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15

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

VOL. VI.
From June 11, 1872, to June 16, 1873

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
1911

CITE THIS VOLUME

6 Ky. Opin.

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KENTUCKY COURT OF APPEALS

J. B. CAMPBELL, ETC., *v.* COMMONWEALTH OF KENTUCKY.

Sheriffs and Constable—Special Act Relating to the Collection of Back Taxes—Liability on Official Bond.

The act of June 3, 1865, required the sheriffs of 1865 to collect taxes due for certain years in counties in which assessments had not been made. The bond was not executed until March, 1866, therefore the bond was void.

Appeals and Errors—Failure to Appear in Lower Court.

Appellants did not waive the right to have a reversal of the four judgments of February, 1870, by reason of their failure to appear in the court below and object to the character of the proceedings against them. The court of appeals will reverse in all cases in which the petitioner does not set out a cause of action, regardless of whether or not defense was made in the court below.

APPEAL FROM FRANKLIN CIRCUIT COURT.

June 11, 1872.

OPINION BY JUDGE LINDSAY:

The act of June 3d, 1865, required the sheriffs of 1865 to collect taxes due for certain years in counties in which assessments had not been made subsequent to 1860, and to account for and pay the same into the treasury at the same time the revenue of 1865 was due and payable.

By the terms of the act this unusual duty was imposed alone upon sheriffs who might hold office during the year 1865. It is apparent from the statements of the Auditor, and the bond of appellant Campbell filed therewith that he is not proceeded against as a sheriff of 1865.

The bond was not executed until March, 1866, two months after the taxes for 1865 ought to have been accounted for and paid into the treasury. This special duty was imposed upon the sheriffs for 1865 and was required to be discharged within that year, and after that time sheriffs in office were not bound nor had they the legal right to undertake its execution.

Opinion of the Court.

It follows therefore, that appellant Campbell was not liable to be proceeded against in the Franklin Circuit Court by motion for failure to account for the taxes due from Perry county for the years 1862, '63, '64 and '65. If he was guilty of any dereliction of duty it was in failing to give bond and begin the collection of such taxes within the prescribed time. Appellants did not waive the right to have a reversal of the four judgments of February, 1870 by reason of their failure to appear in the court below and object to the character of the proceedings against them. This court will reverse in all cases in which the petition does not set out a cause of action regardless of whether or not defense was made in the court below.

Hence there was no petition at all, and as the case does not come within any of the exceptions made in behalf of the Commonwealth, the Franklin Circuit Court had no jurisdiction and ought not to have entertained the motions upon which the judgments were rendered.

Campbell and his sureties may, by proper proceedings, be held responsible for all taxes due to the Commonwealth collected by him after the execution of his bond, but as it is a mere common law obligation, it must be proceeded upon as such.

Judgments reversed and cause remanded with instructions to dismiss the motions of appellee.

Scott, for appellants.

COMMONWEALTH FOR THE USE OF, ETC., *v.* NEWTON DICKERSON, ETC.

Sheriffs and Constable—Sheriffs—Replevin Bond—Reasonable Diligence as to Surety.

In taking a replevin bond the sheriff is required in good faith to exercise reasonable diligence and discretion in ascertaining the solvency of the sureties offered. But he is not liable for a breach of his official bond in all cases in which it may turn out that the sureties taken were insufficient.

Sheriffs and Constable—Sheriffs—Failure to Levy Execution—Action on Bond—Sufficiency of Amended Petition.

The amended petition specifically charges that one of the defendants in the execution, while it was in the hands of the sheriff, had in

his possession a lot of mules subject to levy and sale sufficient to pay the judgment, that the sheriff knew this and negligently failed and refused to levy.

Held, to be sufficient.

APPEAL FROM JESSAMINE CIRCUIT COURT.

June 7, 1872.

OPINION BY JUDGE LINDSAY:

In taking a replevin bond the sheriff is required in good faith to exercise reasonable diligence and discretion in ascertaining the solvency of the sureties offered. But he is not liable for a breach of his official bond in all cases in which it may turn out that the sureties taken are insufficient. If he exercises as great degree of diligence as would have been exercised by the plaintiff (he being a reasonably prudent man) he has done all that he is required by law to do. The same rule applies where it is his duty to seize and sell property under execution, 14 B. Monroe 22. It is not necessary upon this appeal to determine whether or not the instructions of the circuit judge conforms to this view of the law, as the judgment must be reversed in any event.

The amended petition specifically charges that one of the defendants in the execution, whilst it was in the hands of the sheriff and was alive and in full force owned and had in his possession in Jessamine county a lot of mules subject to levy and sale, of value sufficient to pay appellant's judgment. That the sheriff knew this fact and negligently failed and refused to levy upon and sell them, by reason whereof appellant lost his judgment. The allegations of the amended petition were never denied.

Upon the pleadings the appellant was entitled to judgment and it would have been the duty of the court upon the motion to render judgment for him, notwithstanding the verdict of the jury against him. *Lindsey v. Ruthford,* 17 B. Monroe 242.

It is true he did not ask such action at the hands of the court, but certainly as he was entitled to judgment as the case then stood his motion for a new trial ought not to have been refused.

The judgment therefore must be reversed. The cause remanded for a new trial upon principles consistent with this opinion. Appellee should be allowed to file an answer to amended petition, in case they offer to do so within a reasonable time.

Huston & Mulligan, appellants.

Wm. Brown, for appellees.

JOHN A. BOGIE *v.* M. B. MOORE, ETC.

Executions—Levy and Sale—Quashal of Levy and Sale—Return on Execution Should Be Quashed.

Where the levy of an execution on land and the sale thereunder has been quashed, the sheriff's return on the execution should be quashed also.

APPEAL FROM BATH CIRCUIT COURT.

February 4, 1873.

OPINION BY JUDGE LINDSAY:

The writing executed and delivered to the sheriff by M. B. Moore on the 30th of September, 1871, authorized the levy subsequently made on fifty acres of land therein described, and the fact that other lands as well as personal property were also seized under the execution does not render the levy on the land invalid. Nor can Moore or those representing him be heard to say that because he was not invested with the legal title when the levy was made that it shall therefore be set aside. *Gohegan v. Ditto,* 2d Met. 437.

Baird, the purchaser, does not appeal from the judgment quashing the levy and sale. Nor does Bogie make him a party to the appeal at all, as the purchaser does not complain at being deprived of the benefit of his purchase.

We are not inclined in view of the irregular action of the sheriff to disturb the judgment quashing the sale, but as to the levy the judgment is certainly prejudicial to the substantial rights of Bogie.

As the case now stands, the levy and sale are quashed, and Baird is thereby released from the payment of his bond, whilst the sheriff's return, showing the satisfaction of Bogie's execution, remains undisturbed.

The judgment quashing the levy is reversed and the cause remanded, with instructions to overrule appellees' motion to the extent indicated, and also to set aside so much of the sheriff's return, as gives Moore credit by the amount for which the land sold.

The parties will thereby be remanded to the position occupied by each of them before the sale, and Bogie will have the right to proceed to enforce his levy.

J. S. Hurt, for appellant.

Apperson & Reid, for appellees.

J. G. ARNOLD *v.* WILLIAMS AND J. A. CODDIN'S ADMR.

Bills and Notes—Notice of Protest—When to Be Given.

The notary was under no obligation to mail the notices in this case, on the evening of the protest, but was bound to mail them on the following day. The first mail left at 6 o'clock A. M. It would have required more than ordinary diligence to have sent them by that mail but if it had been the only one leaving that day this diligence would have been required. By the mail at noon the notices reached their destination at 1 P. M. on that day.

APPEAL FROM KENTON CHANCERY COURT.

January 16, 1873.

OPINION BY JUDGE LINDSAY:

From the proof in this case we conclude that the notices of protest were mailed to appellants in time to reach Covington at 1 p. m. on the day after the dishonor of the bill.

In the case of *Dodge v. Bank of Kentucky*, 2 A. K. M. 610, this court laid down the doctrine in general terms that the notice when it goes by mail must go by the first mail after the last day of grace is over. It is to be observed that in that case there were but three mails per week between the place of protest and the residence or postoffice of the party sought to be charged. Hence it was important that there should be no delay in mailing the notice. In *Bank of Kentucky v. Eades*, 1st Littel 277, it was held that where the parties to the bill reside in the same village, notice given on the day after protest is sufficient, and we are not aware that the law has ever been construed differently in this State. The cases of *Smith v. Roach*, 7 B. Monroe 17, and *Triplett v. Hunt*, 3d Dana 126, accord with the principle, and require no greater diligence than that the notice of protest shall be mailed the day following the last day of grace.

The notary was under no obligation to mail the notices in this case on the evening of the protest, but was bound to mail them on the following day. The first mail left at 6 o'clock a. m. It would have required more than ordinary diligence to have sent them by that mail but if it had been the only one leaving for Covington that day this diligence would have been required.

By the mail at noon the notices reached Covington at one o'clock p. m. and during business hours.

Had the bill been protested in Covington, notices delivered at that hour would have been sufficient. We can see no reason why the fact that the protest was made in Cincinnati should require greater diligence on the part of the notary.

To carry the rule to such an extent would be going further than this court has ever gone, and further than the general current of authority will warrant.

Judgment affirmed.

Carlisle & Foot, for appellants.

Rankin, for appellee.

JOHN C. ADAMS *v.* JOHN B. MARTIN, ETC.

Evidence—Statements No Part of Res Gestae—Impeachment.

The statements of McPherson in the presence of Smith are not evidence against appellee, they were made after the payment of the money to Adams and were not a part of the res gestae. Smith's testimony is important only in so far as it impairs McPherson's credibility by showing that his sworn statements are inconsistent with others made by him out of court.

APPEAL FROM WARREN CIRCUIT COURT.

January 27, 1873.

OPINION BY JUDGE LINDSAY:

McPherson swears in his deposition not only that it was his intention to pay off the note sued on, when he paid Martin the $5,000.00, and that it was his understanding that said note was satisfied out of that payment, but that it paid the note of $600 and that he (I) was to have the note. Adams said he had neglected to bring the note with him.

If these statements are to be credited, the questions of law as to the proper application of the judgment need not be considered as it is clear the parties themselves made the application.

The reasons assigned by McPherson why he understood that the $1,500 payment satisfied the note, viz.: "that the money apid covered the note and all the items of the account which had been re-

leased" is not inconsistent with, nor does it destroy the force of his testimony on this point because he states further that the store account was properly left out for future adjudication.

The statements of McPherson in the presence of Smith are not evidence against appellee; they were made after the payment of the money to Adams, and were not a part of the res gestae.

Smith's testimony is important only in so far as it impairs McPherson's credibility by showing that his sworn statements are inconsistent with others made by him out of court.

As the foundation for impeaching McPherson in this manner had not been laid, and as no opportunity had been given him to explain the conversation spoken of by Smith, the testimony of the latter on this point ought not to be regarded as competent for any of the purposes of this litigation.

The petition of Martin contains nothing which precludes him from relying on the specific application of the $1,500 payment to the satisfaction of certain named debts owing by McPherson to Adams.

Judgment affirmed.

Dulaney, for appellant.

Hines & Porter, for appellees.

ADAMS EXPRESS CO. *v.* LOEB & BLOOM.

Carriers—Special Contracts—Loss of Goods—Burden of Proof.

Ordinarily written contracts cannot be contradicted, or essentially modified by oral testimony without proof of fraud or mistake, and it would be carrying the innovation made upon the statutory rule in this class of contracts to a most unreasonable extent to allow the shipper to avoid them on account of duress, importunity or delusion, or failure to understand their effect, and also to presume the existence of one or all the grounds of avoidance, and compel the carriers by proof to rebut the presumption. The more rational course would be to hold that such contracts should not be enforced at all.

It is only necessary that a carrier shall satisfactorily prove that a special contract was entered into under circumstances indicating fairness and good faith, and then it is incumbent on the shipper to show that the contract ought not to be enforced.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 7, 1873.

OPINION BY JUDGE PETERS:

The court below, on motion of appellees, gave four instructions to the jury, the first is in substance as follows: That if they shall believe from the evidence that the printed conditions in the receipt dated December 31st, 1867, were not explained to the plaintiffs at the time or were not understood by them and recognized by them as a part of the contract, and shall further believe that plaintiffs delivered to defendant the express company, a box containing 621 mink skins, 6 otter skins and one beaver skin and they received the same for shipment to New York, and that while said skins were in the custody, or under the control of said company or its agents any of said skins were taken from the box, or were lost, or defendant failed to deliver them, then the jury should find for the plaintiffs whatever they shall believe from the evidence said lost or missing skins were worth. But, if the jury shall believe from the evidence that plaintiffs were aware of, and understood the printed conditions upon said receipt, and accepted it with such conditions then the express company would only be liable to them for such loss as may have occurred by the gross negligence, or fraud of said company or its agents.

2. That if the jury believe from the evidence, that after the box of skins was delivered to defendant's agents at Paducah, 83 mink skins and one other skin were taken out of said box while in the custody of defendant or their agent, and before the box was delivered to the consignee in New York, then the law is for the plaintiffs and the jury must so find unless they shall believe from the evidence that the printed provisions in said receipt were agreed to by plaintiffs, then the defendants are only responsible if said loss was the result of the fraud, or gross negligence of defendant or its agents.

3d. If the jury believe from the evidence that the plaintiffs, by the defendant, a box containing 621 mink skins, 6 other skins, and one bear skin, and that the defendant was at the time a common carrier *for him*, then the law is, that the defendant shall deliver the box and contents as received.

4th. The court tells the jury that nothing will excuse a common carrier for the non-delivery of goods received for transportation except the act of God, or public enemy, unless there is a special contract entered into by which the liability of the common carrier

is restricted, and before the liability of a common carrier can be restricted by such special contract or agreement, the same must be clearly proved that such contract was fairly made, and fully understood, and the burden of proving such contract rests upon the common carrier.

In *Adams Express Co. v. J. J. Guthrie,* Miss. Opinion, October 1872, this court said the objection to the ruling of the Common Pleas judge is that he not only required appellant to prove clearly that the contract embraced in the printed receipt signed by the company's agent, and accepted by the shipping merchants was actually entered into but was fully understood and freely made. If the contract was actually made it is binding on both parties, and appellee can not escape from its consequence unless it appears that he acted under duress, or that it was imposed upon him or his agent under circumstances which probably prevented them from examining the writing, and understanding its nature.

Ordinarily written contracts can not be contradicted, or essentially modified by oral testimony, without proof of fraud or mistake, and it would be carrying the innovation made upon the statutory rule in this class of contract to a most unreasonable extent to allow the shippers to avoid them on account of duress, importunity or delusion on failure to understand their effect, and also to presume the existence of one or all of these grounds of avoidance, and compel the carriers by proof to rebut the presumption.

The more rational course would be to hold that such contracts could not be enforced at all. In our opinion it is only necessary that the carrier shall satisfactorily prove that a special contract was made under circumstances indicating fairness, and good faith, and that then it is incumbent upon the shipper to show that the contract for some of the reasons indicated ought not to be enforced against him.

The instructions in this case go farther than the rule here prescribed that governs this class of contract. The first one required appellant to satisfy the jury that it explained the contract to appellees, or that it was understood by them, and recognized by them as a part of the contract. It is a difficult task to prove that a party understands a contract; to understand and give proper construction to contracs is often among the most difficult and vexatious questions that learned judges have to solve, but without pursuing the subject farther, the law of the case as prescribed in the instruc-

tion imposed a greater burden on appellant than was authorized by the ruling of this court in the case *supra*. It was incumbent on it to show that the special contract was made under circumstances indicating fairness and good faith—and then the burden of proof to show that the contract ought not to be enforced for some of the reasons indicated was on appellees.

Besides Instruction *No. three* is not consistent with the other three given for appellees; this third instruction requires appellant, if it was a common carrier at the time, to deliver the box and contents to appellees' consignee as received, allowing no excuse, a regardless of every misfortune, contingency, or special contract.

The judgment must therefore be reversed, and the cause remanded with directions to award a new trial and for further proceedings consistent herewith.

Sachs, for appellant.

Quigley, for appellees.

SALATHIEL BURRIES *v.* SAMUEL AGNEW.

Fences—Joining—Notice.

If it should be concluded that the gate stood on appellant's land, still by his permitting appellee to join his fence to the gate and thereby enclose his land, he could not legally enter and remove the gate without reasonable notice to the appellee.

APPEAL FROM LEWIS CIRCUIT COURT.

March 6, 1873.

OPINION BY JUDGE PETERS:

This is an action of trespass quare clausum fregit, and which the evidence conduces to the conclusion that the gate which appellant removed was on his land, it is also shown that the parties had by mutual consent made, or permitted a lane to remain, which had been previously made between their two tracts of land, and had at the end of the land next the Ohio River erected a gate, and by permission appellee had joined his fence up to the gate so as to

inclose his land, and protect it thereby from the intrusion of stock.

If, then, it be concluded that the locus in quo be the freehold of appellant still by his permitting appellee to join his fence to the gate and thereby inclose his land, he could not legally enter and remove the gate without reasonable notice to the appellee that he would acquiesce no longer.

Shean v. Withers, 12 B. M. 441.

Appellants might have pleaded not guilty and also liberum tenementum. The first section or paragraph of the answer could scarcely be regarded as a plea of not guilty—and under the second paragraph he had all the benefit of a plea of liberum tenementum. He was not therefore prejudiced by the ruling of the court in regard to the answer, the instructions of the court given for appellee conforms to our view of the law of the case and were properly given and the one asked for by appellant properly refused.

Wherefore the judgment must be affirmed.

Ireland, for appellant.

Phister, Thomas, for appellee.

TEMPLE BERGAN *v.* MARY GARNETT.

Actions—Revivor—Appearance—Waiver.

The filing of the answer by appellant must be regarded as entering his appearance to the rule and the voluntary submission of the cause was a waiver upon his part of the right to question the propriety of the proposed revivor. Both parties proceeded as though the order of revivor had been formally made, and the appellant in effect consented that it should be made.

APPEAL FROM MERCER CIRCUIT COURT.

February 22, 1873.

OPINION BY JUDGE LINDSAY:

The proof shows that John Woods and wife were in the actual possession of the land (devised to the wife, by her father) during coverture, and that they had issue born alive.

John Woods lived till 1846, and held said land up to that time as tenant by the courtesy.

Mary Garnett, the mother of Geo. C. Garnett, died before her father John Woods, and hence she was never entitled to the possession of her interest in said land.

In 1846 when John Woods died and when the right to the possession first vested in George C. Garnett, he was an infant about six years of age. He reached his majority in 1860 or 1861, and then, for the first time, the statute of limitation began to run against him.

He instituted this action on the 27th day of May, 1867, within less than fifteen years after the right of action accrued to him.

Section 570 of the Civil Code of Practice provides that "An order to revive an action in the names of the representatives or successors of the plaintiff shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been first made."

On the 27th of May, 1870, the death of the plaintiff, Geo. C. Garnett, was suggested. On the 18th of May, 1871, a rule was awarded against appellant to show cause why the action should not be revived in the name Mary Garnett, sole devisee of George Garnett, deceased.

Nine days thereafter, May 27th, appellant filed an answer, and the cause was argued and submitted, for judgment without objection. On the 1st of June, judgment was entered; on the 3d of June, the court set aside this judgment and reopened the question as to revivor.

In this the court erred, when appellant filed his answer on the 18th of May, he must be regarded as entering his appearance to the rule and the voluntary submission of the cause was a waiver upon his part of the right to question the propriety of the proposed revivor. Both parties proceeded as though the order of revivor had been formally made, and appellant in effect consented that it should be made.

The will of Geo. C. Garnett, deceased, was properly certified to the court of Mercer county for probate. Sec. 18, Chapter 35, Revised Statutes. And as the said will was proved to have been so executed as to be a valid will of lands in this State, the copy was properly admitted to probate. Sec. 31, Chapter 106, Revised Statutes.

Neither Geo. C. Garnett nor his devisee are claiming under and against the will of his grandfather, John Woods, deceased. This testator directed only that his property should be sold. If his execu-

tors, under a mistaken idea of their rights and duties, sold the lands in which he had only an estate for life, George C. Garnett can not be prejudiced by their mistake. The more especially, as he took specific legacies, not derived from the sales directed to be made.

It appears that the grandmother of G. C. Garnett died, leaving ten heirs at law. Mrs. Garnett represents one of these heirs and is, therefore, entitled to one-tenth of the tract of land devised to Harriet Woods by her father, Jake Woods. She is also entitled to one-ninth interest in the one-tenth of said land which descended to Sarah Burch Marshall, one of the children of Mrs. Woods. She died intestate and without issue, after reaching the age of twenty-one years, and after the death of her father, and hence Geo. C. Garnett was one of her heirs at law.

As the judgment seems to conform to the views herein expressed, it is affirmed.

J. D. Hardin, for appellant.

P. B. Thompson, for appellee.

L. BONNER, ETC., *v.* J. C. JOHNSON'S TRUSTEES.

Landlord and Tenant—Tenancy From Year to Year—Tenancy at Will—Payment of Rent—Evidence.

The fact that rent is payable by the month is not itself sufficient to show that there was an agreement, either express or implied, that appellants were to hold the leased premises at will.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

December 4, 1872.

OPINION BY JUDGE LINDSAY:

Testing the question by the rule laid down by both Kent and Taylor (4th Vol. Kent Com. 112; Taylor, Landlord and Tenant, Sec. 59), it seems to us perfectly manifest that the tenancy in this case was a tenancy from year to year. The fact that the rent was payable by the month is not itself sufficient to show that there was an agreement, either express or implied, that appellants were to hold the leased premises as tenants at will.

This being the sole question submitted to us for adjudication the judgment of the Court of Common Pleas must be affirmed.

Hagan & Dupey, for appellants.

Pirtle & Caruth, for appellees.

ALEX. ADAMS *v.* WM. ABLE.

Equity—Remedy at Law.

No reason is given why appellee did not file certified copies of his judgments, executions and returns in the Circuit Clerk's office and sue out execution thereon under which he might have levied on and sold the land. His legal remedy being complete he had no right to tax appellant with the cost of a proceeding in equity.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 13, 1872.

OPINION BY JUDGE LINDSAY:

It appears from appellee's petition that appellant owned the land adjudged to be sold, and that he had occupied and possessed it for twenty years prior to the institution of this suit.

Such being the case, his title was prima facie as perfect as though he held by regular conveyance.

No reason is given why appellee did not file certified copies of his judgments, executions and returns in the circuit clerk's office and sue out executions thereon. Under such executions he might have levied on and sold the land.

His legal remedy being complete he had no right to tax appellant with the costs of a proceeding in equity.

Judgment reversed and the cause remanded with instructions to dismiss appellee's petition, unless by amendment he shows some right to ask assistance from the chancellor.

Owens & Ellis, for appellant.

Weir, for appellee.

ALBERT DAY *v.* SAMUEL A. DARNELL AND OTHERS.

Partnership—Silent Partner—Liability for Debts of Firm.

A silent partner is liable for the debts contracted by the firm although his name is not known in connection with the transactions and contracts made in furtherance of the business.

APPEAL FROM FLEMING CIRCUIT COURT.

November 12, 1872.

OPINION BY JUDGE PRYOR:

The pleadings in this case on the part of the appellant, who was plaintiff in the court below, are framed with a view of recovering against Gillis as a fraudulent vendee of appellant's property, or by reason of the former's liability as his agent and bailee. Whilst these inconsistent claims asserted by the appellant might not prevent his recovery as against Gillis, still such a dubious assertion of right could scarcely prevail in a controversy between the appellant and Gillis' creditors.

The appellant ought to know whether he sold the goods to Gillis or placed them in his custody to sell as his agent.

The testimony shows that Gillis, in the year 1869, came to the town of Flemingsburg from Circilville, Ohio, and leased of one of the appellees, Franklin, his woolen factory, located in that town.

He leased the property in his own name and engaged in the manufacture of woolen goods, and also in the sale of goods and merchandise. He selected and appointed his agents in several counties to aid in this undertaking, all in his own name, and with no evidences connected with the man, or his establishment, indicating that any other person owned or had an interest in the business in which he was engaged.

He seems to have been a stranger in the place at the time he made the contract with Franklin. He incurred many liabilities to the bank and citizens of the town, created, as the proof indiactes, for the purpose of prosecuting the business in which he was engaged, and no one had any reason to question his ownership of the property until his failure and the institution of the present suit in equity by the appellant against him and his creditors. That the appellant furnished

him goods and money to enable him to engage in business, the testimony clearly shows. Whether the goods were furnished him as agent or were in fact sold to Gillis by Day is a question difficult to answer. The appellant seems not to know himself and gives no such explanation by the proof as to enable this court to determine the relation they sustain to each other. With a proper state of pleading applied to the fact we could not hesitate in this controversy between him and the creditors of Gillis to adjudge that the appellant was a silent partner in the undertaking. The proof ,however, conduces more strongly to show that Gillis purchased the goods of the appellant. It is hardly to be presumed that the appellant would intrust the appelle, whom he alleges and proves was insolvent, with the power to engage in the running of this woolen factory. The sale of the cloth connected with a general agency over several counties, and also the purchase and sale of other description of goods, as a mere agent, and with no instruction whatever upon his authority to act as such, and not even a notice to the community where the business house was located, that he, the appellant, was the owner of the property. He must have sold goods to Gillis, as there is no evidence by parol or in writing that any other character of contract was made between them. Assuming, however, the position taken by the appellant in his petition, that Gillis was his mere agent, what right has he, after permitting the business of this factory to be conducted in the name of Gillis, and creating liabilities to those who in good faith believed him to be the owner of the property, to claim an equity, either equal or superior to the equities of Gillis creditors? Gillis was attempting to borrow money if the banks to enable him to prosecute his business; he appealed to the banks and also to the appellant to furnish him this money. He did obtain money from the bank at Flemingsburg and now appellant insists that this alleged agency gives him a superior equity to the proceeds of the sale of Gillis' goods. If Gillis acted as the agent, upon what principle is it that Day himself is not liable for the rent of Franklin's factory as well as the obther debt? The only escape from responsibility would be that Gillis was not appellant's agent and had no authority to contract these debts. The court acted properly in adjudging in favor of Darnall and Franklin and dismissing the petition as to the remaining appellees.

First: Because the appellant permitted Gillis to use the factory in his own name, thereby inducing the appellee to give him credit.

Second: Conceding that Gillis was appellant's agent, the debts, or most of them, were created in the prosecution of the business and for the purpose of the enterprise, and Day himself was liable.

Third: Although the proof may show that Gillis was the vendee of Day, still, if Day assumes that he was his agent and so alleges, he must be held to his pleading.

The denial of the allegations of the amended petition by Franklin and Darnell is deemed sufficient; in fact, this amendment seems to have been drawn more for the purpose of confusing the rights of parties interested in the controversy, than as a fair presentation of appellant's equity if he even had any.

The only trouble in the case arises in regard to the claims of the bank. The bank was made a defendant to the amended petition, but prior to the filing of this amendment had instituted suits on their claims in the Mason and Montgomery circuit courts and obtained attachments that were levied on some wood, etc., the property of Gillis and this property sold.

The appellant, by his petition filed in these suits, was made a defendant and this petition in which he alleges that he was the owner of the property, taken as his answer in each one of those cases.

The burden of proof in each of these suits was on him to show that the property belonged to him. A change of venue was granted in each of these cases to the Fleming Circuit Court, on the written statement of the appellant of the pendency of the present equity suit in that court. The cases were remanded to Fleming, but were never consolidated so far as this record shows. They were, however, tried together, and treated as consolidated actions. No process on the amended petition seems to have been served on the bank.

It is true that a summons is returned executed on one Stockwell, but whether he was an officer of the bank, or in any way connected with it does not appear, and even if it did, the burden of proof being on the appellant in the two suits instituted by the bank prior to the filing of the amended petition, the appellant must manifest his right to the property regardless of any other pleading, and it was doubtless so considered by counsel in the court below.

The view taken of the pleading by counsel for the appellee is not stated in this court. As no appearance has been made by brief or otherwise for the appellees.

There was no final judgment against Carpenter and the appeal as to him is dismissed.

The judgment as to the other appellees is affirmed.

W. H. Cord, for appellants.

Andrews, for appellees.

Cole, for appellee Carpenter.

H. T. DUNCAN, JR., *v.* SAMUEL L. WILLIAMS.

Vendor and Purchaser—Parol Contract—Performance.

A parol contract to take and pay for a part of a tract of land to be sold by a decree of court is binding on the parties when one of them has performed his part of the contract by bidding in the land at the sale.

Pleadings—Failure to Deny Allegations of Petition.

Every material allegation of the petition not specifically controverted by the answer must for the purpose of the action be taken as true.

APPEAL FROM NICHOLAS CIRCUIT COURT.

September 21, 1872.

OPINION BY JUDGE PRYOR:

By the terms of the contract made between J. B. Bowman, H. T. Duncan and R. L. Williams as agent for his father, dated the 17th of September, 1864, and executed prior to the purchase of the Williams land by Bowman, the appellant expressly agreed to pay the claim of General Williams, the appellee. The consideration for this undertaking was that in the purchase thereafter, to be made by the parties of the land, the appellant was to have and hold in his own right certain sections of the land more valuable than those to be taken by Bowman. The contract recites that said Bowman and

Duncan, wishing to purchase the land, and R. L. Williams, wishing to purchase it, to secure the interest of his father, General Samuel Williams, it is therefore mutually agreed, etc. Then follows the agreement on the part of the appellant to pay this claim now in controversy. This liability of the appellee on account of his son, John S. Williams, is the only claim alluded to by the witnesses, and in ascertaining the intent and meaning of the contract referred to, no other conclusion can be arrived at, from the writing itself and the testimony connected with it, than the appellant agreed to pay this judgment of Holloway and thereby release the appellee from any liability therefor. It is insisted, however, that the contract was rescinded by the consent of all the parties the evening before Bowman's purchase. It seems that an attorney advised the parties that such a contract as they had made with reference to the bidding and purchase of the property would invalidate the sale and for that reason alone the parties agreed that the contract should be annulled but with the mutual understanding, as the testimony shows, that after the purchase by Bowman its terms were to be complied with, in other words, the parties were only endeavorng to avoid the effect htat such a contract might have upon the sale. Bowman, after his purchase of the land, executed the contract so far as he was obligated to the very letter, by surrendering to the appellant all the land he was entitled to by the terms of that instrument, or the parol agreement, made after the alleged rescission of the written contract.

Bowman's testimony is, that the contract was cancelled by the advice of an attorney and that the arrangement then agreed upon was: "That he, Bowman, was to purchase all the land and that Duncan was to purchase a portion of them subsequently to the sale. It was also understood that Duncan was to pay off the liability of General Williams as surety of John S. Williams on the guardian's bond estimated to be about $10,000.

This is all that the witness Bowman knows of the agreement. This statement of Bowman is of itself conclusive of the rights of the parties to this controversy. The appellants not only get the same land that he was to get by the terms of the written contract, but proceeds to pay off the Holloway judgment. He may have regarded this payment as a purchase of the judgment from Holloway, but the facts appearing in the record sustains no such view of the case. If the appellant purchased the judgment of Holloway and there was no contract binding the appellant to pay it, we can not well see

how it was to become entitled to the claims in Clark garnisheed by the appellee for the purpose of indemnifying him as the surety of his son. These claims the appellant collected and applied to the payment of the Holloway judgment reducing it to a title upwards of seven thousand dollars. The testimony in the case conduces to show that the appellant was entitled to these claims ,although the written contract makes no allusion to them whatever, and the parol agreement proven by Bowman is equally as silent upon the subject.

The written agreement and the parol agreement proven by Bowman both evidence the fact that the appellant was to discharge this judgment by reason of his obtaining an interest in that Illinois land.

If, however, the written contract was in fact rescinded and the assignment of the Holloway judgment was a purchase by the appellant he fails to show by any proof in this record, how or in what way he had the right to apply the claims garnished in Clark to the payment of the Holloway judgment. In the absence of such an explanatio we must regard ths appropriation of the monies as confirmatory of the contract relied on by appellee. The appellant in July, 1865, in a letter to the appellee on the subject asks the appellee to send him a copy of the agreement made between Bowman, your son, and myself, so that I can be in position to settle with Houston. This letter expressly recognizes the existence of the agreement relied on by the appellee and is sought to be made by the appellant the foundation of a settlement with Houston's attorney for the appellee of the matters in controversy. In a conversation had by the appellat with the attorney, Houston, he (appellant) admitted that he was to apy off this Holloway judgment and only insisted upon his right to the claims garnisheed in Clark. Whilst we are inclined to the opinion that the appellant may have believed that he had the right to be substituted to the rights of General Sam Williams as against his son John S., still the facts upon this record leave no doubt upon the mind of the court but that the appellant was to be entirely exonerated from the payment of the Holloway judgment.

The amended petition, filed by the appellant, alleges "that if the contract was rescinded it was not a bona fide rescission, but made with a view to avoid any illegality in the sale and the parties still agreed to fully carry out said agreement—that the defendant entered into the possession of his land under the agreement and fully acknowledged it verbally and in writing, etc. To this amended petition and the specific allegations therein contained the appellant makes

this answer: "The defendant, for answer to the amended petition, reiterates the statements of his original petition, and denies all the statements of the amended petition at variance with the statements and denials of his original answer." An answer must contain a denial of such allegations of the petition controverted by the defenndant or of any knowledge or information thereof sufficient to form a relief." Every material allegation not specifically controverted by the answer must for the purpose of the answer be taken as true. *Corbin v. Commonwealth,* 2 Met. 380.

The defendant, making a statement in his answer to an original petition, that if true, is iconsistent with the allegations of an amended petition afterwards filed, does not dispense with the necessity of answerig specifically the allegations of the amended petition, especially where these allegations are material and not set forth in the original petition, and therefore an answer to such an amended petition "That the defendant denies all the statements therein contained inconsistent with his original answer is no such denial of the allegations of the amended petition as required by the code.

The allegations of the amended petition material to the issue in this case stand undenied, and must be taken as true. The appellee is entitled to the relief asked for upon both the pleadings and proof.

Judgment affirmed.

Waters, for appellant.

J. H. Mulligan and Turner, for appellee.

DAVID E. CRAIG, ETC., *v.* JAMES HUDSON, ADM'R.

Principal and Surety—Discharge in Bankruptcy—New Promise—Misjoinder of Parties.

A joint action can not be maintained as against the sureties on a note and the principal on his promise to pay the note after his discharge in bankruptcy.

APPEAL FROM KENTON CIRCUIT COURT.

September 16, 1872.

OPINION BY JUDGE PRYOR:

If the appellant, Craig, was a competent witness for his sureties upon the note to Hudson prior to his discharge in bankruptcy, we are unable to perceive why he is incompetent after his discharge. The testimony of Craig in the present case would not have increased or lessened his liability, and if his promise to pay the debt after his release in bankruptcy makes him not only liable for the debts to Hudson's administrator, but to his sureties also, in the event they pay it, then he occupies the same attitude towards his sureties as he did before the release took place. His responsibility to the sureties and the plaintiff Hudson must be the same.

He has no interest in the issue between the sureties and Hudon's administrator. His discharge in bankruptcy released him from the debt unless a promise mas afterwards made to pay. If re leased by his bankruptcy, he is certainly competent, and if he is liable on the alleged promise to pay, his testimony for the sureties can neither enlarge nor diminish this liability.

Craig was not a party to the issue made between the sureties on the notes and the appellee. He was therefore competent to testify upon the point for which he was called by the sureties. *Mllett v. Parker,* 2 Metcalfe, page 610. Civil Code Sec. 699. 670. Paragraph No. 1 of plaintiff's reply to the counterclaim of is defective nad the demurrer should have been sustained thereto.

The charge in the set-off of Craig is that the services were rendered by him for the administratrix and her response that she has no knowledge or information as to whether they were or not, is insufficient. She denies ever having employed Craig as attorney, but there is no denial that he rendered the services. If the appellant Craig is discharged from the note by his bankruptcy, the appellee can have no recovery as against him upon it, and if his promise afterwards made to pay the debt is relied on, the action must be on the promise and not on the original debt. In this case, however, the set-off of Craig presents a cause of action as agaist the appellee and although Craig may not be liable on the original debt still we can see why thepromise to pay may not be relied on in order to prevent a recovery (if the facts authorize it) by the appellant Craig on his set-off. The proper way to present it, however, is by an amended pleading and not by way of reply. If permitted to reply by setting forth other

causes of action against the defendants than those contained in the petition there would be no end to pleading and a reply to a reply would be made necessary. This character of pleading is not authorized by the code. The demurrer should have been sustained also to the second paragraph of the reply to the set-off of Craig, for the reason that there is no calse of action alleged, even if regarded in the light of an amended petition. To make such an amendment good it must contain all the allegations necessary in an original petition. Either party should be permitted to amend their pleadings, but the appellee should be required to prosecute the suit either on the original note or the new promise.

A joint action can not be maintained as against the sureties on the note and against Craig on his promise to pay. For the reasons indicated, the judgment of the Court below is reversed and the cause remanded with directions to award all the appellants a new trial and for further proceedings consistent with this opinion.

J. M. Collins, for appellants.

Pryor, Chambers, for appellee.

A. E. CANTRILL, ETC., *v.* THOMPSON B. EASTIS.

Estoppel—Party Advising Purchase of Land is Estopped to Set Up Adverse Claim.

The appellee was present when the sale of the land was made to appellant. He advised the purchase and talked of buying it himself. He knew the trouble connected with the title. It was his duty to have explained to appellant the character of the vendor's title, and as he failed to do this, he is estopped now to set up an adverse claim to the land.

APPEAL FROM GREEN CIRCUIT COURT.

February 24, 1872.

OPINION BY JUDGE PRYOR:

The proceeds of the sale of the girl Francis was applied to the payment of the purchase money for the land in controversy. The boy Albert, who had been exchanged by Eastis with Robinson

for Ellen, the mother of Francis, belonged to the children of Mrs. Eastis, subject to the life estate of the mother. The father of Mrs. Eastis left a last will at his death by which the interest of his daughters in the slaves devised was limited to an estate for life with remainder to their children.

Neither Mrs. Eastis nor her husband had any right to dispose of Albert, so as to divest the children of their interest in him. They both seemed to have been aware of this fact, and the purchaser of the girl Francis, ascertaining from the family or otherwise, that the title to the girl was acquired by the exchange made of Albert, required the children to execute a bill of sale to him, to complete and perfect the title.

It seems clear from the proof that the object in making the sale to Pierce of Francis, was to obtain means in order to enable the parties interested to purchase a small tract of land for Mrs. Fulks, one of the daughters of Eastis and wife. The land was bought of a man by the name of Scott, and although he testifies that the money was paid him by old man Eastis for the land, a fact which is doubtless true, still it is equally certain that the money and notes he (Scott) obtained for his land, was the proceeds of the sale of the slave Francis to Pierce. Scott is evidently mistaken in stating that he executed a bond for title to this land to old man Eastis.

A number of witnesses saw the bond after it was executed in the possession of Mrs. Eastis, and say that the bond was executed to her, and that she was then expressing fears that Mrs. Fulks might, in the event the bond was lost, be deprived of her interest in the land.

It appears that during the lifetime of the mother, that the three surviving children were all allotted a small tract of land each, by Mrs. Fulks, Martha Pierce and Thompson B. Eastis, and entered into the possession.

After the mother's death, which occurred before her husband, this division of the land seems to have been disregarded, and the father (old man Eastis) asserting as he does now, that the bond for the title to this land was executed to him, obtained a deed from the vendor Scott to himself, and at his death left a last will of which he devises this particular land to Thompson B. Eastis, the plaintiff in the present action.

This will disposes of no other estate of the old man of any kind or description than the land on which Mrs. Fulks lived.

Thompson B. Eastis and Mrs. Pierce held title to this land in the same way. They had no other title than Mrs. Fulks', and seemed never to have obtained, so far as this record shows, any other evidence of title than the mere possession under the purchase made by their mother in her lifetime and perhaps by the father and mother jointly.

The tract of land occupied and sold by Mrs. Pierce may have been purchased and doubtless was, by the proceeds of the father's land or out of his own means, but the land in controversy was certainly purchased with the money to which these children were entitled after the mother's death. After Mrs. Fulks was placed in the possession of this land the present appellee, knowing the manner in which she held the title, purchased it from her, and took her bond for title. This sale, however, was cancelled and was made for no other purpose, as the proof shows, than to prevent the creditors of Mrs. Fulks from subjecting it to the payment of her debts. The proof also shows that old man Eastis, after the death of his wife, and while Mrs. Fulks was in possession, asserted a claim of ownership over it, and even rented it out, but this action on the part of the father is explained by testimony showing that this asserted ownership of the land by him, was made for the same purpose that the sale of the land was made by Mrs. Fulks to the present appellee, viz., for the purpose of preventing a sale of it to pay the daughter's debts.

The present appellee and his sister, Mrs. Risen, had each obtained their full share of the land left by either the mother or the father, and if they held under no other title, and in the same that Mrs. Fulks did, it is difficult to perceive how they can hold their land and Mrs. Fulks be deprived of hers, and conceding that the land belonged to the father and that he had the power to *dispose* of it, then the appellee can hold the present land under the will, the title ot the property given by the father to himself, and Mrs. Risen, being of no more validity than the title of Mrs. Fulks to her land, the latter by virtue of the 17th section of the Revised Statutes, I. Vol., page 426, Chap. Descents and Distribution, would have to be made equal out of the undevised estate with the other children before they could claim any part of it. We are satisfied, however, that the old man had no right to this land, and could not dispose of it by deed, will or otherwise, and that the manner in which he can deem himself to be the owner was by the repeated efforts of himself and son to relieve it from the burden of Mrs. Fulks' debts.

The appellee could not recover this land even if the advancements had been equal and the title perfect in the father when he made the will. He was present when this sale was made to the appellant by Mrs. Fulks. He advised the purchase and talked of buying it himself. He then knew the trouble connected with the title. It was his duty, instead of advising the appellant to buy his sister's land, to have explained to him the nature and character of her title, and as he failed to do this, and his own statements in regard to this sister's claim inducing, doubtless, the appellant to make the purchase, he is estopped now to set up any such adverse claim as he is attempting to assert.

The judgment of the court below is reversed and cause remanded with directions to the court below to dismiss appellee's petition and permit amended pleadings to be filed, if necessary, requiring the children and heirs of old man Eastis to convey the land to the appellant and for further proceedings consistent herewith.

Howell and W. H. Chelf, for appellants.

James, for appellee.

JESSE DESHASER *v.* COMMERCIAL BANK OF KENTUCKY, ETC.

Pleadings—Amendment After Judgment.

It was too late for the appellant after judgment had been rendered to offer an amendment. After judgment an amendment is sometimes permitted to be made in order to sustain it, but an amendment would not be allowed for the purpose of invalidating the judgment.

APPEAL FROM MERCER CIRCUIT COURT.

November 7, 1872.

OPINION BY JUDGE PRYOR:

Although the judgment is void in the present case as against Wm. Deshaser for the reason that there was no warning order against him and no service of process whatever, still he is not complaining in this court.

The judgment, however, must be reversed so far as it affects the appellant Jesse Deshaser. The cause was never submitted to the court for final judgment, and leave should have been given the appellant to amend his answer or stand by his demurrer.

The only question submitted to the court was as to the sufficiency of the defense relied on by the appellant, and the court after sustaining the demurrer should have afforded him an opportunity to amend his pleading. It was too late for the appellant after judgment had been rendered to offer an amendment. After judgment, an amendment is sometimes permitted to be pleaded in order to sustain it, but an amendment would not be allowed for the purpose of invalidating the judgment.

If, therefore, no amendment would have been permitted after judgment, the court should have given the leave to amend before judgment.

The appellant could not have asked leave to amend for the reason that the judgment sustaining the demurrer also determined the right of the parties upon the merits.

The court below should have, upon the petition offered to be filed by the appellant, considered all the cases pending in that court seeking to subject the land claimed by Wm. Deshaser, or his fathers, to the payment of their several debts.

Upon the return of the cause, the appellant should be allowed to amend his answer.

The judgment of the court below is reversed as to the appellant and cause remanded for further proceedings consistent with this opinion.

J. B. Thompson, for appellant.

JOHN A. DUFF, ETC., *v.* ROBT. W. ROSE.

New Trial—Impeachment of Witnesses—Absence of Party.

The absence of appellant from the trial of the cause is no reason why a new trial should have been allowed him. The fact that he would have been able to impeach some of the witnesses who testified against him would not have entitled him to a continuance.

Contracts—Misrepresentation—Instructions.

It was not erroneous to instruct to the effect that if appellant agreed to take ten additional hogs to make up the supposed average of two hundred pounds per head, nothing should be found on account of misrepresentation as to the weight, made by appellee.

APPEAL FROM ESTILL CIRCUIT COURT.

September 4, 1872.

OPINION BY JUDGE LINDSAY:

The absence of the appellant from the trial of this cause is no reason why a new trial should have been allowed him. The fact that he would have been able to impeach some of the witnesses who testified against him would not have entitled him to a continuance had he made application therefor upon that ground alone.

Besides this, the repeated continuance had upon his motions very strongly indicates that his principal object in the litigation was delay.

Appellant has no right to complain that certain portions of his depositions, which were mere recitals of hearsay testimony, were excluded, nor that his motions to exclude competent testimony taken by appellee were overruled.

The fact that one witness adopted the testimony or deposition of another, amounts to nothing in view of the fact that such witness was cross-examined at length by appellant.

Instructions Nos. 1, 2, and 3, given by the court, present the law of this case even more favorable to appellant than should have been done, in view of the fact that the measure of damages fixed in case the jury should find for him on his counterclaim embraced the expense incurred in driving the unspayed sows, in addition to the difference in value at the time and place of delivery.

It was not erroneous to instruct to the effect that if appellant agreed to take ten additional hogs to make up the supposed average of two hundred pounds per head, that nothing should be found on account of representations as to weight made by appellee. This is not in conflict with the instruction first given to the effect that he was responsible for representations as to size of hogs not seen by appellants.

But independent of this appellant voluntarily received and kept all the hogs after they had been gotten out of the field, and when there was no pretense that they could not be examined by himself or his agent.

Feeling satisfied that the judgment appealed from is consistent with the substantial justice of the case it must be affirmed.

Lilly, for appellants.

Caldwell, for appellee.

MARGARET ELLIS *v.* THOMAS GRIDER.

Dower—Wife Estopped to Claim—Innocent Purchaser.

The appellant appeared in open court, at the term of court at which the commissioner reported the sale of her husband's land, and relinquished her right to dower therein.

As a matter of law this relinquishment did not divest her of her right to dower, but it estops her from asserting such right against those who acted upon the faith of it and purchased and paid for the land, under the impression, traceable directly to her voluntary act, that it was free from such incumbrance.

APPEAL FROM RUSSELL CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE LINDSAY:

It does not appear that appellant was a party petitioner in the ex-parte proceeding by Robert Higginbothan's heirs, but it does appear as part of the record in that case that at the same term at which the commissioner reported the sale of the land, she appeared in open court and relinquished her right to dower in the interests therein owned by her deceased husband.

It does not matter whether this relinquishment was based upon a consideration or not, as Lester, the purchaser, had the right to act upon it in accepting the deed of the court, and in paying the purchase price for the land, and his vendee, Grider, had the same right in purchasing from him.

It may be and is true, as a matter of law, that this relinquishment did not divest Mrs. Ellis of her right to dower, but it certainly estops her from asserting such right against those who acted upon the faith of it and purchased and paid for the land,

under the impression traceable directly to her voluntary act, that it was free from such incumbrance.

The facts constituting this estoppel are aptly pleaded in appellee's answer and are fully sustained by record evidence.

Judgment affirmed.

Garnett, Hays, for appellant.

Montgomery, for appellee.

JOHN CHAPMAN, ETC., *v.* L. SHANNON.

Trespass to Try Title—Injunction to Stay Waste—Boundaries Must Be Fixed in Judgment—Writ of Possession.

In actions in ejectment, where recovery is had, the plaintiff is entitled to a writ of possession and may take possession under it, but in a suit in equity where the deeds under which both parties claim have no definite boundaries, the chancellor in determining the rights of the parties should fix and establish the boundary, so as to enable the officer who executes the writ, as well as the parties, to know the boundaries of their respective tracts of land.

Where the title and possession of land are both brought in question by reason of the alleged unlawful entry, the result of the litigation determines the question of title.

APPEAL FROM LAWRENCE CIRCUIT COURT.

November 14, 1872.

OPINION BY JUDGE PRYOR:

The appellee instituted the present suit in equity alleging that he was the owner and in the possession of certain lands by himself and tenants and that the appellants had entered upon this possession and were cutting and destroying the timber and selling tanbark therefrom and committing great waste, etc. He asks for an injunction to stay waste and also a judgment for the value of the tanbark removed from the premises.

No recovery of the land or the possession is asked for by the pleading.

The appellants traverse the allegations of the petition and assert a right of property in themselves to the land upon which the waste is alleged to have been committeed. This answer necessarily placed in issue the title to the land. Much proof was taken on both sides in regard to the boundary of the parties owning adjoining tracts. The appellee exhibits two different deeds for the land owned by him, one from a man by the name of Roberts, and the other from the sheriff of Lawrence county by reason of an execution sale of the land of James Shannon. Shannon purchased of Shorter, and the land on which this alleged unlawful entry was made is the tract purchased by Sam Shannon of Shorter, and sold by the sheriff by virtue of an execution against Shannon and purchased by Moore, and Moore, the purchaser, afterwards uniting in a deed with the sheriff conveys the land to the appellee. The weight of the testimony shows that the timber cut, and the waste committed was upon the land originally owned by Shorter and conveyed by the sheriff to the appellee. The objection, however, to the judgment is, that it is too indefinite and the sheriff required to execute the writ of possession would have trouble in determining the extent of appellee's recovery. It is true in an action of ejectment where a recovery is had the plaintiff is entitled to his writ, and may take possession under it at his own peril, but in an equity suit like this, where the deeds under which both parties claim, and particularly the deeds of the appellee have no definite boundary, the chancellor in determining the right of the parties should fix and establish the boundary so as to enable the officer who executes the writ, as well as the parties, to know the boundaries of their respective tracts of land. There is some proof indicating that the boundary of the Shorter deed includes the actual possession and improvements of the appellants; whether it does or not, is a question difficult for this court, upon a careful examination of the record, to determine. Therefore the necessity of ascertaining and fixing the boundary line of the true tracts, it is also made the more necessary in this case, as the recovery of the land or a specified boundary is not asked for by the prayer of the petition. It is true that in an action of this character where the title and possession are brought in question by reason of an alleged unlawful entry, the result of the litigation determines the question of title,

and although there was no specific prayer for a recovery of the land, still the unlawful entry being shown, the party guilty of the tort is not prejudiced by a judgment of the chancellor, not only quieting the title but removing him from the premises.

Whilst this may be done, the chancellor, in order to quiet the title and limit the extent of the appellee's recovery, must establish the boundary by having an actual survey made marking and defining the boundary lines. This has not been done by the judgment and the parties are left with the same indefinite and uncertain boundaries they had when the suit was instituted. For the reasons indicated the judgment is reversed and cause remanded for further proceedings consistent with this opinion. Either party should be allowed to amend their pleadings.

Rodman, for appellants.

Moore, Burns, for appellee.

JOHN DANIEL *v.* COMMONWEALTH.

Criminal Law—Carrying Concealed Weapons.

The offense denounced and intended to be punished by the statute, is the practice of carrying deadly weapons concealed from ordinary and common observation, and not such open and visible arming of the person as would be readily seen and understood, and although the pistol may have been worn in scabbard and thus a part of it concealed from view, yet if enough of it was exposed to ordinary observation as to show plainly what it was, such carrying was not an offense under the statute.

APPEAL FROM BATH CIRCUIT COURT.

June 7, 1872.

OPINION BY JUDGE HARDIN:

The question to be determined by the jury in this case was, whether or not the defendant was guilty, as charged, of carrying concealed a pistol, which was a deadly weapon. (1 R. S. 14.)

In explanation of what constituted the offense, the court instructed the jury that "carrying a pistol in a scabbard around

the defendant, is a concealment within the statute, although the scabbard was visible and portions of the pistol invisible."

We cannot concur in this construction of the law. The offense denounced and intended to be punished by the statute, manifestly is the practice of carrying deadly weapons concealed from ordinary and common observation, and not such open and visible arming of the person as would be readily seen and understood, and although the pistol of the appellant may have been worn in a scabbard, as such weapons are, and thus a part of it conceaed from view; yet, if eough of it was exposed to ordinary observation, and not hidden by clothing or otherwise as to show plainly what it was such a carrying of it was not, in our opinion, an offense under the statute.

The judgment is therefore reversed and the cause remanded for a new trial on principles not inconsistent with this opinion.

Nesbitt, for appellant.

Attorney-General, for appellee.

JAMES D. DUNCAN, ETC., *v.* LUTHER CARPENTER, ETC.

Wills—Acceptance of Favorable Provisions—Estoppel.

Where a devisee accepts the provisions of the will, beneficial to him, he is estopped from objecting to that part unfavorable to his interest.

APPEAL FROM WARREN CIRCUIT COURT.

October 14, 1872.

OPINION BY JUDGE HARDIN:

As to the main question arising on the original appeal, whether or not the first sets of Edmund Duncan's children were properly held accountable for the value of the land devised to them in the second codicil to the will, we are of the opinion that whether

the terms of the will are such as to devise the whole estate or not, within the meaning of the 17th section of chapter 30, Revised Statutes, we are of the opinion from the entire will, that the testator in making the devise of the land in the said second codicil, did not intend, further than may have been unavoidably necessary to alter his previously expressed purpose of affectuating "an equitable" distribution of his estate among all his children.

And that he meant by this an equal distribution, as nearly as practicable, including both the land derived by his first wife, and the slaves given to the younger class of children by Margaret Bakey (after conferring on the family remaining at the homestead particular advantages), seems to be reasonably certain from his failure to relieve the second class of children of the previous charge of the slaves to them, and the expression of the wish, in the clause devising the land, that the balance of his estate be disposed of as provided in his "foregoing will."

Upon the cross appeal, we concur with the court below that the devisees of said slaves are estopped from objecting to being charged with them by their acceptance of the provisions of the will beneficial to them. And we perceive no error in the judgment with reference either to the land or slaves as to the amounts charged therefor, or the time of charging those amounts. Nor is there, in our opinion, any available error in the judgment.

Wherefore the judgment is affirmed, both on the appeal and cross-appeal.

Dulaney, for appellants.

JAMES DUDLEY ET AL. *v.* WILLIAM WILSON'S ADMR.

Fraudulent Conveyance—Preference of Creditor—Statute of 1856—Limitation.

In order to invoke the aid of the statute of 1856, suit must be instituted within six months after the fraudulent preference has been made.

APPEAL FROM FLEMING CIRCUIT COURT.

September 19, 1872.

OPINION BY JUDGE HARDIN:

The transfer of the note on Sanders to Jonathan Wilson was not, in our opinion, so designed and intended as to operate as a general assignment for the benefit of Smith's creditors under the act of 1856. Nor did the circumstances prove, as badges of fraud, in relation to the attachment suit of William Wilson against Smith establish a joint purpose or agreement between those parties, to effect a lien on the property merely in order that Wilson should give preference over other creditors of Smith, in contemplation of the insolvency of Smith. But if the evidence was such as to give the transaction that effect, as more than six months elapsed between the levy of the attachment and the institution of this suit, the remedy sought was barred by the limitation provisions of the act of 1856.

Wherefore the judgment is affirmed.

W. H. Cord, for appellants.

Anderson, for appellee.

R. C. MOORE'S DEVISEES *v.* R. C. MOORE'S HEIRS.

Witnesses—Credibility—Contradictory Statements.

The credibility of a witness in the contest of a will is not destroyed by the testimony of other witnesses that the former made statements out of court, different from those made to the jury.

Wills—Evidence—Testamentary Capacity.

The evidence was held insufficient to show that the mind of testator was so far impaired at the time the will was made as to render the will invalid.

APPEAL FROM NICHOLAS CIRCUIT COURT.

December 7, 1872.

OPINION BY JUDGE LINDSAY:

The paper in contest was executed by R. C. Moore, deceased, on the 19th day of June, 1866.

The evidence in our opinion fails to show that its execution was procured by fraud, importunity or the exercise of undue influence. It is not shown that the will was made at the request of either one of the devisees, or of the friends of either of them. There is no evidence whatever conducing to establish that any person present when the will was made, or at any time prior thereto, so far possessed the confidence or affection of Moore as to be able to influence him to do any act involving important consequences, which his judgment did not approve, or his own inclinations or desires suggest.

The record fails to develop any reason why Dr. Phillips should have desired to influence the testator in disposing of his estate, much less to have become a participant in a conspiracy to contest and impose upon the courts as a will a paper that Moore did not execute at all.

That Carter desired that his daughter, and daughter-in-law and their children should be made the recipients of Moore's bounty, may be conceded, and yet it by no means follows from that fact nor from any other circumstance connected with the part played by him, in the execution of the paper, that he was guilty of the fraudulent and iniquitous conduct imputed to him by the appellees.

If Carter and Phillips are to be believed, Moore in making the will acted freely and voluntarily, and the paper before us is his true

lawful will and testament. The attempts to show that their two witnesses are not entitled to be believed can not be regarded as successful; that they differ in their testimony as to immaterial facts and circumstances, is rather to be attributed to the frailty of human recollection than to corruption, and if they had closely and minutely agreed in everything it might well have been suspected that their perfect consistency was the result of conspiracy and fraud.

Nor is it enough to destroy their credibility that certain witnesses swear that they made statements out of court different from the testimony detailed by them to the jury.

It is evident that the capacity of Moore to make a will and the circumstances attending its execution, have been extensively canvassed among the friends and acquaintances of these litigants. The great number of witnesses examined, and the partiality exhibited by many of them, demonstrates that it was a matter of feeling with many persons in no wise interested.

Under such a state of case it might well be expected that the conversations or remarks of these two important witnesses to making this theme of local interest would be misunderstood or misconstrued by the partisans or friends of the contestants of the will. Besides this the importance of some of these supposed contradictory statements depends upon the time at which they were made and it is manifest that it was next to impossible that these dates should be correctly fixed. The character of neither of these witnesses was assailed, and their credibility remains in our judgment unimpaired, notwithstanding the labored efforts of appellees to destroy it.

It only remains to consider the question of testimentary capacity. In the latter part of May, when Dr. Bigstaff ceased to visit Moore, he expressed the opinion that he could get along without further medical attention, Dr. Thompson did not discover that his mental powers were even enfeebled, for twenty or thirty days after he came to James F. Glovers, which was on the 28th or 29th of May.

At the consultation of the physicians, held the day before or the day after the will was executed, no mention was made by any or either of them, not even by Dr. Bigstaff, that the mind of the patient was at all affected. It can scarcely be possible that these scientific gentlemen whose business it was to examine the sick man and to ascertain if practicable the character of the disease with which he was suffering, could have failed to discover that his mental

powers were impaired if such had been the fact. They must have conversed with him freely and fully concerning the symptoms of his malady and as a matter of necessity their conclusions were to a greater or lesser extent based upon information then obtained from him.

Bigstaff says that he before that time had an intimation that Moore was guilty of the practice to which he attributed the supposed softening of the brain. As a physician he knew that such practice results in derangement of the mental faculties, and he would naturally have turned his attention to the condition of the patient's mind as one of the means by which to ascertain the nature of the disease for which he was called upon to prescribe. The failure of these educated physicians to discover insanity upon this occasion, fortified as this circumstance is by the positive testimony of an intelligent man like Payne, who remained with him during the night of the 19th of June, effectually disposes of the vagaries of Coons and wife, and of Moxley and Steele.

Answering all the evidence we conclude that the mind of Moore became gradually enfeebled as the disease preyed upon his physical powers, but that the finding of the jury that his intellect was so far impaired on the day the will was executed as to render him incapable of making a will is not only not sustained by the testimony, but is against the weight of it.

The paper shows upon its face evidences of testamentary capacity, sufficient to rebut any presumption of incapacity that might arise from the testimony offered by the contestants. It was made pursuant to a design previously entertained and expressed.

If upheld it accomplishes ends proved to have been contemplated by the testator when his mind was sound beyond question. In providing a monument to mark his grave, and in keeping his estate or any part of it out of the hands of certain of his kindred, it manifests that he had not forgotten his old friend Lloyd Moore, whose name and family had almost ceased to be remembered by any one else, and demonstrates that the affection he had so often exhibited for his little grand-nephew, Charley Glover, was genuine. It provides that none of his relatives shall be required to pay the notes he held against them, and secures to the orphan whom the testator had raised and his children by the wife he knew and who had doubtless been kind to him, more than one-half of his estate. The remainder

is divided between the brothers and sister of this nephew, who, like him, were left orphans and were brought from a distant state to Kentucky by this bachelor uncle.

The will shows that the testator was familiar with the character, amount and condition of his estate, and when considered in conjunction with the memorandum made at the same time, demonstrates beyond cavil that the testator's memory could not have been seriously impaired. It is, therefore, considered that the judgment of the Nicholas Circuit Court founded upon the verdict of the jury be reversed, and the cause remanded with instruction to said circuit court to enter a judgment affirming the judgment of the Bath County Court admitting the will to probate, and to certify that fact to said last named court.

Wadsworth, Jno. M. Elliott, E. C. Phister, Apperson & R. C. W. Andrews, R. Reid, for appellant.

J. S. Hart, T. Turner, Stone, Nesbitt & Gudgell, Jno. B. Huston, Breckenridge & Buckner, for appellees.

OWEN MURPHY *v.* JOHN A. HIGDON.

Pleading—Amendment, Refusal of.

In an action on a note given for the difference in the exchange of horses, in which defendant set up breach of warranty, and defendant filed an amended answer alleging that the contract was void as having been made on Sunday, and thereupon plaintiff tendered an amendment of his petition, alleging that defendant converted the horse which he got from plaintiff for his own use, the amendment of the petition was properly refused.

APPEAL FROM HANCOCK CIRCUIT COURT.

December 7, 1872.

OPINION OF JUDGE PETERS:

In an exchange of horses appellee executed to appellant his note for two hundred dollars as the difference between the horse he parted with, and the one he got from appellant.

Opinion of the Court.

This action was brought on the note after it matured, and appellee, as a defense in the first answer filed by him, pleaded that at the time of the exchange appellant represented that the horse he traded was sound in every particular, and that he, relying on the representation of appellant, made the exchange, but that very soon thereafter he discovered said horse was unsound and diseased in his eyes.

In an amended answer appellee alleged that said contract for the exchange of horses was made, and said note was executed, and delivered on Sunday, or the Christian Sabbath, and that the parties were not members of any religious society that observed as the Christian Sabbath any other day of rest, than that on which the note was executed and delivered.

After the amended answer was filed, appellant tendered, and asked permission of the court to file an amended petition, in which he alleged that appellee converted the horse he got of him to his own use, sold him and realized from the sale the sum of $150, and prayed judgment therefor.

This amendment the court below refused to permit appellant to file, and a verdict, and judgment having been rendered against him, he has appealed.

It is insisted for appellant that the court erred in refusing to permit him to file his amended petition, by which he sought to recover from appellee the value of the horse which he alleged he had converted, and to keep the one he got in exchange, an advantage which the law would not tolerate even if appellant had been without blame in the transaction.

These parties, as the evidence conduces to show, exchanged horses on Sunday, which as this court decided in *Murphy v. Simpson,* 14 B. Mon. 337, is a work, or business prohibited by the statute.

In that case an action was brought by Simpson against Murphy, with whom he had exchanged horses, for an alleged unsoundness of the horse he had gotten. Murphy pleaded that the contract, or exchange, was made and executed on the Christian Sabbath, in violation of the statute prohibiting labor or business to be done on that day; the court below adjudged his defense insufficient, and a verdict for forty dollars, and on an appeal by Murphy this court said exchanging, or as it is usually termed, swapping horses, is as much a trade, or business, as selling a horse or any other commodity would be; it is a violation of the statute when done on the

Sabbath day, the act is illegal, and consequently no contract arising out of it is enforceable.

The statute should not be extended by construction to embrace cases which are not clearly within its meaning; but at the same time it should be fairly construed, with a view to the accomplishment of the objects contemplated by the Legislature in its enactment, and we concluded that the defense was a valid one, and should have been sustained.

There is no perceptible difference in principle in the two cases, in the one quoted from the appellee had been injured by the exchange to the amount of $40. In this the injury may have been greater or less, but it is not material how that may be. The defendant may have the advantage contrary perhaps to the real justice of the case as between him and the plaintiff. This is not for the sake of the defendant, but on general principles of policy the court will not lend its aid to such a plaintiff. Both being equally in fault, the maxim *potior est conditio defendantes* applies; Chi. on Contracts, 731. The amended petition was therefore properly rejected, and there being no error in the giving and refusing instructions, the judgment is affirmed.

James, for appellant.

Bush, Williams, for appellee.

S. R. NEALE *v.* JAS. B. EVANS.

Malicious Prosecution—Pleading—Proof.

To maintain an action for malicious prosecution, it is necessary to allege and prove that the prosecution was instituted maliciously and without probable cause, both of which elements must concur.

Malicious Prosecution—Probable Cause—Proof.

Although the want of probable cause is negative in its form and character, still it must be proved by some affirmative evidence, unless such proof is dispensed with by the defendant by pleading the truth of the facts involved in the prosecution.

Malicious Prosecution—Instruction—Burden of Proof.

If the facts shown in an action for malicious prosecution were not sufficient to induce the belief on the part of defendant that the

charge was proved, and there was probable cause for the prosecution, the law is for the defendant, and an instruction that the burden of proof is on plaintiff to show that defendant caused the indictment to be found against plaintiff without probable cause, and must show that the material charges in the indictment were false, and if they were false, and yet defendant had good grounds to believe and did believe them to be true, and in good faith acted on such belief he was not liable, is a correct statement of the law.

Malicious Prosecution—Instruction—Probable Cause.

In an action for malicious prosecution, it is the duty of the judge to explain to the jury, when asked by any of the parties to do so, what amounts to probable cause.

APPEAL FROM WEBSTER CIRCUUIT COURT.

December 7, 1872.

OPINION BY JUDGE PETERS:

This was an action instituted by appellee against appellant in the court below for a malicious prosecution and after the evidence on both sides had been concluded, appellant asked among others instruction "No. 9," which is substantially as follows:

That the burden of proof is on the plaintiff to show that the defendant caused the indictment to be found against him without probable cause, and must show that the material charges in the indictment were false, and if they were false still if the defendant had good ground to believe, and did believe them to be true and in good faith acted on such belief, this would excuse him. The court below refused the instruction and appellant excepted to the ruling.

To maintain the action it was necessary for appellee to allege and prove that the prosecution was instituted against him maliciously and without probable cause; both these must concur, and even if it should appear that it was malicious and unfounded, still if there was probable cause the action can not be maintained. And although the want of probable cause is negative in its form and character, still it must be proved by some affirmative evidence, unless that proof is dispensed with by the defendant by pleading the truth of the facts involved in the prosecution. 2 Graul, Secs. 449, 453-454.

In order to excuse appellant the jury were required by the instruction to believe form the evidence that he had good reason to believe, and did believe that the charges in the indictment were true,

and that there was affirmative evidence of the want of probable cause. If the facts as shown were sufficient to induce the belief on the part of appellant that the charges were true in the opinion of the jury, and there was probable cause for the prosecution, then the law was for defendant, that, as we understand it, is the meaning of the instruction, and it conforms to the legal principles deduced from the authorities.

The court was asked to give to the jury instruction "No. 10," which is as follows: Reasonable grounds, or probable cause for a prosecution, consists in acting in good faith upon an honest conviction (based upon information which a man of ordinary prudence would believe), of the existence of a fact or facts which, if true, strongly tends to establish the guilt of the accused.

While the question of probable cause is composed of law and fact, and where the matter of law, and matter of fact of which the probable cause consists are intimately blended together, the judge may refer the question to the jury. Still, when asked by either party, it is the duty of the judge to explain to the jury what amounts to probable cause, and as Instruction No. 10, referred to, is a reasonably fair definition of probable cause, the court below erred in refusing it.

It furthermore appears that the weight of authorities authorize the giving of Instruction No. 7, as asked by appellant, which the court below refused.

From the record before us it appears that the question of the removal of the first action brought by appellee against appellant was before the judge, and undetermined when appellee made his motion to dismiss his action, and we can not say that it was an abuse of a sound discretion in that court to sustain the motion. But for the refusal of the court to give Instructions Nos. 6, 9 and 10, the judgment is reversed, and the cause is remanded with directions to the court to award a new trial and for further proceedings consistent herewith.

Gazlay, Yeaman & Reenecke, for appellant.

JNO. F. BERRY *v.* JNO. MARTIN.

Dower—Answer, Sufficiency.

Where an answer alleges the facts sufficient, if true, to constitute a potential right of dower in the land, which defendant had a right to have protected by the court, it is good as against a demurrer.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 7, 1872.

OPINION BY JUDGE HARDIN:

The reply to the answer being withdrawn and the judgment rendered over the answer, which was adjudged insufficient on demurrer, the only question for the decision of this court is, whether any valid defense is presented by it.

So far as it questions the validity of the assignment from Yonts to the appellee, we concur in the conclusion that the answer is evasive and insufficient as a denial of the assignment, as the act and deed of Yonts. But, in another respect, the answer seems to present an equitable defense to the action. It sufficiently sets forth facts, which if true, constitute a potential right of dower in the land, in Mr. Yonts, against which the appellant had a right, by his answer and cross petition, to seek the protection of the court. The amendment of the answer being taken as confessed by the demurrer, the judgment can not be sustained. It is therefore reversed, and the cause remanded for further proceedings not inconsistent with this affirmance.

W. H. Holt, for appellant.

Turner, French, for appellee.

G. M. PERRY *v.* B. D. LACY.

Execution—Return, Validity.

Where the return to an execution shows that the land in question was sold in front of the courthouse door, and the proof shows that the courthouse had been destroyed by fire, and that the sale was made in front of a hotel which was being used as a courthouse, there is no such irregularity in the return as to render the sale void.

APPEAL FROM MORGAN CIRCUIT COURT.

December 7, 1872.

OPINION BY JUDGE PRYOR:

There is no such irregularity in the sale of the land in controversy under the executions in favor of Lacy as would authorize this court to adjudge the act void. The return of the executions by the sheriff shows that it was sold in front of the court house door. It appears from the proof that the court house was destroyed by fire; that the courts of the county were afterwards held in a hotel in the town. This hotel was for the time being the court house of the county and was used as such and a sale in front of it was in compliance with the law. The amendment made by the sheriff of his return on the execution was proper.

There is no reason for distributing the judgment of the court below. Judgment affirmed.

JOSEPH BONDURANT *v.* COMMONWEALTH.

Intoxicating Liquors—Tippling-house—Instruction.

Under § 1, art. 4, ch. 99 (2 R. Stat. 411), relating to the keeping of tippling-houses, an instruction that if the jury believe from the evidence that defendant suffered or permitted his brother to sell whisky in defendant's house more than once in any quantity, which defendant suffered or permitted to be drunk in a house about 40 yards from the place of sale, he is guilty of keeping a tippling-house, and the jury should so find, in the absence of proof that accused was licensed to sell by the drink, is erroneous, since the liquor was not drunk on the premises where sold or on premises adjacent thereto.

APPEAL FROM MARSHALL CIRCUIT COURT.

December 7, 1872.

OPINION BY JUDGE PETERS:

The appellant was indicted, and tried in the court below for keeping a tippling house.

On the trial the jury were on motion of appellee charged by the court in Instruction No. 2,

That if they believe from the evidence that defendant suffered, or permitted his brother to sell whiskey in defendant's house more than once in any quantity, which whiskey defendant suffered or permitted to be drunk in a house, or shop about forty yards distant from the house, when sold, he is guilty of keeping a tippling house, and they should so find, unless he proves that he was licensed to sell by the drink, and that although he may have merchant's license, he is guilty, if he did not have other than his merchant's license.

This instruction was erroneous. By Sec. 1, Art. 4, Chap. 99, 2 Vol. R. S. 411, it is provided that, any person unless he shall have a license therefor, who shall sell in any quantity wine or spirituous liquors, or the mixture of either, in any house to be drunk therein, or on, or adjacent to the premises where sold or sell the the same, and it shall be so drunk, shall be deemed guilty of keeping a tippling house, and fined the sum of sixty dollars. It certainly can not, as a legal or mathematical proposition, be maintained that a house or shop within forty yards of a house where whisky is sold without other evidence is on premises adjacent, or contiguous to, or touching (all of which mean the same thing), said house or premises but such is the effect of the instruction given by the court. Several houses, or premises may intervene and such is the case frequently as universal observation and experience teach us all—therefore, as appellant was not guilty unless the whisky was drank on the premises where sold, or in a house, or on premises adjacent to or touching the place where sold, the instruction quoted was erroneous and prejudicial to appellant.

Wherefore the judgment is reversed and the cause is remanded for a new trial and for further proceedings consistent herewith.

J. C. Gilbert, for appellant.
——— *for appellee.*

BUCHANAN & ROGERS *v.* L. T. AUSTIN & WIFE.

Appeal—Review—Instructions.

The Court of Appeals can not pass on instructions which are not in the record.

Appeal—New Trial—Grounds—Waiver.

Under Civ. Code Prac., § 372, requiring the grounds for a new trial to be specified in writing, failure to present the admission of evidence as a ground for a new trial excludes such grounds from consideration on appeal, as it will be treated as waived.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE PETERS:

It does not appear in the record that any instructions were given to the jury by the court; consequently there was no error apparent to this court in expounding the law to the jury.

The verdict is not so flagrantly against the weight of the evidence, if it be against it at all, as to authorize the court to interfere and award a new trial.

The motion for a new trial was made in the court below on two specified grounds, and appellant urges as a ground for a reversal in this court that the court below should have excluded from the jury so much of Austin's evidence as states facts inconsistent with, or which qualify the terms of the deed of himself and wife, and also for overruling his motion to exclude from the jury the facts stated in the affidavit that Harris would prove, it being admitted that if present he would prove the facts; but the evidence was objected to on the ground that it contradicted the deed of Austin and wife to him and therefore incompetent.

Whether or not the admission of that evidence would have been an available error for which the judgment would have been reversed if the objection has been properly prosecuted for revision, we can not decide as the failure to present it as a ground for a new trial excludes it from the judicial consideration of this court. Sec. 372, Civ. Code, requires all the grounds relied on for a new trial to be specified in writing; consequently no error not so stated could be noticed by the court below, but all such pretermitted objections must

be treated as waived in that court, and is, necessarily, beyond the sphere of this court's revisory jurisdiction, which is only to decide whether on the grounds properly before it, the court below erred in its judgment. *Hopkins v. Commonwealth,* 3 Bush 480; *Slater & Wife v. Sherman,* 5 Bush 206; *Louisville, Cincinnati & Lexington R. R. Co. v. Mahony's Admr.,* 7 Bush. 235.

Judgment *affirmed.*

E. Field, for appellants.

Clemmons & Wills, for appellees.

COMMONWEALTH *v.* DAN RICE.

Municipal Corporations—Ordinance—Violation—Trial—Fine—Appearance.

It is erroneous to try and fine one on constructive notice only, for violation of a city ordinance without his personal appearance.

Appeal—Reversal—Proper Result.

Where an appeal is taken and prosecuted by one whose liability was necessarily incidental to that of defendant without objection for informality or irregularity in the mode of procedure in the circuit court, the judgment will not be disturbed, where it appears that the proper result was reached.

APPEAL FROM FULTON CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE HARDIN:

As it appears that under the act of March 10, 1854, the city of Hickman had "the exclusive power to tax and license" shows exhibiting or performing within its limits. Rice was not liable to be fined under the act of February 17, 1866, for exhibiting his show in Hickman as charged in the warrant against him, but if he was, his offense being personal, it was erroneous to try and fine him upon constructive service only and without his personal appearance.

It is true the appeal does not appear to have been formally taken in the name of Rice, but it was taken and prosecuted by Taylor, whose liability was necessarily incidental to that of Rice; and it was so prosecuted without objection for informality or irregularity in

the mode of procedure in the circuit court; and the trial having resulted properly, as we think, in vacating both the judgment against Rice and the bond of Taylor, the judgment of the circuit court ought not, in our opinion, now to be disturbed.

Wherefore the judgment is *affirmed.*

H. A. Tyler, for appellant.

———, *for appellee.*

HENRY BUCHTER *v.* COMMONWEALTH.

Criminal Law—Instruction—Concealed Weapon.

Under § 2, Act March 10, 1854 (1 R. Stat., 414), in a prosecution for carrying a deadly weapon, the court properly refused to instruct the jury to find for defendant upon evidence sustaining the charge, but also conducing to prove that at the time of the alleged commission of the offense defendant had prepared to go, and was about to start on a journey from Louisville, Kentucky, to Salem, Indiana, in the absence of any evidence to show that defendant on such journey would be required to travel at night.

APPEAL FROM LOUISVILLE CITY COURT.

December 8, 1872.

OPINION BY JUDGE HARDIN:

This is an appeal from a judgment of the Louisville City Court, imposing a fine upon the appellant for carrying concealed a deadly weapon, viz.: a pistol.

Upon evidence sustaining the charge, but also conducing to prove that at the time of the alleged commission of the offense the appellant had prepared to go, and was then about to start on a journey from Louisville, Kentucky, to Salem, in the state of Indiana; and the court having refused hypothetically to instruct the jury to find for the defendant on this evidence—the only question to be determined is whether or not it was lawful for the appellant, in view of the ordinary dangers of such a journey, alone, to start upon it armed with a concealed deadly weapon.

Under Section 2 of the "act to prohibit the carrying of concealed deadly weapons," approved March 10, 1854 (I. R. S., 414), it is lawful for persons so to be armed who are required by their business or occupation to travel during the night. But if performing the single brief trip, which was contemplated by the appellant, could be regarded as a business or occupation within the meaning of the statute there is an utter failure of evidence to show that the appellant was thereby required to travel in the night; and it would therefore be misleading and erroneous to instruct the jury, as the court was asked to do, for the defendant, with reference to his going to Salem, and the court properly refused to give the instructions based on the evidence relating to it.

Wherefore the judgment is affirmed.

Green & Allen, for appellant.

Attorney General, for appellee.

E. W. BURGES, ADMR., *v.* NICHOLAS G. BOSLEY.

Trusts—Purchasing Debtor's Property for Benefit of Debtor.

Where one purchases a debtor's property for the benefit of the debtor, and takes title to secure the money advanced, the purchase should enure to the benefit of the debtor, and the purchaser should be compelled to execute the trust.

Trusts—Purchasing Debtor's Property—Refunding Purchase Price.

Where one who buys the land of a debtor, which was sold for the debt, and holds it only as security for the liability incurred by the purchaser, and the debtor stands by and sees his land sold and is permitted by the purchaser to retain the possession as if no sale had been made and refunds the purchase price paid for the land, and the purchaser receives it as such, and the debtor makes valuable and lasting improvements upon the land selling other portions of his real estate to refund the advance made for him, a court of equity will upon application enforce the trust against the purchaser, by compelling a re-conveyance of the property and quiet the title of the debtor.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE PRYOR:

There is no doubt but what a court of equity would have enforced the award made by the arbitrators by which the accounts between the appellee and Burges were adjusted.

Burges, however, in his reply to the counter claim of Bosley, ignores the award and by this pleading invites the appellee to another settlement of the multiplied accounts between them, and asks that the case be referred to the commissioner for that purpose.

It is now too late to insist upon enforcing that agreement when all parties seem to have accepted the proposition of Burges to open the controversy and have really prepared the case without regard to this amicable settlement.

The appellant (Burges having died since the institution of the suit) alleges an express agreement made with the appellee at the time of his purchase of his residence and mill property, under execution, "that Bosley was to purchase the property to aid the plaintiff, and that the plaintiff should redeem the property by paying back to him, Bosley, the amount for which he, Bosley, was bound for as purchaser," and in the aswer to the action at law for the recovery of a portion of this real estate in controversy instituted by the appellee, Burges alleges, "that the plaintiff, by an agreement with the defendant, purchased the same with the express understanding between the parties that he was doing so as the friend of the defendant, and that defendant was to retain the possession of the same and redeem it by paying back to the plaintiff the amount bid by him." It is further alleged in the petition of Burges, and also in his answer to the suit at law of the appellee, "that the former retained the possession of the property and did in fact pay back to the appellee all the moneys paid by the latter on the various executions and judgments, and that he, Burges, afterwards sold to the appellee one-half of the mill property for $7,500.

The testimony of many intelligent witnesses was taken with reference to the alleged parol agreement under which Burges or his representative claims the right to redeem this land, and their statements leave no room to doubt that such a contract was made.

It is clearly shown that the purchase of the property was made for Burges, by Bosley, and also to secure the latter as his surety upon the very debts for which the property was sold.

That Bosley, after the purchase and payment by him of the debts of the execution creditors received back from Burges, under the parol contract by which the property was to be held by him until he was repaid the money advanced, nearly the entire amount; that Burges at no time surrendered the possession of any of the land from the date of the purchase in 1862 up to the institution of this suit, but on the contrary after the greater portion of the money had been repaid by Bosley, the latter purchased from Burges one-half of the mill property that he had previously purchased under the judgment in the chancery court; that no deeds were ever demanded or required to be made him, under the execution sales, until the difficulties originated with reference to a settlement of their accounts.

The only defense relied on to defeat appellant's right to enforce this parol agreement, is the statute of frauds, and relief was denied by the learned judge in the court below, upon the sole ground, that appellant's petition contained no such allegation of fraud, or of sacrifice in the sale of his property by reason of this parol agreement, as authorized a court of equity to interpose.

If there had been a sale of land by one of these parties to the other in parol, the refusal of the court to grant the relief would have been proper, but there is nothing in the record evidencing any sale of land by Boswell to Burges, but on the contrary the whole proof conduces to show that the land was bought for Burges, and the title acquired by Bosley, whether legal or equitable, held only to indemnify him as the surety for the moneys advanced by him.

Previous to the adoption of the Revised Statutes, where a conveyance was made to one person and the purchase money paid by another, it was well settled that a trust resulted in favor of the party paying the money.

In the case of *Boyd v. McClain* (referred to by this court in the case of *Honore v. Hutchings,* 8 Bush 693), and reported in 1 Johns. Chancery Reports, Chancellor Kent went so far as to decide that where the party to whom the conveyance was made paid the whole of the purchase money, it was competent to show that he took the title to secure the repayment of the same, it having been loaned to the real purchaser.

In the case of *Green v. Ball,* 4 Bush 586, an agreement by the

purchaser that he would buy the land to prevent a sacrifice, was enforced and adjudged not to be within the statute of frauds.

We perceive no reason why a purchase for the benefit of a debtor, whose propery is sold under an agreement with the purchaser that he will hold it only as security for the money advanced by him on the purchase should not inure to the benefit of the debtor and the purchaser compelled to execute the trust.

It is true that such agreements are generally made when property is about to be sold at a sacrifice, and the opinions rendered in such cases are predicated upon the idea of fraud, but the true, and in our opinion the sound rule, on the subject is that the purchase is made for the debtor, and constitutes no such contract as is within the statute of frauds. *Williams, Jr., v. Williams,* 8 Bush 254.

Conceding, however, that fraud either actual or constructive, must exist the confiding debtor as in this case relying on the possession of his friend, and his agreement that he will buy his land and hold it only as the security of the liability he incurs by his purchase, stands by and sees his land sold and is permitted by the purchaser to retain the possession as if no sale had been made and actually refunding the purchase price paid for the land, the purchaser receiving it as such, making valuable and lasting improvements upon it, selling other portions of his real estate to refund the advance made for him, may well ask a court of equity on account of this unfair dealing, when the purchaser refuses to comply with his contract and seeks to recover the possession, to make the trust effective by compelling a reconveyance of the property, and quieting the original debtor in his possession.

The very object of the purchase by Bosley was to prevent a sacrifice of the land under the execution sale. The effect of the sale was to lessen the value of the property and, although the land might have sold for two-thirds of its value, the object of the agreement by both parties was to avoid the effect that a compulsory sale of Burges' property could have upon his pecuniary condition at that time, and to enable him to redeem it.

The facts alleged in the pleadings show the trust and the breach of faith on the part of the appellee in refusing to execute it, and although the proof is more convincing of appellant's equity than the allegations in his pleadings, regarding them as true, still the

allegations are broad enough to authorize the chancellor to grant the relief asked.

The chancellor should have directed a reconveyance of all the land except the one-half of the property known as the mill property. The appellee was already vested with the title for the purpose of the trust (whether a deed had been made him does not appear) and Burges had the power to surrender his right under the parol agreement to redeem any portion of it with the consent of the appellee. It is clearly shown that Bosley was to retain one-half interest in the mill and the property pertaining to it. Bosley is not seeking to have this trade canceled, but insists, however that he made no purchase of the one-half of the mill property, and that if he did, it was in parol. The proof is clear that he made the purchase. The title is made perfect in him by reason of his purchase under the judgment sale, and the agreement of the appellant to surrender the right to redeem to that extent, and he can not now complain for the want of title.

In regard to the settlement of the accounts between these parties the chancellor should adopt as the basis the accounts of each as presented to the arbitrators. The parties to the controversy knew more in reference to these matters than the witnesses. All the items of each account were admitted except items amounting in the aggregate to about $100, and the value of the mill property.

The small items are not remembered by the arbitrators about which the parties disputed. If the parties desire to correct the accounts with reference to these items, or rely upon any mistake or omission in making out their accounts, they should be required to file an amended pleading specifying the mistake or omissions if any. As to the value of one-half of the mill property, it seems that $7,500 is too high, and as the proof now shows, it is difficult to fix a value. The commissioner should hear proof as to the value of the one-half the mill property at the time of the sale of it to appellee, and also the proof in regard to any other accounts arising between the parties on account of the partnership since the arbitration, and will also ascertain the liability of the partnership which it seems the parties had not ascertained when the case was arbitrated, and the amount due by each, and also may take proof in reference to any other matters arising upon the pleadings hereafter filed.

The heirs of Burges should be brought before the court in order that the title may be vested in them to the property to which they are entitled.

The judgment of the court below is reversed and cause remanded for further proceedings in conformity with this opinion.

Weir & Williams, for appellant.

Sweeney & Sweeney, for appellee.

A. DEVIT *v.* J. K. WILSON, ETC.

Execution—Purchaser's Bond—Insolvency of Surety.

The fact that the surety on the bond given by the purchaser of land at an execution sale was insolvent is immaterial, where the judgment plaintiff has acknowledged satisfaction of the judgment.

APPEAL FROM MERCER CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE LINDSAY:

The judgment of the 29th of November, 1869, directing a sale of the realty in controversy in satisfaction of Wilson's debt and appointing Asken the court's commissioner to make the sale, has already been passed upon and approved by this court in the appeal of *Devit v. Redwitz and Wilson,* decided April 25, 1872. The exceptions as to these matters are not therefore to be now inquired into.

The sale seems to have been properly advertised and was made on the first day of a court for Mercer county.

It does not matter that the surety on the bond given by the purchaser was insolvent, inasmuch as Wilson, the plaintiff in the judgment, has acknowledged its satisfaction. Nor ought the sale to have been set aside because of inadequacy of price.

The plaintiff and purchaser offered to waive all claim to the land if appellant would pay the judgment, and the court proposed to open the bidding if Devit would procure a well-secured bid of ten per cent. advance on that accepted by the commissioner. Appellant refused to avail himself of either of these offers. The court therefore did right in confirming the sale.

Devit had no interest in the rents accruing whilst he was contesting the confirmation of the commissioner's sale, and can not prosecute an appeal to have the action of the court reviewed as to that matter.

Judgment *affirmed.*

J. B. Thompson, appellant.

———, *for appellee.*

BENJAMIN JONES & WIFE *v.* ISAAC CUNNINGHAM, ETC.

Husband and Wife—Judgment—Levy Under.

In an action against a husband and wife for debts incurred by the wife prior to their marriage, judgment may be rendered against them, but as to the husband, the judgment should only be levied upon the property which had come, or might have come to him through the marriage.

APPEAL FROM CLARK CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE HARDIN:

It seems that the judgment is only final so far as it directs the payment of Parker's debt. As to that, it appearing that Mrs. Jones was properly chargeable with enough to pay it, for indebtedness incurred before her marriage with her husband, Jones, it was proper to render judgment against them, but as to the husband, the judgment should only have been to be levied upon property which had come, or might come, to him by the marriage, instead of the ordinary personal judgment which was given against him as well as his wife. *Beaumont v. Miller,* 1 Metcalf, 70; *Fultz v. Fox,* 9 B. Monroe 499.

This case differs from those of *Agner and Wife v. Williams,* 1 Bush 4, and *Curd v. Dodds,* 6 Bush 681, in the essential fact that the liability of the wife, Mrs. Jones, existed at the time of her marriage, and was not merely a claim arising thereafter against her separately or in conjunction with her husband.

Wherefore, for the error indicated in rendering the judgment against Benjamin Jones, it is reversed, and the cause remanded for a judgment not inconsistent with this opinion.

Egiston, for appellants.

J. Simpson, for appellees.

LEONARD F. JETER *v.* JOHN A. WILLIS, ETC.

Courts—Appellate Jurisdiction—Final Judgment.

The Court of Appeals has no jurisdiction on appeal, where a demurrer to defendant's answer was overruled, and on final hearing after the evidence was heard the court refused to permit plaintiff to proceed further, and refused a prayer for judgment, but plaintiff's petition was not dismissed nor final order or judgment rendered.

APPEAL FROM JESSAMINE CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE PETERS:

A demurrer to appellees' answer was overruled by the court below and the case was then submitted on final hearing, and after the evidence was heard, the record shows that the court refused to permit appellant to proceed any further, and refused the prayer for judgment. But appellant's petition is not dismissed, nor has any final order or judgment been rendered in the case, the action is still pending in that court for future adjudication, when a judgment may be rendered or his action may be dismissed.

As, therefore, no final order or judgment has been rendered in the case, this court, under Sec. 15 Civ. Code, has no jurisdiction.

Wherefore the appeal is dismissed.

Breckenridge, Buckner, for appellant.

Bronaugh, Houston & Mulligan, for appellees.

J. W. BOWLING *v.* WM. C. ADKINS, ETC.

Schools and School Districts—Loss of Right to Redeem Property—Negligence.

Appellant's loss of right to redeem property held to have resulted from his negligence.

APPEAL FROM MORGAN CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE PETERS:

Appellant's right to redeem the horses by the express terms of his contract was limited to a definite period, within which, nor at its expiration, he neither paid the money, tendered it, nor procured an extension of the time to redeem.

He was present when the appellee, Mrs. Adkins, transferred the benefit of her purchase to Pennington, and assented to it—his right of redemption having been secured to him by Pennington, it therefore worked no detriment to him.

There is no evidence even conducing to show that Mrs. Adkins and Pennington, or either of them, prevented or attempted to prevent competition in the bidding at the sale of the horses; but appellant's own witness, Murray, proves that he and his son prevailed on the witness to cease when he was bidding for one of the horses.

If appellant has lost the right to redeem the property it resulted from his own negligence, and he must abide the consequences.

Judgment *affirmed*.

Hazelrigg, for appellant.

———, *for appellees.*

ADALINE CHEATHAM *v.* NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Appeal—Reversal—Conflicting Evidence.

The Court of Appeals shall not disturb a verdict or judgment upon conflicting evidence.

APPEAL FROM SHELBY CIRCUIT COURT.

December 8, 1873.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

It is unnecessary to determine any of the legal questions arising upon the facts in this case as there was certainly a conflict in the testimony and in such case this court will not interfere to disturb the verdict of a jury, or the judgment of a court where the law and facts have been submitted, and a jury dispensed with, unless that judgment is palpably against the evidence.

The fact in issue was—Did the company, through its agent, make the contract alleged in the petition? Two witnesses state that they heard the agent of the company say to young Cheatham that the policy of insurance should date from the application and that the agent dispensed with the payment of any money.

The agent swears that in making his suggestions to the young man in regard to the insurance he told him that if he made the payment of the money required, that he would deliver him a binding receipt and then his policy would include all risks from the date of this receipt; that the young man failed to pay any money for the reason that he had none and he was then told that a policy would be sent for and delivered to him upon the payment of the premium.

Before the policy reached the agent, the young man had been shot and was dangerously ill, and in his then condition could not have required a delivery of the policy.

No money had been paid by him or note given and it is hardly reasonable to suppose that the agent could have been so liberal as to insure his life upon such terms.

We can not adjudge that the weight of the testimony is against the judgment of the court—we think the court very properly dismissed the petition.

The judgment is *affirmed.*

Bullock, Barnett, Edwards, Harding, for appellant.

Harwood, for appellees.

B. V. BREWER AND OTHERS *v.* H. PETERS, EX'R.

Parties—Defect of—Objection.

If a suit is objectionable by reason of defects of parties or other informalities, the objection should be made at the time, and not in a collateral proceeding.

Pleading—Knowledge of Contents.

A plea of ignorance of the contents of a petition by parties who were served with process in a former suit can avail nothing, where the petition was on file in the clerk's office, and subject to inspection.

Judgment—Who May Attack.

In a suit against a church, members who are not included in the suit can not attack the judgment.

APPEAL FROM MERCER CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE PRYOR:

The judgment rendered in July, 1868, is final between the parties to the present controversy. If that suit was objectionable by reason of a defect of parties, or other informalities, the objection should have been made at the time and not in a collateral proceeding like this. The judgment is certainly not void, and if this was a proper proceeding to revise it, there is no evidence of any fraud on the part of the appellee. Much proof is taken to show a want of authority in the trustee to purchase the property of Peters, and for which the judgment sought to be reformed was obtained.

These trustees were members of that church, and although they deny all authority to purchase, we can not concede that they made the contract with the appellee with no intention of paying him. If they were sued individually for the debt, their answer would be that they purchased it for the church and held it as church property, and this is true. How, then, can the church escape liability. It is no answer to allege that these trustees, who were members of the church and served with process in the suit of July, 1868, were ignorant of what that petition contained. It was on file in the clerk's office, and no concealment made of its contents. It was their duty as trustees and as members of the church whose property was sought to be subjected, to make defense and to know the nature and char-

acter of the claim asserted against them. Every defense relied on also should have been pleaded in the former suit, and the only ground relied on for annulling that judgment is that the defendants neglected to make any defense to the action, believing that it was only a suit to enforce the vendor's lien. If the defendants in the original suit had been proceeded against not as trustees but as members of the church alone, the result would have been the same. Those members not included in the suit could not attack the judgment, for the reason that they were not parties. Those sued had an interest in the property and were proceeded against as the representatives of the church and the objection should have been made by those in that proceeding.

Judgment *affirmed.*

T. C. Bell, for appellants.

Polk, for appellee.

COMMONWEALTH *v.* GREENUP NICHELL.

Indictment and Information—Allegations of Offense—Bar.

An indictment must allege the offense with such certainty as to enable accused to know what he is called upon to defend, and to constitute a bar to any subsequent prosecution for the same offense.

Larceny—Indictment—Money—Description.

An indictment which simply charges that a number of United States Treasury notes and National Bank notes were feloniously taken by accused, without any further description of the same, was held insufficient.

APPEAL FROM ROWAN CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE PRYOR:

An indictment must allege the offense with such certainty as to enable the accused to know what he is called upon to defend and to constitute a bar to any subsequent prosecution for the same offense.

In this indictment there is no description of the bank bills alleged to have been stolen either as to the number of bills, or the

amount, and no description whatever given, except that a number of United States treasury notes and national bank notes were feloniously taken by the accused.

The accused from this accusation is unable to know whether he is charged with stealing two bank notes or twenty bank notes of the denomination of five dollars or one hundred dollars, and hence could prepare no defense based upon the idea that he had and owned as his own property certain treasury notes answering the description given by the indictment, as he is in entire ignorance as to the description of the paper the commonwealth will produce evidencing his guilt.

The judgment is *affirmed.*

Attorney General, for appellant.

———, *for appellee.*

CITY OF LOUISVILLE *v.* PATRICK MURPHY, ETC.

Municipal Corporations—Council—Journal of Proceedings.

The common council of a city must keep a correct journal of its proceedings, and the journal should be made up by that body prior to the coming in of a new council who can not know whether the journal of prior proceedings made up under their supervision, is correct or not.

Municipal Corporations—Council—Journal of Proceedings.

Where the failure of a branch of a common council to keep a correct journal of its proceedings results in the exoneration of property owners from liability for street improvements, judgment for the amount due and unpaid because of such neglect, should be rendered against the city.

Judgment—Failure to Answer.

A party who was served with process nearly six months before judgment was rendered, but who failed to answer and prepare his defense, cannot complain that judgment was rendered before his defense was heard.

Judgment—Attack—Joinder of Parties.

A city can not set up for the first time after a judgment against it for cost of street improvements, because of the exoneration of property owners, that it was improperly joined in the suit with the property owners, on the ground that it was a mere guarantor.

Opinion of the Court.

APPEAL FROM LOUISVILLE CHANCERY.

December 8, 1872.

OPINION BY JUDGE LINDSAY:

Murphy distinctly alleges in his petition that the contract under which the work on Third street, Portland, was done was approved by both branches of the General Council as provided for by the general ordinance regulating the manner in which such contracts should be made and executed.

The city not only fails to deny this allegation, but is now in this court by her attorney insisting that it is true.

The property holders escape responsibility because one branch of the general council failed to enter on their journals the order or resolution approving the contract, and hence there is no competent evidence as against them of its approval.

We are of opinion that the testimony of McCleary and Vaughan sufficiently establishes that the approval of the contract by the common council was not entered on its journal at the time it was approved nor at any time when the person or persons who made the entry had the right to do so.

The entry had certainly not been made on the 1st of July, 1870, nearly one year after the contract was approved. According to the statements of Vaughan it was made after that time, and after Duerson, the president, and one-half of the members of the general council in office in August, 1869, had either ceased to be members or were holding office under a new election.

Whilst keeping a correct journal does not imply that the entries shall be made and the proceedings signed or approved at each meeting, it certainly is necessary that the journal shall be made up by the body where proceedings are recorded, and before an election may have substituted for one-half the members of such body persons who were not present at the time, and who can not know whether the journal made up under their supervision is correct or not.

The cases of *McKegney v. Obst & Johnson* are conclusive as to the law of this case. As the failure of the common council to keep a correct journal of its proceedings results in the exoneration of the

property holders, judgment for the amount due was properly rendered against the city.

Judgment *affirmed.*

Fox, for appellant.

Eastin & Calloway, for appellee.

RESPONSE TO PETITION FOR REHEARING.

January 5, 1873.

OPINION BY JUDGE LINDSAY:

The opinion in this case is not based upon the idea that either branch of the general council failed to take the necessary steps to render valid the ordinances under which the contract for the street improvements was made. We have no inclination to require of the city legislature or of the city officials more than the charter requires.

Upon re-examination of the opinion of the court, counsel will find that the city is held responsible, upon the sole ground that the common council failed to enter upon its journals its approval of the contract as required by the general ordinance establishing an engineer's department.

We are of opinion that the proof shows, that although this branch of the city legislature did approve this contract on the 19th of August, 1869, that no entry of that fact was made until after the 1st of July, 1870, at which time the identical common council that approved the contract had ceased to exist, the term of office of one-half of its members having expired by operation of law.

This fact is shown by Vaughan, the clerk, who swears that the entry had not been made when McCleary made out the copy filed by the property holders.

McCleary swears that he made out this copy after July 1, 1870.

We attach no importance to the signature of Duerson, the president. We merely decide that the common council must make up its proceedings before its functions cease by operation of law; that

they can not be made up by a new council composed possibly of different members; that this duty must be performed by the council, and not left to the discretion and recollection of its clerk.

As the council did not keep its journals so as to enable Murphy to hold the property holders' bound, the city and not the contractor must pay the loss.

Nor can the city complain that judgment was rendered against it before its defense had been heard. It was served with process nearly six months before judgment and if it wished to defend the action and protect its interest it should have answered and prepared its defense.

Nor will it avail for a reversal that its undertaking was collateral to that of the property holders; that it was a mere guarantor and not liable to be sued until the parties primarily liable had made good their defense. If this position be correct, then the action as to the city was prematurely instituted, but this question can not be raised after judgment. The failure of the city to object to the joint proceeding against it and the property holders was a waiver of the misjoinder. (See preceding case.)

Petition *overruled.*

Fox, for appellant.

———, *for appellee.*

WILLIAM CHILDERS *v.* JAMES C. BARNES, ETC.

Homestead—Proceeds—Depositing as Surety for Debt and Costs.

Where a debtor was arrested under Civ. Code, ch. 1, art. 8, and was released on depositing in the hands of the sheriff as surety for the debt and costs, a sum of money in lieu of bail, under section 186 of the Code, which was the proceeds of defendant's homestead which had been sold under execution by the sheriff, and the proceeds were paid the defendant to purchase another homestead, an order of return of such money to the defendant was erroneous.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE HARDIN:

This action was brought by the appellant for the recovery of $358.84, which, as he allges, he had paid as the surety of J. C. Barnes, Lish & Luncke, partly in money to the sheriff, and partly by a sale of his property under execution; and the plaintiff having obtained an order of arrest against the defendant under Chapter I of Article 8 of the Civil Code of Practice, and he being in the custody of the sheriff, was released by depositing in the sheriff's hands $378.84 as surety for the debt and costs in lieu of bail under Section 186 of the Code.

By the judgment of the court the justness of the plaintiff's claim and the grounds of arrest were sustained; nevertheless, the court adjudged a restitution of the principal part of the money deposited, on the application of Barnes and his wife, made on the alleged facts, that the money was the proceeds of the defendant's homestead, which had been sold by the sheriff under execution, the homestead being valued under Section 4 of the exemption law of 1866 (Myers Supplement 714), and its proceeds paid to the defendant to enable him to purchase another homestead. This appeal is from that order of restitution.

The evidence is not conclusive of the fact that the money deposited was acquired and held by the defendant as alleged by him, but conceding that it was, as the evidence conduces to prove, and that he and his family had such an interest in the homestead as he could not have released or waived except in the mode provided in the statute; and that he might have been restrained at the instance of his wife from depositing the money in lieu of bail, as a misappropriation of it, yet we are of the opinion that as the law invested him with the money, and the sheriff was bound by an express provision of the Code of Practice to accept the deposit when offered, and release him from custody, thus affecting the means which the appellant had lawfully obtained of securing his debt, the order of restitution virtually defeating the appellant's remedy, is erroneous and can not be sustained.

However important may be the provisions of the homestead act to the families of unfortunate debtors, we see no sufficient reason for giving that act such a construction as to render an express provision of the Code of Practice ineffectual, and in this case to sub-

ordinate the rights of the appellant to the equitable claims of the appellee's family under the homestead act.

Wherefore, the judgment of restitution is reversed and the cause remanded for a judgment in conformity to this opinion. Judge Pryor dissents.

Duvall, Marble, for appellant.

Bradley & Darby, for appellees.

J. W. BOWLING *v.* J. H. MARTIN.

Appeal—Reversal—Instructions.

Inconsistent and irreconcilable instructions which tend to confuse and mislead the jury are cause for reversal.

Partnership—Bound by Contracts and Acts of Partner.

One partner may bind the partnership by his acts and contracts done in the scope of the partnership trade or business, and for the purposes thereof.

Partnership—Objects of Business, How Determined.

Where the partnership business is not specifically set forth in the articles of partnership, or where there are no such articles, a majority of the partners have the right in case of a diversity of opinion as to the objects of the business, to determine the question.

Partnership—Evidence—Letter.

A letter written to plaintiff and signed in the firm name of the partnership, was held admissible in evidence with the other facts and circumstances of the case.

Partnership—Representation by Member of Firm.

A representation or misrepresentation of a fact in a partnership transaction, by one member of the firm, will bind the firm.

Appeal—Record—Contents of.

Failure to give credit on a judgment is not an available error on appeal, where the execution and officer's return showing that $100 of the debt had been made by sale of the property, were copied into the record by the clerk, without having legitimately been before the court or jury.

APPEAL FROM MUHLENBURG CIRCUIT COURT.

December 8, 1872.

OPINION BY JUDGE PETERS:

In this action brought by appellee against appellant and others it is alleged that L. W. Kinchloe, Wm. Rogers, Thomas Campbell, and appellant, partners in the business of mining coal from the mines of said Kinchloe, on Green river, and transporting the same to market, employed appellee to go to Evansville, in Indiana, and purchase two boats or barges and have them towed to said mines to transport their coal from thence to market, that under said engagement he went to Evansville, purchased the boats, and caused them to be delivered at their mines, and in the purchase, repairing and delivering of said boats he had expended $520.35, at their special instance and request, which it seems they had failed to pay him, and he prayed for a judgment for the same.

Appellant alone defended the action, and in his answer denied that he was ever a member of any such firm; denied that he was a member of the firm of Kinchloe & Co. or that he was ever a partner of L. W. Kinchloe, Wm. Rogers, and Campbell or either of them in mining and transportation of coal, or for any other business; denied that he ever engaged appellee to go to Evansville to purchase boats for him, or ever authorized any person or persons to employ him in such business, or any other business.

He says that he was the partner of Wm. Rogers and J. W. Campbell in a warehouse in Bowling Green; that the firm name was Wm. Rogers & Co., and the partnership was formed in 1869 to carry on the business of commission merchants in said warehouse in Bowling Green, but that he never was connected in any way with the mining operations at Kinchloe's mines at Lewisburg, or at any other place; that he did not know whether Rogers and Campbell were partners with Kinchloe or not; but that he was not.

Upon the issue thus made the parties went to trial, and a verdict and judgment having been rendered against Bowling, he has appealed to this court.

The important inquiry presented is whether the court below erred in the instructions given to the jury on motion of appellee, and refusal of the one asked by appellant.

Instruction "No. 1" was evidently intended to embrace two distinct propositions in two paragraphs; but if correctly copied in the record before us, the first paragraph is incomplete, and fails to state any legal proposition; but assuming that it is not correctly copied and should read as follows: "that if the jury believe from the evidence that the defendant John W. Bowling is proven to have been a member of the firm of Wm. Rogers & Co. at the time of the alleged purchase, then the court instructs the jury that the defendant Bowling is bound by the acts and declarations of his partners within the scope of the partnership." By using the words "is bound" after the words "defendant Bowling," it is obvious that this restricted the jury in a manner not authorized by the pleadings. Appellant admitted he was a member of the firm of Rogers & Co., composed of Wm. Rogers, J. W. Campbell and himself, doing a commission business in Bowling Green, but denied that he was a member of the firm, or any firm composed of Kinchloe, Rogers, Campbell and himself, for mining coal and transporting it to market, or any other business, and that was the issue raised by the pleadings; but by the instruction under consideration appellant's liability was made to depend upon a different state of facts.

It is true that Instruction "No. 2," which seems to have been given at the instance of appellant, presented the proposition of law correctly to the jury, but that is not consistent with Instruction "No. 1," and the two being irreconcilable, they tended to confuse and mislead the jury.

The general rule is that one partner can not bind the partnership by his own acts, and contracts done not within the scope of the partnership, trade, and business, and not done for the purposes thereof: Story on Partnerships, Section 122. But where the business of the partnership is not specifically set forth in the articles of partnership, or where there are no such articles, and there is a diversity of opinion as to the objects and business of the partnership, in such cases a majority of the partners would have the right to determine the question and control the business. Ib. Sec. 123.

Instruction "No. 3," as asked, required the assent of all the members of the firm to the proposition of enlarging the business, instead of a majority thereof, and was therefore properly refused.

On the subject of the competency of the letter dated Dec. 4, 1869, signed W. Rogers & Co., and addressed to appellee, we apprehend

it was properly admitted as evidence, in connection with other facts and circumstances. The representation of any fact or misrepresentation of a fact made in partnership transactions by one partner, will bind the firm, and the admission of any fact by one partner material as evidence in a suit, or the acknowledgment of a debt during the continuance of the partnership by one partner, will bind the firm, because by forming the connection of partnership, the partners declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns. Ib., Sec. 215.

The execution and officer's return showing that $100 of the debt had been made by a sale of property are copied in the record by the mere will of the clerk, as appears, they certainly form no part of the certified bill of evidence, and do not appear to have been legitimately before the court or jury, and the failure to give the credit was not an available error for that reason.

But for the error and confusion in Instructions "Nos. 1 and 2," as heretofore pointed out, the judgment is reversed and the cause is remanded for a new trial and for further proceedings not inconsistent herewith.

James, for appellant.

———, *for appellee.*

LOU. & CIN. & LEX. RAILROAD CO. *v.* WM. WIGGLESWORTH & CO.

Railroads—Burden of Proof—Defective Spark Arrester.

The burden is upon the defendant railroad company, in an action for damages by fire, to show that a train drawn by an engine did not have defective spark arresters, where such fact is peculiarly within its knowledge.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 9, 1872.

OPINION BY JUDGE LINDSAY:

The evidence in this case certainly conduced to show that the fire that consumed the corn of appellee originated from sparks emitted from one of appellant's locomotives.

A locomotive with a defective spark catcher passed up to Lexington at 7 o'clock on the evening of the fire. A train returning from Lexington passed Darnell's at 10 o'clock the same night. It was within the power of appellant to have shown whether or not that train was propelled by this defective locomotive, just as it did show that the locomotive drawing the train passing from Louisville to Lexington on the same night was in perfect repair.

The failure upon the part of appellant to make this proof considered in connection with the other facts proven, authorized the court to give the instructions complained of, and made it his duty to overrule the motion for a new trial.

The two instructions given upon motion of appellees, qualified as they are by the instruction given upon appellant's motion, correctly present the law of this case.

The remaining instructions asked for by appellant were properly refused. Appellees did not base their right to a recovery upon the negligence of appellant in failing to take proper care of their corn, but upon its negligence in using a defective locomotive. Hence these instructions were in no sense applicable to the issue.

Judgment *affirmed*.

Johnson & Brown, for appellants.

Breckenridge & Buckner, for appellees.

GEORGE W. McDONALD *v.* WILLIAM B. PHILLIPS.

Trial—Open and Close of Argument.

Where the burden of proof is not entirely upon defendant, plaintiff is entitled to open and close the argument.

APPEAL FROM BATH CIRCUIT COURT.

December 9, 1872.

OPINION BY JUDGE HARDIN:

According to the test provided by the Code of Practice for determining on whom the burden of proof is devolved by the plead-

ings, we are of the opinion that the onus was not entirely on the defendant; but it rested on the plaintiff as to his claim for the price of thirteen and four-fifths barrels of corn, and this entitled the plaintiff to take precedence in presenting the evidence to the jury, and to the conclusion of the argument.

It seems to us also, that the testimony of Farmer and others, offered to sustain the character of Cassity, was rightly rejected for the reason that the witnesses failed to disclose such means of knowing the general character of Cassity as the rules of law required to render their testimony competent on that subject. *Williams v. Hancock*, 1 Bush. 368.

There was no error in allowing plaintiff to remit part of his recovery; and the decision seems not to have been excessive or unauthorized by the pleadings and proof.

Wherefore the judgment is *affirmed.*

J. S. Hurt, for appellant.

Nesbett & Gudgell, for appellee.

H. J. McALISTER, ETC., *v.* WM. CARMEN.

Limitation of Actions—Fee Bills.

The effect of Act February 12, 1869 (1 Sess. Acts. 1869-27), was not to revive and give effect to fee bills which under existing law had ceased to be collectible, but the legislative intention was to extend the period within which fee bills not already barred might be enforced.

APPEAL FROM GREENUP CIRCUIT COURT.

December 9, 1872.

OPINION BY JUDGE HARDIN:

The answer in this case seems to be sufficient at least as controverting the plaintiff's claims and interposing the statute of limitations as a bar. But the principal question to be determined is, whether, as appears to have been assumed by the court, the act of February 12, 1869 (1 Session, Acts 1869-27), had the effect of

reviving and giving effect to the claims of the appellee for services which had long ceased to be distrainable and were barred by limitation as ordinary debts. In our opinion it was not the object or purpose of that act to resuscitate and give some validity to fee bills which, under existing law, had ceased to be collectible in any form, but the legislative intention was to extend or prolong the period within which fee bills not already barred by limitation might be enforced.

Wherefore, the instructions of the court, being inconsistent with the foregoing statute, the judgment is reversed and the cause remanded for a new trial on principles consistent with this opinion.

Dlain, for appellants.

Phister, for appellee.

NEFF BRIGGS, ETC., *v.* JOEL H. CAIN.

Deeds—Pleading—Demurrer.

A demurrer to a petition to set aside a deed to land and subject the land to the payment of plaintiff's debts was held properly overruled.

APPEAL FROM MORGAN CIRCUIT COURT.

December 9, 1872.

OPINION BY JUDGE PRYOR:

The demurrer to the petition was properly sustained. There is no allegation that Turner aided the sons of Davis in obtaining the deed for the land described, or that he was even cognizant of the alleged fraud; he occupies the attitude of an innocent purchaser for a valuable consideration, the petition alleging that he paid the purchase money in debts owing him by the father. A cancelment of the deed to the sons would avail the appellant nothing, as the land could not be subjected to the payment of the appellant's debts, the legal title being in Turner. There is no allegation that the sons

received any of the purchase money, but on the contrary, the whole amount was paid by Turner to the father. The case is not within the act of 1856, as many years had elapsed from the conveyance to the institution of the suit.

The judgment is *affirmed.*

Hazelrigg, for appellants.

Cooper, for appellee.

T. P. JAMES, ADMR., *v.* JAMES P. BRANSTER.

Vendor and Purchaser—Conveyance in Payment of Debt.

A sale and conveyance of land was held to be in payment of a debt.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE HARDIN:

There is scarcely room to doubt from the evidence, that the debt in controversy was the real consideration of the conveyance of the tract of about 80 acres of land, made July 15, 1864; and we think it is reasonably certain that said deed, though absolute in form, was understood and intended to operate as a mortgage; or that it expresses only a part of a contract, the residue being a parol agreement providing for a repurchase of the land by the appellee.

It is plain that if the first of these is the correct construction, the appellee still owed the debt, and was liable to a personal judgment, but if the latter is adopted, the deed extinguishes the debt; and the agreement to reconvey being in parol and inconsistent with the writing could not be enforced against the heirs of James, if that result were sought on the facts disclosed in this case.

But neither party has elected to treat the deed as a mortgage. No foreclosure is sought on the one side nor a redemption of the land on the other; and the judgment of the lower court has simply, and we think rightly, adopted the construction of the transaction acquiesced in by the parties themselves.

The question is not presented whether the appellee would have been entitled to redeem the land, had he sought to do so, whatever may have been his verbal agreement with James; but as the case comes before us on this record, we fully concur with the court in treating the sale and conveyance of the land as a payment of the debt.

Wherefore the judgment is *affirmed.*

Greer, for appellant.

Bush & Bush, for appellee.

M. A. McCLURE, ETC., *v.* E. W. SCOTT, ET AL.

Religious Societies—Property Held in Trust for Benefit of Members.

The evidence was held to show that property was placed in control of a church for the benefit of its members as a parsonage, and if not so used to be made contributory to the payment of the officiating minister, and to be held in trust for such purpose.

APPEAL FROM WOODFORD CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE HARDIN:

The parol evidence satisfied us that although, for certain purposes, stock certificates were given to the contributors of the money used in paying for the property and not withstanding the form of the most of the conveyances, the original design of Roolman and Terrill & Thorton was to place the property under the control of the church for the benefit of its members, as a parsonage, if so used, and if not so occupied, still to be made contributory to the payment of the officiating minister of that congregation; and according to the controlling principles of the decisions of this court in the case of *McKinney v. Griggs, etc.,* 5 Bush 407, and other authorities, the court below properly treated the title as held in trust for said uses, and the property as having been by parol arrangement at least, dedicated to the use of the congregation.

Wherefore the judgment is *affirmed.*

Porter & Wallace, for appellants.

Turner & Twyman, Thornton, for appellees.

BURRELL MILLION *v.* JOHN NEWBY.

Principal and Surety—Contribution—Insolvency of Principal.

The evidence was held to show that the principal was not insolvent, and that a surety was not entitled to look to his co-surety for contribution.

APPEAL FROM MADISON CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE LINDSAY:

By the payment of the note to Collins, appellant became primarily the creditor of the principal, Robert Million, and his right to look to his co-surety, Newby, for contribution depends upon whether or not the principal in the note was at the time of such payment insolvent.

The evidence shows that at that time Robert Million owned in his own right, unencumbered by liens, a tract of land, which he sold two years afterwards for the sum of nine hundred dollars, nearly one-half of which was applied to the payment of a debt upon which appellant was his surety. It further appears that in 1865 and 1866 Robert Million owned a grocery store, also, that in 1866 he delivered to appellant $400 in notes.

These facts, considered in connection with other circumstances proved, in our opinion rebut any presumption of insolvency upon the part of Robert Million growing out of the general statements of his witnesses that they did not regard him as solvent. By the use of ordinary diligence appellant could have secured indemnity from his son for whom he paid the money to Collins; hence he was properly refused a judgment against his co-surety, Newby, for any amount. This conclusion renders the consideration of the other questions presented unnecessary.

Judgment *affirmed.*

Burnam, for appellant.

Scott, for appellee.

ALLEN MOBERLY *v.* W. E. MOBERLY.

Evidence—Confession—Constructive Notice.

Nothing can be taken as confessed against a party who is before the court, simply upon constructive notice.

Interest—Amount of.

Where plaintiff fails to offer evidence as to the place where the notes were executed, it is error to adjudge 10 per cent. interest on the debts.

APPEAL FROM MADISON CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE LINDSAY:

There is no proof in the record showing that the notes sued on were executed in the state of Missouri. Nor is there anything showing that the court heard proof upon any of the questions of fact upon which appellee's right to have payment for interest on his debts at the rate of ten per cent. per annum depended.

As appellant was not before the court except upon constructive service, nothing could be taken for confessed against him, and as the appellee failed to offer testimony as to the place where the notes were executed, it was error to adjudge him ten per cent. interest on his debts. For this reason the judgment must be reversed. As the prosecution of this appeal operates as an appearance by appellant, the remaining questions raised by him can be settled in the court below upon the return of the cause which is remanded for further proper proceedings.

Scott & Little, for appellant.

———, *for appellee.*

JOHN KNAPKA *v.* CHRISTIAN LINCK.

Pleading—Legal Conclusion.

Where the cross-petition alleges that the plaintiff is indebted to defendant in the sum of $65 for a cow sold and delivered to plaintiff, a reply merely denying that plaintiff is indebted to defendant in the sum of $65 or in any sum for a cow sold and delivered to her at the the price stated or at any other price, is a mere conclusion of law, and insufficient.

Pleading—Variance.

There can be no variance between the allegations in a pleading and the proof, unless the pleading contains an allegation of fact, or raises some issue of fact.

APPEAL FFOM PENDLETON CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE LINDSAY:

The circuit court committed no error, either in instructing the jury or in admitting or excluding testimony. Appellant, by his cross-petition, charges directly that appellee is indebted to him in the sum of sixty-five dollars for one cow sold and delivered at that price. To this paragraph there is no sufficient reply; appellee merely denies that he is indebted to appellant in the sum of sixty-five dollars, or in any other sum for a cow sold and delivered to him at the price stated or any other price.

He in effect pleads a conclusion of law. He does not deny that the cow was sold and delivered to him at the agreed price of sixty-five dollars; nor does he allege that he has paid or otherwise extinguished the debt.

This court has repeatedly held that such a plea raises no issue and is entitled to no consideration. (*Haggard v. Hay,* 13 B. Monroe 175).

Nor can the judgment be upheld under the provisions 156 section of the civil code, because proof was heard conducing to show that the cow had been paid for. There can be no variance between the allegation in a pleading, and the proof, unless the pleading contains an allegation of fact, or raises some issue of fact. This plead-

ing does neither. Appellant was called upon to prove nothing, and could not be required under it to rebut, explain or contradict any proof that might be offered.

He had the right to take his claim for the cow for confessed even after verdict against him.

Wherefore the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Lee, for appellant.

Perrin, for appellee.

COMMONWEALTH *v.* MARTIN SHANKES.

Appeal—Final Judgment.

An order dismissing a cause is a final judgment from which an appeal may be prosecuted.

Judgment—Reversal—Effect.

After the reversal of a judgment it becomes a mere nullity, and the failure of the court to set it aside gives it no validity.

Execution—On Reversed Judgment.

An execution can not properly issue from a judgment which has been reversed.

APPEAL FROM DAVIES CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE PRYOR:

The order dismissing the case against Shankes was a final judgment and from which an appeal could have been prosecuted. The mandate of the court of appeals had been entered of record in the lower court, reversing the judgment rendered against the appellee and thereby that judgment was rendered inoperative and no execution could have properly issued upon it. After the reversal the judgment was a mere nullity and the failure of the court below to set it aside gave it no vitality.

Opinion of the Court.

The opinion delivered by the circuit judge and made part of the record is conclusive of the question presented.

The judgment of the court below is therefore affirmed. The rule against Judge Cofer is discharged as he has no right to investigate the case on the docket at a time after there was a final judgment and over which he had no control.

Cofer, for appellants.

———, *for appellee.*

MARY L. PECANTET AND OTHERS *v.* W. P. GRAYSON, ETC.

Wills—Mental Capacity of Testatrix.

The evidence was held to show that testatrix, at the time of the execution of her will, was not of disposing mind.

APPEAL FROM HENDERSON CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE PRYOR:

Mrs. Eliza B. Atkinson, whose alleged will is the subject of this controversy, removed with her husband, Amos A. Atkinson, to Graves county, in this state, and settled near the town of Mayfield in about the year 1831. She seems to have been a woman of superior accomplishments, attractive in her manner and person and for many years an ornament to the social circle in which she moved.

Her husband died in the year 1857, and for a few years prior to his death it was ascertained by the friends of the family that she was addicted to the use of ardent spirits; that this fondness for liquor increased upon her to such an extent that she was often seen much intoxicated. The death of her husband, instead of checking this immoral conduct on her part, seems in connection with the constant use of stimulating drinks to have developed other passions over which she had no control. She was then upwards of sixty years of age, dressed in as fashionable and gaudy colors as any of the young ladies of the neighboring town, made love to the young men, and conducted herself in such an unbecoming, and frequently

indecent manner, as led all who knew her, not only to believe, but to know, so far as evidence could be convincing, that the woman of former years, so remarkable for her intelligence and culture, was then wrecked in intellect, and a monomaniac on the subject of making her will, and getting her husband. A little flattery and attention would induce her to devise or promise to give the whole of her estate, and she was constantly offering to deed or will it to those she thought could be induced to marry her. The testimony of her physicians indicates that this affection for men was the offspring of a passion produced from a disease peculiar to her sex. These passions for men and ardent spirits continued to increase so long as she remained in the county of Graves and all the witnesses consisting, some of them, of the most eminent lawyers of that part of the state, as well as physicians, who had known her when neither her intelligence nor sanity could be questioned, concur in saying that she was incompetent at the date of the alleged will to make any valid disposition of her property.

She left Mayfield in the year 1861 and went to the state of Virginia, where she remainded for several months, and in 1862 returned from Virginia to Henderson, Ky., where the writing in controversy was executed.

Several witnesses in Virginia state that they discovered no want of intellect on the part of the old lady, whilst in that State or any evidence that she was too fond of stimulating drinks. One witness, a lawyer by the name of Cabell, speaks of having conversed with her frequently, and in his opinion has no doubt of her capacity to make a will. The interviews he had with Mrs. Atkinson were at his fathers, and at the residence of a man by the name of Hunnicutt, who also speaks of her entire capacity to make a will, says that she drank too freely, and the liquor had to be concealed from her. Dillard and Martin of the same State saw her in 1862 whilst in Virginia and she conducted herself so improperly at the home of the father of Dillard that she was requested to leave and go to a hotel. These witnesses say, that she was constantly under the influence of opium and whiskey. Whether this be so or not, the Virginia witnesses, Cabell, Hunnicutt, Dillard and Martin, all concur in stating that she wanted them to write her will, intending to dispose of her property either to her Virginia relations or to those whom she desired to draft the instrument. She visited

scarcely a single friend, relative or stranger whilst in that State, that she did not want such a writing prepared, and at each time making a different person the object of her bounty.

She left Virginia in company with a young man by the name of Spooner, an entire stranger and in no wise related, and to him she made a deed of gift of all her landed estate in Kentucky. When the two reached Kentucky, she pronounced the deed a forgery and this it seems terminated the young mans claim upon it.

On her way from Virginia she stopped at a hotel at Henderson, Kentucky, and there sent for Robert Cabell, whom she had never seen before, and when he called to see her she at once proposed to bestow upon him by gift all her imaginary wealth. He refused to accept it and she then left for Paducah, where she remained a few days, and again returned to Cabell's, in Henderson, and made the deed to the latter, giving him her estate. She left Cabell's on a visit to Colonel Grayson's family, who lived but a short distance from Henderson, and whilst there called to see D. Watson's family, and being struck, doubtless, with the appearance of young Watson, or by reason of the kindness and attention paid her whilst there by the family, concluded to annul the deed to Cabell, and give to young Watson a thousand dollars out of her estate. She left Watson's and returned to Colonel Grayson's, where in a few days or weeks the will in controversy was executed.

The witnesses for the appellees are not only thruthful, but intelligent, and give what they believe, a correct history of this old lady's mental condition, and although her conduct whilst in Henderson was rather novel and singular in regard to the disposition of her property, when disconnected with the other proof might not create any suspicion in the minds of some as to her want of intellect, still when connected with her past history, as developed by the uncontradicted statements of the many witnesses who had known her for many years her conduct and actions in Henderson with reference to her property but adds strength to the conviction that when she executed the paper in controversy she was incompetent, by reason of the unfortunate condition of her mind, to make any valid disposition of her property.

Her fondness for men had ceased with the rapid decline of her whole physical system. She was then seventy years of age, weak, unhealthy, and suffering from disease that was about terminating

her existence, and whilst some of her passions evidencing a failing, or ruined intellect had subsided, still the inordinate desire to give and dispose of her imaginary wealth seems never to have left her. The will itself bears evidence of the disordered condition of her mind, but we deem it wholly unnecessary to allude to any other evidences of her want of mental capacity, being well satisfied that at the date of the paper in controversy, she was incompetent to make any valid disposition of her estate.

Wherefore it is now adjudged that the writing purporting to be the will of Eliza B. Atkinson is not her last will and testament.

The judgment of the Court below is reversed and the cause remanded with directions to the Court below to enter the mandate herein and certify the same to the Henderson County Court that it may be entered upon the records of that Court, and for further proceedings consistent herewith.

Turner & Trafton, for appellants.

R. K. Williams & Vance, for appellees.

JAMES BREEDEN *v.* T. & W. A. ROBERTS.

New Trial—Pleading—Newly Discovered Evidence.

A petition for a new trial should allege that new evidence set forth as a ground for a new trial was discovered after adjournment of the term at which the trial was had.

APPEAL FROM BOONE CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE PRYOR:

The amendment filed cures the defect in the original petition. This amendment alleges that the evidence disclosed by the affidavit of Northcut was discovered after the adjournment of the term at which the trial was had.

The testimony however in the present case shows that Northcut gave to one of the plaintiffs in the original suit, who was at the

time engaged in prosecuting it, notice of what he knew in regard to the controversy, and this knowledge imparted to him by Northcut, was embodied in an affidavit filed during the term at which the judgment was rendered in order to sustain the motion for a new trial. This affidavit seems to have been lost, and in fact the discovery of testimony after the trial was not relied on, but withdrawn from the several grounds assigned. If, however, it appeared that the information derived from Northcut was obtained after the adjournment of Court, all he says in reference to the case is, that the appellant told him that he had borrowed money of the appellees and paid it back. This character of testamony would not authorize a new trial upon such an issue. The statement of Northcut is as favorable to the appellant as the appellees, and certainly different from the contents of the affidavit of the appellees on the subject. Nor does the statement of Finnell affect the merits of the controversy. The judgment awarding a new trial is reversed and cause remanded with directions to dismiss appellees petition.

Fisks, for appellant.

———, *for appellees.*

G. M. ADAMS, ETC., *v.* ROBERT HOWARD.

Dower—Execution Sale of.

The facts held to show that the legal title to the dower interest of the wife was held to pass by the death of the wife and her husband, under 1 R. Stat., p. 281, ch. 24, § 15, and a subsequent purchaser at execution sale against her took nothing.

Dower—Sale of—Creditors.

The sale of the wife's dower interest in land was held not to enure to the benefit of all the creditors of the wife.

APPEAL FROM BELL CIRCUIT COURT.

December 10, 1872.

OPINION BY JUDGE PETERS:

From the evidence it is shown that in part satisfaction of a debt contracted by Mrs. Brittain while she was a widow with G. M.

Adams, her husband, C. B. Brittain, and herself, on the 22d of September, 1868, conveyed to Adams her dower interest in the real estate of J. T. Renfro, her former husband, and from the certificate of the Clerk of the Court of the County in which the land is situated it appears that the deed was acknowledged, and recorded on the 23d of September, 1868, in the proper office.

On the 13th of October, 1868, an execution issued from the office of the Clerk of Josh Bell Circuit Court in favor of appellee against Brittian and wife, on a judgment for a debt of the wife contracted during her widowhood, and on the 9th of November, 1868, the execution was levied on the dower interest of Mrs. Brittain and in January, 1869, the same was sold when appellee became the purchaser at the price of $201.

After the sale appellee brought a suit in equity, charging the sale and conveyance to Adams as fraudulent and made to hinder and delay the creditors of Mrs. Brittain in the collection of their debts—and praying that the deed from herself and husband to Adams be cancelled, and for general relief. He also brought an action in ordinary for the possession of the land. The two actions were consolidated.

On final hearing the Court below adjudged that the deed from Brittain and wife to Adams was not recorded, nor properly lodged for record at the date of the execution sale of the dower interest of Mrs. Brittain, at which sale appellee purchased, and that the title thus acquired by him was superior to that of Adams, and that appellee recovered the land, but adjudged to appellant, Adams, $200, the price he paid Brittian and wife therefor, with interest from the 22d of September, 1868, till paid, and adjudged to him a lien on the land therefor. And of that judgment Adams, and Brittian and wife complain, and appellee also complains by cross appeal. After the endorsement of the Clerk the deed to Adams was acknowledged by the grantor, and lodged for record on the 23d of September, 1868, the day after its execution, and there is no sufficient evidence in the record to overturn the certificate of the Clerk; on the contrary, he is sustained by a preponderence of testimony—that being the case the legal title to the dower interest of Mrs. Brittain passed to Adams by the deed of the 22d of September, 1868, under Sec. 15. Ch. 24, 1 R. S., p. 281. And consequently Brittain and wife had no estate in the land subject to levy and sale, at the time

appellee's execution issued out against them, and he took nothing by his alleged purchase.

Whether or not the sale and conveyance to Adams inured to the benefit of all the creditors of Mrs. Brittain under the Act of 1856, 1 R. S., p. 553, will now be disposed of.

The petition was not drawn with the design to subject the property to the benefit of creditors generally, nor was it filed within six months after the deed to Adams was recorded. And the lapse of time is pleaded and relied upon in the answer as a bar to the relief provided for in the statute supra, which must prevail.

Wherefore the judgment must be reversed and the cause remanded with directions to the court below to dismiss the petitions of appellee.

On the cross appeal the judgment is *affirmed.*

Farmer & James, for appellants.

Scott, for appellee.

GREENUP MILLER *v.* ELIJAH SUTTON.

Deeds—Stipulation as to Lane.

An insertion in a deed, by the grantor, of the words "that there should be no lane running from the creek between us," did not effect any right of the grantee, where the contract of purchase does not call for such lane, and it does not appear that the grantee ever enjoyed the use of the lane at such place.

Deeds—Failure to Read Deed—Equitable Relief.

The failure of the grantee of land to read the deed and know its contents where he had an opportunity to do so is culpable negligence against which a court of equity will not grant relief.

APPEAL FROM LOUISVILLE CHANCERY.

December 11, 1872.

OPINION BY JUDGE PETERS:

By a writing dated the 10th of January, 1867, appellee contracted to sell to appellant a tract of land in Jefferson county, particularly

described by metes and bounds, at a specified price per acre, and covenanted to convey the same to him by deed with general warranty as soon thereafter as convenient.

On the 9th of August of the year aforesaid, appellee and his wife conveyed the land to appellant with covenant of general warranty, with the following exception, or reservation in the deed—"except the pump in the well, which is to remain there until the party of the first part sees proper to remove it, and it is also understood in the contract that there is to be no lane running from the creek between us."

This suit in equity was brought on the 27th of March, 1869, by appellant against appellee, and in his petition he alleges that there is no such exception, or reservation in the writing evidencing the contract for the sale of the land of the 10th of January, 1867, as that contained in the deed, and that no agreement to that effect was ever made by the parties—the said writing is filed as part of the petition as is the deed and both are in the hand-writing of appellee as is admitted. Appellant further charges that said deed was taken by appellee to the Clerk of the Jefferson County Court on the 16th of January, 1868, and acknowledged by him and his wife, when it had never been read by appellant, nor had he heard it read: that appellee had fraudulently and in violation of his original contract of sale, inserted said exceptions and reservation in said deed without his knowledge, and if the same had been insisted on at the time, he would not have made the contract for the purchase of the land—as they work great hardships on him and impair the value of the land to him.

He prays that said deed be reformed so as to conform to their original contract and for general relief.

The petition was dismissed on final hearing, and to reverse that judgment this appeal is prosecuted.

It is important to observe that it is not alleged in the petition that at the time the parties contracted for the sale and purchase of the land that there was a lane running from the creek between them, or had ever been one there, and the executory contract did not stipulate for one. It does not therefore appear that appellant was at any time in the enjoyment of the use of a lane at the place designated or had contracted for one—and no right of his was

violated by the insertion in the deed of the words, "That there is to be no lane running from the creek between us."

Nor is it alleged that the pump in the well had been removed; but waiving that question, Conn, the clerk, who took the acknowledgment of the grantors of the execution of the deed, proves that appellant was present on that occasion, that an alteration was then made in the deed so as to make it read that all the purchase money was paid, instead of reciting that a deferred instalment of the purchase price was unpaid as the deed was originally written, and that appellant then paid the tax on the deed and the fee for recording and ordered it to record. It is true that Conn does state that the deed was not read to appellant in his presence. But he may have read it, or heard it read before he went to Conn's office. If, however, he failed in that, it was culpable negligence on his part and such as a court of equity cannot relieve against. And we may add from the evidence the probabilities are that the deed conforms to the agreement of the parties on the subject of the pump and the lane entered into subsequent to the contract for the sale of the land as detailed by Frank. The evidence of Redding, if it had been in the case, could not even have changed the result if competent.

Judgment *affirmed.*

B. F. Camp, for appellant.

I. & J. Caldwell, for appellee.

THOMAS MONARCH, ETC., *v.* DAVIESS COUNTY COURT.

Courts—County Court—Imposition and Collection of Taxes.

Under § 19, Act February 27, 1867, chartering a railroad company, the presiding judge of the county court comprises the court, and has authority in the matter of imposing taxes and collection of the same, was derived from the legislative act and not from any supposed delegation of power from the county court.

Railroads—Subscription for Stock—Collection of Taxes to Pay.

Where the Legislature in chartering a railroad by special act, provided for an election on the question of subscribing for railroad stock, and for collection of taxes to pay for such subscription as

might be made, left the collection of the taxes wholly to the county court without prescribing the manner of collection, and by whom the collection should be made or the time of collection, the county court has power to levy the tax, appoint the officer or officers to collect the same, prescribe the condition of their bonds, and direct to whom and what time such officers should pay over the amount collected.

Railroads—Action on Tax Collector's Bond—Pleading.

In an action on a tax collector's bond, it is not necessary to allege that the county court had ordered him to pay over, where the bond fixed the time and place of payment.

Taxation—Tax Collector—Commission.

A tax collector is not entitled to commission from taxes for which he failed to account.

Taxation—Tax Collector—Liability for Interest.

A tax collector is liable for interest on taxes collected by him and not accounted for on the first day of May of each year, where it was his duty to account on such date for all taxes collected.

Taxation—Tax Collector—Liability for Interest.

A tax collector can not escape liability for interest on the ground that he failed to collect the tax within the prescribed time, and without showing that he made an honest effort to comply with his undertaking.

Taxation—Tax Collector—Settlement—Presumption.

Where the county court has jurisdiction of the settlement of tax collectors, it can not be presumed that it did not take the necessary steps to authorize the making of a settlement.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 11, 1872.

OPINION BY JUDGE LINDSAY:

By the 19th section of the Act Approved February 27, 1867, entitled, "An Act to Charter the Owensboro and Russellville Railroad Company," the County Court of Daviess county was empowered after obtaining in the mode prescribed, the sanction of a majority of votes cast at the election directed to be held to subscribe to the capital stock of said company, and to provide for the collection of such tax as it might be necessary to levy, to pay the subscription when made. The collection of the tax was entrusted wholly to the County Court, the Legislature utterly failing to

prescribe the time or manner of collection, or the officer by whom it was to be made. Such being the case, the county court had the power to levy the necessary taxes, to appoint the officer or officers to collect them, to direct the time of collection, to prescribe the conditions of the bonds to be given by the collecting officers, and to direct to whom and at what time these officers should pay over and account for such amounts as they might collect or undertake to collect.

The order of the county court, made at the July term, 1868, in so far as it was attempted to confer power upon the presiding judge or to limit his rights, when sitting as the county court, in providing for the collection of this railroad tax and fixing the duties of the collectors, was not only unnecessary but was not binding upon him.

For the purposes of the act, such judge alone composed the county court, and, sitting as such, his authority in the matter was derived from the act and not from this supposed delegation of power.

It follows, therefore, that when the county court appointed the collectors it had full power to fix the conditions of their bonds, and these conditions must be upheld, notwithstanding they do not accord with the terms of the order of July, 1868.

Monarch covenanted that he would collect the taxes levied in 1868, and that he would on and after the first day of September, 1868, make monthly payments to the Deposit Bank of Owensboro to the credit of Triplet, Berry and Tyler up to the first of May, 1869, when it was clearly contemplated that the entire amounts for which he was accountable should be paid.

The second bond provided for the first payment on the tax for 1869 on the first of September, 1869, and then for monthly payments up to May 1, 1870, when the whole amount should be paid.

The two petitions specifically set out the amount of taxes put into Monarch's hands for collection in each year, distinctly allege that the whole amount levied in each year had been collected, give the credits to which he was entitled, strike the balance and allege a violation of his bonds in failing to pay over or account for such balances.

It was not necessary to allege that the county court had ordered him to pay over. The acceptance of the bonds were acts of the

county court, and by fixing the time and place of payment in the face of the bonds, the necessity for orders to pay over was dispensed with.

We cannot decide from the petitions that Monarch was entitled to commissions for collecting taxes which he had failed to account for; the law does not fix the compensation which the collectors were to receive, nor does the petition disclose the nature of the contract between them and the county court on that subject.

The court properly allowed interest from the first of May in each year. It was the duty of the collector to collect and account for all the collectible taxes in his hands by those dates, nor is it material in this regard whether the bonds are treated as statutory or common-law obligations. The petition alleges that all the taxes were collected at the time the suits were instituted. Monarch cannot escape the payment of interest because he had failed to collect them within the prescribed time, even if the bonds are not statutory, without showing that an honest effort had been made to comply with his undertaking.

By his failure to perform his duty the county court was kept out of the use of the money, and as this was caused by the default of the collector he ought not to complain at being required to pay interest on the amount he had failed to collect and pay over.

Counsel are not exactly correct in assuming that the settlement of Riley, filed with the suit on the bond of 1869, shows that any part of the taxes for that year remained uncollected. It merely shows that the collector reported to him and that there was marked on the tax book as collected $8,895.26, and then that this sum when deducted from the whole amount left uncollected taxes amounting to $7,052.56.

The correctness of this conclusion depends upon whether the tax book presented truthfully the amount of collections then made.

We do not, however, regard this as at all material, as it was clearly the duty of the collector to have made the collections within the prescribed time, or to show some legal excuse for failure to do so. The petitions each set out facts constituting causes of action, and the two judgments are in accordance with the law arising

upon the facts as set out, and as appellant failed to make defense, they must both be affirmed.

(See next case for response to petition for rehearing.)

Sweeney & Stewart, for appellants.

Ellis & Riley, for appellee.

RESPONSE TO PETITION FOR RE-HEARING.

December 25, 1872.

OPINION BY JUDGE LINDSAY:

By the petition on the first of Monarch's bonds it appears that he was indebted to the county court in the exact amount for which judgment was rendered.

The statements of this petition were confessed, appellants failing to answer. But they now insist that the two settlements filed as exhibits show that the amount really due was less than that for which judgment was claimed and rendered.

The last settlement appears upon its face to have been made with Monarch in person. It was in due time reported to the county court, and without objection ordered to be put on record. We are asked to presume that this settlement was extrajudicial, made without authority, and invalid, because it is not shown that the proper steps were taken in the county court to avoid the effect of the approval of the first. The county court had jurisdiction of the entire matter involved. There is nothing in the record tending to establish its want of authority to make the last settlement. We can not assume that it did not take the necessary steps to authorize the making of the last settlement in the face of the fact that appellants have virtually confessed that they owe the amount shown by it to be due.

Counsel are mistaken as to the failure of the commissioner to allow Monarch a credit for one thousand dollars and the seven and one-half per cent commission for its collection. The amount he paid after the first settlement was ten dollars instead of one thousand, and for this amount and the commission thereon he received a credit.

The correction of the first settlement as to commissions, without objection upon Monarch's part, and the failure in the settlement

of his last year's accounts to allow commissions on the amounts not accounted for conduces to show that he was not under the terms of his employment entitled to the compensation now claimed.

The settlements do not show that the allegations in the petitions to the effect that Monarch had collected all the taxes placed in his hands were not true. The settlements of his accounts were made in June, 1870, and the suits for the balance due were not filed until the 21st day of July, 1871.

There was ample time within which to collect every cent of the amounts shown by the settlements to remain uncollected.

The petition must be overruled. (See preceding case.)

Sweeney & Stewart, for appellants.

Ellis & Riley, for appellee.

J. S. McCLELLAN &c. *v.* L. D. LYON.

Appeal—Answer to Interrogatories—Failure to Reply—Reversal.

Where answers made on oath to interrogatories attached to defendant's answer, denied the existence of every material allegation of defendant's answer, the failure of plaintiff to reply to the answer is a mere formal defect, and is not cause for reversal, the answer to the interrogatories being termed by appellant as a reply.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 11, 1872.

OPINION BY JUDGE LINDSAY:

The answer, which appellants insist constitutes a good counter claim, does not set up a specific amount due from appellee on account of alleged losses. It does not ask for a settlement of the partnership accounts, so that these losses might be ascertained, and a proper judgment finally settling the rights of the parties rendered. It does not appear that it was intended that it should be regarded as anything more than a plea in bar to the suit on the note. The only specific relief asked is that appellee's petition be dismissed. But if it be conceded that the facts set up constitute a counter-claim, the failure of appellee to reply was but a formal error in

this case. Appellants saw proper to attach to their answer a list of interrogatories, which were answered under oath by appellee, and these answers deny the existence of each and every material allegation of appellants' answer. A formal reply, which appellants might, before the trial or at any time before the cause was submitted to the jury, have demanded, could have done nothing more. We are of opinion that these answers to the interrogatories were treated by appellants as a reply, and are not willing to disturb the judgment for a merely formal error, by which it is impossible they would have been prejudiced.

The motion to have judgment on their counterclaim, for the reasons already given, was properly overruled.

Judgment *affirmed.*

E. Field, for appellant.

Gibson & Gibson, for appellee.

LEWIS MEYERS *v.* FRED FORSTMAN, &C.

Adverse Possession—Entry Under Void Patent—Extent of Possession.

Where a party claiming land by adverse possession claims to have entered under a patent which is absolutely void, the patent can not have any force except to show the extent of possession claimed under it.

Adverse Possession—When Limitations Begin to Run.

Although a party's entry on land may have been tortious and wrongful from the beginning, yet if he entered under a deed regularly put on record and continued to assert ownership thereunder, the Statute of Limitations began to run from the date of such entry.

APPEAL FROM GRANT CIRCUIT COURT.

December 12, 1872.

OPINION BY JUDGE LINDSAY:

The testimony in this case sufficiently establishes the fact that these appellants and those under whom they claim had for more than twenty years next preceding the institution of their suit, been in

the actual adverse possession of that portion of the fifty-five-acre tract of land to which they were adjudged title.

It may be conceded that the patent to Bishop was void, as it doubtless was, and yet the law of this case is not thereby affected. Hartman entered under his deed from Bishop, and held and claimed to the extent of its boundaries, which included the land in contest. The calls of the deed indicate the extent of his possession, and that possession has only been disturbed in so far as the enclosure around the Baxter improvement encroaches upon it. The possession of those claiming title through Bishop is not analagous to cases in which two legal and valid patents conflict. In such cases it is well settled that the prior patentee can only acquire possession of the land covered by both to the extent that he may actually enclose them.

But as Bishop's patent, in so far as it conflicts with that issued to Walin, is absolutely void, it conferred upon him no right of entry, and can cut no figure other than to indicate the extent of the possession claimed under it. If it be true, as insisted upon by appellants, that the possession of those under whom appellees claim was tortuous and wrongful from the beginning, still, as Hartman entered under a deed regularly put to record, and continued to assert claim of ownership to the lands embraced by such deed, the statute of limitation must be regarded as having began to run against appellant and his vendors from the date of such entry. There may have been breaks in the possession shortly after Hartman's purchase, but for at least twenty years before this suit was instituted it is shown to have been continuous. The amended answer of appellant was not such a pleading as required a reply. It contained only matters of defense, and the fact that appellant chose to ask relief against appellees did not make it incumbent upon them to reply to it. We perceive no error in the action of the court below.

Judgment *affirmed.*

E. H. Smith, for appellant.

———, *for appellees.*

JONATHAN T. JONES, &c., *v.* DANIEL GILLEN, &c.

Pleading—Conclusion of Law.

Where a cross-petition alleges certain items of indebtedness by plaintiff to defendant, plaintiff's reply denying that he is indebted to defendant in such sum for the items specified, or in any other sum, is a mere conclusion of law, and insufficient.

Pleading—Insufficient Reply—Cross-petition Taken as Confessed.

Where plaintiff's reply to a cross-petition is insufficient, defendant is entitled to have his cross-petition taken as confessed.

Judgment—Improperly Taken on Cross-petition.

Judgment on a cross-petition is improper, where taken at the same term the cross-petition was filed, appellants not having been served with process and not having entered their appearance thereto.

APPEAL FROM BATH CIRCUIT COURT.

December 12, 1872.

OPINION BY JUDGE LINDSAY:

Without attempting an extended review of the testimony, we conclude that it is satisfactorily shown:

First. That the partnership between Gillen and Thos. F. Jones, in the cattle and sheep transactions, had been fully settled. One witness swears positively to facts which lead directly to this conclusion, and the negative testimony to the contrary is not sufficient to overturn his direct and positive statements.

Second. That Thos. F. Jones was not a partner with Gillen in the two mule speculations, and that any claim he may have growing out of the profits realized in these transactions is against his father, Jonathan Jones, and not against Gillen.

Third. That the purchase of the land from Collins was made pursuant to an agreement between Thos. F. Jones and Gillen, that the title should have been taken to them jointly instead of to Thos. F. Jones and Jonathan Jones, and that the first payment, to the extent of thirteen hundred dollars, was made with the money of Gillen.

To the extent that the judgment appealed from is consistent with these conclusions, it is approved.

By the seventh paragraph of Thos. F. Jones's cross-petition he claims $105.00 for a mule sold and delivered to Gillen, November 1, 1867.

By the eighth he claims $144.00 for personal services rendered.

And by the ninth he claims $35.00 for mules, paid out for Gillen.

Gillen's reply does not sufficiently controvert either one of these paragraphs to put Jones upon the proof. He denies that he is indebted to Jones in the sum of $105.00 with interest, for a mule bought of him, or in any other sum.

He denies that he owes him $144.00 for services or that he owes him $35.00 for money paid out as expenses. These denials are mere conclusions of law, and are wholly insufficient. (*Haggard v. Hay's Adm'r*, 13 B. Monroe 175.) It is not denied that the mule was bought at the alleged price, nor is it claimed that such price has been paid. It is not denied that the personal services were rendered, nor that they were worth the amount charged; nor is it denied that the amount claimed was paid out as expenses; nor is it alleged that either of said amounts have been paid. Jones was entitled to have had each one of these paragraphs taken for confessed.

The tenth paragraph of appellant's cross-petition is as defective as the reply, and was properly stricken out.

The amended cross-petition of Collins was filed at the same term of the court at which the judgment was rendered. Appellants were not served with process and did not enter their appearance to such cross-petition. The judgment thereon was therefore improper.

For the reasons and to the extent herein indicated the judgment is reversed and the cause remanded for further proceedings consistent with this opinion. The parties should be allowed a reasonable time to cure their defective pleadings by amendments.

Nesbitt, Cudgell, for appellants.

Reid & Stone, for appellees.

ROBT. GIBSON *v.* W. R. THOMPSON.

Trusts—Liability of Trustees for Loss of Funds Deposited.

Trustees appointed by a partnership to close the partnership business and disburse the partnership funds, were held not liable for partnership funds lost on deposit in bank, no negligence on the part of the trustees being shown.

Partnership—Trustee—Negligence—Care and Skill.

The evidence was held to show that a trustee appointed to close partnership affairs and make disbursement of the proceeds was not negligent and did not make improper application of the funds, and that he exercised proper skill in the execution of the trust.

APPEAL FROM LOUISVILLE CHANCERY.

December 12, 1872.

OPINION BY JUDGE PETERS:

On the 20th of May, 1865, appellant and E. D. Tyler, partners in the purchase and sale of mineral and oil lands in Kentucky, disagreeing as to the management of their business and funds, entered into the following agreement in writing:

"Whereas, a difference has arisen between Robert Gibson and E. D. Tyler, who compose the firm of Robert Gibson & Co., respecting the management of the partnership transactions and funds arising out of the contract of said Robert Gibson & Co. with Isaac K. Roberts, in which the said Robert Gibson and E. D. Tyler were the only persons interested as the firm of Robert Gibson & Co., and by which they contracted to sell certain lands to said Roberts, a part of which lands belonged to Robert Gibson alone, and a part to said Robert Gibson & Co.

"Now, in order to avoid further trouble, and danger to our mutual interests, we, Robert Gibson and E. D. Tyler, agree that all the money now on hand to the credit of Robert Gibson & Co. shall be placed in the custody and keeping of Samuel B. Smith and W. R. Thompson, who shall have power to disburse and pay out the same in discharge of the liabilities of said firm of Robert Gibson & Co., and shall pay to said Gibson such sum, or sums, out of said fund now on hand on account of the price of his individual land as they may deem proper.

"And they shall have the sole right to receive and collect the money that may hereafter become due and payable from said Roberts, and hold and control the said money when received and collected, in the same manner and with the same powers over it as are hereby given them over the money now placed in their hands.

"In the event that any dispute should arise between us as to the disposition or division of any part of the money to be received, or collected, only the amount in dispute shall be held by said Smith and Thompson for adjustment, but all besides the amount in actual dispute shall be divided between us according to our rights. The money now placed in the hands of said Smith and Thompson is all that is now to the credit of the firm of Robert Gibson & Co. on deposit with James E. Tyler & Co., and amounts to the sum of twelve thousand two hundred and thirty-five dollars and ninety-five cents; which sum is transferred to the credit of said Smith and Thompson on the books of said James E. Tyler & Co., and is to be paid on their checks for the same. The money hereafter to be received and collected shall be kept by said Smith and Thompson to their credit in some bank and banking house as they may deem proper. Signed 20th May, 1865."

On the 13th of June, 1865, appellant, by a writing of that date, constituted appellee his attorney in fact, to make, seal, sign and deliver any deeds, or any contracts, for land belonging to Robert Gibson & Co., to acknowledge the same for record, and to do all necessary and proper acts in relation thereto in order to effect sales and transfers thereof, to collect money arising from sales of said land, and to settle all matters between Sylvanus J. Macey or J. N. Roberts for the sale of land by me or by Robert Gibson & Co., and to settle all matters arising out of my partnership with E. D. Tyler, to institute suits for me and to defend suits for me, to collect all debts due me, and to pay all debts I owe, and his acts lawfully done in the premises I hereby ratify and confirm.

Thompson undertook to execute the trust created by the writing of the 20th of May, 1865, aforesaid, acted as the attorney in fact of Gibson under the writing aforesaid constituting him such attorney, and was his attorney-at-law by engagements previous and subsequent to the making of said writings.

For some time after the making of the writings herein referred to

But on the 29th of April, 1869, this suit was brought by Gibson against Thompson, charging negligence, inattention to the business

generally, the improper appropriation of large sums of money, the failure to collect money due him which might have been collected by proper diligence, and was finally lost for failing to remove the money on deposit with J. E. Tyler & Co., whereby a considerable sum was lost, for a failure to procure reconveyances of certain lands which were taken out of the contract with Roberts, and for losses sustained for want of skill as a lawyer. The several com- the parties lived on the most amicable and confidential terms, as the letters from the one to the other filed in this record show.
plaints are presented in the very elaborate, original and amended petitions in a confused and indiscriminate manner.

The answers, though not as concise as they might be, deny all charges of neglect, want of skill or improper applications of funds, and controvert all the material allegations of the petitions.

Upon hearing, after full preparation, as appears, the plaintiff's petition was dismissed, and he appealed to this court.

Of the disbursements made by Smith and appellee, two made to E. D. Tyler, one of $2,500 on the 13th of July, 1865, and one of $1,500, on the 20th of September of the last-named year, are called in question.

The deposition of Tyler himself was taken and read without objection, and he proves that the amounts were due him of profits arising from the business of Robert Gibson & Co. When the first payment was made it may be that appellant was in New York, but he was in frequent correspondence with appellee, and on the 4th of August, 1865, as appears from a letter of that date from New York by appellant to appellee, Mr. Tyler was in New York; appellant talked with him about their business, as he writes to appellee in substance as follows: That they (he and Tyler) hope to get an order from the company for Mr. Speed to pay us $40,000, &c. We are trying hard to get $50,000.

Tyler and he were on terms sufficiently friendly to converse, and to earnestly co-operate in their efforts to get $50,000 from the company in New York, a payment on a sale of land for a large sum of money, and from the language of the letter, if they succeeded in getting a payment it was to be for or to both of them; and throughout the correspondence, up to the last letter found in the record, there is no suggestion that the payments to Tyler were disapproved, and long afterwards the utmost confidence is expressed through his

letters by appellant to appellee. We therefore conclude that there is no reason shown why appellee should be made responsible for the money paid to Tyler.

The next subject of complaint is that Smith and Thompson permitted $1,910.90 of the $12,235.95 transferred to them by the writing of the 20th of May, 1865, to remain on deposit with J. E. Tyler & Co. till the 26th of April, 1866. All the money on hand when the transfer was made was on deposit with said Tyler & Co., and was, as the writing stipulates, to be paid out on their (Smith and Thompson's) check for the same, which by a fair construction means that the money was to remain where it was until checked out by them in payment of demands against the company, and in forwarding its business, and this construction is forfeited, if not settled by the succeeding sentence, and last in said instrument, which provides that the money thereafter to be collected and received by Smith and Thompson was to be kept by them to their credit in some bank or banking house that they might select, evidently limiting their discretion as to the selection of the bank to the money to be collected after that date. And there is not an intimation in any of the letters addressed by appellant to appellee that the money on deposit with J. E. Tyler & Co. was unsafe, or should be removed, nor is any evidence addressed that appellant apprehended that the money was in danger, or gave any warning of that sort to appellee; but Thompson could not, as the facts appear, have incurred any legal liability for the failure of J. E. Tyler & Co. to pay the money over.

Though perhaps not in its numerical order, we will proceed to dispose of the claim of $1,000 collected from the New York company, and which he alleges appellee, in his absence in Europe, permitted Tyler to make him give credit for out of his individual account with said New York company instead of charging the same to Robert Gibson & Co. That subject seems to be alluded to in two of appellant's letters, one of the 4th of August, 1865, in which he says:

"They propose to me $1,000 on the 476 acres. I told you I had forgot formerly to put it in as part payment. When I went for it today Macy required a receipt from me that the money should come out of our final payment as a company. I was not pleased, and scrupled a good deal. Mr. Tyler said it would do just as well,

and I accepted on the principle of getting all we could, but don't like it, and scarce feel like using the money."

And in his letter of the 20th of January, 1866, after his return from Europe, he says:

"Mr. Steel, who, as appears, was the president of the New York company, told me today that the $1,000 I got here before starting was agreed to be counted to my Rudy strip of land, when you made the last contract, which is, so far, well."

Of that contract he said in another letter addressed to Thompson that he had sent him a copy and that he accepted it, as the best he could do. And it is not alleged nor shown that the money was not accounted for by him in the way that he had agreed it should be.

As to the money paid to Baker, on the 13th of July, 1865, $1,040 was paid to him on the check of Smith and appellee.

On the 22d of the same month appellant wrote from New York to appellee, and said:

"Your favor of the 19th inst. is received this morning. I am happy to say its contents are satisfactory and hopeful to me. * * * Then you have Baker's deed, so you can really complete the whole transaction, except such confirmation as may be needed by the court on behalf of the Baker tract, and the overplus 2,000 acres is security against the infants. You are to pay Baker only $4,000 more than he has got."

The transactions with Baker were in part the subject of the letter which had rendered the recipient "happy and hopeful." The $1,040 had been paid to Baker only nine days before his deed had been procured, and it would be strange if Thompson had not informed appellant in the same letter in which the transaction with Baker was detailed, of the fact of the payment of $1,040. But it seems that the terms in which he concludes the sentence quoted is conclusive of the question. If the payment had not been communicated, why would he have said: "You are to pay Baker only $4,000 more than he has got." If Baker was only to have $4,000 in all, and it had been deemed necessary to speak on the subject, he would have said, "Baker is entitled to only $4,000," or words to that effect. But this is not all.

On the 5th of November, 1865, appellee wrote to appellant, which letter appellant filed, that $4,000 had been paid to Baker, which payment was made September 20th of that year; that some money had

been paid Paris to remove squatters; $1,500 had been paid to Tyler, and $2,000 to himself and Smith; and that besides the $4,000, Tyler had paid Baker some money. This letter was received by appellant and he filed it. And although he wrote several letters to appellee after the receipt of that, he never complained that he had disregarded his instruction in the payment to Baker, nor to either of the others named. In a letter to appellee dated December 2, 1865, he says:

"I am pushing to settle all my land matters agreeable to your judgment. Baker's title will be settled by now, I presume. Perhaps you will not deed it to the company until you can get a good payment."

Still no complaint about the amount paid to Baker. These facts of themselves seem sufficient to satisfy the judicial mind that all the payments to Baker were understood and approved by appellant.

But in addition to this evidence, Tyler proves that the money paid to Baker was actually due him, and properly paid.

It is not out of place to remark that appellant was informed in the letter of appellee referred to of the payment by Smith and Thompson of $1,500 to Tyler and of $2,000 to themselves, and he never in any letters, subsequently written, complained of any or either of them.

It was important to effectuate the contract with Roberts for the sale of their lands to remove "squatters" from it. Appellant expressed his desire to have it done and recommended Paris as a suitable person to accomplish that purpose. He was accordingly engaged, and seems to have rendered efficient service. Appellant had been informed by the letter aforesaid that money had been paid to him under that employment, and he never complained; and Tyler proves that the expenditure was necessary and the amount paid not too much. On this subject in his letter dated Nov. 4, 1865, he says:

"I notice with attention what you say of the Ohio land squatters and what Judge K. says of them. I know there was difficulty needing prompt action; but good management by Paris, and sufficient money within bearable limits is able to get over it, no doubt. I can only say through you, to instruct Paris precisely according to your judgment, and I withdraw all other, or any other limits I have named."

This seems a very comprehensive if not unlimited power, and there is no evidence of an abuse of the discretion given to appellee.

The last complaint in appellant's brief is that Thompson should be made to account for that land which Robert Gibson & Co., by the contract of the 8th of November, 1865, were to take back, which had been conveyed to the New York and Kentucky Land Company, and which that company, by the terms of said contract, was to recover to Gibson and Tyler.

In a previous letter, written to appellee, appellant acknowledged the receipt of a copy of the contract of the 8th of November, 1865, made with said company, and stated that he accepted it as the best that could be done, and in a letter dated the 20th of December, 1865, to appellee, he says:

"Though that land is thrown back on Mr. Tyler's and my hands, we have it and must make something out of it. My object is to crush it into money by some mortal process. Understand me clearly. I am satisfied in that contract. You did the very best practical under the existing circumstances. My presence could have favored nothing; still I think we have a direct claim on these New York parties to take these lands on certain moderate terms, and to relieve us of holding them." And then proceeds at length to demonstrate why the parties should feel under obligations to take those lands and relieve himself and Tyler, not forgetting to refer to the fact that by said contract said parties had the full benefit of having the whole land put at the average, and, by refusing to take these rejected lands "they pocketed" the benefit of a cheap average to the disadvantage of himself and Tyler.

Appellant then had a copy of the contract, understood it and its effects thoroughly, was satisfied with it, and says in effect his presence could not have favored his interests. Under these circumstances it is difficult to perceive the principle upon which appellee could be made liable for any disaster that resulted from that contract. Injurious as it may be, a failure to consummate it might have been more so. But what real ground is there to complain of appellee if the rejected lands have not been reconveyed?

He was not bound by the accepted contract to reconvey the lands. The title was not in him. The land company was the party bound to reconvey, and if they have wrongfully appropriated any

of the land and failed to perform their covenant it would seem that there are "some mortal means to crush" the conveyance or "money" out of them for the breach. It must be evident that the remedy is against the New York and Kentucky Land Company, which is the covenantor.

There is nothing in this record to warn appellee that Tyler was the debtor, but much in it to assure him that he was the joint owner, having equal claim to the partnership effects with appellant. From the letters of appellant it is manifest that he and Tyler were on social terms in New York after the agreement of the 20th of May, 1865, was entered into. The difficulty between the parties as to the management of their affairs had arisen out of the contract with Roberts, and that difficulty caused the agreement of the 20th of May, 1865, to be entered into. As the writing recites, it provides for a division of the money to be collected after its date, and contains no intimation that one partner had received more of the partnership funds than the other up to that time. Appellant did not leave for Europe until about the 5th of August, 1865, and returned in January, 1866. He does not in any of his letters to appellee suggest that he should see Tyler, but advises him to call on Tyler for aid in certain matters, and he and Tyler had conferences together in New York; and afterwards, when he did bring suit against Tyler, he retained Thompson as his lawyer. If there was any negligence then in failing to sue Tyler at an earlier period, appellant was the party in fault.

Thompson's claim for services seems to be sustained by the evidence, and, perceiving no error prejudicial to appellant, the judgment must be *affirmed.*

Craddock & Trabue, for appellant.

Thompson & Booth, for appellee.

O. C. RICHARDSON, &c., *v.* MARY RICHARDSON, &c.

Guardian and Ward—Former Adjudication—Pleading—Demurrer.

Where the answer, which was not made a cross-petition in an action for a balance due in the hands of a guardian, sets up a matter which might have been litigated in a former suit against the guardian by the ward to surcharge the guardian's settlement, and it does not appear that they were not litigated, a demurrer was properly sustained to the answer.

APPEAL FROM MEADE CIRCUIT COURT.

December 12, 1872.

OPINION BY JUDGE HARDIN:

This appeal involves an inquiry as to the sufficiency of the answer to which the court sustained a general demurrer. It appears from the petition, in such of its averments as are uncontroverted, that the appellant, O. C. Richardson, was the administrator of Albert C. Richardson, and also the guardian of his children, and in the latter capacity was chargeable with the assets remaining in his hand as administrator, and also with the proceeds of the sale of a tract of land, sold under a decision of the Meade Circuit Court, which he procured as guardian, and that having made a settlement before the county court, in which that court failed to charge him some amount of interest on the price of the land, the ward excepted to the settlement and, being overruled by that court, appealed to the circuit court, and exceptions being there sustained, the judgment of the circuit court was afterwards affirmed on the appeal of the guardian to this court.

Afterwards, that controversy having been remanded through the circuit court to the county court, for a final settlement of the guardian's account, a settlement was there made, and admitted to record, showing a balance in the guardian's hands of $1,380.80, to recover which this suit was brought. The principal defendant admitting in his answer, in addition to the foregoing facts, that long before either of the settlements we have stated were made or attempted, he had twice stated and settled as guardian before the judge of the county court, on which his final settlement must have

been based, claimed that by mistake in those settlements he had failed to have any allowance for his services and that in one of said settlements made in 1851 he was improperly charged with two hundred and twenty-two dollars and twenty-five cents, with which he was also credited, and furthermore that in his settlement as administrator he was improperly charged with $175.75, the value of property taken by the widow, and that by mistake in his subsequent settlement as guardian he failed to have that error corrected, and making his answer a cross-petition, he sought to be relieved against said mistakes, and to have credit for said sum.

It does not appear from the pleadings whether these matters were litigated in the appeal case or not, but as they might have been it should be presumed that, as the object of settling his accounts was to fix the balance against him as guardian, he asserted all the just claims he had to have credits allowed him, and especially so as the answer fails to state explicitly or definitely any sufficient reason why the allowances were not claimed in any of the several settlements preceding the last, and why they were not even claimed in that settlement. It seems to us the demurrer was rightly sustained and there is no error in the judgment.

Wherefore the same is *affirmed.*

Walker, Fairley, for appellants.

Kincloe, Lewis, for appellees.

JOHN POINDEXTER, ADMR., *v.* THOS. T. GARNETT.

Frauds, Statute of—Contract Not to be Performed Within a Year.

A contract by a party to build a fence in consideration of permission by plaintiff to defendant to lay and use a switch on plaintiff's land, was held not to be a contract which was not to be performed within one year.

APPEAL FROM HARRISON CIRCUIT COURT.

December 14, 1872.

OPINION BY JUDGE HARDIN:

The evidence in this case, which we regard as amply sufficient to establish the alleged agreements of Poindexter to build the

fence, in consideration of the assent and permission of the appellee to the putting down and using of the switch upon his land, does not necessarily impart a promise which was not to be performed within one year, but an undertaking which ought, at least, to have been complied with when the right of way was granted; and it does not appear that it was contemplated by the parties, when they made the contract, that its performance should be deferred on either side for over one year; nor do we think the obligation to make the fence failed for want of consideration. The privilege of using the switch carried with it, so far as was necessary and indispensable to that use, the right of ingress and egress, and Poindexter himself seems to have considered the benefit thus secured to him a fair equivalent for his undertaking to make the fence.

The evidence and agreed statement of facts seem to sustain the allowance made by the commissioner, and the judgment confirming it.

Therefore the judgment is *affirmed.*

A. H. Ward, for appellant.

Trimble, for appellee.

JAMES S. FISH *v.* ELIZA HAYS.

Attachment—Bounty—Attachment of.

A bounty which was not received by a soldier in his lifetime, is not subject to seizure in the course of transmission to the person entitled thereto.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

December 15, 1872.

OPINION BY JUDGE PETERS:

The bounties granted to the families of deceased soldiers are intended to compensate them in some degree for their bereavement, and the loss of that aid to which they had a right to look for their support; and in order to make these bounties the more effectual, Congress has provided that they shall not be liable to attachment, levy or seizure by or under any equitable, or legal process what-

ever, but shall remain to the benefit of the persons intended to be provided for.

Even, therefore, if the money which was not received by the father in his lifetime did not pass to the mother on his death, to which opinion we incline, still we are satisfied it was not subject to seizure in the course of transmission to the person entitled thereto.

Wherefore the judgment sustaining the demurrer to the petition is *affirmed*.

Eastham, for appellant.

C. Kirtly, for appellee.

BENJAMIN JONES AND WIFE *v.* M. A. C. BRIGHT'S ADM'R.

Guardian and Ward—Joint Judgment Against Guardian and Her Husband.

A joint judgment against a guardian and her husband is erroneous, where the record discloses nothing to sustain a personal judgment against the husband.

APPEAL FROM CLARK CIRCUIT COURT.

December 15, 1872.

OPINION BY JUDGE HARDIN:

The evidence upon which the county court confirmed the report of its commissioner settling the accounts of Mrs. Jones as the late guardian of Miss Bright, is not certified in the record; so this court can not know, from the record, whether the judgment founded on the county court settlement was right or not so far as Mrs. Jones is concerned. But the joint judgment against herself and husband is certainly erroneous, there being nothing disclosed in the record to sustain any personal judgment against him.

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

The case of *Helm v. Short*, 7 Bush 624, should govern the action of the court, on the return of this cause, as to evidence to be considered on the trial of the case.

Egenton, for appellants.

Simpson, for appellee.

CHAS. OSBORN *v.* J. H. HEREFORD.

Ejectment—Boundary—Question for Jury.

Whether certain land is embraced in a boundary recited by the evidence of title is a question for the jury, and the court should instruct that if the patents and deeds in the chain of title down to plaintiff included the land in controversy, the finding should be for plaintiff, unless the defense of adverse possession is sustained by the proof.

Ejectment—Defense—Adverse possession—Instruction.

Where the defense is title by adverse possession, an instruction "that the claim of possession must be to a well-defined marked boundary" is erroneous, as a natural boundary may exist and control in such a case.

APPEAL FROM FLOYD CIRCUIT COURT.

December 15, 1872.

OPINION BY JUDGE PRYOR:

We perceive no objection to the introduction of the patents and deed, by the appellees, for the purpose of establishing their title to the land in question. Whether or not this land was embraced by the boundaries recited in the written evidences of title is a question of fact for the jury, and the court below erred in telling the jury "that the plaintiff has shown a paper title for the land in dispute and they should find it the property of the plaintiffs." The court not only admits the patent and deeds as evidence to which there could have been no objection, but proceeds to say to the jury that these writings make out a perfect title in the plaintiffs, and authorizes a recovery unless bound by an adverse possession on the part of the appellant. The court should have said to the jury that if the patent to May and the deeds from May to May and from May to Osborn, etc., reciting them on down to the plaintiff, included the land in controversy they must find for the plaintiff unless the defense relied on is sustained by the proof. The defense is an alleged adverse holding on the part of the appellant, and the instruction on the question of adverse possession is also objectionable in this: "The jury are told that the claim of possession must be to a

well defined marked boundary." A natural boundary may exist and control in a case like this, as well as a marked boundary and if the defendants and those under whom they claim were in possession of, and claiming this land to a fixed and defined boundary, whether marked by the surveyor or ascertained by natural objects from more than fifteen years prior to the institution of plaintiff's action, it presents such a defense as should go to the jury upon the issue made. For the reasons indicated the judgment is reversed and cause remanded with directions to award the appellant a new trial and for further proceedings consistent with this opinion.

Apperson, J. R. Botts, for appellant.

Hereford, for appellee.

J. P. McCULLOM *v.* P. H. COCHRAN.

Pleading—Answer—Reply—Admission—Production of Choses in Action.

Where plaintiff's reply to defendant's answer and counter-claim admits that plaintiff has in his possession choses in action to the value of $250, which had not been accounted for, he must produce them, or the court will credit defendant with the amount, in the absence of a showing that they can not be used as a set-off.

Equity—Recital in Decree—Proof.

The mere recital in a decree in equity that the case was heard upon the pleadings, proof, and exhibits, is no evidence that parol testimony was introduced and heard in the case.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 16, 1872.

OPINION BY JUDGE PRYOR:

This suit was transferred from the common pleas court to the Louisville chancery court and tried in equity. The reply of the appellee to the answer and counter claim of the appellant in the suit first instituted in that court admits that the choses in action left in appellee's possession were of the value of two hundred and fifty dollars. The choses in action or their value have not been accounted for in any way by the appellee. Although he does not ad-

mit that these claims were left with him to pay this identical debt, still, he does admit, that they were left to pay the debts of Overton and we see no reason why he should not be made to account.

His response amounts to nothing. He must show his hand, by extinguishing the claims or making some proof showing the disposition he has made of these accounts. Admitting as he does that he has $250 of choses in action that were good, he must either produce them, or the court, in the absence of testimony showing that they can not be used as a set-off in this case, must credit the appellant for the amount. The judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion. There is nothing in the record showing that the court heard proof in the court below. The mere recitation in a judgment in equity that the case is heard upon the pleadings, proof and exhibits is no evidence that parol testimony was introduced and heard in the case.

Caldwell, for appellant.

Thompson & Booth, for appellee.

JOHN C. BUCKNER *v.* GEO. W. EDWARDS.

Bills and Notes—Consideration.

A benefit to one party and some prejudice to the other is sufficient consideration to sustain a note.

Trusts—Note Executed to Executors—Bankruptcy.

A note executed to persons as executors is held in trust for the estate, and does not pass into the hands of the assignee in bankruptcy, on application by the executor for the benefit of the bankrupt law.

APPEAL FROM GREEN CIRCUIT COURT.

December 15, 1872.

OPINION BY JUDGE PETERS:

Appellee alleged in his original petition that his co-obligee had transferred the benefit of the note to him; that he was the sole owner thereof, and made the co-obligee a defendant, who was

served with process, and failed to answer; consequently the first paragraph controverting the ownership of appellee to the note sued on, presented no defense.

There was no evidence to sustain the second paragraph charging fraud.

After appellee and Wm. S. Buckner had been removed as executors, appellant entered into the compromise arrangement with them, having full knowledge of all the facts, promised to pay the amount agreed upon and had the agreement executed on the part of appellee and Wm. S. Buckner, and the suit against appellant for a much larger amount than the note sued on dismissed; whereby benefit resulted to him and some prejudice to them which formed a valid consideration for the note.

The note as evidence of a debt against appellant dated the 12th of February, 1856, was executed to Edwards & Buckner as executors, and the same when they applied for and got the benefit of the bankrupt law was held in trust for the benefit of the estate of their testator, and did not pass to their assignees in bankruptcy, and the note sued on was executed two years after their discharge. Every fact relied on in the answer as material was known to appellant before he executed the note sued on, and it seemed important to him to have the suit dismissed which was pending against him when the note in question was executed and that he accomplished and having procured the contract to be executed on the part of Edwards and Crawford so far as it benefited him, it is not graceful in him to endeavor to evade the execution on his part.

Judgment *affirmed*.

Rush, for appellant.

Chelf, for appellee.

LLOYD & TRIBBLE *v.* M. M. QUEEN, ETC.

Mechanic's Lien—Sufficiency of Evidence.

The evidence was held not to sh owthat plaintiffs had a mechanic's lien on the property in question.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 16, 1872.

OPINION BY JUDGE LINDSAY:

The right of Tribble to subject to the payment of his debt the house and lot in his petition mentioned, depends upon whether the note sued on was executed for a balance due for carpenters and joiners' work done on said house. This fact is expressly denied by Bemy. There is testimony showing that appellant did such work during the winter of 1867 and 1868, and that the job was not completed until July, 1868. But there is no evidence showing that any part of the work remained unpaid for until December 24, 1868, when the note was executed, and no evidence tending to show the consideration for the note except the recital therein contained. As this note was not executed by Queen and wife until after the liens of the various appellees had been created, they are in no wise affected by such recitals.

In the absence of proof showing that the debt sued on was for carpenters' and joiners' work done on the house built by Queen and wife, it was difficult for the court to conclude that appellants held a mechanic's lien on the property at all, much less to declare it superior to the undoubted liens held by appellees.

The proof certainly did not authorize any other relief than that appellants have obtained and they have no ground of complaint.

Sweeney & Stewart, for appellants.

Williams, for appellees.

E. F. KING'S ADM'R, ETC., *v.* WM. EVANS.

Pleading—Partnership Accounting—Discovery.

A petition for a partnership accounting which leaves blanks where numbers ought to be inserted, so that judgment can not be entered thereon, is insufficient, and does not entitle the plaintiff to compel defendant to make discovery as to the doings of the partnership, and upon failure of plaintiff to fill up the blanks within a reasonable time, the petition should be dismissed.

APPEAL FROM WHITLEY CIRCUIT COURT.

December 16, 1872.

OPINION BY JUDGE LINDSAY:

This cause seems to have been commenced and prosecuted upon the idea that pleadings are altogether unnecessary.

The paper styled the petition recites that a partnership in the purchase and sale of hogs and cattle existed in the year 1855, between the plaintiff and defendants. That the partners were equally bound for the debts of the firm, that they were to receive equal portions of the profits, and to sustain in equal proportions the losses. The plaintiff undertakes to give a statement of the partnership operations, and does so by stating that ——— head ot hogs and —— head of cattle were purchased for —— dollars; that they were sold for $——, that the expense amounted to $——, and that upon settlement the defendants are indebted to him in the sum of $——, for which he prays judgment. There are many other amounts left blank which for the purposes of this opinion it is not necessary that we should notice. If no answer had been filed it is manifest that no judgment could have been rendered upon this petition. There is nothing in it to be taken for confessed, and the answer when filed throws little or no light upon the matters involved. In the main the appellants leave blank the amounts alleged to have been paid out or received by them. Such pleading ought not to be tolerated. It is not the business of the courts to hear all evidence that may be offered, and from it to make up the pleadings for the parties.

Appellee had no right to ask the chancellor to compel the appellants to make discovery as to the acts and doings as partners until he came into court with a petition upon which a judgment might be rendered when the discovery was made. With the pleadings in their present condition it is impossible that a settlement even approximately correct can be made.

Wherefore the judgments appealed from are reversed and the cause remanded with instructions to require the parties litigant to fill up the blanks in their pleadings, and in case the appellee fails within a reasonable time to perfect his petition it should be dismissed.

In case the defects in the pleadings shall be cured the cause should be referred to the master, who will make up his report

from the pleadings, the proof now in the case, and such other proof as the parties may offer.

G. Pearl, for appellants.

Dishman, for appellee.

ARCHY CALDWELL *v.* COMMONWEALTH.

Criminal Law—Reversal—Overruling Demurrer—New Trial.

Where a judgment has been rendered in a misdemeanor case, reversal can not be had merely because a demurrer has been improperly overruled, or for error in granting or refusing a new trial. (Code of Practice, § 349, p. 659.)

APPEAL FROM FAYETTE CIRCUIT COURT.

December 18, 1872.

OPINION BY JUDGE PRYOR:

This court had repeatedly held that an indictment charging the defendant with having kept a tippling house is sufficient without specifying or alleging the facts necessary to be proven in order to create the offense.

When a judgment has been rendered in a case for misdemeanor no reversal can be had because a demurrer has been improperly overruled, or for an error in granting or refusing a new trial. Code of Practice, Sec. 349, page 659. We can not adjudge from the facts whether the indictment upon which the defendant was found guilty was or not for the same offense contained in the indictment transferred to the district court.

It was certainly not the same indictment, and it seems to us that the defendant in order to avail himself of the right to be tried in a different tribunal, should have adopted the mode prescribed by the law of Congress on the subject.

The judgment of the court below is *affirmed.*

Gibbon & Faulconer, for appellant.

———, *for appellee.*

W. E. N. MARK *v.* JOHN MCGEORGE.

Slaves—Emancipation Proclamation.

The emancipation proclamation of January 1, 1864, did not apply to slaves held in Kentucky, nor to slaves owned by persons residing in Virginia, unless they were held in slavery in that state.

Slaves—Freedom—Loss by Owner.

The owner of slaves at the time they were set free by amendment to the Federal Constitution must bear the loss.

APPEAL FROM HARLAN CIRCUIT COURT.

December 19, 1872.

OPINION BY JUDGE LINDSAY:

From the agreed facts it appears that the slaves, the consideration for the undertaking sued on, left Virginia prior to June, 1862, and remained in Kentucky up to January, 1864, when they were sold to appellee.

The proclamation of emancipation issued by President Lincoln on the 1st day of January, 1864, whatever may have been the legal effect, did not apply to slaves held in Kentucky, nor to slaves owned by persons residing in Virginia, unless they were held in slavery in that state.

It is therefore manifest that these slaves were not freed until December, 1865, when the 13th article of amendment to the Federal Constitution became a part of the instrument.

When freed they were the property of appellee and he must bear the loss. The warranty contained in the bill of sale executed by appellant was not broken or violated by the abolition of slavery. He did not warrant against a change in the fundamental law of the general government.

Inasmuch as the undertaking sued on was executed upon a lawful consideration, and as the charge of fraud is wholly unsustained, even allowing appellee's answer as amended to import such a charge, the courts can not refuse to enforce it.

The judgment is reversed and the cause is remanded for a new trial upon principles consistent with this opinion.

L. Farmer, for appellant.

———, *for appellee.*

THOMAS FOLY *v.* H. B. SMITH.

Appeal—Final Orders.

An order to pay money into court, or appear and show cause to the contrary, and an order adjudging the response to the rule insufficient and awarding an attachment for contempt, are not final orders from which an appeal will lie.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 19, 1872.

OPINION BY JUDGE HARDIN:

The order of the 7th of October, 1870, that Foly pay $420, with interest from December 19, 1867, into court or "appear and show cause to the contrary," and the subsequent order adjudging his response to that rule to be insufficient and awarding an attachment against him for contempt, are merely incidental to the judgment in the case of *H. B. Smith v. Arnold, etc.*, which has just been reversed on the appeal of Emma Arnold and others, and they therefore became inoperative and subject to be set aside with that judgment.

But they are not final orders from which a separate appeal will lie to this court.

This appeal is therefore dismissed for want of jurisdiction in this court.

D. M. Rodman, for appellant.

———, *for appellee.*

NASHVILLE & CHATTANOOGA RAILROAD CO. *v.* DANIEL MURPHY.

Trespass—Evasive Answer.

In an action for injury to real estate, an answer which does not controvert plaintiff's ownership or possession of the land, but alleges want of knowledge or information as to whether plaintiff was the owner of the legal title and in actual possession of the land, is evasive and insufficient.

Damages—Permanent Injury to Land.

In order to entitle one to recovery for permanent injury to land, it is not necessary that he should hold the legal title, but he has a

right of action if he was the owner of the property and in possession of it.

Pleading—Immaterial Issues.

Immaterial issues should not be raised by the pleadings, but if raised they should be disregarded by the court.

Eminent Domain—Compensation.

Private property can not be taken for a public use until just compensation has first been made.

Estoppel—Claim for Damages to Land.

That plaintiff in an action for damages to his real estate worked for the defendant railroad company when the alleged trespass was committed, does not estop plaintiff from asserting his claim for the damages.

APPEAL FROM FULTON CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE LINDSAY:

This was an action to recover damages for trespass to real property. To authorize a recovery for the permanent injury resulting from the car structure of the railway across the lot of land it was not necessary that appellee should hold the legal title. If he was the owner of the property in question, and in the possession of it, his right of action was perfect. Appellant's answer does not controvert his ownership nor his actual possession of the lot, but avers want of knowledge or information as to whether on the day named in the petition, "He was the owner of the *legal title,* and also in the actual possession and enjoyment of *all the privileges of owners* of a certain city lot, etc.," following the exact language used in the petition.

The evasive character of such a plea is palpable. It may be that appellee did not hold the legal title to the lot, and yet have been the equitable owner of it. He may not have been in the actual possession of each and every privilege connected with the lot, and yet have resided upon it, and had the actual control of that portion over which the railway was constructed. Yet the plea is so framed that if any statement in the petition, however immaterial, is not true, appellant could truthfully verify its answer. The law requires the denial of the material allegations of the petition. Im-

material issues ought not to be raised by the pleadings, and if raised must be disregarded by the court. The answer in question when properly construed, does not deny Murphy's ownership nor possession, but denies that he owned and possessed the lot in the exact manner stated in the petition. The only issue raised by the answer is as to the damages claimed to have been sustained by reason of the alleged trespass.

The attempted denial of the entry upon the lot, and the construction of the railway is liable to the same objection as that with regard to the title and possession.

The railway company can not claim exemption from liability by reason of the provisions of the 24th section of the "Act to incorporate the Nashville & Northwestern Railroad Company." In this state private property can not be taken for the public use, until just compensation has been first made. The legislature can not authorize a railway corporation to enter upon and appropriate the lands of a private citizen, and compel him to resort to the courts to secure compensation. If lands are needed the company must upon its own motion procure their condemnation (when they can not be obtained by purchase or donation), and pay or secure to be paid to the owner the amount assessed before entering upon the possession. Even the political corporations of the state have never claimed the right to actually appropriate property until compensation has been secured to the owner. 4 Littel 328, 6 Monroe 498, 1 Dana 247.

If the section of the act in question is susceptible of the construction insisted upon by appellant it is certainly repugnant to the state construction and is therefore void.

The bill of exceptions does not contain the instructions refused by the court, nor are they in any way made a part of the record. The statement of the clerk that the papers copied are such instructions is not sufficient to authorize this court to consider them. *McDowell & Co. v. Bennett,* 7 Bush 474.

In view of the fact that the answer did not put in issue the questions of title and possession, instructions A and B, instead of being prejudicial to, were calculated to promote the interest of appellant, as they rendered it possible for the jury to find against appellee upon matters which should have been taken as confessed.

The fact that Murphy worked for appellant as a laborer, when

the extension of the railway was made, does not stop him from asserting this claim for damages.

Perceiving no error in the action of the circuit court prejudicial to appellant, the judgment is *affirmed.*

Kingman, for appellants.

H. A. Tyler, for appellee.

J. M. LESTER *v.* T. C. WINFREY.

Vendor and Purchaser—Land Devised Upon Condition—Title of Purchaser.

The evidence was held to show that the purchaser of land devised upon conditions imposed as to use and disposition of same, to-wit, for the benefit of testator's wife and children during her widowhood, or until the youngest child arrived at age, acquired a good title although the proceeding under which the sale was made was informal.

Equity—Contract for Sale of Land—Time as Essence.

The doctrine that courts of equity will not ordinarily regard time as the essence of a contract for the sale of land, was held to apply to the case at bar.

Time—Sale of Land Under Will.

The sale of land by an executor was held to be a substantial compliance with the terms of the will fixing the time of sale.

Guardian and Ward—Confirmation of Sale.

A confirmation by the court of a sale of land by the guardian, prior to the death of the ward, precludes the ward's heirs from setting up claim to the land.

Estoppel—Conveyance by Heirs.

Where adult heirs made deeds to their interest in land of the testator, and received the purchase price, they are estopped from setting up any claim to the land, either in their own right, or as heirs of the deceased sister.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE PRYOR:

F. H. Winfrey died, leaving a last will and testament, and his widow with eleven children surviving. By the provisions of his will, Thomas C. Winfrey, who is the appellee in this case, was left his executor. He devised all his estate, consisting of land and slaves, to his wife to be used and worked for the benefit of herself and children during her widowhood or until the youngest child arrived at age and upon the happening of either event his estate, real and personal and mixed, to be sold and the proceeds to be divided between his children.

The appellant (the executor) purchased all the interest of the children of the devisor in the lands devised, except the interest of W. J. Winfrey, Kitty Winfrey, and two of the children of Bledsoe. The slaves devised were all set free and the widow, not being able to keep up the farm, desired to sell her interest and that of her daughter and invest the proceeds of sale in other lands.

The executor, in order to gratify the wishes of the widow, or to convert the interest he had bought into money, sold the tract of land by executory contract to the appellant.

This contract obligated Winfrey to the effect, that in a few days he would make to the appellant a good and sufficient deed for the land, the same to be signed by the widow and W. J. Winfrey as well as himself. The deed, it seems, was prepared and ready for delivery, but the appellant refused to receive it, insisting that the executor had no right to sell under the will, and that one of the children of the devisees and two of the grandchildren were under age. The appellee, who was a son of the devisor and executor of his will, having purchased all the interest of his brothers and sisters in the land who were of age, except W. J. Winfrey, and he, having united with him in the deed, was able to make a perfect title to the whole tract except the interest of Kitty Winfrey and the two Bledsoe children, all these of whom were infants. The evidence establishes the fact beyond controversy, that Lester knew of this defect in the title when he bought the land. Kitty's interest in the land was one-eleventh of the whole tract, and the interest of the Bledsoe children was two-sixths of one-eleventh. The appellant admits in his answer that the appellee told him that his title was good except as to one-eleventh and two-sixths of one-eleventh of the land sold him.

Winfrey, in order to perfect the title, had the guardian of these infants to file a petition for the sale of their interest, under the provisions of Chapter 86 of the Revised Statutes. The guardian seeks an investment of the proceeds of the sale belonging to Kitty in other land. The land was sold under this ex parte proceeding and Winfrey became the purchaser. The sale was confirmed by the court, and a deed made him by the commissioner. Between the date of the confirmation of the sale, and the deed to the commissioner, Kitty died. The proceeding under which the sale of the infants' property was made, although informal, is such a compliance with the statute as passes the title to the purchaser. Winfrey has paid the money into court and it is there held for reinvestment. Second Volume Revised Statutes, page 314; 3 Bush 384. His title to the whole tract was perfected before the appellant by the terms of the executory agreement was to get the possession. There is nothing in the record showing that the time for making the conveyance formed an essential part of the agreement. The general doctrine that courts of equity will not ordinarily regard time as the essence of a contract in the sale of land, applies to this case. *Magoffin v. Holt,* 1 Duvall 97, 3 Monroe 34.

If a good title can be made in a reasonable time the vendee will be compelled to accept it. *Craig v. Martin,* 3 J. J. Marshall 50.

There is no fraud or unfairness alleged, or charged, against the appellee in the sale of the land, but on the contrary the defects in the title were disclosed before the sale was made.

We see no reason why the title is not perfect unless the will of Winfrey precludes any sale from being made. The widow and children have all conveyed their interest in the land as before recited, except the interest of the one-eleventh and the two-sixths of one-eleventh. The executor, by the provisions of the will, was invested with the full power to sell this property when the youngest child arrived at age. The youngest child, Kitty, died and the children survivors were then all adults. The object of the devisor in postponing the sale until the period designated by the will was to enable the wife to hold and use the property until all the children were old enough to receive their distributable share, and in the meantime have them supported and maintained out of it. The executor has exercised his power to sell, not at the exact time prescribed by the will, but when the object of giving him such power is consid-

ered, he has done substantially what the will required him to do. Those who can object to the sale have already conveyed their interest, and although we are inclined to the opinion that the executor could sell as such, still the defect in the title, if any, is cured by the sale of the interests of the infants under the petition of their guardian. The confirmation of the sale to Winfrey by the court previous to the death of Kitty will preclude her heirs from setting up any claim to it.

The judgment of the court below is *affirmed.*

Garnett, for appellant.

James, for appellee.

RESPONSE TO PETITION FOR RE-HEARING.

DELIVERED BY JUDGE PRYOR:

Counsel for appellant, in his petition for rehearing, is attempting by a labored argument to impress upon the minds of the court that Lester was imposed upon by the appellee and that the former knew nothing of the defect in the title and the interest of the infants in the land. The proceedings and proof show that Lester knew that the title was defective as to one-eleventh and two-sixths of one-eleventh of the whole tract. He took the land subject to these defects with the understanding that the appellee would proceed at once to make the title perfect. This the appellee did by filing his petition to have the interest of the infants sold.

It is a matter of doubt, however, whether the action on the part of the executor was necessary. He was invested with full power to sell that land. There was no restriction except as to time.

All of the children of the devisor were of full age except Kitty and two of his grandchildren. The land was in a delapidated condition, and the slaves all set free. The means of enabling the widow to farm successfully and maintain the infant children had been taken from her. There was nothing in the will prohibiting a sale of the property. The will construed as contended for by counsel on both sides converted the land into money, a question we do not decide, but if so, the title is in the executor and the heirs must look to him and not to the purchaser.

The adult heirs received their money and made deeds to their specific interests. Whether they had the title or not, the reception of the money and the execution of the deeds estopped them from setting up any claim to the land, either in their own right or as heirs of Kitty. It is not pretended that the adults had no power to dispose of their interest in the land or its proceeds.

If they had all been adults and capable of contracting they could have annulled the will. Kitty's heirs can assert no claim to this property. Her guardian has received the proceeds of the land for her, or it is held by the chancellor to be reinvested upon his application. If the land was converted into money by the will and the title in the executor why could not the guardian elect to take the money or the value of his ward's interest?

In order, however, to fully protect the purchaser and secure the rights of the infants, the chancellor is appealed to, who takes the money and holds it for the benefit of the ward.

The individual deed of Winfrey and his wife as well as a deed from him as executor is tendered into court, and appellant can withdraw one or both.

Appellant's title is made doubly secure. He has the individual deed of the grantor and his wife and his deed as executor. The sale and title to the infants' interest is approved and sanctioned by a court of equity. There is no one to complain of any defect in the proceeding if there was any and therefore the appellant should be content. There is no question made or none raised in regard to the rents and therefore no reversal can be had on that ground. If the appellant is entitled to rent, his remedy is by another action. We see no reason why he is not unless he has derived the benefits resulting from the use of the land.

Petition *overruled.*

Garnett, for appellant.

James, for appellee.

M. RENTLINGER *v.* D. H. DAVIES'S ADM'R.

Equity—Laches.

It is too late after the lapse of many years and after the death of a party with whom business transactions were had, to litigate the question with deceased's personal representative as to certain credits.

Equity—Decree—Evidence of Business Transactions.

The chancellor is cautious in making an adjudication by which written evidence of business transactions are materially changed, and will only do so where the evidence is so clear and satisfactory as to leave but little room to doubt the propriety of exercising this equitable jurisdiction.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 20, 1872.

OPINION BY JUDGE PRYOR:

There is neither fraud nor mistake alleged in the execution of the deed executed in July, 1868, by which the lots of ground therein described were conveyed by Davies to the appellant, but on the contrary the answer of the appellant states, "there were many items charged against the defendant in the account between Davies and the defendant to which the defendant objected at the time, and in this account there was an omission to give credit for a great many items to which the defendant was entitled, etc."

The defendant insists in this pleading that the object in executing the deed by Davies was to divest him, Davies, of the title (he holding it in trust for the appellant) in order to prevent any litigation between the appellant and the heirs of Davies at his death in regard to the title, the health of the latter being very much impaired. This was no doubt the object of the conveyance, and whilst assuming this as the reason for the execution of the deed in 1868, it would be inconsistent not only with the statement of the answer of the appellant on this subject, but with all the facts of this case to now adjudge that the parties by the execution of the deed were inviting litigation instead of preventing it. Appellant now insists that the notes executed by him, and for the payment of which a lien was expressly created by the deed, embraced a much larger amount of money

than the appellant really owed, and that the object of the deed was to prevent future trouble.

There is not a single mistake specified in the answer as having been made between Davies and the appellant in the execution of the notes, but a general statement that items were included to which he objected and others omitted to which he was entitled at the time this transaction took place. In other words, when he gave the note he knew it was for more than his indebtedness. Davies had been paying debts and assuming liabilities for the appellant from the year 1860 to the year 1868. Various credits are given to the appellant for moneys paid by him amounting to several hundred dollars. For what these credits were given does not appear, and even if it did, it is now too late upon such a statement of facts as appears in appellant's answer, after the lapse of many years, and the death of the party with whom all these business transactions took place, to litigate these questions with his personal representative. The chancellor is always cautious in making an adjudication by which written evidence of business transactions are materially changed, and will only do so when the evidence is so clear and satisfactory as to leave but little room to doubt the propriety of exercising this equitable jurisdiction. The account afterwards found by the appellant and made the basis of his petition for a new trial would not in our opinion have affected the judgment of the chancellor. There is no equity in appellant's case. The judgment is *affirmed.*

Gaslan, Yeaman & Keinecke, for appellant.

Muir & Byior, for appellee.

J. W. EDWARDS *v.* DICKERSON, RICE & BISHOP.

Evidence—Conversion of Note—Subjecting Property—Burden of Proof.

In a suit to subject the property of W. to the payment of creditors of G. on the ground that W. had converted a note belonging to G., the burden of proof is on the plaintiff to show that the note in controversy was the property of G., and no explanatory proof is required by W. until some evidence has been adduced showing some right to it by G.

Opinion of the Court.

Fraudulent Conveyances—Dealings Between Father and Son.

The facts were held to show that the relations and dealings between a father and his son did not constitute a combination between them to place the father's property beyond the reach of his creditors.

APPEAL FROM PENDLETON CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE PRYOR:

We can not concur with the court below that the goods of Wesley Edwards, or their proceeds, were liable to the creditors of George Edwards, by reason of the note on Parker, pledged by the former, to the firm of Butterworth & Potts as securety for his, Wesley Edwards', individual liability. If the note on Parker belonged to George Edwards, and had been used by him in the payment of his own debt, then it would have been right and proper to make Wesley Edwards account for its value. There is no evidence showing that George Edwards ever was the owner of the Parker note, or that he at any time had it in his possession.

The nearest approach to establishing George Edwards' right to it is the statement of Carny that the holder of the note proffered to trade it to him (Edwards), and a statement by an attorney who says his information is that he saw the name of George Edwards endorsed on the note when in the possession of a salesman of Butterworth & Potts, to whom Wesley Edwards had pledged it.

The agent or salesman of the firm of Butterworth & Potts, says that George Edwards' name was not upon the paper; that Wesley Edwards had possession of the note, and placed it with the firm of whom he purchased his goods as collateral security for a debt he owed them, there can be no doubt. The burthen of proof was on the appellees to satisfy the court that the note in controversy was the property of George Edwards, and no explanatory statements or proof was required of Wesley Edwards (his possession and claim of ownership being conceded) until there was some evidence conducing to show some right to it, in George Edwards, the father.

Nor is there any evidence tending to show any combination between the father and son, or an effort upon the part of the latter to place the property of the father beyond the reach of his creditors. The statement made by a clerk of Dickerson Price, etc., that he

saw some two or three articles in the store of Wesley Edwards that had been in the firm of which he was clerk, is accounted for by proof showing that Wesley Edwards purchased at an auction sale in Falmouth a bill of goods and among the goods sold were hats, books, etc., and the latter may have obtained these articles in that way. Whether he did or not, this court, will not upon his failure to account for the possession of these two or three articles hold him responsible for the debt of his father.

The evidence shows him to be an honest, industrious young man, and although not yet of age, the proceeds of his daily labor have been expended by him in contributing to the support of his father's family, a circumstance that repels the charge of fraud instead of sustaining it.

The goods in the father's store at the time Wesley Edwards began his career as a merchant, were of but little value, and they were levied on by a constable and sold. It would have been an easy matter for the appellee to have ascertained from the holder of the note to which of the two parties he sold it, they having alleged that it was George Edwards property must prove it. Wesley Edwards is the owner and entitled to the note in controversy.

The right of property in this Parker note being the only question presented by this appeal, the judgment of the court below is reversed with directions to dismiss the suit as against Wesley Edwards, and for further proceedings consistent herewith.

The judgment on the cross appeal is *affirmed.*

Clark & Dills, for appellant.

Ireland & Dederick, for appellees.

BERRY HURST AND WIFE *v.* J. F. STONE, ETC.

Husband and Wife—Mortgage by Husband and Wife.

Land being general estate, the wife has no power, in conjunction with her husband, to bind it by mortgage to secure a debt of her husband.

APPEAL FROM TODD CIRCUIT COURT.

December 20, 1872.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

Mrs. Hurst did not hold the lot mortgaged to appellees as separate estate, although the title was conveyed to a trustee. It being general estate, she had the power in conjunction with her husband to bind it by mortgage, to secure the payment of the husband's debt. *Sharp's Adm'r v. Proctor's Adm'r and Heirs,* 5 Bush 396.

The court below did not err in enforcing the mortgage, and the judgment must be *affirmed.*

Lowry, for appellants.

Terry & Perkins, for appellees.

JAMES FANNIN, ETC. *v.* JOHN STEELE.

Alteration of Instruments—Effect of Alteration As to Surety.

The principal of a note and the payee thereof do not have the right to change the note without the consent of the surety, although the effect of the change might be to the interest of the surety.

APPEAL FROM MORGAN CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE LINDSAY:

We are of opinion that the alteration of the note from the sum for which it was originally drawn, was a material one, and as it was made without the knowledge or consent of these appellants, it had the effect of releasing them from liability. Their plea of non est factum should have been sustained. It does not matter that the alteration of the note made its amount less than it was originally drawn for. It certainly changed the character of the obligation, and the law will not imply authority upon the part of the principal in the note and the payee to make such change, even though its effect might possibly be to the interest of the sureties. The refusal of the circuit court to give the first instruction asked for by appellants was error.

The second instruction should also have been given. There is no evidence showing that appellants resided in Morgan county during the time the running of the statute of limitations was suspended in that county.

Judgment reversed and cause remanded for further proceedings consistent herewith.

J. T. Hazelrigg, Hazelrigg, for appellant.

Cooper, for appellee.

JOHN MCKAY *v.* S. F. J. COLEMAN.

Subrogation—Right to.

The right of subrogation will be upheld where one at the request of the debtor pays off a lien debt, or where a surety is compelled to pay it, or where the creditor in consideration of the payment transfers the benefit of his claim to a stranger making the payment; but the mere fact that a stranger to the contract loans money to the debtor, knowing that he is borrowing it to satisfy a mortgage debt, will not entitle the loaner to be subrogated to the right of the mortgage creditor.

Subrogation—Payment in Furtherance of Fraudulent Scheme.

Where one who purchases a note at discount knows that a portion of the money is to be applied to a debt, and it is not shown that the application of the money to that purpose constituted any part of the consideration for the purchase of the note, but it appears that the purchaser of the note paid the money in furtherance of a fraudulent scheme to cheat and defraud the debtor, the purchaser is not entitled to be subrogated to the rights of the creditor to a lien on the debtor's land.

APPEAL FROM KENTON CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE LINDSAY:

Upon the appeal of *Coleman v. Fraizer* this court adjudged that this appellee was entitled to a charge upon the estate of Fraizer to the extent that he had furnished money which was used in the sat-

isfaction of debts or in the discharge of liens upon the property of the latter, and intimated that he might be entitled to this right by being substituted to the rights of the original holder of such liens. Of course, it was not intended that the right of subrogation should be implied unless the application of this money was made under such a state of case as would in some way connect Coleman with the transaction. Such a right may be upheld when a party at the request of the debtor pays off the lien debt, or where a surety is compelled to pay it, or where the creditor in consideration of the payment transfers the benefit of his claim to the stranger making the payment, but the mere fact that a stranger to the contract loans money to the debtor knowing that he is borrowing it for the purpose of satisfying a mortgage debt, will not entitle him to be substituted to the right of the mortgage creditor. *Patterson v. Pope,* 5 Dana 241.

Now as it has already been held that in the transaction with Fraizer the conduct of Coleman and his confederate, Williams, was fraudulent and iniquitous, he does not occupy a very favorable attitude, and, in a court of equity, no presumptions are to be indulged in his favor in a contest with creditors of Fraizer who have acted in good faith as is the case with the appellant, McCoy. His mortgage lien is valid. Coleman's right to priority over him grows out of his supposed right of substitution to the lien of Hill. He did not pay Hill's debt. He did not contract with Fraizer that he would pay it. The most that he can claim is that he knew that a portion of the money advanced on the note purchased by him at a discount of 15 per cent. per annum was to be applied to the satisfaction of that debt. It is true that Williams states that Coleman paid the money to Kittridge for that purpose, but it is not shown that the application of it to that debt constituted any part of the consideration for the purchase of the note from Leslie Fraizer. In point of fact he paid the money in furtherance of his fraudulent schemes to cheat and defraud Fraizer, and he should be content to have the law imply a promise upon the part of the decrepit old man to repay the amount advanced, without asking a court of equity to imply a lien in his favor upon the estate of his victim.

The proof taken by the master does not authorize the judgment of the chancellor subrogating Coleman to the rights of Hill. He is but an ordinary creditor and should have been so adjudged. If the

estate will not pay all the debts he must lose his proportion. McCoy's mortgage being valid, his lien was properly upheld.

Judgment reversed and the cause remanded for a judgment in accordance with this opinion.

Stevenson, Myers, for appellant.

Carlisle & O'Hara, for appellee.

JOHN PRICE *v.* WILLIAM LANE.

Evidence—Admissibility of Sheriff's Deed.

A sheriff's deed which is not accompanied by a judgment or other record evidence of the authority of the sheriff to sell the land, is not admissible in evidence to show title in the purchaser.

Judgment—Must Be Based on Pleading.

Although the evidence may authorize a judgment, the judgment cannot be sustained if there is no pleading on which to base it.

APPEAL FROM PULASKI CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE HARDIN:

The evidence shows that E. Taylor did not have the legal title at the time the appellee purchased the land, according to the recitals of the sheriff's deed; but the deed, not being accompanied by the judgment or other record, evidence of the authority of the sheriff to sell the land, was not admissible in evidence to show title in the appellee, and if Taylor had been vested with the legal title, it ought not to have been admitted, if objected to.

But another objection to the judgment is suggested for the appellant, which is certainly fatal to it. There is no pleading authorizing it, if the evidence did.

The petition seeks only a recovery of the land and does not claim a debt nor assert a lien.

The judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion, it being deemed proper to allow further preparatory steps to be taken by both parties.

———, *for appellant.*

T. Z. Morrow, for appellee.

ALEXANDER MILLER, ETC., *v.* MARIA P. POPE, ETC.

Appeal—Necessity of Objection.

Where records of other cases were properly before the trial court upon a trial of a motion to file appellants' petition, appellants can not be heard to complain in the Court of Appeals that they were prejudiced in the lower court by certain proceedings to which they at the time interposed no objection.

Appeal—Reversal—Practice in Trial Court.

Whether the practice complained of in a trial court was regular or irregular, it can not authorize a reversal, unless it is shown to have been prejudicial to the substantial rights of appellants.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 20, 1872.

OPINION BY JUDGE LINDSAY:

It seems from the bill of exceptions that upon the trial of the motion of appellants to file their petition, the record of the case of the *City of Louisville v. Miller and Others,* in the Louisville city court, the entire record of this action and of the action of *Hancock v. Miller* and other consolidated causes in the Jefferson Court of Common Pleas, were read and considered by the court. It is not shown at whose instance these records were considered; nor does it appear that either party objected to the action of the court in the premises.

The entire record in the case was properly before the court for all the purposes of this action, and the records in the cases of *Hancock v. Miller* and the other causes consolidated therewith were mentioned by appellants in their petition and made parts of it. Hence upon the motion, as the court had the right to adjudge whether from the petition and the exhibits appellants showed themselves entitled to any character of relief, these records were properly before it, and from the bill of exceptions we must presume that the record from the city court was considered without objection. Such being the case, appellants can not be heard to complain in this court, that they were prejudiced in the court below by certain proceedings to which at the time they interposed no objection. None

of the records considered by the court of common pleas have been brought before this court. The bill of exceptions informs us what evidence was heard but the records themselves are not incorporated into it, nor in any other way made a part of the record upon which this appeal is prosecuted.

From the brief filed by appellants' counsel we may assume that copies of each of them except the case in the Louisville city court are on file in the clerk's office of this court, but even as to these there is no consent by appellees that they shall be considered upon the trial of this appeal.

Without a complete record of all the matters upon which the court below acted we can not adjudge that it erred in refusing to permit the petition to be filed, as to transfer the case with the funds in its custody to the Louisville Chancery Court.

Whether the practice complained of in this case be irregular or not, it does not authorize a reversal unless it can be made to appear that it resulted prejudicially to the substantial rights of appellants. The imperfect record before us fails to show such result, wherefore the judgments appealed from are *affirmed.*

John M. Harlan, for appellants.

St. John Boyle, for appellees.

ROBT. C. ALEXANDER, ETC., *v.* JOSEPH B. NEWELL.

Appeal—Reversal—Conflicting Evidence.

The Court of Appeals will not disturb a judgment upon conflicting evidence.

APPEAL FROM PULASKI CIRCUIT COURT.

December 21, 1872.

OPINION BY JUDGE PRYOR:

The evidence of the surveyor, Hamblin, who made the survey on file in this case, fixes the boundary line between the lands of the

parties to this controversey as is claimed by the appellee. This line begins at the letter D, from thence to the letter A, and on to (I) the maple at the bank of the river. The patents under which the appellee holds title include the land in dispute, but the Emerson patent under which the appellants claim embraces no part of it. The ancestors of the parties who are now litigating owned these adjacent lands for many years and seem to have had no trouble in regard to this disputed territory. The proof, however, in regard to the possession of the land conduces to show an adverse holding for a long time by the appellants and those under whom they claim; still it is shown that old man Newell had the most of it in his actual possession many years ago and cultivated a crop of cotton upon it. In 1857 or 1858, according to the proof, the fence that Emerson had upon the land was removed, and up to that period he had held no possession for such a length of time as would vest him with title. Whether the removal of the fence was intended as an abandonment of the land or not, does not certainly appear, but from that time until the institution of this suit in the year 1867 the appellee was in the constructive and actual possession of the land. His possession and claim, although the proof conduces to show that it was obtained from a party who entered under Emerson, was of too long standing to require a surrender of the possession in order to enable the appellee to maintain his ejectment. There is also a conflict of proof in regard to the question of possession, and to such an extent as precludes this court from disturbing the judgment.

The judgment dismissing the petition and cross petition was the equitable view of the case. The judgment is *affirmed*.

James, for appellants.

Vanwinkle, for appellee.

TIMOTHY LEIGHT, ETC., *v.* E. W. RUPERT.

Municipal Corporations—Street Improvement Ordinance.

A street improvement ordinance providing for assessment in the proportion that each parcel of land bears to the portion of the street to be improved, was held to be in substantial compliance with the statute.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 21, 1872.

OPINION BY JUDGE LINDSAY:

The record in this case shows that the board of aldermen and the common council did each keep a regular journal, and that a full and perfect record of the proceedings touching the passage of the ordinances and the approval of the contract involved in this litigation was kept. There is nothing in the testimony of the witness Vaughan tending to bring this case within the rule laid down in the case of McKegney, 7 Bush 651. The proof in that case showed conclusively that no journal had been kept at all, but that the ordinances were merely published in a newspaper, and then cut out and preserved, not by both or either of the branches of the city legislature, but by such of the city officers as felt interest enough in the matter to do so.

We are of opinion that the General Ordinance No. 292, Elliott's Digest 787, is substantially all that is required by the 27th Section of the act of March 9, 1868. It does provide for the rate of apportionment of the cost incurred in the improvements of streets, i. e., that such cost shall be apportioned according to the number of feet each lot shall front on the improvement.

It would have been impossible either by a general or special ordinance, to have fixed the exact amount to which each lot should be subjected, in advance of the contract, as the general council could not know in advance the amount which it would be necessary to pay for the entire work. The statutes can not and ought not to be so construed as to render it wholly inoperative.

That no lot could be held subject to the payment of a greater excess than 25 per cent. more than the amount assessed against the same area of other lots, does not prove that the assessment could not be legally made against such in proportion to the front feet thereof, but rather that in making the apportionment in that manner this rule should operate as a limitation in favor of corner lots, and lots running back a less number of feet than those generally do which front on the improvement. There is no complaint that in the assessment against the lots of these appellants this limitation was disregarded.

Judgment *affirmed.*

Barrett & Roberts, for appellants.

Harrison, F. T. Fox, for appellee.

WADE H. MOORE *v.* JOHN JACKSON'S HEIRS.

Pleading—Reply, When Not Necessary.

Where the answer in an action relating to real estate is in effect a denial of the allegations of the petition and is made a counterclaim for the purpose of recovering for the surplus land in the event the sale is adjudged to have been by the acre, there is no necessity for any response to it, since the facts alleged in the answer are controverted by the petition.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 22, 1872.

OPINION BY JUDGE PRYOR:

The original sale of the land by Jackson to Moore was a sale in gross, and the sale by Moore to Jackson was by the acre. The deeds from one to the other evidence this fact, and in the present suit, although Jackson in his answer insists that his original sale was by the acre, still he is contradicted by the deed itself and in the absence of an allegation of fraud or mistake in its execution sustained by proof its express stipulations can not be altered or reformed. The answer is in effect only a denial of the allegations of the petition and is made a counter claim for the purpose of recovering from the appellees for the surplus land in the event it is adjudged that the sale was by the acre. There was no necessity for any response to it—the facts alleged in the answer were controverted by the statements of the petition. See *Davis v. Lyons,* 7 Bush 4. The judgment of the court below is reversed and the cause remanded with directions to award to the appellant the land in controversy, or if the appellee should elect to take it, a right that should not be denied them, it must be subjected to the payment of the purchase money.

Judge Hardin not sitting.

Hays, for appellant.

Noble, for appellees.

JAMES D. JOHNSON *v.* UNITED SOCIETY OF SHAKERS.

Infants—Confirmation of Contract.

Where an infant after becoming of age does such act of affirmance of a deed made during minority, as surrendering a bond, when taken in connection with his failure for 32 years to give notice of disaffirmance, it amounts to a confirmance so as to prevent him from avoiding the contract.

Adverse Possession—Under Conveyance from Infant.

Where defendant acquired the conveyance of land by plaintiff while plaintiff was an infant, defendant's uninterrupted possession of the land for more than 20 years before institution of suit by plaintiff to recover the land gives the defendant a good title thereto.

APPEAL FROM LOGAN CIRCUIT COURT.

December 22, 1872.

OPINION BY JUDGE PETERS:

This suit was instituted on the 8th day of Mal, 1868, by appellant against appellees, and in his petition he alleged that his grandfather David Johnson died many years previous thereto intestate, possessed of valuable lands, and numerous slaves, leaving two daughters, Elizabeth and Sarah, his only heirs. That before his death his daughter Elizabeth had married B. C. Johnson, that she survived her father but a short time, leaving appellant her only child, then an infant, and her said husband surviving her, and that he, upon the death of his mother, inherited the land which descended to her on the death of her father subject to the life estate of his father, to which he was entitled as tenant by the curtesy; and his father, then 85 years of age, was still living, though much enfeebled by disease.

That appellees were, at the institution of this suit, in possession of the land, without right, which had thus descended to them, and were then committing waste on the land by cutting and carrying away timber which was of great value, and otherwise greatly damaging the inheritance; and he also alleged that appellees, as he was informed, claimed a moiety of the land owned by said intestate at his death by purchase from his daughter Sarah, and appellant

prayed for a partition of said lands, asserting his right to one-half thereof at the termination of his father's estate for life therein, and for an order restraining appellees from further commission of waste and for general relief.

Appellees by their trustee answered and admitted the derivation of title to the land claimed by appellant as set forth in his petition. But they allege that appellant and his father, B. C. Johnson, many years before the institution of the suit, sold and conveyed all their estate in said lands to them; that said B. C. Johnson in the year 1818 filed his petition in the Logan circuit court, the county in which the intestate was domiciled at his death, and where the greater part of said lands were located, for a division of the real and personal estate of said intestate, between appellant and Sarah, his surviving daughter; appellant then being, as alleged in the petition, three years of age, which would make him of or about the age of 53 years then; that by the decree of said court certain gentlemen named, being three in number, were appointed commissioners to partition the lands and divide the slaves and personal estate between appellant and Sarah Johnson; that they performed the duties assigned them under said decree, and made their report, which was filed and approved, and that said B. C. Johnson, for appellant, took possession of all the land allotted to him by said commissioners, consisting of 100 acres in the county of Warren, and the residue in Logan county, being part of the home farm; and that Thomas A. Young, with whom Sarah Johnson had intermarried, took possession of the land allotted to his wife for her, all of which they allege will fully appear by a copy of said proceedings in chancery, which they file as an exhibit.

They allege that on the 23d of December, 1825, said B. C. Johnson sold the portion of land in Logan county assigned to appellant, to said Thomas A. Young, for a valuable consideration, and executed to him a bond binding himself to convey all his interest in said land, and to cause appellant, his son, to convey his estate therein when he arrived at full age by deed with general warranty; that Young on the 3d of February, 1826, assigned said title bond, for a valuable consideration, to Geo. Rankin and John McComb, trustees for appelles, and a copy of the bond with the assignment is made an exhibit; that said contract of said B. C. Johnson was ratified by said appellant, after he arrived at 21 years of age, and on the

6th of May, 1836, in execution thereof he conveyed the land embraced in said bond to Geo. Rankin and Eli McLean, trustees for, and to hold to the use of appellees, which deed they file as part of their answer; the recitals of which as they allege, show that appellant thoroughly understood the nature of the contract, and the consideration for said conveyance, and that he labored under no disability; that one hundred acres of land situate in Warren county and which were allotted to appellant out of his grandfather's estate as aforesaid, were by said B. C. Johnson sold to one Joseph Covington, of which sale appellant was fully apprised, and for the purpose of carrying into execution the sale so made by his father to Covington, on the 27th of June, 1838, appellant conveyed said 100 acres of land to said vendee, and a copy of that deed is filed as an exhibit, By which acts they allege appellant has effectually ratified and confirmed the partition of the real and personal estate of his grandfather, made under the proceedings and judgment of the court aforesaid; that he has acquiesced in said partition and sales for more than thirty years since he arrived at twenty-one years of age, and they plead and rely upon lapse of time, and their adverse holding as a bar to appellant's claim to relief.

They further allege that by said partition, Sarah H. Johnson's part was more valuable than appellant's and the difference she was adjudged to pay in money, which she did pay, and afterwards having married said Thomas A. Young, she joined her husband in a conveyance of the land allotted to her as aforesaid to appellees for a valuable consideration. At the date of that conveyance she was a minor and on the 11th of September, 1833, after the death of her said husband, and while she was a feme sole, she in consideration of three thousand six hundred and fifty dollars again conveyed the lands allotted to her in said partition to appellees, and her deed is filed as an exhibit.

It may be added that all the material allegations of the petition are controverted in the answer, and the title, under which appellees claim is set forth with an exhibition of their title papers, and an adverse and continuous holding for more than twenty years before the commencement of the suit pleaded as a bar to the relief sought.

At the November term, 1868, appellant filed an amended petition, in which he charges that appellees, by the cutting and destruc-

tion of forests of young, thrifty trees on the land, and other acts of waste injurious to the inheritance or estate in remainder, had forfeited the life estate, which they had acquired from his father, and prayed for partition and the immediate possession of the land. He alleges that the deed of May, 1836, conveyed only a small portion of the land claimed, and said deed should be deemed effectual to pass only that portion covered and embraced by it and the residue of the lands should be adjudged to him. But he denies that said deed is of any legal and binding force, because he says he was under 21 years of age when he executed it, and therefore incapable of making a valid deed. He alleges that he was taken by his father to the state of Missouri when he was of very tender years, to which state his father removed, and had resided there continuously ever since, and he was ignorant of his rights, and the nature, and extent of his estate in Kentucky, when he executed said deed, and remained in ignorance of those facts until a short time before he instituted this suit, and besides that he had executed said deed without any valid consideration, and was induced to do it by threats, and undue influence. He also asked for a rule against appellees to show cause why they should not be punished for contempt of court in violating the injunction awarded in the case.

In their answer to the amended petition, appellees deny that they had in any way disregarded the injunction in the case, and all intention to do so. They also deny that appellant was under twenty-one years of age in May, 1836, when he executed said deed, or that it was executed by him without consideration, and allege that he recites in said deed, that it was made to execute a contract entered into by his father, when appellant was an infant, that he should convey said land to his vendee, and that he also in said deed recites the fact that the lands which had discussed from his grandfather, had been that the lands which had descended from his grandfather, had been chased that part assigned to his aunt, as well as the part assigned to him, and in consideration of the sale and obligation made by his father as aforesaid, and of the consideration paid him, which was a full and fair price for the land at the time, he made the conveyance by said recitals in said deed he was estopped from claiming against it.

On the 19th of May, 1869, appellees filed an amended answer, in which they allege that appellant had many years before the insti-

tution of this suit, conveyed to them all his interest in the lands of David Johnson lying south of the Russellville road, and that they have title to, and claim all the land north of said road in Logan county adverse to all the world, and have so claimed for nearly forty years, and filed with their amended answer various title papers as exhibits.

The substance of the pleadings is contained in the foregoing statement, and on the hearing the court below dismissed appellant's petition, which judgment he now seeks to reverse.

That appellant made a deed to appellees for the land in controversy on the 6th of May, 1836, he does not controvert, but he alleges that he then labored under the disability of infancy and nothing passed by said deed.

Thirty-two years elapsed from the execution of that deed before this suit was instituted, during all which time appellant acquiesced, and never asserted any claim to the land, nor disputed the validity of said deed.

If it be conceded that appellant was a few days under 21 years of age when he executed the deed, still the act was not void; but only a voidable act which he could upon arriving at full age have perfected by act in pais without deed—and a very slight acknowledgment after full age is sufficient to determine the election to ratify, or avoid an act done in infancy. *Phillips v. Green,* 5 Mon. 344. And in *Deason, etc., v. Boyd & O'Hara,* 1 Dana 45, this court said that slight acts and circumstances are sufficient to confirm the voidable acts of an infant after he comes of age. It has even been held that he is bound to give notice of disaffirmance within reasonable time after coming of full age. However this may be, we entertain no doubt that, where he has done such an act of affirmance as selling the bond in this case, when taken in connection with his failure for so long to notify a disaffirmance, amounts to such confirmation as precludes him from avoiding his contract.

The deed from appellant to appellees was made thirty-two years before this suit was instituted; and during that long period he permitted the grantees to occupy and improve the land without complaint or claim to it, from anything that appears in this record. They surrendered the bond of his father binding him to procure the conveyance of appellant when he arrived at full age, and thereby deprived them of the means of compelling his father to comply with his contract, or make reparation for a failure to do so.

It would seem that an acquiescence for so many years, in the act, whereby important rights to appellees have been lost, should be held sufficient to preclude appellant from repudiating his deed. But there is another aspect in which the question is to be considered.

Appellees had long before the execution of the deed to them by appellant, acquired the life estate of B. C. Johnson in the land, and when they obtained the conveyance from appellant, they no longer looked to him or any one else for the consummation of their right, and may with propriety be regarded as holding adverse to him as well as to the rest of the world, and had the same right to controvert the title of appellant as of any other person.

The contract was executed and the possession of appellees was adverse to all the world, and having held that possession uninterruptedly for more than twenty years before the institution of this suit, appellant's right was lost. *Voorhies v. White's Heirs,* 2 A. K. Marshall 27; *Lyne, etc., v. Bank of Kentucky,* 5 J. J. Marshall 571.

The evidence fails to establish the charge that the execution of the deed was procured by undue influence exercised by B. C. Johnson or any one else, or by fraud.

Wherefore the judgment must be *affirmed.*

B. C. Grider, W. P. D. Bush, W. Underwood, for appellant.

Rodes & Petrie, for appellees.

J. R. ALLEN *v.* CHARLES D. JACOB.

Appeal—Review—Findings of Court.

The findings of the court on questions of fact without the intervention of a jury will not be disturbed on appeal, unless there is a decided preponderance of the evidence against them.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 22, 1872.

OPINION BY JUDGE HARDIN:

It is alleged in the fourth paragraph of the answer to the amended petition, and the allegation is sustained by the evidence, that the copartnership of W. E. Bogle & Co. was dissolved about the 30th of

March, 1864; and the further fact is alleged, and the evidence conduces to prove it, that immediately after the dissolution and before the delivery of any more lumber by the appellant under his contract with the firm, he was notified that the partnership was dissolved.

It appears that the appellant was fully paid for all the lumber delivered by him before the dissolution; and among other issues presented by the defense is the question whether the appellant did or not thereafter treat the contract as ended and sell and deliver the lumber, the price of which is in controversy, to Bogle alone, upon his individual account and responsibility. As the judge in trying the issues of fact acted in the place of a jury, his decision of those issues, according to a well settled rule of practice, ought not to be disturbed, as not sustained by the evidence, unless there is a decided preponderance of the evidence against it.

The record certainly discloses facts conducing strongly to support the affirmative side of the question we have mentioned. That the appellant failed to exact payment for the lumber as delivered, as he had a right to do under the original contract; and continued to furnish lumber to Bogle after the expiration of the time for delivering it under that contract; and finally on the 25th of August, 1864, made a settlement with Whitman, the agent of Bogle alone, and took from him in the individual name of Bogle, an acknowledgment of the price of the lumber importing a debt as due from Bogle individually, and not from the late firm of Bogle & Co., might have led a jury to find that Bogle individually owed the balance due the appellant, and not the late partnership; and we do not think that such a vedrict should have been set aside, on a motion for a new trial, as not sustained by the evidence.

However, if the somewhat difficult and perplexing questions of law, raised by the argument, should be determined, were it necessary to decide them, we are constrained by the evidence on the issue of fact we have stated, to conclude that the judgment ought not to be reversed.

Wherefore the judgment is *affirmed.*

Mix, Muir & Byer, for appellant.

T. W. Gibson, for appellee.

D. H. MCINTIRE *v.* JOHN B. CATER.

Contracts—Pleading—Breach of Contract to Deliver Possession.

A petition for breach of a contract to deliver possession of real estate purchased by plaintiff from defendant, which alleges the purchase of the land from defendant, the occupancy of the land by a tenant of defendant, the agreement of defendant to deliver possession, the refusal of defendant to surrender possession to plaintiff until several months after plaintiff was entitled thereto, states a cause of action.

APPEAL FROM LARUE CIRCUIT COURT.

December 22, 1872.

OPINION BY JUDGE LINDSAY:

The allegations of appellant's petition constitutes a cause of action, and in the absence of an answer, if true, entitled him to a recovery. He alleges a purchase of the house and lot from the appellee, the acceptance of the legal title from Kirkpatrick at the instance of the appellee, the occupancy of the property by the tenant of the latter, and the agreement on the part of the appellee to deliver him the possession, also the refusal of the tenant to surrender and the appellee to deliver the possession until several months after he was entitled to it, under the contract. These facs are admitted by the demurrer, and if so there is nothing appearing from the deed or any allegation in the petition that the appellant was required to look to the tenant of Kirkpatrick for the possession of the property.

The judgment of the court below is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

Murray, Thomas B. Robertson, for appellant.

Bush, for appellee.

MARION BRADY, ETC., *v.* P. G. LANHAM.

Contracts—Implied Promise to Pay.

The law will not imply a promise to pay merely from the fact that one person had advanced money for the assumed debt of another, without the request or consent of the party in whose favor the money was advanced.

Money Paid—Proof Required.

Plaintiff in an action for money paid on a debt of another must prove an actual indebtedness on the part of defendant to the person to whom the money was paid, before plaintiff can recover.

APPEAL FROM WASHINGTON CIRCUIT COURT.

December 23, 1872.

OPINION BY JUDGE PETERS:

That appellant paid the amount for which this action was brought to Beckley, and that he paid it to Campbell is conclusively established by the evidence. But there is a failure of proof as to the important fact that appellee, Lanham, was at the time indebted to Campbell. The law will not imply a promise to pay merely from the fact that one man has advanced money for the assumed debt of another without the request or consent of the party for whom the money is advanced. On the principle that one person can not make himself the creditor of another, without his consent, or against his will. And *a fortiori* there can not be a promise to pay implied, where money is paid, unless there is proof that the money was paid on an actual subsisting debt. In order to enable appellant to recover in this action he should have proved an actual indebtedness on the part of appellee to Campbell, for whose debt he professes to have paid the money, which he failed to do.

Wherefore the court below was authorized to give the instruction complained of and the judgment must be *affirmed.*

Broune & Lewis, for appellants.

Hays, for appellee.

JESSE H. RODMAN *v.* JOHN A. MILLER.

Contracts—Liability of Surety.

Where M. surrendered a mule to C. upon the promise of R., in consideration of the surrender, to pay M.'s note to G., upon R.'s failure to pay the note, and payment of same by M., R. is liable to M. for the amount paid by M.

APPEAL FROM LARUE CIRCUIT COURT.

December 23, 1872.

OPINION BY JUDGE PRYOR:

The weight of testimony heard upon the trial conduces to show that Rodman agreed to pay off the note, if the appellee would surrender the mule to Churchill. The mule was delivered up by the appellee, and Smith at the same time held his note for the ninety dollars. If the fraud existed as is claimed by Churchill and Rodman it was their duty and not Miller's to institute proceedings for the purpose of vacating the contract, or recovery for the alleged fraud. So far as the proof shows Miller was an innocent purchaser. The instructions are to some extent conflicting, but this trouble arises from the instructions given at appellant's instance. They were prejudicial to the appellee and did not contain the law of the case. The jury were told that Miller, the appellee, could not recover unless he had been compelled by law to pay the note to Smith or his assignee. In another instruction they were told that it was appellee's duty, if he believed the note he had executed to Smith was without consideration to notify Rodman to defend the suit. The testimony is that Rodman agreed with Miller to pay the note off, and it was his duty to have done so, or to have taken steps to save Miller harmless in the premises. Miller was in no condition to defend the suit upon the note for the want of consideration in its execution. He gave the note to Smith and received as consideration therefor this mule, and afterwards surrendered it to Rodman upon the latter's promise to pay it, or in the language of the witness, "to take it up." This surrender was made without Smith's knowledge or consent. Miller was not compelled to subject himself to the

expense of a litigation in regard to the fraud, if any, practiced by Smith upon Churchill. The appellant knew that the note on appellee had been assigned to Uptigrove, and said to the latter, that he, Rodman, was bound for it. This witness proves that Miller paid him $115 on the note.

The substance of the instructions given for appellee is that if appellee surrendered the mule to Churchill at the instance of Rodman and that Rodman in consideration of the surrender agreed to pay the note to Smith, and that he failed to do so and the same was paid off by the appellee, that Rodman is liable to him for the amount paid. This instruction embraces the law of the case, as it is immaterial whether Miller paid the note with or without credit upon it.

The judgment of the court below is *affirmed.*

Murray, for appellant.

Reed & Twyman, for appellee.

SAMUEL HARBITT'S ADM'R *v.* F. M. CURL.

Bills and Notes—Defense—Illegal Transaction.

The defense that the note sued on was given for a horse sold and purchased with the intent and knowledge of both buyer and seller that the horse was to be used to enable the purchaser to carry on war against the United States is a valid defense.

APPEAL FROM HARRISON CIRCUIT COURT.

December 24, 1872.

OPINION BY JUDGE PETERS:

In the amended answer it is alleged that at the time the note sued on was executed the intestate himself was engaged in acts of hostility against the United States, and sold said horse to the defendant to assist him, and that he might be enabled to engage in acts of war as a soldier of the Confederate States against the United States, and that said defendant did so engage, and did use said horse as cavalry horse in said Confederate army.

The language not only charges the vendor of the horse with a knowledge of the purchase, but that he sold him to the purchaser

to enable him to carry out his illegal purpose, and thus participated in the accomplishment of the illegal acts of engaging in a war against the government, which presented a good defense to the action according to the authorities recognized by this and other courts.

The facts proved conduced to show that the intestate participated with appellee in carrying out the illegal purpose for which the horse was purchased. At all events we can not say that there is such a failure of evidence on that point as to authorize this court to interfere.

Wherefore the judgment is *affirmed.*

Griffitt, for appellant.

West, Cleay, for appellee.

CHARLES FORSTAN *v.* MARTHA E. FORSTAN.

Husband and Wife—Costs of Suit by Wife.

Under R. S., ch. 25, § 32, the husband, in a suit for alimony or divorce, must pay the cost of each party, unless the wife is at fault or has ample estate to pay the cost.

APPEAL FROM NELSON CIRCUIT COURT.

December 24, 1872.

OPINION BY JUDGE HARDIN:

First. So far as this appeal seeks a reversal of the judgment for alimony, the case must be ruled by the decision rendered May 1, 1872, between the same parties, upon an appeal from a previous order of allowance made on substantially the same grounds as that now sought to be reversed.

Second. But the order allowing and adjudging the payment of attorney's fees and costs must be affirmed.

As is expressly decided in *Ballard v. Caperton, etc.,* 2 Metcalf 412, construing Sec. 32 of Chapter 25 of the Revised Statutes, the husband, in a suit for alimony or divorce must pay the costs of each party, unless the wife is both in fault, and has ample estate to pay the costs.

It does not appear that Mrs. Forstan has such estate; but it is proved, on the contrary, that she is without estate.

The attorney's fees fixed by the court seem to be reasonable and we see no valid objection to the order directing their payment.

Wherefore the judgment for alimony is reversed and the cause remanded with directions to overrule the motion on which it was rendered.

And the other judgment appealed from is *affirmed.*

Muir & Wickliffe, for appellant.

———, *for appellee.*

ISAAC RODLEY'S ADM'R *v.* JACK MORRIS AND OTHERS.

Records—Motion for Nunc Pro Tunc Entry.

A motion to enter an order nunc pro tunc should be overruled where the existence of the order depends upon parol proof in connection with unsigned pencil memoranda, where seven years have elapsed since the alleged failure of the clerk to enter the order of record.

Records—Alteration.

A public record should not be altered or its veracity questioned unless the power as well as the right to alter or amend is clearly shown.

APPEAL FROM HARDIN CIRCUIT COURT.

December 24, 1872.

OPINION BY JUDGE PRYOR:

The appellant, by a motion in the Hardin county court, made on the 16th of October, 1871, asks that court to enter nunc pro tunc an order alleged to have been made by that court on the 1st of April, 1865, and admitted to have been entered by the clerk of record. This order was the appointment of Grohagen, Waycraft, and Cunningham, commissioners to act under the will of John Morris for the purpose of dividing his estate. The evidence of the county judge and clerk conduces to show that the three persons named above were appointed the commissioners and in order to fortify their statements a book purporting to be a minute book kept

by the clerk of that court is produced showing the qualification of the executor of Morris and the appointment of commissioners under the will. What act or duty these commissioners were required to discharge does not appear, and even if it did there is no law requiring the clerk to keep a memorandum book, nor is such a book a part of the records of the county court. This book or its contents is wholly written in pencil, with many erasures and interlineations, and evidences the holding of the court in April before it was held in March of the same year—it has neither the signature of the clerk or the judge appended to the proceedings. Records may be amended, if there is anything to amend from, but if records are to be changed, or made, by parol proof, connected with such memoranda as this book exhibits, it would in effect be dispensing with the necessity of record evidence, and substituting the recollection of the judge or clerk, as to the adjudications of the rights of parties. The interests of individuals, as well as the whole public requires that public records should never be altered, or their veracity questioned unless the power as well as the right to alter or amend is clearly shown. This power can not be exercised upon parol proof in a case like this. Seven years have elapsed since this alleged failure on the part of the clerk to enter the order occurred, and we think the county judge acted wisely in overruling appellant's motion to enter it. The judgment is *affirmed*.

Wintersmith, for appellant.

Brown & Murray, for appellees.

MARY S. MERRITT *v.* SAMUEL W. MERRITT.

Divorce—Residence of Wife.

Where a wife leaves her husband, on the ground of cruel treatment by him, and takes up her abode in another state, she becomes a resident of the latter state so as to give the chancery court jurisdiction of a suit for divorce.

Divorce—Condonation.

Where a wife, after acts of cruel treatment on the part of her husband, continued to live with him for several months prior to their separation, it did not constitute a condoning of the offense, especially where his subsequent habits and conduct toward her were bad.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 24, 1872.

OPINION BY JUDGE HARDIN:

This is an appeal from a judgment of the Louisville chancery court refusing to grant to the appellant, Mary Sophia Merritt, a divorce *a vinculo* from her husband, Samuel W. Merritt, and dismissing her petition in which she sought that relief, substantially and mainly on the alleged ground that shortly after marriage with appellee, which occurred in July, 1869, and during their residence and cohabitancy in the city of Louisville, he was, without fault on her part, guilty of such acts of cruelty to her, by striking, beating, and injuring, or attempting to injure her, as indicating an outrageous, ungovernable temper in him, and probable danger to her life, or great bodily injury from her remaining with him. The defendant, being before the court by constructive service only, the cause was heard on the petition, warning order and proof taken by the plaintiff, which in our opinion sufficiently sustained the foregoing averments; and also the further allegations of the petition, to the effect that the plaintiff was at the institution of the suit, and had been continuously for one year before, a resident of this state and of Jefferson county.

It appears, however, that before the separation of the parties, they had removed from Kentucky and become domiciled in the state of Tennessee, but the appellant, upon the separation returned to Louisville, Kentucky, where she has since resided in the family of her father. But, although, according to the cases of *Maguire v. Maguire*, 7 Dana 181, and *Hicks v. Hicks*, 5 Bush 670, the residence of the appellant in a strictly legal sense, continued to be with that of her husband, we are of the opinion that after her return to Kentucky, her actual or usual residence was in the city of Louisville; and the chancery court, therefore, had jurisdiction of the action under Sec. 4 of Article 3 of Chapter 47 of the Revised Statutes.

We are further of the opinion that, although, after the commission of the particular acts we have mentioned as constituting a statutory cause of divorce, the appellant went with her husband to Tennessee and continued to live with him there for several months

preceding the separation, the cohabitancy, thus continued, was not a waiver or condonation of the existing cause of divorce; and especially so as the evidence as to the appellee's subsequent habits and conduct, conduces to the belief that his treatment of his wife in Tennessee was not less culpable than it had been in Kentucky.

We are constrained to conclude therefore that the court below erred in dismissing the petition.

Wherefore the judgment is reversed, and the cause remanded with instructions to render a judgment divorcing the appellant and restoring her maiden name to her in accordance with the prayer of her petition. Judge Lindsay dissenting.

Woolley, for appellant.

J. C. Johnston, for appellee.

J. Y. BEVER *v.* DISHMAN & GALLOWAY.

Evidence—Warranty—Parol Evidence.

Parol testimony is admissible to establish a warranty.

Bills and Notes—Breach of Warranty—Recoupment of Warranty.

In an action on a note for the price of a mill, defendants are entitled to a recoupment of the damages resulting to them for breach of warranty.

APPEAL FROM WARREN COURT OF COMMON PLEAS.

December 24, 1872.

OPINION BY JUDGE PETERS:

To an action upon a promissory note dated the 31st of December, 1860, due six months thereafter, for one hundred dollars, executed to appellant by appellees, they pleaded that the note was executed by them as a part of the consideration of a smut mill or separator which they purchased of him and which he at the time represented and warranted to be a good and durable mill, and the machinery thereto attached right in every particular, and well adapted to the business for which it was designated; but that said mill was wholly unfit for the purposes for which it was intended; that it was defective and worthless, and in less than six weeks after it was pur-

chased they had to remove it and put up their old mill; that they relied on the representations and statements of appellant as to the adoption of the mill to the purpose for which they needed it, made the purchase, but that his representations were untrue.

They allege in an amended answer that as a part of the contract appellee agreed that defendants might take the smut mill and use it till they were satisfied, and if it did not answer the purpose they need not pay for it.

On the trial in the court below a jury found for appellees, and a new trial having been refused appellant, he has appealed to this court.

A witness who was present when the contract was made proved that appellant warranted the mill, and it was a part of the agreement that appellees were to take the mill and machinery and try them; if they did not suit, or prove satisfactory, they might take them out, and pay nothing for them; that the smut mill was put up and tried; that it did not give satisfaction, and in less than six weeks it was removed and the old mill put back. Another witness proved that he worked at the mill for appellees; that they used the smut mill six weeks, or two months, then took it down and replaced their old one; that he assisted in the removal of the new mill and putting up the old one; that the machinery of the new mill would not work right, and that was the cause of the removal.

The testimony tends to establish an express warranty, but if that were not so the sale of the mill and machinery by appellant and purchase by appellee as a smut mill and separator implied a warranty of its adoption to the end, or business contemplated by both parties to the contract, and parol testimony was admissible to establish a warranty. It was not inconsistent with, nor contradictory to the terms of the note sued on. The note recites on its face that it was for a smut mill. Appellees by plea to the action for the price of the mill were entitled to a recoupment of the damage resulting to them for the failure of consideration. *Miller v. Gaither*, 3 Bush 152, and authorities there cited.

The instructions given by the court below were quite as favorable as appellant had a right to ask them, and were all he was en-

titled to. Perceiving, therefore, no error in the judgment prejudicial to appellant, the same must be *affirmed.*

Gorin, for appellant.

Rodes, for appellee.

J. M. HAWKINS *v.* T. L. LEE, ETC.

Bailment—Gratuitous Bailee.

The owner of a steamer, in transporting freight free of charge, a package containing plaintiff's money, was held to act as a gratuitous bailee only and was not liable for its loss, unless the loss resulted from the negligence of the owner of the steamer or his agents or servants.

Appeal—Reversal—Judgment in Criminal Case.

A judgment of a court in a criminal law action stands on the same footing as the verdict of a jury, and will not be disturbed unless palpably against the weight of the evidence.

APPEAL FROM McCRACKEN COURT OF COMMON PLEAS.

December 24, 1872.

OPINION BY JUDGE LINDSAY:

The testimony shows that no charge was made and no compensation expected for the transportation of the package containing plaintiff's money from Paducah to its destination on the Tennessee river.

As to such package, the owners of the steamer were not acting in the capacity of common carriers, but as mere accommodation bailees. They are not liable for its loss unless it resulted from the neglect of themselves, their agents or their servants.

Whether or not it was so lost, was a question which the parties voluntarily submitted to the court for adjudication. The judgment of the court in a common law action stands on the same footing with the verdict of a jury. We are not prepared to decide that the judgment in this case was palpably against the weight of the evidence.

It must therefore be *affirmed.*

Havins & Allen, for appellant.

Q. Q. Quigley, for appellees.

J. B. KENNEDY & WIFE *v.* J. E. COLLINS.

Husband and Wife—Landlord and Tenant—Rights of Wife.

Where a husband, without opposition on the part of the wife, transferred the possession of a house and lot to another as tenant, the wife can not assert her rights in a controversy between the landlord and tenant, relating solely to the tenancy and in no wise affecting the title to the other part of the property.

Forcible Entry and Detainer—Holding Over by Tenant.

The mere holding over by a tenant after the expiration of his term is not a forcible detainer, and a warrant will not lie until there has been a refusal to surrender possession.

APPEAL FROM MERCER CIRCUIT COURT.

December 24, 1872.

OPINION BY JUDGE LINDSAY:

Neither the county judge nor the circuit judge erred in refusing to permit the petition of Mrs. Kennedy to be filed. She could not be made a party to the warrant for the forcible detainer complained of without the consent of Collins.

Upon the trial in the country, and also upon the traverse in the circuit court, the sole question to be determined by the jury was whether Kennedy was or was not guilty of the forcible detainer charged. No matter what may be the right of Mrs. Kennedy under the homestead act, if her husband, without legal opposition upon her part, did actually transfer the possession of the house and lot to Collins by becoming his tenant, she can not assert her rights in a controversy between the landlord and tenant relating solely to the tenancy and in no wise affecting the title of either party to the property. This is not an action to recover the possession of real property. If the forcible detainer complained of is true, Collins in law now has the possession of the house and lot and his complaint is against a party who holds for him and who has violated the terms and conditions of his holding. We express no opinion as to the rights of Kennedy or his wife under the homestead act, but merely that their rights, whatever they may be, must be asserted in an original action, and can not be enquired into in this proceeding.

We are of opinion that the first instruction given upon the motion of appellee is erroneous and misleading.

The mere holding over by a tenant after the expiration of his term against the will of the landlord is not a forcible detainer. Section 500, Civil Code, defines a forcible detainer to be "The refusal of a tenant to surrender to his landlord the land or tenements demised, after the expiration of the term of a tenant at will after the determination of the will of the landlord." Although the tenant may hold against the will of the landlord, the warrant will not lie until there has been a refusal to surrender the devisor's premises.

For this error alone the judgment is reversed and the cause remanded for a new trial, upon principles consistent with this opinion.

T. C. Bell, J. B. & P. B. Thompson, for appellants.

C. A. Hardin, for appellee.

JOEL BLANKENSHIP, ETC., *v.* WM. BARTLESTON & CO.

Liens—Purchaser at Sheriff's Sale.

A purchaser of land at sheriff's sale with notice of a prior unrecorded mortgage carries only an equity in the land subject to the prior equity of the mortgage.

Courts—Stare Decisis.

Questions of law, although decided on doubtful practice, should ordinarily remain the law rather than be subject to constant fluctuations according to the value of the court as differently constituted.

APPEAL FROM RUSSELL CIRCUIT COURT.

December 25, 1872.

OPINION BY JUDGE PETERS:

The question presented by this appeal is whether the claim of the purchasers of a tract of land at a sheriff's sale under an execution shall prevail over that of mortgagees of an unrecorded mortgage of prior date, and of which the purchasers had notice.

The registration act of 1785 does not differ materially from the provisions of Chapter 24, Revised Statutes, in respect to the validity of unrecorded deeds and mortgages touching the rights of creditors and purchasers without notice.

Prior to the adoption of the revised statutes the question as to the superior equity between the holder of a prior unrecorded mortgage and a purchase under an execution sale with notice of the mortgage was the subject of repeated adjudications in this court, and in which there is considerable vacillation. But in the late case of *Righter, etc., v. Forrester, etc.,* 1 Bush 278, involving the question presented in this case for adjudication, a majority of this court, after a review of the reported cases, adhered to the conclusion of the court in *Campbell v. Mosby,* Litt. Select Cases 358, and adjudged that the purchaser at a sheriff's sale with notice of a prior unrecorded mortgage acquired but an equity subject to the prior equity of the mortgage and must be postponed.

This decision has been adhered to in subsequent cases, and the principle thus adjudicated has become a rule of property by which the rights of parties have been regulated, and we perceive no sufficient reason for a departure therefrom.

As was said by an able judge of this court years ago, "It is better that the law should remain permanent so far as judicial action is concerned, although settled originally upon doubtful principles, than that it should be subject to constant fluctuations according to the views and opinions which might be entertained by the court as constituted, at the time the same question might at some subsequent time arise."

Regarding this question as virtually settled by previous opinions of this court, and the judgment of the court below conforming to them, the same must be *affirmed.*

Joe E. Hays, for appellants.

Van Winkle, for appellees.

F. H. KEAN'S ADM'X *v.* WILLIS DEHONEY'S ADM'R.

Contracts—Guaranty—Consideration.

Where, since the assignment of a note, the assignor and his surety, without additional consideration, undertook, by a written agreement, to make good the collection of a note, the obligors can not be held responsible on such undertaking.

APPEAL FROM SCOTT CIRCUIT COURT.

December 25, 1872.

OPINION BY JUDGE PETERS:

Prior to the 7th of July, 1869, F. J. Dehoney had sold and assigned a note for some $1,400 on one Clark to F. H. Kean, appellant's intestate, for a valuable consideration, and on the day above named, said F. J. Dehoney, with Willis Dehoney as his surety, executed an obligation to said Kean, reciting the facts in relation to the assignment of the note, and that Kean had instituted suit on the same in the Scott Circuit Court against Clark to recover the amount, and to enforce an alleged lien on a tract of land in Scott county conveyed by said F. J. Dehoney to Clark—that Clark was defending said suit, claiming that a prior lien existed on said land, or a part thereof, in favor of W. E. Featherston. Therefore the said F. J. Dehoney (and Willis Dehoney as his surety), bound themselves to make good the collection of said demand and to pay to Kean any amount he shall fail to make by the judgment he might recover in said suit against said Clark—that is to say, if F. J. Dehoney did not remove said Featherston's lien on the land so as to enable Kean to collect his money, said F. J. Dehoney and Willis Dehoney bound themselves to make good any deficit in said collection.

It does not appear that the writing executed by the two Dehoneys guaranteeing the payment of the note previously assigned by F. J. Dehoney to the intestate Kean was upon any consideration of advantage to the guarantors, or either of them, or loss or inconvenience or delay in his legal remedy to the obligee Kean.

The note on Clark had been assigned to him by F. J. Dehoney previous to the execution of the writing, and he has his recourse on

his assignor in case he failed to make the debt of the obligor with which he seems to have been satisfied when he contracted for the note; so that as to the principal in the obligation there seems to be no consideration for the subsequent guaranty, and certainly there was none as to Willis Dehoney, who executed it as mere surety, not connected in any way with the original transaction.

As no additional or new consideration has been shown since the assignment of the note for the execution of the writing, the obligors can not be made responsible. Chitty on Contracts, 52. *Smith v. Glass,* manuscript Opinion Winter term 1853-54.

Wherefore the judgment is *affirmed.*

Rodman, for appellant.

Darnby, for appellee.

JOHN MOSS AND WIFE *v.* GEO. H. PENDLETON AND OTHERS.

Railroads—Killing Animals—Liability.

A railroad company was not held liable for the killing of a horse by its train on the 28th of July, 1869, by the careless and negligent running of the train, since at that time there was no statutory liability for such act, and such liability did not exist at common law.

APPEAL FROM KENTON CIRCUIT COURT.

December 26, 1872.

OPINION BY JUDGE LINDSAY:

The averment upon which appellants seek to recover the value of the horse alleged to have been killed, is that the appellees "by their agents and servants, engineers and conductors, carelessly and negligently running a train of cars along, and upon the track of said road, in said county of Kenton, ran against and over and killed unlawfully and wrongfully one black gelding horse about nine years old and of the value of $110.

At common law the appellees were not liable for injuries to stock straying upon their track, inflicted by their trains, unless such injuries were the result of the willful negligence or reckless conduct of those in charge of the train. *Louisville and Frankfort R. Co. v. Ballard,* 2 Metcalfe 183; *O'Bannon v. L. C. & L. R. Co.,* 8 Bush 348.

By an act approved December 7, 1869, railroad companies were made liable for such injuries when they should result from negligence or carelessness. Session Acts 1869-70, page 1.

Appellants allege that their horse was killed on the 28th of July, 1869, four months before the passage of this act. Their petition, therefore, presented no cause of action; for this reason it is not necessary that other questions discussed by counsel should be considered.

Judgment *affirmed.*

C. H. Moor, for appellants.

Benton, for appellees.

BENJAMIN GOODIN *v.* SELLERS & TATE.

Execution—Nullifying Settlement on Ground of Mistake.

Where a note has been executed in settlement of an execution, and the execution has been "satisfied" by order of the judgment plaintiff, the judgment plaintiff can not nullify the settlement and have a new execution issued on the ground of mistake in the amount due, without first vacating the sheriff's return and canceling the note given in settlement.

APPEAL FROM GARRARD CIRCUIT COURT.

December 26, 1872.

OPINION BY JUDGE HARDIN:

The answer of the appellees admits that they accepted the note of $80, dated August 27, 1868, for the supposed balance of the judgment enjoined, and the note expresses that it was given for a "balance on settlement of execution," thereby importing, with the admission of the answer, that an execution had issued on the judgment, which was satisfied by the delivery of the note; and this is fully proved by the sheriff's deposition and return of the execution, brought up by certiorari.

The answer, however, seeks to sustain the action of the appellees in treating their own settlement and the return of the execution "satisfied" by their own order, as nullities, and in suing out a new

execution, on the ground that they made a mistake and did not take appellant's note for enough money. If this was so it did not justify the issuance of the execution, without the judgment of the court vacating the sheriff's return, and cancelling the note given as the result of the settlement. But this had not only not been done, when the execution was sued out and enjoined, but no sufficient grounds for doing so are either alleged or proved in this record.

We are of the opinion that the court should have perpetuated the injunction and dismissed the appellees' cross-petition.

Wherefore the judgment is reversed and the cause remanded for a judgment in conformity to this opinion.

Bradley, for appellant.

McKee, Anderson, for appellees.

NANCY KITCHEN *v.* GEO. W. ANDERSON, ETC.

Replevin—Question for Jury.

The issue as to the value of a horse, saddle and bridle is a question for the jury.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 27, 1872.

OPINION BY JUDGE PETERS:

The issue as to whether Pence was a bona fide housekeeper with a family, and as such entitled to the mare as his only work beast, could not be raised and tried in this action. The judgment in the case of Pence against Tipton, etc., was conclusive on that question.

The only legitimate issue presented by the answer was as to the value of the mare, saddle, blanket and bridle, and that it was the peculiar province of the jury to try, and to that issue they responded.

The defense was a purely legal one, and the court below did right in refusing to transfer it to equity.

No error is perceived in the instruction and the verdict is sustained by the evidence.

Wherefore the judgment is *affirmed.*

W. H. Holt, for appellant.

Turner & French, for appellees.

G. W. HARRINGTON *v.* R. STEVENS ET AL.

Frauds, Statute of—Agreement Affecting Real Estate.

Where two persons as partners engaged in the erection of a house, and one desiring to withdraw from the undertaking after partly finishing the house, having surrendered his rights in the property to his partner on certain conditions, with the understanding that the title to the property should be conveyed to his partner, the contract was within the statute of frauds and can not be enforced.

APPEAL FROM PENDLETON CIRCUIT COURT.

December 27, 1872.

OPINION BY JUDGE HARDIN:

Whether there was a valid and enforceable contract between Harrington and January, is the only important question to be determined in this case.

It appears that Harrington, after taking possession of the lot and commencing to build the house and make other improvements upon it, gave it up to his partner, January, who partly finished the house and made other improvements at his own expense, and that Harrington repeatedly declared in conversation in effect, that being unable to complete the house and keep it, he had let January take it off his hands, who was to pay his three notes for purchase money and aid him with lumber for fitting up another house to live in; but there is no evidence that this arrangement was expressed in writing; and the circuit court, it seems, only regarded the proof as sufficient to show a parol agreement that January should, on paying off the notes to Stevens & Co., have the title conveyed to him, and this was construed by the court as not within the statute of frauds for the reason that it provided for a conveyance by the

original vendors, or holders of the title, to January, and did not import an agreement on the part of Harrington to convey.

The decision can not be sustained. Waiving the objection taken as to the competency of the evidence, it certainly proves only a verbal contract, and whether that was meant or intended as a sale by Harrington to January, and an obligation on the part of Harrington to get and convey the title, or that he would provide or permit the holders of it to make the deed directly to January, it was nevertheless substantially a contract for the sale and conveyance of land, which, not being in writing, could not be enforced as against Harrington, and it, of course, imposed no obligation on the holders of the legal title.

The court should have adjudged relief to the plaintiff, as it did, but should also have rescinded the agreement between Harrington and January upon such equitable terms of adjustment as were usual in such cases.

Wherefore the judgment is reversed and the cause remanded for a judgment in conformity to this opinion.

Stevenson & Myers, for appellant.

Boyd, for appellees.

JOHN S. BROOK, ETC., *v.* S. S. NIX.

Replevin—Pleading—Allegation of Conversion.

An allegation in a petition that defendant took the property of plaintiff and carried it off and never returned it, is in effect an allegation of conversion.

Trial—Replevin—Assessment of Damages.

The court in an action of replevin may assess damages or adjudge the value of the property taken, where a jury has been waived.

APPEAL FROM CALLOWAY CIRCUIT COURT.

December 28, 1872.

OPINION BY JUDGE PETERS:

Appellant's first objection to the judgment is that the court below allowed appellee to recover the value of the property, when he only

sought damages for the taking, without an allegation of a conversion. This position, we apprehend, can not be maintained, for the allegation in the original petition is that he took the property of appellee, carried it off, and never returned it, which is in effect an allegation of conversion, and that is the construction of the language of the petition put on it by appellant Brooks himself in his answer to the second petition of appellee.

The second objection is that as appellee sought the value of the property taken from him there should have been a jury to assess the value; the law does not require that to be done in an action ordinarily; even the 153d section of the Civil Code provides the allegations of value, or amount of damages can not be taken as true without evidence, although the defendant may fail to answer thereto, or to controvert the same; but there must be evidence introduced on the trial, of value or amount of damages sustained.

The court, however, in an action ordinarily may assess the damages or adjudge the value where a jury is waived, proof having been introduced conducing to show value, or the amount of damages sustained, as was done here. These actions were transferred to equity and consolidated on motion of appellant, and it was the province of the chancellor to determine the value of the property from the evidence which appellee sought to recover.

It would have been more regular for the court to have ordered a sale of the horse left by Purdon with appellant if he had shown he still had the horse; but he in his answer admitted the horse to be worth $125, the price with which he was charged in the judgment, and it is not alleged nor proved that Brooks had the horse when the judgment was rendered, and it is not for him to complain that he was charged with the value which he himself fixed, and admitted was a just valuation.

The evidence does not satisfy us that the demands claimed by appellant against Purdon and disallowed were just and that the court below erred in rejecting them; there is no personal judgment against Purdon.

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

James, for appellants.

W. J. Stubblefield, for appellee.

T. L. HATHAWAY *v.* W. C. MORRIS, ETC.

Bills and Notes—Possession—Evidence of Ownership.

The possession of a bill of exchange is prima facie evidence of ownership of the bill, and, having been a part of the petition, no other evidence of ownership is necessary, but in the absence of other evidence of title the payee or his legal representative should be made to appear to the action.

Bills and Notes—Bill of Exchange—Legal Title.

Where a bill of exchange was not indorsed by the deceased's payee, the legal title was not in the holder of the bill, but in the legal representative of the payee, who was a necessary party to an action by the holder.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

December 28, 1872.

OPINION BY JUDGE PETERS:

Appellees brought this action in the court below, and allege in their petition that appellant by his bill dated March 15, 1865, which they filed with their petition, promised to pay to the order of E. M. Bruce thirty pounds (£30) ten days next thereafter; that said bill was addressed to one David Hathaway at Mt. Sterling, Ky., who never accepted the same; and that defendant had no funds in the hands of said David Hathaway, when he drew said bill, and knew at the time he had none; that said money was loaned to said defendant at a gold valuation, and to enable him to purchase clothing, etc., as shown by an endorsement on said bill; that said E. M. Bruce is dead, and plaintiff, Sallie E., was left his widow, and said bill was transferred to her in the distribution of said E. M. Bruce's estate, and belonged to her; that she subsequently intermarried with plaintiff, W. G. Morris, and that plaintiffs are now the holders and owners of said bill; that a pound sterling (£) at the time of the making of said bill was, and is still worth the sum of $4.88 in gold and so plaintiffs say defendant is indebted to them as above stated, and that no part of said debt has ever been paid.

To the petition the defendants demurred on two grounds; First, that the proper parties are not made; Second, that the title to the bill appears on its face to be in J. E. Withers and R. M. Bruce.

Opinion of the Court.

From a bill of exceptions copied with transcript it appears that when the demurrer was filed, there was an endorsement of the bill sued on to H. C. Bruce and J. E. Withers, and before the demurrer was disposed of, the court permitted the plaintiffs to erase the endorsement to Bruce and Withers, to which the defendant excepted. And the court then overruled his demurrer, and he, declining to answer further, the case was by agreement submitted to the court, and on proof heard judgment was rendered for the plaintiffs below, and the defendants have appealed to this court.

Appellees as holders of the bill might maintain an action against the drawer although they were not the payees therein. The possession of it by them was prima facie evidence of ownership, and having produced and made it part of their petition, no other evidence of ownership was necessary; but that of itself only furnished evidence of an equitable title in the holders, and in the absence of other evidence of title it would have been necessary to have made the personal representative of the payee of the bill a party to the action.

But it is expressly alleged in the petition that the bill was transferred to Mrs. Morris as a part of her distributable share of her late husband's estate, who was the payee thereon.

A promissory note may be assigned, or transferred, by a writing separate from the note; while an averment in a petition by the plaintiff, not the payee of the note that it had been transferred to him might imply that it had been assigned to him by the obligee on a separate piece of paper. As to bills of exchange the rule is different and invested him with the legal title; these can be transferred only by endorsement, which *ex vi lermeni* means an assignment on the back of the instrument. *Instone v. Williams, etc.,* 8 Bibb. 83. As the bill sued on is not endorsed by the personal representative of the original payee the legal title was not in appellees but in E. M. Bruce's personal representative, who was a necessary party to the action, and on that account the demurrer to the petition should have been sustained. *Gill v. Johnson's Adm'r,* 1 Met. 649.

The court below did not err in permitting the plaintiffs, as holders of the bill, to strike out the endorsement of the bill to Bruce & Withers, as it does not appear that appellant was prejudiced thereby.

It is expressly averred in the petition that the drawer of the bill had no funds in the hands of the drawer, and no proof of protest and notice thereof was necessary.

But for the error indicated the judgment must be reversed and the cause is remanded for a new trial and for further proceedings consistent herewith.

Tenney & Summers, Turner, for appellant.

Apperson & Reid, for appellees.

H. C. MELONE *v.* J. F. McDOWELL.

Sheriffs and Constables—Action on Sheriff's Bond—Pleading.

In an action on a sheriff's bond for damages for negligence of the sheriff in serving an attachment summons, the plaintiff should state that the principal defendant was at the time insolvent, and that by reason of such failure to serve the summons the insolvent defendant collected the debt sought to be attached, and that the debt was lost to plaintiff because of the negligence of the sheriff in serving the summons.

APPEAL FROM SHELBY CIRCUIT COURT.

December 29, 1872.

OPINION BY JUDGE PETERS:

Although Dobyns may have been insolvent on the 14th of November, 1870, and even after the 18th of November of that year, and no part of the debt then owing by him to appellee had been paid, still, as this action was not brought for more than one year after the failure of appellant to execute the summons and order of attachment on Campbell, Dobyns may have in the meantime become solvent, or for anything that is averred in the petition he may have been paid the debt to him. To make out a cause of action appellee should have averred that said debt was still owing by Dobyns to him and unpaid, and that by the failure of appellee to execute the summons and attachment he had failed to make the $152 of his debt, the amount Campbell owed Dobyns. The statement, that by the failure and refusal of appellant to discharge his duty, he damaged the plaintiff in the sum of $152 is not sufficient—that is a mere conclusion of the pleader. He should have stated if the fact was so, that Dobyns was then insolvent; that his debt was unpaid, and by the failure of appellant to execute the summons and

attachment on Campbell, Dobyns collected $152, the amount Campbell owed him, and by reason of Dobyns's continued insolvency he had lost said sum.

Without an allegation of the non-payment of the money by Dobyns to appellee proof of the fact would not avail him.

The allegation, as made in the petition and heretofore quoted, would at most entitle appellee to nominal damages only.

Nor does the answer cure the defect in the petition; there is no admission therein contained, either direct or inferential, that Dobyns owed the debt to appellee, when he instituted his action.

Wherefore the judgment is reversed and the cause is remanded with directions to award a new trial, and for further proceedings consistent with this opinion. If appellant should apply within proper time for permission to amend his petition he should be allowed to do so.

Harwood, for appellant.

L. A. Weakley, for appellee.

J. C. GRIGSBY'S EX'R *v.* D. P. RATECAN.

Malicious Prosecution—Abuse of Legal Process—Pleading.

In an action for abusing the legal process of the law in order to legally compel a party to do a collateral thing, such as to give up his property, or to take his property under color of legal process, it is not necessary to allege and prove that the proceedings under which the property of plaintiff was seized had been terminated, nor that he was sued without probable cause.

Malicious Prosecution—Abuse of Legal Process.

It is an abuse of the legal process of the law to have goods seized under a distress warrant for rent not reserved in money.

APPEAL FROM BULLITT CIRCUIT COURT.

December 29, 1872.

OPINION BY JUDGE PETERS:

In an action for a malicious prosecution the plaintiff must show, in order to maintain the action, that the prosecution is at an end; but where the action (as in this case) is for abusing the

process of the law, in order illegally to compel a party to do a collateral thing, such as to give up his property, or to take his property under color of legal process, it is not necessary to allege and prove that the proceedings under which the property of the plaintiff was seized, was at an end, nor that they were sued without probable cause. 2 Greenleaf 452.

A slight examination of the petition in this case is quite sufficient to show that this is an action against appellant for suing out a distress warrant against appellee and thereby causing his property to be taken, when according to the facts stated in the warrant he had resorted to a remedy which the law did not authorize for the rent claimed to be unpaid as charged in the warrant was due and payable in "work" when it is expressly declared by the statute that rent reserved in money may be recovered by distress. Sec. 1, Article 2, Chapter 56, 2d Vol. R., page 92; and Sec. 4 of said article and chapter provides how a landlord whose rent is reserved in money after it is due may obtain a distress warrant, but where it is not reserved in money the remedy is by an action in contradistinction to distress. It was therefore an abuse of the process of the law to have the goods of appellant seized under the form of a distress warrant for rent not reserved in money.

Nor is that the only objection to the proceedings. The term of appellee did not expire till March, 1871, by the stipulations of his contract, or rather he had the whole year to repair the fencing, and the warrant was sued out three months before the lease ended.

Upon the subject of the instructions it is sufficient to say that after a careful examination of all of them, and they are numerous, we are satisfied that those which were given by the court presented the law quite as favorably for appellant as he had a right to ask them.

And, perceiving no error in the proceedings, the judgment must be *affirmed.*

Lee Rodman, for appellant.

A. H. Field, for appellee.

C. ASKIN, ETC., *v.* A. P. ORAHOOD, ETC.

Lost Instruments—Proof of Execution.

Where the execution of a lost instrument is denied, its execution must be proved, or proof of its contents is admissible, although the petition alleging the loss of the instrument is verified.

Specific Performance—Pleading.

A petition for specific performance and to recover possession of certain real estate was held not to state a cause of action.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE PETERS:

This suit in equity was brought by appellees against Cortney Askins, Columbus Eskridge, and the unknown heirs of Samuel Hamilton to recover the possession of one hundred and sixty acres of land in Breckenridge county from Askins and Eskridge, alleged to be wrongfully in their possession, and to coerce the legal title from the unknown heirs of Samuel Hamilton.

The court below adjudged the land to the plaintiffs in that court, awarded them a writ of possession and as against the unknown heirs of Samuel Hamilton adjudged that they should convey the title to appellees, Mrs. Jane Orahood and Mrs. Rebecca Fruit, and that appellees recover their costs, and from that judgment Edward DeHaven, etc., have appealed, they having been made defendants to the suit.

How that judgment can be sustained it is difficult to see. Appellees in their petition allege that the co-heirs of Samuel Hamilton on a partition of 800 acres of land, part of a larger tract patented to Houston, conveyed 160 acres out of said 800 acres to him, said Samuel Hamilton, as early as 1814; that in 1815 or 1816 said Hamilton sold said land to John Wood and executed to him a bond for a conveyance; that he died in 1816 intestate having an only child, Agnes Wood, his heir; that many years ago she married and died, leaving said Jane Orahood and Rebecca Fruit her only children and heirs and they are equitably entitled to said land by

virtue of the title bond executed by said Hamilton to their grandfather, John Wood; that said bond was executed for a valuable consideration, all of which had long since been paid; and that said bond has been lost and can not now be found.

Appellants controvert in their answer the fact that Samuel Hamilton had any title to said land, deny that he ever sold any land to said Wood, and deny that Wood ever had such bond, or that any was lost, and deny every material allegation of the petition; they then allege that the land they claim and have in possession is their own, that they claim the same under two grants from the commonwealth to them dated the 9th day of April, 1858, one of Lewis Haff for 63 acres, and the other to John DeHaven, Jr., for 73 acres. The patents are filed as exhibits. When the surveys were made and the patents issued no one was in the actual possession of the land claiming under appellees nor had been for many years, if ever. Huff may have been in possession of the part covered by the patent to him, but the residue was unoccupied.

If it be conceded that the verification of Fruit, one of the plaintiffs below, to a copy of the petition, in which it is stated that the bond on Hamilton was lost, be a sufficient affidavit to let in parol testimony, still where the execution of the writing was denied, as in this case, it was necessary to prove its execution, before proof of its contents was admissible. *Talton Embry v. Robert Miller,* 1 Mar. 300; *Calvert's Heirs v. Nichols' Heirs,* 8 B. Mon. 264.

Cooper, the only witness who speaks of a bond, was not present, and does not profess to know anything about its execution; he proves he saw a bond after Wood's death in the possession of his widow purporting to have been executed by Thomas Hamilton as agent for Samuel Hamilton; but he does not profess to know that Thomas Hamilton was authorized to execute the bond, nor that it was even signed by him, does not know how many acres of land it bound Hamilton to convey, but supposed it was for 150 acres from a deed he had in his possession; but he fails to tell what deed that was, and makes no exhibition of it. He does not know the price agreed to be paid for the land nor whether it had been paid. It appears from the evidence of Cooper that he lived on a part of the 800-acre tract claimed by Hamilton; was a neighbor to Wood at the time, it is claimed, he purchased the land, and was his brother-in-law. It is strange, therefore, that he never saw the bond in Wood's lifetime, and knew nothing about its execution.

No witness proves that the land sued for is the same land included in the bond set up by appellees. Cooper says he supposes it is the same land, but says he does not know the boundaries of either, and notwithstanding this uncertainty there is no survey of the land and the judgment rests alone on the conjectures of Cooper.

The possession was abandoned by the Hamiltons before Wood entered. His widow married a second husband, and in 1834 or 1835 she and her husband removed from the land to Illinois, leaving no one in possession, and no one to take charge of it, or to rent it out as Cooper proves; and from the death of Wood to the commencement of this suit on the 8th of February, 1868, a period of over fifty years, no effort was ever made to procure the legal title from Hamilton, except to send the bond to Illinois by one Kelly; and whether he ever presented it, or what he did with it, no witness speaks to give any information. It is not shown that Kelly is dead, and if living he might have produced the paper or given some satisfactory account of it.

And besides appellees failed to state in their petition that the names of the heirs of Samuel Hamilton were unknown to them, and to make affidavits as required by Sec. 90, Civil Code.

For the errors pointed out the judgment must be reversed and the cause remanded with directions to dismiss the petition.

J. G. Haswell, for appellants.

Kinchloe, Eskridge, for appellees.

J. G. PHILLIPS *v.* W. A. WATHEN.

Assignments for Benefit of Creditors—Presumption.

Where a debtor, just prior to making an assignment for the benefit of creditors, drew from a bank a large sum of money which was not turned over to the assignee, and was never accounted for, it will be presumed that the debtor is still enjoying the money.

Attachment—Money in Hands of Receiver.

Money in the hands of a receiver, belonging to an insolvent debtor, is subject to attachment by his creditors.

APPEAL FROM MARION CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE PRYOR:

This court in the case of *Kennedy v. Aldridge* decided that the policy of securing compensation to the public agents of the state should not be extended further than to protect from attachment or garnishment the fund or fees belonging to the public officer or agent so long as it remained in the custody of the state, or that of the state officials whose duty it is to pay the fees to the party entitled. In that case Kennedy, one of the commissioners of Garrard county for listing taxable property, had by an authorized agent withdrawn his compensation from the public treasury, and whilst in the hands of the agent one of Kennedy's creditors attached the fund. It was held that the claim or liability against the state by the officer be discharged by the payment of the money to the agent; that it was liable in his hands for the payment of Kennedy's debt. In the present case the money sought to be subjected by the appellant was in the hands of Wood, the receiver of the Marion Circuit Court. The state had no longer any control over or any interest in it, and we see no reason why it is not liable to the payment of appellee's debts.

The testimony in the case shows that the debt for which the judgment was rendered and about which there is no controversy had its inception in the year 1861; that the appellee had been insolvent from that time up to the institution of the suit. He made an assignment of his property for the payment of his debts in the year 1862, and this assignment resulted in the partial payment of his many liabilities. Shortly before he made the assignment to Berry, viz., in September, 1861, he drew from the bank at Lebanon nearly thirty-five hundred dollars in money. He also converted to his own use, or appropriated for his own purposes, the proceeds of a large quantity of land, the property of the firm of Miller and Wathen, and must have had at that time several thousand dollars in money.

No part of this money seems to have been paid over to his assignee, Berry, or accounted for to his partner, Miller, and so far as this record shows he has not attempted in any way to explain the manner in which he has disposed of it. It is true that he says he drew the money from the bank at a time when it was supposed it would be robbed by a band of soldiers, but he fails to show what disposition he made of it, after he took it from the bank. From 1861 to the institution of this suit, and prior thereto, he was

regarded as an active business man, and was occasionally, since 1861, seen with large sums of money in his possession.

It is true that appellant's own interest shows that the house and lot in which the appellee lives was purchased by them for the benefit of their mother, but there is no effort in this action to subject it to the payment of appellant's debts, and the purposes of the investigation in regard to this property is to attempt to show the chancellor the amount in which this large amount of money in the possession of Wathen was disposed of by him. If not in the purchase of the house and lot, and the appellant's own witnesses swear that it was not, what has become of it? A satisfactory response to this question must be made by the appellee. He is presumed to know and must know where this amount of money is, to which, if not expended by him, his creditors are jointly entitled. Many years have elapsed since this fraudulent conduct on the part of the appellee took place, but there is no statutory bar placed in the way of appellant's recovery, and if pleaded his conduct since and up to 1869, when this attachment was obtained, evidences the continued existence of fraud on the part of the appellee in his refusal and failure to make any satisfactory explanation as to what disposition he has made of many thousand dollars shown to have been in his possession in the years 1861 and 1862. In the absence of such proof the presumption to be indulged is that he is now enjoying the benefits resulting from the use of this money to which his creditors are entitled.

The judgment discharging the attachment must be reversed and the cause remanded with directions to sustain the attachment and ordering the receiver, Moore, to pay the fund or the amount in his hands to which appellee is entitled to the payment of appellant's debt and for further proceedings consistent herewith.

Russell & Averitt, for appellant.

W. J. Lisle, for appellee.

JAMES MALONE, ETC., *v.* FRED K. MARK.

Descent and Distribution—Recovery of Land Conveyed.

Where a husband, with the consent of his wife, conveys her inheritance with a covenant of warranty, her heirs, who are also heirs of the husband, can not recover the land from the vendee of the husband, such heirs having received a greater estate from their father.

APPEAL FROM BULLITT CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE PRYOR:

It is true as insisted by counsel for appellants that they are claiming the land in controversy, not as heirs of their father, but as heirs of their mother, the title to the land having descended to them from the mother.

The manner in which they derive title, however, does not affect the issue involved in this case.

If the land had been conveyed to the appellants by a stranger and the father had prior thereto or afterwards conveyed it to another with a clause warranting the title, his heirs would have been liable to the extent of assets received by them from him.

The power of attorney executed by the heirs of John Myers empowered their attorney to sell all their right, title and interest they had in the land purchased by the appellee as his vendor. It recites that the grantees executing the power, including James Malone, are the heirs of John Myers. The object was to make an absolute sale of all the land, and the deed by the attorney purports to pass to the purchasers the absolute title. If Malone was now being in a controversy between him and his vendee as to the extent of the interest conveyed him by Malone's attorney under the power before referred to, could there be any doubt entertained by the chancellor upon that question? The plain intention as well as the language of the power was to authorize the agent or attorney to sell the absolute right and title to this land and there is an express warranty in the deed to Stokes, the vendor of the appellee, by which Stokes is to hold the right and title as against James Malone and his heirs.

These children, the appellants, are the heirs of James Malone and according to the proof have received into their possession by devise from their father a large and valuable estate.

The 18th section of the Revised Statutes, page 229, Chapter 80, provides: "That if the deed of the grantor warrants the estate purporting to be conveyed against him and his heirs, and any estate, real or personal, shall descend to the claimant, or come to him by devise or distribution from the grantor, then he shall be barred for the value of the estate that shall so descend or come to him by devise, descent or distribution."

The father, having warranted the title as against himself and his heirs, they being the appallents, and the latter having received an estate by devise from him exceeding greatly in value the land sought to be recovered, are thereby precluded from maintaining this action, the section of the statute referred to making such a defense when ascertained by the proof a complete bar to a recovery. The identical question made in this case has heretofore been decided by this court in the case of *Lane v. Berry*, 2 Duvall, 283.

The judgment of the court below is *affirmed*.

A. H. Field, for appellants.

Thompson, W. J. McConathy, for appellee.

M. S. LANE *v.* CITY OF LOUISVILLE.

Damages—Speculative—Pleading.

Where the averments of a petition do not import any certain and specific complaint that plaintiff sustained any damages which were natural and proximate to the breach of the contract complained of, but was for contingent and prospective profits or speculative damages, recovery can not be had.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE HARDIN:

Although it is alleged in the petition in general terms, in effect at least, that the appellant was subjected to loss and injury by the failure of the appellee to obtain the right of way and make other pre-

liminary arrangements to enable the appellant to proceed to execute his contract, and it may be inferred, and is even probable from the evidence that the disappointment was injurious to him, particularly as the contract might have resulted profitably to him, if he could have executed it, yet the averments of the petition do not import any certain and specific complaint, nor is there proof of any, if made, that the plaintiff sustained any damage which was natural and proximate to the breach of the contract by the appellee.

There is no allegation or proof that laborers were employed, or that stock, implements, or other means were provided, or that any preparatory expense was incurred by plaintiff on the faith of the contract, from which any loss was devolved on him by the non-compliance of the city with its part of the contract.

The claim, as presented, was therefore simply for an alleged loss of contingent and prospective profits, or in other words, speculative damages; for which, it is well settled, by the authorities referred to in the opinion of the lower court, and others which might be cited, an action can not be maintained. We concur in that opinion also, that the plaintiff was not entitled to a recovery of even nominal damages; because by the specifications of the engineer, made part of the contract, the work was not to be commenced until after the right of way should be obtained, which was not done, and as it appears the city was unable to do; and as suggested in the opinion of the court, these facts operated to discharge both parties from the contract.

Wherefore the judgment is *affirmed*.

Elliott, James Harlan, for appellant.

T. L. Burnett, for appellee.

NICHOLAS OCHSNER *v.* COMMONWEALTH.

Intoxicating Liquors—Sale to Minor—Proof.

In a prosecution for unlawful sale of intoxicating liquor, accused can not prove facts tending to show that he had reason to believe the minor to be over 21 years of age.

APPEAL FROM KENTON CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE LINDSAY:

The court did not err in refusing to permit appellant to prove facts conducing to show that he had reason to believe the minor to whom the liquor was sold to be over the age of twenty-one years. 6 Bush 400. Nor was it error to overrule the motion to exclude the testimony of the father as to the age of the minor. If such testimony was not competent, it would be impossible to prove the age of any one.

This court can not reverse for error of the court below in refusing to sustain a demurrer to an indictment charging a person with a misdemeanor. Sec. 349, Crim. Code. It is unnecessary therefore to criticise the indictment in this case.

Judgment *affirmed.*

Ellis, for appellant.

Attorney General, for appellee.

J. R. B. PARSONS *v.* H. C. GARTRELL'S ADM'R.

Executors and Administrators—Presentation of Claim—Waiver.

Where an administrator, when a claim had been presented to him, declared his intention not to pay it, he thereby waived any right to require a literal compliance by the claimant with the statute, and invited litigation thereon, and can not complain that plaintiff did not duly comply with the statute in presenting the claim.

APPEAL FROM BOYD CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE LINDSAY:

The object of the statute in requiring an account against the estate of a deceased person to be verified by the creditor and established by proof, and payment thereof demanded of the personal representative before suit, is to secure to such representative an accredited voucher and to save the expense of litigation.

In this case the appellee declined even to examine the account when presented, and avowed her intention not to pay it under any circumstances. She thereby waived any right to require a literal

compliance with the statute and invited the litigation, which she is now seeking to escape upon the ground that appellant failed to do that which was wholly unnecessary, and which could have resulted in no practical good either to himself or to the appellee. As the statute was enacted for the benefit of personal representatives to enable them to protect the estates committed to their hands, they have the power as between themselves and the creditors of these estates to consent either expressly or by implication that suits against them may be commenced and prosecuted without complying with its terms.

In this case the appellee by her conduct induced the appellant to begin his suit without making proof of his account before demand, and she must be held to have consented thereto.

The order striking appellant's petition from the docket is therefore reversed.

Upon the return of the cause the rule will be discharged and appellee required to answer.

Pritchard, for appellant.

Moore, for appellee.

JAMES PHELPS *v.* JAS. N. NESBITT.

Alteration of Instruments—Material Allegation—Interest Clause.

The changing of a note after execution and delivery, by inserting in the body thereof the words "to bear interest from date," is a material alteration.

Alteration of Instruments—Change to Conform to Agreement.

After a note has been executed and delivered, one party can not without the consent of the other change the note to conform to the contract between them.

APPEAL FROM BATH CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE LINDSAY:

The defense relied upon by appellee is that the note sued on was materially altered after its execution without his consent, and therefore that it was not his act and deed.

The alleged alteration is that the words "to bear interest from date," were inserted in the face of the note.

It can not be doubted that the alteration, if made, was material, as it increased the liability of the persons to the extent of one year's interest upon the amount of the note.

It is not necessary that we should review the testimony. The verdict is not palpably wrong, and ought not to be disturbed unless the jury were misinstructed as to the law of the case. Instructions Nos. 2, 3, 4 and 5, asked for by appellant, were properly refused for the reason that it is assumed in each of them that Daugherty and appellant had the right after Nesbitt had signed the note to so alter it as to make it conform to the contract between them.

This is not the law. Nesbitt is bound only to execute his own contract, and the note as executed by him is the best evidence as to what that contract was. If it was not in accordance with the agreement between appellant and Daugherty, the principal, the former had the option to refuse to advance the money upon it, but had not the right even with the principal's consent, to change it, and thereby bind Nesbitt by a contract to which he had never assented. Nor does this case come within the rule, that sureties are bound to the payee of a note, although it is delivered by the principal without obtaining the signatures of other parties as sureties whose signatures he agreed to procure. The defense in this case is that the note was complete when signed by Nesbitt. Nothing was to be done except to deliver it. Daugherty was the agent of Nesbitt for this and for no other purpose.

For the reasons indicated Instructions Nos. 8 and 9 were properly modified.

Instructions Nos. 10 and 11, given at the instance of appellee, substantially embody the law.

Judgment *affirmed.*

Reid & Stone, for appellant.

Nesbitt, for appellee.

RED RIVER IRON COMPANY *v.* J. T. HENDERSON.

Bills and Notes—Set-off by Acceptor.

The acceptor of a bill of exchange can not set off against it in the hands of an indorsee claims against the payee which were subsisting at the time of acceptance.

APPEAL FROM ESTILL CIRCUIT COURT.

December 30, 1872.

OPINION BY JUDGE LINDSAY:

The two papers sued on are bills of exchange.

It is so well settled that the acceptor of a bill of exchange can not set off against it, in the hands of an endorsee, claims against the payee subsisting at the time of acceptance, that we deem it unnecessary to cite authorities to sustain that position. Any other rule would destroy the value of mercantile paper.

Judgment *affirmed.*

Lilly, for appellants.

Riddell & Fluty, for appellee.

G. M. RILEY, ETC., *v.* LOUISVILLE, LEXINGTON AND CINCINNATI RAILROAD CO.

Covenants—To Pay Rent Runs With Land.

A covenant to pay rent runs with the land and is binding on one who assumes possession of the leased premises.

Appeal—Judgment on Law and Facts.

A judgment of the court on the law and the facts submitted to it is as binding as the verdict of a jury.

Appeal—Reversal—Sufficiency of Evidence.

A judgment of the trial court, which is not palpably against the weight of the evidence, will not be disturbed on appeal.

APPEAL FROM KENTON CIRCUIT COURT.

December 30, 1872.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

There was no privity of contract between the appellants as assignees of the lease made to Wrede and others; hence no recovery can be had in this action upon the contract itself. The appellee, if bound to pay the stipulated rent, is bound because of priority of estate. The covenant to pay the agreed rent is a covenant that runs with the lands, and attached to and becomes binding upon appellee in case it assumed possession of the leased premises. Possession is the foundation of assignee's liability to the lessor. (Taylor on Landlord and Tenant, Sections 444 and 449.) This doctrine has been recognized by the court in the case of *Trabue v. Adams*, 8 Bush 74.

The facts as well as the law of the case were submitted to the court, and its judgment will be disturbed for no less reason than would authorize the setting aside of a verdict of a jury.

The evidence does not show an actual possession of the leased premises, by the railroad company, and it is doubtful whether or not the notice to Miller to surrender to Wrede, as tenant of the company, had the effect of putting it constructively in possession; and it not being shown that Dudley had authority, either express or implied, to give such notice in the name of the appellee, it may well be doubted whether constructive possession would be sufficient to make the company responsible for rent. The circuit judge held that there was no such possession upon the part of appellee shown as would authorize a judgment against it for the rents in arrears, and his finding is not in our opinion palpably against the weight of the testimony. His judgment must therefore be *affirmed*.

Ellis, for appellants.

Carlisle, for appellee.

J. B. ROBINSON & WIFE *v.* W. B. CALDWELL & WIFE.

Process—Amended Petition.

Where an amended petition is filed, claiming two installments of rent, process must be issued on the amended petition, or judgment can not properly be rendered thereon.

Opinion of the Court.

Municipal Corporations—Judgment for Unpaid Taxes—Proceeding.

A city is not entitled to judgment for unpaid taxes upon a mere statement of the amount claimed to be due, but it must come into court by petition the same as other suitors.

Pleading—Amendment—New Cause of Action.

A court will not permit parties, under the guise of amendment, to set up new causes of action and take judgment thereon by default without process, without giving defendants an opportunity to be heard.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 30, 1872.

OPINION BY JUDGE LINDSAY:

There should have been process on the amended petition filed October 16, 1871. The two installments of rent therein alleged to be due and unpaid constituted new and distinct causes of action, and judgment could not properly be rendered for them until an opportunity was offered appellants to make defense.

The city of Louisville was not entitled to judgment for unpaid taxes upon a mere statement of the amount claimed to be due. No matter what her rights may be in regard to the collection of taxes by distraint and sale, when she chooses to come into a court of chancery to invoke its aid she must come like other suitors with her petition, and the parties against whom she asks relief must be brought into court by the service of summons. For these reasons the judgment in favor of Caldwell and wife is reversed. The cause is remanded for further proper proceedings.

Elliott, for appellants.

Arbegust, for appellees.

RESPONSE TO PETITION FOR REHEARING.

January 7, 1873.

OPINION BY JUDGE LINDSAY:

We are satisfied that a very slight examination of the authorities would have removed from the view of the learned counsel the con-

viction that in this case this court had disregarded either Sec. 159 of the Civil Code, the uniform practice of the Louisville Chancery Court, or the rulings of this court from 1808 to the present time, or the ancient rulings of the English chancery courts.

The two cases of *Rutledge v. Vanmeter,* 8 Bush 354, and *McIntosh v. Beard,* 6 B. Monroe 141, are exactly in point, and sustain our decision in this case. The cases cited by counsel in no wise militate against these decisions. In the case of *Adams v. Essex,* 1 Bibb 149, the defendant answered, and the question was whether or not the suit had been commenced prematurely. In the case of *Butler v. Butler,* 4 Little 203, the same question was involved, and in the case of *Outen v. Mitchell,* 1 Bibb 360, all the debts due and to become due were litigated and judgments rendered for them all to be enforced by execution as each installment should by the terms of the contract become payable. Whether or not the syllabus of the opinion in the case of *Ghiselen v. Sterrett* be correct we have no means of ascertaining, but it is certain that neither the Code of Practice nor the rules of equity proceedings authorize parties under the guise of amendments to set up new causes of action and take judgment thereon by default without giving the defendants an opportunity to be heard. The code allows amendments in furtherance of justice, and not to enable plaintiffs to obtain advantage over defendants who are not actually in court, and also contemplate making no defense to the causes of action set up in the original petition.

The petition for a rehearing is overruled.

Elliott, for appellants.

Arbegust, for appellees.

T. T. PARK *v.* GOVEY MACKOBEE.

Slaves—Right of Action—Acceptance of Satisfaction.

Where one party to a sale has a right of action against the other party, which had become perfect, the former is not required to accept in satisfaction of such right satisfaction offered by a third party.

APPEAL FROM CARTER CIRCUIT COURT.

December 30, 1872.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

The evidence of the witness Pelfrey to the effect that he offered to exchange the mare which appellant received from appellee for the desired horse was irrelevant and ought to have been excluded from the consideration of the jury. Appellant's right of action against appellee, if he had one, had become perfect long before this offer was made and he was under no obligation to accept satisfaction from Pelfrey of any demand or right of action plaintiff may have had against appellee. The second instruction given for appellee, based as it is upon Pelfrey's testimony, is erroneous and misleading. For these reasons the judgment is reversed and the cause remanded for a new trial upon principles not inconsistent with this opinion.

———, *for appellant.*

———, *for appellee.*

J. S. LEE'S ADMINISTRATOR *v.* N. T. HOOD, ETC.

Execution—Notice of Purchaser—Negligence.

Where the purchaser of land, before execution sale, had actual notice when he purchased that L. had some claim upon the land, and the proof shows that L.'s deed to the land was of record, and that the land was in the actual possession of one claiming under L., it was gross negligence in the purchaser to buy without investigating the title.

APPEAL FROM BUTLER CIRCUIT COURT.

December 3, 1872.

OPINION BY JUDGE LINDSAY:

It seems to this court that the case of *McGhee v. Ellis & Browning*, 4 Littell 245, is conclusive as to the law of this case.

It is neither alleged nor proved that the sheriff levied on or sold the land purchased by Hood at the instance or suggestion of appellant. The execution creditor pursued his legal remedies, without in any way controlling the acts of the sheriff.

Appellee was a voluntary bidder at the sheriff's sale with notice that Lee had some kind of claim upon a portion of the tract of land,

and the proof shows that his deed was of record and the land in the actual possession of a person claiming under him at the time of the sale.

Under the circumstances it was gross negligence upon the part of appellee to fail to investigate the title offered for sale by the sheriff. The effect of the execution of the sale bond was to satisfy appellant's common-law judgment to the amount of the bid. Appellant holds the bond in lieu of his judgment and not as the purchase price of the land that he neither owned nor sold.

If appellee does not get the land he purchased, his remedy is against the execution debtor, whose debt he has paid, or bound himself to pay. It is not sufficiently charged that the sheriff failed to have the land appraised, but if it was, the debtor is not complaining of such failure. Judgment reversed and cause remanded with instructions to dismiss appellee's petition, and to dissolve their injunction.

H. T. Clark, for appellant.

Scott, for appellees.

JOHN JONES ET AL. *v.* A. M. HUDSON, ETC.

Receivers—Diligence in Collecting Debt.

Where a receiver is appointed and directed to collect a certain debt, it is his duty to use ordinary diligence to collect it.

Receivers—Negligence—Liability.

Where a receiver, who is directed to collect the amount due on certain bonds, by his negligence released the surety thereon, he is responsible therefor.

Receivers—Justification of Act—Burden of Proof.

In a suit against a receiver by heirs for loss of a debt because of the negligence of the receiver to have an execution issued, the burden is on the receiver to show facts excusing or justifying his action.

Receivers—Liability for Loss of Debt.

The evidence was held to show that the receiver was liable for the loss of a debt because of his negligent failure to have an execution issued.

Court Commissioners—Findings of Facts.

Where a receiver was appointed and directed to collect certain debts due the decedent's estate, and he is sued because of his negligent loss of the debts for failure to have execution issued, the court commissioner in making his findings of the facts should show the acts of the administrator by giving the amount of each bill, and an inventory of the notes and accounts that came to his hands, showing which were solvent and which insolvent, the amount realized by the receiver, the amount of the debts paid by him, and the balance due the heirs.

Descent and Distribution—Liability for Overplus Received.

In a suit by heirs against a receiver, in which the receiver makes the heirs parties to the cross-petition, the heirs are not liable to the receiver for an overplus received by them, unless they received it from the receiver.

Husband and Wife—Liability of Wife for Money Borrowed by Husband.

A wife is not liable for money borrowed by her husband, unless a case is made such as will authorize a court of equity to subject her estate to the payment of the husband's debts.

Pleading—Sufficiency of Petition When Standing Alone.

A petition against a defendant should state facts authorizing a recovery if sustained by the proof, regardless of the statements in another petition against another defendant.

APPEAL FROM McLEAN CIRCUIT COURT.

December 3, 1872.

OPINION BY JUDGE PRYOR:

After the appointment of Rowan as receiver and the entry of the order directing him to collect the money arising from the sale of the negro, etc., belonging to Jones, it was his duty to use ordinary diligence at least in its collection. He insists that the heirs of Jones should be made to refund the money paid by Hudson upon the purchase by the latter of G. G. Jones' land, under the execution against Marshall and others, and for this purpose makes his answer a cross petition against the heirs, who are the appellants in this court.

The sale bonds taken upon the sale of the boy Elijah were undoubtedly good at the time of their execution, and if Rowan by his laches has released the sureties thereon, he ought to be made responsible to the heirs. Having made the heirs parties to his cross-

petition the burden of proof was on him to show why it was he failed to issue an execution to the county of Whittaker's residence. If Whittaker was dead at the time the bonds matured he must show it, or give some valid reason that would relieve him from responsibility by reason of this loss to the appellants. It seems that G. G. Jones, whose land had been sold, was an infant at the time he became liable as Marshall's security, and although the proof conduces to show that Rowan was ignorant of that fact, still it affords no excuse for his failure to make the money out of the other sureties, when he had neglected to issue an execution on the last sale bond until nearly a year after its maturity, and unless Whittaker was dead there is no reason why, during this period, he could not have made the recovery out of him. The proof on this subject is unsatisfactory and certainly not such as to release Rowan from his liability to the appellants.

Rowan also fails to answer the cross-petition of the appellants in which they allege specifically the collection by him of various claims as administrator of James Jones, for which he has failed to account, amounting to nearly eight thousand dollars. The order of court made on the 11th of January, 1870, confirming the commissioners' report and by which the heirs of Jones are made to say that they have been satisfied by the administrator, was certainly a mistake, or intended to apply only to the settlement as practically made, as the very same order notes the filing of the cross-petition of the appellant in which they charge the failure of Rowan as administrator to account for various items made up of notes and accounts due his intestate and specially designated, and to which no response whatever is made.

Nor is there anything in the record showing that the heirs of Jones ever received the money collected from Hudson, except —— partial amounts for which receipts were executed. The commissioners' report is indefinite and unsatisfactory in every particular. The commissioner should state the acts of the administrator by first giving the amount of each bill, then an inventory of the notes and accounts that went into his hands, reporting each as were solvent and insolvent, the amount realized by the receiver from the sale of the negro and all other sources, the amount of debts paid by him, and the balance due the heirs, if anything, and for this balance the administrator must produce receipts, or show by proof

that he has accounted for them to the heirs of Jones. He certainly collected more money from Hudson than was due on the sale bonds. In April, 1865, there was only one on the sale bonds, including all costs, about $375. Yet the administrator collected from the proceeds of the sale of Jones' land $496.12. If there is a mistake as to the amount, and there certainly is, as the record now shows, and Rowan obtained more money than the sale bonds called for, the heirs are not compelled to refund this overpayment unless it appears that they received it from Rowan. It was also erroneous to render a personal judgment against the married woman. If their husbands secured the money they are not liable at law, nor in equity unless such a case is provided as would authorize a court of equity to subject the estate of a married woman to the payment of her husband's debts. The demurrer by appellants to the amended petition of Hudson should have been sustained. There are no allegations contained in it, upon which to have any recovery against the heirs. All that it contains is that the appellant received the money paid by Hudson.

It ought to contain such allegations as would authorize a recovery if sustained by the proof, regardless of the statements in the petition against Rowan. The answer and cross-petition of Rowan is liable to the same objection; and although the demurrer to the pleading was not disposed of or acted on, still as the case must go back, the pleadings should be amended so as to prevent a cause of action, and the parties allowed to take additional proof as to the alleged liability of Rowan and the appellees to Hudson.

The judgment is therefore reversed and the cause remanded with directions to permit the parties to amend their pleadings and to refer the case again to the commissioner for a settlement of the accounts of Rowan as administrator of Jones, etc., and also with the appellants and for further proceedings consistent with this opinion. No brief filed in this case by counsel for appellees.

L. P. Little, Bickers, Jones, for appellants.

———, *for appellees.*

J. W. HALE, ETC., *v.* J. C. VANARSDALE, ETC.

Taxation—Lien—Execution of Sheriff's Bond.

A lien created by the execution of a sheriff of the bond prescribed by R. S., ch. 83, art. 9, § 3, applies only to the revenue and public dues for which the sheriff is bound directly to the commonwealth.

Taxation—Lien—Revenue Bond.

The revenues collected by a sheriff are protected by a bond executed pursuant to R. Stat., ch. 26, art. 2, § 3, and the county does not have a lien on the estate of the sheriff for their security.

Taxation—Right of County Court to Revenues Collected.

The rights of a county court as to revenues collected are like those of the county creditors, and are no greater or more comprehensive.

Taxation—Lien of County Levy.

The lien of the state for taxes assessed does not extend to counties in favor of the county levy.

Taxation—Sureties of County Auditor—Lien.

The quietus of the county auditor, which relates only to the revenues and public dues of the state, extinguishes the lien, and leaves the sheriff's real estate as free from incumbrance as though no bond had been given.

APPEAL FROM MERCER CIRCUIT COURT.

December 3, 1872.

OPINION BY JUDGE LINDSAY:

The lien created by the execution by the sheriff of the bond prescribed by Sec. 3, Article 9, Chapter 83 of the Revised Statutes, applies only to the revenue and public dues, for which the sheriff is bound directly to the commonwealth. The entire chapter is devoted to the revenues and public dues to be annually collected for the payment of the expenses and debts of the state.

The county levy or revenues is secured by the bond executed pursuant to Sec. 3, Article 2, Chapter 26, of Revised Statutes. The statute does not give to the county a lien upon the real estate of the sheriff. The right of the county to sue on the bond is provided for

by Sec. 6 of said article and chapter. Like remedies are given to the various county courts to compel the sheriffs to settle their accounts and pay over money in their hands belonging to the counties as are given to county creditors. To these creditors the sheriff and his sureties, their heirs, devisees and personal representatives, are jointly and severally liable. Against them such creditors may have judgments in *personam*, but the statute gives them no lien upon any part of the estate of the sheriff.

The rights of the county courts are like those of the county creditors and not greater or more comprehensive.

The language of the statute providing for the lien in favor of the commonwealth does not authorize the conclusion that it was intended that counties should also have a similar lien.

The quietus of the auditor which relates only to the revenues and public dues of the state, extinguishes the lien, and leaves the sheriff's realty as free from encumbrance as though no bond had ever been given. The demurrer to appellants' petition was properly sustained.

Judgment *affirmed.*

Bush, Kyle & Poston, for appellants.

J. B. & P. B. Thompson, James, for appellees.

JOHN HAYLEY *v.* JOHN KIERNAN, ASSIGNEE.

Pleading—Evasive Answer—Work Done and Materials Furnished.

In an action for work done and material furnished, an answer admitting that work was done, but alleging that defendant is unable to say what work or how much, is evasive, and insufficient.

Pleading—Second Amended Inconsistent Answer.

In an action for work done and material furnished, where defendant admits performance of part of the work in his original and amended answer, he will not be permitted to file a second amended answer denying such facts.

Appeal—Reversal—Inconsistent Pleadings.

Where the right to sue as assignee is admitted in one answer and denied in an amendment, without assigning some reason for making the admission in the first place, the Court of Appeals will not reverse for this alone where there is no valid defense relied on or pleaded.

Opinion of the Court.

APPEAL FROM FRANKLIN CIRCUIT COURT.

December 6, 1872.

OPINION BY JUDGE PRYOR:

The appellant must know the character and kind and quantity of labor and material done and performed and furnished by Buckly for him. Each item in the appellee's account is specifically set forth, the work alleged to have been done for the appellant, as well as the articles furnished him. He is not allowed to say that he has no knowledge or information sufficient to form a belief as to whether the work was done or the material furnished. There must be a specific denial. He admits that some work was done but is unable to say what work or how much. This is evasive and bad pleading; and if the allegations of the petition, such as is made in this case, is not specifically denied the plaintiff is entitled to his judgment. He admits the right of the party to sue in the original answer and denies it in the amended answer. He admits the performance of a part of the work in the original answer and amendment, and denies it all, in the last amendment offered; and for this reason the court properly refuses the filing of this amendment.

Paragraphs in an answer may, it is true, be inconsistent, and this is no cause of demurrer, but where the right to sue as assignee is admitted in the one answer and denied in an amendment, without assigning some reason for making the admission in the first place, this court ought and will not reverse for this alone when there is no valid defense relied on or pleaded.

Judgment *affirmed.*

Craddock, Ford, for appellant.

Rodman, for appellee.

JESSE HENRY *v.* COMMONWEALTH OF KENTUCKY.

Weapons—Evidence—Wearing Weapon Belt.

The object of the Legislature in enacting the Act of March 22, 1871, § 5, was to permit the fact of a belt being around the body to go to the jury as evidence on the question whether a deadly weapon was carried concealed.

Opinion of the Court.

Weapons—Evidence of Carrying.

The fact that accused wore a belt around him, such as weapons are usually carried in, will not alone authorize a finding that accused carried a deadly weapon.

Weapons—Statute Construed.

Act March 22, 1871, relating to the carrying of concealed weapons, construed.

Statutes—Concealed Weapons.

Act March 22, 1871, relating to the carrying of concealed weapons, construed.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

December 6, 1872.

OPINION BY JUDGE PRYOR:

It is difficult to arive at the meaning of the fifth section of the act approved March 22, 1871, in regard to the carrying of concealed deadly weapons. It was certainly not intended to authorize a verdict upon proof that the party accused had a belt under his coat, or fastened around his person, nor to subject a man to punishment with a belt fastened around him and the pistol itself exposed and not concealed.

The object of the legislature doubtless was to permit the fact of the belt being around the body to go to the jury as evidence upon the question as to whether the deadly weapon was carried concealed.

It must appear that the party accused carried a deadly weapon concealed in order to find him guilty, and to determine the question of guilt or innocence the fact of his having a belt around him, such as pistols or deadly weapons are usually carried in, may go to the jury to be considered by them upon the issue presented; but this fact alone will not authorize a jury to say that the party carried a concealed deadly weapon; and although the act in question does indicate that it is the duty of the judge to tell the jury if the facts proven are true, they must find the pistol concealed, although it may not have been concealed; still we are inclined to the conclusion that the legislature intended merely to express the opinion that as jurors they will find a party guilty upon the state of facts recited in the third section.

The court erred in giving the second instruction and in refusing the instructions asked for by the counsel for the accused. We

think, however, the word "actual" should be erased from defendant's instruction and was doubtless inserted by reason of Instruction No. 2 given by the court.

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

Feland & Evans, for appellant.

Rodman, for appellee.

WILLIS HOCHENSMITH *v.* C. WARREN.

Principal and Surety—Amount of Indebtedness—Presumption.

Where a principal and his surety undertakes to pay another an amount found due from a third party upon settlement with the latter, the principal is presumed to know the amount of the indebtedness, as found by arbitrators, and it is the duty of the principal to derive his information in regard to the matter from the debtor.

APPEAL FROM FRANKLIN CIRCUIT COURT.

December 6, 1872.

OPINION BY JUDGE PRYOR:

The obligation by the appellee, Warren, was a direct undertaking by him to pay the appellant whatever sum of money might be due the latter upon settlement with Sebree.

The inducement or consideration, even if required, for the execution of the writing by the appellee, is fully set forth, and his undertaking to pay, places him in default upon his failure to pay the sum found due on the settlement.

If the principal can be made liable without notice the surety can also, and the principal certainly is presumed to know the amount of the indebtedness and the result of the arbitration. It was the duty of Warren to have derived his information from Sebree and not from the appellant.

The judgment is reversed and cause remanded with directions to overrule the demurrer and for further proceedings consistent with this opinion. *Lowe v. Beckwith,* 14 B. Monroe 150.

Lindsey, for appellant.

———, *for appellee.*

B. F. SHEPPERD, ETC., *v.* WM. BOWLING.

Interest—Money Payable on Demand.

Where money is payable on demand, interest runs only from the date of the demand.

APPEAL FROM CARTER CIRCUIT COURT.

December 7, 1872.

OPINION BY JUDGE PRYOR:

The evidence in the case shows that the claim of three hundred dollars was allowed the appellee by the county court; this claim was included in the list of the county creditors and delivered to the sheriff. It was then the duty of the sheriff to collect the money and pay it over on demand. It also appears that the sheriff had collected or could have collected by the use of ordinary diligence enough of the county levy to satisfy the claims of the creditors. The defense set up in regard to the military claims and the advice of the appellee, with regard to them, can not be made available under the pleadings and proof so as to preclude the appellee from his right to recover. There is no sufficient denial of the demand by the answer, but if there was, the proof shows that the parties live in the same town; and that in 1866 a written demand was made of the appellant, Shepperd, for the money. This we deem sufficient. This money, however, was payable on demand only, and no interest began to run on the claim until a demand was made. It was, therefore, erroneous to instruct the jury to give interest from October, 1863. It was proper to give the 10 per cent. upon the principal and interest, but this interest (6 per cent.) should have been calculated from the date of the demand and then ten per cent. on the aggregate amount. Sec. 5 of the Act of 1864, Myers Supplement, has reference only to the claims due the county and not to the claims of creditors. The payments made by the sheriff were properly applied to the previous allowance made the appellee. The instruction given at the instance of appellees can not embrace the law of the case, except as to the question of interest. The court properly refused the instruction asked for by the defendant, and at

Courts—Affirmance of Appeal—Effect.

Where the Court of Appeals affirmed a judgment of the circuit court awarding damages, the lower court has no power to investigate the question whether the judgment is erroneous.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 11, 1872.

OPINION BY JUDGE PRYOR:

The court properly refused to hear the motion to set aside the judgment upon the ground that no supersedeas was issued.

A judgment had been rendered by this court affirming the judgment of the Daviess court and awarding damages upon the amount of the judgment superseded.

This was in substance and effect a mandate from this court directing the court below to award damages for the amount of the judgment. A supersedeas might have been issued from this court, and even if the judge below had been satisfied that no supersedeas had been issued by the clerk of the Daviess court he still had no right to infer from that fact that no such writ had issued in this court.

Nor does it appear any where in the record that no writ had issued from this court, and if it had, a judgment had been rendered awarding damages, and the court below had no power to investigate the question as to whether that judgment was or was not erroneous.

The mandate was imperative and the only remedy the appellant had was by motion in this court to correct the judgment.

The judgment of the court below is therefore *affirmed.*

Weir, for appellants.

Sweeney, Stuart, for appellees.

H. G. McDOWELL *v.* J. RUSSELL BUTLER, ETC.

Execution—Interest of Heirs.

Under the provisions of Act August 25, 1862, Myer's Supp. 420, land in which heirs have a contingent interest may be sold on judgment.

Descent and Distribution—Sale of Real Estate—Party.

Under § 2, Act August 23, 1862, Myer's Supp. 420, the fact that the person having the present interest in the land sought to be sold was not a party plaintiff, but defendant, does not invalidate the proceeding.

Conversion—Sale for Re-investment.

Where land of an estate is sold for re-investment, it is not absolutely essential to the validity of the sale that the court in its decree prescribe the estate in which the proceeds should be reinvested.

Conversion—Re-investment of Proceeds.

In the investment of proceeds of a sale, the wishes of the owner of the present interest in the land should be consulted, but the court will not act to the prejudice of the interests of the remainderman.

Conversion—Proceeds of Sale—Re-investment.

Where land is sold for re-investment, the chancellor will hold the proceeds until a suitable investment can be found, and if necessary will appoint a commissioner to find one.

APPEAL FROM FRANKLIN CIRCUIT COURT.

December 12, 1872.

OPINION BY JUDGE LINDSAY:

As there may be a contingent interest in the lands sold under the judgment in the proceeding, in the heirs of the testator, Short, whose right to take depends upon Mrs. Butler dying without children or the descendants of children living at the time of her death—an event which may or may not happen—the sale of the lands is authorized by the provisions of the act of August 23, 1862. Myer's Supplement 420.

The 7th section of that act provides that proceedings for sales of land under it shall be instituted by a person having present interest in the estate sought to be sold, and it is objected that Mrs.

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The 7th section of that act provides that proceedings for sales of land under it shall be instituted by a person having present interest in the estate sought to be sold, and it is objected that Mrs.

Butler, the only person having present interest in the land sold in this case, was made a party defendant, and that the action was not instituted by her, as it should have been. Whilst it is true Mrs. Butler did not institute the suit, yet she asks for the sale in her answer, and before that pleading was filed she was merely examined by a commissioner appointed for that purpose by the court. Even, however, if this is not a substantial compliance with the first section of the act, it will be observed that the second section authorizes the suit to be instituted by any or all of the persons having a present or vested interest in the estate.

The children of Mrs. Butler are all made parties plaintiff, and whilst the present right to the enjoyment of the estate is in their mother, under their grandfather's will, they hold vested estates in remainder.

From the report of the three commissioners appointed by the court, it sufficiently appears that the interests of all the claimants to the land, present and future, will be subserved by the sale adjudged.

The statute does not prescribe the character of testimony necessary to authorize the court to act, and in an ex parte proceeding like this, the report of the chancellor's sworn commissioners, who for the purposes of their appointment are quasi officers of his court, is the most satisfactory and convincing evidence he can obtain.

It is not absolutely essential to the validity of the sale that the court shall in its decree prescribe the estate in which the proceeds are to be re-invested. The proceeds must be secured for that purpose, which has been done in this case.

The portion which as yet remains uninvested, the chancellor will hold until a suitable investment can be found, and if necessary, he will appoint his commissioner to find one. Of course, the wishes of the party holding the present interest will be consulted in this matter, provided she acts in a reasonable time, and provided further that her wishes and interests can be perfected without prejudicing the interests of the remaindermen.

Perceiving no error in the proceeding for the sale of the realty in question, the order of the court below making absolute the rule requiring the purchaser to pay the bond for purchase money then due is *affirmed*.

Hensley, for appellant.

James, for appellees.

CLINTON GRIFFITH *v.* REASON MCDANIEL.

Pleading—Extortion—Sufficiency of Petition.

A petition to recover back money obtained by extortion under color of legal proceedings, held insufficient and subject to demurrer.

APPEAL FROM DAVIESS CIRCUIT COURT.

December 12, 1872.

OPINION BY JUDGE HARDIN:

Admitting the principle that an action will lie to recover back "money obtained by extortion under color of legal proceedings in contradiction to the general rule that an action can not be maintained to recover money paid under a judgment," we are of the opinion that the petition in this case is fatally defective and the court erred in overruling the demurrer to it. Although it is alleged that Weir's execution came to Harrison's hands, and that the money was paid to Harrison, there is no disagreement of the time of the payment, nor that Harrison received the money as sheriff upon the execution when it was alive and in force. It is true a paper purporting to be the receipt of Harrison as sheriff is exhibited; but the petition admits that it bears date before the execution, and yet fails to state when the payment was made.

Notwithstanding all the allegations of the petition may be true, the payment may have been made to Harrison without any authority, and thus not have operated to satisfy the debt of Weir.

As the petition may be amended, and the case again tried, we will express no opinion as to the evidence.

Wherefore the judgment is reversed and the cause remanded with directions to sustain the demurrer to the petition for the reasons indicated, and for further proceedings not inconsistent with this opinion.

Swoope, for appellant.

Crutcher & Ellis, for appellee.

E. B. MARTIN AND A. B. QUISENBERRY *v.* ROBT. P. HOLLOWELL.

Bills and Notes—Set-off by Maker.

The maker of a note can not claim a set-off against the note for the price of goods, which was executed and delivered more than a year after the goods were delivered; and after the note was executed, the maker sought to procure the assignee of the note to become his surety on a note so that it might pass in payment for a stock of goods.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 13, 1872.

OPINION BY JUDGE PETERS:

The tobacco, the price for which appellant pleads as an off-set against the demand sued on, was delivered more than a year before the note was executed, and appellant does not even attempt to account for his failure to assert his right to the price of the tobacco at that time.

Besides Boyd proves that Martin came to him with young Cannon, whose father then held the note by assignment, and requested the witness to become his (Martin's) surety on the note in order that Cannon, the holder, might pass it to appellee in payment pro tanto for a stock of goods sold by him to Cannon. These transactions, and this conduct on the part of Martin are inconsistent with any pretext for a claim to an off-set against the note.

Looking to the evidence, the instruction given by the court below was as favorable to appellant as he was legally entitled to have it.

Wherefore the judgment of the court below is *affirmed.*

J. R. Hewlett, John Rodman, for appellants.

R. W. Wake, for appellee.

JOHN C. HEINZE *v.* COMMONWEALTH.

Intoxicating Liquors—Indictment—Tipplinghouse.

An indictment for keeping a tipplinghouse is not defective for failure to state the month in which the offense was committed, when it must have been committed, if at all, within the prescribed time.

Intoxicating Liquors—License—Bond.

Under § 1, Act February 17, 1866, Myer's Supp. 762, requiring a coffee-house keeper to execute a bond before he can sell intoxicating liquor to any one, a license to sell liquor confers no authority to sell liquor without execution of such bond.

APPEAL FROM FULTON CIRCUIT COURT.

December 14, 1872.

OPINION BY JUDGE PETERS:

In the case of *Commonwealth v. Harvey,* 16 B. Monroe, 1, this court held that a presentment which merely charges the defendant with having kept a tippling house is good under the revised statutes; nor is the presentment in this case defective in failing to state the months in which the offense was committed. It was found by the grand jury on the 8th of March, 1872; and the offense as charged must have been committed if at all between the 1st of January, 1872, and the day the presentment was found. Consequently, it must necessarily have been within the time prescribed.

By Sec. 1 of an act approved 17th February, 1866, Myers Supp., page 762, it is provided that before any coffee house keeper shall presume hereafter to sell any spirituous or vinous liquors to any person whatever, he shall execute a bond with one or more good sureties in the penalty of $500, conditioned, etc.

Without executing the bond as required, a license confers no authority to sell liquor on a keeper of a coffee house; the law requires him to execute the prescribed bond at the time and at each time he obtains license to keep a coffee house and it was admitted on the trial that from the 12th day of July, 1871, to the 13th of May, 1872, he had no bond except one he executed on the 6th of Feb-

ruary, 1871, and having sold liquor by the retail within the periods named, without having executed the requisite bond, he subjected himself to the penalty of keeping a tippling house.

T. O. Goalder, for appellant.

Rodman, for appellee.

GEO. HOERTZ, ETC., *v.* THOS. H. CRAWFORD'S ADM'R.

Judicial Sales—Satisfaction of Judgment—Funds Available.

Where it appears that if a judgment creditor is compelled to exhaust the proceeds of G. property in the satisfaction of his debt before receiving any part of the proceeds of T. property, he will lose his entire debt, and if compelled to apportion his claim on the two funds in proportion to their respective amounts he will lose the greater portion of his debt, the equitable rule requiring a creditor whose debt is secured by funds, to resort principally to that fund upon which other creditors have no claim, should not be enforced.

Judicial Sales—Satisfaction of Judgment—Property Available.

A chancellor may allow a judgment creditor to satisfy his debt out of certain property, rather than compel him to resort to other property by which the whole or part of the debt will be lost.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 14, 1872.

OPINION SLIGHTLY MODIFIED BY JUDGE LINDSAY:

In the order of June 4, 1869, modifying the judgment entered on the 29th of May, 1869, the apportionment of the proceeds of the property decreed to be sold was held subject to the future orders of the court. We think there is no doubt but that the chancellor had full power to render the judgment of May 6, 1870, which settled finally the rights of the various parties claiming to be interested in the amount for which the property sold.

Crawford's original claim was secured by a mortgage on both the Green Street and Third Street property. Appellant's claims were against the Third Street property alone and were subordinate

to Crawford's lien. In addition to his mortgage lien Crawford held an execution lien for nearly six thousand dollars on the Green Street lot. The two lots did not sell for enough to pay all the debts; and it is evident that if Crawford is compelled to exhaust the proceeds of the Green Street property in the satisfaction of his mortgage debt before receiving any part of the moneys arising from the sale of the lot on Third Street he will lose his entire execution debt. If compelled to apportion his claim on the two funds in proportion to their respective amounts, he will lose the greater portion of this debt.

Under such circumstances it does not seem to this court that the equitable rule requiring a creditor whose debt is secured by the funds to resort principally to that fund upon which other creditors have no claim. His execution lien on the Green Street lot is of equal dignity with the liens of appellants on the Third Street property. It is neither unconscientious nor unreasonable for him to insist that he shall be allowed to retain his legal advantage. To enforce the rule insisted on would prejudice Crawford's rights, and improperly deprive him of remedies secured by his superior vigilance.

Whilst he ought not to be allowed to use his own property so as to injure others, neither can he be compelled for the benefit of others to use it so as to injure himself.

We are of opinion that the chancellor properly allowed Crawford's mortgage to be satisfied out of the proceeds of the Third Street property.

The fact that the work done by the mechanics embraced the value of the Third Street property can not deprive Crawford of the legal advantage secured to him by his mortgage. They knew or might have known when the work was being done of the existence of his prior and superior lien.

Judgment *affirmed.*

Harrison, for appellants.

Thompson, for appellee.

EDWARD MCKINNEY *v.* COMMONWEALTH.

Appeal—Jurisdiction.

The Court of Appeals has no jurisdiction of an appeal taken directly from the county court, in view of §§ 10, 16, 2 R. S. 407, providing for appeals to the circuit court.

APPEAL FROM BRACKEN CIRCUIT COURT.

December 14, 1872.

OPINION BY JUDGE PETERS:

This is a proceeding against appellant instituted in the Bracken County Court under Sec. 8, Article 1, Chapter 99, 2 R. S. 407, for a breach of his obligation as a keeper of a tavern in said county, and the court having rendered judgment disabling him from thereafter keeping a tavern, he has appealed directly from the county court to this court.

The first question for consideration is, has this court jurisdiction of the case?

By Sec. 10 of the article and chapter, supra, it is provided that an appeal, or writ of error may be prosecuted by the county attorney to the circuit court, or by the defendant from any decision of the county court under this chapter; but the same, until reversed in the circuit court, shall not suspend the decision of the county court. In such cases, the circuit court shall be judge of the law and fact, and no jury shall be necessary.

And by Sec. 16, Civil Code, in cases where appeals are provided for by law from judgments and orders of quarterly, police, city and county courts to circuit courts, appeal from such judgments and orders to this court are expressly prohibited.

From these enactments it is clear that the appeal in this case must be dismissed for want of jurisdiction.

R. K. Smith, for appellant.

———, *for appellee.*

GEO. W. GIST *v.* JOHN AND MILO GIST, ADM'RS.

Gifts—Personal Representative of Donor.

A gift duly executed during the life of a donor can not be disregarded by the donor's personal representative.

Executors and Administrators—Surcharging Settlement.

An ex parte settlement by an administrator, with the county court, may be surcharged and corrected by the circuit court upon proper allegations and proof.

Pleading—Cross-petition—Striking from Files.

It is error to strike from the files defendant's cross-petition, when plaintiff would be compelled to pay back to defendant an amount equal to or greater than the same recovered by plaintiff, upon a demand of defendant.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 14, 1872.

OPINION BY JUDGE LINDSAY:

The defenses set up to the two notes, the one for $1,266 for cattle, and the other for $1,000 for the rent of the farm, were not sustained, and appellant was properly held accountable for both of them. The judgment, however, for $1,350 for the cattle sold to Cravens and Doss was, we think, erroneous. We think it clearly established by the record that John Gist gave the cattle, or whatever interest he may have owned in them, to appellant. The gift was fully executed during the life of the donor, and can not now be disregarded by his personal representatives.

The claim of appellant for five thousand dollars as compensation for services in managing the business of his uncle, is not sustained by the evidence and was properly disallowed.

The answer and cross-petition of appellant filed the 11th of August, 1869, seems to have been filed without objection. It sets up a valid equitable set-off against the claims sought to be recovered in the consolidated actions being prosecuted by appellee, viz.: The amount due to appellant as one of the distributees of John Gist, deceased, which was alleged to be then due and payable. Appel-

lant claims that the same amounts to $2,998.52, and the commissioner's report shows it to be $2,318.52. We can see no valid reason why appellant should be compelled to pay the amount of the two notes upon which appellee is entitled to recover, when as a matter of law it will be the duty of appellee to pay back to him at once, an equal, if not a greater, amount. We think the court erred in striking this cross-petition from the files. The amount actually due appellant as distributee as aforesaid should have been ascertained, and a payment then rendered in accordance as the balance might be found to be in favor of one or the other party.

Whilst the exceptions to the commissioner's report were properly overruled, it does not follow that the ex parte settlement of appellee with the county court of Fayette county is conclusive as to the amount due appellant as one of the distributees of John Gist. The same may be surcharged and corrected by the circuit court upon proper allegations and proof. For the reason indicated the judgment in the consolidated cases must be reversed and further proceedings had in conformity with this opinion. The appellee, however, should not be taxed with the whole costs of the actions on account of a defense arising since the same were instituted, even though it may be ascertained that the balance is in favor of the appellant.

Huster & Carr, for appellant.

Buckner, for appellees.

EBENEZER DUFF *v.* SAMUEL MCELVENEY.

Appeal—Reversal—Fraud or Mistake.

Where by fraud or mistake the consideration expressed in a deed is much less than the purchaser is bound to pay, a judgment compelling the purchaser to accept the deed will be reversed.

Judicial Sales—What Property Passes.

Where an amended pleading asks for the sale of land omitted from the boundary by mistake and the judgment directs the land to be sold, title to the whole tract passed to the purchaser.

APPEAL FROM LEWIS CIRCUIT COURT.

December 14, 1872.

OPINION BY JUDGE PRYOR:

The amended pleading filed by the appellee fails to allege either fraud or mistake in reducing the contract evidencing the sale of the land to writing. The bond is for fifty acres of land described by specified metes and bounds and this alone is subject to the vendor's lien. The failure of the appellant to answer either the original or amended pleading would not have authorized a payment by default including the twelve acers of land not embraced by the boundary. This twelve acres was the most valuable portion of the whole tract, and if sold, some reason must be alleged for failing to include it in the bond for title. The appellant was also entitled to a general warranty deed from the heirs of Gully to the extent of assets discovered before judgment against him requiring a payment of the purchase money. Riley, who was the vendor of Gully, and in whom was vested the legal title at Gully's death, does not by the execution of his deed directly to the appellant for the land, satisfy the claim that the latter has upon Gully's heirs for a warranty of title. The consideration expressed in the deed from Riley to the appellant is only $12.50, whilst the consideration paid and to be paid by the appellant is two hundred and twenty-five dollars; nevertheless the court requires the appellant to accept Riley's deed, and if he should be evicted or lose his land by a superior title the measure of damages would be twelve dollars and fifty cents when he has paid or is required to pay greatly more for it. There is nothing in the record showing that Thomas, the purchaser of the land, is the same person who was the attorney of the appellee. The brief of counsel so states, but the record does not show this fact, and if he is, the remedy for setting aside the sale is by an amended pleading. He is no party to this appeal, and the sale having been confirmed, he is vested with the title. The appellee, having by the amended pleading asked the sale of the twelve acres, as well as the fifty, and the judgment directing all to be sold, the title to the whole passed to the purchaser, admitting that the judgment is erroneous.

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

Phister, for appellant.

Thomas, for appellee.

MARY STROW AND OTHERS *v.* EDWARD CURDS' EX'RS, ETC.

Trusts—Purchase of Trust Property by Trustee.

Where a trustee obtained title to the land of the cestuius que trusts who were infants, under circumstances indicating the sale to himself, and made a profit out of the transaction, the title must be regarded as being held for the benefit of the cestuis que trusts.

Trusts—Trustee Must Account for Profits.

Where a trustee sold portions of the trust estate, the trustee's estate must account to the cestius que trust for the profits made therefrom, and the trustee's executors, devisees, and heirs hold the legal title to the unsold portion of the trust estate for the same purpose and to the same use as the trustee.

APPEAL FROM McCRACKEN CIRCUIT COURT.

December 16, 1872.

OPINION BY JUDGE LINDSAY:

Appellants do not complain that the judgments in their favor for money on account of the personal assets of the estate of the testator Sledd were for too little, but insist that the chancellor erred in dismissing their petition in respect to the Hancock Seminary lands.

John Sledd, by his last will and testament, which was duly probated in 1845, nominated and appointed S. C. Thompson and P. H. Beckham the executors thereof, which offices they accepted.

The tenth item of this will is in these words:

"I devise and bequeath my undivided third of four thousand acres of land lying in Graves and Hickman, purchased of the Hancock County Court, for the purpose of paying off whatever amounts I may be indebted to my three nephews above named (the children of his deceased brother, Seaton Sledd). Said lands being now owned jointly by S. C. Thompson, Edward Curd and myself.

"I hereby fully authorize my executors to sell and convey my interest in the same or to join said Thompson and Curd in conveying the same at their (my executors') discretion."

Within a few months after his qualification as executor S. C. Thompson was appointed guardian for the three infant children of Seaton Sledd, deceased.

On the 16th of May, 1846, a little more than one year after the

testator's death, Thompson and Beckham, his executors, sold and conveyed the undivided one-third of the lands mentioned in the clause of the will quoted, to Edward Curd for the sum of $666.66, or at the rate of fifty cents per acre. By a deed bearing date the 28th of July thereafter, but which, according to the certificate of the clerk, was acknowledged on the 27th of June, Curd conveyed back to Thompson one-half of their interest for exactly one-half of the amount paid by him.

Appellees charge that these two conveyances were mere shams; that in point of fact Thompson, the executor, was interested in the original purchase by Curd and that it was all the while understood and agreed that he should own one-half the interest in the lands which he and his co-executor were ostensibly selling to Curd. It is also charged and not denied that within five or six years after that transaction Thompson and Curd sold portions of that land for more than double the amount paid for it, and that when the suit was instituted in 1859 much of it was worth ten times the amount paid. It is also claimed that Curd was a party to the alleged breach of trust upon the part of Thompson, and he, being his administrator, and his heirs were made parties.

Appellants prayed that the two deeds should be cancelled, and they be reinvested with title to so much of the undivided interest in the lands so owned by their deceased father, as had not been sold by Thompson and Curd to innocent purchasers, and that the amounts realized from any sales so made should be adjudged to them, they offering to account for the amount paid by Curd to the executors when he bought. All charges as to bad faith, breach of trust, or combination between Thompson and Curd were sufficiently denied, and it was insisted that the sale of the land was judicious and the price realized was its full value at the time.

The evidence as to the value of the lands is conflicting. But it is to be observed that none of the witnesses fix the average value of unimproved land in that section of the country in 1846 at less than fifty cents per acre, and also that the recollection of most of appellees' witnesses as to the value of lands in the county of Graves is founded upon one or two decretal sales which took place in that county in 1846 or thereabouts. There is scarcely a witness who pretends that at that time average lands were sold for any such price at private sales. Upon the other hand the wit-

nesses examined by appellants fix the lowest value for such lands in the two counties at one dollar per acre and some of them at more than that price. One witness who is uncontradicted and unimpeached swears that before the transactions between himself and Curd, gave it as his opinion that the purchase of Sledd's interest in these lands would be a good investment. That there was a speculation in it, and that he proposed to the witness to join with himself and Curd in making the purchase. It is certain that thereupon the executor made profit out of the sale to Curd and the subsequent purchase by himself of the lands conveyed to him by the testator.

The sale and purchase transpiring as they did within less than three months, according to the date of the two deeds, and within less than two months as shown by the clerk's certificate, are, to say the least, circumstances calculated to excite suspicion, and unexplained. The presumption that the ostensible sales and conveyances were but means resorted to for the purpose of settling the trust property into the hands of the trustee is very strong.

The discrepancy between the date in the body of Curd's deed and that of the clerk's certificate of its acknowledgment is also a suspicious circumstance.

The certificate of the clerk being an official act, we must assume that he gave the correct date, and we can account for the different date set out in the face of the deed upon no other hypothesis than that the parties felt the necessity of making it appear that at least a reasonable time had elapsed between the two sales.

The testimony is not sufficient to authorize relief against Curd's heirs. He was a stranger to the cestui que trusts, and the onus was upon them to establish satisfactorily that he knowingly participated in the breach of trust charged against the executor. This they have not done, but Thompson does not occupy the same attitude with Curd.

He was a trustee. He obtained title to the estate of his cestui que trusts who were at the time infants, under circumstances indicating a sale to himself. He made profit out of the transaction. Under such a state of the case the chancellor will, without further inquiry regard the title as being held for the benefit of the infant cestui que trusts; he can not refuse to require the trustee to show the utmost fairness in his dealings with their property. The good faith and honesty of purpose presumed by the law in ordinary

transactions between strangers must be clearly proved in a case like this. *Richardson, Adm'r, v. Spence,* 18 B. Monroe 450. Judge Story states the doctrine to be even stricter than this. He lays it down as a general rule that the trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which may have a tendency to interfere with his duty in discharging, etc., and that executors and administrators will not be permitted under *"any circumstances"* to derive a personal benefit from the manner in which they transact the business or manage the assets of the estates committed to them. Equity Jurisprudence, Sec. 321. In this case we need not go so far. Thompson has not satisfactorily explained the manner in which he became invested with the title to a portion of the trust estate. The fact that he expressed to his son a disinclination to purchase from Curd, and that he appeared to act upon his son's advice in making the purchase, is not necessarily inconsistent with the idea that it was all the while understood that he was to have an interest in the lands in case he chose to take it.

He does not show that it was necessary to sell at the time, and indeed the money judgments against his executor and devisees in this action show very clearly that no necessity for the sale existed.

Under such circumstances it is no excuse that the executors had full and complete power to sell. Whilst the testator set apart and dedicated his interest in these lands to the payment of what he might owe his brother's children, he did not intimate that he intended it to be sold, even though it should turn out that there was no necessity whatever for the sale. No reason is given why the lands were sold for cash in hand instead of on a reasonable credit. The fact that the testator's widow was desirous that the sale should be made, and the debt to Seaton Sledd's children paid so that the interest thereon should cease to accrue, was the result of her ignorance of the fact that the personal assets in the hands of the executors was sufficient to discharge the indebtedness without the sale, and the executors, instead of acting upon the requests made by her, should have disabused her mind and allayed her apprehensions.

The petition of appellees was properly dismissed as to Curd's administrator and heirs, and also as to the various persons who bought from Thompson and Curd after they were invested with title to Sledd's interest in them. But upon a careful examination of the

record we are constrained to adjudge that it was error to dismiss as to the executor's devisees and heirs of Thompson.

The title acquired by Thompson under the deed from Curd, he held for the benefit of Sledd's devisees. Whatever profits he made by the subsequent sales of the interest so acquired his estate must account for to his cestui que trusts, and as his executors, devisees and heirs hold the legal title to the unsold portion of the estate for the same purpose and to the same use they should have been compelled to relinquish the same to appellants.

The judgment refusing them relief as to said lands is therefore reversed and the cause remanded for a judgment conformable to this opinion. Upon the return of the cause, if further preparation should be necessary, reasonable time therefor should be allowed. From the endorsement on the record made by appellants' attorney it appears that Wm. E. Sledd did join in the prosecution of this appeal.

The judgment of the chancellor as to him therefore remains undisturbed.

P. Palmer, for appellant.

Bigger, Moss, for appellees.

JOHN SOWER *v.* S. CUMMING.

Assignments—Assignment of Note Secured by Lien.

An assignment of a note carries with it a mechanic's lien securing the debt, and the assignee must use due diligence to collect the debt with the means at hand.

APPEAL FROM OWEN CIRCUIT COURT.

December 16, 1872.

OPINION BY JUDGE PETERS:

On the 21st of October, 1870, Mary L. Riddle executed a note to John Sowers for $383, due one day thereafter. On the 22d of December, 1870, Sowers assigned said note for a valuable consideration to S. Cumming, who sued the obligor at the first term of the Owen Circuit Court on said note, recovered judgment, and upon which he caused execution to issue and be placed in the hands of

the sheriff of said county, which he returned endorsed no property found. The assignee then brought this action against the assignor of the note to recover the amount thereof.

The appellant resisted a recovery against him on two grounds set forth in his answer.

First. That appellee, after he recovered judgment against the obligor in the note, failed to sue out execution thereon within ten days after he obtained his judgment as he had a right to do, and did not use due and proper diligence to collect the same.

Second. And that when he assigned the note to appellee, he being a carpenter and house joiner, held a lien on a house and lot of the obligor, for the construction of the house on said lots situated in Owen County, as security for the note aforesaid, which was executed for the construction of the house, which lien was at the date of said assignment and for a long time thereafter, in full force and effect, which was well known to appellee when the assignment was made to him, which mechanic's lien passed by the assignment of the note to him; but that said lien had been lost by the failure of appellee to assert the same in due time by suit.

A demurrer was sustained to the answer, and appellant having failed to answer further, a judgment was rendered against him and he has appealed to this court.

The main question in the case arises upon the second paragraph of the answer.

The statute on the subject of mechanics' and material-men's liens provides that all persons performing labor, and furnishing materials for constructing, or repairing any building, or other structure within this commonwealth shall and may have a joint lien upon the buildings or other structure they may be employed to construct or repair, and the interest of the employer on any land on which such building or other structure may be constructed or repaired, or for which they may furnish materials, to the extent of the labor done, and materials furnished by them respectively, etc.

The foregoing, with a part of the 5th section, is all of the statute that it is deemed necessary to quote. The residue relates to the character of estates subject to the lien, the mode of enforcing it, and another class of persons whose interests are protected. The 5th section provides that any person or persons having a lien under this act may enforce the same by filing a petition in the circuit court or

chancery court, or any other court having like jurisdiction in the county where the property sought to be subjected, or a greater part thereof, is situated at any time within one year from the completion of the work, or furnishing the materials. All the persons having a lien may join in the petition against the employer and other persons having a lien. Myer's Supp., pages 300-306.

By an act approved March 17, 1870, the thirteenth section of the act referred to, limiting the provisions thereof to certain counties and cities therein specified, was repealed, and the remaining provisions of said act were extended to all the counties in the commonwealth. 1 Sess. Acts 1869-70, page 100.

By the assignment of the note to appellee, all the liens and equities that appellant then had to secure the payment of the debt with the right of action to enforce the same, passed to appellee. As was said by this court in *Morrison v. Glass,* 5 B. Monroe 240, a case analogous to this: "The whip was placed in his own hands by the assignment of the note, and he was bound to use it, not only in pursuing the obligor at law, but also in pursuing the equity which the assignment carried with it to his use before he had a right to turn on the assignor." The first paragraph was insufficient.

It results therefore that the court below erred in sustaining the demurrer to the second paragraph of the answer, consequently the judgment must be reversed and the cause remanded with directions to overrule the demurrer to said second paragraph, and to award a new trial and for further proceedings consistent herewith.

Landrum, for appellant.

H. P. Montgomery, for appellee.

W. H. SANDFORD, ETC., *v.* A. P. SANDFORD.

Partnership—Authority of Partner After Dissolution of Partnership.

After the dissolution of the partnership, one partner can not bind the other partners by execution of a note for the partnership debts.

APPEAL FROM OWEN CIRCUIT COURT.

December 16, 1872.

OPINION BY JUDGE LINDSAY:

The first paragraph of appellants' answer was bad, and the demurrer thereto was properly sustained. It is not only alleged in the petition that the services charged for were rendered at the special instance and request of appellants, but that they agreed to pay for them. As to the truth of these charges it is impossible but that they should have had some knowledge or information.

We are, however, of opinion that the instruction asked for by appellant W. H. Sandford should have been given. After the dissolution of a partnership, one partner can not bind the others by the execution of a note even for an existing partnership debt. *Merritt v. Polly,* 16 B. Monroe 355. The admission of one partner is not evidence against the others as to a partnership transaction. *Daniel v. Nelson,* 10 B. Monroe 318. In this case the court says further that it has frequently sanctioned the principle that the admission of a partner so made does not take a debt out of the statute of limitations as to the other members of the defunct firm, and cites the case found in 1 Peter 373; 3 John 536; 3 Minn. 191; 4 Minn. 215.

We are not referred to the cases in which this court has so held, but as the principle is conservant with the reasons of the law denying the right or ability of one stranger to bind another without his authority or consent, we are inclined still to approve it. For the error indicated the judgment must be reversed, and as it is a joint judgment, F. Sandford is entitled to the benefit of the reversal.

The cause is remanded for a new trial upon principles consistent with this opinion.

Drane, for appellants.

Craddock, Trabue, for appellees.

HALL'S SAFE & LOCK CO. *v.* H. J. MEADE.

Attachment—Allegation of Non-residence.

An allegation in a petition for rent that the defendants are non-residents authorizes attachment for the amount due.

Attachment—Allegation of Fraud.

An action can not be maintained to collect rent not due, even if plaintiff is entitled to recover, without an allegation of fraud upon which attachment can be based.

Opinion of the Court.

Landlord and Tenant—Tenant from Year to Year—Notice.

A tenant from year to year can not abandon the premises on a few days' notice of his intention to do so, without the consent of the landlord.

APPEAL FROM LOUISVILLE CHANCERY COURT.

December 17, 1872.

OPINION BY JUDGE PRYOR:

The attachment in this case was granted and issued by virtue of Sec. 259, Code of Practice.

The grounds relied on are not embraced by the 5th section of Article 2, Revised Statutes, Chapter "Landlord and Tenant." By the provision of this section of the statute there must be a statement, where the debt is not due, "that the landlord believes unless an attachment issues, he will lose his rent." The only allegation in the petition on this subject is that the tenant has removed his property from the leased premises and carried it out of the state to defraud plaintiff with the additional allegation that the appellant has other property within the city of Louisville. It is also a strained and liberal construction of the language of Sec. 259 of the Civil Code, that authorizes the conclusion that the allegations of the petition are even sufficient to authorize the issuing of an attachment under that section, considering, however, that the grounds for such an attachment are sufficiently alleged; still there is no proof sustaining the attachment as the answer puts in issue the alleged fraud. As to the rent due for the one month, viz., March, 1871, the allegations that the defendants are non-residents authorized an attachment for that amount, this fact being denied by the answer. As to the rent due at the institution of the suit the attachment was properly sustained, but as to the alleged claim for rent to become due thereafter the attachment should have been discharged and the petition dismissed. No action could have been maintained for the purpose of subjecting the rent not due, even if the appellee was entitled to recover, without some allegation of fraud, upon which an attachment could be based, and sustained by proof, and therefore the judgment must be reversed as to all the rent except that due when the suit was instituted. We are satisfied that the appellant intended under the lease to Ross & Nemler, and even if they are not bound by reason of their parol contract to pay for the whole term (a question it is now un-

necessary to decide), they made themselves tenants from year to year and a few days' notice only of their intention to quit did not authorize an abandonment at once of the premises, without the consent of the landlord. The judgment is therefore reversed as to all the rent not due when the suit was filed and the attachment as to this rent must be discharged and the petition therefore dismissed without prejudice and for further proceedings consistent with this opinion.

Reid & Cary, for appellant.

Elliott, for appellee.

ALEXANDER JOHNSON AND RICHARD SCOTT *v.* THOS. W. MEANS, ETC.

Action—Consolidation.

A party can not complain that his action for forcible entry and detainer was consolidated with his suit to reform his patent to the land.

APPEAL FROM BOYD CIRCUIT COURT.

December 17, 1872.

OPINION BY JUDGE LINDSAY:

This was not a proceeding to quiet title to real estate, as is insisted on by appellants' counsel. Appellees prayed for a reformation of the calls in their patent and for judgment for the recovery of the possession of that portion of their lands held and occupied by appellant, Johnson.

The proof establishes very clearly that appellees and those through whom they claim title, had actually held occupied and claimed as their own, the land in controversy for more than fifteen years before the entry by Scott and his vendees. It is also shown that Scott pointed out to a party to whom he sold lands many years ago, the line now claimed by appellees to be the true one and recognized it as such.

His attempt to obtain title and possession through the county court entry and patent was palpably and manifestly a scheme resorted to for the purpose of securing title to lands known to him to be the property of others.

The judgment of the court below ousting his vendee from the possession thus improperly obtained was right, and it is affirmed.

Nor can Johnson complain that his proceeding under the writ of forcible entry and detainer was consolidated with the equity suit. He was allowed his costs up to the time of the consolidation. A judgment under it ejecting appellees' tenant would have been a mere farce as the writ of possession awarded in the equity suit would have immediately taken from him the possession thus secured.

Judgment *affirmed.*

Rodman, for appellants.

Dulin, for appellees.

WILLIS WARNER *v.* C. W. HUTCHINSON.

Costs—Scope of Allowance.

A party held to have no right to complain that costs were not allowed him up to the time of the release of mortgage.

Pleading—Filing.

Papers held to be regarded as having been filed.

Sales—Evidence.

The evidence held not to show delivery of a certain amount of lumber.

APPEAL FROM HARRISON CIRCUIT COURT.

December 17, 1872.

OPINION BY JUDGE LINDSAY:

Appellant has no right to complain that costs were not allowed him up to the time of the release by Ecklar of his mortgage. At the time he was sued he owed on the mill and other property sold to him by Hutchinson a much larger amount than was due on the mortgage. No fraud was practiced on him in the sale; he knew of the existence of the mortgage, and relied upon Hutchinson to remove it, and there is nothing in this record tending to show that Hutchinson so failed to keep his agreement to do so, as to damage or endanger appellant.

It is also evident that the reply lodged with the papers of the suit was regarded and treated by both parties as filed. Otherwise appellant would not have taken the numerous depositions to sustain his counterclaim. Under the proof this counterclaim was properly disallowed.

Appellant fails to establish the delivery to Hutchinson of $200 or $240 worth of lumber after the measurement by Dill. The evidence of his own interests is unsatisfactory and entitled to but little consideration, and the proof as to his absence in Grant County at the time it is pretended this lumber was delivered, connected with the testimony of the parties having the mill at the same time, shows that it is almost impossible that any such delivery would have been made.

The testimony fully sustains the judgment of the court below. It is therefore *affirmed*.

J. T. McClintock, for appellant.

J. Q. Ward, for appellee.

FRANK M. LOONEY *v.* FRED HAUCK AND WIFE.

Covenants—Instruction—Lien.

In an action for breach of covenant against the incumbrance, the court should by instruction direct the inquiry of the jury to the fact whether there was a lien on the identical property covered by the deed when the conveyance was made, the amount thereof, and a statement as a matter of law whether the deed contained a covenant of general warrant.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 17, 1872.

OPINION BY JUDGE PETERS:

By Instruction No. 1, given on motion of appellees, the jury is authorized to find for them whether they believe there were any taxes due on the property conveyed by appellants to Schuster or not; but if they believe that Frank W. Looney conveyed "certain" or any property, to Schuster, and the conveyance was with general warranty, without identifying the property, it leaves the jury to determine whether the covenant in the deed was for a general warranty or not.

Again from the language of the instruction the jury were authorized to find for appellees if there was any incumbrance on the property, no difference how small, nor for what nor when accrued.

The instruction should have directed the inquiry of the jury to the facts as to whether there was a lien on the identical property covered by the deed of appellants to Schuster when said conveyance was made, the amount thereof and told them as matter of law whether the deed contained a covenant of general warranty or not.

No other error is perceived; but for the error indicated the judgment is reversed, and the cause is remanded with directions to award a new trial and for further proceedings consistent herewith.

Walker, for appellant.

Marshall, Joseph, for appellees.

SARAH W. DANDRIDGE *v.* SOLOMON ROBERTS.

Vendor and Purchaser—Action to Recover Purchase Price—Defense.

A defendant, in an action to recover the purchase price of land, can not rely on the hostile possession of his own vendee as a bar to the action.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

December 17, 1872.

OPINION BY JUDGE PRYOR:

The suit in equity instituted by the appellee in 1851 against Taylor and Dandridge was to prevent the latter from recovering the purchase money for the land sold the appellee by Taylor as against an attorney of Dandridge. This suit was settled by an agreement between the parties, and in 1857 in accordance with this agreement, was dismissed. There is no doubt but what the present note executed for the same land, was the result of that settlement and the defense relied on by the answer of the appellee is identical with that relied on by him in the suit instituted in the year 1851. In 1857 the appellee accepted a deed from the appellant for this land and he and his vendees have been in possession since that time, and in fact it is claimed and shown that the vendee of Roberts was in possession

prior to the date of this deed. The appellee knew when he gave this note that the land had been conveyed by himself to Butcher and that Butcher was in possession. He was attempting, no doubt, to perfect the title of his vendee when he dismissed his suit in 1857; his defense then was that the appellant had no title and from the statements of that suit he seems to have been familiar with the patents that covered his land, and if not it should have been prosecuted with his suit instead of compromising it; that suit was based upon a defect of title, and was settled by the execution of a new note. He now insists that this last note was procured by fraud on the part of the appellant, Taylor, in representing that he had title when he knew that his title was defective. These allegations of the cross-petition are all denied, and if true the acceptance of the deed with a knowledge of the defective title would estop him from relying on any such defense, even if such a defense could be pleaded before an execution. We can not well see how the appellee can rely on the hostile possession of his own vendee as a bar to appellant's recovery. This title and recovery is neither inconsistent nor adverse as between these parties, and if the adverse possession of the appellee's vendee can be relied on as a defense to this note, the appellee's own possession would present the same bar to a recovery. He had the right to compromise the litigation in 1851 for his own protection or that of his vendee. There is no proof of any fraudulent representation made the appellee by Taylor, and although Taylor's title may be imperfect, it is now too late after his acceptance of the deed and the compromise of a previous litigation in which the question of title was plainly and distinctly made, and being also in the undisturbed possession of the land by himself as vendee to resist a recovery upon the state of facts disclosed by this record.

The judgment of the court below is reversed and cause remanded with directions to render a judgment on the note against the appellee and for further proceedings consistent with this opinion.

J. B. Thompson, Jr., for appellant.

Bradley, for appellee.

LEROY WOMACK *v.* A. S. GARDNER, ETC.

Ejectment—Pleading—Description.

A petition to recover real estate held to be fatally defective for failing to describe, even in general terms, the real estate sought to be recovered.

Ejectment—Writ of Possession—Sufficiency.

A writ directing the sheriff to place plaintiff in possession of a lot at N. station on the east side of the railroad "10 poles in front to two rock corners, and running back 16 poles to two rock corners," neither one of the corners being located or identified, imposes on the sheriff the duty not only to deliver possession, but to locate the property, and the latter duty can nto be imposed on a ministerial officer.

Courts—Transfers of Causes.

Where defendant's answer sets up not only a defense to the action in ejectment, but also facts entitling defendant to a lien on plaintiff's lot, the cause was properly transferred to the equity docket.

Vendor and Purchaser—Location of Land.

Where a deed does not locate the land conveyed, the vendor and the purchaser can make a change in the location, and the purchaser having bought on the faith of an agreement as to the location in force at the time of the purchase, the vendor can not repudiate such changed location, and insist on the first location.

APPEAL FROM HARDIN CIRCUIT COURT.

December 18, 1872.

OPINION BY JUDGE LINDSAY:

Appellant's petition upon its face is fatally defective, in failing to describe even in general terms, the real estate sought to be recovered, and even if the deed be regarded as constituting part of it, still the description of the premises is so indefinite that no judgment capable of being executed could have been entered upon a confession. A writ directing the sheriff to place appellant in possession of a lot at Nebo Station on the east side of the railroad "10 poles in front to two rock corners and running back 16 poles to two rock corners," neither one of the corners being located or identified, would impose upon him not only the duty of delivering the possession, but of locating the property. The latter being clearly a judicial act, can not be imposed upon a ministerial officer.

As the answer of appellees not only sets up matters of defense to the action in ejectment but also a state of facts entitling them to a lien on appellant's lot for their improvements in case it should turn out that their storehouse had been built on it, and also demonstrating the necessity for locating and determining the beginning corners and boundaries of their respective lots, it was proper that the suit should be transferred to the equity side of the docket.

But if the court had erred in making the transfer, as appellant could not have recovered on his petition, such error would afford him no ground for complaint.

We are of opinion that the proof shows very clearly that the line to which appellees claim is the one finally agreed on, and fixed by appellant and his vendor, Neighbors, as his deed does not locate the lot, he and his vendor could make or change the location. Notwithstanding the statute of frauds, these appellees having purchased upon the faith, as they had the right to do, of the agreement as to location in force at the time of their purchase, appellant can not be allowed to repudiate it and insist on the first location to their detriment.

We do not regard it material whether the line in existence at the time of appellee's purchase was pointed out to them by appellant or by some one else. It was shown to them and it was the true line at the time.

Judgment *affirmed.*

Jas. Montgomery, for appellant.

Wintersmith, for appellees.

CHAS. DENTON'S EX'R *v.* EMILY PARKER.

Executors and Administrators—Action by Administrator Against Widow —Admission.

In a suit by an administrator against the widow of the deceased to recover certain gold which the widow claimed as a legacy, failure of the administrator to introduce any evidence with reference to the indebtedness of the estate, when taken in connection with his evasive reply to defendant's answer will be taken as an admission that there are no debts of the estate to be paid.

Opinion of the Court.

Executors and Administrators—Action by Administrator Against Legatee.

Where an administrator sues in equity to recover personal property in the hands of a legatee, recovery can not be had merely for the purpose of enabling him to repay the devisee the sum of money received.

Executors and Administrators—Life Tenant—Bond.

The devise of personal property to the testator's widow for life without requiring a bond to protect remaindermen confers upon her the right to its possession and use without execution of bond to remaindermen.

Executors and Administrators—Life Tenant—Remaindermen—Bond.

Where a will does not require a devisee of a life interest to execute a bond for protection of the remaindermen, the remaindermen, and not the executor, should apply for a bond if their rights are in danger.

APPEAL FROM BARREN CIRCUIT COURT.

December 18, 1872.

OPINION BY JUDGE PRYOR:

This action at law by the appellant for the recovery of the gold was on his motion transferred to the equity docket, and the court below adjudged that the appellee, the widow, was entitled to retain it. The judgment is based upon the idea that the widow (the appellee) was first entitled to the beneficial provisions of the will. The devisor designated first, the property that the widow is to have and in this devise he gives to her three hundred dollars in gold, and the remainder of his estate he gives to certain of his kindred therein named. The widow had possession of this gold at the date of her husband's death and placed it for safe keeping in the custody of the bank at Russellville. She alleges in her answer that she is entitled to it by reason of the devise to her and that the estate in the hands of the executor was ample to pay the debts. The appellant files a reply to this answer and cross-petition of the appellee in which his denial is at least evasive with reference to the indebtedness of the estate, and would indicate to the mind of the chancellor that the statements in the answer of the appellee on the subject of the indebtedness was true. There is no proof whatever as to the indebtedness of the estate to Denton and no offer made by the appellant to have the case referred to the commissioner for the purpose of ascertaining it. It was within the power of the executor, and not the widow, to show the indebtedness, and his failure to in-

troduce any evidence with reference to the debts or to have the same ascertained by a commissioner when taken in connection with his evasive answer, in our opinion was equivalent to an admission that there were no debts to pay, or that he had assets sufficient for that purpose. There is no doubt but what the appellant upon his qualification as executor became entitled to the estate (personal) of the devisor for the payment of debts and the various devises and legacies as directed by the will, but when he comes into a court of equity a recovery will not be permitted as against a devisee or legatee merely for the purpose of enabling him to repay that devisee the very same money received. If the devisee had been indebted to the estate and by the will was entitled either to a specific legacy or a certain sum of money, a court of equity would not compel the devisee to discharge the indebtedness by paying over the money when the legacy or devise would satisfy it and when it was not required to pay debts, or other charges made by the will. In this case the money due the widow was first to be paid; there is no evidence of any indebtedness or necessity for paying it to the executor. She gets less than she is entitled to by the provisions of the will and the court below acted properly in the rendition of a judgment by which she is permitted to retain the money. The devise of the personal property to the widow for life necessarily confers upon her the right to its possession and use without the execution of any bond to the remainderman, nor are we prepared to adjudge that the widow can be required to give bond for the money devised to her. The devisor did not require any such security for the payment of the money to them in remainder and even if their rights are endangered by paying the money over they alone can require the bond and not the executor. The judgment of the court below is *affirmed.*

Lewis Boles, for appellant.

McQuown, for appellee.

W. E. WOODRUFF *v.* CITY OF LOUISVILLE.

Licenses—Occupation Tax.

An occupation tax on attorneys at law, which is not shown to be disproportionate to that borne by tradesmen and professional men generally for the same purpose is a legal exercise of the taxation power.

APPEAL FROM JEFFERSON CIRCUIT COURT.

April 19, 1872.

OPINION BY JUDGE HARDIN:

The exaction of the license fee complained of in this case must, in our opinion, be regarded as merely the imposition of a tax on the particular occupation or business of an attorney at law, as like taxes are imposed on other lucrative pursuits, for various purposes; and, as the burden thus imposed on the appellant is not shown to have been disproportionate or unequal to those borne by tradesmen and professional men generally, for the same purpose, we can not regard it as an unauthorized taking of private property for public use; but we concur with the court below that it was a legal and proper exercise of the taxing power.

Wherefore the judgment is *affirmed.*

Brown, for appellant.

T. L. Burnett, for appellee.

SCOTT WALKER *v.* J. W. WILLIAMS, ETC.

District and Prosecuting Attorneys—Fees.

To entitle the county attorney to the 15 per cent. allowed him by law, it must appear that he prosecuted in the committing court, and assisted or offered to assist the commonwealth's attorney in recovering judgment on the forfeited bond or recognizance.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

December 19, 1872.

OPINION BY JUDGE LINDSAY:

It was held by this court in the case of *Stone v. Riddell,* 5 Bush 349, that the act of February 21, 1868 (Sess., Vol. 1, page 23), was

void and not enforceable. The decision in that case is still adhered to, but the difficulty in the way of affording relief to appellant upon this appeal is that the record before us does not show that he, as county attorney, prosecuted in the examining courts the parties whose bonds were forfeited.

To entitle the county attorney to the 15 per cent. allowed him by the act in question, it must appear that he prosecuted in the committing court, and assisted or offered to assist the commonwealth's attorney in recovering judgment on the forfeited bond or recognizance.

For the reason given the judgment in this case must be *affirmed.*

Garnett, for appellant.

———, *for appellee.*

HINES & THOMAS *v.* S. M. HELM.

New Trial—Newly Discovered Evidence.

A new trial can not be granted because of newly discovered evidence which could have been discovered and used on the trial by the exercise of reasonable diligence.

APPEAL FROM WARREN CIRCUIT COURT.

December 19, 1872.

OPINION BY JUDGE PETERS:

The evidence discovered after the trial was to the very point in issue on which appellants had adduced evidence and made their defense, and the rule in such cases is that new trials for discovery of parol evidence to the facts in issue and to which evidence had been offered on the trial should be seldom granted, even where there had been diligence in preparing the defense. In this case, Thomas, one of the partners and a defendant, knew that Baker was engaged by the firm to haul the wheat and that he would prove the facts which he stated he would prove, and he failed to have him summoned or to give Hines the information. Nor does it appear that Hines was absent and could not have known what Baker would prove by even slight attention to the business. They have not man-

ifested reasonable diligence in the preparation of their defense and the judgment must be *affirmed.*

W. Underwood, for appellants.

Rodes & Clark, for appellee.

C. M. WHIPP *v.* J. W. SWEENEY, ETC.

Deeds—Sufficiency.

A deed purporting to be a sale of all the interest of the grantors in the estate of their grandfather was held to be binding on the grantors.

APPEAL FROM CASEY CIRCUIT COURT.

December 19, 1872.

OPINION BY JUDGE HARDIN:

Although the deed from the appellees to the appellant, describing the interest of the appellees in the estate of Joel Sweeney, deceased, as being one-seventh; having reference, no doubt, to the number of decedent's children and their representatives, including Jesse Sweeney, yet the deed in our opinion plainly imports a sale of all the interest and right of the appellants, as heirs of their grandfather in the property described in the deed as having descended to his heirs; whether Jesse Sweeney, or any other heir, should be excluded on account of advancements or not.

It results that the judgment that the appellees are entitled, notwithstanding their deed, to one-forty-second part of said property, is erroneous.

Wherefore the judgment is reversed and the cause remanded with directions to dismiss the petition.

Wolford, Owsley & Brordett, for appellant.

Durham & Jacobs, for appellees.

E. L. FOULKS *v.* JOHN P. RITTER, ETC.

Chattel Mortgages—Foreclosure—Necessary Party.

In a suit to foreclose a chattel mortgage, one who sold the property to satisfy a debt owing by the mortgagor is not a necessary party.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

December 19, 1872.

OPINION BY JUDGE LINDSAY:

The evidence presented in this record does not justify the conclusion that appellant was induced to give to Spencer authority to execute the mortgage to L. B. Ritter, by reason of any opinion given him as to its legal effect by said mortgagee in person, or by agent or attorney. It does not appear that said Ritter ever spoke to appellant on the subject, and it seems that at the time J. P. Ritter advised him as to its effect, he was acting for Spencer, and gave the opinion at the instance of appellant himself.

We would be inclined to doubt whether or not the written authority empowered Spencer to mortgage the planing mill and other property claimed by appellant, but he sets up in his petition and answer that it was intended to confer that power, and the paper executed to him by J. P. Ritter, as agent for L. B. Ritter, exonerating him from personal liability, in terms ratifies and approves the mortgage then written, which mortgage embraced this property.

Appellant was not a necessary party to the proceeding to enforce the mortgage. He did not, as matter of law, own the planing mill, etc. He held the title thereto to secure the debt owed him by Spencer, and as indemnity on account of his suretyships for him. When he gave Spencer authority to mortgage the property to L. B. Ritter, he released all claim to it, except as between himself and his debtor.

He failed to show that he was damaged by the sale made by the commissioner, or that any fraud had been practiced on him by the mortgagee.

It is no ground of complaint that the mortgage of J. P. Ritter on the individual interest of Abell was enforced, inasmuch as it is clear that the entire property will not satisfy L. B. Ritter's claim, and pay firm debts contracted after Spencer became a partner.

Judgment *affirmed.*

Feland, Phelps & Son, for appellant.

McPherson, Champlin, Ritter, for appellees.

PETER S. SMITH, ETC., *v.* MIKE SNOWDEN'S ADM'R.

Attachment—Conveyance Pending Suit.

Where, after property is attached, the owner conveys it pending the attachment suit, and the ground of attachment is not sustained, the purchaser of the land from the one pending the attachment proceeding is not affected by it.

APPEAL FROM PULASKI CIRCUIT COURT.

December 21, 1872.

OPINION BY JUDGE PETERS:

On the 15th of May, 1861, George W. Gastenaw sued out an attachment against the estate of Andrew Burkheart on the alleged grounds, as stated in the petition only, that he was about to sell, convey or "otherwise dispose of his property with the fraudulent intent to cheat, hinder, and delay his creditors in the collection of their debts." The sheriff, to whom the attachment was delivered, levied it the same day it was issued on 240 acres of land, as the property of the defendant. At the March term, 1862, the plaintiff below filed an affidavit stating that he believed the defendant "is" a non-resident, and in a few days thereafter he amended that affidavit by stating that at the time he filed his original affidavit Andrew Burkheart was a non-resident.

At the September term, 1863, the cause was submitted for judgment without answer or appearance by defendant and without any proof in the case, except that it is stated in the judgment that it appeared from the proof in the case that Andrew Burkheart was a non-resident, and judgment was then rendered for the sale of one hundred and forty (140) acres of land on Clifty in Pulaski County, or so much thereof as should be required to pay the plaintiff the sum of $125, with interest at the rate of 6 per cent. per annum from the 25th of December, 1861, till paid, and the costs, etc.; and a commissioner was appointed to make the sale. The commissioner reports he sold "Two hundred and forty acres of land for $169.70, the amount of plaintiff's debt, interest and costs, to J. C. Patton, who complied with the terms of the sale, and the same was approved and confirmed by the court, and a deed made to the purchaser by the master for 240 acres."

On the 20th of May, 1861, five days after the attachment was levied on the land, Burkheart conveyed it, for a valuable consideration,

to Michael Snowden, who on the 11th of March, 1863, sold and conveyed the same land to Peter S. and Joseph L. Smith, in consideration of $600, one hundred and sixteen of which they paid down, and executed their notes for the residue, one for $100 due 9th of February, 1864, one for same amount due 9th of February, 1865, one for same amount due 9th of February, 1866, one for same amount due 9th of February 1867, and one for $84 due the 9th of February, 1868, all bearing interest from date. On the 6th of March, 1868, Snowden instituted suit on said notes, alleging that they were due and unpaid; that he had a lien on said land for their payment, and prayed judgment for his debt and a sale of the land, etc.

In an amended pleading made by Snowden's personal representative, he having died, and the suit having been revived, he alleged that Patton acquired no title to the land, that the judgment and sale in the case of Gastenaw to Burkheart were void and that he had learned that Howard Gardner was in possession of the land, and he made Gate, Patton and Gardner defendants, on all of whom process was served, and they failed to answer, thereby in effect admitting the truth of the allegations.

The Smiths resisted payment on the ground that Snowden warranted the title in the conveyance to them; that when he made the deed he had no title, but that the title was in Patton, the purchaser at the judicial sale, made under the judgment of Gastenaw against Burkheart, and that their covenant was broken as soon as made. A transcript of the record in that case was made an exhibit and they pray for a cancelment of their notes. The court below rendered judgment against the Smiths for the amount of the notes sued on and adjudging that Snowden had a lien on the land for the payment of their respective amounts, ordered a sale of the land for the purpose of their satisfaction, and the Smiths have appealed.

In *Warner v. Everett,* 8 B. Monroe 262, this court held that the owner of property which had been seized by attachment may, during the continuance of such seizure, sell and dispose of such title as he has to the property, and the purchaser will hold it subject to the final disposition of the suit and attachment by which a lien is attempted to be created.

There was no evidence offered to sustain the ground for the attachment when it was first sued out and which was relied upon

at the time Burkheart conveyed the land to Snowden, and the ground upon which it was sustained was not presented for nearly one year after the date of appellee's decease. On the ground first stated the attachment was not sustained, and no lien on the land was created by it; consequently Snowden's purchase from Burkheart cannot be affected by it.

Besides, the commissioner exceeded his authority by selling 240 acres of land when the judgment required the sale of 140 acres only; but the proceedings under the attachment are radically defective, and the judgment must be *affirmed.*

Fox, for appellants.

Morrow, for appellee.

WILLIAM MCCARTY *v.* GEO. E. JOHNSON, ETC.

Husband and Wife—Wife's Separate Estate.

By Act 1867-8, Vol. 1, p. 5, § 1, relating to the power of married women to alienate their separate estates, the Legislature intended to relieve married women from any greater disability in regard to the sale of their separate estates than is imposed on them with regard to their general estates.

Statutes—Repealing Act.

Where a subsequent act of the Legislature can not be harmonized with the previous act, the former act is repealed by the latter, although no reference is made thereto in the latter act.

Husband and Wife—Conveyance of Wife's Estate.

A married woman may, by joining with her husband, convey her real estate, and retain a separate use in the proceeds of the sale.

APPEAL FROM SCOTT CIRCUIT COURT.

October 22, 1872.

OPINION BY JUDGE PETERS:

On the 9th of Januray, 1863, George Elley published his last will in these words:

"Know all men by these presents, that I, George Elley, of Scott county, Kentucky, do hereby make my last will and testament, revoking all other wills by me heretofore made.

"First.—I give and devise my grandson, George Elley Johnson, the homestead, or farm on which I now reside, containing six hundred and fifty acres, to him and his heirs forever, subject, however, to this limitation, that if the said George should die leaving no child or children, or their descendants, living at the time of his death, then said tract of land is to go to my daughter Irene Johnson to be held by her as specified in the next clause of this will.

"Second.—I give and devise to my said daughter Irene Johnson all the remainder of my estate of every kind whatsoever, consisting of land, slaves, and personalty now owned, or hereafter to be acquired by me, to and for her own separate use, free from all interest or control on the part of her present husband; or any other husband she may hereafter have."

This will was probated on the 25th of September, 1863, and Leonidas L. Johnson, the husband of Mrs. Irene Johnson the daughter and devisee of said testator, took out letters of administration with the will annexed on his estate.

On the 13th of September, 1872, the devisees, George E. Johnson, Irene Johnson and her husband, the said L. L. Johnson as husband, also administrator with the will annexed, joined in a contract for the sale of 227 acres, part and parcel of the 650 acres devised by said testator to said George E. Johnson, with contingent remainder to said Irene Johnson, to William McCarty for a full and fair price, and the latter, not being satisfied that his vendors were able to make him a good title to said land, the parties agreed to the foregoing facts, and having made oath that the controversy is a real one, and the proceedings in good faith to determine the rights of the parties as prescribed in Sec. 705, Civ. Code, submitted the same, with a copy of George Elley's will, and of the writing evidencing the sale of the land by the devisees and administrator *cum testamento annexo* to the Scott Circuit Court for an adjudication of the question, and upon final hearing, the court below was of opinion that said vendors could make to McCarty a good and sufficient deed, and that he should accept the one tendered. And from that judgment the appeal is prosecuted by McCarty.

We are satisfied that if the powers of a married woman to alienate her separate real estate, created by deed or will, had not been enlarged since the adoption of the Revised Statutes, that under Sec. 17, Chap. 47, 2 Vol. R. S., p. 28, Mrs. Johnson could

not have alienated her estate in the land contracted to be sold to appellant by joining with the personal representative of the testator. But by an act of the Legislature, approved 16th of January, 1868, 1 Vol. Sess. Acts 1867-8, p. 5, the powers of married women to alienate their separate estates created as aforesaid, are enlarged; that enactment is in the words following:

"1. That where real property has been, or shall hereafter be 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 coverture, the right of such married woman to sell and convey such property shall be the same as if 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."

By this enabling statute the Legislature intended, where no trustee intervened, and where the deed, or will, creating a separate estate in a married woman does not in express terms withhold or restrict the power, to relieve her from any greater disability with regard to the sale and conveyance of her separate estate than she labored under with regard to her general estate; but when she sold said, although no reference is made to the Revised Statutes either in the title or the context of the Act.

It results from the foregoing that Mrs. Irene Johnson, by joining with her husband in a conveyance, may alienate her estate, though it be separate in the land described, the separate use attaching to and continuing in the proceeds.

And the judgment is therefore *affirmed.*

Darnaby, for appellant.

WILLIS WARD, ADM'R, *v.* ELIZA WARD.

Wills—Election by Widow.

A will held not to put a testator's widow upon her election whether she will take under the will and waive her right to distribution under the will.

APPEAL FROM METCALF CIRCUIT COURT.

December 29, 1872.

OPINION BY JUDGE HARDIN:

We concur with the court below in the conclusion that the will of Willis Ward was not of a character to put the appellee on her election whether she would take the benefit of the special provision made in the third clause and waive her shares in distribution or renounce the will. And also in the opinion that it is manifestly inferable from the provisions of the will that the testator did not intend to exclude his wife from her distributive share of his estate, but that it should be embraced by the reservation made in her favor, in the first clause of the will.

We perceive no valid ground of objection to the details of the judgment.

Wherefore the judgment is *affirmed.*

Garnett, Dehoney, for appellant.

Leslie, Botts, for appellee.

W. H. SANDFORD *v.* R. D. KEMPER.

Forcible Entry and Detainer—Right of Possession.

In an action for forcible entry, the question as to which party is legally entitled to the possession can not be considered, and it is immaterial whether plaintiff's possession was right or wrong, if it was proved to be actual.

Forcible Entry and Detainer—Action of, When Lies.

An action for forcible entry will not lie in favor of one who gains possession merely as an interloping rambler, or as a mere scrambling possession.

APPEAL FROM OWEN CIRCUIT COURT.

January 3, 1873.

RESPONSE BY JUDGE LINDSAY:

Although the court took the trouble to read "the decisions relied on by appellant's counsel to show that the third instruction asked for was proper, we did not deem it necessary to review them to prove that the principal recognized in each of them was perfectly

consistent, with the conclusion that the mere fact of possession without claim of right" was not such a possession as would support a writ of forcible entry.

Although the opinion in the case of *Smith v. Dedman,* 4 Bibb. 192, does not set out the facts, it is perfectly manifest that the party in possession held peaceably and under a claim of right. So in the case of *Brumfield v. Reynolds,* 4 Bibb. 388. Although in the case of *Chiles v. Stephens,* 3 A. K. Marshall 341, the court says: That "to entitle Stephens to restitution it was incumbent on him barely to prove that at the time Chiles & Peebles entered upon the land in contest he was in fact possessed and that their entry was without his assent or that of his agent," the fact clearly appears that if Stephens was in possession at all it was under claim of title. We fully recognize the fact that it is immaterial whether the possession be right or wrong, if it be perfect and complete, and that the question as to which party is legally entitled to the possession is not to be considered on the trial of a writ of forcible entry. Still to hold that the third instruction comes within this principle would be to decide that if a trespasser without claim of right and for the mere purpose of gratifying his lawless inclination, forcibly drives a man and his family from his house, that he can not expel this mere wanderer and regain his possession without subjecting himself to be again ousted by a writ of forcible entry. In the case of *Hunt v. Wilson,* 14 B. Monroe 36, both parties claimed the lands and the right to the possession.

The possession sufficient to support an indictment for forcible entry, under the common law "must be quiet, peaceable, and actual, not a mere scrambling possession." Bacon's Abridgment, Vol. 4, page 328. Although under our laws the entry need not be actually accomplished by force, but is treated as forcible, if made without the consent of the party in possession, we are not aware that it has even been held that the writ would lie in favor of one whose possession was only such as a mere interloping rambler might be able to obtain. The third instruction fails to recognize this distinction and was properly refused. We can not agree that we failed to recognize in the opinion the fact "that there may be a possession in fact by a person not in fact on the land, but we also recognized the fact that in this case, the evidence conduces to show that appellant attempted to secure possession by a mere scramble, and that

he never became actually seized and possessed of the premises. Petition overruled.

Drane, for appellant.

Craddock, for appellee.

R. B. DUNN *v.* W. O. BRADLEY.

Attorney and Client—Duty of Attorney to Court.

An attorney violates his duty as an officer of the court, in advising or instructing persons applying to him for counsel to attempt a dishonest version of the law, or where the aid of a chancellor is revoked to enable appliant to perpetrate a gross and outrageous fraud.

Attorney and Client—Breach of Duty by Attorney—Fee.

Where an attorney at law gives his client advice by means of which the client's creditors may be defrauded, the attorney is not discharging his duties as an officer of the court, but acts in direct violation thereof, and a promise by the client to pay for such advice will not be implied nor an express promise to pay therefor, be enforced.

APPEAL FROM GARRARD CIRCUIT COURT.

January 3, 1873.

OPINION BY JUDGE LINDSAY:

One item of the account upon which appellee obtained judgment in the circuit court is in these words. "Legal advice to place your property beyond the control of your creditors, $300." Appellee proved that when the law firm of which he was a member was applied to by appellant for advice or information as to the best mode of disposing of his property so as to prevent it from being subjected to the payment of large claims against him as surety, they directed him to convey it to one of his brothers apparently for a sufficient money consideration; afterwards to have the brother then to apply to a court of equity to have the wife empowered to hold property in her own right and transact business as a *feme sole.* They impressed upon him the necessity of having a witness present to see the "payment of the purchase money *or rather what seemed to be such payment.*" The advice thus given was substantially fol-

lowed, and appellee, by way of showing that it was valuable, proved that certain parties who were prosecuting claims against appellant for sums aggregating over $13,000, shortly thereafter dismissed their action at their own costs, and that appellant and his wife were at the time of the trial of this cause in the possession and enjoyment of the property thus fraudulently protected. This appeal presents the question whether an attorney-at-law can recover for services and advice of this character.

The petition shows upon its face, and appellee's proof demonstrates beyond all doubt, that the conveyance from appellant to his brothers and from them to his wife were fraudulent, and so known and intended to be, by the party in whose favor the circuit court rendered judgment.

There is no rule more firmly established than that the "law will not aid in enforcing any contract which is alleged, or the consideration of which is inconsistent with public policy and sound morality." That the transaction out of which this claim grew was contrary to public policy and inconsistent with sound morality does not admit of question.

It has always been the policy of our laws to subserve and protect the interests of creditors, and when the common law, or the rules of equitable procedure have been found ineffectual to protect their rights against the fraudulent schemes and devices of dishonest debtors, the legislature has unhesitatingly given its assistance by statutory enactments conferring additional powers upon the judicial tribunals. Conveyances intended to accomplish such ends as those from appellant to his brothers, and from them to his wife, are denounced by the laws of this commonwealth. as absolutely void as to creditors, purchasers and all other innocent persons, who otherwise would be affected by them. Sec. 1, Chapter 40, Revised Statutes.

They are upheld even as between the parties solely because the courts will not interfere to relieve them from the consequences of their own fraudulent acts.

Appellant enjoys his estate today by reason of the dishonest practices to which he resorted. His success in defeating his *bona fide* creditors possibly emboldened him to resist the enforcement of the claim of the attorney whose advice he followed, when engaged in placing his estate beyond the reach of those to whom he was partly

indebted. He is entitled to no consideration from the court, but, being the defendant in this action, he has the legal advantage of his late attorney. He can not be compelled to pay this claim unless the machinery of the law be used to reward one of its own officers for instructing him as to the means by which it might be successfully disregarded.

An attorney is in one sense an officer of the court. He owes a duty to it, and to the law as well as to his client. He violates this duty, in advising or instructing those applying to him for counsel or instruction to attempt a dishonest version of the law, and much more so when, as in this case, the aid of the chancellor is invoked to enable the client the more successfully to perpetrate a gross and outrageous fraud.

One of the means by which Dunn was to secure to himself the future enjoyment of his estate was a decree of the chancellor empowering his wife to hold property and transact business as a *feme sole.*

The official oath of an attorney at law binds him to discharge the duties of his office according to law. Sec. 1, Article 8, State Constitution. Fidelity to the client neither requires nor excuses advice leading to a violation of the law, nor the commission of an act or acts involving moral turpitude. When such advice is given, or when the client is instructed as to the means by which his creditors may be defrauded, the attorney is not discharging the duties of his office "according to law," but in direct violation of it, and a promise upon the part of the client to pay for such advice will not be implied, nor will an express contract to pay for it be enforced.

As to this claim appellee's petition should have been dismissed.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion. As to the remaining items of the account sued on, a new trial will be awarded.

McKee, Hopper, for appellant.

Bradley, James, for appellee.

F. W. GATEWOOD *v.* EDMOND DUFF.

Husband and Wife—Action for Necessaries—Pleading.

A petition in an action on a note alleged to have been given for necessaries, which fails to allege that the goods were sold and furnished to the wife, or that credit was given to her and not to her husband, is insufficient as against the wife.

Husband and Wife—Liability for Husband's Debts.

A creditor can not apply the proceeds of a note owned by his wife to the husband's debts and then look to the wife for payment of such amount on her debt.

Husband and Wife—Liability of Wife for Necessaries.

A judgment in personam against a married woman on a note alleged to have been executed for necessaries was held to be erroneous.

APPEAL FROM BARREN CIRCUIT COURT.

January 3, 1873.

OPINION BY JUDGE LINDSAY:

Appellant's demurrer to appellee's petition, as amended, should have been sustained. To construe the pleading most favorably to appellee he only charges that the consideration of the note "was necessaries for Mrs. Gatewood and her family." To charge the general estate of a married woman, the articles sold must not only be necessaries, but the debt must have been contracted by her. If the credit be given to the husband, the estate of the wife can not be reached, although she signs the note and subsequently agrees to pay the debt. Appellee fails to allege either that the goods were sold, or were loaned to Mrs. Gatewood in person, or that the credit was given to her and not to the husband. But aside from this appellee's petition should have been dismissed upon the proof. Appellee's own deposition shows conclusively that he did not regard Mrs. Gatewood as bound to pay more than $156.54 of the original indebtedness for which the note was executed. Settle, who was appellee's witness, swears that he was indebted to Mrs. Gatewood in the sum of four hundred dollars, and that after he had reduced his debt to about two hundred dollars his note was assigned to Duff in part payment of claims he held against Gatewood and wife. This

two hundred dollar payment, for which a credit is entered as of date January 28, 1867, more than satisfied Mrs. Gatewood's indebtedness, and Duff had no right to apply the payment to the husband's debt, and still look to the wife for what she may have owed him.

There is still another circumstance which very strongly rebuts the idea that the credit was extended to Mrs. Gatewood at all. The account against her filed by Duff with his deposition shows that some of the indebtedness was credited as far back as October, 1858, that it ran through 1859, 1862 and 1863, and that no note was taken except for seventy-five dollars loaned money, until July 24, 1863. Inasmuch as a married woman's estate could only be bound by an agreement in writing signed by herself and husband, it is very remarkable that Duff permitted this account to remain open for nearly five years.

There is yet another error. The judgment against Mrs. Gatewood is a judgment in personam. At the time the note was given she was a married woman and had no power to bind herself personally. The note might enable the creditor to reach her general estate, but it imposed upon her no personal obligation. The death of her husband did not enlarge her liability. There is nothing in this record showing that she owned any estate whatever at the time the note sued on was executed. Nor does the creditor seek by this proceeding to subject to the payment of his debt any specific estate now owned by him.

The judgment must be reversed. The cause is remanded with instructions to dismiss appellee's petition.

Smith, for appellant.

Lewis Boles, McQuown, for appellee.

JOHN BRACKETT AND OTHERS *v.* ELIJAH GREGORY.

Bankruptcy—Fraudulent Conveyance by Bankrupt.

Right of a bankrupt to recover property held by another for the purpose of passing it beyond the reach of creditors.

APPEAL FROM KNOX CIRCUIT COURT.

January 3, 1873.

OPINION BY JUDGE PRYOR:

The evidence in this case shows that neither of the parties to this controversy have any such right or title to the land in question as authorizes a recovery.

The appellants, it seems from the proof, have the possession, but it is clearly shown that they are holding it for James Brackett and for the fraudulent purpose of placing it beyond the reach of his creditors.

The antedating of the bond for title and the attempt to suborn witnesses in order to sustain the defense are facts not calculated to impress the chancellor with the belief that they have any equitable rights originating from the alleged parol purchase of the land of James Brackett.

The appellee, however, has clearly shown that he has no right to the land except to satisfy the demands of creditors through his assignee in bankruptcy. He shows by his own testimony that he has taken the benefit of the bankrupt law and that the reason that he failed to give in the land as a part of his estate was that it was in litigation. His assignee in bankruptcy is the owner of it and entitled to sell and dispose of it for the benefit of his creditors. If the appellants had shown by proof that his estate had passed to an assignee in bankruptcy it would have prevented the prosecution of the action in appellee's name. They do show a schedule of his property but failed to show that he had gone further and obtained his release. The appellee, however, proves this fact by the witness Goodin, and as he shows the title to be in another his action must fail. He should, however, be permitted to amend if he desires upon the return of the cause by making the assignee in bankruptcy a party and ask to have the land sold to pay his debts, or to assert his own claim to the land if his debts have all been paid.

For the reasons indicated the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

James, for appellants.

———, *for appellee.*

HANNAH M. BOLTON AND OTHERS *v.* MARY E. WILLIS AND OTHERS.

Adverse Possession—Priority of Right.

As between persons who claim title by adverse possession, the law favors those who have long held undisturbed possession rather than those who are asserting possession for a much shorter duration.

APPEAL FROM HART CIRCUIT COURT.

January 3, 1873.

OPINION BY JUDGE PRYOR:

The appellees show a continued and uninterrupted possession of the land in controversy for forty years prior to the institution of the present action. The facts proven conduce to show that Gaddie, the ancestor of the appellees, purchased the land of one Dudley Rountree in the year 1824 or 1825. Rountree purchased of one Snead in the year 1813, and Snead acquired his title under a sale of the land for taxes made in the year 1806 and received a deed from the register of the land office in the year 1812. The land was sold for taxes due by Long, the ancestor of the appellants, and under whose title they now claim to hold as against the appellees. There is no written evidence of title exhibited by the appellees so far as the record shows, but their claim of title was asserted through their ancestor, Gaddie, in the year 1825 under his purchase from Rountree. He took the actual possession of the land in the year 1826 and has held possession from that time until his death, and the appellees, his heirs at law, have continued in the possession since that time. Gaddie had the land surveyed in 1824 or 1825 and has all the time claimed to a well-defined marked boundary. He cleared and opened a *farm* on this land and made many improvements upon it, erecting a dwelling house and other outbuildings for the convenience and enjoyment of his home.

The defendant so far as the record shows never made any actual entry on the land until the year 1844. Thirty-eight years had then elapsed from the date of the sale to Snead, thirty-one years from the date of the sale of Snead to Rountree and twenty years from Rountree's sale to the ancestor of the appellees.

The actual occupancy of the disputed boundary by Gaddie, as well as the extent of his claim, was as *noto vois* as the Pollard patent for the 19,000 acres of land under which the appellants derive their title. The appellants lived within two miles of Gaddie's residence, both parties living within Pollard's patent boundary. Their families were upon intimate terms, and no complaint was ever made by the appellants of the alleged appropriation by Gaddie of this tract of land to his own use and possession, until shortly before the institution of this suit, when the suit in equity was instituted in the year 1854 by the appellants against the unknown heirs of Pollard and Phillips as well as the tenants in possession for the purpose of perfecting and quieting their title to all the land within the Pollard patent. Gaddie was not made a defendant, although at that date the appellants must have known through E. V. Bolton that Gaddie was asserting claim to the boundary of land purchased by him of Rountree, and his actual occupancy and the improvements made by him were so notorious as not to escape their attention.

The proof also tends strongly to show that Gaddie's right to this boundary of land was recognized as that of the appellees, or their ancestor, by the appellants.

E. V. Bolton entered upon this land by the consent of Gaddie and under an agreement to pay him for all that portion of it included within his, Gaddie's, boundary and looking to the statements of E. V. Bolton connected with appellants' own proof, he at the time he made his improvements, was obtaining information from Gaddie as to the extent of his boundary, and asserted no right or claim to enter within Gaddie's survey by reason of his mother's claim.

It is true that he afterwards refused to surrender the possession, or pay for the land, and claimed to hold under the appellants, but there is no proof showing that the entry was made under the title of the appellants, but on the contrary it is conclusive that it was made under Gaddie's title so far as the disputed land is concerned, and with the agreement to pay therefor on the part of E V. Bolton. Bolton seems to have been avoiding any interference, and made inquiry of Gaddie as to where he should locate the buildings in order to place himself outside of his boundary.

It is true that the possession of a junior patentee must have continued for such a length of time as to toll the right by those claiming under an older patent in order to give title, and it is also well

settled that an entry by the elder patentee or those claiming under him within an interference between an elder and junior patent before the right of entry is tolled, would prevent the running of the statute, and give to the elder patentee the possession to the extent of his boundary, but this principle can not be made to apply in the present case. No entry was ever made by the appellants within the boundary of the appellees, and even if the entry of E. V. Bolton can be regarded as having been made by him as the tenants of the appellants, then the possession of Rountree and his vendee, Gaddie, with their claim of title had already constituted a complete bar to the appellants' recovery. The entry by the appellants in 1844 gave them no right to enter upon the boundary of Gaddie for the reason that his vendee and himself had then held the possession of the land for twenty years. It is conceded that the farm of the appellees is within the boundary of the deed to Rountree. The latter had the land surveyed to Gaddie in 1824 and his possession must enure to the benefit of his vendees. Rountree claimed and held under an executed contract made in 1813. The appellees are not controverting his title, nor did they or their vendor enter upon the land as tenants of Long, but claimed by reason of the purchase from Snead. Rountree and the appellees are not looking to the appellants for title, but assert an absolute right to the land by reason of their purchase from those who had deeds regularly recorded for this land as far back as 1812. *Gregory v. Nesbit,* 5 Dana 422; *Bell v. Fry,* 5 Dana 345; *Moore v. Webb,* 2 B. Monroe 282.

Conceding, however, that no adverse holding can be relied on by the appellees, still we can not decide from the facts in this record that the deed to Snead is null and void. This deed was made in 1812. The certificate given to Snead evidencing the sale was doubtless for fifteen thousand acres out of the nineteen thousand acre patent. The land had been entered by Long or some one for him, the taxes were unpaid, and this variance, whether material or not, between the certificate and the deed, will not invalidate it as against innocent purchasers who obtained their title under it more than half a century ago, and with that title have held the undisturbed possession for forty years. Such a possession should be favored in law, and particularly against those who are asserting only a possessory right of a much shorter duration.

This court has already decided in regard to the other portions of the Pollard patent boundary in a controversy between the appellants and other parties in possession, as purchasers or tenants, that the deeds from Pollard to Phillips and from Phillips to Long could not be read as evidence to establish title, and whilst the judgment or record evidencing the title of the appellants (in the suit in equity by them against Pollard's heirs) to this land should have been admitted, as the appellants had the right to show title in themselves or even in a stranger in order to defeat the action, still we can not see how they were prejudiced by the action of the court in rejecting it as evidence, as the purchase by Rountree and the possession under it must necessarily have resulted in a verdict for the appellees. These deeds, by which the appellants are divested of title, are offered and read as evidence by them, and even if the commissioner's deed in the suit in equity and the patent connect the appellants with Long's and Phillips' title, still as to the land in controversy embraced within the boundary of the deed to Rountree the appellees exhibit such a title as authorizes a recovery.

The evidence shows beyond doubt that the land in controversy is within the boundary claimed by the appellees and that E. V. Bolton entered under Gaddie, their ancestor, and not under the appellants. The appellant was not entitled to notice, nor was a demand necessary for the possession, as after his entry upon the land he ignored the title of Gaddie, and claimed to hold under that of his mother.

The instructions asked for by the appellants were all properly refused. The only questions for the jury to determine were as to the extent and duration of appellees' possession. These propositions were embraced in the instructions given at the instance of the appellees.

Judgment *affirmed.*

Underwood, for appellants.

Barnett, Edwards, Harding, for appellees.

JAMES E. THOMPSON *v.* PHILLIP JOHNSON AND WIFE.

Pleading—Inconsistency Between Pleading and Exhibit.

Where an allegation in pleadings is inconsistent with a deed and agreement which are made exhibits thereto, the deed and agreement are controlling.

Courts—Jurisdiction Over the Person.

A person not a resident of the county is not within the jurisdiction of the court, unless he is jointly bound with another defendant who was served with process in the county.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 4, 1873.

OPINION BY JUDGE LINDSAY:

Although it is alleged in the petition of Sallie Johnson (late Chiles) and in the answer and cross-petition of David P. Carr that the agreement of the appellant, Thompson, was to pay to Carr for the use and benefit of Sallie Chiles the amount for which he might be liable as surety on the bond of her guardian, the agreement of September 11, 1866, and the deed from Estill and Carr to appellant of date October 25, 1866, show that the undertaking was directly to Carr, and that the payment was to be made to him for his indemnity, and in no sense for the use or benefit of said Sallie. The agreement and deed are made exhibits in both the original and cross-petitions and must be held to control, although the allegations in said pleadings are inconsistent with them.

There was no privity of contract between the ward, now Mrs. Johnson, and the appellant. If she has any right of action against him, on the undertaking to Carr, she acquired it by assignment or holds it by the right of equitable substitution to the securities held by Carr to protect him on account of his being surety on her guardian's bond.

In either event, the liability of Thompson to her is collateral to that of Carr. They are in no sense jointly bound to her.

She recognizes this fact by suing Carr on the guardian's bond, and Thompson on his agreement to pay to Carr such amount as the latter owes her as surety for her guardian.

The action was instituted in the Fayette Circuit Court, and process was served on Thompson in Mercer County.

Conceding that Mrs. Johnson had the right to sue Thompson, the Fayette Circuit Court has no jurisdiction of his person in this action unless he is jointly bound with one of the defendants served with process in Fayette County.

The action against Thompson is embraced by Section 106, Civil Code. He was the only defendant to the action against him. Chiles, the guardian, occupied a neutral position in the litigation between Mrs. Johnson and himself and Carr properly made himself a co-plaintiff with Mrs. Johnson by his own petition. He was not a joint defendant with either Chiles or Carr in the suit on the guardian's bond, nor were they or either of them jointly bound with him on his undertaking to Carr. This fact the court recognizes by rendering separate and distinct judgments on the two causes of action.

Thompson was not a necessary party to the suit on the guardian's bond; and Carr ought to have been a co-plaintiff in the suit against him, and to that suit Chiles was neither a necessary or proper party.

It follows, therefore, that by joining Thompson as a co-defendant with parties with whom he had no joint interest, and with whom he was under no joint liability to the plaintiff, he was compelled to leave the county of his residence to defend an action, which could only be prosecuted in the county in which he lived or was served with process. His plea to the jurisdiction of the Fayette Circuit Court ought to have prevailed.

The judgment is reversed and the cause remanded with instructions to dismiss the petition of Mrs. Johnson and the cross-petition of Carr so far as relief is sought against appellant.

Breckenridge, Buckner, for appellant.

Carr, for appellee.

JOHN MADIGAN *v.* COMMONWEALTH.

Disorderly House—What constitutes.

One who permits disorderly, drunken, and noisy persons to frequent his house and thereby disturb the peace and quiet of the neighborhood, is guilty of keeping a disorderly house.

Disorderly House—What Constitutes.

If by the manner in which accused kept his house, or by inducements held out by him, in connection with his house and the business therein carried on, he consented to or encouraged disorderly crowds to assemble on the sidewalk immediately in front of his house he is guilty of keeping a disorderly house; but the mere fact that drunken and disorderly persons were permitted to assemble and did assemble on the sidewalk is not sufficient to authorize a conviction.

Disorderly House—What Constitutes.

The fact that disorderly crowds assembled in front of accused's house with his consent and in consequence of his house being there located, does not necessarily render accused guilty of keeping a disorderly house, it being not only necessary that he should consent to the assembly but that he should procure or encourage the assembly by the manner in which he kept his house or conducted his business therein.

APPEAL FROM CLARK CIRCUIT COURT.

January 4, 1873.

OPINION BY JUDGE LINDSAY:

The instruction given at the instance of the attorney for the commonwealth authorized the jury to find the defendant guilty of keeping a disorderly house in case they should believe from the evidence to the exclusion of all reasonable doubt, that he kept a house at which divers evil disposed, drunken and disorderly persons were permitted to assemble and did assemble habitually in, *or on a public street and pavement immediately in front of, and adjoining his said house, and there block up said street,*" etc., and so conduct themselves that peaceable citizens were compelled to pass around the crowd while on their way to business or to church, etc. The objection to this instruction is that it makes appellant responsible for the habitual assemblage of disorderly and drunken people upon the public street, in front of his house, no matter whether or not he procured or encouraged them to assemble.

If he permitted disorderly, drunken and noisy persons to frequent his house and thereby disturb the peace and quiet of the neighborhood, he kept a disorderly house, and if by the manner in which he kept his house, or by inducements of any character held out by

him, connected with his house and the business therein carried on, he consented to or encouraged disorderly crowds to assemble on the sidewalks immediately in front of it, he was also guilty of such offense; but the mere fact that drunken and disorderly persons were *permitted* to assemble and did assemble on the sidewalk, a public place over which he had no individual control, was not enough to authorize a conviction.

The modification to Instruction No. 2 asked by appellant is liable to the same objection.

The fact that the disorderly crowds assembled in front of his house with his consent, and in consequence of his house being there located, did not necessarily render him guilty of the offense charged. It was necessary not only that he should consent, but that he should procure, or encourage the assemblages, by the manner in which he kept his house, or conducted his business therein.

As we have no power to reverse for error in overruling the demurrer to the indictment, nor because the verdict is against the weight of the evidence, it is not necessary that we should consider these questions, but for the errors pointed out the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

T. S. Tucker, for appellant.

Breckenridge & Buckner, for appellee.

WILLIAM N. SHELTON, ETC., *v.* PAULINA SHELTON, ETC.

Wills—Life Estate With Contingent Remainder.

A will held to grant to a tenant in possession of land a life estate with contingent remainder to others dependent on their surviving the tenant.

APPEAL FROM BOYLE CIRCUIT COURT.

January 4, 1873.

OPINION BY JUDGE HARDIN:

This court concurs with the circuit court in its judgment, except in the construction therein given to the second clause of Thomas Shelton's will. As to that provision we are of the opinion that the intention of the testator was to devise to his two daughters, Jane St. Clair and Mary P. Stone, the land purchased of Bryant, to take effect and vest in them severally upon their surviving the tenant for life, Paulina Shelton, but with an alternative devise to the bodily heirs of either of them who might not survive the tenant for life; and that the title in fee simple will become vested absolutely in the one or the other persons or class of devisees, at the death of the said Paulina, or pass to the testator's heirs at law, depending upon the contingency indicated. *Robb v. Belt, etc.*, 12 B. Monroe 643.

Wherefore the judgment, being inconsistent with this construction of the will, it is reversed and the cause remanded with instructions to render a judgment in conformity to this opinion.

Vanwinkle, C. H. Rodes, for appellants.

Durham & Jacobs, for appellees.

A. J. PAYNE *v.* JAMES MONK, ETC.

Appeal—Reversal—Pleading.

The failure to file an amended petition at the term of court succeeding the filing of the mandate of the Court of Appeals was held not ground for reversal.

Pleading—Amendment—Dismissal.

When leave has been given plaintiff to amend his petition but he fails to do so, a motion should be made to dismiss the action, or a rule asked for requiring plaintiff to show cause why he had failed to prepare his cause for trial.

Pleading—Amendment—Discretion of Court.

It is discretionary with the court to permit or refuse the filing of an amended petition.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

January 4, 1873.

Opinion of the Court.

OPINION BY JUDGE PRYOR:

The failure to file the amended petition at the term of the court succeeding the filing of the mandate of this court is no ground for reversal. Leave had been given the appellee to amend his petition and upon his failure to do so, a motion should have been made to dismiss the action, or a rule asked for requiring the appellee to show cause why he failed to prepare his cause for trial. The amended petition was filed and an issue made upon it by the answers. It was discretionary with the court to permit it to be filed or not, and we can not see how the appellant has been prejudiced. He has been fully heard and much proof taken on both sides. The judgment was proper and must be *affirmed.*

A. J. Moore, for appellant.

Kirtly, for appellees.

JOHN W. ADAMS *v.* JOHN ECKLER.

Vendor and Purchaser—Rents and Interest—Set-off.

Where the purchase-price of land has been paid, the court will set off rents and interest; but will not do so where the purchaser enjoys the land and holds on to the purchase-price.

APPEAL FROM HARRISON CIRCUIT COURT.

January 5, 1873.

OPINION BY JUDGE LINDSAY:

This court has never decided that the purchaser was entitled to specific execution of an oral contract for the sale of lands.

Eckler was not confined to the interest on the price agreed to be paid for the land, in the way of rents. When the purchase price is paid, courts will set off rents and interest, but not so where the purchaser enjoys the land and holds on to the price agreed to be paid. The judgment of the court as to rents and improvements is as favorable to appellant as the testimony authorized.

It is therefore *affirmed.*

Trimble, for appellant.

Ward, for appellee.

PETER W. ESTILL *v.* JESSE COBB, ETC.

Fraud—Evidence.

The evidence was held to show that the purchaser of mules, who knew that he was insolvent at the time of the purchase, did not buy them with the intention of not paying for them.

APPEAL FROM MADISON CIRCUIT COURT.

April 5, 1873

OPINION BY JUDGE LINDSAY:

The proof in this case does not sufficiently sustain the charge of fraud. It may be that Jesse Cobb had misled Smith as to his solvency, but it does not appear that it was done for the purpose of inducing him to vouch to Estill as to his ability to pay for the mules. It may also be true that Cobb knew he was insolvent when he bought the mules, but it does not necessarily follow that he did not intend to pay for them. He may have believed that he would be able finally to extricate himself from his difficulties and pay all his debts. The fact that he kept the mules on his place, in Madison County a few miles from where Estill lived for over four months, shows that it was not his object to buy them on credit, and then convert them into money, and refuse to pay for them. He seems to have given up everything to his creditors when he made the deed of assignment for their benefit.

Judgment *affirmed.*

Burnam, Turner, Smith, for appellant.

Wm. Chenault, for appellee.

MARY C. STOW, ETC., *v.* EDWARD CURD, ETC.

Executors and Administrators—Settlement.

Statement of manner of charging and crediting an estate in making settlement.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 6, 1873.

RESPONSE BY JUDGE LINDSAY:

In response to the petition by appellants for a modification of the opinion herein rendered December 16, 1872, we state that the responsibility of Thompson's estate to account for one-sixth of the profits realized by him on the sales of land to innocent purchasers, does not turn upon the fact that there was no necessity for the sale to Curd. The fact was alluded to as tending to render more conclusive the presumption that the sale was not made in good faith in the exercise of the power conferred by Sledd's will.

If it had been characterized by good faith, and Thompson had not himself been interested as a purchaser, he would not have incurred liability, although there was no necessity for making it. The one-sixth of the amounts realized by the sales with legal interest thereon is the true criterion of the recovery, and as there is nothing in the record showing that any of the land was sold for less than its actual value at the time, this will place appellants in statu quo and they can ask nothing more.

We are satisfied that, by the opinion, Thompson's estate must be credited with the amount received from Curd and paid out for the benefit of Sledd's devisees in ascertaining the profits for which said estate is to account, as requested by appellees in their petition for a modification. We give the manner in which the account should be stated.

First. Charge Thompson's estate with the one-third of the amount for which each tract of the land sold, with interest from the time the money was paid to him, or the payments became due and commenced bearing interest.

Second. Credit his estate with the $666.66, the amount paid to him by Curd, and allow him interest thereon from the time he charged himself with such sum as the guardian for Seaton Sledd's heirs.

For one-half the amount remaining after deducting the credit so made up, Thompson's estate should account.

In making this settlement due regard should be paid to the manner in which the former settlements of Thompon, as executor, and the auditor's report in this case were made up.

The creditors' report shows upon its face that it is based upon the settlements of Thompson with the Calloway County Court, and

the inventory and sale bills reported by him. None of these papers are in the record; hence we cannot determine whether or not it will be necessary to modify in any particular the basis of settlement herein suggested.

If it be necessary, of course the circuit court will make the necessary modification.

P. Palmer, for appellants.

Bigger, Moss, for appellees.

HENRY BROWN *v.* ALEXANDER MAYS AND WIFE.

Guardian and Ward—Manner of Making Settlement.

Statement of manner of making settlement by a joint owner of accounts and guardian.

Husband and Wife—Support of Step-child.

A step-father can not charge the estate of his step-child with the cost of support of the step-child, where he voluntarily assumed the burden, unless the pecuniary condition of the step-father and of the step-child required it.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 6, 1873.

OPINION BY JUDGE PRYOR:

The commissioner, in making a settlement of the accounts of Brown as guardian, should first deduct from the purchase price of the land the amount allowed the widow as of the date of the sale, viz., $213, also all the costs and expenses of the suit incurred by and allowed the guardian. On the balance is to be computed the interest until the maturity of the last note, and this interest added to the principal gives the aggregate amount due by the guardian to his ward at the time the last note fell due. From this should be deducted any expenses incurred by the guardian in the clothing, education, etc., up to that time. Interest should then be charged against the guardian, making biennial accounts until his removal as guardian and the appointment of Rathburn, crediting him by the amounts paid for the ward. In making the settlement the commissioner should be directed to exclude entirely therefrom any account or items for board charged by or allowed either guardian.

The aggregate amount of each year's expenses should be deducted from the accrued interest, that is, the interest accruing in any one year should be credited by the expenditures for that year.

Rathburn intermarried with the mother of Mrs. Mays in a few years after the death of her first husband, and his domestic relations were then such as precluded him from charging or exacting board of the infant child unless his pecuniary condition required it. The mother and stepfather were entitled to her custody and also her services, and, having had both, should have contributed to her support. Valuable services were rendered by the daughter from the age of twelve until her marriage. The petition alleges that Rathburn owned a farm and had ample means to support the mother and her offspring. The answer only denies that he had any means of supporting her. Upon this subject there is no proof introduced by either party. The relation he assumed towards the child upon his marriage with the mother will prevent the chancellor from making him an allowance for the board of the daughter, when he voluntarily assumed the burden, unless the pecuniary condition of the child authorized it, or the impoverished condition of the stepfather demanded it.

The only witnesses who speak of the services of Mrs. Mays say that they were worth not only her board, but her clothing also. Brown should not have been credited by any board paid for the ward, without charging Rathburn, who wrongfully received it, with having that amount in his hands belonging to her. If Brown had paid it to any one else Rathburn could have compelled Brown to account for it, and as he has received it, he should be charged with the amount.

Either of the guardians, however, are liable to the ward for the amount so wrongfully paid. The two guardians should be allowed to amend their pleadings, with a view of settling their accounts with each other, but not to affect the rights of the appellees.

The settlement made by the commissioner is so confused and badly copied into the record as to render it difficult to understand it. There is no receipt for $270 paid by Brown to Rathburn on the 4th of July, 1866, for which he seems to have had no credit. He is, however, credited by $220 in Rathburn's settlement and this is doubtless intended for the same sum, as there is no receipt for the last amount. It may be that the figures $270 ought to be $220, or

vice versa; if so, the correction can be made upon the return of the case. The item of $36.76, amount paid by Brown to Panotle, Adm'r, should be allowed him. The case should again be referred to the commissioner for settlement upon the basis herein indicated and without regard to the former settlement made by him. Although there are errors in the record as against Brown, still the appellees as against him have been more prejudiced by the judgment than the appellant. The judgment is therefore reversed on the original and cross appeal at the costs of the appellant. The judgment is also reversed on the appeal of Mays and wife against Rathburn and the cause remanded for further proceedings consistent with this opinion.

Browne & Lewis, for appellants.

Hays, for appellees.

SALLY JONES, ETC., *v.* LITTLETON JONES, ETC.

Descent and Distribution—Child of Void Marriage.

Under 1 M. & B. Stat. 565, and R. S., ch. 47, § 2, subd. 3, legitimatizing the issue of void marriages, the daughter of a void marriage is capable of inheriting from her father.

APPEAL FROM BOURBON CIRCUIT COURT.

January 6, 1873.

OPINION BY JUDGE PETERS:

It is satisfactorily established by the evidence that appellees, Littleton Jones and his sister Julia, are the children of the intestate Edward Jones, born in lawful wedlock. But the further facts are established by the evidence that said Edward Jones abandoned his wife, Katy, the mother of said appellees, about 1844, and removed from Nashville, Tennessee, to Kentucky, and perhaps in 1850 married appellant, Sally Jones, cohabited with her and recognized her as his wife when her daughter Christiana was born. At the time said intestate married appellant Sally, his wife Katy was living, and from whom he had not been lawfully divorced. His marriage with appellant Sally Jones was null and void. But the question then arises as to what is the condition of the issue of the last marriage.

The 19th section of an act approved 19th of March, 1796, 1 M.

& B. Statute Laws of Ky. 565, provides that the issue in marriage deemed null in law shall nevertheless be legitimate, and consequently such issue would take by descent from its parents. That was the law of the state in 1850, when the intestate Edward Jones married the appellant Sally, and the rights of appellant Christiana must be measured by the law in force at the time of the marriage of her parents.

But if tested by the Revised Statutes the rights of Christiana would not be changed. By Subdivision 3, Sec. 2, Chapter 47, R. S., the marriage of her parents would be void, but by Sec. 3 she would be legitimate, and capable of inheriting from her father. Vol. 2, p. 4, R. S.

So that in either aspect of the case Christiana Jones was entitled by descent to an undivided one-third of the real estate of intestate. Sally Jones was not entitled to dower in the estate, nor are the facts presented in her amended answer sufficient to entitle her to any relief, but the judgment must be reversed and the cause remanded with directions to adjudge to Christiana Jones the one-third of the house and lot described in the petition, or to the one-third of the proceeds and for further proceedings consistent herewith.

Hargis, Huston, for appellants.

Davis, for appellees.

CHAS. H. WOOLLUMS *v.* H. H. MURRAY, ETC.

Alteration of Instruments—Substituting Another as Drawer of Bill.

Where a bill, after being drawn and accepted and while in the hands of the holder, was so altered, without the drawer's knowledge or consent, as to substitute another as drawer, it was a material alteration such as will relieve the original drawer from liability thereon.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 7, 1873.

OPINION BY JUDGE HARDIN:

If it be true, as alleged in the answer, and the evidence conduces to prove, that the bill accepted by the appellant was also

drawn by him and not by the appellees, as the one sued upon purports to have been, or in other words, that the paper as originally drawn and accepted was afterwards, while in the holder's possession, so altered, without the appellant's knowledge or consent, as to substitute the appellees as drawers for the appellant, thereby changing the character of the paper and destroying its identity, we must regard the alteration as material, and as one which operated to relieve the appellant from liability on the paper in its present form, or rather as imposing none upon him. Whether he may not still be liable on the bill as originally executed, as on account for the lumber which seems to have been the consideration of his acceptance, may depend on ulterior facts not fully disclosed in this record. But however this may be, the instruction given by the court to the jury, in substance and effect, that notwithstanding the erasure and substitution of the drawer's name, the appellant was still liable on the paper, if originally given for a debt to the appellees, can not be sustained. It seems to us to be inconsistent both with other instructions given by the court, and with our own views of the law of the case as herein indicated.

Wherefore the judgment is reversed and the case remanded for a new trial on principles consistent with this opinion. On the return of the cause the plaintiffs should be allowed to file their amended petition, which was offered and rejected.

Breckenridge & Buckner, J. T. Shelby, for appellant.

Johnson & Brown, for appellees.

ZEB WARD *v.* F. M. GEORGE, ETC.

Attachment—Stay of Proceedings.

The attorney of an attachment plaintiff has power to direct a stay of the attachment proceedings.

Attachment—Release of Levy.

An order by the attorney of the attachment plaintiff does not operate to release the levy.

Attachment—Surrender of Property.

Whether there was a surrender to attachment defendant of the property attached, was held a question for the jury.

APPEAL FROM JESSAMINE CIRCUIT COURT.

January 7, 1873.

OPINION BY JUDGE PRYOR:

We perceive no reason for disturbing the judgment of the court below. Conceding the right of the appellant to recover, the damages could be merely nominal. There is no allegation or proof showing any judgment against the sub-tenant for the amount of the rent or any order of court sustaining the attachment. The appellant dismissed his case and the attachment was thereby necessarily discharged, it may be that the attachment was discharged or the case dismissed because as the appellant insists, the property had been released; still we can not well see how a recovery can be had against the sheriff for the value of the rent when there is nothing in the record showing that the appellant was entitled to enforce his claim as against the tenant, either by reason of a judgment for the rent, or the levy of the attachment upon the property. If the attachment had been sustained and the appellant thereby invested with the power to subject the property levied on to its payment, the sheriff would then have been liable by reason of the surrender of the property to the debtor. We are not prepared to say that the direction of the attorney to stay proceedings on the attachment was exceeding his authority as such. The evident object of this order by the attorney was to authorize the sheriff to leave the cattle upon the premises where he found them when the attachment was levied and did not operate as a release of the levy. Whether there was a surrender to the defendant of the property contained in the attachment by the sheriff was a question for the jury, and although the weight of evidence may be with the appellant, still the verdict in our opinion was authorized by the proof.

The case, as presented upon appellant's own testimony, would make the sheriff only nominally liable for either surrendering the property to the tenant or making a false return.

In this view of the case the appellant was not prejudiced by the instruction given for the appellee. The judgment is *affirmed.*

Breckenridge, Buckner, for appellant.

Thornton, Turner, for appellee.

M. RAGACINI *v.* G. S. SKILBECK AND WIFE.

Husband and Wife—Agency of Wife—Action.

In an action against a husband and wife, where the evidence shows that the wife merely acted as the agent of the husband, judgment can not be rendered against the wife, the husband alone being liable.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 7, 1873.

OPINION BY JUDGE PETERS:

This record contains two judgments against the appellant, one in favor of Albert S. Berry and the other in favor of Skilbeck and wife, and this appeal is prosecuted from both judgments.

The appellant leased from Skilbeck and wife certain real estate in the city of Newport for the period of six years from the 19th of January, 1864, at a yearly rent of $75. Three hundred dollars of the renting was paid in hand in a note due the appellant by Skilbeck and wife, and for the balance, $150, she executed her note, payable to G. S. Skilbeck in six months from date. The appellant took possession of the leased premises and before the expiration of her lease, Skilbeck and wife, by a conveyance of record, sold the property to the appellee, Berry. After the expiration of the lease Berry brought an action of ejectment against the appellant for the real estate conveyed him by Skilbeck and wife, and the appellant resisted a recovery on the ground that before the expiration of her lease and prior to the purchase by Berry, she had, by a parol contract, purchased of Skilbeck and wife the land property, and that Berry had notice of her purchase. She also alleges that she made payments to Wm. Skilbeck as agent of her husband, of several hundred dollars, and made valuable and lasting improvements on the property. This answer is made a cross-petition against Skilbeck and wife, and also Berry, all of whom answer, denying the allegations of the cross-petition. There is no proof whatever showing that the appellee, Berry, had notice of any purchase made by the appellant of this property, either from Skilbeck or his wife, having obtained a deed from Skilbeck and wife, and the lease to the

appellant, having expired before he instituted his action, his right to recover can not be questioned, and the judgment in his favor is affirmed. The questions arising between the appellant and Skilbeck and wife are more difficult of solution. Wm. Skilbeck seems to have been the active party in making all the contracts with the appellant and received the money (if any was paid) as the appellant alleges in her cross-petition, as the agent of her husband. When she leased this land or lots of Skilbeck and wife she held the note of the two, secured by mortgage for three hundred dollars, which she surrendered and gave her note for $150, payable in six months, to the husband. How this note for $150 was paid off does not satisfactorily appear. The appellant was an old, illiterate, ignorant German woman, and seemed to have implicit confidence in the fairness and friendship of Wm. Skilbeck. After she leased the premises she sublet some part of the property to a negro by the name of Dudley, and when Dudley made his payments of rent, Wm. Skilbeck was generally present and sometimes received the money. She proves by one witness who had applied to Wm. Skilbeck to lease the property, that the latter informed him that she had sold it to the appellant, and by another, the wife of Dudley, the colored man, that at one time Wm. Skilbeck received some of the rent money, and said to the appellant "that she would set it down and it would go for the place." In 1866, two years after the lease commenced, Wm. Skilbeck made the following memorandum purporting to be a receipt: "Rec'd four hundred dollars up to this date, Aug. 30th, 1866. 33 dollars received $15 on the rent, rec'd fifty dollars on the rent June 21, rec'd $15 and $27 on rent."

This memorandum is in the handwriting of Wm. Skilbeck, and it is proven by a colored woman (the wife of Dudley) who seems to have more than ordinary intelligence for one of her race, "that when this writing was prepared by Wm. Skilbeck, that the appellant asked the witness to read it, and, upon reading it, she informed the appellant that Wm. Skilbeck ought to sign it, that it would be useless without his signature." Wm. Skilbeck protested his friendship for the old lady, and said it would be all right without it. The cross-petition charges the wife of Skilbeck with having received this money as the agent of her husband. The agency is not denied and the only response is, "that no money was ever paid, but the lease money." The reply of both Skilbeck and wife is evasive upon the

subject of this receipt, and calculated to create suspicion of unfair dealing on their part, towards the old German woman. They say that this was a mere memorandum of the rent paid by Dudley, the colored man, to the appellant, so as to enable her to know how much she had received from him. Dudley had only been in the possession of his lease for about six months, and could not have owed the appellant exceeding ninety dollars. This money was paid and received by some of the parties connected with this leased property. Dudley, the colored man, could not have paid it because he, if none of his rent had been paid, would owe only $90. Skilbeck and wife did not pay it for the reason that it is not claimed that they were indebted to the appellant. The appellant has the possession of the paper and it was evidently given to her for some purpose, and the facts proven indicate very clearly that it was written by Wm. Skilbeck as evidencing the amount paid him by the appellant on a parol contract for the purchase of the property sold Berry. She wrote the receipt, as herself and husband both admit. She ought to be able to explain why it was written, and to whom it was intended to be executed. If it was intended for Dudley it was for money he never paid, but if intended for the appellant, and its possession by him is almost conclusive of this fact, we are then constrained to adjudge from all the evidence appearing in the record that the appellee, Skilbeck, and wife were the recipients of this money, under the alleged parol contract for this property.

There is some testimony showing that the appellant, when learning of Berry's purchase, became very angry and said she wanted to buy this property herself. This statement can not, if true, be reconciled with other prominent facts, shown in the cause, the truth of which is conceded by the appellant. The appellant made some improvements on this property, but the testimony shows that these improvements added but little, if any, to its value. She also paid the taxes due the state upon this realty, and all her actions taken into consideration under the proof on this subject evidence the existence of the alleged parol contract. If the sheriff's receipt contributed for the taxes was not genuine, or not in payment for the taxes due on this ground, it would have been an easy matter for the appellees to show that they paid the taxes and not the appellant. It may be that the items for rent charged alleged to have been received by Wm. Skilbeck were in payment of the $150 note, and we are inclined

so to judge, but the sum of four hundred dollars, with interest from the 30th of August, 1866, the appellant is entitled to recover, also the amount of the taxes paid by her on the property. There is nothing in the record showing that the land ever belonged to Wm. Skilbeck and even if there was, the same has been converted into money, and no claim is urged by the wife as against the husband out of the proceeds of sale. She acted as his agent in all these transactions, and the court below, upon the return of the cause, should require the appellee, Berry, to pay the amount of money due appellant out of the purchase money owing by him.

The cross-petition seeks to recover the money in the hands of Berry. He admits an indebtedness of $1,000. No judgment can be rendered as against Wm. Skilbeck, her husband being alone liable by reason of her acts as his agent. The judgment in favor of Skilbeck and wife is reversed and the cause remanded for further proceedings.

E. W. Hawkins, for appellant.

J. R. Hallam, for appellees.

W. O. CRENSHAW *v.* ALISSA JARVIS, ETC.

Equity—Useless Procedure.

A court of equity will not compel the payment of money and a commission for collecting the sum, where the money would have to be paid back as soon as collected, since it would be compelling a useless thing.

APPEAL FROM SCOTT CIRCUIT COURT.

January 7, 1873.

OPINION BY JUDGE PETERS:

It seems to the court under the judgment of the 18th of April, 1869, it was the duty of the master to collect so much of the purchase money of the land from appellant as would be sufficient to pay the owners of the four-sevenths thereof what they would be entitled to and the proposition of appellant's costs, expenses and allow-

ance therefor allowed out of the land money, and for the residue to have credited him on his sale bonds, as he was in the judgment directed to pay three shares to him. It would be useless, and might be oppressive to coerce him to pay these three shares to the commissioner, and then for him, immediately on receiving the amount, to pay it back; a vain and useless transaction, which the law will never require to be done, and which we will not interpret the judgment referred to as authorizing. With this understanding of the judgment the court below, in the case of *Crenshaw v. Cantrell, etc.*, should have ascertained the amount on the sale bond which was unpaid and that would be required to satisfy those entitled to the four-sevenths of the same, and appellant's proportion of the costs, expenses, and allowance charges on the land fund, and to have dissolved the injunction with damages for those amounts, and for the residue of the bond, perpetuated the injunction. It is not consistent with the principles of equity to make appellant pay commissions for collecting money from him, which must be paid back to him as soon as collected.

Wherefore, the judgment dismissing appellant's petition and dissolving his injunction in the case of *Crenshaw v. Cantrell, etc.*, as to the amount of the sale bond which last matured, is reversed and the cause remanded for a judgment and for further proceedings consistent herewith. His pro rata of the costs, expenses, etc., should be ascertained and that amount included in the amount for which the dissolution should go.

As to the judgment in the case of *Crenshaw v. Jarvis, etc.*, although Mrs. Jarvis had not an express authority, from the distributees, or all of them, when she rented the land, still what she did was acquiesced in and ratified by their subsequent conduct, and the settlement of her accounts by the master, including the charge against her for the rents, and the judgment of the court against her for the same in favor of those entitled thereto, discharges appellant from all responsibility. His injunction was properly dissolved and his petition against Mrs. Jarvis properly dismissed, and the same is, therefore, *affirmed*. The question of damages on the dissolution of an injunction is one of discretion to some extent, at least, with the circuit judge and, perceiving no abuse of

that discretion in this case, the judgment is affirmed on the cross-appeal.

Polk, Robinson, for appellant.

Prewitt, for appellees.

MARY MALONEY, ETC., *v.* ST. LOUIS MUTUAL LIFE INS. CO.

Courts—Jurisdiction—Ordinary Docket.

An action founded upon an insurance policy executed and delivered, and also upon a contract for insurance not evidenced by a policy, is cognizable in the common law court, and should be instituted and prosecuted on the ordinary docket.

Courts—Transfer of Causes—Discretion of Court.

Refusal of the court to transfer a cause from the equity docket to the ordinary docket where it should have been brought, is not reversible error, where the motion was not made until after answer, and after all the parties are ready for submission, no abuse of discretion being shown.

Insurance—Renewal Policy—Evidence.

Where an officer of an insurance company swore that the policy in question was never renewed, a clip off the margin at the foot of the application is not sufficient to warrant the assumption that the margin was clipped to conceal the fact of the indorsement of a renewal of the policy.

Insurance—Evidence—Statement by Agent.

A statement by an insurance agent to a third party that plaintiff was insured and that there would be no trouble about his insurance, was held not evidence against the insurance company.

APPEAL FROM MARION CIRCUIT COURT.

January 8, 1873.

OPINION BY JUDGE LINDSAY:

Appellants' petition sets up two separate and distinct causes of action. The first is founded upon a life insurance policy executed and delivered. The second upon a contract for insurance fully consummated, but which was not evidenced by a policy, the person insured having been killed before its delivery. Both are properly

cognizable in a common law court, and the action ought to have been instituted and prosecuted on the ordinary side of the docket.

Appellants, however, sued in equity, and appellee waived its right to have the cause transferred, and prepared its defense in accordance with the rules regulating equitable proceedings.

The first question presented is whether the court erred in overruling appellants' motion to transfer the cause to the ordinary docket for trial after both parties were fully prepared and the cause ready for submission. Sec. 7 of the Civil Code of Practice provides that "An error of the plaintiff as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, by amendment in the pleadings, and a transfer of the action to the proper docket." Sec. 8 provides that "The error mentioned in the last section may be corrected by the plaintiff without motion at any time before the defendant has answered, or afterward on motion in court."

Here the plaintiffs erred by instituting an ordinary action on the equity side of the docket. They failed to avail themselves of their right to transfer before answer, and were compelled by motion to ask a transfer at the hands of the court. The fact that the absolute right to the transfer ceased to exist when the answer was filed, and that they were compelled to ask the court to do for them that which they had lost the right of their own motion to do, shows that the court had some discretion in the matter. We can not say that this discretion was abused when their motion was overruled. The transfer of the cause might have compelled appellee to go to trial with its testimony in the shape of depositions when it has the right to examine its witnesses orally, upon a jury trial, it not appearing that the witnesses were present. It would have given appellants the right to examine their witnesses orally when they had led appellee to believe they would rely upon the depositions and exhibits on file in the case. Possibly the court would have granted appellees a continuance, but under the circumstances it would have been improper and unjust to have made it necessary that a continuance should be asked.

The evidence wholly fails to sustain the second cause of action set up in the petition, giving to the apparent inconsistencies in the exhibits filed and the statements made by the officers of the insur-

ance company the greatest possible weight; and still there can not be a doubt entertained but that the application of July 17, 1869, though in form an application for a new policy, was in point of fact intended to be the basis upon which the policy of the 22d of August, 1867, should be reinstated.

It is not contended that Maloney paid the second premium at the time it became due nor that he paid the interest on the note for one-half of the first premium at the time the contract of insurance required it to be paid. Nor is it denied that by reason of such failure the company had the right to cancel the policy.

If appellants can recover at all it must be upon the idea that the policy was renewed and that the company, by accepting the amount of premiums due from Maloney waived its right to claim the forfeiture. They fail to produce receipts of the company showing any such state of case, and while they prove facts conducing to show that Maloney had been robbed of his pocket-book a short time prior to his death, it is not shown that the pocket-book contained such papers. Appellants ask the court to assume that the policy had been renewed, because of certain suspicious facts connected with the record, and correspondence of the company, and the conduct and evidence of its officers and employees. They claim that the state agent for the company refused to allow their attorneys to examine the books and papers in his office at Louisville; that they withheld until after a rule upon them was made absolute to produce in court books and papers and correspondence touching Maloney's insurance; that they manufactured letters, memoranda and records; that they suppressed important papers and facts, and that they failed to produce the renewal receipts sent to their agent at Chattanooga to be delivered to Maloney when he paid up the amounts due and in arrears on his policy.

The refusal of the state agent to allow his office to be examined by the attorneys of parties from whom his company has been or was about to be sued, until he obtained authority from the principal office, was neither immaterial nor unreasonable. The failure to respond properly to the rule is sufficiently explained by the difficulties attending the collection of letters, memoranda and copies of records from the various offices and agents through whom the business with Maloney had been transacted.

There is absolutely no evidence warranting the conclusion that letters or records of any kind were manufactured. The clipping

of the margin at the foot of the application of July 17, 1869, may be regarded as a suspicious circumstance, but a court would be going a most unreasonable length to assume that this was done to conceal the fact that on this margin it had once been endorsed that the policy of August 22, 1867, was reinstated. We have no evidence that this was the proper place to make such an endorsement, and the officers of the company all swear that no such renewal was ever made.

The failure to produce the renewal receipt sent to Chattanooga to be delivered to Maloney does not necessarily imply anything more than that a receipt upon which the money had not been paid, which have never answered any purpose whatever, which possessed no intrinsic value, and the existence of which would prove nothing in favor of the company, inasmuch as it could manufacture any number of them that might be desirable, had not been renewed or was regarded as too unimportant to be filed in answer to the rule. The failure of the witness, Hocker, to explain some of his correspondence (while it may affect his credibility as a witness) does not assist appellants in proving that the amount necessary to renew the policy had been paid. The failure of Hardie to answer the question as to whether or not the company had suppressed papers or manufactured evidence, would have justified the court in suppressing his deposition if appellants had asked to have it done, but it does not prove the essential affirmative fact that the money had been paid to procure the renewal of the policy. The statement of the same witness to Brew, that Maloney was insured and that there would be no trouble about his insurance, is not evidence against the company. Such statements were not made by Hardie in the course of his employment, and while engaged in the performance of his duties as agent relative to such insurance. Besides this, as he knew that Maloney had applied to have his policy renewed, he may have supposed that it had been done.

Upon a careful consideration of the entire record we are constrained to conclude that appellants failed to manifest their right to any relief whatever, and that their petition was properly dismissed.

Judgment *affirmed.*

Russell, Avitt, for appellant.

Rv. and Fo., Foote, for appellees.

JNO. H. JESSE *v.* S. E. JONES.

Bills and Notes—Action—Pleading—Demurrer.

Where a note plainly imports a personal obligation of the maker, a petition against the maker in his official capacity as guardian is demurrable at the instance of the guardian's sureties.

APPEAL FROM WOODFORD CIRCUIT COURT.

January 8, 1873.

OPINION BY JUDGE HARDIN:

The note for $106.85 exhibited by the appellee, as evidence of his debt, appears to have been taken in satisfaction of the accounts for taxation, and according to repeated decisions of this court, plainly imparts the personal obligation of A. H. Bohannan, the fact of his being guardian being shown only as matter of identity and description. It is not alleged that the acceptance of this note was induced by fraud or mistake. The action should, therefore, have been treated as against A. H. Bohannan and his sureties on his bond, as guardian, for the individual debt of A. H. Bohannan. The demurrer of the sureties to the petition should, therefore, have been sustained, independently of the question whether, in any case, an action can be maintained directly on the bond of a guardian for an ordinary liability incurred by the guardian, as such for and on behalf of the wards.

It results that the action of the court in overruling the demurrer to the petition, and also in instructing the jury, and passing an instruction inconsistently with the views we have stated, is deemed erroneous.

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

Porter, Wallace, for appellant.

D. L. Thornton, W. Turner, for appellee.

WM. APPLEGATE, ETC., *v.* OTHO NUNN.

Contracts—Construction.

The phrase "merchantable coal" as used in a contract for the purchase of coal for use on a steamer, was held to be lump coal, where the kind of coal was not specified.

Words and Phrases.

The phrase "merchantable coal" as used in a contract for the purchase of coal for use on a steamer, was held to be lump coal, where the kind of coal was not specified.

Words and Phrases.

The term "merchantable" imports an article which, when put upon the market, will sell at an average price to those generally desiring to purchase that kind of merchandise, and not such as can be sold to a few persons for special purposes.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

January 8, 1873.

OPINION BY JUDGE LINDSAY:

The sole question presented by this record is as to the construction to be placed upon the term "Merchantable coal," as used in the written contract entered into between the parties. Lump coal is certainly merchantable, and is so regarded by both parties, and the evidence shows that when coal is ordered by buyers none but lump coal is sent unless a different kind is mentioned in the order.

Nut coal can sometimes be sold for something more than half as much as the lump. It can be used for special purposes, and can be burned on a few steamers, but for general use, and upon the steamers, generally, lump coal is required. The miners are paid only for the lump coal mined, receiving nothing either for nut coal or slack.

The term "merchantable" imports an article which, when put upon the market, will sell at an average price to those generally desiring to purchase that character of product or mineral, and not such as can be sold to a few persons for special purposes.

It is manifest, from the testimony, that in sending coal to market no reasonably prudent miner would incur the expense of shipping

nut coal unless he had assurances that by reason of some special demand he would be able to sell it. Under such proof as this record presents, we are constrained to conclude that the terms of the contract do not require appellant to pay the stipulated price for any other than the lump coal he may mine.

The parties might have used language that would have made their intention clear and unmistakable. They failed to do so, and can have no ground to complain because the courts can not unerringly divine their intentions.

For the reasons given the judgment of the court of common pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Bush, for appellant.

J. W. Blue, for appellee.

J. H. GRAY *v.* SANDORF & MYER.

Insolvency—Acts Of.

The act of a debtor in procuring a creditor to bring attachment proceedings against him was held to be an act of insolvency.

APPEAL FROM HARRISON CIRCUIT COURT.

January 8, 1873.

OPINION BY JUDGE LINDSAY:

A remark made by Reickel in the presence of Wilhite, the special friend of Gray, had the effect of calling the attention of the latter to the failing condition of Reickel, and of bringing about a personal interview between the parties. The proof does not show the nature of that interview, but immediately afterward Gray sued out his order of attachment, and attempted by its levy to secure a preference over the other creditors of the failing merchant.

On the same day Reickel telegraphed to a New York firm to secure their debt by attachment. The circumstances connected with the manner in which these two creditors were enabled to obtain prior liens, leaves no doubt but that Reickel gave them notice to

attach with a design to prefer them to the exclusion of other creditors. That he then contemplated insolvency is too clear to admit of controversy.

The chancellor did not err in holding that the procuring of Gray's attachment to be levied was an act of insolvency, and in taking steps to distribute the assets of the debtor under the provisions of the act of 1856, and the amendment of March 8, 1862.

Judgment *affirmed.*

Cleary & West, for appellant.

Trimble, for appellee.

M. R. EVERITT *v.* JAMES BLACKBURN AND WIFE.

Limitation of Action—Absence of Plaintiff in Army.

The absence of plaintiff in the Confederate army was held not to prevent the running of a statute of limitations.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 9, 1873.

OPINION BY JUDGE LINDSAY:

The plea of the statute of limitations should have been sustained. The promise relied on to take the demand out of the statute was made, if at all, in 1863. The only pleading in this cause upon which the relief granted could have been based, was a paper filed June 21, 1870, styled by appellees "Answer to Cross-Petition." This was long after the original action against the Odd Fellows Lodge had been finally disposed of. Still, as appellant did not object to the time and manner in which it got into the case and as he treated it as a petition by filing what he calls an "amended answer, and answer to cross-petition," pleading both payment and limitation, we suppose the court properly undertook to adjudicate the matters presented, notwithstanding the fact that before it could be done, an action in ejectment had to be transformed into an action in assumpsit. From the promise in 1863 to the filing of appellees' "answer to cross-petition" in June, 1870, more than five years had

elapsed. Hence the statutory bar was complete. The absence of Blackburn in the Confederate lines did not prevent the running of the statute, but even if it had, he returned in May, 1865, and more than five years elapsed between his return and the 21st of June, 1870.

The amendment to the original petition making appellant a party and making the same allegations against him as had been made against the Odd Fellows, is of no avail. The relief sought in that action was the recovery of real estate and mesne profits and the existence of such a proceeding could not, according to any rule of practice known to this court, interfere with the meaning of the statute against a claim for money had and received.

The judgment is reversed and the cause remanded with instructions to render judgment in favor of appellant for his costs incurred since the 21st of June, 1870.

Apperson & Reid, for appellant.

Tenney, for appellees.

R. L. HENRY AND OTHERS *v.* J. B. SMITH, ETC.

Assignment for Benefit of Creditors—Pleading—Fraud.

Where a petition in equity alleges not only actual fraud but also that conveyance was made in contemplation of insolvency, and both actual and constructive fraud is established, the constructive fraud brings the transaction within the act of 1868, and is an assignment for the benefit of the debtor's creditors.

Assignments for Benefit of Creditors—Pleading—Proof.

Although actual fraud may be proven under the allegation in a petition that the conveyance was in contemplation of insolvency, the equitable rights of creditors attached when the conveyance was made, and the superior lien could not thereafter be acquired by any creditor in a proceeding at law or equity.

Assignments for Benefit of Creditors—Notice of Assignment.

Under Stat. 1856, relating to equitable assignment for the benefit of creditors, before an assignment can affect the rights of creditors in the distribution of the insolvent's estate, the sale or transfer must be such as in law gives the creditor notice of its existence.

Opinion of the Court.

Assignments for Benefit of Creditors—Creditor a Party to a Fraud.

If a creditor is a party to the constructive fraud by purchasing or obtaining the transfer of the debtor's property for the purpose of securing antecedent debts, and after the commission of an act bringing the cause within the Act of 1856, makes additional payments on the purchase or transfer, or the debtor becomes otherwise indebted to the purchaser, such cause should be rejected, as in such case notice is brought directly home to the creditor.

Assignments, for Benefit of Creditors—Creditors Who May Participate in the Estate.

All debts contracted by a debtor between the execution of a bond to convey his land and the date of the deed should, when properly proven, be allowed to participate in the estate of the insolvent debtor.

APPEAL FROM BOURBON CIRCUIT COURT.

January 10, 1873.

OPINION BY JUDGE PRYOR:

The appellants, R. D. Henry and wife, had an execution issued from the clerk's office of the Bourbon Circuit Court in their favor against the appellees, J. B. Smith, et al. for one thousand dollars, with the interest and costs. This execution was afterwards returned by the sheriff "no property found." The present suit in equity was then filed by the appellants against J. B. Smith and his father-in-law, Fantleroy Ball, alleging that Smith, for the purpose of cheating, hindering and delaying his creditors in the collection of their debts, had made to his father-in-law a fraudulent conveyance of his real estate, located in or near Millersburg, and that said conveyance was also made in contemplation of insolvency and with the design of preferring his father-in-law, who at the time of the conveyance was a creditor for a considerable amount, and that by reason of the conveyance his whole estate passed by operation of law to all of his (Smith's) creditors for the payment of their debts. The appellees (Smith and Ball) both answer the petition, in which they deny all manner of fraud, either actual or constructive. The appellee, Ball, in his answer, alleges that the consideration of the conveyance was five thousand dollars, eleven hundred dollars of which was paid in cash, and the balance in cash notes which he held upon his son-in-law for money previously loaned him. That the sale of the real estate was made on the 28th of May, 1868, and a bond then

executed to him by his son-in-law for a title, that "said money was paid to said Smith and the notes executed to him at the time said property was purchased, and at the time said bond was executed."

The deed was admitted to record on the 22d of December, 1868. The answer of Smith is in substance similar to the answer of Ball. Upon the hearing of the cause the court below adjudged that the sale and conveyance by Smith to his father-in-law was in contemplation of insolvency and within the act of 1856, and by an order of court referred the cause to a commissioner with directions to take proof of claims, etc., and report; and upon the filing of this report, the rights of the various creditors were determined, to which exceptions were made by both the appellants and appellees, and will hereafter be considered.

The appellants insist that the deed should have been annulled by the court below upon the ground of actual fraud, and that by such a judgment the appellee, Ball, would have been deprived of any right to a pro rata distribution of the proceeds of the property with the other creditors. The effect of such a judgment, however, would be to prefer the claim of the appellants over other creditors, when this preference is not asked for, and when the allegations of the petition sustained by the proof present a case not only of actual fraud, but brings it within the act of 1856. Although the deed may be actually fraudulent, if the petition alleges not only the actual fraud, but also that it was made in contemplation of insolvency, and both actual and constructive fraud is established, the constructive fraud, if such as to bring it within the act of 1868, is an assignment of the estate belonging to the vendor of the property to all his creditors, and vests them with the right to appropriate it for the payment of their debts, and the chancellor has no power to deprive them of this right, although actual fraud may exist.

T his court, in the case of *Shawn v. Utterback,* 2 Metcalfe, 52, whose attachment creditors had levied their attachments upon the property of the debtor, who had made a sale of his property in contemplation of insolvency and these attachments issued upon the alleged ground of actual fraud, directed that the right acquired by the creditors by the levy of their attachments was subordinate to the equitable rights of creditors, created prior to the levy of the attachment, and by the judgment of the court, the attaching creditors were compelled to share only in the pro rata distribution of the

proceeds of the debtor's property, with his other creditors. In the present case, although actual fraud may be proven, still, as the petition alleges that the conveyance was in contemplation of insolvency, etc., the equitable rights of the creditors attached the moment the conveyance was made, and no superior lien could thereafter be acquired by any creditor in any proceeding at law or equity. We are therefore of the opinion, the proof showing clearly that the sale by Smith was made in contemplation of insolvency, and to prefer the father-in-law, Hall, in the payment of his debts, that the judgment determining that the conveyance was within the act of 1856 is sustained by both the law and facts of the case. Many exceptions were filed by the parties to the commissioner's report, and in disposing of these exceptions the charge of actual fraud against the appellees will be considered.

The father-in-law and son-in-law lived in the same house, and had been so living for many years. Ball seems to have been possessed of considerable property, and his son-in-law, Smith, insolvent. Executions were being levied upon his personal effects, as well as the real estate then in his possession. His father-in-law claimed to have held against his son-in-law at the time of the execution of the bond for title in May, 1868, notes and other claims amounting to about eight thousand dollars. With this large amount due him by his son-in-law, in May, 1868, he makes a purchase of this land for the sum of five thousand dollars, all of which was paid, as they state, by surrendering up certain notes he held on Smith, and the payment to Smith of eleven hundred dollars in cash. The notes were surrendered and the money paid (as Ball alleges in his answer) to his son-in-law, at the time the property was purchased, and at the time the bond was executed. The appellees take the depositions of both Smith and wife; the latter, the daughter of Ball, to prove the execution of the bond and the payment of the money. Both of their witnesses seem to be intelligent, and fully aware of the interests involved in this controversy.

Mrs. Smith, the daughter, says she wrote the bond, and if there was any money paid she never saw it. She wrote it at her own home, and in the presence of her father and husband. Smith, her husband, says that he received from his father-in-law at the time of the execution of the bond eleven hundred dollars in money, and when asked by opposing counsel whether he had not a short time

before that received four thousand dollars as a legacy from some relative, and also called upon to state what he had done with both sums of money, responds by saying "that he did not remember." These are the witnesses called upon by the appellee, Ball, to prove the payment of the eleven hundred dollars, and we are satisfied, looking to the testimony of Smith and wife, that the statement made by Mrs. Smith is true, and that no money was paid at the time the bond was executed or afterwards. Smith, after his notes had been surrendered and the alleged acceptance by him of the eleven hundred dollars in money, was still indebted to his father-in-law nearly three thousand dollars, and much of this latter sum due, as they both say, upon an open account that had been standing for several years; and, taking both of their statements as explanatory of their business transactions, we can not conceive why Ball left this open account of long standing unsettled, and not only surrendered up the written evidences of his son-in-law's indebtedness to him, but, as he alleges, paid him eleven hundred dollars in cash "and that, too, when the son-in-law was insolvent." It does not appear from anything in this record that this money was advanced him for the purpose of relieving him from his pecuniary troubles as Smith himself is unable to explain what he did with either this eleven hundred dollars, or the four thousand dollars he had not long since received as a legacy, but says he has no recollection as to the disposition he made of it. The only satisfactory explanation that can be made of this eleven hundred dollars transaction is to determine that Smith never received it, and the exception to the commissioner's report by the appellants as to this claim should have been sustained. Nor ought the appellee, Ball, to have been allowed his claim for rent as against the creditors. The proof of one or two witnesses conduces strongly to show that the use of this land was in consideration of the board of Ball and his wife by Smith. It is true that the obligation of Smith to pay rent is produced and proven to be in the handwriting of Smith; still the father-in-law and his wife had been living with Mrs. Smith for nearly nine years; the proof shows that they were to pay board, and the history of this whole case inclines this court to conclude that no board or hire would ever have been thought of except as a compensation for the land but for this effort upon the part of the appellees to deprive the creditors of Smith from the collection of

their debts; the claim for rent should have been disallowed. It was, perhaps, proper to allow the amount of the notes, as there is proof in the case showing their execution previous to the execution of the deed; or if not, at least showing an advance of moneys by the father-in-law, and for which the notes were doubtless executed, and it may be proper to allow the negro hire, as the use of the land fully compensated for the board, but such of the hire only as accrued within five years previous to the institution of appellants' action should be allowed. The creditors have the right, having a common interest in the fund to be distributed, and the claims presented being a charge on this fraud to rely upon the statute of limitations as against any claim presented, and may raise this question by an exception to the commissioner's report. The bond for the conveyance of this real estate was made in May, 1868, and the deed recorded on the 2d of December, 1868. The grantor, Smith, between the date of the bond and the recording of the deed, created other bona fide debts, and the question is: Did the assignment, so far as it affects the distribution of the assets between the creditors, operate from the date of the bond or the recording of the deed? Whilst the sale, so far as the debtor is concerned, operates as an assignment for the benefit of creditors, still, if a mere bond for title in the pocket of the purchaser, the existence of which is unknown to creditors, and the debtor in the meantime, constantly increasing his indebtedness with those who are dealing with him in good faith and trusting his ability, with the property he has, to pay his debts, is to operate as an assignment by which the subsequent creditors are to get nothing, then the statute itself is productive of more fraud than it was enacted to prevent. The fraudulent debtor would make use of the statute as a means of shielding himself and property from the payment of his just debts. The statute of 1856 is an equitable statute and was enacted to protect the rights of creditors, and not for the purpose of enabling a dishonest debtor to defraud them, and so far as an assignment can affect their rights in the distribution of assets, there must be such a sale or transfer as in law gives to the creditors notice of its existence. If a creditor is a party to the constructive fraud by purchasing or obtaining a transfer of the debtor's property for the purpose of securing his antecedent debts, and after the commission of the act bringing the case within the act of 1856, he makes additional payments on the purchase or trans-

fer, or the debtor becomes otherwise indebted to him, such claims would be rejected, as in such a case notice is brought directly home to the creditor. In the case of *Brown v. Early*, 2 Duvall, this court says, that where there was no ostensible change of possession in registration of the deed or bond before the suit was instituted, the lapse of six months from the date of the initial conduct did not operate as a limitation to the cause of action and that under the statute there was no such constructive notice, as was contemplated.

It therefore follows that all of the debts contracted between the date of the bond and recording of the deed, properly proven, should have been allowed. The amount of money collected from the garnishee, Witt, by Henry and wife should be accounted for by them unless the garnishee was summoned previous to the recording of the deed. If summoned after the recording of the deed, the amount was a part of Smith's estate and the appellants must account for the amount received by them. For the reasons herein indicated the judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion. The judgment is *affirmed* on the cross-appeal.

Alexander, Turney, for appellants.

Hanson & Hanson, for appellees.

GEO. W. JONES *v.* GEO. T. HUNSTON, ETC.

Corporations—Subscribers for Stock—Calls for Payment.

It is not material whether a subscriber for stock had notice of calls made on the subscribers for payment, where his contract is to pay as the president and directors may direct.

Corporations—Officers Agents of Stockholders.

The president and directors of a turnpike company are the agents of stockholders who are bound to know what the officers do.

Corporations—Stockholders—Want of Knowledge.

A stockholder of a turnpike company can not be allowed to rely on his want of knowledge touching a matter concerning which he should have informed himself, when it is within his power to do so.

APPEAL FROM HENRY CIRCUIT COURT.

January 10, 1873.

OPINION BY JUDGE LINDSAY:

Appellant, being a stockholder in the Turnpike Company, must have known whether or not it had ever been organized. In fact, the paper upon which he subscribed the stock shows that the money for the road had been made at the time of the subscription and in effect recognizes the existence of a president and board of directors for the company.

It is not material whether appellant had notice or not of the calls made on the subscription for the payment of their stock. His contract was to pay as the president and directors might direct. Being a stockholder in the company, the president and directors were his agents, and he was bound to know what they did in the premises. Besides this he can not be allowed to rely on his want of knowledge or information touching a matter about which he should have informed himself, it being manifestly within his power to do so. *Wing v. Dugan,* 8 Bush 584.

The denial that the road was built on the route specified in the writing, and in accordance with the agreement of the parties, is too general. It raises no issue. If any departures had been made from the terms of his subscription he should have specified what they were, so that the court might have determined whether or not they were material.

The remaining defenses attempted to be set up are such as the company might have made in a suit against it by the contractor, but which can not avail a stockholder in an action against him by the company to compel him to pay his stock.

The demurrer was properly sustained and appellant, failing to answer further, the judgment against him went as a matter of course.

It is therefore *affirmed.*

DeHaven, for appellant.

Weeb & Barber, for appellees.

HOPKINS, SMITH, ETC., *v.* R. J. STONER ET AL.

Adverse Possession—Sufficiency of Possession.

To acquire title by adverse possession, the possession must have been such as to authorize ejectment every day of the alleged possession.

APPEAL FROM BULLITT CIRCUIT COURT.

January 10, 1873.

OPINION BY JUDGE LINDSAY:

It is not proved that the parties under whom the Stoners claim and the heirs-at-law of John Hoglan, deceased, and as this fact is denied in the answer of appellants, it was necessary to establish its existence in order to authorize the relief granted.

Besides this, appellees do not pretend that they or those under whom they claim, hold title by regular conveyances to the fifty acres of land in controversy. There is evidence conducing to show that Ben Doorn, deceased, sold by oral contract to John Hoglan, and after an actual survey authorized him to take possession; that he afterwards executed to him a receipt for a sum of money in full satisfaction of the purchase price for fifty acres of land, which we may infer was the land involved in this litigation. If that receipt be regarded as a bond for title it is certain that no conveyance was ever made pursuant to it.

The witnesses speak in general terms of an actual possession by Hoglan and his heirs and the ancestor of these appellees, but when they come to explain, it very clearly appears that the land never has been actually seized and possessed by any of them. There never was a building or enclosure upon it. The Hoglans asserted claim to it, and their claim was recognized by Doorn, but there never was a day so far as the evidence shows that an action of ejectment could have been maintained against them. As limitation will not bar an ejectment unless there has been such an actual adverse possession the requisite length of time, as to have furnished a cause of action every day. (*Jones v. McCauley*, 2 Duvall 15); neither will any other character of holding be deemed sufficient to

enable the party claiming by prescription to maintain an action to enjoin persons from trespassing upon the land claimed.

We are of opinion that the circuit court erred in perpetuating the injunction in this cause. Its judgment is reversed and the cause remanded with instructions to dismiss appellees' petition.

John E. Newman, for appellant.

A. H. Field, for appellees.

JOHN GAULT *v.* R. A. THOMPSON, ETC.

Vendor and Purchaser—Vendor's Lien—Pleading.

Although it may be necessary in a proceeding to enforce a vendor's lien to allege the ability and willingness of the vendor to comply with the terms of his contract, such allegations are not necessary to authorize a personal judgment against the vendee.

Equity—Personal Judgment.

A matter being properly in the equity court, it is error to render a personal judgment, since the parties have a right to full and complete relief at the hands of the chancellor.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 10, 1873.

OPINION BY JUDGE LINDSAY:

Although it may be necessary in a proceeding to enforce a vendor's lien to allege the ability and willingness of the vendor to comply with the terms of his contract, yet such allegations are not necessary to authorize a personal judgment against the vendee.

The note itself may be made the foundation of the action, and it is not essential that the consideration shall ever be referred to. The petition in this case is certainly sufficient to sustain the judgment rendered, and appellant can not be heard on this appeal to complain that appellee failed to show that it was entitled to have its lien enforced, no judgment to that effect having been rendered.

Nor was it erroneous to render the personal judgment at an equity term. Being properly in a court of equity, the appellee had

the right to demand at the hands of the chancellor full and complete relief.

The action not being in a condition to authorize the enforcement of the lien did not preclude appellee from demanding a personal judgment and, as appellants were in court and interposed no objection, such judgment was properly rendered. Judgment *affirmed.*

Drane, for appellant.

Julian, for appellees.

MARTIN FLANNIGAN *v.* COMMONWEALTH OF KENTUCKY.

Appeal—Reversal—Sufficiency of Evidence.

The Court of Appeals has no power to reverse a judgment upon a conviction for a felony on the ground that it is contrary to the evidence.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 10, 1873.

OPINION BY JUDGE PRYOR:

This court has no power to reverse a judgment upon a conviction for a felony because it is against the evidence. There are no instructions in the record and, the indictment being good, the judgment must stand.

Judgment *affirmed.*

T. H. Burke, for appellant.

Attorney General, for appellee.

S. LAWSON *v.* GARDNER & CO.

Appeal—Reversal—Instruction.

Where the evidence does not show a right of recovery against a principal on the theory that the purchaser was an agent of the principal, it was held reversible error to give an instruction based on such theory.

Opinion of the Court.

APPEAL FROM WARREN CIRCUIT COURT.

January 11, 1873.

OPINION BY JUDGE HARDIN:

It is neither alleged nor proved that when selling the goods the plaintiff knew that Stewart was the agent of the defendant; but the account sued on shows the sales were made to Stewart, and presumptively on his credit; but the theory of the plaintiff's case seems to be that, having sold the goods to Stewart, they had a right, nevertheless, to hold the defendant liable on discovering that Stewart was in fact his agent, and bought the goods for him.

The evidence does not conduce to show a right of recovery except upon this theory. Wherefore the second instruction which the court gave for the plaintiff, however correct it may have been, if there was evidence that the sales were made and the credit given to the defendant himself on the faith of the known agency of Stewart, was abstract in this case; and it was misleading and erroneous in submitting to the jury the irrelevant question whether at the time the goods were sold the supposed pre-existing agency of Stewart had or not been terminated with public or private notice thereof to the plaintiffs. We need express no opinion on the question as to the sufficiency of the evidence to sustain the verdict.

But, solely for the error in giving the second instruction, the judgment is reversed and the cause remanded for a new trial on principles not inconsistent with this opinion.

J. W. Gorin, for appellant.

———, *for appellee.*

PRESCOTT & BROS. *v.* W. J. ANNIS, ETC.

Pleading—Based on Information and Belief.

A petition based merely upon information and belief that certain property of plaintiff had been attached and sold as the property of another, is indirect and equivocal, and insufficient.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 11, 1873.

OPINION BY JUDGE LINDSAY:

Up to the time of the prosecution of this appeal it seems that no formal judgment had been rendered settling the rights of the appellants, Prescott & Bros. The judgment of August 6, 1870, makes no allusion whatever to the matters set up in their petition and answer. But treating the appropriation of the funds of the court as a practical dismissal of their petition, we do not see from the record that they have any legal ground of complaint.

The returns of the sheriff upon the orders of attachment sued out by Sanders and by John Martin Ison & Company, do not show that any of the property claimed by them was levied on or sold.

They state in their petition that they are informed and believe that certain organs and seats belonging to them had been attached and sold as the property of Annis.

Such indirect and equivocal pleading ought not to be tolerated. If their petition had been taken for confessed, it could not have been held that appellees admitted more than that Prescott Bros. had been informed, and therefore believed, that property belonging to them had been sold under the attachments of appellees. Appellants failed to show either by their pleadings or by proof that they were entitled to any relief whatever.

Wherefore the judgment of the circuit court must be *affirmed*.

Rodman, for appellants.

S. C. Bryce, J. W. Hopkins, for appellees.

JOHN CAMPBELL'S ADM'R *v.* JAS. B. MITCHELL.

Contracts—Validity—Drunkenness.

Drunkenness alone will avoid a contract if it is to such extent as to prevent the party from understanding the nature of the contract.

Specific Performance—Lease Contract—Drunkenness.

A chancellor will not enforce a lease contract which was procured from the lessor while in such a state of intoxication as to be unable to understand the nature and importance of the transaction, especially when the consideration for the lease was less than half its real value.

Opinion of the Court.

APPEAL FROM MADISON CIRCUIT COURT.

January 11, 1873.

OPINION BY JUDGE PRYOR:

The testimony in this case conduces to show that John Campbell, for many years prior to his death, was much addicted to the use of ardent spirits, and to such an extent as that many, if not all, of his neighbors regarded him as an habitual drunkard.

His father, Samuel Campbell, with a view of reforming his son, and to enable the latter to support his family, placed him in possession of a valuable tract of land, with a promise at the time, made in parol, that if he would abstain from drink or abandon his intemperate habits he would make him an absolute deed to the property.

The son entered into the possession and assumed various acts of ownership over it, by cultivating the soil and occasionally renting some portions of the land.

His appetite for liquor seems to have increased instead of diminished by reason of the efforts upon the part of the father to reform him, and before the expiration of two years Samuel Campbell sold the land to R. B. Dunn and made him a conveyance therefor. Prior to the execution of the deed by Samuel Campbell to Dunn, John Campbell had, without the knowledge of his father or Dunn, so far as the proof shows, executed a writing purporting to lease the land to the appellee, Mitchell, for the term of three years, at three hundred dollars per year. Mitchell asserted his right to the land, and the present suit in equity was filed by the vendee, Dunn, for the purpose of quieting his title and possession.

John Campbell is made a defendant to the cross-petition of Mitchell, by which he is seeking to enforce his contract of leasing or recover of the former damages by reason of his failure to comply with his contract. The defense of John Campbell to this cross-petition is that he was in such a condition at the time he signed the lease by reason of his drunkenness as to render him incompetent to execute such a writing.

The court below rendered a judgment, quieting the title and possession of the appellee, Dunn, and rendered a further judgment in favor of Mitchell upon his cross-petition against John Campbell's administrator (John Campbell having died) for six hundred dollars in damages.

The depositions of John Campbell and his wife having been taken prior to the passage of the law permitting parties to testify were incompetent to be read upon the issue made between Mitchell and John Campbell on the cross-petition. The testimony, however, as to the intemperate habits of John Campbell, viz.: His constant and excessive use of stimulating drinks, is so conclusive that any contract made with him that failed to evidence fair dealing must be regarded by the chancellor with suspicion.

It may be that his mental capacity was not questioned by many of his neighbors, for the reason that, although constantly under the influence of liquor, his contract gave evidence of his own knowledge of what he was doing, for in nearly all the contracts made by him prior to the date of this pretended lease, he seems to have given, and always received, a fair consideration.

When this lease was signed, however, there is no doubt but what he was so drunk as to destroy every faculty necessary to enable him to understand an ordinary business transaction.

Mitchell found him in this condition when he proposed to have the writing executed, and not content with delaying its execution until the man had regained his reason, he left Campbell's house and went to a neighboring school house and there dictated the terms of the contract to the teacher and the latter drafted the lease. On his way, either to or from the school house, he was told by a witness whose veracity is not questioned that as soon as Campbell got sober he would refuse to abide the contract, as Mitchell's response was, in substance, that he intended to have it executed before he got sober, or, in the language of the witness, "to fasten him whilst he is in the humor."

The contract was at once signed by Campbell, but seems never to have been delivered, why it was not delivered, does not appear from the proof. It is true that the appellee, Mitchell, attempted to show that a few days after this writing is said to have been executed, Campbell wanted to know of Mitchell if he, Mitchell, was satisfied with the contract, and the latter answering in the affirmative, propounded the same question to Campbell and he responded in the same way. This manifestation of anxiety so clearly proven of the appellee, creates of itself a suspicion as to the fairness of the transaction.

It is shown by one witness that in the morning of the day this

trade is said to have been made, that Campbell had a jug of whisky at his house, but was then sober; it is shown by another witness that Campbell was not only drinking but drunk.

The best evidence, however, of his drunkenness is to be found in the statements of the appellee's own witness. They all, or most of them, prove that Campbell was competent to trade and had mental capacity sufficient to enable him to understand and know what he was doing; and still, in order to enable the appellee to recover in this case, he shows by more than one witness that the land rented him by Campbell was worth more than double what he was to give for it.

Clark swears that the place was worth four hundred dollars per year more than Mitchell gave him for it, and that Mitchell sustained that much damages, in other words, it was worth for the three years $2,100 instead of $900.

The judgment of the chancellor is that from the testimony it was worth six hundred dollars more than the appellee agreed to give for it, and the opinion of this court from the proof is that it was worth double the amount of the agreed price, and these opinions, added to the stupid and drunken condition of Campbell at the time, are deemed sufficient reasons for disregarding this pretended claim. Drunkenness alone will avoid a contract, if to such an extent as to prevent a party from understanding the nature of the contract he is making. 1 Hilliard on Contracts 308.

When you add to drunkenness the fact that the property has been sold or purchased by the inebriate at less than half its value, neither the father's silence, if proven, or John Campbell's great desire to know if the appellee was satisfied with the terms will induce the chancellor to enforce such an unconscientious bargain.

The judgment of the court below in favor of Mitchell against John Campbell's administrator is reversed, with directions to dismiss his cross-petition, and is affirmed on the cross-appeal.

Burnam, Carpenter, for appellants.

Barnett, Turner & South, for appellee.

Opinion of the Court.

LOU. & NASHVILLE R. R. CO. *v.* ALBERT LICKING.

Appeal—Reversal—Instruction.

It is reversible error to instruct the jury that they have a right to award punitive damages in the event defendant was guilty of gross negligence, where there are no facts warranting an instruction as to punitive damages.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 11, 1873.

OPINION BY JUDGE PRYOR:

In a former opinion rendered by this court touching the facts in controversy, it was adjudged that, "as there was no intentional injury, nor such gross neglect as to manifest recklessness or bad faith, even if a recovery could be had, it must be limited strictly to compensation."

The facts, as they now appear upon the question of negligence, are identical with those proven on the first trial. It is true that a jury, upon a proper state of case presented, such as a permanent injury to the appellee's arm, would have the right to consider this permanent injury in making compensation by way of damages, and this court would not disturb such a verdict unless it evidenced a departure from a mere compensation, and a desire to punish the party for the alleged negligence. The jury, however, are told by Instruction No. 2 that they have the right to award punitive damages in the event the appellant was guilty of gross negligence, basing the instructions upon a state of facts not appearing in the record, for there is no evidence showing that the injury was intentional or that the appellants were guilty of such negligence as amounted to recklessness or bad faith. *Louisville & Portland R. Co. v. Smith,* 2 Duvall 559.

We are satisfied that the question of punishment was considered by the jury in making up their verdict.

We perceive no error to the prejudice of either the appellants or appellee in the other instructions given or refused. The judgment of the court below is reversed, with directions to award the appellants a new trial and for further proceedings consistent with this opinion.

Noble & Brown, Ramsey, for appellant.

Hays & Thurman, Lee & Rodman, for appellee.

R. F. A. GRIGSBY *v.* ANN M. GRIGSBY, ADM'X.

Wills—Construction.

A construction of a will which harmonizes with the language used by the testatrix, and which has the effect of carrying out her conceptions of justice and equity among her children, will be upheld.

Wills—Probate—Pleading.

An allegation that the will was duly proven and admitted to record in the clerk's office of the county clerk, sufficiently alleges the probate of the will.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 11, 1873.

OPINION BY JUDGE LINDSAY:

It is manifest that Mrs. Grigsby intended to dispose of her entire estate, and that after the payment of debts, funeral expenses, and the specific devise to Mrs. Hinton, she intended the remainder to go to the five children named in the will. The mere fact that she used the term "money" is not enough to defeat this evident intention.

She seems to have contemplated that her estate should first be converted into money (for she devises nothing in kind), the debts, expenses, and specific devises paid, and then the remainder of such "money" divided as directed. This construction harmonizes with the language used by her, and will have the effect of carrying out her "conceptions of justice and equality among 'her' several children." The court below therefore properly adopted it. The objection that the petition does not sufficiently allege the probate of the will is not well taken. It is distinctly alleged that the will was duly proven, and admitted to record in the clerk's office of the Clark County Court. The rules of pleading do not require that this statement of facts shall be so punctuated as to make it appear that the will was proven in the clerk's office, as well as admitted to record therein. Besides this, appellant by his amended answer of June 21, 1871, in effect admits that some portions of his mother's estate passed by her will, which could not have been the case unless it had been properly probated.

Judgment *affirmed.*

Apperson, for appellant.

Turner & Reid, for appellee.

JOHN R. PRENTISS, ETC., *v.* SAMUEL SANDERS.

Infants—Suit to Confirm Sale of Land.

In a suit in equity to confirm the sale of infant's lands it can not avail the plaintiff that no objection was made by the infants to the order declaring the sale, nor to the one affirming it.

Infants—Sale of Infants' Lands.

Where S. joined in an application to have land of infants sold, it impliedly raises an implication on his part to bid for the land the amount which he had promised to pay for it.

Infants—Bid for Lands.

Where one, by joining in an application for the sale of infants' lands, promised to bid them in at their full value, but refused to do so, and only bid about two-thirds the actual value, he will be required to increase his bid to the amount which he originally agreed to pay with interest from the time the deferred payments would have fallen due, or lose his right under his bid.

APPEAL FROM OWEN CIRCUIT COURT.

January 12, 1873.

OPINION BY JUDGE LINDSAY:

It is evident from the original petition filed in this case, in which petition the appellee, Sanders, joined, that the object of this proceeding was to have the sale to Sanders by John R. and Luther R. Prentiss ratified and confirmed by the court of chancery.

The fact that Sanders joined in the application to the chancellor to have the interests of the two infants, Houghton I. and Carrie A. Prentiss, sold, raised by implication a promise upon his part to bid for the land the amount he had previously agreed to pay for it. The assurance thus made to the chancellor that the lands of these infants would certainly be sold for their full value may have exercised a controlling influence in inducing him to render the judgment for the sale thereof. These lands have been three times offered for sale under a judgment rendered at the instance of Sanders, and he has three times failed and refused to comply with his express agreement with John R. and Luther R. Prentiss and his implied agreement with the chancellor, and is now attempting to hold the lands of the infant appellees under a sale at which he agreed to pay scarcely two-thirds of their value. It does not avail him that no

objection was made by the infants to the order directing the last sale, nor to the order confirming it. They can not be prejudiced by the failure of those representing them to object to these orders. In a case like this it is the duty of the chancellor to see that their interests are protected, and as it is manifest that if the sale to Sanders be permitted to stand, they will get under it greatly less than the value of their estate, and therefore, such sale ought not to have been confirmed. Wherefore that order confirming it is reversed. Upon the return of the cause the original proceeding will be stricken from the docket and no further steps will be taken to carry into execution the judgment of sale, unless the appellee, Sanders, will increase his bid to the amount he originally agreed to pay, with interest thereon from the time the two deferred payments would have fallen due.

If he fails to do this within a reasonable time the infants should have the partition prayed for by them and the contract of sale between John R. Prentiss and Sanders should be rescinded upon equitable terms, the court being careful to see that no steps are taken to the prejudice of the infant appellants. They should be allowed a fair rent for their lands, and should account for no improvements or ameliorations that do not actually add to the vendible value of their estate, and in no state of case shall they be held to account for improvements exceeding the rents adjudged to be due them.

Scott, for appellant.

Drane, Ford, for appellee.

P. B. O'DANIEL *v.* JOHN D. FLANNIGAN.

Depositions—Deposition in Another Cause—Admissibility.

It is error to allow the deposition of the witness, taken in another cause, to be read in evidence, although the deposition was referred to by the witness and made a part of his deposition in the pending cause, where it related to a different transaction and was calculated to confuse and mislead the jury.

Insane Persons—Presumption—Proof.

Insanity can not be presumed of a person who has never been judicially declared insane, but must be established by affirmative proof.

Insane Persons—Right to Sue For.

No one has a right to institute or prosecute a suit for an insane person, until such person has been judicially declared insane or of unsound mind, and a mere suggestion of insanity and an order of the court that a certain attorney prosecute the suit as next friend of plaintiff is not sufficient.

APPEAL FROM MARION CIRCUIT COURT.

January 12, 1873.

OPINION BY JUDGE LINDSAY:

The notice to take the deposition of P. B. O'Daniel was sufficiently explicit as to the time it was to be taken. The fact that the witness was in the control of the land under the charge of forging the names of these appellants to the note sued on may affect his credibility, but does not render him an incompetent witness. The exceptions to this deposition were, therefore, properly overruled. It was error, however, to allow the deposition given by the same witness in the suit of *Appellee v. Sheriff and others* to be read as evidence on the trial of this cause, although it was referred to by the witness and made part of his deposition in this cause. The evidence thus brought before the jury related to an entirely different transaction from that being litigated, and was not only irrelevant, but calculated to confuse and mislead the jury.

We are also of opinion that it was error upon the part of the court to refuse to permit appellants to testify.

Section 58 of the Civil Code of Practice provides that "The action of a person judicially found to be of unsound mind must be brought by his committee, or if he has none, by his next friend."

And Section 62 authorizes the committee of a person judicially found to be a lunatic pending an action to be joined with him as a plaintiff.

We are aware of no provision of law authorizing courts to assume that a person once sane has become a lunatic until such fact has been judicially ascertained. It is true that where frauds have been practiced upon such persons, or unconscientious bargains driven with them, the question of sanity may be collaterally inquired into in order to give them proper relief, but no person has the right to institute or prosecute suits for them until they have been judicially found to be of unsound mind. In this case, after the institution of

the action upon the suggestion of the attorney that his client had become insane, it was ordered that it be prosecuted by W. D. Flannigan, his next friend. It is not pretended that there had been any judicial finding as to the sanity of appellee, and there is nothing in the record showing that he is insane, except the statements of one or two of the witnesses made upon the trial of the issues of *non est factum.*

As W. D. Flannigan would not have been allowed to sue for appellee upon his mere suggestion of his insanity, neither could the court, after the suit had been commenced, allow him to come in and undertake its prosecution.

Upon each suggestion we are of opinion that the order allowing him to do so was unauthorized and void, and that the action as matter of law progressed just as though no such order had been made.

W. D. Flannigan was neither the committee nor next friend of a lunatic, nor was there any competent evidence before the court showing that the real plaintiff was a person of unsound mind, consequently the exceptions contained in Sec. 4 of the act of January 30, 1872, did not preclude the appellants from exercising the right to testify in their own behalf under Section 1 of the same act.

It is proper to say, however, that we are of opinion that the exceptions set out in Section 4 apply as well in a suit in which the witnesses of an idiot or lunatic are being produced or represented by a next friend, as when by a committee.

For the reasons indicated the judgment is reversed. The cause is remanded for a new trial upon principles consistent with this opinion. Upon its return, if it shall be made to appear to the court that appellee has been found to be a lunatic by a proper judicial proceeding, his committee or next friend should be allowed to make himself a party to this proceeding, as provided for in Section 62, Civil Code of Practice.

Lindsay, Russell, for appellant.

Thomas, Harrison & Knott, for appellees.

C. E. PEARL *v.* H. C. ELLIOTT, ETC.

Trusts—Debts Created by Trustee—Liability.

Where a deed of trust was executed for the benefit of a widow and her infant children, empowering the trustee to continue the business of selling drugs and applying the profits to replenishing the stock and supporting the widow and children, the trustee can not purchase goods, convert them into trust property and then escape liability of payment for them, but the trust property is liable for the debts, and the debtors are not confined to the profits allowed.

Trusts—Subjecting Trust Property to Debts—Parties.

In a suit to subject trust property converted for the benefit of a widow and her infant children, to the payment of creditors who furnished goods in replenishing the trust property, the infant children are necessary parties.

Trusts—Liability of Infant Beneficiaries.

Infant beneficiaries are not subject to judgment rendered in a suit to subject a trust fund to the payment of creditors, unless they were parties to the suit and failed to respond, and not then without proof as to the nature of the liability.

Trusts—Suit to Subject Trust Property to Payment of Creditors.

In a suit to subject trust property to the payment of creditors all the creditors should be placed on an equal footing, except where liens have been actually created, and where one creditor contributed means to aid in paying on the goods, and if the extent of his interest in the goods on hand or sold by the receiver can not be ascertained all the creditors should be placed on an equal footing.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 12, 1873.

OPINION BY JUDGE PRYOR:

There is no doubt but what the goods and effects belonging to the firm of Elliott & Pearl, or the firm as Elliott as trustee for Pearl, were liable for the firm debts.

The deed of trust from Smith to Elliott expressly authorizes the latter to continue the business of selling drugs and to apply the profits to replenishing the stock, supporting the family of Mrs. Pearl, etc. We can not well see how the business could be con-

ducted without selling the goods or drugs in the establishment when the trust was created. This was done by the trustee and other purchasers. There is no equity in permitting the purchase of goods in a case like this, and then sanctioning a refusal to pay for them for the reason that, after the purchase, they were converted into trust property.

Counsel for Mrs. Pearl insists that if this trust, guarded as it is, can not be enforced so as to secure Mrs. Pearl in the property, that it would be difficult to create one where the rights of a married woman, the beneficiary of the trust, could be secured. It must be recollected that in this case the deed creating the trust expressly confers upon the trustee the power to sell and purchase. It may be that he is required to purchase with the profits, but if this construction be given the instrument, it was not the duty of the vendor of the goods to know whether profits were realized or not. The parties, however, when the deed was executed, did not anticipate loss; if so, the trust would not have been made. Elliott was vested with all the power necessary to conduct such an establishment, and the firm property must pay the debts. The infant children of Mrs. Pearl were necessary parties to the proceeding to subject this property. They were the beneficiaries of the trust as well as the mother. They seem not to have been made defendants and no appearance by guardian ad litem.

Many of the claims against the trust estate, so far as appears from the record, were audited and allowed without proof. Jewell, who is also an appellant in this case, insists that as the debt asserted by him is against Smith and created prior to the voluntary conveyance to his daughter, he should occupy the position of a preferred creditor. Neither Mrs. Pearl nor the children are made defendants to his petition and there is no proof as to his claim. The judgment against Smith and the payment by Jewell of the bill is no evidence as against the beneficiaries of the trust unless they were made defendants and failed to respond, and not then without proof as to the nature of the liability on the bill as the parties who are interested in the property sought to be subjected are infants. If the claim is established, however, as alleged, it is not superior to that of the other creditors. These goods, or the proceeds, constitute the fund out of which the payment of the debts are to be realized, but inasmuch as Smith contributed the means to aid in carrying on the

business and the extent of that interest in the goods on hand, or sold by the receiver, can not be ascertained, it was equitable to place all the creditors on the same footing, except where liens actually existed.

The only error in the record is as to the proof of claims and the failure to make the infants defendants, so that the guardian ad litem, when appointed, may contest them. The case should again be referred to the commissioner to hear the proof of these claims when the infants are made defendants.

The judgment, for the reason indicated on the appeal of Mrs. Pearl, is reversed, and affirmed on the appeal of Jewell. The cause is remanded for further proceedings consistent herewith.

Rodman, Sweeney & Sweeney, McKee, for appellant.

Weir, for appellees.

H. C. PINDELL *v.* A. O. BROWN.

Bills and Notes—Purchaser of Mortgage Notes.

One who purchased mortgage notes did not acquire a greater equity therein than the vendor had.

Mortgages—Application of Proceeds of Mortgaged Property.

Where one executes a mortgage securing the mortgagee as surety, also a creditor of the mortgagor, the mortgagee on sale of the property must apply the proceeds to the payment of the debt on which the mortgagor is surety, and then apply the balance, if any, to individual debts of the mortgagor.

Mortgages—Waiver of Prior Lien.

Where a party takes a mortgage on land for the sole purpose of indemnifying himself as surety, he does not thereby waive his right to the enforcement of a prior lien on the land previous to the taking of the mortgage, for a different liability.

Chattel Mortgages—On Stock of Goods.

A mortgage on a stock of goods is inoperative as to property acquired and added to the stock after the execution of the mortgage.

Opinion of the Court.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 12, 1873.

OPINION BY JUDGE PRYOR:

Under the agreement between the parties constituting the firm of J. M. Cross & Co., the receiver, Pindell, must recover on the notes executed to him upon the sale of the partnership effects, as much as may be necessary to pay the firm debts, the cost of settling the partnership and also what may be required to pay the copartners of Cross the sums, if any, they may be entitled to upon a final settlement. The purchase by Brannin of the notes belonging to Tinker under the sale made by the trustees of the latter, substituted Brannin to the rights of Tinker, and in determining the legal questions involved, Brannin's equitable rights are only such as Tinker would be entitled to if he still owned the notes.

In the month of May, 1868, or shortly before, Pindell, as the receiver of John Cross & Co., sold all the goods of the firm, and John Cross became the purchaser. He executed his notes to Pindell for the purchase price, amounting to over a thousand dollars, with Tinker as his surety. Cross, in order to indemnify Tinker, on the 1st of May, 1868, executed to the latter a mortgage on the stock of goods purchased by him of Pindell and also on any future acquired goods that might be purchased and placed by him in the store. The mortgage also included certain real estate in the city of Louisville, and was executed not only to secure Tinker in his liability as surety to Pindell, but also to secure him in the payment of certain notes owing him by Cross—one for $3,500 due the 1st of May, 1868; one for $3,162.62 dated the 25th of October, 1867. Cross, having purchased the firm property with a view of continuing the business, Tinker, in order to protect himself more fully in his liability as surety, required Cross by the terms of the mortgage to apply the proceeds of the sales of his goods as fast as made, to the payments of the notes due Pindell, and was to deposit the amount of sales thus made in the banking house of Tinker, etc., in order that the money might be so applied. The firm of Tinker & Co., prior to the bankruptcy of Tinker, had received seven hundred and ten dollars on deposit from Cross, and Brannin, after his purchase of the notes received various sums of money from Cross,

the proceeds of the sale of the goods, etc., in the store, whether from the goods in the house at the time of the mortgage or afterwards, does not appear, nor do we deem it material to ascertain this fact, so far as the equities of the appellant Pindell and Brannin are concerned. Brannin is asserting his right to the notes evidenced by the mortgage of 1868 and all the equities pertaining to them by reason of that mortgage and by his purchase did not acquire any greater equity than Tinker himself had. Tinker was liable for the notes due Pindell and we know of no rule of law or equity by which Tinker could apply the proceeds of the sale of the property under the mortgage of May, 1868, to payments of his own debts mentioned therein, and avoid the payment of the debts for which he was liable as surety and for the payment of which the very same mortgage was executed to secure. He must first pay the two debts included in the mortgage, for which he is liable, and the balance, if any, will be applied to his own debts. He must also account for the moneys deposited with him by Cross under the provisions of the mortgage for the payment of the Pindell notes, and will not be allowed to say in the court of equity as between himself and Pindell that he has applied the money thus deposited to the payment of some other debt. Brannin, the purchaser, must occupy the same position toward Pindell that Tinker did. His purchase neither diminished nor enlarged the equities of the parties connected with the mortgage. He holds the notes subject to all the equities by which Tinker was bound. He had notice of the manner in which Tinker held the notes and the terms of the mortgage given to secure them, and we perceive no error in the judgment of the court below requiring Brannin to account for the moneys paid him by Cross. We can not, however, concur with counsel for Pindell that Tinker by reason of the execution of the mortgage executed in May, 1868, abandoned his lien on the real estate described in the mortgage of 1868. It seems that Cross, in addition to the debts owing Tinker and described in the mortgage of 1868, was also indebted to him by note in the sum of $7,000 and to secure which the mortgage of 1867 was executed. We have already adjudged that the proceeds of the mortgage given to Tinker to secure debts for which he was bound as surety, and also his undivided debts must first be applied to the payment of the debts for which he is liable as surety, but we can not adjudge upon any principle of law or equity that the se-

curity of taking a mortgage for the sole purpose of indemnifying himself waives his right to the enforcement of a prior lien existing on the firm previous to the taking of the mortgage and for a different liability on the payment of other debts than that mentioned in the mortgage. The $7,000 note due Tinker, and to secure which the mortgage of 1867 was executed, is not secured by the mortgage of May, 1868, and counsel for appellant in the brief filed, must quote from recollection the contents of the mortgage of 1868, as the view therein taken and the quotations made are not sustained by the language of that instrument. The mortgage of 1868 recites the debts for which Tinker is liable as surety and also the two notes due Tinker by Cross for upwards of three thousand dollars each, and by its terms conveys the property mentioned to secure the payment thereof. The seven-thousand-dollar note for the payment of which the mortgage of 1867 was given to secure, is not alluded to in the mortgage of 1868 until after all the covenants and conditions are recited, and only then for the purpose, as we suppose, of showing that the surety for its payment was still retained. The clause is as follows: "And shall well and truly pay to the second party the debts due him, including the debt of $7,000 executed by mortgage dated 15th of April, 1867, and recorded in deed book No. 131, page 585, Jefferson County Court, then this conveyance shall be null and void." This clause is the only reference made to the note for $7,000, and if intended to be secured by the last mortgage it would have been described and set forth with the other notes as a part consideration for the execution of that instrument. The language used in regard to this note in the mortgage of 1868, instead of evidencing an abandonment of the lien created by the mortgage of 1867, shows an intention not to surrender any lien acquired by it, and we therefore concur with the chancellor in the opinion that Brannin has a prior lien for the $7,000 note upon the real estate therein mentioned.

The appellant, Amelia Codun, after the mortgage executed to Tinker in 1868, by Cross, upon the goods so purchased by Cross from Pindell, being a creditor of Cross, obtained a judgment against him upon which an execution was issued and levied by the sheriff of Jefferson County upon the equity of redemption of Cross in the goods mortgaged. It seems that under the agreement with Tinker, Cross, by the terms of the mortgage, continued his business in

selling his goods and merchandise and in replenishing his stock by making additional purchases. Then appellants insist that the mortgage to Tinker is a nullity so far as he attempts by that instrument to acquire a lien for the goods purchased by Cross after the execution of that instrument, and that the after-acquired goods were liable to be subjected to the payment of their debts. They were about to proceed to sell the goods or the interest of Cross therein under their execution, and whilst their execution was in full force and in the hands of the sheriff, Pindell, the receiver, by an amended petition, obtained an injunction staying all sales of the property until the rights of the parties could be determined by the chancellor. The property was afterwards sold by a commissioner under an order of the chancellor, and it appears from the proof that $900 of the proceeds of the sale was from goods purchased by Cross after the execution of the mortgage to Tinker. The court in the case of *Ross v. Wilson, Peter & Co.,* reported in 7 Bush 33, adjudged that a mortgage was inoperative and void as to after-acquired property, and after a careful perusal of the able argument of counsel for Pindell upon this point, we are still constrained to adhere to the principles announced in that case, sustained as it is by the weight of authority in this country and in England and by nearly all the elementary writers on the subject. Tinker permitted Cross to promote his business by the express terms of the mortgage, and although the goods afterward purchased were so mingled with the old goods, upon which the mortgage was properly executed, as not to distinguish the one from the other, still this confusion and mingling of the stock was the fault of Tinker, the mortgagee, and if any of the parties are to suffer, the party causing the trouble should bear the loss. (*Weil & Brother v. Silverstone,* 6 Bush 703.) Pindell is asserting his right to the mortgaged property by reason of its execution to Tinker, and as he is claiming alone under Tinker upon the issue made between himself and Amelia Cochran, etc., his equity is no greater than that of Tinker; if Tinker had no lien on the after-acquired property by reason of the mortgage, Pindell can have none. The execution of the appellants, Amelia Cochran, etc., whether properly levied or not, was a lien on the after-acquired goods. This lien they could not enforce by right of the injunction in this case and the chancellor, in determining the equities of the parties, should have

allowed the appellants, Amelia Cochran, etc., the sum of $900, the proceeds of the sale of the goods made by the commissioner and purchased by Cross after the execution of the mortgage. The only question of doubt is as to the extent of the appellants' recovery out of the proceeds of the goods as against Tinker and those claiming under him by reason of the mingling of the after-acquired goods with those on hand when the mortgage was executed. We are of the opinion, looking to all the equities of the case, that Amelia Cochran should only recover the amount for which the after-acquired property was sold. We perceive no error in the settlement of the accounts of the firm against Cross to the prejudice of any of the parties.

The judgments in the appeal of Pindell and the cross-appeal of Brannin, is affirmed and reversed on the appeal of Amelia Cochran, etc., for further proceedings consistent with this opinion.

Pindell, Barrett & Roberts, for appellants.

Thompson, for appellees.

L. L. NORTH *v.* IRVIN TURNPIKE ROAD.

Pleading—Corporate Existence—Uncertainty.

Where paragraphs of answer which attempt to deny the existence of a corporation are uncertain whether the defendant intends to allege that there never was such a corporation or to allege that the corporation had ceased to exist, it is insufficient for uncertainty.

Pleading—Answer—Insufficiency.

A paragraph of answer to a complaint of a corporation, which fails to allege the facts from which it appears that the charter granted by the county court was void, is insufficient.

Subscriptions—Plea of Non Est Factum.

In an action on a subscription contract to a turnpike company, an answer of non est factum was held to be defective for failure to show the facts upon which the alleged corporation differed from the agreement or subscription, and how defendant was prejudiced thereby.

Opinion of the Court.

Corporations—Stock Subscriber—Waiver.

Where a subscriber to stock in a turnpike company took part in the organization of the company, and paid the first claim or assessment on his subscription, he thereby waived all technical objection to antecedent proceedings.

APPEAL FROM OWEN CIRCUIT COURT.

January 13, 1873.

OPINION BY JUDGE PETERS:

Appellant, by subscribing his name either by himself or agent, to the paper filed, and designated as the subscription, with the amount opposite his name that he would pay, undertook to pay said sum of money to aid in building a turnpike road from the particular point designated in said writing to another designated point. At the time there was no incorporated company to build the road, but the subscribers, as they state in the writing, had expected to get a charter from the next Legislature, and the road when chartered was to be called the Big Irvin & Brocke Road.

A company was incorporated by the county court of Owen County under Chap. 103 of the R. S., pp. 440-9, 2 Vol., by the name and style of the "Irvin Turnpike Road," and by that name the company was organized under the charter granted by the county court aforesaid, elected a president and directors, located its road over the lands, and from and to the points designated in the subscription, let the building of it to the lowest bidders. Calls were made on the subscribers for the stock subscribed by each upon proper and legal notice, and it is alleged and not denied that appellant paid the first call of his subscription. This action was brought for the second call on his subscription, for which a verdict and judgment were rendered against him, and he had appealed.

After a demurrer to the petition had been overruled the appellant filed an answer containing five paragraphs, alleging in the first that at the commencement of this action there was not, nor was there when the answer was filed, any such corporation as the Irvin Turnpike Road; nor the president, directors and company of the Irvin Turnpike Road named as plaintiffs. That the Irvin Turnpike Road named as plaintiff in this action has never been incorporated according to law, and the pretended charter said to have been

granted by the Owen County Court is null and void, and the said court had no authority to grant the same.

The third paragraph is a plea of *non est factum*. In this paragraph appellant merely denies that the charter granted by the Owen County Court is in accordance with the terms of the subscription. And in the last paragraph he says he never subscribed any stock to the Irvin Turnpike Road, and never authorized any one to subscribe the same for him.

The first and second paragraphs of the answer are attempts to deny the existence of the plaintiff as a corporation, but from the first it is uncertain whether the pleader intended to allege that there never was such a corporation as the one set forth in the petition or whether he intended to allege that the corporation had ceased to exist. It was therefore insufficient for uncertainty. It fails to allege that there never was such corporation as the plaintiff, and if its existence had terminated the facts which produced that termination should have been alleged.

The second paragraph was insufficient because it failed to state the facts from which it would appear that the charter granted by the Owen County Court was void. The whole paragraph is a mere deduction from facts which may exist, but which the pleader failed to state so as to enable the court to determine whether they authorized his deductions.

The third paragraph is a plea of *non est factum*, forming an issue which was tried by the jury, and their verdict is fully sustained by the evidence. The validity of the charter did not depend upon the question whether it accorded with some one agreement or an agreement or subscription. That paragraph, as must be apparent, was defective because it failed to state facts showing how it differed from the agreement, or subscription, and how appellant was prejudiced thereby.

As to the fifth paragraph, it is sufficient to say that it is alleged in the petition that appellant paid the first call on his subscription, thereby fully recognizing his subscription of stock to appellee, which allegation he does not deny, and instruction No. 3, as asked by appellant, was properly refused, and the other two instructions asked by appellant presented mere abstract propositions not raised by the

pleadings, and were properly refused, and no objection is perceived to the instruction given by the court.

The judgment must be *affirmed*.

Drane, for appellant.

Craddock, for appellee.

RESPONSE TO PETITION FOR REHEARING.

April 25, 1873.

OPINION BY JUDGE PETERS:

The paper upon which the subscription for the stock to build the road was made, without giving its name to the company, recites that the subscriptions are made to build a turnpike road from Mrs. Gip Simpson's, by T. J. Brown's, thence by John Vallandingham's to Thomas Blackburn's on Big Irvin; the money subscribed to be paid to the order of the president and directors of said road when elected; the road to be called the "Big Irvin, and branch road to New Liberty." The width and manner of grading and completing the road are provided for in the paper which is made a part of the petition, and it is further provided how the officers are to be elected when $400 are subscribed, who are to hold their offices for one year from their election and until their successors shall be elected under a charter which we (the subscribers of stock) expect to get from the next Kentucky Legislature.

From this language it is perfectly evident that the payment of the subscriptions did not depend upon the procurement of a charter from the Legislature, nor upon the particular name that might be given to the corporation or association.

The object of the subscribers of stock was to construct a turnpike road between the designated points, to be located on the particular route described. Whether the company was to be incorporated by an act of the Legislature or under the general law by the county court, and by what name it was to be called, formed no part of the consideration for making the subscription, and the same could not be conditions precedent to the payment of the money.

The order of incorporation directs that the turnpike road shall be located and constructed as provided for in said paper, and that paper shows that more than $400 of stock was subscribed. And in the amended petition it is expressly alleged that after a charter had been granted by the Owen County Court, to-wit: on the 16th of October, 1869, the stockholders in said road, pursuant to said charter, after having ten days' notice thereof, published in the Owenton News, met together, and elected a president, etc., and appellant does not in his answer deny that he met with them and participated in the election. Appellant was a stockholder, and the language of the petition is broad enough and does include him, and having taken part in the election, he thereby waived all technical objections to the antecedent proceeding.

We may have taken the word "recovered" in the amended petition as "received," but even if the last word had been used there were other and stronger reasons for affirming the judgment.

The petition must be *overruled*.

Drane, appellant.

Craddock, appellee.

J. H. RAPPELL v. J. REBHAM.

Joint Adventures—Recovery.

Where property is sold to a firm engaged in buying live stock, and they are all charged with having purchased the stock, a joint recovery may be had without an allegation that they were partners.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 13, 1873.

OPINION BY JUDGE PRYOR:

The evidence in this case conduces to show a partnership between the defendant to the action in the purchase of hogs. They are

declared against as joint purchasers of the hogs alleged to have been sold them by the appellee, and although the proof may disclose the existence of a partnership, still it does not defeat the right of recovery because they are declared against as jointly liable.

If the hogs were sold to them jointly the proof that they were partners only shows their joint liability. If property is sold to a firm engaged in buying stock or in other business pursuits, if they are all declared against as having purchased it, we see no reason why a recovery cannot be had in the absence of any allegation that they were partners. That they are jointly liable is unquestioned, and they are presumed to know whether this joint liability arises from a contract of partnership or otherwise, and not the party instituting the action. If one of the parties should be omitted the only mode of taking advantage of it under the ruling in Chitty was by plea in abatement. The weight of the testimony shows a joint liability.

Judgment *affirmed.*

T. B. Fairleigh, appellant.

Gazlay, Yeaman & Reinecke, appellee.

LEROY H. FOLLIS *v.* JOHN N. FOLLIS, ETC.

Trusts—Property Conveyed to Wife.

Property conveyed to a wife decided to be held by her in trust for her husband, and subject to payment of his debts.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE PETERS:

The evidence wholly fails to sustain the view that appellee John N. Follis was in a condition financially to make a settlement of the property claimed by his wife on her. If he and his partner had a capital of $10,000 in their business and made the profit of $7,000 within the space of less than two years, they have been unable, or at least they have wholly failed, to give any consistent and

intelligent account of the manner in which the original capital or the profits have been disposed of.

In 1864 the personal estate given in by N. Fallis to the assessor of the town of Wilmington, Ohio, which seems then to have been the residence of Fallis and wife, for taxation, amounted to the sum of $350, and from the evidence it appears that a piano worth some $400 or $500 was the only valuable personal estate of the wife that the witnesses knew anything about, and that she may have yet.

In 1862 it appears by an instrument in the nature of a mortgage on real estate near to or in Wilmington, Mrs. A. E. Farris loaned to her husband $709, to secure which said instrument was executed. Then that must have been the extent of his indebtedness to her, as she only included that sum. On the 2d of August she, by her writing endorsed on the mortgage, released the same, reciting that it was for value received.

A. S. Berry proves he sold the lots in Bellevue to J. N. Fallis for $1,200; that he paid him for them and he knew no one else in the transaction. Also that he was the agent who negotiated the sale of the Timberlake property. He sold it to J. N. Fallis, who paid $1,200. He (Berry) went his surety for $800 to Timberlake, the balance of the first payment, and he transacted the business with Mr. Fallis and made the deed to the Bellevue lots to Mrs. Fallis by the direction of her husband.

It is apparent from the evidence that Mrs. Fallis has secured to her a much larger amount in the Timberlake house than she has shown she advanced to her husband, and that the Bellevue lots and the lot conveyed to her by Raipe are held in trust for her husband, and should be subjected to the payment of appellant's demand.

Wherefore the judgment is reversed and the cause is remanded with directions to sell so much of the Bellevue lots and the lot in Newport conveyed by Raipe to Mrs. A. E. Fallis as will be sufficient to satisfy appellant's debts, and for further proceedings consistent herewith.

Hallam & Hallam, for appellant.

Hawkins, for appellee.

WILLIAM EAST *v.* ELIZ. CANADY, ETC.

Witnesses—Inconsistent Statements.

Where a witness' statements are not consistent, but he is not impeached, or directly contradicted, his evidence can not properly be disregarded.

APPEAL FROM WAYNE CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE LINDSAY:

Martin Silvees was a competent witness in favor of the widow and children of John Silvees, deceased. He had no interest with them in their defense, but was rather interested in compelling them to pay his debt, and as the proceeding against him was upon a return of *nulla bona* he was liable for costs, whether it resulted in the discovery and subjection of any of his estate to the payment of his debt or not.

His statements are not altogether consistent, but as he is neither impeached nor directly contradicted, his evidence could hardly have been properly disregarded.

Even if it be true that he voluntarily and without consideration remitted to appellees two hundred dollars of the purchase price originally agreed to be paid for the land, we do not well see how appellant can complain on that account.

By the sale of what he claimed to be Martin Stevens' equity of redemption in a tract of land, he, by his own bid, satisfied his execution in full. This was done on the 3d day of January, 1865.

The deed to these appellees was made fifteen days afterwards, when appellant had no apparent claim against Martin Silvees. Having elected to take Martin Silvees' title to this land, in satisfaction of his debt, these appellees had the legal right to make any arrangement with the latter they could to perfect this title, and it can scarcely be inferred that by releasing a portion of the purchase money, as matters then stood, the parties intended to practice fraud on appellant. His petition as to appellees was properly dismissed.

Van Winkle, for appellant.

James, for appellees.

E. W. LEN *v.* JOHN HENSON, ETC.

Landlord and Tenant—Transfer of Lease.

Where one who was a conditional purchaser of land as tenant of the vendor, abandoned his attitude as a purchaser after cultivating the land one year, and sold his interest to another and put him in possession, the landlord had the right to treat the transaction as a transfer of the lease only.

APPEAL FROM BRACKEN CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE HARDIN:

As we construe the contract of March 29, 1862, Black was conditionally a purchaser of the land, as the tenant of Len, depending on the payment or non-payment of the stipulated price in tobacco, annually. It appears that Black, after cultivating the land one year and making some improvements, elected to abandon the attitude of a purchaser, and sought to dispose of his alternate rights, under the contract, and upon the failure of Len to pay him for his improvements he sold to Henson for $30 and put him in possession. Len seems to have treated this transaction, as he had a right to do, as a transfer of the lease, which began and took effect upon the election of Black that he would not hold the land as a purchaser.

There is not, we think, any such evidence of an adverse holding of the land by Henson as to entitle him to the benefit of the statute of limitation, as applying before the expiration of the lease, which was less than two years, six months before the institution of this action.

It results that, in our opinion, upon the fact proved on the trial, the court erred in adjudging the inquisition found in the country to be true.

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

B. G. Willis, H. Taylor, for appellants.

Doniphan, for appellee.

PAINT LICK TURNPIKE CO. *v.* E. B. WALLACE & OTHERS.

Subscriptions—Payment.

Persons who subscribe for stock in a turnpike company can not refuse to pay their subscriptions until the road has been built through their lands, in the absence of a stipulation in a subscription contract to that effect.

APPEAL FROM MADISON CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE PRYOR:

There is some conflict in the testimony as to the benefits resulting to the appellees from the partial construction of the turnpike road to or near their lands. It is evident from the statements of the appellees themselves that the original design of the company was to build the road from the railroad as far as Flat Gap.

The stockholders or subscribers were all desirous of having the road located on a certain route, and so far as the proof shows and to the extent the road had been completed, it is located on the ground contemplated by all the parties. The testimony is clear and conclusive that Wallace, one of the appellees, was satisfied with its location and construction with reference to his farm on which he lived, but he is insisting, as well as his co-appellees, the two bankers, that before they can be compelled to pay their money subscribed the road must be finished to Mason's Fork, or extended up that branch of the principal creek. Their subscription, however, is not based upon the condition that the road is to be completed to that point before they are made to pay. If so, the road must be abandoned and the subscribers released from the payment of the money claimed. They, however, agree to pay, provided the road runs to a certain point and then up a particular creek, having reference to the location of the road and not the payment of the money.

They agree to pay in such calls as are made upon them by the company, and if when these calls are made it appeared that the route had been changed and the company had located the road upon a different creek than the one agreed on, then no recovery could

be had. The only mode of making the road run to the point designated by the subscription is for the appellees to pay the money, so as to enable the company to construct it. Wallace and I. A. Baker own land very near this turnpike road. It runs onto the land of Wallace, and within a few hundred yards of the land of I. A. Baker. Prior to its construction they had from five to seven miles of dirt road to travel over in order to get to the railroad depot. Now they have five miles of turnpike to travel upon.

If these appellees are released, all the parties to the contract, or who subscribed, might have refused to pay until the road was completed through their lands, and thus prevented any effort at its construction. If the parties did not intend to pay the money until the road was finished, they should have so stipulated. No road could be made, as said by this court in the case of *McMillan v. The Maysville and Lexington Road*, 15 B. Monroe 234, if under such subscription the payment can be postponed and the completion of the road demanded. There was no objection in the court below to a prosecution of the joint action for these several liabilities.

The judgment is reversed with directions to the court below to render a separate judgment for the amount due by each of the appellees, to be credited by any amount due them by the road, and if the appellees desire to take proof on this subject they should be permitted to do so.

Burnam, for appellant.

Carpenter, for appellees.

JACKSON BRADBURN *v.* CHAS. W. WARNOCK, ETC.

Appeal—Review.

The Court of Appeals can not review matters not raised by the issues and not adjudged by the trial court.

APPEAL FROM CARTER CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE PETERS:

The judgment appealed from was rendered on the 25th of August, 1871, and is that in which certain matters between C. W.

Warnock, J. Bradburn, Robt. Shaw and John Holbrook are litigated, involving the right of Warnock to be reimbursed the amount paid by him to extinguish the lien of Garbell, and how the same shall be paid, or apportioned out of or on the notes given by said Warnock to Gent for the price of the land purchased of him, and by Gent assigned to Bradburn, Holbrook and Shore.

By the judgment of the court below, Warnock was credited on the note held by Bradburn $143.14, the full amount thereof, he having reduced that note to that sum by payment; and the balance of $164.06, to make up the whole amount to satisfy the Gartrell lien, was credited on the note held by Holbrook, and further adjudged that Holbrook by the pleadings was not entitled to a judgment against Warnock for the balance of the note he held on Warnock, and that the case was not in a state of preparation to try as between him and Shore, and as to those matters and all others not settled, and in litigation, the case was continued on the cross-claims of Holbrook, and that appropriate pleadings should be filed to enable the court to dispose of the whole cause, and Bradburn has appealed.

Of the four notes executed by appellant first, and unpaid, the one held by appellant first matured, and if at the time Warnock paid the money to remove the lien, Gent, to whom it was given, had then been the holder, there can be no doubt that he would have been entitled to have the credit therefor on the note, or notes, first maturing, and he lost none of his equities by the assignment of said notes to others, consequently the court did not err in adjudging his credits to be placed on the notes held by Bradburn and Holbrook. And as there is no judgment adjusting the rights as between the several assignees of Gent, on that branch of the case, there is nothing for this court to review. But it may not be improper to suggest that, if it is intended by all the holders of the four notes to have the equities adjusted as between them, it would be proper for the parties to amend the pleadings to raise these issues.

But the final judgment between Bradburn and Warnock as to the right of the latter to his credits is affirmed.

R. D. Davis, for appellant.

Dulin, for appellees.

FOWLER, LEE & CO. *v.* HOWELL GANO, ETC.

Carriers—Insurer of Goods.

A common carrier is an insurer of the goods transported by it, while a warehouseman is liable only for want of ordinary care.

Judgment—Persons Included.

A judgment against three parties, where the record only shows that two of them have any interest in the controversy, is erroneous.

Pleading—Amendment After Reversal and Remand.

Plaintiffs were held entitled, upon reversal and remand of the case, to amend their petition to conform to the facts established by the evidence.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE PRYOR:

Upon a careful consideration of the petition it is evident that the appellees were seeking to make appellants liable by reason of their alleged wrongful act in shipping the goods in controversy on the Rapidow No. 1 instead of the Rapidow No. 2, and the court, therefore, very properly overruled appellants' motion, to require the appellees to elect as to the manner in which they should declare against them. The court, however, after overruling the motion, proceeded to render judgment against the appellants, first, as common carriers, and second, as forwarding and commission merchants. It seems to us in either view of the case presented, a judgment should have been rendered dismissing the appellee's action. The appellants, after having placed the goods on board the Rapidow No. 1, had performed their part of the undertaking and were released from all liability as forwarding merchants, and there is no proof whatever that one of the appellants might have any interest in, or was a joint owner of either of the boats, and still a joint judgment is rendered against him and his co-appellant by reason of this alleged ownership. There is a material difference between the liability of a carrier of goods and that of a warehouseman, or forwarding merchant. The former is held to a greater degree of

care than the latter. The one is the insurer of the goods, the other only liable for the want of ordinary care, etc. The goods had been consigned to the steamer, Rapidow No. 2, at Paducah, and placed on board the steamer Hale at Cincinnati to be transported to that point. The delivery was made by the Hale to these appellants, who were forwarding merchants at Paducah and agents for both steamers, Rapidow No. 1, and 2. The Rapidow No. 2, the consignee of the goods, refused to receive them on account of the heavy load that boat was then carrying, and directed the appellants to ship them by the steamer Rapidow No. 1. When this shipment was made their liability terminated. (Stacey on Bailments.) If the Rapidow No. 2 undertook to carry the goods to their place of destination, or as consignee, and being a common carrier placed them on another boat, then the boat on which the goods were placed must be deemed as carrying them for the Rapidow No. 2, and as its agent knew if the goods were lost the liability of the Rapidow No. 2 or its owners must be determined by the law applicable to carriers of freight upon the principle that common carriers are liable for the acts of their agents and those in their employ. This action, however, is not instituted against the appellants as carriers, and even if the complaint had been made in that way the judgment against three of the parties on this implied undertaking is erroneous when the record shows that only two of them have an interest in the boats. Whether these two appellants, Lee and Fowler, or this company to which they belong, are liable to the appellees are questions not proper to determine upon the case as now presented. The appellees can maintain their action, as it appears they not only failed to ship the goods to Curd as directed, but for the additional reason that they have forwarded to Curd a duplicate of the goods alleged to have been lost. These facts should be alleged and Curd made a party to the action. The appellees should be permitted to amend their pleadings. The judgment of the court below is reversed and cause remanded with directions to award the appellants a new trial and for further proceedings consistent with this opinion.

J. Campbell, for appellants.

J. Q. Quigley, for appellees.

GEO. W. RHODES, ETC., *v.* J. R. GILLISPY & WIFE.

Pleading—Defects in Petition Cured by Answer.

A petition relating to real estate, which is fatally defective for want of description of the property, may be cured by averments of the answer supplying such defects.

Appeal—Grounds—Premature Hearing.

The fact that a case was prematurely heard is not ground for appeal to the Court of Appeals until the question has been presented and acted upon by the trial court.

Appeal—Matters Not Presented.

The Court of Appeals can not prejudge matters not presented to it on appeal.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 14, 1873.

OPINION BY JUDGE PETERS:

There is not an averment in the petition that appellee, Sarah A. Gillispy, was a married woman, or labored under any disability when she signed and acknowledged the deed.

The petition contains no description whatever of the lot or real property sought to be recovered. A large space is left blank in the copy furnished us, apparently to be filled by some one at some future period, and the name of the grantor in the deed, which is referred to for the purpose of giving a location to the property, is left blank. It is therefore a petition without one material allegation, and upon which no valid judgment could have been rendered, if it had stood alone and unaided by the answer; but all the material aid needed is elaborately and fatally furnished by the answer, and with the omissions thus supplied the court below had no alternative and could do nothing less than render judgment for the surrender of the possession of the land to appellees.

But the ulterior questions which relate to the lien of appellants for unpaid purchase money, and for money advanced on the subsequent contract for the purchase of the lot or for the previous sale thereof and rents and improvements, are undetermined by the circuit court, and these questions this court cannot anticipate nor prejudge. But for the reasons stated the judgment for the recovery of the possession of the lot must be affirmed.

G. W. Swope, appellants.

Sweeney & Sweeney, for appellees.

RESPONSE TO PETITION FOR REHEARING.

January 14, 1873.

OPINION BY JUDGE PETERS:

If the case was prematurely heard, that was no ground for an appeal to this court until the question had been presented and acted upon in the court below (Secs. 577, 578, Civ. Code), and no action appears to have been taken in that court on the question.

The case on the cross-petition, asserting a lien on the lot for unpaid purchase money, was continued, and what was "understood" in that court further than is expressed in the record this court has no means of knowing, and if it had and the understanding was erroneous, this court has no power to correct. But in the opinion delivered in the case it is stated that the question as to the lien of appellants for purchase money on the lot is undetermined by the court below, and this court can not prejudge the question. We add that this court must presume that the circuit court will, on final hearing, give to appellants all the relief they shall show themselves entitled to.

The answer fails to allege a failure on the part of appellees to give appellants notice to quit, but places the defense on entirely different grounds.

We are constrained to adhere to the opinion delivered.

Petition *overruled.*

G. W. Swope, for appellants.

Sweeney & Sweeney, for appellees.

WILLIAM DILWORTH, JR., *v.* WILLIAM L. MURPHY.

Mortgagee—Surrender of Lien.

A mortgagee should not be compelled to surrender his lien on any of the property embraced in the mortgage until all parties in interest are brought into court and their respective interests adjudged.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 14, 1873.

OPINION BY JUDGE LINDSAY:

It is not pretended that the wharf property will sell for a sum sufficient to satisfy the claims of all persons holding liens on it. The note transferred to Dilworth by the Bank of Kentucky is secured by a mortgage on both the wharf property and the Preston Street lot. Except for the fact that the latter property has been purchased by Murphy, it is clear that those holding liens on the wharf property subordinate to the lien in favor of the note now held by Dilworth, could in equity compel him in the collection of the note assigned to him by the bank to resort first to the Preston Street lot.

The decree of the vice-chancellor is doubtless based upon the idea that the purchase by Murphy gives him an equity superior to those of the holders of the junior mortgage on the wharf lot, and that as they can not compel Dilworth to look primarily to his lot without disregarding the superior equity, they will not be allowed to do so.

It is not necessary that we should express an opinion as to whether or not this view is correct. The holders of the subordinate or inferior liens on the wharf property are not parties to this suit and are in no way bound by the judgment herein. If in the contest between Dilworth and the holders of these liens a different conclusion as to their respective rights shall be reached, they can insist, notwithstanding such judgment, that he shall satisfy the note assigned to him by the bank out of the Preston Street lot, and thus be deprived of the benefit of his superior lien on the wharf property, which, upon the other hand, the judgment in the case will debar him from looking to said lot for the payment of his debt.

It seems to the court that the appellee should have been required to make the holders of the liens on the wharf property parties to his suit, or else it should have been consolidated with suit No. 21,622, which, it appears, is pending in the chancery court, for the purpose of settling the superiority of the various liens on the wharf property.

Until all the parties in interest are in some manner brought before the court in the same proceeding and their respective rights adjudged, Dilworth ought not to be compelled to surrender his lien on any of the property embraced in the mortgage to the bank.

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

Speed, Boyle, for appellant.

Elliott, for appellee.

A. H. POLLOCK *v.* GERMANTOWN & BRIDGEVILLE TURNPIKE CO.

Estoppel—Right of Way.

Where defendant must be regarded by his defense made as having consented that plaintiff should have a right of way over defendant's land in consideration of a sum allowed therefor by the jury, he is estopped to claim possession as against plaintiff, and it does not matter that he had not parted with the title by conveyance, or bound himself by writing to do so.

Estoppel—Possession—Record of Suit.

The record of a suit concerning land held sufficient to estop defendant from questioning plaintiff's right to possession of the land.

Frauds, Statute of—Memorandum—Record of Suit.

The record of a suit concerning land held sufficient to take the transaction out of the statute of frauds.

APPEAL FROM BRACKEN CIRCUIT COURT.

January 15, 1873.

OPINION BY JUDGE LINDSAY:

In the suit against appellant to compel him to pay the amount subscribed for stock he defended upon the ground that the appellee had unlawfully taken and appropriated a portion of his lots in Germantown.

By an amended answer he claimed that its road had been unlawfully located on his said lots. Upon his motion the jury was instructed that if they believed that appellee, without appellant's consent, entered upon this land and ploughed or dug up his soil, "and removed or destroyed his fencing, and appropriated any part thereof, thereby depriving him of the use thereof," they should find for him the damages thereby sustained. Under this pleading and instruction he recovered on his set-off seventy-five dollars. We

can not escape the conclusion that the fact of the appropriation of the land in the location of the road, and his being thereby deprived of its use, was considered by the jury when the verdict was made up.

The nature of his plea and the instruction asked by him clearly imports the fact that he regarded and treated the appropriation of the land or right-of-way as complete. He must, therefore, be regarded by the defense thus made as having consented that appellee should have the right of way over his said land in consideration of the amount allowed therefor by the verdict of the jury. It does not matter that he had not parted with the title by conveyance, or bound himself to do so by a written obligation. He has estopped himself to claim possession as against the appellee. Judgment *affirmed.*

Wills, Taylor, for appellant.

Donaphin, for appellee.

RESPONSE TO PETITION FOR REHEARING.

DELIVERED BY JUDGE LINDSAY:

This court is satisfied that the opinion in the cause can stand without the introduction of a new mode of passing possession and title to real estate. Oral contracts for the sale of lands can not be enforced, yet if the vendor sues for the purchase money and the vendee permits judgment to go, and the judgment is paid, the record of the suit will certainly estop the vendor from maintaining an action for the recovery of the realty.

Where appellee entered on and appropriated appellant's land without right, an action either for trespass, or for the recovery of the possession would have lain in favor of appellant, but he had the right to waive both the trespass and the unlawful holding, and recognize the appropriation and recover the value of the land or easement appropriated. He exercised this right when sued by the company, and by his pleading and the instructions given at his instance, asked to be credited by the value thereof. The company accepted the issue, and the judgment of the court gave him the credit asked.

The record of that suit is sufficient to take the transfer of the title to the land or easement out of the statute of frauds, and in equity and good conscience estops appellant from questioning appellee's right to the possession. Appellant ought not to have pay for the land, and have the land also.

It is a matter of no consequence whether appellee had the right to construct its road inside the corporate limits of Germantown or not, appellant has in effect sold his land to it and received pay therefor. If it has no right to hold the land the question is between it and the commonwealth and in its settlement appellant has no interest.

Petition for rehearing overruled.

Willis, Taylor, for appellant.

Donaphin, for appellee.

ROBT. RUTHERFORD'S HEIRS *v.* FRANCIS CLARK'S HEIRS.

Executors and Administrators—Sale of Land.

An administrator with the will annexed held authorized under the circumstances to sell the land in controversy.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 15, 1873.

OPINION BY JUDGE PETERS:

When this case was here on a former appeal, it was said in the opinion then delivered by this court that the question of an indebtedness on the part of appellants, authorizing the sale and conveyance in 1847, seems to have been comparatively overlooked or neglected, and possible injustice may have been done to innocent occupants, who were not parties. We have concluded, at the urgent appeal of counsel, to exercise a liberal discretion and give leave on the return of the cause to take, without available delay, testimony on that subject, if either party may choose to do so. 4 Bush 27.

By an examination of that opinion it will also be seen that, from the evidence in the cause, the consideration paid for the land seemed

to be very inadequate, which contributed in no inconsiderable degree to the revarsal of the judgment then complained of; but after the return of the cause to the court below quite a number of depositions have been taken directly on that point. And without entering upon an analysis of that evidence, we remark it has greatly lessened, if not entirely removed, that objection.

But the main question in the case, and that which must decide the fate of this litigation, is whether there was "an indebtedness" authorizing the sale and conveyance in 1847.

After the return of the cause additional evidence was taken under leave of the circuit court as to the indebtedness of appellants, or the estate of their testator, to the representatives of Morrow, the executor, and on final hearing with the additional testimony in, the petitions of appellants were dismissed, and from that judgment they have appealed.

In order to present a connected and comprehensive view of the matters involved it is necessary to refer to some of the facts stated in the former opinion of this court.

From a settlement made by Morrow of his executorial accounts in 1814, it appears that the estate of his testator, Rutherford, was indebted to him in the sum of $5,377.22. No exceptions seem to have been taken to the report of that settlement; hence it may be assumed that it was acquiesced in by all parties. No other settlement was made till October, 1819; then a second one was made, and by it the estate of the testator was reported to be indebted to Morrow in the sum of $9,008.90. In 1822 commissioners were appointed to review the settlement of the accounts of Morrow, who approved the settlement of 1819 by a report made in February, 1822, and on the 27th of March, 1823, the administrators of Morrow returned the approved settlement to the proper court, which was confirmed by the court and ordered to record. Morrow having died in 1820, Robert Worthington and John T. Cooper were appointed and qualified as administrators with the will annexed of Robert Rutherford, deceased, and continued to act in that capacity until March, 1833, when on their failure to give to their surety in their administration bond counter-security on a rule against them for that purpose, they were removed; and in April following W. C. Worthington was appointed by the county court of Jefferson, Va., their successor, and in 1836 Lot Pittman, as his attorney in fact, contracted to sell the

land to Clark & Bright. Of Worthington's subsequent appointment in Kentucky, and his confirmation of the contract of his agent, and conveyance of the land to the vendees in 1847, a history is given in the former opinion.

It may be remarked that the representatives of Rutherford and Morrow, or the greater part of them, lived in Virginia, were well known to each other, as must be presumed from the facts appearing in this record, and could not have been strangers to the conditions of the estates they were respectively interested in, and the transactions connected therewith. The returned settlements, when approved, were adjudications of an indebtedness on the part of Rutherford, spread on the public records, to be sent and read by all who would take the trouble to examine them.

From the evidence of Geo. W. Chase, recorder of the county of Jefferson, Virginia, it appears that the settlement before referred to, showing a balance of $9,008.90 in favor of Morrow as executor, was upon the records of his office, and upon examination he found no exceptions taken to said settlement, a copy of which he filed with his deposition.

Redenow, the administrator of Wm. C. Worthington, proves that during the time he has been acting as such administrator, he had heard from the parties connected with the estates of Rutherford and Morrow, that there was a large balance due from the estate of Rutherford to that of Morrow, the heirs of Morrow always claiming a large balance from Rutherford's estate; and he had no recollection of ever having heard any of the heirs of Rutherford deny such indebtedness, unless it may be that Jas. L. Ranson, whose wife was an heir, may have done so "in a general way." And Sarah Hawks, who was a daughter of Robert Worthington and sister of Wm. C. Worthington, who were successively administrators of Rutherford, proved that they claimed a large indebtedness of the estate of Morrow from Rutherford's estate.

It appears from the opinion of the court below that appellants orally excepted to these last depositions and that the same were overruled and appellants excepted to that ruling of the court.

Sec. 650, Civil Code, provides that exceptions to depositions shall be in writing, specifying the grounds of objection filed with the papers of the case, and noted on the record. The oral exceptions as expressed by the court were therefore properly disregarded, the written exceptions having been withdrawn.

The parties interested in the estates of Morrow and Worthington were related; the reputed or ascertained indebtedness of the one to the other was a frequent subject of conversation between them. The claim was the subject of discussion in the suit of Brown v. Appellees on his bond for 1,000 acres of the land conveyed by Wm. C. Worthington to the latter. The claim of this indebtedness was frequently brought to the knowledge of appellants, and yet no effort was made by them through a long course of years to disprove it, nor does it seem to have been scarcely called in question.

Under these circumstances we can not judicially determine that the administrator with the will annexed was not authorized to make the sale and conveyance to Clark & Bright.

Wherefore the judgment is *affirmed.*

Van Winkle, Lindsey, for appellants.

James, Durham, F. T. Fox, for appellees.

G. B. CONNELLY *v.* T. WEBSTER.

Prisons—Guards.

If a jailor can not procure the services of proper guards upon the terms prescribed by law, he should report such fact to the county judge.

Prisons—Guards—Payment.

It is not the duty of a jailor to pay persons employed as jail guards.

Prisons—Guards—Payment.

Where a jailor voluntarily paid jail guards for their services, he thereby becomes purchaser of their claims against the county, and receives the amount due them as their assignee, and not in his capacity as jailor.

Attachment—Property Subject to.

Money received by a jailor as assignee of the claims of jail guards is attachable and subject to payment of the debts of the owner even though he be the jailor.

APPEAL FROM KENTON CHANCERY COURT.

January 15, 1873.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

It was not the duty of the appellant as jailor of Kenton County to pay the persons employed as jail guards for their services. If he could not procure the services of proper guards upon the terms prescribed by law, he should have reported that fact to the county judge.

When he voluntarily became paymaster to the guards, he merely made himself the purchaser of their claims against the county, and he receives the amounts due them respectively as their assignee, and not in his capacity of jailor.

Such funds are not exempt from attachment, but may be subjected to the payment of the owner's debt, although he be a jailor.

The principles governing the cases of *Webb v. McCauley,* 4 Bush 8, and *Divine v. Harvie,* 7 Monroe 439, do not apply in a case like this.

Judgment *affirmed.*

Hallam & Hallam, for appellant.

Frisks, for appellee.

JOHN WELSH *v.* LOU., CIN. & LEX. R. CO.

Limitation of Actions—Personal Injuries—Suspension of Statute.

To suspend the operation of the statute of limitations against an action for personal injuries, plaintiff should have alleged and proven facts showing either that the defendant had prevented him from suing, or by agreement, contract, or understanding had induced him to refrain from bringing suit.

Limitation of Actions—Personal Injuries—When Statute Begins to Run.

The statute of limitations begins to run against an action for personal injuries on the day of the injury, and the fact that plaintiff did not discover the extent of his injuries until several months thereafter can not relieve him from the operation of the statute.

APPEAL FROM KENTON CIRCUIT COURT.

January 16, 1873.

OPINION BY JUDGE LINDSAY:

There is nothing in this record from which we feel authorized to conclude that there existed between the parties any such contract

or agreement as would suspend the running of the statute of limitation.

Appellant states that immediately after being injured, the railroad company caused him to be taken to a hospital at Covington, paid for his board and the attention bestowed upon him, and also employed a surgeon to give him medical attention and to restore, if possible, his injured leg to such an extent as to render him able to take care of himself in the future, and that at the end of eight months such attention was withdrawn. He does not claim that he received this care and attention in pursuance to any contract or understanding with the company that he was to be so taken care of, or that he was to be restored at its expense, as would enable him to earn a living, but leaves it to be inferred that it was a mere gratuity.

To suspend the operation of the statute he should have alleged and proved such a state of case as would show, either that the company had prevented him from suing, or by an agreement, contract or understanding had induced him to refrain from doing so. And upon this latter hypothesis it would be necessary to place the company in such a position that the plea of limitation upon its part would amount to a fraud.

The fact that appellant did not discover the extent of his injuries for several months can not avail him. The cause of action occurred the day the injury was inflicted, and from that day the statute commenced to run.

The peremptory instruction to find for the appellee was proper.

Judgment *affirmed.*

Fisks, for appellant.

———, *for appellee.*

NORTON, ETC., *v.* L. ANDERSON.

Costs—Accruing Under Cross-Action—Liability For.

One who undertakes to pay the defendant all the costs that may accrue to him at the suit of plaintiffs is not liable for the costs incurred by a cross-action against plaintiff.

Opinion of the Court.

APPEAL FROM GRAVES CIRCUIT COURT.

January 16, 1873.

OPINION BY JUDGE LINDSAY:

Lucien Anderson covenanted by the bond executed January 7, 1867, that the president and directors of the Bank of Tennessee should pay to Clanton & McFadden, the defendants to the action, and to the officers of the court all costs that might accrue to them in that action, either in the Graves Circuit Court or any other court to which it might be carried.

That action was never carried to any other court, and the Bank of Tennessee recovered judgment in the Graves Circuit Court. The appeal that was brought to this court was from the judgments in favor of Norton, Hall & Morse on cross-actions brought by them against the bank. Anderson did not undertake to secure the payment of the costs incurred in these suits either in the Graves Circuit Court or in this court. Hence the rule against him must be discharged, at the costs of Norton, Hall & Morse.

———, *for appellant.*

———, *for appellee.*

J. H. CURD *v.* R. F. MIX, ADM'R OF E. H. CURD.

Executors and Administrators—Action Between Administrators.

A suit can not be maintained by an administrator de bonis non against a former administrator of the same estate for failing to discharge the obligations of his bond.

Executors and Administrators—Action for Waste.

The right of action in a suit for waste is in the distributees, and not in the administrator de bonis non.

Executors and Administrators—Liability for Uncollected Claim.

Before an administrator de bonis non is chargeable with an uncollected claim of the estate for failure to collect it, it should appear not only that the party owing the debt is solvent, but that a fee bill could have been levied upon the property of the debtor.

Executors and Administrators—Surcharging Settlements.

Previous settlements are prima facie evidence of the correctness of the various vouchers filed therein, and before they will be rejected by the court, if there are any affidavits other than the claim-

ants as to the justness of the act and a receipt therefor, it should be made to appear by the parties surcharging the settlement, that the credit was improperly allowed for the reason that it was not owing, or that the administrator had a valid defense thereto.

Executors and Administrators—Claims Against Estates.

Where claims against an estate are authenticated by sworn statements of witnesses and claimants, they ought not to be rejected, especially after they have been allowed in a county court.

Executors and Administrators—Claims Against Estate.

Where claims against an administrator are sustained by affidavits of witnesses as to their correctness, and presented by the claimants, and allowed the administrator in settlement by the county commissioner, they will not after six or seven years be rejected for want of proof, unless their validity is successfully assailed and a state of case presented showing that the administrator ought to have paid them.

Executors and Administrators—Liability of Executor for Fee Bill.

An administrator ought not to be charged with a fee bill which he failed to return to the clerk's office, if he can show that the parties owing it were insolvent.

Executors and Administrators—Judgment Against.

A joint judgment in favor of an administrator de bonis non and the distributees, against the administrators, where the administrator de bonis non was not a party to the action and was not entitled to judgment, is erroneous.

Executors and Administrators—Liability for Fee Bills.

An administrator should not be charged with fee bills, unless it appears that they were collected, or that the parties were solvent, lived in the county, and they should have been levied and made as provided by law after they came into the hands of the administrator.

Executors and Administrators—Liability for Fee Bills.

Where fee bills have not been returned by the administrator, he should be allowed to show that the parties liable thereon were insolvent.

Executors and Administrators—Liability for Fee Bills.

Fee bills returned to office by administrator should be treated as accounts unadministered, and passed to the administrator de bonis non, and the administrator should not be charged with them, unless it is shown that while they were in his hands they could have been collected, and that their return to the office has resulted in a loss to the estate by reason of insolvency of the parties.

Opinion of the Court.

Executors and Administrators—Claims Against Estate.

Where there are written evidences of debt on the part of the decedent, and they are filed as vouchers and have been credited, and a county court settlement, with the receipt of the claimant, they should be allowed.

Court Commissioners—Report.

Manner of making report of claims against estate stated.

Executors and Administrators—Settlement Between Administrators.

Where administrators desire a settlement of accounts as between each other, such requirement must be inserted in the order of reversal, or they must file a cross-pleading for that purpose.

Executors and Administrators—Fee Bills—Collection.

An administrator may be called upon to show whether he has collected any of the fee bills returned to the county court, as he is entitled to all the assets not administered.

Executors and Administrators—Settlement Between Administrators.

A settlement between two administrators in regard to their accounts should not be allowed to delay the prosecution of a suit by the distributees.

Executors and Administrators—Suit by Distributees.

In a suit by distributees against administrators to recover money in their hands for which they had failed to account, it is proper to make the administrators liable for any assets not reported by them and for which they failed to account.

APPEAL FROM CALLOWAY CIRCUIT COURT.

January 16, 1873.

OPINION BY JUDGE PRYOR:

The administrator de bonis non of E. H. Curd was only interested in the assets of the decedent unadministered, and the action was properly instituted by the distributees against the former administrator of the intestate to recover of them the moneys in their hands, for which they had failed to account, and also for the alleged failure of their part to administer the estate as required by the terms and stipulations of their bond.

No suit can be maintained by an administrator de bonis non against a former administrator of the same estate for failing to discharge the obligations of his bond, and in a suit for waste, the right of action is in the distributees and not the administrator de bonis

non. *Felts v. Brown*, 7 J. J. Marshall 147; *Graves v. Downey*, 3 Monroe 355; *Carroll v. Connet*, 2 J. J. Marshall 205.

If this suit is to be regarded as an action for waste and not upon the bond, no joint liability can exist when it appears that the wrong is attributable to the acts only of one of the administrators.

A joint bond was executed by the appellants, and although the sureties in this bond are not declared against, still we are satisfied after a careful reading of the petition that the bond is the foundation of the action. Its execution is not only alleged, but the stipulations therein contained, that the appellants as administrators would make a true and correct inventory of the personal estate of the decedent, and account for all the assets that might come to their hands. The bond is then made part of the petition and various breaches assigned for failing to account for moneys collected, to pay over the same, or to faithfully administer the estate.

The settlements made by the appellants in the county court are attacked, and various items of credits alleged to have been improperly allowed the administrators.

The intestate at the time of his death left his estate in such a condition as necessarily rendered a settlement of it troublesome, and attended with more than ordinary delay. He had been clerk of the court in Calloway County for many years; was a partner in the firm of Shelby & Curd, and of Shelby, Curd & Company, two mercantile establishments doing considerable business; also a partnership in farming with one McDevitt. His business was complicated and it must of necessity have required some considerable length of time before the administrators could ascertain and report the true condition of the estate.

The decedent died in 1849 and these administrators qualified in the same year and were removed as such in the year 1853, which year they made a settlement of their acts as administrators in the Calloway County Court. In the year 1859 the present suit was instituted, six years after these settlements were made, and the case referred to the commissioner to audit and settle the accounts of the appellants. Upon the settlements made in the county court these appellants retain many of the fee bills, belonging to the estate with the settlement, and state that they were so retained because they were insolvent, or not collectible by law.

The administrator de bonis non was then entitled to the fee bill

and all other claims for assets due or belonging to the estate unadministered, and if they were solvent and placed in his hands, should have proceeded to have collected them. Whether the administrator de bonis non received them or not does not appear from the record, but whether he did or not, in the administration and settlement of so many small items, with the difficulty always attending the collection of such claims, there should be discretion allowed a personal representative with reference to his action in regard to them.

By placing them in the hands of an officer for collection he may but add cost against the estate, and before he is chargeable with such a claim, or a failure to collect under the circumstances of this case, it should appear not only that the party owing it was solvent, but that the fee bill could have been levied upon the property of the debtor. If it was out of date the administrator should have returned it, for at least he would have created no liability in doing so. Many of these fee bills were in such a condition as that no levy could have been made upon the property of those against whom they were issued by reason of lapse of time, and therefore should not have been charged against the administrators.

The settlement made by the administrators was shortly after the adoption of the revised statute, and the acts of the administrators in administering the estate and for which they are sought to be made responsible, were all, or nearly all, prior to July, 1852. These settlements are prima facie evidence of the correctness of the various vouchers filed in these settlements, and before they are rejected by the court, where there is any affidavit other than the claimants as to the justness of the account and a receipt therefor, it should be made to appear by the party surcharging the settlement that the credit was improperly allowed for the reason that it was not owing, or that the administrator had some valid defense to it. Voucher 67, rejected by the commissioner in this case as an account of John Curd, is sufficiently proven. This account is for $168.43, and the appellants are now charged with the amount of the account and interest, making the whole amount $349. It was allowed in the county court and is proven by the oath of one of the administrators as well as John Curd and receipted by him.

Voucher 110 should have been allowed as a credit. It had been credited to the administrators in the settlement and seems to have been money expended by them in the building of new ferry boats

after the death of Curd. The affidavit, however, of the administrator should be appended to it. Voucher 82 should have been allowed as it was paid by the administrators and receipted by the creditor, and was for work done by them as carpenters for E. Curd.

Voucher 37 should have been credited by the commissioners, as it was paid for the estate and proven by the oath of two parties. This should be credited by the fee bills against the parties.

Voucher 50 should have been allowed. It is proven by the oath of Ellison and that of a claimant and receipt.

Voucher 14 should have been allowed. It was proven by the affidavit of one witness and the claimant and receipted. The items alluded to and rejected by the commissioners were all included in the county court settlement and the accounts of the administrators credited by them. Some of them were for work and labor done for the decedent and for articles produced, sold and delivered him. They are all authenticated by the sworn statements of witnesses and claimants, and ought not to have been rejected, particularly after they had been allowed by the county court settlement. Many other items rejected are proven in the same way and should not have been charged to the appellants. This does not preclude the appellees, however, from showing that the accounts and claims were improperly paid, as that the administrators knew that they were unjust, or that they had set-offs against them which they failed to use or apply as a payment, but where claims are paid by administrators prior to 1852, based upon the affidavits of the claimant and others as to their correctness and receipted by the claimants and allowed the administrators in a settlement by the county commissioners, it will not do after the lapse of six or seven years to reject the claims for the want of proof unless their validity is successfully assailed and a state of case presented showing that the administrator ought not to have paid them. Nor ought the administrator be charged with fee bills that they failed to return to the clerk's office if they can show that the parties owning them were insolvent, with an absence of proof that they were ever collected. The final judgment in this case is also erroneous. Mix was not properly a party to the action. Duncan, the former administrator de bonis non, was not made a defendant and never answered, and the order substituting Mix, the present administrator, as a defendant as plaintiff, and the adoption of Duncan's answer by him was erroneous,

as Duncan had never filed an answer and seems not to have been a party plaintiff or defendant. The judgment is a joint judgment in favor of Mix as administrator de bonis non and the distributees against the administrators when Mix was not seeking any judgment, and entitled to none.

This case should go back to the commissioner for settlement without reference to the settlement heretofore made by him. He should allow all claims or demands sustained by affidavits of the claimants and a single witness as to their justice that have been allowed by the county court unless it is shown that they were not valid, or that the administrators had set-offs and failed to apply them. No such affidavit or authentication should be required, as it is made unnecessary by the existing law. The administrators should not be charged with fee bills unless it appears they were collected or that the parties were solvent, lived in the county and that they could have been levied and made as provided by law after they came to the hands of the administrator, as they had been allowed by the county court, and this was prima facie evidence that he acted right in refusing them.

Where fee bills have not been returned by the administrators they should be allowed to show that the parties were insolvent. As to the fee bills returned to the office, we are inclined to the opinion that they were accounts unadministered and passed to the administrator de bonis non, and the administrator should not be charged with any of them unless it is shown that whilst these fees were in their hands they could have been collected and the return of them to the office has caused a loss to the estate by reason of the insolvency of the parties. Where there are written evidences of debt on the part of the decedent and they are filed as vouchers and have been credited in the county court settlement, with the receipt of the claimant, they should be allowed.

The firm of Shelby & Curd seems to have been conducted by Shelby and there was no laches on the part of the administrator in failing to sue or settle with Shelby until the year 1850. This was about a year after the administration, and as the decedent Curd seems to have entrusted him with the entire business during the existence of the partnership, his administrators should not be held responsible, when they in fact proceeded by suit against him within a year after the death of their intestate. When the case is again

before the commissioner in making out his report, he should annex with each item or voucher attached the proof of each party, viz.: the evidence upon which it was paid and the evidence against it, or where it is excluded for want of proof the authentication should accompany the voucher so that the court can see from the report itself, first, the voucher; second, the proof to sustain it, and third, the proof against it, or the reason for excluding the voucher.

If the administrators desire a settlement of the accounts as between each other, they must have it inserted in the order of reversal, or file a cross-pleading for that purpose. The administrator can be called upon to show whether or not he has collected any of the fee bills returned to the county court, as he was entitled to all the assets unadministered. The settlement between the two administrators in regard to their accounts should not delay the prosecution of the suit by the distributees. It is also proper in this proceeding to make the administrators liable for any assets never reported by them and for which they have failed to account.

The settlement, however, must be made de novo. The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

The appellants should be permitted to introduce additional proof in regard to their claims and inasmuch as they are in default and obtain this relief they should pay one-half the costs in this court.

Although there is no evidence of any improper conduct on the part of the commissioner in this case, as the errors might well have been committed by either commissioner or judge, and were in fact sanctioned by the court, still, if parties desire they should have a commissioner in no wise interested or related to the parties.

Brown, Bush, Alexander, for appellant.

Williams, Stubblefield, Beckham, for appellee.

JOHN G. MARSHALL *v.* HENRY BENGE, ETC.

Contracts—Construction—Understanding of Parties.

Ordinarily courts will not hear oral evidence as to what parties understood to be the meaning of a written contract, but will look alone to the language used to ascertain the meaning.

Opinion of the Court.

Contracts—Construction—Meaning of Words.

Where it is clearly and unmistakably shown that both parties to a contract attached to a word or expression used a meaning different from that ordinarily applied to it, and that to refuse to allow such understanding to control would be to enforce a contract which they did not intend to make, oral evidence is admissible to show what the understanding of the parties was as to the contract.

APPEAL FROM MADISON CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE LINDSAY:

Appellees' first instruction is irreconcilable with the only instruction given at appellant's instance, and is erroneous and misleading. The writing must be regarded as containing the contract actually made and finally consummated by the parties.

The contract as therein expressed must be taken as the true one, notwithstanding any other different agreement or understanding between the parties before the paper was signed. There is no sufficient allegation of mistake or fraud in reducing the contract to writing, and it must be enforced as written.

Appellees' second instruction is also liable to objection. Ordinarily courts will not hear oral evidence as to what the parties understood to be the meaning of their written contract, but will look alone to the language used, to ascertain that meaning.

If it can be clearly and unmistakably shown that both parties attached to a word or expression used a meaning different from that ordinarily and generally applied to it, and that to refuse to allow their understanding to control would be to enforce between them a contract they neither intended to make nor supposed they had made. The general rule heretofore stated may be relaxed. But in this case, as the application of this exceptional rule of practice will essentially change the legal effect of the contract of leasing as written, this second instruction should have been so framed as not to have withdrawn from the consideration of the jury the testimony conducing to prove that, although Marshall may not have regarded Benge as liable to pay rent accruing thereafter in case the hotel building should be destroyed by fire, he nevertheless expected and intended that he should be bound to him in the same manner and to the same extent that he was bound to his lessor.

We are of opinion that the second instruction is calculated to have this effect.

The numerous instructions asked for by appellant and refused by the court ought not to have been given. His first instruction, which was given, correctly states the law of his case.

For the reasons indicated the judgment is reversed and the cause remanded for a new trial consistent with the principles herein set out.

Burnam, Chenault, for appellant.

Breck, Turner, Smith, for appellees.

S. S. WATKINS, ETC., *v.* WM. SUMMERS & Co.

Judgment—Description of Land.

Where a petition and a judgment described land as the land on "Yellow Bank Island," the description is too indefinite and uncertain to enable the commissioner to execute a judgment without danger of injustice to the owners and probable sacrifice of their rights.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE HARDIN:

We see no objection to the personal judgment against Watkins; but the description given in the petition as well as the judgment of the interest adjudged sold to her, in the land on "Yellow Bank Island" is, according to previous decisions of this court, too indefinite and uncertain to enable the commissioner to execute the judgment without great danger of injustice to the owners of the property and probable sacrifice of their rights. The petition and judgment should have described the property and interests to be sold with reasonable certainty and the judgment should have directed a sale of all or so much as was necessary only to pay the debt and costs.

Wherefore, the judgment being inconsistent with this opinion, so far as it directs a sale of the land, it is, to that extent only, reversed

and the cause remanded for further proceedings not inconsistent with this opinion.

The personal judgment is not disturbed.

Ray, Walker, for appellants.

Owen, for appellees.

WM. PIATT & WM. WATTS *v.* JOHN PIATT'S ADM'R.

Executors and Administrators—Assignee of Claim.

The estate of an assignee of a claim can not be held to lose the benefit of the assignment merely because the personal representative failed to become a party to the suit in which the assignor was prosecuted, and which he might well believe would secure the rights of the estate.

APPEAL FROM BOONE CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE PETERS:

By a transfer in writing dated April 18, 1861, Jacob Piatt and his wife, for the expressed consideration of $900, assigned to John Piatt all their interest in a judgment which then had been recovered against David Piatt, executor of Robert Piatt, deceased, and all their interest in the estate of said testator.

After that judgment was rendered, and said assignment was made, said judgment was reversed, and upon entering the mandate of the court, it seems that Jacob Piatt prosecuted the claim against the executor, which finally resulted in a judgment for a much smaller amount than was the first judgment; but there is neither allegation nor evidence that the contract for his assignment was ever rescinded, or that John Piatt or his representative had abandoned their claim to it. Cauby proves he was present when the contract was made; that the consideration named in the writing was actually paid in his presence, partly in money and partly in a debt which Jacob owed John Piatt.

It does not appear that Jacob was indebted to appellants when he assigned the claim to John Piatt and we can not conclude that the estate of the assignee should lose the benefit of the assignment merely because the personal representative failed to become a party

to the suit which his assignor was prosecuting, and which he might well believe would secure his right.

Judgment *affirmed*. Judge Pryor not sitting.

Drane, for appellants.

Rodman, for appellee.

W. O. CRENSHAW *v.* W. B. KEEN'S ADM'R.

Parties—Partners.

One who alleges that he is a partner of a defendant, and exhibits the articles of partnership, shows sufficient interest in the result of the litigation, as to entitle him to be made a party to the action.

APPEAL FROM SCOTT CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE PRYOR:

In the amended petition filed by Keen's administrator against Ashurst and Brother it is alleged that the mortgage includes all the improvements, buildings, etc., upon the factory lot and all the machinery and apparatus thereon the 7th of February, 1871.

The judgment foreclosing the mortgages is to sell the whole of this property, or so much as will pay the debts.

Crenshaw alleges that he became a partner in the firm of Adent & Bro. in the year 1867 and paid into the partnership to be invested in the enterprise ten thousand dollars or upwards. The money was used as alleged for the purposes of the partnership and a large portion of the machinery now sought to be sold by the judgment of the appellees, was purchased and placed in the mill whilst he was a partner; that the greater portoin of his money is still due him. He exhibits the articles of partnership, and we think manifests such an interest in the result of the litigation as to require the court to make him a party so that he can assert his claim in the present equitable action, by the creditors of the other partners to subject it to the payment of their debts. The only cause of complaint Crenshaw has is in the refusal of the court to make him a party. The remaining errors assigned, if they exist, are not complained of by the parties affected by them. It being error,

however, to refuse the appellant the right to be heard in the present action.

The judgment must be reversed and cause remanded so as to permit him to be made a party to the action and for further proceedings consistent herewith.

Polk, for appellant.

Robinson, for appellee.

THOS. S. ELLIS *v.* TRUSTEES OF RICHMOND.

Municipal Corporations—Rescission of Order Opening Street.

Where town trustees have appropriated property in the opening of a street, and have litigated the question of damages, the trustees have no power to rescind the order opening the street to the injury of the property owner.

Municipal Corporations—Opening Street—Right of Action for Damages.

A judgment or order in an action for mandamus, "that the motion for a mandamus as prayed is overruled," is not such a judgment as will bar the right of action to collect damages assessed in opening a street.

Municipal Corporations—Opening Street—Right of Action for Damages.

The fact that plaintiff was a trustee of the town where an order to open the street was made, does not affect his right to payment of damages sustained by opening the street, or give the trustees the right to take his land without compensation.

Municipal Corporations—Requirement of Tax Levy to Pay Claim.

Where in an action against a town for damages sustained by the opening of a street, the answer of the town disclosing that it has no property out of which the damages can be made, and that its treasury is empty, the court should require the trustees at their next annual assessment to levy a tax sufficient to pay the claim.

APPEAL FROM MADISON CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE PRYOR:

The trustees were vested with the power to open new streets by the act approved January 18, 1868. They did open the street upon appellant's land, as appears from the record of their own proceedings, and the appellant at the time being himself a member of the

board of trustees, agreed to postpone his right to any payment for damages sustained until the next succeeding assessment for taxes in the town. This on the part of the appellant and the directors to open the street was all embraced in one order. The street was opened and the damages to which appellant was entitled properly ascertained. The act under which they claimed the power to open the street authorized the county judge to empanel a jury to assess the damages. This was done by the county judge on the motion of the trustees, and a verdict was rendered awarding the appellant $916 in damages. Ellis had sold various lots bordering upon this street and it was the only mode of ingress and egress to and from the property. These lots were occupied and in the possession of his vendees. The trustees had no power to rescind the order opening this street so as to affect appellant after they had appropriated his property, and placed him in a condition where he must necessarily be subjected to great loss, in the event this right is conceded to the trustees. They had not only litigated the right of appellant to damages, but had, in fact, taken his property. He had the right to postpone the time of payment for these damages as long as he saw proper by the consent of those contracting with him. The town was not bound by this agreement not to demand the money prior to the opening of the street, and there is no rule of law or equity that authorizes such an entire disregard of the rights of a party as shown in this case towards the appellant by the trustees. If the damages were excessive, the same law authorizing them to open the street gave them the right of appeal to the circuit court, and having failed to do so, they must pay the appellant the damages he is entitled to, unless he is barred of his right to recover by reason of the dismissal of a former petition filed by him, to enforce this claim against the same parties. There is no pretense on the part of the trustee that these damages have ever been paid by them, or any of the city authorities; and the only defense made is that they had the power to rescind the order opening the street, and thereby avoid the verdict in favor of appellant for damages. The present petition not only alleges, but the order opening the street and by which Ellis agreed to indulge the town for the payment of his claim shows, that this money was to be collected out of the assessment for the year 1869 and it was not in the power of the appellant to coerce it sooner, as by his consent of record he had given this in-

dulgence. It is also alleged that the petition in 1868 was prematurely brought, and that on this account the motion for a mandamus was overruled and it is manifest that no trial was had upon the merits. The judgment, or rather order, in the original action *"That the motion for a mandamus as prayed is overruled,"* is not in our opinion such a judgment as will bar the right of appellant to collect the amount of damages assessed.

The attempt to coerce the money in 1868 was a premature proceding and was properly dismissed. The fact that Ellis was a trustee at the time the order to open the street was made, does not preclude him from his right to demand payment of the corporation, or give to the trustee the right to take from him his land without compensation.

The answer of the appellees discloses the fact that the corporation has no property out of which the damages can be made and also that its treasury is empty. The court below therefore should require the trustees at their next annual assessment as for taxation to levy a tax sufficient to pay appellant's claim, with interest from the date of the assessment made in 1869. The judgment is reversed and cause remanded for further proceedings consistent with this opinion. *Duncan, etc., Trustee, v. City of Louisville,* 8 Bush 99.

Burnam, for appellant.

Turner, Smith, for appellee.

ROBERT A. O'BRYAN *v.* SARAH E. O'BRYAN, ETC.

Executors and Administrators—Purchase and Sale of Land by Administrator as Commissioner.

Where an administrator was appointed commissioner to sell land of the estate, and purchased the land at the sale, and afterwards sold it at an advance over the price paid by him, he will be held to account for the excess of the price received over the price paid by him.

APPEAL FROM MEADE CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE PETERS:

It is authoritatively settled that if an executor or other trustee at a sale of the trust property buy it, the beneficiary shall have the election to hold him to the purchase, or disregard it, and claim restitution of the thing sold, or payment of its full value. All profits made by a trustee, by the use of any trust property, belongs to the beneficiary. *Longest's Adm'r v. Tyler's Ex'r,* 1 Duvall 192.

In this case the administrator was the commissioner to make the sale, and while it is true that he did not as auctioneer cry the sale, still it was a sale conducted by himself; he alone could approve the bonds which the purchaser might tender, report whether it was made in conformity to the judgment, and the manner it was conducted. He may be said to be seller and buyer, vendor and vendee, positions inconsistent, and such as the chancellor can not recognize, although the sale may have been conducted with the utmost fairness.

Appellant certainly sold the land for a considerable advance, which is conclusive of the fact that he purchased the property at a reduced price, and besides the indebtedness of the estate for which the land was sold amounted to only $157.60, and it does not appear that it was necessary to sell the whole tract to pay that sum.

The court below adjudged correctly in holding appellant liable for the amount he sold the land for after crediting him by the amount he paid for it, and what the estate of his intestate owed him.

Judgment *affirmed.*

Fairleigh, for appellant.

Kinchloe, Lewis, for appellee.

BERRY'S STATION & RAVEN CREEK TPK. CO. *v.* L. REDMON, ETC.

Trial—Direction of Verdict.

A peremptory instruction to find for defendants in an action on subscriptions to a turnpike road, was held erroneous, where there was evidence to show that the road was not put under contract before a certain amount of the stock was subscribed for, and that the road was properly located.

APPEAL FROM HARRISON CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE LINDSAY:

Appellees rely upon these grounds of defense:

First. That the road was not located on the nearest and most practicable route from Berry's Bridge to the Lexington and Covington Turnpike road.

Second. That the road was put under contract before one hundred shares of stock had been subscribed for.

Third. That the company was not expending and had not expended all its means on the end of the road beginning at Berry's Bridge. Upon the testimony of the appellant the court peremptorily instructed the jury to find for appellees.

This action of the court can only be sustained upon the idea that appellant wholly failed to make out its alleged cause of action.

So far as the location of the road is concerned, it is proved by the witness, McNees, that the location selected by way of Colemansville "was the nearest, best, cheapest, and most practicable route." It is further shown that after the road was located appellees were present at a meeting of the stockholders and voted in the election for directors, and that one of them, Lair, superintended the construction of one mile of the road on the route now complained of.

As to the second ground, it is shown that a portion of the money of the company was expended in constructing the road from Stringtown towards Berry's Bridge at the suggestion and request of these appellees.

The third ground is clearly shown to be untenable, even if the contract or subscription paper is susceptible of the construction appellees put upon it. Including the subscriptions conditional upon the road being located by way of Colemansville and Moore's farm, which became absolute by the compliance of the company with such

condition, more than one hundred shares of stock (exclusive of the county subscription) was taken before the work was commenced.

In this appears not only that there is evidence conducing to show that the road has been properly located, but that appellees have ratified and approved the action of the company and that they were actively instrumental in bringing about the action upon which they now base their second ground of defense, and further that their third ground is wholly untenable; under such a state of case it was manifestly improper for the court to take the case from the jury.

Instructions as in case of a nonsuit can only be given when there is no evidence to support some material fact. 3 Monroe 366. To authorize such an instruction it must appear, admitting the testimony to be true, and every inference which is fairly inferable from it that the plaintiff has still failed to support his claim. 6 J. J. Marshall 22; 7 J. J. Marshall 411; 2 B. Monroe 129.

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

Cleary & West, for appellants.

J. Q. Ward, for appellees.

MILTON GROHAGAN & CO. *v.* HEAD QUARTERS & STEEL RUN TURNPIKE R. CO.

Reformation of Instruments—Vagueness and Uncertainty of Instrument.

The evidence was held too vague and uncertain, both as to the existence of mistake of fact and the character of the obligation intended to be imposed by a resolution passed by stockholders of a turnpike company, to authorize the chancellor to reform the contract, either for the purpose of giving it a certain legal effect or of adjudging relief against it.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 17, 1873.

OPINION BY JUDGE HARDIN:

In this action, which was brought by Milton Grohagan against the Head Quarters and Steel Run Turnpike Company, on the note of its board of directors to him, for $538, the corporation filed an an-

swer, admitting the execution of the note, and that it was given as expressed on its face, for work done on the defendant's road, but alleging, by way of cross-petition against the individual stockholders in said company, including the plaintiff, in substance, that it being ascertained after the organization of the company and the subscription of part of the stock which was necessary to construct the contemplated turnpike road of six and three-quarters miles in length, that about $5,000 more than had been subscribed would be required to enable the company to complete the road, a meeting of the stockholders was called and held on the 28th day of July, 1866, "for the express purpose of devising some means of making and completing said road." That after considering and rejecting other propositions, the meeting, by the vote of a majority, adopted a resolution which, as shown by the record kept by the clerk and signed by the president of the board, is as follows: "That the *stockholders* authorize the board of directors to go ahead and let out all the sections on the road they could at a cost of not more than three thousand dollars ($3,000) per mile and the company be responsible for all indebtedness that may accumulate in completing the road, until the same is all paid." That by mistake in reducing this resolution to writing, the word *"Company"* was used instead of the word *"Stockholders,"* the meaning and intention of those who voted for the resolution being that the stockholders who were present at the meeting would "be responsible for all indebtedness over and above the sums thus subscribed that might accumulate" in completing the road as aforesaid. And that on the faith of that undertaking, contracts were made and four miles of the road finished, and the residue was graded; but to complete the road and pay the indebtedness of the company it was necessary that the stockholders contribute, and to that end they sought to have said mistake corrected, and that the court ascertain, adjudge and enforce the liability of the individual stockholders accordingly.

Some of the stockholders answered the cross-petition controverting the alleged mistake in said resolution and questioning the power of the court to reform it; and others traversed the material facts conducing to bind them by it in any form. The relief sought against them was, moreover, resisted on the ground that the legal effect of the resolution was not such as to authorize it. On hearing the cause, it was adjudged in substance and effect that the stockholders

who voted for or acquiesced in said resolution were bound to contribute in proportion to their respective amounts of stock *towards providing* for the deficiency of stock, and that said writing be so *reformed* as to impart that obligation on their part; and the court referred the case to a commissioner to ascertain and report on this basis the sums to be so contributed, and further adjudged that for the amount so to be collected, the parties should be respectively entitled to additional stock in the corporation.

This appeal is prosecuted for a reversal of that judgment. According to the decided weight of the evidence, it was the intention of a majority of those who were present and participating in said meeting, that the action taken by the adoption of said resolution should be essential for binding those who participated in some form, individually, and not as mere members of the corporation, but it does not appear whether that intention was to indemnify the directors in proceeding to complete the road, or guarantee the payment of debts to be incurred by them, or to devolve on the directors an agency for them to make contracts on their individual responsibility; nor is it at all certain from the evidence that the supposed mistake in the resolution, if there was any, was not merely as to its legal effect, as it was written, and not as to the language used in expressing it.

Without considering the grave and difficult question as to the power of the court to reform a written instrument on the ground of mistake, by the interpretation of language, giving it an obligatory effect, which it did not before possess, a question on which this court has heretofore been divided in opinion, we deem it sufficient to say that we consider the evidence too vague and uncertain, both as to the existence of any mistake of fact and the character of obligation intended to be imposed by said resolution, to authorize the chancellor to reform it, either for the purpose of giving it a certain legal effect, or of adjudging relief against it (1 Story's Equity, Sec. 151; *Worley v. Tuggle, etc.*, 4 Bush 168; *Graves v. Mattingly*, 6 Bush 361); it being a well-settled principle that relief will not be granted on the ground of mistake in a written instrument, unless the mistake is plainly and clearly made out by satisfactory proof.

It is plain that said resolution, if not altered by the court, as it should not be, imports no greater obligation on the stockholders, on account of the cost of making the road, than the law would have imposed on them, as members of the corporation, if no such action had been taken.

It results that the judgment or the cross-petition is erroneous.

Wherefore it is reversed and the same remanded with directions to dismiss the cross-petition and allow the plaintiff to pursue such remedy as he may have against the corporation and its property.

Andrews, Ross, Breckenridge & Breckner, for appellants.

Kennedy, for appellee.

CITY OF COVINGTON *v.* CHAS. CHAMBERS.

Municipal Corporations—Assessment for Street Improvement—Recovery of Money Paid.

Where defendant in a street assessment proceeding, on the sustaining of a demurrer to his answer, paid the claim on consideration of dismissal of the action at plaintiff's cost, defendant can not be allowed to recover back the money paid by him after the Supreme Court has decided that the acts under which the assessment was made were repugnant to the state Constitution and void.

Municipal Corporations—Street Assessments—Payment—Mistake.

The payment of a street assessment to avoid further litigation, can not be regarded as having been made under "a clear and palpable mistake of law," and although the assessment was illegal the money can not be said to have been paid without cause or consideration.

APPEAL FROM KENTON CIRCUIT COURT.

January 18, 1873.

OPINION BY JUDGE LINDSAY:

It is evident that Chambers did not pay the amount assessed against him for the improvement of Madison street with Nicholson pavement under any mistake of fact.

That he had reason to believe that the assessment was unconstitutionally made, is manifested by his answer to the suit of Bristol.

It seems that so soon as the circuit court adjudged his defense insufficient, he paid the money, upon the agreement that Bristol should dismiss his action at his own costs, not wanting to have it coerced out of him by judgment and execution.

The payment was not made under duress, but to escape being harassed by litigation. The agreement between Chambers and Bristol was in a certain sense a compromise of a doubtful claim, fully and voluntarily made.

It was subsequently decided by this court that the acts under which the street was improved and the assessments made, were repugnant to the state constitution and void, and hence that the property owners could not be compelled to pay them. Chambers by abandoning his defense and paying the money even before judgment in the circuit court, deprived himself of the right to claim protection at the hands of the courts, and ought not now to be allowed to recover back the money voluntarily paid. The question of law involved in the controversy was, to say the least of it, a doubtful one, and whilst Chambers seems to have yielded to the opinion of the circuit judge in sustaining the demurrer to his answer, he paid the money upon the consideration that he should be exonerated from paying the costs, then incurred by the litigation, for which he was liable in case the law was against him.

It may be assumed that he was aware of the fact that other persons continued to resist the collection of the assessments, as we find him seeking to recover back the money paid so soon as Howell and Clendining make good their defense.

The payment in this case can not be regarded as having been made under "a clear and palpable mistake of law," and whilst the assessment was illegal, as the improvement must certainly have benefited his property to some extent, the money was not paid without any cause or consideration at all.

Under the circumstances it is difficult to conclude that "honor and good conscience" demand that it shall be refunded by the city. We are of opinion that the judgment of the circuit court is erroneous. It is therefore reversed and the cause remanded for a new trial upon principles consistent with this opinion.

John P. Harrison, for appellant.

Pryor & Chambers, for appellee.

P. TAYLOR, ETC., *v.* JAMES BASSETT.

Appeal—Dismissal.

Where there is no bill of evidence certified to the Court of Appeals in an appeal from the county court of a road case, the appeal will be dismissed, since the case stands on the same basis as appeals from judgments of the circuit court to the Court of Appeals from a proceeding admitting or rejecting probate of wills.

APPEAL FROM WEBSTER CIRCUIT COURT.

January 18, 1873.

OPINION BY JUDGE PETERS:

This case originated in the county court and after appellee had succeeded in that court appellants prosecuted an appeal to the circuit court, and on motion of appellee that court dismissed the appeal, and appellants have brought the case to this court.

In *Helm, etc., v. Short, etc.,* 7 Bush 623, this court held that in appeals in road cases from a judgment of a county to the circuit court, the case does not stand on the docket, nor is it to be tried as on original action, nor as if no judgment had been rendered. Appeals in such cases occupy the attitude in circuit courts that appeals from judgments of circuit courts admitting to record or rejecting a will, occupy in the court of appeals. Both law and fact may be tried by the circuit court, but it can not hear and determine any fact which is not certified from the county court. And as there was no bill of evidence certified by the county court to the circuit court in this case the appeal was properly dismissed by that court.

Wherefore the judgment is *affirmed.*

M. C. Given, for appellants.

———, *for appellee.*

JOHN A. DUGAN *v.* W. W. ROBINSON, ETC.

Limitation of Actions—Reservation as to Persons Under Disability.

Under ch. 63, R. S. 1865, limiting the right of action relating to real estate to 15 years, but reserving to persons under disability three years after the removal of disability to commence action, an infant who did not commence action within three years from the time of his arrival at age is barred from maintaining an action.

APPEAL FROM KENTON CIRCUIT COURT.

January 18, 1873.

OPINION BY JUDGE PETERS:

In January, 1850, Abram Powell sold by executory contract to Eli I. Rusk a lot or parcel of land situated in the city of Covington. In the spring of 1850 Rusk inclosed the land contracted for, and in doing so, as alleged, he included a strip, or small piece, of Powell's land within his inclosures.

In December, 1851, Powell, the vendor, was adjudged a lunatic and died a lunatic in 1854. Martin, his committee, in 1853 conveyed the land to Rusk, under a judgment of the Kenton Circuit court authorizing him to do so.

This action, in the nature of an action of ejectment, was brought by the heirs of Powell against Dugan, the tenant in possession claiming the same, to recover the strips of land which they assert Rusk inclosed without right. The action was brought on the 25th of November, 1868, nearly nineteen years after Rusk inclosed it.

On the trial in the court below a verdict and judgment were rendered in favor of the plaintiffs, and the defendant has appealed to this court.

It is admitted by counsel for appellant that the evidence as to the location of the dividing line between the parties is even *"contradictory"*; the only ground, therefore that can be relied on for a reversal of the judgment necessarily must be that the court below erred in giving the instruction asked by appellees, and in refusing the one asked by appellant.

For appellees the court instructed the jury in substance that if they believed from the evidence that the plaintiff named as such in the petition are the only children and heirs of Abram Powell, deceased, and that said Powell died in 1854, leaving all of said children infants under the age of twenty-one years, and that the land in controversy, or any part of it, was reserved by said Powell or his *trustee* in the deed to Patton, and was not conveyed by said Powell, or his trustee to E. I. Rusk, they must find for the plaintiffs the land in controversy, or such part thereof as they find was reserved and not conveyed.

Appellant asked the court to instruct the jury in effect that if they believed Rusk inclosed the land in controversy in 1850, and he

and those claiming under him had been in possession of the same ever since claiming it as their own, they must find for the defendant, which was refused.

In 1850, when Rusk entered and took possession, the limitation act of 1796 was in force, limiting the right of action for the recovery of real estate to twenty years from the time the cause of action accrued, provided that if any person or persons entitled to such writ or writs or to such right or title of entry as aforesaid, shall be, or were under the age of twenty-one years, *feme covert, non compos mentis,* imprisoned, or not within this commonwealth at the time such right or title accrued or coming to them, every such person and his or her heirs shall and may, notwithstanding the said twenty years are or shall be expired, bring and maintain his action, or make his entries within ten years, afterwards changed to three, next after such disabilities have been removed, or death of the person so disabled, and not afterwards. 2 Statute Law of Ky. 1125.

At the death of Powell his children and his heirs were all under the disability of infancy, as the evidence shows, which occurred in 1854. It must be conceded that the lunacy of the ancestor did not stop the running of the statute, nor did the infancy of his children and heirs at the time the descent was cast upon them.

At that time the Revised Statutes had been adopted, but the provisions of Chapter 63, entitled Limitation of Actions and Suits, 2d Vol., p. 123, did not apply to suits or actions already commenced; nor to cases in which the right of action had already accrued. But by an amendment of Chapter 63 of the Revised Statutes of May 31, 1865, which took effect the 31st of May, 1866, it was provided that the provisions of said Chapter 63 of the Revised Statutes shall extend to and embrace all cases, whether the right of action accrued before or after the Revised Statutes took effect. Myer's Supp. 295.

The statute of limitation commenced running at the time Rusk inclosed the land not covered by his purchase, because a right of action then accrued to the father of appellees, and he labored under no disability; and as the law then was twenty years was the bar; but the retroaction statute of the 31st of May, 1865, *supra,* cut down the limitation to fifteen years, saving, however, three years to appellees after they respectively arrived at age, as they were *all* laboring under the disability of infancy at the death of their father,

within which to bring their action; but if one or more of them had attained the age of twenty-one years three years before the action was brought, the statute presented a bar to his or their right, and the court below should have qualified the instruction given for appellees to conform to this view and the unqualified instruction given at the instance of appellees was therefore erroneous.

Wherefore the judgment is *reversed* and the cause is remanded for a new trial and for further proceedings consistent herewith.

Furber, for appellant.

Carlisle, Foote, for appellee.

J. Q. WARD, TRUSTEE, ETC., *v.* S. G. STEVENSON.

Vendor and Purchaser—Cancellation of Sale—Failure to Open Street.

A statement in the sale of land, relative to what had been done and the opinion of the vendors as to what the council would do in regard to opening a street, is not ground for cancelling the contract of sale upon the failure of the council to open the street.

Vendor and Purchaser—Presumption—Knowledge of Other Sale—Waiver.

Where other land was sold at the time plaintiff entered into his contract of purchase, he must be presumed to have entered into the contract with knowledge of the other sale, and to have waived any cause of objection which he may have had to it.

APPEAL FROM HARRISON CIRCUIT COURT.

January 18, 1873.

OPINION BY JUDGE HARDIN:

Admitting the facts of the case to be substantially as stated by the circuit judge in his opinion, we can not concur in the conclusion of the lower court. As to the failure of the city to open Church Street, or rather to extend it, as seems to have been contemplated, there is neither allegation nor proof of fraud on the part of Ward or Dills. It appears that they authorized the auctioneer to announce, and stated themselves, the ordinance of the city council for opening the street; it may be true that a writ had issued preliminary to condemning the land over which the proposed extension of the street would run; but it still does not appear, and in fact, is not

alleged, that they did more than to honestly express this belief as to what the council had done and would do in regard to opening the street. If the appellee, acting on the information thus given, in relation to a matter of which he could have easily learned as much as Ward and Dills knew on the subject, was disappointed, as probably they were also, as to the future action of the council, we do not see that this disappointment is a sufficient ground for canceling his contract of purchase, especially after his acceptance of a conveyance of the lot.

As to the alleged breach of a promise of Dills to donate to the city twenty feet of ground for Wilson Avenue, set up in an amended answer, offered but not filed, we deem it sufficient to say that if the facts therein alleged are true, still as that ground was sold at the same time that the appellee purchased; and as we must infer before he accepted the deed to him, it must be presumed that he entered into his contract with knowledge of the other sale and waiving any cause of objection he may have had to it. It ought not, therefore, now to be made a cause for rescinding the appellee's contract of purchase.

We are of the opinion that the court erred in rescinding the contract.

Wherefore, the judgment is reversed, and the cause remanded with instructions to render a judgment for the plaintiff conformable to this opinion.

J. T. Ward, for appellant.

Cleary, West, for appellees.

JNO. W. ARNOLD, ETC., *v.* HORACE B. SMITH.

Trusts—Fraudulent Claim—Property Not Subject to Trustee's Debts.

The evidence was held not to show that the claim to property was fraudulent, but that the land was held in trust for claimant and was not subject to the trustee's debts.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 19, 1873.

OPINION BY JUDGE HARDIN:

The orders made on the 25th of June, 1869, for filing the answers of the appellants, Emma Arnold and Graff, to interrogations, as well as some subsequent orders, admit of no other construction as to the attitude of said parties than an appearance in the action.

The objection, therefore, that they were only constructively before the court can not be sustained. But a careful examination of the record satisfies us that the judgment should be reversed on the merits of the case. The appellee took the deposition of John W. Arnold and propounded interrogatories to Emma Arnold and Graff which were answered, and thus rendered all three of them competent witnesses. From their testimony it is reasonably certain that the firm of John W. and William Arnold received and resold in this business, either as trustees or debtors of Miss Arnold, several sums remitted to her from England prior to 1859. However these sums were held, the partners after quitting business, and some time before the death of William Arnold, which occurred in 1860, appear to have admitted themselves indebted to her on that account in the sum of $2,000, which afterwards remained in J. W. Arnold's hands, in trust for Mrs. Arnold, as did also the remittance of $2,901.18, received in 1867. And if this testimony is to be believed, we must conclude that the property and debts in contest claimed as the estate of Emma Arnold were the product and result of the funds so in the hands of J. W. Arnold in trust for her, and therefore exempt from the plaintiff's claim. It is true the plaintiff, after placing Mrs. Arnold and Jno. W. Arnold in the position of witnesses for him, has attempted to discredit them. But so far as Mrs. Arnold's testimony is concerned, her previous deposition, as well as her answer in this case, rather shows her to be an artless woman, unskilled in business, than an untruthful witness. The testimony of Bly and Dodge conduces strongly to establish a fraudulent purpose on the part of J. W. Arnold, to avoid the payment of the judgment of the appellee, but whatever they may prove as against him, the matter so proved is not competent evidence against Emma Arnold for any purpose. Nor is there, in our opinion, any sufficient evidence in the cause to repel the proof of the alleged trust, or sustain the conclusion that it was unusual, fictitious and fraudulent.

We are further of the opinion that the evidence does not sustain

the decision that the title and claim of Graff to the property in Taylorsville, Ky., is fraudulent; and it seems to us the court erred in subjecting the property to the plaintiff's claim.

Wherefore the judgment is reversed and the cause remanded with directions to dismiss the petition.

Rodman, Kilpatrick, Armstrong, for appellant.

Mundy, Faerleigh, for appellee.

W. F. DOGGET *v.* J. D. BLADES & SHIRLEY.

Ejectment—Possession of Defendant—Recovery.

Where plaintiff in ejectment fails to show that defendant was in possession of any part of the land when the suit was brought, plaintiff is not entitled to any relief against defendant.

APPEAL FROM PENDLETON CIRCUIT COURT.

January 20, 1874.

OPINION BY JUDGE LINDSAY:

That Dogget was apprised of the claim asserted by Shirley to the small piece of land in his possession at the time he contracted with, and accepted the deed from Blades, is made perfectly clear by the testimony of himself and Shoewalter, his own witness. But notwithstanding all this, upon the pleadings he was entitled to judgment against Shirley for the possession thereof.

It is expressly charged that Shirley is in possession of a portion of the land conveyed to appellee by Blades. Process was served upon him and he failed to answer. He can not be allowed to take advantage of Blades' defense. Appellant holds the legal title to the land, and is presumptively entitled to the possession. The relief prayed against Shirley does not affect Blades, and he ought not to be allowed to defend for him.

As Shirley failed to answer, judgment should have been rendered against him for the possession of so much of the Blades tract as he had in his possession. It was, therefore, error to dismiss appellant's petition as to him.

As appellant utterly failed to show that Blades was in possession of any part of the land when the suit was instituted he was entitled to no relief as against him. The petition does not set up a state of case authorizing a rescission of the contract of sale. Judgment was properly rendered against appellant for the balance due on the purchase money.

For the error indicated the judgment as to Shirley is reversed and the cause remanded, for further proceedings consistent with this opinion.

Clarke & Dills, for appellant.

Lee, for appellee.

DAVID ELMS *v.* JESSE HUNT AND OTHERS.

Arbitration and Award—Views of Attorney for One Party—Award.

The fact that the views of the attorney for one of the parties to an arbitration may have affected the action of the arbitrators, is not ground for disturbing the award, when the other party could have also had an attorney.

Arbitration and Award—Common Law Arbitration.

A common law arbitration is as binding on the parties as if it had been made in pursuance of the statute.

Arbitration and Award—Equitable Relief.

A party who has submitted the question of a boundary line to arbitration and lost, cannot resort to a court of equity for relief.

Boundaries—Boundary Line—Parol Agreement.

A parol agreement fixing a dividing line is binding on the parties.

APPEAL FROM BUTLER CIRCUIT COURT.

January 20, 1874.

OPINION BY JUDGE PRYOR:

The award rendered at the instance of the parties to this controversy is a bar to the present proceeding. The object of this action is to settle the boundary of the lands owned by the appellant and

appellees so as to fix the true dividing line between them. The parties long prior to the institution of the action made in writing, submitted this question to arbitration, and selected two of their neighbors as arbitrators. They reported in writing, specifying the boundary in accordance with the award. The parties were present with their witnesses and title papers, and no objection whatever made to the proceeding. There is no charge of fraud or improper conduct on the part of the arbitrators and their award seems to have been the result of the exercise of an impartial judgment on the facts before them. It is insisted that one of the appellees was an attorney at the time and that his view of the law influenced the action of the arbitrators. This is no reason for disturbing the award. The appellant should have had his attorney also, and was advised by the arbitrators to employ one before the investigation commenced. It was known by him that appellees had employed counsel, and if he was willing to enter into the investigation without one it was his own fault. This is a common law arbitration and is as much binding on the parties as if made in pursuance of the statute. *Overly's Ex'r, v. Overly's Devisees,* 1 Met. 117. A parol agreement fixing a dividing line is binding on the parties. 6 Bush 669. That the parties failed to look to the question of title is immaterial, still it does not appear that the deed offered by appellant was rejected on the question of boundary, but on the contrary, one of the arbitrators says it was taken into consideration as well as the other evidence.

If the appellant intended resorting to a court of equity to aid him in fixing their dividing line, he should not have submitted the question to arbitration. After he has done so and lost, he has no claims upon a court of equity for relief.

Judgment *affirmed.*

H. T. Clark, for appellant.

B. L. D. Guffy, for appellees.

ROBERT W. OGDEN *v.* AINSLEY COCHRAN & CO.

Bills and Notes—Bill of Exchange—What Amounts to.

A copy of an order of the county court making an allowance of a certain sum, made by the clerk of the court, is not a bill of exchange or negotiable paper, but is a mere direction to the sheriff to pay a certain sum out of a particular fund when collected.

Opinion of the Court.

APPEAL FROM WARREN CIRCUIT COURT.

January 20, 1873.

OPINION BY JUDGE PETERS:

The copy of the order of the County Court of Warren making the allowance to Rowe of $1,800 made out by the clerk of the court was in no sense a bill of exchange nor negotiable paper; but a mere direction to the sheriff of said county, who was the collector, to pay to Rowe the amount named out of a particular fund when collected, set apart or dedicated for a specified object.

The copy was not signed by the party controlling the fund, nor accepted by the sheriff, who was directed to pay the same by the order of court. The time of payment was not fixed, but left uncertain; nor does the court direct the money to be paid to the order of Rowe, or to bearer. As the writing, therefore, had none of the characteristics of negotiable paper, the law regulating the transfer and circulation of such instruments had no application to the paper in question.

We do not perceive upon what principles the evidence of Metzer & Rowe was incompetent, or how they were disqualified as witnesses. Metzer could have no possible interest, and if Rowe ever had any, the release by appellees rendered him competent.

For the reasons before stated the second instruction asked by appellant should not have been given. As no error prejudicial to appellant has been manifested, the judgment must be *affirmed.*

Rodes & Clark, for appellant.

Thos. H. Hines, for appellees.

HOUSE OF MERCY OF NEW YORK *v.* ISAAC CROMIE'S HEIRS.

Wills—Residuary Legatee—Inability to Take Devise.

A will construed and held to pass to a legatee one-half the residuary personal estate, and that the real estate devised to such legatee passed to the testator's heirs because of the legatee's inability to take it.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 20, 1873.

OPINION BY JUDGE PETERS:

From a judgment of the Louisville Chancery Court involving the proper interpretation and effect of the will of Isaac Cromie, and the settlement of several antagonistic claims, three appeals were prosecuted to this court on the same record, one of which was prosecuted by the present appellant against the Institution of Mercy of New York and others. 3 Bush 365.

After discussing the merits of the respective claims of appellant and the Institution of Mercy, as beneficiaries under the sixth clause of the will of the testator, this court stated the conclusion in the following words: "According to this essentially true outline of the extraneous facts, the most rational deduction is that the New York beneficiary intended by the testator was The House of Mercy of New York."

The mandate of this court having been entered, appellant filed a supplemental answer and cross-petition, in which, after reciting the sixth clause of the will, and stating that this court had adjudged that it was one of the beneficiaries therein provided for, it alleges that "the judgment of the court of appeals was qualified" by directing that no part of the real estate of the testator should be given to this defendant because her charter restricted the corporation to holding a value not exceeding $50,000 of real estate, which value, it was adjudged, belonged to and was held by said corporation at the time of the testator's death.

Having recited substantially the mandatory part of the opinion and judgment, appellant alleges that it is ascertained that the personal property of appellant, at testator's death, did not exceed $678.75, consequently it is entitled to receive $74,321.25 of the personalty of testator. That a considerable part of the estimate of the value of the personalty consists of receipts and income since testator's death, and the accounts as settled, including the stocks, are not sufficient to satisfy the share which appellant is entitled to take of the personalty, the value of the whole of which at testator's death is, or *may be* less than the sum required to pay said sum of $74,321.25. That the whole residuary estate, including personalty and realty, exceeded in value $200,000, and as a very inconsiderable part of the same had been passed to the devisees and legatees, and as the will of testator means that his whole residual estate, real, per-

sonal and mixed, should be divided between the two beneficiaries equally, and as the aggregate will be more than double the $74,-321.25 at testator's death, and as the personalty exceeds that sum, the full amount thereof should be given to the appellant in personalty, and the same amount should be made up to the other beneficiary out of remainder of the personalty and realty, of which there is a sufficiency. Or if that can not be done, then the prayer is that all of the real estate be sold, and the proceeds be brought into the account for a division and the amount *due* appellant be satisfied in money or other personalty.

To that supplemental pleading a demurrer was sustained in the court below and this appeal seeks a reversal of that judgment.

If this pleading be subject to the process of consideration, it seems to amount to this: that, as it has been judicially determined that appellant, by the law creating it, is made incapable of taking the real estate devised to it, but the same relapsed to the heirs of testator and must be so decreed; therefore it should have the whole of the personalty disposed of in the residuary claim, or so much thereof as will be required to make up to it the sum of $75,000, the maximum it can take, and make the other beneficiary take of the realty enough to reimburse it for its part of the personalty passed to appellant. Or, if that can not be done then, that a sufficiency of the real estate be sold and the sum required to make up the $75,000 be supplied out of the proceeds.

To either of the alternative propositions there appear objections unsurpassable. It is not shown that the testator knew what amount of personalty appellant was capable of taking, or if he did, there is nothing in the will indicating any intention on his part to make the bequest to it up to that sum. He gives to appellant one-half of the residue of his personal estate, in plain, unambiguous language, such as is not susceptible of construction. One-half of the residue of the personalty is all that it can take, and when it gets that one-half, that bequest, or legacy, is satisfied, and the will of the testator to that extent executed.

To the one-half of the residual real estate this court has adjudged the heirs of the testator are entitled, and to the other half the Presbyterian Orphan Asylum of Louisville is entitled under the will of

testator. And of these rights this court has no more power to divest the parties than it has to make a will for the testator.

The judgment of the court below must be *affirmed.*

Bullock & Anderson, Bodley & Simrall, for appellant.

Thompson, Caldwell, Gibson, for appellees.

JESSE HALL *v.* W. M. M. LEE.

Vendor and Purchaser—Conditional Sale.

The evidence was held to show that a transaction amounted to a conditional sale of land, and not a mortgage.

Contracts—Option—Time of Essence of Contract.

Where a vendor of land reserved an option to repurchase the land within a specified time upon a payment of a stated consideration, time is of the essence of the contract, and if the vendor fails within such time to execute his option, the vendee's right becomes absolute.

APPEAL FROM HARRISON CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE LINDSAY:

The distinction between a conditional sale and a mortgage is thus stated by Greenleaf in a note to page 74, 2d Greenleaf: "Where the debt forming the consideration of the conveyance still subsists, *or the money is advanced by way of loan, with a personal liability* on the part of the borrower to repay it, and by the terms of the agreement the land is to be reconveyed, on payment of the money, it will be regarded as a mortgage; but where the relation of debtor and creditor is extinguished, *or never existed,* there a similar agreement will be considered as merely a conditional sale." It can not be gathered from the writing executed by Gorley to Hall on the 12th of March, 1866, either that the consideration therein expressed was money advanced by way of loan, or that Gorley was personally liable to repay it, or that the relation of creditor and debtor ever

existed between the parties. The first clause of the writing clearly imports an absolute bargain and sale of the lands described.

The second reserves to Gorley the right to repurchase "in twelve months" by paying a fixed and definite sum of money. Failing to exercise this right, he imposed upon himself no liability to pay said amount, and receive back his bond, nor could he by tendering such sum compel Hall to accept it in discharge of his obligation to convey. If the land had decreased in value to one-half the amount paid by Hall to Gorley, the loss would have fallen upon the former. A court of equity would not have permitted him to treat the transaction as a mortgage, and give him a personal judgment against Gorley, for such sum as could not be realized from the sale of the lands.

But if there was any doubt as to the construction the paper should receive, the facts and circumstances developed by the proof conduce to show that the parties did not intend to treat the paper as a mortgage.

The consideration, $500, approximated very closely the cash value of the lands. Gorley at once delivered possession to Hall, which is not usually done when real estate is mortgaged. Hall failed to have the paper recorded as would have been proper if it was intended to be treated as a mortgage. But the strongest and most convincing circumstance to show that Hall was purchasing is that he borrowed the money paid to Gorley, paying for its use ten per cent. interest. No reason is shown why he would have put himself to this extraordinary trouble to obtain money, merely to release it on the same terms to Gorley.

We are of opinion that time was the essence of the contract for the repurchase and that as neither Gorley nor his vendee, Lee, offered in proper time to make the prescribed payment, Hall's title became absolute and indefeasible. Wherefore the judgment is reversed and the cause remanded with instructions to dismiss appellee's petition.

Curry, for appellant.

Cleary, for appellee.

D. T. PERRY *v.* B. F. CAFER.

Principal and Surety—Release of Indemnifying Mortgage.

Where a mortgage becomes released under a judgment, a mortgage given to indemnify the surety on the original understanding also becomes released.

APPEAL FROM LARUE CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE HARDIN:

This case is essentially different from that of *Hobson, etc., v. Hobson's Ex'r* (8 Bush 665), where the debt to secure which Mrs. Hobson united with her husband in a mortgage of her property, remained unsatisfied; and it was held that the statute of limitation, which would have released a personal surety, did not release the mortgage.

In this case the mortgage of B. F. Cafer and wife was not made to secure the debt to Richards or Perry, but to indemnify Wesley Cafer in his supposed liability as the surety of B. F. Cafer. If Wesley Cafer's liability had continued, the indemnifying mortgage might have inured to the benefit of the holder of the debt; but when the mortgage became released under the judgment of the court in consequence of the changing or interpolation of the note, the mortgage given to secure him against his pre-existing liability also ceased to be obligatory. This was, in effect, decided in the cases of *Hunter v. Richardson,* 1 Duvall 248; *Vandiver v. Hodge's Adm'r,* 4 Bush 539, and *Yeates v. Weeden, Adm'r,* 6 Bush 438.

Therefore the judgment is *affirmed.*

Wintersmith, for appellant.

Chelf; Brown & Murray, for appellee.

H. G. BIDWELL AND WIFE *v.* A. B. ROWE AND WIFE.

Deeds—Joint Tenancy of Widow and Children.

Where a conveyance was made to a widow as the wife of the deceased husband, it was held that she took as an ordinary grantee, and not as a widow, and can claim under the deed only as joint tenant with her children.

Opinion of the Court.

APPEAL FROM OHIO CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE LINDSAY:

As Bidwell and wife refuse to abide by the division of the lands by which Mrs. Rowe and the two brothers were to take the home farm of 200 acres and pay a difference of $500 and insist on having their full interest allotted them, they were properly required to refund the $83 paid them under the agreement.

And as they will not comply with their contract to allow Thomas an advantage of $1,000 in the division of the lands to compensate him for taking care of the "old folks," the court properly required them to comply with their contract by paying their proportion of the $1,000 in money.

The court had full power and acted properly in refusing to annul the contract, although they could not be compelled to surrender title to their land.

We are, however, of opinion that the court was in error in holding that Mrs. Rowe owned in fee one-third of the 226 acres conveyed to her and her children by Brown and wife. This deed was executed after the adoption of the Revised Statutes, and not under such a state of case as raised a resulting trust in her favor on account of the payments made by her for the land.

By the plain language of the deed she can not hold in fee more than one-sixth of the land. It is insisted that as the conveyance was made to her as the wife of Robert Render, deceased, she takes as widow and not as an ordinary grantee. We do not concur in this conclusion, but are satisfied that she can claim under the deed only as a joint tenant with her children. For this reason the judgment is reversed and the cause remanded for a partition of the lands allotted to Mrs. Rowe and the appellants upon this basis, instead of that adopted by the circuit court.

The court properly refused to disturb the allotment as to the remaining children.

Wintersmith, for appellants.

McHenry, for appellees.

JOHN T. MILLER *v.* BENJ. D. BARNES, GUARDIAN.

Guardian and Ward—Suit by Foreign Guardian—Parties.

In a suit by a foreign guardian against the domestic guardian the ward need not be made a party thereto.

Guardian and Ward—Presumption of Infancy.

In a suit by a foreign guardian against a resident guardian, it will be presumed that the ward is still an infant, especially where the defendant failed to controvert the fact.

Guardian and Ward—Suit by Foreign Guardian—Prima Facie Evidence.

In a suit by a foreign guardian against a resident guardian, a copy of the probate proceedings showing the subsequent appointment of plaintiff as guardian on removal of the ward to the other state, is prima facie evidence of plaintiff's right to relief, and it devolves on the defendant to show the contrary.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE PETERS:

The facts stated in the petition constitute a cause of action, and would authorize a recovery according to the ruling of this court in the case of *Martin v. McDonald*, 14 B. M. 437.

The following facts are admitted in express terms, or by failing to deny them in the answer, that Emma Miller had been a resident of Kentucky, and that while a resident of Fayette County, Kentucky, appellant was appointed her guardian by the proper court; that in February, 1870, she was a resident of Jackson County, Missouri, and that on the 10th day of March, 1870, appellant had in his hands as guardian of his ward the sum of $2,478.67, as shown by his settlement with the Fayette County Court.

This suit was brought on the 2d of June, 1870, by appellee, guardian of Emma Miller against appellant for the money of the ward in his hands, and it is insisted that the suit should have been in the name of the ward, or that she should have been a party to it. In *Martin v. McDonald, supra,* the suit was brought by the foreign guardian against the resident guardian without making the ward

a party at all and the petition was adjudged good on demurrer. And in the case of *Bates v. Culver,* 17 B. M. 158, and *Swaggee v. Miller,* Ib. 564, the same doctrine is approved, and these cases are in harmony with and conform to the law as prescribed in Sec. 33, Civil Code.

The suit was instituted on the 2d of June, 1870, and from the record evidence in this transcript it appears that appellee was appointed guardian on the 23d of February preceding, and although it is not expressly alleged that the said Emma was an infant at the institution of the suit, still as this suit was instituted so recently after the appointment of appellee as guardian we may assume that she was an infant when the suit was brought, and especially as appellant failed to controvert the fact in his answer when from his relation as guardian and uncle he may be presumed to know whether or not she had attained to 21 years of age.

The copy of the record from the probate court of the county of Jackson, Missouri, showing the appointment of appellee as guardian of Emma Miller, authenticated according to Sec. 18, Chapter 35, 1 R. S. 468 (Ky. Statutes, Sec. 1635), is evidence *prima facie* of his right to the relief sought by him, and devolved on appellant the burden of showing the contrary, which he has failed to do.

Wherefore the judgment must be *affirmed.*

Gibson, Falconer, for appellant.

C. D. Carr, for appellees.

LICKING RIVER LUMBER & MINING COMPANY *v.* GEORGE H. BOWLESBY, ETC.

Corporations—Service of Process.

Where process was served on all the persons designated as agents of the defendant corporation in the county, the court has jurisdiction to render judgment.

APPEAL FROM MORGAN CIRCUIT COURT.

January 7, 1873.

OPINION BY JUDGE PRYOR:

We are inclined to concur in the opinion of the court below that the evidence discloses such an agency upon the part of the parties who were served with process in this case as authorized a judgment against the company.

The company had an office at Bangor, and their prospectus holds out that point as the principal location of their business operations. Hays Meyer is the bookkeeper in their store. Whitcomb was their agent in receiving lumber, and Baldwin, who was one of the original incorporators, and also a stockholder, was the general agent in making contracts for lumber. No other persons are designated or named as the agents of the company in Morgan County, and process having been served upon all three, the court acted properly in rendering the judgment.

The judgment of the court below is *affirmed*.

Phister, for appellant.

Rodman, Hazelrigg, for appellee.

J. T. CURRY *v.* J. H. PRIVETT.

Equity—Coming into Equity with Clean Hands.

A court of equity will not grant relief to one who does not come into equity with clean hands.

APPEAL FROM ADAIR CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE PRYOR:

The appellee has made so many conflicting statements under oath in regard to the matters in controversy as compels the chancellor to deny him the relief sought.

His whole object, as he himself avows, in selling his land to the appellant was to defraud his creditors, and in order to accomplish this purpose, when prosecuting his suit in bankruptcy, has more than once sworn that he had no interest in the land now the subject of this litigation.

After his discharge in bankruptcy he institutes the present action, alleging that the bond for title was assigned to the appellant as a mere indemnity for borrowed money, and during its progress his statements under oath are so inconsistent as evidences a willingness on his part to make any assertion necessary to the successful prosecution of his action.

The chancellor will hear no such complaint. The court below, by its judgment, should have the parties occupy the same position towards each other with reference to the property, which they did prior to the institution of appellee's action.

The judgment of the court below is reversed and cause remanded with directions to dismiss the case at appellant's costs.

Garnett, James, for appellant.

Winfrey & Winfrey, for appellee.

ANNA H. ROWLAND v. CHARLES K. OLDHAM.

Replevin—Bond—Instruction.

An instruction in an action for replevin "that if the jury believe from the evidence that an indemnifying bond was taken by the defendant, sheriff, prior to the institution of the action and before the sale of the horse levied on, and that the surety on the bond was good, they will find for the defendants," limits the inquiry to the mere question of whether there was a bond executed, and withdraws from the consideration of the jury the question whether the title to the horse was in plaintiff, and whether he was subject to a distress warrant.

APPEAL FROM MADISON CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE PETERS:

This action was brought by appellant originally against Charles K. Oldham for the recovery specifically of a horse.

The defendant, after denying the title of appellant to the horse, and her right to the possession, says in answer to the petition that

on the 8th of January, 1872, he was sheriff of Madison County, and as such a distress warrant issued by the proper officer in favor of Elizabeth De Jarnett against James Rowland and Robert Rowland was placed in his hands commanding him to levy the same on the goods and chattels of said defendants or enough thereof to pay $150, with interest and costs; that on the 9th of January, 1872, he levied said distress warrant on the horse in the petition described as the property of the defendants therein; but before he made the levy aforesaid he required the said E. De Jarnett to execute to him a bond of indemnity with W. W. Moore and Warren Harris as her sureties, which bond he filed with his answer and prayed that appellant be required to seek redress of the sureties in said bond, who, as he alleges, were good and solvent, and that the actions be dismissed as to him.

After Oldham had filed his answer the record shows: On motion Moore & Harris, the sureties in the bond of indemnity, were substituted as defendants in the action instead of Oldham, and his answer taken as their answer; to this order of substitution of said Moore & Harris, in the place of Oldham, no objection was made and no exception taken.

On the trial of the cause a verdict and judgment were rendered in favor of defendants and the plaintiff below has appealed to this court.

By taking the position of defendants and adopting the answer of Oldham, appellees assumed all the responsibilities that he had incurred by taking the horse, and by adopting the answer, only so much of it as traversed the material allegations of the petition and formed issues of fact can be regarded, and such of it as related to the taking the bond of indemnity by Oldham should be disregarded, as the object had been accomplished when they were substituted as defendants in his place.

This being the attitude of the parties, Instruction No. 1 asked for by appellees and given by the court is erroneous. It is in the following words: "That if the jury believe from the evidence that an indemnifying bond was taken by the defendant, Oldham, as sheriff of Madison County, prior to the institution of the action and before the sale of the horse levied on, and that the surety in the bond was good, they will find for the defendants." This instruction limits the inquiry to the mere question of whether there was a bond executed

or not, and withdraws from the consideration of the jury the question whether the title to the horse was in appellant and the further question whether he was subject to the distress or not.

The judgment for the error pointed out must be reversed and the cause remanded for a new trial and for further proceedings consistent herewith.

Harris & Moore were substituted in place of Oldham, who thereupon ceased to be a defendant, consequently the instruction was misleading and erroneous.

Petition overruled.

Burnam, for appellant.

Turner, Smith, for appellee.

W. H. SANDFORD *v.* R. D. KEMPER.

Forcible Entry and Detainer—Possession Without Claim of Right.

The mere fact of possession of land without the claim of right will not make the entry of the tenant a forcible entry.

Forcible Entry and Detainer—Right to Retake Possession.

An owner of land may take possession of premises where he has been dispossessed by a mere trespasser who sets up no claim to the land.

APPEAL FROM OWEN CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE LINDSAY:

The mere fact of possession by Sandford, without claim of right, would not make the entry of Kemper a forcible entry within the legal meaning of that term. A person may repossess himself of his own premises when dispossessed by a mere trespasser, who sets up no claim in himself. The third instruction asked for by appellant does not recognize this distinction and was therefore properly refused.

The fourth instruction gives the law on this subject correctly and fully. The modification to the seventh instruction did change its meaning, and without it the instruction would have been misleading.

The evidence authorized the fourth instruction given for appellee. Kemper and Sandford were both on the premises when Burk abandoned his possession. Both of them took steps at that time to secure the possession, but neither of them became actually possessed. The one received the key to the house and put up the bars. The other repaired the fence by putting up a few rails. Both of them left shortly after Burk, and if either had possession after leaving, it was constructive and not actual. If Burk had forfeited his lease by transferring it without Kemper's consent, there was no one in the actual possession to whom he could give the notice required in such cases by the statute. He found the premises vacant when he subsequently entered, and if by reason of Burk's unauthorized sale his right to the possession had ended, his entry was not a forcible entry. Perceiving no error in the proceeding prejudicial to appellant, the judgment of the circuit court is *affirmed*.

Drane, for appellant.

Craddock, for appellee.

JAMES SMITH *v.* ALBERT ALLBRIGHT, ETC.

Schools and School Districts—Mulatto Children.

Mere rumor that children are mulattos is not sufficient to establish such fact, especially where their grandmother, who is alleged to be the child of a negro man, attended the public schools, and the children appear to be white children.

Schools and School Districts—Mulatto Children—Evidence.

Mere rumor that a negro was the father of a woman who had attended the public schools as a white child, is not admissible to show that she was a mulatto.

APPEAL FROM GARRARD CIRCUIT COURT.

January 21, 1873.

OPINION BY JUDGE PRYOR:

James Smith, the appellant in this action, is a resident of Rockcastle County, and at the institution of this suit by him against the appellees lived within the boundary of the common school district in that county known as District No. 34. He had several children between the ages of six and twenty residing with him, and the appellees, who were the trustees of that district, refused to permit his children to go to the school for the reason, as they insist and attempt to prove, the children were mulattoes. The mother of these children before her marriage with the appellant was named Jane Wiggins, and her mother Rosanna Wiggins. These trustees, one of them, is a half-brother of Mrs. Smith, the mother of the children, one a nephew and the other a cousin and they now allege that the father of Mrs. Wiggins, who is the mother of appellant's wife, and a grandmother of the children, was the daughter of a negro man by the name of Dan Cabel, her mother being white.

A number of witnesses were introduced and examined by the appellees (the defendants) who prove that from general rumor it was understood that this negro man was the father of Mrs. Wiggins, the grandmother of these children, but several of them also state that years ago they (the witnesses) went to school with Mrs. Wiggins, and this idea of negro origin must have had its inception at a later date, as it would have been rather difficult thirty years ago for a negro of the half-blood to have gained admittance as a scholar in the schools with white children, and if this old lady was recognized as a white scholar at that period it requires stronger proof than is here presented at the instance of appellees to change their own kindred from white to black.

Elias Cabel, who it seems was examined as a witness, is a brother of Mrs. Wiggins and he says that his mother never denied but that his sister was Dan Cabel's daughter. This failure of the mother to deny the paternity of the daughter occurred when the witness, her son, was about five years old, and at the age of sixty-five he repeats the conversation he had with his mother on this subject. This character of testimony, connected with the reason before alluded to, constituted the proof upon which the defense is based. The children were produced in court and are shown from their own appearance to be white children. The record shows that they are white

children, and there was no reason so far as appears from the facts proven for excluding them from the privileges of this common school. Judgment is reversed and cause remanded with directions to award to appellant a new trial and for further proceedings consistent with this opinion.

RESPONSE TO PETITION FOR REHEARING.

DELIVERED BY JUDGE PRYOR:

In response to suggestions of counsel we have to say that the only ground of the demurrer to the petition as amended is the defect of parties. If the children are black they have no right to attend the common schools of the state. If white they should be admitted. Mrs. Wiggins' mother was a white woman. Her mother's husband was a white man, and all the hearsay testimony introduced to show negro blood in these children was incompetent, and particularly when the appearance of the children indicated that they were white.

That it was reputed that a negro was the father of this grandmother was not evidence and should have been disregarded. It is the blood as well as the color that must control the court or jury in determining whether these children are white or black, but this court has adjudged that there is no competent evidence showing that they have negro blood in them. This case will have to be reversed and then counsel will have another opportunity of offering proof upon the question involved.

McKee & Hopper, for appellant.

J. G. Carter, George Denny, Jr., for appellees.

A. J. BALLARD, ETC., *v.* L. GILES & MONAHAN, ETC.

Municipal Corporations—Ordinance—Adoption.

The adoption of an ordinance for a street improvement on the first reading, under suspension of the rule, by a two-thirds vote of the council, is a substantial compliance with § 11, art. 3, charter of 1851.

Opinion of the Court.

Appeal—Presumption as to Adoption of Ordinance Under Suspension of Rule.

The Court of Appeals must presume that an emergency existed for the suspension of a rule and adoption of an improvement ordinance on the first reading, and that the proposition to suspend the rule received the requisite number of votes, in the absence of a contrary showing.

Municipal Corporations—Suspension of rule—Approval of Mayor.

Section 5 of art. 4, charter of 1851, did not require a vote to suspend the operation of § 11 of such charter to be approved by the mayor.

Municipal Corporations—Presumption as to Letting of Improvement Contract.

Where a contract embraces work to be done on several squares at the same rate per front foot, it will be presumed that the work was let in accordance with the provisions of the ordinance.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 22, 1873.

OPINION BY JUDGE LINDSAY:

The ordinance providing for the improvement of Eighth street, from the south side of Kentucky to the north side of Oldham street, was regularly passed by the board of aldermen and on the 22d of July, 1869, reported to the common council, when it was "read once, rule suspended, and passed." It is insisted that the suspension of the rule requiring that "every ordinance shall be read at two meetings of the council, unless two-thirds of the council shall vote for the dispensation of this rule," is not equivalent to an agreement on the part of two-thirds of the members-elect to suspend Sec. 11, Article 3, of the Charter of 1851.

The rule in question was undoubtedly adopted in obedience to this section of the charter, and as it can not be suspended unless the proposition to do so receives at least as many votes as was required to suspend the operation of said section of the charter, we are constrained to conclude that the suspension of the rule was a substantial compliance with the charter, and hence that the ordinance was legally adopted.

We must presume that the emergency contemplated by the char-

ter existed, and that the proposition to suspend the rule received the requisite number of votes.

To construe Sec. 5, Article 4, of the charter as requiring a vote to suspend the operation of Sec. 11, Article 3, to be approved by the mayor would be in effect to nullify the right of either board of the general council to suspend it all. Such a construction is wholly inadmissible.

If it be conceded that the ordinance involved the expenditure of money by the city, still the charter authorized the action of the general council in the premises.

Although the contract embraces work to be done upon several squares, at the same rate per front foot, it is not shown that the work was not contracted for by the square. The presumption in such a state of case must be that the work was let out in accordance with the provisions of the ordinance, the fact the intersections were included in the bids for the several squares neither tends to show that the work was let by the square, and we may well assume that by embracing in each square the intersection to be paid for by the city, the cost of the work chargeable to the lot owners was diminished.

The validity of the contract did not depend upon its being attested by the city engineer, but upon the approval of both boards of the general council.

It is undoubtedly true that an ordinance passed by a municipal corporation must be made to conform strictly to the provisions of the charter, but this strictness applies to the substance rather than to the letter of the charter, and ought not to be carried to such an extent as to render it impossible for the charter to be allowed to operate at all.

Perceiving no available ground for a reversal of chancellor's judgment, it is *affirmed.*

Bullock, Anderson & Weissenger, for appellants.

Jackson, Parsons, for appellees.

W. S. HOUCHLAND *v.* H. M. HODGES.

Brokers—Commission.

A realestate broker is entitled to a commission, where it appears that the owner did not in good faith withdraw the property from the market, but in a few days after the pretended withdrawal, sold the land to persons whom the agent had in effect procured.

APPEAL FROM HARRISON CIRCUIT COURT.

January 22, 1873.

OPINION BY JUDGE HARDIN:

It seems to us that the evidence authorizes the conclusion that the services rendered by the appellant under his contract led to the sale to Ashbrook, and that the appellee, although professing to exercise his right of withdrawing his property from market and thereby discharging the appellant as his agent, the fact that within a few days afterwards he availed himself of the opportunity of selling, which the appellant had in effect procured, satisfies us that he did not abandon the intention of selling for such prices as the appellant could have gotten, nor in good faith withdraw the property from market, and that the sale as made by him should be regarded as having been effected by the appellant under his contract, and he is therefore entitled to compensation accordingly.

Wherefore the judgment is reversed and the cause remanded for a new trial and proceedings consistent with this opinion.

Judge Pryor dissenting.

J. Q. Ward, for appellant.

Trimble, for appellee.

S. S. POTTER *v.* R. T. YOUNG.

Evidence—Parol—Time of Issuance of Restraining Order.

Parol evidence is not admissible to show that a restraining order signed by the special judge was signed on a date other than that on which he presided.

Opinion of the Court.

APPEAL FROM WARREN CIRCUIT COURT.

January 23, 1873.

OPINION BY JUDGE PRYOR:

The petition upon which the injunction was obtained restraining the collection of the judgment against the appellant shows that it was rendered during a regular term of the Warren Circuit Court by a special judge elected and qualified as provided by law.

No fraud is alleged with reference to the judgment, or the proceeding under which it was obtained. The record also shows that the signature of the judge is annexed to the orders of the court made on the day the judgment was rendered. He was then clothed with judicial power, and parol proof will not be permitted to destroy the verity of such a record by showing that the judge in fact signed the order on some other day than that on which he presided. Blackstone says: "That a court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, and are of such high and supereminent authority that their truth is not to be called in question." To this rule there are exceptions, as where a judgment has been obtained by fraud, but record evidence would constitute but little protection to litigants if permitted to be attacked by reason of the judge failing to sign them on the day, or have them read over in accordance with a statute when properly construed is merely directory.

The judgment sustaining the demurrer is *affirmed.*

Gorin, for appellant.

Rodes & Clark, for appellee.

THOMAS MURPHY *v.* WM. M. JOHNSON.

Sales—Payment in Commodity—Priority of Claimants.

One who sold another hogs to be paid for in corn at a certain price per barrel has no claim on corn grown in a particular field by the purchaser, as against an execution creditor of the purchaser, where the corn has not been identified and set apart for the debt before the execution was levied thereon.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 22, 1873.

OPINION BY JUDGE PETERS:

Jones, a man of color, rented from appellee in the spring of 1870 a field to cultivate in corn. In April or May of that year, while they were engaged in planting the field in corn, appellee sold to Jones four hogs at the price of $55, to be delivered the following August, which amount Jones agreed to discharge in corn at $2.50 per barrel, to be delivered at the proper time for cribbing it.

In October, 1870, the corn raised on the field was cut, and put into shocks, being sixty-five in number, and appellant, a judgment creditor of Jones, placed an execution, which he caused to issue on his judgment in the hands of Waugh, a constable of Nicholas County, the same in which the field was situate, and in which the parties resided, who levied it on the shocks of corn in said field and sold thirty-four of them to satisfy appellant's debt.

This action was brought by appellee against Waugh, the constable, for the value of the corn sold, claiming that he was by his contract entitled to as much of the corn grown on his field as would pay his debt and by agreement appellant was substituted as the defendant in the action in place of Waugh, to whom he had given a bond of indemnity. On the trial of the cause in the court below the appellee was successful, and this appeal is prosecuted to reverse the judgment in his favor.

Stewart Johnson, the son of and witness for appellee, who gives a very clear and intelligent account of the transaction, proves in substance that in the spring of 1870 his father rented to Jones a house, garden, and a field to be cultivated in corn, the rent to be paid for in labor by Jones. That about the middle of April or first of May, while they were planting the corn, his father sold four hogs to Jones to be delivered the first day of August thereafter, and to be paid for in corn at $2.50 per barrel, at corn gathering time in the fall; that there was nothing said about the field out of which his father was to get the corn, but that Jones cultivated no other field of corn that year.

Appellee caused himself to be sworn as a witness, and proved the contract substantially as his son had done; he also stated that

he had never been paid for the hogs, that they were planting the corn when the contract was made; that the corn was not to be delivered by Jones till cribbing time, which occurs after the 10th of October; that the corn had not been measured, or pointed out to him, and he did not know whether he was to get the particular shocks levied on by the constable or not.

The execution with the return of the levy and sale of the corn by the constable was introduced and some other evidence, not material, however, to be specially noticed in determining the legal propositions involved.

The court below, on motion of appellee, charged the jury that if they believed from the evidence that the plaintiff, Johnson, sold Jones, the defendant in the execution, hogs at the price of $55.05 and was to have therefor corn then growing, or to be grown *in the field on the farm* of said plaintiff at cribbing time in a quantity sufficient at $2.50 per barrel to pay for said hogs, and the defendant levied upon and sold said corn so as to prevent the plaintiff from gathering the same, they must find for the plaintiff the said sum of $55.05. But if the jury believe from the evidence that the contract between Johnson and Jones was that the hogs were to be paid for in corn at $2.50 per barrel without reference as to where the corn was grown, or procured, then they must find for the defendant. To the giving of this instruction appellant excepted, and the correctness of that ruling we proceed now to consider.

This court in the case of *Cummins v. Griggs & Hayes*, 2 Duvall 87, sustained a sale of growing crop of tobacco made about the 20th of August, 1863, the vendor retaining the ostensible possession, and agreeing to take care of it, and cut and cure it, in that case the court said: "Until that has been done it was not removable, and susceptible of any other than a constructive possession, the retention of an apparent possession by the vendor did not *per se* make the absolute sale fraudulent, as against a creditor of the vendor." But the ground on which that decision rests is that nothing was left to be done in order to ascertain the value or to *identify* the thing sold, and therefore an implied preliminary, to the divestiture of the vendor's title. The parties had fixed the price, and the contract conclusively identified the tobacco sold and paid for.

In this case it is not pretended that the corn which appellee was to get was identified; it was not even identified and set apart; it

was matured and cut and put into shocks. But there was no evidence whatever that appellee was to get his pay out of the field rented from him by Jones, for young Johnson says there was nothing said about the field out of which his father was to get the corn. The court under this state of the testimony should have told the jury that unless they believed from the evidence that the corn which appellee was to get in pay for his hogs was identified, or that the corn was identified, and set apart for appellee before the fi. fa. and known at the date of the contract was placed in the constable's hands, they should find for the defendant.

Under this view of the case other questions discovered need not be decided. But for the reasons stated the judgment must be reversed and the cause remanded for a new trial and further proceedings not inconsistent herewith.

Hargis & Norvell, Chism, for appellant.

Wm. Ross, for appellee.

ISAAC RAINEY v. HENRY MARTIN.

Bills and Notes—Construction.

Where the court construes a note most favorably to the maker the latter ought not to complain.

APPEAL FROM HARRISON CIRCUIT COURT.

January 23, 1873.

OPINION BY JUDGE LINDSAY:

The circuit judge decided that the note sued on bore interest from the 31st day of January, 1868. The obligor must have meant something by agreeing to pay it on that day. It is true that it is afterwards recited that the note for the land is made. The only effect that can be given to the stipulation that he would pay on the day named is that interest should begin to run from that date, although the right to coerce payment should not accrue until the deed should be made.

The court below construed appellant's own undertaking most favorably to him, hence he ought not to complain. He did not object to the suits having been prematurely instituted, but answered the amended petition.

Judgment *affirmed.*

Cleary & West, for appellant.

Trimble, for appellee.

R. P. MILES *v.* J. K. BAYLES.

Costs—Judgment for.

Under R. S., p. 288, ch. 25, § 16, relating to costs, the party who succeeds in recovering judgment in an action is entitled to a judgment for costs.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 23, 1872.

OPINION BY JUDGE PETERS:

Chapter 25, Sec. 13, Revised Statutes, page 288 (Ky. Statutes, Sec. 889), contains the following provisions: The party succeeding in any civil suit or action, on the merits or otherwise, shall recover costs unless differently provided, etc., etc.

This provision of the statute makes no exception on account of the amount recovered. The party who succeeds in the suit or action in the recovery of a judgment, be it ever so small, is entitled to costs. *Brandies v. Stewart, etc.,* 1 Met. 395. The court below, therefore, erred in adjudging to appellee cost, which is the only error prejudicial to appellant in the judgment and proceedings complained of. But for the error in adjudging costs to appellee the judgment must be reversed and the cause remanded with directions to award to appellant his full costs in that court.

By an act approved March 10, 1854, 1 Vol. R. S., page 294 (Ky. Statutes, Sec. 891), this court has a discretion in awarding costs incurred here as may seem just and proper, and as the judgment

complained of is only reversed in part, it seems proper that each party should pay his own costs in this court and the clerk will tax the costs accordingly.

L. R. Thompson, Hays, for appellant.

J. S. Ray, for appellee.

THOS. W. PASCHAL *v.* W. S. SHEPPARD.

Costs—Liability for Board During Imprisonment.

A person in prison under Civ. Process was liable under the statute of 1865, for his board during his confinement in the jail, at the rate of 75 cents per day, to be taxed as costs in the case, but was not liable under an implied assumpsit to the jailor.

APPEAL FROM PULASKI CIRCUIT COURT.

January 24, 1873.

OPINION BY JUDGE PETERS:

Appellant was arrested by the sheriff of Pulaski County, by virtue of a writ of *capias ad satisfaciendum* in favor of one Hubble, and delivered to appellee as jailor of said county and was detained by him in the jail of this county for a considerable length of time, till his board amounted to the sum of $127.75, according to the fees as fixed by law, and this action was brought to recover said sum against appellant. His demurrer to the petition was overruled by the court below, and having failed to plead further judgment was rendered against him and he has appealed to this court.

The statute provides that for keeping a person under civil process in jail and dieting, etc., the jailor shall have for each day seventy-five cents to be paid by the plaintiff, and to be taxed as costs against the defendant, etc. 1 R. S. 524. The compensation was increased to 75 cents per day by an act of 1865.

The compensation for the jailor for services such as are sued for in this action is provided for by law, and the person designated by whom the services performed by the jailor shall be paid for, and

to the person thus designated he must look. With the prisoners the jailor has no contract, either express or implied, and if he could recover from the prisoner the latter would be doubly responsible, first to the plaintiff in the writ, in the way of costs, and second, to the jailor on an implied assumption for the same demand, a burden which the law does not impose.

Wherefore the judgment is reversed and the cause is remanded with directions to sustain appellant's demurrer to the petition and for further proceedings consistent herewith.

James, for appellant.

Morrow, for appellee.

P. C. BROYLES *v.* WM. MOFFET'S ADM'R.

Husband and Wife—Husband's Death—Liability of Wife's Property.

The court will not interfere after the death of both husband and wife to apply the proceeds of property belonging to the wife to the payment of the husband's debts.

Husband and Wife—Notes—Burden of Proof.

The burden is on one who seeks to apply notes executed to the wife to the payment of the husband's debts, to show that the notes were executed for property or money belonging to the estate of the husband.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 24, 1873.

OPINION BY JUDGE LINDSAY:

There is absolutely no evidence tending to show that the $295 on hand at the time of Mrs. Moffet's death did not belong to her.

The note on Craycraft & Montgomery for $337 was given for bacon and a few other small articles, including a stove. Craycraft did not know whether the purchases were made at the sale of the effects of W. G. Moffet's estate or at the sale made by Mrs. Moffet. The meat set apart to Mrs. Moffet was nearly all sold on the day

of the sale made by her deceased husband's administrator; other of her household property was also sold at the same time at the price at which bacon sold 20 to 25 cents per pound, such quantity as would likely be set apart to the widow would sell for three hundred dollars. It is not impossible that this note was given for Mrs. Moffet's property, and the testimony does not require us to conclude that it was not.

The note of Booker for $27 stands upon about the same footing with that of Craycraft and Montgomery. The note for $300 on Covington was given to Mrs. Moffet during the life of her husband, and with his consent for a piano which belonged to her before her marriage. Moffet was not compelled to reduce this piano to his possession. He had the right to allow his wife to retain it as her individual property, notwithstanding their marriage, and as he seems to have done so, the courts will not after the death of both the husband and wife, interfere to apply the proceeds to the payment of the husband's debts.

For the same reasons the note given for the hire of one of Mrs. Moffet's negroes for the year 1865 was held to be part of her estate.

There is not sufficient testimony to establish that the note on Noe for $37, the note on D. Moffet for $100, or the note on Mitchell for $300, or either of them were given for property or money belonging to the estate of W. G. Moffet, and the onus was upon appellant to make out his case as to each of the items set up by him.

The rents of the house and lot adjudged to be subject to the payment of W. G. Moffet's debts inured to the benefit of his heirs, and were not assets in the hands of his administrator.

Perceiving no error in the judgment of the circuit court it is *affirmed.*

In this case Chief Justice Hardin did not sit.

W. H. Hays, for appellant.

Roy & Walker, for appellees.

J. M. HAWKINS *v.* T. L. LEE, ETC.

Bailment—Carrying Without Compensation.

Where a steamer undertook the transportation of a package without receiving or expecting compensation therefor its relation to the owner was that of a mere bailee and was not liable for the loss of the package unless it resulted from its negligence or the negligence of its agents or servants.

Appeal—Judgment—Reversal.

The judgment of the court in a common law action stands on the same footing with the verdict of the jury, and will not be disturbed on appeal, unless palpably against the weight of the evidence.

APPEAL FROM McCRACKEN CIRCUIT COURT.

January 24, 1873.

OPINION BY JUDGE LINDSAY:

The testimony shows that no change was made and no compensation expected for the transportation of the package containing plaintiff's money from Paducah to its destination on the Tennessee River.

As to such package the owners of the steamer were not acting in the capacity of common carriers, but as mere accommodation bailees. They are not liable for its loss unless it resulted from the neglect of themselves, their agents or their servants.

Whether or not it was so lost, was a question which the parties voluntarily submitted to the court for adjudication. The judgment of the court in a common law action stands on the same footing with the verdict of a jury. We are not prepared to decide that the judgment in this case was palpably against the weight of the evidence.

It must therefore be *affirmed*.

Harris & Allen, for appellant.

Q. Q. Quigley, for appellee.

E. T. WILLIAMS *v.* J. M. WILLIAMS.

Divorce—Cruel Treatment—Evidence.

The evidence was held not to show that the wife was entitled to a divorce on the ground of cruel and inhuman treatment.

APPEAL FROM TODD CIRCUIT COURT.

January 24, 1873.

OPINION BY JUDGE PRYOR:

The cruel and inhuman treatment complained of by the wife consists in occasional quarrels between herself and husband, with reference to the children of each, by former marriage, and in relation to their property. They had lived together as husband and wife for fourteen years and notwithstanding the statement of the children and the relatives of the parties, who seem to have become enlisted on the one side or the other of the controversy, we are inclined to believe that they lived happily enough together until by reason of their declining years they each became peevish and fretful, and as the result of a hasty and inconsiderate conclusion resolved to separate from each other without any good or sufficient cause.

Occasional trouble, no doubt, now and then existed in a family like theirs, with children whose claims to parental affection were not always recognized by the stepfather or the stepmother. We have no doubt but what the appellee told his wife to leave, when temporarily excited by the conduct of some of the children whom he supposed had been subjecting him to ridicule. He seems, however, to have repented of this rash act and very soon made overtures and duties as a husband and the wife should at once have accepted his proffered terms and ended their troubles. The character of these parties, connected with their past history whilst together as husband and wife, is convincing that the husband entertained no suspicion to his wife for a settlement of all their domestic troubles, that gave evidence of the fact that he was not unmindful of his obligations as to the purity and virtue of his wife, and the statement of Leavill, who seems to have been a very willing witness, was prompted more by reason of his hostility to the appellee, than by his recollection

of what really passed between him and his old uncle, who seems, according to the witness's statement to have reposed in him the utmost confidence when detailing the cause of his domestic trouble. There is nothing in the record to prevent these parties from spending their remaining years happily together and the chancellor with this view dismissed the petition, and we must affirm the judgment. The appellee, the husband, must pay all the costs, including the costs of the wife, both in this court and the court below.

Kennedy, for appellant.

Petrie, for appellee.

JOHN W. UNDERHILL *v.* WILLIAM RASWELL.

Arbitration and Award—Award—Delivery of Copies.

Under Civ. Code, § 499, subsec. 6, requiring delivery of copies of award to each of the parties, delivery of a copy of the award to the attorney of one of the parties is reversible error.

APPEAL FROM WARREN CIRCUIT COURT.

January 24, 1873.

OPINION BY JUDGE PETERS:

Although this vexatious litigation has already been protracted for years, and until the costs very far exceeds the insignificant amount of the judgment from which this appeal is prosecuted, still this court is powerless to put an end to it, and unless we would disregard a plain and positive requirement of the statute we feel constrained to reverse the judgment of the court below, reluctantly, indeed, on account of the smallness of the amount involved, and of the further opportunity it will afford the parties to use the court, or a conven-

tional tribunal as an elysium to luxuriate in the spirit of controversy, it may be, for another seven years.

By Subdiv. 6 of Sec. 499, Civil Code, arbitrators and their umpire are required to make their award in writing, etc. And when it is so made out, one copy thereof shall be delivered to each of the contending parties, and the original returned to court, etc. In this case it appears that a copy of the award was delivered to the attorneys of each of the parties, and not to the parties themselves, and while from the surroundings of this particular case, it can not be doubted that the delivery of the copy to the attorney of appellant had the effect in due time to apprise him of the result of the deliberations of the arbitrators; still the statute is imperative, and we can not disregard its behests.

Wherefore the judgment is reversed, and the cause is remanded with directions to set aside the award and for further proceedings consistent with this opinion.

Rodes, for appellant.

J. E. Haswell, Dulaney, for appellee.

LEON I. BERGS & CO. *v.* T. J. HAGGARD.

Estoppel—Shifting Position.

Where a defendant has set up a verified plea of non est factum in an action on a note, he can not, in a subsequent suit involving the same transaction (after plaintiff, because of such plea dismisses his action) take a position contrary to the allegations of the plea.

APPEAL FROM CLARK CIRCUIT COURT.

January 24, 1873.

OPINION BY JUDGE LINDSAY:

The firm of Bruner & Haggard being indebted by note to appellants in the sum of $838.98, due September 5, 1860, on the 5th of March, 1861, paid thereon the sum of $338.98 and Bruner executed the firm note for the further sum of $500, due in thirty days, appellants agreeing to surrender the original note.

In April, 1867, suit was brought on the $500 note. The appellee, Haggard, defended this suit upon the ground that prior to the exe-

cution of the note, the partnership between Bruner and himself had been dissolved and all the effects turned over to Bruner, who in consideration thereof had agreed to pay all the firm debts, which facts were known to all their creditors prior to the execution of the note, and that the same was not his act and deed. A trial was had upon the issue raised by this answer and the party failing to agree, appellants dismissed that action, and brought this suit on the original note for $838.98.

Haggard answered, alleging that long before the institution of this suit the note sued on was paid by the payment of $338.98 and the acceptance by appellants of the note of A. I. Bruner for $500 in discharge and full settlement thereof.

Upon the trial he introduced Bruner, who proved that he made the payment of $338.98 in money, and executed and delivered to appellants the note for five hundred dollars; that they accepted it in discharge of the note sued on, and promised to send said last named note to him; and he also proved that the firm of Bruner & Haggard had not been dissolved. The record of the suit on the note for five hundred dollars was offered as evidence by appellant and permitted to go to the jury.

Appellee's own evidence shows that the defense relied upon by him in the first suit was wholly unfounded, that in point of fact the firm did exist when the five hundred dollar note was executed, and that it was legally binding upon him.

Yet by his sworn plea of *non est factum* he induced the appellants to abandon that suit, and resort to the present action, as they had the right to do in case such plea was true; and as appellee had sworn to its truth they had a right to accept it as true, and act upon it; and upon the plainest principles of equity and fair dealing, he is estopped from relying upon a defense in this action inconsistent with his said plea of *non est factum* in the first suit.

"Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced. It makes no difference in the operation of this principle whether the thing admitted be true or false, it being the fact that it has been acted upon that renders it conclusive."

Herman's Law of Estoppel, Sec. 323. It must be taken as true as against Haggard for the purposes of this action that the firm had

been dissolved when Bruner executed the $500 note, and hence that he acted without authority and did not bind Haggard by his acts.

Assuming this to be true, the execution of that note did not merge the liability existing as against appellee by reason of the balance then due on the note first executed and here sued on, he having solemnly repudiated the $500 note before this action was commenced. *Brozee v. Poyntz*, 3 B. Monroe 178; *Calk v. Orear*, 2 B. Monroe 420. Upon the facts presented by the record appellants were entitled to recover.

The court erred in giving the instruction asked by appellee and in refusing Instruction No. 1 asked by appellants.

Judgment reversed and cause remanded for a new trial upon principles consistent with this opinion.

Tucker, Mulligan, for appellant.

Buckner, for appellee.

THOMAS MCNEELY'S ADMINISTRATOR *v.* PHILLIP GUIER, ET AL.

Vendor and Purchaser—Purchase Money.

Where E. purchases land for his brother P., and the deed to P. shows that the whole amount of the purchase money is unpaid, and a lien is retained, it is immaterial whether the money is due from E. or P., unless the vendee of P. was misled thereby.

Vendor and Purchaser—Purchase Money Lien—Abandonment.

Where E. purchased land for his brother P., and gave his note therefor, and afterwards the land was conveyed to P., and the requirements for retaining a lien for the purchase were complied with, the lien can not be said to have been abandoned.

APPEAL FROM GRAVES CIRCUIT COURT.

January 25, 1873.

OPINION BY JUDGE PRYOR:

Thomas McNeely in his lifetime sold to Emanuel Guier two parcels of land in Graves County for the sum of $8,825, for which Guier executed his two notes, each dated the 11th of October, 1859, one for $3,412.50, due the 1st of January, 1860, and the other for

the same amount, due the 1st of January, 1861, and both bearing interest from date, and McNeely executed to Guier his bond for title.

It appears from the testimony that although Emanuel Guier executed these notes in his own name and held the bond for title in the same way, that he was in fact purchasing the land for his brother Phillip Guier, who was then a non-resident. Phillip Guier afterwards came to Kentucky, and McNeely on the 23d of December, 1859, executed to Phillip Guier a deed for the land containing this recital as to the consideration, "for and in consideration of six thousand eight hundred and twenty-five dollars, no part of which is paid and for said sum said Guier has executed his several promissory notes bearing date the 11th of October, 1859, one for three thousand four hundred and twelve dollars and fifty cents, due the 1st of January, 1860, and the other for the same amount due the 1st of January, 1861, and both bearing interest from date."

After this Phillip Guier paid to McNeely the whole of the first note and the witnesses say it was paid, they think, on the day the deed was executed, but in this they are mistaken, as the deed retains a lien for both notes. No notes were ever in fact executed by Phillip Guier for the land, but McNeely held the notes only given by Emanuel Guier at the time the bond for the title was executed, of the date, amount, etc., of the notes described in the deed, with the exception that Emanuel was the obligor and not Phillip. Phillip Guier afterwards sold the land to appellee, McGoodwin, for six thousand dollars and executed to McGoodwin his bond for title.

McNeely died and suit was instituted by his administrator to enforce the lien upon the land making Emanuel Guier's administrator and Philip Guier defendants. McGoodwin, by his petition, was made a defendant and in his answer alleges that he paid Phillip Guier for the land and that Emanuel Guier was indebted to Phillip and had assumed the payment of this land debt, and no lien was intended to be retained by the deed. It is also insisted that as the note described in the deed purported to have been executed by Phillip, when in fact it was executed by Emanuel, that the lien was thereby lost, or if not lost as between the parties, can not be enforced against a stranger.

The defense relied on by the answer is not sustained by the proof only so far as it appears that the note was signed by Emanuel and not Phillip. That Emanuel bought the land for his brother and that

the latter paid the first note and accepted the deed from McNeely is clearly proven. We can not well see in what way the lien of McNeely has been released. The deed upon its face shows that the whole of the purchase money was unpaid. There is no question but what prior to the adoption of the Revised Statutes this note was a lien upon the land. The only alteration made by the statute is "that to save the lien it must be expressly stated in the deed what part of the purchase money is unpaid." The language of the statute is, "the grantor shall not have a lien unless it be expressly stated in the deed what part of the purchase money remains unpaid." This deed upon its face shows that the whole amount of the purchase money is unpaid and whether due by Phillip or Emanuel Guier is immaterial unless the vendee McGoodwin has been misled by it. There is no evidence whatever that McNeely or any one else ever deceived him in any way with reference to this lien for the purchase money. McNeely, it is true, after the death of Emanuel Guier, refused to release his estate by releasing or surrendering the note and taking Phillip Guier's note in its stead. This he had the right to do. If the sale had been actually for Emanuel's benefit and he was to pay for the land it could not affect McNeely's heirs. McNeely held Emanuel's note dated in October, 1859, he executed the deed to Phillip Guier and retained a lien on the same by the recital of the payments thereafter to fall due; no part of the money having been paid. The acceptance of Emanuel Guier's note prior to this time for the land and the execution of the deed afterwards in which a lien is retained, is conclusive that the lien was not abandoned, and in this view of the case he held the note of Emanuel Guier for the purchase money, and also retained a lien in the deed against Phillip, whether he had Phillip's note or not. This debt, however, as the proof clearly shows, was in fact owing by Phillip and he could not have resisted the sale of this land to pay it. McGoodwin, as a vigilant vendee, should have made enquiry of McNeely as to this indebtedness, but this he failed to do, and if there is any loss he must sustain it, and not McNeely's estate.

Judgment is reversed and the cause remanded with directions to enter a judgment subjecting the land to the payment of the note.

Judge Lindsay dissenting.

Rodman, A. R. Boone, for appellant.

C. Bennett, for appellees.

ELIAS ROBINSON, ETC., *v.* BENJ. POWELL, ETC.

Trusts—Holding Partition Land in Trust.

Where land was bought and paid for with the product of the joint labor of I. and J., but afterwards I. and J. partitioned the land between themselves, and each occupied the land as thus divided until the death of I., it was held that I. and his heirs held such portion of the land in trust for J. and his vendees.

APPEAL FROM KNOX CIRCUIT COURT.

January 25, 1873.

OPINION BY JUDGE PETERS:

Although the judgment of John Swafford against the children and heirs of Isaac Swafford may be regarded as void, still in this case it is shown by a very decided preponderance of the evidence that the original purchase of the land was made for the joint benefit of Isaac and John Swafford, that it was paid for with corn which was the product of their joint labor, and was their joint property; and although the title was made to Isaac alone, they afterwards agreed upon a division of the land, had the dividing line of the tract run out, and each held to that line while Isaac lived, and after his death there was no change. From all the facts proved it is clear that Isaac Swafford and his heirs since held the land now in possession of appellee in trust for John Swafford and his vendees, and their possession should not be disturbed.

Wherefore the judgment is *affirmed.*

Rodman, for appellant.

James, for appellee.

VAL. KING *v.* COMMONWEALTH.

Judges—Appointment—Presumption.

In the absence of a showing to the contrary, the Court of Appeals will presume that the provisions of the law as to the appointment of judges pro tempore were substantially complied with.

Opinion of the Court.

New Trial—Discretion of Court.

In penal prosecutions motions for new trials are addressed to the sound discretion of the trial court.

APPEAL FROM LOUISVILLE CITY COURT.

January 25, 1873.

OPINION BY JUDGE LINDSAY:

It is insisted that the judgment in this case should be reversed.

First. Because the judge pro tem. who presided upon the trial of the prosecution was not sworn, and

Second. Because the sickness of the defendant prevented him from preparing his case for trial and from being present when tried and hence that the court erred in overruling his motion for a new trial.

The record shows that the proceedings were had before a judge pro tem., and is silent as to whether or not he was sworn. It does not appear that he was selected to try this particular cause, and the plain inference from all that appears is that he was selected to hold the term or some part thereof.

As we have not the order before us showing the proceedings at the trial of his selection we must presume that the provisions of the law were substantially complied with, and we are strengthened in this conclusion by the fact that the alleged failure of the judge to take the oaths required by law is not made one of the grounds for a new trial.

As to the second ground relied upon in this court it is sufficient to say that in penal prosecutions motions for new trials are addressed to the discretion of the judge of the criminal court. Subse. 3, Sec. 349, Criminal Code of Practice, prohibits this court from reversing a judgment of conviction for error of the judge of the court below in granting or refusing a new trial. The judgment must be *affirmed.*

Demphey, for appellant.

Attorney General, for appellee.

WM. PENCE *v.* GEO. W. ANDERSON, ETC.

Replevin—Judgment for Return of Property.

Where defendant in replevin objects to the setting aside of a judgment for return of the property and the submission of the question of the value of the property and the damages to its detention, he was not prejudiced by the judgment for return of the property.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 27, 1873.

OPINION BY JUDGE PETERS:

This action was brought by appellant to recover the possession of a bay mare, saddle, blanket and bridle, upon which the sheriff of Montgomery County had levied an execution in favor of appellee against him, and having executed bond under Section 211, Civil Code, and appellee having failed to take the necessary steps to prevent it, the property was surrendered by the sheriff to appellant.

At the June term, 1870, of the Montgomery Circuit Court, he dismissed his action, and on a subsequent day of the same term of the court appellee moved to amend the order of dismissal and for a judgment for a return of the property to be subjected to the satisfaction of his execution, and the court sustained the motion and amended the judgment.

And on a subsequent day of the same term of court appellee moved the court to set aside the judgment rendered in the case, and to have a jury empanelled and sworn to ascertain and fix the value of the property levied on by the sheriff, to which appellant objected.

In his bond executed for the purpose of having the property taken by the sheriff delivered to him, appellant undertook that he would duly prosecute the action and perform the judgment of the court therein by returning the bay mare, saddle, blanket, and bridle delivered to him if a return should be adjudged by the court or pay to Tipton, the sheriff, or to Anderson, the plaintiff in the execution, such sums of money as shall be adjudged against him.

After the execution of the bond and the delivery of the property to him by virtue thereof he had no right to dismiss his action, and to prevent a judgment against him for a return thereof, or for the

value to be assessed, and damages for the detention. *Rogers v. Bradford,* 8 Bush 163. To ascertain the value of the property and the damages for the detention, it was proper to have a jury empanelled. But appellee's motion therefor was objected to by appellant and he also opposed the setting aside of the judgment which had been rendered against him for the return of the property, and by doing so he waived his right to a jury, and the mere judgment for a return of what he had, by his action and bond deprived the sheriff, was not prejudicial.

W. H. Holt, for appellant.

Turner & French, for appellee.

R. C. POINDEXTER AND WIFE *v.* HENRY, GRANT & BUSH.

Fraudulent Conveyances—Putting Property Beyond Reach of Creditors.

The pleadings and the evidence were held to show that a conveyance was made to put the property beyond the reach of the vendor's creditors.

APPEAL FROM CLARK CIRCUIT COURT.

January 28, 1873.

OPINION BY JUDGE PETERS:

An unmarried woman, Mrs. Poindexter, purchased the land which has given rise to this controversy, after which she agreed by parol as appears from the record, to let her brother, John L. Smith, have the one-half of it if he would pay one-half the purchase price, which he agreed, but failed to do.

In July, 1868, reciting in the deed that he in conjunction with his sister had purchased the land, and he having failed to pay his part of the purchase price to their vendors, but then owed $2,812.40, which had been paid by his sister and her husband, Richard Poindexter, and the price of the land having depreciated very much since their purchase, so that his interest therein was not worth more than the amount of the purchase money which he owed, in consideration thereof he conveyed all his interest in said land to his sister.

Mrs. Poindexter paid or undertook to pay for the land when she purchased it, ninety-five dollars and sixty cents per acre, and at the time Smith conveyed his interest to her, according to the decided preponderance of the evidence, it was worth $80 per acre, and there being a fraction over 86 acres, the depreciation on Smith's half would have amounted to $671, leaving the value of his half of the land at about $3,475, and although he had actually paid on it $530 of his own money, to say nothing of the $800 in addition, which is alleged to have been paid out of the rents of the place, the consideration recited in his deed is over six hundred dollars less than the value after taking off the depreciation, and then in addition thereto he loses the $530 which he had paid.

This great sacrifice is not satisfactorily accounted for; in the amended petition the appellees charge that the deed to appellants was a fraud on their rights, and the different versions given of the transaction in the original and amended answers, together with the fact that the consideration recited in the deed is considerably less than the value of the land at the time according to the weight of the evidence, conduce to the conclusion that the conveyance was made to protect the property from the payment of J. L. Smith's debts; and we therefore think the one-half the land was properly subjected to the payment of appellees' debt as it appears to be sufficient to pay that, in addition to the $2,812.40, the consideration recited in appellant's deed.

Wherefore the judgment is *affirmed.*

Simpson, for appellant.

Eginton, for appellees.

MARY MORGAN'S ADM'R *v.* N. NICHOLAS AND WIFE.

Husband and Wife—Waiver of Right to Wife's Property.

A covenant by a husband to release all claim in and to his wife's estate, where unexplained or modified by anything else, can not be construed as a surrender or waiver of his right to take the interest in his wife's estate which would otherwise be secured to him by law in case he survives her.

Opinion of the Court.

Executors and Administrators—Suit by Heirs—Burden of Proof.

Where the heirs of the wife sued the administrator of the husband to have their rights determined as to a note and mortgage alleged to belong to the wife, it is incumbent upon the heirs to allege and prove such facts as will show that they are entitled to the relief sought.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 28, 1873.

OPINION BY JUDGE LINDSAY:

The right of persons contemplating marriage to enter into such an ante-nuptial agreement as will secure to the prospective wife a separate estate in such property as she may own at the time of the marriage or may thereafter acquire, is well settled. The principle which excluded the husband from the exercise of his marital rights over the wife's estate, limits this exclusion no further than is manifestly intended by the contracting parties. While the instrument evidencing the contract should receive a fair and possibly a liberal construction in favor of the wife, the right of the surviving husband to take so much of the wife's personal estate as remains undisposed of at the time of her death, ought not to be taken from him by construction.

Appellee's counsel insist that the just and fair import of the provisions of the settlement in this case exclude the husband, not only from the right to control or appropriate the wife's estate during the coverture, but also from taking any interest in it either as survivor or administrator in case he should outlive her. The language is as follows: He "binds himself, his heirs, executors and administrators to release all right or claim in and to the estate of the party of the first part, real, personal and mixed, and gives, grants, conveys to her own separate use and benefit all estate, real and personal and mixed, which the party of the first part may now have, and the party of the second part binds himself, his heirs, executors and administrator (to) give and grant to the party of the first part all the right to any estate she may now hold or possess, as though she was an unmarried woman, and to exercise no control over the same in any manner whatever, and in consideration that the party of the first part is permitted the rights and privileges of a feme sole over her own estate she therefore agrees, etc."

The husband agrees to and does release all right or claim to the

estate of his intended wife, conveys the same to her for her own special use and benefit and binds himself and his representatives that he will exercise no control over it in any manner whatever and that the wife shall be permitted to have and exercise over it the rights and privileges of a feme sole.

The only covenant upon the part of the husband that can properly be construed into a surrender or waiver of his right to take the interests in the wife's estate which would otherwise be secured to him by law in case he should survive her is the agreement to release all claim in and to such estate.

This covenant, unexplained or modified by anything else, would scarcely admit of the construction insisted upon, and when it is considered in connection with the subsequent explanations set out in the agreement, it is manifest that no right or power was intended to be secured by the wife, or conferred by the husband, except the right upon her part to hold her estate as separate property, with power to use and control it as though she was an unmarried woman.

These rights and powers could exist only so long as the coverture should continue, and the marital rights, which the husband could not enjoy except upon the death of the wife, during his life can not be regarded as excluded by the deed of settlement when so construed.

In this case it is not shown by proof whether the husband or wife survived. It is alleged in the answer that the husband admits that he survived his wife. It is questionable whether or not appellees were bound to reply to this answer. This question need not be decided in this case. This action was instituted by those claiming under the wife. It is necessary to a recovery upon their part, against the representative of the husband, that they shall make out their case. If they sued upon the note itself, or upon the original mortgage, their title to these evidences of debt might be implied, but they exhibit neither of these papers and alleged that they have never been in possession of either of them.

They state that the husband and wife are both dead, but leave the dates of their respective deaths blank. From their pleadings it can not be determined which of them survived. Now, as their right to the note and mortgage depends upon whether or not Mrs. Morgan survived her husband, and as they sue his representative to have the question of title as between themselves and him adjudicated, it is incumbent upon them to allege and prove such facts as

will show that they are entitled to the relief sought. This, in our opinion, they have failed to do.

Judgment reversed and cause remanded for further proceedings consistent with this opinion. Appellees should be allowed to amend their petition in case they offer to do so within a reasonable time.

Kinkead, Buckner, for appellant

Gibbons, Falconer, Breckenridge, Buckner, for appellee.

G. V. MORRIS v. RAIL M. JONES, ETC.

Equity—Application of Money Collected.

The facts were held to authorize the chancellor to interfere with the application of money collected on notes to the payment of a judgment.

APPEAL FROM ROWAN CIRCUIT COURT.

January 29, 1878.

OPINION BY JUDGE PRYOR:

The original petition presented no cause of action for the reason that payment is alleged to have been made prior to the institution of the action by Morris on the note in controversy.

The amended petition, however, alleges payment after the rendition of the judgment on this note, and if subsequently paid the chancellor had jurisdiction to prevent its collection by execution. The agreement between the parties by which Morris undertook to collect and apply the notes on Evans to the payment of the notes assigned by Cord to him on the appellee, being in writing, precludes the appellant from relying upon the statute of limitations as a bar to the appellees' right to enforce its terms. At the time the appellant instituted suit on the note the appellee had no right to plead this agreement as a set-off or counterclaim, as by its terms the Evans notes were not to be applied to the payment of the note sued on by Morris until collected. This collection was made after the judgment and was afterwards paid to the appellant as he admits by his failure to respond to the allegations of the amended petition

of the appellees in which these facts are specifically alleged. When appellant received the money, it was a payment of the judgment on the note assigned him by Cord. It was right and proper for the chancellor to interfere. The judgment is *affirmed*.

Clark, Cord, for appellant.

Hargis, for appellees.

J. K. POYNTER, ETC., *v.* SEYMOUR HARDING.

Ejectment—Title of Plaintiff.

To entitle plaintiff in ejectment to recover he must connect himself with the commonwealth by an unbroken chain of paper title, or show title by adverse possession.

Ejectment—Title—Evidence.

The evidence was held not to show title in plaintiff.

APPEAL FROM GREENUP CIRCUIT COURT.

January 30, 1873.

OPINION BY JUDGE LINDSAY:

The proceeding against the McAllisters was abandoned when their demurrer was sustained. The suit from that time forward, although prosecuted on the equity side of the docket, must be regarded as an action in ejectment. Conceding the petition to be good, the answer raises the issue as to whether the title and the right of possession to the land described was in appellee.

To recover, it was necessary either that he should connect himself with the commonwealth by an unbroken chain of paper title, or else establish such an actual adverse possession on the part of himself and those under whom he claims as to invest him with the legal title to the land. No other paper title is shown than the deed from McAllister, executed in 1864.

As to the matter of possession, the evidence conduces to show that Poynter, and those from whom he purchased, were all the while asserting claim to the land, and exercising over it something like the same kind of ownership and control that was being exercised by the McAllisters.

The preponderance of the evidence is rather in favor of the conclusion that Gill entered on the land, and held as the tenant of Poynter. The land was certainly held adversely to the McAllisters in 1864, when the conveyance was made to Harding, and he virtually concedes that fact in his petition.

It seems to us that Harding not only failed to show title in himself, but that the plea of champerty is sustained by the proof.

Wherefore the judgment is reversed and the cause remanded with instructions to dismiss appellee's petition.

Phister, for appellants.

Dulin, for appellee.

HARRISON LITERAL *v.* BENJAMIN MARTIN.

Vendor and Purchaser—Failure of Consideration—Recovery of Purchase Price.

Where there has been a total failure of consideration as to the purchaser of land who has paid the purchase price, he is entitled to recover the purchase price with interest and all legal costs incurred by him, in resisting eviction or right of recovery by adverse claimants.

Vendor and Purchaser—Breach of Covenant—Damages.

A purchaser suing for breach of covenant is not entitled to recover speculative damages, but can recover only the purchase price paid by him together with interest, and money paid by him in resisting eviction or right of recovery by adverse claimants.

Pleading—Lost Answers.

If answers have been lost, defendants should be allowed to file another substitute answer.

APPEAL FROM ——— COURT.

January 30, 1873.

OPINION BY JUDGE PRYOR:

The right of recovery on the part of appellee, Martin, upon the facts alleged, if true, has been heretofore settled in an opinion rendered by this court, and the extent of that recovery is alone to be ascertained.

The instructions given at the instance of appellee's counsel upon this branch of the case is erroneous. The criterion of damages is not the value of the land at the date of the eviction, or at the date of the alleged breach of the covenant. When there has been a total failure of consideration, as in this case, the purchaser, having paid the money, is entitled to recover it back with interest, and all legal costs incurred by him in resisting the eviction or right of recovery by the adverse claimant. This being adjudged, the party complaining of the breach can assert no claim for speculative damages. When what has been paid by him has been returned, he loses nothing. This is the established rule in regard to the breach of all warranties of title, whether applied to chattels or real estate, unless there is some special contract by which the liability of the party covenanting is enlarged or diminished. The value of confederate money in the locality where it was paid at the date of the covenant (the money then having been paid) with the interest, with any legal costs, including a reasonable attorney's fee incurred in the defense of the action by which the appellee was evicted, is the criterion of recovery. *Robertson v. Lemon,* 2 Bush 301. What this confederate money was worth at the time of its payment in the currency of the country known as legal tender paper is the mode for ascertaining the value.

The instructions given by the court below being in conflict with this view of the case, the judgment is reversed and the cause remanded with directions to award to the appellant a new trial and for further proceedings consistent with this opinion.

No personal judgment should have been rendered against the garnishee Literal for one reason, if no other, that there is an absence of proof in the record showing that he was indebted to the parties. The judgment is also reversed as to Literal and upon the return of the cause the appellee may take proof as to his indebtedness. There is no denial by appellants to be found in the record of the ground upon which the attachment was obtained. It is certified by the clerk that some of the answers have been lost; if so, they should be allowed to file other answers.

J. E. Clarke, Thomas F. Hargis, for appellants.

Cord, for appellee.

JOHN H. FORD *v.* JNO. M. RICE, ETC.

Arbitration and Award—Judgment on Award.

Under § 6, subsec. 3, ch. 3, R. S., relating to awards by arbitrators, judgment can not be rendered on an award, unless the provisions of the statute have been complied with.

Judgment—By Confession.

Where the parties to an action consented to submission of the controversy to arbitrators without an answer by defendant, the failure to answer did not entitle plaintiffs to a judgment by confession.

Arbitration and Award—Failure to Answer—Overruling Exceptions to Award.

Where the parties to a suit submitted the controversy to arbitrators without answer by defendant, an answer could avail defendant nothing, where his exceptions to the award are overruled, unless he attempted to impeach the award on some equitable ground.

APPEAL FROM BOYD CIRCUIT COURT.

January 31, 1873.

OPINION BY JUDGE LINDSAY:

The report of the arbitrators shows that a copy of their award was not delivered to appellant, and there is nothing in the record indicating a waiver of the right to require a copy thereof upon his part. Subsec. 3, Sec. 6, Chapter 3, Revised Statutes, provides that, "When the award is made out, one copy thereof shall be delivered to each of the contending parties and the original returned to the court, on which the arbitrators shall note the time of delivering a copy to each party."

Until this is done the court can not proceed to render judgment enforcing the finding of the arbitrators, unless the parties waive or have waived their right to insist that the statute shall be obeyed. Appellant's exception as to the failure of the arbitrators to observe this provision of the law should have been sustained and the award set aside.

The failure of appellant to answer did not entitle appellees to judgment by confession.

They consented to submit the controversy to arbitrators without an answer from him, and when his exceptions to the award were overruled an answer would have availed him nothing, unless he had attempted to impeach it upon some equitable ground. He may

not have been able to do this and he has a right still to answer and have the matters in litigation settled by the court.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

Dulin, James, for appellant.

Ireland, G. N. Brown, Jones, for appellee.

L. CRAIN, ETC., *v.* JOHN HARGIS.

Improvements—Removal of Building.

One who has erected a building on the land of another by mistake must within a reasonable time remove the building, or abandon the improvements to the owner of the land.

APPEAL FROM ROWAN CIRCUIT COURT.

January 31, 1873.

OPINION BY JUDGE PRYOR:

It is evident from the facts in the case that the appellee erected the buildings on the lot of the appellants under the belief that it was his own property, although the evidence discloses the fact that he might have ascertained the location of his own lot by having consulted the records of the county clerk's office, or by making enquiry of the citizens of the town, all of whom seem to have known the location of the town lots.

It is difficult to believe that any one would have placed such an improvement upon property not his own and belonging to a mere stranger without compensation unless in ignorance of his rights.

It is immaterial, however, so far as the appellant's right to recover is concerned, whether the building was placed upon the lot by mistake or with knowledge that it was the property of appellant, except on the latter case, no relief would be given by the chancellor.

The chancellor, however, in the present case has no power to divest the appellants of their title to this ground or to compel them to pay for the improvements.

There is no such law or equity that would compel the owner of land to surrender his title because another had made improvements upon it by mistake.

Opinion of the Court.

It is the misfortune of the party committing the mistake, and the owner can not be required to give up his land or have it subjected to sale, in order to reimburse the party making such an expenditure.

He should be permitted to remove the buildings from off the premises and for that purpose a reasonable time should be given him therefor.

This he must do or abandon his improvements to the one owner. Where a tenant erects temporary building on the land of the lessor he may remove them at the expiration of the tenancy and the present appellee occupies no better position towards the owner than the tenant to his landlord.

The judgment of the court below is reversed and the cause remanded for further proceedings consistent with this opinion.

Scott, Burns, for appellants.

Hargis, for appellee.

JAS. W. OSBORNE v. CITY OF LOUISVILLE AND OTHERS.

Attachment—Priority of Equities.

Where a debtor assigns a chose in action prior to attachment by a creditor, the equity of the assignee is superior to that of the attaching creditor, but where the attaching creditor obtains a judgment he obtains a legal right to the attached property which is superior to the prior equity of the assignee.

APPEAL FROM LOUISVILLE CHANCERY COURT.

January 31, 1873.

OPINION BY JUDGE PETERS:

In this suit in equity brought by appellant against the city of Louisville, Henry Hill, and J. S. Colyer, to enjoin the city from paying a judgment recovered by Hill against it, he alleges that Colyer held a claim against the city for attention to the horses of the fire department during the month of March, 1870, amounting to $122, which demand he avers Colyer assigned to him for a valuable con-

sideration on the 16th of March, 1870, and that immediately after the date of the assignment he presented it to the auditor of the city for payment, which was refused, and that he "then applied through some members of the general council of the city for an order for the payment of said debt, and said city had due notice of said claim being assigned to plaintiff before the day of July, 1870, and said city had hitherto failed to direct the auditor to issue an order upon the treasurer for said claim or any part, and has failed to pay the same, etc.; that Hill held a claim against Colyer and instituted "Suit No. 23,661" against him and the city in the court below and attached said $122 and finally recovered judgment against the city for said sum which it was about to pay; that he had no knowledge of the institution of said suit, nor the proceedings therein, until after the 18th of February, 1871, and was not a party thereto; that he is advised that he is entitled to said judgment, or for a judgment against the city for $122, interest and costs. He prays that Hill be enjoined from collecting the judgment until the matters alleged can be adjudicated, and for all proper relief.

Hill files a demurrer to the petition, upon which the court below as appears from the record took no action; he also filed an answer, in which de denies Colyer assigned said claim to appellant for a valuable consideration, and denies that it was assigned before he sued out his attachment.

He furthermore denies that appellant ever applied to the auditor of the city and demanded payment or that he applied to the general council for payment of said claim, and denies that the "city had any notice of the alleged assignment" or of any assignment of said claim, or any part thereof to plaintiff before the —— day of July, 1870, or at any other time before or since, and denies that said claim is or ever was due and owing to him.

Having traversed the material allegations of the petition, Hill charges that the asserted assignment of the claim of Colyer on the city to appellant was a device to remove it from the reach of his creditors in which appellant participated, and that he in fact paid nothing for it. On final hearing the injunction was dissolved and the petition dismissed. And Osborne now seeks a reversal of that judgment.

If, as is alleged, the city had notice of the assignment of the demand by Colyer to appellant when Hill sued it and failed to

file a petition in the nature of a bill of interpleader to compel Hill and Osborne, the assignee, to litigate their respective rights, and have it judicially determined to whom the money should be paid, it might be a question whether it would not be responsible to appellant.

If the assignment was made to appellant for a valuable consideration prior to the service of Hill's order of attachment, Hill's equity was subordinate to that of appellant at the commencement of his suit. But we apprehend when Hill obtained his judgment he thereby acquired a legal right to the attached property which would override appellants' prior equity. This doctrine, we think is fully sustained by the case of *Forepaugh v. Appold,* 17 B. M. 626, from which appellant quotes, and in which it is said in substance, an attaching creditor only acquires a lien upon, or an equitable right to, the money in the hands of a garnishee, by bringing his action, and delivering the order of attachment to the sheriff. The right he thus acquires is subordinate to that of the assignee of the debt, whose right was created before the commencement of the action, and of the existence of which the attaching creditor shall be apprised before he obtains his payment for the money; and in that case the judgment was reversed because, although the claim of the creditors under the assignment was not asserted by the trustee before the plaintiffs obtained a judgment against Bishop (the garnishee), yet they were fully informed of their right to the debt by the affidavit which the garnishee filed in the cause; and in the next paragraph it is said an unrecorded deed or mortgage will in equity prevail against a creditor who has notice of it, before he acquires the legal right to the property or estate embraced by it. The only case in which an unrecorded deed or mortgage will prevail in equity against a creditor is where the creditor has actual notice of such deed or mortgage. Where there is not such notice to the creditors according to the doctrine of that case the claim of the assignee must fail. Here it is not alleged that Hill had notice of the asserted assignment of the claim to appellant. Nor does the evidence show that the city of Louisville had notice of the assignment to appellant.

The extracts from the journals of the common council and board of aldermen show that the claim presented to both boards was made out and presented in the name of Dr. Colyer. And no intimation, either that he has assigned it to appellant or any one else; and Hill in his answer explicitly denies notice of the assignment.

If in the suit of *Hill v. Colyer* it had appeared by petition or otherwise that the claim had been assigned to appellant, it would have been the duty of the court to have ordered him to be made a party thereto, because the controversy could not have been properly settled without making him a party. And if the city with notice of the assignment had failed to disclose the fact, and to interplead the parties, its rights might have been seriously affected by such failure, but the notice is not established.

Wherefore the judgment is *affirmed*.

Jas. Harrison, for appellant.

Fox, Elliott, for appellees.

W. M. PEAK *v.* R. B. WILLIAMS.

Highways—Report of Viewers—What Should Show.

Viewers, in making their report, should show the convenience and inconvenience which will result to individuals as well as to the public in the opening, discontinuance or altering of a public road.

Highways—Report of Viewers—What Should Show.

Where viewers, in their report, show that the closing of the road would be of some disadvantage to a named person, they should show in their report whether or not the discontinuance of the road would cut him off from a public highway, or increase the distance he would have to travel to reach a highway, or state the facts upon which they based their opinion that he would be subjected to inconvenience by the closing of the road.

APPEAL FROM TRIMBLE CIRCUIT COURT.

January 31, 1873.

OPINION BY JUDGE LINDSAY:

The county court should have sustained the exceptions filed to the report of the viewers. It was their duty to report the conveniences and inconveniences, which would result as well to individuals as to the public, from the opening, alteration or discontinuance of the public road. Inasmuch as they seemed to think that closing the old road might be some little disadvantage to Williams, and

were unable to state definitely the extent of the inconvenience to which he would thereby be subjected, they should have reported whether or not the discontinuance of such road would cut him off from a public highway, or increase the distance he would be compelled to travel in leaving and returning to his home, or at least give the facts upon which they based the opinion that he might be subjected to inconvenience. As the report stands it was impossible for the county court to reach any conclusion as to this matter without resort to evidence outside the record.

The circuit court properly sustained the exceptions and set aside the judgment of the county court authorizing the proposed change.

The order of the county court was final. The right of appellant to have the change was established, and the exercise of the right was merely postponed till he should comply with the conditions annexed. Williams could offer no further resistance in the county court, hence he had the right to appeal. He had a direct interest in the question and could prosecute the appeal, although the change in the road was wholly on the lands of Peak.

As the order of the circuit court quashing the report of the viewers renders it necessary that the proceeding shall be commenced *de novo*, the viewers, being now *functus officio*, it was not necessary that the case should have been remanded to the county court.

Judgment *affirmed*.

Winslow, for appellant.

DeHaven, for appellee.

WILLIAM BIGGS AND OTHERS *v.* NATHANIEL DAWSON, ADM'R.

Limitation of Actions—Proof.

Where the statute of limitations is pleaded and the petition shows upon its face that the claim is barred, no other proof is necessary.

APPEAL FROM CARTER CIRCUIT COURT.

February 1, 1873.

OPINION BY JUDGE PRYOR:

The original liability of the ancestor of appellants occurred in the year 1840 and this is made the basis of the action against them.

They rely upon the statute of limitations more than thirty years having elapsed to the filing of the amended petition. This amendment was the only pleading containing a cause of action against appellants, and upon its face shows when the liability occurred. In such a case, when the statute is pleaded and the petition shows that a sufficient time has elapsed to bar the claim, no other proof is necessary. The judgment is therefore reversed and cause remanded with directions to dismiss the petition as against the appellants.

Stevenson & Myers, for appellants.

———, *for appellee.*

L. M. LEE'S ADM'R *v.* JOHN HARPER AND OTHERS.

Contracts—Made on Sunday—Ratification.

A contract made on Sunday may thereafter be ratified so as to be binding on the parties.

Contracts—Ratification—Question for Jury.

Whether a contract made on Sunday was afterwards ratified so as to bind the parties, is a question for the jury.

APPEAL FROM HICKMAN CIRCUIT COURT.

February 1, 1873.

OPINION BY JUDGE PRYOR:

Conceding that the agreement by which the appellees obtained possession to run the mill race through the appellant's land was executed on the Sabbath, if after its execution it was ratified and confirmed by the appellees, it then becomes valid and obligatory upon them. Whether or not there was such a confirmation of the agreement after its date by the appellees is a question for the jury to determine. The instructions to find for the defendants in the event the writing was executed on the Sabbath was erroneous, without at the same time so qualifying that instructions as to enable the jury to determine from the evidence, whether or not it had afterwards been ratified. *Ray v. Callett,* 12 B. Mon. 532.

The judgment of the court below is reversed and cause remanded

with directions to award the appellant a new trial and for further proceedings in conformity with this opinion.

Bullock, for appellants.

———, *for appellees.*

R. E. HILDRETH, ETC., *v.* W. J. HUGHES, ETC.

Partnership—Lien for Money Furnished by Partner.

One who furnishes money to and for the use of a partnership has a lien for its repayment, on the partnership property.

Partnership—Preference of Creditors.

One who furnishes money to and for the use of a partnership is entitled to a preference to be secured by taking partnership property at its value, over the general creditors of a member of the partnership.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 1, 1873.

OPINION BY JUDGE HARDIN:

Under the contract of co-partnership, as proved and explained by Hughes, the only witness examined, the money for which the whisky and real estate were sold by Buckler, in our opinion was not an ordinary loan to Hughes to enable him to put it into the firm himself, as capital furnished; but it was advanced and furnished by Buckler to and for the use of the firm; and he had a lien therefore for its repayment, on the whisky and real estate which were owned by the firm, according to principles of the law of partnership, too familiar and well settled to require the citation of authority. He was therefore entitled to the preference he secured by taking the property at its value, over the appellants, and other general creditors of Hughes.

Therefore the judgment dismissing their petition is *affirmed.*

Phister, Hargis, for appellants.

Ross, Kennedy, for appellees.

S. R. NEAL *v.* JAS. B. EVANS.

Rewards—Offer Made on Sunday—Renewal.

Where defendant after offering a reward on Sunday for the recovery of defendant's mule, met plaintiff on the next day in another place, where plaintiff had gone in search of the mule, and defendant knew that plaintiff was searching for the mule but did not inform him that the offer of reward was withdrawn, it amounted to a renewal of the offer of reward.

APPEAL FROM WEBSTER CIRCUIT COURT.

February 2, 1873.

OPINION BY JUDGE PETERS:

The only reason urged by counsel of appellant for a reversal of the judgment is the refusal of the court below to give to the jury the following instruction, to wit: If the jury believe from the evidence that the only reward offered by the defendant in reference to his mule was offered on Sunday, or the Christian Sabbath, they must find for the defendant; unless they believe from the evidence that the defendant was a member of some society which observed as a Sabbath some day of the week other than Sunday or the Christian Sabbath.

The evidence without conflict establishes the fact that the offer of the reward for the reclamation of his mule was made on Sunday, the first day of the week, by appellant; and if he had made no other offer, nor done any act after that day to engage appellee in his service for the recovery of his mule, the contract arising out of the offer made on that day might not have been enforceable. But on the day after the reward had been offered, appellant met with appellee at Madisonville, where he had gone in pursuit of the mule. He knew that appellee had gone there in search of the mule, and failed then either to dispense with his services or to inform him that the offer of the reward on the day before was withdrawn, which in effect was a renewal of the offer on Monday, or at least it might be so construed, and the instruction as asked without any qualification was properly overruled.

Wherefore the judgment is *affirmed.*

Gaslay, Yeaman & Keenecke, for appellant.

———, *for appellee.*

R. M. ROBINSON'S TRUSTEE *v.* C. D. HAMILTON.

Pleading—Prima Facie Case—Recovery.

Where plaintiff makes out a prima facie case, recovery on the merits of the action can only be prevented by answer or other pleading necessary to an issue of fact, and this is the rule even where plaintiff is compelled by a court of equity to come into an action for a settlement of a trust estate, as where the suit is in ordinary.

Evidence—Burden of Proof.

Where, if exceptions to a master's report be treated as an answer, they do not deny the purchase or appropriation of the property in question, but set up matter in avoidance, the burden is on defendant to establish some one of his grounds of defense.

Evidence—Presumption.

The fact that plaintiff did not take the deposition of his manager with regard to the acts of plaintiff raises no presumption unfavorable to plaintiff.

War—Claim for Property Taken.

Where from the proof it is doubtful whether R. had permission from the proper authority to purchase cotton in Louisiana, and also whether the cotton when it came into his hands was in a section of the country "occupied and controlled by officers of the United States," such doubts ought to be resolved in favor of the party seeking pay for his goods, rather than one seeking to take advantage of his wrongful conduct.

War—Transaction Against Public Policy.

The defense that a transaction contravenes public policy is not allowed for the defendant's advantage, but for the public good, and should only be upheld where the evidence satisfactorily shows that the party seeking relief has violated some public law.

APPEAL FROM GARRARD CIRCUIT COURT.

February 2, 1873.

OPINION BY JUDGE LINDSAY:

The account of C. D. Hamilton was properly verified and proved, and upon the face of the master's report he was *prima facie* entitled to recover, nor was it necessary upon exceptions to this report that he should introduce further proof to sustain his claim. When a plaintiff makes out a *prima facie* case, a recovery on the merits of the action can only be prevented by answer or other pleading neces-

sary to an issue of fact, and this rule prevails as well where the plaintiff is compelled by a court of equity to come into an action for the settlement of a trust estate, as where he sues in ordinary.

The exceptions filed if treated as an answer do not deny the purchase, or appropriation of the cotton, but set up matters of avoidance. The onus was therefore upon appellant, to establish some one of his grounds of defense.

He does not show that the party from whom Robinson purchased the cotton had authority to sell it. The fact that Hamilton appropriated the note and confederate money paid to his manager or overseer did not necessarily amount to a ratification of such overseer's acts.

He was within the confederate lines. Robinson and his cotton were in the Federal lines. He could not return nor offer to return the note and money. He was for the time reduced to the necessity of taking them or nothing, and Robinson, not his representative, can take advantage of his yielding to this necessity.

So far as the proof shows, Robinson possessed himself of the cotton by wrongfully taking and carrying it away, without contracting for it with any person having authority to sell. The fact that Hamilton did not take the deposition of his manager raises no presumption unfavorable to him. It was for appellant to prove that this party had the authority to sell. Hamilton's case was made out without any proof upon that question, whilst contracts between persons residing within the lines of the two late regiments will not be enforced as against public policy. Still the war being over, the courts will redress unauthorized wrongs committed upon the citizens of either section, and that in our opinion is what has been done in this case. Besides this, it is a matter of doubt from the proof whether Robinson did or not have permission from the proper authorities to purchase cotton in Louisiana, and also whether the cotton when it came into his hands was or not in a section of country "occupied and controlled by forces of the United States." These doubts ought to be resolved in favor of the party seeking pay for his goods, rather than the one seeking to take advantage of his own unlawful conduct. The defense that a transaction contravenes public policy is not allowed for the defendant's advantage, but for the public good, and should not be upheld unless the evidence shows satisfactorily that the party seeking relief has violated some public

law. The fact is not satisfactorily shown as to Hamilton, and the judgment overruling the exceptions to his claim was proper. It is therefore *affirmed*.

Dunlap, Burton, for appellant.

James, for appellee.

BOLLANGER & BODLEY *v.* THOMAS M. PIERCE.

Evidence—Documentary Evidence.

It was held error to permit plaintiff to read to the jury a petition and account filed therewith in another case against defendant, and to reject the rest of the pleading.

APPEAL FROM GRAVES CIRCUIT COURT.

February 3, 1873.

OPINION BY JUDGE HARDIN:

The appellants, being contractors with the New Orleans & Ohio Railroad Company, to do the earth work, grading and clearing several sections of the road, in Kentucky and Tennessee, on the 14th of March, 1855, agreed with Pierce & Ramsey, as sub-contractors, to let them execute part of the work at specified prices, payable partly in money, and partly in bonds and stock in the road; the company assenting to the contract, by which the collection from the sale of stock in Tennessee was anticipated to pay Pierce & Ramsey the amount which would be due to them in money under the contract.

After the sub-contractors had partly performed their undertaking, the original contract was terminated, and the appellants sued the corporation for a large balance of the price of work done under the stipulations of their contract, including an account for work done by Pierce & Ramsey, according to estimates made by the engineer of the road. In the suit the claim for the work of Pierce & Ramsey, as well as a large portion of the residue of the plaintiff's demand, was contested, and the controversy being submitted to ar-

bitration, resulted in an award in favor of the plaintiffs for $4,763.91, which was greatly less than the sum claimed by them.

Subsequently, this action was brought by Pierce & Ramsey claiming under their contract a balance of more than $2,000, which was resisted by the defendants, on the ground, among others, that by the assent of the railroad company to the contract, it became liable to the plaintiffs for their work, instead of the defendants.

A trial of the cause resulted in a verdict and judgment for the plaintiffs (Pierce and Ramsey having died) for $1,844.14, and the defendants have appealed to this court.

It appears that on the trial the plaintiffs were permitted to read to the jury as evidence, the petition and account filed therewith, in said suit of the appellants against this railroad company, notwithstanding the objection of the defendants.

It also appears that after said petition and account had been read in evidence, the answer of the New Orleans & Ohio Railroad Company to said petition, and all the proceedings which were had in said case, were offered as evidence, which the court refused to permit, on the objection of the plaintiff.

Whether in those rulings, which were excepted to, the court erred to the prejudice of the appellants, is the principal question, which it will be necessary to determine on this appeal.

The object of reading the petition and account only as evidence, without the answer or the papers of the suit, is obvious. But if they were competent at all as admissions of facts which the plaintiff sought to establish in this case they were not conclusively so. (1 Greenleaf, Sec. 551; *Francis, etc., v. Hazelrigg's Ex'r,* 1 A. K. Marshall 93; *Roberts v. Tennell,* 3 T. B. Monroe 247).

And while the proceedings of that suit might have been read as evidence against the appellants, to prove the account and fix their liability to the plaintiff, the whole of the record which concerned that matter, and would have either conduced to establish or repel the conclusions sought by the plaintiff, should have been produced (*Francis v. Hazelrigg's Ex'r, supra*).

And it was erroneous and prejudicial to the appellants to permit the appellee to use as evidence against them the particular papers referred to, rejecting the rest of the pleadings, which might have counteracted their effect and produced a different result in the minds of the jury.

As this conclusion may lead to a different presentation of facts, on another trial, it is not deemed essential now to decide whether the court correctly instructed the jury or not. We would suggest, moreover, that from the somewhat complicated nature of the transactions that a correct adjustment of the rights of the parties may be more certainly attained by a transfer of the cause for preparation and trial in equity where the accounts of the parties can be stated by a commissioner.

Wherefore the judgment is reversed and the cause remanded for further proceedings.

Judge Williams not sitting.

Boon & Anderson, for appellant.

Turner & Williams, for appellee.

THOS. MCKINSTER, ETC., *v.* ROBERT EASTHAM.

Contracts—Necessity of Parties.

An instrument which does not name an obligor, as well as an obligee, is invalid and unenforceable.

Sheriffs and Constables—Bond—Obligee.

An instrument purporting to be a bond for a deputy sheriff, which does not name one as obligee is invalid.

APPEAL FROM LAWRENCE CIRCUIT COURT.

February 3, 1873.

OPINION BY JUDGE PETERS:

This action was brought by appellee against appellants on the following writing:

"We, Thomas McKinster, principal, and Wm. Hoge, B. Haise and Sinclair Roberts, agree that we will be responsible as surety for all the acts of said McKinster as deputy sheriff for Robert Eastham, sheriff of Lawrence County. Given under our hands this 17th of August, 1857." The writing was signed by McKinster and the persons named as sureties.

It can not escape observation that there is no one named as an obligee in the writing, and no one to whom there is a direct undertaking to pay, or to account for the failure of McKinster to discharge the duties of deputy sheriff. There can be no contract to which there are no parties; and it is as essential to its validity that there shall be a promise as a promisor, an obligee as an obligor. In this case the persons who sign the writing undertake to be responsible for all the acts of McKinster as deputy sheriff for Robert Eastham. But the undertaking is not to Eastham directly, nor to him more than any other person. His name is used as descriptive of the business in which McKinster was about to engage, and not as a party to the contract, and appellee does not either in the original or amended petition allege that appellants contracted, or covenanted with him that McKinster should faithfully discharge the duties of deputy sheriff, etc.

Wherefore we conclude that appellee did not state facts in his petition sufficient to constitute a cause of action against appellants.

That McKinster will be responsible to Eastham, his principal, for a failure to pay over or to account for taxes, etc., collected by him while acting as his deputy need scarcely be stated, which failure may be proved by parol. We only decide in this case that the facts stated in the petition and the writing declared on are not sufficient to make out a cause of action against appellants, and do not decide the question of McKinster's responsibility in an action on an account stated in the nature of an action of assumpsit.

But for the reasons herein set forth the judgment is reversed, and the cause is remanded with directions for further proceedings consistent herewith.

L. T. Moore, for appellants.

G. N. Brown, for appellee.

E. L. OSBORNE *v.* J. H. BRADSHAW.

War—Property Taken—Promise Without Consideration.

Where a soldier at the command of defendant took plaintiff's mare when defendant was not present, the promise of defendant to send the mare back or pay for her, being made without consideration, is unenforceable.

Opinion of the Court.

War—Taking Property—Liability.

The mere fact that the mare in question was taken by a soldier at defendant's command, when defendant was not present, does not make him responsible for the trespass, and defendant's failure to compel the soldier to surrender the mare when the colonel of his regiment was present and in command can not be regarded as a ratification of the tort.

APPEAL FROM POWELL CIRCUIT COURT.

February 4, 1873.

OPINION BY JUDGE LINDSAY:

The evidence heard upon the trial of this case utterly fails to show that Bradshaw participated, either directly or indirectly, in the taking of Osborne's mare, or that he interposed any obstacle to its recovery. The mere fact that the mare was taken by a soldier under his command, he not being present, does not make him responsible in law for the trespass, and his failure to compel the soldier to surrender the mare, when the colonel of his regiment was present and in command can not be regarded as a ratification of the tort, and even if he did agree that he would subsequently send her back to the appellant or pay for her, the promise being without consideration can not be enforced. For these reasons a verdict against him would properly have been set aside as palpably against the weight of the evidence. Such being the case it is immaterial whether the instructions given by the court were correct or not.

Judgment *affirmed.*

Hazelrigg, for appellant.

Holt, for appellee.

W. F. STANHOPE *v.* O. L. BRADLEY AND WIFE.

Guardian and Ward—Presumption of Fraud—Wedding Apparel.

Where the evidence does not show that a father, at the time he purchased wedding apparel for his daughter, was insolvent, fraud will not be presumed by reason of such gift to his daughter.

APPEAL FROM FAYETTE CIRCUIT COURT.

February 4, 1873.

OPINION BY JUDGE PRYOR:

There is no doubt but what the boy Milton was the property of Mrs. Bradley. The will of her grandfather directed all of his negroes and other property mentioned in the last clause of that instrument "to be equally distributed and divided or sold and the proceeds divided as my executors may think best, and I request that the negroes be retained in the family if possible."

The father and guardian of Mrs. Bradley was also one of the executors of the will, and from the testimony in the case a sale of the slaves was resorted to, for the purpose of having an equal division and not to change the character of the property. Bidders were present when they were offered and were told of the family arrangement, and on that account declined to bid. Robert Mays was not at that time the statutory guardian of his children, but was one of the executors and authorized by the will to divide the slaves.

He was appointed guardian shortly afterwards, and the two slaves, Milton and Henry, held by him as the property of his children from that time until they were emancipated. There was no money paid by him and he credited the notes executed when the slaves were sold by the amount coming to his children. This was done as he had elected to take the slaves for his wards, and executed the notes in order that a division of them might be made upon fair and equal terms and the slaves retained in the family as disclosed by the will of the grandfather. It was therefore erroneous to charge the surety in the guardian's bond with the value of Milton.

There is no evidence of the insolvency of Mays at the date of his daughter's marriage, and his answer indicates that he was made bankrupt on account of his liabilities as surety created after that time, and even if these liabilities existed prior to the marriage he did not then anticipate the insolvency of the parties for whom he was bound, and doubtless in good faith made the advancements out of his own pocket for the purchase of his daughter's wedding apparel. She had claims upon his generosity and particularly on the eve of her marriage, and it was his duty to make provision for her; at any rate

this court will not presume fraud by reason of these gifts. If the father had been insolvent and had charged the daughter with the goods he furnished her the chancellor doubtless would have given him a credit in his settlement, but the proof in this case is that he gave to the daughter her wedding outfit from his own means and so intended it when the goods were purchased. It is a hardship upon the surety to have to pay the money, but the wants of the daughter prompted him no doubt to collect it, or if not she is entitled to it by reason of the failure on the part of the father to comply with the conditions of his bond as guardian.

The judgment is reversed with directions to credit the same by amount charged for boy Milton and any interest calculated as against the surety, and the remainder of the appellees are entitled to a judgment.

Kinkead & Buckner, for appellant.

Huston & Mulligan, for appellees.

SAMUEL M. RICHARDSON *v.* RICHARD ARROWSMITH, ETC.

Alteration of Instruments—Evidence—Competency.

Evidence conducing to show that a note had been so altered as to make it payable to S. M. instead of I. L., is competent under the charge of fraud.

APPEAL FROM BATH CIRCUIT COURT.

February 5, 1873.

OPINION BY JUDGE LINDSAY:

The amended answer filed by the two Arrowsmiths and Dodson showed that the amount sued for by appellant had been attached by Stewart, without collusion with them, and was sufficient to authorize the amount to require Stewart to appear and assert his claim thereto.

The answer and cross-petition of Stewart sets up his proceeding in the Nicholas Circuit Court, and makes the record of his suit against I. L. Richardson pending in said court an exhibit.

Although he does not in terms allege that his judgment against

I. L. Richardson remained unpaid, the facts appearing from his answer and exhibits show that such was the case. Appellant accepted the issue as tendered by Stewart, replying only to so much of the cross-petition as charged a fraudulent collusion between himself and his father. He did not demur to the cross-petition and throughout the entire proceeding both he and his father treated the judgment in the Nicholas Circuit Court as unpaid, and prepared their defense upon that hypothesis. The proceeding by *Stewart v. I. L. Richardson,* under the provisions of the 474th section of the Civil Code, was properly instituted in the court in which the judgment was rendered upon a return of no property found in that county.

The evidence conducing to show that an alteration had been made in the note so as to make it payable to S. M. instead of I. L. Richardson, was competent under the charge of fraud. Such an alteration, if made, was certainly fraudulent as to I. L. Richardson's creditors.

It does not matter that the horse was sold to Arrowsmith before the judgment of Stewart was recovered. We are satisfied that the claim of the son to the note is unfounded, and that whether it was originally made payable to the son, or afterward changed, the father was acting in bad faith towards his creditors.

It is certain that he either changed the note after it was executed or else imposed upon the payees thereof, because they certainly supposed that they were buying the mare from him and agreeing to pay the purchase price to him.

Judgment *affirmed.*

Reid & Stone, for appellant.

Hargis, for appellee.

G. M. MULLIGAN *v.* G. W. HARRIS, ETC.

Insolvency—Debtor's Property in Possession of Creditor—Right to.

Although, as a general rule, a creditor who has property of an insolvent debtor in his possession will not be compelled to pay for it until his debt is satisfied, yet the creditor may, by his conduct, preclude himself from the benefit of such rule.

Opinion of the Court.

APPEAL FROM ALLEN CIRCUIT COURT.

February 5, 1853.

OPINION BY JUDGE PETERS:

While as a general rule it is true that a creditor who has the effects of an insolvent debtor in his hands will not be compelled to part with them until his debt is satisfied; yet in this case appellant, by his disavowal in his answer to Brown's cross-suit against him, etc., and by his acquiescence in the appropriation of the funds, has precluded himself from the benefit of the rule.

By the terms in which appellant accepted appellees' notice of the transfer of the residue of the debt on Brown he certainly waived his lien by failing then to apprise Harris of his claim, and place him in a condition to seek indemnity from Murry, his assignor.

The judgment must therefore be *affirmed.*

Lewis, Leslie, for appellant.

Gatewoods, Craddock, for appellees.

JOHN HEATH, ETC., *v.* S. A. DAVIS, ETC.

Deeds—Cancellation.

Where a contractor for the sale of land reserves to the vendors the coal, oil, and mining privileges, but the deed executed does not contain such reservation, the deed should be canceled and a new deed executed containing the proper reservation.

APPEAL FROM UNION CIRCUIT COURT.

February 5, 1873.

OPINION BY JUDGE LINDSAY:

The five members of the firm or company who were present and participated in the purchase of the lands at the commissioner's sale of the assets of the Highland Coal Company, authorized Murchoff to make with other parties desiring to purchase lots any arrangement he might deem proper, and agreed that they would confirm and

appprove such arrangements. All the testimony in the case conduces to establish this conclusion, and Casey, one of the members of the firm who was present, states unequivocally that such was the fact.

The appellant Heath was present, and certainly acquiesced in the agreement. Bush claims title through the purchase made at the time by his five partners who were present, and can take no higher or greater interest in the property than they purchased, nor can he now set aside the contracts with third parties, by and through which they were enabled to make the purchases upon possibly more favorable terms than otherwise could have been secured.

It is not necessary that we should decide whether or not the arrangements in question were contrary to public policy. It is sufficient that the appellees are not seeking to enforce their contracts. They only ask to be left in the undisturbed possession of property they now hold under a fully executed contract, and are resisting the claims of those who were equally concerned with the parties to these arrangements.

The proof is not clear as to the description or number of lots Murchoff agreed that Davis and Higginson should have, but he must be regarded as acting for the company when he executed the assignment to Davis, and the order to Higginson (both of which papers were executed within a short time after the sale), and as doing nothing more than carrying out in good faith the agreements made with them on the day of the sale, and it is but fair and reasonable to conclude that the description and number of the lots are correctly set out in these papers. The circuit judge therefore did not err in refusing to hold that the lots conveyed to Davis and to Higginson's heirs are subject to the liens sought to be enforced by Bush and Heath.

But as the agreement evidenced by the papers executed by Murchoff reserves the coal, oil and mining privileges to the company making the purchase, the court in this suit should have vacated their deeds and caused the commissioner to make to them new conveyances containing the proper exceptions or reservations.

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

W. P. D. Bush, for appellant.

James, for appellees.

STANLEY MOORE *v.* JAMES COWANS & MCILVAIN.

Frauds, Statute of—Undertaking to Answer for Debt of Another.

A transaction was held to be within the Statute of Frauds as an undertaking to answer for the debt of another, and unenforceable because not in writing.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 6, 1873.

OPINION BY JUDGE LINDSAY:

From an analysis of the testimony this court concludes that Moore consented that Alexander McIlvain should remain in the house, and occupy with his stock a portion of the sheds and lot attached to the barn on the premises conveyed by the Cowans and G. W. McIlvain. It is immaterial as to whether Moore was entitled to demand possession of the farm on the 11th of February or not. Neither of the vendors refused to surrender possession when it was demanded, and as Moore consented that Alex McIlvain should remain in the house with him, when he might have ejected him, his vendors can not be compelled to account to him for the trouble and annoyance subsequently resulting from this consent. Alex McIlvain was his guest or tenant, and he must look to him for compensation. The counterclaim set up against the Cowans on this account was properly disallowed. Moore's answer to McIlvaine's cross-petition shows upon its face that he sold the cattle and plank to Aleck and not to G. W. McIlvaine. Aleck undertook to procure his father to credit Moore by three hundred dollars on his note, but Moore does not pretend that the party to whom he was making the sale had any authority to bind his creditor by this agreement or undertaking. The credit was extended to Aleck, and even if G. W. did afterwards notify the tenant and agree to give the credit, it was a promise to answer for the debt of another, and not being in writing was not legally obligatory. The plea of the statute of fraud was necessarily sustained by the circuit court.

The judgment in favor of the Cowans and of McIlvain are both *affirmed.*

Hargis, for appellant.

Phister, Kennedy, for appellee.

sence of all proof of injury resulting from its use. His own confidence in its medicinal qualities is evidence to some extent, at least by his expenditure of thirty-five thousand dollars with no other means of recompense than his success in selling it. Such medicines are only valuable to the extent in which they are appreciated by the public and the appellee, having made his experiment a success by much labor and a large outlay of his means, the appellants should not be allowed to reap the benefit resulting from it, nor will they be allowed under the charge of fraud and deception against the appellee to avoid their own wrong. The attitude in which they place themselves by their defense in this case is not calculated to bring them into favor with the chancellor and his restraining order will not be interfered with by the judgment of this court.

The judgment is *affirmed.*

Barrett, Robert, Pirtle & Caruth, for appellant.

Jas. Speed, Caldwell, W. A. Bullitt, Thos. Speed, for appellee.

ELI KINNEY, ETC., *v.* R. H. HAGNOW, ETC.

Appearance—General Appearance—Presumption.

Where an appearance order is in general terms, and there is nothing to show that the appearance was not intended to be general, it cannot be presumed that appearance was made to one branch of the action in which they had but little concern, and that they ignored that branch of the action in which they were directly and vitally interested.

Insolvency—Contemplation of Insolvency.

So long as debtors hope to be able to pay their debts and were in good faith endeavoring to do so, believing that they would eventually succeed in doing so, they can not be said to have been contemplating insolvency.

Assignments for Benefit of Creditors—Preference of Creditor.

Where a transaction based on intrinsic evidence that it was an attempt on the part of the debtor to prefer one creditor to the exclusion of others, and the device of pledging the individual estate of one of the partners instead of that of the firm which was the real debtor, can not avail the preferred creditor in her attempt to escape the consequences of the law preventing fraudulent assignments.

APPEAL FROM KENTON CIRCUIT COURT.

February 7, 1873.

OPINION BY JUDGE LINDSAY:

The order of June 16, 1866, when properly construed, shows that Mary H. Caldwell and E. Kinney entered their appearance as well to the cross-petition of Berry and others as to the original petition of Hagnow. This order is general in its terms and there being nothing to show that such was their intention, it will not be assumed that they entered their appearance to an action which as to them was but little more than formal, and ignored that branch of the litigation in which they were directly and vitally interested.

We are fortified in this conclusion by the fact that their answers when filed apply almost exclusively to the matters set up in the cross-action. Their pleas of limitation must therefore be held insufficient. The facts and circumstances developed by the record leave no room for doubt as to the intention of the Caldwells to prefer their sister by the mortgage executed to her by Richard F. on the 9th of May, 1866.

It is equally clear that at least some of the conveyances to Kinney were made for the same purpose. That the Caldwells contemplated insolvency on the 9th of May is another fact about which the record leaves no ground for controversy.

They must have been satisfied for some months that nothing short of combination of fortunate circumstances could save them from financial ruin. The trial balance made on the 1st of May exhibited the fact that they were then unable to pay their debts, and no doubt suggested to them that they could postpone immediate bankruptcy in no other way than by the sale of some portion of their undivided landed estates, and the application of the proceeds arising from such sales to the payment of such of their debts as could no longer be postponed.

A careful consideration of all the facts and circumstances exhibited inclines us to the conclusion that they hoped with the proceeds of the two sales made to Kinney on the 1st day of May to extricate themselves, for a short time at least, from their embarrassments, and while it is impossible to believe that they did indulge in the chimerical idea that their investments in fruit and their merits

in the patent for fruit preservation would enable them not only to pay all their debts at once, but also to realize large fortunes. We think it manifest that they did then believe that it was possible that they might convert their property into a sufficient sum of money to enable them to continue in business and eventually to pay all their debts.

It is not necessary that we should express an opinion as to whether or not this belief was well or ill founded, because so long as they hoped to be able to pay all their debts and were in good faith struggling to do so, believing that eventually they would succeed, it can not be said that they were contemplating insolvency.

We are therefore of opinion that the chancellor erred in adjudging that the two sales made to Kinney on the 1st day of May, 1866, come within the provisions of the act of 1856.

The mortgage to Mary H. Caldwell, deceased, executed on the 9th of May, is in our opinion the fruit of the series of acts of insolvency committed by the two brothers, either jointly or individually, during the four weeks immediately preceding their assignment. The testimony conduces to show that Richard F. Caldwell agreed to borrow from his sister the amount paid her by Kinney for her land, and to secure her by a mortgage upon a portion of his individual estate, but it can not be said that this agreement was ever consummated. The money was paid on the 12th of December, 1865, and was deposited in the bank of the Caldwells, they as bankers, paying interest on the deposit. This status of affairs remained unchanged until the 9th of May. During all this time Mary H. was the creditor of the firm and not of her brother Richard. It does not appear that she took steps at any time to have the agreement with Richard carried out. She did not even take from him a note for the amount, nor does she seem at any time to have demanded an execution of the contemplated mortgage. Further than this it does not appear that she was apprised of or consulted about the execution of the mortgage made by Richard to her. The change of her account on the books of the banking institution making her a creditor of Richard instead of the firm, was also made without her knowledge. The transaction bears upon its face intrinsic evidence that it was an attempt upon the part of the brothers to prefer their sister to the exclusion of others of their creditors, and the device of pledging the individual estate of one of the partners, instead of

that of the firm, which was the real debtor, will not avail the preferred creditor in her attempt to escape the consequences denounced by the law to prevent fraudulent assignments. Whether or not the act of Richard would operate as an assignment for the benefit of the firm creditors of all the property of both of the partners, individual and partnership, is a question not necessarily involved in this litigation. There is no contest between partnership and individual creditors, and besides the conveyance of the fruit house to Kinney on the 29th of May was, we are satisfied, an act of bankruptcy committed by both of the partners, and an assignment under the law of all their property for the benefit of all their creditors. It follows therefore, that all property disposed of, or attempted to be disposed of by the firm or by either of the partners on the 9th of May, and subsequent to that time ought to be subjected to the payment of the debts of the firm, and the conveyances held to inure to the joint benefit of their firm creditors.

The only serious difficulty attending this view of the case is the attempt of Kinney to show that he did not pay the $20,000, the consideration for the two tracts of land sold him by R. H. Caldwell on the first of May, and the 4th of June and that such sum was then applied to the payment of the notes held by E. Kinney & Company, against the Caldwell Bros. We are convinced that such was not the fact. These notes were paid out of the proceeds of the two lots sold him by Richard L. Caldwell and the fruit farm sold him by the firm, and this fact is attempted to be concealed in order to show that these sales were not made to prefer Kinney, as the sureties on the notes held by his firm.

It is not for a moment to be believed that the Caldwells would permit Kinney to keep in his hands $20,000 of their money for an entire month, they being all the while pressed by unfortunate creditors and the contract with him being (as he and the Caldwells both represent it) that he should pay said amount in cash, the sales having been made with no reference whatever to the payment of these notes.

It is apparent that the Caldwells hoped with this $20,000 to keep their house open until their fruit could be gotten into market. It must have been collected and paid out before they became convinced of the utter hopelessness of their insolvency, and it is evident that they abandoned same on the 9th day of May.

The pretense that the proceeds of the sales last made were paid out to general creditors, and this $20,000 applied to the payment of their notes is an after-thought.

There is no sufficient evidence to authorize the court to charge Mrs. Mary H. Caldwell, the mother, with any portion of the amount charged against her on the books of her two sons. Their books are not evidence against her, and the witnesses called by the appellees to sustain these charges prove that the account was improperly kept against her, and that she did not owe any part of it. The testimony of Kinney shows that in all their transactions he was representing the banking house of E. Kinney & Co., and as the sales to him resulted in the payment of the debts due to that firm, he must be held to the consequences resulting from the attempted preference. It is therefore considered by this court that the judgment as to Mary H. Caldwell, senior, be reversed. That the judgment as to F. Kinney be reversed to the extent herein indicated and also in so far as it may be construed to affect the interest in the fruit house property conveyed to him by Samally. And that the judgment as to Mary H. Caldwell, junior, be affirmed. The questions touching the distribution of the assets now in the hands of the circuit court, not having as yet been passed upon by the tribunal, can not be considered by this court.

Hallam, Stevenson & Myers, for appellant.

Webster, for appellee.

JAKE HARRIS *v.* PATSY LAWSON.

Vendor and Purchaser—Rescission of Contract of Sale Restoring Possession.

Where one enters land under a contract of purchase, he is bound to restore possession to the vendor upon rescission of the contract of sale, before he will be allowed to dispute the title of the vendor.

Assignments—Warranty of Title.

The assignment of a title bond does not carry with it a warranty of title.

Vendor and Purchaser—Fraud of Purchaser.

Where one in the purchase of land practices a fraud on his ignorant and illiterate vendor he will not be permitted to take advantage of the fraud.

APPEAL FROM ESTILL CIRCUIT COURT.

February 7, 1873.

OPINION BY JUDGE LINDSAY:

It was not necessary for the purposes of this suit that Patsy Lawson should make out a perfect title to the land in controversy.

Harris entered under her, and when the contract of sale was rescinded he was bound to restore the possession. Until he does this he holds under her title, and cannot be allowed to dispute it.

The assignment to him of the title bond of Mason does not relieve him from this allegiance to the title under which he entered, even though the boundaries set out in said bond cover that of this land. The assignment of a title bond carries with it no warranty of title, but if it did, the circumstances of this case precludes Harris from taking advantage of it. Whilst holding the land in contest as a purchaser from Patsy Lawson, he made the contract as her agent with the agent of Mason. If he bought her land then in his possession, and claimed by him, he practiced a fraud on his ignorant and illiterate principal, and he will not now in a contract with her be permitted to take advantage of this fraud.

Although it does not appear how the plat of the survey made by Benton got into the case, it is marked filed by the clerk, and was treated as part of the record of the court when the judgment was rendered.

But independent of anything set out in this paper there is ample evidence to sustain the judgment. It is therefore *affirmed.*

Burnam, for appellant.

Lilly, for appellee.

H. J. SPRADLIN *v.* WM. M. KENDALL, ETC.

Pleading—Defect of Parties—General Demurrer.

A defect of parties in a petition was held not to be reached by a general demurrer, where there is no specific grounds for objection thereto.

APPEAL FROM MORGAN CIRCUIT COURT.

February 7, 1873.

OPINION BY JUDGE HARDIN:

The covenant of the marshal and his sureties that he would perform his official duties which, in this case, were those of a constable, seem to be sufficiently alleged in the original petition, as well as a breach of that covenant. There is an apparent defect of parties, as the averments of the petition only impart that the plaintiff Spradlin was the equitable, and not the legal holder of the executions against Dory and others. But this defect was not reached by the general demurrer, and was not made the ground of specific objection, and it was error to sustain the general demurrer for a special cause, not assigned. (Civil Code, Secs. 120-121.)

Wherefore, that being the only apparent defect in the petition, especially as amended, the judgment is *reversed* and the cause remanded for further proceedings not inconsistent with this opinion.

Hazelrigg, for appellant.

Nesbitt, Kendall, Cooper, for appellee.

COMMONWEALTH BY ROBERT BAGBY *v.* WILLIAM LITTLE AND OTHERS.

Ferries—Duties of Ferryman—Remedy of Persons Injured.

In the absence of an order of the county court permitting plaintiff as relator to sue the defendant ferryman, plaintiff must disclose some interest in himself, showing that his rights have been affected in some way because of the failure of defendant to conduct and keep his ferry as required by law, plaintiff's remedy for mere injury to himself being by acting on the ferryman's bond, and not the revocation of the license.

Opinion of the Court.

ies—Violation of Duties—General Charge.

Where, in a proceeding against a ferryman for failure to comply with the law, the charge is a general one that defendant has failed to comply with the law, it is too general and indefinite to support the proceeding.

APPEAL FROM GREENUP CIRCUIT COURT.

February 8, 1873.

PINION BY JUDGE PRYOR:

the absence of any order of the county court permitting the ellant to prosecute this proceeding as relator, he must disclose e interest in himself by showing that his rights have been af-ed in some way on account of the failure of the appellees to luct and keep their ferry as required by law, and even then for mere injury to the appellant the remedy should be on the bond, not by way of revoking the franchise.

onceding, however, that he had the right to institute the pro-ing, or that his information gave to the county court the power right to adjudicate on the question, still there is no such state-t of facts in the notice of the intended motion as constitutes cause of complaint. The notice fails to specify in what man-the appellees have failed to comply with the law. They may e all the boats required by the county court and still not a cient number to accommodate the public.

he name of the person is not given who has been delayed on unt of the negligence of the appellees as ferrymen, nor is there allegation, showing in what particular the wharf is insufficient. substance of all the charges is, that the appellees have failed omply with the law. Such a statement is too general and in-iite to base such a proceeding on, and the circuit court acted erly in reversing the judgment of the county court. That court, ever, should have been directed by the judgment of the circuit t to set aside the order revoking the grant and dismissing the eeding without prejudice.

he judgment of the court below is therefore *affirmed* on the inal appeal and *reversed* on the cross-appeal and remanded for ner proceedings consistent herewith.

L. Moore, Dulin, for appellant.

eland, Phister, for appellees.

E. H. CURDS, ADM'R, *v.* EDWARD CURDS, EX'R.

Executors and Administrators—Bond.

It is not necessary that the record of the county court with reference to the qualification of an administrator and the execution of his bond, should contain the words "approved by the court" in order to make it a valid statutory bond.

Executors and Administrators—Bond—Approval of.

The fact that a party appeared in court and on his motion was appointed administrator de bonis non, and executed bond with certain persons as sureties thereon, amounts to a sufficient approval of the court of the bond, and makes it binding on the parties.

Executors and Administrators—Action on Bond—Pleading.

In an action on an administrator's bond, the mere allegation in substance that the administrator executed the bond for the performance of his duties according to law, is a conclusion of law and insufficient, since it should appear from the petition what the stipulations of the bond are, so that the court may know whether liability exists.

APPEAL FROM CALLOWAY CIRCUIT COURT.

February 8, 1873.

OPINION BY JUDGE PRYOR:

The bond executed by the administrator de bonis non was in conformity with the provisions of the Revised Statutes, Section 10 of Article 2, Chapter 37.

It is not required that the record of the county court with reference to the qualification of an administrator and the execution of his bond should contain the words, "approved by the court," in order to make it a valid statutory bond.

That the party appeared in court and on his motion was appointed administrator de bonis non, and entered into bond with B. G. Martin, B. B. Noan and Edward Curd as sureties therein, is in our opinion a sufficient approval by the court of the instrument and renders it obligatory on the parties.

In the case of *Fletcher v. Leight, etc.*, 4 Bush 303, the bond was not approved or valid for the reason that no such bond as the one declared on had ever been signed or executed by the parties, and of course could not have been approved by the court.

It is manifest from the order that the parties were in court and the bond then executed and accepted—this is all the law requires, and is as much an approval as if the words of the statutes had been used.

The petition, however, fails to state a cause of action against the executor of Edward Curd, and the demurrer filed by him and overruled should have been sustained.

The terms and stipulations of the bond are not alleged, but only a statement in substance that the administrator executed bond for the performance of his duties according to law. This allegation, as has often been held by this court, is a mere conclusion of law, and it must appear from the petition what the stipulations of the bond are in order to enable the court to know whether any liability exists. *Montjoys, Adm'r, v. Pearce,* 4th Met. 98; *Skillman v. Muirs, Adm'r,* same book, page 280; *Murphy v. Estis,* 6th Bush 532; *Hill v. Boyd,* 16 B. Monroe 557.

We are inclined to conclude, however, that inasmuch as the court below overruled the demurrer to the petition and adjudged against the appellant by reason of the insufficiency of the record that they should be allowed to amend their petition. This must be done at their costs and as they are in default must also pay the costs in this court. The judgment is therefore *reversed* at the costs of appellants and cause remanded with directions to permit them to amend their petition for further proceedings consistent herewith.

R. D. Brown, W. J. Stubblefield, Bullock, for appellant.

Beecham, for appellee.

PRISCILLA AROSMITH *v.* SAMUEL PLUMMER.

Replevin—Title.

Sufficiency of evidence of title to the property sought to be recovered.

Husband and Wife—Action by Wife in Name of Husband.

A wife was held not to show a right to prosecute an action in the name of her husband under section 51, Code of Civ. Prac.

APPEAL FROM FLEMING CIRCUIT COURT.

February 9, 1873.

OPINION BY JUDGE LINDSAY:

There are two controlling and all sufficient reasons why the judgment in this case should be affirmed.

1st. There is no evidence tending to show that the title to the mare was in Johnson Young instead of the defendant Plummer, except the judgment in the case of *Smith v. Young*, to which Plummer was no party, and of the prosecution of which, so far as appears from this record, he had no notice. It follows, therefore, that said judgment is not evidence against him.

2d. Appellant shows by her pleading that she is a feme covert and that she has no authority from her husband to prosecute this action in his name, and the testimony, instead of showing that her husband had deserted his family, as required by the 51st section of the civil code of practice tends to show that appellant deserted him.

Wherefore the judgment is *affirmed*.

Cord, for appellant.

Andrews, for appellee.

MICHAEL MOORE *v.* W. C. IRELAND, ETC.

Vendor and Purchaser—Vendor's Lien—Burden of Proof.

In a suit on purchase money notes to enforce a vendor's lien, the burden is on plaintiffs to sustain the material allegations of their petition, and must show their ability and willingness to make a good title.

APPEAL FROM LEWIS CIRCUIT COURT.

February 10, 1873.

OPINION BY JUDGE PETERS:

This suit in equity was brought by the assigns of two notes executed for the purchase money for land, and to enforce a vendor's

lien. In such cases this court has repeatedly held that the plaintiff must set forth the terms of the contract, and allege that he is able, and willing to convey the land sold, in accordance with the terms of the sale. Robert Walsh and others who join with Ireland & Pollock as plaintiffs allege that the two notes sued on were executed to appellee Deselding, attorney in fact for Maylan's heirs, for the purchase price of fifty acres of land in Lewis county within the John Maylan's 26,500 acres, upon which said Moore now resides, and has been in possession, and so resided ever since his said purchase of said tract of land.

The plaintiffs, Robert Walsh, etc., say that the legal title is in them and that they are able, ready and willing to convey the same to the defendant when the purchase money shall be paid, and that their attorney in fact, Deselding, on the 7th day of November, 1866, executed to said Michael Moore, the defendant, a title bond for said tract of fifty acres of land, etc.

In his answer to the petition, appellant denies that said Robert Walsh and others, as set out in the petition, are the heirs of John Maylan, and explicitly and positively denies that they are able to convey said land, alleges that they are non-residents, and makes his answer a cross petition against plaintiffs and asks for a good title.

If it be conceded that the statement in the petition that they are ready, able and willing to convey the land when the purchase money is paid, is an unconditional and sufficient allegation, and does not mean that they will be ready when or by the time the purchase money is paid, and that the inference that they are the heirs of John Maylan, from a recital in the petition *"that their attorney in fact De-Selding"* executed to Moore a title bond for the land, in the absence of any direct averment that they are his heirs, which would be extending to pleading a most liberal indulgence. Still the answer puts in issue directly the most material allegations of the petition denying that they are the heirs of John Maylan and that they are *able to convey the land* and charges that said plaintiffs are non-residents. By the denials in the answer appellees were bound to sustain these material allegations by proof, and before they are entitled to a judgment they must identify themselves as heirs of John Maylan and exhibit the title and manifest their ability to make a good title. It would be idle, and without meaning, for

the law to require the plaintiffs to allege their ability to make title if they were not bound to establish the fact by evidence, if it was put in issue by the answer. It was therefore erroneous to sustain the demurrer to the answer, and for that error the judgment is *reversed* and cause remanded, with directions to overrule the demurrer and for further proceedings consistent with this opinion.

Bowling, Phister, Thomas, for appellant.

Ireland, for appellee.

JOSEPH WERNE & POPE *v.* SARAH M. HENISOHN.

Husband and Wife—Mortgage—Coercion of Wife—Foreclosure.

Where one whose note had been forged to a bill exercises his advantage to procure from the wife of the forger, the pledge of her property for his indemnity on the forged obligation, by threatening prosecution of the husband, the creditor can not receive the assistance of a court of equity in enforcing the mortgage against the wife's property.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 11, 1873.

OPINION BY JUDGE LINDSAY:

Whether the certificate of the clerk is conclusive evidence that Mrs. Henisohn was examined separately and apart from her husband when she acknowledged the mortgage to Werne and Pope, is a question that does not arise in this case, whatever may have been the circumstances attending the acknowledgment before the deputy clerk on the morning of the 27th of November, 1869. The certificate of Conn, the clerk, shows that it was acknowledged before him on the same day. This certificate is not attacked, and for the purposes of this case its verity can not be questioned. Still we are of the opinion that the cross-petition of Werne & Pope was properly dismissed.

The proof justifies the conclusion that Henisohn had forged the name of Werne to various bills, one of which would mature on the day upon which the mortgage was executed. Henisohn felt that

exposure was certain unless Werne could be secured and also be induced to take up this forged bill. The mortgage herein sought to be enforced was drafted at midnight, by an attorney who had evidently prepared himself, or been furnished with a minute description of Mrs. Henisohn's property, in contemplation of its being executed on that identical night. Mrs. Henisohn had evidently been notified of what was to be done. When the attorney objected to going to her house at one o'clock, a. m., to obtain her signature, he was informed by the husband, in the presence of the mortgagee, that she was waiting for them. She signed the paper without reading it, and knew nothing of its contents until afterwards, unless it was explained to her by her husband during the conference between them before coming into the presence of the attorney and mortgagee where she did the signing.

The deputy clerk was at her house that morning to obtain her acknowledgment before the breakfast hour had passed.

It is perfectly manifest that she was induced to act in this matter by the alarm and apprehension excited by the criminal charges brought against her husband. She had no opportunity to consult her friends or to advise with any one. At the time she signed and acknowledged the mortgage she was not equal to protecting herself.

Werne felt that he had the husband in his power, and he used his advantage to procure from the wife the pledge of her property for his indemnity. Under such circumstances he should receive no assistance from a court of equity. It does not matter that Mrs. Henisohn did not act under actual constraint, or imprisonment. It is manifest that she had no will of her own. In estimation of law the will of a married woman is all the while subordinated to that of the husband. Hence the law provides protection for her against the undue influence of the husband in making deeds of her real estate. Here Werne, the beneficiary in the mortgage, is clearly and directly responsible for the unusual and hurried manner in which Mrs. Henisohn was induced to execute it. He knew that the presumption arising from the certificate of the clerk, that the appellee voluntarily acknowledged the instrument, was false. He knew that when she acted her will was not free, and that her mind did not accord with the act. If an actual fraud was not practiced upon her, he and her husband preyed upon her fears until they im-

prisoned her will and then took advantage of her weakness. All this the testimony of the attorney, who acted for her at the time, establishes almost beyond a rational doubt. The chancellor could do nothing less than to refuse to become a party to the transaction. Pope's claim seems to have been included in the mortgage without his knowledge, yet it is difficult to perceive how he can avail himself of an equity secured to him, if at all, by an instrument executed as this one was. However innocent he may be, the conduct of Werne, through whose instruction the mortgage was obtained, must be imputed to all who claim under it. He parted with nothing upon the faith of the mortgage and if it was cancelled neither he nor Werne would be placed in a more unfavorable attitude than they occupied before its execution.

Judgment *affirmed.*

Joseph Speed, P. Joyes, for appellee.

Muir, for appellant.

THOMAS P. SMITH *v.* BRENT HOPKINS.

Court Commissioners—Special Commissioner—Compensation.

After a special commissioner has been appointed without objection by either of the parties or the regular commissioner, after his labors have been performed, acted upon and accepted, it is too late to object to his remuneration.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 11, 1873.

OPINION BY JUDGE PRYOR:

There is no exception to be found to the appointment of Hopkins as special commissioner. The case had been previously referred to him, and his familiarity with its condition no doubt influenced the chancellor and the parties in committing it again to his hands for settlement.

Those interested in the adjustment of the matters in controversy have had the benefit of his labor and there is nothing in the record showing that the allowance is exorbitant.

Under the general law with reference to the services performed

by commissioners proof is required as to the number of days the commissioner has been engaged in his work and the value of services rendered. This general law, however, does not apply to the commissioner of the Louisville Chancery Court, as was decided in the case of *Smith v. Cochran, 7* Bush 554.

It is too late after the special commissioner has been appointed without objection by either of the parties or the regular commissioner, and after his labor has been performed, acted upon, and accepted, to say that he is entitled to no remuneration. The judgment of the court below making the allowance is *affirmed.*

R. W. Wooley, for appellant.

———, *for appellee.*

THOS. C. JOHNSON *v.* COMMONWEALTH.

Clerks of Courts—Action Against—Defense.

In an action by the state against the clerk of the county court for money collected as taxes, it is no defense to the action that a suit is pending between defendant and the trustees of the jury fund to whom the money collected is payable, and that the state should wait until the termination of such suit.

APPEAL FROM WOLFE CIRCUIT COURT.

February 12, 1873.

OPINION BY JUDGE PETERS:

Appellant, as clerk of the Wolfe County Court, owed the commonwealth for taxes, etc., collected the sum of $88.55, which by law it was his duty to pay over to the trustee of the jury fund; and upon his failure to do so a rule was awarded against him and in answer to that rule insists that the commonwealth shall wait until he and Cox, the trustee, shall litigate a long and perplexing controversy arising on a contract on the part of Cox to construct a house, and on the part of appellant to pay at future periods.

The mere statement of the proposition would seem to carry its own refutation. As between private individuals, if appellant owed a debt to a man for whom Cox was the agent, with authority to collect, it could scarcely be contended that when Cox as agent was

endeavoring to collect the money, that appellant could set off a demand he had against Cox individually against the debt of his principal, much less could he do so against a debt of the sovereign.

The commonwealth pays all legal demands due from it when properly presented promptly, and to enable it to do so all its agents and collecting officers must act with like promptness.

Cox was its officer for a specified purpose, and with limited powers, with no authority to compound, transfer, or change the liability of its officers. The money in the hands of appellant belonged to the commonwealth, not to Cox, and having the legal right to it, the proceeding was properly in its name. And without its assent to any agreement made between appellant and Cox it could not be bound. And such assent is not alleged in the answer. The demurrer was therefore properly sustained to the answer and the judgment must be *affirmed*.

W. L. Hurst, for appellant.

Rodman, G. W. Cox, for appellee.

H. F. CHEATHAM *v.* JOSH CHEATHAM.

Executors and Administrators—Fiduciary Liability—Bankruptcy.

A writing executed by an administrator stating that there is due a certain person as his share of the estate $200 "to be paid," which was signed by the administrator, was properly treated as evidence of a fiduciary liability, which was not affected by proceedings in bankruptcy by the administrator individually.

APPEAL FROM FULTON CIRCUIT COURT.

February 12, 1873.

OPINION BY JUDGE LINDSAY:

Appellant admits in his answer that the two hundred dollars mentioned in the paper exhibited with appellee's petition was an amount due him as one of the distributees of appellant's estate. He claims that the due bill was accepted in satisfaction of his claim against him as administrator, insists that it is his personal undertaking and pleads his discharge in bankruptcy in bar. The writing is not a note or covenant, nor a direct undertaking of any kind. It merely states the fact that there was at the time of its execution,

due to appellee as his share of the estate of Mary B. Cheatham, deceased, two hundred dollars, "to be paid." To this statement appellant, the administrator, attached his name. He does not agree to pay the amount out of his individual funds. Nor is there anything in the writing from which it can be inferred that appellee intended by its acceptance to release the sureties in appellant's bond from their responsibility to him.

We are of opinion that the court below properly treated this memorandum as the evidence of a fiducial liability, not affected by the judgment in the court of bankruptcy.

Judgment *affirmed*.

T. O. Goalder, for appellant.

Randle & Tyler, for appellee.

JOS. CHANDET *v.* JAMES Q. GORDON AND WIFE.

Descent and Distribution—Timber.

The timber on land which passes to the wife on the death of the husband belongs to the wife.

New Trial—By Court of Appeals—Former Verdicts.

Where other trials of the same case have resulted in a judgment against appellant, the Court of Appeals will be reluctant to award a new trial under such circumstances.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 13, 1873.

OPINION BY JUDGE PETERS:

The title to the land from which the timber was cut on the death of Mr. Winters passed to appellee, Catherine; a portion of it was cut and removed after the death of the father, and to that which was not severed from the land in his lifetime, she was unquestionably entitled. There is some conflict in the evidence as to the quantity severed after the death of Mr. Winters. But there have been three trials of the case in the court below, all of which resulted disastrously to appellant, and this court would very reluctantly interpose to award a new trial under such circumstances. The law and facts on the last trial were submitted to the court, and unless

the judgment was palpably against the evidence we would not be authorized to interfere, which is not the case, wherefore the judgment is *affirmed*.

P. D. Yeiser, for appellant.

———, *for appellee.*

JOHN OPAL *v.* DOMINICK ECKERT, ETC.

Fraud—Burden of Proof.

The burden of proof to establish fraud rests upon the party charging it.

Fraud—Pleading—Fraudulent Intent.

The allegation that the mortgage in question was made in good faith to secure a pre-existing liability is not objectionable as an affirmative denial of fraudulent intent.

APPEAL FROM LOUISVILLE CHANCERY COURT.

February 13, 1873.

OPINION BY JUDGE LINDSAY:

We perceive no available defect in the answers of Eckert & Becker. They both assert that the mortgage was made in good faith to secure the payment of an existing liability. It does not matter that the denials of the alleged fraudulent intent are thus affirmatively made. The onus to establish the fraud remained upon the party making charge. But if it did not, the depositions of the two appellees taken by appellant sufficiently show that the mortgage was executed to secure the payment of money loaned by Becker to Eckert. The immaterial discrepancies in their statements would not have authorized the chancellor to conclude that they had sworn falsely as to the essential and controlling fact that money to the amount of one thousand dollars had actually been loaned by Becker to Eckert.

As no property was seized under the order of attachment (that was shown by appellant not to be embraced in the mortgage), and

as he already had a judgment in *personam* for his debt against Eckert, the chancellor properly dismissed his petition.

Judgment *affirmed.*

Allen, Muir, for appellant.

Lee & Rodman, for appellee.

JOHN McMURTRY *v.* O. S. TENNY.

Contracts—Building Contract—Change in Specifications.

Where a building contract was changed, permitting the contractor to put in a stone foundation instead of brick as called for by the specifications, it was held that the contractor was not bound to comply literally with the specifications in the construction of the foundation, because of the use of different material, necessitating a difference in the manner of construction.

Contracts—Building Contract—Change in Specifications—Compensation.

A contractor was held not entitled to pay for extra work on account of stone walls put in being thicker than brick walls called for by the specifications, since the stipulations in regard to the change of materials require the cost to be the same.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

February 5, 1873.

OPINION BY JUDGE LINDSAY:

The rule of pleading provided by the Civil Code of Practice has been utterly disregarded in the preparation of this case. The parties, instead of stating the facts constituting their claims and defenses in ordinary and concise language without repetition, have repeated and elaborated to such an extent as to require one hundred and twenty pages of legal cap to state the two or three simple issues necessary to be determined.

We do not concur with the circuit judge in his construction of the contract between Gunsally and the appellant. Although the foundation walls of the structure were to be built of stone in every respect as the same are described to be "built in brick work in specifications," etc., yet it did not follow as a matter of course that the necessary and unavoidable differences in the manner of the erection of stone and brick walls were to be disregarded; neither

party so understood the contract at the time the work was commenced by the appellee, Tenney. The stone work was not laid in hydraulic cement one foot high, nor was the outside course of the walls covering against the earth so laid, nor was the outside face of the walls that come in contact with the earth plastered with said cement, as was required to be done in the construction of the contemplated brick foundation. McMurtry did not request nor did Tenney offer so to construct said work, although the contract required the stone work to be done in every respect as prescribed for the brick work by the specifications.

It is further to be observed that inverted arches under the openings to be made in the building above were not constructed in the stone work, although such was the contract as to the brick foundation.

Their failures to comply literally with the specifications were proper in view of the fact that the different materials used in the construction of the two kinds of work necessitated differences in the manner of construction.

We see nothing in the language of the contract evidencing an intention on the part of the contracting parties to disregard these well established distinctions. Nor can it be gathered therefrom that Gunsally was to be allowed to build stone walls so narrow that they not only would not support the superstructure to be put upon them, but some of which would fall of their own weight. At the beginning of the work the parties evidently understood that the stone walls were to be of the dimensions usually put under such buildings as that being erected, and this in our opinion is the proper legal construction of the contract when considered in connection with the circumstances under which it was made.

The work was given to Gunsally for his accommodation. It was no interest to McMurtry to have the foundation built of stone instead of brick, as he had contracted to build it. He was not to receive a cent more for the work when so done than under his original contract, and he expressly stipulated that he was only to pay Gunsally the same price the basement walls would have cost if built with brick, as per plan and specification. The fact that it is recited that this price was ($12) twelve dollars per thousand brick, does not mean that the stone work was to be measured in the same manner and paid for at the same time, but that the aggregate amount

of what the brick work basement would have cost was to be ascertained by the mode of measurement and the price so set out.

We are therefore of opinion that Tenney was not entitled to pay for extra work on account of the stone walls being thicker than the brick walls were required to be built, and that the circuit judge erred in so adjudging.

McMurtry's right to recover on his counterclaim must depend upon whether he was in default in refusing to make additional payment to Tenney when the latter demanded the last estimate. This fact can only be determined by ascertaining whether or not at that time Tenney was fully paid for the work done according to the terms of his contract.

We perceive no error in the action of the circuit court as to the common law action for $105.71, but for the errors pointed out the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Turner, for appellant.

Buckner, Holt, Tenney, for appellee.

ISAAC HOPEWELL *v.* CHARLOTTE HOPEWELL, ETC.

Husband and Wife—Wife's Property—Trust.

A husband becomes vested with an interest in the money of his wife in the hands of an executor, and where the money, with the consent of the wife, was placed by the husband in the hands of a trustee for their joint benefit, a trust is created by the husband for the benefit of the wife, and not by the wife for the benefit of the husband

Divorce—Attorneys' Fees—Liability for.

A wife's estate can not be held liable for the payment of the husband's attorneys in an action by the wife for divorce.

APPEAL FROM BATH CIRCUIT COURT.

February 12, 1873.

OPINION BY JUDGE PRYOR:

This case is unlike the case of *Philips v. Philips,* recently decided by this court. In that case the conveyance was not executed in consideration of marriage nor did the wife become vested with an in-

terest in the property by reason of the marriage. The husband in the case under consideration was vested with an interest in the money to which the wife was entitled in the hands of Magowan's executor. This interest of his was acquired in no other way than by reason of the marital relation. He had the right to collect it, or if he saw proper, to apply it to the payment of his debts, or might have transferred it without the consent of the wife to a stranger, either for the benefit of the latter, or in trust for himself, subject to the wife's right to an equitable settlement out of it. A creditor of the husband could have subjected it to the payment of her husband's debt subject to this equity that she might have asserted. In this case the only equity the wife asserted was to consent to place the money in the hands of a trustee to be held and for their joint benefit, and by this conveyance she made no gift to the husband nor did she part with any other interest in it than her right to a settlement, and this she had secured by the excution of the trust, or rather by its execution on the part of the husband. She made no gift to the husband as it was already his and the conveyance to Daugherty in trust was only securing to the wife a support out of it. If the husband had collected the whole of it and placed it in the hands of the trust it could not be said to have been a gift from the wife, or if the wife had gone into a court of equity and removed all claim to any settlement upon her and consented that it might be paid to the husband it would not have been a gift for the reason that it already belonged to him and the chancellor would have ordered it paid over for the reason that his rights as husband entitled him to receive it. The trust in this case was created by the husband for the benefit of the wife and not by the wife for the benefit of her husband.

The money or a part of it was after the execution of the deed invested in real estate. This is also the property of the wife, as the mere change in the character of the estate can not deprive her of her right to it as provided by the 6th section of Article 3, Chapter 47, Revised Statutes. See 8 Bush 156. There is no law authorizing the payment of the husband's attorneys out of the estate of the wife for services rendered him in resisting a suit for a divorce.

Judgment *affirmed*.

WM. HARPER *v.* E. D. PEEPLES.

Appeal—Reversal—Premature Hearing.

The fact that a case was heard and determined before it stood for trial is not alone ground for reversal, it not appearing that plaintiff's substantial rights were prejudiced by the obtaining of the relief sought sooner than he had the right to demand.

APPEAL FROM GRAVES CIRCUIT COURT.

February 13, 1873.

OPINION BY JUDGE LINDSAY:

The fact that this cause was heard and determined before it stood for trial does not authorize a reversal.

Besides this, we are unable to perceive how the substantial rights of appellant were prejudiced by obtaining the relief asked for sooner than he had the right to demand.

The court compelled Peeples to accept the tendered deed and release appellant from liability on his judgment, in exact conformity to the prayer of the petition. As appellant has had his contract of compromise specifically enforced, it can not be that he objects to surrendering the possession of the land conveyed.

The judgment does not preclude him from asserting any right he may have to the cotton gin.

The question as to whether this gin passed with the land to appellee must depend upon the construction of the deed and not upon the judgment in this case.

Judgment *affirmed.*

L. Anderson, for appellant.

Stubblefield, Smith & Robertson, for appellee.

H. M. CHANEY, ETC., *v.* B. W. S. LOWE.

Insolvency—Preference of Creditor.

A sale of property by an insolvent son to his father in discharge of a debt owing the father was held to be in fraud of other creditors of the son.

Opinion of the Court.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 13, 1873.

OPINION BY JUDGE PRYOR:

The merits of this controversy must be determined upon the testimony of the father and son. The father is asserting a claim against his son amounting to near forty-three hundred dollars and upon his statement, if true, the pledge of the whisky as a security for this debt was made in 1869 and therefore six months had elapsed prior to the filing of Lowe's petition, in which he seeks to bring the transaction between the father and son within the act of 1856.

Robert Chaney, however, swears that the whisky was only stored in the house of his father in 1869 and that there was no transaction between them in regard to it until August, 1870, when he sold it to his father in payment of the debt he owed him. The son was then in an insolvent condition and the father threatening to institute suit against him and to prevent this suit and for the purpose of discharging this debt and having the other creditors to suffer the sale was made.

The son making this statement has no other interest in the action than to have his debts paid and the result of the controversy can not in any manner affect his rights, as the proceeds of the whisky must necessarily be applied as a partial payment upon his indebtedness. If the father's statement is to be adopted he makes nearly the entire amount of his debt to the exclusion of the other creditors, whilst the son's statement will give to each his pro rata portion of the proceeds of the sale of the property.

The petition of Lowe was filed on the 9th of November, 1870. The sale to the appellant was made in August of the same year, except the twenty barrels of new whisky. Whether this new whisky was delivered early or later in the spring of 1870 does not clearly appear. If sold or delivered after the 8th of May, 1870, the suit of Lowe was then instituted within six months from that date and the proceeds of the old and new whisky must be apportioned between the creditors or placed in the general fund for distribution.

No injustice is done their creditors by making them share equally in what Robert Chaney has to pay his debts, and his disinterested position towards all these parties leaves no doubt in our minds but what his statements with regard to these business transactions between himself and father are true.

Opinion of the Court.

We perceive no reason for disturbing the judgment of the court below and the same is now *affirmed.*

Thos. Kennedy, W. P. Ross, for appellant.

Phister, Hargis, for appellee.

G. M. ADAMS, ETC., *v.* HARRISON COCKERILL.

Replevin—Signing Blank Bond—Presumption.

Where one signs a blank replevin bond, it will be presumed that the execution debtor or the sheriff had authority from the person so signing to fill the blanks, unless such authority is revoked before the blanks have been filled.

APPEAL FROM OWSLEY CIRCUIT COURT.

February 13, 1873.

OPINION BY JUDGE LINDSAY:

The appellee's grounds for relief in this action are in the nature of a plea of *non est factum* to the replevin bond which was at the time of the institution of the suit about to be enforced by execution. Although this is a proceeding in equity the parties seem voluntarily to have submitted the questions of fact to a jury, and the chancellor based his judgment perpetuating the injunction upon the verdict returned.

The instructions given are more favorable to appellants than they should have been. It does not matter whether the execution debtors did or not practice a fraud upon Cockerill when he procured his signature to the blank replevin bond.

The essential question is, Did the sheriff have the right to fill up the bond at the time he did so?

The signing of the blank bond imposed no liability upon Cockerill. It was then incomplete and would be made to answer no purpose until filled up. It is to be presumed that the execution debtor Daniels, or the sheriff had authority from Cockerill to fill blanks, and had either of them done so whilst this authority continued he would have been concluded by its exercise. Daniels, however, without filling the blanks, delivered the paper to the sheriff. The latter called Cockerill's attention to the amount due on the execution,

and immediately the presumed authority to fill up the blanks was revoked.

Cockerill had executed no bond, and was not liable for the judgment against Daniels at the time of his conversation with the sheriff, and he that day expressly revoked the authority that that officer had to render him liable therefor by filling up and accepting the bond which had previously been signed in blank.

The sheriff states that when he did fill the blanks, he acted for his own protection, and not under authority from Cockerill.

The newly discovered testimony relates only to the alleged fraud practiced by Daniel upon the appellee, and would not have been pertinent to the issue if it had been produced on the trial. Besides this, the affidavit of Hogg shows that he was agent for appellants in the preparation of the cause and that he knew on the 1st of April what Daniels would swear. This was nearly a month before the trial.

The motion for a new trial was properly overruled.

Judgment *affirmed.*

James, for appellants.

Rodman, for appellee.

H. J. OGLEVIE AND OTHERS *v.* J. WILEY.

Pleading—Reply—Insufficiency.

A reply denying each and every allegation in defendant's claim, and demanding proof in full, is insufficient, since a specific denial of payment should be made.

Pleading—Issues and Proof.

Under an allegation of indebtedness for groceries sold and delivered, proof of indebtedness for oxen, wagon and plow, etc., is not admissible.

Attachment—Liability of Sureties on Undertaking.

The sureties in an undertaking in attachment proceedings can not be held liable after reversal of the judgment in the case

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 14, 1873.

OPINION BY JUDGE PETERS:

Appellee in his original petition alleges that appellant and himself had been partners in the blacksmith business, that the co-partnership had been dissolved by mutual consent, that by the terms of dissolution appellant bound himself to pay all the outstanding debts of said firm, in consideration that appellee had assigned to him his entire interest in the assets of the firm; that there seems to be a debt owing by the last firm to Ragin, Dickey & Carson for $74.45, which appellant had failed and neglected to pay, and suit had been brought against appellee, and judgment would be rendered against him for said debt and cost amounting to $10 or $15, that there might be other partnership liabilities of which, however, he had no knowledge, as appellant had never rendered him an account or list of the firm debts, that appellant was then a new resident of the state, but had personal estate within the jurisdiction of the court, and as appellee was in danger of having the debts to pay he prayed for and obtained an order of attachment against the property of appellant for his indemnity. In his answer appellant admitted that a partnership had existed as stated in the petition, and that it had been dissolved as therein set forth; that the debt to Ragin, Dickey & Carson was due and unpaid, that the late firm owed another debt to Whole of $15 or $20, and that Tomlinson & Edwards claimed to have a debt against it of $26, but when they dissolved appellee asserted that he had paid that debt and got a credit in the final settlement with said firm for the same, but as he had not in fact paid it, he should account for the amount to the firm. That he was always ready and willing to perform his part of his contract, and comply with the terms of dissolution, and for that purpose left the means in the hands of his agent when he left Kentucky to pay Ragin, Dickey & Carson the debt aforesaid. That appellee owed him much more than was sufficient to pay the last named debt, and all others that appellant had assumed to pay for said firm which he had failed and refused to pay.

And in the second paragraph of his answer he avers that appellee was justly indebted to him in the sum of $268 due by account, which he files with his answer, and pleads the same as a set-off against the demand of appellee, and prayed for judgment over the balance alleged to be due him.

Appellee filed a reply to the set-off, as it is denominated in the order of court, noting the filing thereof. In his reply he admits ap-

pellant worked for him on his house in Woodville; but alleges he paid him for the work, and denies explicitly the other items of the account pleaded as a set-off, except the charge for the buggy, but for that he is credited on the account; as to the allegation in the answer that he claimed a credit in the settlement for having paid Tomlinson & Edwards, he neither denies it specifically, nor responds directly; but in the last sentence of the first paragraph he says he denies each and every allegation in defendant's counterclaim, and calls for full proof. This general denial is not sufficient; this debt as to the Tomlinson & Edwards debt, which appellant alleges he improperly got credit for is not pleaded as a counterclaim, nor set-off. But he relied on the asserted indebtedness as set forth in the accounts filed as a set-off, and the $26 due to Tomlinson & Edwards are not included in that exhibit. After concluding his negative of an indebtedness as set forth in the answer, he proceeds in his reply as follows: Plaintiff states that the defendant is indebted to him in the sum of $272.05 for *groceries* sold and delivered by plaintiff to defendant at defendant's special instance and request, an account for which is here filed and marked "D."

No part of said account has been paid; but the same is now due and wholly unpaid. Wherefore "Plaintiff prays judgment against defendant for said sum and for all proper relief." This paper is not alleged in the body thereof to be an amended petition. Nor does the order noting the filing thereof so denominate it. Appellant, if it was properly an amended petition, should have answered it, and his failure to do so would have entitled appellee to a judgment by default if the allegations had been sufficient; but treating it as a reply, where the pleadings under the Civil Code are closed, there could be no rejoinder.

But if we are mistaken in that view—are the allegations sufficient to constitute a cause of action for the amount claimed? The indebtedness as set forth and for which the judgment is sought is $272.05 *for groceries sold and delivered by plaintiff to defendant at his special instance and request.* When the account is examined which he files, only $27.80 of it is for groceries, and they by retail in very small parcels indeed. The balance to make up the $272.05 is for one yoke of oxen at $70, a wagon at $35, 2 plows, etc., $8.50; rent for houses, borrowed money, and one charge for $30, but whether for borrowed money or other thing is not stated.

Under an allegation of indebtedness for *groceries* sold and delivered, proof of an indebtedness for oxen, wagon and plows, etc., would not be permitted. Appellee, however, is as unsuccessful in his proof as he is in his allegations. Rogers, the only witness who speaks of the oxen and plows, says he heard appellant say the oxen were appellee's and he intended to bid for them till they brought his figures. But he proves appellant did not buy them, and does not prove that he received the price for which they sold, and as to the plows, etc., he neither proves that they were the property of appellee, nor their value. And Scott, he proves he bought the wagon at $32.50 and bought it at the sale of appellant's property, and that he heard it was appellee's but from whom he heard it he did not state, and even if it was the property of appellee he was not entitled to more than the price for which it was sold. Still he got a judgment for $35 for it.

And as to the borrowed money charged in the account there is no evidence whatever. It was erroneous therefore to adjudge to appellee the amount of the account under any aspect of the case. The cause of action set out in the original petition seems to have been abandoned. Judgment *reversed* and cause remanded with directions for further proceedings not inconsistent with this opinion.

It is proper to observe that the writing following the attachment, containing a statement that it was levied on property of appellant is not signed by any person. But the reversal of the judgment above which is of the 23d of May 1872, has the effect to reverse the judgment of the 31st of the same month against Burnley & Hazelwood. Since their undertaking was that N. J. Oglevie should perform the judgment of the court in the case, and as there is no judgment against him after the reversal, they can not be responsible.

Bigger & Mop, for appellant.

Bullock, for appellee.

R. T. JOHNSTON, JR., *v.* ROSINA WALKER.

Abatement and Revival—Plea in Abatement.

Where defendant avers that he was sued in equity on the notes upon which the present action is founded, but fails to allege that the suit was pending when his answer was filed, it is not sufficient to bar the action.

Payment—Promise Without Consideration.

Where a debtor made part payment on the debt on the promise of the creditor not to sue for the residue at the approaching term of court, the promise not to sue was without consideration.

Appeal—Bill of Exceptions.

Where the court refused to allow an amended answer to be filed, and defendant desires to have the legality of the ruling tested on appeal, he should bring the question to the Court of Appeals by bill of exceptions.

Pleading—Answer in Bar—Sufficiency.

An amended answer purporting to set up a defense in bar of the action, should be rejected, where it contains only matter in abatement.

APPEAL FROM GRAVES CIRCUIT COURT.

February 14, 1873.

OPINION BY JUDGE PETERS:

Appellant does not allege in his answer that there was another suit pending in the name of appellee against him for the same cause of action as the one set out in this. He does aver that he was sued in equity on the notes upon which this action is founded, and for the same debt; but he fails to allege that that suit was pending when he filed his answer, and as that suit may have been dismissed, and still all he avers be true, his answer was not sufficient to abate the action.

The payment of $50 on the debts which were past due, and which are owing, upon a promise not to sue for the residue of the debt at the approaching term of the circuit court was without consideration. He was under a legal obligation to pay the whole of it, and

he can not enforce a promised reward for paying only a part of it. The record shows that appellant offered to file an amended answer and that the court refused to permit the same to be filed, it then constituted no part of the record. If appellant desired to have it before this court, and its sufficiency tested here, he should have excepted to the opinion of the court; and filed a bill of exceptions referring to said amendment, making it a part of the bill of exceptions, had it signed by the judge and had it entered on the record. The mere unofficial note of the clerk that the paper copied is the rejected amended answer this court can not recognize, as has been often decided. But the amendment was properly rejected as it purported to set up a defense in bar of the action, when it contained at most matter in abatement only. But it even failed in that. It is alleged therein that the notes were given for real estate in Mayfield, and it is not averred that appellant was insolvent, and that the property on which appellee held a lien was not sufficient to pay the debt before the $50 were paid.

It can not therefore be said that her debt was made more secure by the payment of the $50. If he had not paid that sum, he would have owed that much more, but he would have had the same amount as additional means of payment, and other objections might be pointed out, but those named are sufficient.

Judgment *affirmed.*

Stubblefield, Smith, for appellant.

Williams, for appellee.

WM. LOWRY *v.* A. G. MORGAN, ETC.

Courts—Appointment of Trustees of Estate.

A county court was held to have no power to appoint a trustee of an estate in the place of one who had died since such jurisdiction is in a court of equity.

Life Estates—Suit for Sale and Re-investment of Proceeds.

A life tenant may bring an action under the statute to have the land sold, and for reinvestment of the proceeds, where the remainder is a contingent one.

Opinion of the Court.

Life Estates—Suit for Sale and Reinvestment of Proceeds.

Where an estate is held in trust for the life tenant, and the trustees have died, and the life tenant brings suit for the sale and reinvestment of the proceeds of the land, the court will authorize the sale and reinvestment, upon the appointment and consent of the trustee of the property, and upon proof that it will be beneficial to the parties concerned.

APPEAL FROM FAYETTE CIRCUIT COURT.

February 14, 1873.

OPINION BY JUDGE PRYOR:

Richard Wiggins at his death left a last will and testament by which he made various devises to his two daughters, Caroline Waters and America Morgan, the property to be held in trust by his two sons, Joel and Richard Wiggins. The clause of the will creating the trust is as follows: "The portions of my estate given to my daughters, Caroline Waters and America Morgan, are hereby vested in my sons, Joel Wiggins and Richard Wiggins, Jr., as trustees, and the right and title to the same are to remain in my sons and their heirs as trustees, the interest thereon to be paid to my said daughters respectively during their lives, and at their deaths, or that of either of them, their portion, or portions to be transferred and delivered to her heirs forever." Prior to the death of the devisor he had executed a deed to his two sons in trust for the benefit of Mrs. Morgan for life, and then to her children or their issue, for a tract of two hundred and thirty-eight acres of land in the county of Fayette, and after his death the trustees of his daughters purchased with the proceeds of this trust estate, a tract of ninety-five and a half acres of land adjoining the first named tract; the vendors, Parker and wife, conveyed the same to the trustees to be held by them in trust, in the same manner and for the purpose provided in the will of Richard Wiggins. William Lowry (the appellant) purchased the tract of two hundred and thirty-eight acres of land, as is alleged in the petition, at the price of $110 per acre, and being desirous of purchasing the tract of 95½ acres adjoining, the present petition in equity was filed by Mrs. Morgan and her only child, A. G. Morgan, who also was a trustee, and as the guardian and next friend of his infant children for a sale of this last tract of land, and

king a re-investment of the proceeds in other property, a judg-
nt was rendered directing a sale, and William Lowry (who was
a party to the petition) purchased the land at the price of $110
acre, and the court below requiring him to comply with the
ns of sale he has brought the case to this court, insisting that he
uired no title by his purchase. The trustees mentioned in the
l, in whom was vested the title to the property, were both dead
he date of the filing of the petition and no trustee appointed in
ir stead until February, 1872, and the appointment seems to have
n made by an order of the Fayette County Court. Mrs. Morgan,
daughter, is now sixty-five years of age, and her only child,
o also claims to be trustee, united in the prayer of the petition
king parties plaintiffs thereto all of his children, seven in num-
. The appellees say that the act of August 25th, 1862, Myer's
pplement, page 426, authorizing the sale of real estate in which
re is a contingent interest, vested the court below with all the
wer necessary to render the judgment, and that the appellant is
ure in his purchase. Before looking to this statute it becomes
essary to dispose of other questions presented in the record that
y, to some extent, at least, affect the title of the purchaser. The
ointment of A. G. Morgan trustee for his mother was invalid
l gave him no power to act as such for the reason that the county
rt had no jurisdiction to make it. The jurisdiction of the county
rt is derived from statutory enactments and the extent of its
wer clearly defined, and unless there is some express authority giv-
that tribunal, to substitute trustees in room of those who die, or
removed, or who fail to act, or the power may be implied as nec-
ary to perfect a jurisdiction granted one trustee, this act of sub-
ution must be regarded as a nullity. *Chincloe v. Com.*, 13 B. M.
3. In a careful examination of the statute laws with reference
this subject, we have been unable to find any such power vested
the county court and the only tribunal having jurisdiction in such
es in a court of equity. Conceding, however, that the county court
d the power to appoint a trustee, this appointment was not made
til after the petition was filed; it is true that the order made in
72 recited that it should have been made in 1869, but so far as the
ord shows, it is made alone from the recollection of the judge or
rk and it would certainly be a dangerous precedent to permit rec-
ls of courts to be substituted or amended in this way. *Boyle v.*

Connelly, 2 Bibb. 7. There was then no trustee at the time of the sale, and in our opinion the court by its judgment should have recognized the appellee, Alex. Morgan, as trustee and required him to execute bond as such inasmuch as he had been selected by the mother and is now the only one entitled to the estate in the event of his mother's death and his surviving her.

The statute under which this proceeding is had reads as follows:

"Where real estate or use thereof for a limited period is held and the title thereof is devised by deed or last will in which there may be a contingent interest depending on events which may or not happen, and the person or persons, corporation or corporations to take such future interest can not for the time being be ascertained on account of the non-happening of the event or events on which such interest depends, it shall be lawful for any person having a present interest in such real estate to institute proceedings in the county in which the property is situated in a court not inferior to the circuit court for the sale of the entire and absolute title to the property, etc." This statute is so inaptly drawn as to present some difficulty in arriving at the intention of those framing it. It is evident, however, that the enactment was made for the purpose of authorizing a sale of contingent interest in real estate, and it seems to us whether that contingency depends upon the happening or non-happening of an event, or by reason of the uncertainty in whom the title to the remainder is to finally rest, is altogether immaterial. The statute contemplates no uncertainty in regard to the donation or termination of the particular or limited estate, but has reference to events which may or not happen during its existence, making it uncertain as to those who are to take the remainder. If the estate is to pass to A. G. Morgan (her son) at the death of Mrs. Morgan, if he is then living, and if not then to his children, the right of the children to take depends upon whether the father is living at the termination of the life estate. The event upon which the children take may or not happen and for this reason those who are to take the future estate can not be ascertained. If A. G. Morgan is living at the death of his mother he is the only heir and takes the property; if he should not survive her, then his children are the heirs and if they are also dead, the next of kin, and the happening or non-happening of these events render it uncertain as to the person or persons who will own this property at the death of the life tenant. Conceding, however,

at the happening of the event upon which the parties are to take is rtain, and that the only uncertainty growing out of this clause of e will is as to the person entitled to the estate when the event trans-rs; still, if the chancellor by reason of the statute will sell when th contingencies exist, why may he not sell when only one con-ngency arises? The chancellor will certainly not be so tenacious following the letter of the law by refusing to sell when only one ntingency exists, when it is obvious that the purpose of the enact-ent was to authorize the sale of all such contingent rights. Those remainder are made secure in the proceeds of sale by the third ction of the act referred to, which required that the proceeds of le shall be re-invested in the same kind of property and held sub-ct to the same limitations, trusts and conditions as the property ld. We are of the opinion that the life tenant can bring the action, it is difficult to conceive how a greater present or vested interest n exist in an estate when the fee simple estate is made to depend on so many contingencies and in the present action the life tenant not only a party but all those who are likely to succeed to the re-ainder are united with her as plaintiffs. In order, however, to ve removed all doubt in regard to the title it would have been bet-r for the court below to have made A. G. Morgan trustee, in room the trustees who are dead, and in the judgment directed a con-yance by the trustee, and life tenant, as well as the commissioner, d in order to perfect the title the court below upon the return of e cause should permit an amended pleading to be filed by the ap-llees, Mrs. Morgan and A. G. Morgan, making the heirs of the ceased trustees parties and ordering the appointment of a trustee ith power to unite in the conveyance, and when appointed should xecute bond with surety to be approved by the court, etc. Upon e appointment of A. G. Morgan as trustee, and his consent to the le with the heirs of the deceased trustees before this court and roof that it is beneficial to all the parties as agreed by the statute, e court will render a judgment confirming the sale, and directing investment of the proceeds as directed by the statute, as well as conveyance to the purchaser by the commissioner's trustee and life nant, retaining liens for the purchase money, the life tenant war-nting the title to the extent of his interest.

The judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion.

Breckenridge & Buckner, for appellant.

Waters, for appellee.

JAMES BAKER *v.* JAMES INTOSH.

Replevin—Value of Property—Forceable Taking.

Where plaintiff's property was taken from him by force, the jury had the right to find more than its actual value.

APPEAL FROM CLAY CIRCUIT COURT.

February 14, 1873.

OPINION BY JUDGE LINDSAY:

The verdict in this case is not palpably against the weight of the evidence and there is no error of law complained of. If the jury believed that appellee's horse was taken from him by force they had a right to find more than its actual value, and that discretion they did not abuse.

Judgment *affirmed.*

Rodman, for appellant.

James, for appellee.

W. B. MCGEHEE *v.* O. W. MILES ET AL.

Courts—Jurisdiction—Transfer of Case.

Where the trial of exceptions to reports of settlements of the accounts of executors was transferred from the county court to the circuit court by direction of the parties, the circuit court had only the jurisdiction of the county court over the subject-matter.

Executors and Administrators—Personal Judgment.

Where the Court of Appeals reversed a judgment and remanded the case for correction of settlements of executors, so as to hold the executors liable for the price of a slave, it was held that such decision did not authorize a personal judgment against the executors.

APPEAL FROM FULTON CIRCUIT COURT.

February 15, 1873.

OPINION BY JUDGE HARDIN:

The original controversy between Ropen's widow and heirs and Miles and McGehee, was not a suit against the latter to recover the amount due from them as executors of A. I. Ropen, deceased, but simply the trial of exceptions to the reports of settlements of the accounts of the executors, in which, in effect, they were not charged with the price of the slave, "Link." That controversy being by agreement transferred to the circuit court, the latter tribunal, chosen by the parties themselves, had only the jurisdiction of the county court over the subject-matter.

It confirmed the reports, and this court, on appeal, reversed the judgment and remanded the case for a correction of the settlements so as to hold the executors liable for the price of Link. This did not authorize the personal judgment against the executors, which had not been sought in either court in any action. The court, therefore, transcended its jurisdiction in reducing that judgment and its action to that extent was void, it being only authorized to correct the settlements in accordance with the opinion of this court, and remand the matter to the county court, which may yet, and should be done, in order that the corrected settlements may, as such, be available to the appellees in an action against the executors. Whether or not the appellant might have maintained his action for protection and relief against the misappropriation of the money paid by Miles, as well as for adjudication of the question of relative responsibility, for the price of "Link" between him and Miles, is not now to be decided, but he was certainly entitled to have his injunction perpetuated as to the judgment and execution against him, but without prejudice to the rights of the appellees according to the former decision of this court, properly carried into effect, and when properly sought to be enforced.

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

Kingman, for appellant.

Randle, Tyler, for appellee.

GEO. W. CRAVENS, ETC., *v.* W. C. GRAY.

Process—Waiver of Service.

Where the defendant by her attorney excepted to the decision of the court and appeared and filed exceptions to the commissioner's report of sale, she waived service of process.

Appeal—Remedy by.

Where the defendant excepted to the decision of the court, and appeared and filed exceptions to the commissioner's report of sale she thereby made herself a party to the suit, and her remedy for any supposed wrong is by appeal.

Lis Pendens—Affects Whom.

A lis pendens created by an action, can affect only those who are parties to the action and those claiming through them, and only to the extent that the determination of the question involved in the litigation settled the rights of the litigants.

Evidence—Survivorship—Burden of Proof.

Where plaintiffs' right to the property in question depends on the survivorship of their mother and another, the burden of proving survivorship is on plaintiffs.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

February 17, 1873.

OPINION BY JUDGE LINDSAY:

The deed executed September 27, 1856, by John Gray, Sr., to Mrs. Margaret W. Cravens, invested her with the fee to the lands therein embraced, subject to an estate for life in favor of the grantor and his wife, and defeasible in case either of them should survive

her, in which event and in no other her children were to take as grantees.

At the time of the second judgment in the case of *Phelps McKee, etc., v. The Heirs of the Deceased Grantor*, Mrs. Cravens and her mother were both alive, as they also where when the land in controversy was sold and the purchase of W. C. Gray confirmed. This judgment and sale were not void as to Mrs. Cravens. We are inclined to regard the pleading styled the amended petition as an original petition, and as the beginning of a new action so far as the eighty-acre tract of land conveyed by Gray to Mrs. Cravens is concerned. If Mrs. Cravens had not entered her appearance, the court could have rendered no judgment affecting her rights until process had been properly served.

That she waived the service of process is manifested by the recital in the face of the judgment to this effect: "and to this decision the defendant, M. W. Cravens, by her attorney excepts," and by the further fact that she appeared and filed exceptions to the commissioner's report of the sale.

Having thus made herself a party to the suit, her remedy for any supposed wrong was by appeal. The legal effect of the judgment and sale can not be escaped by her, or those claiming through her in a collateral proceeding like this.

The lis pendens created by the suit of *Gray's Heirs v. Cravens and Others* affects none but those who were parties to that action and persons claiming through them, and only to the extent that the determination of the questions involved in that litigation settled the rights of the litigants. The judgment in favor of Mrs. Cravens entered in 1868 in obedience to the mandate of this court, had no other effect than to declare that the deed under which she claimed was valid, and that she could hold the land conveyed against the heirs of the grantor. It did not determine that the creditors of the grantor could not subject it to the payment of their debts. Nor did it in any way affect the judgment or sale theretofore made in the suit of the creditors, nor does the purchaser under said judgment occupy a less favorable attitude because of the fact that he was one of the unsuccessful litigants in a suit involving issues altogether different.

He was not bound to set up his newly-acquired title in this suit. In fact, he had no opportunity to set it up. He acquired it whilst

the suit was pending in this court, and the mandate in the cause imperatively commanded the circuit court to dismiss the petition, nothing was left open for further litigation.

The evidence fails to sustain the charge that appellee, Gray, fraudulently interfered to prevent competition at the sale at which he purchased. No witness states that he had personal knowledge of such conduct on Gray's part. That he purchased the lands at a grossly inadequate price will not authorize us to conclude that such was the case, more especially as the charge was inquired into by the circuit court upon Mrs. Craven's exceptions to the confirmation of the sale.

It therefore seems to us that appellants so far as they claim title through their mother are precluded from asserting their claim as against these appellees by reason of the judgment and sale in the case of Phelps McKee, etc.

From the record we can not determine that they claim as grantees under the deed from John Gray, Sr., to their mother. It is evident that Mrs. Cravens and her mother, Mrs. Gray, both died between May, 1866, and April, 1868, but we find it impossible to ascertain which of them survived the other.

If Mrs. Cravens died first, then upon the death of Mrs. Gray these appellants took as grantors under the deed of John Gray, and as they were not served with process in the second suit of Gray's creditors, the judgment and sale is void as to them. Upon the other hand, if their mother survived, they must claim title as her heirs at law, never having acquired title under the deed, and said judgment and sale interposes an insuperable bar to the relief sought.

Being plaintiffs, the onus was upon them to make out their case. Having failed to show that Mrs. Gray survived their mother, the court below did not err in dismissing their petition.

Judgment *affirmed.*

Dabney & Son, Phelps & Son, Petrie, for appellant.

Little, for appellee.

G. W. HILL *v.* JAMES R. FARMER, ADM'R.

Infants—Presumption—Confession of Judgment.

As against an infant defendant, a presumption cannot be indulged nor a judgment taken as confessed.

APPEAL FROM WEBSTER CIRCUIT COURT.

February 18, 1873.

OPINION BY JUDGE LINDSAY:

It appears from the record that appellant, E. W. Hill, was an infant in May, 1871, and it is not shown that he had reached his majority in the November following, when the judgment was rendered. Nothing should have been taken for confessed against him. It is not proved that L. T. Hill represented to Farmer that there was no accrued interest due on the three notes given to Skinner for that portion of the purchase price remaining unpaid on one of the tracts of land sold to Farmer. It is true the bond for title recites that the total amount to be paid for the tracts sold to Farmer was $4,500. But the cash payment and the notes executed by Farmer, together with his agreement to pay off the Skinner notes, show that more than that sum was to be paid. That there was a mistake is in evidence, but whether it was as to the aggregate amount to be paid, or as to the amount of the three Skinner notes, can not be determined from anything appearing in this record.

The presumption ought not to be in favor of the party seeking relief against an infant defendant. But if it be admitted that the claim asserted against L. T. Hill is satisfactorily established, still, upon the pleadings and proof the land conveyed to appellant by E. Skinner ought not to have been subjected to its payment.

It is charged that L. T. Hill was the equitable owner of said land and that he fraudulently procured Skinner to convey it to appellant and that no consideration passed from appellant to his father.

It thus appears that the legal title at the time of the commencement of this proceeding was in appellant. Surely Farmer ought to have been required to show that he had procured the title through the fraud of his father, or at least that the father had once owned

the land, and that the circumstances attending the conveyance to appellant were such as to excite suspicion of bad faith. Yet there is not a word of proof tending to sustain these material and indispensable allegations of the petition.

The judgment recites that the petition is taken for confessed as against appellant, notwithstanding his infancy, and the further fact that he had answered by a guardian *ad litem*.

Said judgment must be reversed and the cause remanded for such further proceedings as may be necessary to protect the interests of appellant.

M. C. Given, for appellant.

———, *for appellees.*

WALTER F. O'DANIEL *v.* P. B. O'DANIEL, ETC.

Appeal—Review—Sufficiency of evidence.

The preponderance of the evidence is a question for the jury, and the Court of Appeals will not disturb their verdict, unless they were wrongfully instructed as to the law.

Trial—Instructions—Discretion of Court.

It was held that the court did not abuse its discretion in refusing to give a requested instruction after the argument was concluded and the case submitted to the jury.

APPEAL FROM MARION CIRCUIT COURT.

February 18, 1873.

OPINION BY JUDGE LINDSAY:

The testimony offered by appellant conduces very strongly to establish the execution by appellee of the note sued on, but when sworn as a witness he states positively that he neither signed the note himself nor authorized any one else to sign it for him.

It was for the jury to determine as to the preponderance of the testimony and this court will not in such a case as this disturb their finding, unless they were misinstructed as to the law. The two in-

uctions first asked for by appellant were given and he did not cept to the giving of the single instruction presented by appellee. We are not prepared to decide that the circuit court abused a nd discretion in refusing to give the instruction asked after the gument was concluded and the case submitted to the jury. The truction was objectionable because it grouped together certain ts the existence of which might have been inferred from the tes- ony and by calling especial attention to them gave them undue minence, and besides this the law as defined in this proposed in- uction was substantially embodied in the second instruction al- dy given.

Judgment *affirmed*.

Beldent, Cleaver, for appellant.

Lindseys, Russell, for appellee.

JOHN W. KELLEY *v.* R. MILES AND WIFE.

ndor and Purchaser—Sufficiency of evidence.

Certain evidence held not to overcome evidence that the father actually purchased the land for his daughter, paid a certain amount of the funds of his daughter and advanced $75 of his own money.

APPEAL FROM WASHINGTON CIRCUIT COURT.

February 19, 1873.

OPINION BY JUDGE PETERS:

Martin proves that as agent of one of the Greens, guardian of , and husband of the other heir of Henry Green, deceased, who ned the lots in controversy, he sold them to James Marrattay, Marrattay paid $200 to Fanny Green, and sent $325 and a note $75 to be paid to him, the witness, when a deed was made to property, and afterwards Marrattay paid him the seventy-five ars in satisfaction of the note, and he stated that at the time rrattay bought the property he told him he was buying it for daughter, Mrs. Miles, that he had received $800 or $1,000 from grandfather's estate and he wanted to invest it in a house and lot

for his daughter and her heirs. The sale was made in parol of the house and lot about six weeks before the conveyance was made, as Martin proves. A copy of the deed is filed and it bears date September 1, 1866.

Murray proves he was one of the administrators of Caleb Hardesty, grandfather of Mrs. Susan Miles, and that as such he paid to her $600 on the 30th of January, 1854. He thinks she handed it to her husband.

Mr. McElroy proves that he was on the 10th of September, 1865, cashier of the Washington Bank, and on that day the bank loaned R. P. Miles $500 in currency for which the bank received $500 in gold and silver as collateral security, and that Miles could not have gotten the money without good personal or collateral surety, and on the 10th of July, 1866, he redeemed the gold and silver.

The currency could not have been gotten from the bank to pay for the Springfield property; it was borrowed nearly one year and returned a month or two before the purchase was consummated, and money paid Martin proves the property was paid for in currency; no connection therefore is shown between the bank transaction and the purchase of the house and lots.

Mrs. Overton, it is true, says that R. P. Miles told her he had bought the house from the other children, and she thought she was conveying the property to him, when she signed the deed, but she was mistaken as to whom the conveyance was made as the deed shows.

This evidence is not sufficient to overcome the evidence of Martin to the fact that Marrattay actually made the purchase, paid the money and said at the time that $525 of the price paid was the money of Mrs. Miles, and the residue of $75 he himself advanced.

We do not, therefore, feel authorized to disturb the judgment, wherefore the same is *affirmed*.

Brown & Lewis, for appellant.

Hays, for appellees.

GEO. T. GAINES, ETC., *v.* W. T. SCALES, ETC.

Fixtures—Question of fact.

Whether structures and machinery attached to land mortgaged or sold, are real or chattel fixtures, is a question of fact.

APPEAL FROM BOONE CIRCUIT COURT.

February 19, 1873.

OPINION BY JUDGE LINDSAY:

By the judgment of the circuit court it was determined that the two partners, Rice & Carlisle, had the right to sell the personal property held and owned by the firm, and that the title of the purchasers could not be questioned by the other partner nor the creditors of the firm, and hence appellant was protected as to the oxen, wagon, etc.

For the same reason they should have been protected in their purchase of the boiler and engine, the flour mill and bolt, the corn mill and the circular saw mill and all the fixtures attached to and belonging to the same. By the mortgage executed by the firm to Archibold Goins, William Williams and Geo. Goins, on the 24th of October, 1865, these things were all treated as personal property, wholly disconnected from the realty, and under the mortgage could have been sold and removed even after the real estate had been consigned to a third party. It is always a question of fact, and in some instances of intention, whether or not structures, and more especially machinery used for manufacturing purposes are to be regarded as permanent fixtures. Here the party suing has demonstrated beyond doubt that the property mentioned in this mortgage was to remain detached from the realty, and was not to lose its character as personalty.

The mortgage executed to William Scales and Archibold Goins on the 6th of January, 1866, is in harmony with this idea. In that conveyance the realty and the mills and machinery are treated as separate and distinct. In the mortgage to Chittenhelm, executed April 16, 1866, the wheat mill, smut mill and the screw connected therewith are alone embraced, the realty being excluded. It is

therefore manifest that everything sold to appellant except the five and one-half acres of land and the mill house was personalty, and upon the theory of the circuit court a perfect title was passed by the sale. The only interest therefore which W. T. Scales and the general creditors can claim as against appellants is one-third of the five and one-half acres of land and of the mill house and one-third of the rents of said land and mill house independent of that portion of the rents accruing from the mills, machinery, etc., set out in the various mortgages. And against this claim appellant has the right to set off one-third of the amount paid by him (under the judgment in this case) to Snow on the purchase price for the land. As he made this payment with the assent of all the partners it can not be claimed that he was not thereby substituted to the rights of Snow. He is also entitled to the moneys accruing under the rentings made by the court, except that Scales should be allowed one-third of that portion of the same arising from the land and mill house.

The judgment is reversed as to Geo. T. Gaines *in personam* and as administrator of Oliver Gaines, deceased, and the cause remanded for further proceedings consistent with this opinion.

This opinion is intended to apply to both the appeals prosecuted on this record.

Pryor & Chambers, for appellants.

Collins, for appellees.

B. GROOM *v.* T. B. OLDHAM & ELLISON AND J. BARNES WHITE & CO.

Trial—Findings of Court—Effect.

Where the issues in two cases do not come within equitable jurisdiction, an agreement to transfer the cases to a court of equity amounts to an agreement to submit the law and facts of the case to the judge without a jury, and the finding of the judge has the force and effect of a verdict.

Action—Consolidation—Evidence.

The consolidation of several causes of action authorizes the court to consider all the testimony that is competent in either case.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

February 19, 1873.

OPINION BY JUDGE LINDSAY:

The only reason why the two ordinary actions against the appellant were transferred to equity was that Barnes White and Company were prosecuting an equity suit against Oldham to subject his claims against Groom to the payment of a debt due to them. Oldham, upon the record, relinquished the benefit of his claims to Barnes White & Company, and his assignee in bankruptcy also disclaimed any interest in them.

The effect of this was to substitute Barnes White & Co. to the rights of Oldham and to leave their controversy with Groom without even the shadow of an equitable issue. As a matter of law in so far as the litigation with Groom is concerned, there never was a question or issue raised which would give a court of equity the slightest pretext for assuming jurisdiction of the litigation. In view of these facts the agreement to transfer the two actions to equity was in effect an agreement to submit the law and facts of the two ordinary actions to the decision of the judge without the intervention of a jury, and his finding must be treated as the verdict of a jury.

The evidence as to the contracts between Groom and Gillispie & Oldham for the purchase of the horses is conflicting, and the judgment of the special judge can not be regarded as palpably against the weight of it.

We conceive that it was not erroneous to consider the last deposition given by Oldham; he was no longer a party to the record and had no interest in the controversy.

It was not erroneous to consider the testimony of the deceased witness, Taylor, as set out in the bill of exceptions heretofore made up in one of these actions. *O'Brien v. Commonwealth*, 6 Bush 563. The contract of sale of the three horses was essentially one and the same. The testimony of Taylor necessarily applied to the certain transaction. He was cross-examined by Groom. The two causes had long been treated by all the litigants as one and the same, and the judgment of the special chancellor recites that the three actions of *Oldham v. Groom, Oldham & Gillispie v. Groom,* and *Barnes White & Co. v. Oldham, etc.*, were consolidated and by

consent heard together. This recital must be taken as true. The consolidation of the three causes authorized the court to consider all the testimony that was competent in either.

For these reasons the judgment must be *affirmed.*

Apperson & Reid, for appellant.

Holt, for appellee.

J. C. CALHOUN, ETC., *v.* CITY OF PADUCAH.

Interest—Calculation.

A party cannot be heard to complain of the manner of calculation of interest, where he is required to pay a less sum than he owes.

Principal and Surety—Extent of Liability of surety.

It was held that sureties cannot be made liable in a larger amount than the principal.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 18, 1873.

OPINION BY JUDGE PRYOR:

In the absence of any allegation of fraud or mistake, or evidence of the existence of either, the settlement by Traimun, the treasurer, with the city auditor must be conclusive between the parties to this action.

There had passed into the hands of Traimun, according to this report, near forty-nine thousand dollars, and upon a final settlement of the accounts of the city with its treasurer there was a balance due and unpaid of $2,643.24. A judgment by default was rendered against Traimun for this amount, and his sureties, the appellants, making defense to the action, the case lingered upon the docket for upwards of two years. Several amended pleadings were filed during the progress of the litigation, and some of them with a view of enlarging the liability of the appellants, but whether or not these amendments should have been permitted are questions rendered im-

material for the reason that the rights of the appellants have not been prejudiced by this action on the part of the court in any way. That the treasurer was indebted in the amount of the judgment by default against him there can be no doubt, and this sum, with the interest accruing up to the date of the judgment against the appellants, would exceed the amount then found due by the jury.

The judgment against Traimun was rendered for $2,643.24 on the 16th of October, 1868, and the judgment against appellants, his sureties, on the 4th of April, 1871, for $2,835.35.

There are no instructions made part of the record, and the jury, in making their verdict, may have calculated interest upon the judgment against Traimun or the amount found due by the auditor up to the date of their verdict.

The principal and interest from the 16th of October, 1868, to the 4th of April, 1871, on the amount of the first judgment would make $3,032, deducting from this the value of the principal of the verdict against appellants' sureties. But whether this was the mode of calculation or not, the appellants can not complain when they are required to pay a less sum than they owe.

The aomunts collected between the date of the bond and the time of the treasurer's election or appointment have not been indicated in the settlements as the reports and statement of the auditor both show, and if the jury included the value of the principal in this estimate it as error against the appellees as the proof conduces to show that it was the desire of the young lady to own it, that kept off bidders and not the action of the mayor, and if sold in any other part of the city than where it was the result no doubt would have been the same.

We are inclined to concur with the counsel for the appellants that the sureties can not be made liable for a larger amount than the principal, but in this case the question can not arise, as the judgment against them is for a less sum when you calculate the interest that accrued during the litigation by the sureties with reference to this liability than the amount of the judgment against Traimun.

The judgment is *affirmed.*

James, for appellants.

Williams, for appellees.

CUNNINGHAM & CAMPBELL *v.* WM. SIMPSON.

Pleading—Amendment—Proof of original consideration.

Although the filing of an amended petition amounts to an abandonment of the original cause of action, it does not preclude the plaintiff from showing the original consideration, since it must constitute a ground of the new promise or acknowledgment of it.

APPEAL FROM MARION CIRCUIT COURT.

February 19, 1873.

OPINION BY JUDGE PRYOR:

The court below erred in instructing the jury to find for the defendant.

There was an express offer made to pay the appellant two hundred dollars, and no objection made to the whole of appellants' claim except that the order given for the amount and which seems not to have been produced was either lost or mislaid, and therefore the appellee refused to settle.

The evidence is of such a character as required that the jury should say whether there was such an acknowledgment of the debt as implied a promise to pay.

The filing of the amended pleading was an abandonment of the original cause of action. This does not, however, preclude the appellants from showing the original consideration, as it must constitute the basis of the new promise or acknowledgment if any was made.

The judgment of the court below is reversed and cause remanded with directions to award the appellants a new trial and for further proceedings consistent with this opinion.

Russell & Averitt, for appellants.

W. J. Lisle, for appellee.

PARKS & MYERS *v.* JOHN CASEY.

Appeal—Amount in controversy—Jurisdiction.

The Court of Appeals has no jurisdiction on appeal where the only question presented is the power of the trial court to subject under attachment a debt of $17.

Opinion of the Court.

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 19, 1873.

OPINION BY JUDGE PRYOR:

The appellants obtained a judgment for their debts and costs and e only question presented in this court is as to the power of the urt below to subject under the attachment a debt of seventeen llars garnished in the hands of the railroad company to the pay- ent of that judgment. This court has no jurisdiction on account the amount involved to pronounce on the questions made. Nor ll jurisdiction be entertained because the appellee saw proper to ive the question or for the reason that the appellants are made to y the costs of the attachment.

Appeal dismissed for want of jurisdiction.

F. F. Hargis, J. P. Norvell, for appellants.

Ross & Kennedy, for appellee.

E. SMOCK, ETC., *v.* L. SMOCK.

Ile—Construction.

In ascertaining the intention of the testator, the court must take into consideration both the will and codicil as one paper and give force and effect, if possible to every word contained in both instruments.

Ile—Construction.

In construing a will the court has the right to take into consideration the obligation resting upon the testator, by reason of antenuptial agreement, as to the rights the testator and his wife have in the property of each other.

Ile—Estate devised.

A devise held to convey to the testator's widow a life estate with power of disposition of the property by the life tenant.

Ile—Codicil—Effect.

A codicil was held to have been made to make good a deficit in the lands devised to the testator's wife caused by the subsequent sale of a portion of the land, and not to change or enlarge the estate he would otherwise take.

Opinion of the Court.

APPEAL FROM MARION CIRCUIT COURT.

February 20, 1873.

OPINION BY JUDGE LINDSAY:

It is claimed as well by the appellants as by the appellee, that the latter took under the will of John Smock, deceased, a fee simple title to the lands devised to her, and also the absolute title to the personalty. The circuit court concurring with the litigants as to the proper construction of said will set aside the contract of sale from Mrs. Smock to Elbert Smock, and from this judgment Elbert and Wm. Smock appeal.

The language of the will so far as it relates to the devise to Mrs. Smock, is as follows:

Item 1st. "I will to my wife the land in the following boundary * * * including the houses and thirty-foot road round Riggs' fence and to run above the rocks so as to give a good road, and it is never to be stopt her life time and the privilege of fuel wood and timber out in them woods when she pleases, and negro woman Beck and as much of the stock as she may want and what household furniture she may want if it is all."

Item 3d. "The balance of the land may be sold or rented as the children may think best, till my wife's death and all sold and everything she leaves and equally divided with all my children," etc. Having sold a small portion of the land set apart by the will for Mrs. Smock, the testator added the following codicil: "I will to my wife the land in the following boundary * * *. I will her also all the crops that may be on hand at my death."

This codicil must be treated, not as a revocation of, but as an addition to the will, somewhat changing its terms, but only to the extent that it is necessarily inconsistent therewith. In ascertaining the intention of the testator we must consider the will and codicil as one paper, and give force and effect if possible to each and every word contained in both. We have a right also to consider the obligation resting upon the testator by reason of the antenuptial agreement between himself and wife, as to the rights each was to have in the property of the other.

The language of the first clause of the will and of the codicil would undoubtedly invest Mrs. Smock with an absolute title to the estate devised to her, but the third clause shows unmistakably that

was intended that at the death of Mrs. Smock, all the testator's nd, and everything of which he died seized, not disposed of by r should be sold and the proceeds equally divided among all his ildren. If Mrs. Smock took the fee in the lands, this provision ould be utterly nugatory. Nothing could result from it. She ght by will or devise defeat the testator's clearly expressed inten-n, and if she did not, her heirs at law would take under the law descent, and therefore some of the testator's children would get thing.

We are of opinion that the testator by the codicil intended only to ake good the deficit in the lands first given to his wife, caused the subsequent sale of a portion of it, and not to change or in y way enlarge the estate she would take.

It results therefore that Mrs. Smock was not mistaken as to the tate taken by her under her husband's will at the time she sold Elbert Smock, and although he may have fraudulently concealed om her the fact that he regarded her said estate as absolute and qualified, yet inasmuch as he was the party who was mistaken, no ury resulted to her from such fraud. It is not pretended that the ce agreed to be paid was not reasonably adequate upon the as-mption that Mrs. Smock was a mere life tenant. She was there-re entitled to no relief.

Judgment reversed and cause remanded with instruction to dis-ss her petition, leaving her contract of sale to Elbert Smock in rce.

W. B. Harrison, Rodman, for appellants.

Noble, for appellees.

W. M. DAVIS *v.* DAVIS, TRABUE & CO.

mestead—Land Subject to.

The homestead exemption law applies to land upon which the debtor lives and owns at the time of rendition of judgment, if he is a bona fide householder with a family.

mestead—Sale by Husband and Wife.

A husband and wife may sell and convey the homestead, since it being exempt the husband's creditors can not be injured by such action.

APPEAL FROM ADAIR CIRCUIT COURT.

February 20, 1873.

OPINION BY JUDGE PRYOR:

The provisions of the act to exempt homesteads from sale for debt are intended for the benefit of the debtor and his family and can only be sold to foreclose a mortgage or for the purchase money due therefor.

Nor can it be mortgaged, released, or the exemption waived unless it be in writing, signed by the defendant and his wife and recorded. It is also provided that before a sale can be made of same under execution, attachment or judgment of a court, the officer or the court shall cause so much of the land as is of the value of one thousand dollars to be set apart, etc.

This exemption applies to land upon which the debtor lives and owns at the time of the judgment, if he is a bona fide housekeeper with a family, unless he has voluntarily abandoned it and lives elsewhere. Any sale of this homestead exemption except as provided by the act is void and passes no title to the purchaser. It was therefore proper for the court, upon proof made, although judgment had been rendered to deduct so much of the land as Davis lived upon and owned as was of the value of one thousand dollars and levied on by the attachment, to be set apart to him. The evidence shows that he owned one-half of the land in controversy; that he lived upon it and was a housekeeper with a family. His sale of it after the judgment does not make it liable for appellee's debt. He had the right to sell it in conjunction with his wife, and the creditors were not thereby injured, as it was not subject to the payment of their debts.

The appellee in his brief insists upon reversing the judgment against John Davis, when he was neither a party to the original or cross-appeal, and it is doubtful whether he can prosecute a cross-appeal, as John Davis has no appeal in this court.

The judgment must be reversed as to William Davis with leave to the parties to amend their pleadings. The purchaser, Rose, should be made a defendant in order that the rights of all the parties may be finally determined, as it would be improper to assign any part of this land as a homestead to the appellant if he has sold to Rose. The evidence is only in parol as to the sale and not alto-

gether satisfactory. The parties may introduce additional testimony upon the question as to whether there was in fact a sale, or the appellant voluntarily abandoned the premises with the intention of living somewhere else.

Winfrey & Winfrey, for appellant.

H. G. Garnett, for appellee.

JAMES M. MCGREGOR *v.* JAMES KEITHBY & CO.

Executors and Administrators—Claim of Administrator.

At common law an administrator has the right to retain in his hands the amount due him by the deceased, where there are no other creditors, and no statute deprives him of such right.

APPEAL FROM FLEMING CIRCUIT COURT.

February 20, 1873.

OPINION BY JUDGE PETERS:

On the 6th day of October, 1857, Abram Keithby executed his note to B. T. Hayden for $325.95, due on or before the 30th of September, 1859, for the unpaid part of the last instalment on a tract of land sold by said Hayden to him.

Within less than three months after the execution of that note Keithby died, and administration was granted on his estate to his widow, Isabella Keithby, and said B. T. Hayden, by the proper court, who caused an inventory and an appraisement of the personal estate of said intestate to be made out and returned to the Fleming County Court, which, as appears from a copy, amounted to near $2,000, of which $473.75 was cash on hand at the death of intestate, and over $1,000 in good notes soon to become due.

On the 31st of May, 1860, Mrs. Isabella Keithby said B. T. Hayden and J. M. McGregor executed a note to Wm. B. Jones for four hundred and forty dollars, due on or before the 1st day of March thereafter, purporting to be in lieu of the former land note, the last payment for land purchased of B. T. Hayden, and to the name of Hayden signed to the note the letters "Adr." are affixed.

Suit was brought on this note, and prosecuted to judgment by the personal representative of Jones, he having died, against the obligors, and McGregor, having settled the debt with the plaintiff, prosecuted this suit against James Keithby, and Mary Ann Denton, late Keithby (her husband, Asher Denton, being joined), children and heirs of Abram Keithby, deceased, to subject real estate, descended to them from their father, to the payment of his demand.

McGregor's petition was dismissed by the court below, and he has appealed to this court. It does not appear in this record that the intestate owed at his death one dollar except the debt to Hayden. His personal representatives have never made a settlement of their fiducial accounts. The personal estate was more than sufficient to pay five times the amount of the debt owing to Hayden. The cash on hand at his death was greater in amount by over $100 than Hayden's debt.

As it is not made to appear that there were any other creditors, Hayden as administrator had the right to retain in his hands the amount due by his intestate to him by the common law, and there is no statute of the state which deprives him of that right. (*Payne and Wife v. Pusey,* 8 Bush 564.) This case presents some singular features. The personal representative, with an abundance of assets of his decedent in his hands, from everything that appears, to pay his debt, more than two years after the assets came to his hands executes a note to a third party, with security, in consideration, as he recites, for last payment on land purchased of him, but does not say who purchased it; gives his own note for a debt originally due to himself and gives security on that note, when (even if appellant's theory be true that that note was executed in lieu of the note he held on intestate) he had the means of his debtor in his hands to pay it.

If Hayden himself was seeking to coerce appellees to pay this debt, he would be compelled to exhibit his accounts as administrator showing that he had exhausted the whole of the personalty in payment of other debts, and the personal assets proving insufficient to pay him, it was necessary to sell the land of intestate or a part of it.

And it is difficult to see how his surety could be in a better condition, or have any right that he would not have. Appellant was the surety of Hayden, not of appellee's intestate, and until he shows

that Hayden had not a sufficiency of assets to satisfy his debt he cannot succeed in this suit, and this he has failed to do.

Judgment *affirmed.*

Cord, for appellant.

Phister, for appellees.

WASHINGTON COUNTY *v.* HARVEY MCELROY.

Taxation—Listing Land for Taxation.

Under the Act approved March 28, 1872, relating to improper tax levy, it is made imperative that all persons owning land in Washington county lease the same for taxation in such county for all legal purposes, and the fact that the owner has listed the land situated in such county in another county, is no excuse.

APPEAL FROM WASHINGTON CIRCUIT COURT.

February 20, 1873.

OPINION BY JUDGE PETERS:

The power of the Legislature to authorize the taxation of the lands within the limits of the respective counties of the commonwealth for local or county purposes can not be questioned, and we are not aware of any law which confers jurisdiction on county courts to exempt owners of lands from the operation of such laws.

Sec. 2, Art. 8, ch. 83, 2 Vol. R. S., p. 258, provides that if a person be improperly charged with any levy or tax, before he has paid the same he may make proof thereof to the court of the county in which the assessment was made, and the court may correct the same, etc.

The first inquiry under this enactment is, was appellee improperly charged with the tax of which he complained? If not, the county court had no power to afford him relief.

By an act approved March 28, 1872, it is made the imperative duty of all persons owning land in Washington County, although they do not reside therein, to list the same for taxation in the county

in which the land is situated, for all local purposes. That act took effect from its passage, and repealed the act of 1867 or so much of it as is in conflict with the last-named act.

It can be no excuse to appellee that he had listed the 600 acres of land owned by him within the territorial limits of Washington County in Marion County, in which county he resided. The statute makes no such exception, and the county court has no authority to supply it, and thereby qualify or restrict it.

In a proceeding of this character appellee should have made the county of Washington a defendant to his motion, and notified the attorney of the county, by whom it is represented, of his intended motion a reasonable time before he made his motion, but as the county attorney appeared and approved the motion, want of reasonable notice was waived, but it was not on that account that the proceeding against the county was not *ex parte*. The county, therefore, had the right to prosecute this appeal.

Wherefore, for the reasons stated, the judgment is *reversed*, and the cause is remanded, with directions to dismiss the motion.

Selecman, W. H. Hays, for appellant.

Kirk, for appellee.

J. Z. SHELTON *v.* R. A. MELTON.

Estoppel—Disclaiming Interest in Land.

A defendant in a suit for partition of land, who confesses that he has no right or title to the property, is estopped from afterwards setting up any adverse claim to any portion of the land embraced in the judgment, unless he or his vendees present such a state of case as will authorize a chancellor to vacate or modify it as provided by the Civil Code.

Malicious Prosecution—Abuse of Process.

There can be no abuse of process in dispossessing a party who has no right to the property in controversy, and whose rights have been litigated and settled by a judgment rendered in favor of the party at whose instance the writ of possession has been issued.

Partition—Interest of Parties—Cross-petitions.

In a suit for partition it is not required that each interested party, although some may be defendants, should file cross-pleadings and

have summonses issued in order to make the defect perfect by delivery of possession.

APPEAL FROM WEBSTER CIRCUIT COURT.

February 20, 1873.

OPINION BY JUDGE PRYOR:

On the 18th day of May, 1870, Swift and wife instituted an action in equity against Berry's heirs and one Ragland for the division of a tract of land. It is alleged in the petition that Ragland is on the land *"without right or title thereto or any part thereof."*

The summons was executed on Ragland on the 30th of May, 1870, and he having failed to answer, the petition was taken for confessed as against him, and a judgment for partition rendered on the 16th of November, 1870. A portion of the land as allotted to the unknown heirs of Berry, deceased, they being before the court by warning order, etc. After the partition was made three unknown heirs appeared in court by their agent, Shelton, and filed an answer ratifying the division made in pursuance of the judgment and asked for a writ of possession. This writ was awarded and Melton, the appellee, who had a tenant upon this particular farm allotted to these heirs, was dispossessed. Melton now claims that he purchased this land in March, 1871, of one Arnett, who purchased it of the defendant Ragland in November, 1870, and, relying upon his title thus acquired, applied to the court below by motion for a writ of restitution, alleging that he had been wrongfully dispossessed, and upon the hearing he was again restored to the possession, and of which the appellant now complains.

It seems that prior to the application for this writ of restitution the appellee had filed a petition in equity seeking relief from the effects of the judgment rendered in the case of *Swift v. Berry's Heirs* for partition. This petition was read upon the hearing of the motion by the appellee for a retention of the possession and discloses the fact that he is relying alone upon the title derived from Ragland and the want of title in Berry's heirs. Ragland being a party defendant to the original action and confessing that he had no right or title to the property, is now estopped from setting up any adverse claim to any portion of the land embraced by that judg-

ment, unless he or his vendees presents such a state of case as would authorize the chancellor to vacate or modify it as provided by the civil code. The sale from Ragland to Arnett, and from Arnett to the appellee, was made after the institution of the action for partition, and after the service of process on Ragland. If the latter had been dispossessed instead of his vendee, the chancellor would have made inquiry as to the reason of his failure to set up his title or claim to the land before the rendition of the judgment, and the only response that he could have made as appears from the petition of Melton was that Berry's heirs had no title, if this defense should have been relied on before judgment. Melton is a *lis pendens* purchaser and has no better right to be heard in this case than Ragland, and whether Berry's heirs have title or not is immaterial as far as the rights of these parties are to be ascertained from the record. There can be no abuse of process in dispossessing a party who has no right to the property in controversy, and whose rights have been litigated and determined by a judgment rendered in favor of a party at whose instance he is dispossessed. It is not pretended that Melton has any other claim than that derived from Ragland, and upon the latter's failure to answer the action brought by Swift we perceive no reason why the court, even prior to the confirmation of the report of division, could not, upon the motion of any of the parties jointly interested in this land, have removed him from the possession, in order that the division might have been made complete. It is not required in a suit for partition that each party interested, although some may be defendants, should file cross-pleadings and have summons executed in order to make the division perfect by a delivery of the possession. In such case they are all seeking the same relief, and the one is as much entitled as the other. The code, Sec. 546, etc., provides the manner in which partition of lands shall be had, and this proceeding is a substantial compliance with its provisions. The judgment depriving the appellant of possession is reversed and cause remanded with direction to return the possession to the heirs of Berry, and for further proceedings consistent herewith.

Gevens, for appellant.

A. Edwards, for appellee.

MARY MALONEY, ETC., *v.* ST. LOUIS MUTUAL INSURANCE COMPANY.

Equity—Trial of Issues of Fact.

In equitable proceedings, or in actions pending on the equity docket by consent of the parties, the issues of fact are triable by the court, subject to the power of the chancellor to order issues of fact to be tried by a jury.

Equity—Submission to Jury.

In equitable proceedings and in actions pending in equity, the court is not bound, on motion of one of the parties, to submit issues of fact to a jury.

Appeal—Reversal—Refusal to Submit Question to Jury.

To authorize the Court of Appeals to reverse a judgment merely because a motion to submit questions of fact in an equity proceeding to a jury has been overruled, it must be made to appear that the court abused its discretion in overruling the motion.

APPEAL FROM MARION CIRCUIT COURT.

February 20, 1873.

OPINION BY JUDGE LINDSAY:

If it be true that appellants declared in three distinct causes of action, still they are each cognizable at law. The prayer to the third paragraph of the petition, it is true, is for a specific enforcement of the alleged contract to insure, but it also explains that the specific enforcement desired is a judgment for five thousand dollars in money, the exact relief that would have been asked had the action been based on a policy of insurance, instead of the alleged oral contract to insure.

In the petition for a rehearing it is insisted that appellants did not ask to have the cause transferred to the ordinary side of the docket, but merely that they should have the issues of fact tried by a jury.

In equitable proceedings, or in actions pending on the equity docket by consent of the parties, the issues of fact shall be tried by the court, subject to its power to order any such issue or issues to be tried by a jury. (Sec. 341, Civil Code of Practice.)

The court is not bound in such proceedings upon the motion of one of the parties to submit issues of fact to a jury. It is a matter

within the sound discretion of the judge, and to authorize this court to reverse a judgment merely because such a motion has been overruled, it must be made to appear that this discretion had been abused. It has not been abused in this case. Nor do we deem it necessary to reargue the facts involved in this litigation.

Appellants failed to sustain either of the causes of action set up in their petition.

Motion for rehearing overruled.

Russell & Avritt, for appellant.

Rountree & Fogle, for appellee.

JOHN SCHOOLING, ETC., *v.* JNO. W. NATTON.

Partition—Setting Off Several Interests Together.

Although an order of the court in a suit to partition land among heirs, directed the land to be divided into six equal parts, yet where five of the adult heirs desired their interests to be set off together, it was not error for the court and the commissioner to comply with their requests.

Partition—Agreement of Parties.

An agreement in partition of land will be upheld where the parties were competent to contract, and there is an absence of fraud and overreaching.

APPEAL FROM MARION CIRCUIT COURT.

February 21, 1873.

OPINION BY JUDGE PRYOR:

The proceedings in the county court for the partition of the land between Schooling's heirs is made part of the record, and in our opinion was a substantial compliance with the law upon that subject. Although the order of the county court required the land to be divided into six equal parts, yet as five of the heirs were adults and desired their several interests thrown together, it was not only right but proper that the court and commissioner should have complied with their wishes and so allot it. The infant was only

entitled to one-sixth of the tract. This interest was allotted her and she has now no right to complain because lines were not run through the balance of the tract, showing the interest of each of the other children. A deed was made by the commissioner to the five heirs jointly, for their interests in the land as divided, and even if this deed is enforced, the division is reported and confirmed and the rights of the parties defined, the infant would have to present the same state of case authorizing the present division to be disturbed that would have to appear if the land had been divided into six equal parts. There is no evidence of any unfair dealing on the part of the appellants, or either of them, towards the appellee. The capacity of the latter to make such a contract is not questioned, and although the relations between the parties were intimate and perhaps confiding, the mere fact of the land having been sold for an amount exceeding its value is not sufficient to authorize a cancelment of the writing evidencing the sale. Schooling's judgment was doubtless superior to that of Natton as to the value and quality of land, still Natton had every opportunity of knowing its value and the extent of the boundary, and with his judgment ought to have consulted others than those with whom he was contracting. The small clover field and timber land he offered in exchange for other parts of the tract he now has in possession, and his only ground of complaint is that he paid too much for it. This is his own misfortune and in the absence of any imposition or wrong practiced by the appellants he must abide by the result of his own action. The appellants paid to Mrs. Ray twenty-five dollars an acre for her interest in this land, she owning two-sixths, having purchased the interest of one of her brothers, and now asserts a deed vesting the appellee with the title upon his complying with the terms of sale.

The judgment of the court below is *reversed* and cause remanded with directions to enforce the contract and for further proceedings consistent with this opinion.

Russell, Avitt, for appellants.

Harrison, for appellee.

J. J. ROACH *v.* JAMES HOOVER, ETC.

Principal and Agent—Power of Attorney—Inability to Understand Meaning and Effect.

The evidence was held to show that the party who is alleged to have executed a power of attorney did not understand the effect and meaning of it, on account of his great age, his inability to read the instrument, and because of the difficulty of making him hear what was said to him.

APPEAL FROM TAYLOR CIRCUIT COURT.

February 22, 1873.

OPINION BY JUDGE PETERS:

The writing under which Hoover professed to act in executing the mortgage on Wm. McDaniels' land specified no particular object, but gave Hoover unrestricted power over his estate, and was unlimited in duration, and if it does not carry intrinsic evidence of a want of capacity in McDaniel at the time to comprehend the nature and effect of the business, that, together with his great age, bodily afflictions, his inability to read the instrument and the difficulty of making him hear what was said to him on account of his deafness, renders the conclusion irresistible that Wm. McDaniel did not understand the effect and meaning of the instrument when he told Killen, the witness to it, that it was all right. And Killen himself does not prove that McDaniel was at the time of capacity to understand what he was doing.

We therefore conclude that the judgment of the court below is fully sustained by the evidence, and it must be *affirmed*.

Chelf, for appellant.

Howell, for appellee.

JOSEPH JONES *v.* THOMAS TURNER, ETC.

Contracts—Conflict of Laws.

Whether a contract was executed in Kentucky or Ohio can not matter where the laws of each state touching the question in dispute are substantially the same.

Guaranty—Action—Foundation of.

In an action on a guaranty contract, it is essential that the guaranty be made the foundation of the action, and recovery must be based on such contract.

Guaranty—Conclusions of Pleader.

In an action on a guaranty, the conclusions of the pleader as to the purpose for which the bills were indorsed, and the legal obligation incurred by the indorsers, are of no avail.

Guaranty—Writing Contract of Guaranty Over Guarantor's Signature.

Where plaintiff sued defendant as a guarantor of a bill, on the back of which defendant's name was indorsed ,without a contract of guaranty being written above it, and plaintiff sets out the bill as a part of the complaint, he can not complain of the refusal of the court, after the case is ready for trial, to permit him to write out a contract of guaranty over the defendant's signature.

APPEAL FROM KENTON CIRCUIT COURT.

February 23, 1873.

OPINION BY JUDGE LINDSAY:

It is claimed that Clay purchased from Appellant Jones one hundred barrels of whisky, and offered to pay for it with two bills of exchange drawn in favor of Jones, by W. S. Lane, and accepted by Clay. That Jones refused to receive the paper in the condition presented, and that Clay procured appellees Turner, Hoffman and Anderson and Apperson to sign their names across the back of the bills for the purpose and with the intention of securing their payment to the payee Jones, and that in consideration of these signatures the latter received them in payment for the whisky. The bills were not paid, either by the acceptor or drawer, and Jones is attempting in this proceeding to hold Turner, Hoffman, Anderson and Apperson bound to him for their payment. There is some question as to

whether the contract of appellees was executed in Kentucky or Ohio, but as the laws of the two states touching the question raised are not essentially different, we deem it a matter of little or no consequence in which state it was finally consummated.

Neither the elementary writers nor the courts of the various American states are agreed as to the obligation assumed by parties writing their names upon the back of negotiable promissory notes, before the delivery to the payee and in order to induce him to accept them.

In this state it has been held that such inquiry is not to be regarded as a mere idle act, and that the endorser must be held to have had some purpose in view, and the holder of the note has been allowed to use oral testimony to show what that purpose was. The fact that a party so signing cannot well be presumed to be ordinary endorsers has inclined this court to treat them as guarantors. In the case of *Levi v. Mendell,* 1st Duvall 78, upon proof that Mendell endorsed the note at the instance of the maker and thereby induced the payee to part with his goods, he was held to be a guarantor, and the implied power of the holder to write a contract of guaranty above his signature was upheld.

The Supreme Court of Ohio has possibly gone one step further and settled in that state that the indorsement of such paper before delivering to the payee is prima facie evidence of a guaranty. (*Greenaugh v. Smead, et al.,* 3 Ohio St. 415; *Seymour & Co. v. H. Leyman, et al.,* 10 Ohio St. 283.)

Giving to appellant the full benefit of the position assumed that the doctrine cited applies as well to bills of exchange as to negotiable promissory notes (a question upon which it is not necessary that we should express an opinion), we will now consider whether or not he has sued the appellees as guarantors.

A guaranty imports *ex vi termini* a collateral undertaking. It is an accessory agreement distinct from the principal contract, the performance of which it assures. It is not a constituent part of, though it may be considered a branch of such contract, and to enforce its performance it is usually necessary to sue the guarantor in a separate action from that prosecuted against the party for whose default he agrees to answer. *Marshall v. Peck, etc.,* 1 Dana 609; Yeates v. Walker, 1 Duvall 84.

It is essential that the guaranty, or the promise to assure the

erformance of the original undertaking, shall be made the founda-
on of the action, and the recovery must be based upon this promise.
ppellant in his original petition alleged as follows: "In order
secure the payment of said bill defendants Turner, Apperson,
offman and Anderson endorsed their names on the back of said
ll, and thereby guaranteed its payment to plaintiff at its maturity."
y his first amendment he states that each of said endorsers signed
s name on the back of the bill for the purpose of severally and
parately securing and guaranteeing the payment thereof to him,
d that they did thereby secure and guarantee its payment, etc.
y his second amendment he charges that appellees endorsed the
lls for the purpose of jointly and severally securing and guaran-
eing their payment, and that they did thereby jointly and severally
cure and guarantee, etc. It will be observed that the original and
nended petitions charge substantially the same facts, and that
each of them the pleader reaches the same conclusion. The
ly substantive fact charged is that appellees signed their names
ross the back of the bills. The purpose for which the signing
as done is a conclusion to be drawn either from an express agree-
ent existing between the parties at the time or to be implied from
e time, place and circumstances under which it was done. No
press agreement is averred, and neither the time, place nor cir-
mstances attending the signing are set out.

The conclusions of law as to the purpose for which the bills were
dorsed and the legal obligation incurred by appellees by reason
the endorsement, are of no avail, as such purpose and obligation
nnot be implied from the rest of the complaint.

It is perfectly clear that the theory of appellant was that appellees
ere in some way bound to him as parties to the bills, and hence
makes the bills the foundation of his action, and describes his
bts "as the same in the two bills mentioned."

If they are parties to the bills, then they must be treated as ordi-
ry endorsers, and the payee has no right of action against them.
upon the other hand, they are guarantors, the contract of guar-
ty should have been declared on. As the pleadings stand, no issue
fact is made up at all. Appellees content themselves with deny-
g the purpose reputed to them, and the legal conclusion as to their
bility to Jones as guarantors. They admit the signing of their
mes as charged, and claim that they bound themselves as ordi-

nary endorsers of commercial paper and in no other way, in addition to which they set up certain matters of avoidance in case a contract of guaranty should be implied.

It results, therefore, as appellant did not sue upon the contract of guaranty (if one was made) he cannot complain of the refusal of the circuit court, after the cause was ready for trial, to permit him to write out such a contract over the signatures of appellees.

As the pleadings did not authorize a judgment against appellees as guarantors, it is not necessary that the remaining questions raised in the argument of the cause should be noticed.

Judgment *affirmed.*

Eginton, Fisks, for appellant.

Pryor, Chambers, for appellees.

JAMES MALONE, ETC., *v.* C. H. BARRELL, ETC.

Descent and Distribution—Heirs Privies to Contract of Decedent.

Heirs occupy the relation of privies to the contract of their father, and can not hold on to the estate received from him and repudiate his warranty by claiming through their mother.

APPEAL FROM BULLITT CIRCUIT COURT.

February 23, 1873.

OPINION BY JUDGE LINDSAY:

Section 18, chap. 80, R. S., which is a substantial re-enactment of the act of 1798, provides that if the deed of a "grantor warrants the estate purporting to be conveyed against himself and his heirs, and any estate, real or personal, shall descend to the claimant, or come to him by devise or distribution on the side of the grantor, then he shall be barred for the value of the estate that shall so descend or come to him by descent, devise or distribution." (Ky. Stats., Sec. 2352.)

In the deeds conveying the lands in controversy the ancestor of appellants covenanted that he and his heirs would warrant and

defend the title conveyed against the claims of every person claiming under him or them, and, further, that in case it should be lost by a superior title, then that he and his heirs would refund the purchase price without interest.

The appellants received a large estate from their ancestor. They held it subject to the payment of any claims arising by reason of a breach of this warranty. They occupy the relation of privies to the contract of their father, and cannot hold onto the estate received from him and repudiate his warranty by claiming under and through their mother.

The covenantor could not claim against his warranty, and neither can his heirs. The grantor warranted the estate conveyed against himself and those claiming under him. These appellants claimed under him to the extent of the estate of which he died seized. They are embraced by the terms of the statute, and by the condition of the warranty.

The contract to refund the purchase money with interest was confined to the contingency of a recovery by a stranger to the grantor and cannot be taken advantage of by his heirs.

Judgment *affirmed.*

A. H. Field, for appellants.

R. H. Field, for appellees.

R. W. POTTS *v.* CARLISLE AND JACKSON TURNPIKE ROAD COMPANY.

Constitutional Law—Taking Property Without Compensation.

Where money was collected by a sheriff under a void subscription of stock of a turnpike company by a county court, the Legislature can not, by legalizing the subscription, authorize the payment of the money thus collected and held by the sheriff to the discharge of such subscription, since such action would be violative of the Bill of Rights providing, "that no man's property shall be taken or applied to a public use without the consent of his heirs and without just compensation."

APPEAL FROM NICHOLAS CIRCUIT COURT.

February 24, 1873.

OPINION BY JUDGE PRYOR:

The act of March, 1867, gives the right of appeal to the circuit court from the county court in cases of an "allowance, or appropriation, to any individual, county or corporation, or a refusal to make any allowance or appropriation by the county court of this state where the amount is fifty dollars or more," and if this was an appeal from an order making an appropriation, or refusing to make one, the circuit court must first entertain the jurisdiction, but the appeal is prosecuted from a judgment *in personam* against Potts, the appellant, for the sum of three thousand dollars, and we think this is the only tribunal having jurisdiction. Potts is not complaining of the appropriation made by the county court but of the judgment rendered against him for the amount of it.

If the turnpike company, by reason of this allowance, is made a county creditor, the remedy is by an action on the sheriff's bond if he has the money and fails to pay it over, or has failed to collect it, as provided by law, or the county creditors may proceed by motion in the county court against the sheriff by giving ten days' notice as provided by Sec. 6 of Art. 21, Revised Statutes, title County Levy. This notice must specify the grounds of the motion, and no judgment by default can be rendered, but the grounds of the motion must be sustained by proof. The notice must state that the sheriff has in his hands the funds to pay the creditor, or in other words must contain the requisites of a petition. (*Todd v. Cains,* 18 B. Monroe 621.) In this case the county court subscribed the sum of three thousand dollars to aid in building the road of this company by virtue of an act passed in 1871, "and authorizing the court to appropriate and pay the same out of the funds in the hands of the late sheriff of the county, R. H. Potts, which was collected by him under a levy made by him for the benefit of said road company."

This enactment was obtained for the purpose of legalizing a subscription previously made by the county court to this road, and which this court upon an appeal heretofore prosecuted had pronounced invalid. In that opinion it was held:

"That the money collected from the taxpayers under the void subscription still belongs to them. They have the right to compel the sheriff to refund it. The county court has no claim upon it, and no right to control it."

Whilst the Legislature might legalize the subscription by the county court, still we are at a loss to know where the power is derived either by the county court or the Legislature to appropriate this money in the hands of the sheriff belonging to these taxpayers without their consent to the payment of this subscription. It had been adjudged to them, and the county court or the Legislature had no more right to apply this fund to the discharge of this appropriation than the money of any other taxpayer in the county. The moral obligation upon the citizen to pay was no foundation for such legislative action. The citizens of the county might have been taxed to aid in making these roads and the taxes levied and collected by proper legislative enactment, but to enact a law saying that the sheriff shall take the money or property in his hands or possession belonging to the citizen without his consent, or making compensation therefor, is clearly in violation of that provision in the Bill of Rights declaring:

"That no man's property shall be taken or applied to public use without the consent of his representatives and without just compensation."

Nor is it to be presumed that the Legislature in passing the law entertained any other belief than that funds out of which the appropriation was to be paid belonged to the county, and the power exercised by the county court is not delegated to that tribunal by the act in question. The sheriff was directed to pay this money to the company without any notice to him, or the parties to whom it belonged, and upon his failure to do so is made personally liable for the whole amount. Neither the sheriff nor the county has any right or claim to it and the entire proceeding is erroneous. The county court had no jurisdiction to render such a judgment, and if it had the attempted appropriation of the property of the citizen is unconstitutional.

The judgment must therefore be reversed and cause remanded with directions to set aside the judgment and dismiss the proceedings.

Ross & Kennedy, Phister, for appellant.

T. F. Hargis, for appellee.

W. R. THOMPSON & HALBERT *v.* JESSE SHEETS.

Principal and Surety—Subrogation of Sureties.

The sureties on a sale bond of a purchaser of land do not, on payment of it, become subrogated to the rights of the vendor so as to displace any pre-existing specific interest in the mortgaged property derived of the debtor prior to their undertaking to pay the debt of the purchaser to the vendor.

Principal and Surety—Priority of Rights as Between Sureties and Other Creditors.

Where sureties on a sale bond of a purchaser of land take a mortgage on property of the debtor, including two horses, and where the commissioner appointed to sell the property went to execute the judgment, the two horses were produced and their sale was postponed at the request of the sureties, and the commissioner was thereby prevented from taking possession of the horses, and before the next sale day, the debtor had departed, taking the horses with him, which could have been sold for enough or about enough to indemnify the sureties, the sureties are not entitled, over other creditors of the debtor who had acquired a specific interest in the property prior to the date of the undertaking of the sureties to pay the debt, to take precedence over other creditors.

APPEAL FROM LEWIS CIRCUIT COURT.

February 24, 1873.

OPINION BY JUDGE PETERS:

Hackworth surrendered the land to be sold under the execution, which he might do although he had not the legal title, subject, however, to the lien of Osborne, his vendor, and when Sheets purchased he took the land subject to that lien. But does it follow that Thompson and Halbert, the sureties of Hackworth in the sale bonds to Osborne for the unpaid purchase price, by discharging the debt, can be substituted to the lien of Osborne, the vendor, to defeat the claim of Sheets, which is prior in date to their undertaking to pay Osborne's demand?

In *Patterson v. Pope,* 5 Dana 241, this court said: "We have seen no case in which it has been decided, either in terms or in effect, that a surety, becoming so by entering into an obligation taken in

the prosecution of the ordinary coercive remedies against the person of the debtor, can, by paying the debt, acquire such an interest in the mortgage or other lien of the creditor as will enable him to displace any pre-existing, specific interest in the mortgaged property, derived from the debtor after the date of the mortgage." The sureties would be substituted to the rights of the vendor so far as to have a preference over general creditors. But it is different as to a pre-existing specific interest in the property acquired for a valuable consideration, because it ceased to be the property of the debtor before the surety became bound.

But there is an additional reason for sustaining the judgment of the court below. The sureties in the sale bonds took a mortgage on the property of the debtor, including two horses and other personal property, and when the commissioner, appointed under a judgment foreclosing the mortgage to sell the property, went to execute the judgment the two horses were produced, and their sale was postponed at the request of appellants, and by the interposition of one of them the commissioner was prevented from taking them into possession, and before the next sale day the debtor had departed, taking the horses with him, when from the evidence as to the value of the horses, if appellants had not postponed the sale they would have sold for enough, or very nearly enough, to have indemnified them.

In either aspect of the case it seems to us that the judgment is right and must be affirmed.

Throop, for appellants.

Phister, for appellee.

JNO. C. WHITLOCK *v.* G. A. CHAMPLIN, ETC.

Taxation—Payment to Sinking Fund Commissioners—Order of Court.

Until the order of the court, as provided by § 8 of the act of 1868, ordering the sheriff to pay over to the sinking fund commissioners the amount directed to be added to the principal of the sinking fund, such commissioners have no right to proceed against the sheriff to compel him to pay over any portion of the tax, or to receive and receipt for it in their corporate or official capacity.

Opinion of the Court.

Taxation—Money Set Apart for Sinking Fund.

Until the tax is collected and a portion of it dedicated and set apart to the sinking fund by order of the county court, the sheriff holds it as custodian of that court and is liable to suit by such court for any breach of his official duty.

Taxation—Sinking Fund—Supervision of Taxes Collected For.

Under § 8, Acts 1868, relating to collection of taxes and sinking fund, the county court should have supervision of the collection and management of the taxes collected until a portion of it is set apart and dedicated to the sinking fund by appropriate orders, and that the sinking fund commissioners have the right to demand and receive it.

Counties—Order of County Court—Collection by Jury Commissioners.

An order of the county court which goes no further than to order the jury commissioners to collect the money loaned out, and to apply the same and other money in their hands and raised for that purpose to the payment of court house bonds, so far as it applies to money raised, or to be raised, and not within the commissioners' hands, means that they were to so use it when received.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

February 24, 1873.

OPINION BY JUDGE LINDSAY:

The second section of the act of February 13, 1867, authorizing the Christian County Court to issue bonds for the purpose of building a court house, and to establish a sinking fund to liquidate said bonds, makes it the duty of said court "annually to levy an additional tax on the property subject to pay state revenue, which when added to the poll tax should be sufficient to defray the necessary county expenses, and the expenses before named (i. e., the interest on the bonds issued and the expenses incidental thereto and the expense incident to conducting the sinking fund). The eighth section makes it the duty of the county court annually to order the sheriff or county collector to pay over to the sinking fund commissioners the amount directed to be added to the principal of the sinking fund, and should he fail to do so the commissioners are authorized to proceed against him by motion. The tenth section invests the county court with the right of action against the sheriff or collector for failing or neglecting to collect the poll tax and ad valorem taxes levied for the benefit of the sinking fund.

The two thousand three hundred dollars ($2,300) in litigation in this suit is a part of the tax levied in 1868, and collected by the sheriff in 1869.

According to the terms of the second section of the act, the levy of 1868 was for the purpose of defraying the necessary county expenses, and the interest on the court house bonds and the expenses incident to the sinking fund, etc. The tax, when collected, was a general county fund. No specific part of it belonged to the sinking fund nor did the sinking fund commissioners have any power to determine what portion they would receive, hold and manage in the discharge of their duties as custodians of that fund.

Their rights and duties touching the tax collected under the levy of 1868 could only be called into existence by the county court, in obedience to the provisions of the eighth section, "ordering the sheriff * * * to pay over" to them "the amount directed to be added to the principal of the sinking fund." Until such order was made they had no right either to proceed against him to compel him to pay to them any portion of said tax or to receive and receipt for it, in their corporate or official capacity.

Until the tax should be collected and a portion of it dedicated and set apart to the sinking fund by the order of the county court, the sheriff held it all as the custodian of that court, and was liable to suit at the hands of that body for any breach of official duty by the express provisions of the tenth section of the act. It is manifest that the Legislature did not intend that the officer collecting the county taxes for Christian County should be responsible to the different agencies of the people at the same time. It seems to us that the intention is clear that the county court should supervise the collection and management of the entire amount collected, until a portion of it should be set apart and dedicated to the sinking fund by appropriate and proper orders, and that then the right of the commissioners of such fund to demand and receive it should accrue.

A careful inspection of the pleadings, exhibits and proof presented by this record demonstrates that this action is not prosecuted, nor a recovery sought, upon the idea that the two thousand three hundred dollars ($2,300) paid over to Buckner upon the order and receipt of himself and Brasher in and prior to October, 1869, had before that payment been set apart to the sinking fund.

It is true that the order of June 12, 1868, levying the ad valorem

tax, recites that it was for the purpose of paying three thousand dollars of the principal and interest of the bonds of the county issued for the purpose of building the court house and jail, but there is nothing in the order except this recital, from which it can be gathered that this tax was to be paid over to the sinking fund commissioners, and it is perfectly clear that they could not have demanded or sued for the tax or any part of it when collected under authority conferred upon them by said order. The county court order of October 8, 1868, goes no farther than to order the commissioners to collect the money loaned out and to apply the same and all other money in their hands, and *raised for that purpose,* in payment of bonds, etc.

Of course, this order, so far as it applies to money raised or to be raised, and not then in the commissioners' hands, could only mean that they were to so use it when they received or were entitled to receive it.

Inasmuch as the county court had made no order directing what specific portion of the tax collected under the levy of 1868 should be added to the principal of the sinking fund, and as said tax in October, 1869, remained subject to the exclusive control of the county court, Buckner and Brasher had no right to receive and receipt for any part thereof in that capacity of sinking fund commissioners.

The payments to them or either of them were individual transactions between them and the sheriff, for which the body corporate, designated the "sinking fund commissioners," or the sureties on the official bond executed by that body, cannot be held responsible. If there is any cause of action against Buckner and Brasher it is because, by the execution of the receipt and order, and by professing to act in their capacity as sinking fund commissioners, a promise to pay the amounts received, to the sinking fund commission, when it should be authorized to receive the same, may be implied. Upon this question, however, we express no opinion, inasmuch as it is not presented for adjudication.

For the reasons indicated the judgment is *reversed* and the cause remanded. Appellees should be allowed to amend their pleadings in case they desire to do so. Further proceedings not inconsistent with this opinion may be had.

McPherson, Champlin, for appellant.

Hunter, Wood, for appellees.

JOHN TUCKER, ETC., *v.* R. B. HAYDEN, ETC.

Appeal—Reversal—Judicial Sale—Holder of Purchase-Money Note.

Where a holder of a purchase-money note was made a party defendant to a suit, but was not served with process, and the judgment of sale of the land made no provision for protecting her rights, the irregularity and omission amounted to reversible error.

APPEAL FROM NELSON CIRCUIT COURT.

February 24, 1873.

OPINION BY JUDGE HARDIN:

The petition discloses the fact that Mrs. Catherine Brooks was at the institution of the suit the owner and holder of one of the notes of Tucker and Embree for the price of the land; but, although she was properly made a defendant, the judgment of sale was rendered without service of process on her, and the court made no provision in the judgment for protecting her rights.

This error was necessarily prejudicial to the appellants, as it subjected the land to sale without power in the court to cause a proper conveyance of title to be made. The judgment must therefore be reversed and the sale vacated. On the return of the cause the questions as to the title and quality of the land and the acceptance of the deed of James and wife will be adjudicated.

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

W. Johnson, for appellants.

Muir & Wickliffe, for appellees.

J. W. HAWKINS *v.* JONES DEAN.

Execution—Proceeding by Claimant of Property.

A proceeding by a claimant of property in the hands of a constable to prevent the sale of the property should be by notice and motion on the bond as provided by § 716, Civ. Code.

Justices of the Peace—Judgment.

Under § 719, Civ. Code, providing that the bond of the claimant should be returned to the justices of the peace if the execution issued from such a court, the justices can only give judgment for the amount of each execution and 10 per cent interest thereon, and it is the amount of the execution that gives them jurisdiction and not the value of the property.

APPEAL FROM MERCER CIRCUIT COURT.

February 25, 1873.

OPINION BY JUDGE PRYOR:

If the bond declared on is to be regarded as a common law obligation the demurrer thereto was properly sustained. It is nowhere alleged that the execution of the plaintiffs is unsatisfied, or that he has sustained any damage by reason of this alleged claim of the appellee.

The proceeding by which the claimant of the property prevented the sale by the constable was derived altogether from statutory enactment and the bond executed in accordance therewith. The mode of ascertaining his right to it, as well as the remedy allowed the plaintiff, is clearly defined. This special proceeding should have been adopted and is the only mode of determining the right of property in such cases. The proceeding should have been by notice and motion on the bond as provided by Sec. 716, Civil Code. Nor do we think the circuit court had jurisdiction. Sec. 719 provides that the bond of the claimant shall be returned to a justice of the peace if the executions issued from such a court. It is true that the bond recites that the amount of the two executions is sixty-three dollars, but this does not deny the justice of jurisdiction as the only question to be tried by him is whether or not the property levied on is subject to the execution.

If found subject and the value of the property to be one hundred dollars, still the justice can only give judgment for the amount of each execution and ten per cent interest thereon. It is the amount of the execution that gives the jurisdiction and not the value of the property. If a constable levies on a house of the value of five hundred dollars with an execution for twenty, all the justice can do when the claimant of the house is unsuccessful is to render judg-

ment for the amount of the debt and ten per cent thereon, and if the value of the property is less than the execution, the ten per cent is only to be paid upon the value. (Sec. 719, Civil Code.)

Judgment *affirmed.*

C. A. Hardin, for appellants.

E. J. Polk, for appellee.

THOS. C. WOODS' ADM'R, ETC., *v.* JOSEPH MITCHELL.

Attorney and Client—Negligence of Attorney—Liability to Client.

Attorneys who took a note for collection, brought suit on the note and obtained judgment thereon, had execution issued, and the amount of the judgment collected by the deputy sheriff, were held liable to judgment plaintiffs, where the attorneys failed and neglected to collect the money from the sheriff or his deputy, and it was lost to the judgment creditors.

APPEAL FROM MARION CIRCUIT COURT.

February 25, 1873.

OPINION BY JUDGE PETERS:

In 1859 appellee sent a note which he held by assignment on E. G. Martin and others for upwards of $200 to the late law firm of Shuck & Woods, residing and practicing their profession in Lebanon.

They retained a fee of $5 out of a debt they collected for appellee on a Mr. Abell for their service. On the note thus sent to them they brought suit in the Marion Circuit Court, recovered judgment against the obligors, had execution thereon, and after the debt had been replevied it seems to have been collected by Gartin, a deputy of Goodwin, sheriff of Marion County, execution having been issued on the replevin bond; but the sheriff and his deputy failed to pay the amount to the attorneys, or either of them, and the transaction seems to have faded from their memory, and no correspondence took place between them and their client until about the 20th of February, 1863, when in a reply to a letter the attorneys informed him that

the deputy into whose hands the execution was placed was then dead, the principal broke, and if the money had been paid on the execution to the sheriff, or his deputy, it would be necessary to sue the sureties of the sheriff for the debt, as he was insolvent.

The correspondence between the parties seems to have been suspended until 1864, and on the 7th of November of that year Shuck and Woods wrote appellee, acknowledging that they had lost sight of the debt, apologizing for their seeming neglect, and towards the close of that letter they say: "We will not rest under any sort of unpleasant reflections, and you certainly shall have your money if we have to pay it ourselves.

"The difficulty in now pursuing the sheriff and his sureties is that we can not tell anything about the number of the *fi. fa.*, its date, amount, what sheriff's bond to sue on, who were the sureties, etc., etc.; indeed, every essential fact to be known is in the dark. So that if you do not feel perfectly right with less we must pay you the debt."

In 1870 this action was brought against Shuck, the surviving partner, and the personal representative of Woods, he having died, to coerce the payment of the claim from them.

The petition charges them with neglect and inattention to the collection of appellee's debt, and in consideration of such negligence they promised and undertook in writing to pay the debt, and filed the letter from which the extract herein is made.

The very elaborate answer puts in issue only the fact whether or not that said law firm agreed and undertook to collect the debt of appellee, and by way of avoidance they allege an effort on their part to compel the sureties of the sheriff to pay the debt, but were prevented by the burning of the Marion Circuit Court clerk's office, books, papers, etc.

On the trial by a jury a verdict was rendered in favor of appellee for $333.50 and a judgment rendered in conformity thereto, from which Shuck, etc., have appealed.

We can not concur with the attorneys of appellants that the jury should have been instructed that Shuck & Woods did not undertake to collect the debt, and that they discharged their obligation by bringing the suit and recovering the judgment. They do not assume that ground in their letters to appellee and filed in this cause.

The instructions given at the instance of appellee presented the

question of law arising in the case to the jury fairly, while the most of those asked by appellant were abstract, and not applicable, and the evidence warranted the finding. Wherefore the judgment if *affirmed.*

Rountree, Harrison, for appellant.

Russell, Averett, for appellee.

WESLEY BERRY *v.* LYCHA HOPKINS, ADM'R.

Executors and Administrators—Dismissal of Action.

Under § 437 of the Civ. Code, an action to revive a judgment against a personal representative of a deceased judgment debtor is an action contemplated by such section, and where the necessary affidavit and demand has not been made before suit was instituted, the petition may be dismissed.

Executors and Administrators—Insufficiency of Assets.

If the assets of a decedent's estate are insufficient to pay decedent's debts, the administrator must resort to his equitable action authorized by Civ. Code, R. S., ch. 40, § 10.

APPEAL FROM FLEMING CIRCUIT COURT.

February 25, 1873.

OPINION BY JUDGE LINDSAY:

An ordinary action under the provisions of the 437th section of the Civil Code to revive a judgment against a personal representative of a deceased judgment debtor is such a suit against a personal representative as is contemplated by the 437th section of the code, and as the necessary affidavit and demand had not been made before this suit was instituted the petition was properly dismissed as to Hopkins, administrator. *Curry's Adm'r v. Bryant's Adm'r,* 7 Bush 301.

Nor can appellant complain because it was dismissed as to the infant, Mary J. Hopkins. He had no right to have the judgment against his ancestor revived against her. The lands descending to her could not be sold even by a court of equity until the personal

assets of her mother's estate in the hands of the administrator had first been exhausted.

The petition inferentially but unmistakably shows that assets of some sort and to some amount did come to his hands. If they are insufficient to pay appellant's debt, he must resort to his equitable action as authorized by Sections 465 and 466 of the Civil Code, Section 10, Chapter 40, Revised Statutes. A common law court will not aid him in subjecting the lands of the heir whilst there is personal estate in the hands of the administrator still being administered.

The judgment dismissing appellant's petition does not constitute a bar to future proceedings, although it does not state in terms that the dismissal was without prejudice.

It is apparent upon the face of the order that the cause was not heard upon its merits.

Judgment *affirmed.*

J. W. Anderson, for appellant.

T. L. Given, for appellee.

JOE COFFEY, ETC., *v.* STOKES & SON AND OTHERS.

Appeal—Unsigned Brief.

A brief not signed by a party or his regular licensed attorney, can not avail anything.

APPEAL FROM MARION CIRCUIT COURT.

February 25, 1873.

OPINION BY JUDGE LINDSAY:

The judgment from which this appeal is prosecuted directs that the claims of John G. Stokes & Son, John G. Baxter, Murrell & Wells, and W. B. Belknap shall be paid in full out of the moneys received by Jos. Coffey and Mrs. E. R. Coffey, on account of certain policies of insurance taken out for their benefit by the intestate a short time prior to his death.

Opinion of the Court.

These claims amount in the aggregate to less than $2,500, or about one-third of the moneys received by Mrs. E. R. Coffey from the St. Louis Mutual Insurance Company. After their payment there will still remain in her hands a considerable amount, which, according to the opinion heretofore rendered in this cause, 8 Bush 533, can be applied to the payment of her late husband's debts. Hence appellants, Dorinda T. McBeath, the Administratrix of Monah McBeath, deceased, the Guardian of Antoinette McBeath, the Administrator of E. K. McBeath and S. S. Dunbar, have no ground or right to complain, although they, or some of them, may hold preferred claims against the estate of the intestate. In no event, however, can they interfere with the rights acquired by appellees by the prosecution of their suit against Joseph and Mrs. Coffey.

The funds in their hands could not be reached by the administrator. These creditors undertook the litigation, incurred the necessary expense, and risked the result. These appellants can not now be allowed to deprive them of the fruits of their success.

We do not deem it necessary to express an opinion as to the effect of the amendment to the charter of the Kentucky Southern Mutual Life Company, approved January 15, 1867, which has again been called to our attention.

This court has already decided that Mrs. Coffey is entitled to the money received by her on the policy taken out in that company, and it is certainly immaterial to her whether we make her right depend upon this amendment, or upon the fact that the creditors failed to show that the premiums were paid by her husband.

Joseph Coffey appeals from the judgment directing him to pay a small amount out of the money received by him on the claims of Stokes & Son and others. There is an unsigned paper on file purporting to be a brief in his behalf. He has the right to be heard in this court by himself or by attorney. If he sees proper to appear by brief, he must sign it himself, or cause it to be signed by some regularly licensed attorney. Otherwise it will not be considered. Aside from this the paper fails to call the attention of the court to those parts of the record showing the date upon which the circuit court based so much of the judgment as relates to him.

The judgment in all its details is *affirmed.*

Russell & Averitt, for appellants.

Rountree, for appellees.

DARVIN ROGERS *v.* MARTHA A. ISAACS.

Dower—Alienation of.

A married woman may alienate her potential right of dower, but can only do so by record.

APPEAL FROM LYON CIRCUIT COURT.

February 25, 1873.

OPINION BY JUDGE PETERS:

The law confers the power on married women to alienate their potential right to dower in the real estate of their husbands. And they may also alienate their right to the benefit of the homestead law, or they may alienate both; but in doing so the forms of law prescribed must be observed. They can only do it by the record.

From the mortgage filed in this case Mrs. Isaacs only parted with a right to a homestead as expressed. That is the extent of her agreement, and her dower in the land left by her husband can only be taken from her by another contract which courts certainly have no power to make for her.

Judgment *affirmed.*

Bush & Bush, T. J. Watkins, for appellant.

Husbands, for appellee.

GRAFTON MED. COMPANY *v.* J. R. WILSON.

Appeal—Findings of Court.

The finding of the court in an ordinary action submitted to the court without a jury is entitled to the same consideration as the verdict of a jury.

APPEAL FROM McCRACKEN CIRCUIT COURT.

February 26, 1873.

Opinion of the Court.

OPINION BY JUDGE LINDSAY:

This was an ordinary action submitted by the parties to the court without the intervention of a jury. The judgment is entitled to the same consideration as the finding of a jury. The testimony as to the power of the agent Hazel to bind the appellant by his contracts for expenses for board, etc., is conflicting, but the judgment of the court is not palpably against the weight of the evidence. It must therefore be *affirmed.*

Quigley, for appellant.

James, for appellee.

DAVID W. PHILLIPS *v.* BEN DOOM, ETC.

Wills—Construction—Estate Granted.

Where a will devised to the testator's wife and son all of his property, "to have and to hold to themselves, subject to such provisions and limitations as are therein annexed," a further provision that the devise to the wife should, on her death, pass to the son, and that after the death of the wife the son should pay certain of the testator's grandchildren legacies amounting to $5,000, the whole estate passed to the son charged with the support of the wife and the payment of the legacies to the grandchildren.

APPEAL FROM MARION CIRCUIT COURT.

February 27, 1873.

OPINION BY JUDGE PRYOR:

David Phillips of the County of Marion died, leaving a last will and testament, and by the first clause thereof devised to his wife, "Elizabeth, and son, David W. Phillips, all of his estate of every kind, real and personal, to have and to hold to themselves, subject to such provisions and limitations as are hereafter annexed." By the second clause of the will he says: "That portion of my estate which I have above given to my wife she is to enjoy in conjunction with my son David during her life, and at her death to belong to

my son David, and that and the other portion above given to him is to be his absolutely and forever."

In the fourth clause of the will he directs his son David, after the death of his, the devisor's wife, to pay over to two of his grandchildren and a daughter certain specified legacies amounting in the aggregate to five thousand dollars.

If the first clause of the will is to be construed without reference to the subsequent provisions of the instrument, there would be no doubt but what the mother and son held the estate devised as joint tenants, but when considering all the provisions of the will together we have no idea that the devisor ever intended to give his wife, whilst she remained his widow, a greater interest in his estate than would maintain and support her. His clear intention was to give the whole of his estate to David during the life of the mother, subject to such use and enjoyment by her as would supply all her wants, and the better to enable this to be done he is required to pay no part of the moneyed bequests until after her death. It was never contemplated by the devisor that the labors of David in the management of the estate by which it was increased in value by way of interest or profit on merchandise or the farm should be divided in any manner between him and the other devisees, or even with the mother, except as to the mere enjoyment of so much and no more, as would support her comfortably.

It is alleged in the petition and conceded by the answer that David was the business manager of the whole estate and that profits had been realized from it, either by reason of his own exertions or by the natural increase of the funds in his hands, still, this in no wise deprives him of the beneficial use of the principal and interest, except so far as was necessary to satisfy the encumbrances upon it. These were the pecuniary legacies mentioned in the will, and the mother's claim to the support and maintenance.

She lived with her son, controlled and used, doubtless, what she needed of the estate to supply all her wants and make her comfortable in life, and this was the enjoyment and interest with which the devisor intended to invest his wife when he executed the instrument, and is all that passed to her by that paper.

The chancellor, upon application by the widow to have allotted her the interest to which she was entitled by the will, would have assigned her only so much as would have been ample for her support and enjoyment.

The whole tenor of the will impresses the mind at once that the only incumbrance placed upon the estate was the support of the devisor's wife and the payment of the legacies after her death.

As this view of the case is in conflict with the judgment of the court below, that judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Rountree, for appellant.

Johnson, Knott & Harrison, for appellees.

AMOS MCDANIEL & MOORE *v.* N. E. VAUGHN.

Husband and Wife—Liability for Goods Purchased.

The fact that goods purchased by the wife were, without her knowledge and consent, charged to her instead of her husband, will not make her a debtor instead of the husband.

APPEAL FROM SHELBY CIRCUIT COURT.

February 27, 1872.

OPINION BY JUDGE PRYOR:

We must concur in the opinion of the court below that there is no sufficient evidence in the record to authorize a judgment subjecting the estate of Mrs. Vaughn to the payment of the note executed for the goods sold and delivered. Neither the appellant, Moore, nor his clerk, Penniston, made any statement from which it can be inferred that the appellee knew when these goods were being purchased that they were charged to her. The mere fact that the goods were charged to the wife in the absence of any knowledge of this fact on her part or an agreement to that effect will not make her the debtor instead of the husband. She also states that no such agreement was made and that the goods were purchased on the credit of her husband or that of Boone, and not upon the faith of any promise or pledge on his part.

The judgment is *affirmed.*

John A. Middleton, for appellants.

A. G. Roberts, for appellee.

H. J. SPRADLIN *v.* ELI PIERATT, ETC.

Attachment—Reply, When Not Necessary.

Where one comes into suit in attachment for the sole purpose of asserting his claim to the property, a reply to his answer is not necessary.

Courts—Transfer of Cause.

Where the circuit court has the right to entertain jurisdiction of the subject-matter of the litigation, the parties may by agreement before judgment transfer the cause from the quarterly to the circuit court.

APPEAL FROM MORGAN CIRCUIT COURT.

February 27, 1873.

OPINION BY JUDGE LINDSAY:

Spradlin by his petition asked to be made a party defendant to the actions against Dennins, and that his petition be taken as his answer.

His sole object in coming into these suits was to assert his claim to the property seized under the attachment. He did not sue the officer holding the property for its recovery, but asked merely the right to assert his claim in the capacity of a defendant to the actions in which it was seized under the orders of attachments. He did not, and in fact could not have pleaded matters of set-off, or asserted counterclaims against the causes of action set up by the plaintiffs, hence it was not necessary that they should reply to his answer. As the circuit court had the right to entertain jurisdiction of the subject-matters of the litigation, the parties had the right by agreement before judgment to transfer the cause from the quarterly court to that tribunal. The instructions given presented the issues clearly, and the evidence is not of such a character as will authorize this court to interfere, there being no error of law in the proceedings.

Judgment *affirmed.*

John W. Hazelrigg, J. L. Scott, for appellants.

J. E. Cooper, for appellees.

NEW JERSEY MUTUAL INSURANCE CO. *v.* N. S. GLORE.

Pawnbrokers—Levy on Pawned Property in Suit by a Creditor of Pawnbroker.

Where property held by one as pawnbroker is levied on and sold by his creditor, and he abandons his right to recover the property, he must be held to have consented to the action of the constable who levied thereon and sold the property.

Replevin—Levy on Pawned Property—Recovery by Owner.

Where pawned property is levied on and sold by a creditor of the pawnbroker, the legal owner of the property cannot recover the property from the purchaser without tendering the amount bid and paid for the property, where it is less than the amount owing by him to the pawnbroker.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 27, 1873.

OPINION BY JUDGE LINDSAY:

According to appellee's own showing, O'Brien, the pawnbroker, was in possession of the watch and held a lien on it (under an express contract) to secure the repayment of forty dollars loaned money when the constable levied on and sold the same by virtue of appellant's execution against said O'Brien.

The levy was upon the watch itself, and not upon O'Brien's equity. The watch itself was sold and purchased by appellant. The price thereof, thirty-one dollars, was entered as a credit on the execution, and to that extent the judgment against O'Brien was satisfied.

He has taken no steps to have the sale quashed on account of his interest in the watch not being subject to levy and sale under execution, but seems inclined to accept the credit resulting from the sale, and to assist appellee in his attempt to recover the full value of the watch.

As a matter of law, the right of action for the recovery of the watch is in O'Brien, who has a special interest in the property, and also the right of possession under his contract with Glore.

If he abandons this right to Glore, and at the same time takes

no steps to set aside the execution sale, he must be held thereby to assent to the action of the constable. Such being the case, appellant is invested with his rights, at least to the extent that its judgment against him has been satisfied by the sale.

Glore could not have recovered in an action against O'Brien without paying or offering to pay the loaned money. Neither can he recover against appellant' without paying or offering to pay the amount bid for the watch at the constable's sale, said amount being less than the debt owing by him to O'Brien.

The instructions given by the court below are wholly inconsistent with the view of the law. Its judgment must therefore be reversed. The cause is remanded for a new trial upon principles consistent with this opinion.

Seymore & Abbott, for appellants.

Henry, for appellee.

UNITED LIFE, FIRE & MARINE INSURANCE CO. *v.* F. M. EIGENMORE, ETC.

Appeal—Bill of Exceptions, when not Part of Record.

A bill of exceptions which was not filed within the time allowed by the court, or within the authorized extension of time, is not a part of the record on appeal.

APPEAL FROM KENTON CIRCUIT COURT.

February 28, 1873.

OPINION BY JUDGE LINDSAY:

There can be no doubt but that the petition as amended discloses a cause of action in favor of these appellees.

We are of opinion that the paper copied in the record purporting to be a bill of exceptions can not be considered by this court.

Time was given to prepare and file a bill of exceptions till the third day of the term succeeding the judgment. On that day no bill was filed nor does any notice of the subject appear upon the record.

The extension of time made on the second day of the term was unauthorized. The order made on the 5th of January giving an indefinite extension of time, was also void. It does not appear from the record that appellees in any way waived their rights to take advantage of these errors. Their objections to filing the paper on the 21st of January should have been sustained. *Freeman v. Brenham,* 17 B. Monroe 604; *Meadows v. Campbell,* 1 Bush 104; *Smith v. Blakeman,* 8 Bush 476. Without a bill of exceptions, it is evident that this court can not reverse the action of the court below.

The judgment must be *affirmed.*

Webster, for appellant.

Myers, for appellees.

J. J. RIDDLE *v.* JOHN LEWIS.

Municipal Corporations—Street Improvements—Stipulation of Contractor.

A stipulation in a contract for street improvements, that the contractor should keep the street in repair, was held not to have the effect of imposing on the property holders a double tax, but amounts to a mere requirement that the contractor guarantee the character of his work.

Signatures—Of Wife by Husband.

The signature of a wife attached to a petition for street improvement, by her husband with her consent, is a sufficient signing on her part.

APPEAL FROM KENTON CIRCUIT COURT.

February 28, 1873.

OPINION BY JUDGE LINDSAY:

The grade for the street was finally fixed by ordinance on the 15th day of October, 1869, and the street constructed in accordance with the legislative act and not according to the views or plans of the

city engineer. The principle upon which the decision in the case of *Hyds & Goose* was based does not therefore apply in this case.

The failure to establish the grade before the work was commenced and the subsequent changes made by the council resulted in annoyance to the contractor and delay in construction of the work, but added nothing to the burdens of the purchasing owners. There is nothing in the record tending to show that the work cost them more than it would have done had the grade finally adopted been established before the contractor began to work.

The engineer testifies that the cost of tearing up and replacing as much of the pavement as it was made necessary to take up by the change of grade was not charged against the property holders, hence this additional cost affords them no just ground for complaint.

The stipulation in the contract that the contractor should keep the street in repair, did not have the effect of imposing upon the property holders a double tax for repairs as to the street. It was doing nothing more than to require the contractor to guarantee the character of the work.

The proof sufficiently establishes that the petition to the council was signed by the owners of the greater number of front feet of ground abutting on the street proposed to be improved.

Noonan did not, it is true, hold the legal title to the 55 feet represented by him, but he purchased it in 1852, and has lived on it twelve years. His contract, even if it was oral, is not void, and can be avoided by no one except his vendor, Gorman, who had been continually enjoying it for more than fifteen years, when Noonan signed the petition to the council.

Macklin represented his wife, who owned 81½ feet. She assented to his act. This was a sufficient signing upon her part. Under the terms of the charter married women may sign petitions for the improvement of streets, without conforming to the solemnities necessary in the execution of deeds.

Maloney, according to the testimony, owned the property represented by him. His sister merely held the title to secure the payment of loaned money.

Stein swears directly and positively that he owns 23¾ feet set opposite his name.

From the testimony of Bennett and the conduct of Durham it may fairly be inferred that the owner did not exceed his power as

agent, when he petitioned in Durham's name for the improvement of the street.

For the same reasons, strengthened by the manner in which they held title, the right of Metcalf to represent both himself and Prather ought to be presumed.

Steer's title is unquestionable. One-half of the property owned by Rich & Rust was properly represented, without any question.

This leaves only the half of this 47½ feet, and the 23 feet owned by Cook to be deducted from the petition, even if it be incumbent on appellee to show that a proper petition had been presented to the council (about which we express no opinion). This deduction, when made, leaves a sufficient number of front feet represented by the petition to authorize the council to enact the ordinance under which the work was done.

There is evidence showing that some of the lots fronting on the street were diminished in value by the cut made in grading it, but appellant's lot is not among that number, and from all the proof it may be safely assumed that its intrinsic value was increased at least as much as the tax assessed against it.

The evidence preponderates in favor of the conclusion that the work was done in substantial compliance with the terms of the contract.

The location of the Southgate line is sufficiently definite to make it one of the points between which the street was to be improved.

Judgment *affirmed.*

Menzier & Furber, for appellant.

Fisks, for appellee.

A. PEABODY *v.* J. M. SPALDING.

Trial—Instructions—Construction.

It was held that the word "procure," as used in an instruction, was used in its ordinary signification, and that it cannot be presumed that the jury attached to it a meaning different from that which persons of ordinary education would give it under the circumstances.

Opinion of the Court.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 28, 1873.

OPINION BY JUDGE LINDSAY:

Appellant might have had the proceeding instituted before the justice of the peace dismissed because of the failure of appellee to begin his suit by filing a petition. He chose, however, to waive this right, and in the county court asked, not that the warrant should be dismissed, but that appellee should substitute for it a petition, and this being done, no further objection was taken to the manner in which the action had been commenced.

As matter of fact as well as of law a new suit was commenced in the county court upon the suggestion of the party who now complains of this irregularity.

The petition filed in the county court set out a cause of action against all the members of the firm of Dodge Rhorer & Co., and we are unable to perceive the ground upon which the demurrers of Dodge Rhorer and Barclay were sustained. However, as appellee chose to adhere to his original petition and went to trial upon the alleged promise or agreement of the firm as therein set up it was incumbent on him to produce some testimony conducing to establish such joint promise or agreement. Appellant insists that he utterly failed to do so, and therefore that the verdict should have been set aside and a new trial granted.

The jury had the right to consider every fact proved, and to deduce from such facts every allowable inference, in determining whether or not Peabody in employing appellee acted for the firm, and whether if he did, he acted within the scope of his authority as a partner.

We are not prepared to decide that the firm would not have been responsible to Fleming for the damages he sustained in its service. It is not necessary that we should even intimate an opinion upon this subject. But as Fleming was injured whilst obeying the orders of one of the members of the firm, and as that member undoubtedly took an active part in obtaining for the injured servant medical attention, the party may have inferred that he acted not for himself alone, but in the interest and for the protection of the partnership. As such our inference was allowable, and as a partner had the right to take necessary and proper steps in such a case to

protect his firm from a suit for damages, we can not say that the evidence wholly fails to make out the joint undertaking sued on.

We do not see that the instruction complained of was misleading. The word *procure*, like many other words, has different significations, but it was not an improper or unfit word in the connection in which it was used, and we can not presume that the jury attached to it a meaning different from that which persons of ordinary education would have given it under the circumstances. There was no incompetent evidence permitted to go to the jury.

Judgment *affirmed.*

Muir Bijier, Davie, for appellant.

Baird & Baird, for appellee.

I. L. NEAL AND OTHERS *v.* J. L. BASKET, ETC.

Wills—Sufficiency of Instrument.

A paper held to be the last will and testament of the purported testator.

APPEAL FROM SHELBY CIRCUIT COURT.

February 28, 1873.

OPINION BY JUDGE PRYOR:

The evidence in the case leaves no room to doubt the mental capacity of the devisor at the time and prior to the execution of the paper in controversy to make a valid and judicious disposition of his estate.

The contestants of the will or some of them at least, have no right to question his general capacity to control and manage his business affairs, as the devisor, previous to his departure from the county of his residence (Shelby) for the state of Texas, had executed a paper purporting to be his last will, written by I. L. Neal, one of the beneficiaries therein, and now a contestant of the will admitted to probate.

There is no doubt but what the devisor's brother, W. F. Neal, whilst the former was at the house of the latter in Texas, contributed

to some extent to originate the hostility that James (the devisor) seems at that time to have entertained towards his brother, I. L. Neal.

This, however, could not have been done with a view of obtaining from James his estate, as the latter was then a vigorous and healthy young man, with a prospect of living as long as any of his brothers, and W. F. Neal could not then have well anticipated the unfortunate difficulty that resulted in the death of his brother.

At the time the paper was executed those who speak of the capacity of the testator have no doubt on that subject. The lawyer writing the will swears that it was dictated by the devisor himself, and there is proof showing that he contemplated its execution some days previous to the time it was written.

The evidence fails to disclose any influence attempted to be exercised over the young man by his brother in procuring its execution and the result of the interviews between the two in regard to their relatives in Kentucky is arrived at more from conjecture than any facts shown in the cause.

There is nothing unnatural or unreasonable in the manner of this testamentary disposition of James Neal's estate. His brother William seems to have been more needy than any of his other relatives and his marked affection for his niece prompted him to make her one of the objects of his bounty. The county judge, as well as the jury, all living in the same county where these parties were long known, have pronounced in favor of the validity of the paper and this strengthens the view taken of the case by the court based upon the testimony alone that the paper in controversy is the last will and testament of James D. Neal.

Judgment *affirmed.*

Middleton, Bullock, for appellants.

Harwood, for appellees.

WM. QUEEN, ETC., *v.* JAS. M. NICHOLAS, ETC.

Wills—Rights of Devisees.

A wife's devisees held to be entitled to a settlement out of the proceeds of land sold by the wife's husband, to the extent that the land was paid for with land belonging to the wife.

Opinion of the Court.

APPEAL FROM NELSON CIRCUIT COURT.

February 28, 1873.

OPINION BY JUDGE LINDSAY:

There is proof conducing to show that J. W. Nicholas agreed to invest the cash, notes, etc., received from the estate of his wife's father in real estate and to take the title to her.

It seems that he did so invest about three thousand one hundred dollars ($3,100.)

There is nothing in the record authorizing the conclusion that any portion of the purchase price of the Hagan land was paid out of the means of Mrs. Nicholas. Her husband was able to have paid the cash payment, and it is certain that part of the deferred payments were made by the appellant, Queen.

When the two tracts of land to which Mrs. Nicholas held title were conveyed to Queen in exchange for the farm bought from him, the husband clearly and unmistakably manifested his intention to disregard his agreement with his wife by taking the title to himself. It may be that Mrs. Nicholas believed that this farm had been conveyed to her, but the idea can not be entertained for a moment that Nicholas was not apprised of the fact that the conveyance was to him.

Even if it be conceded that a fraud was practiced upon Mrs. Nicholas, or that she joined in the conveyance of the Chaperze land and the Hagan farm, under the mistaken idea that Queen was to convey to her, still she can not in equity claim a greater interest in the Queen farm than was paid for by the lands purchased with her money, and it may well be doubted whether a claim to that extent ought to be enforced as against her husband's creditors. Inasmuch, however, as there is proof tending to show that she would not have relinquished her right to dower in the Queen land when her husband disposed of it, except for the fact that the town property known as the Hynes House was conveyed to her we are inclined to hold, that she was in a position to assert her right to a settlement out of the proceeds arising to the extent that it was paid for by the Chaperze land. Her devisees can not claim more than this.

The chancellor erred in dismissing appellant's petition. He should have adjudged a sale of the Hynes House property, and after setting apart to the devisees of Mrs. Nicholas three thousand one hun-

dred dollars ($3,100), the balance arising from the sale should have been applied to the payment of the debts held by appellants against the estate of J. M. Nicholas.

The judgment is reversed and the cause remanded for a judgment consistent with this opinion.

The court below will permit the assignee of Queen to be substituted for him as a party plaintiff.

Muir & Wickliffe, for appellants.

Johnson, for appellees.

JOHN B. FAY *v.* CITY OF LOUISVILLE.

Nuisance—Parties to Action.

In an action to abate a nuisance, where it is conceded that a certain person has an interest in the property alleged to constitute the nuisance and that his offer to prove that he is in a position to assume part of it, he was properly made a party, and the court ought not to dismiss the case as to him, notwithstanding admissions of his hostile landlord.

Nuisance—Parties to Action.

A statute requiring that the "owner and owners" of a building sought to be abated as a nuisance must be summoned as parties to the proceedings, includes tenants as well as the landlord.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 1, 1873.

OPINION BY JUDGE LINDSAY:

Upon the trial in the city court it was agreed that Alexander was the owner of the house charged to be a nuisance. That Sheckler was his tenant, and Fay, the appellant, the sub-tenant holding under Sheckler.

The proceeding was dismissed as to the tenant and sub-tenant. Whereupon Alexander, the owner, confessed the truth of the statements contained in the warrant, and thereby invited the judgment of the court directing the house to be torn down and removed. It being conceded that appellant had an interest in the property, and he

offering to prove facts conducing to show that he was in the actual possession of some portion of it, he was properly made a party, and the court ought not to have dismissed as to him, and thereby deprived him of an opportunity to be heard. The judgment, if carried into effect, will disturb his possession, and destroy his interest in this house, whatever it may be, and it is contrary to common justice to compel him to submit to such disturbance and loss upon the admissions of a hostile landlord, the more especially when he avows his readiness and ability to show by competent evidence that these admissions are untrue.

Ordinance No. 237 (Elliott's Digest, 710), under which the proceeding was instituted, provides that "the owner or owners" of the property charged to be a nuisance shall be summoned. To confine the words "owner or owners" to the holders of the fee, or even of freehold estates, would render it unnecessary in any case to summon the tenant or occupant of the tenement or building, and persons holding as lessees for five, ten or twenty years, might have the tenements or buildings occupied by them adjudged nuisances, and directed to be abated, before they had even an intimation that they were regarded by any one as "unsafe or dangerous to the lives or bodies of persons passing on the streets in front of them."

Such an absurdity could not have been intended. The "owner and owners" who must be summoned, are those owning interests in the property, including as well the tenants as the landlord.

The proceeding in this case having been dismissed as to Fay, no judgment affecting his rights ought to have been rendered.

As the judgment appealed from can not be executed without disturbing his possession it is prejudicial to him, and he has the right to have it revised by this court. It was error to overrule his motion to set aside the order dismissing the warrant as to him. He had the right to be heard, and could not legally be deprived of this right by the extraordinary means adopted.

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

Milburn, for appellant.

J. L. Barrett, for appellee.

JOHN A. McGRATH *v.* W. A. McGRATH.

Guardian and Ward—Right to Guardianship.

A mother should be entitled to the guardianship of her infant children, rather than a stranger who had become persona non gratis to some of the wards, and where the mother and the wards held the property in common, and there was at least an implied understanding between the guardian appointed and the mother of the wards, that he would surrender the guardianship in her favor.

APPEAL FROM SHELBY CIRCUIT COURT.

March 1, 1873.

OPINION BY JUDGE PRYOR:

Although the evidence in this case establishes the fact that the present guardian is a man of integrity and business habits, still we are satisfied that the interests of the children requires that the mother should have the right to their custody and also the care of the real estate in the town of Shelbyville as it is their only means for support and maintenance, and it is evident that their guardian should endeavor to obtain its highest rental value for that purpose. It may be that business men would express the opinion, as they have done in this case, that the appellant was paying as much rent for the property as it was worth, still if he could have obtained one or two hundred dollars more for it per annum from the same character of tenant it was certainly his duty to have done so and thereby increase the annual income for the benefit of his wards. We are satisfied the property could have been rented for more money than the appellant was paying for it, and to those who could have taken as much interest in its preservation as tenants ordinarily do. In addition to all this the feeling of hostility between the parties, particularly on the part of Wm. McGrath towards the appellant, is of such a character as to render unpleasant at least, if not to forbid entirely any business relation between the two. The proof also shows that the employment of an attorney annually is made necessary by reason of this unfortunate state of feeling and this necessarily decreases the amount of the income to which the mother and children are jointly entitled from the proceeds of their estate. The real estate is owned in common by the mother and children, at least there has been no

severance of their interests, and as the mother must necessarily have the control, care and raising of her children, she should also be allowed to control their estate. There was also an implied, if not an express, understanding between the mother and appellant at the time the latter was appointed guardian, that the surrender of the right to the guardianship of her children was upon the condition that she should be allowed to qualify, as soon as her father visited her from Virginia, and her consent that appellant should qualify was with this proviso, and as she also then believed and was so informed by him that it would be necessary at once to proceed to sell some of the real estate. Whilst there is nothing in this case affecting the integrity of the appellant as a business man or otherwise, still we think the chancellor in the exercise of a sound discretion authorized by the statute upon this subject, adjudged properly in determining that the appellant from the facts in the record was evidently unsuited to act as guardian of the infants and particularly when the mother's affection for the little children and interests in their welfare is prompting her to ask the chancellor or the court to confide in her the trust.

The judgment is *affirmed*. *Windsor v. McAtee*, 2 Met. 431.

Bullock, for appellant.

Middleton, Harwood, for appellee.

JAMES M. MCARTHUR *v.* M. B. JONES, ADM'R.

Set-off and Counterclaim—Defense.

A defense founded upon an alleged payment is not in the nature of a set-off or counterclaim, and after judgment, previous payment cannot be made the foundation of an original action.

APPEAL FROM CAMPBELL CIRCUIT COURT.

March 4, 1873.

OPINION BY JUDGE LINDSAY:

Waiving the consideration of the point raised by appellee, that the Superior Court of Cincinnati is the tribunal at whose hands appel-

lant should seek relief, we are of opinion that his pleadings, exhibits and evidence, all of which we are asked to consider, showed that he is entitled to more in any forum.

The charge that the judgment rendered in 1860 in the Superior Court was obtained by fraud is made to rest upon the fact that Jones, knowing that Johnson had paid off the debt, fraudulently concealed that fact from the court.

It does not appear, nor is it alleged, that he was called upon to state any thing concerning the alleged payment. Nor that he did or said anything calculated to mislead or deceive appellant whilst the suit was in progress.

It is claimed that Johnson paid the debt in 1858. Jones sued in 1860. He made Johnson a party, who came into court after service of process and made defense. An opportunity was offered him to plead the judgment, if he had really paid it.

It can not be said that Jones was fraudulently concealing the fact of payment when he called upon Johnson, the person who is claimed to have made it to come forward and defend an action based upon the identical debts claimed to have been paid by him.

It is not alleged nor is it attempted to be proved that there was collusion between Jones and Johnson. Nor is it even claimed that McArthur inquired of Johnson, when sued by Jones, whether any portion of the claim asserted by Jones had been paid, and when it is considered that Johnson undertook and agreed with appellant that he would pay them and thereby hold him harmless, and that Johnson was in court making defense, it must be regarded as passing strange that he did not learn something about the payment made, if at all more than a year before the institution of the suit.

The petition of *Jones v. Smith & Gilbert* does not show that they were his agents, but upon the contrary that they were the agents of Johnson, and his ground of complaint against them is that they failed to obey Johnson's instructions to them to collect rents and pay off Johnson's and McArthur's debt to him.

Whether his petition disclosed a cause of action in his favor or against Johnson's agents, is an immaterial question. His petition is made an exhibit to show that they were his agents, and that moneys received by them ought to be treated as payments by Johnson to him. It shows exactly an opposite state of facts, and tends to prove that up to 1867 Jones had received nothing from either Johnson or Mc-

Arthur, except the small amount realized from the sale made by the commissioner of the superior court.

A defense founded upon an alleged payment is not in the nature of a set-off or counterclaim, and after judgment previous payment can not be made the foundation of an original action.

Considering everything presented by the record, we are satisfied that the judgment of the Superior Court ought not to be vacated or modified, even if the courts of Kentucky have the power to do so, and as it is the foundation of the judgment in Kentucky, the latter ought not to be disturbed. The judgment of the circuit court is *affirmed.*

Stevenson & Myers, for appellant.

Hallam, for appellee.

JOHN E. RENO *v.* MARY A. DAVIS.

Executors and Administrators—Action on Bond—Pleading.

Where neither the terms nor the substance of an administrator's bond are set out in the petition, the filing of a copy of the bond with the petition does not dispense with the necessity of setting out the undertaking as entered in the pleading itself.

APPEAL FROM MUHLENBERG CIRCUIT COURT.

March 4, 1873.

OPINION BY JUDGE LINDSAY:

The original judgment is erroneous for two reasons.

1st. The petition presents no cause of action against Reno, the surety in the administrator's bond. Neither the terms nor substance of the bond are set out. Filing a copy of the bond with the petition does not dispense with the necessity of setting out the undertaking sued on in the pleading itself.

2d. No judgment should have been rendered until a refunding bond was executed. *Montjoy's Adm'r v. Pearce,* 4 Metcalfe 98. Judgment reversed and cause remanded for a new trial.

The appeal from the judgment refusing a new trial is dismissed.

Jas. Ricketts, for appellant.

———, *for appellee.*

JAMES DONOVAN *v.* L. J. BRADFORD.

Compromise and Settlement—Matters Included in Settlement—Presumption.

Where the claim might have been included in a settlement between the parties, made several years prior to its assertion, and it was not asserted until after a judgment had been rendered against the guardian on the settlement note, it will be presumed that all matters between the parties were included in the settlement.

APPEAL FROM BRACKEN CIRCUIT COURT.

March 5, 1873.

OPINION BY JUDGE PRYOR:

The injunction was properly dissolved as to the claim for usury. This defense should have been made at law. *Chinn v. Mitchell,* 2 Met. 92. As to the alleged claim for one hundred dollars, the value of tobacco sold and delivered the appellee and his partner in the year 1859, we have only to say that it is rather remarkable that in a settlement made between these parties in the year 1867, this claim was not there included and particularly as the appellant then executed his note to the appellee for upwards of eight hundred dollars. This was eight years after the tobacco was delivered, and in the year 1868 a suit was instituted on this note and judgment rendered without the presentation of any such claim on the part of the appellant. He is concluded by laches on his part and the presumption must be indulged in that all of the matters between these parties were included in the settlement of 1867.

Judgment is *affirmed.*

Willis, Rodman, for appellant.

Doniphan, for appellee.

KULP & COLLINS *v.* J. B. ENGLISH.

Judgment—Set-Off Against Judgment.

Where the judgment plaintiffs are admittedly insolvent, the chancellor has authority to set off against their judgment so much of their indebtedness to defendant as was not litigated in the action resulting in the judgment.

Opinion of the Court.

APPEAL FROM BULLITT CIRCUIT COURT.

March 5, 1873.

OPINION BY JUDGE LINDSAY:

The admitted insolvency of appellants Kulp and Collins authorized the chancellor to set-off against their judgment so much of their indebtedness to English as was not litigated in the action resulting in such judgment.

This embraces the amounts paid to the Federal government by English on account of taxes, licenses and penalties due from the old firm, and which appellants had agreed to pay. Also the debts to Kalfus, and the debts to Goodfrey, Wolfe & Co., the whole amounting at the date of the judgment to $574.35.

The claim for $273.15, the difference between the amount of the notes, acts, etc., delivered to English by appellants when they bought him out, and the amount they agreed to deliver to him, appears from the pleadings to have been litigated in the former action. The claim for $90 on account of the debt of Jones Moore was also before the jury, in that suit, and we must assume was considered in making up the verdict. Both these claims should have been rejected.

The petition does not show that due diligence was exercised in the collection of the other claims therein set up, and hence the chancellor properly declined to hold appellants responsible for their loss. For the error in allowing the claims for $273.15 and the Moore debt for $90, the judgment must be reversed. It appears from the exhibit that portions of the judgment in favor of appellants against English were assigned of record to R. H. Fields and Wm. Wilson, attorneys, in payment of their fees for legal services rendered in procuring it. Upon the return of the cause appellee should be required to bring them before the court, and inasmuch as the claims he now asks to be allowed to set off against said judgment might have been asserted in the old suit if he had chosen to set them up. If Wilson & Fields make it appear that the amounts assigned them are not more than were reasonable in view of the services rendered, they can not be affected by the amount of the set-offs herein directed to be allowed.

The cause is remanded for the further preparation indicated, and for a judgment consistent with this opinion.

R. H. Field, for appellants.

A. H. Field, for appellee.

STEAMER ST. PATRICK *v.* W. G. EVANS.

Pleading—Demurrer.

Where the declaration, if the proceedings be construed to be a personal action, discloses no cause of action, and if construed to be an admiralty case, the demurrer to the declaration pending in the county court should be sustained, and judgment for plaintiff denied.

APPEAL FROM JEFFERSON COUNTY COURT.

March 6, 1873.

OPINION BY JUDGE HARDIN:

This somewhat anomalous case was commenced by a warrant before a justice of the peace for $95.90, under the enlarged jurisdiction of justices, in Jefferson county; the warrant being against "Captain Hart, owner and master of the steamboat St. Patrick," and the claim being for "freight not delivered, lost and damaged by said boat."

It appears that on a trial of the case the justice rendered a judgment against the defendant for $99.90, from which an appeal was taken to the Jefferson Court of Common Pleas, and thence removed to and prosecuted in the county court.

It further appears that in the county court the plaintiff filed a declaration setting forth his claim for the non-delivery and loss of the freight, not against Hart, but against "The Steamer St. Patrick," which he styled the defendant in the caption of the pleading, and therefore the following written objection was filed by Mr. Brown, as counsel, and overruled by the court: "The defendant, not appearing in this case, objects to the proceedings because no process has been served on any proper party for which the defendants are bound to answer." And the said counsel for the defendant filed a demurrer to the petition substantially on the ground that the plaintiffs claim, as asserted, being of admiralty jurisdiction, could only be prosecuted in a court of the United States. The court overruled the demurrer; and an answer being filed in the name of the Steamer St. Patrick, traversing the allegations of the petition, the law and facts were submitted to and tried by the court, without the intervention of a jury, and the trial resulted in a judgment for the plaintiff for $75, to reverse which this appeal is prosecuted.

It is plain that if the proceeding be construed to be a personal action against Hart, the declaration disclosed no cause of action against him, and as the amount in controversy was such as to require the statement of a cause of action in writing, the judgment was unauthorized for that reason. And if, as seems to have been intended by the plaintiff, his case was one of admiralty jurisdiction, although not characterized in its presentation by all the distinguishing features of such a suit, then the demurrer should have been sustained for want of jurisdiction in the justice and the county court (*Stuart v. Harry*, 3 Bush 438, and cases therein cited).

It results that in either aspect of the case the judgment is erroneous. Wherefore the judgment is reversed and the cases remanded for further proceedings not inconsistent with this opinion.

Jeff Brown, for appellant.

———, *for appellee.*

G. F. HENDRON, ETC., *v.* OLIVIA ADAMS, ETC.

Appeal—Verity of Record.

The verity of the record of the oath of office of a regular judge and of a special judge, cannot be considered by the Court of Appeals, where it is made to appear only in the brief of counsel.

Judges—Regularity of Election—Presumption.

The fact that one of the plaintiffs in the court below was a married woman cannot destroy the presumption that the judge who decided the cause was properly chosen and sworn.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 6, 1873.

OPINION BY JUDGE PRYOR:

We find nothing in the case upon which to base an opinion except the petition, answer and exhibit filed. The deposition of witness Dunn seems never to have been filed in the case, nor is there any agreement of record that it was to be read upon the hearing in the court below.

The record of the oath of office taken by the regular judge and afterwards by the special judge, who was elected during the term at which the present case was tried, can not be considered by this court. It is made to appear in the brief of counsel only, and it is certainly evident that the verity of the record can not be impeached in this way. The fact that one of the plaintiffs in the court below is a married woman will not destroy the presumption that the judge deciding the cause was properly chosen and sworn. It may be that he was the judge holding the entire term of the court, and such must be the judgment of this court, based upon the record before us. If Dunn's testimony, however, was in the case, there is still nothing in the record authorizing a recovery, as he makes no explanation of the manner and extent of the holding by any of the parties, nor is there any evidence as against these defendants that the plaintiffs were ever legally evicted off the land in dispute.

The judgment is *affirmed*.

Marshall & Bloomfield, I. Campbell, Jr., Rodman, for appellant.

L. D. Husbands, for appellee.

SAMUEL E. PHILLIPS *v.* CHAS. P. BURDIN, ETC.

Dismissal and Nonsuit—Sufficiency of Evidence.

The evidence was held not sufficient to sustain plaintiff's petition, and the petition was properly dismissed.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 7, 1873.

OPINION BY JUDGE LINDSAY:

Wm. P. Phillips states that Burdin said to him that he owed Tatum more than would pay for the work, and before paying Tatum he would notify him (witness) and see that he was paid; that Burdin allowed him to go on with the work and said that he should be paid, whereupon the work was resumed and he always looked to Burdin for the money due.

Thompson says Burdin said to Phillips that he owed Tatum more than would pay for all the work and that he would not pay him

until he had notified him (Phillips) also to go on and do the work and he should be paid.

Giving to this testimony the construction most favorable to appellant, it does not show that he abandoned his contract with Tatum, and completed the work, upon the idea that he had made a new contract with Burdin. All that he demanded of Burdin was that he would hold back from Tatum a sum sufficient to pay for the work he had undertaken to do, and that he be responsible to him, or see that he was paid. This and nothing more Burdin promised. It was a promise upon his part to pay the debt, or to answer for the default of Tatum. Not being in writing, it is within the statute of frauds, and can not be enforced by suit.

Upon the proof the chancellor properly dismissed appellant's petition.

The judgment must be *affirmed.*

Riley, for appellant.

Dembitz & Wehle, for appellee.

R. M. WATSON, ETC., *v.* L. D. HUSBANDS.

Estoppel—Pleadings.

An answer was held not to create an estoppel against defendants or their vendees.

Public Lands—Military Survey.

A military survey was held to be void, and one entering on the land had the right to disregard it.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 7, 1873.

OPINION BY JUDGE PRYOR:

It is clearly shown that the survey and patent made to John Allen as assignee of Meeter in December, 1825, is entirely at variance with the entry made by the latter in August, 1784. The survey and patent embraces no portion of the boundary included by the entry made. The act approved December 26, 1820 (2 M. & B. Digest 1043),

declares "that a patent issuing on a survey made contrary to the location shall be void to all intents and purposes." See Ky. Statutes, Sec. 4704.

The patent issued to Allen was a mere nullity and there was nothing to prevent the actual entry of the lands by Husbands or those under whom he claimed. Neither Allen nor his heirs made any other exhibit of title and seem never to have been in the actual occupancy of the land. Watson's heirs claim to have derived title through Meeter, also under a purchase and assignment from the latter to their ancestor of his entry made in August, 1784; that this sale and assignment was made prior to the sale made to John Allen; still there is no evidence of this fact except some parol proof tending to show an assertion of claim to the entire boundary of the 1,500-acre entry of Jacob Watson as early as the year 1830 and perhaps prior thereto. The land was never reduced to possession, and the preponderance of the testimony conduces to show that no claim of ownership of any of that land was ever asserted by Watson. J. B. Husbands's deposition shows the manner in which R. M. Watson, a son of Jacob Watson, got possession within this 1,500-acre boundary. After his father's death and the entry of this land by Husbands, R. M. Watson made a purchase of a quarter section of this land for the purpose of getting him a suitable building site and for the reason that he owned land adjoining. This quarter section was within the disputed boundary and its possession is the only possession in fact shown to have been in any of the Watsons or any part of it. Having derived it from Husbands, it is at least strong proof if not conclusive that Jacob Watson and his children never asserted or attempted to show a well-known and valid claim to this whole tract connected with the possession for near half a century. If so they would not have yielded so readily to Husbands's claim. A number of witnesses who were familiar with this land and knew Jacob Watson well corroborate the statements made by Husbands as to the alleged claim of ownership by Watson. R. M. Watson, after his father's death, was then the controlling man of the family, and seems not only to have purchased of Husbands but to have known all about the latter's entry of this land and asserted at the time no claim whatever. The suit by Watson's heirs against Allen's heirs for this same land instituted in July, 1850, resulted in a dismissal of the action without prejudice, and although the an-

swer of the two Woolforks disclaims any interest in the land, still it did not vest the appellants in this case with any title, as they failed to obtain judgment in that action either against Allen's heirs or the Woolforks.

The termination of that suit left them with no better title than they had at its institution. The answer of the Woolforks creates no estoppel as to Husbands, their vendee, or as to themselves. The appellants have not been misled by it in any way, nor does it amount to a donation of their interest to the appellants. The title relied on by Husbands is deducible from the state. No adjudication of the question of title or any other issue was had in the suit instituted in July, 1850, and the parties left in statu quo at the dismissal. The entry made by Husbands was not fraudulent, as the land was not covered by any military survey. This survey was itself void and Husbands as well as all others had the right to disregard it, and if not there is an absence of proof showing that the entry and patent of Husbands was subsequently made. The 16th section of the Act of 1825 does not declare that such an entry as was made in this case is to be deemed void, but simply provides that the receiver shall not sell any section of land or part of a section which may be included in any military patent or survey. Now if the military survey is itself void it may be well doubted whether in such a case there is any inhibition from selling; still if the receiver should sell as in this case, and the military survey is void and the prior entry and patent from the state are both regular, we see no reason why the prior patent should not hold as against a patent admitted to be void. If Husbands occupied the position of a mere adverse claimant, by reason of his possession, the appellants exhibit no such title as authorizes them to recover.

The judgment of the court below is *affirmed.*

C. D. Smith, C. S. Marshall, for appellant.

L. D. Husbands, for appellee.

WILLIS U. NIBLACK *v.* HARRISON S. NIBLACK, ETC.

Deeds—Acknowledgment of Receipt of Consideration.

An acknowledgment in a deed of receipt of the consideration recited therein is only prima facie evidence thereof, and may be over-

thrown by clear and satisfactory evidence that the consideration had not been paid.

Evidence—Confessions or Admissions.

Confessions or admissions are the strongest evidence against the party making them if they are clearly established, the only weakness being in the evidence of confessions or admissions.

APPEAL FROM CLARK CIRCUIT COURT.

March 8, 1873.

OPINION BY JUDGE PETERS:

L. A. Niblack and wife in 1867 conveyed 100 acres of land in Clark County to their son, the appellant, for the consideration, as expressed in the deed, "of three hundred dollars cash in hand, and the natural love and affection that said parties have for their said son, etc., etc."

In 1868 L. A. Niblack, the grantor, died intestate, and administration was granted on his estate to appellant. This suit was brought by a part of the heirs of the intestate claiming the estate to be distributed against appellant, charging that he never paid the three hundred dollars, the money consideration, for the land to his father in his lifetime, and had failed and refused to account for the same since his death; and they pray that he be compelled to pay said sum of money to them.

Appellant in his answer denies the allegations of the petition, and avers that he paid the money to his father. On the trial of the issue thus made by the pleadings judgment was rendered by the court below against W. V. Niblack for the sum claimed and he has appealed to this court.

The recital in the deed is to be regarded as an acknowledgment of the receipt of the three hundred dollars, the language imports that and nothing more. But such an acknowledgment as has often been held by this court, is only prima facie and not conclusive evidence of payment. To overturn that presumption, however, the evidence should be clear and satisfactory that the money had not been paid.

In the present case three witnesses testify that appellant stated to them that he had not paid the money and promised that he would pay it, and a fourth says in a conversation with appellant, he said he would settle the claim, and in corroboration of that position it is

shown that no money was paid when the deed was executed and acknowledged, and appellant gives no account of how or when he made the payment.

Admissions and confessions are not the weakest and most unreliable evidence, as counsel for appellant insists, known to the law; it is only the evidence of such admissions that is weak; but confessions, or admissions for themselves, are the strongest evidence against the party making them when they are clearly established.

We are therefore satisfied that the evidence sustains the judgment, and it must be *affirmed*.

———, *for appellant.*

———, *for appellees.*

CITY OF PADUCAH *v.* HOLLORAN & CO.

Judgment—Default.

Where the allegations of a petition authorize recovery against the city, and the answer offered by the city is not responsive to the petition, judgment may be rendered against the city by default.

Municipal Corporations—City Taxes.

The power of taxing for public improvements within the city limits may be exercised by the council without the consent of the citizen, and his property may be subjected to the payment of the tax upon the consideration alone of public and private benefits to be derived therefrom.

Municipal Corporations—Pleading—Defense.

In an action against the city on an improvement contract, it is no defense to allege that although the improvement ordinance was a nullity a property owner is liable by reason of his contract under the void ordinance, and that the city is exempt for the reason that such contract was made.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 8, 1873.

OPINION BY JUDGE PRYOR:

The appellees, Holloran & Co., instituted their several actions at law against McGary, Hamilton & Watts, in which they sought to

recover certain sums of money alleged to be due them as contractors for work and labor in grading, excavating, paving and curbing the sidewalks in Court street in the city of Paducah, under and by virtue of an ordinance of the city council passed in November, 1865, requiring said improvements to be made, at the exclusive cost of the owners of the property.

This ordinance was enacted by virtue of the second section of Article 6 of the city charter, authorizing the council to have such improvements made at the cost of the owner or owners of the ground fronting the improvement according to the number of front feet each may own, etc., provided that "when any such improvement has not been petitioned for by the owners of a majority of feet of ground in front of said improvements it shall require a concurrence of two-thirds of the members elected in office of the board of council to pass the ordinance to procure said improvement, and the final vote thereon shall be taken by yeas and nays and recorded in the journals of the proceedings of the board of council." Sec. 3 of the same article provides that, "the council may pass ordinances to procure the grading and paving of sidewalks on any of the squares within the city limits when the street has been graded and paved, or graded and otherwise improved for more than one year, or to recurb and repave said sidewalks if required at the cost of the owner or owners, etc."

The city council under the sections of the charter referred to not only required the property owners to make the improvements designated by the ordinance, but also made a contract at or about the same time with the appellees for curbing, guttering, and laying down the brick pavement on that portion of the street required to be improved and paid for by the city.

After the passage of the ordinances for the improvement of Court Street may of the property owners, perhaps a majority of them, contracted with the appellees to make the improvements opposite their lots at certain specified rates. This contract with the property owners was submitted to the council and by that body ratified and confirmed. The appellee completed his work of improvement on the street both under the contract with the owner and with the city.

The estimates of the work were reported to the council and allowed, and the work accepted by that body. There is no material difference in the questions of law or fact arising upon all three of

the records filed in this court by the appellant against the appellees. The defendants, McGary, Watts and Hamilton, filed answers in the separate suits against them by the appellees in which they deny making any contract with the appellees for the work done, and also denying that any contract was made by the city, or any ordinance passed by the board of council as required them to pay for the improvements made, or subjected their lots to the payment of appellees' claims. They insist that the council had no power by ordinance or otherwise to subject their property to taxation for the improvement of sidewalks, as well as the street upon which they bordered, at the same time, and further that the ordinance under which this work was done was not enacted by the council as required by Sec. 2 of Article 6 of the City Charter, which enacts, "that where a majority of the owners of lots fail to petition for the improvement, there shall be a concurrence of two-thirds of the members to pass the ordinance, and the final vote thereon shall be taken by yeas and nays and recorded in the journals of the proceedings of the board, etc."

These defenses are specifically pleaded by all the defendants except Mildred Hamilton, and she alleges that she made no contract with the appellees, and also denies that any contract was made by the city; that the improvements were made upon a public street of the town and she had no power to prevent it.

Upon the filing of the separate answers the appellees amended their several amended petitions, making the city of Paducah a defendant, and alleging in substance the allegations and defenses set up in the answers filed by the property owners; that the ordinance requiring these improvements was in violation of the city charter and that no recovery could be had as against the defendant to the original suits or liens enforced upon their property for the work done. They specifically allege that a majority of the owners of the property on Court Street were not petitioners to the council for the improvements made, and that the yeas and nays were not taken on the final vote passing the ordinance and recorded in the journals of the proceedings of the city council.

They further state that the city by the ordinance passed and by contracts made with the appellees, were proceeding to improve, and did in fact improve the sidewalks, and the public street all within the same year by paving, grading and curbing each, and that by

reason of these violations and disregard of the provisions of the city charter by the council, they can not enforce in law or equity their claims against the property owners, or subject their lots to the payment of the moneys due them for their work.

Process as executed on the city under each of the amended petitions filed; and the city failing to answer, a judgment by default was rendered for the amount due the appellees for their work and labor in making the improvements. After this judgment had been rendered and during the same term of the court the city by its council moved to set aside the judgment and offered to file an answer. The court refused to set aside the judgment or permit the answer to be filed, and of this the city is now complaining.

The answer offered to be filed by the city fails to deny any of the material allegations of the amended petitions. The fact of the council having ratified the contract made by the citizens or property owners after the passage of the ordinance is no evidence that a majority of the owners of the ground fronting Court Street petitioned the city council for the improvements, nor can this contract be deemed equivalent to such a petition for the reason that its execution took place by reason of the ordinance already passed and the property owners were forced to make the contract, or have the sidewalks improved by the city at their expense. Nor is there any evidence appearing upon the records of the board of council that the yeas and nays were taken upon the passage of the ordinance, and the city in the answer offered to be filed fails to respond to the allegations of the amended petitions on this subject. The only response offered to be made is, that the ordinance was passed by the unanimous vote of two-thirds of the whole body, the records showing the names of the councilmen present. Nor does the answer controvert the point that the council made a contract or passed an ordinance by which these improvements were to be made on the sidewalks, and the public streets at the same time, and within the same year.

The answer offered by the city is not responsive to the petition, and if the allegations of the amended petitions authorize a recovery against the city it was right and proper to render the judgment by default.

This court in the case of Kaye v. Hall, 13 B. Mon. 455, in a case exactly analogous to the one now presented, says:

That when there is such a clause in the charter as requires a vote of two-thirds to pass the ordinance, and that this vote shall be evidenced by the yeas and nays entered on the record, that the record of the yeas and nays is the exclusive evidence of the requisite majority having voted for the ordinance. The exercise of the power conferred upon the council may sometimes, as said by this court in the case referred to, be arbitrary and oppressive and always liable to abuse, and, therefore, the council, in the exercise of the authority conferred by the charter should be held to a strict compliance with its provisions. The power of taxation for the purpose of improvement within the city limits may be exercised by the council without the consent of the citizen, and his property subjected to the payment of the debt thus contracted upon the consideration alone of the public and private benefits to be derived from it. In order to prevent such legislation by the council from becoming onerous to the citizen, and particularly in reference to sidewalks where the street itself has not been improved, the third section of article 6 of the charter was enacted by which this power could not be exercised, and the improvements of the sidewalks made where the street itself had not been graded and paved for more than one year previous to the passage of the ordinance. This the board of councilmen violated in requiring the improvements made, and if not, the vote passing the ordinance was not in compliance with the charter, for the reason that the yeas and nays were not taken and recorded as provided by section 2 of article 6.

There was no contract made with any of the defendants to the original actions brought for the improvements made. The contract filed with the pleadings and ratified by the council does not contain the names of any of the parties against whom these suits were instituted. And even if such contracts had been made, if executed by the citizen by reason of this ordinance that was in violation of the city charter, and the owner liable therefor, it is no defense in an action against the city, to say, that although the ordinance was a nullity, the citizen is liable by reason of his contract under this void ordinance, and the city itself exempt for no other reason than that such a contract was made.

The contract made with Mrs. McClellan can not be enforced for the reason that she had no power to make it, and the title to the property was not in the party for whose benefit she made it.

The appellees had no lien upon the property for their work done and the judgments rendered against the city must be enforced. The judgments are each *affirmed.*

Williams, for appellant.

Bigger & Moss, for appellees.

CHAS. A. GRAVES *v.* J. M. CORBIN.

Vendor and Purchaser—Purchase-money Notes—Foreclosure of Lien.

Where one is the holder and owner of three purchase-money notes secured by a lien retained in the deed, the court should, on decreing a sale of the land, direct the sale of so much of it as may be necessary to satisfy the judgment then rendered, leaving the deferred installment to have its lien on the remaining land.

APPEAL FROM BOONE CIRCUIT COURT.

March 8, 1873.

OPINION BY JUDGE LINDSAY:

It was error to adjudge a sale of the land, subject to the lien for a note for two thousand dollars not due when the judgment was rendered.

It is apparent from the pleadings that Corbin was the holder and owner of all three of the notes secured by the lien retained in the deed. Under such circumstances, there being no possibility of a contest as to priority, as is the case when the lien notes have been assigned, and are held by different persons, the court should have directed a sale of so much of the land as might be necessary to satisfy the judgment then rendered, leaving the deferred installment to have its lien on any remaining portion. *Emison v. Risk,* Mss. Opinion Sept. 5th, 1872. Hardin, Judge.

The sale of the absolute title is better calculated to invite competition in bidding, and is advantageous to both creditor and debtor.

Waiving any question as to the propriety of the action of the court in hearing the cause without giving appellant time to prepare his defense, inasmuch as the question will be re-opened by the reversal, no judgment should be rendered for the payment of the

notes sued on, until the question as to whether the infant heir of J. S. Nelson, deceased, will recover the six acres he has sued for, is determined. If these six acres are lost, and it is true that upon them are situated the buildings, orchard and garden, and that they are of the value suggested by appellant in his answer, or even approximate that amount in value, it may be proper to rescind the contract, instead of compelling the payment of the purchase money.

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

Stevenson & Myers, for appellant.

J. L. Corbin, for appellee.

J. C. SMALL, ADM'R, *v.* J. C. CALHOUN, ETC.

Bills and Notes—Amount of Recovery.

In an action on a note, the amount of recovery, after deducting certain set-offs and credits, stated.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 10, 1873.

OPINION BY JUDGE PETERS:

By the writing sued on the obligors therein promised twelve months after date to pay the intestate, B. Small, guardian for Mary C. Smedley, seventeen hundred and sixty-six and 38-100 dollars, with interest from date, and agreed if the debt was not paid promptly when due the interest should be paid annually, or bear interest from the time it was payable. The interest, therefore, by the terms of the writing, if not paid at the end of each year, became as principal and bore interest.

From the evidence it appears that intestate petitioned the board of councilmen to improve the street and sidewalks fronting his property, and a man of his name, who we may assume was the man who presided as chairman of the meeting when the petition was presented, ordered the petition to be received and referred; and afterwards, when the improvements had been completed, the esti-

mates made, and the owners of lots fronting the improvements ordered to pay the costs, and the claim therefor on the intestate had been assigned to Calhoun and payment demanded, he promised to settle, recognized it as a just subsisting debt, and in effect promised payment. We, therefore, conclude that for $466.75, as of date September 1st, 1858, appellees were entitled to credit on the debt.

Appellees are also entitled to a credit for the amount of taxes as claimed upon the list filed with the answer, less $168.86, for which appellant exhibited a receipt dated June 8, 1868.

After taking the amount for which the note was executed, calculating the interest and making it principal at the end of each year, and then taking off all proper credit, there appears to be due to appellant the sum of ninety-two dollars with interest from the 1st of September, 1868, until paid.

Wherefore, the judgment is *reversed* and the cause is remanded with directions to render judgment in favor of appellant against appellees for the sum of ninety-two dollars with interest at the rate of six per cent. per annum from the 1st of September, 1868, till paid and his costs.

L. D. Husband, for appellant.

Biggor, for appellees.

COMMONWEALTH, FOR USE OF LUCY WHITE, *v.* BEN SANDERS, ETC.

Recognizances—Liability of Sureties on Bond.

Where a defendant in a bastardy proceeding entered into a recognizance to appear in court on the first day of the next term of the court and abide and perform the judgment of the court, and did appear and responded to the judgment of the court by surrendering himself to the jailor of the county and remaining in jail until regularly discharged as an insolvent debtor, there is no breach of the recognizance whereby his surety is rendered liable.

Recognizances—Undertaking of Sureties on Bond.

A surety on a receognizance bond simply undertakes that no loss shall be sustained by the plaintiff or the commonwealth because of the release of the defendant from custody, and that the defendant shall at all times hold himself subject to the law as though he were confined in jail.

Opinion of the Court.

APPEAL FROM MERCER CIRCUIT COURT.

March 11, 1873.

OPINION BY JUDGE LINDSAY:

The conditions of the recognizance to be entered into by a party proceeded against upon a charge of bastardy are, that he will appear in the county court of the county in which the warrant issued on the first day of the succeeding term, and abide by and perform the judgment of said court. Section 3, Act June 3d, 1865. Myers Supplement page 63.

Should the accused fail to appear as required by his recognizance, and fail to respond to and satisfy any judgment that may be rendered, the bond shall be forfeited and judgment rendered thereon. Ibid, section 5.

If the accused is adjudged the father of the bastard child, he shall enter into bond with good security, to be examined by the county attorney and approved by the court, conditioned for the payment of the sums adjudged in each installment as the court shall direct, and in case of his failure to enter into such bonds, the court shall commit him to jail, there to remain until he shall give the bond, pay the money or be discharged as an insolvent debtor. Ib., Sec. 10.

In this case Ben Sanders, the party charged, did appear, and respond to the judgment of the court against him, by surrendering himself to the jailer of the county, and remaining in jail until regularly discharged as an insolvent debtor.

There having been no breach of the undertaking of his surety, the latter can not be compelled to satisfy the judgment in the case.

The object of the recognizance is to secure the appearance of the accused, and his obedience to such orders as the court may legally make in the progress of the trial, and in the enforcement of such judgment as may be recovered against him.

If he had failed to give the recognizance it would have been the duty of the county judge to commit him to jail, there to remain until it was given, or he discharged according to law.

His bondsman or surety undertook that no loss should be sustained by the complainant or by the commonwealth in case of his release from custody, and that he at all times would hold himself subject to the law as completely as though he was confined in the jail.

Here no loss has been sustained by any one, and all the orders of the court have been enforced in the exact manner they could have been had no recognizance been given. Such being the facts the surety had incurred no liability, and the proceedings against him upon the alleged forfeiture was properly dismissed.

Judgment *affirmed.*

J. B. Thompson, John Rodman, for appellant.

C. A. & P. W. Hardin, for appellee.

CLARK & DUNCAN, ASSIGNEES OF BANK OF BOWLING GREEN, *v.* HINES AND THOMAS.

Bills and Notes—Presentation for Payment.

It was held that the drawers of bills were not discharged from liability to the payee because of the failure to present the bills to the drawee for payment.

APPEAL FROM WARREN CIRCUIT COURT.

March 12, 1873.

OPINION BY JUDGE PRYOR:

There was no attempt to sustain the plea of payment by any proof whatever.

Hines and Thomas were the drawers of both bills, and obtained the money on them by a sale and transfer to the Bank of Bowling Green.

The bills were addressed to R. H. Robinson, Louisville, Ky. The paper has long since matured and no part of the money has has ever been paid by the appellees. Robinson had no funds of the appellees with which to pay any part of the debt, or, if he had, it is conceded and also proven that every dollar of the funds he had in his hands belonging to the appellees has been withdrawn by them, and it is now argued by counsel that, because the paper was not presented to Robinson for acceptance the drawers are discharged from all liability.

The appellees have sustained no loss by reason of the failure

of the appellant to present the paper for acceptance. It is not pretended that Robinson owes them one cent, but is admitted that the drawers have received every dollar from Robinson with which they intended the paper should be taken up.

If the appellants should institute an action against Robinson no recovery can be had for the reason that he has never accepted the paper, and for the additional reason that all the funds he had belonging to Hines and Thomas have been paid them; and yet Hines and Thomas say: "Although we withdrew the funds and have never paid you your money, still we are released because you failed to present the two bills for acceptance.

Upon the facts shown there is no doubt but what the appellant was entitled to a judgment. 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.

Rodes & Clar, J. K. Underwood, for appellants.

Warner Underwood, for appellees.

THOS. MCILVOY *v.* W. E. SELECMAN.

Appeal—Trial de Novo.

An appeal to the circuit court from an election contest board must be tried de novo, and it is not required that the appeal be taken to the circuit court by bill of evidence and bill of exceptions, as no such method of appeal from such a board is prescribed by law.

APPEAL FROM WASHINGTON CIRCUIT COURT.

March 13, 1873.

OPINION BY JUDGE PETERS:

The parties to this controversy were, in 1870, opposing candidates for the office of attorney for the county of Washington. The board for examining the poll books for the county after the election gave the certificate of election to appellee.

Thereupon appellant contested the election and the board fixed by law for determining the contest, after an elaborate in-

vestigation of the merits of the contest, concurred with the examining board and awarded the certificate to appellee.

Appellant, feeling himself aggrieved by the last decision, appealed to the circuit court. And appellee moved that court to dismiss the appeal on the grounds:

First. That appellant had failed to file in court an authentic copy of the record of the proceedings before the contesting board.

Second. That no bill of exceptions was prepared or signed, or note of record made by said contesting board, although much proof, both oral and written, was heard on the trial before said board.

Third. That the appeal was not taken in manner and form required by law.

The motion was sustained and the appeal dismissed, and of that ruling appellant now complains.

The first question to be determined is, was the appeal properly dismissed?

An act of the legislature, entitled an act to amend Sec. 4, Article 7, Chapter 32, of the Revised Statutes, approved March 21, 1870, reads as follows:

"Section 1. That Sec. 4 and its subsections, Article 7, Chapter 32, of the Revised Statutes, be so amended that any person in interest, feeling himself aggrieved by the decision of the board whose duty it is to decide contested elections under said section 4, shall have the right to appeal from the decision of said board to the Circuit Court of the county in which said contestant resides, and from thence to the Court of Appeals."

This act took effect from its passage (1 Sess. Acts 138).

Section 4 and subsections, Article 7, Chapter 32 of the Revised Statutes, to which the foreging act is an amendment, provides who shall constitute the board for determining a contested election of officers elected by the voters of a county, how such board shall be organized, the mode of procedure, and its duties. Subsection 2 provides that the decision of the board shall be given in writing and signed in triplicate, one copy to be entered on the minutes of the court, another handed to the successful party, and the other, when necessary for obtaining a commission, forwarded by mail to the secretary of state.

The amendatory act quoted secures to a party interested an appeal to the Circuit Court without prescribing the mode of trial

in that court, and whether such appeals are to be tried *de novo,* or, as appeals are tried in this court, must be determined by the analogies of the law.

If the case is to be tried in the Circuit Court, as strictly an appellate tribunal, then it must be tried on a bill of evidence and a bill of exceptions, containing all the evidence heard on the trial before the board of triers, the legal question then decided and exceptions properly taken to the rulings on the questions there and signed and certified. This board is not a court of record. We have no statute prescribing how bills of exceptions shall be made out, signed and certified by said board so as to give them verity, and such tribunals were unknown to the common law. There is, then, no mode known by which the case can be made up and prepared for the Circuit Court, as appeals are tried in this court. Therefore, from the necessity of the case, the appeal in the circuit court must be tried *de novo.*

It results that the court below erred in sustaining appellee's motion and in dimissing the appeal. Wherefore, the judgment is *reversed* and the cause is remanded for further proceedings consistent herewith.

The chief justice not sitting.

Knott, McElroy, for appellant.

McKay, Bush, for appellee.

PETER TURPIN *v.* COMMONWEALTH.

Removal of Causes—Trial of Negro.

A motion to transfer a criminal case against a negro pending in the county court to the United States Court, was held properly overruled, since jurisdiction was in the state court.

APPEAL FROM JESSAMINE CIRCUIT COURT.

March 13, 1873.

OPINION BY JUDGE LINDSAY:

If the United States Courts ever had jurisdiction to try persons charged with offenses against the laws of Kentucky, a

question not necessary to decide, this court knows judicially that since the passage of the act of assembly making negroes competent witnesses, the United States District Court in this state has refused to entertain jurisdiction of indictments (found by grand juries in the state courts) against negroes for such offenses.

If the motion in this case to transfer to the federal court had prevailed, the prosecution would undoubtedly have been remanded to the state court by that tribunal. It follows, therefore, that no matter what may have been the proper construction of the law "aforetime," that the motion in this case did not oust the Jessamine Circuit Court of its jurisdiction.

Judgment *affirmed.*

W. Brown, for appellant.

———, *for appellee.*

BEN GOODEN *v.* R. P. GRESHAM.

Appeal—Final Judgment or Order.

The overruling of defendant's motion to dismiss the proceedings and set the same aside, is not a final order or judgment from which an appeal can be prosecuted.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

March 13, 1873.

OPINION BY JUDGE PETERS:

The order appealed from in this case reads as follows:

"This cause, having been submitted to the court on motion of the defendant to dismiss the proceedings herein and set aside the same, and the court now being sufficiently advised thereon, overruled said motion, to the overruling of which the defendant excepts and prays an appeal to the Court of Appeals, which is granted."

For appellee, it is insisted, that this is not a final order or judgment from which an appeal can be prosecuted to this court.

In *Maysville & Lexington Railroad Co. v. Punnett,* 15 B. Mon. 38, this court held that a final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original position. Now it is perfectly manifest that in overruling appellant's motion to dismiss the proceedings and set aside the same, the court below did not terminate the action, decided no matter litigated, and it did not operate to divest the party of any right or deprive the court of the power to place the parties in their original position after the expiration of the term, because the court could, either at that or the next term of the court, have gone on and disposed of the case just as if no such order had been made and, indeed, could, at any time, have reconsidered said motion. But if appellant's motion had prevailed, all the court could have done would have been to dismiss his appeal on his own motion, for the jurisdiction of the circuit court being strictly appellate, if on trial of the appeal it should have adjudged that the county court erred. It could have only reversed the judgment and remanded the cause for such judgment to be rendered as it might have directed. *Helm, etc., v. Short, etc.,* 7 Bush 623.

Appeal dismissed for want of jurisdiction.

Scott, Holman, Bradley, for appellant.

James, for appellee.

WALTER C. WHITAKER *v.* E. M. GAULT.

Parties—Necessary Parties.

In a suit on a traverse bond, it was held that it was not necessary that all the obligors be made parties.

Principal and Surety—Traverse Bond.

A surety on a traverse bond was held liable because the traverse was not prosecuted with effect.

APPEAL FROM JEFFERSON CIRCUIT COURT.

March 14, 1873.

OPINION BY JUDGE LINDSAY:

It is too late now to inquire whether the traverse of the finding of the jury in the forcible entry and detainer case of *Gault v. Price* should have been prosecuted to the county court instead of the Court of Common Pleas. The judgment of the latter court was affirmed on appeal by this court, and that judgment is now conclusive as to the validity of the bond sued on. It was not necessary that all the obligors to the bond should have been sued. Appellee had the right to sue all or any of them.

The answer presented no legal ground of defense, and the judgment upon the facts as to damages sustained seems to be for the proper amount.

It is therefore affirmed. In response to petition for rehearing, we would say, that the record shows that the traverse bond was not taken by the Common Pleas Courts, but by Matlock, the justice, who was the proper person to take it. The condition of the bond is that Price and Whitaker would pay to Gault all damages he might sustain by reason and in consequence of the traverse if it should not be prosecuted with effect. It was not prosecuted with effect, hence Whitaker, the surety, is liable.

Petition overruled.

John C. Walker, for appellant.

Bodley & Sumrall, for appellee.

A. J. KNOWLES, ADM'R, *v.* Z. LEARS.

Arbitration and Award—Unanimity of Decision.

Where a cause is submitted to arbitrators and no umpire is selected, the arbitrators are substituted for a jury, and the same unanimity is necessary in making an award as is required of a jury in rendering a verdict.

APPEAL FROM WARREN CIRCUIT COURT.

March 16, 1873.

OPINION BY JUDGE LINDSAY:

The matters in litigation in this action were submitted "to the arbitration of P. Hines, William Cook and J. M. Donaldson."

Opinion of the Court.

This court is of opinion that it was necessary that all three of these gentlemen should concur in the award to make it binding on the parties.

Section 1, Chapter 3, Revised Statutes, authorizes the submission of controversies to one or more arbitrators, or to two and the umpire. Here, the submission was to arbitrators alone. There was no umpire named. We must presume, and the law seems to be based upon the idea, that where no umpire is selected, the parties substitute the arbitrators for a jury, and the same unanimity necessary to enable a jury to render a verdict is necessary to authorize arbitrators to make an award.

Section 3, Chapter 21, Revised Statutes, does not, in our opinion, apply to arbitration. The award in this case should have been set aside.

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

Bates & Wright, Bush, for appellant.

Dulaney, Halsell, for appellee.

D. A. WATSON *v.* WASH. SPRADLING, EX'R.

Guardian and Ward—Confirmation of Sale.

The court cannot at the instance of a guardian have a void sale by the guardian confirmed, in a suit to which the wards were not parties, upon the ground that it would be to the interest of the wards, where the purchaser at the judicial sale is resisting confirmation.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 17, 1873.

OPINION BY JUDGE LINDSAY:

The sale to Watson by the marshal of the Chancery Court was absolutely void as to the children of Louisa Spradling, they not having been made parties to the suit in which the judgment of sale was rendered. Watson was, therefore, entitled, when the marshal's report was filed, to have the sale set aside and his bonds canceled.

The only remaining question is, whether the chancellor had the power by subsequent proceedings to perfect Watson's title and compel him to take and pay for the property. He was not made a party to the amended petition bringing these children before the court, and, so far as appears from the record, took no part in the preparation of this branch of the litigation. No special importance, however, is attached to either of these facts, except that they show that he did not consent to any of the steps therein taken.

The will of Washington Spradling, deceased, charged the estate devised to Louisa Spradling for life with remainder in fee to her children, with the payment of one-fourth of his indebtedness.

It was the duty of the chancellor, upon the petition of the executor, to decree a sale of so much thereof as might be necessary for this purpose, but this could not be done so as to divest the children of title to the portion sold without making them parties to the suit. The judgment of March 12, 1872, attempts to confirm a sale thus made, because it appears to be beneficial to them. It is to be observed, too, that this is not done upon the application of the children, nor of their statutory guardians, but upon the petition of the executor of Washington Spradling, deceased, whose interest is necessarily antagonistic to theirs. Having failed to make them parties to this original petition as he should have done, he now seeks to divest them of title and to compel the purchaser to accept title under a judgment based upon the idea that it is to their interest that they should be compelled to confirm this void sale.

It seems to us that the chancellor possesses no such power as that here attempted to be exercised. If the executor, and Louisa Spradling, and Watson, the appellant, had entered into a private contract of sale, exactly similar in terms to that made by the marshal, no court upon this joint application would have rendered a judgment conveying the interests of these infants to the purchaser, no matter how beneficial the sale might be to them. The judicial sale is of no higher dignity, so far as they are concerned, than would have been the private contract of sale.

The proceedings are in no wise analogous to proceedings for the sales of infants' real estate under the provisions of Chapter 86 of the Revised Statutes.

In those proceedings in contemplation of law, the sales are made upon the application of the infants. The chancellor makes and confirms them because the legal disabilities of the owners prevent them from acting in person. The purchaser buys from the infant, or from the chancellor who represents the infant. Like all other contracts with infants, they bind the adult purchaser, but may be avoided by the infant vendor. If the chancellor finds that by reason of some irregularity in the proceedings he cannot pass the title to the purchaser, he may, under the amendments to said chapter in certain cases, by subsequent proceedings cure these defects and complete the sale by a conveyance. In other words, he has the right to refuse to rescind the executory contract, upon the motion of the purchaser, whenever he finds it possible to tender him a good and perfect title. It was upon this theory that the constitutionality of these curative statutes was upheld. *Thornton v. McGrath,* 1 Duval 350. As was said in the case of *Woodcock v. Bowman,* 2 Duval 508: "The purchaser has no right to complain that, all of his objections being obviated and all ground of apprehension being removed, he is compelled to take the title which he purchased. He is not forced to make a new purchase, but to comply with the terms of that which he voluntarily made; and as the title which he purchased is secured to him, the enforced payment of the price he had agreed to pay is not taking his property without consent or compensation."

Watson did not purchase the title of the infant children of Louisa Spradling. The chancellor did not attempt to sell it. He made no purchase from them, and the judgment in this case recognizes that fact, and confirms the sale made before they were parties to the suit.

Watson is compelled to pay the purchase money upon the ground that the judgment of confirmation passed to him the title of the infants. If this be correct, he is compelled to make a new purchase. The infants are required to sell, although no one is authorized to represent them in the sale be made, and Watson is forced to purchase, although he is all the while protesting against it.

Besides all this, we are aware of no statute or rule of equity practice authorizing the proceedings had upon the amend-

ed petition filed after the marshal's report of sale. Prior to the passage of the amendments to Chapter 86, Revised Statutes, courts of equity did not presume to cure defective sales of infants' real estate, and their right to do so has always been based upon these statutes.

The judgment confirming the sale to Watson and the order requiring him to pay the purchase money are both reversed. Upon the return of the cause the marshal's report as to his purchase will be set aside and his bonds will be canceled.

J. G. Wilson, for appellant.

Harrison, for appellee.

ELIZA MOORE, ETC., *v.* JOHN LITSEY.

Insolvency—Right of Creditor to Follow Debtor's Money.

Where a debtor invests money for the benefit of his wife and children, which ought to have been applied in the discharge of his debt, the creditor has the right to follow the money, notwithstanding several sales and re-investments.

APPEAL FROM SPENCER CIRCUIT COURT.

March 18, 1873.

OPINION BY JUDGE LINDSAY:

From a careful inspection of the record, we are constrained to conclude that the tract of land held by Vandyke as trustee for Mrs. Moore and children was in part paid for with moneys that ought to have been applied to the satisfaction of the appellee's claim. These moneys were invested by the debtor for the benefit of his wife and children, long after the debt to Litsey was contracted, and the latter has the right to follow them, notwithstanding the several sales and reinvestments.

The elaborate and conclusive opinion of the circuit judge relieves this court from the necessity of reviewing the testimony.

Appellants have not the slightest ground for complaint. The judgment must be *affirmed.*

A. P. Harcourt, for appellant.

Jas. H. Beauchamp, Thos. J. Barker, for appellee.

ABNER DAVIS *v.* N. C. POWELL.

Judgment—Correction—Petition.

Where a judgment has been affirmed on appeal to the Court of Appeals, a petition will not be entertained for correction of the judgment, in the absence of such fraud as will authorize relief.

Appeal—Law of Case.

An opinion of the Court of Appeals is the law of the case in all subsequent proceedings therein and all subsequent appeals to the Court of Appeals involving the same controversy.

APPEAL FROM UNION CIRCUIT COURT.

March 18, 1873.

OPINION BY JUDGE PRYOR:

This is an attempt to modify a judgment rendered in the Union Circuit Court in the year 1866, by which the rights of the parties to that action were finally settled as to the land in controversy.

That judgment was also affirmed by this court and if there was any error in the record, or mistake committed in drafting the judgment, it should have been corrected on that appeal. It will not do to say after the court below as well as this court have passed upon the rights of parties that there was a mistake in the judgment as to the amount to be recovered or to the boundary of land in dispute and therefore a petition will be entertained to correct it. If this practice was tolerated there would be no end to litigation. The alleged fraud is not of that character as would authorize the chancellor to disturb the judgment. The allegation upon that subject is that the appellant knew where the true boundary line of the land was, and failed to disclose it, and that he had executed a bond for title in which this disputed boundary was recognized as existing where the appellee claimed it to be. This may all be true and must be so regarded upon demurrrer, and still it presents no ground for relief. If the discovery of this cumulative testimony had been presented by petition within three years after the judgment in 1866, it would not have authorized the chancellor to set aside that judgment. The bond in which these corner trees are described was executed in 1839, long before the land was possessioned, and the appellant himself might then have been ignorant as to the true boundary. The fraud

consists in one allegation only, that the appellant knew of testimony that the appellee should have been informed of by him and as he failed to do so it is cause for reviewing the former judgment. When this case was here the second time, upon an effort made in the court below by motion to correct the judgment upon the ground of mistake, this court said: "The legal effect of the affirmance was that there was no error, clerical or judicial, and that judgment is now conclusive between the parties and can not be altered by this court or reviewed by the circuit court for the imputed errors." If this mistake existed why did not appellee have it corrected on the original appeal; it was as plainly to be seen then as now, and no reason whatever is given for this omission. The appellant did not present it, and there is no denial of the fact that it was then error, conceding the case to be as presented by the demurrer.

This judgment was final and can not be disturbed upon such facts as are presented by the complaint.

The demurrer should have been sustained as the petition presents no cause of action. The judgment is reversed and cause remanded with direction to dismiss it.

L. Hord, for appellant.

Bennett, for appellee.

JAMES GUTHRIE'S EX'R *v.* J. H. MCGOODWINS.

Landlord and Tenant—Oral Agreement as to Rent.

Where a written lease does not fix the rent, it is competent for the lessor and the lessee to orally agree upon and fix the rent.

Landlord and Tenant—Rental—Valuation of Property.

Where the lessee is sued for rent, he may show satisfaction of the claim by proving that he paid the rent as agreed upon, by arriving at the value of the property in a different manner from that adopted in the written lease.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 18, 1873.

OPINION BY JUDGE PRYOR:

The lessor and lessee in this case, instead of having a valuation placed upon the property in accordance with the provisions of the

written lease, orally agreed upon a fixed sum as its rental value. This parol agreement as to the consideration was not a contract for the sale or leasing of any real estate, but only an agreement as to what the consideration should be. The contract of leasing had already been reduced to writing and although a certain mode had been agreed upon by its terms by which the annual renting was to be ascertained, still it was entirely competent for the parties to agree by parol as to what sum should be paid without resorting to the means provided by the contract and this in no manner affected the validity of the lease. In the case of *Gully v. Grubbs,* 1 J. J. Marshall 387, it was said that the contract for the sale of the land being in writing it was not necessary that the promise to pay for it should be in writing, and it is the recognized doctrine in this state that contracts, even within the statute of frauds, may be relied on as a defense to an action and when sued for the rent it was proper to permit the appellee to show satisfaction of the claim by proving that he had paid the rent as agreed upon by the lessor and himself, although it may appear that the two arrived at the value of the property in a different manner from the mode adopted by the writing. *Roberts v. Tennell,* 3 T. B. Mon. 247; *Berry v. Graddy, Adm'r,* 1 Metcalfe 553.

The testimony of the agent of Guthrie leaves no reason to doubt that such an agreement was made as is relied on by the appellee. The appellee having paid the money into court must leave it to the chancellor to say who is entitled to receive it, the executor or the heirs.

Judgment *affirmed.*

Arbegast, for appellant.

Barr, Goodloe, for appellee.

OWSLEY COUNTY COURT *v.* LEE COUNTY COURT.

Counties—New County—Liability for Taxes.

Where a new county is created from territory which formerly belonged to another county or counties the detached territory is not liable for taxes levied by the county from which it was detached, but only to levies by the new county.

APPEAL FROM LEE CIRCUIT COURT.

March 19, 1873.

OPINION BY JUDGE PRYOR:

The character of the proceeding adopted by the appellant is proper if any such right has been manifested by the petition as authorizes a recovery.

The act of March 9, 1854, 2 Revised Statutes 251, is not, in our opinion, to be applied to any boundary of land taken from one or more counties for the purpose of forming a new county. The act reads: "that whenever a change has been, or shall be made in the boundary of any county or counties of this commonwealth after the 10th of January in each year, whereby a portion of the territory of one county is added to another county, the state revenues and county levy shall be assessed and collected for such year in the same manner as if such change had not been made," etc.

The reason for the enactment of this statute was doubtless to secure for the county losing the territory all the revenue, or rather the county levy, for the purpose of relieving it of its indebtedness which had been created on the faith and credit of its entire population. Whilst this benefit results to the county losing its population, it works no injury to the county to which the territory is attached, as its indebtedness must have also been created alone upon the faith and credit of those at the time living within its boundary.

In regard to the formation of new counties the inhabitants must necessarily assume a heavy burden in the way of taxation for the purpose of erecting their public buildings, and in order to enable them to do this there seems to have been no reservation by any enactment to the counties out of which the new counties had been created enabling the former to proceed with the collection of the county levy in order to meet their indebtedness. It is a sacrifice that such counties must make, viz., the loss of their territory and revenue for the public good. If any other rule should be adopted the new county would be unable to collect one dollar of revenue for the first year of its existence. Whether the county from which the territory has been detached is compelled to pay allowances made to those living in the deducted territory for public improvements made in that part of the old county that at the time of the construction of

the improvement belongs to the new county is a question not necessary to determine in this proceeding. The act creating the county of Lee made all those within its boundary subject to the jurisdiction of the courts answerable to its orders in regard to the county levy, and the assessment and levies made for county purposes they were compelled to pay.

The demurrer was properly sustained and the judgment is therefore *affirmed.*

Jno. L. Scott, James M. Sebastian, A. H. Clarke, for appellant.

James, H. C. Lilly, for appellee.

MORGAN MILLER *v.* J. M. BRUNSWICK & BRO.

Sales—When Purchaser Becomes Bailee of the Property.

Where the purchasers of property got possession of it before the sale was consummated, they were made bailees or custodians of the property which might be reclaimed by the owners if the purchasers should refuse to make partial payment and execute a mortgage for the residue, according to the contract of purchase.

APPEAL FROM McCRACKEN CIRCUIT COURT.

March 19, 1873.

OPINION BY JUDGE HARDIN:

Whatever might have been the relative rights as to priority of the appellant, as landlord, and the appellees as mortgagors of Settle and Allensworth, if the billiard tables had been voluntarily delivered to the latter by the appellees or their agents, and placed upon the leased premises before the execution of the mortgage, yet as the evidence satisfied us that by the terms of purchase the ownership of the property was not to vest in Settle & Allensworth till they paid part of the price and mortgaged the tables for the residue, and that the appellees' rights under this contract were not waived by themselves or their agents, although it seems the tables were by some means removed from the wharf boat before the lease commenced. We must consider such possession as Settle & Allensworth may have had of the tables, before the mortgage was made, as that of mere

bailees or custodians, which might have been divested and the tables reclaimed by the appellees if the purchasers had not complied with their agreement by making the payment and the execution of the mortgage.

This being so, no landlord's lien could have attached unless at the very instant the legal title became vested in Settle & Allensworth for the purpose of being at once returned to the appellees, by means of the mortgage as security for their debt; and the delivery and execution of the mortgage and notes being simultaneous and materially dependent parts of one and the same transaction, there is obviously no reasonable ground for the position assumed in the argument for the appellant that a lien in his favor could have attached between the vesting of the title in Settle & Allensworth and the completion of the transaction by the execution of the mortgage.

The judgment is *affirmed.*

Bidwell, for appellant.

Nigger &Mop, for appellee.

HARVEY SANDERS, ETC., *v.* DANIEL WILSON.

Reformation of Instruments—Mutual Mistake, Proof of.

Where relief is sought on account of mistake, the mistake must be established by proof that it was mutual, and must be shown to the satisfaction of the court.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 20, 1873.

OPINION BY JUDGE PETERS:

That courts of equity have in some cases, on account of fraud or mistake, departed from the rule which excludes parol evidence to vary, or control written contracts, even when they have been executed, and make them conform to the true intention of the parties, is admitted. But if the relief be sought on account of mistake, it must be established that the mistake was mutual and the proof thereof must be clearly made out to the entire satisfaction of the court.

The evidence in this case fails to satisfy the requirements of the law. Mr. Barrett, the only witness who was examined on the subject of the alleged mistake, and who was present at the time the deed complained of was executed, as counsel for A. G. Walthall, and assisted in preparing it, says: "I think the parties (referring to Mr. and Mrs. Walthall) understood the settlement then made was a final settlement of that question, meaning the question of alimony. If there were any other matters in dispute between them, and then settled, I did not know it." This evidence shows that the deed accomplished all that the parties then contemplated, omitting no part of their agreement. It results, therefore, that the judgment must be *affirmed*.

James, Bush, Joyes, Hord, for appellant.

Pirtle & Caruth, D. English, for appellee.

A. C. THOMAS, ETC., *v.* COMMONWEALTH, ETC.

Taxation—Tax Collector—Liability on Bond.

In an action on a sheriff's bond as tax collector, the surety can not be held liable for defalcation of the sheriff, where a copy of the bond is filed, but it is not set out in terms or substance in the petition, it being alleged only that it was the duty of the sheriff as tax collector to account for and pay over the taxes collected, without alleging whether that duty is imposed by law or by covenant undertaken by the sheriff and his sureties.

Taxation—Suit on Tax Collector's Bond—Defect in Pleading.

A defect in a petition on the bond of a sheriff as tax collector, in failing to set out the conditions of the covenant and the breach on which the action is based, was not cured by an answer filed by defendants alleging that at the time the tax book went into the hands of the tax collector there was no law allowing damages for failure on the part of the tax collector to account for the taxes.

APPEAL FROM NELSON CIRCUIT COURT.

March 20, 1873.

OPINION BY JUDGE PETERS:

By an act approved January 7, 1871, entitled "An act in relation to the Bardstown & Louisville Railroad Company," it provided in

Sec. 1 that all taxes assessed in districts numbers one, five and nine, in the county of Nelson, for the paying the one hundred thousand dollars capital stock subscribed by the county court of said county for and on behalf of said districts to the Bardstown & Louisville Railroad Company, shall be due and payable to the treasurer as follows, viz.: "So much on the first day of September in each year as will be sufficient to pay the interest then due on said bonds, and the remainder of said taxes shall be due and payable to the treasurer on the first day of January in each year, and if the sheriff and other collecting office of said taxes fail to pay the same when due as aforesaid, he and his sureties shall be liable for the same with legal interest thereon from the time it should have been paid, to be recovered by suit on his bond in the name of the commonwealth for the benefit of the taxpayers of said districts and with ten per cent. on the amount of such defalcation."

Sec. 2 provides that it shall be the duty of the commissioners of the sinking fund to settle with the sheriff or other collecting officer of said taxes between the first day of December and the fifteenth of January annually; and if the amount found to be owing upon said settlement be not paid to the treasurer by the first day of February thereafter, said commissioners shall cause suit to be brought to the first term of the next court having jurisdiction for the recovery of the amount so owing, and its interest and damages aforesaid.

By the third section the sheriff, or other collecting officer, and his sureties are made liable for said taxes upon their bond executed for the collection of the county levy, and public dues of said county, and by the residue of the section the first section of an act entitled an act to amend the charter of the Bardstown & Louisville Railroad Company, approved October 3, 1861, is repealed.

This act took effect from its passage. 1 Session Acts Aug. 1871, §§ 6 and 7.

The third section of the act approved 3d of October, 1861, provides that if the sheriff or collector shall fail to collect the tax or refuse so to do according to law, or refuse to pay it over when collected, he and his sureties shall be liable to suit on said bond by motion, or at law in the circuit court having jurisdiction, for such defalcation, and ten per cent. damages on the amount. Sess. Acts 1861-62-63, pp. 64, 65.

By an act approved March 6, 1856, Sess. Acts 1855-6, p. 14, the

county court of Nelson County is authorized to impose a tax upon the real and personal estate in said Districts Nos. 1, 5 and 9, to pay the principal and interest of the debt created by said districts to aid in the construction of said railroad.

It is manifest from the foregoing statutes that the court of Nelson County was authorized by law to levy a tax on the real and personal property of the designated districts in said county, for the purpose of extinguishing the debt voluntarily imposed on said districts by the voters thereof, to appoint the sheriff of the county the collector of said taxes, the law making it his duty to settle with the commissioners of the sinking fund for said county and pay over at stated times the taxes which as collector it was his duty to collect, and in case of his failure to do as required, he and his sureties are liable to an action on his bond "In the name of the Commonwealth for the benefit of the taxpayers of said district" for such defalcation, with ten per cent. damages on the amount. These damages are allowed by the Act of October, 1861, *supra*, as well as by the one of January, 1871.

This action was brought in the name of the proper plaintiff against A. C. Thomas, sheriff of Nelson County, and Simon Humphrey, John G. Samuels, H. G. Thomas and Wilson Samuels, his sureties, April 10, 1871. On the bond executed by them on the 14th of February, 1878, by which they covenanted that said A. C. Thomas, sheriff of Nelson County, should by himself and deputies during the year aforesaid, collect, account for and pay into the treasury of the state, and to other persons entitled thereto, according to law, all taxes and public dues also received by him in the year, penalties directed, or authorized by law to be collected, or all fines and assessments within the county of Nelson.

The plaintiff below alleged in the petition that during the year 1870 the defendant was duly elected, qualified and entered upon the discharge of the duties of the office of sheriff of Nelson County, and on the 14th of February, 1870, executed the bond to the commonwealth in the court of said county, conditioned as required by law with the persons before named as his sureties, and the plaintiff avers that a copy of said bond was filed as a part of the petition marked "A."

It is then alleged that it was the duty of said Thomas, as sheriff and collecting officer as aforesaid under law by himself or deputies,

to collect, account for, and pay over to the treasurer of the Bardstown & Louisville Railroad Co. the railroad tax levied by the county court of Nelson County on the taxabel estate and property in Districts Nos. 1, 5 and 9, in said county, which were due and collectible in the year 1870. That on the 14th of January, 1871, the commissioners of the sinking fund of said districts made a settlement with the defendant Thomas as "sheriff" of the railroad tax for the year 1870, and there was then in the hands of said sheriff, due and unpaid, the sum of $7,838.45. A certified copy of said settlement was filed, marked "B."

The plaintiff then alleged that the defendant Thomas had failed to keep and perform his said bond, but had broken the same, and had wholly failed to pay over to said treasurer of the said Bardstown & Louisville Railroad the said sum due on said settlement or any part thereof, and concludes with a prayer for judgment for said sum of 7,838.45, with interest at the rate of 6 per cent. per annum from the 1st of January, 1871, till paid, and ten per cent. damages thereon for the non-payment of said sum.

It has been repeatedly decided by this court that where a writing is the foundation of the action, it must not only be filed with the petition, but so much of it must be set forth as will show that by reason of the alleged acts or omissions on the part of the defendant the plaintiff is entitled to an action, and to relief, and unless the contract is set out in terms or in substance for a breach of which the action is brought, the petition will be bad on demurrer. *Hill, etc., v. Barrett, etc.*, 14 B. Mon. 67; *Collins v. Blackburn*, Ib. 203; *Riggs, etc., v. Maltby & Co.*, 2 Met. 88.

In this case a copy of the sheriff's bond is filed but it is neither set forth in terms nor in substance in the petition. The only allegation is that it was the duty of said Thomas as sheriff and collecting officer as aforesaid to collect, account for and pay over, etc., without saying whether that duty was imposed by law, or whether it was a duty which he had covenanted to perform, and without an allegation that the sureties had covenanted that the sheriff should collect and pay over, etc., they could not be made liable for his defalcation. It is true by the Code of Practice all objection to a petition shall be deemed to be waived by the failure of the defendant to make the objection by demurrer or answer, except only the objection to the jurisdiction of the court over the subject of the action, and

the objection that the petition does not state facts sufficient to constitute a cause of action. Sec. 123. In this case it is obvious that the facts stated do not constitute a cause of action against the sureties.

And this defect is not cured by the answer which was filed by appellees in which they merely state that at the time the tax book went into the hands of the collector there was no law allowing damages for a failure on the part of the collector to account for the taxes, which certainly does not supply the defect in failing to set out the conditions of the covenant and breach for which an action accrued.

Wherefore, the judgment being a joint one, must be *reversed,* and the cause remanded with directions to award a new trial, with permission to appellee to amend the petition if application should be made therefor in reasonable time and for further proceedings consistent herewith.

E. I. Bullock, for appellant.

W. Johnson, for appellee.

CHAS. OBST *v.* THE CITY OF LOUISVILLE.

Municipal Corporations—Improvement Contract—Manner of Execution.

The law will not imply an obligation on the part of the city to pay for work procured to be done by the city's officers, unless the contract has been executed and approved as provided by the charter and the general ordinance regulating the manner in which such contracts shall be made.

Municipal Corporations—Approval of Engineer's Report—Liability of City.

The approval of the report of the city engineer and the issual of a warrant for the value of work done, does not commit the city to payment therefor, unless the work was undertaken as provided by the city charter and the general ordinance regulating the manner in which such contracts shall be made.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 20, 1873.

OPINION BY JUDGE LINDSAY:

The chancellor was compelled to refuse appellant relief as against the city of Louisville. The contract clearly and unmistakably sets out the work to be done. The city engineer had no power to settle its terms, nor to authorize appellant to do more work than the city had employed him to do. His good faith can not change the law.

The city of Louisville can bind itself by contracts for the improvement of its streets in but one way, and that is pointed out by its charter. The law will imply no obligation upon the part of the the charter and the general ordinance regulating the manner in which city to pay for work procured to be done by the city's officers, unless the contract has been executed, signed, and approved as provided by such contracts shall be made. *Murphy v. City of Louisville,* Manuscript Opinion, 1872.

The rules of law applicable to private corporations do not in matters of this kind apply to municipal or public corporations.

The approval of the engineer's report, and the issual of the warrant against Richardson for the value of the work did not commit the city to its payment.

That the general council, with the approval of mayor, might make an appropriation of the city treasury to pay for the extra work, done at the instance of the city engineer, may be conceded, but inasmuch as no such appropriation has been made, the courts have no power to interfere.

The judgment must be *affirmed.*

Harrison, for appellant.

Burnett, for appellee.

HANKS & PORTER *v.* W. A. STEWART, ETC.

Attachment—Money Due School Teacher from State.

Money due a teacher in the common schools from a state can not be attached in the hands of the school commissioners.

APPEAL FROM OWEN CIRRCUIT COURT.

March 21, 1873.

OPINION BY JUDGE PRYOR:

This court, in the case of *Tracy & Lloyd v. Hornbuckle and Wife,* 8 Bush 336, decided the identical question involved in this case.

Money due a teacher of a common school from the state can not be attached in the hands of the school commissioner.

Judgment is *affirmed.*

Craddock & Roberts, for appellants.

J. W. Green, for appellees.

DUBOY & BROS. *v.* DANIEL F. ROBERTS.
YOUNG'S ADM'R *v.* DANIEL F. ROBERTS.

Judgment—Validity of Process.

In an action in Kentucky on judgments rendered in the state of Pennsylvania, where there is no evidence showing the manner of service of process required by the law of Pennsylvania, the court must adjudge that the judgments sued on are void, the service not being sufficient under the law of Kentucky.

Process—Return of Summons—Judgment.

The return of a sheriff indorsed on the summons implies that he has done his duty, and is sufficient to authorize a judgment.

Judgment—Validity—Execution of Summons—Return.

In an action in Kentucky on judgments rendered in Pennsylvania, the court will not hold a judgment invalid because of the sheriff's failure to state how he executed the summons.

APPEAL FROM ——— COURT.

March 21, 1873.

OPINION BY JUDGE PRYOR:

In all the actions (three in number) instituted by Duboy & Bros. against the appellee, the latter filed his plea of nul tiel record and also a special plea denying the jurisdiction of the court to render a personal judgment against him, as there was no service of process. Upon the hearing of the cause the statute of Pennsylvania was read authorizing a judgment in personam after the actual service of the summons, or if the defendant can not be conveniently found, by leaving a copy with an adult mem-

ber of his family. In the action (No. 8198) the court below rendered a judgment against the appellee, as the record in the proceedings in Pennsylvania where the judgment was rendered, shows in that case an actual service of the summons.

In the actions, Nos. 8196 and 8197, a judgment was rendered against the appellant, from which this appeal is prosecuted.

By the law of Pennsylvania, where the judgments were rendered, no declaration is necessary to be filed in order to obtain a summons against the party to appear and answer. The account or claim is filed upon which the judgment is sought, and a summons issued against the party charged, and upon the failure of the party to file what is termed an affidavit of defense within the time prescribed by law, a judgment is rendered upon motion only. In these cases the claims seem to have been filed and constitute a part of the Pennsylvania record. Summons were issued and executed by leaving a copy with an adult member of defendant's family. No affidavit of defense appearing, and a judgment for the plaintiff. In the absence of any testimony showing the manner of service, by the law of Pennsylvania this court must adjudge that the judgment was void, as the law of this state, which would then constitute the only guide, does not authorize a personal judgment on such service. The law of Pennsylvania, however, does, as the statute read upon the hearing shows, and also the testimony of an experienced lawyer practicing in that state at the time. In the case of *Rope v. Heaton* there was no service of the summons, as the sheriff failed to state that he had left it, or a copy, with the family of each of the defendants, and also failed to state that he had left it with an adult member of either family.

If the appellee in this case had appeared in the Pennsylvania court and moved to quash the return of the sheriff, the court would have refused to entertain the motion, as the return shows that a copy was left with an adult member of the defendant's family. He might have required the sheriff to amend his return in order to show that the person with whom it was left was not at the age of discretion, but the return as made was such a service as is authorized by the law of Pennsylvania.

The court holds that where the return of the sheriff is endorsed on a summons executed, such a return implies that

he has done his duty, and is sufficient to authorize a judgment. Now a court in a sister state would hardly hold the judgment invalid because the sheriff failed to state how he executed the writ.

In the present case the return follows the Pennsylvania statute and must be held to be a sufficient service of the summons.

The case of *Rope v. Heaton,* of Missouri, fully sustains this view of the case. In the case of *Snyder v. Snyder,* 25 Ind. 399, it was held that the return of the service on the summons, "by leaving a copy at defendant's residence," was not service at common law, and the declaration after the judgment was held bad on demurrer because it was nowhere alleged that the service was sufficient and such as the law of Ohio authorized. With such an allegation in the declaration and proof of the statute sustaining it, there could have been no question in regard to it. It is entirely competent for the legislature to say by an enactment that a service by leaving a copy at the residence of the defendant with an adult member of his family should authorize a personal judgment. We have, in fact, a statute of this state, and upon which this court has frequently acted, where judgment after judgment in personam has been rendered without any petition, declaration or summons.

In proceeding against the sheriff and his sureties, judgment may be rendered upon a statement filed by the auditor of the amount due by the officer. Leaving a copy at the defendant's residence will authorize a personal judgment, if this mode of notice is permited by statute. The court, therefore, erred in dismissing appellant's claims 8196 and 8197. The allegation that the defendant was at the time a resident of the state was sufficient, and subjected him to the law of the place of his residence with reference to such a proceeding as this. The judgments, therefore, in actions 8196 and 8197, are both reversed and cause remanded with directions to allow the appellant a new trial, and for further proceedings consistent herewith. The clerk will not be allowed any costs for copying record, as there is no index.

The case of Young's Admr. v. same party (Robert's appellee), presents a different question. In this case there was no declaration filed, no summons issued, no process served, either actual or or by attorney, and still a judgment was rendered for three

from Stennan to Symones was voluntary and fraudulent, and the burden of proof was on the appellee to show that the consideration alleged to have been paid was in fact received by Stennan, or in other words, that it was a bona fide conveyance. Where there is no charge of fraud the conveyance as between the parties, and as to strangers will be sustained, but where fraud is charged the recitals in the deed can not be alone relied on to sustain its validity as against third parties. *Edwards v. Ballard,* 14 B. Mon. 233; *Whitaker v. Garnett,* 3 Bush 402.

The deed for this property in controversy expresses the consideration of one dollar and in order to sustain it a bond is filed with the answer executed three years previous to the execution of the deed between the same parties, acknowledging the consideration of fourteen hundred dollars in cash paid for the property. Although the execution of this bond is proven, still its recitals, if regarded as evidence, are not conclusive as against the appellant, but on the contrary under the pleading and proof, in this case is entitled to but little weight.

The deed made three years after the execution of this bond expresses the consideration only of one dollar in hand paid and it is a little remarkable, to say the least of it, that with a consideration of $1,400, paid as stated in the bond, a deed should have been accepted reciting only this nominal consideration. It seems also from the evidence that the appellees was in no such pecuniary condition as to enable him to make investments in real estate, without ever taking possession of it or asserting any claim whatever until this suit was instituted.

The cross-petition alleges that he failed to take possession of the property or list it for taxation, and the answer denies that he failed to take possession or failed to list for taxation, and makes no affirmative statements whatever in regard to it.

Such a response by the defendant is equivalent to an admission of the truth of the statements made in the petition and constituted no defense. It is also shown that other business transactions existed between Stennan and the appellees and that a mortgage had been executed to the appellees in order to secure them in other moneys.

Stennan was in failing circumstances, and the appellees in no condition to be so liberal with his means as to invest his money in this

way; and when the charge of fraud is directly made, and evidence taken to sustain it, content himself with the alleged recitals in the deed and bond alone as proof of the consideration paid.

The judgment of the court below is reversed and cause remanded with directions to enforce the lien of the appellant as against the appellee upon the property, and to annul the deed as fraudulent, and for further proceedings consistent with this opinion.

Harrison, for appellant.

Pirtle & Caruth, for appellees.

JACOB STOEPLER *v.* GEORGE MERKLE AND OTHERS.

Insolvency—Satisfaction of Pre-existing Liabilities.

Where the claim of plaintiff for $2,000 of the $5,000 alleged to be owing him originated after the act of insolvency was committed and the writing evidencing it recorded, all pre-existing liabilities must first be satisfied.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 26, 1873.

OPINION BY JUDGE PRYOR:

We perceive no error in the judgment of the court below. The mortgage to Miller was made to prefer the latter and also in contemplation of insolvency.

This court has heretofore decided that this act of insolvency on the part of the debtor operates as an assignment of all his estate to his creditors. The recording of the deed or mortgage giving the preference is constructive notice as to the rights of creditors, and these rights attach as to third parties as soon as the deed or writing is lodged for record and all subsequent liabilities must be regarded as subordinate to the claims of antecedent creditors. *Shouse v. Utterback,* 2 Met. 52; *Givens, Haynes & Co. v. Gordon,* 3 Met. 538.

The claim of the appellant for two thousand dollars of the five thousand dollars alleged to be owing him originated after the act of insolvency was committed and the writing evidencing it recorded, and therefore all the pre-existing liabilities must be first satisfied.

If, as in the case of *Utterback v. Garnett,* the mortgage to the appellant was the act of insolvency complained of, then the fact of the loan of the two thousand dollars at the time of the execution of the mortgage would entitle him to a preference over all creditors. But in this case the act of insolvency occurred long prior to the creation of this liability for the two thousand dollars and the result is that this part of the debt is neither a lien on the estate or entitled to be audited for the purposes of a pro rata distribution. The object of the statute under which the present proceeding was instituted was to prevent the debtor from preferring his creditors, and whilst the argument of counsel is to some extent plausible, this court has established too many precedents recognizing its validity to now adjudge it unconstitutional, by reason of the conflict of its provisions and the act of Congress establishing a uniform system of bankruptcy.

The judgment of the court below is *affirmed.*

P. A. Gaertner, for appellant.

Clemmons & Willis, for appellees.

SAMUEL STERLING v. G. W. RICHMOND.

Wills—Meaning of "Lawful Heirs."

Where a will devised land to one and her "lawful heirs," and there is nothing indicating that the devisor attached any other than the legal meaning to the words "lawful heirs," the words must be treated as having been used in their legal sense.

Wills—Fee Simple Estate.

A will held to devise to the testator's widow a fee simple estate in certain property.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

March 26, 1873.

OPINION BY JUDGE PRYOR:

John Berry by his last will devised to each of his sons a tract of land as follows, viz.: "I give and bequeath to my eldest son, Rutledge Berry, 200 acres of land to be laid off, etc." "I give and bequeath to my son, U. G. Berry, 200 acres of land, etc." "I give and bequeath to my son, Leander Berry, 200 acres of land, etc." He also

devised to his daughter, Angeline Sterling, 250 acres of land, as follows, viz.: "I give and bequeath to my daughter, Angeline Sterling, and her lawful heirs 250 acres of land, provided I shall purchase the remainder of Norma Mark's land where Capt. Sterling now lives," etc.; he also devises all the balance of his land to his four sons, naming them.

Mrs. Sterling, at the time of the devise to her had two children, one, the appellant, Samuel Sterling, and the other Ferdinand Sterling. The last named died some years since childless and of age, leaving his mother, Mrs. Sterling, and the appellant his only heirs. The husband of Mrs. Sterling died after the devise and his widow intermarried with Ebenger Rondeau, and after this marriage in conjunction with her husband sold this land to Richmond and Mentyell, the present appellees. The appellant, Samuel Sterling, insists that by the will of his grandfather, he and his brother were joint devisees, with his mother, and that she had no right or title at the time of the sale to the appellees except to the one-third of the land. If the words "lawful heirs" in the devise to Mrs. Sterling mean children, then the claim of appellant is well founded. It must be understood as having been used by the devisor in its legal sense, unless there is something else in the will indicating that the devisor gave it a different meaning. The only argument in favor of the position assumed by the appellant is "that the devisor in the various devises to his other children used no such language, thereby imparting that the rights of Mrs. Sterling were restricted by the use of the words "lawful heirs." It may have been the purpose of the devisor in using this language to exclude the husband from the benefits of the devise or give to the children an interest equal to the mother in the property, but this intention must appear from the will itself. The devisor was doubtless a man of ordinary intelligence, or if ignorant and unlettered, as insisted upon by counsel, it is hardly probable that in writing his will, when he intended that his daughters' two children should be vested with an interest equal to her in the property devised, he would use the words "lawful heirs" instead of children, or in preference to making a devise directly to them. If written by an attorney we would have known the legal significance of the words, and with the instruction from the devisor to vest the children with an interest would have used other words than "lawful heirs" for that purpose. In the latter part of the will

the devisor says "that in the event I do not become the purchaser of the residue of Norma Mark's land, by myself or through my executors, then in that case my daughter is to have as much money as will make up her proportionate part of the land, say 200 acres; it is my wish that my executor, Leander Berry, purchase the remainder of the Marks land when sold, for the express purpose of letting Angeline have the complement mentioned in the will." This last provision in the will makes no reference to the children of Angeline or to her lawful heirs, and evidences an intention on his part, which the language in the will clearly indicates, to give the land to Angeline without any restriction. This will is well written and was evidently prepared by one having a knowledge of what he was doing and the manner in which such a writing should be executed. There is nothing in the will indicating that the devisor attached any other than the legal meaning to the words "lawful heirs," and this conveyance must be construed as having been made in its legal sense. In the case referred to by counsel the devisors in the several wills had attempted and did in fact give to their daughter life estates in the property devised. In the case of *Williamson v. Williamson*, 18 B. Monroe 263, "The daughters were to have held, use and employ the rents and profits during their natural lives and at their death the title to the same to rest in their heirs in fee forever," and so in the case of *Hunt v. Johnson*, 10 B. Monroe 342. There is but little analogy, if any, between the present case and the cases cited by counsel for appellant. The provision of the will of which the devise is made to Mrs. Sterling vested her with a fee simple title to the property and this title passed to the purchaser from her and her husband.

Judgment of the court below is *affirmed*.

W. J. Bullitt, Craddock, for appellant.

———, *for appellee.*

ELI MOORE AND OTHERS *v.* E. J. CLEVELAND'S ADM'R.

Pleading—Demurrer—Waiver.

A demurrer which was never disposed of must be regarded as having been waived.

Opinion of the Court.

Deeds—Evidence—Testimony Contradicting Terms of Deed.

The detail of conversations alleged to have occurred nearly thirty years prior to the examination of the witnesses can have but little weight in an attempt to destroy the plain and unmistakable language of a deed.

Estoppel—Want of Consideration.

Where a mother sold land held in common with her sons, and received the consideration therefor, and the only object in having a son sign the deed being to strengthen the warranty of title, the fact that the son was one of the grantors does not estop him from showing that he received no part of the consideration.

Infants—Deed—Acquiescence.

Where an infant joined in a deed with his mother simply in order to strengthen the warranty of title, and received no part of the consideration, his acquiescence therein long after the execution of the deed can not render him responsible.

APPEAL FROM WOODFORD CIRCUIT COURT.

March 27, 1878.

OPINION BY JUDGE PRYOR:

The answer and cross-petition of Cleveland's Adm'r, although it presented no cause of action at the time of the filing against the appellants, is cured by the amended answers filed by which the title to the land in controversy is conceded to be in Mrs. Ritchie, notwithstanding a conveyance of the absolute title by deed with a clause of general warranty by the appellants to Cleveland. The demurrer to the cross-petition was never disposed of, and must therefore be regarded as waived. The deed to Cleveland was made in the year 1844 and purports to be a conveyance of the fee simple to the land in controversy. The detail of conversations occurring nearly thirty years prior to the examination of the witnesses must have but little weight in the attempt to destroy the plain and unmistakable language of the deed; such testimony will scarcely be considered by the chancellor and in our opinion the proof conduces to show that the full value of the land was paid by Cleveland at the time of its purchase. As to Jesse Moore the judgment is erroneous. The evidence shows that he received no part of the consideration whatever for the land; that it was sold by the mother and the money received by her. The only object in having him to sign it was to strengthen the warranty of title. His being one of the grantors does not estop him

from showing that he received no part of the consideration. The evidence shows that at the time he signed this deed he was under age and that the sale was in fact a sale by the mother, and he was in no wise a beneficiary of the proceeds. His acquiescence, however, long after its execution, could not under such circumstances make him responsible. The statute provides that no action shall be brought to charge one upon a promise to pay a debt contracted during infancy, *or a ratification of a contract or promise made during infancy unless the same is in writing, etc.* This precludes any recovery as against Jesse Moore. As to the other appellants, the judgment for the recovery of the land was an eviction. The Clevelands or their heirs had the right after payment to hold under the appellee and therefore the fact that Cleveland or those claiming under him have not in fact been turned out of possession can not affect the rights of the parties.

The judgment, being joint, must be reversed as to all the appellants and the cross-petition dismissed as to Jesse Moore and a judgment rendered against the other appellants and for further proceedings consistent herewith.

James, U. Turner, for appellants.

Peter, Wallace, for appellee.

S. S. HITE *v.* FRED HOETHIDE, ETC.

Judicial Sales—Confirmation—Relief of Purchaser.

Where a purchaser of land at a judicial sale made no objection to the order of confirmance until nearly a year thereafter, and in response to a rule fails to suggest the specific defects which render his title imperfect, he occupies the position of one seeking to rescind an executed contract; and he should disclose the facts enentitling him to relief.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 27, 1873.

OPINION BY JUDGE LINDSAY:

There is no connection between this and the case of *Hite v. Reeve,* except that they relate to the same property. The equities of Mrs.

Renter and her two infant children in said property are fully described in the pleadings in the case of *Hoethide v. Renter*. Hill must be regarded as having notice of the contents of these pleadings at the time he permitted the sale to him to be confirmed, and the conveyance to be executed and certified for record.

He made no objection to either of these orders until June 23, 1871, nearly a year after the order of confirmation. In his response to the rule, he fails to suggest the specific defects which render his title imperfect. He occupies the position of a party seeking to rescind an executed contract. His response to the rule should have disclosed facts entitling him to such relief. It fails to show any facts whatever, except that "he is not satisfied that he has a good title to the property sold herein, and his vendors are insolvent" and that he had sold the property to Reeve, who preferred to pay for it.

This response was properly overruled.

Judgment *affirmed*.

J. B. Cochran, for appellant.

Muir & Bigers, for appellees.

S. S. HITE *v.* HENRY REEVE.

Judicial Sales—When Purchaser Takes Subject to Lien.

Where land which was held in trust for a widow and her children was sold without making provision for the children, her lien on the land still subsists, and the purchaser takes subject thereto.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 29, 1873.

OPINION BY JUDGE LINDSAY:

Although Mrs. Sutherland (now Mrs. Renter) and her children, Elizabeth and Margaret, took the estate conveyed in trust for them to Henry Knipp, subject to existing liens, their right to so much of it as might be left after these liens should be discharged was perfect and absolute.

It does not appear why the entire property was sold at the suit of the lien holders, but if the sale was regular and proper, then they

were entitled to the surplus purchase money, between $1,500 and $1,800. The children certainly could not be divested of their interest in this surplus by the consent order entered up (on motion of Rummers, the purchaser, Mrs. Renter, and Knipp, the trustee), by which Mrs. Renter was substituted as purchaser. The result of that consent order has been a resale of the property, in which no provision was made for these children, notwithstanding this sale.

Their lien still subsists and Hill holds subject thereto. It results, therefore, that he can not make to Reeve a good title. The chancellor properly refused to compel the latter to accept an imperfect one.

Hightower v. Smith, 5 J. J. Marshall 542; *Barnett v. Higgins*, 4 Dana 565.

Judgment *affirmed*.

J. B. Cochran, for appellant.

P. A. Guestner, for appellee.

JUDITH SALE, ETC., *v.* R. H. SNYDER.

Executors and Administrators—Sale of Land—Bond by Administrator.

An administrator was held to be the proper custodian of money due his intestate's estate, and where by agreement between the widow, a life tenant, and the remainderman, the land was sold, it was the duty of the administrator to tender the widow a bond with good security, and to receive and hold the portion of the money due the estate.

APPEAL FROM LOUISVILLE CHANCERY COURT.

March 31, 1873.

OPINION BY JUDGE LINDSAY:

It is sufficiently proved that the sale of land to Mrs. Woolford was made under an agreement between the parties in interest. That each of the four remaindermen (including B. A. Wilhoit) was to take one-fourth of the purchase money paid upon the execution to Mrs. Sale of bonds, with approved security, securing to her during life the payment of six per cent. interest on their respective shares as it should annually accrue. It does not matter that B. A. Wilhoit did not sign the writing setting out this contract. By reason of his

failure to sign, it never became operative, but still the contract existed, and is established by oral evidence.

R. A. Snyder, as administrator of B. A. Wilhoit, succeeds to all his rights. It was his duty to tender Mrs. Sale a bond with good security, and to receive and hold that portion of the money due to his intestate. It is not material that he can not be compelled to disburse it in the payment of his intestate's debts until after Mrs. Sale's death even if such be the fact; he is the proper custodian of the fund.

The contract of loan between Mrs. Sale and James Wilhoit presents no obstacle to appellee's recovery. Mrs. Woolford does not complain that the wife of B. A. Wilhoit, deceased, has not relinquished her right to dower in the land. She as yet has asserted no such right, and appellants do not show that they have reason to apprehend danger on account of their warranty of title.

Mrs. Sale's amended petition was not filed and is not a part of the record. *McDowell, etc., v. Bennet,* 7 Bush 474.

James Wilhoit purchased the note on B. A. Wilhoit's estate after his death. He can not assert this claim in this suit, and secure its payment in full. He charges that the estate is insolvent; such being the case, he must pro rate with the other creditors. We forbear to express an opinion as to appellee's rights under the alleged assignment by the intestate to him of their claims. This question can be more properly determined in a contest with the heirs and creditors of B. A. Wilhoit, deceased.

Judgment *affirmed.*

———, *for appellants.*

———, *for appellee.*

E. W. KNIGHT *v.* HANNAH TURNER, ETC.

Appeal—Absence of Bill of Exceptions—Presumption.

In the absence of a bill of exceptions, the Court of Appeals must presume that the ruling of the court below in refusing to quash the deposition was correct.

Tquity—Taking Testimony—Failure to Give Notice.

Where a party had opportunity to cross-examine the witnesses before a master in chancery, and to introduce any witness whom

he desired to examine, he can not be held to have been prejudiced by failure to give him notice of the taking of the testimony in the first instance.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 31, 1873.

OPINION BY JUDGE PETERS:

This suit in equity was brought by the widow and a part of the heirs of Abraham Turner (who died intestate), against the residue of his heirs for a partition of the lands of intestate and assignment of dower to his widow.

Appellant, claiming to be entitled to the share of James Turner, a son and heir of said share, on his motion was made a defendant to the suit and asserted his claim, which was controverted by the brothers and sisters of James Turner on the ground that his father had advanced to him more than the share of each of the other heirs would amount to.

The cause was referred to the master to ascertain the value of the estate of the intestate, both real and personal, the advancement made by him to each of his children, and to report the evidence to the court. After hearing the evidence and reducing the same to writing, the master made out and returned his report to the court, from which it appeared that intestate had advanced more to James Turner than to any of the other children and that the estate which he left would not be sufficient to make the other children equal to the advancements made to James. After the report was filed it appears from the record that appellant filed exceptions to "the Commissioner's report and proof." The exception reads as follows: "E. W. Knight excepts to the depositions herein, and says they ought not to be read against him, because he had no notice of the taking."

This exception was overruled and to that ruling of the court Knight excepted.

A final judgment was then rendered in the cause by which it was decided that Knight was not entitled to any part of the estate on account of the advancements made to James Turner, under whom he claims, by his father; and he has appealed.

The only reason assigned for a reversal of the judgment in the briefs is, that appellant had no notice of the time of taking the evidence by the master.

It is stated in the master's report that notice of the time and place of his sitting and taking the evidence was accepted by the attorneys of the parties. But if appellant was not at that time a party to the suit, it is not certified by a bill of exceptions what evidence was heard on the trial of his exceptions and in the absence of a bill of exceptions this court must presume that the ruling of the court below was correct.

It is true the record shows that on appellant's motion his testimony taken in open court was ordered to be filed, and following that order is copied a statement which purports to be the testimony of Rule, the Master Commissioner, but whether it was heard on the trial of the exceptions to the master's report and the evidence on which it was founded, the record fails to inform us. Waiving that objection, however, and giving to appellant all the benefit of the testimony, still it appears therefrom that the master offered to have the witnesses present at such time as would suit him and offered him the opportunity to examine them and take the evidence of any witnesses that he desired to have taken, all of which he declined to accept. With the opportunity to cross-examine the witnesses of appellees and to introduce any he desired to examine, we do not perceive that he was prejudiced by the failure to give him notice in the first instance. Consequently the judgment must be *affirmed*.

Knight, Menzies, for appellant.

Lee, for appellees.

DANIEL WILSON *v.* THOMAS MAIZE.

Deeds—Covenants—Defect of Title.

The acceptance of a deed requires the grantee to look to its covenant in case of a defect of title.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 1, 1873.

OPINION BY JUDGE PRYOR:

The evidence of Judge Bodley shows that the appellant was negotiating for the property for which the note in controversy was

executed as a part consideration, for some time, and after having been made fully conversant with the terms upon which he or his firm was authorized to make the trade, entered into it, with his eyes open. The deed recites in full the consideration to be paid and although the consideration in the deed is greater than the amount of the several debts and interest paid by Gillespie for Thixton, the son-in-law of appellant, still there was included in the notes a fee of Bodley and Simrall for more than three hundred dollars that Gillespie had paid in the litigation affecting this property by the creditors of Thixton. A part of the contract was that all three were to be paid, and this makes up the sum for which the notes were given. The appellant fixes the price to be paid by him far below the amount to which Gillespie was entitled. It is hardly to be presumed that Gillespie would surrender his purchase to the appellant at such a sacrifice when the proof conduces to show that at the time appellant purchased the property it was thought that he had obtained it at a low price. It is evident that both the appellant and his son-in-law had every opportunity of knowing what moneys Gillespie had paid for the latter and with any effort on their part could have discovered this alleged error long prior to the attempt made in the present case to coerce the payment of the purchase money. We are satisfied that the ignorance now relied on in regard to the transaction is more affected than real. The acceptance of the deed requires the appellant to look to its covenants if there is any defect in the title. So far as this record shows the appellant has all the property he purchased. The evidence shows that the assignment of the note was made to the appellee for the purpose of discharging an indebtedness by Gillespie to him and if it more than paid appellee he was to refund it. This vested the appellee with the legal right to sell. If Gillespie had instituted the action (never having assigned the note) the result would have been the same. The assignment of the note vested the appellee with the rights only of the assignor. Judgment *affirmed.*

S. D. Morris, for appellant.

Brodley & Simrall, for appellee.

F. H. GAINES, ETC., *v.* WM. T. CARLISLE.

Sales—Negligence of Purchaser.

The execution of a note for goods without making examination of a partial invoice, was held to be culpable negligence on the part of the purchaser.

Sales—Representation as to Value.

Representation by the seller of goods as to their value in the aggregate was held to be a mere expression of opinion on which the buyer had no right to rely.

APPEAL FROM GALLATIN CIRCUIT COURT.

April 1, 1873.

OPINION BY JUDGE LINDSAY:

Gaines was guilty of culpable negligence in making no examination of the partial invoice, before the execution of the note. He does not pretend that an opportunity to do so was denied him. If he be a man of ordinary business capacity it is most remarkable that he should have relied upon Carlisle's statements as to what this paper showed on the second evening after they began invoicing. One of the parties making it out was his own agent, and he was himself present whilst it was being done. The proof does not show that Carlisle made false statements as to the original cost of the goods. His representations as to the value in the aggregate, or as to the value of any particular article, are to be regarded as mere expressions of opinion upon which Gaines had no right to rely. The instructions given at appellee's instance are based upon this idea, and are correct. Instruction No. 1 asked for by appellants was misleading, because it directed the jury to find for them if they should believe that Carlisle made false representations either as to the amount or the value of the goods. The second was also misleading, in view of the fact that it assumed that there was evidence conducing to show that Carlisle had before the execution secreted the note or destroyed the partial invoice, so as to prevent Gaines from obtaining correct information as to the quantity and value of the goods. Such assumption was wholly unwarranted.

The third instruction asked for was also properly refusd. Whilst the testimony of Carlisle is to some extent varied from that of some

of the other witnesses there are no such direct contradictions as would have authorized the court to call special attention to these reasonable and natural differences in recollection, and thereby prejudice him and his testimony in their estimation. Perceiving no available error in the action of the circuit court, the judgment is *affirmed.*

Landram, for appellants.

———, *for appellee.*

JOHN EAKER *v.* R. T. ALBRITTON.

Mortgages—When Lien Does Not Attach to Proceeds of Mortgaged Property.

Where mortgaged property is sold by the mortgagor with the consent of the mortgagee, the lien of the mortgagee does not attach to the proceeds of the sale in the hands of the mortgagor.

APPEAL FROM GRAVES CIRCUIT COURT.

April 1, 1873.

OPINION BY JUDGE PRYOR:

The only construction to be placed upon the language used in the mortgage out of which this litigation has arisen is "that it was an attempt to mortgage after-acquired property." The appellant had no right or title to the goods except by virtue of this writing. The right to use, sell and control the proceeds was with the mortgagor, and the only trust created is such as arises upon the execution of every mortgage if the goods belonged originally to the appellant, and he had constituted the mortgagor his agent only to sell, as contended for; the writing here is: "I am to have the right to sell by retail said groceries and replenish my stock and the goods hereafter bought to stand in lieu of such as I sell until said indebtedness is paid." Under this writing when the goods were sold that were mortgaged the title of the appellant went with them and those afterwards purchased were not embraced by its terms, at least as against third parties. This same question was decided in the case of *Austin Cochran, etc., v. Pindell,* and also in the case of *Ross v. Wilson*

Peter & Co., 7 Bush 29; also in case of *McChesney & Co. v. Ford*, manuscript opinion delivered at the present term. It is immaterial whether the after-acquired goods were purchased with the proceeds of those sold or not. When the mortgagor gets the money into his pocket from the sale of the property mortgaged by the consent of the mortgagee the lien of the latter is gone. In the illustration given by counsel for appellant, where A. mortgages to B. a house and A. sells the house and buys a yoke of oxen, there is no question but what the lien is lost when B. not only consents to the sale but authorizes it, as in this case. The property upon which the lien existed having been sold by his consent the lien is thereby released.

Judgment *affirmed*.

R. K. Williams, for appellant.

A. B. Stubblefield, W. H. Miller, for appellee.

M. D. WHITESIDES *v.* T. J. DUNCAN ET AL.

Pleading—Answer—Demurrer.

The answer was held sufficient on demurrer, where it presented a good ground for abating the action, the same claim having been set up in another suit which was still pending, and plaintiff's remedy seems to be complete in the pending suit.

APPEAL FROM SIMPSON CIRCUIT COURT.

April 1, 1873.

OPINION BY JUDGE HARDIN:

The indebtedness of the estate of George W. Whitesides, being near $8,000 in excess of the personal assets in the administrator's hands, and that fact having necessitated the suit of the administrators against the creditors of the decedent for a sale of the real estate and the marshaling of assets, which then became subject to the control of the chancellor, it is difficult to see how the appellant, as surviving administrator, could have been guilty of a destraint in failing to pay the plaintiff's judgment. But waiving this, we are satisfied the court erred in sustaining the demurrer to the amended answer which, if sufficient, as a bar to the claim, presented good

grounds for abating the action, the same claim being shown to have been set up in the other suit which was still pending, and it appears that the appellee's remedy was complete in that suit.

Wherefore the judgment is reversed and the cause remanded with directions to overrule the demurrer as to the amended answer and for further proceedings not inconsistent with this opinion.

W. P. D. Bush, W. G. Whitesides, for appellant.

J. A. Finn, for appellee.

THOMAS DAWSON *v.* JOHN CONKLIN.

Trial—Order of Reception of Evidence.

Evidence which ought to have been offered in chief is inadmissible when it is offered after the evidence in chief has been closed on both sides.

APPEAL FROM CALDWELL CIRCUIT COURT.

April 2, 1873.

OPINION BY JUDGE HARDIN:

On a careful consideration of the several grounds relied on in the argument for reversing the judgment, they are each deemed unreasonable.

1. The agreement to pay for half the work in Lyon County bonds at 85 cents on the dollar, fixed the value of those bonds as between the parties at $85 for each $100 so to be paid in bonds. Numerous authorities might be cited as sustaining this construction, even in addition to those relied on in the argument for the appellees. And we understand it to be "substantially the ruling of the court in Instruction No. 10, and others relating to the lands."

2. We do not think the jury could have been confused or misled as to the item of $23.10 by the supposed inconsistency of Instructions 8 and 10, but however the facts might be as to the $23.10, the instructions were authorized by the pleadings.

3. The burden of proof being on the defendant and the consequent right to open the case in evidence and conclude the argument being conceded to him, the court properly ruled that his own pro-

posed testimony, which would have been clearly in chief, though offered as contradicting Coughlin, was inadmissible when offered, the evidence in chief then being closed on both sides.

4. There is contrariety of evidence and some uncertainty as to the disputed facts, but we can not adjudge that the verdict of the jury is not sufficiently supported by the evidence.

The judgment is *affirmed.*

Hewlett, for appellant.

Darby, for appellee.

L. L. HERNDON *v.* C. C. MOORE.

Principal and Surety—Pledge of Indemnity.

In an action on a note, a surety can not complain that the payee did not make the pledge of indemnity perfect, where it is neither alleged nor proved that he could have done so.

Principal and Surety—Negligence—Release of Surety.

It was held that the payee of a note was not guilty of negligence or fraud in regard to a pledge of indemnity so as to release the surety on a note from liability.

APPEAL FROM SCOTT CIRCUIT COURT.

April 2, 1873.

OPINION BY JUDGE PETERS:

This action was brought in the court below by appellant against Charles C. Moore, surviving obligor on the following note:

"Georgetown, March 30, 1867. One day after date we promise to pay to the order of L. L. Herndon Eight Thousand Dollars, value received. CHARLES C. MOORE.

$8,000. J. D. GRISSIM."

Moore, in his answer, admits the execution of the note, but says he executed the same as the surety of his co-obligor, J. D. Grissim, which fact was at the time well known to the plaintiff.

That at the time of the execution of said note said J. D. Grissim had on special deposit at and with the branch of the Farmers Bank at Georgetown the sum of six thousand dollars in gold coin, which it was agreed at the time, between him and the plaintiff, should be

pledged as additional security for the payment of said note, and accordingly on the day said note was executed, to wit, on the 30th of March, 1867, and as a part of the same transaction, the plaintiff and said Grissim executed an agreement, whereby after reciting that said Grissim had on that day borrowed from the plaintiff $8,000 in currency, for which he, together with this defendant, had executed the note aforesaid, it was stipulated and agreed that said Grissim, as collateral security for the payment of said note, then and there pledged to the plaintiff $6,000 in gold then on deposit in the Farmers Bank in Georgetown, and it was further stipulated that said gold was not to be removed or disposed of without the consent of both parties to the transaction; but might be removed, or sold at any time or place as they might agree upon, and the proceeds to be used for the payment of said note, and interest thereon, the balance of the proceeds, if any, to belong to said Grissim. A copy of the agreement referred to is made a part of the answer. That said writing at the time it was executed, was deposited by the parties thereto in the branch bank of the Farmers Bank at Georgetown.

He says that neither said gold, its proceeds, nor any part thereof were used for, or applied to the payment of said note and interest thereon; but on the contrary said plaintiff, without the knowledge or consent of the defendant, and in violation of said written agreement, and of defendant's rights under it, suffered and permitted said $6,000 in gold to be removed from said bank by said Grissim for purposes other than the payment of said debt.

He states that at the date of said note and written agreement the premium on gold was —— per cent. and at the time the same was used and disposed of as aforesaid, the premium was —— per cent. Wherefore the defendant charges that at both, or either of said dates the value in currency of said $6,000 in gold was more than sufficient to discharge the debt and interest sued on, the principal being $8,000 in currency.

For the reason stated the defendant alleges he is released from all liability on said note. That at the date of said note said Grissim was solvent, or was believed to be so, that plaintiff, after the removal and disposition of said gold, had indulged said Grissim from time to time, without the knowledge or consent of defendant, who believed said note had been paid off, and he had no knowledge to the contrary until after the death of said Grissim, which occurred

at the —— day of ———, many months after the execution of said note; and that he died insolvent.

Afterwards appellee filed an amended answer to the effect that on the 12th of March, 1867, he conveyed to L. J. Peak a tract of land in payment for which he received near $6,000 in gold, which Peak then had on special deposit in the branch of the Farmers Bank in Georgetown. Subsequently he increased the amount to $6,000, and loaned the same to said Grissim, who had the bag containing it labeled in his name and left the gold in the bank on special deposit. That on the 30th of March, 1867, the gold then being in bank, the note sued on was executed, and also the agreement named in his original answer, a copy of which was filed therewith, and appellee then repeats the allegation made in his original answer, that said agreement to pledge said gold for said debt was entered into by and between Grissim and the plaintiff at the time the note was executed, and as part of the same transaction; but that defendant was then wholly ignorant that such pledge and agreement had been made, and so remained until after the death of Grissim, and until one of the officers of the bank communicated the fact to him. He avers that said writing was deposited in the bank by appellant and Grissim for safe keeping, while the gold was in the bank on special deposit. And he says "He does not know whether said plaintiff either at the time of said agreement, or afterwards notified or informed the officers of the bank that said agreement had been entered into, or that it had been deposited in said bank; but if he failed to do so, it was from his own negligence, and has resulted, without any negligence or fault on the part of this defendant, in the removal and loss of a security and pledge for said debt, to the benefit of which he, as he is advised and states, was and is entitled to as surety therein."

The cause was by agreement transferred to the equity docket, and on final hearing appellant's petition was dismissed at his costs and from that judgment he prosecutes this appeal.

According to any rational construction that can be placed on the writing referred to in the answer, the language clearly imports that Grissim was the principal in the note, and that appellee was his surety. And we have failed to discover such contradiction or inconsistency in the original and amended answers of appellee as counsel for appellant seem to think exists. The writing referred to may have

been executed as a part of the same transaction, referring to the borrowing of the money by Grissim, and appellee have been ignorant of it until he was informed thereof by Spears. But we do not consider the determination of these issues very material to a proper solution of the questions before us. We will pursue that inquiry no further.

It is shown by the testimony that the writing evidencing the pledge of the gold coin was taken to the bank sealed up in an envelope and handed to the cashier for safe keeping by one of the parties thereto in the presence of the other, neither of them disclosing to the cashier nor to any one else the contents of the sealed package, nor did they inform the officers of the bank that the gold deposited to the credit of Grissim was not to be delivered to the one in the absence of the other.

The previous sealing of the package, and the silence of the parties as to its contents, at the time of the delivery, indicate very clearly that there was a pre-agreement between them that the contents of the writing was not to be disclosed, and the pledge of the gold not to be spoken of.

The indemnity, frail and uncertain as it was, certainly was not procured by the instrumentality of the appellee, for he says in his amended answer that he knew nothing of it until after the death of Grissim. Nor were his apprehensions such as to induce him to seek it. A very short time before he executed the note he loaned Grissim the gold which is the subject of controversy without security for its payment, and if he ever took a note for it or a writing evidencing the transaction, it is not shown in this record. It is therefore most probable that the indemnity, such as it was, was given at the request of appellant and as he had not the power to dictate the terms, he had to take it on such terms as he could get, and it is not for appellee to complain that appellant did not make the indemnity perfect when it is neither alleged nor proved that he could have done so.

Appellee, by signing the note as obligor, took the greater risk, and he was in consequence thereof under the greater necessity of seeking indemnity from the principal, but having failed to secure himself, he can not throw the loss on appellant, unless he has by such negligence as would amount to a fraud, failed to make the security, which he had taken, available, and there is no evidence that appellant knew of or consented to the removal of the gold.

As subsequent developments have shown, Grissim had very strong motives imposing secrecy on appellant on the subject of the pledge; he was, when the money was borrowed, in failing circumstances, and if it had been made known that he had borrowed and pledged the gold, his credit would have been thereby impaired, and the crisis hastened; hence it may be conjectured that the pledge was made on the condition that the fact should not be made public, and that appellant should rely on Grissim's written obligation that he would not dispose of the gold without his consent; this obligation Grissim violated.

From the facts disclosed in this record we have been unable to discover that appellant has been guilty of any fraud, or even of negligence, certainly not such as to release appellee from his responsibility as obligor on the note.

Wherefore the judgment is reversed and the cause is remanded with directions to render judgment against appellee for the unpaid balance on the note sued on.

Huston, Robinson, Prewitt, for appellant.

Campbell, for appellee.

R. T. McGILL *v.* L. B. PENCE, ETC.

Municipal Corporations—Improvement Ordinance—Origin.

Where an improvement ordinance was adopted by unanimous vote of the council, it is immaterial whether it originated in the council or resulted from petition of the lot owners.

Municipal Corporations—Improvement—Apportionment of Cost.

An improvement ordinance was held to require that the total cost of the improvement shall be apportioned among the property owners in accordance with the front footage of the property abutting on that portion of the street which was improved.

APPEAL FROM KENTON CIRCUIT COURT.

April 2, 1873.

OPINION BY JUDGE LINDSAY:

The ordinance providing for the improvement of Holman street between Twelfth and Berry streets was adopted by the unanimous

vote of the council, hence we do not deem it material to inquire whether it originated with the council or resulted from the petition of the lot owners.

We differ, however, with the chancellor as to the proper construction of said ordinance. Notwithstanding the fact that the work was directed to be let out in two different contracts, the one embracing so much of the street as was 66 feet wide, and the other so much as was 45 feet wide, yet it was further provided, that "When the *work* shall have been completed the cost and expense of the same shall be ascertained and assessed and levied against said lots and parts of lots, according to front feet, and the city charter of Covington and the amendments thereto."

The specific direction as to the manner in which the cost of the work was to be apportioned among the lot owners, accorded with the declaration previously made in the same section that "the council adjudges and declares all of the above work to be necessary, and that the same shall be done at the cost and expense of the owner or owners of all the lots and parts of lots fronting or abutting thereon."

It is not to be inferred from anything in the ordinance that the cost of that portion of the work on the street where it is 66 feet wide was intended to be assessed against the lots fronting thereon, and the same must be applied on that portion of the street 45 feet wide.

The work was to be let in two contracts, but when completed the cost and expense of the same (that is of the entire improvement), was to be ascertained, and assessed and levied against said lots and parts of lots, i. e., "all the lots and parts of lots abutting thereon."

The assessment as made does not follow the ordinance, and it is palpable that the gravest injustice will be done to this appellant and others if it be upheld. The improvement covers but one square. There must of necessity be a community of interest between those owning lots fronting thereon. The benefits conferred must approximate to something like equality, and yet a portion of the lots, and those the deepest at that, are taxed only 43 cents per front foot. Before a court should conclude that the council intended such gross inequality and manifest injustice, that intention should be expressed in plain and unmistakable language. The ordinance under consideration not only expressed no such intention, but when construed according to the natural import of the language used provides that

the cost of the entire work shall be apportioned among the lot owners according to the number of front feet each may own abutting "thereon." Appellant can be required to pay no greater amount than will fall to him upon a calculation based upon the rule indicated.

The judgment is reversed and the cause remanded with instructions to ascertain the amount due from appellant according to the mode prescribed by the ordinance, as herein interpreted, and to enforce Pence's lien for that amount and for further proper proceedings.

W. L. Rankin, for appellant.

Athey, Pryor, etc., for appellee.

JOHN R. MOORE AND WIFE *v.* GEORGE LEHMAN.

Trial—Instruction.

An instruction was properly refused where there was no evidence on which to base it.

Contracts—Change in Plan of Building—Defective Work—Release.

A change in the original plan of a building does not release the contractor from liability for defective work causing leakage.

Contracts—Breach—Damages—Counterclaim.

In an action for a breach of contract the jury should determine, if required by the parties, the amount to which the defendant is entitled by way of damages by reason of the matters set up in her counterclaim.

APPEAL FROM WARREN CIRCUIT COURT.

April 8, 1873.

OPINION BY JUDGE PRYOR:

The evidence conduces strongly to show that the contract for the building of the house was made with Mrs. Moore and not with Calvert, and in fact there is no testimony in the case upon which the court or jury could have arrived at the conclusion that Calvert had anything whatever to do with the making of the contract, and therefore the refusal of the court to instruct the jury "that if the con-

tract was made with Calvert they must find for the defendant" was proper. The statement of S. I. Williams, who seems to have made a measurement of the work done upon this building and a valuation of all the material, leaves but little reason to doubt that including all the work done on the building and the value of the material furnished its entire costs exceeded but little the amount claimed by the appellee. In this estimate made by Williams he was allowed for joiner's work, $1,418.06; for wood, material and carpenter's work, $1,539.46. The whole cost of the building is $8,114.80; from this is to be deducted the joiner's work, $1,418, and say one-half of the amount at which the material and carpenter's work is estimated, viz., $770, these two sums, $1,418 and $770, deducted from the $8,114.80, leaves the sum of $5,926.80, and from this deduct the amount of damages allowed on the counter-claim of the appellant, viz., $1,484.47, leaves due the appellee $4,442.33; besides the appellee insists that he is not entitled to any pay for the carpenter's work, it is evident that it constitutes and forms a part of the judgment he has recovered; in fact, the evidence conduces strongly to show that he had agreed to complete the whole building and the object in the attempt to prove that some one else was responsible for the carpenter's work was made to avoid the damages that the appellant has sustained by reason of the construction, as the proof shows, of a very defective building. It is true, no doubt, that Mrs. Moore agreed to pay the carpenters, but we think it is equally as well established that the appellee was responsible for the character of the work done.

Instruction No. 5 given for the appellee is clearly erroneous. The jury are told that if the appellant changed the original plan by which the house leaked, or has been otherwise injured, they must find for the plaintiff. How far this instruction affected the question of damages is difficult to determine, nevertheless, we can not see why a change in the original plan of the building should release the appellee from liability if the work was defectively executed.

It was also error to refuse to continue the case in order to enable the appellant to amend the amended petition. The amended pleading was filed on the 23d of August, and by an order of court the appellants' counsel was required to answer it in less than three hours after its filing. Merchant lived out of the county and the appellee never announced himself as ready for trial until this amend-

ment was filed. It is true the appellee consented that the allegations of the amendment might be traversed on the record, but the court not only required the appellant to go into trial but also took this amended pleading for confessed in the judgment rendered, notwithstanding the appellee had agreed that it should stand denied. In this judgment a house and lot is designated to be sold that had previously been purchased by one Graham of Mrs. Moore Graham was only a garnishee in the original action, or rather it was alleged that he was indebted to Mrs. Moore for the property. This amended pleading is taken for confessed against all the parties by reason of the allegations therein, and without other proof the court adjudges that the conveyance to Graham has been set aside and annulled, and assumes that the judgment in the suit of Mrs. Moore v. Graham, annulling that deed, may be reversed by this court, and if so, the commissioner is ordered not to sell that house and lot, but directs Graham to pay over to the appellee the money he may be owing Mrs. Moore not exceeding the amount to which the appellee is entitled. Such a judgment must be reversed.

It is certainly proper that a jury, if the parties require it, should determine the amount to which the appellee is entitled and the damages, if any, sustained by the appellant by reason of the matters set up in her counterclaim. In the event of another trial the sum found due upon the facts as now appear upon the record either by this court or the court below will not be regarded as any evidence of what the parties are entitled to recover, either upon the original petition or the counterclaim. For the reason indicated the judgment of the court below is *reversed* and the cause remanded with directions to award the appellants a new trial and for further proceedings consistent with the opinion.

Bush, for appellant.

Rodes & Clark, for appellee.

KERTY & HASNY *v.* G. S. MILES AND OTHERS.

Attachment—Bond.

Under § 268 of the Code, the court has power to permit the execution of a bond, upon the terms therein prescribed, upon the execution of which the property attached should be released.

Opinion of the Court.

Attachment—Bond—Enforcement by Rule.

The provisions of the Code must be complied with before the Court of Appeals will permit attachment plaintiff to resort to the harsh and summary method of enforcing the bond by rule.

Attachment—Bond—Liability of Surety.

By executing the statutory attachment bond, a surety places himself in a condition that when called on for the money he is not allowed the right to replevy, but must respond with either the money or the property.

Attachment—Bond—By Whom Taken.

A sheriff is required to take the attachment bond for the reason that he must know the solvency of the sureties and that they have executed the undertaking.

Attachment—Bond—Estoppel of Sureties.

The sureties on an attachment bond may be estopped from denying their liability on the bond, but they are not estopped from denying that the plaintiff has adopted the proper remedy of charging them with liability.

Attachment—Bond—Manner of Execution.

An attachment bond, to be a valid statutory bond, must have been executed in the manner provided by statute, and where the statute requires the bond to be executed in the presence of the sheriff, it can not be taken by the clerk or other officer and thereby make it a statutory obligation.

Attachment—Bond—Enforcement by Rule.

In enforcing an attachment bond by rule, it is not necessary that the surety in response to the rule should urge that it was not a statutory bond where such fact is made to appear from the record.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

April 3, 1873.

OPINION BY JUDGE PRYOR.

We are not disposed upon the case as presented to question the validity of the bond executed to the appellants if delivered to the sheriff by the consent of the sureties. The boat by reason of its execution was released from the custody of the sheriff, and the only remedy the appellants have is upon the bond or by enforcing their personal judgment against the original debtor.

The mode of proceeding adopted in this case is by rule requiring the sureties upon the bond to produce the boat or pay the amount of the judgment into court. The code of practice contains

ample provisions for securing judgments upon attachments and provides the mode in which bonds for the performance of the judgment or the forthcoming of the property shall be executed.

The court has the power by the 268th section of the code to permit the execution of a bond upon the terms therein prescribed and upon the execution of which the property shall be released. One of the bonds may be to the effect that the defendant will perform the judgment of the court, or that the boat shall be forthcoming subject to the order of the court. This bond shall be executed to the plaintiff in the presence of the sheriff with surety sufficient for the sum for which the attachment was granted. The sheriff was directed to take the bond in the present case by reason of this provision of the code and had no authority to take it in any other capacity than as sheriff.

These provisions of the code must be complied with before this court will permit plaintiff in the attachment to resort to the harsh and summary mode of enforcing the terms of the bond by rule.

By executing this statutory bond the surety places himself in such a condition that when called on for the money he is not even allowed the right to replevy, but must respond with either the money or property. Hence this court is not willing to take such a liberal view of the provisions of the code authorizing these statutory obligations as to declare them such, unless they are executed as the law requires. The bond in this case was executed by the sureties before the deputy clerk of the Fulton Circuit Court on the 5th day of September, 1869. The sheriff of Livingston County, who alone was authorized to sell the property, had never, so far as this record shows, seen these sureties, or agreed to accept them as such on any bond of the defendants in these attachments. In about six weeks after the bond was signed before the clerk of the Fulton Circuit Court the sheriff of Livingston County made a statement in writing by endorsement on the bond "that the within bond is good and will be received when filed with me," and on the 1st of November, 1865, endorsed on the bond as follows, "the within bond was filed with me on the first of November, 1865. C. G. Hatcher, S. L. C." All these endorsements are made by the sheriff on his return showing why a sale of the boat was not made. These provisions of the code were adopted, and the particular mode of proceeding on attachments defined in order to prevent such a state of

case as is here presented. This bond releasing the attachment would not have been required to be executed in the presence of the sheriff unless it had some meaning attached to it.

If the clerk of another county can take the bond, or any one else, and that without the knowledge or consent of the sheriff, who alone could have taken it under the order, in that case then the provisions of the code are dispensed with and all such bonds must be recognized as statutory obligations.

The sheriff is required to take the bond for the reason that he must know the solvency of the sureties, and that they have executed such a paper.

It is argued, however, that in this case the sureties were solvent and did in fact sign the bond.

This may be true, but does this make it a statutory bond? If so, then any bond executed without the knowledge of the sheriff for the purpose of releasing an attachment, although he never sees the sureties, must be so regarded. The sureties may be estopped from denying their liability on such a bond but they are not estopped from denying that the plaintiff has adopted the very remedy in order to charge them.

A bond, to be a valid statutory bond, must be executed in the manner as provided by the statute, and when the statute requires a bond to be executed in the presence of the sheriff it does not mean nor can it be construed to mean that the clerk of another county can take it, so as to make it a statutory obligation.

Nor was it necessary that the sureties in response to the rule should urge that it was not a statutory bond when the fact was made apparent from the record.

In the case of *Leavitt v. Goggin*, 11 B. Monroe 229, this court adjudged that because the sheriff who had been made a commissioner to sell property had taken the notes payable to him as sheriff, the party entitled to the proceeds was not compelled to resort to his action on the bond, but might enforce it by rule.

There is but little analogy between the cases. In the case referred to the party authorized to sell did sell and did take the bond. If the sheriff had authorized some one else to sell and take the bond it could not have been regarded as a compliance with the law.

In the case of *Watson v. Gabby*, where a party in whose name an execution had issued assigned the execution to a third party, and

the execution was levied on the property of the debtor and a claimant executed bond, as provided by the code, to the assignee of the execution; on motion by the assignee on this claimant's bond for judgment, it was held that the bond was not enforcible as a statutory obligation for the reason that the statutes only authorize the execution of such a bond to the plaintiff in the execution, the legal owner.

This case must be, and is, *affirmed* for the reason alone that the appellant has mistaken his remedy, and must proceed by an ordinary action on the bond.

What the measure of damages will be, and whether the bond was authorized to be delivered by the sureties to the sheriff, are questions this court is not now called on to determine.

Judgment is *affirmed.*

Bush, Bennett, for appellants.

Greer, Marble, for appellees.

CITY OF LOUISVILLE *v.* C. G. GOODAN AND BLAN BALLARD, ETC.

Municipal Corporations—Council—Journals of—How Kept.

Where a legislative body, such as the common council, is required to keep a journal of its proceedings, the correctness of the journal can be passed upon only by the council or legislative body of whose proceedings the journal is kept, and not by the clerk or president thereof.

Municipal Corporations—Ordinance—Evidence of Passage of.

A journal record of the proceedings of the common council of a city can not be received as sufficient evidence of the passage and acceptance of an ordinance where the correctness of the journal has not been passed upon by the council. but only by the clerk or president.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 3, 1873.

OPINION BY JUDGE LINDSAY:

It is clear from the evidence in this record that the board of common council during the years 1868 and 1869 did not "keep a correct journal of its proceedings," as required by the city charter

of 1851. The books in the possession and custody of the clerk of that board do not bear upon their faces the requisite evidence of authenticity. Besides it is clearly proved that they were written up long after the meetings the proceedings of which it is pretended are recorded were held. In some instances as much as two or three months intervened. The clerk himself swears that the proceedings of the last three or four meetings held by the board expiring April, 1870, were not written out until June or July of that year and were signed by the president of the board after he had ceased even to be a member of the council.

It is perfectly evident that the board did not know, and had no means of knowing, the contents of these books. They were written up by the clerk in his office, and privately submitted to the president for his examination and approval.

From the present appearance of the books it can be legitimately assumed that in many instances the president signed his name in advance, at intervals through the books, and authorized the clerk afterwards to write up the proceedings of the board. Hence his signature is sometimes found in the middle of the proceedings he intended to approve, and sometimes two or three blank pages intervene between his signature and the conclusion of the particular record.

We attach no special importance to the signature of this officer, but these facts conduce to show the manner in which these books were kept, and are sufficient to taint them with suspicion.

A legislative body can not keep a journal unless it is submitted to and approved by the body itself. It is not for the clerk nor the president to determine whether or not the proceedings as written out by the clerk are correct. This alone can be done by the body whose proceedings are being recorded.

Our state constitution requires each house of the general assembly to keep a journal. This constitutional provision has been construed by both branches of the general assembly. The first rule of the senate requires the speaker, immediately upon taking the chair, a quorum being present, to "Cause the journal of the preceding day to be read."

The first rule of the house of representatives imposes the same duty upon the speaker of that house. It is so with the senate and house of representatives of the Federal Congress.

Notwithstanding the irregularities shown upon the face of the books purporting to be journals of the board of common council, no effort was made to show that any of the proceedings therein recorded had ever been read to that board, or in any way approved by it. In two or three instances it is shown that the reading of the journal was dispensed with, but it is nowhere proved that any portion of it ever was read to, or approved by, any member of the board.

A record kept in the manner indicated can not be received as sufficient evidence of the passage and existence of laws under which the most onerous and oppressive taxation is sought to be imposed upon private citizens. The taxpayers have the right to demand that the municipal laws by which they are to be governed, shall be regularly passed in accordance with the provisions of the city charter, and that the journals of the lawmaking department shall be kept by the respective branches, and not left to the discretion of the clerk or president. *City of Louisville v. McKegney*, 7 Bush 651.

The fact that ordinances passed in the years 1868 and 1869 have in some cases been upheld by this court only proves that parties resisting their enforcement did not make the proof presented in this case.

The effect of the 12th section of the act to amend the charter of Louisville, passed March 3, 1871 (Sess. Acts 1871, page 326), remains to be considered. This section provides "That the charter, laws and ordinances of the city of Louisville, as published in Elliott's Digest of the charter, acts, and ordinances of the said city from the year 1870 to the year 1869, shall be regarded as correct, and shall be held and received as *prima facie* evidence in the courts of the state of Kentucky. And that proceedings of the general council of said city, as heretofore published in the newspaper in said city selected and declared by the general council to do the printing and publishing of said city shall be received as evidence *prima facie* in the courts of the state of Kentucky."

Waiving any question of the power of the legislature to so vitalize this digest and these published proceedings as to affect controversies which had previously arisen, it is sufficient in this case to say that appellant did not present, nor rely upon the proceedings of the board of common council as published in these newspapers. The newspapers themselves were not offered in evidence, and the copies of ordinances and proceedings filed with the petition do not purport to be taken from these publications.

The fact that they are attested by the clerks of the two boards shows conclusively that they were not taken from such publications, as these officers are not required nor authorized to keep them, nor to certify copies from them.

The chancellor properly dismissed the Goodans petition as to the property holders, and properly rendered judgment against the city.

His judgment is *affirmed.*

Burnett, for appellant.

Gazley, R. & L. Buchanan, Bullitt, A. H. Marrett, for appellees.

JOHN R. MOORE AND WIFE *v.* J. A. GRAHAM.

Husband and Wife—Deed by Wife—Pleading.

A deed executed by a married woman without her husband joining is insufficient, and unless the plaintiff grantor files an amended petition and tenders therewith a good and sufficient deed, her petition should be dismissed.

APPEAL FROM WARREN CIRCUIT COURT.

April 3, 1873.

OPINION BY JUDGE PETERS:

From the pleading in this case it appears that appellant, Mrs. Lee Ann Moore, acquired title to the house and lots from the contract for the sale of which this litigation has arisen under the first clause of the will of her father, the late Bennett Barnam, which reads as follows: "After my just debts and funeral expenses are paid, I give, bequeath, and devise to my daughter, Lee Ann Smith, widow of the late Calvin Smith, deceased, all of my real estate and slaves, of which I may die possessed, or of which I may then be the owner, whether said property be held separately or in conjunction with another." If there had been no other clause in the will limiting her estate in the house and lot, it would have been general and by joining with her husband in a sale and conveyance the purchaser would have taken an unincumbered title.

But by the fifth clause of the will the testator directed that the real estate devised to the said Lee Ann Smith, in case of her mar-

riage, was to be entirely free from the control or disposition of her husband, and not in any way subject to his debts, whereby her estate in said property was made separate. But be that as it may, the deed which she professes to have made is wholly insufficient to invest appellee with the legal title, and she should have tendered an amended petition with a good and sufficient deed in which her husband should have joined, and upon her failing to do so the petition should have been dismissed without prejudice to another suit. This, however, according to our construction of the judgment, the court below failed to do; and if permitted to stand said judgment might operate as a bar to another action on said obligation.

Wherefore the judgment is reversed and the cause is remanded with directions to dismiss the petition unless appellants should within reasonable time offer to amend the petition and present such pleadings as will ultimately put an end to the litigation.

As the first error in pleading commenced with appellants, they will not be allowed to recover costs, but must pay their even costs.

Bush, for appellants.

Hines, for appellee.

JAMES F. IRVINE, ETC., *v.* J. E. VANSANT, ETC.

Municipal Corporations—Certifying to Contents of Journals of Common Council.

The clerk of the board of aldermen not being shown to be the keeper of the journals of the board of common council, has no authority to certify as to what appears in those journals.

Municipal Corporations—Improvements—Encroaching on Private Property.

Where a contractor, in making a street improvement, encroaches on the private property of an abutting owner, the contractor can not recover against the owner of such property for the costs of the improvement.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 4, 1873.

OPINION BY JUDGE LINDSAY:

This case differs from the cases of the *City of Louisville v. Goodwin, etc., Scott v. Croffot,* and *Thompson, etc., v. McClish,* in this:

The ordinances under and by virtue of which the work was done were passed in 1870, instead of 1869. The testimony in those three cases, which was by consent considered on the trial of this, does not impeach the journal of the board of common council kept in and after the month of July, 1870.

Appellants, however, deny in specific terms that the ordinance and proceedings set up by appellee were even passed, or had. The only evidence conducing to sustain the material allegations of the petition in this regard, is the copies of such ordinances and proceedings filed as exhibits. These papers are attached by the clerk of the board of aldermen. This officer no doubt has the legal authority to certify copies taken from the records in his office. It does not appear, however, and we can not presume that he is the keeper of the journals of the board of common council, nor that he has authority to certify as to what appears in these journals.

The exhibits so far as they purport to be copies of the journal of proceedings had in the common council should not have been considered. Without them it is clear that appellee did not make out his case.

The damages claimed by reason of the alleged location of the improvement on portions of appellants' lots can not, as against this appellee, be pleaded as a counterclaim, and if it is desired to hold the city responsible therefor, appellants should resort to an action at law for the trespass. But as appellees' right to recover for the cost of the improvements depends upon whether he did or not improve High street in accordance with the ordinances providing for its improvement, it is proper that the court should inquire whether or not the city engineers and the contractors have encroached on the property of appellants.

Neither the city nor the contractors have the right to convert private property into streets until it has been legally appropriated to such purposes, and if in this case any portion of the improvement is on appellants' property, no recovery can be had against them.

Upon the return of the cause it will be proper to have a survey made by an engineer agreed upon by the parties, or selected by the chancellor, in order that this question may be settled. Either party should be allowed to take further testimony in case they desire to do so.

Judgment reversed and cause remanded for further proceedings consistent herewith.

Thompson & Booth, for appellants.

Burnett, for appellees.

W. B. CRAWFORD *v.* A. L. VOORHEIS AND WIFE.

Equity—Extension of Time for Taking Testimony.

The facts were held to warrant the extension of the time for the taking of testimony by defendant before a commissioner in chancery.

Costs—Reversal Without Cost.

The facts were held to warrant the reversal of a case without cost against the appellee.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 4, 1873.

OPINION BY JUDGE PRYOR:

It would be difficult to present a case to this court where more negligence has been exhibited by the defense than appears from the present record. No reflection is made upon the attorneys, as they seem after their employment to have used all the diligence that could be required of them. The appellant, after having been charged with controlling a large amount of money for years as the agent and friend of the appellee, and for the latter's benefit, fails or refuses to make any response whatever to the petition until he is required to do so by a rule of court. He then filed his answer, and upon the reference to the commissioner for a settlement of his accounts pays no regard to the notices given by the commissioner of his desire to make up and consider the settlement; takes no proof whatever and seems to have been entirely indifferent as to the result, until a judgment is rendered against him for a large sum of money. The chancellor upon affidavits filed reluctantly set aside the judgment, and gave him additional time for taking proof, and but for this action on the part of the court below this court would not hesitate to hold him for the amount of the judgment rendered.

After the court had set aside the judgment it seems that the

appellant was taken violently ill, and was unable to see his lawyers until the time given him for taking proof had about terminated. He presented an affidavit of this condition of his health to prevent a second hearing, accompanied by a number of checks and evidences of payments made to the appellee and that seem not to have been included in the settlement. We think as the court had set aside the first judgment, the affidavit filed in connection with these evidences of payment was sufficient to authorize an extension of time, so as their vouchers might have been presented.

There is no error in the record to the appellant's prejudice; the only hardship he can complain of and that to a great extent results from his own negligence, is in his failure to get in his vouchers, and for some of which we are inclined to think he should be credited. It is hardly to be presumed that Mrs. Voorheis could have lived and expended money for years, as the proof in this case clearly shows, and then have as much or more in appellant's hands than was originally deposited with him, and that, too, when she had no other resources from which to draw these expenses.

This case must be reversed, but the appellant is entitled to no costs as against the appellees, and when it is remanded the chancellor will only direct his commissioner to take proof as to the items or vouchers from Numbers 1 to 30, which were presented by the appellant in his affidavit to prevent a final hearing.

The door is closed as to anything except these items, proof should be taken in regard to them and the commissioner also directed to ascertain whether any of them have been included in the former report; it is to that extent they must be disallowed.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion. The appellant must pay his own costs.

Noble, for appellant.

Jas. A. Pirlte, for appellees.

THOS. N. ALLEN, ETC., *v.* W. L. MITCHERSON, ETC.

Bills and Notes—Answer—Confession of Matters Alleged in Petition.

An answer to a petition on a note, which merely alleges want of information or knowledge as to whether the debt was due as recited in the petition, and avers want of knowledge or information as to whether plaintiffs acquired possession of the note in the manner alleged, is virtually a confession of the truth of the matters alleged in the petition.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 5, 1873.

OPINION BY JUDGE LINDSAY:

The answer in this case, which was not filed for more than four years after the service of summons, does not controvert the allegations of the petition to the effect that John Allen, deceased, owed to Scarbrough the note for $1,012.50, but merely states that the parties answering had no knowledge or information as to whether the debt was due as recited in the petition.

Neither does it deny that Barron and Mitcherson paid off and discharged the debt, but again reverts to want of knowledge or information as to whether they gained it in the particular manner charged. This court has so often condemned this character of pleading that it is scarcely necessary to say that the answer virtually confessed the truth of the petition as to these matters.

We are of opinion that Barron and Mitcherson were entitled to be substituted to the Scarbrough's rights. It is true that a third party can not by paying off a note, claim to stand in the place of the payee without taking an assignment from him, but when the payment is made at the request of the debtor, the rule may be and in many cases is different.

D. N. Allen, the executor, had the right to represent the estate of the deceased. He was charged by the will with the payment of the debts. He might have procured Barron and Mitcherson to pay the debt to Scarbrough and by the execution to them of a note in his capacity as executor have bound the estate to refund to them the money thus paid to its use. It is perfectly plain from the pleading and proof that Barron and Mitcherson paid the debts for the es-

tate, and not for the individual accommodation of the executor. They can therefore look to the estate for their money.

These appellants do not pretend that they have not received sufficient property and money under their ancestor's will to pay them.

The credit allowed the executor in a settlement of his accounts made four years after suit was commenced, and after appellants had actual notice of appellees' claim, can not affect their right.

As this action is against devisees, and not against a personal representative, a demand accompanied with the statutory affidavit as to usury discounts, off-sets, etc., was not necessary.

Judgment *affirmed.*

Sweeney & Stuart, for appellants.

Ray & Walker, for appellees.

JNO. T. SWEENEY *v.* W. L. OLDHAM'S ADM'R.

Wills—Meaning of Phrase "Dying Without Issue."

Where a will provides that if any of the testator's children should die without issue the portion of such child should descend to and be equally divided between the heirs of the testator's children or grandchildren as the case may be, the phrase "dying without issue," refers to such event before distribution has been made, but that in case of death without issue after the death of the testator's widow the rights of the children in her fee simple title was not to be affected.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 5, 1873.

OPINION BY JUDGE PETERS:

In 1825 Conway Oldham published his last will and testament, which was admitted to record in Jefferson County on the 5th of December of that year.

In the first clause of his will the testator devised to his wife, for and during her natural life, the plantation on which he then resided, containing five hundred and fifty three acres, with slaves, and a considerable amount of personal property; in a subsequent clause of his will he disposed of the estate in remainder in said tract of land in the following language: "*Item.* After the death of my wife

I give and devise the tract of land hereinbefore devised to her for life, to my two sons, John Conway Oldham and William Levi Oldham, their heirs and assigns forever, upon the condition that when they arrive at full age, they shall each of them separately pay to their sisters hereinbefore named, the sum of one thousand dollars specie, to be divided equally between them according to quantity, quality, and value as hereinafter directed. And I further direct that my son, Wm. Levi Oldham, shall be entitled to and have that part of said tract of land whereon my dwelling house and orchard is situate. The above sums to be paid in two equal installments of one and two years without interest." And after devising to each of his daughters slaves to a designated amount, he directs that when his youngest daughter shall arrive at full age his executors, or the survivor of them, shall sell the tract of land devised to him by his father, also the tract of land near Louisville which he purchased of the Merriweathers, on a credit of one, two, or three years, with interest, and the proceeds thereof to be equally divided between his six daughters or their heirs, and then follows a clause in this language: "*Item.* It is my will and desire and I do hereby direct that in case any one or more of my said children shall die without issue the part or portions of such child or children shall descend to, and be equally divided between the rest of my children or grandchildren, as the case may be."

John Conway Oldham, after he arrived at age, sold his half of the tract of land devised to his brother and himself by their father to Frederick Herr, and Mrs. Oldham, the widow of testator, purchased and took a conveyance to herself for one hundred and fifteen acres of the land her son, John Conway Oldham, had conveyed to Herr. After her death, said one hundred and fifteen acres of land were divided amongst her children and fifteen acres thereof were allotted to said William Levi Oldham. He having died, under a judgment rendered by the court below in a suit brought by his personal representative against his heirs and creditors to settle his estate, said fifteen acres of land were sold and appellant became the purchaser thereof and in response to a rule against him to show cause why he should not pay the purchase money into court, he says, after reciting the manner in which Wm. Levi Oldham acquired title to the land, that it was a part of his father's home tract, devised to John Conway Oldham, and by the will of Conway Oldham, his

father, it is provided that if one or more of his children should die without issue, the part of such child, or children in his real estate should descend to and be divided between the rest of his children, etc., that John Conway Oldham is alive and about 60 years old, is married, but has no issue, his brothers and sisters claim that if he should die without issue that the real estate which he took under the will of his father will revert to them; and on account of this defect in the title he insists he should not be compelled to take and pay for the land.

He also says that at the death of Wm. Levi Oldham the title which he had to said land descended to his two children, who are infants, for whom a guardian *ad litem* was appointed to defend said suit; that said guardian *ad litem* filed an answer in his own name, and that no answer was put in by, or for the infants, and in consequence of the defective preparation of the cause and the insufficiency of intestate's title to the land he can not get a good title, and should not therefore be compelled to pay for it.

In this investigation it is necessary to ascertain first what meaning the testator intended should be given to the words: *"in case any one or more of my said children shall die without issue," etc.* Did he mean that if one or both of these devisees in remainder should die before his own demise, the land should be divided between the rest of his children? Or did he mean a dying without issue in the lifetime of his widow, and before said devisees came into the possession of the estate, or did he mean a dying without issue at any future period, however remote? By the direct devise to these two sons, they took a fee simple title to the land after the death of their mother, charged with the payment of one thousand dollars each to their sisters, to be paid in one and two years after they arrived at 21 years of age. It is not reasonable to presume that the testator intended to require their devisees to pay $1,000 each to their sisters in consideration of the devise of the land to them, probably before they were entitled to the possession and enjoyment of the estate; and by a subsequent clause in his will convert their fee simple estates into estates for life only. In his will he directs real estate to be converted into money when his youngest daughter arrives at age, and the proceeds of the real estate directed to be sold to be divided amongst his daughters. Can it be that he intended that his daughters should have only a life estate in the money, the pro-

ceeds of real estate, in case they died without issue, when from its very nature the money would be consumed in the use. The clause under consideration applies to the daughters of the testator, whose legacies were principally in money, and to whom he devised no real estate as well as to his sons to whom he devised land.

After the purchase money for the land which the testator directs to be sold for the benefit of the daughters was collected, which could not be done under two years after his youngest daughter arrived at age, and perhaps three or four years, he directed distribution to be made amongst them, and the home tract of land to be divided between his sons, John and William, after the death of their mother, before the ordered distribution could be made amongst his daughters. He knew years must elapse, and he also knew that even a greater number of years *might pass* by, before the division of the land devised to his said sons could be made, and that it was not improbable that some of his large family of young children might die childless, and that some one or more might die leaving children before the distribution or division could take place, and he therefore intended to the *"dying without issue"* as an explanation of how the division and distribution should be made on the happening of that event, before said division or distribution was made, but that the dying without issue of either of the devisees of the land after the death of the widow was not to affect their right and they then held it in fee simple.

We think the language of the will neither requires, nor consistently permits any other construction, and that our conclusion is consistent with adjudged cases and especially the case of *Birney v. Richardson, etc.*, 5 Dana 424.

As to the other objection to the judgment it appears that the infant defendants were regularly served with process, a guardian *ad litem* was appointed by the court after the process was returned executed, and the guardian answered for them and controverted all the allegations of the petition prejudicial to their interests, which we consider a sufficient answer.

Judgment *affirmed*.

H. C. Pendell, for appellant.

Pirtle & Cœruth, for appellees.

R. A. SPAULDING, ETC., *v.* BEN P. CISSELL.

Guardian and Ward—Negligence of Guardian.

Where a guardian loaned money in April 1859 on a note due the following December, but suit on the note was not instituted until March, 1864, and then against the sureties only, the principal having become insolvent in 1862, and a return of no property found was made as to the surety, and all the parties lived in the same town, and all the facts were known to the guardian, he was held negligent in failing to institute proceedings for collection of the ward's money, and was liable for its loss.

APPEAL FROM UNION CIRCUIT COURT.

April 5, 1873.

OPINION BY JUDGE PRYOR:

If a balance of either interest or principal is owing by the guardian at the end of any year from the time of his appointment, which ought to have been loaned out for the benefit of the ward in a reasonable time, but which remained in the hands of the guardian, he shall be charged with interest from the end of the year in which such balance arose and thereafter he shall be charged with interest upon interest in biennial amounts. 1 Revised Statutes 578.

It is made the duty of the guardian to loan out the ward's money, and in effect to renew the paper once in two years. When the money is loaned out and good security taken the guardian has done all that should be required of him, unless after the loan is made by the want of diligence on his part the money is lost by reason of his failure to sue or collect it. He is not only required to loan the money to solvent men, but he must look after it, to see that they remain solvent, and if his debtors fail and the guardian by the exercise of ordinary diligence could or ought to have known they were in failing condition, it was his duty to have the debt secured.

The money was loaned in this case on the 13th of April, 1859, and due on the 25th of December of the same year. No suit was instituted on this note until the 12th of March, 1864, and then the surety only was sued and a return of no property found was made as to him. Wheeler, the principal on the note, was involved prior to the loan of this money, and failed in 1862. The surety Waggoner executed a mortgage on his property in 1861. The parties all lived

in the same town or county with the appellee. In 1860 the appellee and his partner instituted suit against the surety Waggoner for a Louisville firm and collected $800. Witnesses say that the surety began to indicate his pecuniary embarrassment as early as 1861 or 1862. All these facts should have been known to the appellee. He in fact was himself instituting a suit against the surety for a considerable sum of money. A mortgage was shortly after recorded on this surety's property in the clerk's office of the county where appellee lived and no effort whatever made to collect this money.

A guardian must be vigilant in protecting the interest of his ward, and although the appellee may have permitted his own claims to have remained uncollected, still we are satisfied from all the circumstances in this case that the loss sustained by the appellant originates from the neglect of the appellee in failing to institute proceedings against the parties to collect the note. The commissioner's report should not have been disturbed. The judgment of the court below is reversed and the cause remanded with directions to confirm the commissioner's report and overrule the exceptions of the appellee thereto and for further proceedings consistent with this opinion. *Hemphill v. Lewis*, 7 Bush 214.

Bush, for appellant.

James, for appellee.

MORRISON & OAKS *v.* W. VOORHIES & CO.

D. W. JONES & CO. v. J. W. MUNDAY, ETC.

Notice—Illegality of Consideration—Bill of Exchange.

Where the directors of one company were also directors in another company from which the bill of exchange was purchased, their knowledge as officers of the company from which the bill was purchased is sufficient to give actual notice of the illegal consideration of part of the bill to the company for whom they acted in making the purchase.

Usury—Bill of Exchange—Purchased by Savings Association.

The purchase of a bill of exchange by a savings institution was held to be merely for the purpose of disguising loans of money at a greater rate of interest than is allowed by R. S., ch. 53, § 8.

Assignments—Void Contract.

One can not take a vested right as an assignee of a void contract.

APPEAL FROM MERCER CIRCUIT COURT.

April 9, 1873.

OPINION BY JUDGE LINDSAY:

It is perfectly manifest from the proof that the purchases of the bills of exchange by the Savings Institution from Munday were made merely for the purpose of disguising loans of money, at a greater rate of discount than was allowed by the 8th section of the 53d chapter of the Revised Statutes.

The bill held by E. Hutchinson & Co. was not received in the regular course of business and the title was not passed to them until after it was over due. Besides this, the three directors of the Savings Institution, who were also directors in the banking firm of E. Hutchinson & Co., must be presumed to have known that the bill contained usurious interest, and their knowledge as officers of the one institution must be regarded as carrying actual notice of the illegal consideration of part of the bill to the firm in behalf of which they acted in making the purchase. E. Hutchinson & Co. therefore occupy a no more favorable attitude than does the Savings Institution from which they purchased.

The interest taken in the way of discount in the various bills sold by Munday to the Savings Institution was about double that authorized to be taken by the 8th section of the 53d chapter of the Revised Statutes. If it had been paid, these appellants, who are bona fide creditors of Munday, might have sued for and recovered it by a suit in equity before it is paid, or insist that E. Hutchinson & Co. shall not be allowed to have judgments upon a void contract for the payment of this illegal interest, until their debts are fully satisfied.

The court below should have appropriated the proceeds arising from the sale of the mortgaged property, first to the payment of the amounts actually loaned to Munday by the Savings Institution to E. Hutchinson & Company. Then to the payments of the claims of these appellants in the order of their respective priorities, and then such balance as remained, to the payment of the usurious interest due to E. Hutchinson & Company from Munday, Jones & Company.

The judgment appealed from is reversed and the causes remanded for a judgment consistent with this opinion.

T. C. Bell, for appellants.

John G. Kyle, for appellees.

A. J. James, for Jones.

MORRISON & OAKS v. W. VOORHIES & Co.

D. W. JONES & Co. *v.* J. W. MUNDAY, ETC.

RESPONSE TO PETITION FOR REHEARING.

OPINION BY JUDGE LINDSAY:

It does not matter that the debts of Voorhies & Co. and D. W. Jones & Co. were contracted after E. Hutchinson & Co. purchased the bill; they took it with notice of its infirmities. The contract for the interest therein embraced was illegal and void. Munday was under no legal obligation to pay it, or any part of it. If he had paid it he might have recovered it back by suit. Voorhies & Co. and Jones & Co., his creditors, occupy as favorable an attitude as their debtor. Hutchinson & Co. could take no vested right, as assignees of a void contract. Nor does it matter that appellants did not present their petition setting up claim to this usury, until after the sureties' mortgage was foreclosed. The contest was not as to the sale of the mortgaged property, but as to the application of the proceeds of the sales.

The court expressly reserved the power to adjudicate as to the usury contained in the bill, notwithstanding its judgment foreclosing the mortgage.

To hold that a debtor or his creditors might recover back money paid under a contract declared void by Sec. 8, Chapter 55, Revised Statutes, and can not resist the judgment, would be to stick to the letter and disregard the spirit and intention of the statutes. Petition overruled.

T. C. Bell, for appellant.

John G. Kyle, for appellees.

A. J. James, for Jones & Co.

CITY OF LOUISVILLE *v.* A. TEMPLETON.

Intoxicating Liquors—Sale by Manufacturer.

Under § 118 of the charter of the city of Louisville, the right of a manufacturer of liquors to sell same as a merchant, does not give him the privilege of setting up and maintaining, free from municipal control, a coffee house, merely because he retails only liquors manufactured by him.

Intoxicating Liquors—Right to Keep Coffee House.

The right to sell spirituous, vinous and malt liquors does not impliedly confer the right to keep a coffee house.

Criminal Law—Misdemeanor—Reversal of Judgment of Acquittal.

The Court of Appeals has no power to reverse a judgment of acquittal in a prosecution for a misdemeanor, except for errors of law which occurred on the trial and appear of record.

Criminal Law—Bill of Exceptions—Presumptions.

Where a bill of exceptions fails to set out the rulings of the court as to the law, the presumption is that the rulings were correct.

APPEAL FROM LOUISVILLE CITY COURT.

April 7, 1873.

OPINION BY JUDGE LINDSAY:

Section 118 of the charter of the city of Louisville provides that "no tax shall be assessed on the tools and implements of manufacturers in said city. Nor any license be required of them for selling their own manufactures."

Templeton claims that this exemption protects him in retailing by the drink beer manufactured at his brewery, or in other words, that because he is manufacturing, and has the right to sell without a license the products of his manufactory, that he may keep a tippling house.

Considering this section in connection with Section 96, which provides that the general council shall provide for certain licenses, "for each tavern or hotel, coffee house, club room or other establishment where malt, fermented, vinous or spirituous liquors are sold by retail within said city," etc., we conclude that the right of a manufacturer of liquors to sell as a merchant does not give him the privilege of setting up and maintaining, free from municipal control, a coffee house, merely because he retails only such liquors as are manufactured by him.

The local community have such a direct interest in the character and conduct of persons keeping these establishments that the legislature has for many years left the question as to who shall have the privilege of so doing to be determined by the local officers, and we can not presume that it was intended that the Louisville city government was to be deprived of this right as to any portion of its citizens.

The right to sell malt, spirituous or vinous liquors by no means implies the right to keep a coffee house.

But as the record before us does not show the construction placed on these statutes and ordinances by the judge of the city court, we can not assume that he construed them erroneously.

We must conclude that he dismissed the warrant because he was of opinion that the proof did not sufficiently make out the charge.

This court has no power to reverse a judgment of acquittal in the prosecution for a misdemeanor except for error of law occurring on the trial and appearing of record.

The bill of exceptions failing to set out the rulings of the court as to the law, the presumption must be indulged that they were correct.

Having no power to pass upon the facts, the judgment must be *affirmed*.

Burnett, for appellant.

Mix, for appellee.

SARAH EMMONS, ETC., *v.* JAS. P. RINGO, ETC.

Infants—Judgment Against—Defense.

A judgment can not properly be rendered against an infant until after a defense has been made by a guardian.

APPEAL FROM FLEMING CIRCUIT COURT.

April 7, 1873.

OPINION BY JUDGE PETERS:

Although a guardian *ad litem* was appointed for part of the infant defendants, no answer is found in the record for them, besides

for Jane Emmons, who is sued as an infant defendant, no guardian *ad litem* was appointed, and no guardian answered for her. Sec. 55, Civil Code, provides: The defense of an infant must be by his regular guardian, or by a guardian to defend for him, where no regular guardian appears, or where the court directs a defense by a guardian appointed for that purpose. No judgment can be rendered against an infant until after a defense by a guardian. And this court has frequently held that unless defense is made as required by Sec. 55, *supra*, a judgment against infants will be reversed. But there is still a more radical error in the judgment than that. Before the court below should have adjudged a sale of the land, he should have caused so much thereof as would not exceed one thousand dollars in value to be selected by the widow of intestate to be valued under oath and be set apart to her by two disinterested housekeepers of the county, not related to either party, the master to act as umpire, and required the valuation to be made to be in writing and returned to court. Myer's Supp., 714, 15.

In the judgment complained of the homestead law was disregarded and only dower was allotted to the widow in the land of her deceased husband which was prejudicial to her; dower and homestead to be both included to be of the value of one thousand dollars. The administrator in the original petition asks that dower and a homestead be set apart to the widow, which dispenses with the allegation that she was a white woman—even if that were necessary.

Wherefore the judgment is reversed and the cause remanded with directions to set aside the sale and for further proceedings consistent with this opinion.

Cord, for appellants.

Andrews, Pluster, for appellees.

JOHN P. WILLS, ETC., *v.* CHAS. S. LOCKNANE AND WIFE.

Wills—Testamentary Capacity—Undue Influence.

The evidence was held to show that a testator at the time of the execution of his will possessed testamentary capacity, and that it was not the result of undue influence.

Opinion of the Court.

APPEAL FROM CLARK CIRCUIT COURT.

April 8, 1873.

OPINION BY JUDGE LINDSAY:

John P. Wills made and published his last will and testament on the 3d day of August, 1862, and departed this life in the year 1869. This paper was properly proved and admitted to record by the county court of Clark, the county in which the testator was domiciled at the time of his death.

Martha E. Locknane, a granddaughter of the testator (and the only child and representative of his deceased daughter, Martha E. Flynn), who was cut off by the will with one dollar, together with her husband, Charles S. Locknane, prosecuted an appeal from the order of the county court admitting the paper to probate.

Upon a trial in the circuit court of the issue of *Devisant vel non* the jury found that the paper in question was not the last will and testament of John P. Wills, deceased. A motion for a new trial was overruled, and judgment rendered directing the county court to set aside its order of probate. To reverse that judgment this appeal is prosecuted.

The contestants of the will claim

1st. That at the time of its execution the testator did not possess sufficient general capacity to make a legal testamentary disposition of his large estate.

2d. That he entertained towards Mrs. Locknane an insane aversion.

3d. That he was morally insane.

4th. That the execution of the paper was superinduced by the exercise over the testator of undue influence by certain members of his family.

The proof shows that Wills was and had been for twenty years a constant drinker. That on some occasions he drank to such excess as to disqualify himself for attending to business. Such debauches, however, were not frequent, and it is manifest that during this period he managed his business affairs prudently and successfully.

His mind was not comprehensive, but he possessed strong common sense, and notwithstanding his want of education and culture he does not seem to have been unmindful of his obligations to his family. That he was in the full possession of all his faculties, free

from the influence of liquor at the time the will was executed, is established by a decided preponderance of the testimony. That liquor was drunk at his house on that day, and that he drank some himself, is shown by the testimony of all the witnesses who speak on that subject, but the attempt to show that he was disqualified for the transaction of any kind of business at the house at which the will was written utterly failed.

It appears from the evidence of all the witnesses introduced by the propounders of the will, and from that of fully one-half of those offered by the contestants that Wills's mind was not impaired in 1862, and notwithstanding the opinion to the contrary, expressed by six or eight witnesses, several of whom base their conclusions not upon actual observation, but upon their ideas as to the effect of the continued use of intoxicating liquors, that he continued for five or six years thereafter to manage successfully his large estate.

We can not agree with counsel for appellees that he was not aware of the execution of the will. He told the person having possession of it that he thought of riding over and reading it, and directed him to show it to any of his children who might desire to see it. He spoke to one of appellee's witnesses about the contents of the will, and expressed fears that he had done Mrs. Locknane injustice, and also a disposition upon his part either to change its provisions or to provide for her and her family in some other way. The fact that he expressed a determination to cut Mrs. Locknane off without anything in case she persisted in the prosecution of the suit against her father, by no means proves that he had forgotten that he had already made a will by which she was pretermitted, but rather that he would not change it if she persisted in disregarding his wishes.

There is absolutely no evidence tending to show that he entertained towards Mrs. Locknane or her husband an insane aversion. He was certainly displeased at her marriage, but he expressed towards neither her nor her husband feelings of hostility or hatred. He (like men of his temperament sometimes do) doubtless determined that those of his family who would not respect his feelings and wishes should enjoy no part of his estate, but instead of hating his granddaughter it is shown by her own witness that his affection for her still continued to exist, and that he debated the propriety of changing his determination to disinherit her. This record utterly fails to show any offer or attempt upon the part of Mrs. Locknane or her husband to effect a reconciliation.

Nor can we conclude that the continued use of intoxicating liquors had so far blunted his sensibilities and destroyed his moral sentiments as to render him morally insane. In making his will he recognized the propriety of protecting his daughters against the improvidence of their husbands.

His regard for all the members of his family who yielded to him that degree of obedience and respect to which he conceived himself entitled, continued as long as he lived.

He was not the man to be influenced by his family, in the disposition of his estate, and the evidence rather tends to show that Dudley Flynn could not have controlled him in any matter of importance.

To set aside the will of John P. Wills, because he saw proper to disinherit his granddaughter, would be in effect to deny to a man of sound mind the right to make a will. This the courts of this state have not the legal right to do.

Impressed with the correctness that the testimony presented by this record shows satisfactorily that the testator was possessed of testamentary capacity at the time the paper in question was executed and was not influenced by prejudice, we are constrained to reverse the judgment of the circuit court and remand the cause to that court with instructions to render a judgment confirming the order of probate in the county court, and to certify that judgment to said last-named court.

Tucker, Simpson, for appellant.

Breckenridge, Huston, Egminton, for appellees.

HUGH CRAYCRAFT *v.* J. T. RATCLIFF.

Libel and Slander—Matter in Mitigation.

Where an answer fails to deny the uttering of the words alleged, but avers that plaintiff had made statements prior to the taking of the depositions entirely different from the statements contained in the deposition, such statements should go to the jury on the ground of mitigation and not in justification.

APPEAL FROM CARTER CIRCUIT COURT.

April 8, 1873.

OPINION BY JUDGE PRYOR:

It is difficult to determine the character of the defense filed in this action. If the pleader intended to justify he should have alleged the scienter in regard to the false statements made in appellee's deposition as no crime could have existed, or perjury been committed unless these statements were made by the appellee, knowing that they were untrue. No denial is made of the publication of the words as alleged, or of the malice towards the plaintiff in uttering them. Nor is it alleged that the facts set up in the answer to the amended petition are pleaded in mitigation, and in fact the whole pleading seems to have been drawn with a view of seeing how near the pleader could make it a good answer in justification or mitigation and still leave it defective as a pleading on either ground. The Civil Code, by its provisions, however, permits not only the truth of the matter alleged to be pleaded, but any mitigating circumstances legally admissible in evidence to reduce the amount of damages. It is alleged in the petition that the defendant spoke the slanderous words with reference to the deposition of the plaintiff taken in a suit pending between one S. P. Ratcliff and Caswell Smith. The answer of the defendant to the original and amended petition fails to deny the uttering of the words alleged, but says, and as we are inclined to conclude by way of mitigation, that the plaintiff had made statements prior to this deposition entirely in conflict with the statements contained in it, and if so, we think this fact, if established, should have gone to the jury to be considered by them in mitigation and not in justification of the act complained of. The statements made under oath can not be shown to have been false upon testimony alone that the party had made different statements when not under oath, still such facts might be considered by the jury in mitigation of damages. For the reasons indicated the judgment is reversed and cause remanded with directions to award the appellant a new trial and for further proceedings consistent herewith.

J. R. Botts, W. C. Ireland, for appellant.

Apperson & Reid, for appellee.

FRED HAWKINS *v.* C. W. PARKER, ETC.

Cancellation of Instruments—Mortgage—Title—Pleading.

Where plaintiffs sued to cancel a mortgage executed by them, and defendant answered resisting the right to have the mortgage canceled, an allegation that he acquired title to the property, and if not he is willing to take a good title thereto, the chancellor is not compelled to go in search of a title for defendant, nor are the plaintiffs required to make an exhibit of the title they have when not called upon to do so.

Appeal—When Appellant Not Entitled to Relief.

Where the record shows that appellant obtained everything he asked for in the court below, he is entitled to no relief as he has nothing to complain of.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 9, 1873.

OPINION BY JUDGE PRYOR:

Parker and wife in the original petition filed in this case were seeking a cancellation of the mortgage executed by them to Margaret Wilson upon the ground of fraud. A final judgment was rendered in September, 1868, dismissing their petition, and this terminates all claim they ever could have asserted against Hawkins for the property as it is now too late for them to prosecute an appeal from that judgment. The appellant, Hawkins, by his answer filed to the petition of Parker and wife, resists their right to have the mortgage canceled and claims that under his purchase from Mrs. Wilson he acquired a title to the property, and if not says that he is willing to take a good title and asks the chancellor to perfect it. No rescission of the contract is asked for by him, and no defect of title pointed out in any way. Parker, as the evidence shows, authorized Whaley to sell the notes he had obtained for his property and had, in fact, received from Whaley a part of the purchase money, but whether he did or not is immaterial, as he is not complaining and could not if he desired. As has already been suggested it is now too late for him to prosecute an appeal.

The chancellor, in accordance with the prayer of the cross-petition of appellant, has given him all he asked for. He had accepted the deed with a general warranty from Mrs. Wilson, and in order

to perfect the title all the chancellor could do was to require Parker and wife, or a commissioner for them, to execute a deed to the appellant.

The chancellor was not compelled to go in search of a title for the appellant, nor were the appellees required to make an exhibit of what title they had, as they were not called upon by the appellant to do so. The suggestion in the brief of counsel that it appears in some other case that there is some defect in the title is nowhere to be found in the record, and if such a defect exists it results only that appellant had ample opportunity afforded him in the present case to make the question and has failed to present it.

This record presents a case where the party appealing has obtained everything he asked for in the court below and in such case the party is entitled to no relief, as he has nothing to complain of. The judgment is *affirmed*. *Todd v. McClanahan's Heirs*, 1 J. J. Marshall 355.

Harlan, Nesoman, for appellant.

Speed & Buckner, for appellees.

MISSISSIPPI VALLEY LIFE INSURANCE CO. *v.* NANCY NEWMAN.

Insurance—Payment of premium—Waiver.

The evidence was held not to show that a note given by the applicant for life insurance premium was accepted by the agent of the insurance company in satisfaction of payment of the first premium, such payment being a condition precedent to the delivery of the policy; and held also that there was not sufficient evidence of a waiver of the cash payment of the first premium.

APPEAL FROM LYON CIRCUIT COURT.

April 9, 1873.

OPINION BY JUDGE PETERS:

This appeal is prosecuted by the Mississippi Valley Life Insurance Company from a judgment recovered against it for two thousand dollars by Mrs. Nancy Newman, widow of James Newman, deceased, on an insurance of his life by said company executed by

him in his lifetime, as she insists. And the question at issue is whether appellant did in fact insure the life of decedent.

No policy was ever delivered. Wheeler, who was acting as the agent of appellant testified that he received the application of decedent for an insurance at Louisville, proves that the application was received and approved, and a policy for $2,000 sent to him at Paducah (Newman at the time residing at Smithland or Eddyville), to be forwarded to him, Newman; that the policy was received by him from the 10th to the 15th of September, 1871, and was sent to him without any conditions, and would have been forwarded to Newman immediately, but for the low stage of water in the Cumberland and Ohio rivers, which prevented any communication between Paducah and Eddyville, there being no way of transporting the mail except by the river; that he kept the policy a week or ten days, and then gave it to Gen. Finnell, to be forwarded from Louisville, or some place on the railroad, to Eddyville, and that the policy was forwarded to John Boyd, his agent at the last named place. He states that there was no tender of the premium made in the lifetime of Newman because communications were cut off between himself and Newman on account of low water, and he did not consider a tender a prerequisite, as the policy had been issued, and was in force at the time of Newman's death, and first premium receipted on its face by Charles F. Fecher, secretary of the company.

In a previous part of his deposition he stated he took the note of Newman for the first premium and assured him at the time that if his policy was issued his insurance would date from the time he made his application, that in taking his note for the first premium he assumed the payment of the *binding receipt* required by the company, and notified it of the fact, when he forwarded the application, and upon that information the policy of Newman was issued, that he had taken a number of applications in the same manner, all of which were ratified by the company. The note he says was payable to the company; he did not remember whether he sent it to the company or not, but he notified it that he had taken it, which was the same thing, and he was in the habit of retaining notes until the premiums were paid; that he was acting as the agent of the company on a salary, and the amount of notes taken in the way Newman's was were invariably charged to him. If the policies were accepted by the applicants when issued and presented by him, the amount was

acknowledged by the company. If the policies were not accepted, the amount of the first premium called "the binding receipt," was deducted from his salary; in this transaction the company could lose nothing, as his salary was a security to them.

This is the contract substantially of assurance as proved by Wheeler. Fletcher, the secretary of appellant, proves that it invariably instructed its agents to require its advance premiums in cash in every instance at the time of taking the application for insurance, and Wheeler was instructed more than once very particularly on that subject; that James Newman's application was received at the office of the company on the 6th day of September, 1871, with four or five others, sent there by Wheeler, that no statement whatever accompanied said application, and no reason given to induce the belief that the application was taken except according to the instructions furnished Wheeler by the company, and that Wheeler made a monthly return for the month of September, 1871, and he shows in that return the premium of James Newman unpaid, and after that report he did no business for the company. That the policy was mailed to John Boyd, agent at Eddyville, on the 25th of September, 1871, with instructions to present it, collect the premium, and report on same, and he never heard of a note having been taken for the first premium until after the death of Newman.

In the printed form of an application for an insurance filed with the petition one of the stipulations is, that the assurance shall not be binding on the company until the amount of premium as stated therein, shall be received by said company, or an accredited agent thereof in the lifetime of the assured—and there is a condition on the face of the policies issued by the company, as Fennell proves, that the same are not binding until the first premium is paid during the lifetime and good health of the insured, etc. He also proves that the company never received, nor had any information that a note had been taken for the first premium of Newman's insurance till the month of October, 1871, after the death of Newman. Wheeler sent it to the office stating he had taken it for the *first premium* and that Newman was dead; this was after Wheeler had been removed as agent of appellant.

The evidence we regard as wholly insufficient either to establish the fact, that a note was given by decedent, and was accepted by the agent Wheeler as satisfaction of the payment of the first pre-

mium required in order to affect an insurance. Nor is there sufficient evidence of a waiver of the cash payment of the first premium, which was a condition precedent to the delivery of the policy.

St. Louis Mutual Life Insurance Company v. Kennedy, 6 Bush 450.

Wherefore the judgment is *reversed* and the cause is remanded with directions to dismiss the petition.

Muir & Byer, for appellant.

C. Bennett, for appellees.

W. D. THOMPSON *v.* MARY FENLEY.

Estoppel—Defense by Maker.

The payor of a note is not estopped to make defense to a note because of the statement made to the payee or to the payee's agent that the note was "all right."

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 10, 1873.

OPINION BY JUDGE LINDSAY:

If the note sued on in this action still belonged to Pearson, the payee, it is manifest that Thompson would have the right to demand that the mortgage lien owned by Mayo should be extinguished, before judgment should go against him for the balance now in litigation, unless Pearson could show that it was part of the contract between himself and Thompson that the latter, in addition to the two notes for three thousand dollars each, was also to pay off and satisfy the mortgage debt.

The acceptance of a deed with general warranty would not preclude Thompson in a contract with Pearson, the latter being insolvent, from demanding a clear and unencumbered title before paying the purchase money, and the right to make this demand would not depend upon Thompson's knowledge of the defect of title, nor of Pearson's insolvency at the time of the acceptance of the deed, but upon the existence of the defect and the insolvency at the time Pearson should seek a specific execution of the contract of purchase,

i. e., the payment of the purchase money. The distinction between this and the case of Craddock v. Shirley is that Craddock was seeking the active interposition of the chancellor, in his behalf, while Thompson merely asks that the chancellor shall not interfere in behalf of Pearson because to grant the relief asked will work unnecessary injustice to him.

The distinction between the case of a plaintiff seeking a specific performance in equity and a defendant resisting such performance is well defined and universally recognized. Story's Equity Jurisprudence, Sec. 769. *Hatcher and Wife v. Andrews, etc.*, 5 Bush 561. There is no proof conducing to show that Thompson agreed to pay off the mortgage debt. The recital in the deed that three thousand dollars were paid in cash, when in point of fact no such payment was made, is a circumstance from which the inference might be drawn, that something more than six thousand dollars, the amount of the two notes, was to be paid for the property, but in the absence of direct evidence that such was the case, and in view of the positive and uncontradicted statements of Thompson to the contrary, this inference cannot be allowed to charge him with the payment of this mortgage debt.

The testimony of Mayo establishes only, that Thompson told him that his claim would be paid when the arrangement for the purchase was consummated, or that Thompson had loaned or expected to advance some money to Pearson to enable him to release the mortgage lien. This evidence rather tends to rebut the presumption that Thompson was himself to satisfy the mortgage, and harmonizes with his statement, that Pearson agreed to pay money out of the first moneys realized by a sale of the notes. The evidence of Davis also conduces to show that Pearson had made this agreement. He states that in the conversation he had with Thompson, when contracting for the property, the latter informed him that Pearson had promised to pay off Mayo's mortgage, but that he did not know whether he had done so or not.

Thompson did not state to Davis that he would lose money on the property in selling it for $8,500.00, but that, if he had to pay off the mortgage, the paving claims, and the full amount of the note sued on in this claim, that he would in that event lose money.

So far we have considered this case as though Pearson was the plaintiff. As to the matters considered, Mrs. Fenley occupies no

more favorable attitude than he would have occupied. The assignment to her did not impair Thompson's right to any defense, discount or offset he might have used against Pearson. It remains now to be determined whether Thompson is estopped to make the defense relied on and whether he, by promises to pay the note, prevented Mrs. Fenley from discounting it, and thereby placing it upon the footing of a bill of exchange. The only statement made by Thompson before the purchase of the note by appellee, from which it could possibly be inferred that he had no defense, set-off or counterclaim, upon which he could or would rely to defeat its collection, was the conversation with Green, the clerk of Morton Gault & Co., with whom Pearson had left the note to be sold. When asked by Green if the note was all right, Thompson replied, "Of course it is all right, if I had not thought it was all right, I would not have given my notes." Green did not tell Thompson the name of any person who was negotiating for the note, nor did Green ask for, or Thompson give him authority to repeat this conversation to persons to whom he might offer to sell it. Green was the agent of Pearson and not of appellee. The statement or assurances made by Thompson to Green are no more binding upon him than they would have been if made to Pearson himself. Besides this, there is no evidence that the note was purchased upon the faith of these statements. Green states that Fenley, the agent of appellee, said to him, that relying upon Thompson's representations he would buy the note, but Fenley's deposition is not taken, and we have no means of knowing whether he relied on these representations or upon his own judgment. In the case of *Smith v. Stone,* 17 B. Monroe 168, the assignee purchased the note in consequence of representations made to *his* agent. In the case of *McBrayer v. Collins,* the payor of the note represented to the assignee himself that it was good. We have found no case in which the payor has been estopped to make defense because of statements made to the payee, or to the payee's agent, and conceive that the doctrine will never be carried to that extent, unless it can be shown that he constituted them his agents and expressly authorized them to repeat his statements to persons to whom they might propose to sell the note. No such express agency can be inferred from the street conversation between Thompson and Green. It is therefore immaterial so far as Thompson's legal rights are concerned, whether Fenley did or not rely on the statements made to Green.

There is absolutely no proof conducing to show that Thompson promised to pay the note after the assignment, except what he himself says as to his conversation with the cashier of the Farmers & Doover Bank, when the note was left for collection.

A day or two before it became due he "asked if the bank had discounted it, and if so, whether it could be renewed. The reply was that the bank had not discounted it, but that Mr. Abbott had left it there and to see him."

He went again on the day the note was due "and was told that Mr. Abbott had said the note could not be renewed by my giving security." From this it is clear that Thompson did not agree to pay the note, and did nothing calculated to prevent appellee from discounting it. Nor does it matter that Thompson did not see Abbott about the renewal as he (Abbott) had left word at the bank that he would not be permitted to renew it.

We are of opinion that Thompson has made out a good defense to so much of the note as is now being litigated, and that he has been guilty of no act that estops him from relying upon such defense. There are other matters canvassed by counsel, but as they are not material to the issues involved, they will not be considered by the court.

For the reasons indicated the judgment is *reversed* and the cause remanded, with instructions to sustain Thompson's defense.

Bullitt, Booth, for appellant.

Seymour & Abbott, for appellee.

UNITED LIFE, FIRE AND MARINE CO. *v.* VON BORIES, ETC.

Appeal—Review—Right to.

The right to review on appeal is not dependent on a bill of exceptions or a motion for a new trial, where the law and facts were submitted to the chancellor for decision.

Appeal—Review—Finding of Chancellor.

Where the parties voluntarily submitted their case to the chancellor, his judgment will be taken as a verdict and will not be refused on account of the evidence in the case for any reason that would not authorize the Court of Appeals to set aside the finding of the jury.

Opinion of the Court.

Insurance—Failure to Produce Books.

The insured's right of recovery is not affected by its failure to produce its books, where it is shown that the books were destroyed.

Insurance—Proof of Loss—Waiver.

Where proof of loss was not made out in exact accordance with the policy, but the insurer did not call upon the insured to correct it, and the insurer retained the proof of loss for three months without objection the insured had the right to conclude that mere formal objection would not be insisted upon.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 11, 1873.

OPINION BY JUDGE LINDSAY:

The action so far as the contest between Shea & O'Connell and their creditors, on the one side, and the Insurance Company on the other is concerned, involves none but legal questions. The issues presented are such as ought to be tried by a court of law, and the Chancellor's jurisdiction attached only by reason of the fact that the relief sought against appellant is auxiliary to that sought in the equity suit of *Von Bories & Co. et al. v. Shea & O'Connell.*

Acting upon the idea that appellant was entitled to have the facts involved passed upon by a jury, and recognizing the propriety of the request in its petition for a rehearing filed in this case when it was first passed upon by this court, the question as to the amount of damage Shea & O'Connell sustained by the fact was left open, and the cause remanded with a suggestion to the Chancellor that it would be proper to order an issue out of Chancery for the trial of such questions of fact as he might deem necessary and proper.

The Chancellor accordingly caused parties to be summoned, and when the cause was called for hearing and opportunity was afforded appellant to have its rights passed upon and determined by a jury, in accordance with the rules of practice in courts of law. This right, however, was waived and the law and facts submitted to the chancellor, who was thereby substituted for the jury.

We are not inclined to hold that his judgment cannot be revised, because there is no bill of exceptions in the record, nor because the appellant did not make a motion for a new trial. So far as the first question is concerned this record must be treated as records in other equity cases, and it will not be assumed that other evidence than the depositions and exhibits on file was heard or considered.

As to the second proposition, it has been held by this court that even in ordinary actions it is not necessary to make a motion for a new trial when the law and facts have been submitted to the court.

But, as the parties voluntarily substituted the Chancellor for the jury, his judgment will be treated as a verdict, and will not be reversed on account of the evidence in the case for any reason that would not authorize this court to set aside the finding of a jury.

The proof of loss made out and forwarded to Covington immediately after the fire was not in exact accordance with the requirements of the policy, but the Insurance Company did not call upon the assured to correct it. The agent, Moore, objected to it, but did not point out the particular defects to which he objected, and the company retained it without objection for three months. The retention warranted Shea & O'Connell in concluding the mere formal objections, would not be insisted on.

The failure of the insured to produce their books does not militate against their right to recover. They swear, and the testimony conduces to show, that their books were destroyed by the fire.

The testimony fails to establish a fraudulent combination between Shea & O'Connell and their attaching creditors. Whilst the evidence is conflicting as to the value of the stock of goods on hand at the time the policy of insurance was taken out, as well as at the time of the fire, it preponderates in favor of the conclusion that it was at neither time less than twelve thousand dollars. Appellees' witnesses had certainly enjoyed reasonable opportunities to arrive at conclusions on this subject proximately correct, and they all fix the value of the stock at from twelve to fifteen thousand dollars. The insurance officers and agents having that opinion upon an appraisement made a year before, fix the value of the goods at less than seven thousand dollars. But the appraisers and their clerk demonstrate conclusively that this appraisement embraces but about one-half the goods.

The proof warrants the assumption that the stock of goods at the time of the fire was worth over twelve thousand dollars. Such being the case the judgment appealed from cannot be regarded as for too great an amount. All are of opinion that the judgment of the Chancellor is in accordance with the weight of the evidence, and it is therefore *affirmed.*

Webster, for appellant.

Muir & Bijur, for appellees.

U. E. EWING *v.* E. V. BURNS' ADM'R.

Equity—Duties of Commissioner.

The duties of the commissioner and receiver of the Louisville Chancery Court are somewhat different from that of similar officers throughout the state, by reason of the rules and regulations of that court adopted in accordance with the provisions of the Code of Practice.

Deposits in Court—Payment into Court.

Where without an order from the Louisville Chancery Court, the commissioner and receiver of that court received money due on notes executed at a decretal sale and deposited the same in the depository of the court, the money was in effect paid into the court, since where the money was placed in the court's depository to the credit of the court the court alone had jurisdiction over it.

Deposits in Court—Deposits to Credit of Court.

Where the commissioner and receiver of the Louisville Chancery Court received money due under decretal sale without order of the court and placed the money in the depository of the court to the court's credit, it became the money of the court.

Equity—Liability of Sureties on Commissioner's Bond.

Where by the negligence of the commissioner and receiver of the Louisville Chancery Court, the court without knowledge of a deposit and of the case to which the money belonged, improperly paid it out to other creditors of the court fund, the sureties on the commissioner's bond are liable for the loss.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 11, 1873.

OPINION BY JUDGE PRYOR:

The cases of *Burns v. Smith* and *Ewing v. Burns' Adm'r*, were argued as one case, have a direct connection with each other, and will be considered together.

Ewing, under a decree of the Louisville Chancery Court, purchased some real estate, the proceeds of which, after the payment of certain debts, belonged to the Burnses, who are the appellants in one case, and Burns' administrator, the appellee in the other. Thomas P. Smith at the time of the sale was the commissioner and receiver of the Louisville Chancery Court, and whilst acting as such, on the 1st of October, 1864, Ewing, the purchaser, paid to him the sum of

$3,013.85 in full, of the last note executed by him for the purchase money. No portion of the money seems ever to have been paid over to the Burnses by the receiver, and the administrator with the will annexed of the devisor Burns, through whom the present appellants in the case of *Burns v. Smith* derive their right to the money, by rule in the chancery court against Ewing, the purchaser, obtained an order requiring the latter to pay the money to him. Ewing insists that he cannot be compelled to pay this money a second time, as he has rightfully paid it to the receiver, and the chancery court had taken possession of it, and applied it to the payment of other judgments. The sureties of Smith, who are the appellees in the suit of *Burns v. Smith,* say that they are not liable, for the reason that there was no order of court authorizing the receiver to collect this money, or Ewing to pay it, and the court below taking this view of the case held Ewing responsible and released the sureties.

The duties of commissioner and receiver of the Louisville Chancery Court are somewhat different from that of other similar offices throughout the state, by reason of the rules and regulations of that court, adopted in accordance with the provisions of the code of practice, and the amendments thereto, organizing and regulating its jurisdiction. On the 14th of April, 1854, the following order was made by that court:

"It is held that a commissioner and receiver of this court be appointed, who is to be a deputy clerk of this court, but to attend only to the duties herein devolved, who shall receive and deposit in the bank of Kentucky (or such other place as the court may order), all moneys that are paid into court unless immediately ordered out. Said money should be placed in said bank (or rather depository) to the credit of the court by the commissioner, and said commissioner shall keep a plain account, showing what money is paid, what is deposited, and what is paid out otherwise. This account must also show, what money belongs to each case, what every person is entitled to, when it has been adjudged, and in all respects, shall have his accounts so complete and obvious that the amount and disposition of the money which shall have been paid in can be seen in a few minutes, and where money has heretofore been paid into court, and money is yet to be paid in on the same cause, he shall make an account of the money already paid, to be kept in connection with that which is to be paid. All money shall be withdrawn from the de-

pository, as the code of practice provides, by order of the court copied and his, the commissioner's, check issued. In the margin of the check, to be left in a check book, shall be stated the name of the cause in which it is drawn, the amount of money and also the date of the order in pursuance of which it is drawn and date of check. Said commissioner shall also take duplicate receipts for checks drawn or money paid out, and keep one in a book and the other shall be filed in the papers of the cause. He shall also return quarterly statements to be entered of record.

"Before he enters upon the duties of his office he shall enter into bond in the sum of $50,000.00, payable to the clerk of the Louisville Chancery Court for the benefit of all persons interested, to be subject to the order of the court, with good surety, and with condition to discharge faithfully and correctly the duties herein.

In pursuance of this rule Thomas P. Smith executed a bond with a portion of the appellees (in the case of *Burns v. Smith*) as his sureties on the 9th of September, 1862.

In the year 1868 Smith was reappointed commissioner, and executed a new bond with some of the appellees as his sureties thereon.

The object of this rule of 1854, the learned Chancellor in the court below, was to adopt a system under which the court funds could be safely received, kept and paid out.

It is made the duty of the receiver to comply with this rule of the court, and upon his failure to do so his sureties, as well as himself, are liable upon his bond. If the purchaser pays him money due upon notes executed at a decretal sale, without any order of court directing its payment, and the receiver converts it to his own use or fails to pay it into court, he (the purchaser) still remains liable for the money, nor can the latter look to the sureties on the official bond for indemnity, for the reason that the receiver had no legal right to receive it, and in doing so can only be regarded as the agent of the party paying it over to him. A receiver is not authorized to collect money due from a purchaser at a decretal sale, without any order of court directing its payment to him, or the receiver to collect it, and we are not prepared to adjudge that under the rules and regulations pertaining to the duties of receiver of the Louisville Chancery Court, that the official, even when the money is paid into court, has the power to withdraw it, or take charge of it without an order of court directing him to do so. This court will never sanction

a custom that is conceded to exist in that court, by which the receiver is permitted without an order of court to collect and receive from the purchasers at decretal sale the money whenever due, or whenever the purchaser sees proper to pay it over.

The money in this case was, however, in effect paid into court, when placed at the disposal of the Chancellor by the receiver. It is true that when it was paid by Ewing, the receiver had no right to collect it, and held it only as the agent of the former, but when this agent of Ewing, who was also receiver of the court, placed the money in the Louisville and Savings Institution, at that time the depository of the court, to the credit of the court, that tribunal alone had jurisdiction over it, and this money having been made a part of the courts fund, no one, not even the receiver or Ewing had longer any power over it, or right to withdraw it, without an order directing this custodian of the court's money to pay it over. After the Chancellor had acquired such control as this over the money and had in fact by the orders of the court, paid it out, it would, it seems to us, be a narrow view to take of the questions involved here, by adjudging that this money was never in court. In the other chancery courts of the state there is no depository of this character and the money when paid into court is directed to be loaned out or held by the receiver or commissioner for purposes of distribution. When the money was placed in the court's depository to the credit of the court, it became the money of the court, as much so, as if it had been paid, and placed upon the clerk's desk in the presence of the Chancellor during the session of court. Ewing had no right to withdraw it. The receiver had no power over it, and the court alone could direct its payment. It is conceded that where there is no order of court directing the payment of money, or acknowledging its receipt in open court, its reception by the receiver is no payment at all except as between the receiver and the party paying it, but when there is such a payment that gives the court control of the fund, although there may be no order of court directing its payment it presents an entirely different question.

It is urged, however, that this was not a payment of money into court because the Chancellor had no knowledge that such money had been placed in the depository to the credit of the court. Yet it might well be asked, why it was using this money in the payment of other creditors of the fund in entire ignorance of its having been

paid, and the response is for the reason that the receiver failed to comply with the requirements of the rule adopted in 1854, defining his duties, and by which he is required to show, in a book kept for that purpose, and subject to the inspection of the court, the amount of moneys paid into court, and the disposition made of the money in each case, and to make quarterly statements of his accounts to be entered of record.

With such a record of his acts the Chancellor, as well as the parties to this controversy, could have acertained the condition of this fund, to which the Burnses were entitled, the case to which it belonged, and as the result of the receiver's failure to do this the court has improperly paid out the money belonging to Burns' administrator to other creditors of the court fund, the whole fault being attributable to the negligence of the receiver in failing to comply with his duties. He had made it part of the court fund. It was his duty to know of what this fund consisted, and also to enable the court to know its condition by keeping a faithful record belonging to each case that was on deposit in the court's depository. He not only knew that this money paid by Ewing was a part of the fund, but also knew that the court, by its orders, was paying it out, and he and his sureties are all estopped from saying that it was never paid in court, that the money was paid by Ewing and placed to the credit of the court by the receiver clearly appears in the case of Burns' administrator against Ewing and the same facts are alleged in the petition by Burns against Smith and his sureties to which a demurrer was sustained by the court below.

We have no doubt that the money collected of Ewing and deposited by the receiver was placed to the credit of the court to supply the place of the moneys unaccounted for by this official and perhaps collected by him under a custom that ought not to be tolerated by the Chancellor. In order to prevent this use of the court's funds, the custodian of the money should be required to keep a separate account in each case, as the use of it by the bank would certainly be a compensation for this trouble. The violation of the receiver's bond having occurred prior to the 12th of August, 1868, there is no cause of action presented against the sureties on the bond as of that date. As to the sureties on the bond of the 9th of September, 1862, the demurrer to the petition as amended should have been overruled. The judgment of the court below against Ewing is reversed and the

cause remanded with directions to discharge the rule. The judgment of the court below sustaining the demurrer to the petition of Burns against the sureties on the bond dated 12th of August, 1868, is *affirmed*, and as to the sureties on the bond dated 9th of September, 1862, the judgment is *reversed* and the cause remanded with directions to overrule the demurrer to the petition as amended and for further proceedings consistent with this opinion. The sureties who are appellees in the bond of 1868 are J. A. Moore and John G. Simrall. They are entitled to their costs against the appellants, Geo. W. Burns, etc. The sureties, appellees, in the bond of 1862 are W. D. C. Ulipps, Robert J. Elliott, Chas. J. Meng, Henry McDowell and W. H. McWeather. The case is *reversed* as to these sureties and the appellants, Geo. W. Burns, etc., are entitled to their cost against them. Ewing recovers his cost against Burns' administrator.

Barnet & Wright, Lindsay, for appellant.

W. S. Bodiley, G. & H. Barr, J. B. Cochran, for appellee.

ISAAC H. TRABUE, ETC., *v.* FRANKLIN LANDER, ETC.

Mines and Minerals—Restoration of Leased Property—Condition of Property.

The lessees in a mining lease were held to have restored the mine to the lessor in a more valuable condition than they were obliged to do under the terms of the lease.

Appeal—Reversal—Substantially Correct Judgement.

The Court of Appeals will not reverse a judgment which is substantially correct, for the purpose of giving the appellant nominal damages and taxing the appellee with the cost of the litigation.

APPEAL FROM McLEAN CIRCUIT COURT.

April 12, 1873.

OPINION BY JUDGE LINDSAY:

This court has heretofore expressed the opinion that what was termed the main entry into the lower coal bank was valueless as a means of communication with, or route by which to reach the sup-

posed coal deposits in Lead Creek valley, and that the destruction of a portion of this entry inflicted upon appellants no loss whatever, to the extent that they desire its preservation for the purpose stated.

A reconsideration of the case has not shaken our confidence in the correctness of said conclusions. The language of that stipulation in the contract alleged to have been violated is: "The parties of the second part also bind themselves to preserve the main entry in what is known as the lower bank by leaving pillars on each side sufficient to support the same, and leave it open With this exception the parties of the second part have the right to draw, and reserve all the pillars and mine all the coal from the lands of the parties of the first part."

It is evident that this exception was made for the purpose of preserving the entry, and not on account of the value of the coal in the pillars supporting the earth above it. The contract did not require these pillars to be left intact. Appellees were merely to leave pillars sufficient to preserve the entry or passway.

A compliance with the terms of their contract would have left appellants in possession not only of the valueless passway but of the unused coal in the pillars. A portion of this coal was mined by appellees, and it is insisted that inasmuch as it was mined and carried off in violation of the contract they ought to be compelled to account for its value.

Upon the first hearing of this cause we were inclined to adopt this view, but upon more mature consideration we are compelled to reject it. This action is for the recovery of the actual damages sustained, by reason of the alleged breach of contract. There is no such state of case set up in the petition as would authorize a jury under any character of proof to award punitive damages. Appellants according to their own pleading are entitled only to be compensated for the losses actually sustained by them.

It is clearly and conclusively shown that appellees did not exercise this right to draw and remove all the pillars and mine all the coal from the lands of appellants, except sufficient pillars to support the main entry.

Upon the contrary they restored the mine to appellants in a much more valuable condition than they had the right under the contract to demand. At most appellees violated merely the letter of their contract. In its spirit and meaning the covenants were more than performed.

Under such circumstances the question arises, whether when the parties waive a jury, and agree that the actions shall be tried by the court without the intervention of a jury in all respects as if it were an action in equity, except that witnesses may be examined orally, this court should not reverse because the tribunal selected by the parties failed to award to appellants nominal damages? We have been referred to no case in which a judgment substantially correct, has been reversed for the mere purpose of giving to the appellants nominal damages, and taxing the appellee with the cost of the litigation. In the absence of a precedent, requiring such actions upon the part of this court we are not inclined to inaugurate the practice in this case. Feeling assured that the substantial rights of appellants were not prejudiced by the judgment of the circuit court the same is *affirmed*.

RESPONSE TO PETITION FOR REHEARING.

May 21, 1873.

OPINION BY JUDGE LINDSAY:

This court did not decline to reverse the judgment of the circuit court for want of precedents determining that the costs of an action follow the judgment, but because we had been referred to no case in which a judgment substantially correct had been reversed for the mere purpose of giving the appellant nominal damages and taxing the appellees with the costs of the litigation.

The delivery of the opinion having relieved counsel from any feelings of delicacy as to the performance of what had theretofore seemed to them "an unnecessary and an unbecoming labor," the court had the right to expect in their petition for a rehearing that they would refer it to some authority upon a question about which it had candidly admitted its want of information. In this reasonable expectation we have been disappointed. The cases cited settle only that the costs must follow the judgment.

They follow the judgment in this case, and one of the grounds relied on for reversal is the fact that they do follow it.

The facts of this case have been twice considered. We have no reason to believe that further argument will change the con-

clusion last reached. The petition for a rehearing must therefore be overuled.

Bullitt & Harris, for appellants.

Williams, for appellees.

N. R. JONES, ETC., *v.* JEFF RICE, ETC.

Mortgages—Foreclosure—Parties—Sale.

Where in a foreclosure suit the mortgagor and the person in possession of the mortgaged land are made parties defendant, but the mortgagor was not served with process and failed to appear, the land of the person in possession can not be sold to pay the mortgagor's debt.

Witnesses—Mortgagor—Foreclosure Proceeding.

In a foreclosure proceeding the mortgagor is a competent witness to show that the mortgagee consented that the land might be sold and the proceeds applied to the benefit of the mortgagee.

APPEAL FROM BATH CIRCUIT COURT.

April 15, 1873.

OPINION BY JUDGE PRYOR:

The petition in this case fails to disclose any cause of action as against either Scott or Jones. The substance of the original petition is, that Jones is in possession of a tract of land that Scott had mortgaged to Rice & Thompson to secure an indebtedness to them, they therefore asked that the mortgage be foreclosed and the land sold to pay the debt. The amount of the debt is not set forth or the mortgage filed, or a description of the land given, nor does the amended petition cure this defect. It is alleged in the amendment that Scott is indebted to Rice and Thompson in the sum of $———, as is evidenced by the proceedings in another suit made part of the amendment. Scott, who owes this debt, is not before the court, and if he had been his failure to take advantage of the defective pleadings by demurrer might have been urged as a waiver of the objection. Still we are inclined to the opinion that upon such a pleading with the service of a process on Scott a judgment by default could not have been rendered.

It is not pretended that Jones, against whom the judgment was rendered subjecting the land to the payment of the debt, owns

any part of it, and his land cannot be sold upon an alleged indebtedness by Scott to Rice and Thompson, when Scott, who is the real debtor, is not in court by service of process or otherwise.

Jones denies by his answer any indebtedness on the part of Scott and insists that the mortgage has been satisfied. This pleading, if Jones was substituted as the debtor, would make the petition good, but as the case now stands we cannot well see how the rights of these parties are to be determined and Scott declared by the judgment to owe this large sum of money when he is not before the court.

Scott must be heard and his liability ascertained and then Jones' land, if this debt of Scott is a lien upon it, may be sold. It is true that Scott, by a judgment rendered in a different suit, has been adjudged to pay the appellee a certain sum of money, but this judgment may have been satisfied. It is obvious, however, that Jones' land cannot be sold to pay Scott's debt unless the latter is before the court.

As this case must go back for trial it may be proper to add that the amount of the judgment in the suit of *Rice and Thompson v. Scott* cannot be questioned by Jones, as the parties were all before the court in that case and cannot now relitigate the matters of account between Rice and Thompson on the one side and Scott on the other.

Scott, however, was a competent witness in this case not to prove that the judgment against him was erroneous in the suit of *Thompson v. Rice,* but to show that these mortgagees had consented that the land should be sold by him to Jones, and to show that the proceeds of the Jones notes for the land had been applied to the benefit of the mortgagees.

On page 390 of the record is an answer of Jones, in which the above facts are alleged, and there is no reason why, when Scott's deposition was given, his statements with reference to these matters should have been excluded.

Either party should be allowed to amend their pleadings.

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

Judge Peters not sitting.

Simpson, Reid & Stone, for appellants.

Nesbitt & Gudgell, Young, for appellees.

THOMAS DWYER, ETC., *v.* A. J. BASS.

Limitation of Actions—Prescriptive Right to Passway.

The evidence was held to show a prescriptive right to a passway over lands to a public highway, by the use of the passway for more than 30 years by persons on the adjoining farms.

APPEAL FROM BOONE CIRCUIT COURT.

April 18, 1873.

OPINION BY JUDGE PETERS:

In a petition filed by appellee against Wm. Levy & Thos. Dwyer on the 16th of September, 1871, he alleges that he is the owner of a tract of land in Boone county, adjoining the lands of the defendants, on which he resides, and that there has been a passway from time immemorial leading from said farm through the farms of the defendants to the county road, known as the Walnut Lick road, which passway he describes thus: Starting at a point in a branch, a corner of said plaintiff and defendants, thence down the branch in a northwest direction about 100 yards through the land of said Levy, thence in the same direction, but leaving the branch on the left alongside of a hill about 25 yards from the branch, through the land of said Levy about 100 yards, thence in the same direction and about the same distance from the branch through the land of deft Dwyer about 200 yards to Little South Fork creek; thence down the same and on the northern bank thereof to Walnut Lick road. That plaintiff is the owner of a small tract of land "adjacent" to the farm on which he resides, and that it is separated from the same only by a narrow strip of the lands of defendants, through which the passway above described passes; that at the time he purchased said small tract of land there was no way to it except by the passway herein described—the use of which the owners of the land over which it is located, yielded to plaintiff, and his grantors without dispute, from time beyond the memory of man, and relying on the right of way he was induced to purchase said small tract.

He alleges that his right to the use of said passway was uninterrupted until 1859, when J. A. C. Adams, who then owned the land, now owned by defendant Long, erected a fence across said passway, but by a slight change over to the land of deft Dwyer he continued

to have access to his land until 1870, when deft Dwyer built a fence across the pathway where it had been changed; that Long refues to remove the fence erected by Adams, and has obstructed said passway in other places, and that Long and Dwyer both refuse to remove said obstructions, by reason of which the value to him of his smaller tract of land is greatly reduced, that the distance to it from his home tract over this passway is about 600 yards, while if he is compelled to take a different route, the nearest one he can use, will force him to travel two and one-half miles to get from one place to the other; that said passway had been opened, and kept free from obstruction for the use of plaintiff and his grantors for 60 years, and that they and he used it free of hindrance, or the control of others until the same was obstructed by the defendants at the periods as herein stated. He prays for the removal of said obstruction, and that his right to the passway be quieted.

Appellants Dwyer and Long in their answers denied that there had ever been any dedication of the land for the purpose of a passway, asserted that the passway claimed had been used as such by the permission of the owners of the lands, who had the right at any time to close it, and that one or more of them had exercised that right by fencing across it and stopping it up in several places.

By an amended petition appellee claims the right to have the passway extended from a certain designated point opposite, and about twenty feet from a corner common to himself and Thomas Dwyer through the land of Lawrence Dwyer in an eastern direction to a county road.

Process was not served on Lawrence Dwyer after he was made a defendant by the amended petition, but the record shows it was filed by consent, and the allegations thereof were traversed on the record, and by another consent order as the record shows the evidence then in the cause was to be read as to L. Dwyer subject to legal exceptions.

Some question is made by L. Dwyer's counsel as to the propriety of these orders purporting to have been made by consent, which may hereafter demand further notice.

On final hearing the court below adjudged that appellee had established his right to a passway as claimed in his original and amended petitions, that all obstructions should be removed therefrom, that his right to the enjoyment thereof should be quieted, and

that he recover his costs. And appellants seek a reversal of that judgment.

Black proves that he purchased the land over which a portion of the passway was located in 1828 or 1829, a part of the same land that Thos. Dwyer now owns, that when he owned the land the passway was in existence, that he used it as a wagon road, and for general purposes, that it was used by himself, by McPherson, and the owner of the land now owned by appellee. That a man by the name of Harbeson owned then the land now owned by appellant Long, that the way was opened in part on his land, that he lived on it, and made no objection to the use of the passway, although it was but little if any benefit to him. And the witness says in response to a question directly to that point that the land was given up for the benefit of McPherson, himself, and the occupant of the land now owned by appellee.

Arnold proves that he purchased the land on which appellee now lives from Grave in 1832 or 1833 and occupied it until between 1840 and 1850; that the passway was open and in use when he purchased, and remained so as long as he owned the land, and it was used free from the control of the owners of the land over which it was located.

Tyler Whitson proves he has known the land over which the passway goes since 1836; that he lived with his father on the Dwyer tract, including a part of the land on which appellee lives; that the passway he thinks was opened for the benefit of himself and father, and was located and occupied the general route as contended for, but "was sometimes varied to avoid mud holes, fallen trees," etc.

And A. D. Whitson states that he had lived in the neighborhood of the land for thirty-odd years; that he owned a portion of the land owned by Dwyer, and his brother owned a portion of it. He did not know who cut out the passway, nor did he know that it had ever been established by contract or by an order of court; but he supposed by permission of the owners of the land. There has been no question made about it.

Northcutt proves that he bought the land now owned by appellant Long and moved on it in 1849, owned it until 1859; that the passway was open when he bought the land and remained open as long as he owned the land; that the passway cut off a corner of the Long farm and then ran on to Wm. Whitson, now the farm owned by Dwyer; that it was used by every one who wished to use it, and he never heard any one object to it.

And S. R. McPherson proves that, some 44 years before he gave his deposition, he assited Black, when he lived on the farm now owned by L. Dwyer, to cut out a bridle way on the route described, and it is proved by Black and others that they worked it.

No express declarations of a dedication of the land over which the passway was located are proved to have been made by the owners thereof; but there are acts on the part of the owners of the land which can not be regarded in any other light than a dedication.

Black, when he owned the land, opened the passway for the especial benefit of himself, McPherson and the owner of appellee's land, but it was open for all who chose to travel over it, and it was used continuously from 1828 or 1829 without interruption, and indeed without the right being questioned, from a point near the corner at "A" on the plat, westwardly, until 1859 when it was turned or closed up by Adams so far as it ran over his lands, now owned by appellant Long. The use of the passway on the land described was enjoyed for thirty years or more before this change, nor does it appear that those who used and enjoyed it depended therefor on the permission of the owners of the land.

The whole of the evidence conduces strongly to the conclusion that the site of the passway was devoted to the use of the persons occupying the adjoining farms by the owners of the lands, and neither they nor their vendees could reclaim it without the discontinuance of the use of it by the beneficiaries. *Beall v. Clore,* 6 Bush 676.

The facts in this case are very different from those in *Bowman v. Wickliffe,* 15 B. Mon. 84. In that case no acts were proved on the part of the owners of the land dedicating it to the use of the beneficiaries as in this case. This view of the case applies to that part of the passway located on the lands of appellants Thomas Dwyer and Wm. Long, starting from a point or the corner designated on the plat at "A." But it is far from being clearly established by the evidence that the passway as originally located passed over the land of Lawrence Dwyer; on the contrary, it was located on the land of McPherson, and he had closed it more than twenty years before this suit was brought, and so far as the judgment establishes the passway over the land of L. Dwyer it is erroneous and prejudicial to him.

The judgment will therefore be *affirmed* as to appellants Wm. Long and Thomas Dwyer, but is *reversed* as to Lawrence Dwyer, with directions to dismiss the petition as to him.

Pryor, for appellants.

J. B. Finnell, for appellee.

JOSIAH S. JOPLIN, ETC., *v.* C. E. RADDIN, ETC.

Appeal—Jurisdiction—Amount of Controversy.

The Court of Appeals has jurisdiction on appeal of a judgment for $42.21 against an assignor of a lease for repairs of the leased premises made by the lessee.

Landlord and Tenant—Repairs.

On the assignment of a lease, and in the absence of an express covenant on the part of the assignee to make repairs on the leased premises, the law will not imply such a promise.

APPEAL FROM JEFFERSON CIRCUIT COURT.

April 19, 1873.

OPINION BY JUDGE PETERS:

On the 1st of December, 1869, Cochran, as executor of T. E. Wilson, deceased, leased to Reynolds & Joplin a certain six-story brick warehouse in the city of Louisville for the term of three years at an annual rent of $5,500, payable monthly, and the lessees covenanted that they would at the end of the term, or if the lease should be forfeited, return the premises in as good order as when received, ordinary wear and loss by fire without the tenant's fault, and destruction or injury by the act of God excepted.

The lessees assigned the lease to Raddin & Co. on the 13th of June, 1871, with the assent of the lessor. The assignees entered into possession of the leased premises prior to September, 1871, and finding the house needing repairs, had some glazing and other work done to the amount of $42.21, and then warranted their assignors for the same.

The justice who tried the warrant dismissed it; they then appealed to the Jefferson County Court, and then succeeded in recovering

judgment for the amount claimed, and from that judgment Joplin & Co. have appealed to this court.

As to the question of the jurisdiction of this court, raised by the attorney for appellees, we must regard that as not now an open question; the jurisdiction of the court in like cases was sustained in *Commercial Bank v. Benedict, etc.*, 18 B. M. 307, and in subsequent cases.

When appellees took the assignment of the lease and entered on the leased premises the repairs were needed which they subsequently had made, and still they neither took the written obligation nor parol promise of appellant to have them made; but in the assignment appellees expressly assumed to perform all the covenants that their assignors were bound to perform, one of which was to return the premises in as good repair as when received; and in order to discharge that undertaking it may have been necessary for them to have the repairs made. But in the absence of an express covenant on the part of appellants to make the repairs, the law will not imply a promise to make them.

The judgment must therefore be reversed and the cause remanded with directions to affirm the judgment of the justice dismissing the warrant.

Badjer & McGuire, for appellants.

Mundy, for appellees.

LEXINGTON & BIG SANDY RAILROAD CO. *v.* EDW. JOEPA.

Master and servant—Assumption of risk—Instruction.

An instruction on assumed risk by a servant, that ordinary risks of service means such risks as were known to the servant at the time he entered upon the service, although erroneous, was held not to mislead the jury, in view of other instructions given.

Master and servant—Safety of place and Appliances.

A servant has the right to expect that the master will exercise all prudent means to avoid danger to him in the course of his employment.

Master and servant—Care of master—Question for Jury.

Whether an employer exercised reasonable care to avoid injury to his servant, is a question for the jury.

Opinion of the Court.

APPEAL FROM BOYD CIRCUIT COURT.

May 21, 1873.

OPINION BY JUDGE PRYOR:

The ground of recovery in this case is that for the want of sufficient ventilation of the mines of the appellant the appellee was dangerously or seriously injured. That by the use of ordinary care and skill on the part of appellant in providing means for the noxious air to escape such injury would not have occurred, etc.

The defense is that the appellee's own negligence caused the injury. The evidence authorized the verdict if the law of the case was properly given the jury. The substance of Instruction No. 4, given at plaintiff's instance, is that if it was defendant's duty to keep the mines ventilated and it failed to do so, and on account of which the injury resulted without the fault of plaintiff, they must find for the plaintiff. This instruction required the jury before they could render a verdict for the plaintiff to find: 1st, that it was the duty of the company to have its mines ventilated; 2d, that it failed to do so; 3d, that the injury resulted from this want of care and skill, and lastly, that the injury was not the result of plaintiff's negligence. It was the duty of the company to use ordinary care and skill in preventing these accidents in its mines from the creation of noxious gas, and it is certainly liable for injuries arising from this neglect of duty unless the appellee knew of the danger and voluntarily assumed the risk, and it may be proper to add that after the accident that had previously happened in this same mine from the identical causes to which the injury to the plaintiff was attributed, "it was the duty of the appellant at the time it employed the plaintiff to inform him of the injuries resulting to others in attempting to exercise the same employment he was then about to undertake." That working in such mines is more or less dangerous to those employed does not admit of doubt, and such dangers the laborer agrees to risk when he enters into such service, but where the danger is such as appears from the proof in this case, the company should have made it known to the appellee. Those in the company's employ a short time prior to plaintiff's employment came near losing their lives from the same cause and it is hardly to be presumed that such noxious gas is usually to be found in the development of such mines; or, if so, that those employed in such an undertaking should be required to ascer-

tain its existence by actual experiment, and agree to run all such risks, when those employing them not only have the means of knowing but do in fact know of the imminent danger of the service by reason of the injurious effect of this gas upon those who had been previously in their employ. It is said, however, that the appellee knew all about this danger, and if ignorant of it when he entered appellee's service, was made aware of the risks he was assuming directly after, and voluntarily continued in the service. The court below, at the instance of the defendant, told the jury, 1st, that if appellee engaged as engineer knowing the danger in operating the mines from that noxious gas, that he then took the risk and therefore must find for the defendant. Under this instruction it was immaterial how negligent the defendant might have been in not providing proper ventilation for the escape of this noxious gas; if the plaintiff knew of the danger he was not entitled to recover. In the second instruction the jury were told that although the appellee might have been ignorant of the dangers when he entered appellant's service, but afterwards ascertained the danger and continued in the service he was not entitled to recover. They were also told that if the accident happened from the want of ordinary care and prudence on the part of the appellees, or by reason of his own neglect in disobeying orders given him in regard to raising steam in the mines they must find against him. These instructions were all more favorable to the company than the law authorized and it has no cause to complain. The only objectionable instruction is to be found in the one modified at the instance of the defendant, viz., Instruction No. 3. The jury were told by this instruction that the ordinary risks of the service meant such risks as were known to the plaintiff at the time and this instruction should have been to the effect that the appellee at the time he entered the service assumed all such risks as ordinarily pertained to such an undertaking. This instruction, however, was given at the defendant's instance and, even if not, we see nothing in it when taken in connection with the other instructions calculated to mislead the jury. They certainly understood that if the appellee knew of the danger and voluntarily assumed it, that he was not entitled to recover. This was really the issue to the trial. The evidence decides the fact that the company knew that others had been seriously affected by this gas, and also tends strongly to show that it all originated from the want of proper

Opinion of the Court.

ventilation. The appellee had the right to expect that all proper and prudent means had been used by the company to avoid the danger and whether or not he had been informed otherwise, and took the risks with his eyes open, was a question presented to the jury by the instructions in a most favorable light for the defendant and the verdict we can not disturb. The judgment is therefore *affirmed.*

Ireland, Moore, for appellant.

Rodman, for appellee.

BANK OF KENTUCKY *v.* DAVID EMMERSON, ETC.

Bnkruptcy—Discharge from Liability.

Where a creditor of an insolvent presented and proved his claim in a bankruptcy proceeding, he thereby exonerated the debtor from further liability therefor, and can not thereafter sue to subject property conveyed by the debtor and in the hands of the purchaser.

Assignments for Benefit of Creditors—Preference of Creditors.

The evidence was held not to show that a debtor in selling his property for the payment of his debts was actuated by the intent of giving preference or advantage to some of his creditors over others in contemplation of insolvency.

APPEAL FROM SCOTT CIRCUIT COURT.

April 21, 1873.

OPINION BY JUDGE HARDIN:

In 1867 David Emmerson, then greatly embarrassed by his individual debts and liability as surety for others, sold off in different parcels and at different times his real and personal estate, which appears to have been of considerable value, doing so openly, and with the generally professed object of making his property pay all of his creditors, to some of whom, in almost every instance, it seems the property or its proceeds passed in payment of debts.

The object of this suit, commenced in April, 1868, by the Bank of Kentucky and Thomas N. Lindsey, the Farmers Bank and Stephen Black afterwards uniting as co-plaintiffs, was to have the sales or part of them adjudged, under the act of March 10, 1856, as made in contemplation of insolvency and with the design of preferring

one or more of Emmerson's creditors to the exclusion of others and therefore operating as an assignment of all his property and effects for the benefit of his creditors.

The essential allegations of the petition were controverted by Emmerson and the purchasers; and in the progress of the case the debts of the original plaintiffs were satisfied, and the suit as to them dismissed; and Emmerson, on his own application, was adjudged a bankrupt, and as such discharged from his liabilities, under the general bankrupt law of the United States.

The claims of the Farmers Bank, but not those of Black, were regularly proved against the estate of Emmerson and adjudicated in the bankrupt court, and this was certainly a waiver of "all right of action" against Emmerson, and, as to him, a bar to the pending action in the state court under Sec. 21 of the Bankrupt Act. (*Brown, Assignee, etc., v. Farmers Bank,* 6 Bush 198).

We incline to the conclusion that as at most the sales could only have operated under the act of 1856 as a transfer of the property for the purpose of satisfying debts against Emmerson, the Farmers Bank, at least, having absolutely exonerated Emmerson himself by proving its debt, could not afterwards prosecute the action even for the specific object of subjecting the property in the hands of the purchasers.

Nor was it aided in that object by joining the assignee in bankruptcy with it as a co-plaintiff after the final settlement and discharge of the assignee had terminated alike his liabilities and functions as such.

But as it is at least questionable whether Black, who did not prove his claims in the proceeding in bankruptcy, had not the right, after the final discharge of Emmerson, still to prosecute the suit for enforcing any right as against the property which he may have previously acquired under the act of 1856, we have deemed it proper to examine the record carefully, both with regard to the preparation of the case as to his claims, and the evidence concerning the purposes and objects of the various sales and dispositions which Emmerson made of his property. It is worthy of observation that the notes forming the foundation of Black's claims, consisting of a comparatively small debt to himself, partly litigated, and a debt in which Emmerson, bound as the surety of Bell, held by Black, as the representative of John Macklin, were not even filed; and on the last

named debt another suit was pending against Bell's estate, the result of which is not shown. But if it be conceded that under the pleadings Black would be entitled to relief, if the evidence sustains the essential averments of the petition, under the act of 1856, we are constrained to sustain the decision of the lower court as to Black's claims, as well as the others, for the reason, at least, that the evidence fails to satisfy us that Emmerson, in selling his property and as it appears, honestly striving to pay all his debts with it or its proceeds, was in fact actuated by any intention to give preference or advantage to part of his creditors over the others in contemplation of his approaching insolvency.

Wherefore the judgment is *affirmed.*

Lindsey, for appellant.

Craddock & Trabue, for appellees.

GEO. M. MURRELL, EX'R OF DUGAN, *v.* S. M. WING, ETC.

Wills—Probate of Will—Jurisdiction.

Where a testator at the time of his death resided in D. county, the W. county court had no jurisdiction to admit his will to probate, nor to induct his executor into office.

Executors and Administrators—Power to Act.

An executor has no power to act until he is qualified as such by taking an oath and giving bond in the court in which the will or a copy thereof is admitted to record.

Wills—Admissibility in Evidence.

Section 519 Civ. Code, providing that "no will shall be received in evidence until it has been allowed and admitted to record in a county court, and its probate before such court shall be conclusive until the same is superseded, reversed or annulled," applies to wills admitted to record by a county court within the meaning of subsec. 1 of such section.

Wills—Admissibility in Evidence—Presumption.

It was not intended by § 519, subsec. 3, Civ. Code, relating to receiving of wills into evidence, to declare that the jurisdiction of a court of limited powers should be conclusively presumed as against persons not before it at the time it acted in a matter by which their rights are sought to be affected.

Opinion of the Court.

Executors and Administrators—Collection of Debts Owing Decedent.

Debtors of a deceased have the right to demand that the person seeking to coerce payment of the debts shall show that he is legally entitled to collect them, and he can not be deprived of such right by the unauthorized action of the county court having no jurisdiction of the matter.

Wills—Probate—Jurisdiction of County Court.

County courts have no general jurisdiction in the probate of wills and the appointment and qualification of personal representatives, their power in this regard being purely local.

APPEAL FROM DAVIESS CIRCUIT COURT.

April 21, 1873.

OPINION BY JUDGE LINDSAY:

The court is of opinion that the demurrer to appellee's answer was properly overruled.

Appellant, by *"standing by his demurrer,"* must be held to have admitted the truth of the statements set out in said answer, and that admission authorized the circuit court to dismiss his petition.

As the testator, Dugan, resided in Daviess County at the time of his death, the Warren County Court had no jurisdiction to admit his will to probate nor to induct his executor into office.

Sec. 519 of the Civil Code of Practice provides that "Wills *shall* be proved before, and admitted to record by, the county court of *the county of the testator's residence,*" if he had a known place of residence, etc.

The demurrer admits that the testator, Dugan, had a known place of residence, which was in Daviess County, and that the will under and by virtue of which appellant claims the right to act was admitted to record by the county court of Warren County. The facts thus admitted show conclusively that the Warren County Court had no jurisdiction to admit the will to record, nor to qualify appellant as the executor thereof.

It is insisted that this question can not be raised collaterally. Before the adoption of the Revised Statutes and the Codes of Practice, parties defending actions instituted by persons claiming to act as personal representatives were always allowed to question the jurisdiction of the county court, by which they were appointed, and thus to show that these appointments were, as matter of law, void. An executor has no power to act until he qualifies as such by taking an

oath and giving a bond, in the court in which the will by which he is nominated or an authenticated copy thereof is admitted to record. Sec. 1, Article 1, Chapter 37, Revised Statutes.

To clothe the person nominated with exceptional power, he must be qualified by the court in which the will has been *legally* admitted to record. The right to inquire into the jurisdiction of the county court acting in the matters of the probate of the will, and of the qualification of the executor, in actions instituted by the person claiming to be executor still exists, unless it is inhibited by the third subsection of Sec. 519 of the Civil Code, which is in these words:

"No will shall be received in evidence, until it has been allowed and admitted to record, *in a county court,* and its probate before such court *shall be conclusive until the same is superseded, reversed or annulled."* We construe this provision to apply to wills admitted to record by *"a county court"* coming within the provision of Subsection 1, of the same section. Otherwise it will result that whilst in one portion of the section the county courts having the right to act are especially pointed out, in another and subsequent portion, it is provided that these directions may be utterly disregarded and still the action of the *"county court"* usurping jurisdiction in a proceeding which may be, and most frequently is, *ex parte* will be conclusive until superseded, reversed or annulled by an appeal.

We cannot suppose that the legislature intended by this subsection quoted to declare that the jurisdiction of a court of limited powers should be conclusively presumed against persons not before it at the time it acted in a matter by which their rights are sought to be affected, and yet this is the position assumed by the learned counsel representing the appellant. The case of *Hughey, etc., v. Sidwell's Heirs,* 18 B. Monroe 259, does not sustain him. In that case the will was admitted to probate by the county court having jurisdiction, and hence the question raised in this case was not considered.

For the same reason the case of *Stevenson v. Huddleson,* 13 B. Monroe 299, is not in point.

When the motion was made to revive this action the appellees had for the first time an opportunity to question the power of the Warren County Court to admit Dugan's will to probate. They had no right to go into said court and resist the probate nor to prosecute an appeal from its judgment, or order of probate. They have the right now to demand that the person seeking to coerce the payment

of a debt from them to the deceased shall show that he is legally entitled to collect it, and this right can not be taken from them by the unauthorized action of a county court having no jurisdiction to act at all.

By the statute the jurisdiction of county courts to probate wills and qualify or appoint personal representatives is purely local. They have no general jurisdiction of these subjects. That power to act in such cases is derived from the statute and it may be shown collaterally, that the power to act in a particular case did not exist, because the case was not within the delegation of authority to the county court that assumed to act.

The judgment of the circuit court is *affirmed*.

G. W. Ray, for appellant.

W. T. Owen, for appellee.

MARY F. BUFORD *v.* JAMES GUTHERIE AND SAME *v.* SAME.

Vendor and Purchaser—Vendor's Lien—Foreclosure.

In the foreclosure of a vendor's lien securing two notes owned by the same person, one of which is not due, it is error to decree the sale as to one subject to a lien of the other note.

APPEAL FROM HENRY CIRCUIT COURT.

April 21, 1873.

OPINION BY JUDGE HARDIN:

These cases, having been heard together, will be so decided.

Waiving other objections taken in the argument to both judgments, we deem it sufficient to say that the first judgment of sale, being directly in conflict with the decision of this court in the case of *Emison v. Risque*, 9 Bush 24, in that it directs a sale of the land for one instalment of purchase money subject to another, it must be reversed for reasons indicated in the opinion of the court in that case, and the error in that judgment necessarily invalidates the other.

Wherefore both judgments are reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Judge Pryor did not sit in this case.

Rodman, Wheat, for appellant.

Thorn & Drane, for appellee.

JAMES A. ROBERTS *v.* MELVILLE COLLETT.

Boundaries—Designation of Lines—Proof.

Boundary lines of land may be designated by physical or natural objects set up for that purpose, by the owners, or fixed and established by the surveyor in the presence of witnesses, or both means, and in such cases the exact location of a given line must be proven by witnesses.

Boundaries—Locating Patent—Ambiguity—Question for Court.

The manner of locating a patent, when there is ambiguity in the calls, is a question of law to be determined by the court, and can not be submitted to a jury.

APPEAL FROM WARREN CIRCUIT COURT.

April 22, 1873.

OPINION BY JUDGE PETERS:

The grounds relied upon mainly for a reversal of the judgment of the court below are two. The giving of certain instructions asked for by appellee, to which appellant objected, and the refusal of the court to give those numbered 1, 3, 4 and 6 asked for by him.

The first instruction asked for by appellant and which the court refused reads substantially as follows: "Two patents having been read by defendant subject to all legal exceptions, one to Robert Reese for 170 acres, and the other in the name of Robt. Reese, assignee of Stephen Thompson, for 35 acres, and each of said patents calling for a stake on a line of William Jones' 200-acre survey, assignee of Thomas Hendrick, and thence with said line, and the defendant having failed to introduce or read any survey or patent in the name of Wm. Jones, assignee of Thomas Hendrick, or Hendricks, the plaintiff moved the court to instruct the jury that the calls in said

patents calling for a survey in the name of Wm. Jones, assignee of Thomas Hendricks, when no such survey or patent had been produced, was no evidence of the position of such survey on the ground, or that such a survey existed, and should be disregarded as evidence in locating the position of the Robert Reese patent for 170 acres, or any other patent read as evidence in this action, which the court refused."

The legal proposition presented by that instruction is that unless the defendant had produced and read to the jury a patent or a survey in the name of Wm. Jones, assignee of Thomas Hendricks, he could not prove that said Jones as assignee as aforesaid, had a known or reputed line, or had any land in the vicinity which he claimed to be bounded in part by that particular line unless paper evidence of title to the land in said Jones was first produced.

It may be observed in the first place that while it is stated that the two patents to Reese were read subject to legal exception, no motion appears to have been made to exclude them, and no exception was taken to them as evidence, consequently, as both of said patents call to run with a line of Wm. Jones, assignee of, etc., it would seem that it would be proper and competent to prove by parol where said Wm. Jones' line was in order to locate said patents. But, waiving that, if a patent or a survey be required to be produced before a line of a claimant to land could be proved a possessory right to land could never be established; the mere courses and distances, and even objects called for in a patent do not of themselves fix the boundary of land, but the lines by which different tracts of lands are bounded and separated from other tracts are facts cognizable by physical or natural objects, set apart for the purpose, or fixed and established by a surveyor with his instruments in the presence of witnesses, or by both means, and whether it be by the one mode or the other, the exact locality of a given line must be proved by witnesses. A person may be in possession of land to a designated or specified line or it may be a reputed line called for and his boundary or lines as well known, and as easily proved as if they were specified in a patent. The instruction as asked was therefore properly refused.

In *Handley's Heirs v. Young,* 4 Bibb. 376, this court held that pursuing from a particular point—course called for, a line would be found, which was known in the neighborhood by the name of Har-

rison's line; that it is not proved in fact to be Harrison's line, we do not deem material; for a call for an object, by its *reputed* name is sufficient, as is clearly established by the repeated decisions of this court.

For the reasons that Instruction No. 1 was refused the court properly rejected Instructions Nos. 3 and 4.

Instruction No. 6, which was refused, reads as follows: "The court instructs the jury that where there are doubts as to the true mode or plan of locating a survey, or patent, and the testimony would allow its location in more than one manner, and any mode of location would allow the claimant under the patent the full acres called for, that mode of locating it most favorable to the claimant should be selected."

How a patent shall be located when there is an ambiguity in the calls, is a question of law to be determined by the court, and can not be a question of fact to be submitted to a jury.

In the earlier reports numerous cases are to be found where the chancellor has been appealed to, to fix the form of entries and surveys where there were ambiguities, repugnancy or mistake in their calls, but the court is aware of no case in which such a question was submitted to a jury.

No exceptions were taken to the ruling of the court below in giving Instructions Nos. 11 and 12, and no available error is perceived in giving the others which were asked for by appellee. And there certainly is not such a preponderance of evidence against the verdict as would authorize this court to interpose and grant a new trial contrary to the opinion of the circuit judge.

Let the judgment be *affirmed*.

Underwood, for appellant.

Rodman, for appellee.

DAVID TODD, ETC., *v.* H. RODMAN, ADM'R, ETC.

Trusts—Death or Resignation of Trustee.

If a trustee resigns or dies, a court of equity has the power to appoint another as trustee in his place, since the trust will not be allowed to lapse for want of a trustee.

Trusts—Authority of Trustee.

A trustee appointed by a will can only do what the will authorizes him to do, but a trustee appointed by the court derives his power from the court and must execute the trust only as authorized by the court.

Trusts—Unlawful sale by Trustee.

Where a trustee unlawfully sells a note belonging to the trust fund, and the contract can be rescinded without loss, the sale will be set aside.

APPEAL FROM FRANKLIN CIRCUIT COURT.

April 22, 1873.

OPINION BY JUDGE PETERS:

The late Samuel Todd devised to his friend, John T. Stoffer, the whole of his estate, real, personal and mixed, to be held in trust for certain purposes therein named. He also nominated said Stoffer as his executor. At the March term, 1859, of the Franklin County Court the will was properly probated, and it appears that Stoffer some time after that qualified as executor thereof and undertook to execute the trusts confided to him. It further appears from a copy of a judgment filed in the record rendered at the March term, 1869, of the Franklin Circuit Court, in the suit of Mary S. Todd and others against said Stoffer, that he tendered to that court his resignation as trustee, which the court accepted, and then the court proceeds to adjudge that "Dabney Todd is appointed their trustee, and the said Stoffer is directed to deliver to the said trustee the two bonds on the Louisville and Frankfort Railroad, mentioned in the petition."

By his will said testator conferred the power on his said executor after the death of his wife, for whose comfortable support he made provision, to sell and convey any of his real estate with the consent of his daughter-in-law, Mary S. Todd, and if his wife should consent thereto he was authorized to sell during her life.

After the appointment of Dabney Todd trustee for Mary S. Todd and her children by the Franklin Circuit Court, he as trustee sold a valuable house and lot in the city of Louisville, a part of the trust property, to the Central Savings Bank of said city in consideration of

$15,000, for which said bank executed its note payable ten years after date, bearing interest at the rate of six per centum per annum from date, payable quarterly, and reserving a lien on the estate sold to secure the price, and the said Dabney Todd, as trustee, conveyed the estate to the purchaser, his wife, the said Mary S. Todd, the principal beneficiary in the will, joining him in the conveyance, in which it is recited that he, the said Dabney Todd, has the power to sell and to convey said real estate under the will of said testator.

On the 9th of October, 1871, Dabney undertook as trustee of Mary Todd and her children to assign the note for the Louisville property by a formal writing in which his wife, the said Mary S. Todd, joined him, to Dr. Hugh Rodman for a valuable consideration, covenanting in the assignment that he has title to the note, the right to sell and transfer it, and binding himself personally and in his character of trustee for the validity of said assignment.

Doctor Rodman having died not a great while after he took the assignment of the note, his administrator filed a petition in equity in the Franklin Circuit Court against Dabney Todd, his wife, Mary S. Todd, and her children, all of whom are infants, and who are beneficiaries under the will of said testator, alleging the foregoing facts, setting forth that decedent purchased said note for the consideration of nine thousand dollars, three thousand dollars in money paid down at the time of the purchase, a house and lot in Frankfort worth one thousand dollars and which the trustee had rented at an annual rent of $144 per annum, a note on A. Brawner secured by a lien on real estate in Frankfort and which was bearing ten per cent. interest per annum for two thousand dollars, and that the interest was promptly paid, and that he had executed his own note for three thousand dollars with interest at the rate of ten per cent. per annum from date, which was also promptly paid; that the amount paid and promised to be paid was at the time a fair and full price for said note and more than any one else would have given for it. He alleges that said Dabney Todd had the same power under the will that the executor had, and that in pursuance of said power said sales were made with the consent of his wife and Mary S. Todd, and were beneficial to all the *cestuis que trustent;* and asks the court to approve and ratify the sale and transfer of said note, and that he may be adjudged to pay to Todd, the trustee, the amount unpaid, and which he as administrator of Dr. Rodman owes for the same.

On the petition of the Central Savings Bank it was made a defendant to the suit and admits the sale of the house and lot in Louisville to it by Todd as trustee, and prays that its rights and interests may be protected.

Todd and wife both answered and alleged that the sale of the house and lot and the note were not only advantageous to the *cestuis que trustent*, but state that it was a necessity in order to put the residence of the family in a state of comfortable repair, and for family considerations.

The guardian *ad litem* who answered for a part of the infants in a formal way, merely denied what was stated in the petition to their prejudice.

On final hearing the court below adjudged that the sale of the house and lot in Louisville was absolutely necessary for the repair of the mansion house, and for the support of the *cestuis que trustent*, that the trustee was authorized to make the sale and he approved it; that by the appointment of him as trustee by the court he succeeded to all the powers and rights of Stoffer, and that the sale and assignment of the note of the Central Savings Bank to Dr. Rodman was proper, and was ratified by the court, and from that judgment the infant defendants prosecuted this appeal and Todd and wife a cross-appeal.

After Stoffer resigned the trust a court of equity had the power to supply his place by the appointment of a trustee, as it is a well-settled principle of equity that a trust shall not fail for the want of a trustee; but in such cases the court making the appointment takes upon itself the due execution of the trust.

Stoffer, who was appointed trustee by the testator, derived his power from the will, and could lawfully do whatever the will authorized him to do. But Todd, who was appointed to the trust by the court, derives his power from the court, and can execute the trust so far as he is authorized and empowered by the court to do it.

Todd was not authorized by the order appointing him trustee for his wife and children, nor directed to sell the house and lot in Louisville, nor any other of the trust property.

Nor did the order of appointment invest him with the same powers that the will conferred on Stoffer.

Having derived his authority from the court, he could not sell the property unless he was expressly authorized to make the sale

by an order of court, and then if a sale had been made it would have been the act of the court through him as its agent, and if the court had authorized him to make the sale of the property it would have required him to make it subject to its confirmation, so that it would have retained full power over the subject, and to control the purchase money and have it appropriated according to the intention and directions of the testator. *Harris, etc., v. Rucker,* 13 B. Mon. 564.

It is clear, therefore, that Todd had no power to make sale of the house and lot nor of the note executed for the price, but as it may not have been to the prejudice of the beneficiaries under the will to have sold the house and lot, and as the parties by a rescission might not be placed in statu quo the court will not now conclude that question, but will remand the cause on that branch with directions for amended pleadings and further proceedings, and for a confirmation of the sale, if it can be done without prejudice to the rights of the infants. As to the sale of the note to Dr. Rodman, the condition of the parties is different; the contract can be rescinded without loss to his estate, and although it does appear from the evidence that he paid more for the note than others would pay, still, as Todd had no power to make the sale, it must be set aside on equitable principles. Wherefore the judgment is *reversed* and the cause is remanded with directions for Dabney Todd, trustee as aforesaid, to reconvey the house and lot in South Frankfort, conveyed to him by Dr. Hugh Rodman, to his heirs, to surrender up the note on A. Brawner assigned to him by Dr. Rodman to his administrator, to surrender up the note which he holds for $3,000 on Dr. Rodman to his administrator, and the administrator will surrender the note on the Central Savings Bank for $15,000 to the court, to be placed in the hands of a receiver to be appointed by the court, who will collect the interest thereon as it falls due, to be applied to the extinguishment of the balance of the $3,000 cash paid by Dr. Rodman to said Dabney Todd, that balance to be ascertained by the master, who will settle the accounts between the parties on the following principles: The administrator of Dr. Rodman will be charged with all the interest he has collected on the note for $15,000 on the Central Savings Bank, and credited by the amount of rents received by D. Todd on the house and lot conveyed to him, by the interest collected on the Brawner note, and the interest received on the note of $3,000

executed by Dr. Rodman to Todd and the balance received by the administrator to be credited on the $3,000 cash paid by Dr. Rodman. Then the interest on the note for $15,000 on the Central Savings Bank to be applied to the payment of the residue of the $3,000, which will bear interest at the rate of six per cent per annum till paid. The annuity to Louisa Todd is to be protected, and if Rodman has paid Louisa Todd her annuity that is to be credited to him.

The court will order a settlement of the accounts of Dabney Todd as trustee and take such steps as may be necessary to secure the trust estate in his hands.

Judgment *affirmed* on cross-appeal.

Moore, Brown, Julian, for appellants.

Rodman, B. Young, Gibson & Gibson, for appellees.

MANASSES LYLES *v.* D. MATHEWS AND WIFE.

Executors and Administrators—Loaning Money of Estate.

An administrator will not be required to loan money out, when, because of litigation, he might be required to account for it at any time.

APPEAL FROM McCRACKEN CIRCUIT COURT.

April 22, 1873.

OPINION BY JUDGE PRYOR:

The history of this controversy shows that the administrator of Jacob Wafford saw proper, notwithstanding the opinion of this court, to pay off the heirs of Joseph Wafford their claims without any proof, or even affidavits of their correctness, as required by the statute. The claims for extra services allowed by the county court were properly rejected; also the $200 as attorney's fee; $175 had been properly allowed and the present judgment allows an additional $100. If the claims of the administrator and his attorneys are all directed to be paid the litigation would be productive of little good

to the heirs of Jacob Wafford, as such a result would indicate that it was instituted more for the benefit of the administrator and his attorney than those really interested. It is doubtful whether the $143, by which the administrator was credited on account of improper charges for rent, should have been allowed as such. There is nothing in the record showing that he is entitled to this credit, but inasmuch as this court had decided that the heirs of Joseph Wafford were entitled to $100, we are disposed to permit this, with the interest, to set-off this credit thus improperly allowed. We see no reason for reversing this case on the original appeal, but it is questionable whether it should not be reversed on the cross-appeal. The fact that the administrator succeeded in the litigation with Joseph Wafford's heirs, and managed the estate as he thought best, does not authorize this court to substitute him to the rights of the heirs of Jacob Wafford and give him what is left of the estate. The item of $17.00 clerk's fees was also properly rejected as the administrator had the right to collect this of Joseph Wafford's heirs. He should be charged with interest, and we think the date fixed by the court is just and equitable. The termination of the litigation was uncertain and we are not disposed to say in such a case that the administrator should be required to loan the money out when he might be required to account for it at any moment.

Judgment is *affirmed.*

Husbands, for appellant.

Bullock, for appellees.

L. R. GLENN, ETC., *v.* GEO. CLAYTON'S ADMINISTRATRIX.

Injunction—To stay Collection of Judgment—Prior levy.

Where at the time an injunction was issued to stay proceedings on a judgment, the execution was in the hands of the sheriff and he levied on personal property, the injunction does not operate to discharge the levy, but the levy remained in force at the time of dissolution of the injunction.

Injunction—Proceeding on Injunction Bond.

Under § 308 Civ. Code Prac., as amended by Act of Feb. 15, 1866, the right of a party to proceed upon an injunction bond given under such amended section depends upon whether he has been damaged by the injunction.

Opinion of the Court.

Injunction—Action on Bond—Damages.

The liability on an injunction bond in a proceeding to stay the collection of a judgment, extends only to the damages sustained up to the time of the dissolution of the injunction, but this liability does not extend to the full amount of the judgment enjoined, unless the defendant was thereby prevented from collecting his judgment, and resulted in total loss.

APPEAL FROM DAVIESS CIRCUIT COURT.

May 22, 1873.

OPINION BY JUDGE LINDSAY:

The action of the circuit court in giving the instruction complained of was not excepted to and can not be revised on this appeal.

The essential inquiry is as to the sufficiency in law of appellee's petition. The action is founded on an injunction bond by which the obligors therein stipulated to pay to appellee such damages as she might sustain in case it was finally decided that the injunction ought not to have been granted. The bond was executed under the provisions of the act amending the 308th section of the Civil Code of Practice. It is true that the county judge did not in express words authorize a bond to be taken to the effect that the party obtaining the injunction should pay to appellee such damages as she might sustain in case it should finally be decided that the injunction ought not to have been granted, as it was his imperative duty to do under the amendment. But his failure in this regard did not operate as a suspension of the obligation in this particular case of the provisions of the statute. It is evident the legislature intended in all cases of injunction to stay proceedings upon a judgment or final order, that the clerk should take a bond similar to that executed by Spray and his sureties, unless the party obtaining the injunction desires to discharge the levy and voluntarily executes the bond originally prescribed by Section 308. The order of the county judge was that the clerk should issue the injunction upon the execution of a bond "in the sum of twenty-five hundred dollars, according to law." The bond accepted is conditioned "According to law" and is such a bond as the clerk was bound to accept when tendered.

At the time the injunction was granted appellee's execution was in the hands of the sheriff and had been levied on personal prop-

erty, and in conjunction with another execution against Spray for less than five hundred dollars on his right of redemption in a tract of land, which right it is alleged in the petition was worth three thousand dollars or nearly double as much as the aggregate amount of both the executions levied thereon. The injunction did not discharge these levies. Upon the contrary they remained in full force at the time of its dissolution. It is stated in the petition that the land was originally sold under Crutchfield's execution in April, 1868, and that the dissolution of the injunction became effectual on the 9th of April, 1869. By reference to Crutchfield's execution, made an exhibit, it appears that in point of fact the land was sold on the 13th of July, 1868, and that appellee had three months after the dissolution of the injunction and before the right of redemption expired, within which to enforce her levy had she chosen to do so. Instead of this her petition shows that when the injunction was dissolved she abandoned the levy, and resorted to a writ of *fieri facias*.

By Section 308 of the Civil Code of Practice, before it was amended, "where the injunction is to stay proceedings upon a judgment or final order, the bond shall be to the effect that the party obtaining the injunction will satisfy the judgment or order, or so much of it as is enjoined, to the extent to which the injunction may be dissolved, and that he will satisfy any modified judgment or order that may be rendered in lieu of it, or so much of it as exceeds the amount left unenjoined." The amendment of February 15, 1866, requires the officer granting such injunction to authorize a bond to be executed, conditioned as that upon which this action is based. Where the bond is given in accordance with this section as originally adopted, the judgment creditor upon the dissolution may proceed at once upon such bond and recover the full amount of his claim, regardless of the facts, that the defendants in the judgment may be perfectly solvent, and that he has sustained no real damage from the injunction other than delay, costs and expenses. His right to proceed upon a bond given under the amendment depends upon whether he has in point of fact been damaged by the injunction. *Furgeson v. Tipton, etc.*, 1 B. Monroe 28; *Ashby v. Tureman*, 3 Littell 6. The facts stated in the petition must show that the plaintiff has sustained actual damages, and these statements of fact must be upheld by proof. In this case the petition merely recites

that upon the levy of the execution, the injunction was obtained, that it was afterwards dissolved, that instead of enforcing the levies which were not discharged by the injunction, they were abandoned, and a *fi. fa.* issued upon the judgment, which was returned no property found, and then concludes with the allegation that by reason of these facts, appellee was damaged in the full amount of her judgment, a conclusion altogether unauthorized by the facts; but if it were not, as the injunction bond binds the appellants to pay no more than the damages awarded upon the dissolution of the injunction, but not to pay the judgment enjoined or any part thereof, except upon the contingency that appellee sustained an actual loss by reason of the injunction to the extent that she was injured by being prevented from collecting her judgment, they are responsible and no farther. If by the enforcement of her levies she could have realized any part of her debt, the loss of which was occasioned by her folly in abandoning the levies, the loss did not result from the injunction. If the defendants in the judgment at the time the injunction was obtained were all insolvent, and continued so until its dissolution, and the property levied on was all that could have been taken under execution, then except so far as she was delayed in the enforcement of these levies, and incurred expenses in the consequential litigation (which are reversed by the judgment for the statutory damages), it is plain that she could have sustained no actual damage from the injunction. The pleadings and proof do not warrant a judgment against the sureties on the injunction bond for a greater sum than the amount of the judgment rendered against Spray upon the dissolution of the injunction, for the statutory damages and costs of suit.

Appellee did not object to the order of court extending the time for appellants to file a bill of exceptions, until the next term, nor ask that the extension should be to a day certain, neither did she object to the order permitting said bill to be filed.

For the reasons given the judgment is reversed and the cause remanded for further proceedings consistent with this opinion. The parties should be allowed to amend their pleadings in case they desire to do so.

Kincheloe, Swope for appellants.

Sweeney, Stuart, for appellee.

THE COMMONWEALTH *v.* FALLS CITY TOBACCO BANK.

Banks and Banking—Statute Amending Charters.

The provisions of the Act of Feb. 17, 1858, entitled "An Act amending the charters of the several banks of Kentucky," do not apply to banks incorporated subsequent to the taking effect of such act, since charters not in existence could not be amended.

APPEAL FROM FRANKLIN CIRCUIT COURT.

May 23, 1873.

OPINION BY JUDGE LINDSAY:

The act of February 17, 1858, entitled "An act amending the charters of the several banks of Kentucky."

The first section provides "That the net amount of the surplus accumulated profit of each of the incorporated banks of this commonwealth shall be taxed at the same rate at which the capital stock of said bank is now taxed by law, which shall be paid in the same manner as the tax on the capital."

The natural import of this language is that the act was to amend the charters of existing banks, and to leave to the legislature the duty of prescribing the amount of taxation to which banks subsequently chartered should be subjected. The net amounts of accumulated profits to be taxed were the accumulated profits of the banks of the commonwealth then incorporated. But if the language and structure of the section leaves this a matter of doubt, this doubt is removed by reference to the title of the act. The legislature therein declared its object to be the "amendment of the charters of the several banks of Kentucky." Charters which had not then been granted could not from the very nature of things be amended.

The act does not declare that its provisions shall apply to charters thereafter granted, and its title utterly forbids that they shall be so applied.

The Falls City Tobacco Bank was not incorporated until January 21, 1865, hence it is not bound to observe the requirements of the act of February, 1858.

The demurrers to appellant's petition and amended petition were properly sustained and said petitions properly dismissed.

Judgment *affirmed.*

Rodman & Thompson, for appellant.

Pendell, for appellee.

ELLEN DARLING *v.* WM. W. DARLING.

Divorce—Abandonment.

The acts of a husband were held not to amount to an abandonment of his wife, in view of the circumstances of his absence.

APPEAL FROM CARROLL CIRCUIT COURT.

April 23, 1873.

OPINION BY JUDGE PETERS:

The promises which appellant exacted of appellee immediately preceding their marriage show that she approached the hymeneal altar "in doubtings and in fears," and although he lingered too long in the neighborhood after she returned to her father's, and seemed reluctant to leave for that distant land to which by their ante-nuptial agreement he was to go in search of a fortune which was to secure her ease and comfort, still when he did go his absence can not be construed into an abandonment of appellant, and furnish grounds for dissolving the marriage relations between them, at least until after the expiration of the time when he was to return.

Appellant voluntarily left her father's house and entered into the most responsible and solemn relations which pertain to this life, under circumstances, as her own conduct shows, which caused in her own mind great doubts, if not alarm, as to the results to herself, and if the disasters have followed which she at the time had just cause to fear, she must await the period which the law in its benignity has fixed, when she may be relieved, which has not yet arrived.

The judgment must be *affirmed.*

Cox, Deane, for appellant.

Masterson, for appellee.

JOE REED, ETC., *v.* CLIFTON RODES, ETC.

Contracts—Failure to Cancel Revenue Stamp.

The mere failure to cancel a stamp placed on a written contract does not invalidate it.

Contracts—Impairment by Act of Congress.

Congress has no power to control contracts, or to impair the obligations thereof, which were made in the state according to its laws and which derived their obligations from and are amenable only to such laws.

APPEAL FROM BOYLE CIRCUIT COURT.

April 24, 1873.

OPINION BY JUDGE PETERS:

In *Hunter v. Cobb,* 1 Bush 239, this court decided that no private contract or other writing is in any degree invalidated by the want of a stamp, and that no remedy upon it is essentially affected by a like cause.

If a contract or writing can not be affected by the want of or entire failure to affix a stamp thereto, it is not perceived how a mere failure to cancel a stamp placed on a writing can invalidate it, whatever may have been the reason for failing to cancel it.

In the cases referred to by counsel for appellants, the courts which decided them recognize the power of Congress not only to inflict a penalty on the parties to contracts in writing for a failure to affix a stamp, but also to declare the contract void if the proper stamp is not affixed. This court, however, takes the ground that Congress has no power to control contracts, or to impair the obligation thereof, made in a state according to its laws, deriving its oggligations from and amenable only to them. The ruling of the court below conforms to the doctrine of this court in the case, *supra,* and feeling confirmed as well by mature reflection as by the scenes that are almost daily transpiring in the correctness of the principles of that case, we can but adhere to it.

The judgment must be *affirmed.*

McKee, Poston & Kyle, for appellants.

Durham & Jacobs, Vanwinkle & Rodes, for appellees.

HENRY DENT *v.* FRANK PARSONS.

Wills—Restriction on Devise—Postponing Power of Alienation.

A restriction on a devise in favor of the testator's son in attempting to postpone the power of alienation until the son arrives at twenty-five years of age, was held to be invalid.

APPEAL FROM LOUISVILLE CHANCERY COURT.

April 25, 1873.

OPINION BY JUDGE PETERS:

By the will of his father the absolute fee to the house and ground passed to his son, F. Parsons, and the effort to postpone the power of alienation until he should arrive at 25 years of age was inconsistent with the devise of the fee.

The property would be subject to the debts of appellee contracted after he was 21 years of age, as much as if contracted after he was 25 years old. *Carlin's Adm'r v. Carlin, etc.*, 8 Bush 141.

The attempted restriction on the power of alienation relied upon by appellant can not have the effect contended for. And the judgment of the chancellor is therefore *affirmed.*

B. F. Camp, for appellant.

Mundy, for appellee.

COMMONWEALTH *v.* L. ECKSTEMPER AND OTHERS.

Insurance—Voluntary Association—Assuming Corporate Name.

An association of persons for mutual protection against fire, to which a corporate charter has been refused, violates no law by assuming what may be regarded as a corporate name.

APPEAL FROM FRANKLIN CIRCUIT COURT.

May 27, 1873.

OPINION BY JUDGE LINDSAY:

The association known as the "Falls City German Mutual Insurance Company," must be regarded as a mere voluntary association of the members thereof, for the purpose of indemnifying each other against loss by fire, the General Assembly having failed to grant them a charter. There is no corporation, and the proposed charter, which forms the bonus upon which the association credits its business, should be treated as the article of agreement, by which the rights and duties of the various members are prescribed and defined.

The association violates no law by assuming what may be regarded as a corporate name, and as it is engaged in a legitimate business, it can not be interfered with by the courts. The petition of the commonwealth was properly dismissed.

Judgment *affirmed.*

Attorney-General, for appellant.

Bullitt, Bramlett, for appellees.

COMMONWEALTH *v.* RUFUS ROGERS, ETC.

Recognizance—Enforcement of Obligation.

Sections 20, 27, 52 and 80, Civ. Code Prac., were enacted for the purpose of enabling the court to enforce obligations on recognizance bonds, although they may not be executed in strict conformity with the statute.

APPEAL FROM GRAVES CIRCUIT COURT.

June 3, 1873.

OPINION BY JUDGE PRYOR:

Section 26 of the Civil Code of Practice provides that the officer in taking the bail bond shall fix the day of the defendant's appearance not exceeding five days from the arrest unless made in a different county.

Section 27 provides that a deviation from the provisions of this section shall not render the bond invalid. Section 52 provides that after bail is given the justice may for cause extend the time for defendant's appearance not exceeding ten days. This last section still leaves Section 27 in force and only enlarges the power of the magistrate in extending the time after the bond has been executed for the appearance of the party charged. If this construction of the several sections referred to should even admit of doubt Section 80 of the Code provides that if no day be fixed for the appearance of the party, or an impossible day the bond or recognizance shall be considered as binding the defendant to appear and surrender himself for trial within twenty days from the time of giving the bond. These sections of the code were enacted for the express purpose of enabling the courts to enforce such obligations, although they may not be executed in strict conformity to the statute. That the warrant embraced two offenses is no defense to the motion. The magistrate had the right to have the party arrested, and the warrant justified the officer in making the arrest. When brought before the court the accused might have demanded a separate trial or even the right to execute separate bonds, but this he failed to do and we see no reason for disturbing the judgment upon the forfeiture. The judgment of the court below is reversed and cause remanded for further proceedings consistent with this opinion.

Rodman, for appellant.

Landrum, for appellees.

J. W. ADAMS *v.* COMMONWEALTH.

Intoxicating Liquors—Tavern License—Discretion of Court.

The county court has a large discretion in the granting of a license for the keeping of a tavern, and such discretion will not be interfered with by the Court of Appeals, in the absence of a showing of abuse of discretion.

APPEAL FROM MADISON CIRCUIT COURT.

June 3, 1873.

OPINION BY JUDGE PRYOR:

The motion to dismiss the appeal for want of jurisdiction is overruled. An appeal in such cases must be taken from the judgment of the county court to this court.

The provisions of the Revised Statutes on the subject has been repealed by a provision of the Code of Practice subsequently enacted. *Boehler v. Commonwealth,* 1 Duvall 3. The evidence in the case, however, does not show an abuse of discretion by the court below in refusing the license.

The county judge is presumed to have personal knowledge of the necessities of those traveling on the highway for entertainment where this tavern is proposed to be kept as well as the evil results that might follow in its immediate vicinity in the event the license should be granted, and when there is any evidence tending to show that the object in getting the license is more for the purpose of selling liquor than providing food and lodging for the traveler, this court, recognizing the enlarged discretion vested in the county judges of the state with reference to such questions, will not interfere with such a judgment as rendered in this case.

Judgment *affirmed.*

Scott & Little, for appellant.

Jno. Rodman, for appellee.

J. H. McMULLIN *v.* J. G. DODGE.

Trade-marks and Trade-names—Unfair Competition.

Where D. used the trade-mark "Kentucky Bells" on bells manufactured by him, the use of the words "Kentucky Stock Bells" on bells manufactured by M. constitutes unfair competition, and M. may be enjoined.

Trade-marks and Trade-names—Pleading.

Where plaintiff sued to enjoin defendant from committing apprehended injury by unfair competition, it is not necessary to allege and prove actual injury as a prerequisite to recovery.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 3, 1873.

OPINION BY JUDGE LINDSAY:

The name adopted by Dodge for the bell manufactured by him, which by long and continuous use he became entitled to as a trade-mark, was that of "Kentucky Bell." He did not use the word "Kentucky" to indicate the place at, or the state within which his bells were manufactured, but appropriated the words "Kentucky Bell" as the name of his work and made the combination his trade-mark, by attaching it to the goods he manufactured.

Appellant could have shown upon the bells manufactured by him, that they were manufactured in the state of Kentucky without using the name of the state so as to create the impression upon the minds of ordinary observers that they were the "Kentucky Bells," manufactured by Dodge. The fact that he inserted between the words "Kentucky" and "Bell" the word "Stock" amounts to nothing. His bells are similar in size, shape, and color to those manufactured by Dodge. His label is printed upon paper very nearly the same color with that used by appellee. The word "Stock" conveys no information to the purchaser of the bells, as they show for themselves that they are stock bells.

The evidence in this case raises the presumption that the label used by Offett was intended to be an imitation of the trade mark of Dodge, and that it was well calculated to deceive the public, and to injure his business. As this is not an action for damages it was not necessary to allege or prove actual injury. It was for the purpose of being protected against the apprehended injury that Dodge prayed for an injunction. The judgment of the chancellor is not more comprehensive than it should have been.

Judgment *affirmed.*

Fox, for appellant.

James Harrison, for appellee.

SAMUEL GLASSCOCK, ETC., *v.* COMMONWEALTH.

Intoxicating Liquors—License—Place of Business.

Under a license to keep a tavern, the licensee does not have the right to keep a barroom at his storehouse detached and forty feet distance from the tavern where a separate business is conducted.

APPEAL FROM BRECKENRIDGE CIRCUIT COURT.

June 3, 1873.

OPINION BY JUDGE HARDIN:

The license to the appellants clearly imports the usual privileges of tavern keepers, which embraced the right to retail liquors at their tavern house and in connection with their business of entertaining guests; but it did not in our opinion, protect them in keeping a separate bar-room at their storehouse, detached and forty yards distant from the tavern, and where a distinct and separate business was conducted.

We therefore concur in the judgment, which is *affirmed*.

G. Williams, for appellant.

Atty. General, for appellee.

JAMES F. PURSLEY *v.* COMMONWEALTH.

Recognizances—Bond—Time for Appearance.

Where a recognizance bond does not show that accused was charged with a public offense and that he was discharged from custody by reason of the giving of the bond, and does not stipulate that accused should appear before the court for trial of the charge, such omissions are fatal to the bond.

APPEAL FROM BARREN CIRCUIT COURT.

June 3, 1873.

OPINION BY JUDGE PETERS:

It neither appears from the bond or the recognizance in this case that Dennison, for whose appearance appellant undertook, was charged with a public offense; that he was discharged therefrom by reason of the giving of said bond. Nor has appellant stipulated therein that Dennison should appear before the court for the trial of a charge. The omission of these substantial facts is fatal to the bond under Sections 77 and 80 of the Criminal Code.

Wherefore the judgment must be reversed and the cause remanded with directions to dismiss the proceeding against appellant.

Boles & McQuown, for appellant.

Rodman, for appellee.

COMMONWEALTH FOR MUIR *v.* J. S. COLEMAN, ETC.

Guardian and Ward—Undue Influence—Presumption.

As to transactions between a guardian and ward, the presumption of undue influence will be indulged in favor of the ward, where the result was beneficial to the guardian, or intended to be so.

Guardian and Ward—Transaction Between Guardian and Ward—Burden of Proof.

Where, in making settlements with his ward, the grantor gave the ward notes on third persons, the burden of proof is on the guardian to show the utmost fairness on his part, and that the ward fully understood his legal rights and was fully advised as to the solvency of the payors of the notes.

Guardian and Ward—Loaning and Collecting Ward's Money—Diligence.

A guardian, in loaning out money of the ward and in collecting money due the estate should exercise a high degree of diligenc for the protection of the ward's estate.

Guardian and Ward—Settlement with Ward—Duty of Guardian.

Where a guardian, in making settlement with his ward assigned him certain notes, it was the duty of the guardian to advise the

ward as to the solvency of the payors of the notes, and to advise the ward that unless he sued on the notes at the first term of court the guardian's liability as surety for the payors would be lost.

Guardian and Ward—Settlement with Ward.

A guardian in making settlement with his ward, by assigning notes of third persons, can not hold the ward to the strict rules of law regulating contracts of assignment.

Guardian and Ward—Settlement with Ward.

The fact that an attorney represented the ward in a settlement with his guardian does not authorize the guardian to treat the ward "as a person at arm's length."

APPEAL FROM TODD CIRCUIT COURT.

June 4, 1873.

OPINION BY JUDGE LINDSAY:

The appellant Muir became of age on the 30th of November, 1868. On the 26th of January, 1869, Coleman, the guardian, settled his accounts with the county judge and transferred to Muir as part of his estate the note on Hutchings and Browder, and in satisfaction of a balance due in money assigned to him the note of Hollingsworth and Edwards.

Up to the time of these transactions, a considerable portion of the ward's estate had remained in the hands of the guardian, and the presumption of undue influence arising from the relationship of the parties may be considered as then existing. Strong Equity, Sec. 317.

The contracts that day entered into between the guardian and ward are to be scrutinized with the utmost jealousy, and as they resulted beneficially to the guardian, or were intended to result beneficially to him, in relieving him from liability to his ward on account of his fiducial acts, the *onus probandi* rests upon him to show the utmost fairness on his part, or in other words, that the ward fully understood his legal rights, and was fully advised as to the solvency of the persons who were the payers of the two notes, and advised that under the law it was his duty to sue on the notes at the succeeding term of the court. *Richardson, Adm'r, v. Spencer, Marshall, etc.*, 18th B. Monroe 450.

It was the duty of the guardian to loan out the money of the ward, and it was no doubt proper and judicious for him to make the loan to Hutchings in 1866. But prior to the time the note was renewed in 1868, it must have been manifest to every person observant of the manner in which Hutchings was doing business that he was liable to fail at any time. It was the duty of the guardian to have kept himself advised as to this matter, and more especially to have inquired into Hutchings' financial affairs before renewing the note. Had he done this he would certainly have acquired such information as would have made it incumbent upon him to have taken steps to collect the money due his ward instead of renewing the note, nor did the fact of Browder's apparent solvency justify him in the course pursued. It has been held by this court that when a guardian leaves the funds of his ward to a solvent principal, he should also require good security, that he should never be allowed to invest the money of his ward upon the credit of a single individual. *Clay v. Clay*, 3d Metcalf 548. The exercise of reasonable diligence would have satisfied Coleman when he renewed the not in 1868, that but one of the obligors was solvent, and such vigilence and fidelity as he should have exercised considering his fiducial position would probably have excited grave suspicions as to the solvency of Browder, the surety. It was not enough that it was possible to collect the note by the exercise of the highest degree of diligence. The ward's money should, when loaned out, have been secured by the note of at least two solvent payors, and whenever it became a matter of doubt as to the solvency of either of them the guardian was bound to take steps to collect it. In this case he not only failed to do so, but renewed the note without additional security, and when he settled with his ward, turned over to him as part of his estate a note which could not be collected except by the exercise of a very high degree of diligence.

Whilst it is proved that Coleman said to Muir that he ought to wind up his business as speedily as practicable, he does not seem to have advised him as to the ability of Hutchings and Browder to pay the note, but let him rest under the delusion that it was as good as the cash. It was certainly his duty to have done this much, and if he intended, by his assignment, to become surety for the payors of the note, he should have advised his ward that unless he sued at the first term of the court this security would be lost.

He had no right to put off on his ward the note of Hollingsworth & Edwards. He should have paid him in money, having failed to do this, he cannot claim that the ward shall be held to the strict and arbitrary rule of law regulating contracts of assignments. Hollingsworth was insolvent at the time, and Edwards, if good, was a mere surety, lacking less than three months of being released by lapse of time. Coleman does not pretend he informed Muir that unless he sued before the 19th of April, 1869, Edwards would be released. Nor that he (Coleman) would not remain bound on the contract of assignment unless suit was instituted at the final term of the court.

The fact that Muir had counsel to superintend the settlement of Coleman's accounts, did not authorize the latter to treat his ward, "As a person at arm's length." The business of Muir's attorney seems to have been to look after the settlement. He is not shown to have had anything to do with the manner in which Coleman undertook to pay off his ward, and as the guardian failed to exercise proper vigilence in the management of his ward's estate, and attempting to pay off a portion of the amount he owed in a cash note, instead of in money as he should have done, the mere presence of an attorney will not authorize the relaxation of that strictness which, as Lord Hardwicks says, public utility requires, shall be enforced. *Hylton v. Hylton*, 2 Ves. 548.

This court is of opinion that upon the facts as presented by the record, appellant is entitled to the relief sought.

The judgment dismissing his petition is *reversed*, and the cause remanded for proceedings consistent with this opinion.

S. W. Kennedy, Rodman, for appellant.

Petrie, Reeves, for appellee.

COMMONWEALTH *v.* MOSES RUGLESS.

Recognizances—Bond—Release of Surety.

Where a party was indicted and fined and was afterwards taken into custody by the sheriff under a capias, and permitted to escape, it operated as a release of the surety on the recognizance bond.

Opinion of the Court.

APPEAL FROM LEWIS CIRCUIT COURT.

June 4, 1873.

OPINION BY JUDGE PRYOR:

The party indicted and fined was afterwards taken into custody by the sheriff under a capias and permitted to escape.

This released the surety. Judgment *affirmed*.

G. M. Thomas, for appellant.

———, *for appellee.*

JOHN & WM. PUGH *v.* COMMONWEALTH.

Intoxicating Liquors—Place of Drinking.

Although persons who purchased whisky of defendant may have had the legal right to drink it where they pleased, such defendant had no power to authorize them to drink it, nor to consent that they should drink it, in the public highway adjacent to his premises.

APPEAL FROM HARRISON CIRCUIT COURT.

June 4, 1873.

OPINION BY JUDGE LINDSAY:

The indictment charges that the two appellants kept a tippling house. The proof shows that they were merchants, doing business together or in partnership.

Two or more persons may jointly keep a tippling house, and upon conviction, they are each liable for the penalty imposed by law, just as each joint offender is liable for the commission of any other character of offense. *Caldwell v. Commonwealth*, 7 Dana 229; *Gray, etc., v. Commonwealth*, 9 Dana 300.

Instructions Nos. 1 and 2 seem to be free from objection, and instruction No. 3, when considered in connection with No. 1, was

not calculated to mislead the jury. Obviously those who purchased the whisky may have had the legal right to drink it where they pleased, but appellants had no power to authorize them to drink it, nor to consent that they should drink it in the public highway adjacent to their premises.

The answer of the court embodied in the 3d instruction imparted this information to the jury; it is not to be presumed that they, in considering this instruction, disregarded the law in instruction No. 1.

Judgment *affirmed.*

A. H. Ward, for appellant.

———, *for appellee.*

JAMES MILLER *v.* B. F. ROGERS AND OTHERS.

Judicial Sales—Confirmation of Sale—Nunc pro tunc Order.

Where all the parties directly interested in the sale of land are seeking confirmation of the sale and are desirous of perfecting the title, and the defect consists in the failure to make an order approving the execution of the bonds of guardians of infant defendants, the defect may be cured by an order nunc pro tunc, or by the execution of new bonds under supplemental proceedings.

Infants—Sale of Lands.

There can be no valid objection to the selling of an infant's real estate in conjunction with other and separate interest in land where it is made to appear that the sale would be to the interest of the infant.

Infants—Sale of Lands—Confirmation.

Where the sale of an infant's land is shown to be beneficial to the infant, the chancellor will uphold the sale, unless the proceeding under which the sale was made is so defective as to preclude the chancellor from giving a valid title to the purchaser.

APPEAL FROM BOURBON CIRCUIT COURT.

June 4, 1873.

OPINION BY JUDGE PRYOR:

Benjamin F. Rogers died in the County of Bourbon, the owner of a tract of about four hundred acres of land. He had been twice married, having four children by his first and one child by his last wife. The children by his first wife owned a tract of two hundred acres of land in their own right derived by descent from their mother.

The last wife of Rogers survived him, and by her husband's will was entitled to a life estate in two hundred acres of the land owned by him, including the homestead. After his death his children by his first wife had the two hundred acres of land they owned by descent from their mother divided into two parcels. One parcel was allotted to William S. Rogers, Jr., and Anna C. Rogers jointly, containing ninety-eight and three-fourths acres, and the balance to the other two children. The land allotted to William S. and his sister, Anna, adjoined the two hundred acres devised to the widow for life out of the lands of her husband. The devisor had two daughters, Mrs. Kate Parish and Anna C. Rogers, the last named having intermarried with Israel Stone during the pendency of this suit. By the will of the father the interest in the lands devised to his two daughters was a life estate, and then to their children. The widow of the devisor in conjunction with the adult children, as well as the infant children, and their statutory guardians, filed this petition in equity to sell the four hundred acres of land owned by the father and in which all of his children had an interest, and also the ninety-eight and three-fourths acres of land allotted to William S. Rogers, Jr., and Anna C., his sister, the latter being an infant. The commissioner was directed to sell all the land as one tract, including in it this ninety-eight and three-fourths acres belonging to William S. and Anna, or to sell it in two parcels. The land was sold in two parcels and James Miller, the appellee, was the purchaser of 331 acres, 1 rod and 23 poles, at the price of $145.00 per acre. This purchase by Miller included the two hundred acres devised to the widow for life, and the ninety-eight and three-fourths assigned to William S. and Anna C., out of the land they owned through the mother. The appellee, Miller, insists that by his purchase, under the proceedings instituted for the sale of this land, he acquired no title. One of the grounds relied on is, that no bonds were executed by the guardians and approved by the court prior to the sale. 2. That the

married women were not privily examined. 3. That it was error to sell the four hundred acres of land in conjunction with the ninety-eight and three-fourths acres, as the child of the last wife of the devisor had no interest in the small tract, and it therefore prejudiced his rights. 4. That there was no evidence before the court that a sale was necessary. Upon these objections being made a supplemental pleading was filed by Stone and wife, Anna C., against all the parties in interest for the purpose of curing any defects that may have existed in the original petition and upon the hearing the Chancellor adjudged that the title passed to the purchaser. All the parties directly and indirectly interested in the sale of this land are seeking a confirmation of the sale and are desirous of perfecting the title. The law requires that before any sale shall be made of infant's real estate in a case like this, bonds must be executed by the guardians and approved by the court. These obligations seem to have been executed in court and approved, but by some omission of the clerk the order approving them was not made. Still the bonds were in court and had really been executed as the law required, and we see no reason why an order *nunc pro tunc,* as was made in this case, did not cure this defect, but if this be not so, the guardians in the supplemental proceeding have executed other bonds that were approved by the court.

We see no valid objections to selling infants' real estate in conjunction with other and separate interests in land, when it is made to appear that such a sale would be to the interest of the infants.

The statute authorizes the sale of infants' real estate and nowhere forbids the Chancellor from selling that estate in conjunction with other lands in which the infant may have no interest.

Where land has been divided between children, some of whom are infants, and deeds made, if it should appear to the Chancellor that the interest of the infants would be enhanced by selling their lots in conjunction with those owned by the adults, he ought at once to render such a judgment. The defect in the original proceedings in this case was in failing to allege and prove that such a sale would redound to the interest of all the parties. This, however, is alleged in the supplemental proceeding and is sustained by a number of witnesses fully conversant with the location of the land and the rights of the parties.

It is shown that the addition of this ninety-eight and three-fourths

acres of land to the dower tract made the land as a tract desirable and enhanced its value and no doubt, from the proof, was an inducement for the appellee to make the purchase. The infant child by the last wife cannot complain, as his interest has been advanced by this action on the part of his guardian and sanctioned by the court. The owner, however, of this ninety-eight and three-fourths acres, in order to quiet the title, and remove all cause of complaint, agrees on the record not to assert their right to the purchase price, viz: $145.00 per acre, but to accept the value of the ninety-eight and three-fourths acres of land as if sold without regard to its forming any part of the dower interest. This value is fixed at $110.00 per acre by the appellee himself and by other witnesses. The married women, one of whom was an infant when this action was originally instituted, are now of age and have made and tendered to the appellee, in conjunction with their husband's deeds to their interests properly acknowledged, and which pass the title. If any defect existed by reason of them not being privily examined by the court prior to the rendition of the judgment these deeds certainly cure all such errors. This sale is shown to be beneficial to all the infants and in such a case the Chancellor will uphold the sale unless the proceeding under which it is made is so defective as to preclude the Chancellor, by his judgment, form giving a valid title made to the purchaser. The infants, adults, and guardians all want this sale confirmed. It is shown to be greatly beneficial to the infants. The purchaser wants the land if the title can be made, and in such a case even if the present proceedings were defective and these defects could be cured, this court would remand the case back to the lower court with directions to have such a proceeding instituted as would perfect the title. We are satisfied that in the present case the title passed to the purchaser. The proceeds of the infants' land is held by the Chancellor for reinvestment, and whether he can require the widow to make an election as provided in the will or give to her absolutely the value of her dower interest, or require her to take the annual interest thereon, are questions in which appellee has no interest and are not determined by this judgment. The judgment of the lower court is *affirmed.*

J. Q. Ward, for appellant.

Davis, for appellee.

L. W. LONG *v.* H. W. WAGGONER.

Set-off and Counterclaim—Setting off Judgment Against Demand.

Where defendant, in an action on a note, is the assignee of a part of the judgment against the plaintiff who is insolvent, defendant may have his debt set off against the demand for which defendant is sued.

APPEAL FROM UNION CIRCUIT COURT.

June 4, 1873.

OPINION BY JUDGE PETERS:

The substance of the 2d paragraph of the answer is that the plaintiff, on the 27th of September, 1869, was indebted to George Huston, administrator of Celia Hord, in the sum of $1,800, evidenced by a judgment of the court in which this suit was pending, and on the last named day said Hord assigned to the defendant one hundred dollars of said judgment by a writing which he files; that said assignment was made for a valuable consideration before he had any notice of the transfer of the note sued on by plaintiff to any one; that the judgment was against the plaintiff and one while both of whom were insolvent at the date of the assignment; that Wheeler is dead and died insolvent, and that plaintiff remains insolvent and therefore prays that the case be transferred to equity and that his debt be set off against the demand for which he is sued.

In his reply to this paragraph of the answer the plaintiff admits the recovery of the judgment referred to against himself and Wheeler, says that in the debt, which was the foundation of the judgment, he was only the surety of Wheeler; that the assignment of a part thereof was made to the defendant by Huston, after the summons had been served on defendant, and that the set-off pleaded by him is for the benefit of Huston, and that the assignment from him to Long was without any consideration moving from the latter to the former.

The recovery of the judgment against appellee and Wheeler by appellant's assignor is admitted in the reply, and it is further admitted that the assignment was made before appellant had notice of

the assignment of the note sued on to Waller, etc., and the insolvency of Wheeler and appellee is not denied, but it is insisted that the assignment of $100 of the judgment against appellee, etc., was not made for a valuable consideration, but was made to enable Huston to collect that much of his judgment.

If that be so, it is not sufficient of itself to defeat the set-off. In *Otwell v. Cook*, 9 B. Mon. 357, this court held "that although the defendant offering the set-off holds it as trustee, he holds it for every purpose of the set-off, which may be in fact for the exclusive benefit of the *cestui que use*. Having the legal title he had the legal right to make the set-off, and be allowed to do it, unless the interest of the beneficiary should forbid." And the set-off was therefore allowed although set up in a legal action, and by a party who had no beneficial interest in the demand, but who took the assignment for the sole benefit of the assignor. *Graham v. Tilford and Barclay*, 1 Met. 112.

There seems therefore to be no difficulty in the way of appellant to avail himself of the set-off, unless it arises from the fact that the judgment is against appellee and Wheeler, and not against appellee alone; but we do not suppose that such an objection is available. Appellee's liability to pay the debt was fixed by the judgment, and the plaintiff therein, or his assignee, had the legal right to coerce payment from him alone, and although at law it might not be available, still as the insolvency of the judgment debtor is admitted, the set-off was clearly available in equity and as such should have been allowed.

Wherefore, the judgment is *reversed* and the cause is remanded with directions to render judgment in conformity with this opinion. If, however, it should appear that the set-off was obtained after the summons was executed on Long, appellee should pay the costs in the court below.

Spalding, Chapeze, S. W. Long, for appellant.

W. P. D. Bush, for appellee.

OWEN GRIMES *v.* L. S. TRIMBLE, ETC.

Money Received—Receiving Money Due Another.

An action for money had and received is the proper remedy, where defendant presented a claim for and received money for timber belonging to plaintiff, which was used by the federal army during the civil war.

Evidence—Testifying from Memorandum.

The fact that a witness had reduced his knowledge of the manner in which the estimate was made to writing in the form of an affidavit or deposition, is no reason for excluding what the witness knew in regard to the controversy, although the same statements may be found in the writing.

Evidence—Exhibits as Evidence.

Refusal to permit exhibits of a petition to be read to the jury by plaintiff, was not prejudicial to plaintiff, where the answer admits all that the exhibits would have shown if they had been produced.

APPEAL FROM McCRACKEN CIRCUIT COURT.

June 5, 1873.

OPINION BY JUDGE PRYOR:

The appellant is seeking to recover of the appellees upon a count for money had and received to his use by the latter. It is alleged that the plaintiff was the owner of certain down timber near the city of Paducah, and that this timber was used for fire and other purposes by the Federal army during the war; that the defendants presented a claim against the government of the United States for the value of this timber belonging to the plaintiff and received compensation therefor under the laws of Congress authorizing the payment of such claim. We see no reason why a recovery should not be had if the alleged cause of action is sustained by the proof. This character of action may be maintained where money has been received tortiously or even by the intervention of forgery.

It is said in Chitty's Pleadings, page 351, that where goods or other property has been improperly received by the defendant and are saleable, that under certain circumstances and after a lapse of time

it may be presumed that the property had been sold by the defendant and converted into money and when the evidence conduces to show this state of fact the common count for money had and received may be maintained. If one disposes of a note belonging to another he is liable to the owner for the amount in an action for money had and received. *Larabee v. Ovit,* 4 Vermont 47. Where one receives money, whether tortiously or improperly, that belongs to another, the law is well settled by all the elementary writers on pleading that the owner may recover in an action for money had and received. Chitty's Pleadings and Notes, 351-99.

The appellant, in order to maintain this action, is required first to show that he owned the timber; second, that it was used by the government and that the defendants received compensation for it. During the progress of the trial it became necessary to show what timber was included in the estimate made by the government officials in allowing defendants' claim. The witness Grace testified that he estimated the value of the timber claimed by the appellant and made an affidavit in which his statement could be ascertained and delivered it to the claim agent. The court below, at the instance of the defendant, excluded from the jury this evidence of Grace, as also the evidence of Harman in regard to the map he had made including the territory of timber claimed by appellant. What the affidavit of Grace the witness contained was not the subject of inquiry in the case, and there was no reason for excluding his statements as to what timber he valued in making the estimate. These were facts known to the witness and of which he should have spoken when called on. The fact that he had reduced his knowledge of the manner in which the estimate was made to writing in the form of an affidavit or deposition is no reason for excluding what the witness knows in regard to the controversy, although the same statements may be found in the writing.

Harrington's statement should not have been excluded for the same reason it was competent for him to state what timber was included in the estimate and that he made a map showing the boundary. In addition those prosecuting this claim against the government obtained the affidavit and map for the purpose of establishing the claim and if the statements of the witnesses as to what was said and done by them in making the estimate varies from the written statements, the defendants can produce the papers, for the pur-

pose of refreshing their recollection or of showing that they have made other and different statements. The plaintiff's counsel asked Instruction No. 16 explanatory of Instruction 14, by which the jury were told that the fact that the witnesses made the estimate of the timber within the boundary claimed by plaintiff, was not excluded. This the court refused to give. If this instruction had been given it might perhaps have cured the error committed in Instruction No. 14.

That the exhibits in the petition were not permitted to be read by the appellant did not prejudice the case, as the defendants admitted in their answer that they had received the money and this was all that the exhibit could have shown if produced.

Whether Morrow sold this timber to Grimes and if sold whether or not the defendants recovered pay from the government for it are questions of fact for the jury and in regard to which this court expresses no opinion. For the reasons indicated the judgment of the court below is *reversed* and the cause remanded with directions to award the appellant a new trial and for further proceedings consistent with this opinion.

Husband, Williams, for appellant.

Bullitt, Bigger, for appellee.

W. J. WILSON *v.* COMMONWEALTH.

Bail—Time of Appearance.

Under § 80, Crim. Code, where a bail bond fixes no time for the appearance of defendant in court, he is bound to appear and surrender himself to the custody of the court for examination within twenty days from the date of the bond.

APPEAL FROM BALLARD CIRCUIT COURT.

June 5, 1873.

OPINION BY JUDGE HARDIN:

The bail bond of Mix recites that he was "Allowed bail for his appearance during the examination of the charge," but it fails to

show either that the trial was then progressing, or that the examination was adjourned to any particular time, as provided for by Section 48 of the Criminal Code. But we must infer from the bond that the time of Mix's appearance was either indefinite or left to the discretion of the magistrate, or that the court, by its order fixed some day for his appearance for trial, which is not even intimated in the bond. If the issue made by the answer depended on what the magistrate's record would prove if produced, the court was not in error in rejecting the parol testimony of the appellant, as to what might have been better shown by the record, which was not produced by either party.

But we must infer from the language and tenor of the bond that no day was fixed for the appearance of Mix, and therefore the bond should be considered as binding him to appear and surrender himself into custody for examination in twenty days from the date of the bond according to Sec. 80 of the Criminal Code. The prescribed twenty days not having elapsed, and the forfeiture endorsed being only three days after the date of the bond, we must adjudge that the supposed forfeiture was void and conferred on the commonwealth no right of action on the bond.

The judgment is therefore *reversed* and the cause remanded by a judgment in conformity to this opinion.

Bullock, for appellant.

Rodman, for appellee.

B. B. COZINE & BRO., ETC., *v.* J. B. KENNEDY.

Attachment—Property Subject to.

Where machines in transit were consigned to defendant in attachment and the machines in transit were attached, and the consignees were acting only as the agents of the owners of the machines, such property should not be subjected to the payment of the agents' and consignee's debts.

Partnership—Action in Firm Name—Remedy.

Under the present system of pleading, if an action is brought in the firm name instead of the individual names of the partners, the defect may be taken advantage of by rule or motion requiring plaintiffs to set forth their individual names.

Attachment—Action in Firm Name—Remedy.

Where the claimants of attached property sued in the firm name alone, they may be required by motion or rule to give the individual names of the members of the firm.

Attachment—Action in Firm Name—Waiver.

Where the claimants of attached property sued in the firm name alone, the defect must be taken advantage of by demurrer, answer or motion, or it will be waived, and objection when taken must appear of record.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 5, 1873.

OPINION BY JUDGE PRYOR:

There is no doubt from the evidence as to the identity of the machines upon which appellee's attachment was levied. They were from the house of Stoll, Barrows & Co., of Cincinnati, and were consigned to Cozine & Brother at Memphis. This property was in transit when it was attached and there is no pretense that it was ever paid for by the consignees. No lien is asserted, it is true, for the purchase price for the reason that the consignees had never purchased the machines, but were to sell them only as the agents of the owners. Houston and McCallister both show conclusively that Cozine & Brother were the agents of the claimants in selling these machines and exhibit the contract by which this agency was created. The fact that Cozine & Brother failed to execute bond with surety as provided by the terms, instead of evidencing the fact that the machines were sold to them, conduces to show that the owners, Stoll, Barrows & Co., were not even disposed to rely upon their promises as agents without indemnity, and if surety was required of them as agents, it is to be presumed that they would have demanded surety when making an absolute sale. That Cozine & Brother had been buying machines of these claimants up to the time this contract of agency was made, and that Stoll, Barrows & Co. about that time ceased to do business as a firm are not such circumstances as should be held sufficient to overthrow the positive statements of Houston and McCallister as to the property in

the machines and the contract between the parties. Houston, as the agent of the claimants, went from Cincinnati to Memphis and made the contract with Cozine & Brother and there is no reason to doubt his statements with reference to it. It is true that Stoll, Barrows & Co. transferred or placed their stock in Cincinnati in the possession of the Field & Lyon Company and perhaps sold it to them about the time this contract was made; still this did not pass the title to these machines then in transitu to Memphis. That they instituted proceedings in the firm name was not made an objection in the court below and can not be taken advantage of in this court. The petition of the claimants alleges that they were selling as the agents of the Field & Lyon Company, but that the machines in controversy were the sole property of the petitioners. There is no doubt from the pleadings and proof that the machines belonged to the claimants and it was error in the court below to have subjected them or the proceeds to the payment of appellee's debt. The judgment of the court below is *reversed* and cause remanded for further proceedings consistent with this opinion.

Cozine & Brother by their appeal insist that the notes sued on were embraced in another judgment theretofore rendered between the parties; if so, that judgment has not been satisfied, and we can not decide from the facts in the present record that this previous judgment embraced the notes in controversy. The judgment as to Cozine & Brother on this branch of the case is *affirmed.*

Allen, J. S. Butler, for appellants.

Clemmons & Willis, for appellee.

ON PETITION FOR REHEARING.

June 26, 1873.

RESPONSE DELIVERED BY JUDGE PRYOR:

The same argument is made upon the petition for rehearing that was made when the case was first considered. Prior to the adop-

tion of the Code of Practice, where the action was brought in the name of the firm without setting forth the individual names of the members, it could only be taken advantage of by special demurrer or plea in abatement. Under the present system of pleading it may be taken advantage of by rule or motion requiring the parties to set forth their individual names. A defect of parties when such defects exist must be taken advantage of by demurrer when it appears on the face of the pleading or otherwise by answer. It is urged that appellee made the objection in the court below, and that injustice has been done him by the opinion rendered in which it is said "that their objections can not be made available for the first time in this court." After a careful inspection of the record we have been unable to find where any such objection was made, and whilst this court does, and should, always take pleasure in reversing its opinions when necessary, it is certainly unjust to the court in requiring additional labor or reading a record, merely to find out, that if an objection was made at all, no entry of it is to be found. That this petition is that of a claimant of property attached does not prevent the filing of a demurrer and making it available when the pleadings show that the claimant has no cause of action, nor does it preclude the parties from requiring the claimants when the action is in the firm name by motion or rule to give the individual names of its members. When this objection is not made by demurrer answer or motion it must be regarded as waived, and when made the objection must appear of record. That the appellee does not know who composes the firm of Stoll, Barrows & Co., is now immaterial to him. It is enough for him to know that the machines are not subject to his attachment. The chancellor can have no difficulty in rendering a judgment for Stoll, Barrows & Co.

When depositions have been excluded in a cause upon exceptions the party taking them must pay the cost of taking unless this court should decide that the exceptions were not properly sustained.

Petition *overruled.*

Allen, Butler, for appellant.

Clemmons & Willis, for appellee.

COMMONWEALTH *v.* ALEX. MCDANIEL, ETC.

Larceny—Continuous or Separate Offenses.

Where defendant was charged with carrying away one lot of wheat, the fact that the carrying away occurred on three different days does not require the commonwealth to treat the acts committed on each day as a separate and distinct defense, since the acts may be treated as a continuous offense.

APPEAL FROM LEWIS CIRCUIT COURT.

June 5, 1873.

OPINION BY JUDGE LINDSAY:

The indictment charges the commission of but one offense, The unlawful taking and conveying away of one lot of hay.

The fact that defendants were engaged, or are charged to have been engaged on three different days in the commission of the offense did not render it necessary that the commonwealth shall treat the act or acts committed on each day as a separate and distinct taking and conveying away. It is charged that one lot of hay was taken. The taking and carrying away of one thing can constitute but one offense, although the wrong-doers may have occupied themselves two, three, or five days in the perpetration of the wrong.

There are offenses which may be constituted by a succession of acts performed at different times. When these are set out in the indictment there may be more days than one mentioned in which the successive acts were done. Bishop's Crim. Procedure, Sec. 244. In this case but one lot of hay was taken and carried away. It is charged in effect that a portion was taken and carried away on the 10th, another portion on the 11th and the remainder on the 15th of February, 1870. The succession of acts performed on these three several days constitute together the one offense. That of taking and carrying away the lot of hay specifically described as having been taken under execution by Appleton, the constable, and placed by him in the possession of bailee Rea.

Possibly the commonwealth might have treated each removal of

a cart or wagon load, as a separate taking, but it was not bound to do so. Neither is it required to treat the taking on each day as an act separate and distinct from taking on the next or any other subsequent day.

The judgment dismissing the prosecution is reversed, and the cause remanded with instructions to overrule the demurrer and for further proceedings.

Phister, for appellant.

Halbert, for appellees.

R. E. CLASBY *v.* EMILY BARNETT.

Judicial Sales—Confirmation of Sale.

Although a purchaser at the sale of the commissioner of a court of equity is only a preferred bidder until the sale is consummated by the chancellor, yet the chancellor can not arbitrarily refuse to confirm the sale, but must act under his authority as regulated by the fixed rules of equity.

Equity—Purchaser at Commissioner's Sale.

The purchaser of property at the sale of a commissioner of a chancery court is the equitable owner of the property, and an order of confirmation is a determination by the chancellor that purchaser's right had existed from the date of the sale.

Taxation—Purchaser at Commissioner's Sale.

A purchaser of land at the sale of a commissioner of a chancery court is required to list the same for taxation, although the sale may not have been confirmed by the chancellor.

Taxation—Land Sold at Commissioner's Sale.

Where the purchaser of land at the sale of a commissioner of a chancery court, failed to list the land for taxation, prior to confirmation of the sale, and the land was taxed to the person who owned it prior to the sale, the purchaser of the land can not treat the payment of the tax by the prior owner as a mere gratuity, it having been paid by the prior owner for the benefit of the purchaser to escape a distress warrant.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 5, 1873.

OPINION BY JUDGE LINDSAY:

Whilst it is true that in one sense the purchase at a sale made by the commissioner of a court of equity is only a preferred bidder, and that his rights thereunder do not become absolutely perfect until the sale is confirmed by the chancellor, it is also true that he occupies a position similar to and jointly as favorable as any other purchaser under an executory contract. The chancellor can not arbitrarily refuse to confirm the sale. It is not with him a mere matter of discretion, but a duty or power, regulated by fixed rules, and unless there exists some reason which, according to the principles of equity practice authorizes the sale to be set aside, the purchaser is not only a preferred bidder, but one who under his bid can demand as matter of right that the sale shall be confirmed.

In the proceeding by Emily Barnett and others, there was no reason why the sale should not be confirmed. Neither party claimed that there was irregularity in the proceedings resulting in the judgment for the sale, or that there was inadequacy of price or fraudulent acts upon the part of the petitioners, the court's commissioner, or the purchaser. Hence Clasby by the acceptance of his bid and the execution of his bonds acquired the same rights he would have acquired by a written contract, entered into with parties *sui juris*, without the intervention of a court. He was from that time forward the equitable owner of the land, and the order of confirmation instead of vesting him with a new or original claim was a mere determination by the chancellor that such claim had existed from the day of the sale.

Strump v. Kenn, etc., Ms. Opinion 1873, and authorities cited; *Vance's Adm'r v. Foster, etc.*, Ms. Opinion 1873.

Being the owner of the land on the 10th day of January, 1871, he was bound to list it for taxation, notwithstanding the fact that the legal title had not then been vested in him by a conveyance. The statute requires the *owner* or *possessor of the estate* and not the holder of the legal title to assess it for taxation, and to pay the taxes due upon it.

It results therefore that appellant should have listed the land bought at the commissioner's sale with the assessor in 1871. He declined to do so and was thereby indirectly instrumental in inducing the assessor to list it to Mrs. Barnett.

It was improperly listed to her, and whilst she might have had the question as to her liability for the tax tested by a proceeding in the county court, she was not bound to resort to such proceeding and incur the trouble and expense incident thereto, but had the right to pay the amount of the taxes to escape the distress threatened by the sheriff, and then look to Clasby for whose use and benefit the payment was made, for the amount so paid.

She was not estopped by her warranty of title; she did not warrant that the estate was free from claims which had accrued against it after appellant became the equitable owner.

The payment of the tax was not a mere voluntary act upon her part, but was made under constraint in some degree brought about by the failure of appellant to perform a legal duty. He enjoys the benefit of the payment and does not occupy that innocent attitude that will authorize him to insist that the payment should be treated as a gratuity.

Without critically examining the instructions it is sufficient to say that those given for appellee are scarcely as favorable as they should have been, and not all those asked for by appellant were properly refused. They being inconsistent with the views herein expressed.

Judgment *affirmed.*

J. D. Hunt, for appellant.

Kinkead, Darnell, for appellee.

JESSE E. HORNAKER *v.* SAMUEL YEAGER.

Vendor and Purchaser—Estoppel of Purchaser.

A purchaser of land can not be estopped by admissions made by his remote vendor, unless he had notice thereof prior to his purchase.

APPEAL FROM LEWIS CIRCUIT COURT.

June 6, 1873.

OPINION BY JUDGE LINDSAY:

Appellee's title to the land upon which the alleged trespass was committed does not depend upon the legality of the patents issued to Wilson and Owings, but to the actual adverse occupancy, or possession of himself and those under whom he claims to hold for the requisite length of time to invest him with a possessory title.

It is not material to decide whether, when Owings purchased from Wilson and entered upon the fifty-acre tract patented to the latter, claiming to the boundaries of the three adjoining tracts patented to himself, his possession by operation of law extended to said boundaries.

The opinion of this court in the case of *Young v. Withers*, 8 Dana 165, seems to justify the conclusion that it did, but however this may be, when he sold to Willis Bagby, the latter entered under his deed, and not under the patents of Wilson and Owings.

If he claimed to the extent of the lands embraced by his deed, the boundaries being well marked and defined, then his possession was co-extensive with his claim, and limitation at once began to run in his favor as to all the land covered by the deed. Instructions Nos. 1 and 2, given at appellee's instance, conform to this view of the law and are therefore approved. It follows that Instruction No. 1 asked for by appellant was properly refused. Under the pleadings and proof in the case appellant could not have been prejudiced by appellee's third instruction as the right of recovery did not depend upon appellant's title, but upon that of appellee. The second instruction asked by appellant was properly refused. Yeager could not be estopped by oral or written admissions made by his remote vendor, Willis Bagby, unless notice thereof was carried home to him before his purchase. Instruction No. 5 was much too favorable to appellant. Perceiving no valid objections to the ruling of the court, the judgment is *affirmed*.

Halbert & Taylor, for appellant.

G. M. Thomas, Phister, for appellee.

G. W. WEST *v.* IRVING & CAMPBELL.

Homestead—Land Subject to.

The right of a debtor and his family to a homestead extends to land on which he has an actual bona fide residence.

APPEAL FROM FAYETTE CIRCUIT COURT.

June 6, 1873.

OPINION BY JUDGE PRYOR:

It does not appear that the appellant had or claimed his home on the dower estate of his mother. He was not in the possession and had no right to the possession. The statute was intended to secure insolvent debtors in homesteads that they owned and possessed and this protection against creditors is as much for the benefit of the family of the debtor as the debtor himself. It is not necessary that the debtor should be actually living on the land at the time the execution is levied in order to claim the exemption, but it must be regarded by the debtor as his actual *bona fide* residence, a mere temporary residence would not perhaps deprive him of this right, but where he is not in the possession of the premises and has his actual residence elsewhere or after having lived upon the land removes from it, making some other place his *bona fide* residence, the right to the exemption can not be asserted. If the statute can be made to apply to the present case the effect would be that every owner of land being a housekeeper with a family, would be entitled to an exemption of $1,000 in value of the land, whether he ever lived upon it or not. This court has adhered to this view of the questions presented in too many cases to attempt now to enlarge by judicial construction the operation of this homestead law.

The judgment is *affirmed.*

Kinkead, Darnell, for appellant.

P. H. Johnston, for appellee.

SAMUEL W. THOMPSON, TRUSTEE, ETC., *v.* JOHN JONES, ETC.

Vendor and Purchaser—Pleading—Title of Vendor.

In an action to coerce the payment of the purchase price of land, the plaintiff was held to have failed to allege and prove that he had title to the land which he conveyed to the defendant.

APPEAL FROM SCOTT CIRCUIT COURT.

June 6, 1873.

OPINION BY JUDGE PETERS:

On the 1st of February, 1865, Samuel Berrosford instituted a suit in the court below against John Jones and Samuel W. Thompson to coerce the payment of a balance of the price of a tract of land sold by said Berrosford to Jones, situate in Scott County, by the enforcement of an alleged lien on the land for amount claimed.

About the same time said John Jones instituted a suit in said court against said Samuel W. Thompson to coerce the payment of various installments of purchase money due him by Thompson, for the same tract of land as may be inferred from the allegations of Berrosford in his petition against Jones.

The two suits were consolidated and heard together, and judgment having been rendered in favor of the plaintiffs in each case, subjecting the land to sale to satisfy their demands, Thompson has appealed.

It is to be observed that Berrosford wholly failed to allege that he has title to the land which he alleges he sold to Jones, and exhibits no title whatever to himself.

Jones, in an amended petition against Thompson, alleges that he and his father, Peter Jones, under whom he claims (he having purchased the entire interest of the other heirs), as he says have been in the peaceable adverse possession of the land continuously for more than 41 years, and that having a perfect legal title he is able and willing to convey the same. But he failed to state how many heirs his father left. Several deeds from persons of his name, and from married women bearing different names, are filed in the suits, but

there is no proof to identify those persons as the heirs of Peter Jones.

Besides, it appears from Berrosford's petition against Jones, etc., that he sold the land or a part of it to Jones; but how much or how he derived title to the same does not appear. The tract which Peter Jones purchased of Nelson's heirs composed only a little over one-third of the land sold by Jones to Thompson, to that portion Jones made out title by proof of long and continued possession; but for the residue of the tract he exhibited no derivation of title whatever.

And for whatever interest Berrosford may have had in the land the deed from him and wife is wholly insufficient. It was executed out of the state and appears to have been acknowledged before a notary public, which acknowledgment did not authorize the same to be recorded in this state. Sec. 17, Chapter 24, 1 T. S. 281.

Dorcas Jones, who was an heir of Peter Jones, deceased, sold by executory contract all her interest in the land to Robinson Jones, while she was a single woman, and her obligation for a conveyance of her interest is filed; but how John Jones became entitled to that interest is not shown. This lady afterwards married a man by the name of Welden and died leaving an only child, Peter Welden, who is an infant, and in order to perfect the title, steps shauld be taken to get the legal title from him which descended from his mother, and John Jones should manifest his right to that interest.

For these errors and irregularities the judgment, both as to Berrosford and Jones must be reversed and the cause remanded with directions to allow them further time to perfect the title to the lands, and for all the costs in perfecting the title they must be made responsible and they must pay the costs in this court. They should amend their pleadings and exhibit their derivation of title. This reversal does not necessarily set aside the sale made by the master under the judgment.

Darnaby, for appellant.

Lindsey, for appellee.

PETER BRAMLETT'S EX'R *v.* CLARISSA BRAMLETTE, ETC.

Wills—Provision for Support of slaves.

Where a testator provided in his will for a comfortable support of two of his slaves the provision for the benefit of the slaves should be upheld, it being the duty of the court to set apart a sum sufficient for their comfortable support.

Wills—Slaves as Devisees.

Where, prior to the adoption of the 13th amendment to the Federal Constitution, a testator made provisions in his will for the support of two of his slaves, and the testator died after the adoption of the 13th amendment, the devisees had the legal capacity to sue in their own names, since the will spoke from the time of the testator's death.

APPEAL FROM BOURBON CIRCUIT COURT.

June 6, 1873.

OPINION BY JUDGE LINDSAY:

It is not to be asumed that Peter Bramlett, deceased, in making provision in his will for the comfortable support of his two slaves, Hiram and Clarissa, intended merely to discharge a legal duty. Upon the contrary, it is clear that his object was to make them as individuals the recipients of his bounty. Had the institution of slavery continued to exist, they could not have taken as legatees, but the duty imposed upon the executor was one, the discharge of which the courts would have enforced. The testator did not change the provisions of his will by reason of the adoption of the 13th Article of Amendment to the Federal Constitution. It spoke from the time of his death, and as appelleees were then free people, they were capable of taking as devisees and had the legal capacity to sue in their own name. The court below properly held that the provision for their benefit should be upheld, but we are of opinion that the judgment is eroneous in its details. The court reserves the power to make additional allowances to appellees at its discretion. Under such a state of case it is impossible for the executor to determine what sum of money it will be necessary to retain, in order to be able to obey the future orders of the court.

A sum sufficient to yield annually the amount necessary to support comfortably the two appellees should be set apart. The sum should be fixed by the court. In case it becomes necessary to make additional allowances, the court may direct the principal to be encroached upon. Appellees are not entitled to be supported in idleness, but should be required to assist in supporting themselves. Judgment *reversed* and the cause remanded for proceedings consistent with this opinion.

Davis, for appellant.

R. Mann, G. C. Lockhart, for appellees.

W. C. MILLS, ETC. *v.* W. H. CHELF.

Husband and Wife—Individual Liability of Wife on Note.

A note executed by a feme covert for the purchase-money of land bought by her can not be enforced.

Principal and Surety—Liability of Surety on Note.

Where the consideration for a purchase-money note for land executed by a feme covert fails, the sureties on the note can not be held liable.

Contracts—Executory Contract of Married Woman.

A mere executory contract executed by a married woman for the purchase of land can not be enforced against her or her sureties on the purchase-money notes.

APPEAL FROM MARION CIRCUIT COURT.

March 26, 1873.

OPINION BY JUDGE PRYOR:

On the 25th of December, 1870, W. H. Chelf sold to Mrs. Mary M. Mills a house and lot in Lebanon, Kentucky, for the sum of sixteen hundred dollars and executed to her his bond for title. The purchase money was made payable in installments, the two first

payments in notes with sureties thereon, the first for $200, due the 4th of April, 1871, and the other for $400, due the 25th of December, 1871.

Mrs. Mills, at the time she made this purchase, was a *feme covert,* and the note for two hundred dollars seems to have been signed by her husband, W. G. Mills, and F. Raley as her sureties. The present action was instituted at law against Mrs. Mills and the parties whose names appear as sureties on this note (her husband being one of them) alleging their failure to pay and asking a judgment. Mrs. Mills filed her answer alleging her coveture at the date of the contract and denying plaintiff's right, either at law or equity, to enforce it against her. She also set forth its terms, and insists that it is prejudicial to her interests, and asks that the contract be rescinded and the cause transferred to a court of equity for that purpose. Mills, the husband, and Raley, who signed the note as sureties, also filed answers setting forth the coverture of Mrs. Mills as well as the substance of her answer and insists that as they are only sureties on the note and have no other connection with the contract of purchase, that if Mrs. Mills is released by the revision of the contract they are also discharged from liability.

A general demurrer was filed to each answer and sustained, to which an exception was taken.

The cause was continued as to Mrs. Mills and a judgment rendered against the remaining obligors for the amount of the note and interest and from which they prosecuted this appeal.

It is clear that this executory contract cannot be enforced against Mrs. Mills by reason of her coveture at the time of its execution. Nor can a recovery be had upon the note as against her for the purchase money for the same reason. She could have made no contract with reference to her property that would have been obligatory, or that the Chancellor could have enforced. It results, therefore, that the Chancellor erred in sustaining the demurrer to her answer. She, it is true, is not an appellant in the present record, but the case is still pending against her in the court below, and the inevitable result must be a rescission of the contract by the Chancellor so far as the *feme covert* is concerned. If the contract is rescinded as to Mrs. Mills, can it be made obligatory on the remaining obligors, who are no party to it other than their names to the note as sureties for the purchase money? It is well settled that where one

becomes the surety of an infant or a *feme covert,* upon a contract, it is binding on the surety, although the principal laboring under the disability is released for the reason that it is as much his contract as that of the principal. *Short v. Bryant,* 10 B. Monroe, page 10. *Gaines, Administratrix, v. Poor,* 3 Met., page 503. In the present case, however, if the married woman is released from her contract of purchase she fails to get the land, and remains indebted to the appellee for the purchase money, and as the cause now stands the vendor would have his judgment against the sureties upon the note and a suit pending against the *feme covert* in which the contract must be rescinded, by which the appellee gets his land and at the same time has his judgment for the purchase money. Whilst the surety of an infant or *feme covert* is held liable to perform the contract, still where the consideration fails or where the infant or *feme covert* fails to get that for which the money was agreed to be paid a chancellor would hardly coerce payment of the surety. In this case the *feme covert* asks to have the contract rescinded, and if this is done upon the state of facts presented, the vendor can only take his land back, and the sureties are discharged. Where obligors never entered into any contract of purchase, nor do they hold a bond for title, no action could be maintained by them against the appellee to enforce a compliance with its terms, as they are not parties to it, nor are they entitled to a conveyance, nor have they any right to have the property sold and these notes discharged, as the *feme covert* insists that she is not bound by either the title bond she has accepted from, or the notes she has executed to, the appellee. In a petition filed by the appellee against these sureties alleging the acceptance of the deed by Mrs. Mills the chancellor upon this executed contract would enforce payment, for the reason that the *feme covert* has received that for which the notes were given. If the petition, however, seeks only to enforce a contract merely executory as against this married woman, will the chancellor hold those who sign the note as sureties liable and rescind the contract? We think not, and on the other hand, if the sureties are made to accept the deed and perform the contract, they are compelled to take that which they never purchased and to comply with a contract they could not have enforced.

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 as against the husband, or if the present contract was 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 is a question not necessary now to decide. The demurrer to each of the answers should have been overruled in order that these questions it desired might have been made, and at any rate no judgment should have been rendered against those signing the note as sureties until the chancellor had determined to enforce the contract. Upon the return of the cause the case should be transferred to the equity docket and the parties allowed to amend their pleadings.

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

C. Sanders, Executrix, Jno. Rodman, Mills, for appellant.

W. H. Chelf, L. H. Noble, for appellee.

CREATH SHROPSHIRE, TRUSTEE, ETC., *v.* W. S. PRYOR.

Trusts—Discretion of Trustee—Sale and Re-investment.

Where a trust deed authorizes a trustee to dispose of the land and invest the proceeds in other land in a manner to promote the interest of the cestuis que trustent, the trustee was invested with such discretion as to the welfare of the cestuis que trustent as authorizes a re-investment of the proceeds of the sale in other land in trust for the beneficiaries.

Execution—Title to Property.

Where at the time a creditor subjected land to the payment of his debt, the legal title was not in the debtor, the sale passed no title to the purchaser, since a sale under execution was not the proper means of subjecting the land.

APPEAL FROM SCOTT CIRCUIT COURT.

June 6, 1873.

OPINION BY JUDGE HARDIN:

By the deed of Joseph Shropshire of October 7, 1841, the trustee, Crockett Shropshire, was authorized to "dispose of the land, the ultimate proceeds of which were invested in the land bought of Emmerson," in a manner so as to promote the interest of Mrs. Porter "and her increase," otherwise, her children. This, in our opinion, gave such discretion to the trustee in view of the welfare of the family, the raising and maintenance of the children as admitted of the investment in the land conveyed by Emmerson, simply in trust for Mrs. Porter.

The appellee had therefore a right, under Sec. 23, Chapter 80 of the Revised Statutes, to subject the interest of Mrs. Porter to his debts, and her children having no vested interest, and not being necessary parties, could not question the correctness of the judgment, even for errors which might be available to them if they were interested parties.

The appellee failed to exhibit the record evidence of his judgments, executions and securities, and his assignment of the claim of Buckley & Pierce. But the non-production of these evidences is virtually cured by the admissions of Mrs. Porter's answer; and the plaintiff showed himself entitled to relief in equity, to the extent of subjecting enough of the land to pay his debts, interest and costs. But he was not entitled to the relief the court adjudged sustaining his claim to the 25¾ acres of land under his purchase and the sheriff's deed, for the reason that the legal title not being in Mrs. Porter, the levy and sale under execution was not the appropriate or authorized means of subjecting the land and passed no title to the appellees.

Wherefore the judgment is reversed and the cause remanded with instructions to render a judgment setting aside the sheriff's sale and deed, but enforcing the plaintiff's claims by a sale of enough of the land to satisfy the same and costs of sale, should one be made.

Judge Pryor did not sit in this case.

Lindsey, for appellant.

Darnaby, for appellee.

SARAH J. GAMBLE'S EX'R *v.* F. HUMBERT AND OTHERS.

Frauds, Statute of—Sufficiency of Memorandum.

Where a memorandum relied on gives no description of the property alleged to have been leased, and the parties were not in possession of the property when the memorandum was made, and did not afterwards take possession of it and the property could only be located by extrinsic evidence, it is not sufficient to take the transaction out of the statute of frauds.

Vendor and Purchaser—Recovery for Improvements by Vendor.

Where no enforceable contract of sale has been made, a vendor can not recover for improvements placed upon the land by him at the instance of the vendees.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 7, 1873.

OPINION BY JUDGE PRYOR:

The memorandum relied on by the appellant as taking the present case without the operation of the statute of frauds although containing many of the evidences of what the contract should contain when fully executed gives no description whatever of the property alleged to have been leased. The court is unable to ascertain from an inspection of it what character of real estate it was, or even its location. The chancellor, when called upon to enforce such a contract, would have to ascertain by extraneous testimony what property it was the appellant was endeavoring to lease. This court in the case of *Overstreet v. Rice,* 4 Bush 1, where the contract had been entered into for an exchange of farms, and the exchange actually made permitted parol proof to identify the property for the reason that the parties by their subsequent acts in actually taking possession has so identified it as to remove all uncertainty in regard to what property had been exchanged. It was upon that same reasoning that the court in the case of *Ellis v. Deadman's Heirs,* 4 Bibb. 466, adjudged that the writing if it had specified the terms of the contract would have been enforced although the only description of the property sold was "that it was a house and lot in Versailles."

The vendee had paid a part of the purchase money and was in the possession of the property, so there could have been no question as to its identity. The parties in this case were not in the passession of the property when the memorandum was made nor did they take possession afterwards or in any manner consummate the proposed agreement. The memorandum was evidently made in order that a contract might be written from it, and there is no evidence that the appellees ever agreed to accept it. The mere fact that the vendor signs the writing does not bind the party purchasing unless there is an acceptance. If there had been an acceptance, however, of its terms as stated in the memorandum the statute of frauds would have defeated the recovery as there was no description of the property. By permitting parol proof to supply such an omission the statute would be rendered inoperative and the rule heretofore established with reference to the principle involved, greatly enlarged. Nor is the appellee entitled to recover upon the second count in the petition. Parties who enter in possession of property as purchaser or lessee, in good faith, and make improvements, are permitted to recover the value of the improvements made when the lessee or vendor refuses to execute the contract for the reason that the venue has had the property increased in value by the labor and means of those who derive no benefit from it. In the present case, however, the vendor is attempting to recover for an improvement that she has placed upon her own property or damage on account of alterations made in the building at the instance of the appellees. If the appellant is entitled to recover in such a case it must be upon the idea that a contract that could be enforced was made between the parties. It has been adjudged that no action could be maintained on such a writing and it would be incumbent to make a party liable for the violation of an obligation which neither a court of law or equity can enforce. If the appellees had derived any benefit from a parol contract of leasing that has been avoided by them, they could be made liable if in possession and the contract had been adjudged null and void; for the reason that its terms were not set forth they would be liable for the rent, or for breach committed upon the premises. This liability arises from the benefits received from the use of the property or injuries committed while in the possession and not for the reason that a contract was made that could be enforced between the parties. The building in this case is on

the premises. The improvement inures to the benefit of the vendor and there is no way of making the appellees liable in such a case in the absence of a valid contract, for the performance of which they were bound. The judgment is *affirmed*.

Arbogust, for appellant.

Gaslay, Y. & R., for appellee.

JOHN PERRY *v.* HARDIN HUNTER.

Trusts—Liability of Trust Property for Debts.

Where land is devised for the benefit of the testator's son and the son's wife and children, the chancellor has no power to subject the land to the payment of the son's debts, or its proceeds or product, unless there should be a surplus of the product or actual increase after supporting the son and his wife and children.

Parties—Suit to Subject Trust Property to Payment of Debts.

In an action to subject land devised to the testator's son, wife and children for their support, to the payment of the son's debts, the wife and children should also be made defendants.

APPEAL FROM JESSAMINE CIRCUIT COURT.

June 7, 1873.

OPINION BY JUDGE PRYOR:

The property sold by the sheriff was certainly liable to the lien of the landlord and therefore Hunter, under whose execution it was sold, acted properly in paying it, and particularly when it was sold with this agreement, as the return of the sheriff, although informal, clearly shows. It is clear from the will of John Perry, deceased, that the wife and children of his son, John Perry, Jr., were entitled as beneficiaries in conjunction with their father to the care and products of the seventy-five acres of the land for their support and maintenance. This land was devised for that purpose and the chancellor has no power to subject the land to the payment of John Perry's

debts or its proceeds or products unless there should be a surplus of the products or actual increase left after supporting the family. The wife and children should have been made defendants to the action and the action referred to a commissioner. If it appears by his report that there is anything left at the end of each year after supporting the family, as provided in the will, it can be applied to the payment of this debt. The judgment is reversed and cause remanded for further proceedings consistent herewith.

Menaugh, for appellant.

Anderson, for appellee.

DANIEL B. CURD *v.* KING A. STINNETT.

Trial—Instruction.

An instruction which in effect tells the jury to give the evidence such consideration and weight in making up their verdict as they may deem proper, is not prejudicial to defendant as it left the jury free to act and can hardly be regarded as an instruction.

Appeal—Reversal—Giving or Refusing Instructions.

The Court of Appeals can not reverse a judgment for an error of the trial court in giving or refusing instructions, unless the ruling has been excepted to.

APPEAL FROM JESSAMINE CIRCUIT COURT.

June 7, 1873.

OPINION BY JUDGE PETERS:

After the evidence was concluded on both sides the jury retired to consider their verdict without having been instructed as to the law of the case, neither party having asked any instructions.

After an absence of several hours they returned into court and asked the judge what was the legal effect of a promise made by appellant to appellee that he would pay for the cattle if he would let

Lanham have them, and the judge told them, that if they believed from the evidence that Curd told Stonnett before he sold the articles charged to Lanham that he would pay for them, they might infer from that fact that Lanham and Curd were partners, or they might not so infer at their discretion. On the contrary, if they believed from the evidence that Curd made any such promise to Stinnett after the articles charged were sold to Lanham by Stinnett it did not bind Curd unless the promise was reduced to writing. This instruction left the jury free to put such construction on the evidence as they deemed proper, if indeed it would be regarded as an instruction. It was in effect saying to the jury, you have heard the evidence and you will give to it such weight in making up your verdict as you deem proper. This we can not regard as prejudicial to appellant.

But if it were otherwise there is no exception to the ruling of the court below in giving the instruction to the jury. And this court can not reverse a judgment for an error of the court below in giving or refusing instructions unless the ruling of that court is excepted to, as has been repeatedly decided.

There is some conflict in the evidence and the verdict certainly is not so flagrantly against the weight of the testimony as to authorize this court to interfere on that ground.

The judgment must be *affirmed.*

Brown, for appellant.

Anderson, for appellee.

C. C. DIXON *v.* JAMES S. CHEATHAM'S ADM'R, ETC.

New Trial—Time of Action for.

Under § 373, Civ. Code, an action for a new trial must be brought within three years after the rendition of the judgment sought to be set aside.

New Trial—Pleading—Diligence.

Where plaintiff, in a petition for a new trial because of newly discovered evidence, fails to allege that he made any effort to discover

the evidence in question, but it appeared that he accidentally found the evidence when not looking for it, but could have found it before the trial if he had looked for it, the petition is demurrable.

APPEAL FROM HENDERSON CIRCUIT COURT.

By Subsec. 7 of Sec. 369 of the Civil Code appellant might have been entitled to a new trial if he had alleged and shown that he had newly discovered evidence material to him which he could not with reasonable diligence have discovered and produced at the trial.

But he fails to allege in his petition that he made any effort to discover any evidence of the payment of the money and from the statements therein made it is manifest that he accidentally and when he was not looking for said paper, found it, and could have found it before the trial if he had put himself to the trouble to look for it. The demurrer was properly sustained.

And besides such a suit as this can not be maintained unless it be brought within three years after the final judgment sought to be set aside. Sec. 373. The final judgment was rendered and the money paid more than three years before this action was instituted.

The judgment must be *affirmed.*

Sizemore, for appellant.

Yeaman, for appellees.

O. H. PERRY, ETC., *v.* JOHN D. SCOTT, ETC.

Arbitration and Award—Unanimity of Decision.

Under ch. 3, R. S., relating to submission of controversies to arbitration, all the arbitrators and the umpire, if there be one, should act together, and if there is no umpire, an award shall be the joint decision of the arbitrators, unless the parties agree to be bound by the action of the majority.

Arbitration and Award—Umpire.

The right to act as umpire can only be conferred by a rule of court from which the arbitrators derive their authority.

Opinion of the Court.

Arbitration and Award—Application of Statute.

Section 3, ch. 21, R. S., does not apply to arbitrators who do not derive their authority directly from the statute, but from agreement of the parties or rule of the court.

APPEAL FROM JESSAMINE CIRCUIT COURT.

June 9, 1873.

OPINION BY JUDGE LINDSAY:

The order of court under which the arbitrators acted in this matter, does not designate either of them as umpire, nor in terms or by implication invest two of them with authority to make and return an award.

By Sec. 1, Chapter 3, Revised Statutes, it is provided "That all controversies which might be the subject of a suit or action may be submitted to the decision of one or more arbitrators, or to two and their umpire, in the manner provided in this chapter. If any arbitrator shall fail or refuse to act, the court may set aside the order of reference." Sec. 5, Ib. They (the arbitrators) and their umpire, if there be one, shall meet together and hear evidence, and when their award is made, shall reduce it to writing and sign it. Sec. 6, Ib. It is evident from the provisions of this chapter that it is intended that all the arbitrators and the umpire, if there be one, shall at all times sit and act together, and when there is no umpire, that the award shall be the joint decision of all the arbitrators. Such was the rule prior to the adoption of the Revised Statutes and the Civil Code of Practice, and there is nothing in the provisions of either necessarily indicating an intention on the part of the legislature to change such rule. The fact that an umpire may be appointed, or that the controversy may be submitted to one or more arbitrators without an umpire, evidences the fact that it was contemplated that the old practice should continue unless the parties availed themselves of that right, thus recognized, of leaving any differences that might arise between two arbitrators settled by the intervention of an umpire. When three or more arbitrators are appointed, neither one of them has the right to assume the power or exercise the powers of an umpire. Such powers must be expressly conferred by the rule of court from which the arbitrators derive all their authority.

The arbitrators must all act, and act together, not only in hearing the evidence and statements of the parties, and in conducting the arbitration, but in making the award. The parties are not only entitled to the suggestions and arguments of each and all of them, but (unless they agreed to be bound by the final action of a majority) to have a decision which according to the best judgment of each and all of them conforms to the "law and evidence and the equity of the case."

It is eminently proper that such should be the rule. An award, unlike the findings or judgments of ordinary tribunals, is not open to revision. It can not be set aside for mistake of law or fact, by the court to which it is returned, nor can it be revised by appeal.

Courts of equity it is true have power over awards, as heretofore (Sec. 8, Ib.), but they can not interfere unless it be shown that the decision was procured by the fraud or misconduct of the successful party, or that the arbitrators acted from corrupt motives or were guilty of a mistake so palpable as to evidence partiality or corruption. *Callant, etc., v. Downey,* 2 J. J. Marshall 346; *Baker's Heirs v. Crockett,* Hardin Reports 396.

Sec. 3, Chapter 21, Revised Statutes, does not in our opinion apply to arbitrators who do not derive their authority directly from the statutes, but from the agreement of the parties or the rule of court.

As one of the arbitrators refused to unite in the award in this case it was properly set aside and the parties taking no steps to proceed further with the arbitration, the court did not err in striking the cause from the docket.

Bronaugh, Anderson, Breckenridge, Buckner, for appellant.

B. P. Campbell, for appellee.

COMMONWEALTH *v.* JNO. N. FAGUE.

Courts—Jurisdiction—Appeal.

Appeals from the judgment of a county court refusing to grant a tavern license should be prosecuted to the Court of Appeals.

Opinion of the Court.

APPEAL FROM TRIMBLE CIRCUIT COURT.

June 10, 1873.

OPINION BY JUDGE LINDSAY:

The case of *Bochler v. Commonwealth*, 1 Duvall 3, settles that appeals from the judgment of county courts refusing to grant tavern license should be prosecuted to this court. Hence the Trimble Circuit Court had no jurisdiction and should not have entertained the appeal in this case. Its judgment directing the county court to set aside its order refusing appellant such license, and to grant the same, is therefore reversed. The cause is remanded to the circuit court, with directions to dismiss the appeal.

Rodman, for appellant.

Drane, for appellee.

BRONSTON & FRANCIS *v.* R. PERRY WHITE AND OTHERS.

Partition—Deeds to Shares.

Where, by agreement of the heirs of a decedent, a certain tract of the decedent's land was set apart to one of the heirs, which agreement was recognized as binding upon the parties, and made so by the judgment of the court, the assignors have no right to deprive such heir of his interest in the land, so as to affect the rights of creditors, by making an absolute deed thereof to his children.

Descent and Distribution—Transfer of Interest by Heir.

Where an heir has transferred his interest in his father's estate to the payment of his debts, such interest when ascertained and set apart, becomes subject to the payment of the debts.

APPEAL FROM MADISON CIRCUIT COURT.

June 10, 1873.

OPINION BY JUDGE PRYOR:

It is clearly shown from the testimony that the agreement between the heirs of Jacob White, dated the 23d of January, 1867, was the

result of a compromise between the heirs by which the claim of R. P. White for an equal interest with his brothers and sisters was recognized and settled upon the terms therein expressed. By this agreement R. P. White was entitled to a life estate in fifty acres of the land known as the "White Oaks," remainder to his children. The evidence conduces to show that R. P. White had by advancement made to him by his father precluded himself from asserting or at least from recovering in a controversy between the heirs any interest in the estate; but although this is made to appear, still when he asserted this claim and received more from his father than the other children, the balance of the heirs, in order to prevent litigation, and it may be as an act of kindness towards their brother, gave him a life estate in this fifty acres of land. It is true that one of the heirs was a married woman and another an infant when this agreement was made, but afterwards a suit was instituted for the purpose of settling the rights of the parties or of partitioning the land, and this agreement was recognized as binding upon the parties and made so by the judgment of the court. The commissioner of the court had no authority under this agreement to deprive R. P. White of this interest in the land so as to affect the rights of creditors by making to his children an absolute deed to the land, nor could the judgment of the court have affected the rights of creditors as they were not parties to the suit. R. P. White had prior to this agreement transferred to these appellants his interest in the estate to pay this debt, and when his interest was ascertained by the agreement, the land or his life estate in it became at once subject to the payment of his debts. He had no other estate and so far as the conveyance affects these appellants it must be deemed invalid and his life estate in the fifty acres of land known as White Oaks sold to satisfy this debt and costs. He is not entitled to the benefit of the homestead law as the debts originated long prior to its enactment. For the reasons indicated the judgment of the court below is reversed and cause remanded with directions to sell so much of the land in controversy for and during the life of appellee R. P. White as will pay this debt and costs and for further proceedings consistent herewith.

W. Chenault, for appellant.

———, *for appellee.*

ABRAM BUFORD *v.* W. R. CAMERON.

Customs and Usages—Effect on Written Contract.

The custom of horsemen can not control a written contract relating to a stallion, or change its legal effect, especially when one of the parties notified the other that the custom formed no part of the contract.

APPEAL FROM WOODFORD CIRCUIT COURT.

June 11, 1878.

OPINION BY JUDGE PRYOR:

The rights of the parties to this controversy should be determined by the stipulations of the written contract between them. It is expressly stated in this agreement that if the horse Lexington sexes a less number of mares than forty (or the number mentioned in the writing) Buford is to have one thousand dollars for his trouble and expense in keeping the horse during the season, and on his part guarantees to Cameron the price of season for each and every mare sexed by the horse and is individually responsible to said Cameron for the same.

The custom of the horsemen in Kentucky can not control the terms of this writing or change its legal effect and particularly when the appellant was notified by Cameron that this custom formed no part of the contract and would not be sanctioned by him. The right of the owners of mares to breed back in the event they proved not to be in foal was given by Buford himself and in opposition to the avowed disapproval by Cameron before the season commenced. The letter written by appellant to the appellee in which he attempts to convince him of the necessity of changing his mind with reference to this matter and requesting a response is not deemed sufficient to show an acquiescence on the part of the appellee in the action of the appellant as to the terms of breeding, etc., and particularly when appellant had been notified both by telegraphic dispatch and letter that appellee would not submit to such terms. We have considered the evidence carefully upon the questions made on both the original and cross-appeal and in our opinion the judgment of the court below

gives to each of the litigants the sums of money they were entitled to receive in a settlement of their accounts.

This judgment is therefore *affirmed* on both the original and cross-appeal.

Breckenridge, for appellant.

Buckner, Kinkead, Buckner, for appellee.

A. J. HERD *v.* J. W. & J. C. COCHRAN.

New Trial—Diligence—Witnesses.

Where defendant's witnesses all resided in the county, and defendant does not appear to have made inquiries as to what their testimony would be until after judgment was rendered and execution issued, there was such lack of diligence as to bar an action for a new trial.

APPEAL FROM MADISON CIRCUIT COURT.

June 12, 1873.

OPINION BY JUDGE LINDSAY:

Appellant fails to show diligence in looking up the testimony to make good his defense to the original suit. The witnesses examined in this action, are all residents of Owsley County, and are the very persons by whom he had the greatest reason to suppose he might be able to prove the payment of the Brandenburg and Guy claims, and yet he does not appear to have made inquiry as to what proof they would make until after judgment was rendered and execution issued. Such diligence is inexcusable, and is enough of itself to preclude the court from granting him a new trial. But in addition to this, he fails to show himself entitled to relief upon the merits of the new proceeding.

Judgment *affirmed.*

Scott, Capteron, for appellant.

Bennett, Brown & Julian, for appellees.

R. H. WILLIAMS, ETC., *v.* COMMONWEALTH FOR USE OWEN COUNTY COURT.

Sheriffs and Constables—Pleading—Action on Bond.

Where defendant, by a demurrer to plaintiff's petition, admits that defendant was elected sheriff of the county and executed bond with the other defendants as sureties, and had collected the county revenue to the sum of $———, and failed to pay it over, failure to allege that the bond was approved or accepted, or that the levy was made by the county court is not a ground of demurrer.

Sheriffs and Constables—Pleading—Demand.

In an action on a sheriff's bond as collector of taxes, failure to allege that a demand was made on the sheriff or his sureties for the fund due on settlement, by one authorized to receive it, renders the petition fatally defective.

Sheriffs and Constables—Payment of Money—Order of Court.

A sheriff has no right to pay money over to any of the officers of the court, unless ordered by the court to do so.

Sheriffs and Constables—Demand—Action on Bond.

In an action on a sheriff's bond, in his capacity as revenue collector, it must appear from the petition that the money due was demanded by some one authorized to receive it.

APPEAL FROM OWEN CIRCUIT COURT.

June 12, 1873.

OPINION BY JUDGE PRYOR:

Upon the demurrer to the petition the allegations that Williams was elected sheriff of Owen County and as such had executed bond with the other appellants as sureties thereon and had collected the county levy, amounting to $——, and failed to pay it over, would be taken as true, and therefore the failure to allege that the bond was approved or accepted or that the levy was made by the county court was no ground of demurrer.

If no bond had been executed by the parties charged they could only rely on it as a defense by way of answer as there is nothing on

the face of the petition showing that the bonds declared on were invalid. Nor does it appear from the petition when the breaches of the two covenants were committed. And upon breach of covenant binding the sureties that the sheriff would account for this levy, upon his failure to pay, an action can be maintained upon either covenant. And whether the sureties on the cost bond are liable for the levy collected and used by the sheriff prior to its execution is a question not raised by the petition as there is no allegation with reference thereto, and this fact to be available as a defense must be pleaded.

The petition, however, is fatally defective in failing to allege that a demand was made of the sheriff or his sureties for the amount found due on the settlement by some one authorized to receive it. A sheriff has no right to pay the moneys over to any of the officers of the court, unless by an order of the court he is directed to do so. Upon the report of settlement to the county court an order should have been made requiring the sheriff to pay this money to the county treasurer or some one else designated in the order and then upon a demand made and a refusal the action can be maintained and not before. This identical question was decided by this court in the case of *Owens v. Ballard County Court,* 8 Bush 611. The allegation that the money was demanded is insufficient. It must appear on the face of the petition that it was demanded by some one authorized to receive it.

The petition presents no cause of action against either the sheriff or his sureties.

Wherefore the judgment of the court below is *reversed* and the cause remanded with directions to award the appellants a new trial and for further proceedings consistent herewith.

The appellee should be allowed to amend the petition and the questions raised by counsel for the appellants can then be made by answer.

Grover, Montgomery & Revill, for appellants.

Craddock & Trabue, for appellees.

N. R. JONES, ETC., *v.* E. E. PEARCE.

Evidence—Establishing Testimony of Deceased Witness.

Refusal to permit a party to prove the testimony of a deceased witness given on a former trial, was not error, where it does not appear what the testimony sought to be established was, and it appears that the witness presented to prove the testimony of the deceased witness can not remember all that the deceased witness testified to, or even the substance thereof.

APPEAL FROM BATH CIRCUIT COURT.

June 13, 1873.

OPINION BY JUDGE PETERS:

The suppression of a part of the depositions of Shropshire and others by the court, and its refusal to permit appellant to prove what Craig, who was dead, testified to on a former trial of the case were not assigned as reasons for a new trial, and if they had been we do not perceive any error in the ruling of the court below on those questions. The evidence offered was incompetent.

It does not appear what were the statements made by Craig on the former trial, or that they were material or beneficial to appellant; and, besides, the witness Norris, by whom appellant proposed to prove them, stated that he could not remember all that Jesse Craig proved on that occasion. Nor did he say that he could prove even the substance of what the decedent stated on the occasion referred to. The two instructions given by the court presented in clear and lucid language to the jury the principles of law arising on the pleadings and evidence, and they were quite as favorable to appellant as the testimony authorized.

The evidence was conflicting and we can not say that the verdict is against the weight of it.

Perceiving no error in the proceedings in the court below, the judgment must be *affirmed.*

Reid & Stone, Turner, for appellants.

Lacy, for appellee.

WM. FRENCH *v.* REBECCA J. FRENCH, ETC.

Judgment—Annulment—New Evidence.

Under § 14, Civ. Code, relating to annulment of a judgment in ordinary by an equitable proceeding, a party is not entitled to a retrial because of the discovery of evidence tending to establish a fact of which they must have been cognizant for a long time prior to the rendering of the judgment sought to be annulled.

Depositions—Following Example of Adversary.

In taking a deposition in term time, a party can not complain of the action of his opponent in taking a deposition, where his opponent simply followed his example and exercised a right which the other party had first assumed.

Depositions—Cross-examination—Waiver.

Where depositions were taken by a party in the absence of his opponent, and the latter excepts to the depositions, and allowed two vacations to pass without asking leave to cross-examine the witness, there is no grounds of complaint because of the overruling of his exceptions.

APPEAL FROM FRANKLIN CIRCUIT COURT.

June 13, 1873.

OPINION BY JUDGE LINDSAY:

To the extent that the petition and the amendment thereto sets up a trust in Wm. H. French as a ground for the vacation of the judgment at law they should have been disregarded. The 14th section of the Civil Code of Practice provides that a judgment obtained by ordinary proceedings shall not be annulled or modified by any order in an action by equitable proceedings, except for a defense which has arisen or been discovered since the judgment was rendered. Sections 579 and 373 are perfectly consistent with the provisions of Section 14.

The trust did not arise, and from the very nature of things its existence could not have been discovered until after the rendition of

the judgment in the action of ejectment. It is not enough that appellant discovered after judgment the evidence to establish the trust. He should have pleaded and relied on its existence as a ground of defense to the suit at law, and then if he had failed by the use of proper diligence to discover the evidence now relied on to make out this breach of the present cause, its subsequent discovery might have entitled him to a retrial of the first action, but to allow him now to have a retrial because he has discovered evidence tending to establish a fact of the existence of which he must have been cognizant since 1844, would be to disregard the express and positive limitations prescribed by Sec. 14 of the Civil Code.

The only fact set up in the petition authorizing the circuit court to grant the relief asked, was the fraud practiced by Mrs. French in obtaining the judgment at law, which fraud consisted in the alleged corrupt agreement upon her part to give to Mrs. Watkins a portion of the land in contest, in consideration that the latter would testify as a witness to a state of facts tending to show that appellant held the land as the tenant of William H. French, deceased, and all the while recognized and acknowledged his title.

Before considering this branch of the case upon its merits it is proper to notice the exceptions to the depositions of appellees taken during the February term, 1872, of the circuit court and also the action of that court in refusing to allow the amended petition to be filed except upon the condition that it should stand controverted upon the record. The objection to the depositions is that they were taken during the term of the court, and when it was impossible for the attorney to be present and cross-examine the witnesses.

It appears that appellant gave notice and commenced taking depositions during the same term, thus requiring appellee's attorney to do that which he now complains was an unreasonable hardship when imposed upon his attorney. Appellant gave notice on the 20th and 21st of February that he would take depositions on the 24th, the fifth day of the term. On the 22d appellees gave notice that they would take on the 26th, the 7th day of the term. Whatever may be the proper rule as to depositions taken in term time, it does not lie in the mouth of appellant to complain that appellees followed his example and exercised a right which he had first assumed to exercise.

But the motion to dissolve the injunction as well as the exceptions to the depositions were continued until the same term, and again until the September term, 1872, before action was taken by the court on either. Appellant did not ask leave of court to cross-examine the witnesses whose depositions were taken during the February term, but allowed two vacations to pass, and matters to stand just as they were when the exceptions were filed, and the first motion made for a continuance. If he had asked leave to cross-examine and the court had refused to grant it, he might have some ground for complaint, but he pursued a line of policy of doubtful propriety in any state of case, and not to be tolerated under the circumstances heretofore pointed out.

Hence he was not prejudiced by the action of the court in overruling his said exceptions.

As the amended petition raised an irrelevant issue, appellant was not prejudiced by the order controverting the allegations therein made upon the record.

The only direct evidence tending to establish the corrupt bargain between Mrs. French and Mrs. Watkins is that given by Mrs. Redman. She is contradicted in every particular by Mrs. Watkins. The circumstances under which she claims to have overheard the conversation resulting in the corrupt bargain go very far towards impairing the confidence which otherwise would be reposed in the statements of a person whose good character is vouched for by her neighbors and acquaintances.

It is almost impossible that she could have been present in the small room described by her for fifteen or twenty minutes without being observed by Mrs. French and Mrs. Watkins, one or both, and it is contrary to common sense and human experience to believe that such an agreement would have been made by them in the presence of a third party, and especially one who was at most but a casual acquaintance; further than this it is not probable that they would have selected such a time and place to consummate such a bargain, when they were residing together, and could have conversed the matter and made their arrangements in the privacy of their common home.

The testimony of Mrs. Arnold and the younger Mrs. Redman shows that no such meeting as that described by the elder Mrs. Redman took place at the house of Daddridge Arnold in the year 1870.

Upon the whole case we are of opinion that the circuit judge decided this branch of the cause in accordance with the decided weight of the testimony, and as the alleged corrupt bargain was the only material fact in issue, his judgment dismissing appellant's petition and dissolving the injunction must be *affirmed.*

James, Lindsey, for appellant.

Craddock, for appellee.

W. A. MARSHALL, ETC., *v.* COMMONWEALTH.

Appeal—Objections and Exceptions—Waiver.

In the absence of objection to evidence, or in the absence of exceptions to instructions, any errors contained therein will be deemed to have been waived.

Appeal—Reversal—Misdemeanor.

The Court of Appeals can only reverse a judgment in a misdemeanor case for errors of law appearing in the record and prejudicial to defendant.

APPEAL FROM OWEN CIRCUIT COURT.

June 13, 1873.

OPINION BY JUDGE PETERS:

No objections were made to any evidence that was offered or heard on the trial, and no exceptions were taken to the instructions given to the jury at the instance of appellee, although therefore there may have been errors in those instructions we must regard them as waived. *Burns v. Commonwealth,* 3 Met. 13; Sec. 275, Crim. Code.

The evidence in our opinion preponderates very decidedly against the verdict, but this court can not reverse the judgment because the court below refused to grant a new trial on that ground. In cases of misdemeanors this court can only reverse a judgment of a lower court for errors of law appearing on the record to the prejudice of the appellant. Sec. 348, Crim. Code.

Wherefore the judgment must be *affirmed.*

Craddock, for appellant.

Attorney-General, for appellee.

J. C. FURNISH *v.* J. R. BROWN, ETC.

Statutes—Construction.

The courts will not so construe apparently repugnant provisions of an act of the Legislature as to make it defeat the object which it was attempted to accomplish, unless its provisions are so utterly inconsistent that it is impossible to harmonize them.

APPEAL FROM GALLATIN CIRCUIT COURT.

June 14, 1873.

OPINION BY JUDGE LINDSAY:

The direct and immediate cause of the verdict for the appellees was the peremptory instruction of the court to the jury so to find. To this instruction appellant objected, but he did not make the action of the court in giving it a ground for a new trial. For this reason alone this court might well refuse to reverse, but for the satisfaction of the parties in interest the case will be considered as though this oversight had not been committed.

That provision of the charter of the town of Warsaw which provides that "Before entering upon the duties of his office, each member of the board shall appear before some justice of the peace of the county and make oath that he will perform the duties of his office to the best of his skill, and a certificate to that effect must appear

on the record book of the board," does not admit of the construction insisted upon by appellant. The powers, rights and duties of the trustees result from their election and qualification. The certificate of their qualification is required to be made matter of record by the board, so that there may be permanent and unmistakable evidence of the fact. Possibly in a case in which the trustees are required to show that they were qualified by taking the required oath, this record would be the only competent evidence by which to establish such qualification.

This question, however, we do not here decide. In this case all difficulty on this point is removed by the admission appearing in the bill of evidence "that said trustees were duly elected * * * and had taken the oath of office, but that the same had never been recorded as required by law."

Having been elected, and having taken the oath required by law, the trustees had the right to pass ordinances for the proper government and regulation of the municipality.

The ordinance under which appellant was arrested and in one instance fined was a proper and possibly a necessary police regulation, in no wise inconsistent with the construction or general laws of either the federal or state government. *McKee v. McKee*, 8 B. Monroe 433. The board of trustees had power to adopt it, independent of the special provisions of the charter of the town of Warsaw under Sec. 1, Article 3, Chapter 100 of the Revised Statutes. The 33d section of the charter of Warsaw does not render nugatory all the preceding sections. It repeals all other laws providing for the government or organization and control of said town, and substitutes that charter for the laws thereby repealed. The courts will not so construe apparently repugnant provisions of an act of the legislature as to make that body defeat the object it attempted to accomplish, unless they are so utterly inconsistent that it is impossible to harmonize them. No such impossibility exists in this case, and the evident and unmistakable will of the lawmaking power must be enforced, although it is somewhat obscurely expressed.

Perceiving no error in the proceedings of the circuit court prejudicial to the rights of appellant, the judgment is *affirmed*.

J. C. Furnish, for appellant.

Landrum, for appellee.

JACOB GROWDER'S ADM'R *v.* J. U. PRATHER, ETC.

Appeal—Reversal.

A judgment in an action against an administrator was reversed and the cause remanded with directions to allow certain claims against the estate, and to set off the same against the demands of the administrator against the claimant.

APPEAL FROM OWEN CIRCUIT COURT.

June 14, 1873.

OPINION BY JUDGE PETERS:

This suit in equity was brought by appellee Prather against the personal representatives and devisees and heirs of Jacob Growder, deceased, on the 13th of September, 1871, to subject the real estate of the deceased to the payment of several claims alleged by appellee to have been due to him by said testator at his death and to be still unsatisfied, the personal estate being insufficient to satisfy the same.

The case was referred to the master to ascertain and report the amount of debts unpaid, and the assets, legal and equitable, belonging to said estate. He reported the outstanding debts as amounting to the sum of $433.66 and presented with his report the evidence of said alleged indebtedness. Exceptions were filed to said report by appellants. Some of the items of indebtedness were in favor of Prather of $225.05 with interest from the 10th of November, 1872, till paid, and in favor of J. B. Foster for the sum of $7.13, with interest from the last-named date till paid, and in favor of B. F. Sidebottom, administrator of M. Sidebottom, for $13.38, with interest from the 10th of May, 1872, till paid, with the costs of the suit, and the court adjudged a sale of land to satisfy said several sums, and from that judgment this appeal is prosecuted.

The several demands set up in the petition are controverted in the answer, and the statute of limitations pleaded and relied upon as a bar to each one in proper form, and every claim, even where there had been sufficient evidence of the existence of the same presented by Prather, was barred by lapse of time before he instituted his suit, except the note for $47.20, due 25th of December, 1857, and the administrator of the testator holds debts on Prather more than sufficient to satisfy that demand.

The judgment in favor of Sidebottom's administrator and that in favor of Foster's administrator seem to be unobjectionable, but

the judgment must be reversed and the cause is remanded with directions to allow the claim of appellee Prather for $47.20 evidenced by note due 25th of December, 1857, and to off-set the same against the demand the administrator holds against Prather, and out of the balance to satisfy Sidebottom and Foster's demands, and Prather must pay the costs in the court below and in this court.

Craddock, Trabue, for appellant.

Grover, Montgomery, Revill, for appellees.

HALLAM ELDRIDGE, ETC., *v.* A. T. BROMLEY'S EX'RS.

Mortgages—Release—Representative Capacity.

A release of a mortgage executed to one individually was held to be intended as a release of the party in her representative capacity, where she was not individually indebted to the releasors, but was indebted to them in her representative capacity, and all the circumstances clearly show the purpose and application of the release.

Mortgages—Release—Consideration.

Where the consideration of a release of a mortgage was that the releasors should hold a certain plantation, the release was not without consideration because the releasees already held the plantation under a decree of court, the effect of such decree being doubtful and the release agreement having the effect of quieting their title to the plantation.

Cancellation of Instruments—Mistake of Fact.

Equity will not grant relief to persons who execute a release of a mortgage upon a valuable consideration without fraud or misrepresentation, because of a mistake of fact, where they could by inquiry have ascertained the true state of facts.

APPEAL FROM FRANKLIN CIRCUIT COURT.

June 16, 1873.

OPINION BY JUDGE LINDSAY:

For the purpose of deciding the questions of law arising upon the general demurrer to appellant's petition, it may be assumed (independent of the judgment of the chancery court in Mississippi) that the notes and mortgage upon which such a judgment was founded are sufficiently described, and the undertaking evidenced by them sufficiently embodied in the petition to entitle appellants to a judgment for the amount left unsatisfied by the sale of the land made pursuant to said judgment, unless the release made and executed

by them to Frances A. Burnley, the executrix of the last will and testament of A. G. Burnley, deceased, on the 13th day of September, 1869, which release appellants set up in their petition and seek to avoid, precludes them from recovering.

Although this release is to Frances A. Burnley individually, her fiducial character not being mentioned therein, yet considering it in conjunction with the petition and the exhibits, it is perfectly manifest that the debts or claims intended to be released are identical with those set up in the petition. Individually, Frances A. Burnley owed Eldridge and Montgomery nothing. As the executrix of A. G. Burnley, deceased, she was or had been legally bound to make good to them out of the assets left by the decedent, the amount of their claims against him, in case such assets were sufficient for that purpose. Her letters to them, and in response to the proposition contained in the last of which the release was executed and delivered, refer in unmistakable terms to the indebtedness that she desired to arrange, and the paper states that the object intended to be accomplished by its execution was the release of Mrs. Frances A. Burnley from a further liability arising from the mortgage indebtedness formerly a lien on the Burnley plantation, so called, the said mortgage having been foreclosed, and a balance remaining due thereon. As Mrs. Burnley was under no individual liability on account of this mortgage indebtedness, and as she was under liability on account thereof as executrix of her deceased husband's will, the release must be treated as referring to her in that character and releasing her from liability in her fiducial capacity, or else regarded as a mere idle act, as purposeless as it would be useless if such were the case.

But appellants show that such was not the purpose of its execution by insisting in their petition as a ground of avoidance that they were misled by the letters of Mrs. Burnley as to the true condition of the estate of A. G. Burnley, deceased, and executed and delivered it under the erroneous impression and belief superinduced by those letters, that his estate was insolvent and that it would therefore be impossible for them to obtain or secure any further recovery on their claim.

The release to Mrs. Burnley operated as a release to the estate represented in part by her, although her co-representative, Robert H. Crittenden, executor, is not named therein.

The allegation that the release was executed without consideration

is introduced by the petition and exhibits. In her letter of September 6, 1869, Mrs. Burnley proposes in consideration for such release that appellants shall hold the plantation on which they had a mortgage and which had appreciated in value since the sale to more than the amount of their debt, and on the 15th of the same month this proposal was accepted by the execution and delivery of the release. It is not enough to answer that appellants already held the plantation under the decretal sale. They regarded the agreement, upon the part of Burnley's executrix, to acquiesce in such holding as a valuable consideration and so demonstrate it in the release. They were fully apprised of the extraordinary proceedings by which the judgment foreclosing their mortgage had been otherwise obtained, and had good reason to fear that the judgment and sale, if not absolutely void, were both liable to be avoided. From the record of the Mississippi chancery suit which is made an exhibit by appellants, it appears that a certain law firm supposed to represent the representatives, heirs and devisees of A. G. Burnley, deceased, endorsed upon the bill of reviews a waiver of process thereon, and an agreement that the appearance of their clients might be entered and a judgment rendered conforming to the prayer of the complainant's original bill.

The attorneys or firm signing this agreement did not profess to have authority to take either of these unusual steps, and the only evidence in the record tending to show that they had such authority is the unsworn statement of complainant's attorney that one of them had exhibited to him a paper, which in his opinion constituted "a full and sufficient power of attorney" and that he had learned from a third party that these attorneys were the legally constituted attorneys of the defendants.

It is further to be observed that notwithstanding this agreement no one ever did enter the appearance of the defendants or consent of record to the rendition of the judgment of sale. The entire proceeding was *ex parte,* and if the judgment is not absolutely void, we can very well see how the parties holding under it could regard and treat the abandonment by Beamley's personal representatives of the right to attack it as the surrender of a valuable right, and as in some degree quieting their title to a tract of land, worth much more than the amount of their bid, and the sum released including the taxes paid by them on the land.

The only right appellants can have to demand the payment to

them by Burnley's executors of the taxes that had accrued on the land prior to the decretal sale, must arise out of the stipulation in the mortgage that the land should be held for the payment of the notes thereby secured "without any abatement on account of taxes, or other assessments."

The release covers all liabilities arising from the mortgage indebtedness, and consequently embraces the claim for these taxes, it being in existence at the time it was executed. As a further ground of avoidance appellants claim that they were misled by the letters of Mrs. Burnley into the belief or impression that the estate of A. G. Burnley, deceased, was insolvent, and that it would be impossible for them to obtain or secure any further recovery on their claim, and that acting under this belief, and actuated by feelings of sympathy and friendship for Mrs. Burnley, they executed and delivered it. But that, as matter of fact, they were mistaken as to the solvency of said estate. That instead of being insolvent, it was on the day the release was executed abundantly able to pay off the debt due to them, and that the executors and their agents were then receiving large sums of money derived from the sales of the lands of the estate in Texas, and that the executors have sold large bodies of land and received large sums of money and now hold large tracts of land and other property, being assets of the estate of A. G. Burnley, deceased, and partly subject to the payment of his debts.

Whether the executors sold these large bodies of land, and received these large sums of money before or after the date of the release is not stated, but as the petition was not filed until more than three years after such date, and as the word "have" may relate as well to the time the same was filed as to the execution of the release, it must be construed as relating to that time, in view of the rule that pleadings shall be construed in cases of doubt most strongly against the pleader. By Exhibit No. 5, the letter of Mrs. Burnley, proposing the settlement of the debts growing out of the mortgage on the Mississippi plantation, the attention of appellants was specially called to the fact that she "owned a large interest in Texas lands" which at that time yielded nothing of consequence, her agent occasionally sending her a few hundred dollars from a chance sale, but that he (the agent) buoyed her up with the hope that she would be able out of those lands to pay a certain debt, and have a competency left.

On the 4th day of November, 1872, these hopes may have been realized and yet every word contained in the three letters exhibited may have been strictly true at the time they were written and the release executed. Appellants do not allege that the statements made in these letters were not true, but that the effect of the letters was to fix in their minds an erroneous impression, or an unfounded belief.

Before equity will relieve against mistake of fact it must be made to appear that the mistake was as to a material fact, and it must be such as the party could not by reasonable diligence get knowledge of when put upon inquiry, for if by such reasonable diligence he could have obtained knowledge of the fact, to relieve him would be to encourage culpable negligence. Story's Equity Juris. 146.

Appellants were informed that the executrix of Burnley's will held a large interest in Texas lands. They might have ascertained the extent of this interest by inquiry. They failed to make inquiry and now ask a court of equity to interpose in their behalf, because these lands have turned out to be more valuable than they then anticipated that they would. They do not charge that they were lulled into confidence by the fraud or misrepresentations of the party with whom they dealt, and their petition shows upon its face that they seek the aid of a court of equity to release them from the effects of a paper voluntarily executed, upon a valuable consideration, without fraud and without mistake as to any matter about which they could not have been fully advised had they chosen to make inqury, in order that they may be enable to make profit by the unconscientious prosecution of a legal advantage they would hold, were they to obtain the relief sought.

Considering the petition in connection with the exhibits, it presents no reason for the interference of a court of equity, and as it also manifests the fact that there is a complete defense to the action that might be prosecuted at law, for the recovery of any balance remaining unpaid on the mortgage debts, after the sale of the Mississippi plantation. The general demurrer was properly sustained, and as appellants failed to amend, their petition was properly dismissed.

Judgment *affirmed.*

Brown, Julian, for appellant.

James, for appellee.

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Where claims against an estate are authenticated by sworn statements of witnesses and claimants, they ought not to be rejected, especially after they have been allowed in a county court. J. H. Curd v. R. F. Mix, Adm'r 332

Where claims against an administrator are sustained by affidavits of witnesses as to their correctness, and presented by the claimants, and allowed the administrator in settlement by the county commissioner, they will not after six or seven years be rejected for want of proof, unless their validity is successfully assailed and a state of case presented showing that the administrator ought to have paid them. J. H. Curd v. R. F. Mix, Adm'r 332

Presentation of Claim—Waiver.

Where an administrator, when a claim had been presented to him, declared his intention not to pay it, he thereby waived any right to require a literal compliance by the claimant with the statute, and invited litigation thereon, and cannot complain that plaintiff did not duly comply with the statute in presenting the claim. J. R. B. Parsons v. H. C. Gartrell's Adm'r 180

Claim of Administrator.

At common law an administrator has the right to retain in his hands the amount due him by the deceased, where there are no other creditors, and no statute deprives him of such right. James M. McGregor v. James Keithby & Co. 489

Assignee of Claim.

The estate of an assignee of a claim cannot be held to lose the benefit of the assignment merely because the personal representative failed to become a party to the suit in which the assignor was prosecuted, and which he might well believe would secure the rights of the estate. Wm. Platt & Wm. Watts v. John Platt's Adm'r.....342

Insufficiency of Assets.

If the assets of a decedent's estate are insufficient to pay decedent's debts, the administrator must resort to his equitable action authorized by Civ. Code, R. S., ch. 40, § 10. Wesley Berry v. Lycha Hopkins, Adm'r 515

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Sale of Land—Bond by Administrator.

An administrator was held to be the proper custodian of money due his intestate's estate, and where by agreement between the widow, a life tenant, and the remainderman, the land was sold, it was the duty of the administrator to tender the widow a bond with good security, and to receive and hold the portion of the money due the estate. Judith Sale v. R. H. Snyder 592

Collection of Debts Owing Decedent.

Debtors of a deceased have the right to demand that the person seeking to coerce payment of the debts shall show that he is legally entitled to collect them, and he cannot be deprived of such right by the unauthorized action of the county court having no jurisdiction of the matter. Geo. M. Murrell, Ex'r, v. S. M. Wing.....667

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An administrator will not be required to loan money out, when, because of litigation, he might be required to account for it at any time. Manasses Lyles v. D. Mathews & Wife 678

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An ex parte settlement by an administrator, with the county court, may be surcharged and corrected by the circuit court upon proper allegations and proof. Geo. W. Gist v. John & Milo Gist, Adm'rs....209

Previous settlements are prima facie evidence of the correctness of the various vouchers filed therein, and before they will be rejected by the court, if there are any affidavits other than the claimants' as to the justness of the act and a receipt therefor, it should be made to appear by the parties surcharging the settlement that the credit was improperly allowed for the reason that it was not owing, or that the administrator had a valid defense thereto. J. H. Curd v. R. F. Mix, Adm'r 332

Fiduciary Liability—Bankruptcy.

A writing executed by an administrator stating that there is due a certain person as his share of the estate $200 "to be paid," which was signed by the administrator, was properly treated as evidence of a fiduciary liability, which was not affected by proceedings in bankruptcy by the administrator individually. H. F. Cheatham v. Josh Cheatham 450

Purchase and Sale of Land by Administrator as Commissioner.

Where an administrator, who was appointed commissioner to sell land of the estate, purchased the land at the sale, and afterwards sold

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it at an advance over the price paid by him, he will be held to account for the excess of the price received over the price paid by him. Robt. A. O'Bryan v. Sarah E. O'Bryan 346

Suit by Heirs—Burden of Proof.

Where the heirs of the wife sued the administrator of the husband to have their rights determined as to a note and mortgage alleged to belong to the wife, it is incumbent upon the heirs to allege and prove such facts as will show that they are entitled to the relief sought. Mary Morgan's Adm'r v. N. Nicholas & Wife.....403

Suit by Distributees.

In a suit by distributees against administrators to recover money in their hands for which they had failed to account, it is proper to make the administrators liable for any assets not reported by them and for which they failed to account. J. H. Curd v. R. F. Mix, Adm'r.....332

Fee-Bills—Collection.

An administrator may be called upon to show whether he has collected any of the fee-bills returned to the county court, as he is entitled to all the assets not administered. J. H. Curd v. R. F. Mix, Adm'r 332

Liability for Fee-Bills.

Fee-bills returned to office by administrator should be treated as accounts unadministered, and passed to the administrator de bonis non, and the administrator should not be charged with them, unless it is shown that while they were in his hands they could have been collected, and that their return to the office has resulted in a loss to the estate by reason of insolvency of the parties. J. H. Curd v. R. F. Mix, Adm'r 332

Where fee-bills have not been returned by the administrator, he should be allowed to show that the parties liable thereon were insolvent. J. H. Curd v. R. F. Mix, Adm'r 332

An administrator should not be charged with fee-bills, unless it appears that they were collected, or that the parties were solvent, lived in the county, and they should have been levied and made as provided by law after they came into the hands of the administrator. J. H. Curd v. R. F. Mix, Adm'r.....332

An administrator ought not to be charged with a fee-bill which he failed to return to the clerk's office, if he can show that the parties owing it were insolvent. J. H. Curd v. R. F. Mix, Adm'r.....332

Liability for Uncollected Claim.

Before an administrator de bonis non is chargeable with an uncollected claim of the estate for failure to collect it, it should appear not

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only that the party owing the debt is solvent, but that a fee-bill could have been levied upon the property of the debtor. J. H. Curd v. R. F. Mix, Adm'r 332

Settlement Between Administrators.

Where administrators desire a settlement of accounts as between each other, such requirement must be inserted in the order of reversal, or they must file a cross-pleading for that purpose. J. H. Curd v. R. F. Mix, Adm'r 332

A settlement between two administrators in regard to their accounts should not be allowed to delay the prosecution of a suit by the distributees. J. H. Curd v. R. F. Mix, Adm'r 332

Dismissal of Action.

Under § 437 of the Civ. Code, an action to revive a judgment against a personal representative of a deceased judgment debtor is an action contemplated by such section, and where the necessary affidavit and demand has not been made before suit was instituted, the petition may be dismissed. Wesley Berry v. Lycha Hopkins, Adm'r.....515

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The right of action in a suit for waste is in the distributees, and not in the administrator de bonis non. J. H. Curd v. R. F. Mix, Adm'r ..332

Action Between Administrators.

A suit cannot be maintained by an administrator de bonis non against a former administrator of the same estate for failing to discharge the obligations of his bond. J. H. Curd v. R. F. Mix, Adm'r..332

Action by Administrator Against Widow—Admission.

In a suit by an administrator against the widow of the deceased to recover certain gold which the widow claimed as a legacy, failure of the administrator to introduce any evidence with reference to the indebtedness of the estate, when taken in connection with his evasive reply to defendant's answer will be taken as an admission that there are no debts of the estate to be paid. Chas. Denton's Ex'r v. Emily Parker 227

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Where an administrator sues in equity to recover personal property in the hands of a legatee, recovery cannot be had merely for the purpose of enabling him to repay the devisee the sum of money received. Chas. Denton's Ex'r v. Emily Parker.....227

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A joint judgment in favor of an administrator de bonis non and the distributees against the administrators, where the administrator de bonis none was not a party to the action and was not entitled to judgment, is erroneous. J. H. Curd v. R. F. Mix, Adm'r.....332

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Where the Court of Appeals reversed a judgment and remanded the case for correction of settlements of executors so as to hold the executors liable for the price of a slave, it was held that such decision did not authorize a personal judgment against the executors. W. B. McGehee v. O. W. Miles 470

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An administrator with the will annexed held authorized under the circumstances to sell the land in controversy. Robt. Rutherford's Heirs v. Francis Clark's Heirs 326

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The devise of personal property to the testator's widow for life without requiring a bond to protect remaindermen confers upon her the right to its possession and use without execution of bond to remaindermen. Chas. Denton's Ex'r v. Emily Parker.....227

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Where an owner of land permits an adjacent owner to join his fence to the former's gate, thereby enclosing the latter's land, the former cannot legally enter and remove the gate without reasonable notice to the latter of his intention to remove. Salathiel Burries v. Samuel Agnew 10

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Where plaintiff sued defendant as a guarantor of a bill on the back of which plaintiff's name was indorsed without a contract of guaranty being written above it, and plaintiff sets out the bill as a part of the complaint, he cannot complain of the refusal of the court, after the case is ready for trial, to permit him to write out a contract of guaranty over the defendant's signature. Joseph Jones v. Thomas Turner. 499

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A mother should be entitled to the guardianship of her infant children, rather than a stranger who had become persona non gratis to some of the wards, and where the mother and the wards held the property in common, and there was at least an implied understanding between the guardian appointed and the mother of the wards, that he would surrender the guardianship in her favor. John A. McGrath v. W. A. McGrath 534

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In a suit by a foreign guardian against a resident guardian, it will be presumed that the ward is still an infant, especially where the defendant failed to controvert the fact. John T. Miller v. Benjamin D. Barnes, Guardian 370

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Settlement with Ward—Duty of Guardian.

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Loaning and Collecting Ward's Money—Diligence.

A guardian, in loaning out money of the ward and in collecting money due the estate, should exercise a high degree of diligence for the protection of the ward's estate. Commonwealth for Muir v. J. S. Coleman 692

Transaction Between Guardian and Ward—Burden of Proof.

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In a suit by a foreign guardian against a resident guardian, a copy of the probate proceedings showing the subsequent appointment of plaintiff as guardian on removal of the ward to the other state, is prima facie evidence of plaintiff's right to relief, and it devolves on the defendant to show the contrary. John T. Miller v. Benjamin D. Barnes, Guardian 370

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Sale of Lands—Confirmation.

Where the sale of an infant's land is shown to be beneficial to the infant, the chancellor will uphold the sale, unless the proceeding under which the sale was made is so defective as to preclude the chancellor from giving a valid title to the purchaser. James Miller v. B. F. Rogers et al. 697

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Although a purchaser at the sale of the commissioner of a court of equity is only a preferred bidder until the sale is consummated by the chancellor, yet the chancellor cannot arbitrarily refuse to confirm the sale, but must act under his authority as regulated by the fixed rules of equity. R. E. Clasby v. Emily Barnett.....711

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There can be no abuse of process in dispossessing a party who has no right to the property in controversy, and whose rights have been litigated and remanded by a judgment rendered in favor of the party at whose instance the right of possession has been issued. J. Z. Shelton v. R. A. Melton 492

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In an action for malicious prosecution, it is the duty of the judge to explain to the jury, when asked by any of the parties to do so, what amounts to probable cause. S. R. Neale v. Jas. B. Evans.....41

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If the facts shown in an action for malicious prosecution were not sufficient to induce the belief on the part of defendant that the charge was proved, and there was probable cause for the prosecution, the law is for the defendant, an instruction that the burden of proof is on plaintiff to show that defendant caused the indictment to be found

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against plaintiff without probable cause, and must show that the material charges in the indictment were false, and if they were false, and yet defendant had good grounds to believe and did believe them to be true, and in good faith acted on such belief, he was not liable, is a correct statement of the law. S. R. Neale v. Jas. B. Evans.....41

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The evidence was held to show that a transaction amounted to a conditional sale of land, and not a mortgage. Jesse Hall v. W. M. M. Lee 366

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Where a party takes a mortgage on land for the sole purpose of indemnifying himself as surety, he does not thereby waive his right to the enforcement of a prior lien on the land previous to the taking of the mortgage, for a different liability. H. C. Pindell v. A. O. Brown 302

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Where in a foreclosure suit the mortgagor and the person in possession of the mortgaged land are made parties defendant, but the mortgagor was not served with process and failed to appear, the land of the person in possession cannot be sold to pay the mortgagor's debt. N. R. Jones v. Jeff Rice.....655

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Where one executes a mortgage securing the mortgagee as surety, also a creditor of the mortgagor, the mortgagee on sale of the property must apply the proceeds to the payment of the debt on which the mortgagor is surety, and then apply the balance, if any, to individual debt of the mortgagor. H. C. Pindell v. A. O. Brown.....302

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A release of a mortgage executed to one individually was held to be intended as a release of the party in her representative capacity, where she was not individually indebted to the releasors, but was indebted to them in her representative capacity, and all the circumstances clearly show the purpose and application of the release. Hallam Eldridge v. A. T. Bromley's Ex'rs.....746

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The adoption of an ordinance for a street improvement on the first reading, under suspension of the rule, by a two-thirds vote of the council, is a substantial compliance of § 11, art. 3, charter of 1851. A. J. Ballard v. L. Giles & Monahan.....378

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Section 5 of art. 4, charter of 1851, did not require a vote to suspend the operation of § 11 of such charter to be approved by the mayor. A. J. Ballard v. L. Giles & Monahan.....379

Ordinance—Evidence of Passage of.

A journal record of the proceedings of the common council of a city cannot be received as sufficient evidence of the passage and acceptance of an ordinance where the correctness of the journal has not been passed upon by the council, but only by the clerk or president. City of Louisville v. C. G. Goodan & Blan Ballard.....613

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It is erroneous to try and fine one on constructive notice only, for violation of a city ordinance without his personal appearance. Commonwealth v. Dan Rice.....48

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Where the failure of a branch of a common council to keep a correct journal of its proceedings results in the exoneration of property owners from liability for street improvements, judgment for the amount due and unpaid because of such neglect, should be rendered against the city. City of Louisville v. Patrick Murphy.....62

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Improvement Ordinance—Origin.

Where an improvement ordinance was adopted by unanimous vote of the council, it is immaterial whether it originated in the council or resulted from petition of the lot owners. R. T. McGill v. L. B. Pence 605

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A street improvement ordinance providing for assessment in the proportion that each parcel of land bears to the portion of the street to be improved, was held to be in substantial compliance with the statute. Timothy Leight v. E. W. Rupert.....136

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Where defendant in a street assessment proceeding, on the sustaining of a demurrer to his answer, paid the claim on consideration of dismissal of the action at plaintiff's cost, defendant cannot be allowed to recover back the money paid by him after the Supreme Court has decided that the acts under which the assessment was made were repugnant to the state Constitution and void. City of Covington v. Chas. Chambers 352

Improvement—Apportionment of Cost.

An improvement ordinance was held to require that the total cost of the improvement shall be apportioned among the property owners in accordance with the front footage of the property abutting on that portion of the street which was improved. R. T. McGill v. L. B. Pence 605

Improvements—Encroaching on Private Property.

Where a contractor, in making a street improvement, encroaches on the private property of an abutting owner, the contractor cannot recover against the owner of such property for the costs of the improvement. James Irvine v. J. E. Vansant.....617

Street Improvements—Stipulation of Contractor.

A stipulation in a contract for street improvements, that the contractor should keep the street in repair, was held not to have the effect of imposing on the property holders a double tax, but amounts to a mere requirement that the contractor guarantee the character of his work. J. J. Riddle v. John Lewis 525

Improvement Contract—Manner of Execution.

The law will not imply an obligation on the part of the city to pay for work procured to be done by the city's officers, unless the contract has been executed and approved as provided by the charter and the general ordinance regulating the manner in which contracts shall be made. Chas. Obst v. City of Louisville 577

Presumption as to Letting of Improvement Contract.

Where a contract embraces work to be done on several squares at the same rate per front foot, it will be presumed that the work was let in accordance with the provisions of the ordinance. A. J. Ballard v. L. Giles & Monahan 379

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Opening Street—Right of Action for Damages.

A judgment or order in an action for mandamus, "that the motion for a mandamus as prayed is overruled," is not such a judgment as will bar the right of action to collect damages assessed in opening a street. Thos. S. Ellis v. Trustees of Richmond.....344

Rescission of Order Opening Street.

Where town trustees have appropriated property in the opening of a street, and have litigated the question of damages, the trustees have no power to rescind the order opening the street to the injury of the property owner. Thos. S. Ellis v. Trustees of Richmond.....344

Opening Street—Right of Action for Damages.

The fact that plaintiff was a trustee of the town where an order to open the street was made, does not affect his right to payment of damages sustained by opening the street, or give the trustees the right to take his land without compensation. Thos. S. Ellis v. Trustees of Richmond 344

Street Assessments—Payment—Mistake.

The payment of a street assessment to avoid further litigation, cannot be regarded as having been made under "a clear and palpable mistake of law," and although the assessment was illegal the money cannot be said to have been paid without cause or consideration. City of Covington v. Chas. Chambers 352

City Taxes.

The power of taxing for public improvements within the city limits may be exercised by the council without the consent of the citizen, and his property may be subjected to the payment of the tax upon the consideration alone of public and private benefits to be derived therefrom. City of Paducah v. Holloran & Co.....547

Requirement of Tax Levy to Pay Claim.

Where in an action against a town for damages sustained by the opening of a street, the answer of the town disclosing that it has no property out of which the damages can be made, and that its treasury is empty, the court should require the trustees at their next annual assessment to levy a tax sufficient to pay the claim. Thos. S. Ellis v. Trustees of Richmond 344

Judgment for Unpaid Taxes—Proceeding.

A city is not entitled to judgment for unpaid taxes upon a mere statement of the amount claimed to be due, but it must come into court by petition the same as other suitors. J. B. Robinson & Wife v. W. B. Caldwell & Wife.....184

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ment therefor, unless the work was undertaken as provided by the city charter and the general ordinance regulating the manner in which such contracts shall be made. Chas. Obst v. City of Louisville.....577

Pleading—Defense.

In an action against the city on an improvement contract, it is no defense to allege that although the improvement ordinance was a nullity a property owner is liable by reason of his contract under the void ordinance, and that the city is exempt for the reason that such contract was made. City of Paducah v. Holloran & Co.....547

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Where defendant's witnesses all resided in the county, and defendant does not appear to have made inquiries as to what their testimony would be until after judgment was rendered and execution issued, there was such lack of diligence as to bar an action for a new trial. A. J. Herd v. J. W. & J. C. Cochran.....735

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A new trial cannot be granted because of newly discovered evidence which could have been discovered and used on the trial by the exercise of reasonable diligence. Hines & Thomas v. S. M. Helm 231

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The absence of appellant from the trial of the cause was held to be no ground for a new trial. John A. Duff v. Robt. W. Rose.....27

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Under § 373 Civ. Code, an action for a new trial must be brought within three years after the rendition of the judgment sought to be set aside. C. C. Dixon v. James S. Cheatham's Adm'r 728

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Illegality of Consideration—Bill of Exchange.

Where the directors of one company were also directors in another company from which the bill of exchange was purchased, their knowledge as officers of the company from which the bill was purchased is sufficient to give actual notice of the illegal consideration of part of the bill to the company for whom they acted in making the purchase. Morrison & Oaks v. W. Voorhies & Co.; D. W. Jones & Co. v. J. W. Munday 627

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In a suit on a traverse bond, it was held that it was not necessary that all the obligors be made parties. Walter C. Whitaker v. E. M. Gault 561

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One who alleges that he is a partner of a defendant, and exhibits the articles of partnership, shows sufficient interest in the result of the litigation, as to entitle him to be made a party to the action. W. O. Crenshaw v. W. B. Keen's Adm'r.....343

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In an action to subject land devised to the testator's son, wife and children for their support, to the payment of the son's debts, the wife and children should also be made defendant. John Perry v. Hardin Hunter 726

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In a suit to subject trust property converted for the benefit of a widow and her infant children, to the payment of creditors who furnished goods in replenishing the trust property, the infant children are necessary parties. C. E. Pearl v. H. C. Elliott.....300

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An agreement in partition of land will be upheld where the parties were competent to contract, and there is an absence of fraud and overreaching. John Schooling v. John W. Natton.....496

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In a suit for partition it is not required that each interested party, although some may be defendants, should file cross-pleadings and have summonses issued in order to make the defect perfect by delivery of possession. J. Z. Shelton v. R. A. Melton.....492

Setting Off Several Interests Together.

Although an order of the court in a suit to partition land among heirs, directed the land to be divided into six equal parts, yet where five of the adult heirs desired their interests to be set off together, it was not error for the court and the commissioner to comply with their requests. John Schooling v. John W. Natton 496

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Where, by agreement of the heirs of a decedent, a certain tract of the decedent's land was set apart to one of the heirs, which agreement was recognized as binding upon the parties, and made so by the judgment of the court, the assignors have no right to deprive such heir of his interest in the land, so as to affect the rights of creditors, by making an absolute deed thereof to his children. Bronston & Francis v. R. Perry White et al.....732

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A representation or misrepresentation of a fact in a partnership transaction, by one member of the firm, will bind the firm. J. W. Bowling v. J. H. Martin 67

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The evidence was held to show that a trustee appointed to close partnership affairs and make disbursement of the proceeds, was not negligent and did not make improper application of the funds, and that he exercised proper skill in the execution of the trust. Robt. Gibson v. W. R. Thompson.....98

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Under the present system of pleading, if an action is brought in the firm name instead of the individual names of the partners, the defect may be taken advantage of by rule or motion requiring plaintiffs to set forth their individual names. B. B. Cozine & Bro. v. J. B. Kennedy 706

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Where property held by one as pawnbroker is levied on and sold by his creditor, and he abandons his right to recover the property, he must be held to have consented to the action of the constable who levied thereon and sold the property. New Jersey Mut. Ins. Co. v. N. S. Glore 523

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Where a debtor made part payment on the debt on the promise of the creditor not to sue for the residue at the approaching term of court, the promise not to sue was without consideration. R. T. Johnston, Jr., v. Rosina Walker.....464

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A petition based merely upon information and belief that certain property of plaintiff had been attached and sold as the property of another, is indirect and equivocal, and insufficient. Prescott & Bros. v. W. J. Annis 289

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Every material allegation of a petition not specifically controverted by the answer must, for the purpose of the action, be treated as true. H. T. Dunken, Jr., v. Samuel Williams.....18

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sum of $65 or in any sum for a cow sold and delivered to her at the price stated, or at any other price, is a mere conclusion of law, and insufficient. John Knapka v. Christian Linck.....78

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There can be no variance between the allegations in a pleading and the proof, unless the pleading contains an allegation of fact or raises some issue of fact. John Knapka v. Christian Linck.....78

Action on Tax Collector's Bond—Pleading.

In an action on a tax collector's bond, it is not necessary to allege that the county court had ordered him to pay over, where the bond fixed the time and place of payment. Thomas Monarch v. Daviess County Court 88

Partnership Accounting—Discovery.

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In an action for work done and material furnished, an answer admitting that work was done, but alleging that defendant is unable to say what work or how much, is evasive and insufficient. John Hayley v. John Kiernan, Assignee 193

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A petition relating to real estate, which is fatally defective for want of description of the property, may be cured by averments of the answer supplying such defects. Geo. W. Rhodes v. J. R. Gillispy & Wife 321

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Where paragraphs of answer which attempt to deny the existence of a corporation are uncertain whether the defendant intends to allege that there never was such a corporation, or to allege that the corporation had ceased to exist, it is insufficient for uncertainty. L. L. North v. Irvin Turnpike Road.....307

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A trustee appointed by a will can only do what the will authorizes him to do, but a trustee appointed by the court derives his power from the court and must execute the trust only as authorized by the court. David Todd v. H. Rodman, Adm'r.....673

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Failure of Consideration—Recovery of Purchase Price.

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Where other land was sold at the time plaintiff entered into his contract of purchase, he must be presumed to have entered into the contract with knowledge of the other sale, and to have waived any cause of objection which he may have had to it. J. Q. Ward, Trustee, v. S. G. Stevenson 357

Breach of Covenant—Damages.

A purchaser suing for breach of covenant is not entitled to recover speculative damages, but can recover only the purchase price paid by him together with interest and money paid by him in resisting eviction or right of recovery by adverse claimants. Harrison Literal v. Benjamin Martin 407

Rescission of Contract of Sale Restoring Possession.

Where one enters land under a contract of purchase, he is bound to restore possession to the vendor upon rescission of the contract of sale, before he will be allowed to dispute the title of the vendor. Jake Harris v. Patsy Lawson 438

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The mere fact that the mare in question was taken by a soldier at defendant's command, when defendant was not present does not make him responsible for the trespass, and defendant's failure to compel the soldier to surrender the mare when the colonel of his regiment was present and in command cannot be regarded as a ratification of the tort. E. L. Osborne v. J. H. Bradshaw.....424

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The defense that a transaction contravenes public policy is not allowed for the defendant's advantage, but for the public good, and should only be upheld where the evidence satisfactorily shows that the party seeking relief has violated some public law. R. M. Robinson's Trustee v. C. D. Hamilton 419

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The fact that accused wore a belt around him such as weapons are usually carried in, will not alone authorize a finding that accused carried a deadly weapon. Jesse Henry v. Commonwealth.....194

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A construction of a will which harmonizes with the language used by the testatrix, and which has the effect of carrying out her conceptions of justice and equity among her children, will be upheld. R. F. A. Grigsby v. Ann M. Grigsby, Adm'x.....295

In ascertaining the intention of the testator, the court must take into consideration both the will and codicil as one paper and give force and effect, if possible to every word contained in both instruments. E. Smock v. L. Smock.....485

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