Hite, James J. vs Thompson, William H 1853 Marion Co 327/3
Hite, Harriet Jane " , Joseph N

569/8

Ejectment

Ryland/~~affirmed~~ G. not sit

"Court will not critically + minutely investigate"
proceedings the lower courts
+ sales of real est.

Such critic "would be ruinious"

Ohio Ug Free Xpl 0.0
800-694-6989

The State of Missouri, ss.

The State of Missouri, *To the Honorable the* Judge of the third Judicial Circuit *in said State, GREETING:*

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court, within and for the County of Marion

wherein James I. Hite and Harriet Jane Hite now plaintiffs; and William H. Thompson and Joseph N. Thompson, now defendants,

in an action of the nature of Ejectment . . . . 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 in the City of Saint Louis, in the County of Saint Louis, in said State, on the third Monday in October 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 S. GLANVILLE, Clerk of our said Supreme Court, at office, in the City of Saint Louis, the ninth day of September in the year of our Lord one thousand eight hundred and fifty-three.

Wm. S. Glanville,
CLERK.

State of Missouri }
County of Marion }

Marion Circuit Court

The Execution of the within writ, appears, by the transcript of the record and proceedings hereto attached. In testimony whereof we have caused the seal of our said Court to be hereunto affixed. Witness Thomas E Thompson Clerk, Done at office at Palmyra this 12th September A.D. 1853.

Thos E. Thompson Clk

1

James I. Hite and Harriet Jane Hite
vs
William H. Thompson & Joseph N. Thompson } In Marion Circuit Court.

State of Missouri
County of Marion ss Be it remembered that heretofore to wit, on the 18th day of June A.D. 1853. there was filed in the office of the Clerk of the Circuit Court, within and for the County of Marion, a petition in a civil action, in the words and figures following to wit:

Petition James I. Hite and Harriet Jane Hite, his wife, formerly Harriet Jane Marden. } plaintiff
against
William H. Thompson and Joseph N. Thompson. defendants } In the Circuit Court of Marion County.

Plaintiffs state that on the day of June A.D. 1833. one Harrison Marden and one Abijah C. Abernathy, were seized and possessed of an indefeasible Estate of inheritance in fee simple as tenants in Common in and to all that part of Lot No. one in Block No. 29. in the town of Palmyra ~~in the County of Marion~~ in the County of Marion, in the state of Missouri, bounded as follows, to wit: Beginning at the North East Corner of said Lot of ground, running thence West seventy feet with the Northern line of said Lot, - thence South 22 feet - thence East parallel with the first named line 70 feet to the Eastern boundary of said Lot, and thence North with the said Eastern boundary of said Lot. 22 feet to the place of beginning.

Plaintiffs further state that afterwards on or about the day of June 1833. the said Harrison and Abijah C. still being seized and possessed as aforesaid, said Harrison Marden departed this life leaving surviving him, Harriet Jane Marden (one of the plaintiffs) James A. Marden, and Harrison Marden Junr., his Children

2. and only heirs at law, upon whom descended the undivided half of said parcel of ground, that shortly afterwards, and during the year 1833, the said James A. Marden, while in his infancy departed this life without issue, whereby all the Estate in said parcel of ground which vested in him, by the death of his father descended upon, and vested in the said Harriet Jane, and Harrison Marden Jun. his sister and brother and only heirs at law.

Plaintiffs further state, that afterwards about the year 1834 or 1835, the said Harrison Marden Jr. while in his infancy, likewise departed this life, without issue whereby all the estate in said parcel of ground which vested in him, by the death of his said father and brother, descended upon and vested in the said plaintiff Harriet Jane.

Plaintiffs further state that by means of the premises, the said plaintiff Harriet Jane became and was entitled to the possession of the undivided one half of said parcel of ground and premises, and that being so entitled to the possession thereof the defendants afterwards on or about the Month of May AD. 1843 wrongfully denying the right of the said Harriet Jane in said parcel of ground, and pretending to have succeeded to her right thereon, entered into and upon said parcel of ground and premises, and from thence until her marriage with the said James L. Hite which occurred in the year 1849, or thereabouts unlawfully and wrongfully withheld from the said Harriet Jane the possession of said parcel of ground and premises and from the time of her marriage with the said James L. Hitchcock, the defendants have unlawfully and wrongfully withheld and still do unlawfully and wrongfully withhold from the said Harriet Jane and James L plaintiffs the possession of said parcel of ground and premises.

3 Plaintiffs further state that the rents and profits of the said parcel of ground, ever since the defendants entered into, and upon the possession of said parcel of ground as aforesaid, have been and still are of the yearly value of three hundred dollars, to the one half of which the plaintiffs are entitled, yet the plaintiffs say the defendants have taken to themselves, and have withheld from the said Harriet Jane, and from the plaintiffs since their marriage, the whole of the said rents and profits, and still do withhold the same from the plaintiffs, to the great damage of the plaintiffs.

Plaintiffs pray Judgment, for the possession of the undivided half of said parcel of ground, and also for the one half of the said rents and profits, and also for the one half of the rents and profits of said ground and premises from the time of the filing of this petition until possession of said ground and premises are rendered by defendants to plaintiffs.

Samb & Dryden Attys. for plaintiffs.

John D. S. Dryden attorney for the plaintiffs, makes oath and says he believes the above petition and the matters therein as stated are true.

Sworn to and subscribed before the undersigned this 18th day of June 1852. } John D. S. Dryden.
Thos. E. Thompson Clk

Filed 18th June 1852. Thos. E. Thompson Clk

And afterwards to wit on the 18th day of June 1852 there was issued from the office of the Clerk of said Court a writ of summons, attached to a copy of said petition, in the words and figures following to wit:

Writ State of Missouri
County of Marion. } The State of Missouri.
To the Sheriff of Marion County: Greeting:

4 We command you to summon William H. Thompson and Joseph W. Thompson, that they be and appear in our Circuit Court, at the Court House in the town of Palmyra, within and for said County on the first Monday in August next, then and there before the Judge of our said Court to answer a petition Exhibited in our said Court against them by James L Hite and Harriet Jane Hite his wife formerly Harriet Jane Marders, of which the accompanying writing is a Copy and this you shall in no wise omit, and have you then there this writ. Witness my hand as Clerk of our said Court, and the Seal thereof. Done in office in Palmyra at the County aforesaid, on the 18th day of June A D. 1852.

Seal

Thos. E. Thompson Clerk

on which said writ appears the following return by the sheriff of said County of Marion.

Executed this writ by reading the same, with the accompanying copy of the petition to Joseph W Thompson June 18th 1852, and by reading and delivering the said petition to William H. Thompson June 28th 1852. All done in Marion County, Missouri the days and dates above written

Shffs fee $2.00 B. B. King Shff. Marion County. Mo
By F. S. See dep.

And afterwards to wit on the 14th day of August 1852. before the Hon. Carty Wells Judge during the Continuance of the Circuit Court continued and held at the August term of said Court, at the Court house in the town of Palmyra within and for the County aforesaid the following among other proceedings were had:

Mot. for Security for Costs & Continuance

James L Hite & Wife pltff
vs
William H & Jos. W Thompson Defts

(Vol 8 page 208) Civil action

5 At this day Com the parties by their attorneys, and on motion of defendants they have leave to file their answer to plaintiffs petition at least thirty days before the first day of the next term of this Court, and the plaintiffs are required to file a good and sufficient bond for the Costs herein by the first day of the next Term of this Court and this Cause is Continued until then.

And afterwards to wit on the 8th day of January A.D. 1853, before the Clerk in Vacation of Court there was filed in his office the answer of defendants. (Vol. 8 page 240)

Defendants file Answer

James L. Hite and wife plaintiffs
vs
Wm H. & Joseph B. Thompson defendants
} Civil action

At this day Com the defendants by their attorney Thomas L Anderson, and with the Clerk in Vacation of Court, file their answer to plaintiffs petition herein

Which said answer is in the words and figures following to wit:

Answer of Defendants

James L Hite and Harriet Jane his wife formerly Harriet Jane Marders. plffs
vs
William H. Thompson & Joseph B Thompson. defts
} In the Circuit Court of Marion County in the State of Missouri.

The defendants in answer to said petition admit that Elijah C. Abernathy and Harrison Marders as tenants in Common, were seized of an estate of inheritance in fee simple in and to all that part of Lot No one in Block Number twenty nine in the town of Palmyra in the County of Marion and bounded and described in said plaintiffs petition

Defendants admit that said Marders died intestate. That Harriet L. Hite is his sole surviving heir. Defendants know nothing of the intermarriage of the said Harriet with said James L. Hite. They are

reputed to be husband and wife, and defendants suppose it is so. Defendants admit that they are in possession of said real estate, But they aver that their possession is lawful. That said part of said Lot number one is the property of Mary D. Bates of whom they are tenants and under whom they hold possession. They deny that they wrongfully hold the possession of said property. They deny positively that the said plaintiffs have any right to the possession of said property, nor are they entitled to recover the same or any rents therefor.

Defendants state that on the 30th day of December 1833. Elijah C Abernathy filed in the Circuit Court of Marion County in the State of Missouri, a petition to which the said Harriet I. Hite, then Harriet I. Marders and James A. Marders her brother, since deceased, heirs at law of the said Harrison Marders were defendants, praying for a partition of said real estate, between himself the said Abernathy and the heirs aforesaid of the said Harrison Marders dec: averring that said Abernathy was entitled to one moiety of said property, and the said heirs the other moiety. Defendants state that at the time of filing said petition the said Abernathy the uncle of said heirs was their guardian and curator legally appointed by the County Court of said County of Marion in the State of Missouri

Defendants state that on the 17th day of Feby 1834, one William P. Richardson was duly appointed by the said Circuit Court guardian ad litem for the said defendants to said petition. And afterwards to wit on the 26th of February 1834, the said Richardson as guardian ad litem filed his answer to said petition. And on the same day and year last aforesaid the said Court adjudged and decreed that the said Abernathy was entitled to an equal

7

and undivided half of the real estate aforesaid and James A. Marders and Harriet L. Marders were entitled Each to one Equal and undivided fourth part of said real estate, and adjudged that partition be made and appointed Samuel Shepherd, Samuel C. Sloan, Thomas J. Pollard, & George W. Lane Commissioners to make partition of said real estate.

And afterwards to wit at the June term of said Court, on the 20th day of June 1834, the said Commissioners filed their report, in which they stated that the said real estate, could not be divided nor partition made thereof, without destroying the value of said real estate, Whereupon the said Circuit Court, with the consent of the parties ordered the Commissioners to sell the said real estate at private sale, for not less than 300 dollars, and make report of their proceedings at the next term of said Circuit Court.

And afterwards to wit at the October term of said Court on the 22d of October 1834, the said Commissioners made their report stating that they had sold said real estate to Henry Wilcox for 350 dollars and Executed their Conveyance therefor, which report and sale was then and there approved by the said Court and it was decreed that the said sale should be valid and effectual and that the said Commissioners should pay over the said 350 dollars, to the parties in proportion to their respective rights in the premises as ascertained by said Court deducting the costs and charges attending the said partition, the one half of which amount was paid to the guardian of said defendants, a copy of which said proceedings are herewith filed as Exhibit A. also an authenticated copy of the deed from said Commissioners to said Henry Wilcox, the original not being in possession or control of said defendants or said Bates.

8 Defendants also state that on the 15th day of January 1842, Mary D. Bates in a proceeding then pending in the Circuit Court of Marion County recovered by the Judgment and Consideration of said Court against Henry Wilcox for debt the sum of three thousand three hundred and thirty nine dollars and 48 cents, and the sum of six hundred and thirty nine dollars and 73 cents damages, and the sum of five dollars and 71¼ cents costs, for which said debt and costs and damages, a writ of execution was issued on the fifth day of March 1842, from the office of the Clerk of the Circuit Court of Marion County Mo signed by John P. Rutter Clerk, and also on the 15th day of January 1842, Henry Von Phul and Theodore L. McGill, in a proceeding then pending in the Circuit Court of said County of Marion recovered against the said Henry Wilcox for debt the sum of one thousand and sixty three dollars and 62 cents, and the sum of one hundred and forty four dollars and 45 cents, damages and the sum of two dollars and 76¼ cents costs, for which said debt, damages and costs, a writ of execution issued from the Clerk of the said Circuit Court on the first day of February 1842, signed by John P. Rutter, which said Executions were delivered to Jordan L. Montgomery Sheriff of Marion County, aforesaid and by him levied on the said lot of ground claimed by the plaintiffs and after having duly advertised the same according to law, the said sheriff did on the 9th day of May 1842, expose the said real estate to sale at the Court House door in the town of Palmyra at Public Vendue to the highest bidder to satisfy said executions and that at said sale the said Mary D. Bates being the highest bidder, became the purchaser thereof.

9

And the said Sheriff Jordan J. Montgomery did by deed, bearing date the 9th day of May 1842, convey to said Bates all the right, title claim and interest of said Wilcox in and to the real estate aforesaid, By means whereof the title to said real estate vested in the said Bates, who is now the owner of said real estate, which said deed is herewith filed as Exhibit B. and the said Judgment will be relied on and filed if required.

Defendants state that at the time of the purchase of the part of Lot claimed by said plaintiffs there was no improvement on the same and the said Henry Wilcox paid for said Lot its full value at that time.

That after the said Wilcox purchased the said Lot as aforesaid, believing his title to be complete and indefeasable he erected upon said part of said Lot claimed by plaintiff a large Brick house designed, and afterwards occupied by said Wilcox as a Tavern, which then cost and is now worth three thousand dollars, that said improvement is of a desirable and permanent character and was put there by said Wilcox in good faith believing that his title was perfect and complete. An account of said building and cost will be filed.

Defendants further state that after the purchase of said property by said Bates, he took possession of the same and believing his title to be good and indefeasible he converted the lower part of said house so built by said Wilcox into a store house, and also built an addition to said house consisting of a cellar and part of room of Brick, the balance of the room being on other ground, well finished of a durable and permanent character, which cost

the said Bates dollars &

10 cents, an account of said additional buildings and improvements will be filed. And said defendants having now fully answered pray to be dismissed

Pratt & Redd & Anderson
attys for Defts

William H Thompson makes oath and says that he believes the foregoing answer and the matters and things as therein stated are true.

Sworn to and Subscribed before me this 8th Jany 1853
Thos E Thompson clk

W. H. Thompson

Filed in vacation 8th January 1853

Thos E Thompson Clerk

And afterwards to wit on the 15th day of March 1853 during the Continuance of the March term 1853 of the said Circuit, Continued and held as aforesaid before the Hon Carty Wells the following among other proceedings were had.

Continuance at Mar T. 1853

James J Hite and wife plff
vs
Wm H & J W Thompson Deft

Civil action

At this day come the parties by their attorneys and on motion of plaintiff, and by consent this cause is continued until the next term of this Court.

And afterwards to wit on the 15th day of August 1853, during the Continuance of the August term 1853 of the said Circuit Court Continued and held as aforesaid before the Honorable Carty Wells Judge the following among other proceedings were had to wit.

Vol 8 page 370

Judgment

James J. Hite and Harriet Jane Hite his wife, formerly Harriet Jane Marders plaintiffs
against
William H. Thompson & Joseph W Thompson defds

Civil action

At this day come the parties herein

11

by their attorneys, and thereupon comes a Jury, to wit, J. Thomson Finlay, George Lemmon, Enoch Smith, Thomas W. Armstrong, Robert L. Ruffner, Rufus Matthews, Harvey L. Mann, Nicholas Marksberry, Henry J. Sandford, Richard M. Johnson, Jachariah Parker, and George See, twelve good and lawful men, who were elected, tried, and sworn the truth to speak upon the issue joined between the parties, and after hearing the evidence and argument of counsel, the plaintiffs suffer a nonsuit, leave of the Court, being first had and obtained, to move to set the same aside. It is therefore considered by the Court that the Jury herein empannelled be discharged, that the plaintiffs take nothing by their writ, and that defendants go hence without day, and that said defendants do have and recover of said plaintiffs their costs by them in this behalf expended, and have therefor their writ of Execution. And thereupon come the plaintiffs and file their motion to set aside the nonsuit herein, and grant a new trial, which motion being seen and considered, is overruled by the Court.

Nonsuit.

Motion to set aside

overruled.

And afterwards to wit, on the 16th day of August 1853, during the continuance of the said August term held as aforesaid the following among other proceedings were had to wit. (V.S. 8 page 372)

Bill of Exceptions filed

James I. Hite and Harriet Jane Hite, his wife formerly Harriet Jane Marders, plaintiffs

vs

William H. Thompson & Joseph H. Thompson defendants

Civil action

At this day come the parties herein by their attorneys, and thereupon the plaintiffs file their Bill of Exceptions in this cause, which being seen and examined by the Court, is received, signed and sealed, and made a part of the record herein.

Which said Bill of Exceptions is in the words and figures following to wit.

Bill of Exceptions.

James I. Hite and Harriet I. Hite plaintiffs
v
William H. Thompson & Joseph H. Thompson. Defds } Ejectment

Marriage of Pltffs admitted.

Be it remembered that on the trial of this cause the marriage of the plaintiffs was admitted by the defendants. The plaintiffs then proved the premises in dispute were

annual Val. of premises.

and are of the annually value of two hundred dollars.

The defendants then offered in evidence the record and proceedings had in a case in the Marion Circuit Court, to the reading of which, the plaintiff by their counsel objected, but their objection was overruled by the Court, and the defendants read the same in the words and figures following, to wit:

Abernathy vs Heirs of H Marders transcript.

State of Missouri
County of Marion ss Be it remembered that heretofore to wit, on the 30th day of December AD. 1833. there was filed in the office of the Clerk of the Circuit Court within and for said County, a petition in the words and figures following to wit:

State of Missouri In the Circuit Court
Marion County ss. February Term 1834 –

The petition of Abijah C. Abernathy, to the Circuit Court within and for the County aforesaid.

Your petitioner Abijah C. Abernathy respectfully states that himself and one Harrison Marders late of said County of Marion, purchased jointly, and was Equally and jointly possessed at the death of said Marders of the following real estate, lying and being in the County aforesaid, and in the town of Palmyra in said County known and described as follows to wit: Being all that part of Lot numbered one

in Block numbered twenty nine, in the said town
13 of Palmyra, bounded as follows. viz: Beginning at
the North East Corner of said Lot numbered one
thence south to a part of the said Lot numbered one
belonging to Dickerson and Shepherd, twenty two
feet, thence west with the North line of Dickerson
and Shepherds ground seventy feet to an alley.
thence North, with the East line of said alley, twenty
two feet, thence East with the North line of said
Lot numbered one, seventy feet to the beginning
with a privilege of the use and enjoyment forever
as a public alley all that part of said Lot numbered
one, beginning at a point on the North line of
said Lot, seventy feet from the North East Corner
of said Lot, thence south across said Lot, sixty six
feet to the south line of said Lot, thence west with
the south line of said Lot, Ten feet. thence North
across the said Lot sixty six feet, to the North
line of said Lot. thence East with the North line
of said Lot ten feet to the beginning. All of which
will more fully appear from the deed herewith
filed marked (A) and made a part of this
petition.

Your petitioner would further state, that said
Harrison Marders, departed this life sometime in June
in the year 1833. leaving his wife Sarah L. Marders
(who has since departed this life) and the following
Children to wit. Harriet I. Marders and James A.
Marders, his heirs at law, and entitled to all his
(the said Marders) right and interest in and to
the aforesaid property, (real), and further that
the said Marders died intestate, and your petitioner
would also state, that the aforesaid Children and
heirs of said Marders deceased, are minors, and that
your said petitioner has been legally appointed, and

made this guardian, but being interested in the
14. premises, prays your Honor, to appoint some person as guardian ad litem, as to the matters in this petition.

Your petitioner therefore prays your Honorable Court to appoint Commissioners, under the statute in such cases made and provided, to make partition of the aforesaid real estate, between your petitioner and the said heirs of said Marders, according to the rights and interests of the parties aforesaid, to be adjudged and ascertained by said Court. And your petitioner will ever pray.

Abijah C. Abernathy
By his attorney Thos L Anderson

Filed December 30th 1833.

Theodore Jones Clerk

and afterwards to wit: on the 17th day of February AD. 1834, it being during the Continuance of the Circuit Court at the February Term 1834, held at the Court house in the town of Palmyra, within and for the said County of Marion before the Honorable Priestly H. McBride Judge of said Court the following among other proceedings were had to wit:

Wm P. Richardson appd guardian ad litem for Defendants.	Abijah C Abernathy vs Harriet J. Marders and James A. Marders heirs of Harrison Marders decd	plaintiff / Defendant	Petition for Partition

This day comes the plaintiff by his attorney and thereupon on his motion the Court appoints William P. Richardson guardian ad litem for the said defendants herein.

And at another day to wit the 26th day of February 1834, during the Continuance of the said term of the Circuit Court aforesaid, held as aforesaid the following among other proceedings were had to wit.

15.

Order of Court appg Commrs & decree of interests

Abijah C. Abernathy pltff
versus
William P. Richardson guardian ad litem for James A Marders and Harriet I. Marders Defdt

Petition for Partition

This day came the plaintiff by his attorney and thereupon comes the defendant, and filed his answer to the petition of the plaintiff herein, therein and thereby admitting the facts set forth in the said petition to be true, whereupon the Court do order adjudge and decree, that the plaintiff owns of right and is entitled to one equal and undivided half of the real estate as set forth in the said petition, and that the said James A. Marders and Harriet I Marders are each entitled to one equal and undivided fourth part of the said real estate, and it is further considered that partition of the said real estate be made amongst the said parties, according to their rights ascertained as aforesaid, and it is also further ordered that Samuel Shepherd, Samuel C. Sloan, Thomas L Pollard and George W. Lane, be and they are hereby appointed Commissioners to make the said partition quality and quantity relatively considered, according to the respective rights and interests of the parties adjudged as aforesaid and that they make their return herein at the next term of this Court.

Which said answer of guardian ad litem for defendants, filed as mentioned in the foregoing order is in the words and figures following to wit.

Answer of Richardson gdn ad litem

Abijah C Abernathy pltff
v
William P. Richardson gdn ad litem for James A. Marders and Harriet I. Marders, infant heirs of Harrison Marders dec

Petition for Partition Feby Term 1834

The Answer of Wm P. Richardson guardian ad

litem, for James A. Marders & Harriet L. Marders infant
16. heirs of Harrison Marders dec.d to the petition of A. C
Abernathy for Partition.

This respondent says, that he believes the facts set forth and stated in said petition are true as this respondent is informed, and hence prays to be dismissed &c.

Wm. P. Richardson g.d.n. &c.

Filed in open Court February 26.th 1834

Theodore Jones Clerk

On a copy of the last mentioned order of the Circuit Court appointing Commissioners, on file among the papers of the cause, appears the following endorsement to wit.

Commissioners Oath. State of Missouri
Marion County, set. Be it remembered that on this 19th day of June in the year 1834, before me S. W. B. Carmichael a Justice of the peace within and for said County of Marion personally came Samuel Shepherd, Thomas I. Pollard and Samuel C. Sloan, and made oath in due form of Law that they would honestly and impartially execute the trust reposed in them as Commissioners, for making partition of the land, tenements and hereditaments as directed by the said Court in the within order

Subscribed and sworn to before me, on the day aforesaid. S. W. B. Carmichael J.P.M.C.

S. Shepherd.
S. C. Sloan
Thos I. Pollard

And afterwards to wit on the 20th day of June 1834. at the June term 1834. of the Circuit Court aforesaid, held as aforesaid, the following among other proceedings were had to wit:

Judgment and order for Sale of Lots

Elijah C. Abernathy	Plaintiff	Petition for Partition
versus		
William P. Richardson guardian ad litem of James Marders and Harriet L. Marders	Defendants	

This day came the parties by their attorneys

and the Commissioners appointed to make partition
17 herein file their report stating that the part of the
Lot of ground, in the said petition mentioned of which
partition is prayed, cannot be divided, nor partition
made thereof, without destroying the value of the said
real estate, and thereupon it is ordered by the Court
by consent of the parties herein, that the said
Commissioners proceed to sell the said real estate at
private sale, for a sum not less than three hundred
dollars, and make report of their proceedings herein,
to this Court, at the next term thereof.

Which said report of Commissioners, filed as
aforesaid, is in the words and figures following to wit:

Report of Comm.rs

In obedience to the above order, appointing us
Commissioners, to make partition of the following real estate
to wit; Being all that part of Lot numbered one in
Block numbered twenty nine, in the said town of
Palmyra, bounded as follows. Beginning at the North
East corner of said Lot numbered one, thence south to
a part of the said Lot numbered one, belonging to Dickerson
& Shepherd, twenty two feet, thence west with the North
line of Dickerson & Shepherd's ground, seventy feet to an
alley, thence North with the East line of said alley,
twenty two feet - thence East with the North line of said
Lot numbered one, seventy feet to the beginning.

We do report that the aforesaid real estate cannot
be divided, nor partition made thereof, in obedience to
said order, without destroying the value of said real
Estate, and that partition, cannot be made thereof
and pray the Court to receive this as our report.
Given under our hands and seals.

S. Shepherd (Seal)
19th June 1834. S. C. Sloan (Seal)
State of Missouri } Tho. D. Pollard (Seal)
County of Marion set. } Be it remembered that on this

20th day of June 1834. before me Clerk of the Circuit Court
18 in and for said County, personally came Samuel Shepherd
and Thomas J. Pollard, both of whom are personally known
to me, to be the persons whose names are subscribed to the
within report, and severally acknowledged the same to be
their act and deed, for the purposes therein mentioned. In
testimony whereof I have hereunto set my hand
and affixed the seal of said Court this day and
(Seal) date aforesaid.

Theodore Jones Clerk

State of Missouri
County of Marion } Be it remembered that on this 20th
day of June 1834, before me Theodore Jones Clerk of the
County Court in and for said County, personally came Samuel
C. Sloan, who is personally known to me to be the person whose
name is subscribed to the within report, and acknowledged
the same, to be his act and deed for the purposes therein
mentioned. In testimony whereof I have hereunto set my
hand, and affixed the seal of said Court
(Seal) this day and date aforesaid.

Theodore Jones Clerk
By his deputy John P. Rutter

Filed in open Court June 20th 1834
Theodore Jones Clerk

And afterwards to wit on the 22nd day of October 1834
during the Circuit Court, continued and held for said
County at the October term thereof, held as aforesaid
the following among other proceedings were had to wit.

Judgment & order on Comm.rs report

Abijah C. Abernathy	plaintiff	Petition for Partition
versus		
William P. Richardson guardian ad litem of James A. Marders and Harriet L. Marders	Defendants	

This day came the parties by their attorneys
and the commissioners appointed to make sale of the real

Estate in the petition herein mentioned, file their
19 report stating that they had sold the same to Henry
Wilcox for the sum of three hundred and fifty dollars
and Executed their Conveyance therefor, accordingly —
which report and sale is approved by the Court
and it is ordered and decreed, that the said sale
shall be valid and effectual, and it is further ordered
by the Court, that the said Commissioners shall pay over
the said three hundred and fifty dollars to the parties
herein, in proportion to their respective rights in the premises
sold, as herein ascertained and decreed by the Court,
deducting from their respective shares the costs and
charges attending the partition herein.

Which said report of the Commissioners filed as
aforesaid, is in the words and figures following to wit.

Report of Comm.rs of sale.

To the Honorable the Judge of the Circuit Court
October Term 1834.

The undersigned Commissioners, appointed by your
Honorable Court to make sale of the part of a Lot or real
Estate, in the above order referred to, submit in obedience
to said order the following report to wit. That they did
on the 23.rd day of June in the year 1834, bargain, sell
and convey to one Henry Wilcox of the County of Macon
and state of Missouri, by deed dated the said 23.rd day of
June 1834, for and in consideration of the sum of three
hundred and fifty dollars to us in hand paid by the
said Wilcox, that part of said Lot one of Block numbered
twenty nine in the Town of Palmyra, which is bounded
as follows, to wit: Beginning at the North East Corner of
said Lot Numbered one, thence South twenty two feet —
to that part of said Lot belonging to Shepherd and Dickinson
thence West with the North line of said Shepherd and
Dickinsons part of said Lot, seventy feet to an alley,
thence North twenty two feet to a stake, thence East seventy
feet to the place of beginning. They therefore offer

20

this as their report of their proceedings in obedience to said order, and pray that it may be received &c. This 20th day of October 1834.

S. Shepherd
S. C. Sloan.
Thomas L. Pollard

And afterwards to wit on the 17th day of February AD. 1835. at the February Term 1835. of the Circuit Court continued and held as aforesaid. The following among other proceedings were had:

Leave of Court to withdraw deed.

Elijah C. Abernathy plaintiff
vs
William P. Richardson guardian ad litem of Harriet I. Marder & James A. Marder, heirs of Harrison Marder dec.d Defendant

Petition for partition

This day comes the plaintiff by his attorney and thereupon on his motion leave is granted him to withdraw the deed from Theodore Jones filed as an exhibit in this suit, which he accordingly does.

Certificate to Trans.

State of Missouri
County of Marion ss. I Thomas E Thompson Clerk of the Circuit Court within and for said County of Marion, Certify that the foregoing papers, contain a full, true and complete transcript of the record and proceedings had in said Circuit Court, in relation to the cause therein mentioned and of all the original papers filed in said cause and properly forming a part of the record thereof, as fully and completely as the same remains of record and on file in my said office. In testimony of which I have hereto set my hand and affixed my official seal. Done at office at Palmyra this 28th June 1852

Seal

Thomas E. Thompson Clerk

Plaintiff Excepts to overruling

To the decision and opinion of the Court ~~in overruling~~ in overruling plaintiffs objections and in permitting said record and proceedings to be read by defendants, plaintiffs by their attorney Excepted

Defendant then read in evidence the following proceedings of the Marion County Court.

Proceedings County Ct.

"November Term 1833. (3rd day) At a County Court Continued and held for Marion County, sitting as a Court of Probate, at the Court house in the town of Palmyra in and for said County on Tuesday the 19th day of November 1833 present James Jamison President, and Matthew Ray Esquire Justices of said County. The following among other proceedings were had to wit:

Appointment A.C. Abernathy gdn.

The Court doth appoint Abijah C. Abernathy guardian to Harriet Jane Marders & James Abernathy Marders minors and orphan Children of Harrison Marders deceased, whereupon the said Abijah C Abernathy, with William P. Richardson Daniel Bradley, Thomas L. Andrews & Theodore Jones his securities entered into and acknowledged their bond in the penalty of twelve thousand dollars with Condition according to law,

And also the following order to wit:

Wednesday 4th May 1836. At a County Court Continued and held at the Court House in the town of Palmyra, within and for Marion County, and sitting as a Court of Probate, this day, present Francis Patterson, John Gash and John Lear Esqs. Justices of said County. The following among other proceedings were had to wit.

Order accepting Abernathy resignation as gdn.

This day Came Abijah C. Abernathy and filed a report as guardian to the infant heirs of Harrison Marders deceased, which is ordered to be recorded, and the said Abernathy having removed from the State of Missouri he is permitted to resign his office of guardian to said heirs.

Report of Abernathy

Which said report filed as above is in the words and figures following, to wit:

To the County Court of Marion County. May Term 1836

Having been appointed guardian of Harriet Marders

and Harrison Marders infant heirs of Harrison Marders
22 deceased, I do hereby report to your honors that the said Harrison Marders (infant) is dead and that I am now residing in the state of Alabama and that I have as yet received no money due to said ward, finding it inconvenient to make settlement in this state, I desire to resign my guardianship, and do hereby resign it

Very Respectfully
A. C. Abernathy

State of Missouri }
County of Marion } In the County Clerks Office May 13. 1836

Recorded in Book B. for the record of guardian accounts at page 36.

W. J. Harrell Clerk

Defendants then offered in evidence a Commissioners deed, to the reading of which the plaintiffs by their counsel objected, but their said objections was overruled, and the defendants, with the permission of the Court read said deed, in the words and figures following to wit: (Book C. page 191.)

Sloan. Shepherd & Pollard Comm^rs deed to H. Wilcox

State of Missouri
County of Marion ss In the Recorders office.

This Indenture made this 23rd day of June in the year of our Lord 1834. between Samuel C. Sloan Samuel Shepherd, and Thomas J. Pollard of the County of Marion, and state of Missouri, as Commissioners to make partition of that part of Lot Numbered one of Block Numbered twenty nine, in the town of Palmyra in said County of Marion, which is bounded as follows to wit. Beginning at the North East Corner of said Lot No 1. thence South twenty two feet to that part of said Lot, belonging to Shepherd and Dickerson thence west with the North line of said Shepherd & Dickerson's part of said Lot seventy feet to an alley, thence North twenty two feet to a street thence East

seventy feet to the place of beginning, between Abijah
23. C. Abernathy, and William P. Richardson as guardian
ad litem of Harrison A Marders and Harriet L.
Marders, infant heirs of Harrison Marders dec'd of the
first part and Henry Wilcox of the County aforesaid
of the other party. Witnesseth that whereas the party
of the first, in obedience to a decree and order of the
Circuit Court of Marion County as Commissioners as
aforesaid, have attempted a partition of the premises
aforesaid, and whereas they have not been able to make
the said partition and have so reported to said Court
at the June term thereof, and whereas the said Court
have ordered and decreed at the last June Term
that the said party of the first part as commissioners
as aforesaid, do proceed to sell and dispose of the
premises aforesaid for any sum not less than three
hundred dollars, and make report to. Now therefore
in obedience to the last mentioned order and decree and
in consideration of the sum of three hundred and fifty
dollars, lawful money of said state to them in hand
paid by the said Wilcox, unto the said party of the
first part as commissioners as aforesaid, the receipt of
which they do hereby acknowledge, they the said party of
the first part, acting as commissioners as aforesaid have
granted, bargained, and sold, and by these presents do give,
grant, bargain, sell and convey unto the said Wilcox
and his heirs and assigns forever, all that part of the lot of
land aforesaid as is bounded within the boundary as above
described, with all and singular the appurtenances thereof and
thereunto belonging, or in any wise appertaining. To have
and to hold the part of the said lot No One, as above
bounded and described and the appurtenances thereof unto
him the said Wilcox, and unto his heirs and assigns
forever, and unto his and their only proper use, benefit
and behoof forever. And the said party of the first

part, acting as Commissioners as aforesaid, and in obedience to the order and decree of said Court made at the June Term thereof 1834, Covenant to and with the said Wilcox that they will as Commissioners as aforesaid warrant and forever defend the title to the aforesaid premises unto him the said Wilcox and unto his heirs and assigns forever, free from the claim or claims of all persons whatsoever. In testimony whereof they the said parties of the first part, acting as Commissioners as aforesaid, have hereunto set their hands and affixed their seals the day and year first above written.

S. Shepherd (Seal)
Th. J. Pollard (Seal)
S. C. Sloan (Seal)

State of Missouri
County of Marion } Be it remembered, that before me Theodore Jones Clerk of the Circuit Court, in and for said County, personally appeared Samuel Shepherd, and Thomas J. Pollard, on the 23rd day of June 1834, and Samuel C. Sloan on the 4th day of July 1834, all of whom are personally known to me to be the persons whose names are subscribed to the foregoing instrument of writing as having Executed the same and severally acknowledged the same to be their act and deed, for the purposes therein mentioned. In testimony whereof I have hereunto set my hand and affixed the seal of said Court this 4th July 1834

(Seal)

Theodore Jones Clerk
By his deputy John P. Rutter

Exceptions of Pltff to Reading

To the decision and opinion of the Court in overruling plaintiffs said objection, and in permitting the defendants to read said deed the plaintiffs by their Counsel Excepted.

Defendants read in evidence the following deposition (by agreement of parties, the Caption and

 certificate to same are here omitted)

Wilcox's deposition

Henry Wilcox of lawful age, being produced sworn and examined, on the part of the defendants, deposeth and saith that soon after the first Cholera which was in 1833 according to my recollection, I purchased a corner lot (number not recollected) in the town of Palmyra Missouri, the same on which I constructed a two story Brick building, since occupied by the above defendants as a Store house. I purchased the said lot after the death of Mr. Marders who had been a partner of Elijah C. Abernathy. I understood that some legal steps had been taken to enable Abernathy not only to sell one half but the entire lot. My best recollection is either that Abernathy had been authorized to convey the part owned by Marders heirs or that the proper Court had appointed a Commissioner to sell the lot. I cannot now recollect, whether I paid $300 or $350, but do recollect and know that I purchased and paid for the entire lot, and that I considered and others expressed their opinion that I had paid a full Compensation. I know that I should not have purchased and improved said lot, had I entertained any doubt, as to my having purchased the whole lot. I suppose the deed or deeds Executed to me for the lot, and recorded as I suppose in the Recorders office, Marion County — Missouri, will present the true history of my purchase of said lot

Henry Wilcox —

Chain of title from Wilcox

The defendants then shewed a regular chain of title from Henry Wilcox to themselves.

Testimony of Clerk as to notice

The plaintiffs then proved by the Clerk that no notice to Harriet I. Marders and James A. Marders or to either of them, appears among the files in the Case

of Abernathy or said Harriet I. and James A. Marders.

Thos L Anderson testimony — The Plaintiff then introduced Thomas L Anderson as a witness, who testified that he was the attorney of Abernathy the Plaintiff in said proceedings for partition, (read in evidence in this case) That he has no remem=brance of any notice having been served on the said Harriet Jane and James A., or either of them, or of the publication of any notice to them of the said Abernathys intention to make application for said partition. That always having entertained the opinion that notice to infant defendants in proceedings for partition was unnecessary, it is his impression no notice was given or published in this cause. Said Anderson further testified, that at the time of said proceedings in partition the said Abernathy and said Harriet Jane & James A were seized of Lots. 1. 2. 3. 4. 5. 6. 7 and 8. in Block 44 in Dickerson addition to Palmyra in like manner as of the property now in Controversy.

The following admission was then made by the defendants, in open Court. to wit:

Admission of Deft. The above defendants admit that between the 1st and the 10th of October AD. 1833. the plaintiff Harriet Jane Hite and her brother James Abernathy Marders, removed from the State of Missouri, and took up their residence, in the state of Kentucky that shortly afterwards the said James Abernathy Marders still being a citizen of the state of Kentucky died without issue, a minor — That said Harriet Jane Ever since her removal has been and still is a resident citizen of the state of Kentucky, that she and the said James S Hite intermarried about the year 1849. she said Harriet then still being a minor under the age of 21 years.

This was all the evidence in the Case.

Instructions asked by plaintiff.

The plaintiffs then asked the Court to instruct the Jury as follows, to wit:

The plaintiffs by their Counsel moved the Court to instruct the Jury.

1st That the record and proceedings for partition in the Case of Abernathy and Harriet Jane and James A Marders read in evidence, are and were insufficient in law to divest the said Harriet Jane and James A. of their title to the premises in question.

2nd If it appear from the evidence that the Judgment in the Case referred to in the first above instruction, was rendered without any notice to the said Harriet Jane and James A Marders, then the said Judgment, and all the proceedings had thereunder, are void and inoperative to pass the title of the said Harriet J. and James A.

3rd That the private sale of the property in Controversy by the Commissioners to Henry Wilcoe was illegal and void as against the said Harriet Jane and James A.

4th That the deed from the Commissioners to Wilcoe for the property in dispute, made and delivered before the report of the sale to the Court was void, and the subsequent approval of the report and sale, did not give validity to said deed to pass the title of the said Harriet Jane and James A.

5th That unless a deed was made by the Commissioners to Wilcoe, after their report of their said sale to the Circuit Court, and after the approval of the sale by the Court, the said sale, and the said proceedings for partition will not operate as a bar against the said Harriet J and James A.

Instructions refused.

To give which instructions the Court refused. To the decision and opinion of the Court in refusing which the plaintiffs by their Counsel excepted.

28. Non Suit

And thereupon the plaintiffs suffered a nonsuit, with the leave of the Court to move to set the same aside.

Motion to set aside nonsuit &c.

The plaintiffs then filed a motion, to set aside the non-suit, and grant them a new trial in the words and figures following to wit.

James I Hite & Harriet Jane Hite, plffs
vs
William H. Thompson & Joseph W Thompson, defts } In the Circuit Ct of Marin Co Aug. T. 1853

The plaintiffs by their attorney, move the Court to set aside the nonsuit, and grant them a new trial, in this cause, for the following reasons, to wit.

1st Because the Court admitted illegal and incompetent evidence, at the instance of the defendants.

2nd Because the Court refused to give legal and proper instructions to the Jury, asked by the plaintiffs.

Lamb & Dryden
attorneys for the plaintiffs

which motion was overruled by the Court, To the decision and opinion of the Court in overruling which, and refusing to set aside the non suit, and grant a new trial, the plaintiffs Excepted.

And they now pray the Court to sign and seal this their Bill of Exceptions, and make the same a part of the record, which is done accordingly

Carty Wells Jud

Filed 16th August 1853

W. T. Thompson Clk

29. State of Mississippi
County of Marion ss

I Thomas E. Thompson Clerk of the Circuit Court within and for the said County of Marion do Certify, that the foregoing papers (numbered to twenty Eight) Contain a full, true, and Complete transcript of the record and proceedings had in said Circuit Court in relation to the Cause therein mentioned, and also of all the original papers filed in said Cause, and properly forming a part of the record thereof, as fully and completely as the same remains of record and on file in my said office.

In testimony whereof I have hereunto set my hand, and affixed my official seal. Done at office at Palmyra this the 12th day of September 1853

Thos. E. Thompson Clk

Statement of the Costs accruing in the above Cause

	Pltffs Costs		Defts Costs		Totals	
William A. Maddox Sheff. Marion County	2	60		30.	2	90
James Sangster Dr. for depositions (pd by Defendant)			2	50	2	50
Thos E. Thompson Clk. Marion Circuit Court	8	30	2	10	10	40
for this transc. Certificate & Seal	9	50			9	50
	20	40	4	90	25	30
Marion County, Jury fee	3	—	-	-	3	00
					$28	30

Test

Thos. E. Thompson Clk

Index to Transcript

Petition filed 18th June 1852. & Copy of Petition page 1
Writ issued " " " 3
Motion for Security for Costs & Continuance August T. 1852 " 4
Defendants file Answer 8th January 1853. Answer " 5
Continuance March Term 1853 " 10
Judgment on Nonsuit August Term " 10
Motion to set aside overruled " 11
Bill of exceptions filed " 11
Bill of exceptions, Marriage of pltffs admitted " 12
Annual value of premises proved " 12
" Transcript Abernathy as heirs of Marders 12.
" Richardson appd guardian ad litem 14.
" Order of Court appointing Commrs & decree of Int. 15.
" Answer of Richardson gdn ad litem 15
" Commrs Oath &c 16
" Judgment and order Sale of Slt 16
" Report of Commrs that partition cannot be made 17
" Judgment & order on Commrs report of Sale 18
" Report of Commrs of sale 19
" Leave of Court to withdraw deed 20
" Certificate to Transcript 20
" Plaintiff excepts to Court overruling objections &c. 20
" Proceedings in County Court 21
" " Appointment Abernathy guardian 21
" Order accepting Abernathys resignation 21
" Report of Abernathy as guardian 21
" Commissioners deed to Wilcox 22
" Exceptions of pltff to overruling objections &c. 24
" Wilcoxs deposition 25
" Testimony of Clerk as to notice 25
" Thomas L. Anderson Testimony 26
" Admissions of defendant 26
" Instructions asked by plaintiff refused. 27
" Nonsuit & Motion to set aside 28
Certificate & Bill of Costs 29

(8) October. T. 1853

James J. Hite & Wife
Appts in Error

vs

Wm. H. & J. W. Thompson
Depts. in Error.

Transcript of Record from
Marion Circuit Court

Writ of Error

Dryden & Lamb for pltff

Anderson. Pratt & Redd for Defs

James J. Hite & Harriet J. Hite } Pltffs
vs
Wm H. & J. W. Thompson defts

Civil action in nature of Ejectmt lately pending in the Marion Circuit Court

To the above defendants —

Gentlemen

you will please take notice that the Record in the above entitled cause has been removed to the Supreme Court by writ of Error returnable to the next term of said Court to be begun and held at the Court House in the city of St Louis Missouri on the 3rd Monday in October A.D. 1853, when and where you can attend if you think proper —

Lamb & Dryden
attys for Pltffs

We accept service of the above notice this 3d Oct 1853

Bruce [illegible]
Attys for
Defts

4

Hite & wife

vs

Wm. H & J.W. Thompson

Notice of writ of Error.

Filed 17th October 1853
W. L. Glanville
Clerk.

James I Hite &
Harriet J Hite } plffs in Error

vs

Wm. H & J. W. Thompson defts in Error

Supreme Court Oct Term 1853

The plffs by their attorney come and say that in the record and proceedings of the Circuit Court there is manifest Error and the plffs assign the following Errors

1st The Court Erred in admitting illegal and incompetent Evidence offered by the defts

2nd The Court Erred in refusing to give legal and proper instructions to the jury, asked by the plffs -

3rd The Court Erred in refusing to set aside the non-suit in the case - all which the plffs are ready to verify &c. wherefore they pray Judgment &c -

Lamb & Dryden
for plffs in Error

4

Hite & wife

vs

W. H. & J. W. Thompson

Assignment of Errors.

Filed 17th October 1853
Wm L. Glanville
Clerk,

Hite & Wife vs Thompsons-

The only questions worthy of consideration in this case, arise upon the evidence offered by the defendants in the Court below- that is the record of the proceedings on the petition for partition, brought by Abernathy against the Heirs of Marvers-

In the opinion of this Court, the record of those proceedings was properly admitted- and the sale ordered by the Court, on that petition for partition is conclusive upon the parties ~~XXXX petition~~ therein.

Under the Statute of this State, concerning Partition, Digest of 1825, the law governing the proceedings in this case: the Circuit Court for any of the purposes of said Partition, had the power and authority to appoint a guardian for any minor, whether such minor was living in or out of this State, and that too, either before or after the commencement of any proceeding by virtue of said Act concerning Partition. Such guardian thus appointed by the Circuit Court, in such proceeding, had the same power as any general guardian- This same Statute of Partition, declares, "that the guardians of all minors and persons of unsound mind appointed according to law, shall be and are hereby authorized on behalf of their respective wards, to do and perform

any matter or thing respecting the division of any lands, tenements or hereditaments as herein directed; which shall be binding on such ward and deemed as valid to every purpose, as if the same had been done by such ward after his disabilities are removed" — Notwithstanding, the 1st section of the said Act, states "that if any of the parties to be notified shall reside out of this State or cannot be found therein, the notice describing the lands &c shall be published for the space of two months in one of the Public Newspapers, printed in this State, which shall be deemed sufficient notice &c — We think the power given to the Courts to appoint a guardian for any minor either residing within or without this State, either before or after the commencement of any proceeding under the Partition Act, when exercised by the Courts, so appointing such guardian, does away with the necessity of any publication of the notice —

The Statute expressly authorises the Courts to appoint the guardian before the commencement of any proceeding to obtain partition; as well as to appoint ~~when~~ after such commencement —

In the proceedings on the petition for partition in this case, the Court appointed the guardian for the minor heirs

of Marders after the commencement. The petitioner Abernathy was himself the General Guardian of these heirs; but for more caution, the Circuit Court appointed an other person Guardian; who appeared and answered the petition. Thus the parties were under the law concerning "partition" properly in Court and the proceedings were afterwards carried on by them. It appears by consent of the parties and the Guardian by law had a full right and power to do any thing that his ward could have done, had all disability been removed) that the sale of the land in question was directed to be at private and not public vendue. It was to be for not less than such a sum, the supposed value of the land. The Commissioners sold at private sale for an amount exceeding the sum specified in the order. A third person purchased. The deed was made by Commissioners and the report of the proceedings of the Commissioners approved.

The Statute did not require the infant defendants to be served with notice, either by publication; or by personal service; before the Circuit Court had authority to appoint a Guardian. This proceeding is

under the Statute of Partition; it is purely statutory; and when the record shews a general compliance substantially with the provisions of the Statute, it is binding and conclusive between the parties thereto.

The various defects pointed out by the plaintiffs to the record of the proceedings in partition are of no weight or force: This Court will not critically and minutely investigate the proceedings of the Courts ordering the sales of real estate, where such have general jurisdiction of such matters, in order to set aside such sales and declare them void. Courts are inclined to uphold judicial sales; and it is very well, that such is their tendency. A contrary course would be ruinous in its consequences. No person could feel safe in purchasing real property, and a sacrifice of it would follow, fatal in effects alike both to creditor & debtor.

In the view then that this Court has taken of the law governing the proceedings under the partition act of 1825, there is no error in the judgment of the lower Court;

Its judgment is accordingly affirmed judge Scott concurring. Judge Gamble not sitting

John F. Ryland

4

Hite & wife

vs

Thompsons

Opinion

Ryland

Filed 15 December 1853
Wm L. Glanville
Clerk.

Hite
vs
Thompsons
" "

By the Record in this case it appears. That Abernathy was the owner of one half & his wards of the other half of the lot now sued for. That he filed a petition for partition of the lot. averring these facts.

That for abundant caution a guardian ad litem was appointed, that an answer was filed by the ~~defe~~ defendant admitting the facts in petition

Partition law. 1825

The court ascertained the rights of the parties, and appointed Commissioners to make partition — February Term 1834 of the Marion Circuit Court.

At the June term Commissioners reported that a division could not be made, without destroying the value of the real estate. The Court ordered with consent of the parties, that the commissioners sell the same at private sale for not less than three hundred dollars — It was sold by the Com^rs for 350.00 & the defendants claim under the Com^rs deed

It is asserted by Defendants

1st That the Court had jurisdiction of the matter. to make partition of the lot, or to order it sold.

2d That the court in the exercise of this jurisdiction, rendered a judgt. & with the consent of the parties, ordered the Comrs. to sell at private sale,

3d That the Comrs. having in obedience to the order of the court, sold the lot & made their deed, and their act being approved by the court, vested the absolute title in the purchaser.

4th The judgment being in full force, cannot be collaterally questioned, but is binding upon all -

The defendants claim under a judicial sale ordered by a court of competent jurisdiction which sale was duly approved & ratified & the title confirmed as full & complete as the court could do it. it further appeared by the Record to the purchaser, that every requisite had been complied with, that the owners were in court, & assenting to all its decrees. Every act of the court must be deemed to be rightfully done

See 3d Partition law 1825, P 611-

In the case of Voorhees Vs Bank of the United States 10th Peters 449, most of the principles above assented, are declared to be law, as to the validity of a sale of land under the judgment of the court of competent jurisdiction

If the judgments of ~~the~~ circuit courts could be declared void collaterally, without any proceeding directly to set them aside. The result would inevitably follow that no man would dare bid at such sales — for fear that some defect in the proceedings or evidence upon which they were based would vitiate the judgment, & render the sale void. Such would be directly against the public policy, which requires that all sales under judgts should be as absolute & certain as under deeds — It is to be presumed that a court having jurisdiction of the matter before them, had in all things complied with the law, before judgment was entered, & that the judgment is final until set aside. That the proceedings evidence, and papers on file are not evidence to show that the court erred —

That the evidence upon which the court acted whether sufficient or insufficient is immaterial, & cannot be inquired into.

The judgt alone, is the thing in question

Pratt & Reed

Attys for Deft in Error

Inkreme Cont

Thompsons
ads
Hite

Brief Defts
in Error

Pruth & Redd

James I. Hite &
Harriet J. Hite } Pltffs

vs

Wm H. & J.W. Thompson defts

Error to the Marion Circuit Court

Harrison Marders and one Abijah C. Abernathy being seized in fee as tenants in common of 22 feet front by 70 feet deep of Lot 1. in Block 29. in the Town of Palmyra Mipouri (defined by metes and bounds in the record) the said Marders about the month of June 1833 died leaving surviving him three Children all infants of tender years on whom his Estate in said premises descended - Two of the Children shortly thereafter died in infancy - Harriet Jane one of the Children and one of the plaintiffs in this suit who intermarried with her Co-pleff in the year 1849 is the sole representative of the interest of her father -

To recover the possession of her interest in said lot the pltffs on the 18th of June 1852 instituted this action in the nature of

Ejectment founded on the title stated, against the defts who in the meantime had got the possession and ousted her -

On the 8th of January 1853 the defts filed their answer admitting the seizen and death of pltffs ancestor, the heirship and marriage of pltffs and their (the defts) own possession - but by way of defence of their possession alledged that by means of a proceeding for partition instituted in the Marion Circuit Court in the year 1833 by said Abernathy against said Harriet Jane and her co-heirs the property in dispute was regularly conveyed and the title vested in one Henry Wilcox under whom the defts claim. -

At the August Term 1853 of the Marion Circuit Court the cause was tried. -

On the trial the pltffs proved the value of the rents and profits of the premises, and closed. -

The defts then offered in Evidence the record of the partition suit under which they claim title, to the reading of which the pltffs objected but their objection being overruled they excepted and the defts read the same.

The grounds of pltffs objection

to said record were
1st. That it did not appear that the said Harriet Jane and James A. Marders were parties to said proceeding or that they had had any notice thereof or that they had in anywise appeared to the same - and that said proceeding was therefore void

2nd That it did not appear that the guardian ad litem appointed to the said Harriet and James was required to give or did give any bond as prescribed by law. -

3rd. That the order to sell directed the property to be sold at private sale - and

4th That it appeared the Commissioners sold privately and made their conveyance to the purchaser, before their report of the sale and before any order to convey. -

The defts then read the record of the Marion County Court, shewing the appointment of Abijah C. Abernathy as general guardian of the said Harriet and James A. on the 19th of Apr 1833 and his resignation in 1836. -

The defts then read the Commr deed for the property in controversy to Wilcox, to which the Pltff objected

but their objection was overruled and they Excepted-

The defts then read the deposition of Henry Wilcox to prove he had paid the purchase money but it is not pretended he paid to Harriet Jane and James A. or to any guardian - in fact the payment of the fund to Abernathy the general guardian is negatived by his report accompanying his resignation - (see said report)

Defts then shewed a regular chain of title to themselves from Wilcox -

The plffs then proved by the Clerk that no notice to Harriet and James A. Marders appeared among the files in said partition suit - They also proved by T. L. Anderson Esq: the atty: of Abernathy in said partition suit, that he had no remembrance of any notice having been given to said Harriet and James and that it was his impression from circumstances by him detailed in his Evidence that no notice was in fact given - they also proved by said atty: that at the time of said partition Abernathy and said heirs of Marders were seized of

Eight other lots in Palmyra in like manner as of the lot in controversy.

It was then admitted by the defts that in the month of October 1833 and ever afterwards said Harriet and James Marders were resident citizens of the State of Kentucky.—

The plaintiff then asked the Court to instruct the jury substantially as follows—

1st That the record and proceedings in said partition suit were void

2nd If it appeared from the evidence that the judgment in the partition case was rendered without notice to said Harriet and James it the same was void—

3rd That the private sale of the property was illegal and void.—

4th That the deed from the Comrs to Wilcox made prior to the report to the Court was void and that the subsequent approval of the report and sale did not give validity to the deed to pass title.—

5th. That unless a deed was made by the Comrs to Wilcox after after their sale and the report of the same to the Court and its approval of the same by the Court the sale and proceedings in partition would not operate as a bar to the pltffs rights — all which instructions were refused by the Court and pltffs excepted —

The pltffs then suffered a non-suit with leave to move to set the same aside —

Pltffs then moved the Court on the usual grounds to set aside the non-suit, but their motion was overruled and they excepted — and now bring their case to this Court by writ of Error. —

The pltffs rely upon the following points and authorities to reverse the judgment of the Circuit Court —

I.

To give the Circuit Court jurisdiction in a partition suit of a party not joining in the petition and residing out of the State, it was necessary by the law in force in 1833, either to publish notice describing the lands to be partitioned, for the space of two months in one of the public newspapers printed in this state, or to serve a copy of the petition and notice on such party. See Rev. Statutes of 1825. p 610.- Section 1. title "Partition"-

Where a statute prescribes the mode of acquiring jurisdiction, that mode must be complied with or the proceeding will be a nullity- Denning vs Corwin 11th Wend. R. 647.- Greenhaus vs Beckenridges heirs 4th Monroe 541.-

2nd "The acts of a Court of record must "be shewn by the record itself; nor "will any presumption of notice "arise where the record is silent."
Peake vs Redd 14th Mo. R. 83.-

The Record of the partition suit under which the defendants claim title does not shew or assume that Mardens heirs were in anywise notified of said proceeding for partition- on the contrary the Evidence of the clerk and of the attorney who procured the partition strongly negatives the conclusion that they had notice-

3.rd If the Judgment in the partition suit was rendered without notice to said Harriet and James A. - then said Judgment and all the proceedings based upon it are mere nullities; and would be so regarded as well in a collateral as in a direct proceeding. -

2.nd Slack Ev: p: 531. title "notice". -
7.th Mo: R: 463. Smith vs Rofs & Strong
9.th Cow: R. 227 Laytham vs Edgarton

The Judgment being a nullity the Circuit Court erred 1.st in permitting it to be read to the jury - and 2.nd in refusing to instruct the jury that it was inoperative to pass the title of the said heirs of Marders. -

II. At common law joint tenants and tenants in common were not compellable to make partition - 5.th Bac. Abr: (Bouvier's Ed of 1852) p. 290. I. 7. title "Joint-tenants". - Much less could the Estate be <u>sold</u> in case partition could not be made. -

Partition between joint-tenants and tenants in common was first allowed by 31. Hen: 8. Ch. 1. but no power to <u>sell</u> was thereby conferred - ib.

The statute then of 1825 making partition compellable and especially so much of it as gives power to sell the fee in case partition cannot be made, is in derogation of the common law and should be construed strictly.- 9th Bac. Abr. I. 10. p 256. title "Statute."—

"It is in general true that if "an affirmative statute, which "is introductive of a new law, "direct a thing to be done in a "certain manner, that a thing "shall not, even although if "there are no negative words, "be done in any other manner"- 9th Bac: Abr. I. p 235.- title "Statute".

Of this character is the law of 1825 relating to "Partition"- see section 4. of the act, p 611. & 12.- 1st It is introductive of a new law in this- that it gives power to sell the fee in a certain contingency- a thing that could not have been done before- 2nd It is affirmative in this- that in case a sale becomes necessary- it directs that the same shall be made to the highest bidder at public vendue at such time and place and upon such conditions as the Court shall direct- and in case there are infant defendants a guardian

shall be appointed who shall be required to give bond and security.

On the principle then of the authority first referred to the Court had no power to divest the said Harriet and James A. of their title to the property in question, except by a compliance with the affirmative directions of the statute. and the sale of the property in this case, without requiring bond and security of the guardian - without the competition of bidders - at private sale, and without the specification of any time or place, was an unwarranted departure from the statute and the sale was therefore void -

In Atkins vs Kinman 20th Wend: R. 249. it is said - "Where certain steps "are authorized by statute in "derogation of the common law, "by which the title of one is to be "divested and transferred to another, "every requisite having the "semblance of benefit to the "former, must be strictly com: "plied with". Davison vs Gill 1st East R. 64.

That bond and security of a guardian - a public rather than a private

sale - at a fixed and definite time and place would be likely to be beneficial to an infant incapable of looking to its own interests needs no argument to prove. -

III. But if it be conceded that the proceedings in partition were in other respects binding, still the deed from the Comrs. to Wilcox is void, because it was made without any order to convey - before the report of the sale to the Court and the approval of the report and confirmation of the sale by the Court -

The 4th section of the act (see R.S. of 1825. p 612) after prescribing the manner of the sale enacts that "the said Comrs. shall make report of their proceedings under such order of sale at the next term after such sale shall be made: and if the said Court shall approve said sale, they shall confirm the same as valid and effectual, and shall order and direct the said Comrs. to execute good and sufficient conveyances in law to the purchaser or purchasers for the premises so sold - which shall operate as an effectual bar in law

(10)

, and in Equity against the
"said Parties (the parties to the
"partition) and all persons
"Claiming under them."

It is only by force of the law
that a Commissioners deed has
any operation at all - to make
it have the operation of a bar
there must be 1st a sale - 2nd a
report to the Court - 3rd the ap=
proval of the report and confirm=
of the sale by the Court - and 4th
the Court must direct - that
is - give Judgment that the
Comrs Execute the Conveyance -
these several steps are the
basis on which the Conveyance
rests and depends for its va=
lidity - they are each and all
necessary prerequisites to the
Conveyance - if one of the
prerequisites may be dispens=
ed with, then may another;
if the order directing the
Commissioners to convey
may be dispensed with and
the deed still operate as a
bar, then the order of sale
itself may likewise be dis=
pensed with - and thus you
may go on wiping out one
safeguard after another until
there will be nothing of the
law left. —

The order of sale was made on the 20th of June 1834 - in the usual form requiring a report at next term - no order to convey - On the 23rd of the same month the Comrs not only sold but <u>Conveyed</u> the property -

Now I apprehend it will not be insisted that this conveyance had any validity on the day of its execution - If it had no validity on that day when and by what means did it become valid? Not by the subsequent report and approval of the report and confirmation of the sale by the Court -

1st Because, although the Court did approve the report and sale, yet it did not approve the Conveyance -

2nd Because the Conveyance before the order to convey was a <u>void</u> act and not voidable merely - If the Comrs had had power to convey but had executed the power defectively there might be some reason in saying the approval of the same would cure the defective execution of the power - but where there is an utter want

of power
the act is void and cannot be cured by the order of the Court.—

IV. If it be said that Abernathy was the general guardian of Harriet & James A Manders during the pendency of the suit for partition, and that his appearance was theirs and bound them.— I reply 1st That at the time he was appointed as such guardian by the Marion County, to wit, on the 15th of Nov 1833.— said children were residing in & citizens of the State of Kentucky and that said County Court had not jurisdiction in making said appointment and that consequently the appointment was void.—

2nd If it be conceded he was their lawful guardian yet he was adversary to them and did not appear for or defend them, but expressly declines to do so. (see his petition)—

The petition from the beginning to the end is the petition of Abijah C. Abernathy. in the singular number. the said Harriet and James A. were not joined in the petition as petitioners and therefore notice became necessary - see 1st Sec: partition law of 1825 - they were treated by both Abernathy and the Court as defts.

Lamb and
John D. S. Dryden
atty for plff in Error

4

James I. Hite & wife
vs }
Wm. H. & J. W. Thompson

Plffs: Brief

authorities referred to –
Rev: Stats of 1825 –
11th Wend: R. 647. –
14 Mo: R 83. –
2 Stark Ev: 531. –
7 Mo: R. 463
9th Cow R. 227. –
5 – Bac Abr: 290 – I. 7.
9th ib – 256. I. 10.
" ib – 235. C.
20. Wend R. 249. –
1. East R. 64.
4 Monroe R. 541. –

487

Hite & wife pffs
is
Thompson deft

This is an action Instituted for the possession of a part of a Lot in the Town of Palmyra

the following State of Facts appear by the record

in 1833 Harrison Marders (the father of the plaintiff Harriett) and A. C. Abernathy were Tenants in Common of the property in Controversy

in June 1833 Marders died Intestate leaving the plaintiff Harriett and a son James H Marders his sole Heirs at Law both of whom were Minors

in November 1833 the County Court of Marion County A. C. Abernathy their Co Tenant & uncle their Guardian who gave Bond & continued to act as Guardian until his resignation in 1836

in Decem 1833 Abernathy filed in the Marion Circuit Court his petition under the statute making his wards Harriett & James A. parties setting out the facts & praying for Partition

the Court thereupon appointed

Wm. P. Richardson Guardian (for the purposes of the suit) who filed his Answer — the court upon petition answer &c rendered its Judgment settling the rights of the parties and adjudging partition & appointing Commissioners to make it

at the June Term 1834 the Commissioners made their report that partition could not be made without Prejudice &c

the Court thereupon the Court (by Consent of all the parties) ordered the Commissioners to sell at private sale for a Sum not less than $300.00 the ascertained value of the property

See Record page 17

The Commissioners acting under the order proceeded to sell and did sell the property at Private sale to H. Wilcox for the sum of $350.00 Received the purchase money & Executed a Deed

(See Report of Commissioners Record page 17)

the Commissioners at the October Term 1834 filed

page 8 th

their report stating the sale the receipt of the purchase money and the making of the Deed the court thereupon rendered its final Judgment approving their proceedings & directing the Commissioners to Distribute the money

See Record page 18 & 19

after the above proceedings were had James A. Nurdes Brother of plaintiff Harriet died Intestate without Issue

Wilcox went into possession & improved the Property and defendants hold by a regular chain of Title under him

See Record page 25

It is insisted on the part of the Defendants

1st that in the proceeding in Partition the action was an Action in Rem that the Court had Jurisdiction of the subject matter and that its Judgment & proceedings can not be treated as void in a collateral proceeding

See

U. States vs Arredondo 6 Peters 729 & 730
Elliot Val vs Piersol Val 1 Peters 340

4 Thompson vs Tolmie 2nd Peters 169
Perkins vs Fairfield 11th Mass 326 & 7
McPherson vs Cunliff & al (& cases
cited) 11th serg & Rawles Rep 427 & 8

2nd that the Court had
Jurisdiction not only of the
Subject matter but also of
the parties
See Brief page 5 & 6

3rd that for any Irregularity
on the part of the Commissioners or for any Error of Law
in the Court the parties had
an ample remedy by motion
to the Court before whom the
proceeding was pending or
by appeal and having
neglected that remedy the
Proceeding is Binding &
Conclusive however Erroneous
See
Voorhees vs the Bank of the
U. States 10th Peters 449

this principle applies to the objection that court erred in directing a private sale and in approving the report of the commissioners &c

as to the second point that the court had jurisdiction of the parties
the manner by which the court acquires its jurisdiction in a Partition case under the Statute of 1825 is by Publication or by the service of notice on a minor defendant (whether resident or non resident) or on his Guardian
See Sect 1 Statute 1825 Act Partition

The Court for the purposes of Partition had the power to appoint a Guardian
see Sect (7)

The General Guardian or the Guardian appointed by the Court was authorized by Statute to do and perform any matter touching partition and his acts

are declared as valid and
Binding on the ward as
if done by herself after
arriving at full age
See sect 7

among the acts which the
Guardian was authorized to
do is the appearing and
answering for his ward which
confers Jurisdiction as fully as
the service of a notice on
him could do

in this case the General Guardian
of Pltff & Abernathy) was before the Court
a party to the proceeding and
out of abundant caution the
Court appointed ~~William~~ P
Richardson guardian for the
purposes of the Action and
he (whether upon or without
the service of notice the
Record is silent) appeared
& answered for Plaintiff
this defendant insists gave
the Court Jurisdiction of the
Plaintiff Harriette and
renders the proceeding conclusive
upon her

Defendant Insists that the record shows that the defendants were in Court assenting to its action and that the record is Conclusive on this Question which is not open to Parol evidence
See order of Sale Record page 17

Defendant submits that the Question of Jurisdiction as to the parties was a Question in fact to be decided by the Court before whom the proceeding was had upon evidence as to the service of notice &c, and that such Court having necessarily passed upon its action is Conclusive in any Collateral proceeding

the policy of the Law requires that a Bona fide purchaser for full value at a Judicial sale under the Circumstances like the present should be protected
the purchaser looks at the record he sees that the Court has Jurisdiction of the subject matter and by the very order of sale he learns that all the parties in

Interest are before the Court
assenting to its action
he buys in good faith
for a full price paid down
in Cash takes his Deed
& Improves his property
if he can be ejected
after the Lapse of 20 years
under what circumstances can
a party purchase at a
Judicial sale be protected
Pratt & Redd
Attys for defts

No 4 Oct T/53
Supreme Court

Fito & wife
vs
Thompson & al

Brief for
defendants
Pratt & Redd
Attys