Thornton, John v. Thornton, Joseph 1858 Washington 424/3
etal

601/6

58/058

27 Mo. 303

John app. (deceased)

Jackson Thornton
John Gennigs/Jennings
Catherine Gennigs/Jennings
John ~~Baunk~~ Brunk
Mary ~~Baunk~~
Mary Thornton
Thomas Hampson
Catherine Hampson
James Thornton
Eliz "
~~Cynthian~~ Cynthia "
Margaret "
Daniel "

minors

Joe resp
in CA

Brunks name was on petition w/out consent, sale set aside

part of real estate
want sale to be ordered
so partition can justly take place

Guardian of minors is unknown

Rich - rev & remand
uphold infants rights
common & upheld by courts for petitioners to unite in such cases

Brunk's objection is not impt

State of Missouri }
Washington County } Be it Remembered
that on the 18th day of December 1853
there was filed in the office of the
Clerk of the Circuit Court of said County
a Petition for Partition which is in the words
and figures following to wit

Petition To the honorable Circuit court of Washington County
your petition John[1] Thornton Jackson[2] Thornton John[3] Gennegs & Catharine his wife
John[4] Brunk and Mary his wife Mary[5] Thornton
Thomas[6] Hampson Catharine his wife and
James[7] Thornton Elizabeth[8] Thornton Cynthia
ann[9] Thornton Margaret[10] Thornton & Daniel
[11] Thornton by their Guardian
the five last named being minors under
twenty one years of age say that they are the
owners in common and in fee with Joseph
Thornton who is absent in California and
who does not joine in this petition of the follow
ing described real estate situate in the County
of Washington State of Missouri (to wit) (the)
West 1/2 of the N E quarter of Section 33 Town 38
Range 4 East 80 acres N E qr of N E qr Section 9 in
Township 37 North of Range 4 East 40 acres
the East 1/2 of the South S E qr Section 33
Township 38 North of Range 4 East E 1/2 of
N E qr Section 33 Township 38 Range 4 East 80.

E½ of S E qr Section 33 Town 38 R 4 E
N E qr of S W qr Section 4 Town 37 R 4 E) N E qr
S E. Sec 5 Town 37 R 4 East West ½ of lot No 1
N W qr Section 4 Town 37 R 4 East that my
claim title to the above described lands as the
heirs and legal representatives of John Thornto
deceased who dose intestate in the County of
Washington aforesaid and that more than
five years has elapsed since letters of admin
istration has been granted on his estate and
all demands against said estate has been
fully paid so that no part of said land
is necessary for the payment of debts of said decd
The interest of the petitioners as well the
said Joseph Thornton in and to the aforesaid
Land as described in this petition is as
followers John Thornton Jackson Thornton
Nancy Bounst Mary Thornton James Thornto
Elizabeth Thornton Cyntha ann Thornton
Margaret Thornton Daniel Thornton
Joseph Thornton Catharine Gemings are each
intitled to one twelfth (12th) part of same and
John Genings as the legal representative of
Jacob Thornton is also entitled to the one
twelfth (12th) part of said Land as subject
to the right of Dower of Catharine Hopison
who was the widow of the said the said
John Thompson decd

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Your petitioner further say that the premises aforesaid are not susceptible of partition or devision among the Several parties in interest with out great predjudice to their interest your petitioners all pray including the said Catharine Widow as aforesaid for an order or decree for a sale of said Land in order that partition and distribution may be made among the Several parties in interest according to their respective rights and as in duty Bound your petitioner will ever pray

Jackson Thornton
John Jennings
Catharine Jennings
John Thornton
Mary Thornton
John Brunk
Nancy Brunk
Thomas Hopson
Catharine Hopson

D C Perryman attorney for Petitioner being duly Sworn makes oath says that the foregoing petition and matters therein Stated he believes to be true

Sworn to before me D C Perryman
Decr 18th 1854
W A Matthews Clk

I concent to act as next friend for the minors named in the within petition 18th Dec 1854

D E Perryman

and afterwards there was an order of publication made in said cause which was duly proved according to Law and afterwards at the April term of Said Court 1855 the following order appears of Record in said cause to wit

Judgement of Partition & order of sale

John Thornton's Heirs } Now at this day come the
For } Petitioners by their attorney and
Partition } proved to the satisfaction

of the Court that the order of publication heretofore made in this cause has been duly published as the law requires and the said petitioners presented their petition verified by affidavid praying for the partition and division of the following real estate to wit the West ½ of the North East ¼ of Section 33 Town 38 Range 4 East containing 80 Acres the North East ¼ of the North East ¼ Section 9 Township 37 North of Range 4 East containing 40 Acres the East ½ of the South East ¼ Section 33 Township 38 North of Range 4 East The East ½ of the North East ¼ Section 33 Town 38 Range 4 East containing 80 Acres the East half of South East ¼ Section 33 Town 38 Range 4 East

The North East ¼ of South West ¼ Section 4
Town 37 Range 4 East the North East ¼ South
East ¼ Section 5 Town 37 Range 4 East
The West half Lot No 1 North West ¼ Section 4
Town 37 Range 4 East It is considered by
the court that partition be had of said
Real estate and the Court appoints Saml
Irwin Jacob Boas and Whitmell Sholar comm
issioners to assign and set off the dower of Cath
arine Hopson who was the widow of the said
Jno Thornton Decd and the court proceeding
to ascertain the interest of the several parties finds
that Jos Thornton John Thornton Jackson Thornton
Nancy Brunk & John Brunk her husband
Mary Thornton James Thornton Elizabeth Thornton
Cynthia ann Thornton Margaret Thornton
Daniel Thornton Catharine Jennings and John
Jennings as the legal Representatives of Jacob
Thornton are each entitled to one twelfth part
of said land after the dower of the sd Catharine
Hopson is set off it is farther ordered that
the sd commissioners make partition &
division among the sd parties according
to their Respective rights an report their
proceedings herein to the next term of this
Court and continued
and afterwards at the October Term 1853
the commissioners filed their Report

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which is as follows to wit

Commissioners Report

To the honorable Circuit Court of Washington County

We the undersigned commissioners appointed to assign and set off the dower of Catharine Hopson who was the Widow of John Thornton decd and also to make partition and division among the several heirs according to their respective rights respectfully report

That in obedience to the said appointment we have proceeded to the lands belonging to the Estate of said John Thornton decd and after viewing the same have assigned and set off as the widows dower the North East ¼ of South West ¼ of Section 4 Township 37 N Range 4 East (upon which the homestead is situated) containing 40 Acres and the West ½ of the North East ¼ of Section 33 Township 38 North of Range 4 East containing 80 acres as marked on the accompanying plat

And your commissioners would farther report that the remaining real Estate of the said John Thornton decd is not susceptible of partition and division among the several heirs without great injury thereto

October 27th 1855

Whitmell Sholar

Samuel Irvin

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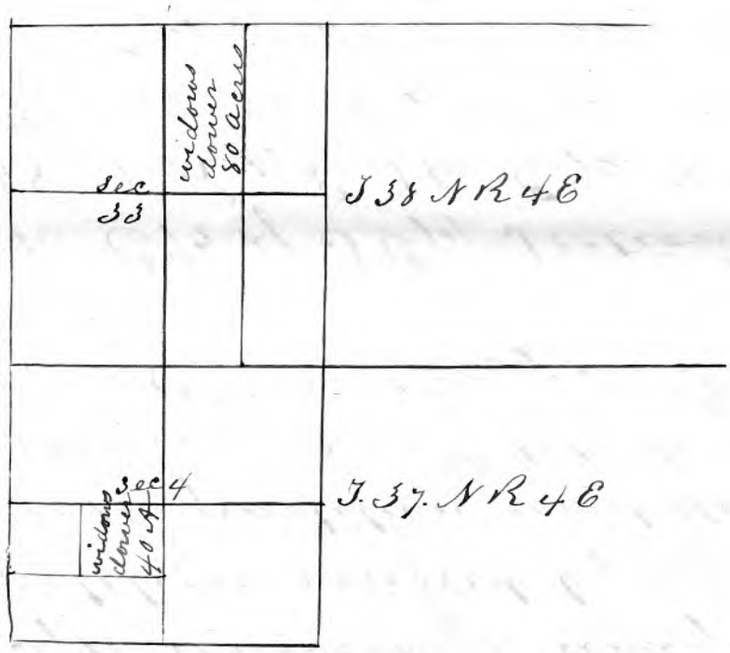

State of Missouri }
Washington County } Be it Remembered that on this 31st day of October A D 1855 personally appeared before the undersigned Clerk of the Circuit Court Whitmal Sholar and Saml Irvin two of the commissioners appointed to set off the widows dower & make partition among the heirs of John Thornton Decd and acknowledged the foregoing report to be their act and deed for the purposes therein mentioned

In testimony whereof I hereto set my hand and affix the seal of said Court at office the date last aforesaid

Wm A Matthews Clerk

order setting off dower

John Thornton et al } Partition
Jas Thornton } Now at this day come
The Commissioners heretofore appointed in this cause to set off the widows dower and make partition among the several heirs and filed their report by which it appears that they have set off as the dower of the said Catharine Hopson the NE¼ SW¼ Sec 4 Town 37 N R 4 E cont 40 acres & W½ NE¼ Sec 33 Town 38 N R 4 E cont 80 acres which report is approved and confirmed by the court & the said commissioners further report that the ballance of the real Estate is not susceptible of division among the Severel heirs

order of sale Renewed

John Thornton et al } Partition
vs } Now at this day
Joseph Thornton } come The plaintiffs
By their attorneys and present their petition verified by affidavit praying for the partition and division of the following Real Estate to wit The NE¼ of the NE¼ Section 9 in Township 37 N R 4 East containing 40 acres the E½ of SE¼ Section 33 Township 38 N R 4 E The E½ NE¼ Section 33 Town 38 R 4 E containing 80 acres The E½ of SE¼ Section 33 Town 38

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R 4 East the N E¼ S E¼ Section 5 Township 37 N R 4 East the West ½ Lot no 1 N W¼ Section 4 Township 37 N R 4 East and it appearing to the court from the report of the commissioners appointed herein that said real estate is not susceptible of division without great predjudice to the interest of the owners it is therefore considered by the Court that partition be had of said real Estate and the Court proceeding to ascertain the interest of the several parties herein finds that John Thornton Jackson Thornton Nancy Brunk May Thornton James Thornton Elizabeth Thornton Cynthia Ann Thornton Margaret Thornton Daniel Thornton Joseph Thornton & Catharine Jennings are each entitled to one twelfth part of said real estate and that John Jennings as the legal representative of Jacob Thornton is also entitled to one twelfth part of said real estate it is further ordered that the Sheriff of Washington County proceed to sell said real Estate to the highest bidder on a credit of twelve months except ten per cent of the purchase money which will be required in hand on the day of sale and the ballance to be secured by bond with approved security and have the amount when collected in court to be paid out to the several parties according to their

Respective Rights and report his pro
ceedings herein to the next term of this
court and continued
and afterwards the Sheriff filed his
report of the sale of said real estate
which is as follows to wit

Sheriff Report of Sale

To the Hon Circuit Court of Washington
County in the State of Missouri

The undersigned Sheriff begs leave to
Submit the following Report of the sale of
the Aforesaid Described Real Estate
hereto attached haveing advertised the
Same as the law directs before I expose
the Same for sale by setting up at least
Six hand bills signed by myself in Six
of the most public places in different
parts of Said County at least Twenty days
before the day of Sale containing a description
of the Real Estate to be sold and when situated
and the time place and terms of Sale and
in persuance of said advertisement I did
on the 29th day of April 1856 Between the hours
of Ten Oclock in the forenoon and five
Oclock in the afternoon of that day agreeable
to the advertisement thereof at the Court
House door in The Town of Potosi during
the april Term of Circuit Court 1856
while Said Court was in Session

Expose to public Sale on the Term mentioned in the within order of Sale as follows to wit 40 acres NE¼ NE¼ Sec 9 Town 37 Range 4 East and Henry McGahan being the highest and best bidder for the Same the Same was Stricken off and Sold to him the said Henry McGahan for the price and sum of Fifty dollars (50$) the said Henry McGahan paid me ten per cent of the purchase money and Took his note payable to me as Sheriff of Washington County Twelve month after date for the balance of the purchase money also 80 acres being the E½ of the South E¼ of Section 33 Town 38 Range 4 East and and Geo Taylor & W C Taylor being the highest best & last bidder for the Same the Same was Stricken off and Sold to them the said Geo Taylor & W C Taylor for the price and Sum of one hundred dollars also 80 Acres being E½ NE¼ Sec 33 Town 38 Range 4 East also 80 acres E½ SE¼ Sec 33 Town 38 Range 4 East 40 Acres NE¼ SE¼ Sec 5 Town 37 Range 4 East also W½ Lot No 1 NW¼ Sec 4 Town 37 Range 4 East and Geo Taylor & W C Taylor being the highest last and best bidder for the Same the Same was Stricken off and Sold to them Geo Taylor & W C Taylor for the price and Sum of one Hundred

and Forty Dollars makeing in the aggregate Two Hundred and Forty dollars The Said Geo Taylor & W C Taylor paid me Ten per cent of the purchase money and I took their note payable to me as Sheriff of Washington County Twelve month after date for the balance of the purchase money

Respectfully
M A Todd Sheriff of
Washington County Mo

and afterwards at the October Term 1856 being the 29th day of Said month John H Brunk one of said parties filed a motion and affidavit praying the Court to set aside said Sale which is as follows to wit

Motion to set aside Sale

Thornlons heirs
vs Partition

John H Brunk one of the parties who are Represented as Petitioners states that his name was signed to the petition without his knowledge consent or approbation that he had no notice whatever that any proceedings were insituted to to Sell the land in the petition mentioned that James Thornton Elizabeth Thornton Cynthia Ann Thornton Margaret Thornton & Daniel Thornton

children of John Thornton deceased who are represented as appearing by guardian in fact had no guardian and yet has none he farther States that the widow Cynthia Thornton now the wife of Thomas Hopson but liveing separate and apart from her husband is willing that her dower which has been set apart shall be sold with the other land so that the value of all will be greatly enhanced

D A. Brunk

Sworn to before me
Oct 29th 1856
W A Matthews Clk

Said John Brunk therefore prays that the Sale may be set aside and after the proper parties are before the Court that the order of Sale may be renewed.

M Frissell atty
for Brunk

and afterwards at the October Term 1857 being the 31st day of Said month the following proceedings were had to wit

John Thornton etal
vs
Jos Thornton

Now at this day come the parties by their attornies and the motion to set aside the Sale in this cause is sustained as to the interest of James Thornton Cynthia Ann Thornton Eliza Thornton Margaret Thornton Daniel Thornton

Mo Sustained in part & over rulled in part

John Brunk and Nancy his wife and the motion overruled as to the balance of the heirs to which Brunk excepts

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W. A. Matthews clk
This Transcript $7,50

The State of Missouri, ss.

The State of Missouri, to the Honorable the Circuit Court in the Ninth Judicial Circuit **in said State—Greeting:**

WHEREAS, In the record and proceedings in a certain cause lately pending in the Circuit Court & held in and for the County of Washington in said State

wherein John Thornton and others were plaintiffs and Joseph Thornton was defendant

in a Civil Action manifest error hath intervened, to the great damage of said ~~Opp~~ plaintiffs as by complaint we are informed.

NOW, 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 St. Louis, in the County of St. Louis, in said State, on the Third Monday in March 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 27th day of January in the year of our Lord one thousand eight hundred and fifty-eight.

Wm S Glanville

CLERK.

Writ $1.50
Postage

State of Missouri }
Washington County } I the undersigned Clerk of the Circuit Court in and for the County aforesaid hereby certify that in obedience to the within writ of error I have made out a full true and complete transcript of the Record and proceedings had in the case of John Thornton and others against Joseph Thornton in the Circuit Court of said County as the same remains of Record and on file in my office which is hereto annexed

In testimony whereof I hereto set my hand and affix the seal of said Court at office this 20th day of February 1858

W. A. Matthews Clerk

Thornton
vs
Thornton
Writ of Error

Filed Jany 29 1858
W. A. Matthews
Clk

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(6)

Oct. Term. 1858

Jno. Thornton et al P.E.
vs
Jos Thornton D.E.

Transcript
Washington Cir Court.

Filed 26th Feby 1858
Wm. S. Glanville
Ck.

Appgt. errors / opts stat. & brief / called & adjourned over till monday on motion /
Submitted by parties on brief / stat for res / brief for res /
Rev. & Remanded 8 Dec. 1858 - B. p. 571 /

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John Thornton & others
Plaintiffs in error
vs
Geo Thornton

This was a petition for the partition of lands in Washington County returnable to the March Term 1855

It purports to have been preferred by John Thornton Jackson Thornton John Jennings & Catharine his wife John Brunk & Mary his wife Mary Thornton Thomas Hampson & Catharine his wife James Thornton Elizabeth Thornton Cynthia Ann Thornton Margaret Thornton & Daniel Thornton the five last being minors

The parties all appear as petitioners It appears by the record that publication was proved as to whom does not appear

D C Perryman the attorney endorsed upon the petition that he consented to act as guardian for the infants

At the succeeding April Term judgment for partition was had and commissioners appointed to set off dower and report whether the land was susceptible of partition in kind They assigned dower and reported that the land was not susceptible of division at the October Term 1855

At this term a sale was ordered and the premises were sold by the sheriff at the April Term 1856. A small portion of the land was bid off by one Grahame

but the greater part was bid off by George Taylor & U C Taylor

At the October Term 1856 John Brunk one whose name appeared as one of the petitioners and whose name was appended thereto as having signed it ~~and in~~ filed a motion to set aside the sale for the reason his name had been signed without his knowledge consent or approbation. That he had no notice whatever that any proceedings had been instituted to sell the land and that the five infants mentioned in the petition had no guardian at the time the petition was filed nor had they any at that time. He prayed that the sale might be set aside

His statement was verified by affidavit. The facts set forth in the motion ~~the~~ ~~court~~ being proved or conceded the court set aside the sale as to the interest of Jas Thornton Cynthia Ann Thornton Eliza Thornton Margaret Thornton Daniel Thornton and John Brunk - Nancy his wife.

This ruling of the court was made at the October Term 1857 and in the mean time Brunk had been appointed guardian of the infants.

Brunk excepted to the ruling of the court. and brought the case to this court by appeal

M Trissell atty for Brunk.

Plaintiff in error insists that a sale is an entire thing, and if void or voidable in part, ~~the~~ it is void or voidable as a whole.

2d The judgment is irregular and void as to the infants & Brunk & wife for the reason they were not in fact parties before the court. As to the infants ~~there~~ there is nothing to show that they were before the court.

The judgment then is void.

A sale under a void judgment is a nullity.

As to nullity of the judgment see

Rangeley vs Webster 11 N Hampshire Rep 298

Hall vs Williams 6 Pickering 247

Richard vs Walton 12 Johnson 434

Holbrook vs Murray 5 Wendell 161

M Tripell atty for Plaintiff in Error

Ino Thornton
et als Plffs in error

vs

Jas Thornton et als
Dfts in error

Plaintiffs state-
ment & Brief

Filed 23d Oct. 1858.
Wm S Glanville Clk

Jno Thornton & others

vs

Jas Thornton

Appeal from Washington Circuit Court.

Appellant comes and says that in the record and proceedings and in the judgment of the court below there is manifest error in this

That this court set aside the sale as to a portion of the parties and refused to set the same aside as to all.

For the above mentioned error and for other errors appearing upon the face of the record Appellant prays that the judgment of the court below may be reversed

M Triplett atty
for Appellant

The said Respondent says there is no error in the record & proceedings of the court below & he prays that the same may be ~~adjudged~~ affirmed

Thos J Johnson
for Respondent

Jno Thornton &
others Plaintiff in
Error
against
Jas Thornton

Appearance
of Errors.

Filed 23d Oct. 1858.
Wm S. Glanville Cl.

John Thornton et al
Agt.
Joseph Thornton.

Appeal from Washington Co.
In the Sup. Court
Oct. T. 1858

Brief by Thos. C Johnson
Atty for the Respondents

The circuit court could not set aside the sale on a mere motion except for causes originating after the judgement such as the misconduct of the Sheriff or unlawful combination of purchasers.

And even then a purchaser would not be affected unless he was cognesant of the official misconduct ~~and~~ participated in the combination.
Neal v. Stone 20 Mo Rep 294

It is equally certain the purchasers are not affected by the motion to set aside the sale unless they had notice, and the record in this case does not show any.
Coleman v. McCenulty 16 Mo Rep 173.

It is contended that the want of authority in the Attorney to use Brunk's name and the infancy of five of the petitioners cannot be

urged against the sale, but if tenable at all must be urged against the judgement. These causes if true might make the judgement erroneous so that it would be reversed by an appellate tribunal. and yet the sale under an erroneous judgement might be good & vest a perfect title in the purchaser. The court therefore should have overruled the motion to set aside the sale for the reasons stated even if it believed these reasons true. See case just cited

But we conclude that the judgement in partition is good and valid and ~~neither~~ ought not to be disturbed. and

1st The suggestion of Brunk by affidavit that his name was signed to the petition without his consent, knowledge or approbation is not sufficient to authorize the court to disturb the judgement. It does not appear that any proof was offered or required. Brunk is husband of one of the heirs and he does not even swear that his wife did not authorize the suit nor that he did not delegate any one else to have the suit but the employ an attorney. When a man's name is to the record as a party plaintiff the presumption is that it was put there by his authority. The affidavit is mere ground to induce the court to make the enquiry (and

I take it to be clear that if no evidence is offered by the affiant, his motion falls as a matter of course.

2nd The main ground however on which the Court seems to have acted was that five of the infants having appeared by Gdn as plaintiffs instead of defendants, the judgement is void and therefore the sale was void. The case of Johnson v. Noble 24 Mo. Rep 252 I think is extensively misunderstood by the courts and the profession. The syllabus is that "an infant cannot be a party plaintiff in a statutory proceeding for partition". On looking into the partition law, I find two modes of having partition by the courts. One is by petition with notice to be served twenty days before court. The other is by petition & summons in the ordinary way. Where a suit is brot in the ordinary way and infants are made defendants, the summons is personally served on the infants and unless they come in & have a Gdn appointed to defend their interests, the plaintiff is authorized to have a Gdn appointed for them. The summons cannot be served upon the Gdn of an infant. But the court will see that where a partition suit is brot in the first mode mentioned, the notice must be served upon the Gdn of the infants, and not upon the infants

themselves; and it is at least doubtful whether this mode could ever be used where the infants had no Gdns. I cannot see how any fair reading of the 6th section can make any other sense. The section says that the notice shall be served "on all parties interested in the lands or tenements who shall not have joined in the petition and on the Guardians of such as are minors or of unsound mind." Now the section does not say in so many words that infants cannot join in the petition. But it would seem that as the infant is a party interested in the land he might join. It does not say that the petition ~~may~~ shall be served upon the guardians of all the infants but upon the Guardians of such as shall not have joined in the petition: In other words this section prescribes a new mode of suing infants — a mode unknown to the practice either at law or chancery which always required personal service upon the infant himself and authorized the notice to be served upon the Gdn.: And this might often prove a great convenience. There might be a dozen children who were very much scattered and yet they might have one Gdn.—: one notice served on him would bring the whole twelve legally before the Court, and this I think is all that ~~[illegible]~~ the section meant.

In the case of Johnson & Noble the suit was brought in the mode first mentioned that is by petition & notice. A demurrer was filed & the case was decided upon that demurrer. Even if the court is not satisfied that the construction put upon the act in the case just mentioned, is wrong, I think it would be sound policy to hold that the decision did not apply to suits brot in the ordinary way and that even where suit was commenced by petition and notice, that unless the objection of the infancy of one or more of the plaintiffs was taken by demurrer it would be considered as waived. It is a clear case that infants may be plaintiffs where a suit is brot under the "Practice in civil cases." And the exception even if it arises on the 6th section extends no further than to suits brot by petition & notice.

It is a matter of great importance that the court should review & explain the case of Johnson & Noble. In one half of the Estates in St Louis County, infants have always been made parties plaintiff. The decision as generally understood throws a cloud over titles that have always been considered good and I have known large purchases which had been fully agreed on, mentirely defeated so soon as the conveyancer, in examining.

the title discovered that in some proceeding of partition an infant was a party plaintiff. I myself had four thousand dollars sent me for investment in city property: I found the property — spent some time in examining it — then examined the title found that it had been originally a part of the Pleasant tract — that in the Partition of the tract some infants were plaintiffs and under the decision of the case of Johnson v. Noble, I declined the purchase. The owner offered me security in double the amount, but as an agent I declined to make the investment. This court has no idea of the extent of the influence of that decision, based as I humbly think upon a wrong interpretation of the act, until they ~~could~~ shall make enquiry among the members of the bar generally.

It will be seen that the legislature that met after the decision in the case of Johnson v. Noble as far as they could endeavored to remedy the difficulties of that decision (See Acts of 1857 Adjourned Session p. 52. And the Legislature in 1856-7 passed ~~law~~ an act amendatory of the Partition law declaring that it should be lawful for the Guardian Curator of a minor to file a petition for the partition & division of real estate and the Court is authorized to order a sale where the

partition cannot be made to advantage. Acts of 1856–7. p 83. The case of Johnson v. Noble was decided at the Jany term 1857 and this act was approved Feb. 27. 1857.

In the above case, the court say that injury might result by permitting infants to sue as plaintiffs in partition. I think it can be shown that infants would sustain injury by not having this right. I put this case. A & B are tenants in common of a Block of ground in this city – B dies leaving his children all infants and who have nothing for support or education but their interest in this ground. If they could get it divided it could be sold to good advantage. But A wants to buy the share of B's heirs and he would not consent to bring a suit. The only course for B's heirs is to go into the ~~County or~~ Probate Court and get an order for the sale of the undivided interest of B's infant heirs. The sale is made & the property does not bring its full value & A buys at much less than its value: for we all know that an undivided interest in property never brings full value. Men always know that an undivided interest brings delay, uncertainty & a lawsuit.

Again. In the case put, if B's heirs could get partition, they might get a ground rent for their portion which would

support them handsomely; But as they cannot sue and the other part owner will not — the Gdn has to apply to the Probate Court and it authorizes him to lease the undivided half (and) tell me how much their interests would be sacrificed if A was opposed to leasing and ~~what~~ what is commonly called an "ugly customer". The truth is the rights (and) welfare of infants require that they should have the right to sue as well as to be sued They should have the right to be plaintiffs in partition as well as in other cases. There is no reason for limiting their right in partition that would not as well apply in all other cases.

My this decision has had a very extensive influence (and) as I humbly & candidly think it is wrong, I most respectfully ask the Court to review it. or at any rate to confine it to the case of petition & notice and that the objection even there must be taken by demurrer. And for a further confirmation of my views I respectfully refer you to Secs 49, 51, 52, & 53 of the law of Partition.

When this motion was decided at the Oct Term 1857, the Act of the Legislature authorizing infants to sue as plaintiffs was in

full force. Acts of '56-7 p. 82.

With all due respect then I contend that Brunk by the suggestion in his affidavit, no proof being offered made no case for setting aside the sale so far as he was concerned and that this suit being brot under the Practice in Civil Cases, infants could appear by Gdn as plaintiffs and therefore the Court below should have overruled the motion entirely and not have interfered either with the judgement or the sale.

If the petitioners or the defendant had been the purchasers perhaps they might be affected by the motion without notice because being in Court for one purpose they would be bound to take notice of all the steps taken in the cause. But here the purchasers are strangers. The record does not show any notice. They have bot at a fair sale, paid part of the purchase money, executed the note for the residue, received a certificate of purchase — they have an equitable interest which is vendible & can be sold under execution. Can the Court sustain a motion & divest vested rights without notice. I contend that strangers being purchasers, that the sale can only be set aside for the reasons alleged by bringing a regular suit and making the original parties and the

purchasers defendants. A regular issue could be made up and tried. If these causes constituted mere error, the judgement would be set aside but the sale would be good ~~against~~ in favor of, the present purchasers. If the judgement was void - then the sale is void also. But such important questions are not decided upon a motion laying as reasons matters that go exclusively to the judgement.

If the Court shall be of opinion that the motion should have been considered, the next question is whether the Circuit Court erred in setting aside the sale only so far as Brunk & the five infants were concerned leaving the sale valid as to the other six heirs. Now there is no pretence that the sale was not fair and for a fair price. The purchaser alone can complain that he bought the whole tract and is not to be put off with half. If the six adult heirs and the purchaser does not complain Brunk and the infants cannot be heard. The purchasers are willing if they cannot hold the whole tract as they purchased, ~~they are willing~~ to retain the interests of the six heirs who were properly parties to the suit. Those purchasers will be tenants in common with Brunk & the infants. They are willing to hold in common with them & encounter the trouble (and)

expense of a partition if one is desired. And as to Brent & the infants even if the whole sale should be set aside, they will have to join in a partition suit either as plaintiffs or defendants and a suit with the purchasers at the sale who would hold $\frac{6}{12}$ of the land would be no more troublesome or expensive than with the original part owners. I therefore ask the Supreme Court in the name of the purchasers to let the action of the circuit Court stand, if it shall be of opinion that it could act at all upon the motion.

A sale in Partition is not like a judgment – an entirety – Part of the land may be sett off and part sold. Some of the heirs may get land & some money. See 29. 2 Vol. Stat of Mo p 1115 Besides under our Practice Act "judgments may be given for or against one or more of several plaintiffs and for against one or more of several defendants. 2 Vol. Stat of Mo. Sec. 2 p 1278.

Thos. Johnson
Atty for deft in error

No. 54

In the Supreme Court

Oct. T. 1858

John Thornton et al

v. } Error to Washington

Joseph Thornton

Brief & argument by

Thos. C. Johnson

atty for deft. in error.

Filed 6 Nov. 1858.

W. T. Glanville Cl.

Johnson

John Thornton et al — plaintiff
v — Partition
Joseph Thornton — defendant

Appeal from Washington County
In the Supreme Court at St Louis
Oct. Term 1858

Statement of the case by Thos C. Johnson
Atty for Respondent.

This was a suit brought under the Practice in Civil Cases. The petitioners are John Thornton, Jackson Thornton, John Jennings & Catharine his wife, John Brent and Mary his wife, Mary Thornton, Thomas Hopson & Catharine his wife and James Thornton, Elizabeth Thornton, Cynthia Ann Thornton, Margaret Thornton & Daniel Thornton by their Guardian the five last being minors. They state that they are owners in fee & in common with Joseph Thornton who is absent in California and who does not join in the petition of certain lands which are described containing in all 480 acres. The petitioners claim title as heirs of John Thornton dec? who died intestate and they say that more than five years have elapsed since the date of letters and that all debts have been paid. They say that Catharine Hopson wife of Thomas Hopson is entitled to dower — that each petitioner with the defendant is entitled to 1/12 of the land after dower assigned — they say that partition cannot be made without prejudice; the widow joining in the statement and they pray for a sale.

D. E. Perryman endorses on the petition his consent to act as next friend of the minors.

There was an order of publication agt the defendant which was duly proved to the court.

At the April Term 1855 Commissioners were appointed to set off the dower of Catharine Hopson and make partition and the Court ascertained the respective rights of the heirs.

At the Oct T. 1855 the Commissioners reported that they had set off the dower to Catharine Hopson that the balance of the land was not susceptible of division without great prejudice. The Court then confirms the report of the Commrs as to the widow's dower and made an order of sale as to the residue of the lands prescribing terms of sale to be 12 months credit the purchaser to pay 10 per cent in cash.

At the April Term 1856 the Shff reported his sale showing that McGahan had purchased some of the lands and Geo. Wm C. Taylor had purchased other portions — that they had paid 10 per cent upon the purchases and executed their notes payable in 12 mos as prescribed by the order.

At the Oct. T. 1856 John H. Brent one of the parties filed his motion & affidavit in which he stated that his name was signed to the petition without his knowledge consent or approbation — that he had no notice whatever that any proceeding were instituted to sell the land in the petition mentioned — that James, Elizabeth, Cynthia Ann, Margaret and Daniel Thornton who are represented as appearing by Edw in fact had no Edw and yet has none. He further states that the widow Cynthia Thornton now the wife of Thos Hopson but living separate and apart from her husband is willing that her dower which has been set apart shall be sold with the other land

At the Oct. T 1857 the court set aside the sale as to the interest of the five minors and Brook & wife and the motion was overruled as to the balance of the heirs. to which Brook excepts.

There is no evidence in the record, that notice was served upon any person a party to the record or upon McGahan & Geo Wm C. Taylor the purchasers of the land.

The case brot here by writ of error

Thos L. Johnson
Atty for Respondents

No. 54
In the Supr Court
Oct. T. 1858

John Thornton et al
agt.
Joseph Thornton.

Writ of error to Washington Co

Statement of the case
by Thos. C. Johnson
Atty for Respondent

Filed 6 Nov. 1858.
W S Glanville
Clk.

No 54. Thornton et al. vs Thornton

This was a proceeding for partition of real estate between the widow and representatives of John Thornton deceased, commenced in Decr. 1854. The petition begins "To the Hon. Circuit Court of Washington County. Your petitioners John Thornton Jackson Thornton John Jennings & Catherine his wife, John Brunk and Mary his wife, Mary Thornton Thomas Hopson Catherine Hopson his wife, and James Thornton Elizabeth Thornton, Cynthia Thornton Margaret Thornton and Daniel Thornton by their Guardian — — the five last named being minors under twenty one years of age — say that they are the owners in common and infee with Joseph Thornton who is absent in California and does not join in the petition" &c. but the name of the guardian of the infants is no where stated and it does not appear that they had any. The petition purports to be signed by the adult parties, but it is not signed by an attorney nor by the infants, nor by their guardian nor any other person for them. The affidavit is made by Mr. Perry-man as attorney for the petitioners, and there is endorsed on the petition a memorandum signed by him that he consented to act as next friend for the minors, but it no where appears that his appointment as such was ever requested, or that he was ever appointed by any Court or officer. The record states that an order of publication which had been previously made was duly proved, and at the April term of the Court 1855, which we suppose was the first term after the petition had been filed, there was a judgment ascertaining the rights of the parties and appointing Commissioners. At the following October Term the commissioners made a report which resulted in an order of sale, and at the April Term 1856 the land was sold by the Sheriff pursuant to the order for one tenth of the purchase money in hand and the residue on a credit of twelve months. And at the ensuing term in October Brunk, one of the parties whose name appears to the petition, filed his motion supported by his affidavit, to set aside the sale made at

the previous term, because his name had been signed to the petition without his knowledge or consent, and he had no notice of the proceedings, and also because the infants, who are represented as appearing by guardian had no guardian in fact. The Court set aside the sale as to the interest of Bryant and his wife and the minors and overruled the motion as to the other parties.

It is not shown that the purchasers had notice of the motion to set aside the sale, but notice to them was not necessary, as the irregularities in the proceedings were such, as affected the validity of the judgment, and as their title would have been insecure, perhaps even in a collateral proceeding, it was to their interest, before the purchase money was paid, that the sale as to all the parties should be set aside.

We think it is no objection that the infants were joined as plaintiffs, but they could not appear by attorney, and they did not appear by guardian or next friend. The petition is not signed by them, or by any person in any capacity whatever for them, and they only appear as parties to the proceedings, by the caption to the petition. Infants can only sue by guardian or next friend and of these infants had no guardian. one could have been appointed for them before the commencement of the suit under the ample provision of the statute for that purpose, (Rev. Stat. 1845. Part. act. Sec 34) and the endorsement by Mr. Perryman on the petition that he consented to act as their next friend amounted to nothing.

It was also irregular to try the case at the first term of the court at which the defendant was bound to appear without his consent, and as he never appeared. It cannot be presumed that he consented. (Smith vs Davis decided at the present term).

It is stated in the ~~[illegible]~~ brief of the counsel ~~[illegible]~~ for the purchasers, that the main ground on which the court acted in setting aside the sale, was that the infants could not unite as plaintiffs in a proceeding for partition, and his

argument is chiefly directed to that view of the subject. If that was the only objection the judgment and sale under it would be valid.

The provisions of the partition law of 1845, that affect this question, have been in force for more than thirty years, and it is believed that the practice has generally prevailed according to circumstances in several of the circuits, not only to join infants by their guardians as petitioners but to unite as petitioners all the parties in interest. Many of the oldest and most experienced members of the bar have pursued this course, and have given a practical and cotemporaneous construction to the statute, so that the practice has worked itself into the records and judgments of the courts, which have become the muniments of title, on which repose the security of the homes and fortunes of a large portion of the community. We recognize the propriety of ~~giving~~ ~~sustaining the~~ maintaining the stability of the decisions of this Court, especially where rights have been acquired on the faith of them, and ~~[illegible]~~ though we do not concur in the reasoning or conclusion of the opinion in the case of Johnson and Nobley (24 Mo. 252) we would not be inclined to disturb it, if we did not believe that it has shaken confidence in the titles to a vast amount of property, acquired in good faith, and under proceedings conducted in the usual way.

The first section of the partition act of 1845, provides that when any lands, tenements or hereditaments shall be held in joint tenancy, tenancy in common or coparcenary, it shall be lawful for any one or more of the parties interested therein, to present a petition to the circuit court of the proper county; and though the fifth section, directs, that a copy of the petition and notice, shall be served on all parties interested who shall not have joined in the petition, and on the guardian

of such as are minors, or of unsound mind. It does not say that infants by their guardians, may not be joined. Indeed it would require language not susceptible of a doubtful construction to warrant such a conclusion. Since by the general law infants in all other civil cases can sue as plaintiffs by their guardian or next friend. The scope of the act shows it was intended, that infants should be represented by their guardians, either as plaintiffs or as defendants, hence the 54th section provides, that it shall be lawful for the Circuit Court, for any of the purposes of the act, before or after any proceeding by virtue thereof, to appoint a guardian for any minor, and such guardian for all the purposes of the act shall have the same power as any general guardian. It seems that proceedings may be commenced against an infant before the appointment of a guardian, hence the power to appoint after proceeding, but if an infant can only occupy the position of a defendant, the power to appoint a guardian before proceeding, is entirely useless, and full effect can only be given to the statute by the construction that the power to appoint before hand is to enable an infant to join in the petition. The statute suggests the natural order of events; if the infant is to be a plaintiff he must appear by guardian, and if he has none, one must be appointed before he begins the suit, but if he is a defendant, a guardian may be appointed after the proceeding is begun.

The policy is very obvious that requires the guardian to have notice that proceedings are on foot, which affects the land of his ward, but how is it material whether he occupies the position on the record as plaintiff or as defendant?. A guardian appointed under the authority of the 54th section has the same power as a general guardian, and the 53rd section declares that guardians of minors appointed according

to law, are authorised in behalf of their respective wards, to do and perform any matter or thing respecting the division of any land, as directed by the act, which shall be binding on the ward, and deemed valid to every purpose, as if the same had been done by such ward after his disabilities are removed. This comprehensive language without the aid of any other section, seems sufficient to clothe the guardian with power to initiate proceedings for partition on behalf of his ward.

It is the duty of every minister of the law, to watch with jealous care the rights of infants, but human wisdom has not yet succeeded in providing a shield, that will protect the weak[illegible] and innocent against the strong and the crafty, and it is not perceived how infants are more exposed to robbery or breach[illegible] when they are plaintiffs, than when the[illegible] defendants.

If an infant has no o[illegible]n means of support but an undivided interest in real estate, it is often of great importance to him, to have the power of forcing a partition and of securing the separate enjoyment of his share, for whilst it is held in common with an obstinate cotenant it would not be productive in yielding a ground rent or in any other manner, and to deny him the right to have partition would drive him to want, or to an application to the county Court for the sale of his interest, and in that way produce the very result dictated by the cupidity of his tenant in common.

The doctrine of Johnson and Noble can do no good in preventing for the future any of the mischief apprehended in the opinion, because the General Assembly in the next month after the opinion was delivered, not impressed with the sense of danger entertained by the Court in allowing infants to be plaintiffs in partition, enacted that

"When any minor is interested in any real estate in which there are other parties holding undivided interests, it shall be lawful for the guardian or Curator of such minor to file a petition for the division and partition of such real estate". (Sess. Acts. 1856-7. p 83). We think that this legislation was unnecessary, and that it is not to be inferred from it, that the right it expressly gives did not exist before, but the object was to put at rest any doubt on the subject.

The view we have taken of this ~~subject~~ case renders it unnecessary to notice the objection of Brunk that the appearance for him was without his authority.

The judgment will be reversed and the Cause remanded. The circuit court will see that the instalment of the purchase money is refunded, and will set aside the sale and judgment, with leave to the ~~and dismiss~~ plaintiffs to amend their petition ~~the petition~~. All the judges concur in the judgment here given but Judge Scott ~~adheres~~ adheres to the opinion in Johnson's Noble

Jno. Richardson

No 54

Thornton et al

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Thornton

Opinion of the Court

Rev remarks

Filed 8 Decbr. 1858.
W. S. Glanville Ck.

Richardson