Jacobus by the defendant, inclosed in the letter of April 8, 1893, the regular custom of the company in admitting persons to membership or reinstating lapsed members under new medical examination being to allow the applicant to be examined by his local physician, and to refer the application and the examination so made to the company's medical director, whose duty it was to examine such application and medical examination, and pass upon the same, before a new certificate of membership could issue, or a lapsed certificate of membership be reinstated. Whether Jacobus knew this custom, there is no evidence, except the inferences, if any, to be drawn from his several memberships in and communications and correspondence with the company as in the statement of facts set forth. In this instance the examination was forwarded from the home office of the company in Chicago to its only medical director, Dr. J. L. White, at his office in Bloomington, "in accordance with such custom, very soon after it was received by the defendant"; but, by reason of its "not being accompanied by an application," it was not examined or passed upon by White, and the company had not issued any new policy or certificate of membership to Jacobus before his death.

No further communication passed between the parties until May 3, 1893, when the company, acting by its general manager, mailed to Jacobus the following letter:

"Chicago, May 3, 1893.

"O. I. Jacobus, Esq., Edgerton, Wis.—Dear Sir: Your new examination received at this office, but too late to accept same and reinstate your policy, as same has been canceled off the company's books. However, we will issue you a new policy, which is the best we can now do for you, for the sum of what one assessment would amount to, or $6.00. I inclose herewith a blank application for that purpose, which you may fill out carefully on the members' side, sign same, and forward it to this office. Your examination of recent date will answer if attended to immediately. In the meantime we hold your remittance of $18.00 at this office, subject to your order or the above. With best wishes, I am,

"Yours, respectfully, W. H. Gray, Genl. Mgr."

This letter, with the inclosed printed blank application, Jacobus received the next day, and, "having duly filled up and signed" the application, inclosed it in the following letter, which on May 5, 1893, he mailed to the company:

"Edgerton, Wis., May 5th, 1893.

"W. H. Gray, Genl. Manager, 1303 Masonic Temple, Chicago—Dear Sir: Inclosed please find application filled out as per your letter of the 3rd inst.; if anything left from remittance, place it to my credit.

"Yours, Resp., O. I. Jacobus."

The letter and application were received by the company the next day. In the printed part of the application, preceding the signature of the applicant, is the following expression: "I further understand and agree that no liability whatever is assumed by the company under any circumstances, until after the policy or membership hereby applied for has actually been issued at the home office by the officers of the company." The answers of Jacobus to questions in the application and the certificate of health at the end thereof were truthful and correct so far as he knew. For several months prior thereto he was in apparent good health, without premonitions of disease, and continued so until the evening of May 6, 1893, when he became ill, and on the 10th died, after an unsuccessful attempt by surgery to relieve him of a stricture of the intestines. He was at his death under 56 years of age.

Clark Varnum, for appellant.

John S. Cooper (S. M. Millard and C. P. Abbey, of counsel), for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

If it were true, as contended, that the policy upon the life of Jacobus had lapsed for every purpose, and that, when he died, he was simply an applicant for insurance, under a new policy, as if he had never before been a member of the association, it would seem to follow necessarily that the decree of the circuit court was wrong, though it is urged, on the other hand, that, under the circumstances, the last application should be deemed to have been made in order to obtain reinstatement under the lapsed policy, and not to procure the execution of a new one, and that on that theory the provision in the printed part against liability before actual issue of the policy would be inapplicable and without significance. That question it is not necessary to decide. It is not true, as asserted, that, under the lapsed policy, "there were no contractual relations between the company and Jacobus." At the end of 10 days from March 3d, when notice of the assessment was mailed, the policy ceased to be effective as a contract of insurance; but for 20 days longer there was an absolute right to procure reinstatement "by the payment of all arrearages," and even after that time, under the resolution of the board of directors, the same privilege was allowed to one who had "furnished a certificate of good health signed by himself, and also a medical examination" satisfactory to the company. Jacobus complied fully with all these requirements. He sent the requisite sum of money and a certificate of good health and a medical examination, to neither of which was there made at the time, nor has there been suggested since, any objection. By the letter of April 3d he was told that his policy had been canceled, and that he would "now be required to furnish a new medical examination satisfactory to the company, and sign the certificate of good health as per inclosed forms." He was not told, and could not properly have been told, that any new application was necessary, and the failure of the company's medical director to pass on the examination because of its "not being accompanied by an application," and the statement in the letter of May 3d that the examination had been received too late to be accepted as a basis of reinstatement, because the policy had been canceled, were without justification, and therefore without effect to hinder the reinstatement of the policy. The money to pay arrearages was already in the possession of the company, and it does not appear that there was unreasonable delay in forwarding the required certificate of health and medical examination. The certificate and the examination in form and substance were unobjectionable, and if the medical director of the company had examined the latter, as it was his duty to do, he must have approved it. He could not have rejected it upon capricious grounds. Miesell v. Insurance Co., 76 N. Y. 115. It follows that, upon the receipt by the company of the certificate and the examination, the right of reinstatement was complete, and that, in the contemplation of equity, the lapsed policy was revived, as effectually as if a certificate of reinstatement had been issued or an entry of like purport made upon the books of the company.

It is said that Jacobus acquiesced in and agreed to the statement that his former policy had been canceled, and that his only

method of again becoming insured was by means of a new application and a new policy. If the new policy had been issued and accepted, there would doubtless have been a waiver of all rights under the old one, but, the negotiations for new insurance having failed, there is in the situation no element of estoppel which could have barred the assertion by Jacobus, or can now bar the assertion by his widow, that the lapsed policy had been revived. In no respect is the company in a worse position on account of the new application.

The objection is made that the decree proceeds on the theory of a new application for a new policy, and not of a renewal or reinstatement of the lapsed one; but that is not clearly so, and the objection does not go to the merits. In substance, the decree is right, and therefore is affirmed.

MORSE v. SOUTH et al.

(Circuit Court, D. Kentucky. April 15, 1897.)

1. EQUITY PLEADING—MULTIFARIOUSNESS—WAIVER OF OBJECTIONS.
When the objection of multifariousness is not taken to a bill which from its nature is open to that objection, and the cause is submitted upon one of its aspects alone, the other being apparently abandoned, it may be heard and decided as submitted.

2. FEDERAL JURISDICTION—CITIZENSHIP—QUIETING TITLE.
Where one tenant in common brings a suit against his co-tenant and others for partition of the land held in common, and to quiet the title as against claims of the defendants other than his co-tenant, but does not press it as a bill for partition, it may be sustained as a bill to quiet the title of the complainant's undivided interest, notwithstanding there is a want of diverse citizenship between him and the defendant, his co-tenant.

3. QUIETING TITLE—GENERAL EQUITY RULE—KENTUCKY STATUTE.
The Kentucky statute (section 2361, Ky. St.) giving a right of action to restrain trespasses on land of which the plaintiff is not in possession, has not changed the general equity rule that a suit to quiet title cannot be maintained except by one who has both the legal title and possession.

4. TAXATION—LISTING AND ASSESSMENT.
Complainant, claiming lands in Kentucky under a sale for taxes, showed by the records that the lands were assessed to one F. from 1792 to 1810; that they were sold in 1811 by the register of the land office for the taxes of 1810, and, not having been redeemed, were conveyed in 1815 to complainant's predecessor in title. It was shown, however, by the defendant, that prior to March 1, 1796, F. had conveyed to others all his interest in the lands by deeds duly executed, which were duly recorded in the clerk's office of the court of appeals on April 11, 1796. *Held*, that there was no legal assessment of the lands to F. for 1810, since he had then ceased to have any interest therein; that the fact that, prior to the requirement of the listing of nonresidents' lands with the state auditor by the act in force March 1, 1796, the lands had been properly assessed to F. by the county tax commissioners, did not justify a continued assessment thereof to him after the recording of his deeds; and, accordingly, that no title passed under the sale and conveyance for the taxes of 1810.

5. SAME—SALE OF LANDS STRUCK OFF TO STATE.
One who claims land under a sale made by an agent of the auditor of Kentucky, pursuant to the act of 1840, as amended March 10, 1843, authorizing the selling of lands stricken off to the commonwealth for taxes, must show not only proper public notice of the sale, but that the agent, before

making it, made diligent search and inquiry for the former owner, his heirs, or persons in adverse possession, and, upon such search and inquiry, failed to find them.

Wm. H. Holt and W. J. Hendrick, for complainant.
Thos. H. Hines, Jas. B. Marcum, and Wm. B. Dixon, for defendants.

BARR, District Judge. This suit in equity is brought against the heirs of J. W. South, and also against William Strong, H. C. Duff, and the heirs of Alfred Marcum. The purpose of the suit, according to the allegations of the bill, is to have a partition between the complainant and the heirs of J. W. South of certain lands alleged to be the unsold portion of the land patented to Thomas Franklin by the state of Virginia, on January 26, 1787, and which are alleged to be jointly owned by the complainant and said heirs. The bill, as against the defendants Strong, Duff, and the heirs of Alfred Marcum, is for the purpose of quieting complainant's title to certain lands therein described, which are alleged to be a part of the unsold land patented to Thomas Franklin in 1787. The bill likewise seeks an injunction to prevent the defendants Strong, Duff, and the heirs of Alfred Marcum from disturbing complainant's possession or cutting timber on the lands described in the bill, and to recover damages for certain alleged cuttings of saw logs. There is no description of unsold lands in the Franklin patent, except those which are described and alleged to be claimed by the defendants Strong, Duff, and the heirs of Alfred Marcum. The bill is perhaps multifarious, in that it is a bill quia timet, and also for a partition of the unsold lands in the Franklin patent, as between the complainant and the defendants J. W. South's heirs; but the objection of multifariousness has not been taken, and the case as prepared and now submitted is upon its aspect as a suit quia timet. J. W. South's heirs have not answered the bill, nor have they been subpœnaed, and it may be assumed that, as the case has been submitted generally, that part of the bill which seeks a partition has been abandoned. The heirs of J. W. South are alleged to be tenants in common with the complainant, each being a half owner in the lands in controversy. In the present controversy the heirs of South and the complainant have a common interest, as they are alleged to be joint owners with the complainant of the land the title of which is sought to be quieted, and said heirs have the same citizenship as that of Strong, Duff, and the other defendants. But, as complainant could bring an action of ejectment for his undivided interest in the lands in controversy, he can, we think, maintain a bill to quiet the title for his undivided interest in this land, notwithstanding the want of diverse citizenship between South's heirs and the other defendants.

The bill alleges that complainant and the heirs of J. W. South are tenants in common, and have a fee-simple title in the land in controversy, and the actual possession thereof. Complainant claims, and seeks to sustain by testimony, a derivative title, as follows: (1) A patent issued by the commonwealth of Virginia, January 26, 1787, which granted to Thomas Franklin 116,656 acres of land lying between the North and Middle Forks of the Kentucky river, in what

was then the county of Fayette. This land is described in said patent as commencing at the junction of said rivers, and running with the meanders thereof many miles, and thence, by a line which is described therein, from one river to the other. (2) That Thomas Franklin's interest in said patented lands was sold by M. Hardin, as the register of the state of Kentucky, to John Wilson, in the year 1811, for taxes due by said Franklin on said land for the year 1810; that said land thus sold was not redeemed, and was conveyed by John M. Foster, then register of the land office of the state of Kentucky, to said Wilson, the purchaser thereof, by deed dated December 6, 1815. (3) That the interest of John Wilson in the lands in the Franklin patent which remained unsold in the county of Breathitt was sold for taxes for the years 1836–45, on September 21, 1846, by John Hargis, agent of the then auditor of Kentucky, for taxes due and unpaid by said Wilson, and that at said sale J. W. South and Daniel Breck, Jr., became the purchasers thereof; and subsequently the land thus purchased was conveyed to said South and Breck, by the auditor of the state, in equal shares, and that said deed was recorded in said Breathitt county clerk's office, and subsequently destroyed by fire. (4) That the interest of Daniel Breck in said land was sold and conveyed to N. C. Morse, Sr., who is the father of the complainant, by deed dated September 13, 1865. (5) That the interest of N. C. Morse, Sr., in said land, was sold in a chancery proceeding brought in the Kenton circuit court, state of Kentucky, and purchased by one Charles Evans, and, the sale being thereafter confirmed, was conveyed to him by a special commissioner of said court; that said Evans subsequently sold his interest in said land, which was five-twelfths, to the complainant, which deed was subsequently lost, and the complainant, not being a party to the proceeding in the Kenton circuit court, inherited one-twelfth part of his father's (N. C. Morse's) interest in said land, and thus is a half owner of the interest in said land in controversy. (6) The deed of the auditor to South and Breck having been destroyed by fire, a suit was instituted in the Breathitt circuit court to have a conveyance substituted by the auditor for the one destroyed; and in that proceeding the court ordered a special commissioner (Little) to make the substituted deed of conveyance. This deed is dated 25th October, 1882, and is made to the heirs of J. W. South, he having previously died, and to the complainant and Charles Evans. The bill alleges that the complainant and the defendants, the South heirs, have had possession of the land in controversy, by themselves and those under whom they claim, for a number of years before the filing of the suit, and had, at the time of filing of the suit, the actual possession, and that said defendants Strong, Marcum's heirs, and Duff claim to be the owners of the land which is described in the bill; that they have been trespassing upon said lands, by cutting logs therefrom; and that they are without any legal or equitable right whatever; and the value of the logs thus taken is alleged.

The defendants William Strong and the Marcum heirs and Duff have answered, and have put in issue all of the material allegations of the bill, except that the commonwealth of Virginia patented to

Thomas Franklin the 116,656 acres, as described in the bill. They deny that any title passed either to John Wilson by the conveyance made by J. M. Foster, as register, on December 6, 1815, or that any title passed by the sale of the land for taxes alleged to be due by John Wilson, and the conveyance thereof made by the auditor's agent in 1846; and they deny that the deed of October 25, 1882, made by Special Commissioner Little, conveyed any title to complainant or to Evans, or to the defendants the South heirs, or that said sale was legally made. They deny that taxes were ever regularly or legally assessed against either Thomas Franklin or John Wilson; and they deny that the complainant has any fee-simple or any title in said lands in controversy or any part thereof; and they deny that said complainant and said South heirs have had actual possession of the land, or any part thereof, at the time of the institution of the suit, or at any other time. Defendants allege that they are the owners of the land in controversy, claiming the same by continuous, notorious, and adverse possession, by well-marked boundaries, for a time more than sufficient to give them title. The defendants William Strong and the heirs of Alfred Marcum claim ownership by adverse possession by a marked boundary, by William Strong, commencing in 1845, and again by William Strong and Alfred Marcum's heirs, commencing in 1872. They claim adverse and notorious possession, commencing in 1872, with boundaries which are described in two surveys made on the 10th of December, 1872, one for 190 acres, and the other for 250 acres, and for which patents from the commonwealth of Kentucky were immediately applied and issued after a contest with J. W. South by caveat proceedings,—the 190-acre tract by patent dated March 26, 1891, issued to the heirs of Alfred Marcum, and the other dated October 1, 1891, issued to the heirs of Alfred Marcum and William Strong; and it is claimed that the patent for the 190 acres was applied for in the name of William Strong as well as the Marcum heirs, but that Strong's name was omitted from said patent by oversight. These boundaries are substantially the boundaries which are set out in the bill of complaint. The defendant Duff sets up a similar claim, and files patents issued from the commonwealth of Kentucky.

It will be seen that the issues thus made go to the title and the possession of the complainant, and also the claim of ownership by the defendants, based upon adverse possession. The complainant cannot maintain his action to remove a cloud upon his title and quiet possession on general principles of equity, without clear proof of both possession and the legal title in himself.

It is said in Frost v. Spitley, 121 U. S. 556, 7 Sup. Ct. 1131:

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. Alexander v. Pendleton, 8 Cranch, 462; Peirsoll v. Elliott, 6 Pet. 95; Orton v. Smith, 18 How. 263; Crews v. Burcham, 1 Black, 352; Ward v. Chamberlain, 2 Black, 430. As observed by Justice Grier, in Orton v Smith: 'Those only

who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on title.' 18 How. 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment. U. S. v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991; Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631."

This is also the rule in Kentucky. In Packard v. Valley Co., 28 S. W. 779, the court say:

"The general rule and one well settled in this state is that in order to maintain an action quia timet the plaintiff must have both title and actual possession."

See Armitage v. Wickliffe, 12 B. Mon. 494; Campbell v. Disney, 93 Ky. 41, 18 S. W. 1027.

It is true this general equity practice will be modified in some respects so as to conform to a state statute when that statute enlarges the equitable rights, and allows the holder of a perfect legal title to be quieted in his title, although he may not have at the time actual possession of the land to which he has a perfect legal title. Thus, in Holland v. Challen, 110 U. S. 16, 3 Sup. Ct. 495, the supreme court sustain a bill quia timet where the complainant had a perfect legal title, but did not have the actual possession. This was a suit in the state of Nebraska, where there was a statute authorizing such a proceeding without actual possession. See, also, Clark v. Smith, 13 Pet. 195.

The state of Kentucky has legislated upon this subject, but has not, we think, changed the equity rule as herein indicated. The Kentucky legislature enacted March 9, 1854, thus:

"That hereafter it shall and may be lawful for any person having both the legal title and possession of lands to institute and prosecute by petition in equity in the circuit court of the county where the lands or some part thereof may lie against any other person setting up a claim thereto, and if the plaintiff shall be able to establish and does establish his title to said lands, the defendant shall be by the court ordered and decreed to release his claim thereto, and to pay the plaintiff his costs."

And on the 10th of March, 1854, the following:

"That the owner of any land in this state may maintain the appropriate action to recover damages for any trespass or injury committed thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Approved March 10, 1854 (Sess. Acts 1853–54, pp. 149, 167).

The first of these acts was not repealed by the General Statutes of Kentucky, and is still, as we understand, the law of the state. Kincaid v. McGowan, 88 Ky. 91, 4 S. W. 802. But the act of March 10, 1854, was repealed by the General Statutes, which covered the same subject-matter. See Hillman v. Hurley, 82 Ky. 629. After the decision of the court of appeals in Hillman v. Hurley, the legislature re-enacted the act of March 10, 1854, in substance as follows:

"The owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespasses or other injuries thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Act 1888 (Ky. St. § 2361).

The right of action given by the act of 1888 to "prevent or restrain any trespasses or other injuries thereto or thereon" should, we think, be construed to give an equitable remedy by injunction to prevent or restrain such trespasses or injuries, but only in aid of common-law actions, and not as an independent equitable jurisdiction, under which the question of title to real estate or the right of possession should be tried.

The next inquiry, then, is as to complainant's title. The complainant, to sustain his title under the tax sale to John Wilson, has read an authenticated copy of the certificate signed by Mark Hardin, register of the land office of Kentucky, dated November 5, 1811, and also a certificate of the auditor of the state of Kentucky, George Madison, dated December 5, 1815. These certificates show that Hardin, as register, sold the tract of land described as Thomas Franklin's 116,656 acres, third rate, lying in the county of Clark, and on the Kentucky river, being entered, surveyed, and patented to Thomas Franklin for taxes due thereon for the year 1810 and costs, and that John Wilson became the purchaser thereof at the sum of $146.07, which was the amount of the taxes for that year and the costs. The certificate of Madison shows that the tract thus sold had not been redeemed. The complainant also read a conveyance from John M. Foster, then register of the land office of the state of Kentucky, dated December 6, 1815, conveying to the said John Wilson the whole of the tract which had been patented by Thomas Franklin. In this deed of conveyance the certificates of Hardin, as register, and Madison, as auditor, are copied, and made a part thereof. He also files as exhibit what purports to be a copy from the books of the auditor's office for the assessment of this land for the years 1792 to 1810, both inclusive. This copy is filed in the deposition of L. C. Norman, who was then auditor of the state of Kentucky, and the only evidence in regard to this assessment is the transcript, and what Norman says. He is asked: "If the records of your office show any assessments of the lands, or any of them covered by it [the patent], please state all you know on that subject." Answer: "I have a copy of the patent named before me. The records show an assessment to Thomas Franklin from 1792 to 1888, to Thomas Franklin first, and afterwards to others, who held the lands or part of them. I file attested copy of the record, showing all about it, marked 'L. C. N.' I have no personal knowledge of the facts. I speak only of what the records show." This record, thus filed, purports to be an assessment of this Thomas Franklin patent, or parts thereof, from 1792 to 1888. The assessment is first to Thomas Franklin from 1792 to 1810, both inclusive, and from 1811 to 1838, both inclusive, to John Wilson. These exhibits are all of the evidence offered to sustain the complainant's title under the sale for taxes for the year 1810.

In the case of Allen v. Robinson, 3 Bibb, 328, the Kentucky court of appeals have said, in regard to such sales and conveyances:

"The sale and conveyance of the register, when legally made, passes to the purchaser the legal title; and, in a contest involving the validity of such a sale, the register's deed (as he is an officer of the government, presumed by law to

do his duty) shall be taken as prima facie evidence that the requisitions of the law have been fulfilled; but as the register derives his authority to sell lands for the nonpayment of taxes from the law, to make his deed effectual to pass the title, that authority must be strictly pursued, and, although the deed will prima facie prove the correct exercise of the authority, it can be repelled by proof that the law was not regularly pursued in making the sale."

See, also, Hickman v. Skinner, 3 T. B. Mon. 211.

The defendants deny that this property, thus sold, belonged to Thomas Franklin, or that it was legally assessed in 1810, and insist that the alleged sale is void, and passes no title. To sustain this contention, they have read copies of a deed from Thomas Franklin to Abraham Fowler, dated August 12, 1793, and a deed from said Franklin to Benjamin Walker, dated December 13, 1795, and certain conveyances to the parties to whom the land was subsequently conveyed. The deed from Thomas Franklin to Abraham Fowler conveys all of Franklin's interest in the tract of land patented to him by the commonwealth of Virginia, on the 26th of January, 1787, and in the same deed another tract of land containing 108,344 acres, but excepting and reserving out of said tracts of land 30,000 acres which is undivided. The deed itself does not indicate what proportion of the 30,000 acres should come out of the 116,656 acres, and what should be taken out of the 108,344 acre tract; but this is not material, as, subsequently, whatever reservations were made were conveyed to another party. Franklin, in the conveyance to Benjamin Walker, conveyed the 30,000 acres, which was reserved in the deed to Abraham Fowler. He describes it in said conveyance as the undivided rights and shares of Samuel Osgood, Maria Osgood, and Daniel Bowen in the lands granted to him, the said Thomas Franklin, by the state of Virginia, in trust for them and others. The deed to Abraham Fowler was acknowledged before the mayor of the city of New York, August 2, 1794, and again acknowledged before Edward Shipping, a justice of the supreme court of Pennsylvania, March 14, 1796. And the deed to Benjamin Walker was acknowledged by Franklin before Edward Shipping, a justice of the supreme court of Pennsylvania, January 11, 1796. Both of these deeds were put to record in the clerk's office of the court of appeals of Kentucky on April 11, 1796. The defendants also read authenticated copies of conveyances from Abraham Fowler and wife to Theodosius Fowler, dated February 6, 1795, conveying an undivided 54,150 acres of land in the Thomas Franklin patent of 116,656 acres. This deed was properly acknowledged in the city of New York by the grantor, and put to record in the clerk's office of the Kentucky court of appeals on April 11, 1796. And a conveyance by Benjamin Walker and wife to Richard Harrison and Joshua Ogden Hoffman, dated March 7, 1796, conveying the 30,000 acres of land conveyed to said Walker by Thomas Franklin. This land thus conveyed is described as being the undivided rights and shares late of Samuel Osgood, Maria Osgood, and Daniel Bowne (Bowen), in the land granted to Thomas Franklin, of Philadelphia, in trust for them and others, and by him conveyed to said Benjamin Walker, by indenture dated 13th of December, 1795. This deed was legally acknowledged in the city of New York, March 9, 1796, and recorded

in the clerk's office of the court of appeals April 11, 1796. And also a copy of another conveyance by Benjamin Fowler and wife to Richard Harrison and Joshua Ogden Hoffman, March 1, 1795, conveying an undivided interest in the Franklin patent of 116,656 acres. This deed was acknowledged in the city of New York March 21, 1795, and put to record in the clerk's office of the court of appeals of Kentucky, April 11, 1796. And another conveyance by Theodosius Fowler to Richard Harrison and Joshua Ogden Hoffman, dated January 8, 1796, conveying an interest in the said Thomas Franklin patent. This deed was acknowledged in New York City, March 8, 1796, and recorded in the clerk's office of the court of appeals of Kentucky, April 11, 1796. And another conveyance from Richard Harrison and Joshua Ogden Hoffman to Effenham Embree, dated October 11, 1813, in which they conveyed to said Embree the undivided 30,000 acres conveyed to them by Benjamin Walker on March 7, 1796, in the Franklin patent. This deed was properly acknowledged in the city of New York, October 11, 1813, and recorded in the clerk's office of the general court of Kentucky, July 8, 1814.

It will be seen from these deeds that all of the right, title, and interest of Thomas Franklin had been conveyed to other parties, and these deeds duly and legally acknowledged,—one on August 2, 1794, and again the same deed reacknowledged March 14, 1796; and the other deed duly and legally acknowledged January 10, 1796, and both of them recorded in the clerk's office of the court of appeals of Kentucky on the 11th of April, 1796, which recording gave constructive notice of the conveyances. It follows that there was no legal assessment of the land patented to Thomas Franklin as his after the conveyance thereof was made by him to others, and the said conveyances legally recorded in the state of Kentucky. A legal assessment is indispensable to a proper levying of tax. It is said by Mr. Cooley: "The necessity of an assessment is undoubted; it is the first step, and is the foundation of all that follows." See Cooley, Tax'n, 259. In Parker v. Overman, 18 How. 142, the supreme court says: "A legal assessment is the foundation of the authority to sell; and, if this objection be sustained, it is fatal to the [tax] deed." In that case there was a fatal objection to the authority of the officer making the assessment. See, also, Pillow v. Roberts, 13 How. 475.

It is insisted, however, on the part of the complainant, that the assessment once properly made of this patented land against Thomas Franklin continued, notwithstanding he conveyed his entire right, title, and interest therein. This contention necessitates a brief review of the then tax law of Kentucky. Under the first act of the state of Kentucky, after it became a state, all lands were listed and classified by tax commissioners, who were appointed in each county for that purpose, and the tax itself was collected by the sheriff, and there was no distinction as to assessments between lands owned by residents and nonresidents. Act approved June 26, 1792 (1 Litt. Laws, 63). By an act of Kentucky approved December 19, 1795 (1 Litt. Laws, 321), which became effective March 1, 1796, it is provided for the first time that all nonresidents shall enter their lands

with the state auditor, under the same rules and regulations as in case of residents. It is also provided that these taxes shall be paid to the treasurer of the state, instead of to the sheriff, and, if the taxes are not paid by the nonresidents, the sheriff of the county where the lands lie shall sell the land in the same manner and under the same regulations as residents' lands are sold for taxes. It is provided in this law that the auditor shall keep a book for the purpose of receiving and entering the lands of nonresidents for taxation, and that the taxpayers shall enter their lands for taxation therein; but there is no provision made in this law for a book in which transfers are to be noted, nor is there any provision declaring to a nonresident party that the assessment shall be continuous from year to year until changed by him or other parties in interest. By an act approved February 28, 1797 (1 Litt. Laws, 653), which is entitled "An act to amend and reduce into one the several acts establishing the permanent revenue," the provisions of the acts of December, 1795, as to nonresidents' lands, are substantially re-enacted, and, in addition, it is provided that the auditor shall keep a book of transfers, and "every nonresident who has entered his lands with the auditor may, on transferring the same to any other person or persons, have the alterations made with the auditor, and charged to the person or persons to whom transferred, and such person shall be chargeable with the tax of such land or lands thereafter." This law also provided for the sale of the lands by the sheriff for unpaid taxes. This is the first law which provides for a book of transfers in which sales and conveyances are to be entered, so that the property may be taxed as against the successive owners. The next act is an act approved December 21, 1799 (2 Litt. Laws, 324). This is an act entitled "An act to amend and reduce into one the several acts establishing the permanent revenue." It re-enacts the provisions of the previous law as to the entry for taxation of nonresident lands by the auditor, and for a transfer book and the mode of payment, which was to the treasurer; but it changed the officer who was to sell the property for the nonpayment of taxes from the sheriff of the county where the land lies to the register of the state, and provided that the register, when the tax was certified to him as unpaid, should proceed on the third Monday in November in each year, at public auction, at the state house at Frankfort, to sell lands for unpaid taxes, under like regulations as residents' lands are sold by the sheriff. This act also provides for a transfer book in which nonresidents who had sold their lands or conveyed them could have their transfers entered; but it was not compulsory for them to do so, nor is there any declaration in the statute that the assessment should continue against the first party assessed, unless such transfer were made in the auditor's book. This act of 1799 gave the register the same power to execute conveyances for the lands sold by him as the sheriff had who sold the lands of residents of the state for the nonpayment of taxes.

We think it quite clear that no title passed under the sale of the register in 1811 and the conveyance in 1815, for the taxes due and assessed against Thomas Franklin on these lands, which lands

had been conveyed by him many years before, and the deeds showing the conveyances recorded as early as April, 1796. The record from the auditor's book in regard to assessment is very brief indeed, and unsatisfactory; but it is quite evident that part of that record is made up from assessments which were originally made before the tax commissioner, and not before the auditor, and that, if there ever was any return of the lands patented to Thomas Franklin made in the auditor's office, it was not made by Thomas Franklin, or by any one representing or authorized by him, because there was no provision for a return of nonresidents' lands to the auditor prior to the act of December 19, 1795, which went into effect March 1, 1796, and at that time, according to the record of transfers filed, Thomas Franklin had ceased to have any interest in the land, although these conveyances were not put to record in the state of Kentucky until April, 1796.

In the case of Bell v. Fry, 5 Dana, 341, the court of appeals had occasion to consider the effect of the register's deed like the one at bar. The court says:

"The register's deed purporting to convey the land in question to Achilles Sneed in consequence of a sale of the said lands for taxes charged thereon from 1792 to 1798 was ineffectual to pass the title under Fry's patent, because the land was sold and conveyed as the land of Joshua Fry, and for taxes charged to him, when he had conveyed it to Vancouver by deed regularly executed, acknowledged, and recorded in 1790, two years before any portion of the taxes for which it was sold were charged or became payable; and it does not appear but that the taxes for the same year were paid by the real owner of the land. The court therefore did not err in refusing to instruct the jury peremptorily that this deed barred the plaintiff's action."

By the very terms of the register's deed, it only conveyed the right, title, and interest of Thomas Franklin, and this was in accordance with the law under which the lands were sold for taxes. There is no evidence in the record which proves or tends to prove that John Wilson either took or ever had actual possession of the land which was thus attempted to be conveyed to him by Foster, as register of the state of Kentucky. The only evidence on this subject is that he made quite a number of conveyances, but there is no evidence whatever that he took actual possession of any of the land in the Thomas Franklin patent, claiming the same by well-marked boundaries; so that the complainant's title must rest, if at all, upon the tax sale of 1846 and adverse possession thereafter.

The sale by John Hargis, as agent of the auditor, made in September, 1846, for taxes alleged to be due from John Wilson could not, of course, pass a title to South and Breck if John Wilson had no title. We are inclined to think, however, that the attempted sale made in September, 1846, is fatally defective for other reasons. The transcript filed by Norman, auditor, of the assessment of this land, shows that there was no assessment thereon for the years 1839, 1840, 1841, 1842, 1843, 1844, and 1845. The copy of the certificate of John Hargis, agent, indicates that the land was sold by him for taxes for the years 1836 to 1845, both inclusive. The record of

assessment filed by Norman would indicate that there was no assessment for taxes for the years 1839 to 1846, and the certificate of John Hargis recites that the land had been forfeited for the nonpayment of taxes for the year 1839. The act approved December 7, 1822, provided that it should be the duty of the auditor, when three years' taxes and interest became due on lands, to advertise the same for three successive months previously to the 1st of November in the newspapers of the public printer twice each month, stating the amount of taxes, interest, and costs due on each tract; and, if the same be unpaid on any tract or tracts as aforesaid, the same shall be stricken off to the commonwealth, and all the right, title, and interest of such nonresident shall thereby invest in the commonwealth; nevertheless, said land may be redeemed as provided for in the act of December 5, 1820. If this be considered as forfeiting the rights of John Wilson to the state of Kentucky for taxes for the years 1836 to 1838, there is no evidence in the record to show that that which is required by the act of 1822 was ever complied with. Hence there is no evidence to show that the interest of Wilson, if he had any, in the land patented to Thomas Franklin, was assessed for 1839 to 1845, or that it was stricken off to the state under the provisions of the act of 1822, after proper notice. But considering the proceeding by John Hargis, agent, as under the act of 1840, as amended by the act approved March 10, 1843, the record is likewise fatally defective in showing that any title passed by such alleged sale. The act of 1840, as amended by the act of March 10, 1843, authorized the selling of property which had been stricken off to the commonwealth, but provided that the auditor may authorize his agent to sell the same to the former owner, or his heirs or assigns, for the taxes due thereon, with the interest and charges, with 10 per cent. thereon; and further, when no former owner or heirs or assigns could be found to redeem, and there was then any one in possession of such land, or any part thereof, under adverse title, such person in adverse possession shall have the right to quiet his title by paying the amount of the taxes, interest, and charges, with 10 per cent. thereon; and section 3 of the amended act provides "that when there shall be no former owner or his heirs or assigns willing to redeem, and no one in adverse possession willing to purchase, the auditor may direct the agent or attorney to sell the land, in one or more tracts, to suit purchasers for as much as it will bring at public sale, provided it shall not be sold for less money than the amount due the commonwealth, with interest and charges." Thus, the right of the auditor to direct a sale is dependent on the effort to find the original owner, or the heirs or assigns, and allow him or them to redeem, or to give the occupant in adverse possession the opportunity to quiet his title, and his refusal to avail himself of it; and then the law provides for the advertising of the sale and the place of sale, which seems to have been done, but there is no evidence here that any effort was made either to find John Wilson or his heirs, or to inquire whether there was any one in the adverse possession of said land, or any part thereof. This record shows that ir