Walker v. Brown, 11 C. C. A. 135, 63 Fed. 204, 211; In re Foley, 76 Fed. 390, 395. A nonresident creditor of the estate may also, under certain conditions, maintain a suit in equity, for fraud, to set aside a sale of real estate made under authority of the probate court. Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619; Arrowsmith v. Gleason, 129 U. S. 87, 9 Sup. Ct. 237. In Byers v. McAuley the court said:

"The federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the state as between themselves. The state court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees; and in that exigency the circuit court might entertain jurisdiction in favor of all citizens of other states, to determine and award their shares in the estate. Further than that it was not at liberty to go."

The question, and the sole question, to be determined upon the amended petition, arises under the provisions of the statute of this state, as to whether the property of the deceased is separate or community property. The state court has exclusive jurisdiction to determine that question. The question which is presented upon the amended petition is entirely different in its character from any of the cases which authorize the federal courts to take jurisdiction, either by the commencement of an independent suit, or by the removal of a cause regularly pending in the state court. The case is in many essential particulars dissimilar from the facts as presented in Foley v. Hartley, 72 Fed. 571, and In re Foley, 76 Fed. 390. There the only issue in dispute was "whether or not M. D. Foley, in his lifetime, in writing, acknowledged Vernon Harrison Hartley to be his son, in the presence of a competent witness." That question may be involved in the present controversy. But the parties in the present proceeding, upon the amended petition for distribution, are different, and additional issues are raised. Mrs. Foley was not a party in the former case. It was there admitted that she was entitled, as against the nonresident heirs and the minor heir, to one-half of the estate of M. D. Foley, deceased. The contest was solely between the nonresident heirs and the minor heir, as to which was entitled to the other half of the estate. Mrs. Foley, after her marriage, and by her amended petition, has presented an entirely different question. She claims that a part of the estate is community property. She therefore has an interest therein adverse to the nonresident heirs, and adverse to the minor heir. Proceedings in the probate court to determine the question whether the property of a deceased person is separate or community property cannot be said to be a "suit of a civil nature at law or in equity," within the meaning of the removal act of 1887–88. In the determination of the question as to the character of the property, there cannot, in the nature of things, be any separable controversy. All persons claiming any right to share in the distribution of the property are equally interested in the proceedings. Their rights must be measured and determined by the same rule. It cannot be held that the nonresidents would be entitled to have that question, as to them, determined in

the federal court, while other claimants, who are residents of the state, would be compelled to try the same issue, as between themselves, in the probate court of the state. Courts have never recognized any such a divided jurisdiction. It certainly will not be claimed that, as to the nonresident heirs, no portion of the property is exempt from distribution, but, as to the resident heirs, some portion of it is. "To entitle a defendant to a removal on account of the separability of the controversy from the rest of the case, there must exist a separate cause of action, on which a separate suit could be brought, and complete relief afforded, distinct from the rest of the case, and of which all the parties on one side are citizens of different states from all the parties on the other. The case must be separable into parts, so that in one of the parts a controversy will be presented wholly between citizens of different states, which can be fully determined without the presence of the other parties to the suit." 2 Fost. Fed. Prac. § 384, and authorities there cited. But it is claimed that the proceedings in the matter of the estate of M. D. Foley, deceased, were removed to this court in 1895, and that the whole matter as to the respective rights of the parties to share in the distribution is therefore not within the jurisdiction of the state court, and that the amended petition should have been filed in this court. The answer to this claim will be found in the opinion of this court in Re Foley, 76 Fed. 392–395, and need not be repeated. This court has no jurisdiction in respect to the general administration of an estate. Let an order be entered remanding the proceedings upon the amended petition to the state court.

BENNER v. HAYES.

(Circuit Court of Appeals, Seventh Circuit. June 19, 1897.)

No. 357.

APPEAL—DISMISSAL—COLLUSION.

An appeal will be dismissed when it appears that the parties have settled their differences, and that the further prosecution of the appeal is collusive.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

This was a suit in equity by Lorenzo D. Benner against Eugenio K. Hayes for alleged infringement of letters patent No. 232,137, granted September 14, 1880, to Tyler C. Lord, for improvements in check-rowing attachment for corn planters. The circuit court dismissed the bill, holding that, if complainant's device was patentable at all, the patent must be limited to the mechanical arrangement by which the rope or cable is permitted, on the removal of obstacles, to straighten itself, and that, so construed, it was not infringed by defendant. From this decree the complainant appealed.

Taylor E. Brown, for appellant.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. It is apparent that there is no longer a real controversy between the parties to this suit, their differences having been adjusted, and that the prosecution of the appeal is collusive. The appeal is therefore dismissed.

WEBB v. PHILLIPS et al.

(Circuit Court of Appeals, Sixth Circuit. May 24, 1897.)

1. DEEDS—SUFFICIENCY OF DESCRIPTION.
As part of his chain of title to a certain tract of land, plaintiff offered in evidence a deed by which one D. conveyed to one B. all his "interest in a tract of land in the county of E., Kentucky, patented in the name of C.," and warranted the title "against all persons * * * except so far as he may have heretofore sold"; also another deed, by which B. conveyed to one M. "all the lands in C.'s survey allotted to him in the division, * * * except what has heretofore been sold by him or those under whom he claims." It appeared that D., before his sale to B., had made sales to sundry persons; that, in a partition of the C. survey, the lands so sold by D. were not definitely marked in allotting to B. his portion as grantee of D.'s interest; and that M., in subdividing the land, after he acquired B.'s title, into parcels of which one was conveyed to plaintiff's predecessor, failed to distinguish the lands which had been sold out of the share originally of S. *Held*, that these deeds were inoperative to convey any particular land, and accordingly were insufficient to show title in plaintiff, and they could not be aided by attempts to locate the lands conveyed by D., where the calls of the descriptions thereof could only be located by probabilities.

2. REPLEVIN OF TIMBER—PROOF OF TITLE TO LANDS.
Though proof of actual possession of land will make a prima facie case of title and right, as against any but the true owner or one connecting his title with him, sufficient to support replevin for timber severed from the land, proof of a short possession, at a remote time, by the plaintiff or his predecessor in title, is insufficient for that purpose.

3. SAME—DAMAGES FOR DETENTION—INTEREST.
In an action of replevin, the jury may be instructed to render a verdict for interest on the value of the goods from the date of the taking, as damages for detention, or simply to fix the date of the taking, and judgment may then be entered for the interest computed from that date.

In Error to the Circuit Court of the United States for the District of Kentucky.

This was an action of replevin, begun by William F. Webb, the plaintiff in error, to recover the possession of a large number of logs lying in and about the mouth of Contrary creek, a stream running into the Kentucky river. The suit was begun by petition according to the practice in the courts of Kentucky, wherein the plaintiff alleged that he was the owner and entitled to the possession of the said logs, and that defendants had possession thereof, and wrongfully detained the same. The defendants were Thomas J. Phillips and D. S. Harris, who appeared, and, for answer or plea, first denied that the plaintiff, William F. Webb, was the owner or entitled to the possession of the logs sued for in the action, and, second, asserted that the defendant D. S. Harris was the true and lawful owner of all the logs described in plaintiff's petition. At the conclusion of plaintiff's testimony, the court, upon motion of defendants, instructed the jury to find for the defendants, and assessed the value of the property taken by the plaintiff from the possession of the

defendants at the sum of $2,460, as of December 15, 1892. It was thereupon adjudged by the court that the defendants recover of the plaintiff the logs in the petition mentioned, or, if not to be had, "$2,460.00, and that said defendants recover interest on said sum from December 15, 1892, at the rate of six per cent. per annum until paid, and also their costs herein expended."

The plaintiff in error has assigned as error—First, that the court erred in instructing the jury peremptorily to find for the defendants; and, second, that it was error in the court to render judgment for interest on the sum assessed as the value of the logs taken by the plaintiff from the possession of the defendants from December 15, 1892. Other errors are assigned, but in substance they are embraced by the first error mentioned. The evidence submitted by the plaintiff below tended to show that the logs in suit had been cut from a tract of some 3,000 acres lying in Lea county, Ky., and claimed by plaintiff under a deed from Augusta Kuchenmeister, made in 1888. For the purpose of showing title to the logs, plaintiff undertook to show title to the land from which they had been severed without his license. For this purpose he first introduced a patent from the commonwealth of Virginia, dated January 4, 1786, to John Carnan, for a body of land described as containing 29,000 acres, which included the lands claimed by plaintiff. For the purpose of connecting himself with this patent, he introduced and read a number of intermediate conveyances, as follows: (2) Deed from John Carnan to Thomas Flahaven, dated 10th May, 1793. (3) Deed, William Cowland to Thomas Champney, 12th June, 1798. (4) Deed, Richard Champney to Thomas Duckham, 15th February, 1817. (5) Deed, Thomas Duckham to Daniel Breck, 17th July, 1838. (6) Deed, Daniel Breck to N. C. Morse, 13th September, 1865. (7) Deed, N. C. Morse to August Kuchenmeister, 23d November, 1875. (8) Deed, N. C. Morse to August Kuchenmeister, 16th December, 1875. (9) Deed, A. Kuchenmeister to Peter Romeister, 12th April, 1876. (10) Deed, A. Kuchenmeister to Peter Romeister, 12th April, 1876. (11) Deed, Peter Romeister to Augusta Kuchenmeister, 13th April, 1876. (12) Deed, Peter Romeister to Augusta Kuchenmeister, 13th April, 1876. (13) Deed, Augusta Kuchenmeister to William F. Webb, the plaintiff, July 13, 1888. For the purpose of showing possession by the plaintiff of the land from which the logs in question had been taken, there was offered in proof a lease from N. C. Morse, conveyee under the deed from Daniel Breck, aforesaid, to one John Warner, dated January 26, 1872. To show that said Warner had taken possession under this lease, the plaintiff's witness, W. L. Hurst, testified that he was a lawyer and the agent of N. C. Morse, and that he visited the lands in question for the purpose of looking after trespassers in January, 1872. When on or in the vicinity of the lands, the witness says he heard that one John Warner was preparing to build a house, and go in possession within the boundaries of the lands claimed by Morse. The witness, as to this lease, said: "When I heard Warner was about to build a house, and was cutting a lot of timber, I advised him not to do that, that Morse owned the land, and that he must take a lease under Morse, and he readily agreed to do so." At that time the witness says Warner was not living on the land; that there was no cabin there; that he learned that he had cut some timber, and was preparing to put up a house. This lease was for 100 acres of land on the waters of Contrary creek, at a place known as the "Maple Slashes," and was within the exterior lines of the deed from Augusta Kuchenmeister to Webb, the plaintiff, in consideration of which lease, said Warner was permitted to clear, use, and occupy 100 acres of land, and to range his stock over the remainder, and agreed to hold possession for said Morse and his vendees of all the other lands of said survey, "in conjunction with any other tenants of said Morse in said survey." The witness continues, speaking of the time after he had made this lease to John Warner: "After that, I don't know how long, but may be the next fall (I don't know that I learned it then) I learned that the old man had gotten out, and that Aaron [Warner] had taken possession." As to the exact time when he learned that Aaron Warner had taken possession of the place cleared by John Warner, he says: "I did not learn that for some time. I don't think I learned it that fall. I know that Aaron had gotten in there. When I gave the old man the lease, I thought the thing was all right." It appears that this Aaron Warner was the son of John Warner,

to whom the lease had been made. It further appears from plaintiff's proof that Aaron's possession was adverse, but whether for himself or some other claimant of this title does not appear, though it does appear that the witness Hurst, as attorney for N. C. Morse, afterwards instituted an action to oust him from the possession, which action was unsuccessful, the witness Hurst saying that "Aaron Warner proved that he had been in possession for more than two years, which fact operated to defeat the suit." From the evidence of plaintiff it is not clear whether any appeal was taken from the judgment of the justice of the peace before whom the suit against Aaron Warner was brought or not, but, if an appeal was taken to a higher court, it does appear that Aaron Warner was successful in his defense, and remained in possession, holding adversely to the title of said Morse. There was evidence as to certain other leases made by said Morse to parcels of the lands claimed by him, but these were ineffective to show any actual possession within the boundaries of the tract of land claimed by Webb; either because there was a total failure to show that the parcels so leased were within the boundaries claimed by him, or that any possession had ever been taken thereunder by the lessees.

J. O'Hara, for plaintiff in error.

Wm. W. Sudduth, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

To entitle the plaintiff to recover the logs in question from the defendants, it was essential for him to show either a general property, or a right to their possession. Plaintiff sought to show title and right of possession by evidence of title to the lands from which they had been severed by defendants without his consent. While the timber stood on the land, it was part of the realty. When severed, its character was changed, for it became personalty; but the title was not changed if the severance was wrongful, for it continued to be the property of the owner of the land, and could be taken by him from any one who had thus acquired possession. Schulenberg v. Harriman, 21 Wall. 44–64.

Plaintiff's proof failed to show a connected legal title to the land from which these saw logs had been severed. Without considering a number of objections which were made to his chain of title, it is sufficient for the purposes of this case to say that the deed from Daniel Breck to N. C. Morse, made September 13, 1865, was inoperative as a conveyance of any particular land. Breck's immediate grantor was Thomas Duckham, who, by deed of July 17, 1838, conveyed to Daniel Breck "all of said Duckham's interest in a tract of land in the county of Estill, Kentucky, patented in the name of John Carnan, containing 29,000 acres," and warranted the title "against all persons claiming by, through, or under him, except so far as he may have heretofore sold by written contract." There was no other or further description of the interest intended to be conveyed. It appears that there were many persons claiming interests under this Carnan patent,—some by virtue of conveyances from Flahaven, to whom Carnan had conveyed a part of the lands, and others under agreements or contracts with Duckham or his vendors. For the purpose of ascertaining these interests and partitioning the

land embraced within the Carnan patent, a suit in equity was instituted by Duckham against one Fishal and others. In 1852 an order was entered appointing commissioners to survey the entire John Carnan patent, and divide it among the heirs of one Haggins, and the heirs of one Beatty, and Daniel Breck, who, pending the suit, had taken a conveyance from Duckham of his interest in the John Carnan tract of land, and who had intervened and become a party to the said suit. The said commissioners reported a plan of division between the parties thus interested in the said land, which report was confirmed August, 1853, and the parties interested ordered to release to one another the tracts allotted them. No deeds appear to have been executed according to the directions of this decree. September 13, 1865, Daniel Breck conveyed to N. C. Morse "all the lands in John Carnan's survey and patent of 29,823 acres allotted to him in the division between him and Haggins' heirs and Samuel Beatty," etc., "except what has heretofore been sold by him or by those under whom he claims, and excepting also the claim of any one whose actual adverse possession has been so long as to bar a right of entry." This is the only description of the lands intended to be conveyed by the deed to said Morse. In the decree of partition, before mentioned, there occurred the following paragraph:

"But it is alleged that Duckham has sold and conveyed portions of said tracts, before or since he conveyed one moiety of the 23,000 to James Haggins, so that Haggins' heirs will not have their moiety unless all such sales be allotted to Breck, as assignee of Duckham. To enable the court to decide on this part of the case, the surveyor and commissioners are directed to ascertain and lay off in quantities and value, as near as may be, charging to Breck any land sold by Duckham before his deed to Breck and to Haggins' heirs all the land sold by the ancestors or themselves, and make a division, so as to give each party their equal moiety, noting upon their plat and in their report the tract or tracts sold, when and to whom sold, as nearly as they can ascertain."

The surveyor and commissioners did not ascertain and lay off the lands theretofore conveyed by Duckham, though there appear in the record filed in this cause of the proceedings in the case of Duckham against Fishal and others no less than 12 deeds made by Duckham prior to his conveyance to Breck, of lands lying within the general boundaries of that portion of the Carnan grant claimed by him. For purposes of partition, the commissioners and surveyor appointed under the said decree divided the lands into a number of large tracts, numbered from 1 to 8, inclusive. Lots Nos. 4, 5, and 6, according to this plan of division, were allotted to Daniel Breck. Touching so much of the decree as directed that the sales made by Duckham or others should be surveyed and laid off on the plan of said division, the commissioners reported as follows:

"The parties, on account of trouble and expense, superseded the necessity by consent of running and marking the long lines, and agreed that the division might be made on paper. They were unwilling that the sales made by Duckham and others should be surveyed and laid down on account of trouble and expense, but, from what the commissioners have learned, the principal portion of the land sold by Duckham are located in the lots assigned to Breck. The division was made, as near as might be, with the object that the Breck lots might be incumbered with the Duckham sales. Robt. Wickliffe, Esq., for

Haggins' heirs, and Hon. Daniel Breck for himself in person, consented, and directed the division in part to be made on paper."

No evidence was offered by the plaintiff to show the location of the lands theretofore conveyed by Duckham, nor was there any proof offered to show that the timber cut by the defendants had not been taken from the lands excluded from those set off to Breck as aforesaid. After Morse acquired Breck's title, he caused the land claimed by him to be subdivided into a large number of lots, most of which contained 100 acres each. Of these lots, Morse conveyed to August Kuchenmeister, through whom Webb holds, lots Nos. 20 to 45, inclusive, each containing or purporting to contain 100 acres, and three smaller parcels, one of 15 acres, one of 13, and one of 10 acres, the whole including 2,438 acres, and being but a part of that set off to Breck by the decree of partition in the suit heretofore mentioned. No notice appears to have been taken of the fact in making this subdivision that within the general boundaries of the land conveyed by Breck to Morse were included no less than 12 parcels theretofore conveyed by Duckham, Breck's predecessor in title, to other persons, and that the deed under which Morse claimed title excluded all such prior conveyances from the land conveyed by Breck to him. To what extent these excluded tracts or parcels were included within the lots conveyed by Morse to Kuchenmeister, and ultimately by Kuchenmeister's vendee to the plaintiff, was not shown. It is true that 12 deeds made by Duckham to various parties prior to his sale to Breck were included in the record of the partition suit put in evidence by plaintiff; but no evidence was offered to show the location of those parcels. Counsel for the plaintiff in error have endeavored to locate these excluded lands by aid of the calls in the report of partition and the calls of the several deeds, and thus show that none of them are within the tract of land claimed by Webb, from which these logs were cut. This, in our judgment, is utterly inadmissible, in view of the character of the calls and general description of the excluded parcels, and cannot be regarded as a substitute for a survey and definite proof. To illustrate the impossibility of establishing plaintiff's title by this method of locating excluded parcels, it is only necessary to set out the boundaries of one of these Duckham deeds, being that from Duckham to John Akers, dated October 17, 1835. The description in that deed is as follows:

"* * * A certain tract or parcel of land, part of a survey of twenty-nine thousand acres patented to John Carnan, lying and being in the county of Estill and state of Kentucky, af'd and bounded as follows [to wit]: Beginning at the first falls of Contrary creek from the thicket where the cut out road passes; thence, up a small branch nigh the said falls, to a poplar tree, where there is three out of one root at Miller's old trace; thence, with the said trace, to the thicket; thence, crossing the road, and down the path between the two creeks opposite Barker's Rock house, to a stake; thence a straight line across to the path that leads to the Rock Shole; thence, up the path, to the place of beginning. * * *"

The counsel for plaintiff in error frankly admit the difficulty of locating a tract whose area is not given, upon a record which contains no legal evidence as to the locality of the "first falls of Contrary creek," or "the thicket where the cut road passes through,"

or "of Miller's old trace," or "the Rock Shole," or the "poplar tree where there is three out of one root," but have advanced a theory based on what they call the "probabilities," which, however plausible, cannot be accepted as a basis for supporting a title. It may be that each of these excluded parts can be identified by proof, and the deed made certain as a conveyance of land; but upon this record no such identification of the lands excluded from those included in the deed can be made, and the deed must therefore be treated as insufficient evidence of title. Plaintiff should have gone further, and shown by proof that the land covered by his deed did not include the excluded lands. The burden of doing this was upon him, and he has not discharged it. It was essential that plaintiff should show that the trespass committed by defendants in entering upon lands claimed by him was within the limits of land conveyed to him, and this he could only do by showing that these logs were not cut within one or other of the tracts of land excluded from the conveyance under which, through subsequent deeds, he now claims. This is not an open question in the land law of the state of Kentucky. Dembitz, Land. Tit. 40, 41; Madison v. Owens, Litt. Sel. Cas. 281; Taylor v. Taylor, 3 A. K. Marsh. 20; Guthrie v. Lewis, 1 T. B. Mon. 142; Hawkins v. Barney's Lessee, 5 Pet. 457; Land-Grant Co. v. Dawson, 151 U. S. 603, 14 Sup. Ct. 458.

There was evidence that N. C. Morse, one of plaintiff's predecessors in the title, took possession of the land conveyed to him by Breck through one John Warner, who entered under a lease executed in 1872. The evidence of an actual possession by John Warner under this lease is most doubtful. That he accepted the lease was proven. But that he ever took actual possession is not shown, save in the most equivocal way. But, assuming that he did take possession, he stayed in possession at most but a few months. In some way, the clearing which John Warner made or started to make, and the cabin he began to construct, were taken possession of by one Aaron Warner, a son of John. It is also clear that Aaron was holding for himself, or some one other than Morse, for he is shown to have remained in possession more than two years, and at the end of that time to have successfully resisted an action by Morse to dispossess him. Thus, whatever possession Morse or any of plaintiff's predecessors in title may have had lasted less than a year, and terminated more than twenty years before this suit was brought. From the time John Warner abandoned the possession, the lands claimed by plaintiff have been vacant and unoccupied, except in so far as occupied and claimed by Aaron Warner in hostility to the title Webb claims. There was therefore no actual possession by plaintiff at the time defendants entered and severed the logs in question from the soil.

Proof of actual possession of land will make a prima facie case of title and right as against any but the true owner or one connecting his title with him. Upon such evidence, a prima facie case of right to the dominion and possession of timber severed from the land by a mere wrongdoer would support an action of replevin. Such evidence at the common law and under the law of Kentucky would