sue out execution on his judgment, and Chorn instituted this action in equity to enjoin and restrain him from attempting to subject his estate to the judgment thereof.

We need not decide whether, under the provisions of Sec. 10, Chap. 97, Revised Statutes, which were continued in force by Sec. 11, Chap. 104, of the General Statutes, a surety is required, in order to secure the full benefit thereof, to notify the creditor, both to sue at the next term of the court, and to prosecute his suit with reasonable diligence, and also to sue out execution on his judgment after he shall have obtained it, and in good faith prosecute it to collection.

We are satisfied that in either view of the statute, both requisitions may be made in one notice, and we are of opinion that a notice to "collect" is in effect a notice to institute suit, and to enforce the collection of the judgment when the debt shall be reduced to a judgment. It is not complained that the claim was not prosecuted to a judgment with sufficient diligence. The question is whether Stevens has acted in good faith in his attempts to sue out execution and collect the judgment. The proof shows that his attorney was at the clerk's office a day or two before the execution was due, for the purpose of directing it to be issued. He was then informed by the deputy clerk in charge of the office that the judgment had been re-

plevied, or that Quisenberry had signed the bond and would give the security within a few days.

This information was acted upon by the attorney, and there is no reason inconsistent with good faith why he should not have acted upon it. The bond accepted by the clerk was not signed by Chorn, and the surety thereon was insolvent at the time he signed it. The acceptance of that bond by the clerk put it out of the power of Stevens to sue out execution, until he could have it set aside and quashed by order of court.

But it is insisted that the attorney for appellant authorized the clerk to accept the insolvent surety, and that this was equivalent to an acceptance of the bond when executed. It may well be doubted whether the attorney had the power to bind his client by the acceptance of an insufficient bond, especially when as in this case its acceptance operated to release one of the defendants in the judgment. An attorney is employed to collect the debt due to his client, and has no authority to release the sureties thereon, nor to do any act necessarily prejudicial to his client's interest. *Graves v. Briscoe,* 3 J. J. Marshall 532.

But answering the question, it is clear that the burden was upon appellee to prove that the attorney did undertake to interfere with and direct the clerk as to the manner in which he should discharge his official duties, in taking and accepting the bond in question. The deputy clerk swears that the attorney authorized him to accept the surety, who was accepted. The attorney swears without hesitancy or qualification that he did not so authorize him.

Treating each of the witnesses as equally entitled to credit, the evidence is equipoised and the appellee has failed to make out his case. The testimony of Taliferro was incompetent; but if it had been admitted, it could not have changed the character of the proof. The facts and circumstances of the case tend strongly to corroborate the statements of the attorney, as the evidence of Taliferro does to corroborate the statements of the deputy clerk.

The judgment is *reversed* and the cause remanded with instructions to dissolve the temporary injunction and to dismiss appellee's petition.

James Simpson, for appellant.
Breckenridge & Buckner, for appellee.

WILLIAM PARROT'S DEVISEES *v.* THOMAS J. PARROT'S EX'X.

Contracts—Mental Capacity of Party to Contract.

Even in a case of absolute imbecility when there was entire good faith and the contract was just and proper and for the benefit of the imbecile a court of equity will not interfere to annul it.

APPEAL FROM WASHINGTON CIRCUIT COURT.

April 21, 1876.

OPINION BY JUDGE LINDSAY:

It is not pretended that Thomas J. Parrot procured the execution of the contract of February 1, 1868, by fraud or undue influence. The witnesses relied on by appellants show that the sums agreed to be paid him were not unreasonable, much less uncertainties. They show also that Thomas J. Parrot honestly and faithfully complied with his undertaking, and that the services rendered were not only beneficial to his father and mother, but were absolutely necessary for their comfort and security.

The proof shows that the mental faculties of William Parrot were much impaired by age, but he was not an imbecile at the time of the execution of this contract; and appellant's witnesses prove that he understood its terms and was anxious that it should be entered into. Under all these circumstances, the chancellor ought to enforce the agreement according to its terms.

Even in a case of absolute imbecility, when there was entire good faith, and the contract was just and proper, and was for the benefit of the unfortunaate party, a court of equity will not interfere to annul it; and in a case like this, where the party was not entirely destitute of mind, but understood and assented to the terms of a fair and proper contract, after advising with his neighbors and relations, and after it had been acted upon by the other party, and has resulted in manifest benefit to the persons supposed to be incapable of contracting, equity will enforce rather than annul the agreement. *Joncs, Adm'r., v. Perkins,* 5 B. Mon. 222.

The judgment in this case is *affirmed.*

W. H. Hays, for appellants. Brown & Lewis, for appellee.

ROSA P. GRAVES, ET AL., *v.* R. C. HARRIS, ET AL.

Husband and Wife—Wife's Right to Secure Estate.

The wife has a right to claim a settlement out of estate descended to her and may assert it by original bill at any time before it is reduced to actual possession by the husband.

Right of Wife to Pay Husband's Debt.

The wife has a right to allow her interest in a decedent's estate to be applied to pay her husband's debt and may go into a court of equity and have that interest settled upon her and thereby free it from the control of her husband and terminate his right to reduce it to possession and thus remove it beyond the reach of his creditors.

APPEAL FROM MARION CIRCUIT COURT.

April 22, 1876.

OPINION BY JUDGE COFER:

The appellant, Rose P. Graves, was entitled as one of the distributees and heirs of her father to over one thousand dollars as her share of the surplus personalty in the hands of his administrators, and to an interest in his real estate. The administrators held the note of her husband, George W. Graves, for over two thousand dollars.

She sold her interest in the land to her mother for $1,500. When the administrators were ready to distribute the surplus personal estate, Graves desired that his wife's interest should be applied to the payment of his note, but she declined to allow it to be done, and insisted that it should be secured to her. Her husband then agreed that if she would consent to have his note paid out of her interest in the personal estate and the proceeds of the sale of her interest in the realty, he would secure that amount to her separate use by a mortgage on a house and lot in Lebanon. To this Mrs. Graves assented, and on that day, March 14, 1874, the administrators settled with her and her husband. In that settlement Graves's note was credited with $1,000, and he and his wife executed to the administrators a receipt for that sum as so much paid on her distributive share. Mrs. Graves had not then conveyed her interest in the land to her mother, and the latter having sold it to Thomas H. Johnson, a deed was made to him on that day in which Graves and wife united. The deed contains a recital that Mrs. Rosetta Johnson (Mrs. Graves's mother) had purchased the interest of Rosie P. Graves and G. W. Graves, her husband, and paid them therefor, but the evidence shows that the money had not in fact been paid.

On the same day the administrators assigned the residue of Graves's note to Mrs. Johnson, and it may be assumed that it was then agreed that Mrs. Graves would accept it in payment, as far as it would go, for her interest in the land.

The result of the transactions of that day may be thus stated; one thousand dollars of Graves's note held by the administrators had, at

his request, been paid by his wife, and she had agreed to pay the balance out of the proceeds of her interest in the land, in consideration of which he agreed to secure that amount to her separate use by a mortgage on his house and lot.

March 24, ten days afterward, a mortgage was executed in accordance with that agreement, but without the intervention of a trustee, to secure to the separate use of Mrs. Graves the sum of two thousand dollars, and April 18, following, her husband's note was delivered to her in payment of $1,367.09, of the price of her interest in the land, and the difference between that sum and $1,500 was paid to her in cash.

Prior to all these transactions H. C. Harris and George W. Graves had become jointly bound as sureties for E. A. Graves in two debts for $2,000 each; some time in the latter part of that year, but exactly when it is not disclosed by the record. E. A. Graves was adjudged a bankrupt, and Harris having paid the debts, brought this suit December 9, 1874, against George W. Graves for contribution, and sued out an attachment against his property, which was levied on the next day, on the house and lot mortgaged to Mrs. Graves.

She was made a party defendant and her mortgage was attacked as voluntary and fraudulent.

She answered, denying all charges of fraud, and insisting that the mortgage was not voluntary, but was based upon a valuable consideration, and asked that it be upheld and enforced. George W. Graves answered, and among other things, alleged that he was adjudged a bankrupt January 13, 1875, and filing a copy of the adjudication, he resisted any judgment against him personally.

February 5, C. A. Johnson presented his petition adjudging that he had been regularly appointed assignee of the estate of George W. Graves, and had received the register's deed conveying to him all the estate of said Graves and asked to be made a party, which was done, and he then moved to discharge the attachments, but his motion was overruled. The house and lot were subsequently sold under a consent judgment, and the court on final hearing having adjudged to Harris priority over Mrs. Graves, and the fund not being sufficient to pay both, she prosecutes this appeal; and Johnson also prosecutes an appeal claiming the fund as assignee against both Harris and Mrs. Graves.

Johnson's appeal may be disposed of in a few words. He comes in as a claimant of the property in litigation, under his deed of assignment from the register, but he has failed to furnish any evidence

of his appointment, or of the execution of a conveyance to him as assignee, and has therefore failed to manifest any right to the property or its proceeds.

It may be remarked upon the appeal of Mrs. Graves, without entering into an examination in detail of the facts in the record, that the allegation that the mortgage to her was made with the intention to hinder or defraud the creditors of her husband is unsustained. The only question which we need consider at any length is whether the mortgage was voluntary, and on that account invalid, as against the creditors of George W. Graves, and the decision of that question must depend upon an inquiry into the relative rights of Graves and his creditors on the one hand and Mrs. Graves on the other in the interest of the latter in her father's estate.

Before entering upon that question, however, we remark that we do not agree with Mrs. Graves's counsel that in as much as Harris did not pay the debts for which he and George W. Graves were jointly bound, until after the execution of the mortgage, he is to be treated as a subsequent creditor, against whom the mortgage is valid even though it be voluntary.

The debts existed when the mortgage was made, and being bound as surety for their payment, Harris, upon making payment, was subrogated to the rights of the creditors, to whom payment was made to the extent that he was entitled to contribution from a co-surety.

The conflicting claims of married women and the creditors of their husbands have been the subject of repeated adjudications by this court, and the principles upon which such controversies are to be decided seem now to be well settled.

The right of a wife to claim a settlement out of estate descended to her is not confined to cases where the chancellor is called upon to subject such estate to the payment of the debts of the husband, but may be asserted by her by original bill. 2 Story's Equity, Sec. 1414; Chaney on Rights 417; Moore v. Moore, 14 B. Mon. 259. And it is now well settled that even assignees of the husand for value, of the choses of the wife may be compelled to make a settlement upon her out of the estate assigned. *Thomas v. Kennedy,* 4 B. Mon. 235; *Crooks v. Turpin,* 10 Ib. 244; *Moore v. Moore,* 14 Ib. 261.

Counsel for the appellee therefore states the rule too broadly when he says, without qualification, that the law is that the husband is entitled to the distributable share of his wife in the personal estate of her father. The cases cited by him in support of that view are not analogous to this case. *South v. Hay,* 3 B. Mon. 88, was a suit

by the legatees and distributees of William Hay against his executors. South, who was one of the executors, was the husband of one of the distributees, and the court held that he was not bound to account to any one for his wife's share of the estate which was in his hands as executor. No claim was made by the wife to a settlement, and all that was there decided was that the husband was entitled in his settlement to be credited by his wife's distributive share. His election to take a credit had the same effect that the receipt for the money would have had if another had been executor, so that the case decides nothing more than that when the husband had reduced the distributive share of the wife to possession it becomes his absolutely.

In *Miller v. Miller,* 1 J. J. Marsh. 169, the husband being dead, the question was whether his administrator or his surviving wife was entitled to money bequeathed to her during coverture and not received or otherwise disposed of by the husband in his lifetime, and it was held the wife was entitled. That was the only point decided in that case, and there is nothing in the opinion touching the relative rights of the husband and wife or the rights of the wife as against the husband's creditors.

Jones's Adm'r v. Warren's Adm'r, 4 Dana 33, was also a contest about the right of survivorship. The note sued on in that case by the administrator of the wife was executed to her during coverture, and the defendant pleaded that her husband survived her and was still living and that the note belonged to him as survivor, and it was held by the court that the plea presented a bar to the action.

There being nothing in the cases cited by counsel, or in any known to the court, inconsistent with the doctrine already announced upon what we regard as ample authority, that the right of the wife to claim a settlement out of estate descended to her may be asserted by original bill at any time before it is actually reduced to possession by the husband. It cannot be doubted that Mrs. Graves had a right at the time she agreed to allow her interest settled upon her, thereby freeing it from the control of her husband and terminating his right to make it his own by reducing it to possession and removing it forever beyond the reach of his creditors. Such a right in Mrs. Graves was wholly inconsistent with an absolute right in her husband to the fund, and as she might have asserted and enforced it in equity against both her husband and his creditors, we see no reason why her husband might not secure it to her in the mode adopted by them.

When parties have done for themselves only that which the chancellor would have done for them if he had been called upon, he will not refuse to recognize its validity.

But it is argued that although the mortgage may be valid as to the sum of $1,367.09, the balance due on Graves's note and which was paid by Mrs. Graves on the 18th of April by a credit on the amount due from her mother for her interest in the land, and which the husband never reduced to possession, it is voluntary and invalid as to the residue. This argument is that the credit on the husband's note, and the receipt given by both husband and wife for the amount, reduced that much of her interest to the possession of the husband, and that when it came into his possession it was absolutely his, freed from all equity in her, and could no more be legally settled upon her afterward than any other money or property owned by the husband.

This argument gives no effect whatever to the established fact that before the husband received the credit, and before the wife would consent to that appropriation of the fund, the husband agreed that if she would consent he would secure the amount to her by mortgage; nor to the further fact that a mortgage was made which was a complete execution of the agreement, and that his creditors are now in a court of equity asking that that executed agreement be set aside for their benefit.

In *Maraman v. Maraman*, 4 Met. 84, cited and relied upon by counsel for Harris, Mrs. Maraman was forced to invoke the aid of the chancellor to enforce the notes she held on her deceased husband, and the administrator, who stood in the room and stead of creditors as far as was necessary to secure the payment in full of their debts, stood on the defensive armed with an equity in other creditors equal to Mrs. Maraman's equity, and, in addition, with a legal right which she did not have.

Another distinction between that case and this, it seems to us, is, that the proceeds of the sales of the wife's land and slaves, which her husband attempted to secure to her by his notes, were paid over to and used by him at his discretion; but in this case the wife's money, instead of being paid to the husband, was, at his request, paid by her direction upon a subsisting debt against him, and we incline to the opinion that she is entitled to be substituted to the rights of the creditor to whom the money was paid.

But we rest our decision, as to the $1,000 credited on the note, upon the ground that the husband's promise to secure that sum to his wife by a mortgage gave her an equitable right, as against him,

to have that agreement performed, and that when it was fully executed his creditors could only reach it through the aid of a court of equity, as it rested upon a sufficient consideration to uphold it.

There are other creditors besides Harris whose rights are involved in this appeal, but as they all, except Hutchinson, who holds a prior mortgage, stand upon the same ground with Harris, we have found it more convenient in considering the case to treat it as if he was the only appellee, but what we have said as to him is intended to apply to all except Hutchins.

The judgment is affirmed as to Johnson, but is reversed as to Mrs. Graves, and the cause is remanded with directions to render a judgment in conformity with this opinion, and to adjudge to Harris any balance remaining after satisfying the mortgages of Hutchins and Mrs. Graves.

C. S. Hill, C. H. Johnston, for appellants.
R. H. Rountree, for appellees.

MARY S. HARRISON'S TRUSTEE *v.* JOHN KUNTZ.

Distress Warrant—Landlord and Tenant—Pleading—Exemption.

Where a distress warrant is issued at the instance of a landlord against the goods of his tenant, and pleading by the tenant is defective which avers that at the time of the levy and sale he was a bona fide housekeeper with a family and that the personal property seized and sold was by law exempt from seizure and sale under a distress warrant, the pleader should have stated what number or quantity of each character of personal property levied on he owned at the time of the seizure so that the court might determine whether the property taken was exempt.

Exemption.

A contract not to claim the benefit of the exemption is executory and does not bind the appellee.

APPEAL FROM BULLITT CIRCUIT COURT.

April 26, 1876.

OPINION BY JUDGE LINDSAY:

In order to enable a tenant whose property has been seized and sold under a distress warrant sued out by his landlord, to recover under the provisions of the 4th and 5th sections of the Act of March 7, 1871, Sess. Acts 1871, Vol. 1, p. 44, it is necessary that his

traverse shall either controvert the material averments of the affidavit upon which the warrant was based, or if the warrant was properly sued out, shall set up affirmatively such facts as rendered the levy and sale illegal.

The traverse in this case, in effect, concedes that the appellee was indebted to his landlord in the sum of at least seventy-five dollars, and that the same was due and payable in money, when the warrant was sued out. The traverser avers that at the time of the levy and sale he was a bona fide housekeeper with a family, and that the personal property seized and sold was by law exempt from seizure and sale under execution or distress warrant.

Whether or not it was exempt is a question of law. If he owned more than two horses, or more than one wagon, or more than two cows, or more than the number of stores, fowls, hogs, &c., that are exempted by statute, then the officer had the right to seize and sell the property, for the value of which the traverser is here seeking a recovery. The presumption of law is that the officer did not levy upon property not subject to seizure and sale, and in order to overcome that presumption it was necessary that appellee should have stated what number or quantity of each character of personal property levied on he owned at the time of the seizure, so that the court might have determined whether or not the property taken was exempt.

The instruction given for appellee was erroneous. It did not inform the jury what property is exempt from the payment of debt; and besides the traverse sets out no cause of action on that branch of the controversy. The terms of the lease cannot be specifically enforced. The contract not to claim the benefit of the exemption law remained executory and does not bind the appellee.

But if it shall finally turn out that the seizure and sale of the property was a trespass, the estate of the cestui que trust, Mary L. Harrison, cannot be subjected to the satisfaction of the damages resulting from the wrong of her trustee, unless it shall be made to appear that she actually participated in procuring the trespass to be committed.

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

R. H. Field, J. &J. W. Rodman, for appellant.
E. E. Pate and R. J. Meyler, for appellee.

LOUISVILLE & NASHVILLE R. CO. *v.* LUTHER G. HALL.

Judgment—Collection of Judgment Against Corporation.

The holder of a judgment against a railroad corporation may compel the company or its officers and agents to disclose and surrender its property, choses in action or equitable or legal interests which it may own or which are held by or for it by strangers.

Attachment.

In the collection of a judgment against a railroad corporation it is error for the court to award an order of attachment against the president and directors of the company, without first bringing them into court as garnishees and ascertaining whether they had money or property of the defendant in their possession or under their control.

APPEAL FROM NELSON CIRCUIT COURT.

April 27, 1876.

OPINION BY JUDGE LINDSAY:

This is a suit in equity to enforce the judgment rendered in the ordinary action of *Luther G. Hall v. Louisville & Nashville and Great Southern Railroad Co.,* which judgment we have this day affirmed. The defendant is styled "The Louisville & Nashville & Great Southern Railroad Company, alias The Louisville & Nashville Railroad Company." As it declined in the ordinary action to disclose its true name, it cannot complain that the appellee has not yet learned what it is. The question of names, however, can cut no figure in this proceeding. That question is concluded by the course pursued by the appellant in the ordinary action.

The appellee has the right to enforce the collection of its judgment at law, by compelling the company or officers or agents to disclose and surrender any property, choses in action, or equitable or legal interest in any property, which it may own, or they may hold for it, and to disclose the existence of any such property, held by or for it, by strangers or persons now in his employ.

But it was error in this action to render a second judgment against the appellant. The judgment at law may be enforced, but a judgment in equity founded on that judgment is neither necessary nor proper. It was also error to award an order of attachment against the president and directors of the company, without first bringing them into court as garnishees, and ascertaining whether or not they had money or property of the defendant in their possession or under their control.

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

William Johnson, for appellant.
Muir & Wickliffe, for appellee.

A. CLEARY *v.* JOHN G. OFFUTT.

Bill of Exceptions—Practice.

Unless a rejected pleading is made part of the record by bill of particulars or order of the court the clerk has no right to copy it in a transcript and it will not be considered by the appellate court.

APPEAL FROM SPENCER CIRCUIT COURT.

April 28, 1876.

OPINION BY JUDGE LINDSAY:

The answer which appellant proposed to file is not made a part of the record. A paper purporting to be a copy thereof was incorporated in the record by the clerk, but that paper cannot be considered by this court. Unless a rejected pleading is made a part of the record, by order of court, or bill of exception, the clerk has no right to copy it in a transcript intended for this court. We cannot therefore determine whether or not appellant had a just or legal ground of defense, or that he was other than a nominal party to the action.

Besides, his affidavit states merely that he was kept away from court by sickness. He does not state that he or any one of his family was sick, nor that he was unable to get to the court house, or that any one was sick enough to need his attention.

The action of the circuit court in refusing to set aside the judgment was proper.

Judgment *affirmed.*

T. J. Barker, for appellant. J. H. Beauchamp, for appellee.

W. P. CUNDIFF, ET AL., *v.* W. B. CUNDIFF, ET AL.

Wills—Resisting Probate of Wills—Expenses Incurred.

An executor who has in good faith attempted to sustain a will is entitled to his costs out of the estate.

APPEAL FROM BULLITT CIRCUIT COURT.

April 29, 1876.

OPINION BY JUDGE COFER:

The order discharging the rule against the appellees to bring into court the watches and chains referred to is not a final order, and the circuit court still has power to inquire through its commissioner or in such other manner as it may think best into the question whether the watches and chains are worth more than the amount at which they were estimated by the appraisers, and to charge the orders with such sum as it shall ascertain the several articles to be worth.

Counsel concedes the general rule to be that an executor who has in good faith attempted to sustain a will is entitled to his cost out of the estate, but claims that the effort to sustain the will of J. B. Cundiff was not in good faith and therefore that the nominated executrix had no right to be reimbursed her expenses.

The will was probated in the county court and upon full hearing on appeal to the circuit court it was sustained by the verdict of a jury and the judgment of the court. Those facts are sufficient to show that there was sufficient evidence of the genuineness and validity of the will to make it the duty of the executrix named therein to make an effort to have it probated, and as such was her duty she is entitled to her cost in that behalf, legal and extraordinary. That she was more interested than any other person in sustaining the will does not lessen her right to her costs; something is due as well to the testator as to the devisee, and the nominated executor owes it not only to himself but to the other beneficiaries and to the testator when there are reasonable grounds to believe that the will can be sustained, to make the effort.

We will not therefore look into the evidence heard on the trial of the issue of will or no will, but accept the result of the trial in the circuit court as sufficient to entitle the nominated executrix to her costs. Judgment *affirmed*.

R. J. Megler, for appellants. W. R. Thompson, for appellees.

MT. VERNON BANKING CO. *v.* H. P. RANDOLPH, ET AL.

Attorney's Fees—Promissory Notes.

Conditional contracts inserted in the body of promissory notes to pay attorney fees if legal process is resorted to to collect the note are not enforcible.

APPEAL FROM HENDERSON CIRCUIT COURT.

April 29, 1876.

OPINION BY JUDGE LINDSAY:

In the case of *Thomasson v. Townsend,* 10 Bush 114, this court held that an undertaking of like import with the one embodied in the note here sued on, to wit, "Should the payment of this note be enforced by legal process, the judgment shall include the attorney's fee for collecting the same," was inconsistent with the policy of our laws.

In that view of the subject such contracts will not be enforced by the courts of this state, no matter where they may have been entered into. It is manifest upon the face of the note that this undertaking constitutes no part of the indebtedness of the obligors to the payee. It is in the nature of a penalty for the non-payment of money, and will be relieved against upon the payment of the principal and interest of the debts. Damages in the way of counsel fees for the breach of contracts were never recoverable at the common law. Sedgwick on Damages, side page 96. Our statutes have changed the common-law rule to the extent of fixing the sums that may be awarded as damages in the way of attorney's fees. These statutes determine the duty of the courts in this regard. This duty cannot be enlarged or extended by contracts entered into under the laws of the state of Indiana.

We recognize to the fullest extent the rule that the lex loci contractu controls the nature, construction and validity of a contract. But it does not control or in any way affect the remedy allowed in the county in which it is in suit; nor does it impose upon the courts of that county the duty of holding valid and enforcible a contract which contravenes the policy of its laws. As we have already seen, the contract under consideration, so far as it contemplates the payment of a greater sum, as an attorney's fee, than is fixed and allowed by our statutes, is inconsistent with and contrary to the policy of our laws. The legal attorney's fee was adjudged by the court below, and it properly refused to adjudge a greater sum. Judgment *affirmed.*

H. F. Turner, for appellant. Eaves & Prentice, for appellees.

JAMES A. HUFFAKER, ET AL., *v.* BANK OF MONTICELLO.

Pleading—Petition on Promissory Note—Averments Necessary.

In declaring upon a promissory note the pleader must set out the material stipulations of the promise and its breach, and a failure to do so will not be cured by filing the note as a part of the petition.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

May 2, 1876.

OPINION BY JUDGE LINDSAY:

Appellee avers in the first paragraph of its petition that Edwin Huffaker & Shy "are indebted to plaintiffs in the sum of one thousand eight hundred dollars upon the note of said Edwin Huffaker & Shy, No. 337, date May 2, 1874, payable ninety days thereafter to Walton & Bros., and discounted and transferred to plaintiff by endorsement of said Walton & Bros. on the bank thereof," etc.

When this allegation is analyzed it will be found that the substantial facts averred are, 1. That the note referred to is the note of Edwin Huffaker & Shy to Walton & Bros.; 2. that it bears date May 2, 1874, and became due ninety days thereafter; and 3. that it had been sued and transferred by the payees to the plaintiff.

Appellee fails to state in terms that the note contained or evidenced a promise upon the part of the payors to pay any sum of money to the payees. But if that agreement or promise can be supplied by implication or intendment, there is still an utter failure to state the sum agreed to be paid. The averment that the makers of the note are indebted to the plaintiffs in the sum of eighteen hundred dollars upon said note, is but the statement of a conclusion of law. If the note evidenced a promise to pay that sum of money, then this conclusion of law is correct; but if in order now, then it is incorrect, and as the petition does not set out the promise, even in the most general terms, it is impossible for the court to determine, from what the pleader states, whether the facts do or not support his legal conclusion.

In declaring upon an express promise to pay money, the material stipulations of the promise must be substantially set out by the pleader, and a failure in this respect will not be cured by filing the note or obligation declared on as part of the petition. The petition must state the facts constituting the cause of action. *Hill v. Barrett, et al.*, 14 B. Mon. 83; *Dodd v. King*, 1 Met. 430. These cases are not overruled by the opinion in the case of *Burton, et al. v White's Adm'r*, 1 Bush 9. In that case this court refused to reverse because

the petition failed to state the time at which the note sued on became due and payable, holding that the note which was filed with and made part of the petition might be considered for the purpose of ascertaining whether or not the debt was due when the action was instituted.

There is no intimation that the note would have been considered for the purpose of ascertaining what the terms and conditions of the promise were. If the provisions of Sec. 145, of the Civil Code of Practice, when complied with, make the note, bond, or bill filed, literally a part of the petition, the pleader need only refer to the evidence of indebtedness, and leave it to tell its own story, and that the debt has not been paid. The case of *Burton, et al., v. White's Admr.* has not been so understood by this court, and we do not recollect that it has ever been followed even to the extent its language seems to warrant.

A petition founded upon a promissory note must so set out the promise, its terms, and its breach, as to enable the court to render a judgment upon the failure of the payors to make defense, without being compelled to refer to the note on file to ascertain those facts. We are of opinion that the first paragraph of the petition in this case is insufficient in law, and that the general demurrer thereto was improperly overruled.

Judgment *reversed* and cause remanded with instructions to sustain said demurrer, and then for further proceedings not inconsistent with this opinion.

Gibson & Gibson, for appellants.
J. S. Vanwinkle, Alexander & Dickinson, for appellee.

S. LITTLEFIELD *v.* JAMES ZANONE, ET AL.

Bankruptcy—Effect of Discharge—State Court's Power.

A discharge in bankruptcy granted by the district court of the United States, exonerates the person discharged from the payment of debts and the state court has no power to set aside or disregard it. If the discharge was procured by fraud, the federal court alone can give relief.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

May 3, 1876.

OPINION BY JUDGE LINDSAY:

The discharge in bankruptcy granted by the district court of the

United States to James Zanone exonerated him from the payment of all the debts theretofore owing by him to Littlefield. The state court had no power to set aside or disregard said discharge. If it was procured by fraud, Littlefield's remedy was to have it set aside by proceedings in the district court, commenced within two years after it was granted.

It is true that, notwithstanding the discharge, Zanone was still under a sufficient moral obligation to Littlefield to support any promise he might make to pay the debts owing to him, and if he had made such a promise, his wife, the present appellee, might, by proper conveyances have bound her real estate to secure its performance. But the difficulty in this case is that the record does not show any such promise upon the part of said Zanone.

The promises sued on and sought to be enforced are the promissory notes of Mary Zanone. She does not, in express terms, plead and rely on her coverture; but the petition of Littlefield shows that she was a married woman at the time he instituted his original action, and his deposition shows that she was a married woman at the time the notes were made and delivered. Such being the case, said notes were absolutely void as to Mrs. Zanone and as they were not signed by her husband, they did not, of course, bind him. Littlefield, therefore, has sued a married woman upon a void contract, and seeks to sell her real estate for the purpose of satisfying a non-enforceable claim. At the time of the institution of his action, he held no valid claim against either the wife or the husband.

If the notes sued on had, as matter of fact, been executed for the purchase price of the realty conveyed by Littlefield to Mrs. Zanone, equity would compel her either to pay the same or submit to a rescission of the contract of sale. But Littlefield shows by his own deposition that he was not at any time the owner of said realty. The conveyances first from Mrs. Zanone to him, and then from him back to her, by retaining a lien, were intended to operate as a mere security and said conveyances will be treated as in law a mortgage, executed by a married woman for the sole purpose of securing the performance of a void contract.

As Littlefield has no right to recover on the notes sued on, of course his security, which is a mere incident to said notes, cannot be made available to him for any purpose whatever. The court below, therefore, did not err in refusing to subject to the payment of said void notes the Gower property. In this view of the case we need not

inquire as to the rights of Mrs. Zanone under the act to exempt homesteads from the payment of debts.

Judgment *affirmed*.

Bush & Hendricks, for appellant.
Campbell & Greer, for appellees.

ANNA WEBB *v.* J. W. FORMAN.

Marriage Contract—Capacity of Party to Contract.

A person having a living husband from whom she has not been divorced cannot make a binding contract to marry another conditioned upon a divorce being granted.

Capacity to Contract.

The same capacity is required to make a contract to marry upon a contingency that is requisite to make an absolute contract to marry at a future time. A contract must be valid when entered into or it never can be valid.

APPEAL FROM BULLITT CIRCUIT COURT.

May 4, 1876.

OPINION BY JUDGE COFER:

At the time of making the alleged agreement to marry, the appellant had a living husband from whom she had not been divorced, and she was therefore legally incapacitated to make a valid contract for a second marriage. Counsel, in effect, concede that such is the law in regard to an absolute and unconditional agreement, but they seek to establish a distinction between such an agreement and one depending upon a future contingency. We can see no room for the supposed distinction. The same legal capacity is required to make a contract to marry upon a contingency that is requisite to make an absolute contract to marry at a future period. A contract must be valid when entered into, or it never can be so.

The fact that suit for a divorce was pending, and that a judgment therefor was afterwards obtained, cannot affect the question. Until a divorce was actually granted, the appellant was under all the disabilities incident to coverture, and her agreement to marry the appellee was a nullity, and his agreement to marry her was without consideration. There can be no such thing as an agreement to marry which is valid as to one party and void as to the other.

Nor do we think the appellant can maintain an action on the agreement set forth in the second paragraph of her petition. It is true that she alleges compliance on her part, and that in consideration thereof the appellee undertook and agreed to furnish her and her children with a home; and it is also true, as a general rule, that when in consideration that one under disability will do a certain act, one under no disability promises and agrees to do an act or to pay a sum of money, and the former performs the agreement, the latter cannot set up the disability when sued for non-performance on his part.

But the demurrer in this case calls the petition in question upon every ground, and if it is bad upon any the judgment must be affirmed. The appellant could not lawfully contract to marry the appellee, and she had no legal right to enter into communication with him looking to a marriage after a divorce should be obtained; so long as she remained in law the wife of another, the law must refuse to recognize as valid, or to lend any assistance whatever for the enforcement of an agreement inconsistent with her legal status.

Although she had been abandoned by her husband without fault on her part, as long as the relation of husband and wife subsisted between them a reconciliation and a resumption of his marital rights and duties was possible, and public policy will not permit us to sanction or enforce an agreement, the whole tendency of which was to prevent a reconciliation between her and her husband.

The facts as stated in the petition bear with equal force upon the appellee as upon the appellant, and it is not out of regard for him that the law will not compel him to answer in damages for a breach of his agreement. If he had paid her a sum of money, or had conveyed her his farm, in consideration that she would leave Louisville and go to Mt. Washington in order that he might more conveniently, and at less expense, enjoy her society, and he was in court asking damages for a breach of the agreement on her part, he would not be heard.

The law intends to encourage the settlement of domestic broils, and the healing of breaches between husbands and wives, and discountenances, by all proper means, everything calculated to produce or keep alive conjugal estrangement; and it would be destructive of that purpose of the law to award damages for the breach of agreements like those set up in this case.

Judgment *affirmed*.

W. R. Thompson, J. W. Croan, E. D. Purdy, for appellant.
R. H. Field, R. J. Meyler, for appellee.

JOHN W. BELL'S ASSIGNEE *v.* BETTIE MERRIWEATHER.

Usury—Disaffirmance and Recovery Back.

One who has paid usury may disaffirm and maintain an action to recover it back, but is under no obligation to his creditors to exercise such right.

Assignee's Right to Recover Back Usurious Interest.

Before an assignee can reach and recover back usurious interest paid by the assignor, it is necessary for him to show that his assignor has elected that such right shall be enforced.

APPEAL FROM SHELBY CIRCUIT COURT.

May 4, 1876.

OPINION BY JUDGE LINDSAY:

This action was instituted by Harboson, assignee of Bell, to recover from Bettie Merriweather certain sums of money alleged to have been paid by Bell to her in the way of usurious interest. Harboson avers that he is the assignee of said John W. Bell, and was constituted and appointed as such by a deed of general assignment for the benefit of his creditors, made and executed by said Bell in the day of September 1874, and by virtue of said deed, he is authorized to collect the debts owing to said Bell. The conveyance is not on file in the record.

The primary question is whether the statement of facts above quoted shows a right of action in Harboson. Construing his language with the utmost liberality, we cannot conclude that the deed of assignment operates further than to transfer to him all the legal and equitable estate of Bell, and to authorize him to see for and collect the debts owing to Bell at the time of its execution and delivery. There is nothing in the petition tending to show that the usury was not paid by Bell, voluntarily and without mistake or fraud. The contract to pay it was not enforceable, but the payment itself was not void. Bell might, if he had chosen so to do, have disaffirmed the payment and maintained an action to recover back the sum paid. But as this was with him a mere matter of conscience, he was under no legal obligation to his creditors to exercise that right. Hence, before his creditor or his assignee can reach the usury in the hands of Merriweather, it is necessary that it shall be shown that Bell has elected that his statutory right to reclaim it shall be enforced.

Harboson does not aver, in terms, that Bell has so elected, or that

he is prosecuting this action with his (Bell's) approval and consent; nor does he state that the right of Bell, in regard to this usury, was specifically transferred to him by the deed of assignment under which he claims. We have already said that we will not presume that the deed passed to Harboson anything more than the legal and equitable estate of the grantor. A conveyance or assignment of legal and equitable estate does not transfer the right of the grantor or assignor to sue for usury. *Breckenridge v. Churchill,* 3 J. J. Marsh. 11.

Upon the authority of the case cited and of the subsequent cases of *Estill v. Rodes, et al.,* 1 B. Mon. 314; *Graham, et al., v. Moore, et al.,* 7 B. Mon. 53, and *Lee v. Fellows & Co.,* 10 B. Mon. 117, we are constrained to conclude that Harboson failed by his petition to show a right in himself to prosecute the action and that upon this ground, if upon no other, the court below properly refused to render a judgment in his favor.

Judgment *affirmed.*

Bullock & Beckham, for appellant.
A. J. James, for appellee.

JOHN R. LAMBERT *v.* GEORGE SMITH.

Conversion of Personal Property—Pleading—Evidence.

In a suit charging that the defendant wrongfully took possession of plaintiff's horse and refused to deliver the same to the plaintiff, although demand was made, the defendant, under a general denial, cannot by the evidence make defense of confession and avoidance.

APPEAL FROM HENDERSON CIRCUIT COURT.

May 6, 1876.

OPINION BY JUDGE COFER:

It was alleged in the petition that the defendant "wrongfully, without right, took possession" of the plaintiff's horse, and had "failed and refused to deliver the same to the plaintiff, although due demand had been made therefor." These allegations being undenied, the conversion of the horse stood confessed on the pleadings. These allegations being confessed, the denial that the defendant wrongfully and without right converted the horse to his own use, presented no defense whatever to the action.

But if the answer be conceded to contain a traverse of all the material allegations in the petition, the result would be the same. The evidence shows without contradiction that the defendant took possession of the horse without the consent of the plaintiff, and that while in the former's possession the horse was killed.

The defendant attempted to show by the evidence that the horse was trespassing upon his premises, and that he took possession of him merely for the purpose of restraining him from committing other depredations until the plaintiff could be informed of the fact and come and take him away. In other words, he sought to prove that his possession was lawful, and then insisted that being lawfully in possession he was only liable in the event the horse was killed in consequence of his negligence.

This defense could not be made under an answer which contained only denials of the allegations in the petition. The answer, if good at all, was a simple denial of the facts constituting the plaintiff's cause of action; but the defense attempted to be made out by the evidence was of confession and avoidance.

To admit such a defense under such an answer would be totally to disregard the rules of pleading and practice, and thereby to deprive the plaintiff of the advantage of being informed by the answer of the facts upon which the defendant intended to rely. The plaintiff had a right to look to the answer; and when he found no attempt to make any other defense than a mere denial of the facts alleged, he had a right to assume that he would only be required to prove those facts, and would naturally be surprised by, and totally unprepared to meet the evidence offered, not to disprove, but to avoid the facts he had alleged.

It results, therefore, that, even conceding the answer was sufficient to bar the action, the court did not err in refusing to give instructions based on evidence offered in avoidance of the plaintiff's cause of action.

Judgment *affirmed.*

Clay & Coleman, for appellant. H. F. Turner, for appellee.

JOHN D. BAKER, ET AL., *v.* J. W. TANDY, ET AL.

Highways—Damages on Account of Opening Of.

Where damages are awarded to the owners of land taken for a highway, such damages must be tendered or paid into court before their land can be taken.

APPEAL FROM CARROLL CIRCUIT COURT.

May 8, 1876.

OPINION BY JUDGE PETERS:

The place of beginning for the change in the road is described in the viewer's report with such certainty as to leave no difficulty in ascertaining it; and taking the line as surveyed as the center of the route, which is made so by law, and the alteration is described by metes and bounds, courses and distances in the report, and the terminus is fixed therein with exact certainty. There is, therefore, no objection to the report of the viewers; and the court having adopted that as the route for the purposed change in the road, the judgment to that extent is approved.

The sheriff was commanded by the writ of ad quod damnum to summon the jury to meet on the 18th of March, 1874, but if from any sufficient reason the jury could not attend and be sworn on that day, he was directed to summon them to meet on some other day to be fixed by himself, giving due notice to the parties interested. The inquest was held on the 26th of March, 1874, of which, as the sheriff returns show, he gave to appellants due notice. The writ and inquest were returned to court, and no exceptions were taken thereto, for the want of notice of the time and place of the meeting of the jury, or for any irregularity in the proceeding; and if any defects existed they were waived by failing to except in the lower court.

The jury fixed in their verdict what would be a just compensation to each of the appellants for their land taken, and the cost of making the additional fencing by the establishment of the alteration of the road; and they found that no damage would result to the residue of the appellants' lands. The verdict responded to all the requirements of the writ, and seems to be complete.

But there is a fatal defect in the judgment in leaving the sums to be paid to Baker and Darbro respectively in blank. If as it appears they declined to take the damages assessed when tendered to them, the money should have been ordered to be paid into court for them; and placed in their power to receive the compensation for their property whenever they should choose to do so, and not compel them to resort to their actions at law to get it, or to await the pleasure of those who had to pay it. Compensation must be previously made before their land can be taken, or it must be in such a condition that they can get it, when it shall be their pleasure to receive it.

Wherefore the judgment of the circuit court is *reversed* for the

single error pointed out, and the cause remanded with directions to reverse the order of the county court, and for a judgment to be entered in conformity with this opinion.

W. B. & M. W. Winslow, for appellants.
Masterson & Gaunt, for appellees.

JOHN JONES AND WIFE v. ALFRED THOMPSON.

Resulting Trusts.

Since the passage of the Act of July 1, 1852, it devolves upon a party asking the aid of a court of equity to enforce a resulting trust to show, by appropriate averments, that it is not within the operation of the general provisions contained in § 20, but belongs to one or the other of the classes excepted in § 22, otherwise the relief cannot be granted.

Pleading.

Averments in a pleading to enforce a resulting trust are insufficient when they amount to no more than that the defendant purchased the real estate for plaintiff and took conveyance to himself, which may be true and not result in a trust.

Conveyance to Defraud Creditors.

A contract fully executed, founded in a fraudulent purpose to cheat creditors, is valid against those who, as volunteers, claim under one of the parties to the fraud.

APPEAL FROM BOYD CIRCUIT COURT.

May 9, 1876.

OPINION BY JUDGE COFER:

The facts of this case are so far similar to the facts in *Graves v. Graves,* 3 Met. 167, as to make that case decisive of this. In that case the appellant, who was the mother of appellee, brought suit to compel the appellee to convey to her land which she alleged he bought for her, as her agent, and paid for with her money, but the title to which had been made to him.

This court commenting on the petition in that case said: "The petition fails to charge that the appellee violated any trust confided to him in procuring the deed thus to be made, or that the deed was so made without the consent or directions of the appellant. For aught that appears to the contrary, the deed may have been made to him with her consent, and by her authority and express direction."

The first question, then, that arises is, could the chancellor, upon the state of fact presented by the petition, have compelled a conveyance, even though the existence of such facts had not been controverted by answer? We think not.

And then, after stating what the law of resulting trusts was before the adoption of the Revised Statutes, and quoting Secs. 20 and 22 of Chap. 80, the court went on as follows: "In all cases, therefore, arising as this did, since July 1, 1852, it devolves upon a party asking the aid of a court of equity to enforce a resulting trust to show, by appropriate averments, that it is not within the operation of the general provision contained in Sec. 20, but belongs to one or the other of the classes excepted in Sec. 22; otherwise the relief cannot be granted."

There are no averments in the pleadings in this case to take it out of the general provisions of Sec. 20. The most liberal construction which can be given to the answer and counterclaim cannot bring it within the rule just cited. All that can be found in that pleading amounts to no more than an averment that the appellee purchased the lots for his father and took the conveyances to himself. It is not alleged that this was done in violation of confidence reposed in the appellee, or that the deeds were so made without the consent of Jackson Thompson, and as was said in the case *supra*, "For aught that appears the deeds may have been made to him with Jackson Thompson's consent, and by his authority and express direction."

The allegation that the appellee received the conveyances in trust for his father, is but the averment of a legal conclusion. The facts showing that there was a trust should have been stated, and that not having been done, the averment of the conclusion adds nothing whatever to the strength of the pleading. We are, therefore, of the opinion that if all the facts alleged had been admitted or proved, the chancellor could not have done otherwise than dismiss the counterclaim, so far as it was based upon a supposed trust.

The supposed agreement of the appellee to convey the lot sued for to Mrs. Jones is not even referred to in the pleadings, and if it had been fully established by the evidence it could avail nothing in the state of the pleadings. And the same is true of the other ground of defense urged in argument, viz.: that the deeds were made to the appellee to shield the property from the creditors of his father. Nor could that fact, if alleged and proved, be of any avail whatever. The contract is fully executed, and if founded in the alleged fraudulent purpose to cheat creditors, it is valid against those who, as volunteers, claim under one of the parties to the fraud. In *Bookover v.*

Hurst, 1 Met. 665, this court held that a mortgagor "cannot prevent the legal operation of the deed by showing it was fraudulently executed by him. This is neither a valid, legal nor equitable defense."

It was said in *Graves v. Graves* (and the same doctrine was fully recognized in *Martin v. Martin, et al.,* 5 Bush 47), that when the money of one person is used to pay for land which is conveyed to another, under such circumstances there is no enforceable trust, the party whose money has been so used for the benefit of another may recover it; and upon the facts in that case the appellant would have been entitled under her prayer for general relief to a judgment for the money, but for other matters which were held to amount to an estoppel to claim it. So in this case, if Jackson Thompson, instead of Jones and wife, had pleaded the facts pleaded by them, he could have recovered whatever money, belonging to him, the evidence shows was used in paying for the lots. But the right of action to recover the money is in his personal representative, and not in his heirs.

We are, therefore, of the opinion that the appellants failed to show a right to relief of any kind to any extent, and the judgment is *affirmed.*

Elliott & Prichard and A. J. James, for appellants.

Ireland & Hampton and A. L. Moore, for appellee.

E. K. WEIR *v.* ELIZABETHTOWN & PADUCAH R. CO.

Principal and Agent—Authority of Railroad Engineer.

General authority conferred by a railroad company upon its chief engineer to make contracts for its construction gives such agent no power to contract with the owners of mines to construct switches or branch roads to such mines.

Proof to Establish Agency.

Statements and letters of the agent are not admissible in evidence to establish the agency.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

May 11, 1876.

OPINION BY JUDGE PRYOR:

It is admitted by the answer that McLeod is or was the chief engineer of defendant's road, and as such had the general authority to superintend and control its construction. Numerous witnesses were

introduced showing that this engineer made contracts for its construction, and was no doubt authorized to do so by reason of his superior skill in the construction of such improvements. This general authority of the road to make contracts for its construction conferred upon him no power to make contracts with the owners of mines, to contract switches or branch roads to their mines. His agency, so far as this record shows, extended to the construction of the road, and from it is not to be implied a power to contract for, or contribute to branch roads owned by others, although it may appear beneficial to the company. Such authority must be shown. The fact that one such contract had been made by this engineer or some other officer that had been approved by the company was no evidence from which the existence of a general authority in such matters was to be inferred; and the court should have excluded it from the jury. Nor were the statements or letters of the engineer competent evidence to establish the agency.

This fact must be brought home to the company, and when established, the declarations and conduct of the agent in the discharge of the duties of his employment would be competent. The engineer was a competent witness, and by him the agency, if it existed, could have been shown; certainly his declarations were incompetent to establish that fact.

The company was not compelled to bring its books or private correspondence into court to enable the appellant to make out his case. The rule was, therefore, properly refused. It is unnecessary to notice the other questions used by counsel for the appellee in the case.

Judgment *affirmed.*

M. Mundy, J. C. Walker, W. Whitaker, for appellant.

H. C. Pindell, for appellee.

O. C. PACE *v.* H. B. CLAFLIN & Co.

Partnership—Withdrawal of Debt.

A partner, when a debt is incurred, is not relieved by the fact that before a note is given to evidence such debt he has withdrawn from the firm.

Non est Factum.

Non est factum pleaded by a member of a firm to a note given by the firm for a debt, after dissolution of the firm but before actual notice to a creditor, is not a defense to a suit by the creditor on such note who has had previous dealing with the firm before the execution of the note.

Notice of Dissolution.

Notice of the dissolution of a partnership published in a newspaper is not sufficient to inform one of such dissolution who has had previous dealings with the firm unless it is shown that such notice came to the knowledge of such person.

Plea in Abatement.

Under our Code pleading an answer in the nature of a plea in abatement for want of necessary parties must not only be affirmative in character, but must contain the names of those who ought to be parties but are not and these averments must be proved by the defendant.

APPEAL FROM JEFFERSON CIRCUIT COURT.

May 12, 1876.

OPINION BY JUDGE COFER:

These suits were brought upon promissory notes signed by R. E. Cross & Co., and payable to H. B. Claflin & Co. It was stated in the petitions that H. B. Claflin, E. E. Eames and E. W. Bankroft composed the plaintiff firm at the dates of the notes sued upon, and that R. E. Cross, R. H. Baker, O. C. Pace and W. F. Alexander, at said times composed the defendant firm.

Pace answered and denied that he was a member of the firm of R. E. Cross & Co. at the dates of the several notes, and denied that said notes, or any of them, were his acts and deeds. He further averred that he was formerly a member of said firm, but had withdrawn therefrom on a day anterior to the date of said notes, of which withdrawal and dissolution due notice was given in the Courier Journal, a daily newspaper published and extensively circulated in the city of Louisville, the place of business of said firm, so that at the time of the creation of the supposed indebtedness sued on this defendant was not a member of said firm of R. E. Cross & Co.; and of this plaintiffs had legal and sufficient notice.

Further answering, he said that the plaintiffs and others, creditors of R. E. Cross & Co., had compromised, compounded, and settled with R. E. Cross, and had agreed to release him from further liability on account of the notes sued upon, so that the said Cross was no longer bound for said indebtedness or any part of it, whereby he, Pace, if ever liable therefor, was released. In his answer in one of the cases, Pace averred that he did not know, and had not knowledge or information sufficient to form a belief whether the persons named

as plaintiffs were at the times stated, partners under the firm name of H. B. Claflin & Co.

The plaintiffs afterwards amended both petitions, and alleged that at the dates when the notes sued on were executed the firm of H. B. Claflin & Co. consisted of H. B. Claflin, E. E. Eames, H. J. Fairchild, Dexter N. Force, Daniel Robinson, John Claflin and W. S. Dunn. By consent the allegations of the amended petitions were to be "taken as specifically controverted upon the record without any answer thereto being filed."

As respects the plea of non est factum, the evidence showed that in the spring of 1873 Pace was a member of the firm of R. E. Cross & Co., doing business in Louisville; that between that time and the date of the dissolution of the firm of R. E. Cross & Co., and the withdrawal of Pace from said firm, the firm repeatedly bought goods of H. B. Claflin & Co., wholesale merchants in the city of New York, for portions of which the firm of R. E. Cross & Co. gave notes from time to time; that the goods for which the notes sued on were given were all, save one, small bills purchased prior to May 24, 1874; that early in that year the firm of R. E. Cross & Co. was dissolved, but that Pace continued in the store as a salesman until May 24 when notice of the dissolution was published in the daily Courier Journal, a newspaper published in Louisville; but there was no evidence that the plaintiffs had received notice, or had any knowledge of the dissolution until after the 10th of August, 1874. The notes all bear date in July, 1874, and were probably not delivered to the payees until August 10 of that year. They were signed with the firm name by R. E. Cross, and there was no evidence that any special authority had been given him by Pace to execute the notes.

The firm of R. E. Cross & Co. having been dissolved before the notes were executed, it is earnestly argued by counsel for Pace that R. E. Cross had no authority as partner to execute the notes in the firm name, that as he is not shown to have had any special authority, the plea of non est factum is not overcome by the evidence, and that the court erred in not so adjudging. "The doctrine is well settled that after a partnership had been dissolved, and legal notice of the dissolution has been given, one partner cannot bind his co-partners by the execution of a note, or any other instrument of writing which creates a new cause of action, even for the renewal of a partnership note or the settlement or liquidation of a partnership account." *Merrit v. Pollys, et al.*, 16 B. Mon. 355.

These notes were certainly executed by one partner after the dis-

solution of the partnership and without any new authority to do so, or indeed any authority at all, unless he had such authority because of the late partnership. But this is not enough to avoid the notes on the plea of non est factum. To do this there must have been previous legal notice of the dissolution. Pace admitted in his answers that he had been a member of the firm, but sought to avoid liability on notes executed by one of the partners in the firm name on the ground that the partnership had been dissolved before the notes were executed; and in order to do so he did not stop when he had averred that the partnership was dissolved before the execution of the notes, but he went on and averred in addition that they were executed after the "plaintiffs had legal and sufficient notice" of the dissolution. Without this latter averment the answer would not have been sufficient.

In regard to dealings with them by the firm of R. E. Cross & Co., while Pace was a member of that firm, what sort of notice would, as to the plaintiffs, be legal and sufficient to avoid the notes executed after the dissolution? Upon this subject the authorities are clear and decisive.

The rule is thus stated in Story on Partnerships, Sec. 161: "Public notice given in some such reasonable way (by publication in local newspapers), will not be deemed actual and express notice; but it will be good presumptive evidence, and sufficient for a jury to conclude all persons, who have not had previous dealings with the firm. As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least, that the credit should be given under circumstances, from which actual notice may be inferred." See also *Kennedy v. Bohannon,* 11 B. Mon. 118; *Merritt v. Polly, et al.,* 16 B. Mon. 355; *Montague v. J. & C. Reakert,* 6 Bush 393.

The plaintiffs were entitled to actual notice of the dissolution. The only notice given prior to the execution and delivery of the notes was by a newspaper publication not shown to have come to their knowledge. Such publication, we have seen, is not actual notice. Wherefore the plaintiffs did not have "legal and sufficient notice," and Cross had authority to bind Pace by the execution of the notes in the firm name. Lindley on Partnerships, 294.

The evidence wholly failed to sustain the allegation in the answers in respect to the compromise and compounding with Cross. No agreement to release Cross is proved. The plaintiffs were not present at the time when it is attempted to prove that the composition was

made. They were represented by attorneys, but the attorneys made no agreement to release Cross; and if they had done so, no authority from their clients to so agree had been shown; and it is clear that such authority is not incident to the ordinary employment of attorneys at law.

It is next insisted that the allegations in the petitions that the persons named therein as plaintiffs composed the firm of H. B. Claflin & Co. at the time the notes were executed, having been specifically denied, were not proved, and that the actions should have been dismissed on that ground. When in an action upon a note payable to a firm, all the individuals composing the firm are not named as parties, the action cannot be maintained unless the objection on account of the defect of parties is waived. If the defect of parties appears on the face of the petition the defendant may demur, otherwise the objection must be taken by answer. Sec. 123, and Subsec. 120, Civil Code. Unless so taken the objection is waived.

It does not appear in the petitions in these cases that there was any defect of parties plaintiff, and it was, therefore, necessary to take the objection by answer. That was attempted to be done by denying the allegation that the persons named as plaintiffs composed the firm of H. B. Claflin & Co. at the date of the notes.

Since the adoption of the code of practice there is no such pleading known in our system as a plea in abatement. Petition, answer, reply and demurrer comprise our whole list, and a pleading in the nature of a plea in abatement is now called an answer. Secs. 120 and 123, Civil Code. What, then, are the requisites of an answer in the nature of a plea in abatement for defect of parties? The code has dispensed with the forms of pleading, but not with the substance. No pleading is good under the code which does not contain all the averments essential to a good pleading under the former system. *Hill v. Barrett, et al.,* 14 B. Mon. 83.

What, then, were the essentials under the common-law system of pleading of a plea in abatement for non-joinder of plaintiffs? From the very nature of the plea it was affirmative, and could not be made in merely negative language. The pleader confessed that there was a cause of action against him on the facts alleged in the declaration, for otherwise he would have demurred instead of pleading. Confessing that the declaration showed a cause of action in the plaintiffs, he undertook to avoid it by showing that on account of some fact not disclosed by the declaration the plaintiff had no right to maintain the action. Now he could only show that the plaintiff had no right to re-

cover by showing that some one not a party was a necessary party; and this he could only do by naming in his plea the person alleged to be jointly interested with the plaintiff; and therefore a plea in abatement, because some of those who were necessary parties had not joined in the declaration or been made defendants, was always held bad unless it disclosed to the plaintiff who it was who should be a party, or, in other words, unless the plea gave the plaintiff a better writ. 1 Chitty's Pleading 481. This was necessary to enable the plaintiff to proceed at all; and if issue was joined on the plea, the onus probandi was on the defendant, because he had, by his plea, confessed and avoided the plaintiff's cause of action, and as to the matter of avoidance he held the affirmative.

These rules still prevail, and the simple denial in the answer did not devolve upon the plaintiff the duty of proving that the persons named as plaintiffs were the only members of the plaintiff firm. This was in effect decided in *Petty v. Malier,* 14 B. Mon. 246. In that case the plaintiff sued in her own name to recover a tract of land. Her petition did not disclose the fact that she was a married woman. The defendant, however, pleaded that fact in his answer, and proved it on the trial. In commenting on the case this court said: "That the plaintiff has no legal capacity to sue is cause of demurrer, if the fact appears on the face of the petition. * * * But when the fact does not appear in the petition, but is relied upon in the answer and proved upon the trial, the defendant is entitled to the full benefit of the objection."

If the answer in that case had contained a denial that the plaintiff had legal capacity to sue, or an averment that she had not such capacity, but had failed to state the facts which showed that she had no such capacity, it would have been just such a plea as those in these cases; but there, as here, there would have been nothing to prove.

It seems to us entirely clear, both upon principle and authority, that under our code an answer in the nature of a plea in abatement for want of necessary parties must not only be affirmative in its character, but must contain the names of those who ought to be parties but are not, and that the averment must be proved by the defendant. *Petty v. Malier,* 14 B. Mon. 246; *Vanbuskirk, et al., v. Levy,* 3 Met. 133; *Graves, et al., v. Ward, Sanders and Hunt,* 2 Duvall 301.

Perceiving no error to the prejudice of the appellant, the judgments are *affirmed*.

Alexander & Dickinson, for appellant.
Muir, Biger & Davie, for appellee.

A. K. YOUNG *v.* D. W. PHILLIPS, ET AL.

Exemption of Housekeeper.

A bona fide housekeeper with a family residing on his mortgaged land is entitled to homestead exemption in the absence of a valid release or waiver of the homestead right according to the provisions of the statute.

Mortgagor Entitled to Exemption.

A person entitled to a homestead exemption is entitled to have set apart for him land upon which a house is located unless such house and appurtenances exceed in value $1,000.00 and if they do he is entitled to $1,000.00 in money out of the sale of the property.

APPEAL FROM MARION CIRCUIT COURT.

May 13, 1876.

OPINION BY JUDGE PETERS:

At the time of the rendition of the judgment of foreclosure and up to the time of the sale the defendant, Young, was a bona fide housekeeper with a family, and was residing in the house and on the mortgaged premises. The debt secured by the mortgage was created after the passage of the act to exempt homesteads from sale for debt, approved February 10, 1866, the first section of which provides, except for a foreclosure of a mortgage or for purchase money due therefor, that so much land, including the dwelling house and appurtenances owned by the debtor, as shall not exceed in value one thousand dollars, shall be exempt from sale, etc.

Sec. 4 provides that where the real estate owned by the debtor is of greater value than one thousand dollars, and is not divisible without great diminuation of its value, the same shall be sold, etc., and one thousand dollars of the money arising from the sale shall be paid to the defendant to enable him to purchase another homestead, provided, however, that if the land, when offered for sale, does not bring more than $1,000, there shall be no sale.

Sec. 5 provides that no mortgage release or waiver of such exemp-

tion shall be valid, unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate, and that such exemption shall continue after the death of the defendant for the benefit of his widow and children, but shall be estimated in allotting dower. Myers Supp. 714.

No valid release or waiver of the homestead right is exhibited in this case, according to the provisions of the statute, supra. If the homestead is set apart in land, it must include the dwelling house and appurtenances; but if for the reasons set forth in the statute that cannot be done, there is but one other mode of proceeding prescribed by the statute, if the estate will produce more than $1,000, and that is to sell the property and pay $1,000 of the money to the purchaser.

It is an entire departure from the letter as well as the spirit of the statute to set apart land without a house on it for a homestead. The debtor must have the dwelling house and appurtenances if they do not exceed in value of $1,000, and if they do, he must surrender his house and take one thousand dollars in money, and when the facts are presented, the court has no discretion. Nor did Young, by filing his answer and consenting to the sale of the property, waive the right to a homestead. This court, in *Wing, et al., v. Hayden, et al.,* 10 Bush 276, said that a waiver could be made only in one way, and that is by a writing signed by the debtor and his wife, and acknowledged and recorded, and that no sale of the property will divest the debtor of the right unless it has been waived in the manner pointed out by the statute.

The judgment must be *reversed* and the cause remanded with directions to sell the property, and out of the proceeds to pay appellant one thousand dollars, and apply the residue to the payment of appellees' debt and for other proceedings consistent herewith.

Affirmed on cross-appeal.

R. H. Rountree, for appellant. Russell & Averitt, for appellees.

PAT SHAUGHERSSEY *v.* WILLIAM HUFFMAN'S ADM'R, ET AL.

Wills—Sale of Real Estate by Executor.

When a will directs the sale of real estate but names no one to make it, the executor has the power to do so.

Sale of Real Estate to Pay Debts.

An executor is only authorized to sell real estate when directed by the will to do so or when it becomes necessary to pay debts and the personal property is not sufficient for such purpose.

APPEAL FROM LOUISVILLE CHANCERY COURT.

May 17, 1876.

OPINION BY JUDGE COFER:

It seems settled by the authorities that when a testator directs his real estate to be sold, but fails to say by whom the sale shall be made, the executor will have the power of sale by implication. 2 Redfield on Wills 124; 1 Sugden on Powers 194.

If, therefore, the testator had plainly, or by necessary implication, directed his real estate to be sold, we should have no difficulty in holding that the sale made by the administratrix was valid. But we incline to the opinion that the will does not contain directions or authority to sell the real estate. It does not appear from the will that the testator owned any real estate. He does not direct all his estate to be sold, but only so much as shall be necessary to pay his debts. It does not appear that he had not ample personal estate to pay all his debts. Such estate is by law the primary fund for the payment of debts, and the testator, when directing a sale of so much property "as may be required to be sold to pay all debts," may have referred alone to his personal estate, and it ought to be presumed that he did so in the absence of more explicit language.

The authorities cited by counsel do not, in our opinion, warrant us in holding that there was authority to any one to sell the real estate. The cases cited in 2 Sugden on Powers 198, are not like this. In *Elton v. Harrison,* the direction was to pay certain legacies within a year if the testatrix's land in A. could be sold. There was express mention of the land, and a clear intention that it should be sold. It would have been absurd to say that the testatrix had made the payment of the legacies within the time prescribed to depend upon the doing of an act which she did not intend should be done. In *Newton v. Bennett,* the testator expressly directed all his estate to be sold forthwith. *Lillard, et al., v. Robinson,* 3 Litt. 415, involved a question of title to slaves.

The language of the will was, "I lend all my estate of all kinds to my wife during her natural life; and I give all the said estate to be divided equally between the children of Thomas Prather, de-

ceased, at her death, unless my said wife order it to the contrary." The widow sold the slaves in contest and the court held that the sale was a valid and effectual exercise of the power conferred upon her by the will, in other words, that she had ordered to the contrary, and therefore the children of Thomas Prather were not entitled to the slaves.

In *Morse, et al., v. Cross,* 17 B. Mon. 735, the testator gave all his estate after the payment of his debts to his wife "to hold, add to or dispose of at her own discretion during her life or widowhood for the purpose of keeping together and maintaining" his children. Those authorities do not justify us in holding that authority to sell real estate can be implied from language such as occurs in the will before us. The only authority given even to sell personal estate is in case it should be required to pay debts.

If, however, the sale of real estate be necessary for the payment of the testator's debts, and the sale was made at a fair price, we see no reason why, upon these facts being made to appear, the chancellor may not approve and confirm the sale, the purchaser being willing, as appears from his answer, to keep the property and pay for it upon being assured of a good title. But unless it be made to appear that a sale of real estate was necessary for the payment of debts, and that the sale was made at a fair price and may be approved and ratified by the chancellor without detriment to the devisees in remainder, the contract of sale should be rescinded upon equitable terms.

Judgment *reversed* and cause remanded for further proceedings.

Pat Joyes, Hagan & Caruth, for appellant.
J. W. Wilson, for appellees.

R. G. BUSH *v.* E. KANSH QUISSENBERRY, ET AL.

Guardian and Ward—Irregularities in Proceedings for Sale of Ward's Realty.

Mere irregularities in the proceedings to sell the ward's real estate, if not detrimental to the ward, will not effect the purchaser's title.

Sale of Ward's Real Estate.

The failure of a guardian or committee of an infant, idiot or lunatic to give bond will render the sale of its real estate void.

APPEAL FROM CLARK CIRCUIT COURT.

May 18, 1876.

OPINION BY JUDGE PRYOR:

This is a proceeding under Art. 3, of Chap. 63, of the General Statutes. The Revised Statutes provided that, "before a court shall have jurisdiction to decree a sale of infants' lands," commissioners must be appointed to report, and must report under oath the net value of the infant's real and personal estate, and the annual profit thereof, and whether the interest of the infants requires a sale, etc. Other steps were necessary in order to give the court jurisdiction in such cases. By the provisions of the General Statutes, courts of equity are clothed with the jurisdiction to sell the real estate of infants. The mode of proceeding in such cases is prescribed by various sections of the statute, not for the purpose of conferring jurisdiction, but to enable the chancellor to ascertain whether the interests of the infants require that a sale should be made. An error in the proceeding cannot affect the rights of the purchaser.

If the proceedings are merely erroneous by reason of a failure to comply with the provisions of the statute, such as the failure of the guardian to make oath to the petition, or the commissioners to report, the title in the purchaser after confirmation of the sale cannot be affected by it, unless the exceptions to the report of sale or its confirmation brings the case within the general doctrine authorizing the chancellor to set aside judicial sales. The petition filed by the guardian presenting a cause of action or alleging a state of facts showing that a sale of the same will prove beneficial to the infant, authorizes the sale to be made; and for mere errors in the proceeding, a reversal can only be had as in other cases; and the title of the purchaser acquired under the judgment by reason of the sale will remain undisturbed, unless for equitable reasons the chancellor is authorized to disregard it.

In general, the title of the purchaser in such cases will remain undisturbed unless there is a failure on the part of the guardian to comply with the provision of the fifth section of the article in question. This section reads: "If the guardian or committee of an infant, idiot or lunatic fails to give bond, the interest of such infant, idiot or lunatic shall not be sold, and any decree, sale or conveyance thereof shall be void." A bond must be executed as required

by the statute authorizing that proceeding, and the omission to execute this covenant renders the whole proceeding a nullity.

The bond executed in this case is ample to hold all the rights of the infants. And although not pursuing the letter of the statute, it is a substantial compliance with its provisions. The failure of the guardian to make oath to the petition cannot affect the rights of the purchaser. The court below acted properly in requiring the affidavit to be made to this pleading upon the filing of the exceptions to the commissioner's report of sale. The proceedings in this case vested the purchaser with title.

Judgment *affirmed.*
Beckner & Nelson, for appellant.

CATHARINE WALLER'S ADM'R *v.* WILLIAM HARRISON, ET AL.

Marriage—Conveyance of Real Estate in Consideration of Marriage.

A conveyance by a man to a woman in consideration of a marriage is legal when the parties have capacity to contract.

Mental Capacity.

Mere mental imbecility of one of the parties to a contract does not render the contract void. Such contracts, if fairly made and fully executed without knowledge on the part of the other contracting party, are not even voidable by the lunatic or by any one claiming under him.

Creditors of Husband.

Where a man conveys his real estate to a woman in consideration of marriage and the marriage is consummated, his creditors cannot subject the land to sale to pay the grantor's debts.

APPEAL FROM HICKMAN CIRCUIT COURT.

May 19, 1876.

OPINION BY JUDGE COFER:

The deed to the land in contest was made by E. T. Taylor to the female appellee in consideration of her agreement to marry him. The marriage was consummated and the contract thus became fully executed on both sides.

The appellant, who is a creditor of Taylor, and was such at the time the deed was made, seeks to subject the land thus conveyed to the payment of his debt, upon two grounds: 1. That the grantor

was at the time of making the deed in a state of mental imbecility which incapacitated him to make a valid contract; and, 2. That the grantee, well knowing his mental weakness and his peculiar susceptibility in his then demented condition to the influence of women, wickedly and fraudulently imposed upon him and procured him to make said conveyance to her, thereby intending to get possession of said land, and afterwards refusing to cohabit with him, and to acknowledge his marital rights, but treating him with great inhumanity.

Mere mental imbecility, or even lunacy of one of the parties to a contract does not render the contract void. Such contracts, if fairly made and fully executed without a knowledge on the part of the other contracting party, is not even voidable by the lunatic, or by any one claiming under or through him. *Breckenridge's Heirs v. Ormsby,* 1 J. J. Marsh. 236; 1 Chitty on Contracts 401, and note p. 1.

It is not proved that the grantee, who afterwards married Taylor, knew that he was an imbecile and incapable of making a valid contract, and the deed cannot, therefore, be avoided by the appellant on the first ground, even though it be conceded that such knowledge on her part would entitle a creditor of the grantor to avoid the deed. The evidence shows that Taylor transacted important business about the time and after the date of the deed in contest, and although many witnesses express the opinion that he was incapable of making a valid contract, and although the weight of the evidence, so far as it consists of the mere opinions of non-experts, is against his competency, the record fails to disclose a single instance in which he showed a lack of capacity when brought to a practical test, unless the deed to his intended wife is an exception.

But the evidence certainly shows a decided weakness for the opposite sex, and we incline to the opinion that he was so in love with the lady to whom he made the deed that he would have been incapable of resisting any demand she might have made as the condition upon which she would marry him. There is, however, no evidence whatever that she sought the marriage or used any arts to induce him to make the conveyance. On the contrary, she seems to have repeatedly rejected his suit, and only to have yielded and consented to marry him after such repeated importunities on his part both in person and through others as wholly forbids the con-

clusions that the marriage was of her seeking, or that she at any time overstepped the bounds of delicacy or strict propriety.

The deed having been made without any unfair practices, and without any knowledge on her part of his imbecility, if it existed, and the marriage in consideration of which the deed was made having been consummated, the creditors of Taylor cannot overreach her rights and subject the land to sale to pay his debts. Marriage is a valuable consideration, and the well settled rule of law is that an antenuptial conveyance in consideration of marriage, if untainted with fraud, is valid against antecedent creditors.

The alleged mistreatment of the grantor by his wife cannot affect the question of her right to the land. If the conveyance was valid when made, and the contemplated marriage took place, it could not be rendered invalid by her subsequent conduct toward her husband, and her counsel very properly refused to go into that question in the examination of witnesses.

The appellant chose to submit his case without revivor, upon its merits, and as on the merits he fails to show a right to recover, he was not prejudiced by an absolute dismission of his petition.

Judgment *affirmed*. Judge Lindsay not sitting.

W. R. Bradley, Ed Crossland, A. Duvall, for appellant.
E. L. Bullock, for appellees.

BENJAMIN HATCHER *v.* JOHN F. ALFORD, ET AL.

Arbitration—Power of Arbitrators to Correct Mistake.

A board of arbitration after it has made an award, but before it adjourns, has the power to correct a mistake.

APPEAL FROM EDMONSON CIRCUIT COURT.

May 20, 1876.

OPINION BY JUDGE COFER:

The board of arbitration had not adjourned by any act of its own, nor had its members even separated after rendering and announcing their decision, before they discovered the mistake they had made, and they at once announced that they would correct the mistake, and proceeded to do so. The appellant had gone from the room where the board was sitting before the mistake was discovered, but

his attorney came in and learned that a mistake had been made, and that it was proposed at once to correct it; and the appellant does not deny that he knew what was going on, and does not claim that he had not an opportunity to be present. Nor does he rest his case on the ground that he had no opportunity to be heard, or that any injustice was done him. If the board had legal authority, after announcing its decision and delivering to him a copy, to correct a mistake the existence of which is not disputed. The whole case is rested on the ground that when the decision was made out, signed in triplicate, and a copy delivered to the appellant, the board eo instanti lost all power over the case, and stood adjourned by operation of law, except for the purpose of giving a certificate of costs and the making of a bill of exceptions.

It is not necessary, in this case, to decide how long the power of the board to correct a mistake continues after its decision is announced and a copy is delivered to the successful party. The only question to be decided is whether such correction can be made at all. We know of no tribunal, however great or small its jurisdiction and powers may be, or what its nature or character is, that is so restricted in its authority that, having once announced its decision, is in an instant powerless to recall that decision, however erroneous it may be.

We think that under the facts in this case the board has power to correct the mistake, and that having done so, the decision at first made was thereby revoked, and that the court properly refused to award a mandamus.

Judgment *affirmed.*

P. T. Edwards, A. Duvall, for appellant.
J. W. Rodman, R. Rodes, Hazelip & Botts, for appellees.

W. T. EVANS *v.* H. R. RYAN.

Partnership—Fraud—Contract.

Where there is fraud in a contract vitiating a part of it, it will vitiate the whole contract, and a party cannot hold on to a part of a contract and repudiate such part as he may select.

Contract of Firm.

Where in a partnership contract it is stipulated that either party may sell his interest in the partnership to any purchaser who is satisfactory to the other, and does so to one who is satisfactory but the remaining partner for the fraudulent purpose of extorting money from the partner desiring to sell refuses to consent to the sale, he is guilty of a breach of the contract, and the other partner is entitled to recover from him such damages as he sustains by the refusal.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 4, 1876.

OPINION BY JUDGE COFER:

By the terms of the contract between the parties the appellant purchased the appellee's interest in the firm of Ryan & Evans, and assumed his liability to Stokes and Rufer for the rent of the hotel they were operating as partners, and such debts as the firm then owed, and released the appellee from his liability for one-half of the money advanced to the firm by the appellant; and in consideration thereof the appellee transferred all his interest in the property and effects of the firm, and executed to the appellant the note sued upon for one thousand dollars.

All these matters were embraced in a single contract, and that contract must stand or fall as a unit. If there is fraud in it which vitiates a part, it must vitiate the whole, and the appellee cannot affirm and hold on to a part and repudiate such portion as he may select. He must choose between abiding the whole and rescinding the whole; and as he has not offered to rescind, he must be taken to have elected to allow the contract as a whole to remain as made.

But if, as the appellee claims, one of the stipulations of the contract of partnership was, that should either party at any time desire to retire from the partnership he was to have the right to sell and convey his interest therein to any one whom he might present as a purchaser who was satisfactory to the other as a partner, and he did present J. C. Ray, and Ray was willing to buy and was satisfactory to the appellant, and the appellant, for the fraudulent purpose of extorting money from the appellee, refused to consent to the sale, the appellant was guilty of a breach of the contract of partnership, and the appellee has a right to recover on his counterclaim, and to be recouped out of the note for such damages as he sustained by the refusal. If, on the other hand, the stipulation was, as claimed by the appellant, that neither party should sell except to

such person as the other should consent to as a partner, the appellant had a right to withhold his consent, although he may not have had any objection to Ray as a partner.

In the one case the appellee had an absolute right to sell whenever he procured a purchaser acceptable to the appellant; in the other, no matter how acceptable the offered purchaser might be, he could not sell to him without the appellant's consent. If the latter's version of the contract is correct, he might well have said: "Ray is not objectionable to me, but I will not consent that you may sell to him, unless you will pay me a bonus of one thousand dollars." This would have been no violation of the contract, if it was as the appellant claims, for whether he would or not consent to a sale was a matter of volition; and he had a right to withhold his consent without a reason for so doing.

But if the contract was as the appellee claims, he had a right to sell, and when he presented Ray as a purchaser, the question was not whether the appellant would consent to a sale—appellee already had that right secured by his contract—but the question was whether Ray was satisfactory to the appellant as a partner in the business of keeping a hotel; and if he was such a person, and the appellant refused to say so, but said he was not, not because that was true, but for the purpose of forcing the appellee to sell to him for less than Ray was willing to give, he violated his contract and is responsible in damages. To say that Ray was not satisfactory when in fact he was, was a falsehood, and if he said so for the purpose of preventing a sale to Ray in order that he might compel the appellee to remain in the firm, or to sell to him at less than Ray was willing to give, such refusal was a breach of contract and a fraud in law.

But the court did not submit to the jury the question at issue between the parties as to what the contract was upon this point, but in effect it assumed that the appellee had a right under the contract to sell to any one who was acceptable to the appellant as a partner, whereas the appellant denied that such was the contract and insisted that by its terms the appellee had no right to sell to any one, however acceptable, without his consent. And as the appellee cannot insist upon the matters set forth in his answer as a defense to the action upon the note, but is confined to his counterclaim for damages for a breach of the contract of partnership, the amount of such damage should be submitted to the decision of the jury.

Judgment *reversed,* and cause remanded for a new trial upon principles not inconsistent with this opinion.

Edwards & Seymour, for appellant.
Lane & Harrison, Barrett & Brown, for appellee.

COMMONWEALTH *v.* G. W. WAINSCOTT.

Criminal Law—Indictment.

A defendant cannot be required to plead to an indictment not indorsed "a true bill" and signed as prescribed by § 118 of the Code.

Indorsements on Indictment.

The names of witnesses are required to be indorsed on an indictment, but where this is not done before the return by the grand jury, it may be done by the commonwealth's attorney after that time.

APPEAL FROM OWEN CIRCUIT COURT.

September 5, 1876.

OPINION BY JUDGE COFER:

There can be no indictment without the indorsement and signature required by Code, Sec. 118. That is the evidence, and the only evidence, that the indictment has been found by the grand jury to be a true bill and cannot be dispensed with; and if a writing purporting to be an indictment has no such indorsement upon it, the defendant cannot be required either to plead or move to set it aside. He may stand mute, disregarding it altogether.

Not so, however, of the requirement of Sec. 119. The indictment and the evidence that it has been found "a true bill" are complete without the names of the witnesses on whose testimony it was found. The names of the witnesses should be indorsed, and when the proper steps are taken by the defendant they must be indorsed. But the statute does not say when or by whom the indorsement is to be made. The names of the witnesses are required to be indorsed in order to enable the defendant to see upon whose testimony he is charged, that he may be the better enabled to meet the accusation. This would have been as well accomplished by allowing the commonwealth's attorney to make the indorsement, as he offered to do, as if it had been done before the indictment was returned into court, and in our opinion the court erred in not permitting him to do so.

If, in consequence of not having previously known the names of the witnesses against him, the defendant was not ready for trial, it was in the power of the court to prevent injustice to him by allowing a continuance.

Judgment *reversed,* and cause remanded with directions to allow the attorney to indorse the names, as he offered to do; and if that be done, to overrule the motion to set aside the indictment, and if it be not done, to dismiss the indictment.

Moss, for appellant. J. D. Lillard, for appellee.

COMMONWEALTH *v.* M. D. HARDIN.

Criminal Law—Intoxicating Liquors.

Where the proprietor of a place where intoxicating liquors are sold was present and saw his bartender sell liquor in violation of law he is guilty the same as if making the sale himself.

APPEAL FROM WAYNE CIRCUIT COURT.

September 5, 1876.

OPINION BY JUDGE COFER:

The court erred in not permitting the witness, Tuttle, to answer whether, at any time within twelve months before the finding of the indictment, he had purchased spirituous liquors in defendant's saloon, in the defendant's presence, from his bartender.

If the defendant was present and saw his bartender sell to the witness, he is legally guilty as though he had sold the liquor himself.

Judgment *reversed,* and cause remanded for further proceedings.

George Denny, for appellant. T. E. Moss, for appellee.

JAMES HANLON *v.* JOANNA HANLON.

Husband and Wife—Divorce—Wife's Real Estate.

Where real estate is purchased from the earnings of the husband and by his consent and direction is conveyed to the wife, he is not entitled to such real estate upon the granting of a divorce to the wife, where the wife has not been guilty of fraud in procuring the conveyance.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 5, 1876.

OPINION BY JUDGE COFER:

The appellant and appellee were married some time in the year 1864. At the time of their marriage the appellee had on deposit with Stevin & Cain the sum of about $1,784.00, and in August of that year she purchased a house and lot at the price of $1,200.00, which was paid for with a part of that money, and conveyed to her. In October of the same year she purchased another house and lot, and in April, 1868, she purchased another, both of which were conveyed to her, without limitations. In 1874 she brought this suit for a divorce, and to be adjudged entitled to the use and occupation of said houses and lots free from the interference of the appellant.

The appellant answered, and among other things alleged that the house on the lot first purchased was in need of repairs to make it habitable, and that he repaired it at a cost of $1,000.00 He also alleged that the other houses and lots were paid for with his means; that it was his custom after his marriage to turn over his earnings to the appellee to be taken care of, and as he accumulated, he, at her suggestion, purchased said houses and lots, she suggesting that that course would be safest for them; and that not knowing that the title so held would not secure the property to him, he had it conveyed to her. He asked that she be compelled to convey each of said houses and lots to him.

The appellee, in her reply, denied that any of the houses and lots were purchased by the appellant, or that either had been paid for with his money, but alleged that they were paid for with money she had when they were married, and from the rents of the house and lot first purchased, and with her personal earnings during the marriage.

The chancellor rendered judgment divorcing the appellee, and denied appellant's prayer for a judgment compelling her to convey to him the two houses and lots claimed in his answer; and from the latter branch of the judgment he has appealed.

An effort was made on the part of the appellee to show that the appellant had been an idler and had not earned more than a support for the family, and that her own earnings were sufficient, when added to the rents of the house first purchased and the money she

had when they were married, to pay for the houses and lots in contest.

We think the evidence shows that the appellant has been ordinarily industrious and frugal, and that the two lots were paid for in part at least with his individual earnings. But we do not regard that question as very important. Nor do we regard the fact that, as a matter of law, the money which the appellee had at the time of the marriage and that which she earned afterwards, as well as the rent of the house first purchased, belonged to her husband, as material.

If it be conceded that the property was all paid for with money belonging to the appellant, the decision must be the same that it would be if it were conceded that it was wholly paid for with money which belonged to the appellee before marriage. The conveyances were made to her with the knowledge and consent of her husband, and upon the most favorable view claimed by him must be regarded as a gift to her, which he is not entitled to reclaim upon the granting of a divorce to her. *Phillips v. Phillips,* 9 Bush 183. It is not charged that the appellee was guilty of fraud in procuring the deed to be made to herself, and the alleged ignorance on the part of the appellant that the conveyance to her would not secure the title to him cannot affect the decision of the question. He does not say that she represented to him that title conveyed to her would be to his benefit. All he says is, that she represented that it would be safest to have the title conveyed to her, and he partially explains in his deposition what she meant by that, viz.: that it might save the property from creditors in the event he should become insolvent; and he seems to have understood that view of the subject. It is, therefore, hardly probably that he was ignorant of the effect of the conveyances to his wife.

To decide that a husband who has purchased property and had it conveyed to his wife, may recover it when she obtains a divorce from him on the ground of cruel treatment, would be to establish a precedent dangerous in the extreme to the peace of families, and detrimental to the best interests of society.

The judgment of the chancery court must be *affirmed.*

M. Mundy, for appellant. Badley & Simrall, for appellee.

COMMONWEALTH *v.* C. O. ALLARD.

Criminal Law—Concealed Weapons.

An indictment for carrying concealed weapons is good where the charge is made in the language of the statute.

Indictment.

In an indictment for carrying concealed weapons it is not necessary to aver that the defendant was not within the exceptions provided for in a separate section of the statute. Such exceptions are matters of defense.

APPEAL FROM McCRACKEN CIRCUIT COURT.

September 5, 1876.

OPINION BY JUDGE LINDSAY:

The indictment in this case is good. It charges substantially, in the language of the statute, that the defendant unlawfully carried concealed on his person a pistol, the same being a deadly weapon. The descriptive part of the indictment does not state that the weapon was a deadly one, but the facts set out in the body of the pleading constitute a public offense, and gave notice to the defendant of what is intended. The general descriptive charge may, therefore, be treated as surplusage.

It is not necessary to aver that the defendant was not within the exceptions provided for in a separate section of the statute. These exceptions are matters of defense which must be affirmatively proved by the party defending under them.

Judgment *reversed* and cause remanded for further proper proceedings.

B. A. Neal, Moss, for appellant.

NATIONAL BANK OF MONTICELLO *v.* J. M. BRYANT, ET AL.

Commercial Paper—Indorsement.

The effect of indorsing a bill or note is a conditional contract on the part of the indorser to pay in case of the acceptor's or maker's default, provided proper and prompt measures be taken to fix the liability of the indorser by making demand and giving him notice of the default.

Days of Grace.

The presentment and demand necessary to make an indorser of a bill or note liable must be made on the last day of grace. If made after the last day or before the last day only, such indorser is discharged.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 6, 1876.

OPINION BY JUDGE COFER:

It is a fundamental doctrine of the law merchant that the effect of indorsing a bill or note is a conditional contract, on the part of the indorser, to pay the immediate or any succeeding indorsee or holder of the bill, in case of the acceptor's or maker's default, provided proper and prompt measures be taken to fix the liability of the indorser by making demand and giving him notice of the default. Byles on Bills, p. 2.

It is consequently well settled that in order to charge the indorser of a bill of exchange, or of a promissory note placed upon the footing of a bill, the instrument must be presented for payment, and due notice of dishonor must be given to all persons intended to be held liable and who would have a right, upon paying it, to maintain an action thereon. Smith Mercantile Law, pp. 303-4; Byles on Bills, pp. 169-170.

Such presentment and demand must be made on the last day of grace. *Battertons v. Porter,* 2 Litt. 388; *Pintt v. Eads,* 1 Blackford 182; *Bussard v. Levering,* 6 Wheaton 102. If not made until after that day is passed, it will be ineffectual to charge the indorsers (*Woodbridge v. Brigham,* 12 Mass. 403; *Davis v. Herrick,* 6 Ohio 55) unless presentment and demand be waived by the parties, or be excused by some fact which prevented the holder, although exercising reasonable diligence, from making presentment and demand in proper time. *Schofield & Taylor v. Bayard, et al.,* 3 Wend. 488; *Windham Bank v. Norton, Converse & Co.,* 22 Conn. 213.

If presentment and demand be not made until after the expiration of the last day of grace the indorsers will be discharged (*Woodbridge v. Brigham,* 12 Mass. 403; *Davis v. Herrick,* 6 Ohio 55), unless presentment on that day be excused, in which case it must be made as soon thereafter as is reasonably practicable. *Windham Bank v. Norton, Converse & Co.,* 22 Conn. 213; *Morgan, et al., v. Bank of Louisville,* 4 Bush 82.

Applying these principles to the case in hand, its solution is not difficult. The appellees, who were indorsers of a note negotiable and payable in the National Bank of Monticello, Ky., denied that said note was duly presented at the counter of the bank and payment demanded and refused. The evidence showed that the note was dis-

counted by the bank and held by it at maturity, and that the makers had no funds there with which to make payment. It was, therefore, not necessary to make a special and formal demand in order to charge the indorsers. *Folger, et al., v. Chase, et al., Ex'rs,* 18 Pick. 63; *Jenks v. Doylestown Bank,* 4 Watts & Serg. 505.

But the evidence also shows that the note was protested October 27, which was the first, instead of the last day of grace, and that it was then delivered to an attorney to institute suit thereon, and that October 30, the day after the last day of grace, he returned it to the bank and called attention to the fact that it had been prematurely protested; but no formal demand was then made, all that was then done being simply to change the date of the former protest from the 27th to the 29th.

If the note had been at the bank in the custody of its officers on the 29th, the last day of grace, no presentment and demand would have been necessary. 1 Daniel on Negotiable Instruments 486. But it was not there, and the failure to have it there has no other excuse than the unexplained oversight of the officer of the bank. As already seen, the undertaking of the indorsers was conditional, and one of these conditions was that the holder of the note would make due presentment and demand at the time and place of payment. The holders having failed to perform the condition upon which the indorsers undertook to be bound, they are discharged. *Chickopee Bank v. Philadelphia Bank,* 8 Wall. 641.

This seems at first blush a rigid rule, but it must be borne in mind that the appellees were not the injured debtors of the bank. They merely undertook upon certain well understood conditions to answer for the default of the makers of the note, and they cannot be held liable otherwise than by the terms of their agreement. If the appellant could part with the possession of the note until the day after the expiration of the days of grace, and then do that which should have been done the day before, and still hold the indorsers liable, no reason is perceived why they might not have waited for a month or a year.

It is not necessary in such a case that the indorsers should show that they have been prejudiced by the delay. It is enough that by the terms of their contract they were only liable in case such delays did not occur.

Alexander, Dickinson, for appellant.
Gibson & Gibson, for appellees.

COMMONWEALTH *v.* J. Z. TURRELL.

Recognizance Bond—Validity.

Where a recognizance bond does not show that the principal therein was in custody charged with a public offense, it fails to show any consideration for its execution and is invalid.

Consideration.

A recognizance bond, unlike ordinary contracts, does not import a consideration.

APPEAL FROM BALLARD CIRCUIT COURT.

September 7, 1876.

OPINION BY JUDGE COFER:

As decided at the present term in *Commonwealth v. Newton,* the circuit court had no jurisdiction of this case; but as the bond made the foundation of the proceeding is invalid, the commonwealth has not been prejudiced by the judgment appealed from.

The bond does not show that the principal therein was in custody charged with a public offense, and therefore fails to show any consideration for its execution. The bond does not, like ordinary written contracts, import a consideration. Criminal Code, Sec. 80.

Judgment *affirmed.*

T. E. Moss, for appellant. Bugg & Bishop, for appellee.

VERNETTA P. YOUNG, ET AL., *v.* J. J. NESBITT, ET AL.

Husband and Wife—Wife's Property.

Where a woman took a vested remainder in property at the death of her father and afterwards married, such interest vested in her husband upon her marriage.

Wife's Property.

Where the wife's property is invested in lands but conveyed to the husband, he is liable to her as between themselves, but this will not prevent creditors from subjecting such land to the payment of his debts and the wife's rights are postponed to those of his creditors.

APPEAL FROM BATH CIRCUIT COURT.

September 8, 1876.

OPINION BY JUDGE COFER:

The appellees, having obtained judgments in the Bath circuit

court against the appellant, Sinnett Young, caused executions of fi. fa. to issue thereon, which were levied upon a tract of 114 acres of land situated in that county, as the property of said Young. The sheriff advertised that he would sell the land on October 12, 1874. On that day Young and his wife instituted this suit in the Bath circuit court against the appellees, in which Mrs. Young asserted title to the land and sought to have it settled upon and conveyed to her.

The facts upon which she bases her claim to the relief sought are these. She is the daughter of John Arnold, who died testate at his domicile in Mason County, Ky., in 1829. By his will he gave all his estate, except some small legacies, to his wife until his youngest child should arrive at the age of twenty-one years, which would be in 1849, and then to be disposed of according to the law of descents and distribution. Among other property left by the testator was a female slave named Peggy, who gave birth to two children, one in 1845, and the other in 1847. Mrs. Young was married to her present husband July 19, 1845, and in 1851 the estate of her father was divided between his children, and the two children of Peggy were allotted to Mrs. Young, and soon thereafter came into the possession of her and her husband, where they remained and were regarded and spoken of by both the husband and wife as belonging to the latter. One of the slaves was sold in the latter part of 1859 for $1,450 and the other in January, 1860, for $1,250. The sale of one seems to have been negotiated by Mrs. Young, and of the other by her husband, acting at her request and for her. The price of both seems to have been kept by Mrs. Young under her personal control, or in the hands of her step-father and former guardian.

Before the sale of the last of the two slaves, Mrs. Young made an agreement with her brother, John D. Arnold, to buy from him the tract of land now in contest, provided she could sell the slave; and on the day after the sale, which was early in January, 1860, the agreement was concluded and Mrs. Young and her husband took possession of the land and have resided on it ever since. The slaves did not sell for enough to pay for the land, but the residue was paid out of money received from the estate of Mrs. Young's father, and the whole was paid by her in person or by her step-father, in whose hands she had placed a part of the proceeds of the sale of the slaves. No bond or other written memorial of the contract was entered into at the date or the purchase, but the evidence shows that it was understood between Mrs. Young and Arnold that the title was to be made to her; and it may be inferred from the circumstances disclosed by

the record, that the husband acquiesced in that arrangement, but his express assent is not proved.

In March, 1860, Arnold, in the absence of Mrs. Young and her husband, and without the knowledge of either, executed, acknowledged, and caused to be recorded, a deed conveying the land to Mr. Young. But before the execution of the deed, to wit, January 26, 1860, he executed and delivered to Mrs. Young, who has held it ever since, the following writing, viz.:

"An article of agreement between Sinnett Young, of the county of Bath, and state of Kentucky, on the first part, Vernetta P. Young, his wife, on the second part, it is agreed that for and in consideration of her interest in the property in the city of Maysville, and the sale of her slaves, Charles and Mimma, she is to have the farm that was bought of John Arnold, in her name, for her use and benefit. This 27th of January, 1860. SINNETT YOUNG."

In a very short time after the execution of the deed, Mrs. Young read it and became aware that the land had been conveyed to her husband. She immediately consulted her step-father and former guardian, who assured her that she could always prove that she paid the purchase money, and that she would be able to successfully assert her claim to the land at any time, and advised her to let the matter rest, and she did so. She always spoke of and claimed the land as her own, and often did so in the presence of her husband, who never disputed her claim, but repeatedly spoke of the land as belonging to her; but the evidence fails to show that she ever spoke to him of the deed having been made to him, or that he ever expressly agreed that it should be made to her, or admitted that it was improperly made to him. It does not appear that the appellees had any notice of Mrs. Young's claim until this suit was commenced.

Upon this state of fact the circuit court adjudged the land subject to the husband's debts, and this appeal is prosecuted from that judgment. The first position assumed by Mrs. Young's counsel is that the land was purchased by her, with the assent of her husband, and paid for with her money, and that the deed was made to her husband by mistake, and therefore he holds the land in trust for her; while it is contended by counsel for the appellees that the two slaves and the money received from John Arnold's estate belonged to the husband, and consequently, that there cannot, under any circumstances, be a resulting trust in favor of Mrs. Young.

We think it entirely clear that the slaves and the money used in paying for the land belonged to Mr. Young. The testator gave his estate to his wife until his youngest child attained majority, and then directed that it should be divided and distributed according to the law of descent and distribution. Whether the property be treated as passing under the will or as passing under the statute, subject to the particular estate given to the testator's widow by the will, the result will be the same so far as the rights of Mrs. Young are concerned. In either case she took a vested remainder at the death of her father. Title either by descent or by purchase vested in her then, the period of enjoyment alone was postponed. She and her coheirs or codevisees took a joint estate in remainder in the woman Peggy, and the children of Peggy born during the continuance of the particular estate belonged to the remaindermen precisely as the mother did. *Murphy v. Riggs,* 1 Marsh. 532. And although one of the children was not born until after the passage of the act of 1846 for the better protection of the rights of married women, yet the title to Peggy having vested at the death of the testator, the title to her subsequent offsprings vested at the same time. And if this were not so, the interest of Mrs. Young in Peggy vested in Mrs. Young's husband upon her marriage in 1845, and the interest in the afterborn children, which, but for the marriage would have vested in Mrs. Young, vested by operation of law in her husband. In any view of the case, then, the two children of Peggy were the property of Mr. Young from the time of the division of the testator's estate in 1851, unless counsel are right in construing the Act of 1846, as relating to the time of acquiring possession of slaves, and not to the time of the vesting of the title.

That statute provided that "the slave or slaves of a married woman shall hereafter, within this commonwealth, be held and taken to be real estate, in so far that no slave or slaves, or the increase thereof, which any such married woman may have at the time of her marriage, or which shall come, descend, or be devised or given to her during her coverture, shall be liable for the debts of her husband." The slaves both came to the possession of Mrs. Young and her husband after the passage of the act, and after the marriage, and it is contended that this was a coming to her within the meaning of the act so as to bring them within its operation. It is obvious that the phrase "which shall come," etc., did not have reference to either possession or the right of possession, but to the vesting of title.

But if the language of the act was such as to admit of the construc-

tion contended for, that construction would not be adopted if the language would admit of any other. Under the law as it stood at the time of Mrs. Young's marriage, all her interest in the slaves of her father, and their increase, vested eo instanti in her husband, and as is well suggested by counsel for the appellees, could not be divested by legislative action. We must, therefore, hold that the slaves were the property of the husband, and so far as the claim of Mrs. Young depends upon the assumption that the land was paid for with her money, it must fail. *Jackson v. Sublett,* 10 B. Mon. 467.

Counsel next insist, and upon that proposition they mainly rely, that the writing of January 26, 1860, and the facts and circumstances disclosed in the record, amount to a waiver of the husband's marital rights, and constitute a valid post-nuptial agreement. A husband may certainly waive his marital right to money or property coming to him through his wife and permit her to retain it as her own; and if he does so she may hold it against him and volunteers under him. *Bryant's Admr. v. Bryant,* 3 Bush 155.

But where the wife, to relieve the pecuniary embarrassment of her husband, united with him in the sale of her land and slaves, and in consideration that she did so he executed to her his notes for the amount realized from the sales, it was held that, while the notes were enforcible in equity against the administrator of the husband, they created only an equity which could not be enforced to the prejudice of creditors of the husband having legal demands, and she was postponed until the other creditors were paid. *Mariman v. Mariman,* 4 Met. 84.

If, therefore, it be conceded that Mr. Young waived his right to the slaves, and to the money arising from their sale, and consented that it might be invested in land to be conveyed to her, it is clear on the authority of *Mariman v. Mariman,* that until that agreement was executed it was invalid as to the husband's creditors, even if the agreement of the husband had been supported by a sufficient consideration.

The agreement, if one was made, that the land should be conveyed to Mrs. Young was never executed, and was without any valuable consideration whatever. Upon what principle, then, can it be enforced by her to the prejudice of the appellees? Her counsel argue that she has an equity dating back to the time of purchasing the land, and that the appellees have only an equity dating from the time of making their levies, and that as her equity is the elder, it must prevail; and they cite *Lowe & Whitney v. Blinco,* 10 Bush 331;

Morton v. Robards, 4 Dana 258; *Halley v. Oldham,* 5 B. Mon. 233; and *Righter v. Forrester,* 1 Bush 278, as sustaining that position.

Those cases all involved the question whether an equity in land levied on under execution would prevail over the title acquired by a purchaser under the exectuion who had notice of the prior equity, and it was held in such that it would. But in all those cases the prior equity was supported by a valid legal consideration, while the equity asserted by Mrs. Young is without such consideration; and in view of what was decided in Mrs. Mariman's case, it may well be doubted whether, even if there had been a valuable consideration for the alleged waiver of Mr. Young's marital rights, the equity thereby created in Mrs. Young's favor could be enforced against his creditors.

In consideration that Mrs. Mariman would sell her land and slaves, her husband expressly agreed to repay to her the amount that should be realized from such sale, and pursuant to that agreement executed to her his notes for the amount; but the court said her petition showed that she placed the proceeds of her property in his hands to relieve him from pecuniary embarrassment, expecting to be paid by him when his circumstances should become better. "The natural tendency of her conduct was to give him credit with others who knew nothing of the arrangement between him and her." The court further said: "As she has come into equity for relief, sound policy seems to forbid that her claim, which has no legal validity, shall be placed upon an equal footing with the legal demands of creditors. A different doctrine might open the door to many frauds." And her claim was postponed to all other creditors.

The foregoing remarks of the court in that case apply with peculiar force to the facts in this case. Mrs. Young became acquainted with the fact that the deed had been made to her husband within a few days after its date, but failed to take any steps to have it corrected. The deed was a matter of public record and all persons ignorant of the facts as she claims them to have been, had a right to regard the land as belonging to her husband. "The natural tendency of her conduct was to give him credit with others who knew nothing of the agreement between him and her." And to hold that she may now enforce that secret voluntary agreement against these appellees who were ignorant of the agreement when they trusted him, and who may, and probably did, trust him on the faith of the land in contest, not only might but would open the door to many frauds.

The evidence shows that at the time of the execution of the writing

of January 26, 1860, Mr. Young was free from debt, and was the owner of an estate, besides that devised from his wife's father, worth about $8,000; and counsel seek to sustain Mrs. Young's claim on the ground that the writing and other evidence in the record show a valid post-nuptial settlement, and that Mr. Young holds the title in trust for her, and that trust ought now to be enforced.

There is no doubt but his circumstances were such that he might have made a valid post-nuptial settlement upon her, but he did not do so. The writing upon its face evidences a trust, but is merely executory, and as we have already remarked was executed without any valuable consideration, and cannot be enforced.

The well settled rule upon that subject seems to be that "Where there is a valuable consideration the court will enforce the trust, though it is not perfectly created, and though the instrument does not pass the title to the property, if from the documents the court can clearly perceive the terms and conditions of the trust, and the parties to be benefited. In such cases effect is given to the consideration to carry out the intention of the parties, though informally expressed. But if from an imperfect declaration the trust is not fully created, and the beneficiaries are compelled to come into court to have it perfected, the court will refuse relief where the plaintiff claims as a volunteer." Perry on Trusts, Sec. 95; *Tanner, et al., v. Skinner, et al.,* 11 Bush 120.

In order to sustain this position, that there was a valid post-nuptial settlement, counsel cite *Duhme & Co. v. Young, et al.,* 3 Bush 343; *Hinde's Lessee v. Longworth,* 11 Wheaton 198; *Babcock v. Eckler, et al.,* 24 N. Y. 623; and *Townsend v. Maynard,* 45 Pa. St. 198.

The settlements involved in those cases were executed, and were called in question by the husband's creditors, who, finding the wife invested with title, were forced to go into equity for relief; while in this case the creditors of the husband were pursuing their legal remedies against him, in whom they found the legal title, and the wife seeks to interpose to perfect an unexecuted settlement and then to have it enforced, and thereby to overreach and defeat creditors who are not under the necessity of coming into equity at all.

It is only when creditors of the husband are compelled to come into equity for relief that mere equities of the wife to property held in his name can be successfully set up against them. The cases of *Miller and Wife v. Edwards, et al.,* 7 Bush 394; *Ward v. Crotty, et al.,* 4 Met. 59; and *Forepaugh, Bishop, et al., v. Appold & Sons,* 17 B. Mon. 625, were all cases in which creditors invoked the chancel-

lor's aid to subject to the payment of their debts that which in equity belonged to the wife. If the title to the land in contest was so situated that creditors were forced to seek aid in equity to subject it, the rules applicable to that state of case would be wholly different from those applicable to the facts as presented in this case. Then the court would withhold its aid until an equitable settlement was made on Mrs. Young. *Sims v. Spalding,* 2 Duv. 121.

Counsel also cite and rely upon *Whitehead v. Whitehead, et al.,* 64 N. Car. 538. The land in contest in that case was paid for with money which was the separate estate of the wife, and by mistake was conveyed to the husband, whose creditors levied upon and sold it, and the purchasers were held to be trustees for the wife, whether they had notice of her equity or not. Without approving or disapproving the decision in that case, we may remark that it is wholly unlike this. There the land was paid for with money which was the separate estate of the wife; here the land was paid for with the money of the husband.

We are for these reasons of the opinion that the appellants failed to manifest an enforcible right in Mrs. Young, and that her petition should have been dismissed. The court, however, without any appropriate pleading to that end, adjudged the whole land to be sold, first to pay to Mr. Young $1,000 in lieu of a homestead, and then to pay the several judgments in favor of the appellees, and retained the case in order to dispose of any surplus that might remain.

The appellees sought no judgment for a sale of the land, unless the court should adjudge it to Mrs. Young, in which event they prayed for a sale of so much as would equal the value of the permanent and lasting improvements put upon it by Sinnett Young; and if they had done so, there was no authority for a judgment to sell the whole unless it should be necessary to do so to raise the amount due, and $1,000 for the homestead; and even then it was error to sell the homestead, although the buildings and the ground occupied by them were worth more than $1,000, unless it was necessary to sell it in order to satisfy the judgments. We are, for these reasons, of the opinion that the appellants failed to manifest in Mrs. Young an enforcible right to the land, and that her petition was properly dismissed.

But the court erred in adjudging the land to be sold to satisfy the appellee's judgments. They did not ask for a judgment to sell the land unless the court should adjudge the land to Mrs. Young, and then they only asked for a sale of so much as would pay the value of

the lasting and valuable improvements put upon it by Sinnett Young. As the land was adjudged not to be the property of Mrs. Young, both the petition and counterclaim should have been dismissed.

The judgment for a sale of the land is *reversed,* and the cause is remanded with directions to set that judgment aside and to dismiss the appellees' counterclaim.

H. L. Stone, Holt & Brooks, for appellants.

A. Duvall, V. B. Young, J. S. Hunt, Nesbitt & Gudgell, for appellees.

ELIZABETH K. GRAHAM *v.* SAMUEL R. GRAHAM.

Divorce—Jurisdiction.

The court of appeals has no jurisdiction of an appeal from a judgment granting a divorce, but it has jurisdiction of an appeal from so much of the judgment as dismissed appellant's petition and denied her petition for alimony.

Alimony.

The wife is not entitled to alimony when a divorce has been granted to her husband and denied to her.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 9, 1876.

OPINION BY JUDGE COFER:

The appellee brought this suit in the Louisville chancery court against the appellant to obtain a divorce a vinculo matrimonii, upon the ground that she had voluntarily abandoned him for a period of more than a year. She denied the alleged abandonment, and, making her answer a counterclaim, she alleged that at the time of their marriage and afterwards, he was afflicted with a secret loathsome disease which he had communicated to her, and upon that ground prayed for a divorce a mensa et thoro, and for alimony.

The chancellor adjudged in favor of the appellee, and granted him a divorce as prayed for, dismissed the appellant's counterclaim, and denied her prayer for alimony. From that judgment this appeal is prosecuted.

We have no jurisdiction of an appeal from a judgment granting a divorce, and it is not only unnecessary but would be improper to express an opinion on the facts upon which the divorce was granted.

But of the appeal from so much of the judgment as dismissed appellant's petition and denied her prayer for alimony we have jurisdiction, and this is as much of the judgment as we are asked to revise.

It is conceded by the appellant's counsel that the charge in her counterclaim that the appellee had been afflicted with a loathsome disorder, is wholly unsustained by evidence; and it follows that the court did not err in dismissing the counterclaim so far as it sought a divorce. It has been judicially and irreversibly ascertained that the appellant abandoned her husband without fault on his part, and she has failed to show a right on her part to a divorce.

This state of the record bars her right to alimony. The statute provides that "if the wife have not sufficient estate of her own, she may on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable." Sec. 6, Art. 3, Chap. 52, Gen. Stat. But there is no statute or rule of equity jurisprudence, of which we have any knowledge, which authorizes an allowance of alimony to the wife, when a divorce has been granted to her husband and denied to her.

Except as otherwise provided by statute, the effect of a divorce from the bonds of matrimony upon the property rights of the parties is substantially that of death, or annihilation. Schouler Domestic Relations, 299. The parties stand in the same legal relation to each other that they would have occupied if the marital relation had never existed between them.

The appellee asked for the custody of an only child of the marriage, now about six years old, which was then and is now in the custody of the appellant; but the chancellor, having the interest and welfare of the child principally in view, and deeming it too young to be deprived of a mother's care, refused to make an order respecting its future custody, simply leaving it with the appellant, and retained the case for future orders on that subject. The statute provides that pending an application for a divorce, or a final judgment, the court may make orders for the care, custody and maintenance of the minor children of the parties, and may at any time afterwards, upon the petition of either parent, revise and alter the same. Sec. 7, Art. 3, Chap. 52, Gen. Stat.

No special application was made for an allowance for the maintenance of the child, and the mere omission of the court to make it upon the general prayer in the counterclaim that the appellee should be adjudged to pay such sum as would be sufficient for its support,

is not error. The court has full power to make such orders for the custody and maintenance of the child as shall, from time to time, appear to be proper.

As we have already said, from the time of granting the appellee a divorce, he and the appellant have occupied the same legal relation to each other as if they had never been husband and wife. No appeal lies from the judgment granting the divorce, and even a reversal of the judgment refusing to grant to the appellant a divorce could not bring them again into conjugal relations. We are, therefore, of the opinion that no allowance can be made to the appellant for counsel fees or costs, in this court, and that upon an affirmance the appellee is entitled to a judgment for his costs.

Judgment *affirmed.*

M. Mundy, for appellant. Mix & Boothe, for appellee.

M. P. HIATT *v.* BEN F. FIELD.

Liability of Assignor of Note—Waiver of Diligence.

Where, notwithstanding no sufficient diligence is shown to make an assignor liable, the assignor at the time of making the assignment made an agreement with the holder of the note that he would remain bound, he is not released.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

September 14, 1876.

OPINION BY JUDGE COFER:

The appellee did not use such diligence as would render the appellant liable on the contract of assignment. But the writing exhibited with the petition evidences an agreement on the part of the appellant to remain bound, although legal diligence might not be used.

The evidence tends to prove that that writing was executed as a part of the same transaction in which the note was assigned; and as it recites that it was executed on the same day, we should be bound, if necessary to support the judgment, to presume that the court found as a fact that they were executed at the same time. But that is not necessary, for no matter whether executed at that time or subsequently, so it was executed before the appellant was discharged from liability, it is valid, and that, too, whether there was any consideration for its execution or not.

The appellant had a right to waive due diligence in prosecuting the obligor, and to consent to remain bound; and having done so while he was yet liable, he cannot now avail himself of laches to which he consented in order to escape liability.

The writing was not skilfully worded, but there can be no doubt but that it was intended as a waiver of the right. The appellant would otherwise have had to be discharged if the obligor was not prosecuted with legal diligence. It is true the language is, that he was to remain liable if the appellee did not sue to the first court, and that there is no stipulation that he would remain bound if suit was brought and execution was not issued in due time. But there is no escaping the conclusion that the object was to waive legal diligence, and, unless such was the object, the writing was meaningless.

The judgment is *affirmed.*

John B. Cochran, for appellent. D. M. Rodman, for appellee.

J. W. GRIMES *v.* COMMONWEALTH.

Criminal Law—Sureties on Bond.

When a defendant, after his cause has been submitted to the jury, was, by order of the court, remanded to the custody of the jailer, the sureties are released and cannot bind themselves to further stand on the bond.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 15, 1876.

OPINION BY JUDGE PRYOR:

The accused, after the cause had been submitted to the jury, was by an order of the court remanded to the custody of the jailor. His sureties had consented that he might stand on his bond during the progress of the trial, but the court very properly placed him in jail, or in the custody of the jailor, after the jury had taken charge of the case. When placed in jail or in the jailor's custody by the order of the court, the sureties had no longer any control over the accused, and their liability as such terminated. They had fulfilled their obligation when the prisoner was placed in jail or in custody of the jailor, all power to control their principal in any way having ceased. *Commonwealth v. Coleman, et al.,* 2 Met. 382; *Askins v. Commonwealth,* 1 Duv. 275.

If when placed in custody the sureties were released, the stipula-

tions of the bond or its covenants could not be revived without their consent; and it may be questioned whether a consent in open court by the sureties (after the bond had been complied with by the delivery of the prisoner and his being taken into custody) to remain bound on the bond, would have been obligatory. The safer course would be the execution of a new bond. The judgment is *reversed* and the cause remanded for further proceedings consistent with this opinion.

Huston & Mulligan, for appellant..
Breckenridge & Shelby, Frank Waters, for appellee.

CAROLINE J. BACON *v.* RICHARD RUDD, ADM'R.

Usury—Recovery Back of Usurious Interest—Statute of 1876.

One paying usurious interest is entitled to have it credited on the principal, but cannot recover it back until all the principal is paid.

Statute of 1876.

The statute of 1876 to vary the rule as to contracting to pay interest is not retrospective in its operation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

September 15, 1876.

OPINION BY JUDGE PRYOR:

The execution of the memorandum dated in October, 1871, by which the obligor in the note agreed to pay 10 per cent. in consideration of forbearance, etc., created no such obligation on the part of the appellant as precluded her from instituting an action at any time upon the note and prosecuting it to judgment. She had agreed not to enforce the lien created by the mortgage upon certain property for a specified time, in order that the debtor, Dr. Rudd, might lease it, but the note was then due, and no demand or refusal was necessary to enable the appellant to coerce payment by suit. Such an action could have been instituted at any time, and the memorandum referred to, if pleaded, could not have prevented a judgment.

It was proper for the commissioner to deduct the annual interest from the note, and the mode of calculation, in order to ascertain the amount due, must be approved. The prior and legal interest has been computed up to the time of payment, and the payment deducted; and if any error has been committed by this method of arriving at a correct result, it is against the appellee. *Kay v. Fowler,*

et al., 7 T. B. Mon. 594. In 1868 the appellant loaned to the decedent ten thousand dollars, payable in three years, at 10 per cent. interest. The interest, amounting to three thousand dollars, was secured by notes of five hundred dollars each, payable in instalments and executed at the same time. It must then be regarded as an entire transaction, which the decedent undertook to pay 10 per cent. interest on for three years. There never was any renewal of the original note, and the only change made in the contract was the memorandum of October 13, 1871, on which the obligor still agreed to pay the 10 per cent. interest; and if there had been a renewal for the same debt and by the same parties, the rights of the appellant would have been the same.

It must be admitted that the contract to pay this excess interest made in 1868 was illegal, and that the debtor could have recovered the usury at any time after the payment of the principal debt unless barred by the statute. He could not have recovered any of it back until the principal was paid, as the law applied such payments in discharge of the principal debt. The agreement to pay the 10 per cent. interest after the passage of the interest law of 1871 in no manner deprived the obligor of his right to plead usury; nor did it legalize or affect usurious contracts made prior to its passage. The earlier decisions in this state, several of which have been quoted, conduce to sustain the position announced by appellant's counsel in this case.

We find, however, that these decisions have not been followed, and, in effect, have been overruled since the decision in the case of *Crutcher v. Trabue & Tunstall,* 5 Dana 80. In that case it was held that no recovery could be had of the usury by the borrower until the principal debt was paid, and that the usury should be credited on the debt as of the date when it was paid. See *Wood v. Gray's Exr.*, 5 B. Mon. 92. In the case of *Booker v. Gregory,* 2 B. Mon. 439, Booker loaned to Gregory a large sum of money at 10 per cent.; a separate note for $303 was executed for the usury. In a controversy in regard to the usury this court said that the payment of the $303 was a part of the res gestæ; it was paid on account of the borrowing and lending. The mere fact of calling it the usury which had then accrued, did not have the effect to separate the transaction or to dissolve the connection and relation which it bore to it. The giving the small note was as much a part of the transaction as giving the large one. The effort of the lender to separate the chaff from the wheat is merely ideal.

The true question is, "How much of the loan and legal interest has been reimbursed and how much remains unpaid." It is now too well settled in this state to admit of controversy that all moneys paid by the debtor or borrower to the lender on the debt, whether called usury or not, will be treated as a payment of so much of the debt and the legal interest due; and no recovery of the usury can be had until the debt and legal interest is paid. There is nothing in this case to vary the rule unless the interest law of 1876 is retrospective in its operation, and invalidates all usurious transactions theretofore made. Such could not have been the intention of the legislature, nor is such a construction authorized by the language of the act. The language of the enactment is that it shall be lawful to contract, not that all contracts now in existence and hereafter to be made shall be deemed lawful. Courts are not disposed to construe such law as retrospective, and disturb the rights of parties fixed and understood by the law in existence at the time they were entered into, unless there is something in the statute indicating at least that such was the legislative intent.

If the act in question is not retroactive the contract must be regulated by the law in existence at the time the contract was made. There was no penalty annexed to the usury law when this contract was entered into. The lender was entitled to his money and legal interest with the right on the part of the borrower to recoup the money, if any, paid. We are not able to perceive the application of the doctrine in reference to crimes and punishments under our penal laws, to the case at bar. The cases from the Indiana Supreme Court have heretofore been considered by this court, and although the statute, if introduced, differs somewhat from the Kentucky statute, even with the high respect we have for the learning and ability of that court, still we could not give a similar construction to such a statute.

The rights of the parties are not affected by the change made in the interest laws, as to transactions originating prior to the passage of that act; nor is the payment of money upon such contracts after its passage an obstacle to its recovery back by the borrower. The written obligation to pay 10 per cent. on the price executed after the interest law was enacted can be enforced. The court below having adopted this view of the questions presented, the judgment must be *affirmed*.

John Roberts, George B. Easton, for appellant.
Barr, Goodloe & Humphrey, for appellee.

J. W. CROAN *v.* J. C. CRENSHAW.

Slander—Words Spoken in Jest.

An instruction in a slander case is correct which said to the jury that if the words were spoken without malice and in jest and were so understood by those who heard them, the law was for the defendant.

Malice.

Malice is an indispensable ingredient in slander, without it there can be no slander in the absence of evidence of special damage.

Malice.

Where words spoken are in themselves actionable malice may be presumed from their falsity, but this presumption may be rebutted by evidence.

APPEAL FROM BULLITT CIRCUIT COURT.

September 15, 1876.

OPINION BY JUDGE COFER:

The plaintiff (now appellant) alleged that he and the defendant (now appellee), were rival candidates for the office of county attorney of Bullitt county; that the defendant, on several occasions, charged in his public speeches that the plaintiff had turned against his clients, and instead of defending them, as was his duty, had prosecuted them and sent one to the penitentiary, and came near sending another.

The defendant admitted that he used the words charged in the petition, but alleged that he did so in jest and without malice; and he alleged that those who heard him understood his remarks as made in jest, and not as intending to charge the plaintiff with want of loyalty to his clients. As to whether the charges were made in jest or in malice the evidence was conflicting. The court instructed the jury, in effect, that if the words were spoken without malice and in jest, and were so understood by those who heard them, the law was for the defendant.

This, we think, correctly presented the law of the case to the jury. It required the jury, before rendering a verdict for the defendant, to find from the evidence (1) that the words were spoken in jest, and (2) that they were uttered without malice. This the jury have done by their verdict.

Malice is an indispensable ingredient in slander. Without it there can be no slander in the absence of evidence of special damage, of which there is none whatever in this record. Where words are in

The true question is, "How much of the loan and legal interest has been reimbursed and how much remains unpaid." It is now too well settled in this state to admit of controversy that all moneys paid by the debtor or borrower to the lender on the debt, whether called usury or not, will be treated as a payment of so much of the debt and the legal interest due; and no recovery of the usury can be had until the debt and legal interest is paid. There is nothing in this case to vary the rule unless the interest law of 1876 is retrospective in its operation, and invalidates all usurious transactions theretofore made. Such could not have been the intention of the legislature, nor is such a construction authorized by the language of the act. The language of the enactment is that it shall be lawful to contract, not that all contracts now in existence and hereafter to be made shall be deemed lawful. Courts are not disposed to construe such law as retrospective, and disturb the rights of parties fixed and understood by the law in existence at the time they were entered into, unless there is something in the statute indicating at least that such was the legislative intent.

If the act in question is not retroactive the contract must be regulated by the law in existence at the time the contract was made. There was no penalty annexed to the usury law when this contract was entered into. The lender was entitled to his money and legal interest with the right on the part of the borrower to recoup the money, if any, paid. We are not able to perceive the application of the doctrine in reference to crimes and punishments under our penal laws, to the case at bar. The cases from the Indiana Supreme Court have heretofore been considered by this court, and although the statute, if introduced, differs somewhat from the Kentucky statute, even with the high respect we have for the learning and ability of that court, still we could not give a similar construction to such a statute.

The rights of the parties are not affected by the change made in the interest laws, as to transactions originating prior to the passage of that act; nor is the payment of money upon such contracts after its passage an obstacle to its recovery back by the borrower. The written obligation to pay 10 per cent. on the price executed after the interest law was enacted can be enforced. The court below having adopted this view of the questions presented, the judgment must be *affirmed*.

John Roberts, George B. Easton, for appellant.
Barr, Goodloe & Humphrey, for appellee.

J. W. CROAN v. J. C. CRENSHAW.

Slander—Words Spoken in Jest.

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The true question is, "How much of the loan and legal interest has been reimbursed and how much remains unpaid." It is now too well settled in this state to admit of controversy that all moneys paid by the debtor or borrower to the lender on the debt, whether called usury or not, will be treated as a payment of so much of the debt and the legal interest due; and no recovery of the usury can be had until the debt and legal interest is paid. There is nothing in this case to vary the rule unless the interest law of 1876 is retrospective in its operation, and invalidates all usurious transactions theretofore made. Such could not have been the intention of the legislature, nor is such a construction authorized by the language of the act. The language of the enactment is that it shall be lawful to contract, not that all contracts now in existence and hereafter to be made shall be deemed lawful. Courts are not disposed to construe such law as retrospective, and disturb the rights of parties fixed and understood by the law in existence at the time they were entered into, unless there is something in the statute indicating at least that such was the legislative intent.

If the act in question is not retroactive the contract must be regulated by the law in existence at the time the contract was made. There was no penalty annexed to the usury law when this contract was entered into. The lender was entitled to his money and legal interest with the right on the part of the borrower to recoup the money, if any, paid. We are not able to perceive the application of the doctrine in reference to crimes and punishments under our penal laws, to the case at bar. The cases from the Indiana Supreme Court have heretofore been considered by this court, and although the statute, if introduced, differs somewhat from the Kentucky statute, even with the high respect we have for the learning and ability of that court, still we could not give a similar construction to such a statute.

The rights of the parties are not affected by the change made in the interest laws, as to transactions originating prior to the passage of that act; nor is the payment of money upon such contracts after its passage an obstacle to its recovery back by the borrower. The written obligation to pay 10 per cent. on the price executed after the interest law was enacted can be enforced. The court below having adopted this view of the questions presented, the judgment must be *affirmed*.

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and then Breen and John Wallace and Michael Murphy executed the following covenant:

"We, Thomas Breen, Michael Murphy, and John Wallace, hereby bind ourselves jointly and severally to pay John A. Nelson, administrator and guardian aforesaid, said sum of five hundred dollars, rent of said farm and premises, for the rental year ending March 10, 1871, without defalcation, and all damages that may accrue to said Nelson, for said Thomas Breen not fully complying with his terms of this lease for said first years renting of said farm. This 18th day of September, 1869."

It will be seen that by the terms of this covenant executed by appellants they only bound themselves to pay the rent of said premises for the first year, and no longer; and also they agreed to pay such damages as might result to the lessor for the failure of the said Thomas Breen to comply with the terms of his lease for said first year. It results, therefore, that there is a fatal variance between allegations of the petition and the appellants' obligation, which is filed as a part thereof; and as the appellants' covenant must control the allegations of appellee's petition so far as they are inconsistent therewith, we are of opinion that the judgment of the lower court against the appellants for four hundred dollars was erroneous. Indeed, the petition, when compared with appellants' covenant, fails to show any cause of action against them of which the circuit court had jurisdiction. The said appellants were only bound for one year's rent of the premises, and as the petition showed that all of said year's rent had been paid except twenty dollars, the plaintiff failed to show a cause of action within the jurisdiction of the court, and his petition should have been dismissed.

Wherefore said cause is *reversed* as to appellants, and remanded with directions to dismiss the plaintiff's action.

E. C. Phister, for appellants.
Whitaker & Robertson, for appellee.

COMMONWEALTH *v.* ROBERT VANMETER.

Criminal Law—Amendment.

An indictment can only be found and presented by a grand jury and no amendment can be allowed.

Warrant.

A warrant in a criminal case may be amended.

APPEAL FROM HARDIN CIRCUIT COURT.

October 4, 1876.

OPINION BY JUDGE COFER:

The warrant in this case is in substantial conformity to the requirements of Secs. 24 and 321 of the Criminal Code, and the court erred in quashing it. If it had not been originally sufficient the amendment proposed should have been allowed. The amendment would not have changed the character of the prosecution, nor would it have infringed the rule that the case tried in the circuit court, on appeal, must be the same case which was tried in the inferior court.

An indictment can only be found and presented by a grand jury, and therefore no amendment of an indictment can be allowed. But a warrant which issues upon information may be amended in the same manner as a warrant in a civil case. Judgment *reversed* and cause remanded, with directions to overrule the motion to quash the warrant.

Attorney-general, for appellant. J. P. Hobson, for appellee.

FARMERS' BANK OF KENTUCKY *v.* LOUISVILLE, CINCINNATI AND LEXINGTON R. CO.

Attachment—Garnishment.

After the service of a garnishee notice on a person indebted to a defendant, such garnishee may legally pay to such defendant the amount of its indebtedness in excess of the sum demanded by plaintiff from the defendant.

Garnishee.

The service of a notice on a garnishee defendant when he is indebted to the defendant does not amount to attaching a specific fund nor does it constitute a lien on the fund. It merely prevents the garnishee from paying the fund to the defendant, and if the garnishee becomes insolvent, the plaintiff is only on an equal footing with other creditors.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 4, 1876.

OPINION BY JUDGE PRYOR:

The Farmers' Bank of Kentucky (appellant) loaned to the Chesapeake and Ohio R. Co., a nonresident corporation, thirty thousand

dollars, and upon its failure to pay the debt at maturity instituted an action on the note, and obtained an attachment. It is alleged in the petition that the Louisville, Lexington and Cincinnati R. Co. is indebted to the Chesapeake and Ohio R. Co. in the sum of $200,000; and the plaintiff (appellant) asks that the amount of its debt, interest and costs be adjudged against the Louisville, Lexington and Cincinnati R. Co. out of what it owes the Chesapeake and Ohio road.

An ordinary attachment was issued, directing the officer to attach sufficient property of the debtor to satisfy the sum of $30,930, the debt interest and probable cost of the action, and to summon the garnishee. The Louisville, Cincinnati & Lexington R. Co. was summoned by the delivery of a copy of the attachment and summons to the president, Wilder; and there was also delivered to Wilder, as president of the road, a copy of the attachment, etc., with an indorsement notifying him of the object of the action, viz.: "to attach all money, property, chose in action, etc., in his hands or under his control, belonging to the debtor."

The Louisville, Cincinnati & Lexington R. Co., at the time of the service on its president, was indebted to the Chesapeake and Ohio road in the sum of two hundred thousand dollars. This indebtedness was admitted, and the attachment being sustained, a judgment was rendered against the Louisville, Cincinnati and Lexington R. Co. for the amount of the note, interest and costs. Upon this judgment an execution was issued, and was returned no property found; and now the appellant (the bank) has instituted the present action seeking to make Wilder, the president of the Louisville, Cincinnati, and Lexington R. Co., individually liable, the last-named company being insolvent. After this company had been summoned as garnishee, and the notice served on its president, the company, by its officers, its president and directors, paid to the Chesapeake and Ohio road all of its indebtedness to that road, except the amount garnisheed in its hands, retaining that much of the debt to answer the final outcome of the litigation. The appellant insists that the payment of the money after service of the attachment makes the president personally liable for its debt.

There is no proof of fraud in the case, or of the existence of any combination between these appellees and the directors of the corporation, that was the real or original debtor, to prevent the appellant from making its debt; and the principal ground relied on for a recovery is that the appellant had a lien on the whole indebtedness from the one company to the other. There was no specific fund at-

tached, nor any property seized, and the appellant was only asking to be permitted to make its debt out of the Louisville, Cincinnati and Lexington R. Co., the debtor of the Chesapeake and Ohio R. Co., or in other words to stand in the shoes of the debtor with the right to coerce payment out of the property of the garnishee. This right the appellant was entitled to when the attachment was sustained; and the means of supporting it is in the judgment of the court requiring the Louisville, Cincinnati and Lexington R. Co. to pay the debt. If the company had not paid one dollar of its indebtedness to the Chesapeake and Ohio R. Co., the identical judgment would have been rendered, and the debt owing by the garnishee applied to the payment of the debt owing the appellant.

The Louisville, Cincinnati and Lexington R. Co., if the facts authorized it, might have been required to bring the money into court by rule, but this was not done; and the appellant, as the case is now presented, can only enforce the claim against the garnishee as any other creditor could have done. It had no lien on the garnishee's estate, and had only acquired the right, by reason of the attachment, to say to the garnishee, "You must not pay this much of your debt to the Chesapeake and Ohio R. Co. or to any creditor of that company. My attachment gives me alone the right to demand payment." The garnishment gave to the appellant an equitable right to this debt as against the other creditors of the debtor. The fact that the Louisville, Cincinnati and Lexington R. Co. had been summoned as garnishee did not prevent it from paying its debts, or giving to the appellant a lien upon the property or earnings, or placing the appellant in any better condition than any other creditor of the company; and if the garnishee is insolvent the appellant must abide its fate with the other creditors. The garnishee, having admitted the indebtedness, became liable for the debt upon the attachment being sustained, and that liability is not questioned.

The appellant is proceeding upon the idea that it has a lien upon a particular fund to pay its debt, and that the appellee held the fund in trust for its benefit, and that $200,000 of the garnishee's money or property had been set apart by reason of the proceeding as a fund out of which the demand must be satisfied. This is a mistaken view of the case. All that appellant acquired was the right to appropriate so much of the debt due the garnishee as would satisfy its own debt, and this appropriation has been made by the judgment rendered. No lien exists upon the garnishee's property, and the creditor is only substituted to the rights of his debtor, and has no preference

over any other creditor of the garnishee except in so far as he may acquire it by the levy of his execution.

If no payment had been made by the Louisville, Cincinnati and Lexington R. Co. to the Chesapeake & Ohio R. Co., the judgment would not have directed that $200,000 of the garnishee's property be set apart to pay it, but only a judgment rendered against the garnishee for the amount of appellant's debt, interest and costs. The appellee acted in good faith. It refused to pay over the amount guaranteed in the hands of the company, and recognized the liability of the company to pay it. This is all the appellant has asked, and it can demand no more. Where a particular fund is attached or the party restrained from paying any part of it over, or where specific property is attached, the lien exists; and such is the authority relied on by counsel.

In this case the company and its officers were only required by the suit itself to retain so much of their indebtedness as would satisfy appellant's claim. This was done, and now, as the company has become solvent, it is maintained that the president is individually liable because he, together with the directors, paid or directed to be paid to the Chesapeake and Ohio R. Co., the balance of its debt. Such is not the law.

The railroad company is liable, but no individual responsibility rests upon its officers.

The judgment is *affirmed*.

A. J. James, Muir, Bijou & Davie, for appellant.
James Speed, for appellee.

R. M. LESLY *v.* JOHN D. MINOS.

New Trial—Newly Discovered Evidence.

Where one suffers judgment and prior thereto had made no diligent search for a receipt, he is not entitled to a new trial because since the trial he has found the receipt.

APPEAL FROM PIKE CIRCUIT COURT.

October 5, 1876.

OPINION BY JUDGE PRYOR:

It is alleged in the petition to vacate the judgment, by the appellant, that he made diligent search after the judgment had been ren-

dered against him, for the lost note, being satisfied that he had paid it, and upon making this search found it among his appellant's papers; that the appellee was mistaken in alleging that it had not been paid, and asserted his right to a judgment from a want of recollection as to what had transpired prior to the war. The statements of the petition, if true, do not bring the case within any of the provisions of the Code of Practice, authorizing the granting of new trial or vacating judgment. If the appellant had made diligent search before judgment, and when process was served upon him, he might have found the note, and according to his own statement the judgment against him, if improper, results from his own laches.

Besides, the appellant's own father now swears that he was present when the money was paid and the note taken up, and of this fact the appellant must have been apprised. He was, therefore, negliment in not making inquiry of those who, according to his own statement, must have known all about it. The appellee also accounts for the manner in which the father of appellant got possession of the note. Brown, the attorney, says that the note alleged to have been lost was given up to appellant's father for the purpose of having it renewed; that both the old note and the renewal note was handed to the father with the direction that when renewed it was to be delivered to a man by the name of Hamilton. The note held was renewed, and the father may have forgotten to deliver the old note to Hamilton. He, however, swears that the note was paid to Hamilton, and this may be true; but such negligence on the part of the appellant in the preparation of his defense, connected with the doubt therein on the question of payment created by the testimony of Brown, precludes a court of equity from affording any relief; and, in fact, the statements in the petition, if conceded to be true, present no case for the interposition of the chancellor.

Judgment *affirmed.*

Apperson & Reid, for appellant. George N. Brown, for appellee.

RICHARD REALY *v.* COMMONWEALTH.

Criminal Law—Evidence—Larceny.

Where in an indictment a defendant is charged with stealing a horse in 1874 from a certain named person, it was competent for the commonwealth to prove that the theft took place in 1872.

APPEAL FROM MARION CIRCUIT COURT.

October 6, 1876.

OPINION BY JUDGE COFER:

We do not perceive in this case any substantial error to the prejudice of the appellant. He had no right to complain of the introduction of evidence tending to prove him guilty of stealing Simpson's horse in 1872; for although it was alleged in the indictment in this case that the horse stealing therein charged was committed in 1874, it was competent to prove the stealing of a horse from Simpson at any time prior to the finding of the indictment.

There was no error in refusing to allow the appellant to prove the conversation had with Preitt, or that with the two men who are said to have brought the horse to his house. Neither of these conversations occurred at the time the horse is said to have been delivered to the appellant. One was more than a half hour afterwards, and the other after the horse had been delivered and the parties went into the house. Neither conversation related to or explained an act being done at the time the conversation was had, and therefore neither was admissible as a part of the res gestae.

We perceive no objection to the instructions given. The words, "feloniously stole, took, and carried away," were sufficiently specific, and must have been understood by the jury, and are not obnoxious to the objection that a question of law was submitted to the jury. Instructions 7 and 8 were properly refused. No. 7 was wrong because by it the court was asked to say that a conviction could not be had for the stealing of the horse mentioned in the indictment unless such stealing was on or about the date mentioned in the indictment. No. 8 was substantially given in the other instructions, especially in No. 4.

Judgment *affirmed.*

C. S. Hill, J. W. Jones, for appellant. Moss, for appellee.

J. L. BARNARD *v.* COMMONWEALTH.

Criminal Law—Plea to Indictment.

Where there has been no plea to the indictment before the trial in the circuit court and no objection made because of such omission, the case will be treated in the court of appeals as if the plea had been made.

Obstruction of Highway.

When in a criminal case one is charged with obstructing a public highway, the question of whether the way obstructed was a public highway should be submitted to the jury.

Agency in Crime.

There can be no agency in crime and a landlord who was not present or directing his tenant to build a fence in a public highway cannot be held guilty. In such case the prosecution should be against the tenant.

APPEAL FROM OHIO CIRCUIT COURT.

October 6, 1876.

OPINION BY JUDGE ELLIOTT:

This appeal questions the correctness of the judgment in the above cause, and mainly on the ground that the court below failed to properly instruct the jury.

The indictment charged the defendant with the erection of a fence in the public highway and its continuance therein for one year. The record fails to show that the defendant put in any plea to the indictment, but it does show that he not only appeared and resisted the recovery all through the trial, but that even after it was over he filed grounds for a new trial and supported them with several affidavits, and this record fails to show that either his evidence or other effort to manifest his innocence were objected to by the state attorney because he had failed to plead to the indictment. The case having been tried in the court below as if the defendant had plead not guilty, it will be so treated here. There were several witnesses sworn as to whether the fence encroached upon the public highway, but the commonwealth failed to show by any record evidence that any public highway had ever been located at the place where defendant had built his fence; nor does the evidence show that a road where the obstruction occurs had been made and used by the public for such a length of time as to create the presumption of a dedication of the said land over which said road ran to the public for public use as a highway. We are, therefore, of opinion that the question as to whether the road charged to have been obstructed by defendant's fence was a public road or not, ought to have been submitted to the jury, and the failure of the court so to do was error.

The only proof in this record connecting the defendant with the erection of said fence is that his tenant, Harper, built the fence at the place charged in the indictment to be an encroachment on the

public road. Upon this evidence the court instructed the jury that if the defendant, by himself or agent, created said obstruction, he was guilty as charged; and the jury may have inferred that Harper was defendant's agent from the mere fact that he was his tenant. A tenant is as independent of his landlord and has as absolute a property in the premises and the control of them during the continuance of his term, as the landlord had before he rented them, and if the premises where the obstruction occurred were in the possession of Harper as tenant for an unexpired term, and he was guilty of the purpresture, the defendant is not guilty, unless he directed or sanctioned the same; and the fact that Harper was his tenant did not make him his agent especially in the commission of a trespass. As the jury may have believed that as tenant Harper was the general agent of his landlord, and by reason of the failure of the court to distinguish between an agent and a tenant in his instruction, we are of opinion the said cause should be *reversed,* which is done, and said cause remanded with leave to the defendant to plead to the indictment, and for further proceedings not inconsistent with this opinion.

Walker & Hubbard, for appellant. Moss, for appellee.

BANK OF COLUMBIA *v.* W. P. D. BUSH.

Corporations—Bond for Costs—Dismissal of Action.

A suit brought by a corporation in this state must be dismissed when it fails to give bond for costs before commencing the suit.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 7, 1876.

OPINION BY JUDGE ELLIOTT:

The appellant is a corporation, and as such brought this suit, without having first executed a bond for the cost of the action. On appellee's motion, and because said bond had not been executed, said suit was dismissed without prejudice, and this action of the court below is complained of by appellant. The law on the subject is unambiguous, and is to be found in the General Statutes, p. 265, and is as follows: "When a non-resident or any corporation shall institute an action in any court, whether suing in his own right or as representative of another, he shall before the commencement thereof, give bond with a surety resident in this state, payable to the defend-

ant, to pay all cost that may accrue in consequence thereof either to the opposite party or the officers of court." If the plaintiff fails to give surety for cost, as required by the provisions of this chapter, his action shall be dismissed.

It will be seen that this statute leaves no room for construction. It says to the appellant that before it brings an action in this state it must give surety for cost; and if it fails so to do, it says to the court that it shall dismiss its action; and consequently the court in which the suit was brought had no discretion. Any exercise of discretion which operated as a refusal to dismiss the suit on motion made to do so, would have been a violation of the statute. We see no escape from the provisions of the statute. It is not contended that it is unconstitutional, and its words are imperative that a suit by a corporation "shall be dismissed" if bond for cost is not executed "before" its "commencement." We see nothing wrong in the statute except that it puts a corporation in the masculine gender, and that error, if any, is not before us for correction.

But it is contended that, under the rules of practice of the Louisville chancery court, notice of appellee's motion should have been given to appellant, and the same should have been in writing; but these errors, if any, were waived by appellant's failure to object thereto in the court below.

Wherefore the judgment must be *affirmed*. Judge Cofer did not sit in this case.

Alexander & Dickerson, for appellant.
Barrett & Brown, for appellee.

ELIZABETH GRAHAM *v.* SAMUEL R. GRAHAM.

Appeals—Practice—Bill of Exceptions.

Where a pleading offered for filing is rejected it will not be a part of the record unless made so by a bill of exceptions or order of the court.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 7, 1876.

OPINION BY JUDGE COFER:

After careful search therefor, we do not find in the transcript the amended answer and counterclaim which the record shows appel-

lant's counsel offered to file. We cannot, therefore, decide that the chancellor erred in refusing to allow it to be filed.

The record shows such a pleading was tendered, and that the motion to file it was denied; but it does not appear to have been in any way made a part of the record; and if it were before us we could not, as has been repeatedly decided, treat it as constituting any part of the record of the case. The case of *Ballard v. Caperton*, 2 Met. 412, and *Mayer v. Mayer*, 3 Ib. 298, related to the costs incurred, while the relation of husband and wife existed. In this case that relation ceased, with the judgment divorcing the appellee, and with it his liability for costs of the appellant, ceased.

Petition *overruled.*

M. Mundy, for appellant. Mix & Boothe, for appellee.

SAMUEL BARNARD *v.* COMMONWEALTH.

Criminal Law—Homicide—Caution Required in Handling a Gun.

One who kills another without malice and with no intention to kill by snapping a pistol and pointing it at another believing it not to be loaded is not guilty if he has used such diligence as an ordinarily prudent person would have deemed necessary to satisfy himself that the pistol was not loaded, and did in fact believe it was not loaded.

Caution Required in Handling a Gun.

Before a man deals with a gun or pistol as if it were not charged, it is incumbent upon him to ascertain whether it is so or not and if he does not use reasonable caution in this respect, and afterwards upon pulling the trigger it unexpectedly explodes and kills a person, it will be manslaughter.

APPEAL FROM LAUREL CIRCUIT COURT.

October 9, 1876.

OPINION BY JUDGE COFER:

The appellant was indicted in the Laurel circuit court for the murder of Mary J. Martin, by shooting her with a pistol. At the time the shooting occurred the appellant was about sixteen years of age, and resided with his father, James Barnard, who kept a store. Some time prior to the killing of the deceased James Barnard sold a pair of pants to some one who was unable to pay for them in full, and they left with him a pistol as security for seventy-five cents, the balance unpaid. The pistol was thrown about the house and played

with by the children of James Barnard, until the morning of the day on which the unfortunate shooting of the deceased occurred. On that morning Barnard offered to sell the pistol to Brown Davis, who loaded it and went to the woods to see whether it would shoot well; but some ladies, of whom the deceased was one, coming along, he returned without discharging the pistol and laid it down in the store, without giving notice to any one that he had loaded it. In the evening of that day the appellant took up the pistol and burst several caps on it, holding the muzzle toward the ceiling; some of his brothers and sisters younger than himself were in the store at the time, and he in jest and play snapped the pistol several times, while holding it toward them; and the deceased coming in, he pointed it toward her, when the charge exploded and she was shot through the head and killed. He immediately ran into an adjacent room, where his mother was lying in bed sick, and told her he had shot the deceased. His mother directed him to return to the store and bring deceased into her room, saying she might not be dead; he went into the store and immediately returned screaming and wringing his hands, and said she was dead, and that he would not have done it for the world.

The deceased was employed to wait upon the mother of the appellant, and came to the house for that purpose on the morning of the day on which the shooting occurred. She and he were near the same age, and the evidence not only failed to disclose any unkind feeling between them, but conduced to show they were on the most friendly terms with each other. Upon evidence strongly conducing to establish these facts, and without any evidence whatever tending to show malice or an intention to harm the deceased, except the single fact that he shot her, he was, under instructions of the court, found guilty of manslaughter and sentenced three years' service in the penitentiary.

The court instructed the jury that, although they might believe from the evidence that the defendant thought the pistol was unloaded, and that he had no intention to kill deceased, yet, if they believed from the evidence, to the exclusion of a reasonable doubt, that defendant, without using the means and care of a prudent man to ascertain whether or not the pistol was loaded, heedlessly and incautiously engaged in an effort to entertain himself by snapping the pistol at said Mary J. Martin, and in doing so the pistol was discharged and killed the deceased, though by accident, they ought to find him guilty of manslaughter and fix his punishment, which is by

confinement in the penitentiary not less than two nor more than twenty-one years.

The punishment indicated is that denounced by the statute against voluntary manslaughter. Sec. 1, Art. 4, Chap. 29, Gen. Stat. The appellant asked the court to instruct the jury in substance that if they believed that he and the deceased were upon friendly terms, and he had used such diligence as an ordinarily prudent person would have deemed necessary to satisfy himself that the pistol was not loaded, and did in fact believe it was not loaded, and that in snapping it at the deceased he had no intention or expectation to do injury to her, they should find him not guilty. It seems to us that the instruction should have been given as asked. Before a man deals with a gun or pistol as if it were not charged, it is incumbent upon him to ascertain whether it is so or not, and if he does not use reasonable caution in this respect, and afterward, upon pulling the trigger, it unexpectedly explodes and kills a person, it will be manslaughter. 2 Archabold's Cr. Pl. 783. Mr. Justice Foster said the law did not require the utmost caution that could be used, but that it was sufficient that a reasonable precaution, such as is usual in like cases, should be taken; and he states a case, cited in note 3, p. 784, vol. 2, Archabold's Cr. Pl., Waterman's ed. 1860, in which he ruled that a homicide, under circumstances strikingly similar to the circumstances of this case, was misadventure and not manslaughter. That case fully sustains the principle embraced in the instruction asked for, and the court erred in refusing that instruction. Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

John Dishman, for appellant. L. E. Moss, for appellee.

JOHN T. RATCLIFFE *v.* SUSAN MCGREWDER.

Promissory Note—Husband and Wife.

A debt contracted before the marriage between the parties is extinguished by the marriage.

Divorce.

Where a debt between the parties has been satisfied by their marriage it cannot be restored to the wife when a divorce is granted to her.

APPEAL FROM CARTER CIRCUIT COURT.

October 10, 1876.

OPINION BY JUDGE LINDSAY:

The debt, for which the note was given, was contracted before the marriage between the parties. The marriage extinguished it. It was not like a debt due to the wife from a third person, which the husband was bound to reduce to possession in order to perfect his title. After the marriage the debt had no existence. It was in law satisfied. As it did not exist it could not be restored to the wife when the divorce was granted. Neither could the judgment of divorce revive the liability of the husband to his quondam wife.

Upon the statements of the appellee, her petition should have been dismissed. Judgment *reversed* and cause remanded for a judgment conforming to this opinion.

J. & J. W. Rodman, for appellant. J. L. Scott, for appellee.

JOHN GORMAN *v.* SARAH L. GORMAN.

Dower—Fixing Value of Dower.

Where the widow has a dower interest in a house and lot which not being susceptible of being partitioned has to be sold, her interest shifts to the proceeds of sale and it is error for the court to fix the value of her interest before sale.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 10, 1876.

OPINION BY JUDGE PRYOR:

The appellee has asked the chancellor to sell the house and lot, for the reason that to allot her dower by a division of the property would impair its value. The chancellor granted the prayer of the petition, but undertook to fix the value of the dower before the property was sold. This was error. She was entitled to her dower out of the proceeds of sale, and the amount the house and lot sold for must be regarded as its value for the purposes of the action.

The judgment is *reversed* with directions to the court below to give the widow the value of her dower in money, estimating the value of the property at the price for which it was sold. In rendering the

former opinion affirming the case, the attention of the court was not called to this question.

Russell & Helm, for appellant.
J. C. Walker, M. Mundy, for appellee.

MARY F. HIGGINS *v.* MATILDA A. POWELL.

Wills—Subscribing to Will.

A will must be subscribed by the testator at the close of the writing and is invalid where a vacant page of paper or more is left above subscription, but a will signed at the close but in which a blank page or a large part thereof is left in the middle of the instrument is prima facie valid.

APPEAL FROM HENDERSON CIRCUIT COURT.

October 13, 1876.

OPINION BY JUDGE COFER:

In the case of *Soward v. Soward*, 1 Duv. 126, it appeared that the paper offered for probate as a will consisted of an ordinary sheet of paper, the writing on which occupied the first, and a little over half of the second page, and was signed at the close thereof by the testator. The names of the subscribing witnesses were signed on the fourth or last page, and were separate from the close of the writing, and the signature of the testator, by nearly two blank pages, and it was held that that was not a good attestation, because the statute required the witnesses to "subscribe the will with their names." The court held that to subscribe a writing with the name of a party or witness, was to sign the name at the close of the writing, and that a name separated from the end of the writing by nearly two blank pages was not subscribed to the writing, and therefore that Soward's will was ill executed, and was invalid.

In this case the will is written on an ordinary sheet of foolscap paper, the writing being on the first and third pages, leaving the second page blank, and signed at the end thereof by the testator and witnessed by the names of two witnesses following immediately after the signature of the testator.

The statute requires the name of the testator to be subscribed to the will, and in the case supra it was held that that was equivalent to requiring his name to be signed at the close of the writing, and that

as the statute required the names of the witnesses to be subscribed, it must be held to require their names also to be at the close of the will, and because that was not done the will was rejected. In this case the signatures of the testator and witnesses are at the close of the writing, and in that respect there is a literal compliance with the law.

But it is contended that the object in requiring the names of the testator and witnesses to be subscribed at the close of the will was to prevent frauds, and that to leave blank pages, anywhere between the beginning and close of a will will leave open the same door for fraud which the statute was enacted to close, and that upon the commonly recognized canon for the construction of statutes of the nature of that under consideration, that "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter," the will in contest should be held to be invalid.

There is force in the argument, but when the letter of the statute has been complied with in a case like this, we incline to the opinion that the safer and more reasonable rule is to hold that, prima facie, the will is valid, and especially so when upon an inspection of the paper and writing it is plain that there not only has not been any additions to the will, but could not have been any which could have escaped detection.

The rule contended for does not seem to us to be necessary in order to guard against the mischief which led to the passage of the statute. It can hardly happen that fraudulent additions can be made upon blank pages in the body of a will without easy detection, and it would be going a great way to assume, in the first place, that such blank pages are equally a mischief with that intended to be remedied by requiring the testator and witnesses to sign their names at the close of the will, and then to hold by construction that the assumed mischief, of the existence of which the statute gives no intimation, should invalidate a will executed in all respects according to the letter of the law. When there has been a compliance with the letter of the statute, we think the safer rule is to leave the question of alterations or additions to be settled as a question of fact, and not to preclude all such inquiry by an arbitrary rule of law, and especially when such a rule is to be established by a doubtful judicial assumption that such was the intention of the legislature.

Judgment *affirmed.*

H. F. Turner, for appellant. Clay & Coleman, for appellee.

N. B. BORTMAN *v.* JAMES GILES.

Sale of Real Estate—Possession—Estoppel.

One who secures and holds possession of land under a parol contract to purchase, while so in possession is estopped to deny the title of one who thus contracts to sell to him and cannot set up a title acquired by him while so in possession.

APPEAL FROM ADAIR CIRCUIT COURT.

October 14, 1876.

OPINION BY JUDGE COFER:

The evidence that the appellee took possession of the land in contest under the parol contract to purchase it of the appellant is conclusive and uncontradicted, and it also appeared in the evidence that he has continued in possession ever since. Having entered under the appellant, the appellee is estopped to deny his title, and cannot set up a title acquired by him while so in possession, but must surrender his possession and divest himself of the advantage gained by the possession received from the appellant, and when he does so, and the parties are in statu quo, he may in a suit test the relative strength of the title of himself and the appellant.

Wherefore the judgment is *reversed,* and the cause is remanded with directions to render judgment for the appellant, and to compel the surrender of the possession to him.

Winfrey & Winfrey, for appellant. Stewart & Nell, for appellee.

REUBEN GILL *v.* MILTON FARMER.

Sheriff—Service of Process—Judgment.

A sheriff or his deputy has no power to serve civil process out of his county and when he does so his return is not proof of service.

Judgment.

A judgment entered without the service of process, where there is no appearance by the defendant to the action, is void.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 18, 1876.

OPINION BY JUDGE PRYOR:

The deputy sheriff of Daviess county had no power to serve the

summons in McLean county. His return is "executed on Reuben Gill in McLean county, April 29, 1875, by delivering him a true copy of the within, which I accept," signed Reuben Gill. The deputy signed his name in his official capacity at the place on the paper where it is usual to attest such papers.

The Code requires that service may be acknowledged by the defendant by an endorsement on the summons, signed and dated by him and attested by a return. The affidavit of the witness should be proof of service, etc. There is no proof of the service or acknowledgment in this case, nor is there any attestation to the act of the defendant in signing it. In New York, under a similar provision, where the sheriff served the summons out of the county, it is said, "The proof of service must be by affidavit; his certificate of service is of no avail." There is no proof of service whatever in this case, and the judgment was therefore void. If the last judgment had been proper, we see no reason why the commissioner should not sell to satisfy both judgments, as the cases were consolidated. The judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

G. W. Ray, for appellant. Owen & Ellis, for appellee.

McKAY, ET AL., *v.* J. W. SUTHERLAND.

Sale of Real Estate by Parol—Possession—Lien for Purchase Money.

A purchaser of real estate by parol who has been put into possession thereunder has a lien for the purchase price on the premises, on a rescission of his contract not only as against his vendor but against the claim of a subsequent purchaser with notice of his prior purchase.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 18, 1876.

OPINION BY JUDGE ELLIOTT:

The appellee, Sutherland, charges in his petition in this action that he bought a half-acre lot of land of appellant and paid him for it; that the contract was verbal; that appellant put him in possession of the lot, but afterwards refused to convey it to him, and sold the lot to appellant, Givens; that the lot was worth $125, and that appellee had given said sum for it.

The appellants failed to answer, and judgment was rendered

against appellant, U. McKay, by which said contract was declared not to be enforcible, and a judgment rendered for plaintiff for $125 and costs; and it was further adjudged that as the adjudged sum was the purchase price of a lot of land, and as appellant could not enforce his contract for a conveyance he had an enforcible lien upon said land for the purchase price thereof, which lien was enforced and the land ordered to be sold by the judgment.

After judgment was rendered, the appellant, McKay, offered to file an answer; but as he failed to show why he did not answer before judgment, we think the court did not abuse a sound discretion in overruling his motion. The petition states that appellant, Givens, had notice before his purchase of the lot, that appellee had bought by parol contract and paid for it, and that he had been put in possession.

A purchaser by parol, who has paid the purchase money and been put in possession of the purchased premises, has a lien for the purchase price on the premises on a rescission of his contract, not only as against his vendor, but against the claim of any subsequent purchaser, with notice of his prior purchase, and as this was all that was done in this case, said judgment must be *affirmed*.

W. N. Sweeney, for appellants. Owen & Ellis, for appellee.

ROYAL INS. CO. *v.* FRANK WATERS, ET AL.

Insurance Policy—Arbitration.

A written stipulation in an insurance policy that where a difference shall arise relative to the amount of the loss and there is no fraud suspected such difference shall be submitted to arbitration, does not require that any other question concerning recovery on the policy shall be submitted to arbitration.

OPINION BY JUDGE COFER:

The express stipulation is, "If any difference shall arise with respect to the amount of any claim for loss or damage by fire, and no fraud suspected, such difference shall be submitted to arbitrators," etc. This manifestly contemplated cases in which the only matter of dispute was "with respect to the amount of the loss," and to apply it in a case like this, where the company denies that those claiming under the policy have any interest in the subject, and denies their

right to receive compensation for the loss sustained by the destruction of the property insured, would be unreasonable.

The first question which arises when a claim is made on account of a loss is whether the person claiming is the person insured, and when that is disputed it would be most unreasonable to suppose that the parties intended, by the 13th condition, to provide that the claimant should enter into an arbitration while his right to anything was disputed, and take the risk of being compelled afterward to bring suit in order to establish his right to the sum awarded by the arbitration. The parties cannot have intended, when they entered into the agreement, that it should apply in such a case.

Counsel conceded that the question, whether the appellees were the heirs of Thomas H. Waters and owners of the property, was preliminary to a final settlement and payment, because of the necessity for a good receipt. But they say, "There has been no controversy on this matter prior to the suit, and the plaintiffs had no such excuse for violating their contract and bringing this suit"; and again they say, "It was not a matter about which there either had been, or ought to have been any dispute"; and again "The entire correspondence between the parties is in the record, and the court cannot fail to see that the one point in controversy was the amount of the loss."

We must look to the pleadings, and not to the evidence, to ascertain the matters in dispute, and we must assume that when the appellant filed its answer it did not deny facts it had previously admitted, but that it said then just what it had previously said, and what it would have said upon a proposition to refer, or if not, upon being applied to to pay the award, viz.: that it had "no knowledge or information sufficient to form a belief that the plaintiffs are the heirs of Thomas H. Waters, or that C. V. Waters is the executor of Thomas H. Waters, deceased, * * * or the interest of plaintiffs or any of them, under any such will."

It may be that this was not a matter about which there ought to have been any dispute, but we are forced to assume that the appellant intended to make dispute about it; and, if its answer was true, it ought to have made dispute, for it did not know that the appellees were the persons entitled to receive whatever it was bound to pay.

If appellant's counsel are right in their conclusion as to the legal effect of the 13th clause of conditions indorsed on the policy (a question on which we express no opinion), the petition was bad, and the demurrer should have been sustained; but when the answer came, showing that the company denied that the plaintiffs had any interest

in the policy, and thereby showed that the amount of loss was not the only question in issue, it showed that they were not bound to offer to submit to arbitrators, and therefore that they had a cause of action in the petition aided by the answer; and as the clause for arbitration could not, as the case then stood, interpose an obstacle to the prosecution of the suit, the demurrer to the third paragraph of the answer was properly sustained.

Petition *overruled.*

Breckenridge & Shelby, for appellant.
Frank Waters, for appellees.

W. E. MITCHELL *v.* M. A. BAILEY & CO.

Contracts of Married Women.

A contract of a married woman, not entitled to transact a separate business, is void, but when she has parted with money or property by reason of such contract, her husband must join her in an action to recover.

Disability of Wife.

A married woman, who has not been empowered to act as a feme sole, has no power to form a partnership with others.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 19, 1876.

OPINION BY JUDGE PRYOR:

The petition being defective, it is not necessary to notice the various alleged errors relied on for a reversal of the judgment. It appears on the face of the petition that the party, with whom the contract was made, was at the time of the institution of the action a married woman. She declares against the appellant as the wife of Bailey. The contract is signed by Mr. M. A. Bailey, and, she being a feme covert, the right of action, if any, was in the husband. A contract made by a married woman is absolutely void, but when she has parted with money or property by reason of such a contract the husband must be a party to the action. The court did not judicially know that she had been empowered to act as a feme sole; and when pleading the coverture in abatement the appellees still had the right to amend their petition. This they failed to do, but filed what is called a reply, to which no response was necessary, nor was it proper

to present such a traverse of the plea in abatement.

The issue having been made by the plea, and the burden being on the appellee to show that the disability of the wife had been removed, there is an entire absence of proof showing that she had been declared a feme sole with the right to sue. So in either event the judgment must be reversed. The demurrer, however, should have been sustained to the petition. It there appeared that the plaintiff was a married woman. She had no right to form a partnership with others. Her contract was void, not only with the appellant, but with those to whom she transferred the claim.

The judgment is *reversed* and cause remanded with directions to permit the appellees to amend their petition, and for further proceedings consistent with this opinion.

James Weir & Son, for appellant. Owen & Ellis, for appellees.

SUSAN B. SETTLE'S ADM'R *v.* JERRY S. GORDON.

Appeal—Interlocutory Order.

An order of the court directing a party to pay money into court is an interlocutory order and cannot be appealed from, but an order directing the money to be paid over to one of the parties is a final order and may be appealed from.

APPEAL FROM BARREN CIRCUIT COURT.

October 19, 1876.

OPINION BY JUDGE COFER:

The order directing the appellant to pay into court the amount of the appellee's claim was only interlocutory, but the order directing it to be paid over to him was final and might have been appealed from and superseded. It decided the rights of the parties as to that fund, and the court had no power, after the term, to set aside the order, or to require the appellee to pay back the money, and the rule was properly discharged.

Sec. 42, Art. 2, Chap. 39, Gen. Stat., relates to voluntary payments, and not to such as are made under the judgment of a court. The appellant did not pay because he supposed that the estate was solvent, or on account of any mistake on his part, but because the court so ordered. There is no appeal from the orders requiring the money to be paid to the clerk and requiring him to pay it to the appellee, and

as long as those orders stand unreversed, the order appealed from must be held correct.

Judgment *affirmed.*

P. H. Leslie, for appellant. J. P. Garnett, for appellee.

JAMES CATE *v.* JAMES A. ROUSE.

Bankruptcy—Appeals by Bankrupts.

After one has been declared a bankrupt, he cannot prosecute an appeal from a judgment against him in the circuit court. The assignee in bankruptcy in such a case is the real party in interest.

Discharge in Bankruptcy.

A discharge in bankruptcy relieves a debtor against all claims that might have been proved against his estate in the bankrupt proceeding, but to be available the discharge must be pleaded.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 19, 1876.

OPINION BY JUDGE LINDSAY:

After Cate had filed his petition in the bankrupt court, and at a time when he had no personal interest in the matter, he prosecuted to this court an appeal from the judgment against him in the Daviess circuit court in favor of Rouse. He did not make his assignee, who, as the representative of his creditors, was the real party in interest, a party appellant, nor suggest to this court that the appeal was prosecuted in behalf of his assignee. He appeared in this court as a party litigating for himself. He succeeded in reversing a judgment, against which the proceeding in bankruptcy would have protected him.

The judgment of this court was his judgment. The mandate issued and sent to the court below was his mandate. The judgment he is now seeking to enjoin was and is the direct and necessary result of his voluntary action in this court. Said judgment was reversed subsequent to the date of his application for a discharge in bankruptcy, and is not affected by such discharge.

It is true that a discharge in bankruptcy in general relieves a debtor against all claims that might have been proved against his estate in the bankrupt proceedings. But it is also true that to make a discharge available it must be pleaded, and if, as in this case, the bank-

rupt chooses to pursue a line of conduct that deprives him of the right and power to plead his discharge, he must submit to the consequences.

The judgment against appellant remains unreversed. The ground upon which he seeks to enjoin its enforcement has neither arisen, nor been discovered since it was rendered. There is no reason for the interference of the chancellor.

Judgment *affirmed.*

W. H. Sweeney, for appellant.
C. S. Walker, G. W. Ray, for appellee.

H. T. MATTINGLY *v.* J. O. MATTINGLY.

Landlord's Attachment.

The right of an attachment secured by a landlord against his tenant depends on whether he has reasonable grounds to believe that his debt will be lost unless an attachment issues.

Attachment.

A tenant who is an attachment defendant is entitled to make any defense that is available to him in any other kind of an action.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 19, 1876.

OPINION BY JUDGE ELLIOTT:

The judgment in this cause is founded on an attachment sued out by appellee for rent. By Sec. 5, Chap. 66, p. 602, Gen. Stat., a landlord is authorized, if his rent be due within a year thereafter, to go before the proper officer of the county in which the rented tenement lies and make affidavit "that there are reasonable grounds for belief, and that he believes that unless an attachment be issued he will lose his rent, and having executed the required bond an attachment shall issue in his favor."

The right to the attachment depends upon the reasonable grounds of belief and the actual belief of the landlord that unless he is aided by this process of attachment he will lose his debt. On the trial of this cause the defendant set up a counterclaim for some $160.65, which he charged he had paid as appellee's surety. This was a good set-off against appellee's claim, and should have been allowed, but was rejected by the court.

The remedy of a landlord by attachment does not deprive his tenant of any defense that he would be entitled to if sued in any other form of action. But we are of opinion that the appellee's grounds of belief that he would lose his debt were not reasonable, but on the contrary were unreasonable and cannot be sustained by this court.

The evidence conduces strongly to the conclusion that the personal property of the appellant then on the leased premises and its immediate vicinity, including his crop of tobacco, was worth from four to seven hundred dollars, and the proof is positive that he sold his tobacco which he owned when the attachment was sued out for $225.00.

If this attachment can be sustained, then any tenant can (as was done in this case) be deprived of the benefit of his contract to pay at the end of the year by the extraordinary remedy of attachment, and be compelled to pay, by said sacrifice of his property, a debt before it is due that he is amply able to pay when due, and when he has property subject to levy, enough to pay double the amount of his rent.

We cannot sanction a judgment sustaining an attachment under circumstances which are conclusive that the appellee by the least inquiry could have ascertained that his tenant's estate was ample for the payment of the rent due on the rented premises.

The judgment was for $200.00, when by the covenant sued on the defendant was only bound for $195.00, and this was error. Wherefore the judgment is *reversed* and cause remanded with directions to quash the attachment in this cause, and for further proceedings consistent herewith.

W. N. Sweeney, for appellant. Owen & Ellis, for appellee.

THOMAS S. MORGAN *v.* HENRY WOOD.

Witnesses—Instruction.

A party producing a witness is not allowed to impeach him by evidence of bad character unless in a case where it was indispensable that the party should produce him, but he may contradict him by other evidence and show that he has made statements different from his present testimony.

Credibility.

It is error for the court to charge the jury that they should discredit such witnesses as are without general moral character as shown in the evidence, except where they are corroborated by other evidence.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 20, 1876.

OPINION BY JUDGE LINDSAY:

The party producing a witness is not allowed to impeach his credit by evidence of bad character, unless it is in a case in which it was indispensable that the party should produce him; but he may contradict him by other evidence, and by showing that he had made statements different from his present testimony. Sec. 660, Civil Code of Practice.

The appellee produced as a witness his adversary, Morgan, to prove that he had written a letter relied on as evidence in this case. It was not indispensably necessary, nor even apparently necessary that he should have been produced, for that or any other purpose. Yet after he had testified in his own behalf, the appellee was allowed, in the face of the statute, and over appellant's objections, to attack his character. This was manifest error.

On appellee's motion the court instructed the jury that they were the judge of the credit to be given the several witnesses, and that they should discredit such as were without general moral character, as shown in the evidence, except so far as such witnesses may stand corroborated by other evidence. This is not the law; the jury may, but is not obliged to, reject the testimony of a witness of bad moral character. The jurors may believe the uncorroborated statements of such a witness, and if they do, they have the right to act upon that belief, and the court has no power to take that right away from them.

For these two errors a new trial should have been granted. Judgment *reversed* and cause remanded for a new trial upon principles not inconsistent with this opinion.

L. P. Little, John H. McHenry, for appellant.
Owen & Ellis, for appellee.

S. H. SANDIFER *v.* JOHN H. WILLIAMS.

Warranty—Eviction—Recovery.

A grantee under a warranty can only recover where he has been evicted and not then beyond the amount paid by him to secure good title.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 20, 1876.

OPINION BY JUDGE COFER:

The cross-petition is fatally defective. The allegation that the appellee was compelled to repurchase from McCain is too vague and uncertain. It is not pretended that the appellee had been evicted by a paramount title, nor that he appellant had no title. One or the other was certainly necessary in order to show a right of action, even if the title was warranted by the appellant. But it is not alleged that he warranted the title, and unless he did so he is not liable, unless he had no title at all, which is not claimed.

The appellee took possession under the appellant, and even if the appellant warranted the title, the appellee, not having been evicted, could not recover beyond the amount paid for the repurchase of the lease. He does not state how much he paid McCain, nor, indeed, that he paid him anything, and unless he did he has no right to recover back any part of the purchase money paid to the appellee.

The facts stated did not warrant a judgment for the alleged failure to build a tobacco barn. The contract as stated was to build a tobacco barn, but it is not stated that any particular description of a barn was to be built, nor what it would have been worth to build such a barn as was contemplated by the parties. If the appellee has a right to recover at all, he is not entitled to what it cost him to build it, but to what it was reasonably worth.

Judgment *reversed,* and cause remanded, for further proceedings.

L. P. Little, for appellant. McFarland & Tharp, for appellee.

ELIZABETH SMITH, ET AL., *v.* R. C. EUBANK, ET AL.

Insurance Policy—Beneficiary—Creditors of Husband.

Creditors of the husband have no cause of action against a widow who has received insurance money on a policy made payable to her, purchased by her husband.

APPEAL FROM ADAIR CIRCUIT COURT.

October 23, 1876.

OPINION BY JUDGE ELLIOTT:

H. W. Smith, in 1869, insured his life for the benefit of appellants,

his wife and children, in the sum of ten thousand dollars, in the Southern Mutual Life Insurance Co. of this state.

Smith paid the calls due on his policy up to his death in 1874. In 1875 R. C. Eubank, one of the appellees, brought suit, by which he sought to reach the fund received by Smith's widow and heirs by virtue of said policy, on the ground that said policy so made for the benefit of Smith's wife and children was a fraud on his creditors. Appellees' debt was not created till five years after the insurance of Smith's life was made with the Southern Mutual Life Insurance Co., and how he could have contemplated a fraud on said appellees without even any evidence that he even knew or ever expected to deal with them, is difficult to perceive.

The charter authorized the insurance as made by Smith, and protects the beneficiaries of the policy against creditors of the assured, and even if said act is illegal or even unconstitutional as to Smith's creditors, when the policy was executed, we are of opinion that appellees are in no condition to make the question, as the beneficiaries of the policy have a better title to the money received thereon than appellees.

It is said that H. W. Smith paid one call on this policy after he incurred the debt to appellees, and it is insisted that the amount of said call ought to be held liable for his debt. We are of a different opinion. Smith became bound for said call in 1869, long before he became indebted to appellees, and paid it in pursuance of his contract. We are of opinion that as to subsequent creditors of Smith, the appellants, the widow Smith and her children, are to be considered as the absolute owners of the fund paid them on the policy in dispute in this suit.

Wherefore the judgment of the lower court is *reversed* and the cause remanded with directions to dismiss appellees' suits at their cost.

Russell & Averitt, for appellants.
Baker & Hindman, for appellees.

T. J. BRENT *v.* PETER SINVILLE.

Liability of Indorser on Note—Release of Indorser by Delay.

When a holder of a note obtains judgment against the principal and delays nearly a month before issuing execution, such delay unaccounted for, will release one who has assigned the note to the plaintiff.

APPEAL FROM NICHOLAS COUNTY COURT.

October 25, 1876.

OPINION BY JUDGE ELLIOTT:

By this suit appellant seeks a recovery of judgment against appellee on his obligation of assignment to him of a note on R. Cheatam.

The note executed by Cheatam to appellee was due January, 1872, and was assigned to appellant by appellee in July, 1872. Appellant sued Cheatam and obtained judgment at the October term of the circuit court, which was the first term of the court after the assignment of the note. The judgment was obtained on the 6th day of November, 1872, and no execution issued on the judgment till the 10th day of December, next after the rendition of the judgment. This delay of nearly one month after appellant could have had execution on his judgment is unaccounted for in any way. We are of opinion that the delay in ordering execution on said judgment after its rendition, unaccounted for, released the assignee of the debt, appellee, Sinville, from all responsibility, by reason of his assignment; and as the lower court so decided, said judgment is hereby *affirmed*.

Hargis & Norrell, for appellant. Ross & Kennedy, for appellee.

HENRY LIEBER, ET AL., *v.* HENRY COOPER.

Sale of Real Estate—Lien for Purchase Money—Notice.

A lien for purchase money of real estate may be provided for in the deed and when such a deed is recorded a purchaser is bound to take notice of the lien.

APPEAL FROM MEADE CIRCUIT COURT.

October 25, 1876.

OPINION BY JUDGE COFER:

A lien is expressly retained in the deed from Jenkins to Mrs. Wright to secure the payment of the purchase money, and unless the notes held by the appellee as assignee of Jenkins have been paid, of which there is now no evidence in the record, he has a lien on the land enforceable against Brandenburg, even though he be a purchaser for value without actual notice. He was bound to take notice of the lien reserved in the deed.

But we are of the opinion that the appellee has no lien on the land to secure the notes on King assigned to him by Wright. Mrs. Wright and her husband had conveyed the land to Brandenburg & Lieber, and of course she could not assert a lien against her vendees, and the appellee can be in no better attitude in this respect than she would be in were she suing on the notes. Whatever claim the appellee has as to those notes he derived from her and her husband, and any defense against her is good against him. Having sold and conveyed the land to Brandenburg & Lieber, she could not have a claim against King for the purchase money he agreed to pay her, and could not reach the land through him.

The appellee has a judgment in personam against King, but that judgment does not bind Brandenburg & Lieber, nor their vendee, Brandenburg, nor give a lien on the land. Nor can the appellee reach the land as the property of King under his proceeding on the return of no property. King had no property in the land at the institution of this suit. The sale to him was void, and the subsequent sale and conveyance to Brandenburg & Lieber divested Mrs. Wright of title and left her assignee without any claim whatever upon the land, even though Brandenburg & Lieber may have had notice of the sale to King, for, that sale being void, Mrs. Wright's assignee would not have a lien enforcible even against her. She could not incumber her land in that way.

Judgment *reversed,* and cause remanded with directions to render judgment for the appellee to sell so much of the land as will pay the balance due on the notes held by him as assignee of Jenkins, and to dismiss the residue of the petition.

Lewis & Fairleigh, Edwards & Seyman, for appellants.
A. T. Rankin, for appellee.

FRANK GRIFFIN'S EX'R, ET AL., *v.* GEORGE H. BARNES.

Decedent's Estate—Claims for Interest.

No interest accruing after his death will be allowed against decedent's estate unless the claim is verified and demand made of the executor or administrator within one year after his appointment.

Note and Interest.

Where a note due in one year with ten per cent. interest from date is not paid when due it will only draw six per cent. interest after due, for the reason that the maker did not contract to pay any interest after the note should become due, or until it should be paid.

APPEAL FROM OHIO CIRCUIT COURT.

October 26, 1876.

OPINION BY JUDGE ELLIOTT:

This action was brought by appellee against Tyler Griffin, executor of Frank Griffin, and Henry D. McHenry, for the recovery of the amount of a promissory note for three hundred dollars executed by said Frank Griffin and McHenry on the 23rd day of August, 1872, and payable one year after date, with interest at the rate of 10 per cent. from date.

The petition charges that Frank Griffin died on the —— day of ———, 1874, and that proper affidavit and demand had been made of appellant, Tyler Griffin, his executor; but the affidavit annexed to said note and made a part of appellee's petition shows that it was made February 7, 1876, which was more than one year after the death of the decedent. The first question presented is whether the judgment for interest against appellant, Tyler Griffin, as executor of decedent, was proper. It is provided by Sec. 53, Chap. 39, Art. 1, Gen. Stat., that "No interest accruing after his death shall be allowed or paid on any claim against a decedent's estate, unless the claim be verified and authenticated as required by law and demand of the executor, administrator, or curator, within one year after his appointment."

If Frank Griffin departed this life in 1874, as charged in appellee's petition, the affidavit and demand must have been made more than one year after his executor's appointment, as it was not made until February 7, 1876, and consequently no interest should have been adjudged against his executor, Tyler Griffin, on said note, after the death of his testator. But appellants complain that interest at the rate of 10 per cent. was adjudged against them from the time the claim became due till the same should be collected by the coercive process of the law. By the terms of the contract the obligors only bound themselves to pay 10 per cent. interest on the claim for one year, and at the end of said time they promised to pay the entire debt and accrued interest; and as they did not agree in writing to pay 10 per cent. interest after the claim of appellee became due, the judgment for such interest must be deemed erroneous.

It will be proper for the appellee to amend his petition and show the exact time of the death of Frank Griffin, and the qualification of his executor, as he is entitled to judgment for interest on the claim up to the death of the testator, and also up to the payment of the

claim, if the affidavit and demand were made within one year after the qualification of the executor, and against McHenry up to the payment of the claim; but he is entitled to a judgment against neither except for the principal and 10 per cent. interest thereon, for one year after the execution of the note sued on, and then for 6 per cent. per annum till the same is paid.

Wherefore said judgment is *reversed* with leave to appellee to amend as indicated herein, and for further proceedings consistent with this opinion.

McHenry & Hill, for appellants. Fogle & Sweeney, for appellee.

F. J. STATON, ET AL., v. J. W. CHRISTIAN, ET AL.

Sale of Real Estate—Cancellation of Deed.

If the grantor of real estate has no title and knows it and this fact was unknown to the grantee at the time of the execution of the deed and was fraudulently concealed from him by the grantor, such grantee is entitled to have the deed canceled.

Insolvency and Fraud.

Insolvency and fraud when properly pleaded is a complete defense to an executed contract, and the party who by the fraud of a grantor has been induced to accept a deed when the grantor had no title and knew he had none and the grantee was in ignorance of such facts at the time the deed was executed, is not compelled to rely on his warranty.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 27, 1876.

OPINION BY JUDGE PRYOR:

The court acted properly in permitting the appellees to prosecute their cross-action against the appellants. They had been regularly brought into court and required to enforce their lien, and the compromise between the original parties to the action could not affect their rights. They were made defendants to the cross-petition of Clark, and their answer to this was as required, and the cross-petition by them against the appellants, as authorized by Chap. 4 of the Civil Code, and the amendments thereto.

The answer of the appellants presented a good defense to the action. It is expressly alleged that the appellees have no title, that this fact was unknown to the appellants and known to the appellees

at the time of the execution of the deed, and fraudulently concealed by them from the defendants. If the appellees have no title they should not be permitted to recover. Fraud vitiates the contract, whether executory or executed, and if the appellees are without title, and knew it when they sold, and concealed the fact from the defendants, they are entitled to a cancelment of the deed. Insolvency, non-residency and fraud, all or either, when properly pleaded, make a complete defense to an executed contract like this. The party is not compelled to rely on his warranty. *Gale v. Conn,* 3 J. J. Marsh. 538; *Vance v. House's Heirs,* 5 B. Mon. 540.

The fact that the parties only conveyed their interest is immaterial. The language of the deed imports that they had an interest, and it is hardly to be supposed that the appellants would undertake to pay to the appellees several hundred dollars without any consideration. The burden of showing fraud is on the appellants, and that must be established in a case like this. The appellants should be permitted to present their defense.

The judgment is, therefore, *reversed* and cause remanded for further proceedings consistent with this opinion. The vendors and appellees being the owners of all the notes, there was no error in subjecting the land to the payment of the notes due.

King & Gilbert, for appellants. Bigger & Reid, for appellees.

A. R. HAY *v.* W. G. HUNTER.

Conveyance of Real Estate—Grantee Must Rely on His Warranty When Grantor Is Neither a Non-Resident nor Insolvent.

One who has accepted the conveyance of real estate, in the absence of fraud and where the grantor is neither a non-resident nor insolvent, must rely on his warranty and cannot resist the payment of a note given for such conveyance even if the wife of the grantor has not relinquished her dower.

APPEAL FROM CLINTON CIRCUIT COURT.

October 27, 1876.

OPINION BY JUDGE LINDSAY:

Hay, having accepted the conveyance of Mayo, must rely on the warranty therein contained, and he cannot resist the payment of the note sued on, even if Mrs. Mayo had not relinquished her right to dower, without showing that Mayo was insolvent or a non-resident.

But the conveyance shows that Mrs. Mayo did relinguish her right to dower, and the recollection of the clerk on that subject cannot be allowed to override his official certificate.

There was no order of survey in the case. The witnesses evidently know little or nothing about the exact location of the boundary lines of the tract of land sold by Mayo to Hall. The court could not determine from their evidence that the twenty-five acres mentioned by Hall as having been shown to him by Mayo as part of the tract, are outside of the real boundaries. The agreement between Lane & Dalton cannot prejudice Hay, even if it can be upheld. He gets in value as much land from Lane as she gets from him.

The other defect complained of is too insignificant to be taken into consideration in a contract in which a variation of two or three acres was evidently contemplated by the parties.

Judgment *affirmed.*

James E. Hays, for appellant. J. A. Brents, for appellee.

R. D. GEOGHEGAN'S EX'R *v.* JOHN G. HILLSON.

Guardian and Ward—Suit on Guardian's Bond—Averments of Necessary Facts.

Where in a suit against a guardian and his bondsmen by the ward no averment is pleaded showing that the plaintiff is of the age of twenty-one years or older, such omission is waived by an answer which avers such fact.

Limitations.

Where a suit is filed before barred by the statute of limitations and the petition is amended after a time when the original action would have been barred, the plea of the statute of limitations cannot be maintained where such amendment does not declare upon a new cause of action.

APPEAL FROM HARDIN CIRCUIT COURT.

October 28, 1876.

OPINION BY JUDGE ELLIOTT:

This action was brought by appellee in the Hardin circuit court against his guardian, A. E. Geoghegan, and his surety, R. D. Geoghegan. It appears from this record that the appellee's father departed this life in one of the southern states, that A. E. Geoghegan was appointed guardian for his two infant children, and that he procured

an order of said court by which he was permitted to remove the estate of his minor to this state, and that in 1848 he presented the record of said proceedings in the state where appellee's father was domiciled at the time of his death, to the county court of the county of Hardin, and was by an order of said court duly appointed guardian of said infant appellee and his brother; and as required he executed his guardian bond with appellant's testator, R. D. Geoghegan, and M. Geoghegan as his sureties.

Said Geoghegan then filed in said court the record of his settlement in the state of decedent's domicile as his inventory of said estate and entered upon the discharge of his duties as guardian aforesaid; and in October, 1869, he presented his accounts, vouchers, etc., and made what seems to have been intended as a complete settlement of his guardianship, so far as appellee was concerned, and said settlement was reported to the Hardin county court. At its February term, 1870, said reported settlement was reinstated on exceptions, and after a correction of the errors it contained, said report as corrected was confirmed and ordered to be recorded as a final settlement of A. E. Geoghegan's guardianship so far as the appellee was concerned. Said guardian was present and assisted to make this settlement, and the record shows that it was made on the evidence of indebtedness presented by himself. In 1870 this action was brought by appellee against said guardian and his surety, R. D. Geoghegan, on their said guardian's bond, in which he charged that said guardian was indebted to him in the sum of twelve thousand nine hundred fifty-four dollars and seventy-six cents; and he asked judgment against his said former guardian and said surety, R. D. Geoghegan, for said sum, with interest from the 30th of October, 1869, the date of the settlement of said guardian's accounts as such.

This petition failed to state that the appellee had arrived at the age of twenty-one years, but the death of R. D. Geoghegan having been suggested and a revivor had against the appellant, he filed an answer in which he stated that the appellee had arrived at the age of twenty-one years. Afterwards the appellee amended his petition and set out the bond sued on and its breach with some more particularity, and it is insisted that this amendment set up a new cause of action. The motion of appellants to file a plea of the statute of limitations having been refused by the lower court, he complains that the court erred by such refusal and that the claim was barred by limitations. We think not, for two reasons: First, although the original petition was defective in not stating that appellee had ceased to be

an infant, the answer of the appellant cured the defect by stating that he had arrived at majority; and, secondly, the amended petition only sought to cure a defect in the statement of the original cause of action, but did not attempt to introduce or state any new cause of action; and it is the settled law of this state that where the amended petition is filed to amplify or cure some defect in the statement of the original cause of action, and does not introduce a new cause of action, the statute of limitation does not run against the cause of action up to the filing of the amended petition, but only runs up to the issuing of the summons in the action in which said amendment is filed. *Horton v. Banner,* 6 Bush 596.

It is also objected that the record of the settlement of A. E. Geoghegan, made in the state of Mississippi, of his guardianship of appellant, was inadmissible as evidence in this action. This may have been true if said guardian had not filed it as the inventory by which he evidenced his indebtedness to his ward, but having done so, said paper was legitimate evidence in said cause. But it is said that the settlement of October, 1869, made by the guardian of appellant with the judge of the Hardin county court, is void because records of said court fail to show that it was returned to the Hardin county court and filed to the first term after it was made.

We are of opinion that these irregularities, if they exist, were waived by the guardian by his appearance at the February term, 1870, of the Hardin county court, and filing exception to same, and also his presence and active participation in the trial of said exceptions, at the termination of which trial on said exceptions said report of settlement as corrected was ordered to be recorded as a full settlement of the accounts of said guardian so far as the estate of appellee was concerned. We are of opinion that this settlement is prima facie evidence of the indebtedness of the said guardian to appellee; and, as appellant failed to deny that said recorded settlement was made, and made no attempt to surcharge it or falsify any of the items thereof, we do not perceive how he can avoid the force of it in this suit.

But it is said that after this suit was instituted the appellee and his former guardian made a contract by which said guardian was to and did pay him fifteen hundred dollars, and that said appellee was to and did suspend his said action and wait twelve months before making any effort to enforce said guardian's liability, and that this was done without appellant's testator's knowledge and consent. On the other hand said appellee contended that he only agreed if said guardian would pay him fifteen hundred dollars he would give him

credit on said debt, which he did, and that any agreement to wait was without consideration and void, and in addition thereto that appellee's testator assisted to get the money with which to make said partial payment, and begged for and assented to all the time given by appellee on said debt.

If the $1,500.00 was furnished to be placed as a credit to the guardian and went to extinguish that much of his indebtedness, then the giving of time on the balance was a matter of favor and was without consideration, and could have been disregarded by appellee at any time; and had the agreement been supported by a valuable consideration, if assented to by the appellant's testator, it was no contract of which he could take advantage.

We are of opinion that the court ruled the law correctly on all the questions made, and we perceive no error in either giving or refusing instructions; and we have some doubt as to whether the appellee was not entitled to judgment on the pleadings, save the plea of novation, which was not sustained by the verdict under correct rulings of the law by the court.

Wherefore the judgment is *affirmed*.

Brown & Chelf, for appellant.
James Montgomery, M. H. Marriott, for appellee.

JAMES C. RUDD AND WIFE *v.* J. F. KIMBLY, ET AL.

Usury—Forfeiture.

Chapter 60 of the General Statutes, § 4, art. 2, provides that where usury is intentionally charged, the whole of the interest is forfeited.

Penalty for Exacting Usurious Interest.

The party desiring to have interest forfeited where usury is charged, must aver affirmatively that the illegal interest was intentionally charged and must sustain his averment by proof.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 3, 1876.

OPINION BY JUDGE LINDSAY:

Section 4, Art. 2, Chap. 60, Gen. Stats., provides that if any person shall intentionally charge a greater rate of interest for the loan or forbearance of money than is authorized by said article, the whole interest shall be forfeited.

The party who desires the benefit of this forfeiture must ask for it. He must aver affirmatively that the illegal interest was intentionally charged, and an issue of fact may be raised upon the question of intention. The court will not assume that illegal interest was intentionally charged, and then upon its own motion enforce a forfeiture in favor of a party not asking for any such relief.

The chancellor, having no legal right to render a judgment for usurious interest, will purge a claim sued on, when it appears upon its face to embrace usury. But he will not, unless the pleadings require it, inquire as to the propriety of inflicting a penalty upon the creditor. When this cause returns to the circuit court, application upon the part of the appellants for leave to plead further will be addressed to the sound legal discretion of the chancellor, and this court will not interfere with the exercise of that discretion, by directing specifically the steps he should allow the parties to take in the way of further preparation.

Kimbly's branch of the case was ready for hearing when the final judgment, fixing the amount of the claim for which Mrs. Rudd's land is bound to him, was rendered. The bank's case was also ready for hearing. The reversal of the judgment in favor of the bank renders necessary the reversal of the judgment in favor of Kimbly, and compels him to await the action of the chancellor in the enforcement of the bank's mortgage. But as Mrs. Rudd withdrew her answer, and as there is now no issue of fact pending between her and Kimbly, we do not think that equity practice requires that the questions settled shall be opened in order first to let Mrs. Rudd answer, and then to make preparation to sustain her defense.

Petitions in each of these cases *overruled.*

SAMUEL ORR *v.* A. J. COLLEY.

Statute of Frauds—Contracts—Consideration.

A parol promise to pay the debt of another, not reduced to writing, is not enforcible because of the statute of frauds, but a contract with a debtor founded upon a valuable consideration to pay the debt which he, the debtor, owes to the creditor is binding.

Consideration.

Where one person in consideration of the sale of another's interest in a certain business, promises to pay off a debt of such other person and fails to do so and hence the vendor of such business interest is forced to pay the same, he may recover the amount from his vendee, who agreed to pay such debt.

APPEAL FROM GRAVES CIRCUIT COURT.

November 3, 1876.

OPINION BY JUDGE ELLIOTT:

It appears from the record that the sheriff of Graves county had rented what was known as the Waller and Pryor house in Mayfield, Graves county, Ky., to another, Gardner, and that afterwards Gardner rented the lower east room to the appellee and J. N. Colley, to be kept and used as a barroom, at the price of one hundred thirty-five dollars, due the first day of January, 1865.

The evidence conduces to show that some time after this contract was made appellee sold his interest in said barroom to the appellant and B. F. Colley, and his former partner, J. N. Colley, and that by the terms of said sale the said appellant and B. F. Colley were to pay off and discharge the $135 note executed by appellee to Gardner, which they failed to do. Judgment having been obtained against said appellee by Gardner, and he having paid the same, he instituted this action to recover the amount so paid. The important question involved is as to whether the promise by appellant, if made, to pay said note to Gardner, is binding although not made in writing. A parol promise to pay the debt of another is not enforcible by reason of the statute of frauds, but a contract with a debtor founded upon a valuable consideration to pay the debt which he, the debtor, owes to the creditor, is binding, and a recovery can be had for its violation. *North v. Robinson,* 1 Duv. 73.

If, therefore, appellant promised the appellee, in consideration of the sale of the said appellee's interest in the said barroom and grocery, to pay off and discharge the said note executed by said appellee to Gardner, for the rent of said house, and failed to do so, and afterwards said appellee was by legal coercion forced to pay the same, there can be no doubt but that he could recover the amount so paid against said appellant.

The evidence is conflicting as to the agreement by appellant to pay the Gardner note; but the cause was submitted to a jury, and as the evidence was conflicting, their verdict must be considered conclusive on the facts of said case; and in our opinion the law was correctly ruled by the instructions of the court.

The judgment must be *affirmed.*

Stubblefield & Smith, for appellant.
J. C. Gilbert, W. W. Tice, for appellee.

P. C. Ross *v.* John Cunningham, et al.

Slander—Instructions.

When in defense of a slander suit the defense of justification is pleaded and relied upon, it is error for the court to charge the jury that if they believe the slanderous words were spoken they must find for the plaintiff unless they believe from the evidence beyond a reasonable doubt that the words spoken were true.

Reasonable Doubt.

It is not incumbent on a defendant in a slander suit to prove the truthfulness of the words spoken beyond a reasonable doubt.

APPEAL FROM MARSHALL CIRCUIT COURT.

November 15, 1876.

Opinion by Judge Elliott:

In this action of slander the appellees charged that the appellant said in the hearing of witnesses that John Cunningham (the male appellee) found his wife (a female appellee) in a whorehouse in Louisville, Ky.

The appellant at first filed his answer of not guilty, which he afterwards withdrew, and filed an answer in which he admitted that he spoke the words in a private conversation to his wife and without any intention that said words should be published. He, however, stated that the words so uttered by him were true, which in effect made his answer amount to a plea of justification.

On this issue the parties went to trial; and after hearing the evidence of many witnesses for each party to this litigation, and after hearing the instructions of the court and arguments of counsel, the jury rendered a verdict for the appellees for the sum of three thousand dollars. Appellant's motion for a new trial having been overruled he has brought the case to this court, and insists that said judgment should be reversed for many reasons.

We are of opinion that the evidence conduced to prove the utterance of the words as charged by appellees to have been uttered by appellant, and as the jury had a right to decide from the evidence whether the plea of justification had been sustained, and also the amount the female appellee had been damaged, and as they did decide that the appellant spoke the words, and that they were slanderous, and as they fixed, as they had the right to do, the damage done to the female appellee, said verdict must stand unless the court erred in its instructions to the jury.

By instruction No. 2, asked by the appellees, the jury are in substance told that if they believe from the evidence that the appellant uttered the slanderous words as charged against him, then they must find for the appellees, unless they believe from the evidence beyond a reasonable doubt that at the time of the marriage of the male and female appellees the said female was a prostitute. This instruction was clearly erroneous, and the error was not cured by a subsequent instruction in which the jury were told that the plea of justification could be sustained by a preponderance of the evidence adduced on the trial.

We know of no rule of law that requires that the evidence shall be so conclusive as to shut out all reasonable doubt of the facts charged in any civil action in this country. It is only where the life or liberty of the citizen is involved that a rational doubt of guilt in the juror's mind amounts to an acquittal.

It has been said by some jurists, eminent in their profession, that where a party is accused of a crime which, if true, would deprive him of his liberty, his accuser, if he justifies, ought to satisfy the minds of the jury in an action of slander even beyond a reasonable doubt of the truth of the offense charged; but the contrary doctrine has been held by this court.

But the words charged to have been spoken in this case do not amount to a criminal charge. If all that appellant said of the female appellee were true, then she would only be guilty of a misdemeanor, and not a crime, and the appellant's plea of justification required no more evidence to sustain it than a plea in bar of any other civil action does.

It was also erroneous to instruct the jury that both of the appellees could not be witnesses in this suit. It was the duty of the court, if more than one of the appellees had been offered as a witness, to have rejected the witness improperly offered; but as such a ruling was a question of law the jury had nothing to do with it.

There appears to have been some irrelevant evidence given to the jury, but as the case has to be reversed for the errors indicated they will not be stated in detail.

For the errors indicated the judgment is *reversed* and cause remanded for further proceedings consistent with this opinion.

Charles S. Marshall, R. K. Williams, for appellant.
J. C. Gilbert, J. B. Husbands, for appellees.

ANDREW J. SMITH *v.* SAMUEL BERRY.

Practice—Instructions.

One failing to except to an order requiring him to elect which of the causes of action he will prosecute waives his right to have this court pass upon the question.

Duty of Counsel.

Counsel should ask instructions upon such points as they desire, and when none are especially asked the court trying the cause has a right to assume that such as are given meets the views of counsel and upon an appeal this court will assume that the omission to give further instructions was assented to.

APPEAL FROM NICHOLAS CIRCUIT COURT.

November 16, 1876.

OPINION BY JUDGE COFER:

The appellant did not except to the order requiring him to elect which of the causes of action he would prosecute, and by failing to do so waived any right he might otherwise have had to insist in this court that said order was erroneous. Nor did he except to the single instruction given by the court or ask any instruction in respect to limitation, or anything else.

The bill of exceptions shows that "the parties asked the court to instruct the jury in the law of the case," but no instructions were offered; nor does it appear that the appellant even suggested to the court the points upon which he desired to have the jury instructed. A party has no right thus to abandon his case to the court without suggesting what instructions he desires to have given, and then to ask this court to reverse the judgment because instructions which might have been proper were not given. It is the duty of counsel to ask instructions upon such points as they desire, and of the court to give or refuse them; and when none are specially asked for, the court trying the cause has a right to assume that such as are given meet the views of counsel, and that no others are desired; and upon an appeal this court will assume that the omission to give further instructions was assented to.

Judgment *affirmed.*

Hargis & Norvell, for appellant. W. P. Ross, for appellee.

SQUIRE HAMMONDS *v.* COMMONWEALTH.

Criminal Law—Malicious Stabbing.

The offense of malicious stabbing with intent to kill is not a degree of homicide. All kind of offenses where the death of a human being results are degrees of homicide.

Homicide.

Where a person with malice aforethought and with purpose to kill deceased, aided and abetted, then such person is guilty of murder as principal whether his conduct resulted in the death of the deceased or merely aided in such result.

Homicide.

When two principals in the murder of a person, both wounded the deceased with their knives by cutting him in sudden heat and passion both are guilty of manslaughter, and the offense of malicious stabbing with intent to kill was merged in the higher offense of murder or manslaughter.

APPEAL FROM OWEN CIRCUIT COURT.

November 16, 1876.

OPINION BY JUDGE ELLIOTT:

Upon an indictment by which the appellant was charged with the murder of one Robert Martin, he was tried and sentenced to the penitentiary for five years by the judgment of the Owen criminal court; and having filed grounds and moved for a new trial of said cause, and the same being overruled, he appeals to this court and asks a reversal of said judgment of conviction.

The evidence conduces to prove that in an encounter between one Smith and Robert Martin, the said Smith took his life by stabbing him with a knife in the back and breast, and other places on the body; and it is charged that appellant was present and also stabbed the deceased, and therefore is guilty as one of the principal offenders in his murder.

After defining the offense of murder, and voluntary and involuntary manslaughter, the court instructed the jury by instruction No. 4, in substance, that if they believed from the evidence beyond a reasonable doubt that appellant, with malice aforethought and not in his necessary self-defense, stabbed and wounded Robert Martin with the intention to kill him, the said Martin, of which wounds he did not die, then his punishment shall be confinement in the penitentiary not less than one nor over five years.

By Sec. 258, Criminal Code, it is provided that upon an indictment for an offense consisting of different degrees the defendant may be found guilty of any degree not higher than that charged in the indictment, and may be found guilty of any offense included in that charged in the indictment. By Sec. 259, Criminal Code the degrees of offenses are defined, and it will be seen that the offense of malicious stabbing with intent to kill is not a degree of the offense of homicide, but that all kinds of offenses, where the death of a human being results, are degrees of the said homicide. The section referred to makes malicious stabbing a degree of the offense of injury to the person, and not a degree of the offense of homicide.

If Smith was guilty of murder in the killing of the deceased, and the appellant, with malice aforethought and with purpose to kill deceased, aided and abetted, then he and Smith are both principals in the murder of deceased, and if they both wounded deceased with their knives by cutting him in sudden heat and passion, then they were both guilty of manslaughter; and the offense of malicious stabbing with intent to kill or the offense of stabbing in sudden heat and passion was merged in the higher offense of murder or manslaughter, for we take it that he who wrongfully aids in the killing of his fellow, whether the wounds inflicted by him produce his death or not, cannot be convicted of the offense of assaulting or wounding him, because said minor offenses are merged in the offense of killing or aiding and abetting the same.

The second instruction is erroneous, as it fails to define voluntary manslaughter, because it requires that a man shall feloniously and maliciously kill another in order to be guilty of manslaughter. The court erred in passing sentence on the appellant less than six hours after the verdict of the jury was received in the court, but this is not a reversible error. Sec. 278, Criminal Code.

Wherefore the judgment of conviction is *reversed* and cause remanded for further proceedings consistent herewith.

A. Duvall, Strother & Orr, Montgomery & Page, for appellant.

Moss, for appellee.

J. G. CAMPBELL *v.* WILLIAM IRVINE.

Release of Surety—Notice to Holder to Prosecute and Collect.

When a surety has given notice to the holder of a note to sue and prosecute his suit to collect, on the failure of the holder to do so with reasonable diligence and in good faith such surety will be released.

APPEAL FROM MARION CIRCUIT COURT.

November 18, 1876.

OPINION BY JUDGE COFER:

The appellee held the joint note of J. G. Campbell, E. G. Mayes, and Thomas Irvine, upon which he brought suit against Campbell and Mayes. They answered at the ensuing August term, and the cause was continued. At the January term, 1875, Campbell filed an amended answer in which he averred that on the 2d day of January he gave notice to the plaintiff, now appellee, to sue out process against Thomas Irvine and prosecute the suit against him; and in a second amended answer he averred that suit had been commenced against Thomas and process served in time for judgment at the January term, that no answer was filed or defense made, but that the plaintiffs had failed to take judgment, and that Thomas had in the meantime become insolvent. Notwithstnding the notice and failure of the appellee to prosecute the suit against Thomas, the court rendered judgment against the appellant, J. G. Campbell, for the full amount of the note.

Section 11, Chap. 104, Gen. Stat., provides: "A surety, co-obligor or co-contractor, or one of several defendants to a judgment, may, by notice in writing served * * * on the creditor or plaintiff, * * * require him to sue or issue execution; and if the creditor shall not sue to the next term thereafter at which he can obtain judgment and in good faith prosecute the suit with reasonable diligence, or if the plaintiff shall not, within ten days thereafter, sue out execution, and in good faith prosecute the collection thereof, such co-surety, co-obligor or co-contractor shall be discharged from all liability as such, except for the proper share of such co-surety, co-obligor, co-contractor or defendant, according to the then existing condition of the several obligors, contractors, or defendants; and in any joint suit against the whole, or separate suit against him, judgment shall only be rendered against him separately, and only for such proper share."

It is manifest that the suit against Thomas Irvine was not prosecuted in good faith and with reasonable diligence, and judgment should only have been rendered against the appellant for his proper share of the debt according to the then condition of the several obligors. If all the obligors were then solvent, appellant's share of the debt was one-third; but the appellee was then prosecuting his suit

against the appellant and Mayes, and the appellee cannot be discharged from any besides the share of Thomas Irvine.

The evident purpose of the statute was to protect the party giving the notice against loss resulting from failure to sue, and he should not be released beyond the loss he may have sustained by that failure; but when he has given the notice and the obligee has failed to sue and prosecute his suit in good faith with reasonable diligence, the law assumes that he has sustained loss to the amount to which he could have looked for indemnity to the co-obligor not sued. It does not appear that Mayes is insolvent, so that had the appellant paid the whole debt he could only have recovered from Thomas one-third, and to that extent, and that only, he is released by the notice and failure of the appellee to comply with the statute.

The judgment against the appellant is *reversed,* and cause remanded with directions to render judgment against him for two-thirds of the note and interest.

Russell & Averitt, for appellant.

N. HARRIS, ET AL., *v.* THOMAS H. PRATHER, ET AL.

Mortgage or Sale of Personal Property.

The owner of personal property exempt from coercive seizure for debt may nevertheless sell it or mortgage it and such sale or mortgage may be enforced.

APPEAL FROM MERCER CIRCUIT COURT.

November 21, 1876.

OPINION BY JUDGE LINDSAY:

The owner of personal property exempt from coercive seizure and sale for debt, may nevertheless sell it, or pledge it by express contract. When the pledge is evidenced by a mortgage regularly executed and delivered, the chancellor must at the suit of the mortgagees enforce the contract.

The statute does not, as in the case of the homestead exemption, make the right of the mortgagee depend upon the assent of the mortgagor's wife to be expressed by the fact that she joins in the mortgage. This question was incidentally settled in the case of *Moxley v. Ragan,* 10 Bush 156, when it was said, "It is well settled that a debtor may sell his personal property, exempt from execution either

in payment of debt, or for any other valuable consideration, so as to vest in the purchaser the absolute title, or even mortgage it, which is in effect a sale, to secure the payment of a debt."

Judgment *reversed* and the cause remanded with instructions to enforce the mortgage by subjecting the mortgaged property to the satisfaction of appellant's claim.

P. B. Thompson, for appellants. Kyle & Poston, for appellees.

DANIEL STEVENS *v.* COMMONWEALTH.

Criminal Law—Larceny—Felonious Intent.

Felonious intent is required to render one guilty of larceny and one who without felonious intent to deprive the owner of his property takes possession of it and after taking possession forms the design to deprive the owner of the property, is not guilty of larceny, because the intent to steal must exist at the time of taking possession.

APPEAL FROM OHIO CRIMINAL COURT.

November 21, 1876.

OPINION BY JUDGE ELLIOTT:

If this case should be reversed it is because of erroneous instructions of the court. In its first instruction the court told the jury that if they believed from the evidence beyond a reasonable doubt that the defendant, Daniel S. Stevens, in the county of Ohio, previous to the finding of the indictment, took and carried away with a felonious intent one keg of apple brandy of the value of over ten dollars, and that said keg of brandy was the property of James F. Collins, they ought to find him guilty.

Larceny is defined to be the wrongful and fraudulent taking and carrying away by one person of the mere personal goods of another from any place with a felonious intent to convert them to the taker's use and make them his property without the consent of the owner. Mr. Baron Parker said that this definition of larceny is complete, without explaining the meaning of the word felonious. This, however, may be technical, but the instruction in this case is too general. It fails to define what taking and carrying away the goods of another with a felonious intent means. It is the wrongful and fraudulent taking of the goods of another with the fraudulent intent to convert the goods to the use of him who takes them, that makes him guilty of felony and liable to punishment as such.

By the second instruction the jury are told that no difference how the appellant got possession of the goods if at the time he took them and carried them away his intent was felonious, he was guilty, leaving the jury to decide what was a taking and carrying away with a felonious intent, unexplained by the court; and therefore said instruction was misleading.

By the third instruction the court does not require the jury to find that the property taken belonged to James F. Collins as charged in the indictment, or to any one else, but makes the defendant's guilt depend upon the felonious intent of taking the property and carrying it away, and therefore said instruction is clearly erroneous.

The rulings of the court in refusing instructions offered by the counsel for defendant were correct, for the reason that by those instructions the court was asked to tell the jury that unless they believed from the evidence that at the very instant the defendant found the brandy he intended to convert it to his own use they should find him not guilty.

There can be no doubt upon principle and authority that if the defendant, at the time he took possession of the keg of brandy, did so without any fraudulent intent to deprive the owner of it or convert it to his own use, but that after he took possession of it he changed his mind and formed the design of so converting it and depriving the owner of it, he is not guilty of larceny, because the intent to steal the article must exist in the mind of the accused at the time of the taking possession thereof; but the instructions refused required that unless the guilty intent to convert the goods existed in the appellant's mind when he first saw the keg of brandy, and not when he first took possession of it, he was entitled to an acquittal, and were properly refused. The judgment is *reversed* and cause remanded for further proceedings consistent herewith.

E. D. Walker, for appellant. Moss, for appellee.

H. B. PHILLIPS, ET AL., *v.* J. D. CLAYBROOK, ET AL.

Judicial Sale—Measure of Damages Where Wrong Property Is Sold.

Where the sheriff by mistake levies upon and sells property which does not belong to the defendant, the measure of damages that the owner is entitled to recover is the value of the property with interest on said value from the time he was deprived of the possession. The owner in such a case is not entitled to vindictive damages.

APPEAL FROM WASHINGTON CIRCUIT COURT.

November 23, 1876.

OPINION BY JUDGE ELLIOTT:

The lower court did not err in refusing to permit appellants to read the evidence of Piper contained in a bill of exceptions in another cause, and question him as to whether he swore in said cause what by said bill he is said to have sworn. The court permitted appellants to ask appellee, Piper, what he did swear in said other case about his purchase of the saw mill, and that said statement was inconsistent with his evidence on the trial of this cause. They were permitted to fully prove by Piper, which was all they were entitled to. But we are of opinion that the instructions of the court were erroneous to appellants' prejudice.

By instruction C the jury are told that Bosley, the sheriff, had no right to bid for appellant, Phillips, or any one else at a sale made by himself as sheriff, and that if he did so bid for Phillips, and that said Phillips claimed the property by virtue of said bid, then the law was for the appellees, and the jury should so find. It will be seen that this instruction makes the right of appellees to recover depend not upon the fact that they were the owners of the property when they brought their suit, but upon the fact that the sheriff had bid for appellant, Phillips, at the execution sale of the property, and that Phillips derived his title through said bid.

If said bid so made by the sheriff was illegal, the only effect was that no sale was made, and it would have been his duty to readvertise the property for sale in satisfaction of Phillips's execution. The failure of Phillips to acquire title by his bid certainly did not vest any title in the appellees, and yet by instruction C their right to recover is made to depend upon the validity of Phillips's bid.

Instruction D is also erroneous. By it the jury are told that they should, if their verdict is for the appellees, find such damages, in addition to the value of the property in dispute, as they believe from all the facts and circumstances proven they are entitled to. This instruction was misleading, as under it the jury may have found even what profits they imagined appellees could have made by running said saw mill if they had not been dispossessed by said sheriff's levy.

The true criterion of damages in a case where by mistake the sheriff levies on property which does not belong to the defendant in the execution, is the actual value of the property, with the right to find the interest on said actual value from the time said owner was de-

prived of the possession thereof, by way of damages. In such a case the owner is not entitled to smart money or vindictive damages.

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

Lindsey, for appellants. Hays, Brown & Lewis, for appellees.

LLOYD CLEMMENTS *v.* JAMES GREEN, ET AL.

Real Estate Title—Failure of Title—Recovery of Purchase Money.

When a plaintiff has been instrumental in causing the property of a stranger to be sold, the property not belonging to the defendant, the purchaser at such sale may recover back the price paid from such plaintiff.

APPEAL FROM WASHINGTON CIRCUIT COURT.

November 25, 1876.

OPINION BY JUDGE ELLIOTT:

Prudence Brothers, after the death of her husband, had set apart to her a dower interest in his real estate, and said dower interest contained about twenty-five acres located in Washington county.

A man by the name of Rhinehart, having obtained a judgment against said Prudence Brothers, caused execution to be issued thereon and had the same levied on said dower tract of land, and the same was sold and bid off by Rhinehart. Afterwards J. R. Whorton, a judgment creditor of said Prudence Brothers, caused an execution to be levied on the equity of redemption of the said Prudence in and to said tract of land, and purchased the same at a sale thereof on the 20th day of April, 1868, at the sum of $80.82.

On April 2, a Mr. Selecman, an attorney-at-law, as he proves, drew up a deed in Whorton's name for said land, which was executed by the sheriff who sold the land on said Whorton's execution, and said deed was duly recorded, and shortly thereafter said Selecman, as attorney for appellees, caused an execution to issue on a judgment in their favor; and Whorton having delivered him a writing surrendering his title in said tract of land for sale, said Selecman delivered said writing to the sheriff, and directed him to levy on said land, which he did, and the same was sold at the court house door at Springfield, Washington county, on the 26th of May, 1876, and the appellant became the purchaser.

It appears from the evidence of the sheriff that all the information received about the title to said land he received from Mr. Selecman, appellees' attorney. Mr. Selecman knew at the time he wrote the deed to Whorton that the equity of redemption sold by the sheriff on Whorton's execution was of Prudence Brothers's dower or life estate in the land afterwards sold on the execution of appellees; and he could, if he had asked him, have learned from Whorton that he had never paid Rhinehart the sum bid by him for said land when sold under his execution, and that consequently Whorton had no right to a deed to said tract of land; but notwithstanding Selecman either did know or could have known by the least inquiry that Whorton had no title, he wrote a deed to Whorton, which the sheriff executed, and then he procured from Whorton the written surrender of the said land to the sheriff, to be levied on and sold in satisfaction of his client's execution debts.

At the sale the sheriff proclaimed to the bidders that the title was good; and he swears that all the proclamations as to title were althorized by Selecman, and all his knowledge of the title he got from Selecman. At the sale thus made the appellant bought the land at the price of $124.44; and shortly after his purchase and before he gave the sale bond he consulted Selecman, who told him he had a good bargain, and he then executed said bond. On the 26th of June, 1873, he paid off said bond, not having yet learned that he had acquired no title by his purchase.

As a general principle, the plaintiff in an execution is not responsible when the title fails to property sold under his execution, but to this there are exceptions. In *Sanders v. Hamilton,* 3 Dana 550, it was held that "If a plaintiff in an execution has been instrumental in causing the property of a stranger to be sold, we can see no principle of reason or of law that would exonerate him from responsibility to the purchaser." The exhibition and sale of property by an individual is regarded by law sufficient to make him a warrantor of the title, and we see no principle which would exempt him from liability when he has been instrumental in effecting the same object by color of execution. His execution affords him no warrant to levy upon the property of a stranger, and if he does it or procures it to be done he is guilty of an abuse of the process of the court which cannot sanctify the deed or place him on better ground than if he sold or procured the sale to be made without such authority. Now, if either of the appellees had directed the officer to make the levy or induced a bidder to buy by representing that Whorton's title was

good, there can be no doubt but that he would be responsible to appellant to the extent he has been damaged, and the fact that the levy was directed by appellee's attorney, and that he represented the title of Whorton to be good, was as binding on appellees as if made by them. The attorney, Mr. Selecman, was the agent of the appellees for the collection of their debt, and he swears himself that his agency continued till the debt of his principals was paid by the appellant.

In the case heretofore referred to of *Sanders v. Hamilton,* the court rested its judgment, against the principal, mainly on the ground that his attorney had been guilty of an abuse of the process of the court by directing the levy and sale of property that did not belong to the defendant in the execution. As Selecman was appellee's attorney and directed the levy and sale of the land of Whorton, and represented Whorton's title to be good, when the deed to Whorton for the land which he wrote himself only pretended to vest in him a life estate, and as appellant by reason of the levy and sale became purchaser, and as Whorton had no title to the land, we are of opinion that the said appellant is entitled to a judgment against the appellees for the amount he held and afterwards paid for the land, with interest from the time it was so paid. The judgment is *reversed* and cause remanded for judgment in conformity to this opinion.

Brown & Lewis, for appellant. L. R. Thurman, for appellees.

W. B. HOSICK *v.* ELIZABETH TRABUE.

Limitations—Statute of Limitations a Defense—Pleading.

The statute of limitations is a matter of defense and if relied upon must be pleaded by the defendant, and unless the petition shows on its face not only that the action is barred by him but that the defendant is not within any of the exceptions mentioned in the statute, a demurrer will not be sustained to it.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

November 28, 1876.

OPINION BY JUDGE ELLIOTT:

The deed, the execution of which it is alleged was procured by the fraud of appellee, was executed and delivered in 1864, and this suit was not brought till 1875; and as more than ten years have elapsed since the deed was executed, and as this appears on the face of ap-

pellant's petition, it is contended that the petition did not show a subsisting cause of action; and it was the duty of the court to sustain a demurrer thereto, which was done and the action dismissed. In the case of *Board v. Jolly,* 5 Bush 86, this court held that the statute of limitations is a matter of strict defense, and must, if relied on, be pleaded by the defendant in all actions, unless the petition shows that the action is not only barred by time, but that the defendant is not within any of the exceptions mentioned in the statute, when any exceptions are contained in the statute which prescribes the limitation. See also, *Chiles v. Drake,* 2 Met. 146; *Rankin v. Turney,* 2 Bush 555.

It is true, as appellee contends, that the chancellors of England sustained demurrers when the complainant by his own bill shows that he had been guilty of great laches in bringing his suit, or when it was an old stale claim that a court of equity, on complainant's own showing, would not enforce; but this was not enforcing any statute of limitations; it was a refusal to investigate the merits of an old stale demand.

The defense in this suit as indicated by appellee is that no suit was brought to set aside the deed for fraud within ten years of its execution and delivery to appellee, H. A. Trabue, which is purely a statute of limitations of the legislature of our own state. Mr. Chitty in his work on pleadings says that the statute of limitations is a matter of defense, which must always be pleaded; and when the party sued does not rely on it, it is the duty of the court to render judgment against him.

But so far as this state is concerned, the law has long since been settled by adjudications that the defense of the statute of limitations must be made by plea or answer, and not by demurrer. Wherefore the judgment is *reversed* and cause remanded with directions to overrule the appellee's demurrer, and for further proceedings consistent herewith.

Bush & Hendrick, for appellant.
I. H. Trabue, Hord & Trabue, for appellee.

JAMES T. TATE *v.* J. A. ELLIOTT.

Executions—Levy and Collection of Executions.

When an execution is issued and a levy made by the sheriff but no effort made to sell the property in a reasonable time, the execution plaintiff should proceed against the sheriff and where such plaintiff fails to pursue such a remedy within a reasonable time, other creditors may refuse to recognize the first execution.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 28, 1876.

OPINION BY JUDGE COFER:

The principles announced in the case of *Deposit Bank of Cynthiana v. Berry's Adm'r*, 2 Bush 236, seem to us to be decisive of this case. It is true there was no venditionis issued in that case between November 2, 1861, and February 8, 1865, a period of three years and three months; but in other respects that case is like this in every essential particular, and the venditionis issues cannot make the case any stronger for the appellant than it would have been if they had not been issued at all. It is not pretended that they were issued with any intention to make sale of the property, and it is virtually, if not expressly conceded that the sale was deferred to enable the debtor to discharge the debts without a sale of the property. During all the time from March, 1872, to February, 1874, a period of twenty-three months, the debtor retained possession of the property, and on the 21st of May, 1872, when there was no process in the officer's hands, a payment of $350 was made without a sale of any part of the property levied on.

These facts satisfy us that the process of the court was not used in good faith to coerce payment, but to place the property in a position where it could be resorted to as a last resort in case other creditors should seek to subject it, and in the meantime to allow its use to be enjoyed by the debtor. Such use of legal process ought not to be encouraged; to do so would be to open a wide door for collusion and fraud.

The safer and better rule is to require the execution plaintiff to cause a sale to be made in a reasonable time after the levy, and in case the sheriff fails to make a sale, to proceed against him to compel him to do so, and upon the failure of the plaintiff to pursue these remedies within a reasonable time, to refuse to recognize his levy as valid against other creditors who are pursuing legal remedies against the common debtor.

There can be no room to doubt that the delay in this case was unreasonable, and as before remarked that the process was used not in good faith to coerce payment, but as the means of giving indulgence to the debtor, while he enjoyed the use of the property which, if the levy be now held to be effectual, was shielded from other creditors. It is true the fi. fa.'s and venditionis were returned, and that although the property was situated in a distant county, all persons had con-

structive notice of the levy, but this only proves the necessity for requiring greater promptness than was used in this case in order to make the levy available against other creditors.

We do not regard the fact that the appellee's attachment was levied subject to the levy under the executions as fatal to his right. He could not control the form of the sheriff's return; nor could the sheriff by returning that he had made the levy subject to the former levy, renew that levy or give it any legal efficacy it did not have before, and would not otherwise have had.

The conduct of the appellant and his assignors was well calculated to conceal from the community the fact that there was a subsisting levy, and those who may have known it at the time, especially in view of the advertisements in April, May and July, 1872, the failure to sell, and the continued possession of the property by the debtor, were authorized to conclude that the debts had been paid. Wherefore the judgment is *affirmed.*

Muir, Bijou & Davie for appellant. A. C. Buckner, for appellee.

ELLA SMITH'S G'D'N, ET AL., *v.* ROBERT CALVIN, ET AL.

Suit to Quiet Title—Averment of Ownership.

A petition to quiet title is good which avers title in an ancestor and that it was vested in plaintiff by his will.

Statute of Limitations.

The statute of limitations must be set up if relied upon, by plea and cannot be taken advantage of by demurrer where the only defect in plaintiff's petition is that his cause is barred by time.

APPEAL FROM TAYLOR CIRCUIT COURT.

November 29, 1876.

OPINION BY JUDGE ELLIOTT:

The appellants claim lots Nos. 12 and 13, in Campbellsville, under the will of their grandfather, and the appellees claim it under a mortgage from the said ancestor and a continued adverse possession for over fifteen years. The appellants demurred to the answer of appellees, and the court sustained the demurrer, not to the answer, but to the appellants' petition, and whether the demurrer was properly sustained is the only question for our consideration.

As appellants aver title in their ancestor, and that it was vested in

them by his will, and as they do not even state that appellees had been in possession fifteen years, it seems to this court that the petition stated a good cause of action. The statute of limitations must be set up if relied on by plea, and cannot be taken advantage of by demurrer where the only defect in plaintiff's petition is that his cause of action is barred by time.

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

D. G. Mitchell, J. N. & D. W. Lindsey, for appellants.
William Howell, for appellees.

CITY OF PADUCAH *v.* A. S. JONES'S ADM'X.

City Improvements—Contract.

One who contracts with the city has a right to do so upon the faith of the fact that its council had not disobeyed the law, and where the costs of public improvements made by him thereunder cannot be collected from property owners because of a faulty ordinance he can look to the city to pay him.

APPEAL FROM McCRACKEN CIRCUIT COURT.

December 1, 1876.

OPINION BY JUDGE LINDSAY:

When Jones contracted with the city to improve the street, he agreed to look to the property holders for compensation. He did not expect to look to the city, because he knew that the city had power to charge the costs of such work upon the property improved. The recitals in the ordinance and the contract that the city was to be liable for no part of the cost of the work, were but the recitals of that which both the city and the contractor knew to be the express provision of law, and Jones would have been bound to look to the property owners, in the same way, had these recitals been omitted. But neither the ordinance nor the contract bound Jones to do the work for nothing, in case it should turn out that the city council had failed to keep its journal in the manner the law directs, and by such failure had made it impossible for him to enforce the contract against the property owners. If a provision to this effect had been incorporated either in the ordinance or contract, then Jones would have had notice of the city's intention, and would doubtless have gone behind the

municipal law, which was valid on its face, and made examination as to whether the city council had followed the law, in passing it, and in keeping a record of its proceedings.

Jones had the right to contract with the city upon the faith of the fact that its council had not disobeyed the law, and he cannot be held to have had notice of the council's defeat, nor to have agreed to release the city from the legal consequences of its neglect, merely because the effect of its organic law when obeyed, was recited in the ordinance and in the contract.

The judgment of the court below is *affirmed.*

L. D. Husbands, for appellant. P. D. Yeiser, for appellee.

MARY C. PAUL, ET AL., *v.* HUGH W. PAUL.

Mental Capacity of Defendant—Service of Process.

Where a defendant before a suit was brought against him had been found to be of unsound mind and sent to the lunatic asylum and there is no evidence that he was served with process or that a committee or guardian was appointed, it was error to render judgment against him.

APPEAL FROM WOODFORD COURT OF COMMON PLEAS.

December 1, 1876.

OPINION BY JUDGE ELLIOTT:

From the pleadings and proof in this cause it appears that at the bringing of this suit and at this time Thomas W. Paul, one of the appellants, was and is a lunatic, and that before this suit was brought he had been found to be of unsound mind and sent to the lunatic asylum at Lexington, Ky., where he has been confined ever since, and there is no evidence in this record either that he has been served with process or that a committee or guardian was appointed in the court below to defend for him, and consequently it was error to render judgment against him.

Sec. 60, Civil Code, declares that no judgment can be rendered against a person of unsound mind till after defense either by committee or guardian ad litem, appointed by the court, and that the appointment of his guardian to defend shall not be made till after the service of the summons in the action as required by the code. For this error alone the judgment is *reversed,* and cause remanded with

instructions to bring Thomas W. Paul before the court, and for further proceedings consistent herewith.

Porter & Wallace, for appellants.
Marshall & McLeod, for appellee.

ELIZABETH HEINRICH, ET AL., *v.* NICHOLAS BOOKER, ET AL.

Continuance of Action.

The action of the trial court in refusing a continuance will not be disturbed except for an abuse of discretion.

Notes and Interest.

Where the makers of a note agree to pay ten per cent. interest from date until the note is due there is no promise to pay such rate after due and the holder can only recover six per cent. interest after maturity.

APPEAL FROM GRANT CIRCUIT COURT.

December 2, 1876.

OPINION BY JUDGE ELLIOTT:

The first question that arises upon this record is whether the circuit court abused a sound discretion in overruling appellants' motion for a continuance. It appears that the female appellant had made the same motion based on similar grounds, and had been successful at the term next preceding the trial of this suit, and we are of opinion that the lower court exercised a proper discretion in overruling the motion for a continuance.

The proof in this record is conclusive that female appellant acknowledged all the mortgages before the clerk, and that she did so without coercion by any one and in the absence of her husband. But it is insisted that her amended answer and cross-petition has not been replied to by any of the mortgagees except Booker and wife, and therefore should have been taken for confessed, and that its allegation makes out a good defense.

No reply was necessary to the amended answer of appellants. Said amendment only denied the right of appellees to recover because the mortgages had been obtained from her by duress, threats, etc. These allegations under the Code did not have to be replied to to put them in issue, and consequently judgment for the amount due the mortgagees would have been proper, but we are of opinion that

the court erred to appellants' prejudice in adjudging to Cunningham, Collins and Davidson interest at the rate of ten per cent. after their debts fell due.

The notes to Cunningham are due one and two years after date with ten per cent. interest from date. The note to Collins was made payable about a year after date with ten per cent. interest, and the note to Davidson was made payable about two years after date with ten per cent. interest. The appellants only promised to pay ten per cent. interest till the claims were due, and then he promised to pay the whole amount of them, and as he did not contract to pay ten per cent. interest after the claims were due the appellees can only recover six per cent. after that time. Booker and wife are entitled to ten per cent., as the appellants promised them ten per cent. till their debt was paid.

For these errors alone the judgment is *reversed* and cause remanded for judgment in conformity to this opinion.

J. J. Landrum, for appellants.
J. M. Collins, E. H. Smith, for appellees.

MORGAN, THOMAS & CO. *v.* BANK OF ROME.

Assignment of Personal Property.

Where a bona fide assignment of personal property is made to a bank to secure a debt owing to the bank from the assignor, the bank has the right to the proceeds of a sale of the property sold by a commission merchant as against the assignor or his creditors.

Attachment by Creditors.

Creditors who attach personal property in the hands of a commission man for sale that has been assigned to a bank as security for a debt, acquire but an equity by the seizure of the property, and the bank having an older equity under the assignment has a better right.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 2, 1876.

OPINION BY JUDGE COFER:

We incline to the opinion that the assignment to the Bank of Rome gave to it an equitable lien on the iron in the possession of Hull, subject, of course, to his prior right to be reimbursed for advances, charges, etc. This case is not analogous to the case of *Phil-*

lips, Reynolds & Co. v. Barbaroux, 2 B. Mon. 89; or *Tiernan v. Jackson,* 5 Pet. 580.

In the former case the assignment was of only a part of the proceeds of the bagging and rope, "the consignor, Bakewell, retaining the principal interest in the consignment." But even if that had not been the case, and it be conceded that that case is an authority for holding that the assignee had no right to control the consignee in making sale of the consignment, it would not follow that the assignee had not such an interest in the property as would have enabled him to prevent the consignor or his creditors from seizing the goods and selling or disposing of them so as to defeat his right to the proceeds. The question there was not whether the assignee took any interest at all in the goods, but whether he took such interest as not only gave him a right, but made it his duty, as between himself and his assignor, to interfere and control the action of the consignee in making sales. There is certainly an appreciable distinction between the absolute right and duty to take control of a consignment, a part of the proceeds of which is placed as collateral security, and a right to interpose to prevent the assignor, or what is the same thing, to prevent his attaching creditors from defeating the security by putting it out of the power of the consignee to make sales so as to realize proceeds to which the assignee is entitled by the letter of the assignment.

It seems to us that it would be going quite too far to say that although the bank had an unquestioned right to the balance of the proceeds of the sales of the iron, that the assignor might have defeated its right by instructing the consignee to sell only so much as would reimburse him and to hold the residue subject to the orders of the consignor. We cannot doubt but that if such an order had been given the bank might have obtained relief by a proceeding to subject the iron to sale. If we are right in that conclusion, then it follows that the appellants, who have no other or greater right than the assignor had, cannot defeat the claim of the bank by attaching the iron.

Tiernan v. Jackson, was based upon facts very similar to the facts of this case, but that was an action of assumpsit for money had and received, to recover from Tiernan the money received for the sale of the tobacco under attachment. Jackson did not have the legal title to the tobacco and consequently could not maintain the action. There was nothing in that case requiring, or even rendering it proper, that the court should express an opinion on the question whether or

not he had an equitable lien on the tobacco, for conceding that he had, the result, in an action at law, must have been the same.

The assignment to the bank of the balance of the proceeds of the iron, after satisfying the claim of Hull, was intended to secure the debt due to the bank from the assignor, and gave the bank a right to such proceeds, and the right to the proceeds carried with it the right to have the iron protected from any act on the part of the assignor, the effect of which would be to defeat the right to the proceeds. The iron was, therefore, beyond the control of the assignor, and after notice of the assignment, Hull held it subject to the terms of the writing, and if he had disposed of it so as to defeat the claim of the bank he would have been liable to it for the loss. Having a right to the proceeds, and consequently a right, enforcible against both the assignor and Hull, to demand that the iron should not be so disposed of as to put the proceeds beyond its reach, the bank had an equitable interest in the iron. The appellants acquired but an equity by the seizure of the iron under the attachments. *Newby & Taylor v. Hill & Million*, 2 Met. 530. The bank having an older equity under the assignment had the better right.

We entirely agree with the cases cited by counsel that in order to make a valid assignment the assignor must not retain control over the thing or fund assigned; but we do not concur in the conclusion that the assignor in this case retained control of the iron. The whole balance of the proceeds, after satisfying Hull, was assigned to the bank, and the assignor could not thereafter dispose of the iron so as to put its proceeds beyond the reach of the bank, unless the rights of innocent purchasers had intervened.

As respects the charge of fraud in the assignment, we need only remark that the debt to the bank is clearly proved, and that the fact that the assignment may have been made with the design to prefer the bank over other creditors does not render it fraudulent. Nor does the fact that a greater sum was assigned than was actually due prove fraud in fact. It may be a circumstance tending to establish the charge of fraud, but is not alone sufficient for that purpose. That Cathran who made the assignment was president of the bank furnishes strong reason for supposing that his object was to prefer the bank to the other creditors of H. D. Cathran & Co., but no reason whatever for concluding that the transaction was actually fraudulent.

It is not important to inquire whether the firm of H. D. Cathran & Co. was a bona fide partnership or not. No matter how much fraud there may have been in its composition, or in the conduct of its busi-

ness, the appellants can reap no advantage on that account, unless they can connect the bank with fraud in the transaction out of which this contest arose, of which there is no evidence in the record.

Upon a careful consideration of the whole case we are of the opinion that it was correctly decided, and the judgment is *affirmed.*

Armstrong & Young, for appellants.
William Reinecke, for appellee.

E. C. CURD *v.* COMMONWEALTH MUTUAL LIFE INS. CO.

Insurance Policy—Time of Payment of Premium—Construction.

The terms of a contract of insurance are to be determined by an examination of the application and the policy and the receipt delivered by the company to the assured.

Waiver by Company.

The insurance company may waive the payment of a premium when due or it may insist that the contract of insurance had terminated by the failure to pay premium when due. The company could not compel the insured to keep the policy alive by the payment of the premium and the insured could not compel the company to accept payments after the time it became due.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 2, 1876.

OPINION BY JUDGE LINDSAY:

In order to ascertain the exact terms of the contract of insurance, the application signed by the insured, the policy, and the receipt delivered by the company to him, must all be considered together. It is clearly and conclusively proved that a receipt for this first annual premium, was delivered to the insured at the same time with the policy. Appellee was not precluded from proving that both the receipt and policy were delivered on a day different from that averred in the petition. The averment of the particular day of the delivery was immaterial as to the substantial issues of the case, and the appellee was not bound to deny it. When these three papers are considered together, it is clear that the annual premium of $172.50 was to be paid in two semi-annual installments and that the increase of the premium for the beginning of the year was intended to compensate the company for allowing the insured six months time within which to pay the second semi-annual installment.

It was expressly agreed in the face of the policy that if any premium or installment of premium should not be paid when due, then the policy should cease and determine. The stipulation with regard to the payment of premiums during the lifetime of the insured applied only to the first premium, if to be paid in full, or to the first installment thereof, if to be paid in installments.

It is not pretended that the second installment of the first yearly premium was paid or tendered until long after it was due. The fact that the general agent of the company was willing to receive payment and insisted upon the insured paying said installment after it was part due, did not make it obligatory upon the insurance company to waive its right to insist that the contract had ceased and determined after the insured become fatally sick.

The company could not compel the appellant or her agent to keep the policy alive by the payment of the installment in question, and neither could they compel it to accept payments after the time at which it fell due. From that time forward it was a matter of election with the insurer, as well as with the insured. The instruction of the court below accords with this view of the law of the case, and those asked by appellant conflict with it.

The judgment appealed from is *affirmed*.

W. R. Abbott, for appellant. Bullock & Anderson, for appellee.

J. N. JONES *v.* PARMELIA ALEXANDER, ET AL.

Promissory Note—Alteration After Execution.

Where a memorandum is made at the bottom of a note by one of the makers, below the signatures that "interest on this note 10 per cent." it is not an alteration of the note and is no part of the note and the holder is entitled to recover the amount of said note according to the stipulations made in the body thereof, the added words being no part of said note.

APPEAL FROM WARREN CIRCUIT COURT.

December 5, 1876.

OPINION BY JUDGE ELLIOTT:

Henry S. Alexander was indebted to appellant for cattle, and having promised him to give him his note with ten per cent. interest from the date thereof, he, on the 28th of July, wrote a note to said appellant for two hundred fifty dollars, due four months after

date, and signed it himself and procured the signature of his mother, Parmelia Alexander, thereto. Afterwards, and before said Henry S. Alexander delivered the note to the appellant, he wrote below his own and his mother's signature to the note these words, "Interest on this note 10 per cent."

He then took the note to appellant, who looked at it and remarked that it failed to bear interest from date at ten per cent., and therefore did not comply with the contract, whereupon said appellee, H. S. Alexander, pointed out the memorandum on the note below his and sureties' signatures and said it was all right, and appellant took the note. Appellees having failed to discharge the note, appellant has brought this suit to coerce its payment. The appellant sets out the agreement of appellee, H. S. Alexander, to execute a note for the amount due him, worth ten per cent. interest from date, and charges that the interest was left out of said note. The proof is that appellee, Parmelia Alexander, signed her name to the note before the memorandum as to the interest was made, and that same was afterwards made by appellee, H. L. Alexander, without her knowledge or consent, and the court below held that it was a material alteration and avoided the entire note as to Mrs. Alexander.

The memorandum as to interest is below the signatures of the obligors to the note, and is without date, and according to the proof was made after the note was executed and was no part of the contract of appellee, Parmelia Alexander, when she executed the contract, and we are therefore of opinion that the same was no part of the written promise contained in the note which was signed by the appellees.

The obligors' names should be signed at the end or close of the written instrument, and if so done and a memorandum is afterwards made below said signatures by one of the obligors, it will not be treated as a part of the instrument. Such a memorandum cannot be considered an alteration of the written instrument because not inserted in the body thereof, and it cannot be considered as another contract qualifying the original one and executed simultaneously therewith because it does not show that it was executed by the same parties who executed the original.

We are, therefore, of the opinion that the memorandum made on the note after its execution by the appellee, H. S. Alexander, was no alteration of said note, and that the appellant is entitled to recover the amount of said note according to the stipulations made in the

body thereof, said memorandum as to interest being no part of the written instrument and a nullity in this proceeding.

Wherefore said judgment is *reversed* and cause remanded for furthere proceedings consistent herewith.

H. T. Clark, for appellant. W. E. Settle, for appellees.

ADOPLY ENDRICK *v.* PETER KARLIN.

Bill of Sale—Record.

A bill of sale is not required to be recorded and if it is recorded is not notice to the public.

Lien.

The lien retained in a bill of sale is good as between the vendor and vendee and the equity will be protected against the claim of any person not possessing a superior right.

Rights of Creditor.

The creditor of one who has executed a bill of sale to another, becoming such creditor after its execution, is of no greater dignity than that of the holder of the bill of sale and is inferior in point of time, and where such creditor has actual notice of the senior equity, his claim is postponed to that of the holder of the bill.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 5, 1876.

OPINION BY JUDGE LINDSAY:

Whilst there is no statute requiring or authorizing the recording of a bill of sale of personal property, and whilst the law will not imply notice upon the part of either a purchaser or creditor by reason of such recording of any lien that may be retained to secure the vendor in the payment of the purchase price, yet it seems that actual notice of appellee's lien had been brought to the appellant before the enforcement of his execution levy.

The lien retained in the bill of sale is good as between the appellee and his debtor. It is an equity that will be protected by the chancellor against the claim of any person who does not possess a superior right. Appellant's debt was not contracted on the faith of the personal property in contest. It was sold by appellee to the common debtor long after appellant's debt was created. The sleeping or secret equity cannot, therefore, operate as an actual fraud upon his

rights. His claim arises out of the levy of his execution. It is of no greater dignity than that of the appellee, and it is inferior in point of time. He had actual notice of the senior equity, and according to the doctrines of the cases of *Halley v. Oldham, et al.*, 5 B. Mon. 233; *Righter, et al., v. Forrester, et al.*, 1 Bush 278, and *Low & Whitney v. Blinco, et al.*, 10 Bush 335, he ought not to be allowed to proceed to sell the property under his execution levy.

This conclusion obviates the necessity of considering the proof touching the execution of the alleged mortgage.

Judgment *affirmed.*

James Harrison, for appellant.
P. A. Gaertner, L. M. Dembitz, for appellee.

HENRY FARRIS'S EX'R *v.* EMLY ROWLAND, ET AL.

Attachment.

After the discharge of the first attachment and no new cause of attachment being shown, the issuance of a second attachment by the clerk is unauthorized and void.

Dismissal of Attachment.

The clerk cannot revise the ruling of the court dismissing an attachment by issuing another attachment upon the same record which the court had decided did not authorize it.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 5, 1876.

OPINION BY JUDGE COFER:

The discharge of the first attachment was a decision by the court that grounds for an attachment had not been made out, and as no new pleading was filed, and no step was taken afterwards that could furnish any ground or authority for an attachment that did not exist when the first attachment was discharged, we are of the opinion that the second attachment was issued without authority, and that it should have been discharged and the petition dismissed on the final hearing. It will not do to say that after a decision by the court that no grounds exist for an attachment, the clerk may afterward issue another attachment upon the record which the court has decided did not authorize it. To so hold would be practically to allow an appeal to the clerk from the decision of the court.

Whether the first attachment was properly discharged is not a

question we are now called upon to decide. If it was erroneous the law pointed out the mode of correcting it, and that mode not having been pursued within the time prescribed by law the order became final, so far as the first attachment was concerned until reserved by this court. We do not mean to decide that the court might not have ordered another attachment to issue, or that the appellees might not, by filing an amended petition setting up the fact that Bullock held a fund belonging to the appellant, have obtained an attachment against that fund. All we mean to decide is that the clerk could not virtually revise the ruling of the court by issuing an attachment upon the same record which the court had decided did not authorize it.

This view of the case renders it unnecessary to decide whether the fund in Bullock's hands can be attached by the appellees. The judgment is *reversed,* and the cause is remanded with directions to dismiss the petition and discharge the attachment.

Breckenridge & Shelby, for appellant.
Morton & Parker, for appellees.

W. L. ENGLISH'S G'D'N *v.* JAMES B. ENGLISH.

Homestead—Right of Non-Resident to Claim Homestead as Exempt.

The right of a judgment debtor to a homestead only continues so long as he occupies or resides on the premises. When he has moved from the premises and to another state he cannot claim such exemption.

APPEAL FROM BULLITT CIRCUIT COURT.

December 14, 1876.

OPINION BY JUDGE PRYOR:

This is an appeal from a judgment of the Bullitt circuit court sustaining appellee's motion to quash the levy of appellant's execution on about forty-five acres of land in Bullitt county which appellee claims is exempt from levy and sale, because the same was set apart to him as his homestead in a suit brought by his creditors against his trustee to whom he had conveyed his estate for the benefit of his creditors, to which suit appellant was a party.

In his deed to the trustee for the benefit of his creditors the appellee reserved the homestead in the land levied on by appellant's execution, which levy has been quashed and held for naught by the court below in this case.

In 1873, according to the evidence, appellee left this state and emigrated with his family to Missouri, and has since on his visits to Kentucky avowed his intentions never to return and become a resident of Kentucky. His agent has rented this land out for him since 1873, and under these circumstances the only question is whether appellee can still hold the abandoned premises as a homestead and exempt from levy and sale by his execution creditors.

In *Gaines, et al., v. Casey, et al.,* 10 Bush 92, this court held that "this right to the exemption must terminate whenever the debtor ceases to be a housekeeper or removes from the premises;" and the same doctrine has since been held in *Phipps, Addington, et al., v. Acton, et al.,* Mss. Opionion.

There can be no doubt that the right of a judgment debtor to a homestead only continues so long as he occupies or resides on the premises, but when he ceases to occupy the premises and leaves the state and remains away over two years, and resides in another state, when a fi. fa. is levied upon his land he cannot insist on his right to a homestead as against his execution creditors.

Wherefore the judgment is *reversed* and cause remanded with directions to overrule appellee's motion.

R. J. Meyler, for appellant. R. H. Field, for appellee.

R. H. FIELD *v.* J. F. SMITH.

Judgment—Error in Judgment—How Corrected.

An error of the clerk in entering a judgment may be corrected by the court at a subsequent term when there is anything in the record to go by, but when there is nothing in the record to amend by such judgment cannot be corrected upon the mere recollection of witnesses as to what took place in the court.

APPEAL FROM BULLITT CIRCUIT COURT.

December 15, 1876.

OPINION BY JUDGE COFER:

An error of the clerk in entering a judgment or order may be corrected by the court at a subsequent term, when there is anything in the record to amend by. *Hopkins v. Alvis,* 2 A. K. Marsh 374.

But when, as in this case, there is nothing in the record to amend by, it would be extremely hazardous to allow a record to be amended

upon the mere recollection of witnesses as to what took place in court. Under such a practice the rights of parties would depend, not upon the records of the county, but upon the memory of men. There would be no security in relying upon the solemn judgments of courts, and the records of their proceedings, from being the highest grade of evidence known to the law, would be reduced to the lowest and most unreliable.

If the proposed amendment could be made, it would follow that after an adjudication by the circuit court, a reversal by this court, and a second adjudication by the circuit court, a change would be made which, if it is to have any effect whatever, reopens the entire subject of litigation, would authorize a new appeal to this court, the reversal of a judgment entered in pursuance to its mandate, and a direction to re-enter a judgment once reversed. We cannot approve a practice fraught with such consequences, and must *affirm* the order of the circuit court.

R. H. Field, for appellant. R. J. Meyler, for appellee.

ELIJAH C. HUNT, ET AL., *v.* C. H. BLAKEY, ET AL.

Conveyance of Real Estate—Notice by Possession—Lien of Purchaser in Possession—Improvements.

One who buys real estate in the possession of another must be held to be put upon inquiry as to the nature of that possession and the manner in which it was held.

Conveyance of Real Estate—Lien of Purchaser in Possession—Improvements.

Where a person owing a debt agrees to sell real estate in payment of it and puts such purchaser in possession, such purchaser has a lien for the amount of his claim and improvements made by him before notice from a purchaser that he has received conveyance of such real estate.

APPEAL FROM LOGAN CIRCUIT COURT.

December 16, 1876.

OPINION BY JUDGE COFER:

The loan of the money to Gordon by Mrs. Hunt seems to be well established; and we think it is also established that he verbally agreed to sell the property in contest in satisfaction of the debt, and in pursuance to that agreement placed her and her husband in possession.

They were in possession when the appellees purchased the property from Gordon, and their possession was sufficient to put them upon inquiry as to the nature of that possession, and the manner in which it was held; and if they had made inquiry they would have learned why they were claiming it as purchasers, or, failing in that, would have placed the appellants in the wrong and thus have disarmed them of the equity now being asserted. Having failed to make the inquiry which the possession of the appellants ought to have suggested, the appellees must be taken to have purchased with notice of the character of the possession, and thus stand in the shoes of their vendor, Gordon, and as the appellants had a lien on the property as against him they have it against the appellees also.

The testimony of Mrs. Hunt was not objected to in the court below, and that question cannot be made here for the first time, but if it had been made it would have been unavailing. The debt of Gordon to Mrs. Hunt was not discharged by the verbal contract for the sale of the property so as to divest her of all interest in it; it continued to be a debt due to her and in the event of the death of her husband would have belonged to her as survivor. She was therefore a proper, though not a necessary party to the suit, and was competent as a witness in her own behalf.

The failure to prove the debt against the estate of Gordon, so far from being a circumstance against the appellants, seems to us to be in their favor. If their claim to have purchased or agreed to purchase the property be correct, they had no debt that ought to have been proved, for it was already secured by a lien, which might have been defeated if they had proved the debt. The fact that they did not seek redress in some form when they learned that the appellees had purchased the property does not weaken their case. They were in possession, and so long as the appellees remained passive they could well afford to do so.

The only circumstance disclosed by the record which is calculated to create any doubt of the truth of appellants' claim is the testimony of the appellees. Blakey says that in the fall of 1872 the appellant, Elijah Hunt, came to him to rent the property and proposed to pay the rent in improvements, and that not having time to go and see what improvements were needed he referred him to his coappellee, Hall. Hall testified that he had a conversation with Hunt in January or February, 1873, and that he asked Hunt if he wanted to rent the place for that year, and he said he did, and that Hunt then told him he had talked with Blakey and Blakey had told him he could pay the

rent in improvements, and that in November afterwards he met Hunt and suggested a settlement, when Hunt told him the place was liable for some improvements made while Gordon owned the property and declined to make a settlement.

Mrs. Hunt testified that her husband knew of her purchase of the property, and his application to the appellees for the rent was therefore inconsistent with the claim now asserted. That conduct upon his part he had no opportunity of explaining or contradicting, for his wife having testified he was not competent to testify also.

But it may be susceptible of explanation consistently with the honesty and veracity of all the witnesses, while the testimony of Mrs. Gordon and Mrs. Hunt, which his conduct tended to contradict, is either true or wickedly and corruptly false, and cannot be otherwise disposed of. There is nothing proven by others or appearing in the testimony of these witnesses calculated to cast any suspicion upon their veracity, and we are therefore of the opinion that their direct and positive statements outweigh the conduct of Elijah Hunt as proved by the testimony of the appellees.

Counsel argues, however, that conceding all the appellants claim to be true they have no lien upon the property for the debt to satisfy which Gordon agreed to convey them the property; that it is only when the vendor has paid out his money on the faith of a parol contract that he has a lien, and that when he merely agrees to receive land in discharge of an existing indebtedness by the vendor he has no lien. When the appellants entered into the agreement to take the property in satisfaction of the debt and were put in possession, they lost their right to sue Gordon for the debt, and that right could only be revived by his refusal to convey pursuant to the agreement, and he could, by tendering a deed, have made the satisfaction of the debt complete. There was, therefore, such consideration for the agreement as ought to uphold it as far as the statute of frauds will allow it to be enforced. It was about two years from the time the appellants took possession until Gordon put it out of his power to convey to them by conveying to the appellees. During that time the right of the appellants to sue for their debt was suspended, and about the end of the time Gordon became a bankrupt. But for the agreement to convey the property the appellants might have secured themselves; and not having done so, but trusted to the good faith of Gordon, they are as much entitled to a lien against him and purchasers from him with constructive notice of their claim, as if they had paid the money,

instead of agreeing to receive the land in payment of an existing debt.

Nor can we concur with the counsel in his conclusion that the appellants are not entitled to the value of the improvements put upon the property before notice of the conveyance to the appellees. For improvements put upon it after notice of appellees' purchase they are not entitled to be paid anything, but for improvements made before that time they were entitled, as against Gordon, to be paid their actual value, and as the appellees can stand in no better attitude than Gordon would have occupied if he had continued to be the owner, they also must account for the value of the improvements at the time of their purchase, and the appellants should account for rent since that time. *McCracken, et al., v. Sanders,* 4 Bibb 511. Neither rent nor interest should be charged prior to the date of appellee's deed, but both should be charged after that time.

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

Caldwell, Browder & L. C. Garrigus, for appellants.
J. H. Bowden, for appellees.

T. C. & J. NEWCOMBE *v.* TOLLE, HOLTON & CO.

Bankruptcy as Defense—Answer.

An answer setting up bankruptcy, to be good, must aver that plaintiffs proved their debts in the bankrupt court, or that the defendant had been adjudged a bankrupt, or that the defendant had been discharged by the proceedings in bankruptcy from said debts.

APPEAL FROM FLEMING CIRCUIT COURT.

September 18, 1875.

OPINION BY JUDGE PETERS:

It is alleged in the answer by appellants that they had filed their petition in the United States District Court at Louisville under the bankrupt laws of the United States for a discharge in bankruptcy, as per Exhibit A, and they therefore protest and object to this court's taking jurisdiction of this case.

But it is not alleged in the answer that appellees had proved their debts against the appellants in the bankrupt court, nor had been adjudged bankrupt, nor that appellants had been discharged by the proceedings in bankruptcy from said debts.

Section 21 of the general bankrupt laws of 1867 provides that no creditor who proves his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, etc.

Their answer, therefore, in order to have presented a good defense to the action, should have alleged that appellees had proved their debts in the bankrupt court, or that appellants had been adjudged bankrupt, or had been discharged from said debts by the judgment of said court, and neither averment having been made, the demurrer was properly sustained.

Wherefore the judgment is *affirmed.*

W. H. Card, for appellants. W. S. Botts, for appellees.

F. R. HANCOCK *v.* JOHN F. RICE.

Pleading—Answer—Reply.

Where an answer presents a valid counterclaim, a reply is not good which avers that plaintiff has not sufficient knowledge to form a belief as to whether the averments in the answer are true.

APPEAL FROM MUHLENBURG CIRCUIT COURT.

September 21, 1875.

OPINION BY JUDGE COFER:

It is alleged in the answer of the appellant, in substance, that the several sums of money charged to the appellee in the account made part of the answer were either drawn out by him or transferred by his direction to the credit of Morgan, and that after crediting the appellee with all the money deposited with appellant, and charging him with what he had drawn out or caused to be transferred to the credit of Morgan, there was due to the appellant the sum of $9.97, for which he prayed judgment.

The substance of the reply is that he has not sufficient knowledge or information to form a belief as to whether the statement filed with defendant's answer, and showing the amount of cash deposited with and drawn from the defendant, Hancock, by the plaintiff, is correct. Therefore, that is, because he had not sufficient knowledge or information to form a belief, he denies that said statement is correct. He specifically denies each and every item and statement of defendant's answer, denies that defendant ever repaid to him the amount of the check sued for, or any part thereof, denies that he is indebted to the defendant in the sum of $9.97, or any part thereof.

Whether the amounts charged as having been paid to him were in fact paid, and whether those charged as transferred to Morgan's credit had been directed by him to be so transferred, were matters necessarily within the personal knowledge of the appellee, and he could not make a sufficient answer to such allegations by denying knowledge or information sufficient to form a belief of their truth. *Wing, et al., v. Dugan,* 8 Bush 583. That he specifically denies each and every item and statement of defendant's answer is obviously insufficient; nor is the denial of indebtedness good. *Francis v. Francis,* 18 B. Mon. 57; *Whitaker v. Sandifer,* 1 Duvall 261; *Corbin, et al., v. Commonwealth,* 2 Met. 380.

The jury having found a verdict for the appellee for the sum of $365, the appellant moved for a new trial, and his motion was overruled. He then moved for judgment non obstante veredicto, which motion was likewise overruled. In this the court erred. We have already decided that the reply was insufficient. The answer presented a valid counterclaim, which, not being controverted, judgment should have been rendered for the appellant on the pleadings for the sum of $9.97.

"Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, he shall be so entered by the court, though a verdict has been found against such party." Sec. 416, Civil Code.

For the error indicated the judgment is *reversed* and the cause is remanded with directions to sustain the motion and render judgment on the pleadings for the appellant for $9.97.

A. J. James, for appellant.

F. B. VANMETER *v.* R. P. PEPPER.

Liability of Guarantor—Petition.

To make out a cause of action against a guarantor it is necessary in the petition to aver, in addition to the facts by which he became bound for the default of the principal, facts showing such default.

Recovery on Contract.

To recover on an executory contract plaintiff must aver facts in his petition showing that he was ready and willing, on the day stipulated in the contract, to perform his part of it.

APPEAL FROM FRANKLIN CIRCUIT COURT.

September 25, 1875.

OPINION BY JUDGE COFER:

Pepper's only liability was that of a guarantor, and in order to make out a cause of action against him, it was necessary, in addition to the facts by which he became bound for the default of Duckworth, to allege facts showing such default. This was not done. Duckworth would only be liable in the event the appellant was ready and willing at the time and place of performance to deliver the cattle to him according to the terms of their contract, that is, at five cents per pound on a credit of fifteen days. It is not alleged that he was ready and willing on the day stipulated in the contract to perform his part of it. The only allegation on that point is in these words: "Plaintiff says that he kept said cattle until said 15th day of November, 1873, and that they then weighed 65,050 pounds," etc., and that "Duckworth failed and refused to receive said cattle on said 15th day of November," etc.

But if the petition had been good, the testimony of the appellant himself shows he had no right to recover. He says he was at home on his farm where the cattle were, on the 15th and 16th of November, and that he went away on the 17th, and left instructions with J. M. VanMeter that if Duckworth came, not to let him have the cattle unless he paid the money for them. He does not say that he was ready and willing to deliver the cattle on the 15th, but says that sometime prior to that date he received a letter from Duckworth saying he was afraid he would not be able to take the cattle, and would have to look up a purchaser for him to take the cattle. The evidence shows that Duckworth was then known to be seriously embarrassed, and we have no doubt but the failure to allege readiness on appellant's part to comply with his contract resulted from his unwillingness to make it, and not from inadvertence or mistake.

If the petition and evidence showed a breach of contract on the part of Duckworth, it would then be doubtful whether the appellee is not absolved from liability by appellant's failure to give him notice of the default of Duckworth, and that he would look to him for indemnity, but we need not now decide that question.

Judgment *affirmed.*

T. N. & D. W. Lindsey, for appellant.

G. W. Craddock, for appellee.

JAMES BEST *v.* PERRY JEFFERSON.

Duty of Officer.

When an officer has it in his power to make matters pertaining to his duties plain, and fails from negligence, ignorance or design to do so, every fact left fairly in doubt should be construed against him, and in favor of those for whom he transacts business, and to whom he owes the duty to do it correctly.

APPEAL FROM MASON CIRCUIT COURT.

October 4, 1875.

OPINION BY JUDGE COFER:

We have given this record the very best consideration of which we are capable, and have been unable to come to any other conclusion than that the execution in favor of Burgayne came to the hands of the appellee before that in favor of the Pearces.

The following facts appearing in the record have led us to this conclusion. Burgayne's execution was issued on the 24th, and that in favor of Pearces on the 25th of the month. It was the duty of the sheriff or one of his deputies to attend at the clerk's office each day to receive any process that might be issued. Sec. 72, Civil Code. This duty is some evidence, when taken in connection with the testimony of the clerk, that the execution was taken out on the 25th. The indorsement by appellee, of the time when it came to his hands, was apparently made with and as a part of his return, which latter was not made, as we shall presently see, until several months after the return day; and it is fair to presume the whole was written at once. His return shows that the levy and return of sale were entered on Burgayne's execution after the 16th of May, 1866, and on Pearces' execution as late as October 31, 1866.

The time of making the levy under the former is stated in the return, but the return is without date. No date is given on Pearces' execution of the levy or return, and neither return shows the date of the sale or where it was made. The law required the date of the levy and of sale to be stated. Sec. 10, Art. 1, Chap. 91, Rev. Stat. The return on the execution against Mrs. Curtis is also without date, as well as the transfer of the judgment against appellant. These repeated failures to give dates where dates were not only usual, but required by law, is unaccounted for and cannot be attributed to oversight. Where the sale was made, but a single bond was taken from the purchaser, which can only be accounted for by

supposing the appellee then understood that only one of the executions was to be paid. That bond, instead of being returned, was retained by the appellee, and does not yet appear to have been returned. He collected the bond without legal authority. It was in his power to produce it, and if produced it might have shed great light upon the question at issue. He was sworn as a witness, and does not swear that both executions were received at the same time. He made a return on the execution against Mrs. Curtis, showing this by the proceeds of the other execution, and then undertakes to explain that return by saying that it had not been satisfied in that way, but had been paid off by himself out of his own money, which, of course, was no satisfaction at all. If both executions came to his hands at the same time, the duty of the appellee was so plain that it is impossible to suppose that he did not understand it. In that case there would have been no necessity to omit dates, or to confuse indorsements, or to neglect to make the entries at the time they should have been made and in the manner directed by law; and there was no propriety in taking one bond instead of two, or necessity to hold up the executions; and there was no truth in the return on the execution against Mrs. Curtis.

When an officer of the law has it in his power to make matters pertaining to his duties plain, and he fails from negligence, ignorance or design to do so, every fact left fairly in doubt should be construed against him, and in favor of those with and for whom he transacts business, and to whom he owes the duty to do it correctly. If the appellee had made his return at once in accordance with what he now says was the fact, the appellant could have sought a remedy, either by proceeding to correct the return, or by suing out an execution against Mrs. Curtis, or against his principal, or against both. It is, therefore, but fair to hold that any loss resulting from the confusion and uncertainty that have arisen should fall upon him who had it in his power to make the matter plain, but neglected to do it.

We do not think the appellee has succeeded in establishing a valid arbitration and award. Conceding that a reference was agreed to, and an award made, the appellant is not bound by it. He does not appear either to have had notice of the time and place of the meeting of the arbitrators, or to have agreed to waive it. Nor does it appear that he was present, or that the arbitrators were sworn, or that this was waived.

This arbitration and award is alleged to have been made in

October, 1866, but no steps seem to have been taken by the appellee to coerce payment until sometime in the latter part of 1869, a period of nearly three years after he claims that it was settled that he was to be paid. He attempts to excuse this delay by alleging repeated promises by appellant to pay him, but of this there is no evidence, not even in his own testimony.

We think the appellant made out a case for relief, and the judgment is *reversed* and the cause is remanded, with directions to perpetuate the injunction.

J. G. Hickman, A. Duvall, for appellant.
W. H. Wardsworth, T. C. Campbell, for appellee.

ROBERT HALL, ET AL., *v.* LEWIS HARRIS'S ADM'R.

Administrator—Decedent's Real Estate.

An administrator has no control over the land of his decedent; such land descends to the heirs, and when one of the heirs is indebted to the decedent his interest in such land is liable to be sold to pay such indebtedness.

Creditors of Heirs.

Where there is personal property in the hands of an administrator, in which an heir has an interest, the creditors of such heir may subject it to their claims after such interest is charged with indebtedness due the estate from such heir; and if there is not sufficient personal property the creditors may have his interest in the real estate sold to pay their claims.

APPEAL FROM BULLITT CIRCUIT COURT.

October 5, 1875.

OPINION BY JUDGE PRYOR:

The note of John L. Harris constituted a part of the personal assets of Lewis Harris in the hands of his administrator for the payment of debts and for distribution. If the action had been instituted by John L. Harris for his part of the personal estate, the administrator could have compelled him to account for the amount of this note; and if so, the creditors' recovery cannot be for any greater sum. He stands in the place of John L. Harris when he seeks to coerce payment of the administrator, and his recovery is limited as John Harris's would be if he were plaintiff instead of the creditor. This, however, is not the case with reference to his in-

terest in the real estate of the decedent. The administrator was vested with no title to the land, nor did he have any lien upon it for the payment of debts. He had no more control over the land than a mere stranger, and with debts in his hands against John L. Harris, must enforce the payment of his claim when he seeks to subject the real estate, like any other creditor.

If John L. Harris had sought a division of the land, it would be no answer to his claim that he owed the administrator of the intestate this note, and must first pay it off before his right to the land accrued. The title to the personal estate is in the administrator, and the title to the land at the death of the brother vested in his heirs, John L. Harris being one of them. This interest of John L. Harris in the land was as much liable for his debts as if he had purchased it of his brother and obtained the legal title. His title to this extent was complete, and not encumbered, so far as this record shows, by any lien when his creditors sought to make it subject to his debts. The appellants had acquired liens by the levy of their attachments and executions. There seems to be no contest between the creditors as to their rights as between each other by reason of the levies. The case should have gone to the commissioner to ascertain the amount of the personal estate going to John L. Harris. If he has any interest in this fund (the personalty), after charging him with what he owes the estate, it must go to pay his debts. If there is no personal estate, or not a sufficient sum going to John Harris to pay the claims of the creditors who have obtained these liens, the court will proceed to sell the interest of John Harris in the lands levied on to satisfy the creditors, the attachments or executions first levied being entitled to priority. The judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

W. R. Thompson, for appellants. R. H. Field, for appellee.

ALFRED BUTT, ET AL., *v.* JAMES BOREN, ET AL.

Mental Capacity—Evidence.

The opinions of witnesses as to mental capacity are not entitled to much weight unless the facts upon which they are based are given.

Joinder of Causes of Action.

A suit to enforce the settlement of an administrator's accounts cannot be joined with a suit to set aside a deed.

APPEAL FROM SIMPSON CIRCUIT COURT.

October 5, 1875.

OPINION BY JUDGE PETERS:

Many of the witnesses who testified on the part of appellants gave it as their opinion that Francis Boren, the grantor, at the date of the deed in contest was, from his great age and physical weakness, childish and mentally incapable to understand and to transact important business; but from an inability and a failure to state the facts upon which they base their opinions, except the advanced age of the grantor, their mere opinions cannot be allowed to overturn the evidence of witnesses who saw and conversed with the grantor shortly before and after the making of the deed, and who prove facts which could not exist if the mental capacity of Francis Boren was as frail as the opposing witnesses considered it.

For an example, Mrs. Bush, who seems to be a very intelligent woman, proves facts showing that F. Boren had not only a distinct memory of important facts relating to the title to her land, but communicated them to her in a satisfactory manner, and so effectually as to enable her to succeed in removing difficulties in the title to her land.

Eubank proves that he went to see the old gentleman in 1872, after the date of the contested paper, and conversed with him on the business for which he went to see him; that he conversed very intelligently; and he afterwards took his deposition to prove the marriage of his mother, the time and place, etc., all of which he related with great accuracy, and he was intelligent on all other subjects about which he conversed with him.

The draftsman of the instrument also proves facts that occurred at the time he wrote it that show the old gentleman entirely competent to thoroughly understand the business he was engaged in.

Upon the subject of undue influence, it may suffice to remark that there is no evidence that the beneficiary in the deed ever spoke to his father on the subject, or attempted to influence him in any way whatever. So far as this record shows, the deed was the voluntary and independent act of a man fully competent to do it.

The suit (if any exists) against James Boren to enforce a settlement of his accounts as administrator of Francis Boren, Jr., was improperly joined with the suit to set aside the deed of Francis Boren, Sr., to appellee, James Boren.

Judgment *affirmed.*

G. W. Whitesides, A. Duvall, for appellants.
W. P. D. Bush, T. Lee Wilkerson, for appellees.

MILTON WILLIAMS *v.* AGNES NOEL.

Slander—Implied Malice.

While malice is an essential ingredient in slander, it will be implied from the speaking of words falsely which import slander, unless they are spoken in the performance of some public or private duty.

Misconduct of Jurors.

The separation of the jury without the court's consent is a misdemeanor, but it is not sufficient of itself to vitiate the verdict, especially where it appears that the separation took place after the verdict had been agreed upon.

APPEAL FROM GALLATIN CIRCUIT COURT.

October 6, 1875.

OPINION BY JUDGE PETERS:

This action was brought in the court below by appellee against appellant for slander, and a verdict having been rendered for appellee, and appellant's motion for a new trial having been overruled, he has appealed to this court to reverse the judgment rendered upon the verdict.

The petition contains three distinct paragraphs. In the first, in which it is alleged that appellant maliciously said of and concerning the appellee (she being an unmarried woman) that he saw her have sexual intercourse with Bona Stewart. It is furthermore alleged in the same paragraph that appellant charged her with the same offense in other words, which are set forth in said paragraph, but are too obscene to be inserted here.

In the second paragraph it is alleged that appellant, in the presence and hearing of divers persons, and on many occasions in 1873, spoke of and concerning appellee the following false and slanderous words, that he had been watching a long time one dark rainy night at the back window of plaintiff's house, and was unable to see anything wrong; that he then went around to the front door of her house, and peeped through the keyhole for some time, and he saw her, meaning the plaintiff, and Bona Stuart have sexual and "illicit" intercourse together.

In the third paragraph, it is alleged that the defendant, with the malicious intent to injure and destroy her character and her business, she being a merchant and engaged in the same business and in the same town with the defendant, spoke of and concerning the plaintiff in the year 1873, in the presence and hearing of divers persons, on many occasions, the following false and slanderous words, to wit, "She (meaning the plaintiff) is a whore, she keeps a whore house," referring to and meaning that plaintiff was keeping a public whore house, or house of ill fame.

Appellant moved the court to strike out the second paragraph of the petition; his motion was overruled, and he excepted. He then demurred to each one of the paragraphs. His demurrer was also overruled, and he filed an answer containing three paragraphs, in which he admits seriatim the speaking of the words as charged in the several paragraphs of the petition, and justifies the speaking of them on the ground that they were true. The causes assigned for a new trial are nominally five, while the whole are comprehended in the first and fifth, which are as follows:

First. Because the verdict of the jury is contrary to the law and the evidence.

Fifth. Because the jury was not kept together during the time they were considering their verdict, and some of them were out of the room, mixing and mingling among the crowd, while the others were considering their verdict.

Departing somewhat from the order in which the attorney for appellant has discussed the questions, we proceed to consider, first, whether the court below erred in overruling appellant's motion to strike out the second paragraph of the petition. Since the statute of 1811, which makes fornication or adultery criminal in their nature, and punishable, this court has repeatedly held that words charging a woman with either offense are actionable; and to say of appellee, she being an unmarried woman at the time that she had sexual intercourse with Bona Stewart, was charging her with having committed fornication. But it is insisted that by the second paragraph appellee attempted to set out a cause of action independent of and distinct from that set out in the first; and as it is not alleged that the words were maliciously or wrongfully spoken, no cause of action was stated. It is certainly true that malice is an essential ingredient in slander; but malice will be implied from speaking of words falsely which impart slander, unless they are spoken in the performance of some public or private duty, or as is

sometimes said in discharge of some moral or legal duty. Starkie on Slander, 122-3; *Faris v. Starke,* 9 Dana 128. The words set forth in the paragraph under consideration are of themselves actionable, and the court below did not err in refusing to strike it out, and for the same reason the demurrer to it was properly overruled.

The first paragraph contains all the words necessary to constitute oral slander according to the rule contended for by appellant. It charges that he spoke the defamatory words set forth of and concerning the plaintiff in the presence and hearing of divers citizens, with the malicious intent to injure her.

The objection taken to the third paragraph by appellant is that in it appellee states her occupation and business, but fails to allege any special damage that resulted to her business by reason of the speaking of the words complained of. She stated the business she was engaged in, not for the purpose of recovering damages for any special injury done to her business, but for the purpose of showing the malignity of appellant, and the selfish motive that prompted the speaking of the words, and thereby enhance the damages. The words, as charged, are actionable, and the paragraph was not vitiated by having inserted in it the business or trade of appellee. We cannot say, therefore, that the court erred in overruling the demurrer to the first and third paragraphs of the petition.

It is insisted with much zeal by the learned attorney for appellant that the judgment should be reversed, because the verdict is not sustained by the evidence. Evidence was introduced on the trial by appellant tending to sustain the defense, and on the other side contradictory evidence was introduced. It is not the province of this court to enter upon an analysis of the evidence, and determine with exactness on which side the scales preponderate. To do so would be to invade the province of the jury, and if in any case we were disposed to enter upon such a task, we have rarely seen one less inviting than this. But we cannot, after mature consideration, come to the conclusion that the verdict of the jury is palpably against the weight of the evidence, and do not feel authorized to interfere.

The law of the case, as embodied in the instructions to the jury, seem to be as favorable to appellant as he was entitled to. But we do not see that the action of the court in giving the instructions to the jury was excepted to.

As to the misconduct of the jury at and during the trial, it appears that one of them was absent from the jury room a while after the

case was submitted to them; but he was during the time engaged with one of the attorneys for appellant, on legitimate business; and it is not shown that he was guilty of any misconduct during his absence from the jury room, or at any other time during the trial. While waiting for this juror, another absented himself a short time from the room, and may have said that they had made a verdict in favor of the plaintiff before it was returned into court. This was certainly indiscreet in the juror, but there is no evidence of misconduct on his part, or such a violation of duty as to prejudice the rights of appellant. The separation of the jury without the permission of the court is a misdemeanor for which the court might punish them. But it is not sufficient of itself to vitiate the verdict, more especially as it appears that the separation was after the verdict had been agreed upon. *Brown v. M'Connel,* 1 Bibb 265; *Yancy v. Dower,* 5 Litt. 8. As to the word "illicit," found in the second paragraph, it is meaningless in the connection in which it is found, and did not in any way affect the meaning or change the effect of the other words of the sentence, which was perfect without it.

After a mature consideration of the important questions presented in this record, we feel constrained to approve the rulings of the court below. Wherefore the judgment is *affirmed.*

J. J. Landrum, for appellant. G. W. Craddock, for appellee.

JOHN A. DUNCAN, ET AL., *v.* MADISON COUNTY COURT.

County Bonds Issued to Build Railroad—Power of Legislature to Legalize.

Where county bonds were issued to pay for stock in a railroad, but without legal authority, the general assembly has the power to legalize and make them valid.

Funds of County from Sale of Railroad Stock May be Used to Build Jail.

The surplus funds derived by a county from the sale of railroad bonds held by it may be devoted to the use of building a county jail.

APPEAL FROM MADISON CIRCUIT COURT.

October 6, 1875.

OPINION BY JUDGE LINDSAY:

The fourth section of the act relating to the Louisville & Nashville Railroad Company, approved the 9th of January, 1852, Sess.

Acts 1851-2, p. 738, provides that counties subscribing for capital stock in said company may pay their subscriptions in three several modes, viz.:

First. By the issuing and delivering to the company the bonds of the county, subscribing to an amount equal to the stock subscribed for, said bonds to be issued with coupon attached, under the seal of the county court, to be signed by the presiding judge thereof, and countersigned by the clerk, and to be negotiable and payable to the said Louisville & Nashville Railroad Company in the city of New York, at not more than twenty years from the date of issue, and to bear interest from the date thereof at the rate of six per cent. annually in the city of New York.

Second. By the levy of a direct tax sufficient to pay in four years, or longer, as the county court may deem expedient, the whole amount due for the stock subscribed for.

Third. By the issue of bonds, of the nature hereinbefore set out, to be delivered to the company, in payment of one-half the amount agreed to be paid for the stock, and by direct tax to be levied to pay the remainder.

On the 2d day of May, 1867, the county court of Madison county subscribed for and on behalf of said county three thousand five hundred shares of said stock. Instead of paying the subscription in one of the modes provided by law, said court caused to be issued and sold the bonds of the county, payable to Walker & Co., bankers in the city of New York, bearing six per centum interest, payable annually. Four hundred sixty-eight bonds of $1,000 each were issued by the court and the proceeds applied to the payment of the subscription for stock. The county court had no power or authority to issue and sell these bonds, and it is a question of doubt whether, except for subsequent legislation, they could have been collected from the taxpayers of the county, even by innocent holders, for value.

After about one hundred of the bonds had been sold, the general assembly (for the purpose of removing this doubt), by an act approved January 9, 1868, the preamble to which recites all the steps taken by the county court in the matter, enacted "that the said acts and orders of the Madison County Court in opening the poll, holding the election, in levying the taxes for the purposes above named, in issuing the bonds, in appointing the commissioners aforesaid and ordering the sale of the bonds, and all acts done in pursuance thereof, be and the same are hereby legalized and made valid,

as fully and completely as if the orders aforesaid had been made in conformity to law; and any and all bonds issued and sold under said orders shall be binding upon the county of Madison to all intents and purposes."

The power of the legislature to pass this act cannot be questioned; but the effect of the act was not to place the bonds upon the same footing with those issued pursuant to the power conferred by the act relating to the railroad company approved March 9, 1852. The bonds were declared to be as valid and binding on the county as though there had been in existence, at the time, a law authorizing and empowering the county court to pursue the course it saw proper to adopt. The county is bound to pay the bonds, but the holders have no such lien upon the stock of the railroad company subscribed for, nor upon the dividends arising from that stock, as sections 11 and 12 of the act of January 9, 1852, secured to other holders of bonds issued pursuant to the provisions of that act. The rights of the holders of the bonds issued and sold by Madison county are to be ascertained by reference to the orders of the county court, and to the act of January 9, 1868.

The fact that the order of May 6, 1867, directed that the subscription for stock should be made on the terms set forth and provided in the acts incorporating said company and the amendments thereto, does not conflict with this conclusion. The subscription was, no doubt, properly and legally made. It was the plan adopted by the court to pay the sum subscribed without legal sanction, up to the passage of the act of 1868. If the appellants have any claim to or lien upon the fund in controversy in this cause, it must arise out of the provisions of the act of March 22, 1872. 2 Sess. Acts 1871-2, p. 152. Under authority conferred by that act, the county court of Madison county caused all its stock in the railroad company to be sold, and with the proceeds it has purchased all the bonds of the county except 157 bonds of $1,000 each. It has also purchased, and the sinking fund commissioners hold for the county, the bonds of other counties, amounting in the aggregate to $156,000. The remainder of the proceeds of the sale of said stock, amounting to over $55,000, has been loaned on good security to the Louisville & Nashville Railroad Company. Out of this fund the county court proposes to devote to the erection of a county jail the sum of $20,000; and these appellants, who are bondholders and taxpayers of the county, seek to restrain that court from carrying out the order made with that view. The act of March 22, 1872, authorized the

county court to sell the railroad stock of the county, and to invest the proceeds, or such an amount thereof as may be deemed best by said court for the interest of the county, in some safe and solvent securities or bonds.

The second section of the acts provides that such bonds and securities, when purchased, shall be held for the benefit of the county, and the interest accruing on them shall be applied by the sinking fund commissioners, "first, to the payment of the interest on the outstanding county railroad bonds; and if a surplus shall accrue after the payment of such interest, the commissioners shall apply such surplus to the purchase of outstanding Madison county bonds, or invest the same in other good and solvent securities, or in such safe and profitable manner as the court may direct."

It will be observed that the controlling idea of this act is to benefit the county, and to secure and advance its interests. Such advantages as inure to the holders of the county bonds, arise incidentally, and must be held to be subordinate to the interests of the county.

To the extent that the county court has deemed it best for the interests of the county to invest the proceeds of the sale of the railroad stocks in bonds or securities, it has irrevocably devoted the sum so invested, and the interests accruing thereon, to the purchase of the bonds of the county, and to the payment of the interest annually accruing on them. But to this $55,000 that the county court has not deemed it best for the interests of the county to invest, the holders of the county bonds have no right or claim. As appellants, as holders and owners of county bonds, have no right or claim to and no lien upon this fund, they have no right to object to its appropriation by the county court.

Nor do we think they have the right as taxpayers of the county to have the county court restrained from expending such portion of that fund as may be necessary to erect a county jail. The order of the court on that subject directs, "That an amount not exceeding $20,000, required to build a county jail, shall be paid out of that portion of the railroad sinking fund now in the hands of the Louisville & Nashville Railroad Company."

It is agreed in the record before us that the jail of Madison county has been condemned by frequent reports of grand juries for several years past, and that the necessity for a new jail is not open to question. It is the imperative duty of the county court of Madison county, setting as a court of claims, to cause to be erected and

kept in repair a secure and sufficient county jail; and for this purpose it may appropriate any money or credits belonging to and applicable to the payment of demands against the county. By the order of court of date April 7, 1867, which was made valid and binding by the act of January 9, 1868, the county court reserved the right to sell the stock proposed to be taken in the Louisville & Nashville Railroad Company, if deemed expedient, and provided that in case it should not be sold, the dividends thereon should be applied annually to the payment of the interest on the bonds to be issued by the county, and if said dividends should exceed the interest on the bonds, the excess should be set apart as a sinking fund, which fund might, at the discretion of said court, be distributed among the taxpayers of the county pro rata, or applied to the lessening of the county levy, and of the taxes for county purposes.

In 1869 the railroad company declared a dividend payable in stock of 40 per cent., and in payment thereof there was issued and delivered to the county of Madison one thousand four hundred shares of stock, of the nominal value of $140,000. All this stock was a clear surplus, and under the reserved powers set out and defined in the order of April 7, 1867, it might have been sold by the county court, and its proceeds distributed among the taxpayers of the county, or applied to the lessening or extinguishment of county levy and other county taxes.

The act of March 22, 1872, was not intended to abridge the powers of the county court as to the surplus. It imposes no obligation upon that court to invest for the benefit of the bondholders the proceeds of the $140,000 stock of which it is made up. It appears that this stock was sold for nearly double the sum now loaned to the railroad company, and fully five times as much as the order of court proposes to apply to the erection of the jail.

We do not doubt the right of the county court to treat the fund in the hands of the railroad company as an excess of dividends, in the sense of the order of April 7, 1867; and as the expenditure about to be made is clearly within the letter and spirit of that order, the circuit court properly refused to interfere to restrain the county court from carrying out the order providing for the erection of a county jail, and for the payment of the expense thereby incurred, out of this fund.

Judgment *affirmed.*

C. J. Bronston, W. B. Smith, for appellants.
W. C. Miller, T. J. Scott, for appellee.

VASSAM *v.* HAMILTON.

Appeals—Causes Stricken from the Docket.

Parties to a cause which is stricken from the docket upon the order of the court are out of court; the effect of such order is the same as if the appeal had been dismissed.

October 7, 1875.

OPINION BY JUDGE COFER:

This case was stricken from the docket at the last term, and that order is beyond the control of the court; and as we can neither set it aside nor disregard it, the only question raised by the motion of counsel for appellants is whether the order is, in effect, a dismissal of the appeal. Certainly after the order was made the appellees were not bound to take notice of what was being done in court, any more than if the appeal had been dismissed. If, after a case has been stricken from the docket, the court may at a subsequent term order it to be redocketed, and allow the appeal to proceed as if no order had been made, it would be impossible to say when this power of the court would cease; and parties would never be able to know, in such cases, when their rights were settled. We think it is clear that the parties are out of court, just as if, instead of striking the cause from the docket, the appeal had been dismissed.

Motion *overruled.*

CALDWELL & HARWOOD *v.* TRUSTEES OF TOWN OF SHELBYVILLE.

Towns—Power of Chairman of Board of Trustees.

In the absence of any power given to the chairman of the board of trustees of a town to bind the town by contract, no such power exists, and where he acts against the wishes of a majority of the board in attempting to make a contract his action is void.

APPEAL FROM SHELBY CIRCUIT COURT.

October 12, 1875.

OPINION BY JUDGE PRYOR:

We have been referred to no authority by the learned counsel sustaining the right of appellants to recover upon the facts alleged

in the petition. The contract with the chairman of the board of trustees of the town of Shelbyville must be regarded as having been made in his individual capacity, in the absence of any power conferred upon him by the town charter to make such a contract, and since the facts alleged show that he was acting against the wishes of a majority of the board in employing counsel to prevent the town, through its trustees, from taking stock in the gas company.

Those having the power to contract with and employ counsel, not only failed to invest the chairman of their board with this right, but were resisting his whole action in the premises. The trustees had the right, as a board, to employ counsel to prevent the citizens in their attempt to nullify the action of a majority of the board, and the fact that the chairman of the board was correct in his views as to the legality of the act by which the stock was taken or the money subscribed, raises no implied promise on the part of the board as such, to pay him or the counsel employed by him for their services. The chairman in this case was not acting in pursuance of any resolution of the board, but was acting with the avowed purpose of defeating the will of a majority of the board.

When acting officially, he must show his authority to bind the corporation, and this is a difficult undertaking when it is admitted that he was attempting to do an act that those from whom he must have derived the power to make such contract were at the time resisting. The judgment of the court below is *affirmed.*

Caldwell & Harwood, for appellants. J. S. Morris, for appellees.

R. H. FIELD *v.* J. F. SMITH.

Levy of Execution—How Made—On Standing Corn.

A levy of an execution may be made on corn not severed from the ground by the officer going on each parcel of ground where the corn was and indorsing his action on the execution and signing it on the day he makes the levy. The levy puts the officer in constructive possession, and on the sale under such levy the purchaser is invested with title.

APPEAL FROM BULLITT CIRCUIT COURT.

October 15, 1875.

OPINION BY JUDGE PETERS:

Maraman proves he levied the execution on the corn, which was

not severed from the ground on the 2d of October, 1874, by going on each field or separate parcel of ground where the corn was standing, they having been shown him by one of the tenants of the defendant in the execution; that one or more of the tenants who cultivate it were with him when he made the levy, they owning a part of the corn, and that the levy was indorsed on the fi. fa. and signed by him on the same day it was made. The levy of the execution on the corn put the officer in the constructive possession of it, and on the sale of it by him would invest the purchaser with the title.

The defendant in the execution seems to be a corporation, and notice to the tenants, or some of them who cultivated the corn, was sufficient. Perceiving no error, therefore, in the judgment, the same is *affirmed*.

R. H. Field, for appellant. R. J. Meyler, for appellee.

L. B. HUDSON *v.* B. STONE.

Levy on Property—Rights of Third Persons Claiming the Property.

Where an officer levies on personal property claimed by a third party he must appoint appraisers to appraise the property, and the claimant may refuse to give the required bond until the officer takes such action.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 18, 1875.

OPINION BY JUDGE COFER:

When an officer has levied an execution upon personal property, and any person other than the defendant in the execution claims the property and desires to suspend the sale, it is the duty of the officer to select three housekeepers and administer to them an oath to make a fair appraisement of each article of the property, whose appraisement shall be recited in the bond. Secs. 713-714, Civil Code.

Until such appraisement is made, the claimant may refuse to give the bond, and the officer will have no right to proceed with the levy. But if the officer selects but two instead of three persons to make the appraisement, and the claimant executes bond reciting such appraisement, the irregularity will be waived, and the bond will be valid as a statutory bond.

We are, therefore, of the opinion that the court properly over-

ruled the appellant's motion to quash the bond. Nor did the court err in striking the appellant's written response to the motion from the files. Sec. 479 of the Code provides that judgments may be rendered upon motions in the several classes of cases therein enumerated, and in all other cases specially authorized by statute. Sec. 716 provides that judgment may be rendered on motion upon a bond given to suspend a sale of property under execution, and Sec. 484 provides that motions shall be heard and determined without written pleadings, and that judgment shall be given according to law and the rules of equity. It results, therefore, that no written pleadings are allowed in such case. *Williams v. Smith,* 4 Bush 540.

The appellant had a mortgage upon the property levied upon for a sum greatly exceeding its value, and it was on account of his claim to it under his mortgage that he executed the bond. The appellee insists, however, that as the interest of Bryant, i. e., the equity of redemption, was subject to levy and sale under his execution, the property was so far subject to the execution as to render the appellant liable on the bond for the full value of the property, not exceeding the amount of the execution and ten per cent. thereon.

This question seems to be settled by the decision in *Smith v. Wells's Adm'x,* 4 Bush 928. The facts of that case were these: W. W. Smith and wife rented a farm of Middleton, and gave bond for the rent, with Reuben Smith as surety. While Smith and wife occupied the leased premises, executions against W. W. Smith were levied upon twenty-five fat hogs on the premises, as the property of said W. W. Smith. The surety, Reuben Smith, claimed the hogs, and executed bond to suspend the sale, and subsequently paid the rent and took an assignment from Middleton to himself, of the rent bond, and of all the rights of the landlord. The execution plaintiff moved for judgment on the bond, and judgment was rendered accordingly; but this court reversed the judgment, holding that as the landlord had a lien upon the hogs for the rent, and had assigned that lien to Reuben Smith, the latter was thereby substituted to the rights of the former, and that as the value of the property appeared to be less than the claim for rent, the execution plaintiff was not entitled to recover on the bond. This case is not distinguishable from that, and we must hold that the court erred in rendering judgment against the appellant, unless, as claimed by the appellee, the mortgage was fraudulent.

The evidence relied upon to establish the fraudulent character of

the mortgage is that it was not recorded for several months after it was executed and acknowledged, and that the appellant, since the execution of the bond which is the foundation of this proceeding, consented to the removal of the property from the state.

Bryant and the appellant swore that the indebtedness expressed in the mortgage in fact existed, and that there remains an unpaid balance of over four thousand dollars, and that after the property was removed to another state, a new mortgage was executed upon it; and there is nothing in the record to contradict their statements.

Wherefore the judgment is *reversed*, and the cause remanded for a new trial upon principles not inconsistent with this opinion.

W. O. Dodd, for appellant. James Harrison, for appellee.

SAM JOHNSON, ET AL., *v.* CLIFTON RODES, ET AL.

Misjoinder of Actions.

If no objections are made in the court below on account of misjoinder of actions, no objection thereto can be made in this court.

Setting Aside Judgment.

Where in a cause process was served and a judgment rendered, a motion to set such judgment aside, made nearly three years after its entry, will be denied. If relief is sought against such a judgment it must be by a new action.

Record on Appeal.

Where in the trial court a party offers to file a pleading, which is denied by the court, such pleading does not become a part of the record on appeal, unless made so by bill of exceptions.

APPEAL FROM BOYLE CIRCUIT COURT.

October 21, 1875.

OPINION BY JUDGE LINDSAY:

The mortgage executed to Thomas and Bedlow passed the entire estate of Johnson and wife, including the homestead exemption. The petition of Thomas & Bedlow certainly presented a cause of action and a right of recovery in each of the plaintiffs. If there was a misjoinder of actions, a question we do not decide, it was not objected to in the court below, and cannot, therefore, be taken advantage of here.

Johnson and wife were regularly served with process, and judg-

ment rendered against them by confession. Nearly three years afterwards Mrs. Johnson moved to have the judgment set aside, and to be allowed to file an answer. The court below had no power to set the judgment aside upon motion. If there exists any reason why the judgment shall be modified or vacated as to her, she must by an original proceeding apply for such relief in the mode prescribed by Sec. 581, Civil Code of Practice.

Further than this, Mrs. Johnson cannot, so long as the judgment remains in force, have the question as to her right to a homestead or its value retried. But if this were not so, she could have no relief upon this appeal. The record shows that she and her husband offered to file answers, and that their motions to file were overruled. These answers, therefore, did not become parts of the record. They have not been made so by bill of exceptions or otherwise. The bill of exceptions was offered and rejected by the court, but such answers are neither incorporated in the bill, nor identified by it.

We have no evidence that the papers copied by the clerk were the answers offered, except his statement that such is the fact. It has been repeatedly decided that the clerk cannot certify a paper that has not been made part of the record.

We need not pass upon the plea of limitation. The indorsement on this record makes Clifton Rodes an appellee. The record does not show that he has any connection with the cause. The two sales were properly set aside. It was the fault of the appellees that the mistake occurred in the first sale, and the commissioner should have awaited direction from the chancellor before selling the second time.

Judgment *affirmed* on original and cross-appeal.

Thompsons, for appellants. Durham & Jacob, for appellees.

J. M. DELPH *v.* A. B. HEWITT, ET AL.

Judicial Sale of Real Estate—Descriptions Given in Advertisement.

One buying real estate at judicial sale is not bound to inspect the premises, but has a right to rely upon the accuracy and truthfulness of the description which is given by the judgment and the master's advertisement, and he cannot be compelled to accept a conveyance unless it conforms substantially to the description by which he was induced to bid.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 22, 1875.

OPINION BY JUDGE LINDSAY:

Lot No. 2 is described in the judgment of the court as "lot No. 2, having a front on Waters street of sixteen feet, eight inches, extending back the same width fifty-one feet, to vacant space marked on said plat of division." The judgment further provides that "the center of the walls of the houses as they stand on said property is the dividing line between the said lots and improvements. And the area marked 'vacant space' on the said map being 16 1-3 feet by 20 feet, is to be common appendage to lots Nos. 1, 2, 3, 4, 5 and 6." The marshal, in his advertisement of the time, place and terms of sale, describes the property to be sold precisely as it is described in the judgment. J. M. Delph, who became the purchaser of lot No. 2, excepted to the confirmation of the marshal's report upon various grounds, among them, "that the property is heavily encumbered with taxes due to the state of Kentucky, and to the city of Louisville, * * * and neither the state of Kentucky nor the city of Louisville is a party to this action or bound by the decree herein; and that the property so sold is not such as it was represented at said sale to be, and as it is described in the decree herein; that there is no vacant space such as represented on the plat according to which said sale was made; that a large portion of said space is occupied by privies used by the occupants of the other lots shown on said plat, and the use of said space is not free or common to the lots, 1, 2, 3, 4, 5 and 6, and said privies are a nuisance to said lot No. 2, and the occupants thereof, and greatly diminish the value of said lot." At the time of said sale, the said Delph believed that said property was such as it was represented to be, and that said space was vacant and free to the use of lot No. 2; and if he had known the true condition of same he would not have bid at said sale.

The chancellor ought to have caused the encumbrances growing out of the existence of the tax claims of the state and city to be removed by appellees before compelling Delph to accept a conveyance. Upon the trial of the exception last stated, it was agreed that Delph had not examined the property, and it seems that he was not apprised, at the time of the sale, of the purposes to which the vacant space had been devoted. He was not bound to inspect the premises. He had the right to rely upon the accuracy and truthfulness of the

description, which appellees, through their own judgment and through the master's advertisement, gave of the property; and he cannot be compelled to accept a conveyance and pay for the lot unless it conforms substantially to the description by which appellees induced him to bid.

It is in proof that the space described in the judgment and advertisement as vacant is occupied by privies used by the occupants of the other houses and lots, to which it is an appendage; that the house on lot No. 2 has no other avenue than said "space" through which to receive light and air, in the rear; that the privies render the air supplied by way of said space offensive and impure; and that the existence of the privies depreciates the value of lot No. 2 about five hundred dollars, or about one-third of the price agreed to be paid for it. It is certain that in a transaction between individuals disconnected from a proceeding in court, a purchase of this character would not be enforced. If appellees can have a specific execution of the contract made with the chancellor for their benefit, they will thereby succeed in compelling Delph not only to accept and pay for property, differing in a material particular from that sold to him, but of greatly less value.

They can obtain no such an unconscientious advantage through the instrumentality of a court of equity. The judgment of the chancellor confirming the report of the sale to Delph is *reversed,* and the cause remanded with instructions to sustain his exceptions, and for further proper proceedings.

Muir & Booth, for appellant. James Harrison, for appellees.

CITY OF BOWLING GREEN *v.* ALBERT MITCHELL, ET AL.

Cities—Taxation to Construct Water Works.

While the trustees of a city are authorized to levy a tax to raise money to construct water works, such trustees have no power to make an unequal distribution of the burden of taxation between the citizens. They have no power in addition to a general levy on all the property of the municipality, to assess adjoining property by the front foot to raise money to pay interest on its bonds or to extend such water works system.

APPEAL FROM WARREN CIRCUIT COURT.

October 22, 1875.

OPINION BY JUDGE PRYOR:

The chairman and board of trustees of the city of Bowling Green, in order to place in successful operation the water works contemplated by the act incorporating the company, were empowered to assess and collect a tax upon the real and personal estate in the city subject to the taxation for ordinary city purposes, as well as a poll tax, in such manner and amount as they may deem equitable and just. City bonds were also authorized to be issued, with coupons attached, at a rate of interest not exceeding eight per cent. per annum, as a means of payment for the work contemplated. These bonds were issued, and the works undertaken and completed, the city incurring a large liability, for which its bonds are outstanding.

The city authorities, for the purpose of liquidating the interest on these bonds, and perhaps extending the construction of the water works, passed this ordinance: "A tax of twenty-five cents on each one hundred dollars worth of real estate fronting and along the line of the pipes of the Bowling Green Water Works, and not exceeding two hundred and ten feet from the line of the pipes of said water works, is hereby levied for the year 1873, which, when collected, shall be used exclusively for water works purposes."

It is admitted by the answer that this tax is levied for the purpose of paying the interest on the city bonds, and may, perhaps, be intended to construct the works in other parts of the city. An additional tax seems to have been imposed also on all the property of the town, of ten cents for every hundred dollars, to go in discharge of the principal debt. It is manifest that a large grant of power was made to the board of trustees by the provisions of the act of incorporation; but the language empowering them to assess and collect a tax in such manner and amount as they may deem most equitable, vested them with no power to make an unequal distribution of the burden of taxation between the citizens, or to disregard the well-established doctrine of uniformity and equality in the imposition of taxes. In the present case, these bonds and the interest thereon are debts due by the whole city for expenditures already made, and there is no principal recognized by which such discrimination can be made as requires that one debtor, only equally liable with the rest, shall be made to pay the whole debt, or his undue

proportion of the burden, or when applied to taxation, that his property shall be assessed for a greater sum than his regular property, equally liable of the same kind and value.

This mode of taxation in the present case has no precedent upon which it can be maintained. Many cases have been decided by this court where local taxation has been imposed on the owners of the property in towns and cities for the purpose of making such improvements in front of the property as has enhanced its value, or from which the owner derived a peculiar local benefit; but where a debt has been incurred by a city in making such improvements, we know of no rule that would require a portion of the citizens only to bear the burden. If a tax had been imposed on the real estate fronting the improvement for the purpose of constructing it, such as laying down pipes, etc., the taxation might there be made equal and uniform by requiring the other property, which the improvement is estimated to help, to be taxed in the same way; but in the present case, where the work in front of the property has been completed, and the debt incurred by the whole city, an ordinance requiring the property in a certain part of the town to pay the debt or to tax this property more than other property of the like kind to aid in extending the improvement, is unconstitutional and void.

Each taxpayer is liable to pay upon the amount and value of property owned by him, or the value of the kind of property taxed, the whole city to pay this city debt. Such a mode of taxation appears as near uniformity and equality as can be arrived at. *Malchus v. District of Highlands,* 4 Bush 547. The ordinance imposing the tax of twenty-five cents on the hundred dollars is null and void. There was no demurrer to the petition, and if there had been this proceeding is sustained by the case of the *Cypress Pond Draining Co. v. Hooper, et al.,* 2 Met. 350. The judgment of the court below, perpetrating the injunction, is *affirmed.*

W. L. Dulaney, for appellant.
R. Rodes, H. T. Clark, for appellees.

C. HOSKINS, ET AL., *v.* JOHN COOK, ET AL.

Surety of Execution—Limitations.

A surety for an executor to whom a decedent's estate has been transferred is discharged from all liability as such to a distributee, devisee or ward when five years shall have elapsed without suit after the cause of action accrued.

APPEAL FROM TAYLOR CIRCUIT COURT.

June 23, 1875.

OPINION BY JUDGE PRYOR:

The appellants, who were the sureties of Wilson, as executor of Richardson, should have been discharged from liability on his bond upon the plea of the statute of limitations. The executor qualified on the 1st of February, 1865, and the present action was instituted on the 17th of September, 1873. A surety for an executor, administrator, guardian or curator, or for a sheriff, to whom a decedent's estate has been transferred, shall be discharged from all liability as such to a distributee, devisee or ward, when five years shall have elapsed without suit after the cause of action accrued. The evidence conduces to show that the appellants secured of the executor a note on Jarboe, belonging to the estate of Richardson, and that this note was transferred to them as an indemnity for their liability as sureties. Although Jarboe may have been insolvent when this transfer was made, still, if the sureties afterwards collected it, they should account to the estate or the distributees for the amount, deducting first the costs incurred in making the collection. It seems that they made some payment out of their own means to the widow or distributees for the executor, and at his instance, if so, the payments thus made should be applied as a credit on this claim. As to the Jarboe debt, the case is left open, that the parties may take further proof showing the extent of the liability of appellants upon that claim only, and may amend their pleadings for this purpose.

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

J. R. Robinson, D. G. Mitchell, for appellants.
W. Howell, for appellees.

B. SMALL'S ADM'R, *v.* A. S. JONES, ADM'R.

New Trial—Newly Discovered Evidence.

One about to go into trial is required to make preparation and a diligent effort to discover and produce his evidence, and a new trial on account of newly discovered evidence will be denied where it is not shown that such evidence could have been discovered and produced at the trial by proper diligence.

APPEAL FROM McCRACKEN CIRCUIT COURT.

October 26, 1875.

OPINION BY JUDGE LINDSAY:

This is a proceeding to obtain a new trial of an action at law. The appellant was an administrator, and was under no disabilities at the time of the judgment, and was the plaintiff in the action. There is no averment in the petition that the judgment was obtained by fraud, and the only ground mentioned in the petition upon which relief could in any state of case be afforded, is that of newly discovered evidence. Secs. 581 and 573 of the Civil Code of Practice. It is, therefore, necessary to inquire into the alleged errors of the court, and the trial of the original action. These errors can be corrected, if at all, in no other way than by an appeal. The only evidence claimed to have been discovered is the receipt for one hundred dollars. The appellant says that after judgment, and after the expiration of the term at which it was rendered, he for the first time, "upon a careful examination of the paper of B. Small, decedent," found this receipt. Why he did not make a careful examination of these papers, before judgment, is a fact not disclosed. It was certainly his duty to do so. He cannot now have a new trial on account of his lack of diligence in this respect.

Judgment *affirmed.*

J. L. A. King, for appellant. P. D. Yeiser, for appellee.

P. P. AND J. O. MARTIN *v.* COMMONWEALTH.

Criminal Law—Horse Stealing.

A defendant cannot be guilty of horse stealing if in fact the horse was owned by him.

APPEAL FROM BALLARD CIRCUIT COURT.

October 27, 1875.

OPINION BY JUDGE LINDSAY:

P. P. Martin and John O. Martin were indicted by the grand jury of Ballard county for stealing a horse, the property of William H. Davis.

The proof shows that the only interest Davis ever owned in the

horse was a special property, growing out of the fact that as sheriff of the county he had, by virtue of an execution in his hands in favor of Northington and against P. P. Martin, levied upon it. He delivered the horse to Northington as his bailee, and authorized the creditor and debtor to arrange the debt evidenced by the execution; and upon its being arranged, Northington was authorized to restore the horse to Martin. Martin made payments on the debt to Northington, and sent him work that the value of certain pork he proposed to deliver upon his order, would, in his opinion, about satisfy it. A subsequent conversation between the parties tended to show that in this he was mistaken, but he declined to pay the balance claimed, and thereby obtain possession of his property, saying, in effect, that he had not taken the horse to Northington, and would not take him away.

On the night succeeding this interview it is alleged that the horse was stolen from Northington's possession. There is testimony conducing to prove that the horse escaped and returned to the home of Martin. He sent the horse to Marshall county, by his son, the appellant, John O. Martin, as they claim, to prevent its being subjected to the payment of certain debts for which P. P. Martin was bound as surety for the late sheriff of Ballard county. We see no objection to the action of the circuit judge in admitting and excluding testimony.

The first instruction given for the commonwealth is substantially correct, as is also instruction No. 2. Instruction marked No. 3 is objectionable. It assumes that Davis, at the time of the alleged larceny, had an interest in and claim to the property, resulting from the levy of the execution, and the possession thereby acquired. This is one of the most material questions of fact in controversy, and it ought not to be determined by the court. If Martin had paid off the debt after the levy, then the sheriff had no interest in or claim to the horse. The title to the property remained in P. P. Martin, notwithstanding the levy, and he was entitled, upon payment of the debt, to have it returned to him. After such payment, he might commit a trespass, but could not commit a larceny, by unlawfully regaining the possession to which he was entitled, unless he intended by so doing to attempt fraudulently to charge Davis with the value of the horse. The instruction does not make the guilt of the accused depend upon the latter proposition, and erroneously admit, as proved, a question which as we have already said the jury should have been allowed to determine.

By instruction No. 4, the jury were, in effect, told that because Martin had no right to the possession of the horse until the whole amount of the execution was paid, therefore the taking and carrying away, if any part thereof remained unpaid, was in law felonious. It is true that the instruction does not set out this proposition in terms; but it is purely abstract in its nature, and when considered in connection with the questions of fact involved in this prosecution, it naturally, if not necessarily, leads to the conclusion stated.

Instruction No. 5, like instruction No. 3, erroneously assumes it to be a fact that at the time of the alleged taking and carrying away of the horse, Davis, the sheriff, had a claim to him. It also determines the law to be that the taking under the circumstances therein recited was felonious, unless the jury should believe from the evidence that the defendants, in good faith, believed that Northington had turned the horse out, to return home, or consented to his being turned out. Now although they may not have believed either of these things, yet if they believed that the debt had been paid in full, the taking possession and carrying away of the horse was not felonious. This instruction is objectionable in another respect. It is dangerous for the court to select out and group together certain of the prominent circumstances in a case, and make the guilt or innocence of the accused turn upon the sufficiency or insufficiency of the evidence touching these supposed facts. The better mode would have been to state to the jury what constitutes in law a felonious taking and carrying away in cases of larceny, then permitted the jury to apply the law to the particular facts of the case under consideration.

Instruction No. 7 also erroneously assumes that Davis owned an interest in the property, when it is alleged to have been taken. The instructions given for the accused were sufficiently favorable to their defense; but the instructions given for the commonwealth are, in the main, inconsistent with them. As the jury could not be expected to reconcile these inconsistencies, it is evident that the accused must have been prejudiced by the erroneous exposition of the law given by the court at the instance of the commonwealth.

A new trial should have been granted, and for the error of the circuit court in overruling appellants' motion therefor, the judgment is *reversed* and the cause remanded for further proceeding, not inconsistent with this opinion.

J. M. Bigger, J. & J. W. Rodman, for appellants.
T. E. Moss, for appellee.

LOUISVILLE CITY RAILWAY COMPANY *v.* ELLEN D. SALTMARSH.

Appeals—Amendment of Record.

Where the record on appeal fails to show that any exception was taken to the giving of an instruction, it may be amended when there is something to amend by, but it cannot be amended where the defect can only be supplied from the mere recollection of the judge or the attorneys.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 27, 1875.

OPINION BY JUDGE PRYOR:

No exceptions were taken to the instructions given by the court below, nor is there any bill of evidence to be found in the record. An amended record was offered to be filed, showing that after the case was brought to this court a motion was made in the court below to so correct the record as to show that exceptions were taken to the instructions at the time they were given. A record in such a case may be amended when there is something to amend by, as when a paper has been ordered to be copied that constitutes a part of the record, or when there is some defect in an order that may be corrected by reference to some other order in the case, but where the defect is to be supplied from the mere recollection of the judge or the attorneys, we are satisfied no such correction can be made, unless by consent after the record is filed in this court.

Besides, the bill of evidence is not signed by the judge, or so identified as to enable this court to say that it formed any part of the record.

The judgment is therefore *affirmed.*

Mundy & Lawson, for appellant. Jeff. Brown, for appellee.

BERRY *v.* COMMONWEALTH.

Criminal Law—Homicide—Evidence—Confession.

Evidence of a witness is admissible when it shows so much of a conversation of the defendant in a murder trial as can be remembered by the witness, amounting to confession of guilt; and the fact that the witness cannot remember all that was said does not render inadmissible what he does remember of the conversation.

APPEAL FROM KNOX CIRCUIT COURT.

October 27, 1875.

OPINION BY JUDGE PETERS:

Appellant and Joseph Sampson, between whom angry words had passed, by mutual consent, engaged in a personal conflict, in which Sampson was stabbed and killed; appellant was indicted for the homicide, found guilty by the jury who tried him; and the court below, after having overruled his motion for a new trial, rendered judgment of death against him, and he has appealed to this court for a reversal of that judgment. On the trial, Thomas Wilson was introduced as a witness by the attorney for the commonwealth, to prove statements made by appellant in a conversation with one Henry Martin, in relation to the homicide, in the hearing of Wilson, while he was guarding appellant prior to his examination by the court of inquiry.

On being interrogated by the attorney for appellant, the witness states that he could not remember all the conversation that took place, that a great many things were said in the conversation that he did not remember. He was then asked by the attorney for the commonwealth to state what he did remember that Berry said. The attorney for appellant objected, and insisted that the witness should not answer the question; but the court overruled the objection, and permitted the witness to state what was said at the time referred to on the subject by appellant, or so much thereof as he could remember. To that ruling of the court appellant at the time excepted, and whether or not the court erred in admitting that evidence is the first question to be decided.

It may be that the greater part of the conversation, which was forgotten by the witness, was what Martin said; on that point, however, he was not examined, and no prominence will be given to that position. Owing to the frailty of human memory, there are few witnesses indeed, who, when called upon to narrate conversations had with, or confessions made by persons in their presence, can recollect all that was said, or can tell the substance of all that they heard, and fewer still who can give the words in which a communication is made either to them, or which they may have heard. Recognizing the infirmity of memory, and too often the want of fidelity on the part of witnesses, the law had declared that verbal evidence of admissions, or confessions of parties made in the pres-

ence of the witness alone who is called to prove them, is the most suspicious of all testimony, and to be received with great caution, and if extorted by threats or violence, or procured by promises of favor, or the creation of delusive hopes, the evidence will be rejected, thus protecting as far as practicable the accused from fraud and injustice, and from every injury that might result from their own indiscretion, or from the calamity of their situation.

2 Russell on Crimes 644. In this case the statements made by appellant, which Wilson was called on to prove, were made fully and voluntarily; they were made without request from any one, and not addressed to Wilson, but to Martin, in the presence of Wilson and several other persons. Martin was examined as a witness, and if Wilson had forgotten any material part of what appellant had said, and omitted any important portion of the conversation, or had not related with fidelity the statements made, the opportunity was presented by an examination of Martin to correct any mistakes or errors Wilson may have committed. And he could have examined the other persons who were present on the occasion. If the rule is to be established, that when a witness is called to prove admissions or confessions of a party, that unless he remembers and can prove all the party said at the time, whether that which he may not remember be material or not, his evidence is to be excluded. The effect of such a rule would be to exclude entirely proof of admissions and confessions, and abrogate a rule of evidence too long and well established to be disregarded. The court below, therefore, did not err in admitting the evidence.

After a careful examination of each and all of the instructions given to the jury at the instance of appellee, we have been unable to discover any available objection to them or either of them, or to perceive any error prejudicial to appellant. And of those asked by him, all were given except one which is marked "No. 3" in the transcript. In that, certain facts are selected from others, and especial prominence given to them, a practice which this court has repeatedly had occasion to condemn; and besides, these facts are assumed in the instruction to have been proved, thereby withdrawing from the jury the consideration of the evidence on that point, and asking for the court to decide the facts which it was the province of the jury to determine. The instruction for these reasons, if for no other, should have been refused.

Whether or not the court below erred in refusing to admit the offered statements of Doan as evidence is the next question to be

disposed of. It appears from the bill of exceptions, that appellant proposed to introduce G. A. Doan as a witness to prove statements he heard appellant make while he was guarding him, as to how the difficulty arose between Sampton and himself, which resulted in the death of Sampton. The court refused to permit the witness to testify, and that ruling of the court is complained of as erroneous. Neither appellant nor his counsel stated what the declarations were, which the witness would prove, or what they believed he would prove, or if they did, the bill of exceptions fails to disclose that they made such statement; and we cannot decide that the witness would have proved anything material for the defense, or that appellant was prejudiced by the refusal of the court to allow him to testify. *Tipper v. Commonwealth,* 1 Met. 6.

The bill of exceptions shows that Doan was not present, and did not hear the conversation or confessions as proved by Wilson and Martin. He could not, therefore, have been offered to contradict them, or to prove other statements made at that time which were explanatory of their evidence and beneficial to appellant; and any statements made by him at a different time, unless they were contemporaneous with the transaction, and so connected with it as to form a part of the res gestæ would not be competent. So that, in any aspect in which the question can be presented, the ruling of the court was proper.

The refusal of the court below to award a new trial on the ground that one of the jurors had formed and expressed his opinion of the guilt of appellant before he was impanneled, if that be an error, is not one of the four errors enumerated in Sec. 334 of the Crim. Code, for which this court can reverse a judgment of conviction. Of that question, therefore, we have no jurisdiction. After a careful consideration of the various questions presented by this appeal, we can discover no error which is available for a reversal by this court.

Wherefore the judgment must be *affirmed.*

Ford, for appellant. Attorney-General, for appellee.

C. D. BRUCE *v.* J. D. CARLISLE, ET AL.

Attachment—Levy and Sale—Ownership of Property Sold.

A plaintiff who causes an attachment to issue and causes property to be sold not belonging to the defendant, which property the purchaser is required to surrender, is liable to such purchaser for the money paid for such property.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 3, 1875.

OPINION BY JUDGE COFER:

The appellant sued Muir, and caused an attachment to be issued against his property, which was placed in the hands of the sheriff and levied upon a stallion as the property of Muir. Judgment was rendered against Muir, and the attachment was sustained, and the horse was ordered to be sold to satisfy the judgment; a sale was accordingly made, and the appellees became the purchasers of the horse, and paid to the appellant so much of the purchase price as was necessary to satisfy his judgment against Muir.

After the confirmation of the sale and the payment of the money to appellant, one Glass asserted claim to the horse, and the appellees surrendered him, and brought this suit to recover the money paid to the appellant; and judgment having been rendered in their favor, he has appealed.

The court instructed the jury, in substance, that if the horse was the property of Glass they should find for the plaintiffs, and whether that instruction was correct is the important question in this case.

Counsel for the appellant cites *M'Ghee v. Ellis & Browning,* 4 Litt. 245, decided by this court, and similar decisions by the courts of other states, in support of the position taken by him that the remedy of the appellees, if they have any, is against Muir or the sheriff. In *M'Ghee v. Ellis & Browning,* the sheriff, without the interference or knowledge of the plaintiff in the execution, levied upon and sold a slave belonging to one not a defendant in the writ, and took a sale bond, and returned the execution satisfied. The owner of the slave sued the purchaser and recovered the slave, and thereupon the purchaser filed his bill in equity to have his bond canceled. But the court held that the plaintiff in the execution having had no agency in the seizure and sale of the slave, and the return on the fi. fa. having barred his judgment and discharged his debtor, the purchaser must look to the defendant in the execution, whose debt he had paid, or to the sheriff, for indemnity.

But the doctrine of that case has no application to the facts of this case. It is true it does not appear that the appellant had any agency in levying the attachment; but he did have all agency in causing the horse to be sold. The attachment was levied and returned to court, and then there was an order for a sale of the horse,

and this must have been made at the appellant's instance; and he does not, therefore, stand in the favorable position in which McGhee stood in the case supra.

It was held in *Sanders v. Hamilton,* 3 Dana 550, that where the plaintiff in an execution is instrumental in causing it to be levied on goods which belong, not to the execution defendant, but to a third person, who asserts a better title and recovers his property from the purchaser, the latter may maintain his action against the plaintiff for indemnity, and the same principle was recognized in *Tucker, et al., v. Fogle,* 7 Bush 290.

Conceding that the appellant would not have been liable if the horse had been seized and sold under a fi. fa. without any participation on his part, it seems to us that he cannot be held not to have participated in the sale at which the appellees purchased. There would have been no sale without an order of the court or of a judge directing it to be made, and as the appellant must be taken to have procured such an order, it seems to us that the case falls within the rule in the cases last cited, and that the court did not err in instructing the jury.

The contract between the appellees and Glass was, we think, improperly admitted, and there may have been other illegal evidence which was allowed to go to the jury; but as there was nothing to contradict the testimony of Glass as to the ownership of the horse, except the possession of Muir, which was satisfactorily explained, the appellant was not prejudiced by the illegal evidence.

That the appellant's judgment against Muir appears on the record to have been satisfied, cannot furnish a sufficient reason for denying to the appellees the relief to which they are otherwise legally and equitably entitled. He may, probably, by appropriate proceedings, have that obstacle to the enforcement of his demand removed.

We perceive no error to appellant's prejudice, and the judgment is *affirmed.*

Z. Gibbons, for appellant. W. B. & G. B. Kinkead, for appellees.

WILLIAM MURPHY *v.* JOHN R. ASHBY.

Conveyance of Land—Bond for Deed.

Where a bond for a deed shows a sale of land in gross and not by the acre, the vendor cannot in disregard of the written contract be allowed to show that it was verbally agreed that the purchaser should pay for the land at so much per acre. He is bound by his written contract.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 4, 1875.

OPINION BY JUDGE PRYOR:

The bond executed by the appellee for title, as both parties admit, shows a sale in gross, and not by the acre. The appellant agreed to pay $2,000 for the land containing 116 acres, more or less. The deed is for a certain boundary of land, containing 116 acres, for two thousand dollars. The appellee now says that it was verbally agreed at the time of the execution of the deed that this sale in gross should be disregarded, and the writings evidencing the sale held for naught so far as they affected that part of the contract. If written contracts can be assailed in this way, but little importance is to be attached to this mode of evidencing the obligations of parties.

There is no mistake alleged, or if so, it is not pretended that any was really made, but the appellee is relying solely upon the fact of the verbal agreement made when the deed was signed. The party purchasing had been in possession for several years, with a bond and deed, showing how he entered upon the land, and the terms of his contract; and yet it is insisted that a verbal contract made at the same time is to determine the rights of the parties. If there had been a deficit in the tract of the nine acres, the appellant would have been without remedy. The production of his bond for title and the deed would have determined his rights, as it must those of the appellee. If this verbal agreement was a part of the contract, it should have been reduced to writing, and neither party is entitled to relief by reason of any excess or deficit in the number of acres in a case like this, unless such deficit or excess is sufficient to convince the chancellor that the parties, with a knowledge of that fact, would not have made such a contract. The judgment is *reversed* and cause remanded with directions to dismiss the petition, and also the cross-action.

W. N. Sweeney, for appellant. G. W. Williams, for appellee.

B. F. VANMETER *v.* R. P. PEPPER.

Guarantor—Notice of Acceptance—Pleading.

Where the petition fails to aver notice of acceptance of a guaranty, evidence cannot supply the place of such averment.

APPEAL FROM FRANKLIN CIRCUIT COURT.

November 9, 1875.

OPINION BY JUDGE LINDSAY:

We do not share with counsel for the appellant in the apprehension that injustice is likely to result from the practice of giving a peremptory instruction after evidence has been heard on both sides. If, upon looking into the pleadings, the court is of the opinion that the petition does not state facts constituting a cause of action, we see no reason why the jury should not be instructed to find for the defendant; but on the contrary there seems to be some weighty reasons why it should do so. If there is no cause of action in the petition, one sufficient reason for giving a peremptory instruction is that it saves the time of the court, which would otherwise be lost in the further consideration of the case.

Nor does the plaintiff lose any right of amendment by such a course; but on the contrary he has an opportunity to amend, which he would not have if, instead of a peremptory instruction, the court should allow the case to go to the jury, and then, in case a verdict should be found for the plaintiff, set it aside and render a judgment for the defendant. When the court is about to instruct to find for the defendant, it has power to allow the petition to be amended; but upon a motion for judgment, notwithstanding the verdict, no amendment can be allowed in order to support the verdict. A party who is not entitled to a verdict when it is rendered cannot sustain it by a subsequent amendment.

We still incline to the opinion that the petition was defective in failing to allege notice to the appellee of the acceptance of his guaranty. It appears in evidence that the guaranty was given in consideration that appellant would so change his note to Duckworth as to make it negotiable, and that he did so change it, and that the note afterwards came to the appellant's hands. That these facts show notice of the acceptance is not doubted, but it is not perceived how the evidence of a material fact can supply the place of an allegation of that fact in the pleadings.

If the foregoing facts appeared in the petition it would no doubt be sufficient upon this point; but as they are not alleged, and there is no express allegation of notice of acceptance, it seems to us the petition was defective on this point also.

In *Hockersmith v. Warren,* as the case is stated by counsel, the

point made was that Warren had received no notice that an arbitration had been made and an award found. There does not seem to have been any question whether he had notice of the acceptance of his guaranty. If it was not made to appear that Warren had notice that Hockersmith had accepted the guaranty and entered into an agreement to arbitrate in consideration of his undertaking to pay the award, the cases would be parallel; and if it had been held in that case that it was not necessary to aver notice of the acceptance, we should regard the opinion as authority in this case; but the failure to allege notice that an award had been made is a very different thing from a failure to allege notice of acceptance of the guaranty.

That there was no notice of a failure of the principal to perform the agreement, performance of which is guaranteed, must always come from the defendant; and he must show not only that he had no notice, but that he may suffer loss in consequence of the want of such notice.

As, for instance in this case, if appellee had sought to avoid liability on the ground that he received no notice of Duckworth's failure to comply with his contract, he would have been required to aver that he had received no notice and had or would sustain some loss by the failure to give him notice.

Lindsey, for appellant. G. W. Craddosk, for appellee.

SAMUEL MURRELL, ET AL., *v.* HENRY DUGAN'S ADM'R.

Suit Against Administrators—Jurisdiction.

Administrators of an estate can only be sued in the county in which they qualified and the county where their decedent resided at the time of his death.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 10, 1875.

OPINION BY JUDGE LINDSAY:

Henry W. Scott is the public administrator for Daviess county. The estate of Henry Dugan, deceased, was ordered in his hands to be administered. He instituted this action for the purpose of having said estate settled, its assets marshalled, and the conflicting rights of the various creditors adjudicated.

He alleges that Dugan died leaving a last will and testament, in

which he nominated and appointed one G. M. Murrell his executor; that said Murrell caused said last will and testament to be probated in the county court of Warren county; that he qualified as executor thereof in said county, and executed bond with Samuel Murrell and A. I. Woodland as his sureties. He charges further that whilst acting as executor under said appointment and qualification, Murrell took into his possession a very large amount of the assets of the estate of the decedent. He also alleges that Dugan died domiciled in Daviess county, and that the Warren County Court had no jurisdiction to probate his will, or to qualify his executor, and he insists that its action in the premises was and is void and of no effect, and that Murrell, by acting under it, became executor of his own wrong.

At the time this action was commenced Murrell was dead, and these appellants, Samuel Murrell and A. J. Woodland, were the administrators of his estate. They were made defendants, and judgment was asked against them for the value of the assets taken into possession by their intestate, under and by virtue of the claim asserted by him as executor of Dugan. They were served with process in Warren county. Upon their appearance to the action which had been instituted, and was then pending in the Daviess Circuit Court, the demurred specially to the jurisdiction of the tribunal in which they were sued. Their demurrer was overruled, and they then pleaded to its jurisdiction. Upon final hearing their plea in this regard was held to be unavailing. Their said plea should have been sustained. If their intestate had been living he could not have been sued except in the county of his residence or in some county in which he might have been summoned.

Leaving out of view the right of these parties as personal representatives to demand that, as to all matters touching the estate of their intestate, they shall be sued in the county in which they qualified, they certainly occupy as favorable an attitude as that occupied by their intestate. As the proceeding against them is strictly in personam, the question of jurisdiction must be determined by the provisions of Secs. 106, 107 and 108 of the Civil Code of Practice.

A personal representative cannot escape the effect of these provisions, as to parties indebted to him in his fiducial capacity by instituting an action to settle the estate of the decedent, and seeking therein to recover against them. The purpose of such an action is not to enforce the collection of debts due to the estate, but to marshall the assets, and pay them out to the crediors, distributees and devisees.

As the Daviess Circuit Court had no jurisdiction of these appellants, we cannot yield to the desire of counsel, and undertake to settle the question as to whether the county court of Warren county, or that of Daviess county, has jurisdiction to probate the will of the decedent. Any opinion we might express on the subject would be extrajudicial, and would not be binding on this or any other court. Nor do we feel inclined to go out of our way to settle a question which the parties in interest have heretofore seemed so reluctant to have settled.

An appeal from the judgment of the Warren County Court admitting the will to probate, would have determined this question of jurisdiction. An appeal from the order of the Daviess County Court directing the public administrator to administer the estate would have accomplished the same end.

So the question might have been finally settled in the case of *Murrell v. Wing,* in the Daviess Circuit Court, or in the action in the Henderson Circuit Court of Winfrey's heirs. All these opportunities were neglected, and it seems that a valuable estate has been wasted in consequence of the neglect or perverseness of those most interested in its preservation.

The judgment is *reversed* and the cause remanded with instructions to sustain appellants' plea to the jurisdiction of the court, and to dismiss so much of the petition as seeks relief against them.

Williams & Brown, for appellants.
Ray & Walker, for appellee.

MISSISSIPPI VALLEY LIFE INSURANCE CO. *v.* R. H. MORTON.

Life Insurance Policy—Representations to Procure.

While an insurance company is not bound to pay on a policy that was procured by false representations made by the insured, it is bound when the evidence discloses that such representations were substantially correct and true.

Evidence.

Close neighbors and friends who have an opportunity to observe a person almost daily are in a better position to state the condition of one's health than those seeing the person infrequently.

APPEAL FROM MARSHALL CIRCUIT COURT.

November 14, 1875.

OPINION BY JUDGE PRYOR:

This is an action by the appellee, Richard H. Morton, upon a pol-

icy of insurance issued by the appellant, the Mississippi Valley Life Insurance Company, upon the life of appellee's wife, Harriet A. Morton, for the sum of twenty-five hundred dollars. To this action upon the policy by the husband, for whose benefit it was made, it is alleged, by way of defense, that her lungs were diseased, and that she had an habitual cough, as well as other diseases prior to and at the date of the application for insurance and issual of the policy; that the statements made by the wife in the application and when the policy was delivered "that she never had inflammation of the lungs, habitual cough, or spitting of blood, were not only untrue, but false and fraudulent; that the statement made in the application that Dr. Brooks was her attending physician was also false, and that the insurance was affected by the agent of the company and the husband of the insured, with a knowledge of all these facts, for the purpose of defrauding the company.

A verdict having been rendered for the appellee, it is now insisted as one of the grounds for reversal that the wife of appellee was diseased with consumption at the date of the insurance, and concealed from the company or its agent such facts connected with the condition of her health as were material to the risks, and if disclosed would have deterred the company from issuing the policy. The proof is not only conclusive, but the fact is conceded that Mrs. Morton, the insured, died of consumption. The statement of her attending physician traces the indirect cause of her death to a cold taken by her after recovering from the measles, that she seems to have had about ten years prior to her illness and death.

The preponderance of the testimony establishes the fact that Mrs. Morton, until a short time prior to her death, was in the enjoyment of excellent health and with a constitution that promised as long a life as any of her female acquaintances of the same age. Neither the members of her family, or those who were her constant companions, anticipated that she was liable to such a disease as consumption, or had any premonitory symptoms of its approach. She married in 1864, and between that date and the time of her death in January, 1872, gave birth to three children, and attended to her household duties without any serious illness or evidences of failing health until a few months prior to her death. The colds she occasionally had were attended with slight coughing, but yielded readily to such mild remedies as are used in such cases, and were never regarded by any one as the incipient stages of a more formidable disease. The members of her own household thus did not know that

she had consumption until her attending physician pronounced her case hopeless. Her husband, a short time before his wife's illness, had been quite sick, and the latter had nursed him almost night and day for the period of fifteen days, and from that time she seems to have manifested much physical weakness and rapidly declined in health. Whether or not the remote cause of her disease was properly attributed to the measles she had in 1862 is involved in much doubt; and the testimony of medical witnesses based upon her physical condition from 1862 until her death rather tends to show that there was sudden inflammation of the lungs from some exciting cause of a later date than January, 1862.

It may have been that she was predisposed to consumption by reason of her illness with measles prior to her marriage, and that the exhaustion in waiting upon her husband only developed it into a fixed and permanent disease, or that she had no predisposition to any such disease, but died from a sudden attack of inflammation of the lungs. Indulging in either theory, the same conclusion must be reached as to the rights of the parties in this controversy.

It is true that there are three witnesses examined by appellant who speak of her emaciated and consumptive condition prior to and even on the day her life was insured, giving her own declarations "that she would live but a short time, and her life was not worth fifteen cents," etc. It is rather singular that the wife of appellee should have made such statements to those who were only her casual acquaintances, and who had no claims upon her confidence, particularly on the day her life had been insured, statements that, if true, forfeited the policy. She had intimate friends in the same town, some of whom lived adjoining her own premises, others living in her own house; and no such communication was even made to them, nor was there any discovery by these intimate friends, from her conduct or otherwise, that she was laboring under any disease. Some ten or eleven witnesses who had known her intimately for many years never discovered that she was deseased until after her husband's illness. The policy of insurance was issued in the 24th of July, 1871, and several witnesses state that they met the wife of appellee at picnics and barbecues in the months of May, June and July, 1871, some of those gatherings a distance of ten miles from where she lived; that she was then a lady of fine appearance, with a ruddy complexion, elastic step and seemingly in the enjoyment of fine health. These statements, in connection with those made by her numerous acquaintances, make it impossible that

her condition should have been such as described by the three witnesses of appellant on or about the time the insurance policy issued. It is also shown by the medical examiner for the company that he made the usual test in order to ascertain if her lungs were diseased, counting the respirations and pulsations. She had a large full and well-developed chest, when unexpanded measured 30½ inches, and expanded measured 33 inches. He applied other tests, and expresses the opinion that it was impossible for her lungs to have been diseased at that time. Dr. Brooks is the only physician who seems to have detected any evidence of consumption upon her prior to her last illness, and his opinion is based, not upon any examination made, but from her general appearance and cough, noticed by him whilst he was attending her husband in his illness that occurred some time after the policy issued.

The necessary and rational conclusion from all the evidence is that neither the husband nor wife made any representation to, or withheld any fact from the agent of the company at the time the application was made and the policy issued, that would have induced the agent to have acted otherwise than to issue the policy, and certainly nothing known by them or either of them that, if developed, would have caused the company or its agent to have declined the risk. She had not contracted the disease in 1862, and the weight of the evidence is that she was sound and healthy at the date of the policy; and there is no stronger or more conclusive proof in the record sustaining this view, than the statement of the medical examiner of the company, who made a close and careful examination of the applicant before the policy issued. The husband was not present when the examination was made, and there is nothing in the record from which it may be inferred that any combination or conspiracy was entered into between the husband and the agent to defraud the company; but on the contrary, the policies were issued upon the importunities of the agent, and not at the solicitation of the appellee; and whilst the character of this agent has been assailed by the appellant, the medical examiner stands, so far as this record shows, unimpeached in his character for professional integrity and moral worth.

It is insisted, however, by counsel for the appellant, that the appellee is estopped from controverting the facts contained in the affidavit of his wife's attending physician as to the origin of the disease, this affidavit having been presented by appellee to the company as a part of the preliminary proof of her death. The statement is "the indirect cause was taking cold after recovering from

measles." The case of *Campbell v. Charter Oak Fire & Marine Insurance Company,* 10 Allen (Mass.) 213, is relied on as establishing this view of the question. Campbell insured his hotel with the company, and by the terms of the charter, it was provided that no burning fluid should be used about the building without the consent of the company indorsed in writing on the policy. The hotel having been destroyed by fire, the insured made affidavit of the loss, stating therein "that the house was usually lighted with burning fluid in lamps." The statement made, instead of negativing that which was made requisite in his preliminary proof of loss by the terms of the policy, expressly admits its existence, and by his own affidavit shows that he has no right of recovery. The court below, in the case noticed, permitted the plaintiff to prove that the affidavits were made upon a mistaken state of facts; and upon an appeal, it was held that although the mistake might have been corrected, the plaintiff should have made an amendatory statement and presented it to the company prior to the institution of his action. He had already done that which, if true, forfeited his right to the insurance money, and there was no necessity for the company to make any other defense than appeared in plaintiff's own affidavit. The fact admitted by Campbell was not only material, but concluded his right to recover. Bliss on the law of life insurance, Sec. 259, lays down this rule based upon the opinion in the case of *Campbell v. Charter Oak Fire & Marine Insurance Co.*

The assured is bound by the statements contained in the proof presented by him unless before trial he notifies the company of some error in them. The meaning of this rule is that the facts material to plaintiff's right of recovery, set forth on the preliminary proof, cannot be contradicted without notice of some mistake as to the contents of the affidavit or proof first given the company. In the present case, by the terms of the policy, it was not necessary to negative the fact that the wife died of consumption, habitual cough, or spitting of blood. The policy only requires proof of the death, and certain negative statements that were made, and about which there is no controversy. It is admitted that the insured died from diseased lungs, and that she had measles nine or ten years before the death; but it is denied that she was laboring under any disease at the time the policy was issued, or that the spell of measles affected her general health. All the facts stated in the affidavit are admitted, in effect, on the trial below, except that the deceased had cold after measles, or that the origin of this disease of which she died was from

this cold. It was never admitted or proven in any affidavit that the deceased was laboring under any disease prior to the insurance, and the statement made by the attending physician in his affidavit as to his opinion of the remote cause of her death, could not have misled the appellant, nor was it such a material fact, if true, as barred the appellee's right of recovery, or necessarily affected the issues involved.

The only question presented is, Was the insured diseased at the time of the insurance? There was not even an apparent ground of defense disclosed in the affidavit of the attending physician as to the origin of the disease; it was an unnecessary statement of circumstances, upon which a mere opinion seems to have been based, and if true could not have prevented the recovery or constituted a defense to the action. *Cluff v. Mutual Benefit Life Insurance Co.*, 99 Mass. 317. Nor does it appear in this case that there was any false representation made by the deceased as to who was her attending physician. She had formerly lived in the county of Ballard, but had removed not long prior to the insurance, to the city of Paducah. The physicians who had been practicing in the family for years were living in Ballard, and after the removal to Paducah, Dr. Sanders was the only physician who seems even to have prescribed for her. Dr. Brooks was the family physician, or rather had been employed to attend her husband in his illness. Sanders says that he was not the family physician, and Brooks having been the physician of the husband, the wife, when asked who was her attending physician, responded "Dr. Brooks." We think there is no fraud or misrepresentation in this statement. She seems at that time to have had no medical attendant, and Dr. Brooks was as much the physician of the family as any other member of the profession in the city.

The court instructed the jury at defendant's instance, that if Mrs. Morton was diseased at the date of the application for insurance they must find for the defendant and further instructed the jury that if Mrs. Morton or her husband failed to disclose any material fact relative to the condition of her health then known to either of them at the date of the application, they must find for the defendant; also, that the printed or written application for the insurance is a warranty, and if they believe that any of the answers therein made are untrue, they must find for the defendant. The jury was again told that it was the duty of Mrs. Morton and her husband to have disclosed any material fact relating to the condition of her health prior to the date of the insurance. All their instructions were as

favorable to the appellant as they should have been, and embraced the whole law of the case. It is not error for the court to refuse to instruct the jury to make a special finding. The submission of such special issues being altogether within the discretion of the court. We perceive no error in the record prejudicial to the appellant, and the judgment is therefore *affirmed.*

R. K. Williams, J. C. Gilbert, for appellant.
Marshall & Bloomfield, for appellee.

JAMES BRIDGEFORD *v.* EDWARD W. BURBANK.

Indemnity Bond—Release from Liability.

Where one signs an indemnity bond as surety for another who signs an appeal bond, he has a right to expect the appellant to prosecute his appeal in good faith, and if the person holding the indemnity bond, by purchase or otherwise, so far alters the situation as to make it to his interest to have the judgment affirmed, the indemnity bondsmen would thereby be released as to him.

APPEAL FROM JEFFERSON CIRCUIT COURT.

November 14, 1875.

OPINION BY JUDGE LINDSAY:

On the 24th day of July, 1867, Clark A. Smith as principal and James Bridgeford as surety, executed to Edward W. Burbank a penal bond in the sum of twelve thousand five hundred dollars. The stipulations of said bond are as follows:

"Whereas the above named Clark A. Smith has heretofore and until the 24th day of July, 1867, been a partner and member of the house of J. H. Oglesby & Co., of said New Orleans; and whereas the said Smith did on the twenty-fourth of July sell, assign, transfer and set over unto the said Edward W. Burbank all his right, title and interest in said house of J. H. Oglesby & Co.; and whereas said Burbank did in said agreement of sale and transfer assume all liabilities and responsibilities of said Smith in and to said house of J. H. Oglesby & Co., excepting only and fully any and all such responsibility and liability as to him, the said Smith, as might arise by reason of a certain bond given in the fifth district court of New Orleans, for the appeal to the Supreme Court of Louisiana, of a certain suit entitled *Lucien Harris v. H. G. Andrews & Co.*

"Now the condition of this bond is such that if the said Clark A.

Smith and the said James Bridgeford shall well and truly pay or cause to be paid unto the said Edward W. Burbank, his heirs, executors, and administrators, the one-half (½) amount of all sums which said Edward W. Burbank may at any time hereafter be condemned to pay by reason of his having signed as surety the said appeal bond in the case of Lucien Harris against H. G. Andrews & Co., now pending in the Supreme Court of Louisiana, at the time when such sum or sums may become due in the discharge of the obligation in such bond of appeal mentioned, and shall from time to time, and at all times hereafter, save, defend, keep harmless and indemnify the said Edward W. Burbank, his heirs, executors and administrators, and his and their goods and chattels, lands and tenements, of and from one-half pecuniary obligation on said bond of appeal, arising, then this bond and obligation, shall be void, and otherwise shall remain in full force and effect."

There were two appeal bonds executed in the case of *Harris v. Andrews & Co.,* the one upon the appeal of Andrews & Co., the defendants in the district court, and the other upon the appeal of J. H. Oglesby & Co., who had intervened or interpleaded in said suit, and asserted claim to certain property therein attached. Upon each of said bonds, the members of the firm of Oglesby & Co., either as a firm or in their individual capacities, were bound as principal obligors or as sureties, and upon each of them Burbank was bound as surety.

The first question arising in this case is, Which of these bonds was it intended that the obligation of Smith and Bridgeford should indemnify Burbank against? To a correct understanding of this inquiry, it is necessary to state briefly the facts attending the litigation, which resulted in the execution of two appeal bonds. Harris sued Andrews & Co. for large sums of money, and among other property attached in the hands of Oglesby & Co. was ninety-one bales of cotton, and in the hands of Summers, Brannin & Co., eighty-three bales of cotton. December 18, 1866, Andrews & Co. procured the release of the attachment as to said 174 bales of cotton, by the execution of a bond with J. H. Oglesby & Co. (said firm being then composed of Oglesby and Smith) as sureties. The penalty of said bond was $24,000, and its condition was that Andrews & Co. should satisfy such judgment as might be rendered against them. By reason of this bond, J. H. Oglesby & Co. were enabled to retain possession of the 91 bales of cotton then in their hands, and it seems that

Summers, Brannin & Co. retained the 83 bales of which they had possession.

In December, 1866, J. H. Oglesby & Co. filed in the suit of *Harris v. Andrews & Co.* a petition or intervention, claiming that as merchants they had the right to subject to the payment of a debt of $14,761.03, due them from Andrews & Co., the 91 bales of cotton in their possession, and that by virtue of some contract or agreement with Andrews & Co., they held a claim upon or an interest in the 83 bales held by Brannin, Summers & Co. Harris responded to said petition of intervention, setting up and relying on a preferred lien, which he claimed to hold as the assignee of the landlord of Andrews & Co. Upon the trial of the cause, Harris recovered judgment against Andrews & Co. for $25,000, with interest and costs, and the petition of Oglesby & Co. was dismissed.

The attorneys representing H. G. Andrews & Co. appealed from the judgment against their clients, and J. H. Oglesby, Clark A. Smith and Robert Burbank executed as sureties an appeal bond for said Andrews & Co. in the sum of $40,000. At the same time, Oglesby & Co. prosecuted an appeal from the judgment dismissing their petition of intervention, and executed a bond in the sum of $250, with Burbank as their surety. Bridgeford insists that he indemnified Burbank against loss or damage resulting from his suretyship on this last named bond, whilst Burbank insists that the indemnity is against the obligation arising upon the bond executed for Andrews & Co. The obligation of July 24, 1867, describes the responsibility or liability indemnified against, as such as "to him, the said Smith, might arise by reason of a certain bond given in the fifth district court of New Orleans, for the appeal to the Supreme Court of Louisiana of a certain suit entitled *Lucien Harris v. H. G. Andrews & Co.*" It obligates Smith and Bridgeford "to pay to Burbank one-half of all sums he may be condemned to pay by reason of his having signed as surety the said appeal bond in the case of Lucien Harris against H. G. Andrews & Co.," and to "keep him harmless and indemnify the said Edward Burbank of and from the one-half pecuniary obligation on said bond arising."

The language used seems to point unerringly to the bond executed on the appeal of H. W. Andrews & Co. That bond is described, certainly, with reasonable accuracy; and if there had been no bond executed by J. H. Oglesby & Co. on an appeal growing out of the judgment rendered in the suit of *Harris v. Andrews & Co.*, upon their petition of intervention, there would be no ground to question

that the bond of H. W. Andrews & Co. is the bond against the "necessary obligation," of which Smith and Bridgeford undertook to indemnify Burbank.

The bond of J. H. Oglesby & Co. does not come within the description given. It was not executed for the appeal to the Supreme Court of Louisiana of a certain suit, entitled Lucien Harris against H. G. Andrews & Co.; but for the appeal (in an original proceeding of that style) of the suit of *J. H. Oglesby & Co. v. Lucien Harris and H. G. Andrews & Co.* Upon the case as presented by the pleading and evidence, the court below rightly held that appellant undertook to save, defend and keep harmless the appellee, Burbank, from loss or damage arising out of his being bound for Smith on the bond of appeal for $40,000, executed for H. G. Andrews & Co.

We need not analyze the petition. It is not as concisely drawn as it might have been; the averments of facts are not as direct and specific as they should have been made; but it contains all of the necessary allegations to make out a cause of action. The conditions of the bond of indemnity are fully set out. It is alleged that the judgment in the suit of *Harris v. Andrews & Co.* was affirmed by the Supreme Court of Louisiana, and that upon proceedings in the district court, regularly had, upon the bond of appeal executed on behalf of H. G. Andrews & Co., Burbank was condemned to pay nineteen thousand one hundred thirty-one dollars, and was therefore compelled to pay, and did pay on account thereof, nine thousand five hundred sixty-five dollars and sixty-two cents. He avers that appellant failed, neglected and refused to save, defend and keep him harmless from the obligation of said bond as he had covenanted to do, and prays that he be compelled to indemnify him for his loss and damage so sustained, by the payment to him of said sum of $9,565.62.

Appellant insists that by the terms of the bond of indemnity he is only bound to pay to Burbank one-half the sum or sums that he, Burbank, has been compelled to pay. He agreed to pay to Burbank "the one-half (½) amount of all sums which said Edward W. Burbank may at any time be condemned to pay by reason of his, said Burbank, having signed as surety the said appeal bond," and from "time to time and at all times hereinafter, to save, defend and keep harmless and indemnify the said Edward W. Burbank * * * of and from one-half the pecuniary obligation on said appeal bond arising." Considering all the language used, it is evident that Burbank was to be paid more than one-half of any amount he might be

compelled to pay. The stipulation of the bond is that Smith and Bridgeford will pay one-half the sum or sums he shall "be condemned to pay;" and this stipulation is further explained to mean "the one-half pecuniary obligation on said bond of appeal arising." This construction accords with the circumstances attending the whole transaction.

Bridgeford proved by his witness, Davidson, that the defense of the suit by Harris was entrusted by H. G. Andrews & Co. to J. H. Oglesby & Co., and that they employed counsel and managed the case. Considering the facts proved by appellant, it may be assumed that the suit was defended and the appeal prosecuted at the instance and for the benefit of J. H. Oglesby & Co. In point of fact, Burbank was surety on the appeal bond for Oglesby and Smith, and not for Andrews & Co. They were utterly and hopelessly insolvent, and doubtless regarded the suit in the district court as a contest between Harris and Oglesby & Co. over the attached property, and a matter in which they had no special interest.

Oglesby & Co. filed in the district court, and, in the name of their insolvent debtors, executed the appeal bond, and prosecuted the appeal to the Supreme Court; and as between the members of that firm and Burbank, they were primarily liable on said bond; and this was the liability of Smith, in and to the said house of Oglesby & Co., that the parties excepted out of Burbank's undertaking to assume all the liabilities and responsibilities of Smith in and to said house.

In order, therefore, to hold Burbank harmless and to indemnify him against this excepted liability, it is necessary that Smith and Bridgeford shall pay one-half of the sum Burbank has been condemned to pay, that is, one-half the "pecuniary obligation" that arose against the firm of Oglesby & Co., composed as it was of Oglesby and Burbank, on said appeal bond, when the judgment of *Harris v. Andrews & Co.* was affirmed by the Supreme Court of Louisiana. We do not concur with the court below as to the amount of the "pecuniary obligation" that then arose against the new firm of Oglesby & Co. It was not the full amount of the judgment of *Harris v. Andrews & Co.*, although Harris, or his assignee, had the right to proceed on that bond and compel the obligors therein to pay the full amount of his judgment.

The appeal bond was a second or cumulative security to Harris. The bond to discharge the attachment upon which Oglesby & Smith, who composed the old firm of J. H. Oglesby & Co., were bound

as sureties, was the first security that had been given him. This bond secured to him $24,000, and he might have proceeded upon it for that amount, and then looked to the appeal bond for such balance as might remain unpaid. By the execution of this bond, the 83 bales of cotton held by Brannin, Summers & Co., and the 91 bales held by Oglesby & Co., were released. The bond was substituted for said cotton, and by reason of its execution, the proceeds of the ninety-one bales were applied to the payment of the debt due from Andrews & Co. to Oglesby & Co., and thus became the assets of the last named firm. The assets secured by the sale of the 91 bales of cotton were, of course, charged with the payment of so much of the claims of Harris as were secured by the attachment bond; and when Burbank purchased from Smith, the latter's interest in the house of Oglesby & Co., he took the proceeds of these 91 bales of cotton, subject to the contingent liability of having to surrender them in satisfaction of said bond. This fact he recognized when the firm of Oglesby & Co., of which he was then a member, consented that the proceeds of the 83 bales of cotton held by Brannin, Summers & Co. should be so applied. It was by the application, among other funds, of the proceeds of said 83 bales of cotton that the claims of Harris, or rather of his assignee, was reduced to the sum finally paid by Oglesby and Burbank, viz., $19,131.

The liability of Smith upon the attachment bond was not excepted out of the liabilities by Burbank; and he could not, by making payment on a judgment founded on the appeal bond, escape his liability upon the attachment bond, and shift it upon Bridgeford, the surety for Smith. The payment of the judgment founded on the appeal bond was a satisfaction of all claims or rights arising out of the attachment bond, but as between Burbank and Bridgeford, to the extent of the 91 bales of cotton, satisfied the judgment on the appeal bond. Burbank was paying his own debt and not that of Smith. Smith was bound on the appeal bond as between himself and Burbank, for one-half the balance due to Harris or his assignee, after the proceeds of the 174 bales of cotton had been applied to the satisfaction of his judgment. Hence, from the $19,131 paid by Oglesby & Co., the proceeds of the sale of the 91 bales of cotton should be deducted, and Bridgeford then held to account for one-half the balance.

As a further ground of defense, Bridgeford relies on the fact of Burbank (as a member of the firm of Oglesby & Co.) pending the appeal in the Supreme Court, and before the judgment against An-

drews & Co. was affirmed, becoming part owner thereof, as working, as matter of law, his release as surety on the bond of indemnity. He also charges that Oglesby & Co. fraudulently interfered to procure the affirmance of said judgment. The circumstances under which Oglesby & Co. acquired an interest in the judgment of Harris against Andrews & Co., are not such as to authorize the inference of bad faith upon the part of Burbank. His firm was compelled to accept the transfer of an interest in said judgment in satisfaction of a claim against a failing debtor, or else to lose the whole of a debt, contracted, so far as the record shows, without the slightest view upon their part of looking to said judgment as a security.

Notwithstanding this fact, however, if, by reason of this transfer, Burbank became so far interested in the Harris judgment as to make it his interest to have it affirmed, rather than reversed by the Supreme Court, Bridgeford ought not to be held bound on the bond of indemnity. When Bridgeford signed said bond he had the right to expect, and no doubt did expect Oglesby & Burbank to prosecute the Andrews & Co. appeal with good faith and reasonable diligence, and under the circumstances that was an implied contract between the parties to the bond of indemnity, that they would so prosecute it. Burbank had no right to so far alter the situation by agreeing, however innocently, to an interest in the appeal in the Supreme Court adverse to that of Bridgeford. He was in a limited sense the agent of Bridgeford to prosecute said appeal; and if by his own act or that of his firm, he acquired such an interest in the Harris judgment as to create in his bosom a conflict between self interest and the duty he owed to Bridgeford, and without notice to the latter of such change of interest, he permitted the cause to progress to a hearing in the Supreme Court, he thereby subjected Bridgeford to a risk that he could not have anticipated when he signed as surety for Smith. If there was such a change of interest (a question of fact upon which we express no opinion), Burbank necessarily lost all incentive to labor for the reversal of the judgment against Andrews & Co. He profited by the affirmance. He would have lost money had he succeeded in the attempt. He contracted with Bridgeford that he would work to reverse it. If, by the acquisition of the alleged interest, Burbank changed his attitude of himself and Bridgeford, and by such change increased the risk of the latter, he cannot complain that the surety, whose rights were disregarded and whose risk was increased, is thereby discharged from the obligations

of his contract of suretyship. *Mayhew v. Boyd,* 5 Md. 109; *Norton & Williams v. Roberts & Latham,* 4 Mon. 492.

Bridgeford is not bound to show actual injury. If he shows that the judgment of *Harris v. Andrews & Co.* was affirmed by the Supreme Court of Louisiana, and that Burbank profited by the affirmance, his defense is made out. Of course, if Burbank, by himself or through the agency of his firm, interfered to procure an affirmance of the judgment against Harris & Co., such interference operated to discharge Bridgeford, as a party indemnified cannot be allowed to be instrumental in bringing about the event, upon the happening of which the liability of the indemnitor depends. We need not decide whether the court erred in compelling the appellant to answer before a complete transcript of the proceedings in the Louisiana court was filed, as upon the return of the cause he may avail himself, by an amended answer, of any information acquired therefrom. The alleged error as to the admission of the statement of Dupey need not be considered, as the deposition of the absent witness will doubtless be taken before another trial of the cause.

As some of the rulings of the court below do not conform to the views herein expressed, the judgment is *reversed* and the cause remanded for a new trial upon principles consistent with this opinion.

Lee & Rodman, Muir & Bijou, for appellant.
Hagan & Dupuy, for appellee.

SOUTHERN MUTUAL LIFE INS. CO. *v.* ELIZA J. DOWNS, ET AL.

Life Insurance Policy—Failure to Pay Premium.

When a life insurance policy provides that failure to pay a premium when due renders the policy void, and it is shown that such failure occurred, there can be no recovery on such policy.

Burden of Proof.

When in a suit on an insurance policy the company claims a forfeiture on account of a failure to pay a premium, the burden is on the plaintiff to show that the right to forfeit had been waived by the company, or that the agreement, if any was made, to extend the time of payment had been waived by the company.

APPEAL FROM JEFFERSON CIRCUIT COURT.

November 19, 1875.

OPINION BY JUDGE PRYOR:

It is immaterial in this case what statements were made by Petrie,

the agent of the company, in order to induce the insured to enter into the contract. There is no fraud alleged in its procurement, and the representations then made, either to Downs, the insured, or to others by the agent, are not competent to change the terms of the policy. The policy is the evidence of the contract between the parties, and what was said by the agent prior to its date, in order to effect the insurance, should have been excluded. It is claimed by appellees that, prior to the falling due of the second semi-annual premium, the appellant, by its local agent, waived the right to forfeit the policy, and extended the time of payment for thirty days. The petition fails to allege in direct terms the authority of the agent to extend the time for payment, or to waive a forfeiture; but the answer supplied this defect by denying that the agents, or either of them, had any such authority from the company.

By the terms of the policy the failure on the part of the insured to pay the premiums on or before the day they fell due, rendered the contract of insurance void, and forfeited all payments previously made. It is further indorsed on the policy accepted by this insured, that "no person, except the president or secretary, is authorized to make, alter or discharge contracts or waive forfeitures." It must be assumed that the deceased knew that the president and secretary were the only persons authorized to waive the forfeiture, as it was a part of the contract; and this indorsement, independent of other proof, negatives the idea that the local agent had any such authority. The burden, then, is on the appellee to show that this right to forfeit had been waived by the company, or that the agreement, if any was made, to extend the time of payment, had been waived by the company.

The local agent would have made no such agreement binding upon the company unless authorized to do so. This authority must have been derived from the company through its president or secretary, or by reason of some corporate action, and must be shown to exist, and cannot be implied from the fact only that the agent exercised the power. The authority may be general or restricted to a certain class of patrons; but when established it must also appear that the alleged extension of payment was given Downs upon the latter's agreement to pay within or at the expiration of the thirty days. The evidence in the case fails to show any custom on the part of the company in dealing with its patrons by which its rules in regard to the waiver of the forfeiture had been abandoned; and the only question to be determined upon the facts of the case as they now ap-

pear, is, Was there an agreement made between appellant's local agent and Downs, prior to the falling due of the premium, by which the time of payment was extended for thirty days, and if so, did the local agent have any authority from the president or secretary to make such an agreement with Downs, or did he have, by instructions from the company or its secretary, a general authority to extend such payments when applied to by its patrons?

It is not pretended that the regulations of the company were changed by any corporate action. There is a distinction to be made between an agreement of this character entered into after forfeiture, and a like agreement before forfeiture. After the non-payment occurred, the contract becomes void; and a mere promise made afterwards to receive the money, or to give time for payment, must be regarded as an act of indulgence or favor only, and when not complied with by the insured prior to his death, cannot afterwards be enforced. If, however, the time is extended before the forfeiture takes place, no forfeiture occurs until the expiration of the time to which the payment has been extended. The company would be estopped to say that there was no consideration for such an agreement, as its own act has induced a non-compliance with the original contract under which the right of forfeiture is claimed. Both the insured and the local agent were laboring under the belief that the right to extend the payment was a part of the original contract; still this cannot bind the company unless, by general or special instructions given him, this local agent was clothed with this additional power.

That part of the instruction No. 2 reading, "or was held out to the public by the company or its secretary as having such authority, or if said agent so held himself out to the public as having such authority, with the knowledge, approval and ratification of the company, it is estopped," etc., should not have been given, for the reason that there were no facts upon which to base it. If the extension was made by the agent at the instance of Downs upon the latter's agreement to pay the premium within or at the expiration of the thirty days, and this act of the agent was ratified by the company or consented to by the secretary, it will bind the company; or if the agent had authority to make such agreements, either verbal or written, from the company or its secretary, such an agreement, when made, would bind the company.

The facts of this case have not been discussed only so far as is required to settle the legal questions upon the facts as they are

now presented. For the reasons indicated the judgment is *reversed* and the cause remanded, with directions to award a new trial and for further proceedings consistent with this opinion. The pleadings should be amended so as to allege more definitely what the agreement was between the agent and the insured.

John Roberts, William T. Barrett, John Boyle, for appellant.
E. E. McKay, for appellees.

W. E. CLARK *v.* A. LEE'S ASSIGNEE, ET AL.

Public Schools—Principal of a Public School.

The principal of the public schools of the city of Paris is an employee of the state, and the money in the hands of the officers of said city for school purposes is public money held by the officers as agents of the state.

Common-School System.

The state has undertaken to maintain a system of common schools and this is a state system.

Pay of Teachers—Attachment.

The state must be allowed without interference by creditors to employ and pay teachers, and the amount due from the state to its teachers cannot be reached by attachment.

APPEAL FROM BOURBON CIRCUIT COURT.

November 23, 1875.

OPINION BY JUDGE LINDSAY:

In the matter of managing and supporting the common schools established within its territorial limits, the city of Paris acts in its political capacity. It is a part of the machinery of the state government, by and through which the system of common schools, established by the institution, is maintained.

It is immaterial whether in strict law, the appellant, who is the principal of the public school of the city of Paris, is or not an officer. He is an employe of the state. The moneys in the hands of the officers of the city of Paris, set apart by law for school purposes, are public moneys, and are held by those officers as agents and representatives of the commonwealth; and this is the case as well with the moneys received by special taxation in the municipal-

ity of Paris, as that turned over to its officers by the school commissioner of the county of Burbon.

The state has undertaken to maintain a system of common schools. To do this, it must be allowed, without interference by creditors, to employ and pay competent teachers. The amount due from the state to the teacher of a public or common school cannot be reached by attachment. *Tracy & Loyd v. Hornbuckle & Wife,* 8 Bush 336.

The funds attached in this case are school funds, and they were attached in the hands of an officer set apart by law, to hold and disburse them in accordance with law. The attachments should have been discharged. Judgment *reversed* and cause remanded for a judgment conformable to the views herein expressed.

Brent & McMillan, for appellant.
Buckler & Paton, for appellees.

LEXINGTON, LOUISVILLE & CINCINNATI R. CO. *v.* GEORGE A. CASTLEMAN.

Cost Bonds—Non-Resident Plaintiffs.

The failure of a defendant to move to dismiss because no cost bond is filed amounts to a waiver of the right he has to have the action dismissed.

APPEAL FROM FAYETTE CIRCUIT COURT.

November 24, 1875.

OPINION BY JUDGE LINDSAY:

The failure of a non-resident plaintiff to execute a bond for costs at the time he institutes his action, cannot be taken advantage of by being pleaded as matter in abatement. We do not doubt that a statement in the answer of the fact of the non-residency, and of the failure to execute the bond, may be made the foundation of a motion to dismiss the action. But in this case no such motion was made, and we are constrained to hold that the failure to make the motion to dismiss amounted to a waiver of the right secured to defendant litigants by Sec. 5, Chap. 26, General Statutes.

The original answer does not show that the receiver of the railroad company was appointed by the Louisville Chancery Court, prior to the time the moneys in the hands of the garnishee were

earned. If he was not, it is plain the title to these moneys did not, and could not pass to him in virtue of his subsequent appointment. The facts that Monroe was the agent of the railroad company, and that his possession was that of his principal, amounts to nothing in a case of this character. Upon a proceeding to enforce a judgment after a return of no property found, moneys in the possession of the debtor himself can be reached.

The averment in the amended answer that the mortgage to Douglas covers the earnings and profits of the defendant railroad, is but the averment of a conclusion of law. The stipulations contained in the mortgage are not set out in the answer, and no copy thereof was filed with it.

Neither the answers of the company nor the response of the garnishee show title in either the receiver or the mortgagee, and we are therefore of opinion that the court below did not err in applying the attached property to the satisfaction of appellee's judgment.

Judgment *affirmed.*

Morton & Parker, for appellant.
Smith & Shelby, for appellee.

LIVINGSTON COUNTY COURT *v.* S. H. PILES.

Collection of Taxes—Duties of Tax Collector.

The act of February, 1868, authorizing the appointment of a tax collector did not fix the time he should hold such office; and if while acting as such he collects taxes he and his sureties are liable for his failure to account for them, and the fact that he is styled as sheriff in the bond cannot affect the liability of his sureties.

Levy and Collection of Taxes.

Where a tax levied under claim of legal authority has been collected by an officer whose only authority for making the collection is the act under which the tax was collected, he cannot when sued for the money, escape liability on the ground that it was levied and collected without authority of law unless the want of authority is clear.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

November 26, 1875.

OPINION BY JUDGE COFER:

The act of February, 1868, authorized the county court to ap-

point a collector to collect the tax authorized by said act to be levied, but did not fix the term for which he should remain in office. Piles, having been appointed collector of the tax in 1868, continued in office; and, although he is described in the bond sued on as sheriff, he and his sureties undertook that he would collect and account for the jail tax. They do not deny that Piles collected the tax, but merely deny that he collected it as sheriff, or that he was ordered to collect it as sheriff. He was empowered to collect the tax under his appointment as collector, and that he is styled sheriff instead of collector cannot affect the liability of his sureties.

We think the whole act, when taken and considered together, authorized the county court to levy and collect a tax of fifty cents on the $100 worth of taxable property, and fifty cents on each title each year for three years.

It is true that a delegation of the power of taxation will generally be strictly construed in favor of the public; but when a tax has been levied under claim of legal authority, and has been collected by an officer whose only authority for making the collection was the act under which the tax was levied, he cannot, when sued for the money thus collected, escape liability for it on the ground that it was levied and collected without authority of law, unless the want of authority is clear.

If the tax payers had resisted the collection of the tax, the courts might have required the county court to exhibit clear authority to levy and collect it; but the tax having been collected, the officer who collected it and has the money in his hands cannot escape liability because of a mere doubt whether the tax was legally levied and collected. Nor can the appellees escape liability upon the ground that a greater sum was collected than was actually required to build the jail and jailer's residence. It was, in the very nature of things, impossible to know the exact amount that would be required to complete the building, or the amount that would be collected on the levy made.

We are, therefore, of the opinion that the court erred in dismissing the petition, and the judgment is *reversed,* and the cause is remanded for a new trial upon principles not inconsistent with this opinion.

J. K. King, W. D. Greer, Lindseys, for appellant.
Caswell Bennett, for appellee.

JOHN MATTINGLY *v.* F. L. SIMMS, ET AL.

Attachment—Burden on Plaintiff.

The plaintiff in an attachment suit must show that he had a subsisting cause of action when he commenced it, either by showing that his debt was due and unpaid or by showing that the grounds of attachment, or some one of them, existed.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 26, 1875.

OPINION BY JUDGE PETERS:

Sec. 259, Civ. Code, authorizes an attachment by a creditor against the property of his debtor before his claim is due, when either of the reasons therefor exist as therein specified; and if a suit is brought and an attachment sued out on a claim not due at the institution of the suit, it cannot be maintained unless the attachment is levied on the property of the debtor, and is sustained. And if that is not the case, it is not sufficient to amend the petition and allege that the debt is then due, and unpaid. The plaintiff must show that he had a subsisting cause of action when he commenced it, either by showing that his debt was due and unpaid, or by showing that the grounds, or some one of them, existed as provided in Sec. 259, Civ. Code.

In this case the debt was not due when the action was instituted; and although it appears from the officer's return that the attachment was levied on property of the defendants, it does not appear that it was sustained, and consequently the jurisdiction of the court is not shown. But if the plaintiff failed to sustain his attachment, his action should abate, and his right to bring another action be preserved. The judgment in this case is an absolute dismissal of the action, and is final; and it will operate as a bar to another action on the note, which is erroneous and prejudicial to appellant.

Wherefore the judgment is *reversed,* and the cause is remanded with directions to dismiss the action without prejudice to another action on the note.

W. M. Sweeney, for appellant. Ray & Walker, for appellees.

JARVIS THOMPSON *v.* NANCY GLINN.

Mental Capacity to Contract—Deed.

The deed of an insane person is not necessarily void. Such deeds stand on the same ground with the deeds of infants, and courts should not set them aside only when justice requires it, and only then on terms just to all parties.

APPEAL FROM SCOTT CIRCUIT COURT.

December 1, 1875.

OPINION BY JUDGE COFER:

June 24, 1863, the appellee conveyed to the appellant a tract of land in Scott county, containing eighteen acres, for the recited consideration of $717.00 in hand paid. In August, 1871, she brought this suit to have said deed set aside and cancelled.

She alleged that before and at the time of making said conveyance, she was of unsound mind and incapable of making a valid contract; that the only consideration for the conveyance was a negro woman and her child, then not worth over one-third as much as the land; that in consequence of her mental condition she was incapable of judging of the then value of slaves, but that the appellant, who was fully aware of the depreciation of their value in consequence of the war then pending, took advantage of her mental imbecility and induced her to trade her land for the slaves.

The appellant denied the material allegations of the petition, and averred that the facts were that the appellee had been the owner of the slaves, and had sold them to a negro trader, and afterwards, repenting of what she had done, desired to get them back, and induced him to go to the person to whom she had sold them, and buy them back for her; that he kept them in his possession from the fall of 1860, when he got them back, until the deed was made; and was at all times ready and willing to let her have them upon being reimbursed, and that being unable to refund the amount paid out by him in money, she conveyed him the land for that purpose at say $665, and let him have a note for $185.00, he having paid out for the slaves $850 in cash.

The evidence shows that she sold the slaves on the 12th of April, 1860, and that soon thereafter she became very desirous to get them back, and was greatly distressed because she had sold them; that, not having the money to repurchase them, she applied to several persons to buy them for her; and that the appellant finally consented to do so, and made the purchase in September, 1860. On the 27th of June, 1860, the appellee was found by a jury to be of unsound mind, and was sent to an insane asylum, where she remained until the 28th of September of that year, when she was discharged as restored; and in June following she was found by a jury to be of sound mind; and the appellant, who had been appointed her committee, was discharged. She subsequently recog-

nized her obligation to take the slaves and reimburse the appellant, and on the 24th of June, 1863, made the deed. In April, 1863, she was again found to be insane, and was sent to an asylum, where she remained until 1870, when, being again restored, she was discharged.

It is most probable that her aberration of mind was not caused by the distress consequent upon having sold the slaves; but there can be no doubt that her malady was greatly aggravated thereby; and it is equally clear that the appellant was induced to repurchase them by the request of herself and her friends, and that he did not do so on his own account. It also satisfactorily appears that at the time she requested him to purchase the slaves for her, and when she agreed to compensate him for his outlay by conveying to him the land, she was not insane, while it is equally clear that she was insane when she executed the conveyance. There is no evidence whatever of any importunity on the part of the appellant to induce her to make the conveyance, or of any bad faith or improper conduct on his part in the whole transaction. He paid $850 for the slaves, and not having been able to collect, the $185 note and the land, worth not exceeding $700, is all the return he has received therefor. Under such circumstances we do not think the deed should have been set aside. The deed of an insane person is not necessarily void. *Jenkins, et al., v. Jenkins,* 3 T. B. Mon. 327; *Hunt v. Weir,* 4 Dana 347; *Jones's Adm'r v. Perkins,* 5 B. Mon. 222; 2 Greenleaf on Evidence, Sec. 368. Such deeds stand upon the same ground with the deeds of infants. 2 Greenleaf 369; *Breckenridge's Heirs v. Ormsby,* 1 J. J. Marsh. 236. The chancellor will interfere to set them aside only when justice requires it. *Hopson v. Boyd,* 6 B. Mon. 296, and then only upon such terms as will be just to all the parties interested. *Bailey v. Barnberger,* 11 B. Mon. 115; *Petty v. Roberts,* 7 Bush 410; 2 Kent's Commentaries 240. The same principle is recognized in *Coleman, et al., v. Frazer, et al.,* 3 Bush 300. At the time the appellant expended his money at the instance of the appellee, the slaves were worth the money he advanced for them; he advanced it for her benefit, and without any view to his own interest; his act was one of benevolence, and not of selfishness; it was approved by the appellee; and but for subsequent events, which neither could foresee, it is probable that all the advantage derived from the purchase would have resulted to her. It is certain that the appellant neither expected nor could have derived any pecuniary benefit from what

he did; and it would be unjust now to deprive him of the benefit of the partial indemnity which he has obtained.

As already said, the appellee was mentally competent to bind herself when she made the request of appellant that he would purchase the slaves for her, and also when she subsequently agreed to convey the land to reimburse him; and the circumstance that she was insane when she made the deed will not entitle her to have it set aside.

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

Geo. E. Prewitt, A. Duvall, for appellant.
J. T. Robinson, for appellee.

J. D. JONES *v.* W. O. HAMPTON'S ASSIGNEE.

Promissory Note—Assignor.

Where a promissory note not discounted by an incorporated bank, not being negotiable as well as payable in bank, one signing on the back thereof is only liable as assignor and cannot be sued until the maker of the note has been prosecuted to insolvency.

APPEAL FROM BOYD CIRCUIT COURT.

December 6, 1875.

OPINION BY JUDGE COFER:

John M. Dunlap executed a note for one hundred fifty dollars, payable ninety days after date, at the Ashland National Bank, to the order of the appellant, J. D. Jones. The note was indorsed by Jones for the accommodation of the maker, and was delivered to him to raise money by a sale thereof.

Dunlap sold and delivered the note to Wilson, Andrews & Co., who were private bankers. Wilson, Andrews & Co. made an assignment of all their effects to Hampton before maturity of the note, and Hampton, as assignee, indorsed the note to A. C. Campbell, cashier of the Ashland National Bank, for collection and credit. The note was protested for non-payment, and suit was brought thereon by Hampton, assignee, against both Dunlap and Jones. Jones demurred to the petition, and his demurrer was overruled. He then filed an answer, and a trial was had, which resulted in a judgment against him; and he prosecuted this appeal to obtain its reversal.

The note was not discounted by an incorporated bank, and not being negotiable as well as payable in bank, could not have been placed upon the footing of a foreign bill of exchange, if it had been discounted in the bank where it was payable. Sec. 21, Chap. 22, Gen. Stat. The appellant was, therefore, only liable as assignor. Sec. 14, Chap. 22, Gen. Stat., and cannot be sued until the maker of the note has been prosecuted to insolvency.

The court, therefore, erred in overruling the demurrer. Judgment *reversed,* and cause remanded with directions to sustain the demurrer and dismiss the petition as to the appellant.

J. D. Jones, for appellant. L. T. Moore, for appellee.

S. M. JONES'S ADM'R, ET AL., *v.* PATSY SHY'S ADM'R, ET AL.

Administrator Buying Equity in Real Estate.

An administrator who is an heir may legally purchase for the estate the equity of redemption in real estate sold and redeem the land from the original purchaser and save money to the estate he is administering, and where he does so is entitled to credit for the sum thus expended.

Administrator's Right to Buy Real Estate.

While an administrator has no right to invest personal assets in real estate he may do so when it is the only means of saving a debt due to the estate.

Administrator's Liability.

Where an insolvent debtor to an estate has a claim against the estate and the administrator fails to withhold money due to such debtor but pays him in full and is unable to collect the debt due the estate, he is liable for negligence in having paid such debtor.

APPEAL FROM MERCER CIRCUIT COURT.

December 9, 1875.

OPINION BY JUDGE COFER:

B. M. Jones, administrator of S. M. Jones, had in his hands debts due his intestate against Metheny, Kennedy, etc., amounting to more than two thousand dollars, for which he recovered judgment, and to satisfy which he caused Kennedy's equity of redemption in real estate property sold under fi. fa. and purchased by Forsten, to be levied on and sold; and with the consent and advice of distribu-

tees of the estate of S. M. Jones, owning an interest equal to one-third of the whole, the administrator, who was also a distributee owning an interest of one-fourth, bought the equity of redemption at the sum of $1,670.17; and to redeem the land from the original purchaser, he paid to him out of assets belonging to the estate of S. M. Jones, the sum of $2,324.30. It appears that all the parties liable for the debt were insolvent except Kennedy; that he had no estate except the equity of redemption in question; that the real estate secured was worth the amount paid to Forsten and the amount bid for the equity of redemption; and that by the action of the administrator in the premises, the sum of $1,670.17 was saved to the estate.

On a settlement of his accounts, the administrator claimed a credit for the amount paid to Forsten to redeem the land, and resisted being charged with the amount of his bid, claiming that he had a right as administrator to purchase the land as the only means of securing the debt. The circuit court refused to allow him credit for the sum paid to redeem the land, and charged him with the amount bid for the equity of redemption; but it gave him relief so far as the distributees who consented to the purchase were concerned, by charging them with their respective distributable shares of these two amounts, so distributed to them by the administrator, and crediting him in his accounts with them respectively, but refused him any relief as to the other distributees, some of whom were infants, and of this he complains.

It is certainly true that as a general rule an administrator has no right to invest personal assets in real estate; but when, as in this case, he buys real estate as the only means of saving a debt due to the estate, he should not be subjected to personal liability on that account, until it is made manifest, by a sale of the land, that loss will result; and as to the amount of his bid for the equity of redemption, he certainly ought not, in equity, to be charged beyond what he may realize out of it. To the extent of his bid for the equity, the estate has been benefited, and not injured, by his action; and he ought not to have been charged with any part of it, but should have been allowed, as against those consenting to the purchase, credit for their respective shares of the amount paid to Forsten; and then he should have been directed to sell the land, and reimburse himself and those consenting to the purchase for their investment, and to account to the whole of the distributees for the excess.

The administrator also complains that the court erred in charging him with a note on Curry for $1,050. The facts are these: the intestate, at his death held a note for that amount on F. W. and John Curry, which was past due; after his qualification the administrator permitted the obligors to renew the note, which was made payable to him, January 1, 1869. Both the obligors were then solvent, and remained so until the 9th of January, 1869, when they became insolvent, and the debt was lost. Had the note not been renewed, suit might have been brought on it at the September term, 1869, which was the first term of the circuit court of the county in which they resided, after the administrator qualified, and the debt could have been collected. If he had not renewed the note, and had failed to sue on it to the first term after his qualification, the same loss would have been sustained. Did the mere fact of allowing the note to be renewed, of itself, render the administrator liable for the loss of the debt? The renewal was not illegal, and the administrator did not become liable as for a conversion; if liable at all, it must result, not from a wrongful conversion of the old note, but from his failure to secure the payment of the new one. In other words, if liable at all, it must be for negligence, and not in consequence of the act of renewing the note.

We apprehend that if he had not renewed the note, and had failed to sue, he would not have been liable for the loss; for the obligors were apparently solvent, and were so regarded by the witnesses; and the position assumed, that the debt was lost by the renewal, admits their solvency up to and after the September term of the court in 1868. As knowledge of their failing circumstances has not been brought home to the administrator, we are bound to assume that there were no such indications of approaching insolvency, prior to the September term of the court, as would, had the note not been renewed, have made it incumbent on the administrator to sue on the peril of becoming individually liable. The intestate had created the debt, and no doubt deemed the debtors entirely solvent; and there is no evidence that they were any less responsible at the time of the renewal than at the time of the creation of the debt. As there is not the slightest evidence of bad faith or negligence on the part of the administrator, whose act was apparently beneficial to the estate, and was lawful in itself, we are of opinion that he should not have been charged with the amount of the note after his qualification.

We think the court erred in allowing the administrator credit for $114.10 paid by him to F. G. and J. H. Metheny. They were indebted to the administrator on the notes; and as both members of the firm were obligors in the notes, the administrator should have off-set the notes against the account.

Although there was a large sum of money drawn out of the bank during the first two years by the administrator, on checks not corresponding with debts paid or amounts distributed, yet, upon a careful examination of his accounts, as the evidence adduced to show that he used the assets in his hands for his individual purposes, we are satisfied that the evidence warranted any charge against him for interest during the first two years.

We cannot say that the circuit court abused a sound discretion in allowing the administrator five per cent. commission on payments to creditors, and on disbursements to the other distributees. *Cabell v. Cabell's Adm'r, et al.*, 1 Met. 319. But he should not have been allowed commission on his own distributable shares or debts due to himself. *Worseley's Ex'r v. Worseley,* 16 B. Mon. 455.

The statute of limitations is not available against the claim of B M. Jones for balance due him from his intestate as administrator of David Jones. The settlement of the 6th of March, 1860, was a recognition of that debt by S. M. Jones; and whether it be treated as filed on the day of its date, or at the time when it was in fact filed, it is an indebtedness evidenced by record in the nature of a judgment, and would only be barred by fifteen years; and if this were not so, still the administrator might retain it. *Payne and Wife v. Pusey,* 8 Bush 564.

The plea of payment is unsustained by any evidence whatever; and the fact that the claimant was administrator of the debtor, and could have suppressed evidences of payment to himself, found among the papers of the intestate, will not warrant this court in presuming that the debt was paid.

Wherefore, on the appeal of *B. M. Jones v. Shy's Adm'r,* the judgment is *reversed,* on both the original and cross-appeal, and the cause is remanded for further proceedings not inconsistent with this opinion.

C. A. and P. W. Hardin, for appellants.
Thomas C. Bell, for appellees.

H. H. KLAIR *v.* MALIND ASBY, ET AL.

Wills—Construction.

A testator by his will freed his slaves and devised a house and lot to his executors in trust for such slaves, and set apart to each his or her part of said house, and provided if any of them should fail to occupy their part they should have no power to put tenants into it, and directed "that when it shall become difficult for said slaves and their offsprings to occupy said house and lot, owing to the great increase in their number, that it shall be advantageous to them all to sell said house and improvements, my executors shall do so, and the proceeds of sale shall be invested for their benefit in some way, so as to accrue to them the greatest permanent benefit. The portions of all * * * to be equal, the children of any that may have died taking the portion of the ancestor; and if any die leaving no issue, the interest of that one or more * * * to go to the survivors." It was held that the executors were to decide when a sale was necessary, and where the executors are dead the chancellor, having all the interested parties before him, has the power to do what the executors might have done, and having acted, his action is conclusive until reversed or set aside, and that under such will the devisees named took an estate in fee, and hence it was not necessary to name children of devisees who were alive as parties to a proceeding to sell.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 18, 1875.

OPINION BY JUDGE COFER:

Calver and wife conveyed a lot of ground in Louisville to Clark, to be held by him in trust for John Murphy during life, and after his death for such person or persons as Murphy might, by will or otherwise, in writing direct. Murphy, by his last will, emancipated his slaves, twelve in number, and by a subsequent clause devised the lot to his executors in trust for said manumitted slaves; and after setting a part to each his or her part of the house, and providing that if any of them should fail to occupy their part of said house they should have no power to put tenants into it, he directed "that when it shall become so difficult for said slaves and their offsprings to occupy said house and lot, owing to the great increase in their number, that it shall be advantageous to them all to sell said house and improvements, my executors shall do so, and the proceeds of sale shall be reinvested for their benefit in some way, so as to accrue to them the greatest permanent benefit. The portions of all said slaves are to be equal, the children of any that may have died taking the portion of the ancestor; and if any die leaving no

issue, the interest of that one or more so dying to go to the survivors."

Only one of the persons nominated as such qualified as executor, and he died without having executed the power of sale. This suit in equity was brought by one portion of the beneficiaries against the others, and also against the heirs at law of the deceased executor, to obtain a sale of the property. A sale was decreed, and the appellant became the purchaser, but declined to execute bonds according to the requirements of the decree; and upon being ruled to do so, or show why he should not, he responded (1) that the chancellor had no power to decree the sale, and that he would not on that account acquire a valid title, (2) that some of those having an interest in the property were not parties to the suit, and even if the court had power to decree the sale, he would not acquire the entire title. The vice-chancllor made the rule absolute, and from that order this appeal is prosecuted.

It appears that two of the devisees are dead without surviving issue, and that one of the survivors has five children; but those children were not made parties to this suit. It also appears that three of the devisees are married women.

It is argued by counsel for the appellant that as the steps required by the statute regulating proceedings to obtain judicial sales of real estate belonging to married women were not taken, the judgment and sale are void; and they cite *Barrett v. Churchill,* 18 B. Mon. 387, in support of their position. This suit was commenced, and judgment for a sale rendered while the revised statutes were in force. The case cited may be regarded as stating the law under these statutes to have been that the general powers of the chancellor to decree the sale of the real estate of infants were limited and restricted to the particular mode of proceeding therein indicated. As very similar restrictions were placed upon the power of the chancellor to decree the sale of the lands of married women, we think the same rule applies to such proceedings as was applied to proceedings to sell the real estate of infants, and that the chancellor now has no general power to decree the sale of the lands of married women, except in the mode pointed out by the statute.

But we concur with the counsel for the appellees that the statute has no application to this case. The will of John Murphy created a trust in favor of the appellees, and directed the trustees to make a sale on the happening of a named event; and he gave them power to decide when that event happened; and there can be no doubt,

at the time and under the circumstances under which the sale was decreed by the chancellor, but that such sale would have been a valid execution of the power. The trustee being dead, the chancellor, who will not allow a trust to fail for the want of a trustee, upon being applied to, and having all the parties interested before him, will himself undertake to do that which the trustee, if living, might and ought to have done. Percy on Trusts, Secs. 248, 749; Story's Equity, Secs. 1059–1061. The chancellor having power to execute the trust, his decision that the time had arrived when the testator intended the property to be sold, is conclusive, until reversed or set aside, and the appellant has, therefore, acquired a valid title, unless, as his counsel contends, the devisees named in the will took an estate for life, only with remainder to their children; for in that event, the five children of one of the first devisees not being before the court, whatever interest they may have had did not pass under the decree and sale.

But we construe the will as giving to the devisees therein named interest in fee, subject to be defeated by their death before a sale was made. When the testator says, "the children of any that may have died taking the portion of the ancestor," we understand him to refer to the children of such as may have died before a sale of the property. After a sale is made, the rights of those then alive became fixed and their title unconditional. It was not, therefore, necessary to make the children of a devisee who was then living a party.

The mere possibility that Mrs. Slaughter may yet be living and claim dower is too remote to justify the appellant in declining to accept the title. Such a defect of title would not warrant the chancellor in rescinding a private contract, and *a fortiori* will not warrant the setting aside of a judicial sale. That the accidental burning of a part of the house after the sale was made will not furnish grounds for setting aside the sale, was decided in *Vance's Adm'r v. Foster & Ray*, 9 Bush 389. The failure of the appellant to do voluntarily, and in proportion, that which he ought to have done, can furnish him with no ground for relief which he would not have had if he had done his duty.

Judgment is *affirmed*.

Barr, Goodloe, Humphrey, for appellant.
Rowan Boone, Bullitt & Bullitt, Harris, for appellees.

J. & S. B. SACHS & Co. *v.* W. B. SHELTON, ET AL.

Partnership.

A partner in business does not cease to be a partner by merely abandoning the partnership business.

Fraud of Partner—Right of Creditors.

A fraudulent collusion by partners with others to cheat and hinder creditors will give the creditors a right to the aid of a court of equity; and where one partner made a mortgage in fraud of the rights of the other partner and of the firm creditors, this gives the creditors a right to come into court and set up the lien of the defrauded partner and have themselves substituted to whatever lien such partner had.

APPEAL FROM UNION CIRCUIT COURT.

December 23, 1875.

OPINION BY JUDGE COFER:

The appellants, J. and S. B. Sachs & Co., sought relief upon two grounds: (1) that the mortgage to Dixon was within the act of 1856, and (2) that the mortgage to Shelton was actually fraudulent.

There is nothing in the record to show that Young was insolvent when he made the mortgage to Dixon; but on the contrary, it appears that when sold under the attachments in these cases, the goods owned by the firm of Young & Green realized more than the indebtedness of the firm and the individual debt of Young to Dixon; and it does not appear that Young then owed any other individual debts. But insolvency and an assignment to a creditor must concur before a trust for the creditors of the assignor can result from the operation of the statute. *Temple, Barker & Co. v. Poyntz, et al.*, 2 Duvall 276. That a debtor at the time of making a mortgage to secure a creditor may have intended, by fraudulent acts thereafter to be done, to render himself insolvent, cannot affect the rights of the secured creditor, unless he had knowledge at the time of accepting the mortgage of the contemplated fraud. We must, therefore, hold that the mortgage to Dixon was not within the statute.

Although there are some facts in the record which cast a shade of suspicion over the transaction between Young and Shelton, we do not think there is enough to overcome the direct and positive evidence that the money was loaned as alleged by Shelton.

The appellants, Sachs & Co., allege in their petition that previous

to the dates of the mortgages from Young to Dixon and Shelton, Young had purchased, or otherwise obtained, the entire interest of Gum in the assets of the firm; and in his answer to all the petitions filed after the cases were consolidated, Shelton averred the same fact. Sachs & Co. never amended their petition; and so far as they are concerned, it must be taken to be true that, before the mortgages were made, Green had parted with all the interest he ever had in the firm assets. But as to the other appellants, the record presents a somewhat different question. They all sued Young and Green, and alleged that the goods, the price of which they sued for, were sold and delivered to them as partners, and in their amended petition, which is unanswered, they alleged that Green was a partner, and as such had a lien on the goods to secure the payment of the debts of the firm; and they asked to be substituted to such lien, and to be first paid out of the mortgaged property.

They also alleged "that Young, regardless of the rights of these plaintiffs and the rights of his co-partner, Green, and with the intent to cheat, hinder and defraud them and his co-partner, Green, out of their just rights, made and executed the mortgages to Dixon and Shelton, as set out in their original petitions, upon the partnership assets, to secure said Young's individual indebtedness to said Dixon and Shelton; that said mortgages were made in contravention of the rights and equities of these plaintiffs and his co-partner, Green, and the defendants Dixon and Shelton knew the same." Treating the answer of Shelton as putting the allegation that Green had an interest in the goods in issue, as he does not deny that he was a partner, and that the goods were sold to Young and Green as partners, but seeks to show that Green had ceased to have an interest by selling out to Young, the burden was upon him to prove that such sale had been made. This he has failed to do.

The only evidence in the record which can be supposed to have any bearing upon that question, is in the deposition of Green, in which he says he repeatedly tried to get Young to allow him to take care of the money in order to pay off the indebtedness, but being unable to do so, and seeing no prospect of ever being able to pay the debts in that manner, he quit the business about the 1st of October, 1871, upon no specified conditions. We cannot conclude from this that Green intended to abandon all claim as a partner, and that he thereby surrendered the lien which the law gave for his indemnity against the firm liabilities. He is treated

throughout all the pleadings by all the parties as a partner; and he is distinctly alleged in the amended petition to have been a partner, and as such to have had a lien. Shelton, by alleging that Young had bought out his interest, impliedly admits that he had an interest as a partner, and rested his claim upon the alleged sale of that interest to Young; and he cannot now be heard to say he never was a partner and never had the rights incident to being a partner. That a partner has a lien on the firm assets to indemnify him against the firm liabilities is conceded; and it is also conceded that under certain circumstances the firm creditors may be substituted to the lien of the partners, and may enforce payment through them out of the firm assets; but it is contended that this record does not present a state of case authorizing the court to enforce any lien Green may have in favor of firm creditors, and we are referred to the case of *Jones, et al., v. Lusk, et al.*, 2 Met. 356, as sustaining this position.

While it was said in that case that the only insolvency which will give the chancellor jurisdiction to decree priority of payment in favor of partnership creditors is that which is ascertained and established by a judgment, execution and return of no property against one or more of the partners, it was also said, "There is no doubt that a fraudulent collusion, either by partners or individuals with others, for the purpose of cheating or of hindering creditors in the collection of their debts, will give the creditors a right to the aid of a court of equity."

It is distinctly charged in the amended petition that Young made the mortgages in fraud of the rights of Green and of the firm creditors, and that Dixon and Shelton knew it. This, according to the authority quoted, gave the appellants the rights to come into a court of equity for relief, and to set up the lien of Green, and to have themselves substituted to whatever lien he had.

If Green had paid the debts of these creditors, and had sought reimbursement out of the goods attached in these cases, there can be no doubt but that he would have had a right to it; and as he would have had that right, the creditors may assert it through him. For the reasons given, the judgment is *reversed* as to Roach and Torian, Roach and Underwoods, and Marsh and Lyon, but is *affirmed* as to J. and S. B. Sachs & Co., and the cause is remanded for a judgment directing the payment of the debts of Roach and Torian, Roach and Underwood, and Marsh and Lyon, out of the proceeds of the sale of attached property, if so much remains after

paying the rent due to Cambun, and if there is not enough to pay all, to distribute it according to the priority of their attachments.

C. Adair, J. A. Spalding, A. J. James, for appellants.
A. Duvall, D. H. Hughes, for appellees.

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