heard on June 26th. The grounds of the motion for a new trial are error of the court in the admission of the evidence and instruction to the jury.

In the course of the trial the plaintiff offered in evidence a transcript of the proceedings in the state court in the case of *Ladd* v. *Barrell et ux.*, to which the defendants objected for various reasons, only one of which is pressed on the motion for new trial. In this transcript there are two final decrees—the one given on March 19th and the other the 22d; and while the latter is pleaded in the replications as an estoppel, the execution appears to refer by date to the former. And, first, the rights of the parties to this conveyance or mortgage of January 17, 1877, and the writing of March 22, 1877, were directly involved and determined in the suit of *Ladd* v. *Barrell et ux.*, in the state court, and are now *res judicata*. The defendants had their day in that court, and by their answer substantially admitted the claim of the plaintiff therein, and cannot now be heard to allege aught to the contrary of the determination based thereon.

But counsel for the defendants contend that as there is nothing in the transcript from which it expressly appears that the state court intended to vacate or modify the first decree, the second one is a nullity, and does not support the estoppel set up in the replications; while, if such decree is valid, then the sale and conveyance to Ladd in pursuance of the first decree is void and of no effect.

But if the order of this argument is reversed, as it well may be, the conclusion reached supports the allegation of title or ownership in the plaintiff, and disproves the plea of title in the defendants, whatever may be the effect on the estoppel. Admit, if you please, that the second decree is void, as being made after the court had exhausted its power and jurisdiction over the subject, then the first decree is valid, and the sale and conveyance to Ladd in pursuance of it is valid. But we do not see any reason to think this second decree invalid. It was given at the same term as the first, and while the proceeding was still in the breast of the court, and subject, in this respect, to its control and power. True, it would have been more orderly and convenient, in making the second decree, to have referred to the first one, and stated in what particular the latter was intended to modify, supplement, or supersede the former. But such a statement was not absolutely necessary. On the contrary, it is to be presumed that a second decree made within the term is intended to modify a former one just so far as it differs from it, either in breadth or length. Any other conclusion, unless under circumstances plainly indicating mistake or misapprehension, would be contrary to reason and common sense. Nor is the objection that the sale appears to have been made on an execution issued on a decree of March 19th, instead of the 22d, valid in this action. The process upon which this sale was made consists of a copy of the decree, followed by a writ in the nature of a *venditione exponas*, issued and signed by the clerk,

and may be considered an execution, within the purview of section 403, Code Civil Proc., providing for the enforcement of a decree in a suit in equity.

It is necessary, of course, that this execution should have a decree to support it, and that it should appear from the former what decree is intended to be enforced by it. But where sufficient appears on the face of the execution to connect it with the decree,—to indicate with reasonable certainty that the one is intended to enforce the other,—courts usually disregard mere variances in the names of the parties, the date, or the amount of the judgment or the decree. *Bissell* v. *Kip*, 5 Johns. 100; *Jackson* v. *Walker*, 4 Wend. 462; *Jackson* v. *Anderson*, Id. 478; *Brown* v. *Betts*, 13 Wend. 33; Freeman, Ex. § 43.

The material question in this case is, did the execution issue on this decree? and if, upon all the facts, it appears evident to the court that it did, the sale upon it ought to be regarded, so far, as valid.

Now, there is no doubt that this execution was issued upon and to enforce the final decree in the court in *Ladd* v. *Barrell et ux.* The marks of identity are the names of the court and the parties, the origin and amount of the indebtedness to satisfy which the property was directed to be sold, the subject-matter of the sale,—in short, every material circumstance contained in such decree except the date, and that all the authorities agree is amendable, and should be disregarded in this action. But, in legal effect, there is no difference in these two decrees of March 19th and 22d, and the execution may have been well issued on either of them. The actual difference between them consists simply in the fact that in the first decree the premises are described by parcels, seven in number, and in the second decree by said parcels and as a whole,—the one being as exactly the equivalent of the other as 2 and 2 are of 4.

The entry of two final decrees in the case, and the difference between them, evidently arose in this way: At the request of counsel for the Barrells, the court sent the case to a referee to examine and report upon the propriety of a scheme of offering the property for sale in parcels, so as to enhance the proceeds thereof. The referee reported a scheme, dividing the property into seven parcels, and the court directed it to be sold accordingly, upon the condition that, after it had been offered in parcels, if any would bid more for it as a whole, it should be knocked down to him, and the result was that it was sold to Mr. Ladd as a whole. But in the first decree the property was only described and bounded by the metes and bounds of these seven parcels, and the second decree was evidently entered out of an abundance of caution, so as to describe the premises by metes and bounds as a whole, as well as in parcels, and as a convenience for future use and direction, in case it should be so offered and sold.

The motion for a new trial is denied.

WILLIAMS *v.* BUFFALO GERMAN INS. CO.

(Circuit Court, D. Kentucky. February 19, 1883.)

1. FIRE INSURANCE—SOLE OWNERSHIP OF PROPERTY—OUTSTANDING INTEREST —BOND FOR CONVEYANCE.
   A policy of fire insurance described the property insured as "his two-story dwelling-house," etc., and it appeared that he had purchased the fee and taken a bond for a conveyance, but that the vendor had only a life estate in the property, with a remainder in six-sevenths thereof; that a suit had been instituted to perfect the title, to which the insured was a party; and that there was an outstanding purchase note, which he owned at the time of the insurance and the loss. *Held*, that the outstanding note, and the fact that the insured only held under a title bond, was not material to the risk, and that the fact of the outstanding seventh interest or remainder did not prevent him from being "the sole and unconditional owner," within the meaning of the policy.
2. SAME—MATERIALITY OF DEFECT IN TITLE—QUESTION FOR JURY.
   In such a case the question whether the defect in the title or interest of the insured was material to the risk should have been submitted to the jury, and the peremptory instruction to the jury to find for him was error.

At Law. Motion for new trial.

Yeiser & Moss, for plaintiff.

Gilbert & Reed, for defendant.

BARR, J. I gave the instructions for plaintiff on the trial of this case, and I am glad a motion for a new trial has been entered, as it gives an opportunity for the examination of the authorities, and a more mature consideration of the questions upon which the case turned. The material facts are not in controversy, and, if I remember them, they are briefly these: No previous written application for insurance was made by plaintiff, and at the time he insured he was in the possession of the property insured, claiming the absolute ownership thereof. He had purchased a fee-simple title, and held a title bond for a conveyance with covenant of warranty. There was an outstanding purchase note, which he owed at the time of the insurance and at the time of the loss. At this time there was a defect in the title of the vendor, Mrs. Perkins. She had a life estate in the property, and had obtained from her children their interest, except one of them, who held an undivided one-seventh in the remainder after the death of Mrs. Perkins. There was pending in the McCracken circuit court a chancery suit at the time this insurance was obtained. Williams was a party to this litigation, and its object was to perfect Mrs. Perkins' title so that he (Williams) might obtain from her a perfect title. The policy describes the property insured as plaintiff's: "His two-story frame dwelling-house and ell." There was no other statement as to title and ownership; and as the policy provides that the assured, by the acceptance of this policy, warrants that he, among other things, has not "omitted to state to the company any information material to the risk," the learned counsel insists that the omission to state to the company the outstanding vendor's note, and that he only held