Hockensmith, William et al vs. Slusher, Henry et al; 1857 Clay Co. #5 Cir. 224/8

77/2

· estate settlement

· division of land among descendants of Slusher who did not provide for such in will

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the fifth Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Clay County in the Judicial Circuit aforesaid wherein William H. Hochensmith and Susannah Hochensmith were plaintiffs and Henry Slusher and others were defendants.——

in an action of manifest error hath intervened, to the great damage of the said plaintiffs as by their complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the first Monday in July next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the ninth day of May in the year of our Lord one thousand eight hundred and fifty seven

Wm E Dunscomb

State of Missouri }
County of Clay } ss I Alexander Hallman clerk of the circuit court within and for the county of Clay in the State of Missouri certify that I have in compliance with the within order made out a true and correct transcript of all the record and proceedings had and made in the cause therein set forth and herewith return this writ with the transcript aforesaid

In Witness whereof I hereunto set my hand and affix the seal of said court at office in the city of Liberty this fourth day of June AD 1857

Alex Hallman clerk

State of Missouri }
County of Clay }

Pleas in the circuit court within and for the county of Clay aforesaid before the Honorable George W. Dunn judge of said court.

Be it remembered that heretofore on the 9th day of February 1857 William H. Hockensmith and wife Plaintiffs by their attorney filed in the office of the clerk of the circuit court within and for the the said County of Clay a transcript of the proceedings in the Lafayette circuit court against Henry Slusher and others defendants, which said transcript is in the words and figures following to wit:

Petition

William H. Hockensmith &
Susanna Hockensmith Plaintiffs

Against } In the circuit court Lafayette County
Henry Slusher. Thomas Slusher, Jackson. Slusher, Maria Cooper, Washington Cooper, Nancy Pfleger, David Pfleger, Wilburn Slusher, Julia A. Slusher, Virginia Thomas. Charles F. Thomas. Mahala Going & her husband ---- Going whose christian name is unknown Washington Gilham; Hugh Gilham, Eliza A Gilham Maria Gilham, Martha A Shaw, John Shaw. Nancy Gilham, Sarah Gresham, William Gresham Elizabeth Talbot, Margaret Talbot, Christopher Slusher, Thomas Slusher, Charles Slusher, Mary P. Slusher, Martha Slusher, John Starr, Christopher Starr, Joseph Starr, Polly Starr, Henderson Starr Ann Crabtree, James M. Crabtree, Matilda Crabtree Job. Crabtree & Jordan James Defendants

Plaintiffs State that sometime in the month of December 1853. one Christopher Slusher then a citizen and resident of Lafayette county Missouri departed this life testate and seized and possessed of the following lands situate in said County to wit: The West half of the North East quarter of Section 27. Townsh 51. Range 26. Also the West half of the South East quarter of same Section Township & Range — Also the Southeast quarter of the North East quarter of Section 34 same Township & Range. also the North East fourth of the North East quarter of same Section Township and Range. Also the East half of the North East quarter of Section 27 same Township & Range Also East half of the South East quarter of Section 27 same Township & Range. Also all that tract bounded as follows. Viz: Beginning at the South East corner of the South East quarter of Section 22. Township 51 and Range 26. Thence North along the east line of said quarter 22. chains & 17 links to the Missouri River, thence North 88 degrees West along the bank of said River 15 chains. Thence due West along the bank of the Missouri 18 chains and 77 links to a Stake thence South 24 chains & 17 links to the South line of said quarter - Thence East along the South line twenty five chains & 77 links to the place of beginning contain 60 $\frac{85}{100}$ acres — Also one other tract bounded as follows Viz beginning at the South East corner of the South West quarter of Section 27. Township 51 Range 26 Thence West along the South line of said Section, 28 chains & 23 links to the Middle of the fence between John Dustan and Joseph Dixon. Thence North 26 degrees West along the Middle of the above mentioned

fence 26 chains & 50 links to a black Walnut tree standing on the West line of the Section, Thence due North along Said line 6 chains and fifty links to the Southwest corner of 5 acres that Said Dixon formerly Sold to judge Cox. Thence East 5 chains to the South East corner of the 5 acre piece. Thence North 10 chains to the North line of the quarter Section, Thence East to along the North line of Said quarter 35 chains to a rock at the North East corner thereof Thence due South 40 chains to the place of Beginning containing 141 17/100 acres. Also the South East fractional quarter of Section 26 Township 51. Range 26 containing one hundred & eleven 52/100 acres. Also all that part of the North East quarter of Section 35 Township 51 Range 26 beginning at a Stake at the Northwest corner of Said quarter Section, Thence East 32. poles to the middle of Tabbeau Creek. Thence up the middle of Said creek 41 poles to the mouth of Linn Branch. Thence up the middle of Said Branch to the West boundary of Said quarter Section, Thence North 60 poles to the beginning containing 10 acres, Also one other tract Also one other tract of land bounded as follows. to Wit: Beginning at the corner of Section 22 & 23 - on the margin of the River from which a little white Oak 12 inches diameter bears S 22" E 30 links - a ditto 10 inches dia bears N 73° W. 30 links - Thence South 22 chains to the corner of Section 22, 23. 26 & 27 from which an ash 10 inches dia bears N 76°. E 30 links and an Elm 10 inches dia bear S 22°. W 50 links - Thence west 40 chains & 25 links to the quarter Section corner on the line between Sections 22 & 27 from which a hackberry 15 inches dia bears S 40" W 50 links

and a W oak 15 inches dia bears N 46" E 20 links. Thence South 17 chains set a post from which a white oak 18 inches dia bears N 20" E 90 links and an Elm 18 inches dia bears S 66° W 27 links. Thence West 20 chains and 11 links to a Stake Thence North to the Missouri River Thence down said River with its meanders to the beginning containing One hundred & Seventy-nine acres - and being a part of Section 22 & 27 of Township 57 Range 26 - Also one other tract as follows to wit: A part of the Northwest quarter of Section 25 Township 51 Range 26, bounded as follows - Beginning at the South West corner of said quarter Section thence North on the line of said quarter Section fifty poles to Catrons Spring branch thence up said branch with its meanders, and agreeably to the point of the compass North 58 degrees East Six poles. Thence South 76 degrees. East 30 poles Thence East 22 poles Thence South 62 degrees. East 16 poles, Thence South 76 degrees East 14 poles to a chink a pin oak on the bank of the branch near said Catrin's Spring. Thence South 53 degrees East 28 poles. to a Stake in the South boundary line of said quarter Section. Thence West with said boundary line 122 poles to the beginning containing 27 acres.

Also the Southwest quarter of Section 25 Township 51 Range 26. containing 160 acres.. Also the South-west quarter of Section 25 Township 51 Range 26.

Also the following land to wit: Beginning at the Southwest Corner of a certain tract of Land located in the name of Alexis Picard in Township 51 Range 26. Survey Numbered 2798 - Thence East with the boundary line of said Survey 59 chains & 50 links

to the right bank of Sabo Creek. Thence down said creek in the middle thereof to the Missouri River to the North West Corner of said Tract. Thence South with the Western boundary of the said Survey to the beginning containing 245 acres – Also the North West quarter of Section 35 Township 51 Range 26 containing 160 acres, Also the Southwest fractional quarter of Section 26 Township 51 Range 26 containing 111 $\frac{52}{100}$ acres = Also that part of the Lot known and designated on the plat of the first addition to the Town of Lexington now on file in the Recorder's Office of Lafayette County as Lot No 7 in Block No 36 which is bounded as follows commencing at a point on North Street in the South line of said lot 17 feet East of the Corner of said Lot on Pine and North Street and running thence North in a line parallel with said Pine Street 140 feet to a Stake on an alley thence East 18 feet with said alley to a Stake thence South in a line parallel with said Pine Street 140 feet to a Stake on said North Street. Thence West with said North Street 18 feet to the beginning.

Plaintiffs State that the title papers to the aforesaid lands are in the possession and under the control of David Pfleger & Henry Slusher two of the defendants and who are executors of the last will and testament of said Christopher Slusher deceased. They ask that said defendant be required to produce said title papers and to answer whether the lands are correctly described as it is not in the power of Plaintiffs to produce the same

Plaintiffs State that by the said last will and testament

of said Christopher Slusher deceased a certified copy of which is herewith filed and relied upon as evidence the original not being in the possession or under their control cannot be here produced he the said Christopher Slusher attempted to give and bequeath all the afresaid lands except the South west fractional quarter of Section 35 Township 51 & Range 26 containing 111 $\frac{52}{100}$ acres, and the said Lot Situate in said addition to Lexington to his three Sons To wit; Jackson Slusher Henry Slusher & Thomas Slusher in fee simple

Plaintiffs State that in making said paper purporting to be a last will and testament and which has by the proper tribunal in Lafayette County Missouri been regularly admitted to probate - the said Christopher Slusher gave and bequeathed to the children of Roland Slusher one of his Sons. the Sum of one thousand dollars to be equally divided between them and no more thereby depriving them of any other interest whatever in the estate of the said Christopher Slusher deceased

Plaintiffs State that the said Christopher Slusher in making said last will and testament left the Plaintiff Susanna Hockensmith unprovided for in said will and testament, wholly and entirely failing omitting and neglecting to name her either in terms or by name although as Plaintiffs State and charge that Plaintiff Susanna Hockensmith is and was one of the children of said Christopher Slusher deceased and so recognized by him in his lifetime

Plaintiffs State that said Christopher Slusher deceased in making said will failed neglected

and omitted to provide for Maria Cooper and Nancy Pfleger two other of his children

Plaintiffs state that at the time of his death the said Christopher Slusher left the following children and heirs to wit: Susanna Hockensmith late Susanna Slusher, and who had intermarried with Plaintiff William H. Hockensmith Henry Slusher, Thomas Slusher Jackson Slusher Maria Cooper late Maria Slusher who had intermarried with defendant Washington Cooper, Nancy Pfleger late Nancy Slusher who had intermarried with defendant Maria Pfleger. The following grand children-children of Allen Slusher all of whom are under twenty one years of age who departed this life before the said Christopher Slusher to wit: Wilburn Slusher Julia Ann Slusher, Mahala Going late Mahala Slusher and who had intermarried with — Going whose christian name is unknown to plaintiffs & Virginia Thomas late Virginia Slusher and who intermarried with Charles F Thomas. Also the following grand children who are the children of Mary Talbot late Mary Gilham & late Mary Slusher who was the daughter of said Christopher Slusher deceased and who departed this life before her said father, leaving the following children to wit: Washington Gilham, Hugh Gilham, Eliza A. Gilham, Maria Gilham Martha A Shaw, who are infants under 21 late Martha A Gilham and who had intermarried with John Shaw. Nancy Gilham, Elizabeth Talbot and Margaret Talbot the last three are infants under 21 years of age also the following grand children, children of Catherine Starr late Catherine Slusher - a daughter of said

Christopher Slusher deceased - and who departed this life before her said father leaving the following children to wit: John Starr, Christopher Starr. Joseph Starr. Henderson Starr. Jeremiah Starr. Polly Starr. The said Polly is an infant under 21 years of age. Ann Crabtree late Ann Starr and who has intermarried with James M Crabtree. Matilda Crabtree late Matilda Starr who has intermarried with Job Crabtree also Jordan James a grandchild and child of Matilda James late Matilda Slusher and who departed this life before her father the said Christopher Slusher. and also the following children of Rolana Slusher who was a son of said Christopher Slusher deceased and who departed this life before his said father to wit: Christopher Slusher. Thomas Slusher. Charles Slusher Mary P. Slusher. Martha Slusher. Sarah Gresham the last four are infants under 21 years of age. late Sarah Slusher and who intermarried with William Graham.

Plaintiffs state that said Christopher Slusher deceased failed neglected and omitted to make any provision for the said Margaret Talbot in his said will or for this deceased Mother although they are descendants of said deceased to wit: his grandchildren

Plaintiffs state that said Christopher Slusher died intestate as to the South West fractional quarter of Section 35 Township 57 Range 26 & the lot in the addition to the town of Lexington and that the plaintiffs and defendants are entitled in and to the land owned by said Christopher Slusher

deceased at the time of his death as follows to wit: Susanna Hockensmith is entitled to four two hundred & Sixty four parts or one eleventh part of all the lands of which the said Christopher Slusher died seized and possessed as Plaintiffs State and charge that said Christopher Slusher failed neglected and omitted to name said Susanna Hockensmith or make any provision for her in his said will by reason whereof he died intestate as to her. They also state that said Maria Cooper and Nancy Pfleger is each entitled to $\frac{24}{264}$ parts or the one eleventh part of all the lands of which the said Christopher Slusher died seized & possessed as plaintiffs state and charge that said Christopher Slusher deceased by reason of his failure to name said Mariah and Nancy or to make provision for them in his said will died intestate as to them. They also state that said Christopher Slusher deceased failed to name or make any provision for the said Margaret & Elizabeth Talbot two of his descendants to wit: children of his deceased daughter Mary Talbot in his said will by reason of which he died intestate as to them and they are each entitled to $\frac{3}{264}$ Three two hundred and Sixty four parts of all the lands of which he died seized and possessed, And the said Wilburn Slusher. Julia A. Slusher. Mahala Going and Virginia Thomas children of Allen Slusher deceased is each entitled to Six two hundred and Sixty four $\frac{6}{264}$ parts of the South west fractional quarter of Section 35 Township 51 Range 26 and said described Town Lot. And Washington Gilham. Hugh Gilham, Eliza A. Gilham. Mariah

Gilham. Martha A. Shaw, Nancy Gilham children of Mary Talbot deceased and who was a daughter of said Christopher Slusher deceased is each entitled to three two hundred and sixty four $\frac{3}{264}$ parts of said Southwest fractional quarter of Section 35. Township 51 Range 26 and said lot in the addition to the town of Lexington, And John Starr, Christopher Starr Joseph Starr, Benanson Starr, Jeremiah Starr, Polly Starr, Ann Crabtree Matilda Crabtree children of Catherine Crabtree deceased who was a daughter of said Christopher Slusher deceased is each entitled to three two hundred and sixty four $\frac{3}{264}$ part of said Southwest fractional quarter of Section 35. Township 51 Range 26 and said town Lot in Lexington, and Christopher Slusher, Thomas Slusher, Charles Slusher Mary P. Slusher, Martha Slusher & Sarah Graham children of Roland Slusher deceased who was a son of said Christopher Slusher deceased is each entitled to four two hundred and sixty four $\frac{4}{264}$ parts of said Southwest fractional quarter of Section 35 Township 51 Range 26 and said Lot in said addition to Lexington, And Jordan James child of Matilda James deceased who was a daughter of said Christopher Slusher deceased is entitled to twenty four two hundred and sixty four $\frac{24}{264}$ part of said South west fractional quarter of Section 35. Township 51 Range 26 and said Lot in said addition to Lexington, The said Henry Slusher, Jackson Slusher, and Thomas Slusher is each entitled as sons of said Christopher Slusher deceased to Twenty four two hundred & Sixty four $\frac{24}{264}$ parts of said Southwest fractional quarter

of Section 35 Township 51 Range 26 and said Town Lot in said addition to Lexington and to all the rest and residue of the lands as willed to him in the will of said deceased after deducting the rights of the parties as set out and described in this petition.

Plaintiffs state that no other persons except as herein stated are in any wise interested in said land as heirs or children or devisees of said Christopher Slusher deceased.

Plaintiffs pray judgment of partition of the lands and town lot aforesaid and that commissioners be appointed to view and divide said lands and town lot among the several persons interested therein according to their respective rights as herein set out & ascertained if susceptible of division, and if not susceptible of division they pray that the said lands be sold and the proceeds divided among the several parties therein interested according to their respective rights as set out in this petition and such other and further things as to the court may seem just and right &c &c

Smart & Shelby
for Plaintiffs

William H. Hockensmith one of said Plaintiffs makes oath and says that he believes the foregoing petition and the matters and things therein as stated are true. and that defendants Jordan James John Starr Henderson Starr, Jeremiah Starr Washington Gilham, Wilburn Slusher, Mahala Going & her husband — Going whose

christian name is unknown to Plaintiff are now residents of the State of Missouri — so that the ordinary process of law cannot be served upon them W. H. Hockensmith —

Subscribed & Sworn to before me this 13th day of February 1855.

Saml. D. Lucas, clerk

and upon the filing of said petition & affidavit as aforesaid a writ was issued by the clerk of said court endorsed thereon, directed to the Sheriff of Lafayette county in words and figures as follows to wit:

Writ to Lafayette County

The State of Missouri

To the Sheriff of the County of Lafayette Greeting; You are hereby commanded to summon Henry Slusher, Thomas Slusher, Jackson Slusher Maria Cooper, Washington Cooper, Nancy Pfleger, David Pfleger, Sarah Gresham, William Gresham Christopher Slusher, Thomas Slusher, Charles Slusher Mary P. Slusher, Martha Slusher and Christopher Starr, if they be found in your county that they be and appear before the Lafayette Circuit Court at the Court house in the City of Lexington in said county on the first day of our next May term thereof, to be holden on the 21st day of May next then and there to answer unto the complaint of William H. Hockensmith and Susannah Hockensmith as set forth in the foregoing petition and have you then there this writ and that you certify how you execute the same, Witness Lewis W Smallwood Clerk of our said court with the official

Seal hereto affixed at office in Lexington this 15th day of February A.D. 1855.

Lewis W. Smallwood Clerk

And upon such said petition & writ the Sheriff of said County of Lafayette endorsed his return in words and figures as follows to wit:

I Marquis W. Withers Sheriff of Lafayette County in the State of Missouri do certify that I executed the within writ on the within named Christopher Slusher, Thomas Slusher, Charles Slusher, Mary P Slusher, and Martha Slusher on the 20th and on Sarah Gresham & William Gresham on the 21st and on Thomas Slusher and Maria Cooper & Washington Cooper on the 22nd and on Nancy Pfleger, David Pfleger, and Jackson Slusher on the 23rd day of March 1855. by reading the within writ and petition to each of them in Lafayette County Missouri and on Henry Slusher on the 22nd day of March 1855 by reading the within writ to him and also by delivering to him a copy of the within writ and petition in Lafayette county Missouri on the day above named and the within named Christopher Starr cannot be found by me in Lafayette County Missouri

M. W. Withers Sheriff

fee $14.00

By G. M Jaquess Deputy

1 non est 50
14.50

Be it further remembered that on the filing of said petition & affidavit on said 15th day of February 1855 in vacation of said Court, the following further proceedings were had and made by the clerk of

said court in said suit to wit:
William H. Hockensmith &
Susannah Hockensmith Plaintiffs
against
Henry Slusher, Thomas Slusher, Jackson Slusher, Maria Cooper, Washington Cooper, Nancy Pfleger, David Pfleger Wilburn Slusher, Julia A. Slusher, Virginia Thomas Charles F Thomas, Mahala Going and her husband —— Going whose christian name is unknown, Washington Gilham, Hugh Gilham, Eliza A Gilham, Maria Gilham, Martha A Shaw, John Shaw, Nancy Gilham Sarah Gresham, William Gresham, Elizabeth Talbot Margaret Talbot, Christopher Slusher, Thomas Slusher Charles Slusher, Mary P Slusher, Martha Slusher, John Starr, Christopher Starr, Joseph Starr Polly Starr Henderson Starr, Ann Crabtree, James M. Crabtree Matilda Crabtree, Job Crabtree, & Jordan James
Defendants —

Now at this day in vacation comes said Plaintiffs by their attorney and files in the office of the Clerk of said court their petition against the said defendants and also an affidavit alleging that Jordan James John Starr, Joseph Starr Henderson Starr, Jeremiah Starr, Washington Gilham, Wilburn Slusher, Mahala Going and her husband whose christian name is unknown are non residents of the State of Missouri It is therefore ordered by the Clerk of said court that publication be made against the said non residents as follows

To the said Jordan James, John Starr, Joseph Starr, Henderson Starr, Jeremiah Starr, Washington

Gilham Wilburn Slusher. Mahala Going and her husband — Going whose christian name is unknown. You are hereby notified that said Plaintiffs have this day commenced a suit against you and said other defendants in said Court by petition in which the plaintiffs state that in the year 1853. one Christopher Slusher then a resident of Lafayette County Missouri died testate and seized of a large amount of Real Estate situate in said County all of which he devised to his three sons Jackson Slusher, Henry Slusher & Thomas Slusher in fee simple except the Northwest fractional quarter of Section 35 Township 51 Range 26. and a part of the lot known on the plat of the first addition to the town of Lexington in said County as lot seven in Block Thirty six as to which it is alleged he died intestate. It is also stated in said petition that Maria Cooper Nancy Pfleger and said plaintiff Susanna Hoekensmith are children of said Christopher Slusher and that said testator failed and omitted to name and provide for them in his said will and that as to them he died intestate and that they are each entitled to one eleventh part of all the real estate of which said Slusher died seized, that said testator also failed and omitted to name or provide for Margaret Talbot and Elizabeth Talbot, children of Mary Talbot who was a daughter of said Christopher Slusher and who died before her said father as to whom it is alleged he died intestate and that they are each entitled to 3/264 parts of all his said real estate. The object and prayer of said

petition is that judgment may be rendered for the partition of all the real estate owned by said testator at the time of his death and that commissioners be appointed to view and divide the same among the parties interested if susceptible of division and if not then that the same be sold and the proceeds divided accordingly. And you are further notified that you are required to appear in said Court on the first day of next May Term thereof, to be holden on the 21st day of May next and answer said petition or the same will be taken for confessed

Lewis M. Smallwood clerk

February 15th 1855. By John C Anderson. Deputy

And be it further remembered that after the filing of said petition & affidavit and on the 16th day of February 1855 a certain other writ was issued by the clerk of said Court endorsed on a counterpart of said petition & affidavit and directed to the Sheriff of Saline County in words & figures as follows to wit:

The writ to Saline County

The State of Missouri

To the Sheriff of the County of Saline Greeting. You are hereby commanded to summon Hugh Gilham, Eliza A. Gilham, Maria Gilham, Martha Shaw John Shaw, Nancy Gilham, Elizabeth Talbot, and Margaret Talbot if they be found in your County that they be and appear before the Lafayette Circuit Court at the court house in the City of Lexington in said County of Lafayette on the first day of our next May Term thereof to be holden on the 21st day of May next

then and there to answer unto the complaint of William A. Hockensmith and Susanna Hockensmith as set forth in the foregoing petition and have you then there this writ and that you certify how you execute the same. Witness Lewis W. Smallwood clerk of our said court with his official seal hereto affixed at office in Lexington this 16th day of February 1855

L W. Smallwood clerk

Upon which said counterpart & writ the Sheriff of Saline County endorsed his return in words and figures as follows to wit:

Sheriffs' Return

I. John Lynch Sheriff of Saline County do certify that I executed this petition and writ on all the within named Deft except Elizabeth Talbot and Margaret Talbot, one of them is dead and the other not in Saline County. Executed on all the rest by reading this writ to them and delivering a copy of this petition to them on the 9th day of April A.D. 1855.

John Lynch Shff S. C

By S. W. Lynch D. S.

And be it further remembered that after the filing of said petition & affidavit, and on the said 16th day of February 1855, a certain other writ was issued by the clerk of said court endorsed on a counterpart of said petition & affidavit, directed to the Sheriff of Jackson County, in words and figures as follows to wit:

Writ to Jackson County

The State of Missouri

To the Sheriff of Jackson County Greeting. You are hereby commanded

to Summon Julia A. Slusher, Virginia Thomas Charles F Thomas, Polly Starr, Ann Crabtree and James M Crabtree, Matilda Crabtree, and Job Crabtree if they be found in your county that they be and appear before the Lafayette Circuit Court at the court house in the city of Lexington in said County of Lafayette. Missouri on the first day of our next May Term thereof to be holden on the 21st day of May 1855 then and there to answer unto the complaint of William H. Hockensmith and Susanna Hockensmith as set forth in the foregoing petition and have you then there this writ. and that you certify how you execute the same. Witness Lewis W Smallwood clerk of our said court: with his official seal hereto affixed at office in the city of Lexington this 16th day of February A.D. 1855.

Lewis W. Smallwood. clerk

By John C Anderson. Deputy

Upon which said counterpart and writ the Sheriff of Jackson county endorsed his return in the words & figures following Viz:

Sheriffs Return

I certify that I executed the within writ by delivering a copy of the within petition & writ to the within named Charles F Thomas he being the first defendant served & by delivering a copy of the within writ to the within named Virginia Thomas each on the 30th day of April & by leaving a copy of the within writ for the within named Julia A Slusher at her usual place of abode with a white person of the family in which she resides

on the 2nd day of May 1855 in Jackson County

William Botts Sheriff

And I further certify that I executed the within writ by delivering a copy of the within writ to the within named Polly Starr, Ann Crabtree James M Crabtree Matilda Crabtree & Job Crabtree on ~~on~~ the 3rd day of May 1855 in Jackson County William Botts Sheriff

By George J Simmons D. S.

Be it further remembered that afterwards to wit at a term of the circuit Court of said County of Lafayette begun and held on Monday the 21st day of May in the year 1855 and on the 2nd day of said term said being the 22nd day of the month & year aforesaid the following proceedings were had & made by said Court in said cause to wit:

William H. Hockensmith Dal
vs
Henry Slusher Dal

Now at this day came the parties aforesaid by their attorneys and the defendants Henry Slusher, Thomas Slusher, Jackson Slusher & David Pfleger file herein their joint answer to said plaintiffs petition, which said answer is in the words & figures following to wit:

William H Hockensmith &
Susanna Hockensmith
Against
Henry Slusher, Thomas Slusher
Jackson Slusher & David
Pfleger, who are impleaded
with Maria Cooper & others

In the Circuit Court of Lafayette County in the State of Missouri

Petition for Partition &c

Answer

These defendants for answer to plaintiffs petition state, that it is true as stated in said petition that the said Christopher Slusher departed this life in the month of December A.D. 1853. testate, seized in fee simple of the real estate mentioned in said petition excepting as hereinafter stated and of the following additional real estate lying & being in said County of Lafayette and designated as follows The North west quart of Section 35 in Township 51 of Range 26 and the South east fractional of Section 26 in Township 51 of Range 26 containing 111 $\frac{52}{100}$ acres It is also true that defendants David Pfleger & Henry Slusher as executors of the last will and testament of the said Christopher have in their possession the title papers for all of the aforesaid lands and they are ready and willing to produce the same in this Honorable Court for inspection It is also true that the said Christopher Slusher attempted to devise ~~by his aforesaid will to his said sons~~ and equally true that he did in fact devise by his aforesaid will to his said sons Henry, Thomas and Jackson all of the aforesaid real estate excepting fifty acres thereof specified in the fifth item of said will and therein devised to defendant David Pfleger and excepting also the said South west fractional quarter of Section 26 in Township 51 of Range 26 and said part of said Lot 4 in Block 36 in said City of Lexington, but these defendants deny that the said Christopher Slusher ever owned the said Southwest fractional quarter of said Section 35

These defendants further answering admit that the said Christopher Slusher left surviving him as his and legal representatives, the several and respective persons named in plaintiffs petition but they aver that the said Martha Talbott is now dead and the said Elija A Gilham is now the wife of one — Bias who resides in Saline County in said State and they further aver that the said Christopher Slusher left surviving him and as his lawful widow Christiana Slusher who is still living.

These defendants further answering state that after the death of the said Christopher Slusher the said Christiana Slusher filed her petition in said Circuit court against the aforesaid heirs and legal representatives of the said Christopher Slusher praying that dower might be assigned to her out of all the aforesaid real estate of which her said husband died seized and such proceedings were thereupon had that afterwards at the November term of said Court 1854 dower was assigned to the said Christiana Slusher in all of the real estate of which the said Christopher Slusher died seized: and pursuant to said judgment the following tracts and parcels of said real estate (being one third of the whole quantity & quality relatively considered) were assigned & set apart to her as such dower to wit: The South west fractional quarter of Section 26 containing 111 $\frac{52}{100}$ acres. The east half of the North East quarter of

section 34 containing 80 acres - The East half of the North East quarter of Section 27 containing 80 acres. The East half of the South East quarter of Section 27 containing 80 acres - The portion of the East side of the West half of the North East quarter of Section 27 set forth in the report of the commissioners appointed to assign said dower containing 22 50/100 and the other portion of the East side of the West half of the South East quarter of Section 27 set forth in said report of said Commissioners containing 22 50/100 acres being in all, 396 52/100 acres of the aforesaid real Estate assigned & set apart to the said Christiana Slusher as her dower together with said portion of said Lot No 7 in Block No 36 as by the record of the proceeding & judgment for such dower now remaining in this honorable court unreversed and in full force more fully appears, and to which proceedings & record defendants pray that reference may be had and that the same may be regarded as a part of this answer -

These defendants further answering said that since said assignment of dower the said Henry Slusher has become the owner by purchase and by good & valid title from the said Christiana Slusher of her aforesaid dower Estate so assigned & set apart as aforesaid excepting said said portion of Lot No 7 in Block No 36 and is in the actual possession and occupancy thereof. Whereupon these defendants deny the

right of plaintiffs or any other of the heirs or legal representatives of the said Christopher Slusher to have partition of any of the aforesaid tracts or parcels of said real Estate so assigned & set apart as aforesaid.

These defendants further answering state that the said Christopher Slusher on the 16th day of May A.D. 1853. duly & legally made published and declared his last will & testament which said will was after the death of said testator to wit: on the 26th day of December A.D. 1853 duly & legally proven and admitted to Record in the Probate Court of the said County of Lafayette That in and by said will the following tracts & parcels of the aforesaid real estate were devised to said defendant Jacob or Slusher (by the name & description of Jacob J Slusher) in fee simple to wit: The west half of the South East quarter of said Section 27 and the west half of the North East quarter of the same Section: The South East quarter of the North East quarter of Section 34 and the North East quarter of the North West quarter of the same Section, also the tract or parcel of land set forth in plaintiff's petition as containing 141 17/100 acres. and also the other tract or parcel of land set forth in said petition as containing 179 acres.— And the said Christopher Slusher in and by said will. devised to said defendant Henry Slusher the following tracts or parcels of the aforesaid real estate to wit: The East half of the North East quarter of Section 27 and the East half of the South East

quarter of the same Section.— Also 140 acres off of the North side of the Northwest quarter of Section 35— also the tract or parcel of land set forth in said petition as containing 245 acres— excepting 30 acres thereof devised in and by said will to said defendant Maria Pfleger— also the tract or parcel of land set forth in said petition as containing 60 $\frac{85}{100}$ acres.— and also the tract or parcel of land set forth in said petition as containing 10 acres— And the said Christopher Slusher in and by said will devised to said defendant Thomas Slusher. the following tracts or parcels of the aforesaid real Estate to wit: The tract or parcel of land conveyed to the said Christopher Slusher by Wm M. Turpin by deed bearing date March 25th 1847 recorded in deed Book S pages 456 and 457. and also the tract or parcel of land conveyed to the said Christopher Slusher by Samuel Evans. by deed bearing date June 5th 1833 recorded in Deed book L page 132— And the said Christopher Slusher in and by said will. devised to said defendant Maria Pfleger the following tracts or parcels of the aforesaid real Estate to wit: being 20 acres off of the South side of the North West quarter of Section 35— and also 30 acres, out of the aforesaid 245 acre tract to be laid off as near as may be in a square form at the mouth of Table Creek on the west side thereof— All of which said several and respective legacies the said Jackson Slusher. Henry Slusher Thomas Slusher and Maria Pfleger claim in and by virtue of

the aforesaid devises contained in said will of the said Christopher Slusher and they therefore deny the right of Plaintiffs or of any other of the heirs or legal representatives of the said Christopher Slusher to partition of the land as devised as aforesaid or of any part thereof — a full and true copy of said last will and Testament as well as of the probate thereof is herewith filed as a part of this answer —

These defendants further answering state that it is not true that the said Christopher Slusher died intestate as to the said Children and grand Children mentioned in said petition or as to any or either of them as alleged by plaintiffs or otherwise,

And these defendants further state that is not true as stated in said petition that the said Christopher Slusher in making his said will failed or neglected to name or provide for said plaintiff Susanna Hockensmith and the said defendants, Maria Cooper, Nancy Pfleger, Margaret Talbot or any or either of them so as to entitle them or any or either of them to claim any interest in the real estate so devised as aforesaid or any part thereof

These defendants further answering state that the said Jackson Slusher took possession of the tracts or parcels of land so devised to him as aforesaid about one year before the date of said will at the instance of his said father who promised the said Jackson Slusher that he should have

said land by gift or devise and the said Jackson Slusher relying upon the aforesaid promise of his said father, and in the full expectation and belief thereby created that he would ultimately obtain title to said land made valuable & lasting improvements thereon by erecting a frame dwelling house and out buildings and enclosing said land the value of which said improvements is at least one thousand dollars and that the said Thomas Slusher took possession of the tracts or parcels of land so devised to him as aforesaid nearly six years before the date of said will at the instance of his said father who promised the said Thomas Slusher that he should have said land by gift or devise. and the said Thomas Slusher relying upon the aforesaid promise of his said father and in the full expectation and belief thereby created that he would ultimately obtain title to said land made valuable and lasting improvements thereon by erecting a frame dwelling house and out buildings and enclosing said land the value of which said improvements is at least fifteen hundred. hundred dollars)

(These defendants further answering state that the said Christopher Slusher left undisposed of by his said or other testamentary disposition or otherwise a large amount of personal estate consisting of slaves farming utensils & stock and money at interest amounting in the aggregate to at least the sum of thirty five thousand dollars which added to the reasonable value of the land

South West fractional quarter of Section 26 and the said portion of said Lot 7 makes more than forty thousand dollars worth of property left by the said Christopher Slusher to go by descent to his children and heirs at law, the said Christopher Slusher having died free from indebtedness)

These defendants further answering state that the said Christopher Slusher in and by his said will bequeathed to the said Plaintiff William H. Hockensmith (by the name and description of Harrison Hockensmith) the sum of one thousand dollars the said William H. Hockensmith being at the time of the execution of said will the husband of the said Susanna Hockensmith daughter of the said testator.

These defendants therefore admit that Plaintiffs are entitled to have partition of the said Southwest fractional quarter of said Section 26 and of the said undivided portion of said Lot 7 and that the interest of Plaintiffs therein is the one eleventh part thereof. But these defendants deny that Plaintiffs have any right to have partition made of the said fractional quarter of said Section 26 or of said Lot No 7 in Block No 36 or any part of either until after the natural death of the Christiana Slusher widow of the said Christopher Slusher, and they further deny that Plaintiffs have any right to the real estate so devised by the said Christopher Slusher as aforesaid or any part thereof. And having fully answered these defendants pray this Honorable Court to protect their several & respective

rights & interest as hereinbefore set forth

Trovell & Sawyer Attys
for Defendants

Henry Slusher & David Pfleger two of the above named defendants make oath and say that they believe the foregoing answer and the matters therein as stated are true

Henry Slusher
David Pfleger.

Sworn to & Subscribed before the Clerk of the Circuit Court of Lafayette County this 21st day of May 1855

L. W. Smallwood Clerk

Be it further remembered that afterwards to wit, on the 8th day of said term of said Court same being the 29th day of May 1855 the following further proceedings were had and made by said Court in said Cause to wit:

William H. Hockensmith & Susanna Hockensmith
vs.
Henry Slusher, Thomas Slusher, Jackson Slusher - Maria Cooper, Washington Cooper Nancy Pfleger David Pfleger, Wilborn Slusher. Julia A Slusher Virginia Thomas, Charles F Thomas Malala Going and her husband - Going whose Christian name is unknown, Washington Gilham Hugh Gilham. Eliza A. Gilham Maria Gilham Martha A Shaw, John Shaw Nancy Gilham Sarah Gresham, William Gresham. Elizabeth Talbot, Margaret Talbot Christopher Slusher Thomas Slusher. Charles Slusher Mary P

Slusher Martha Slusher John Starr
Christopher Starr, Joseph Starr, Polly Starr
Henderson Starr Ann Crabtree, James M.
Crabtree, Matilda Crabtree, Job Crabtree
& Jordan James.

Now at this day came the plaintiffs by their attorney and it appearing to the Court that the said William Slusher, Julia Ann Slusher Mahala, Virginia Thomas, Nancy Gilham, Polly Starr Sarah Gresham, Martha Slusher, Mary P Slusher & Charles Slusher are infants within the age of twenty one years, It is therefore ordered on motion of said plaintiffs that John J Reese be appointed Guardian ad litem for said infants who thereupon comes and files herein his answer for said infants and the said plaintiffs file motion to strike out a part of the answer of Henry Slusher Thomas Slusher, Jackson Slusher and David Pfleger filed in this cause, and it is further ordered by the court that an alias writ against the said Elizabeth Talbot be issued to the Sheriff of Saline County returnable to the next term of this court, and the said plaintiffs thereupon proves to the satisfaction of the court that the order of publication made in this cause against the non resident defendants namely Jordan James, John Starr, Joseph Starr Henderson Starr, Jeremiah Starr, Washington Gilham, Wilburn Slusher Mahala Going and her husband whose christian name is unknown has been duly published according to law. and they the said non residents although called come not but

make default nor have they or either of them answered said petition, Whereupon it is considered and ordered by the Court that said petition & the matters therein contained as against the said non residents be taken for confessed, and the said defendants Maria Cooper Washington Cooper, Nancy Pfleger Charles F Thomas, Hugh Gilham Eliza A. Gilham Maria Gilham, Martha A. Shaw. John Shaw Margaret Talbot, Christopher Slusher, Thomas Slusher Christopher Starr, Ann Crabtree, James M. Crabtree Matilda Crabtree & Job Crabtree although called came not but make default nor have they answered said petition, It is therefore considered and ordered by the Court that said petition and the matters therein contained as against the seventeen last named defendants be taken for confessed and the cause is ordered to be continued

Which said answer of said guardian ad litem is in the words and figures following to wit

Answer of Guardian Ad Litem

W. H. Hockensmith & wife Plaintiffs
Against } In the Circuit Court of Lafayette County.
Henry Slusher & others Defendants.

William Slusher, Julia Ann Slusher Mahala Going, Virginia Thomas, Nancy Gilham Polly Starr, Sarah Gresham, Martha Slusher Mary P. Slusher & Charles Slusher infants who come by John Reese their guardian ad litem and for answer to Plaintiffs petition say that they have no sufficient knowledge of the matters

and things stated in said petition and each and every allegation therein contained and set out to form a belief.

John I Reese Guardian
ad litem for infant Defts

John I Reese Guardian ad litem makes oath and says he believes the annexed and foregoing answer and the matters and things therein as stated are true. John I. Reese

Motion to strike out part of answer

Which said motion to strike out part of the joint answer of Defendants is in words and figures following to wit:

W. H. Hockensmith & wife Plffs
Against } In the Circuit Court of Lafayette County
Slusher & others Defts

Plaintiffs move the court to strike from the joint answer of Henry Slusher, Thomas Slusher, Jackson Slusher & Davia Pfleger as is included in brackets thus ( ) for the following reasons (viz):

1. Because the same is irrelevant, impertinent and not responsive to the allegations in the petition -

2. Because the same cannot be legally set up as a defense to this action

3 Because the same is otherwise informal irregular defective illegal and defective

Sharp, Smart & Shelby
For Plff

Be it further remembered that afterwards to wit: at a further term of said court begun and held

on Monday the 19th day of November in the year 1855 and on the 7th day of said Term same being the 26th day of November 1855 the following further proceedings were had and made by said Court in said cause to wit:

William H. Hockensmith &
Susanna Hockensmith
vs.
Henry Slusher & others

Now at this day come the said Plaintiffs by their attorney and on their motion leave is given the said Plaintiffs to file amended petition making one John Bias a party defendant which amended petition is accordingly filed and it is thereupon ordered that a writ of summons be issued against the said John Bias returnable to the next term of this court and that an alias writ be also issued against the said defendants Margaret Talbot and Elizabeth Talbot to the Sheriff of Saline County and that this cause be continued which said amended petition is in words and figures as follows to wit:

Amended Petition

William H. Hockensmith & others. Plaintiffs
Against { In the Circuit of Lafayette County -
Henry Slusher & others. Defendants

Plaintiffs ask to make this their amended or Supplemental petition and adopt and restate as a part of this their petition the original petition filed in this cause

Plaintiffs state that Elza Gilham one of defendants has intermarried with one John Bias who plaintiffs ask the Court be made defendant and be required to answer this, and the said original petition and ask that the prayer of the said original petition be granted by the Court and as in duty bound &c

F. C. Sharp & Sheley
for Plaintiffs

William H. Hockensmith makes oath and says that he believes the matters and things contained in the annexed and foregoing amended or supplemental petition therein as stated are true.

William H. Hockensmith

Sworn to and subscribed before the Clerk of the Lafayette Circuit Court this November 26th 1855. Lewis W. Smallwood clk
By C. B. Daniel, Deputy

Be it further remembered that after the filing of said amended petition, a writ was issued by the Clerk of the Circuit Court of said County of Lafayette endorsed upon a counterpart of said amended & original petitions and directed to the Sheriff of the County of Saline. in words and figures as follows to wit:

Writ to Saline

The State of Missouri

To the Sheriff of the County of Saline Greeting. You are hereby commanded as you were before commanded to summon Margaret Talbot & Elizabeth Talbot and you are also

commanded to summon John Bias if they be found in your County that they be and appear before the Lafayette Circuit Court at the Courthouse in the City of Lexington in said County of Lafayette on the first day of our next May Term thereof to be holden on the 19th day of May next then and there to answer the Complaint of William A. Hockensmith and Susanna Hockensmith as set forth in the foregoing petition and have you then & there this writ: and that you certify how you execute the same.

Witness Lewis W Smallwood clerk of our said Court with his official seal hereto affixed at office in the City of Lexington this 25th day of January A.D. 1856

Lewis W Smallwood Clk
By C. B. Daniel Deputy—

Upon which said writ & petition the Sheriff of Saline endorsed his return in words and figures as follows to wit:

Sheriffs Return

I John Lynch Sheriff of Saline County return this petition and writ not executed none of the Deft found in Saline County

John Lynch Shff S. C

Be it further remembered that afterwards to wit: at a further term of said Court begun and held on Monday the 19th day of May in the year 1856 and on the 15th day of said term same being the 6th day of June 1856. the following further proceedings were had and made by said Court in said cause to wit:

William H. Hockensmith &
Susanna Hockensmith
vs.
Henry Slusher. Thomas Slusher Jackson
Slusher. Maria Cooper, Washington
Cooper, Nancy Pfleger, David Pfleger
Wilborn Slusher, Julia A. Slusher Virginia
Thomas, Charles F. Thomas, Mahala Going
and her husband — Going whose christian
name is unknown. Washington Gilham
Hugh Gilham. Eliza A Gilham, Maria
Gilham, Martha A Shaw, John Shaw
Nancy Gilham. Sarah Gresham. William
Gresham. Elizabeth Talbot, Margaret Talbot
Christopher Slusher. Thomas Slusher
Charles Slusher, Mary P. Slusher, Martha
Slusher. John Starr. Christopher Starr
Joseph Starr, Polly Starr Hennison Starr
Ann Crabtree, James M. Crabtree, Matilda
Crabtree, Job Crabtree, Jordan James &
John Bias.

Now at this day come the said
plaintiffs by their attorney and on motion of
said Plaintiffs it is ordered that Alias writ
be issued in this cause returnable to the next
term of this court and that this cause stand
continued until that time.

Be it further remembered that afterwards
to wit: at a further term of said court began and
held on Monday the 19th day of November in the
year 1856 and on the 7th day of said term same

being the 24th day of November 1856 the following further proceedings were had and made by said Court in said Suit before the Honorable Russell Dicks Judge of said Court to wit:

William H. Hockensmith & al
vs
Henry Slusher & al

Now at this day come the said Plaintiffs by their attorney and file herein their amended petition making Benjamin Camp Mahala Camp & Mary J Byers parties defendant in this cause and thereupon the said Benjamin Camp & Mahala Camp by their attorney in fact Charles F. Thomas also come and enter their appearance in this suit

Which said amended petition is in words & figures as follows to wit:

Amended Petition

William H. Hockensmith &
Susanna Hockensmith Plaintiffs
against
Henry Slusher, Thomas Slusher &
others heirs of Christopher Slusher
deceased Defendants

In the Circuit Court of Lafayette County

Plaintiffs State by way of supplemental petition State that in their Original petition in this action it is by mistake averred that one Mahala Going was a child and heir of Allen Slusher deceased that the name of her husband was unknown to them. Plaintiffs have since

learned and now avers the fact to be that said Mahala child of said Allen Slusher intermarried with one Benjamin Camp and is now his wife and they reside in the territory of Oregon

Plaintiffs further state that Eliza A Gilham a child of said Mary Gilham & grandchild of said Christopher Slusher dec^d has since the suit was commenced intermarried with one William J Byers by whom she has one child named Mary J Byers a minor under twenty one years of age and that said Eliza A Byers has since died leaving her said child her only heir at law. — and in addition to the children and heirs of said Mary Gilham dec^d daughter of said Christopher Slusher deceased mentioned in said petition Plaintiffs state that after the death of said — Gilham with whom said Mary intermarried as afore-said Mary Gilham intermarried with one John Talbot by whom she has one child named Mary E. Talbot a minor under twenty one years of age which child is also an heir of said Mary E mentioned in said Petition. That said Mahala Camp and said Mary J Byers said Mary E Talbot and said — are each and all entitled to a share and interested in the estate of said Christopher Slusher as afresaid each and all of whom plaintiffs pray to make defendants to this suit and that they may by proper process be made to appear & answer the same and plaintiffs ask judgment as in their original petition they have done. M. H. Hockensmith

Affiant William H. Hockensmith makes oath & says that the foregoing supplemental petition and the matters therein as stated he believes to be true. W. H. Hockensmith

Sworn to & subscribed before the Clerk of the Lafayette Circuit court this November 24th 1856 S W Smallwood Clk
By C. B. Daniel Deputy

Be it further remembered that afterwards to wit: on the 8th day of said last mentioned term of said Court same being the 25th day of November 1856 the following further proceedings were had and made by said court in said cause to wit:

William H. Hockensmith & others
vs
Henry Slusher & others

Venue changed

Now at this day come the said plaintiffs by their attorney and the judge of this Court having been of counsel for one of the parties in this cause. It is therefore ordered by the Court that the venue of this cause be changed to the circuit court of Clay County in the fifth judicial circuit in the State of Missouri—

Bill of Costs in the Lafayette Circuit Court –

	To S W Smallwood Clerk		
May 9 1855	Filing Petition & issuing writ to Lafayette	1,20	
	Making 5 Copies of Pet & certifying – 3,95 each	19,75	
	Issuing writ to Jackson County	1 00	
	Issuing writ to Saline County	1 00	
	Order of publication 50. Copy of Same 40	90	
	Appearance 20. filing ans 20, issue 25	65	
Nov 9 1855	appearances 20. Motion & order appointing Guard 50. appearance Guard 10	80	
	filing ans 20. Motion to Strike out ans & filing 30. Motion & order for alias writ 50	1 00	
	Order approving publication 25. filing notice & Judgt by default 50	80	
	Motion & Court 50	50	
May 9 1856	2 Copies Amended Pet & certs 70 ea	1 40	
	1 Copy original Pet & cert 3,95	3,95	
	Issuing alias writ to Saline County 100	1 00	
	Appearances 20. Docketing 5. order for alias writ 25. Court 25	,75	
Nov 9 1856	" 20 Motion & order allowing Supplemental Pet 40 filing Same 5	65	
	Docketing Cause 5. Entering appearance of New Defts 20	25	
	appearance 20 order to change Venue 25.	45	
	Making transcript 9500 words & figures & cert	10 00	48,70
	To Marquis W. Wilkes Sheriff Lafayette		
May 9 1855	Serving 14 writs @ 14. Mileage on writ 50	14 50	
	Calling action & parties	30	
Nov 9.	Summoning 3 Wit	1 50	16 30
	To William Botts Sheriff Jackson		
	Serving writ on 8 Defts		8 00
	To John Lynch Sheriff Saline		
	Serving Writ on 6 Defendants		6 00
	To Smallwood & Julian Printers (Pd by Plffs)		27 00
	To Joseph Green Witness 1 day & 20 Miles		1 50

State of Missouri }
Lafayette County } I Lewis W. Smallwood Clerk of the Circuit Court of said County certify that the foregoing is a full true and complete Transcript of the record and all the proceedings had and made by said Court in the foregoing entitled cause as fully as the same appears of record and on file in my office.

In witness whereof I hereto set my hand and the Seal of said court at office in Lexington this January 23rd 1857

Lewis W. Smallwood Clerk
B C B Daniel Deputy

And afterward to wit at a Circuit Court commenced and held at the City of Liberty in the County of Clay in the State of Missouri on the day of April AD 1857 Present Hon. George W Dunn Judge A J Calhoun Clerk and Samuel Hadley Sheriff of said County of Clay

Among the record and proceeding of said Court had on the 2d day of May AD 1857 it being a continuation of said April Term of said Court for said year AD 1857 The following proceedings were had viz:

William H Hockersmith

vs

Henry Slusher & others

Now at this day comes the Plaintiffs by his Attorneys And the Motion heretofore filed in this cause to strike out part of Defendants Answer being taken up. And the Court being sufficiently of and concerning the same overrules said Motion And both parties being here in Court by their Attornies And announces themselves ready for Trial and neither party requiring a Jury the matters at issue between the parties are submmitted to the Court upon the Petition Answer Exhibits and Proofs. And the Court after hearing the same and And being sufficiently advised of and concerning the same The Court finds as follows viz

William H Hockersmith and Susannah Hockersmith his wife

vs

Henry Slusher and Others

The Court finds the facts to be that Christopher Slusher by his last will and Testament read in Evidence dated the 16th day of May AD 1853 and admitted to probate on the 26th day of December AD 1853 made a bequest to Harrison Hockersmith of One thousand dollars in the following words: I give and bequeath to Harrison Hockersmith the sum of one thousand dollars = That the Plaintiff William H Hockersmith is the Harrison Hockersmith mentioned in the said last will and testament that the Plaintiff Susannah Hockersmith is and was at the date of the said last will and testament the wife of the said William H Hockersmith and known to be such by the said Christopher Slusher. and Daughter of said Christopher Slusher Deceased That the said William H Hockersmith on the 13th day of May AD 1856 received from the Executors of the last will and testament of the said Christopher Slusher the bequest of One thousand dollars and gave them receipt for the same. read in Evidence. And the Court draws the Conclusion of law upon the facts aforesaid that the said Christopher Slusher deceased dies not die intestate as to his said Daughter Susannah Hockersmith and cannot be so deemed the Court therefore finds for the Defendants. and that the said Plaintiffs have not nor has either of them any right title or interest in land in controversy

George W Dunn Judge

It is therefore considered by the Court that the said Defendants recover against the said Plaintiffs their Costs and charges by them laid out and expended and that they have thereof Execution

And the Plaintiffs then tendered to the court their Bill of Exceptions and prayed that the same be allowed signed sealed and made a part of the record in this Cause which is done accordingly

""

The Bill of Exceptions is in the words and figures following to wit

""

William H Hockensmith & Susannah Hockensmith Plaintiffs

against } In the Circuit Court Clay County

Henry Slusher & others

Be it remembered that on the trial of this cause the following proceedings were had to wit The Cause was submitted to the Court and then Plaintiff read the petition and amended Petition to the Court The Defendants Henry Jackman Thomas Slusher and David Pflieger and their Joint Answer It was then admitted by the Plaintiffs and Defendants that the lands were and are correctly described in the petition and answer taken together And that the lands assigned for Dower are correctly set out and described in the said answer it was also admitted that the only issue was and is whether Christopher Slusher deceased died intestate as to Plaintiff Susannah Hockensmith That if he died intestate as to her then she was entitled to the one Eleventh part of said lands. Plaintiffs then read the

Certified Copy of the last will and testament of said deceased to the Court and Closed his Case

" Which said Certified Copy of said last will and testament of Christopher Slusher Deceased is in the words and figures following To wit

"

Know all men by these presents that I Christopher of the County of Lafayette in the State of Missouri being in good health and of sound mind do make publish and declare this to be my last will and testament:

First, My will is that all my Just debts be paid

Second " I give and bequeath to my son Andrew J Slusher his heirs and assigns forever the following lands situate in the County of Lafayette aforesaid To wit The West half of the North East quarter and the West half of the South East quarter of Section 27 in Township 51 of Range 26 containing 160 acres Also the South East quarter of the N E 1/4 and the North East quarter of the North quarter of Section 34 in Township and Range aforesaid containing 80 acres. Also a certain other tracts of land containing 141 17/100 acres being the same conveyed to me by Joseph Dixon by Deed bearing date August 6th 1833 and now of record in said County in Book D at page 137 = And also one other tract of land of 179 acres being the same conveyed to me by James Campbell by Deed bearing Date the 24th day of Nov 1846 and now of Record in the recorders Office of said County in Book L at page 252 =

Third: I give devise and bequeath to my son Henry Slusher his heirs and assigns forever the following lands situate in said County of

Lafayette namely the East half of the North East quarter and the East half of the South East quarter of Section 27 in Township 51 Range 26 containing 160 acres Also 140 acres off the North Side of the North West quarter of Section 35 in Township 51 of Range 26 Also one other tract of ~~land~~ Two hundred and fifteen Acres being all that part of a tract of 245 acres conveyed to me by Stephen Donohoe except 30 Acres thereof hereafter devised to David Pfleger also one other tract of 60 80/100 acres Conveyed to me by Joseph Dixon by Deed bearing date August 6th 1833 and now of Record in the Recorders office of said County in Book D at page 135. Also one other tract of ten Acres being the same Conveyed to me by David Pfleger by Deed dated April 8th 1842 and now of Record in the recorders office of said County in Book H at page 356 & 357

Fourth I give and devise to my Son Thomas Flusher his heirs and assigns forever The following lands Situate in said County of Lafayette To wit. A certain tract of 187 acres being the same Conveyed to me by William M Turpin by deed bearing date March 25th 1847 and now of Record in said Recorders Office in Book L at page 456 & 457 and also one other tract of 111 52/100 acres being the same Conveyed to me by Samuel Evans by deed bearing date June 5th 1833 and now of record in said Office in Book D page 132

Fifth I give Devise and bequeath to David Pfleger his heirs and assigns forever The following lands Situate in said County of Lafayette. To wit Twenty Acres off the South Side of the North West quarter of Section 35 in Township 51 of Range 26 Also

30 acres out of a tract of 245 acres conveyed to me by Stephen Donohoe as above mentioned which said 30 acres is to be laid off as near as may be done in a Square from at the Mouth of Tabbo creek on the west so as to make Tabbo the East boundary and the Missouri River the Northern boundary of said 30 acres

Sixth I give devise & bequeath to Harrison Hockensmith the sum of One thousand Dollars

Seventh. I give and bequeath to the Children of Lewis Starr the sum of One thousand Dollars

Eighth I. give and bequeath to my son in law Washington Cooper the sum of One thousand Dollars

Ninth. I give and bequeath to the four Children of my son Allen Slusher the sum of Eight hundred dollars to be equally divided between them

10th Tenth. I give to the seven Children of Isaac Gilliam the sum of One thousand dollars to be equally divided between them

11th I give and bequeath to Jordan James the sum of five hundred dollars

12th I give and bequeath to the Children of Rolana Slusher the sum of One thousand dollars to be equally divided between them and no more

13th To my wife Christine Slusher I give and bequeath the sum of Twelve hundred dollars also a good Horse saddle and bridle one Bed all my Cooking utensils one good Cow and six Chairs and one Table

Lastly. I hereby appoint my son Henry Slusher and my son in Law David Pflegar Executors of this my last will and testament In Witness whereof I hereto set my hand and seal this 16 day of May 1853

Christopher his X mark Slusher

I the undersigned Lewis W Smallwood hereto subscribed my name as a witness to this will and state that the name of said Christopher Slusher was subscribed to the foregoing will by me at the request of the said C Slusher

L W Smallwood

Mr Slusher acknowledges to me that this is his last will and testament May the 16th 1853

R B Bradford

Robt A Barnett

I subscribed this Instrument as Witness at the request of Christopher Slusher. he assenting it to be his last will and Testament August the 1st 1853

Wm H Russell

State of Missouri }
Lafayette County } Be it remembered that on this 26th day of December AD1853. Before me the undersigned Judge of the Probate Court within and for the County of Lafayette aforesaid was produced the foregoing Instrument of writing purporting to be the last will and Testament of Christopher Slusher deceased And thereup comes Lewis W Smallwood Robert B Bradford Robert A Barnett and William H Russell the subscribing Witnesses thereto and they being severaley sworn to testify in relation to the Execution of said Instrument of writing. proved that Christopher Slusher the Testator signed or caused said

Instrument to be signed as his last will and testa ment in the presence of said Smallwood who signed said Testators name at his request and that the said Slusher Acknowledged the said Instrument the presence of the said Bradford Barnett & Russell to be his last will and Testament and that he was of sound mind at the times of Executing and Acknowledgeing the same and they as witnesses Subscribed said Instrument in the presence of and at the request of the said Christopher Slusher the Testator In Testimony whereof I have hereunto set my hand and the seal of said Court at office in Lexington this 26th day of December AD 1853

(L S)

Edward Stratton Judge

" "

The foregoing will and Testament and Probate thereof was recorded on the 26th day of December AD 1853

Edward Stratton Judge

" "

State of Missouri } ss
Lafayette County }

I Edward Stratton Judge of the Probate Court within and for the County aforesaid do Certify that the foregoing is a full true and perfect Copy of the record of the last will and Testament of Christopher Slusher deceased and also of the Probate thereof as fully as the same remains of Record in my Office

In Testimony whereof I have hereto signed my name and affixed hereto the seal of said Court at office in Lexington this 14th day of January AD 1854

(L S)

Edward Stratton Judge

" "

Defendants then introduced James R Shely as witness who testified that he was acquainted with William H

Hockersmith. was asked by Defendants if said Hocker smith was known by the name of Harrison Hockersmith

Plaintiff objected to witness telling any thing about the name of Hockersmith. because the same was irrel evant incompetent not pertinent to the issue and illegal. The Objection was by the Court overruled. to which Opinion of the Court in overruling said Objections and permitting the witness to testify Plaintiff objected and Excepted. Said Witness then said that he knew said William H Hockersmith since 1853 Generally heard him called Harry Hockersmith witness has a few times heard him called Harrison: Defendants first identified the signature of W H Hockersmith to a receipt dated May the 13th. 1856

Which is in the words and figures following Swit

" I William H Hockersmith do hereby Acknowledge that I have this day received of the Executors of the late Chris to pher Slusher deceased the sum of one thousand dollars in full of a Specific Legacy willed to me in right of my wife Susanna Hockersmith as one of the children and legatees of said Deceased

May 13th 1856.

W H Hockersmith

as Evidence which was Objected to by Plaintiffs because the same was illegal not pertinent to the issue irrevelant - The Objection was by the Court overruled & the receipt permitted to be read to the Opinion of the Court in overruling said Objections & permitting said receipt to be given as testimony Plaintiffs Objected & Excepted

Defendants then introduced one Barnet as a witness who stated that he knew Christopher Slusher in his life time lived in same Neighborhood knew his lands Plaintiffs Objected to the witness stating any thing about the lands or intention of Christopher Slusher deceased relative to his lands. Objection was by the Court overruled. to which Opinion of the Court in overruling said Objection and permitting witness to testify the Plaintiffs Objected and excepted; Witness stated that he heard the Old man Slusher say that he intended to place Jackson on one place & Thomas on another & Henry on another he changed them some way. Jackson and Thomas Slusher were on the places where they now live at the time of the Old mans death A part of the lands owned by the Old man Henry has moved to home place. since the death of the Old man. Jackson made no improvements except fixing up the Cabins that were on the land; Thomas had possession of land where he lives at the time of Old mans death and had been for some years before. He had at the time of the death of the Old man a New house commenced two stories in front with a One Story Ell and no other improvement made by him

One Green was introduced as a witness by Defendants by whom they offered to prove the intentions of Christopher Slusher deceased in relation to his lands and sons and also their residence of the sons which was Objected by the Plaintiffs which objection was by the Court overruled and the witness permitted to detail the testimony to which Opinion of

of the Court in permitting said Testimony to be given the Plaintiffs Objected & Excepted: Witness then stated that he knew Christopher Slusher in his life time says that he intended the land for Jackson Thomas and Henry That Thomas has had possession of the land. where he now lives for some 9 or 10 years. Old man said he allowed for Thomas Slusher to have the lands where he lived. was frequently at Slushers for last 20 years Knew Susanna Hockensmith before her marriage have seen her at her fathers also have seen Wm H Hockensmith at Slushers not long before his death he was the son in law of Christopher Slusher deceased. This testimony was objected to by Plaintiffs Court overruled Objection and permitted the same to be given which was Objected to and Excepted by Plaintiffs Stated that Mrs Gilliam was deceased Roland Slusher was dead so was Allen Slusher dont know Jordan James these persons died before Old man: Defendants introduced one Johnson as a witness who stated that Christopher Slusher lived in Lafayette County witness lived six or 7 miles from him Often at Slushers house six or 7 years before his death have talked with him in relation to his Children & intentions dont know Susannah Hockensmith witness knows where Thomas and Jackson Slusher resides Old man said he intended the places where they lived for ~~them~~ Thomas and Jackson. Thomas had commenced a frame house at the death of Old man 2 Story in front with one Story Ell he had said he intended to give Jackson

home place but afterwards changed ~~his~~ ~~[illegible]~~ when Jackson Married he moved to where he now lives Jackson had fixed up old buildings Jackson lived on part of home place: Plaintiffs Objected to the introduction of this testimony before and as the same was given the Objection was overruled by the Court and the witness permitted to detail the same to which Opinion of the Court in overruling said Objection and permitting said Testimony to be given Plaintiffs Objected and excepted = This was all the testimony given by either or both the parties. The Court then made the following finding in writing To wit "

William H Hockersmith & Susannah Hockersmith his wife

vs

Henry Slusher & others

The Court finds the facts to be that Christopher Slusher by his last will and testament read in evidence dated the 16th day of May AD 1853 and admitted to probate on the 26th day of December AD 1853 made a bequest to Harrison Hockersmith of One thousand dollars in the following words. I give devise and bequeath to Harrison Hockersmith the sum of One thousand dollars = That the Plaintiff William H Hockersmith is the Harrison Hockersmith mentioned in the said last will and testament. That the Plaintiff Susannah Hockersmith is and was at the date of the said last will and testament the wife of the said William H Hockersmith and known to be such by the said Christopher Slusher and daughter of said Christopher Slusher deceased that the said

William H Hockensmith on the 13th day of May AD 1856 received from the Executors of the last will and testament of the said Christopher Slusher the said bequest of one thousand dollars and gave them receipt for the same read in Evidence. And the Court draws the conclusion of law upon the facts aforesaid that the said Christopher Slusher deceased did not die Intestate as to his said Daughter Susannah Hocker smith and cannot be so deemed The Court therefore finds for the Defendants And that the said Plain tiffs have not nor has either of them any right title or interest in land in Controversy

George W Dunn Judge

To which said finding the Plaintiffs objected and excepted And now tenders this his Bill of Exceptions and prays that the same may be allowed signed sealed and made a part of the record which is done Accordingly

George W Dunn Judge (Seal)

State of Missouri } Scilicet
County of Clay

I Alexander J Calhoun clerk of the circuit court within and for the County of Clay in the State of Missouri hereby certify that the foregoing Record contains a true copy of the bill of Exceptions and perfect transcript of the record and all proceedings in the cause as above entitled as fully and completely as the same appears in my office

In Witness Whereof I have hereunto Subscribed my as clerk as afore said and affixed the Seal of said Circuit Court at office in the City of Liberty this fourth day of June AD 1857

Alexander J. Calhoun clerk

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Bill of Costs in the Clay Circuit Court.

To A A J Calhoun clerk

Feby 9th 1857	To filing Transcript from Lafayette	.05	
	" Filing Exhibits 2	10	
	Docketing this cause	.10	
	Issuing 2 Spa for Dft 50	1 00	
April 1857	appearance	.30	
	Administering 5 oaths	.25	
	Order overruling motion	50	
	Trial this cause	.50	
	Entering veraict	25	
	Judgement for costs	.50	
	Making Transcript 153:50 @ 15	23 02	
	Certificate & Seal	.50	
	Postage to Supreme court	60	$27:67
To.	Sheriff Lafayette County		
	Summoning 9 Witnesses 50		4.50
"	Saml Haaley Sheriff Clay calling party & action		.30

~~A True Copy Taken from my fee book~~

~~A. J. Calhoun clerk~~

April Term 1857 Witnesses

William Johnson	4 days attendance	4.00	80 miles travel	4.00	8.00
Joseph Green	4 " "	400	100 " "	500	9.00
Robert A Barnett	4 " "	400	94 " "	4.70	8 70

Whole amount. $58:17.

a true copy. attest

A J Calhoun

~~23~~ ~~24~~

29.

& Susannah 1st.

William H. Hockersmith ~~[illegible]~~

vs } Transcript

Henry Slusher Etal

---

filed June 11 1857

Wm E Drumcomb

Clerk

Clay

5th.

William H Hochensmith & Susannah Hochensmith Plaintiffs in Error
Against Error to Clay Circuit Court—
Henry Slusher & others Respondents—

Plaintiffs come by their attorney and assign that the Circuit Court committed error in the above entitled cause in this to wit—

1st The Court erred in permitting testimony to be given showing that W H Hochensmith was known by the name of Harry & Harrison

2. The Court erred in permitting the receipt assigned by W H Hochensmith to be given in evidence—

3. The Court erred in permitting any evidence tending to show the intentions of said Christopher Slusher as to the disposition of his lands & property—

4 The Court erred in permitting ~~any~~ the evidence ~~to be given tending to show~~ of Witness that Plaintiff W H Hochensmith was and is the son in law of said Christopher Slusher Deceased—

5th The Court erred in permitting parol evidence to be given to add to, vary explain or change the will of said Christopher Slusher—

The action of the Court was otherwise informal illegal & irregular

S Mart & Shelby
for Hochensmith Ms

Hochenmiller
& wife

vs

Henry Shuckersatter

Assignment of
errors

filed July 9th 1857
Wm E Dunscomb
Clerk

William H. Hockingsmith et al.
a. } Error to Clay Circuit Court.
Henry Slusher et al

Come the defendants, by J. R. Troxell their attorney, and says that there is no error in the record of the judgment and proceedings aforesaid.

J. R. Troxell, for Defts.

Wm. H. Hockinsmith et al.

m. Joinder in Error

Henry Slasher et al.

filed Aug 13 1857

Wm E Dunscomb

Clerk

William H Hochensmith &
Susannah Hochensmith Plaintiffs in error
Against } Error to Clay Circuit Court.
Henry Slusher & others Defendants in error

Plaintiffs Brief

Shelby for Plaintiff

This was a petition for partition of land, originally brought in the Lafayette Circuit Court the present judge of that Court having been of counsel for plaintiff the cause was by change of venue removed to the Clay Circuit Court The petition sets out that One Christopher Slusher departed this life, seized and possessed of a large amount of lands situated in Lafayette County and as described in said petition by numbers meets & bounds - The petition also states that said Christopher Slusher had eleven children some of whom were living at the time of his death others were dead but left children their descendants living -

The petition states that plaintiff Susannah Hochensmith is one of the children of said Christopher Slusher Deceased

It is also stated that said Christopher Slusher made and published his last will and testament and which has been regularly probated - by which he made various devises among the

vest he devised to his three sons, Henry Slusher Jackson Slusher & Thomas Slusher nearly all his lands having a small portion undisposed of.

The petition states that the name of said Susannah Hochensmith is not mentioned in said Will, and that as to her, the said Christopher Slusher died intestate, and claims that she is entitled as one of the Children of said Christopher to the One eleventh part of said lands - and accordingly asks partition of the same -

Defendants, or those who answered, admit the death of said Christopher Slusher, and avow at the time of his death the lands described in the petition with the exception of one or two pieces described in the Answer, and admit that the said Christopher left the Children and grand Children as stated in the petition.

The answer states that a portion of the lands including those not described or devised in the Will has been set apart and assigned to the widow of said Christopher Slusher deceased as dower.

The answer denies that said Christopher died intestate as to said Susannah Hochensmith, and states that by the following clause in said Will she is provided for to wit "I give devise and bequeath to Harrison

Hochensmith the sum of One thousand dollars" that said Hanison Hochensmith is and was the husband of said Susannah Hochensmith and denies that she is entitled to partition of the said lands

It was admitted upon the trial that the lands described in the petition as corrected in the answer belonged to said Christopher Slusher deceased at the time of his death, It was also admitted that the lands described in the answer as dower lands have been set apart and assigned as dower to the widow of said Christopher Slusher. It was also admitted that plaintiff Susannah Hochen=smith was one of the children of said Chris=topher Slusher Deceased, and that if he died intestate as to her she is entitled to the one eleventh part of said lands not included in the lands assigned ~~to~~ dower. The petitioners then read in evidence a certified copy of the last will and testament of Chris=topher Slusher Deceased and close their case,

Defendants then introduced as a witness James H Shelby and offered to prove by him that plaintiff William H Hochensmith was known by the name of Hanison Hochensmith this testimony was objected to by the plaintiff

the Court overruled the objection and permitted the testimony to be given - Witness stated that he had known plaintiff William H Hochensmith since the year 1852 generally heard him called Harry Hochensmith, occasionally Harrison, Witness proved the signature of plaintiff to a receipt, which was then offered in evidence, plaintiffs objecting to the reading of the same, the Court overruled the objection and permitted the receipt to be read as evidence and which is in the words & figures following to wit "I William H Hochensmith do hereby acknowledge that I have this day received of the executors of the late Christopher Slusher deceased the sum of One thousand dollars in full of a specific legacy willed to me in right of my Wife Susannah Hochensmith as one of the children & legatees of said deceased May 13th 1856 W H Hochensmith"

Defendants then offered testimony tending to show that for some time before his death the said Christopher Slusher had intended to give the lands to his sons Henry, Thomas & Jackson & some of them was in possession of the same, the plaintiff objected to the introduction of such testimony, the Court overruled the objection and permitted the testimony to be given in evidence

Defendants offered to prove by a witness that he knew plaintiff Susannah Hochensmith before her marriage and since, that plaintiff W H Hochensmith is her husband & sonin law of said Christopher and that he has seen him at said Christophers and once but a short time before his death, this was objected to by plaintiff, objection over=ruled by the Court and the testimony per=mitted to be given in evidence, It was also proven that the other children of said Christopher Slusher had frequently been seen at the house of said Christopher — The Court made a finding in writing and in substance found, that the said Christopher devised to Harrison Hochensmith, that Harris=on Hochensmith is the plaintiff W H Hochen=smith that he is the husband of plaintiff Susannah Hochensmith and the sonin law of said Christopher Slusher deceased, and declared the law to be that a provision had been made by said Christopher for said Susannah, that as to her he died testate and that she is not entitled to partition of said lands —

The plaintiff sued out a writ of error and brings the case to this Court and now relies upon the following points and authorities to reverse the judgment of the

the Circuit Court -

1 The said Christopher Slusher having failed to name or make provision for Plaintiff Susannah Hochensmith in his last will, died intestate as to her. The devise to Harrison Hochensmith is no provision for Susannah Hochensmith Revised Code 1845 page 1080 § 11 Gage vs Gage 9 Foster's Rep 542 Duchen vs Boston 15 Pickering 166 -

2 The Circuit Court erred in permitting parol testimony to be given, tending to show that Harrison Hochensmith is the same as plaintiff William H Hochensmith, the surviving of said Christopher Slusher and the husband of said Susannah

3 Parol testimony cannot be received to contradict, vary, explain or enlarge the terms of the will - In the construction of a will the intention of the testator must be gathered from the will itself and not from testimony dehors the will - Stephens

vs Walker 8 Ben Monroe 601 - Mann vs Mann's Ex^rs 1 J. C. Rep 233 - same case 14 J Rep 9 - ~~Manu~~ = ~~script Opinion in the Case of~~ Bradley & others vs Bradley & others, 24 Mo Rep 311 Goode vs Goode 22 Mo Rep 522 9 Maryland Rep 346 -

4th The receipt of Wm H Hockensmith was incompetent evidence, because the admissions of the husband, are not permitted to affect the title of the wife to Real Estate.

Hochenswith & Wife
plaintiffs in error

Against

Henry Slusher & others
respondents

Plaintiffs Brief

Shelby for plaintiffs

filed Jany 14. 1858
Wm E. Dunscomb
Clerk

In the Supreme Court.
January Term 1858

William H Hockensmith &
Susannah Hockensmith his wife
v. } Error from Clay Cir. Court.
Henry Slusher Thomas Slusher & als.

The plaintiffs filed their petition in the Lafayette Circuit Court, against the defendants, praying for partition of certain lands, and a town lot, formerly the property of Christopher Slusher deceased, who was the father of said Susannah Hockensmith. The petition alleges that said Christopher Slusher made his last will and testament, but left the plaintiff Susannah Hockensmith unprovided for in said will, wholly and entirely failing omitting and neglecting to name her or make any provision for her. There are a great number of defendants, children and grand children ~~[illegible]~~ of said Christopher Slusher; the petition avers that he died intestate as

as to several of them; but I do not consider it material to mention their names, as the issue tried by consent of the parties was narrowed down to the point of his dying intestate as to his daughter Susannah Hockensmith —

Christopher Slusher died in the month of December 1853 —

The answer denies that said Christopher Slusher died intestate as to his said children and grand children as alleged in the petition — and denies that in making his will he failed or neglected to name or provide for said plaintiff Susannah Hockensmith, and the portion of the defendants as named in said petition. The answer states that a large portion of the real estate, which is mentioned specifically, was bequeathed to certain of the defendants by said will — and that the widow was entitled to her dower this

the estate of the said Christopher Slusher, which has been adjudged and assigned to her by the judgment of the Circuit Court of Lafayette County - and that one of the Defendants, Henry Slusher, had become the owner of said slave estate by purchase for good and valuable consideration -
The answer states, that said Christopher Slusher died intestate as to a very large amount of personal estate, negroes, money at interest, and a tract of land the South West fractional quarter of section 26, as specified in said answer and a portion of a town lot No. 7 mentioned in the answer, making the amount of some forty thousand dollars worth of property undisposed of by his will -

The answer avers that said Christopher Slusher by his will bequeathed to the plaintiff William H. Hockensmith, by the name and description of Har

rison Hockersmith the sum of One Thousand dollars, the said Harrison being, at the time of the execution of said will the husband of the said Susanna Hockersmith a daughter of the testator.

The answer admits that plaintiffs are entitled to have partition of the South West fractional quarter of Section 26 aforesaid; and of a part of lot 7; and admits that the plaintiffs interest therein is one eleventh part - but denies that plaintiffs have any right to partition thereof until the natural death of the widow of said Christopher Hughes - and denies that plaintiffs have any right to the real estate devised by the will -

The petition was amended twice as to parties names - The venue was changed to the Circuit Court of Clay County, because the judge of Safety the Circuit Court had been of Counsel for one of the -

parties - a motion was made to strike out parts of the answer, not deemed necessary to notice it here - it was overruled by the Clay Circuit Court.

Neither party requiring a jury the cause was submitted to the Court at the May Term 1857 for trial; and the Court found the following facts - "The Court finds the facts to be, that Christopher Slusher by his last will and testament read in evidence dated 18th of May 1853 and admitted to probate on 21st day of December AD 1853, made a bequest to Harrison Hockensmith of one thousand dollars in the following words - "I give and bequeath to Harrison Hockensmith the sum of one thousand dollars" - that the plaintiff William H. Hockensmith is the Harrison Hockensmith mentioned in the said last will and testament, that the plaintiff Susanna Hockensmith is and was at the date of said last will and testament the wife of the said William H Hockensmith

and known to be such, by the said Christopher Slusher, and daughter of said Christopher Slusher deceased, — That the said William H. Hockensmith on the 13th day of May A.D. 1856, received from the Executors of the said last will and testament of the said Christopher Slusher the bequest of one thousand dollars and gave them receipt for the same, read in evidence; and the Court draws the conclusion of law upon the facts aforesaid, that the said Christopher Slusher deceased did not die intestate as to his said daughter Susanna Hockensmith, and can not be so deemed, and that the said Plaintiffs have not nor has either of them any right title or interest in land in controversy". Thereupon the Court rendered judgment against Plaintiffs for costs —

Plaintiffs then tendered their Bill of Exceptions — From this it appears, that the only issue between the parties was admitted to be whether Christopher Slusher deceased died intestate as to Plaintiff Susanna Hockensmith, that if he died

intestate as to her, then she was entitled to the one eleventh part of said lands - Plaintiffs read the Will of said Thresher - the sixth clause of which is as follows, "Sixth I give devise & bequeath to Harrison Hockensmith the sum of one thousand dollars". I have not copied the whole Will, but will read it to the Court -

The defendants introduced testimony tending to show that the plaintiff William H. Hockensmith was known by the name of Harrison Hockensmith; They also read in evidence, the following receipt, "I, William H. Hockensmith do hereby acknowledge that I have this day received of the Executors of the late Christopher Thresher deceased, the sum of one thousand dollars in full of a specific legacy willed to me in right of my wife Susanna Hockensmith as one of the children and legatees of said deceased - This May 13th 1856 W. H. Hockensmith" The plaintiffs objected to this as evidence, and saved the exception - The defendants then introduced witnesses, stating some

conversations of the testator in regard to the manner he intended to dispose of his lands. Exceptions were saved to this evidence also by plaintiff. Also a witness who states that he knew Susanna Hockensmith before her marriage, had seen her at her fathers, had also seen William H. Hockensmith at Shubers not long before the death of Shuber, said he was the son in law of Shuber, this testimony was also objected to, and exceptions saved.

" " " "

Points of Defts. in Error

"The defendants in Error make but two points. The first involves the construction of the Will of the testator, that is the 4th clause of it. Was that clause intended as a provision for his daughter the wife of the person named in it as the legatee? If so, then the testator did not die intestate as to the plaintiffs, and the Court below properly found the issue for defendants.

Second point, involves the propriety of admitting in evidence the

the testimony of the witnesses Barnett Green and Johnson stating the conversations of the testator in regard to his intentions in giving his land to his sons: We contend that there is no error in this -

It may for argument sake be admitted that this testimony has nothing to do with the construction of the 4th clause in the Will: it may be considered irrelevant to the issue, yet if the evidence offered and saved on the record shews that the court forms the issue correctly and properly, and there was evidence plainly shewing the correctness of such finding, then the admission of irrelevant testimony or even of improper testimony not influencing such finding, ought not and can not afford sufficient reason for reversing the judgment or granting a new trial -

Landon vs Humphrey 9 Connec.t 209 - 215
Prince v Shepard & Ropes 9 Pickering 176 - 183 -
Stiles v Telford 10 Wendell 338 -
Smith v Kerr 1 Barb. S. C. 155 - 157
State v Hays - 23rd Mo. Rep. 316 -
State v Ford 3 Strob. Law Rep. in note pp. 517 - 526 - 527

But we contend that the testimony

was properly admitted. It did not in the least tend to contradict alter or affect any thing done in the will by the Testator. It is not like the evidence offered and refused in the case of Bradley v Bradley 24 Mo Rep. 311. In Bradley's case the parol evidence was offered to supply an omission in the will, it was to insert in effect, the words "I have heretofore given to my children all that I intend them to have; I have amply provided for them all heretofore". Here the evidence only shews that the intentions of the testator in regard to his lands and his sons, were mainly the same as expressed in the will, and as they had before that time been told to the heir apparent. Nor is this evidence like that in the case of Gibson vs Gibson 24 Mo. Rep 227. Nor that in Cawthorn vs Haynes 24 Mo Rep. 236. Upon the second point there is no error.

Now as to the 1st point we think that this has heretofore been settled by this Court in the case of Guitar vs Gordon 17 Mo. 408. In support of the rule in Guitar vs Gordon we cite Tucker et ux v City of Boston 18 Pick. 162. Wilder v Hoff. 14 Mass 357. Wilson vs

Forket 6 Metc. 400 –

Ryland & Son with Troxell
& King for Defts in Error

Hockensmith et ux
v. } Error from Clay
Henry Slusher et als

Statement of the principal matters & points for Slusher & others defts in Error

Ryland & Son
for defts

Filed Jany 15 1858
Wm E. Dunscomb
Clerk

William H. Hockinsmith et al.
vs. } Supreme Court.
Henry Slusher et al.

Statement of Case.

This is a suit for partition of the real estate of Christopher Slusher, deceased, originally instituted by plaintiffs in error against defendants in error in the Lafayette Circuit Court, but sent by change of venue to the Clay Circuit Court, and there tried.

Susanna Hockinsmith, one of said plaintiffs, is the daughter of said Christopher Slusher, and had intermarried with Wm. H. Hockinsmith, the other of said plaintiffs, long prior to the death of her said father. The said Christopher Slusher made his will, by which he disposed all of his real estate, except one tract of land, and after his death said will was duly proved & recorded. Said testator died possessed of a large amount of personal property, including slaves and money due upon notes & bonds — but of none of which did he dispose of by his will, excepting the specific legacies therein mentioned.

At the time testator made his will

he lived, and for many years previously had lived, in Lafayette County; and at the date of said will Susanna and her husband, plaintiffs in error, lived, and for several years previously had lived, in Jackson County, which adjoins Lafayette. Testator, before and at the time of making his will, well knew where his son-in-law & daughter, plaintiffs in error, resided; they having been upon visits to his house frequently, and as late as a few days only prior to his death.

Testator made no express mention of his daughter, Susanna, in his will; nor did he, in his will, make any express provision for her. But testator, in his said will, gave to his son-in-law, William H. Hockinsmith, one thousand dollars in money. This legacy was given to said son-in-law in the name of "Harrison Hockinsmith"; said legatee's full name being William Harrison Hockinsmith, though he was known and called "Harrison" by Testator and others. Said Wm. H. Hockinsmith claimed the above mentioned legacy of one thousand dollars, and on his application therefore to the executors of the will the same was paid to him, and receipted for by him as legatee.

Plaintiffs in error sought

to have partition of all of the real estate of testator, and to have apportioned to them, in right of said Susanna, as in case of intestacy, an equal part or share of said real estate, upon the ground that said testator neither named, nor provided for, said Susanna in said will. The tract of land not disposed of by the will, was, however, after the death of testator, duly and legally assigned to the widow of testator as dower, and said widow still survives. The Court found for defendants; and to reverse the judgment of the Court below plaintiffs prosecute their writ of error.

Points for Defendants.

1st. The Court below did right in permitting evidence tending to prove that said William H. Hockinsmith was known and called, by testator and others, by the name of "Harrison Hockinsmith"; because evidence de hors the will was legitimate not only to identify said William as the person

meant in the bequest to "Harrison," but also to show that said legatee was the son-in-law of testator. The receipt offered in evidence was admissible, at least against the party who gave, as tending not only to identify the legatee, but also to prove his relationship to testator.

2d. The testator by naming the husband of his daughter, thereby sufficiently indicated that said daughter was in his mind at the time he made his will, and that she was not therefore unintentionally omitted.

3d. That by giving one thousand dollars to his said son-in-law, testator must have thought of his said daughter for she was the moving cause in the mind of testator to the gift of said thousand dollars; and, consequently said daughter was not unintentionally left without provision in the will.

4th. The bequest of one thousand dollars by testator to his son-in-law satisfactorily indicates that he did not

intend to make any provision for his said daughter, Susanna, other than by the gift of said thousand dollars to her husband, and her share of the property undisposed of by his will.

5 The 11th section of the act of 1845 is not applicable to the case at bar; because that section was designed to apply to those cases only where the failure to name or provide for, a child was the result of forgetfulness or inadvertence.

6th. That even though the receipt introduced in evidence may not have been admissible, yet since the facts which that evidence tended to establish were sufficiently proved by other legitimate evidence no advantage can be taken of such alleged error, supposing it to exist.

7th. The bequest of one thousand dollars to the husband of Susanna was a substantial compliance with the requisitions of the statute; because that gift was, to some extent, and in effect, a provision for said daughter. If not, leaving slaves & money to go by descent was a substantial provision for Susanna.

8th. Land which may have descended to heirs, but which has been assigned as dower, is not subject to partition during the subsistence of such dower estate.

Authorities for Defendants.

Perry et al. vs. Foster et al. 1 Mass. p. 146,

Wild et ux. vs. Brewer 2 Mass. p. 570,

Church vs. Crocker 3 Mass. p. 17,

Wild vs. Goss 14 Mass. p. 356,

Merrill et ux. v. Sanborn 2 N. H. p. 499,

Wilson vs. Foster 6 Metf. p. 400,

Black et al. vs. Black et al. 3 Mo. p. 594 (403),

Guitar et al vs. Gordon et al. 17 Mo. p. 408,

Argument for Defendants.

The case at bar involves the construction of the 11th sect. of the act of 1845 in respect to wills; but as there are a few questions raised by the assignment of errors upon the admission, in the Court below, of certain kinds of evidence, they will be first considered.

It is alleged in the assignment of errors, first – That the Court below erred in permitting defendants to introduce evidence de hors the will to prove that the "Harrison Hockinsmith" mentioned in the will is the same Wm. H. Hockinsmith who is coplaintiff in error. Now, this objection involves the untenable position of denying to defendants the privilege, or rather the right, of identifying the particular legatee in question. By reference to the very will under consideration, it will be perceived that some bequests are made – "to the four children of my son Allen Slusher;" – and again – "to the children of Roland Slusher;" – and again – "to my son-in-law,

Washington Cooper." And it is confidently maintained that it was as clearly competent to prove who was meant by the testator when he said in his will, "Harrison", as it would be to prove who were meant by these other designations - "to the four children of my son Jos"; or - "to the children of Roland Slusher." The evidence objected to did not tend to "vary", or to "change", or to "contradict", the will of testator; nor is it now pretended by defendants that they have any right to affect said will in either of the modes above indicated. But it is insisted that a legatee may be identified, and his relationship to testator shown by evidence de hors the will; and that the evidence objected to in the case at bar did not, and cannot affect the will in question, otherwise than to explain the meaning of the testator, and effectuate the purposes he wished to accomplish.

But it has been said, and may be repeated, that by per-

mitting evidence de hors the will to show that Wm. H. Hockinsmith was the son-in-law of the testator, makes the will say more than the testator has said.— The true question here is — did the introduction of that evidence make the will say more than the testator intended to say in his will — as his intention may be ascertained from the face of the will itself, when properly explained and fairly construed? Proof of the relationship of Wm. H. Hockinsmith to the testator no more adds to, or varies, the will, than wou'd proof as to the number, or identity, of the children of Roland Slusher.— It is true that important inference and deductions may be legitimately drawn from the fact of this relationship — as will be more particularly insisted upon in the sequel of this argument; but, in this connection, it may be remarked, that whatever effect the relationship of Wm. H. Hockinsmith may have in construing the will of the testator, such effect will result from the fact of that relationship, and not

from the mere recognition of it by the testator in his will. For however silent the will may be as to this relationship, the fact that Wm. H. Hackinsmith was the son-in-law of the testator nevertheless existed. It is frankly conceded that knowledge by the testator of this relationship, at the time he made his will, was necessary to authorize the inference and deductions for which defendants will hereafter contend. All that is now particularly insisted upon is that the evidence as to who "Harrison Hackinsmith is – that he was the testator's son-in-law – that testator commonly called him "Harrison" – and that he was known by the testator to sustain this relationship at the time the will was made, – that all this was legitimate and proper evidence.

The late case of Bradly et al. vs. Bradly may be invoked in aid of the plaintiffs in error, upon the admissibility of the evidence under consideration. With all due deference to the opinions of others, it is respectfully submitted that the case first referred to does not touch, much

less rule, the point now before this Honorable Court. In that case the question was, whether evidence de hors the will was admissible to explain matters also de hors the will: In this case the question is, whether a legatee imperfectly named on the very face of the will may be identified, and whether the relation of such legatee to the testator may be shown, by evidence de hors the will. In that case the only legitimate foundation for such evidence was wholly wanting: In this case such foundation is ample and manifest.

As to the evidence in respect to the oral declarations of the testator, it will suffice to remind this Honorable Court that those declarations were not offered in evidence in regard to the will at all; but they were offered for the purpose of establishing the equitable defence set up by two of the defendants in their answer - namely, Thomas Slusher and Jackson Slusher, who averred that, long before the will was made, the testator verbally agreed to let them have certain portions of his land -

and that, relying upon such agreement, they had taken actual possession of said portions of said land, and made valuable and lasting improvements thereon; that the testator had repeatedly declared his intention & purpose to be to give them a sufficient title to said land; and these were the declarations given in evidence in the Court below, and this the object of their introduction. Now whether said defendants, Thomas & Jackson, could, in the case at bar, avail themselves of such a defence, is not a question now before this Honorable Court. It is sufficient for the purposes of this case that the oral declarations complained of had no reference whatever to the will, nor to any question arising out of the will, other than this - that in the contingency of a judgment for partition of the real estate of the testator, some equitable order might be made as to the improvements mentioned. If the oral declarations of the testator to the effect that he had not per-

gather his daughter Susanna - or that he intended to provide for her by the bequest to her husband - or the like; - if declarations such as these had been admitted to be proved by the witnesses who testified in the Court below - then, indeed, the case of Brady et al. vs. Brady would be an authority in point against the defendants in error. But a mere glance at the record will show that such is not the case.

Let us come now to the great and controlling question in the case at bar. Does this case fall within the class of cases designed to be embraced by the Eleventh Section of the act of 1845? Or, in other words, was Susanna Hockinsmith left unnamed and unprovided for, by the testator, in his will? This must depend upon the fact whether or not, Susanna was in the mind of the testator at the time he made his will; for if she was in the mind of the testator, at that time, and the fact that she was so in his mind can be

gathered from the will itself when properly explained, then, according to the authorities cited, this case does not come within the purview of the statute. It might be insisted that the testator by bequeathing a thousand dollars to his son-in-law, made thereby a provision for his daughter Susanna in substaintial, though not literal, compliance with the statute; for it is a very common practice with parents, in making advancements to their children — married daughters — to give the property to the husbands of such daughters; and more particularly is this case where the advancements consist in land — the conveyances being made directly to the husbands. If the bequest of the thousand dollars made to Wm. H. Hockinsmith had been made to his wife Susanna, he, in right of her, could have demanded such legacy from the executors — and instantly upon receiving it the same would have vested in himself absolutely. But, again; the 12th Sect. of the statute makes every child in whose favor an

intestacy shall be declared under the 11th Sect. account for advancements. Now suppose a daughter neither named nor provided for in her father's will, but to whom advancements had been made in land in the common mode that is by deed to her husband; suppose such a state of case, and will it be doubted that in a suit for partition such disposition of land by deed to the husband would be held as an advancement to the daughter? Certainly not; and the reason is obvious — but for the daughter no land would have been conveyed to the son-in-law.

But however this may be; the bequest of one thousand dollars by the testator to his son-in-law, Wm. H. Hockersmith, utterly excludes the idea that Susanna, the daughter of testator, and wife of the legatee, and known as such at the time of the making of the will, was not then in the mind of the testator. Upon the simple principle of association of ideas,

that daughter must have occurred to the mind of the testator at the very moment he dictated the legacy to her husband - if she had not been in his mind before. But there is still a stronger reason for concluding that Susanna was, at the time of the making of the will, in the mind of the testator, which is this: that the legacy of one thousand dollars was given to Wm. H. Hockingsmith because he was the son-in-law of the testator; or, in other words, because it was the recollection of Susanna that prompted the bequest to her husband. For it is not to be supposed that if Wm. H. Hockingsmith had not sustained the relation of son-in-law to the testator, he would have been made a legatee in the will. The testator must have recognized this relationship at the time he made his will; and the recognition of such relationship was inseparable from the recollection of his daughter. There is, therefore, no pretence for asserting that Susanna was not in the mind of the testator - was forgotten - at

the time he made his will. And such being the case, the testator did not die, or ought not to be deemed to have died, intestate as to said daughter.

The decisions cited from Massachusetts and New Hampshire clearly establish the positions contended for in this argument; and the case cited from 17 Missouri Reports, it is respectfully submitted, fully recognizes the doctrine laid down in the cases above cited, and adopts the construction placed by those Courts upon statutes similar to our own. These statutes were designed to provide for children unintentionally or inadvertently left unprovided for in the wills of their parents. It was the frequency, or the supposed frequency, of such contingencies that led to the enactment of such statutes; and the authorities cited show that such statutes ought to be construed in the light of the circumstances which gave rise to their enactment. Hence, it is said by this Honorable Court, in the case

of Guitar et al. v. Gordon et al. 17 Mo., supra, — "The object of this section (11th sect. of act of 1845) must be borne in mind. It is not to prevent parents from disinheriting their children, but merely to make provision for those who may be unintentionally omitted." This is not an arbitrary construction of the statutory provision in question, for any other construction would, in its practical results, abrogate the 1st section of the act of 1845, which gives to parents full power to dispose of their property by will to whomsoever they may choose, saving to widows the right of dower. In the case at bar, Christopher Slusher, the testator, disposed of his property by his will in such manner as he deemed proper. This he had an unquestionable right to do under and by virtue of the 1st section of the act of 1845. The testator intended that his property mentioned in his will should be disposed of as set forth in that instrument. By another section of the act of 1845, in respect to wills, it is provided, that Courts shall indulge such a liberality in all

adjudication, when wills are to effectuate the intention of testators in regard to the disposition of their property. Now to declare an intestacy as to Susanna Hockinsmith, would result in enabling her and her husband to obtain an equal portion of the estate with the other children of the testator, and a thousand dollars besides. Surely such an intention as this never entered the mind of the testator. The intention of the testator was manifestly this: that one thousand dollars should be given to Wm. H. Hockinsmith, because he was the husband of Susanna, and that Susanna should inherit with the other children of testator an equal portion of the estate left undisposed of by the will — a portion amounting to several thousand dollars. It is no answer to this view of the case to say, that advancements are to be taken into account in making partition to an omitted child under the 11th sect. of the act in question; because the sum of one thousand dollars given by the wife to the son-in-law cannot

be considered such an advancement to the daughter as is contemplated by the statute in regard to partition. This sum of one thousand dollars was no advancement at all. It was not a provision made anterior to, or even concurrently with, the execution of the will; but it was a legacy created by the will. If, however, this sum ought to be charged as, in effect, an advancement to Susanna, then it was a provision for her within the meaning of the 11th Section; and, consequently, excludes her from the benefit of that Section.

It is, upon the authorities cited, and reasons given, respectfully submitted, that there was no error committed in the Court below; that the case at bar comes strictly within the ruling of this Honorable Court in Guitar et al. vs. Gordon et al; and that the judgment of the Clay Circuit Court ought to be affirmed.

J. R. Troxell, Atty.
for Defendants.

Supreme Court.

W. H. Hockinsmith et al.

vs } Statement of case &c.

Henry Slusher et al.

Error to Clay.

And argument

of

J. R. Tropell.

filed May 15 1858

Wm E Dunscomb

Clerk

(The Reporter will please make Statement)

No 23. William H. Hockensmith et al vs.

Henry Slusher et al —

The main inquiry in this case is whether Christopher Slusher died intestate as to his daughter Mrs. Hockensmith, which will be determined by the solution of the proposition whether a bequest to a son in law is a naming or providing for the daughter within the meaning of the eleventh section of the Act concerning Wills (R. S. 1845). The Roman law prohibited a parent from disinheriting his own issue, but our law permits a father under no legal disability to devise all of his estate as he may see fit, saving to the widow her dower (Sect. 1), and it is made the duty of all Courts and all others concerned in the execution of wills, to have a due regard to the direction of the will and the true intent and meaning of the testator (Sect 5d).

The 11th section declares. "If any person make his last will and die, leaving a child or children or descendants of such child or children (in case of their death) not named or provided for in such will, although born after the making of such will or the death of the testator, so far as ~~regards~~ every such testator shall regard any such child or children or their descendants, not provided for, shall be deemed to die intestate &c".

This provision of the Statute has been several times before this Court for judicial construction, and it may now be considered as settled that the object of it is to produce an intestacy only when a child or the descendant of such child is unknown or forgotten and thus unintentionally omitted, and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child

or grand child was not forgotten
Guitar vs Gordon 17 Mo. 408. Beck vs Metz 25. Mo. 70, Terry vs Foster 1 Mass. 146 Weld vs Brewer 2 Mass. 570. Church vs Crocker 3 Mass. 17. Wild vs Gass. 14 Mass 359 Wilson vs Fickel 6. Met. 400. Merrill vs Sanborn 2. New H. 499. Block vs Block 3 Mo. 594. The statute extends only to a case of entire omission, and the mention of a child without a legacy or other provision for him is sufficient to cut him off from a distributive share of the estate (3 Mo. 594. 1. Mass 146), and whenever the mention of one person by a natural association of ideas suggests another. it may reasonably be infered that the latter was in the mind of the testator and was not forgotten or unintentionally omitted. Thus it has been decided, that by the mention of a daughter. though dead at the time of making the will. it will be infered that her children were not forgotten (17. Mo 408). the mention of grand-children will exclude the parent (2. Mass. 570. 3. Mass. 17), naming a son in law is sufficient to show that the daughter was brought to the recollection of the testator (14 Mass 359) and naming two of seven grandchildren will indicate that the others not named were intentionally omitted (2. New H. 499).

It is insisted however that the testator in his will does not call Mr. Hockensmith his son in law. and that there is nothing to show that the legacy was bestowed because he was the husband of his daughter, or that the relationship was present to his mind so as to bring up the recollection of his daughter.

A gift to a son in law unless otherwise intended is considered an advancement to the daughter, although the husband may waste it and the wife derive no benefit from it (Barber v. Taylor 9 Dana 86); and it is so considered because men without strong motives do not make valuable presents to strangers, and it is a reasonable inference that the daughter is the moving consideration that prompts the gift from her father to her husband. A covenant to stand seized to uses, may be supported by the consideration of blood, and it has been held that the future wife of a son may fall within this consideration necessary to sustain such a covenant, for the covenant is made for the benefit of one's posterity which may spring from the wife (2 Hilliard Real Prop. 313), and the same principle for a like reason would perhaps be applied to a son in law.

In the absence of any thing appearing to the contrary, it must be supposed that the legacy to Mr. Hockenswith was prompted by the fact that he was the testators son in law and that the daughter was the moving cause, and if the bequest was bestowed on her account she must have been in the mind of the testator at the time he made his will.

She would have been included according to the doctrine of the cases cited, if the clause of the will providing for her husband, had besides naming him, stated his relation to the testator, though without giving that as the reason for the legacy, because it would be inferred that the mention of 'son in law' naturally recalled the daughter to his memory. Now if the motive to make the devise sprang from the fact, that the legatee

was his ~~daughter~~ Son in law. The inference that his daughter was not forgotten, is quite as conclusive as if the relation between the Testator and legatee had been stated.

If Mr Hockensmith had not been related to Mr Slusher, the curiosity of the family and neighbors would have been excited to ascertain why the legacy was given, and he would no doubt have been surprised himself. but as it is, though no reason is given in the will, every one knows without asking, what the real motive was. and is as well satisfied as if the Testator had said in so many words in the will, that the legacy was given because the legatee was the husband of his daughter. A stranger to the family in reading this will would exclaim 'why this provision for Mr Hockensmith', but on being told that he was a son in law the motive that actuated the bounty would be quite as obvious as if the fact had been stated in the will.

If the naming of one person in a will is sufficient, as it has heretofore been decided. to preclude another from claiming the benefit of the eleventh section, when the relation which the ~~former~~ person named sustains to the testator, is stated, there can be no reason for withholding the operation of the principle from a case where the relation actually exists but is not formally mentioned. The provision which a father may make for his child by will, dying intestate as to part of his personal estate is not brought into hotch-pot; for such a provision to be construed an advancement must result from a complete act of the parent in his life time (2 Will. Ex.r 1291)

If then any portion of the ~~estate~~ personal estate is undisposed of by the will, Wm Hockensmith will take her distributive share of it as one of the children, and will not be charged with the legacy left to her husband. Now suppose that the legacy instead of being one thousand dollars was ten or twenty thousand equal to or greater than a child's portion of the whole estate. It could not be charged as an advancement to the wife for the reasons already stated. and if the plaintiff argument prevailed the husband would take in such a case part of the estate under the will. and the wife would take her distributive share repudiating the will and in that way one child would take against the intention of the testator. and the equality due to the other children, a double portion.

The general rule is "that parol evidence cannot be admitted to supply or contradict enlarge or vary the words of a will nor to explain the intention of the testator, except in two specified cases 1. Where there is a latent ambiguity arising dehors the will as to the person or subject meant to be described and 2 To rebut a resulting trust" (Man vs Mann? Ex. 1 - John CR. 233). This rule was not violated in admitting evidence that Wm H. Hockensmith was known and called by the name of "Harrison Hockensmith", and that he was the son in law of the testator, for such proof is often necessary to sustain a will and give effect to its provisions, and it is always allowed when there is a latent ambiguity as to the person intended to be described: as "if there be a mistake in the name of the legatee, or there be two legatees of the same

name". If the executors had refused to pay the legacy of a thousand dollars on the ground that the plaintiff's Christian name was not "Harrison" he would have found it necessary to invoke this rule, and surely if it would be competent for him in a suit to recover the legacy to identify himself as the person described in the will, the same kind of proof would be admissible when offered by the defendants in this suit

The evidence of conversations with the testator in regard to his intentions concerning his real estate was improperly admitted It did not bear on the proper construction of the sixth clause of the will, and was wholly irrelevant to the issue, But the judgment is fully sustained by ~~proof, and~~ the law and the evidence without this immaterial testimony, and it would be useless to remand the cause for a new trial on such an objection, when we must see that the result would be the same to the plaintiffs

Judge Scott concurring the judgment will be affirmed

Mr Chuhaw Jon

Nobe Judge Naplon having been of counsel did not sit.

No 23 (Copied)

Hockensmith et. ux.

vs

Henry Slusher et al

Opinion of the Court

Affd

filed March 11 1858

Wm E Dunscomb

Clerk

Richardson