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JUDICIAL SALES.*

BY F. C. LEFTWICH.**

A judicial sale is one which is made by a court of competent jurisdiction in a pending suit, through its authorized agent. It is the act of the court and not of the agent.

There are various kinds of suits in which sales of property are authorized and made in this State. We have what is known as suits for the sale of lands for the benefit of the school fund; suits by guardians and committees for the renting or sale of infants' and insane persons' lands, and what is known as creditors' suits. Sales may be made in various other kinds of suits; but these are the most common.

SALES MADE FOR BENEFIT OF SCHOOL FUND.

As to suits made for the sale of lands for the benefit of the school fund, section 6 of chapter 105 of the Code provides that, upon the filing and recording of the report of the commissioner of school lands, showing lands, from any cause, forfeited to the State for non-payment of taxes, a suit or suits in chancery shall be commenced and prosecuted in the name of the State of West Virginia, for the sale of such lands, as required by section four of article thirteen of the Constitution; that all such tracts of land, not exceeding in quantity one thousand acres, may be included in one suit, but a separate suit may be brought and prosecuted for the sale of each tract exceeding one thousand acres; that the former owner of any such tract at the time of the forfeiture, or the person in whose name the same is forfeited, shall, if known, be made a defendant, and all persons claiming title to or interest in any such lands shall, also, as far as known, be made defendants; and that any person claiming an interest in any such lands or in the proceeds thereof, not made defendant, may file his petition stating what

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interest he claims, either in court, or before a commissioner in chancery while the suit is pending before him, or at rules, and become a defendant.

All such suits shall be commenced as provided in chapter 124 of the Code, and proceeded in, heard and determined as other suits in chancery and subject to the same rules. And all questions of title between former owners and claimants may be litigated in such suits; provided the land is forfeited.

Therefore this proceeding is often used by adverse claimants to settle the title to lands where they are not in a position to go into ejectment. Say there are two or more distinct claims of title to the same land, and one or more of the titles are forfeited to the State. The owner of the forfeited title will have the commissioner of school lands report the land as forfeited, upon which report a suit will be brought to sell the land, and he and all other claimants are made defendants. Then the court has to decide who had the better title at the time of forfeiture, unless the title has been transferred to some claimant under section three of article thirteen of the Constitution.

This proceeding is a judicial proceeding, in the nature of a proceeding against the land itself, and a sale thereunder, when completed is *prima facie* evidence against all persons whomsoever, and no error in the proceeding which does not effect the court's jurisdiction, will render the sale thereunder void. The jurisdiction of the circuit court under this chapter, is that of a court of general jurisdiction. The court has complete equitable jurisdiction of the land, and in a collateral proceeding no proof of the existence of facts essential to jurisdiction is required, nor can the same be received to dispute their existence. It will be presumed that the court ascertained the existence of those facts giving it jurisdiction, before it entered a decree of sale.¹

It was held, under the old school land Act of 1872-3, that the proceeding for the sale of lands for the benefit of the school fund was not a judicial proceeding, but was administrative in character, being simply a mode prescribed by the State for the sale of her lands, as her absolute property, and in which the State alone was interested. And that the former owner was not interested in the land, and was, therefore, not a proper party to the proceeding.²

¹ *Lawson v. Hart*, 40 W. Va. 52, 20 S. E. 819 (1894); *Cecil v. Clark*, 44 W. Va. 659, 30 S. E. 216 (1898); *Starr v. Sampson*, 55 W. Va. 442, 47 S. E. 255 (1904); *State v. Jackson*, 56 W. Va. 558, 49 S. E. 465 (1904); *King v. Mullins*, 171 U. S. 404 (1898).

² *McClure v. Maitland*, 24 W. Va. 561 (1884); *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761 (1887).

There were grave doubts, however, as to the constitutionality of the Act of 1872-3, as construed by our court, because owners were being deprived of their property without being given the right to come into court and dispute the right of the State to sell it. It also resulted, in some cases, in a number of people trying to build up titles to the same property, as it was the practice of the courts to allow any one, who could set up any kind of claim to the land, to come in and redeem it from forfeiture and have the redemption treated as a sale. There was no way to settle the title to the land under this proceeding and the courts would allow all the claimants to redeem the same land.

So, the legislature of 1891, amended the law so as to provide that a regular suit should be brought in the name of the State, in which the former owner and all other persons claiming any interest in the land should be made defendants. And our Supreme Court has held that all such owners and claimants are necessary parties, and that no decree is binding upon them unless they are made parties to the suit and served with process, or come in and ask to be made parties. And, also, that if a claimant is known or his claim can be ascertained by the use of reasonable diligence, he cannot be proceeded against under the general designation of "unknown claimants."³

Therefore, as the law now is, all conflicting titles to lands may be adjudicated in a suit to sell the land as forfeited and a decree in such suit settling the title as binding upon all who are made parties to the suit.⁴

SALE OF LANDS OF PERSONS UNDER DISABILITY.

If there is any class of judicial sales that has given the legal profession more trouble than any other, it is sales of lands of persons under disability.

Guardians of infants and committees of insane persons have no power to sell the lands of their wards, unless authorized to do so by the courts in the manner prescribed by statute. They may rent their ward's real estate and account for the profits thereof. But it is held that without authority from the court, a guardian cannot lease the land of his ward for oil or gas, or for other developments.⁵

³ *Bennett v. Preston*, 59 W. Va. 681, 53 S. E. 562 (1906); *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410 (1908); *Preston v. Bennett*, 67 W. Va. 392, 68 S. E. 45 (1910).

⁴ *State v. Harman*, 57 W. Va. 447, 50 S. E. 828 (1905); *State v. King*, 64 W. Va. 610, 63 S. E. 495 (1908); *King v. Buskirk*, 196 Fed. 299 (1912).

⁵ *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781 (1897); *Haskell v. Sutton*, 53 W. Va. 206, 44 S. E. 533 (1903).

Section 2 of chapter 83 of the Code provides that the guardian of a minor, or the committee of an insane person may, when they think the interest of the ward or insane person will be promoted by a lease, mortgage, deed of trust, or sale of his estate, or estate in which he is interested, file a bill in equity in the circuit court for the purpose of obtaining such sale, lease, mortgage or deed of trust. This section also provides that a trustee of an estate, or any person interested in a trust estate, may, under like circumstances file a bill for the purpose of leasing, mortgaging or selling the same.

Courts of equity have no inherent power to sell lands of infants or insane persons, and can only do so as authorized by the foregoing, or some other statute.⁶

In this kind of suit as well as in all other suits, all parties interested in the estate to be sold should be made parties. But it has been held that, in a proceeding by a committee of an insane person under this chapter to sell the undivided interest of such insane person in the oil and gas underlying a tract of land, his co-tenants are not necessary parties.⁷

This would apply as well to the undivided interest of infants or insane persons in the whole of a tract of land; because one co-tenant has no interest in his co-tenant's property, and a decree of sale of an infant or insane person's interest in the common property would not affect his co-tenant's interest, but the purchaser would take the place of the infant or insane person and become a co-tenant with those owning the other undivided interests in the property.

It is not sufficient, in a bill of this character, to state that the plaintiff thinks or believes that a sale would promote the interest of the infant; but he should set forth all the facts calculated to show the propriety of the sale, and should set forth all the property owned by the infant, both real and personal. And the bill must be verified by the oath of the plaintiff. A guardian ad litem should be appointed for the infant or insane person and the guardian ad litem and the infant, if over fourteen years old, should answer under oath. And no decree of sale is valid unless these statutory requirements have been complied with.⁸

⁶ *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014 (1898); *Conrad v. Crouch*, 68 W. Va. 378, 69 S. E. 888 (1910).

⁷ *South Penn Oil Co. v. McIntire*, 44 W. Va. 296, 28 S. E. 922 (1898).

⁸ *Piercy's Heirs v. Piercy*, 5 W. Va. 199 (1872); *Hull v. Hull*, 26 W. Va. 1 (1885); *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562 (1888); *Eakin v. Hawkins*, 52 W. Va. 124-130, 43 S. E. 211 (1902).

It is also necessary that the guardian ad litem be present at the taking of all depositions in the case, as no deposition can be read in the case, except by permission of the court, unless taken in the presence of the guardian ad litem, or upon interrogatories agreed upon by him.

If all the requirements of the statute are substantially complied with, the court acquires jurisdiction of both the parties and the subject matter of the suit, and a decree of sale, though erroneous, becomes conclusive and binding upon all the parties, both infants and adults.⁹

The statute requires that it be clearly shown, independently of any admissions in the answers, that the interest of the infant or insane person will be promoted by a sale.

As to whether such showing has been made in a particular case, I take it, is a matter for the circuit court to decide, in the first instance, subject to appeal and review by the Supreme Court of Appeals. And if not appealed from, the decision of the circuit court could not be reviewed or attacked in any other way, except by the infant within six months after he attains his majority.

This chapter also provides for the investment of the proceeds of sales of lands made under it, but the question as to whether or not an erroneous decree as to how the proceeds shall be invested can have any effect upon the title of the purchaser, does not seem to have been decided by our Supreme Court of Appeals.

In the case of *Ammons v. Ammons*,¹⁰ the court held that:

“When the real estate so sold is an estate in remainder, created by a devise to the daughter of the testator for her natural life, remainder in fee to her heirs, and the sale is made upon the application of the guardian of her children, her children born after such sale, are deemed to have been before the court by representation, and can claim no interest except in the fund arising from the sale, and in it they are entitled to share equally with the others.”

The court then propounds the following:

“*Quaere*, whether said principal of representation is qualified to the extent that a decree of sale, which fails to provide for, and protect the interest of persons not *in esse* and so deemed before the court, by substituting the fund from the sale of the land in place of it, and preserving the fund to the extent neces-

⁹ *Parker v. McCoy*, 10 Gratt. 594 (1854); *Zirkle v. McCue*, 67 Va. 171 (1875); *Rhea v. Shields*, 103 Va. 305, 49 S. E. 70 (1904); *Tomblin v. Peck*, 73 W. Va. 336 80 S. E. 450 (1913).

¹⁰ 50 W. Va. 390, 40 S. E. 490 (1901).

sary to satisfy such interests, is ineffectual to pass their title to the purchaser.”

Cases of this character do not often arise, but it is well to keep the question in mind and see that proper distribution is made of the proceeds of such sales.

In addition to the regular suit in chancery authorized by the second section of chapter 83 of the Code, section 12 of the same chapter provides for what is known as a summary proceeding for the sale or lease, or mortgaging of estates of infants and insane persons. This proceeding is instituted by giving the defendants ten days' notice and filing a petition setting up the facts showing the necessity or desirability of sale; which petition should set forth all the facts required in a regular bill in chancery for the same purpose. The petition must be verified and a guardian ad litem appointed for the infant or insane defendant. The section (Sec. 13) requires that a guardian ad litem be appointed, but does not require him to file an answer, but says he shall be present at the hearing. But our Supreme Court seems to be of the opinion that section 3 of this chapter applies in the summary proceeding, as well as in the regular chancery suit, and holds in *Sinnett v. Goff*,¹¹ that in a summary proceeding, it is necessary that the guardian ad litem, as well as the infants, if over 14 years of age, should answer the petition on oath.

Notwithstanding this decision, I do not think the court would hold a sale to be void, in a case where there was no answer by the guardian ad litem in a summary proceeding, where it appeared that there was a guardian ad litem appointed, and was present at the hearing, as the court holds in this same case that there is no legal difference in effect between a decree in favor of or against an infant and a decree in favor of or against an adult, as neither can impeach or invalidate it except for fraud, collusion, or error in its procurement. And, also, in the case of *French v. Pocahontas Coal & Coke Co.*,¹² the court holds that to effectuate a regular and unimpeachable sale of the real estate of an infant by this proceeding it is necessary to comply substantially with all of the requirements of the statute, and specifically with such of them as relate to jurisdiction of the property to be sold and the persons interested therein. And in this connection the court says, in the same case, that it is essential that the infant whose land is sought to be sold, have ten days' notice; but the omission of such notice does not ren-

¹¹ 89 W. Va. 629, 109 S. E. 820 (1921).

¹² 87 W. Va. 226, 104 S. E. 554 (1920).

der the sale absolutely void, but voidable only, when properly assailed in due time by the infant; that the statute is remedial, and, properly construed authorizes judicial ratification of a sale infirm and defective in point of procedure only, and that sales of real property of an infant, which are beneficial to the infant owner, will not be set aside on the ground of irregularities therein. The court also says in this case that:

“The plain purpose of Code c. 83, providing for sales of lands of infants, was to give courts of equity a jurisdiction which, in most states, they possessed inherently to represent and act for infants under all circumstances affecting their property rights, and to be in law and fact their guardians, possessed of greater authority than ordinary guardians, and to confer a new jurisdiction on courts of equity, and hence the statute should be liberally construed.”

Of course an infant has until six months after attaining the age of twenty-one years to show cause against such a decree, which he may do by original bill, bill of review, supplemental bill in the nature of a bill of review, petition or answer, but in order to set it aside he must make such a showing as would avail an adult on appeal from the same decree; or such a showing as would avail an adult in an original suit or bill of review seeking to set it aside.¹³

The hearing upon the petition in the summary proceeding is had in open court, and usually upon oral evidence. The statute does not provide that the evidence shall be taken down and preserved; but I presume it may be done, in which case it would be available on appeal or other attack on the decree. But, if the evidence is not preserved, and the court finds and states in its decree that it was clearly shown by the petition, exhibits and evidence adduced, that the interest of the minor would be promoted by a sale of his real estate, and that the rights of no person would be affected thereby; then there is no way, so far as I know, by which the infant, or anyone else, can attack the decree upon the ground that the sale was not to the interest of the infant.

The statute provides that neither the guardian nor the guardian ad litem shall be a purchaser, directly or indirectly at a sale made under this chapter. This would, I think, be true, even if the statute was silent about it, under the general doctrine that one occupying a fiduciary relation to another is bound not to exercise for his own benefit and to the prejudice of the party, to whom he

¹³ *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262 (1896).

stands in such relation, any of the powers or rights, or any knowledge or advantage of any description, which he derives from such a relation, and such purchase may be avoided at the option of the party to whom he holds such fiduciary relation. This option would follow to one who purchases from such fiduciary, provided he had notice of the illegal purchase by the fiduciary. But if he had no such notice, the remedy would be by suit against the fiduciary for the profits made in the transaction.¹⁴

In the case of a sale of infant's land, under this chapter, there could hardly be an innocent purchaser, because the record would show who the guardian and guardian ad litem were, and if one of them was the purchaser the record would show it.

SALES IN CREDITORS' SUITS.

The most important principles applicable to judicial sales are those applicable to sales made in suits to enforce judgment liens and for the collection of other debts, and being most important, are more familiar to lawyers, and for that reason should be briefly treated in a paper of this character.

We have in this State what is known as suits, under chapter 139 of the Code, by judgment creditors to enforce their judgment by sale of the real estate of the judgment debtor, after an execution has been returned showing that no personal property can be found out of which the judgment can be collected. And we have what is known as suits by the creditors of a decedent to subject the real estate of which he died seized to the payment of his debts. And we also have what is known as suits to set aside fraudulent and voluntary conveyances made by debtors and subject to sale the lands so conveyed to the payment of the debts of the grantors.

In a judgment creditors' suit, all interested parties should be made parties to the suit, including the judgment debtor, or his widow, if he be dead, and all persons holding judgments or other liens against the property sought to be sold. And in case there is a deed of trust on the property the trustee therein must also be made a party, in order to have the legal title before the court. It is not absolutely necessary that all judgment creditors be made parties to the bill, as they can come in by petition, or appear before the commissioner and prove their claims, and thus become parties; but all who have their judgments docketed should be

¹⁴ *Newcomb v. Brooks*, 16 W. Va. 32 (1879); *Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94 (1909).

made parties to the bill, as they might fail to come in, in which case the decree would be reversed on appeal; and if there was no appeal, the lien would still be valid and the purchaser would not be protected.¹⁵

Where a judgment creditor has a judgment against two parties and one of them only owns real estate, it is not necessary to make the one who does not own any real estate a party to a suit to enforce the judgment against the other party's real estate.¹⁶

Where a judgment at law is in favor of A for the benefit of B, the judgment cannot be enforced in a chancery suit brought by A for the benefit of B, but the suit should be brought by B in his own right.¹⁷

Where one creditor brings a suit in behalf of himself and all other creditors, making the other creditors parties, or, if he does not make them formal parties, where they come in and have themselves made parties, the plaintiff does not have control of the case, and it cannot be dismissed on his motion. If the plaintiff's lien is paid off during the pendency of the suit, the suit may be dismissed as to him, but cannot be dismissed as to the other creditors without their consent. Usually the suit proceeds in the name of the original plaintiff, and must so proceed unless an order is entered substituting another plaintiff.¹⁸

The usual procedure is for the plaintiff to file his bill making all persons who have liens recorded in the county court clerk's office defendants, along with the owner of the land sought to be sold, filing with his bill a copy of his judgment and a copy from the judgment lien docket showing that his judgment has been docketed. The cause is then referred to a commissioner, who goes to the judgment lien docket and gets the dates and amounts of the judgments and the time at which they were docketed; and from this data he makes up his report. This may be all right where the judgments are admitted, but where the judgments are not admitted, the fact that a judgment appears on the lien docket is not suf-

¹⁵ *Hoffman v. Shields*, 4 W. Va. 490 (1871); *Dickinson v. C. & O. Ry. Co.*, 7 W. Va. 390 (1874); *Neely v. Jones*, 16 W. Va. 625 (1880); *Norris v. Bean*, 17 W. Va. 655 (1881); *Bank v. Bates*, 20 W. Va. 210 (1882); *Livesay v. Feamster*, 21 W. Va. 83 (1882); *Jackson's Admr. v. Hull*, 21 W. Va. 601 (1883); *Bilmyer v. Sherman*, 23 W. Va. 656 (1884); *Grove v. Judy*, 24 W. Va. 294 (1884); *Pappenheimer v. Roberts*, 24 W. Va. 702 (1884); *McNeil's Ex'rs. v. Aldridge*, 25 W. Va. 113 (1884); *McMillin v. Hickman*, 35 W. Va. 705, 14 S. E. 227 (1891); *Bank v. Watson*, 39 W. Va. 342, 19 S. E. 413 (1894); *Calvert v. Ash*, 47 W. Va. 480, 35 S. E. 887 (1900).

¹⁶ *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66 (1889).

¹⁷ *Kellam v. Sayre*, 30 W. Va. 198, 3 S. E. 589 (1887).

¹⁸ *Linsey v. McGannon*, 9 W. Va. 154 (1876); *Bilmyer v. Sherman*, 23 W. Va. 656 (1884); *Lewis v. Laidley*, 39 W. Va. 422, 19 S. E. 378 (1894); *Shumate's Ex'rs. v. Crockett*, 43 W. Va. 491, 23 S. E. 240 (1897).

ficient proof of a valid judgment. So the judgment creditors, who are made defendants, should file certified copies of their judgments with the commissioner, along with a certified copy from the judgment lien docket. If they fail to do this, and objection is made, they may lose their right to enforce their judgments, or at least their right to priority and have to come in and take any surplus that may be left after payment of the judgments which have been properly proven.

The circuit court has jurisdiction to determine the validity of judgments sought to be enforced and ascertain the amounts and priorities of all liens.¹⁹

Of course they cannot go behind the judgment and let in defenses that should have been made at the time the judgment was obtained, but they have the right to require proof that a valid judgment exists, and a properly authenticated copy of the judgment is sufficient proof that a judgment exists.²⁰

Where there are infant defendants it is the duty of the court to examine the evidence upon which the commissioner's report is based, whether the report is excepted to or not, and if the court confirms such report in the absence of sufficient evidence to establish the existence of a judgment and decrees a sale, the appellate court will reverse the decree.²¹

It is held in *Snyder v. Botkin*,²² that where statute enactments do not interfere, a judgment creditor can acquire no better right to the estate of the debtor than the debtor himself has when the judgment is recovered. He takes it subject to every liability under which the debtor holds it, and subject to all the equities which exist in favor of third parties; and a court of equity will limit the lien of the judgment to the actual interest which the debtor has in the estate. And section 5 of chapter 74 of the Code provides that every contract for the conveyance of real estate, and every deed, deed of trust or mortgage, conveying real estate or personal property, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until it is duly admitted to record.

Notwithstanding this statute the court further held in this case that where A sells land to B by parol contract, and B takes possession and has possession at the time the judgment is obtained and

¹⁹ *Smoot v. Newberry* 8 W. Va. 400 (1875); *Scott v. Ludington*, 14 W. Va. 387 (1878); *Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 327 (1901).

²⁰ *Dickinson v. C. & O. Ry. Co.*, 7 W. Va. 390 (1874).

²¹ *Laidley v. Kline*, 8 W. Va. 218 (1875).

²² 37 W. Va. 355, 16 S. E. 591 (1892).

docketed against A and shortly before the judgment was obtained B obtained a deed from A, which is not recorded at the time the judgment is obtained, the judgment creditor cannot enforce his judgment against the land.

So, it is the law in this State that an unrecorded deed is void as to creditors, unless the grantee has been placed in actual open possession of the land in such manner as would vest in him the right to have specific performance, if he had purchased by parol agreement; and in case a bona fide purchaser, either by parol or unrecorded contract, is in position to compel his vender to specifically perform his contract, he will be protected against judgments obtained and docketed after he has so purchased and taken possession.²³

A decree of sale should set out specifically the nature, amounts and priorities of the liens and to whom due; and should give a reasonable time in which the creditor may make payment. A decree of sale which refers to the commissioners' report for the nature, amounts and priorities of the liens is not sufficient, and it is reversible error to fail to give the creditor a time in which to make payment.²⁴

Under section 7 of chapter 86 of the Code, where the personal estate of a decedent is insufficient for the payment of his debts, his executor or administrator may bring a suit in equity, within six months after his qualification, to subject the lands of the decedent to the payment of his debts. The widow, heirs and devisees, if any, and all known creditors of the decedent shall be made parties. If the executor or administrator does not institute such suit within six months after his qualification then any creditor of the decedent may institute such suit on behalf of himself and the other creditors, making the personal representative, widow, heirs and devisees, if any, parties. And any creditor, whether made a party or not, may present and prove his claim, and will be deemed to have been made a party.

The widow, as such, cannot bring a creditor's suit at any time; but if she is also executrix or administratrix she may bring the suit in that capacity, within six months after her qualification. The statute simply gives the personal representative the exclusive

²³ *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530 (1901); *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175 (1902); *Westinghouse Lamp Co. v. Ingram*, 70 W. Va. 664, 74 S. E. 941 (1912); *Westinghouse Lamp Co. v. Ingram*, 79 W. Va. 220, 90 S. E. 837 (1916).

²⁴ *Anderson v. Nagle*, 12 W. Va. 98 (1877); *Scott v. Ludington*, 14 W. Va. 387 (1878); *Trimble v. Herold*, 20 W. Va. 602 (1882); *McCleary v. Grantham*, 29 W. Va. 301, 11 S. E. 949 (1886); *Hart v. Hart*, 31 W. Va. 688, 8 S. E. 562 (1888); *King v. Burdett*, 44 W. Va. 561, 562, 29 S. E. 1010 (1898).

right to bring the suit within six months; but in either case it must appear that there is not sufficient personal property to pay the debts. However, the authority for a creditor to bring suit to subject the lands of a decedent to the payment of his debts is not derived from the statute, but exists independently of the statute, but under the statute he has to wait, under ordinary circumstances, six months after the qualification of the personal representative.²⁵

But in proper case, a bill of discovery against the personal representative to discover assets liable to the payment of the debts, may be filed by a creditor at any time. And such a suit may be carried on as a general creditor's suit.²⁶

The personal representative is not limited to six months after his qualification to bring such a suit; but he may bring it any time before suit is brought by a creditor.²⁷

The object of this statute is to secure a just and equitable distribution of a decedent's estate among his creditors; and no good is accomplished by obtaining a judgment at law against the personal representative, as such a judgment gives no priority over other creditors, and would not be sufficient evidence to prove the judgment creditor's claim.²⁸

The order in which the different kinds of property constituting the decedent's estate, will be subjected to the payment of his debts is as follows:²⁹

First, personal estate at large not exempted by law;

Second, real estate set apart by will for the payment of debts;

Third, real estate descended to heirs;

Fourth, property expressly charged with payment of debts and then devised;

Fifth, general pecuniary legacies;

Sixth, specific legacies, and

Seventh, real estate devised.

If a creditor of an estate of a decedent fail to present his claim before a decree, upon the report of a commissioner, allowing debts against the estate, and subjecting lands to their payment, such decree bars him from participation in the proceeds of sale of such lands until such debts as have been presented and decreed are

²⁵ Reinhardt v. Reinhardt, 21 W. Va. 76 (1882); Cranmer v. McSwords, 24 W. Va. 594 (1884); Broderick v. Broderick, 28 W. Va. 378 (1886).

²⁶ Poling v. Huffman, 39 W. Va. 320, 19 S. E. 421 (1894).

²⁷ Reinhardt v. Reinhardt, *supra*, note 24; Moore v. Lignon, 22 W. Va. 302 (1883).
²⁸ Rex v. Creel, 22 W. Va. 373 (1883); Gardner's Adm'r. v. Gardner's Heirs, 47 W. Va. 368, 34 S. E. 792 (1899).

²⁹ Cranmer v. McSwords, 24 W. Va. 594 (1884); Daingerfield v. Smith, 83 Va. 81, 1 S. E. 599 (1887).

satisfied. He may prove his claim and have it paid out of the surplus, if any.³⁰

All of the errors which may be committed in creditors' suits, that are not jurisdictional, may be corrected on appeal, or, in the case of infants, within six months after they attain the age of twenty-one years; but it is sometimes hard to determine what errors are jurisdictional and what are not.

A case illustrating this difficulty is the case of *Beal v. Wood*.³¹ This was a case where a father died in debt, owning certain real estate, and leaving a widow and a number of infant children living. After his death his widow was appointed administratrix of his estate, and within six months after qualification she brought suit to subject the lands of her deceased husband to the payment of his debts. And while this suit was pending, and within ten months after the death of her husband another child was born to the widow. This child not being in life when the suit was brought was of course not made a party to it; but the suit was carried on in the names of the original parties and decrees of sale were entered and sales made and confirmed, and deeds made to purchasers.

The infant born after the death of her father, did not seek to have these decrees and sales set aside within six months after attaining the age of twenty-one years; but when she was twenty-three or four years old she brought an independent suit claiming an interest in the lands, because she was not made a party to the suit to sell the same, and, therefore, claiming that the court was without jurisdiction to sell her interest in them.

The court held that it was error not to make the infant a party when she came into life; but as she could not be made a party at the time when the suit was brought, and all were made parties who could have been made parties, the court acquired jurisdiction of the persons and property; and that owing to the fact that other heirs who occupied the same position that she would have occupied had she been born before the suit was brought, she was an indirect party by representation, and the fact that she was not made a direct party did not divest the court of jurisdiction.

The court bases its decision upon the general rules that "The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusions in the course of it were right or wrong," and that "The authority to decide being once shown, it can never be divested by being improperly or erroneously exercised."

³⁰ *Trall v. Trall*, 56 W. Va. 594 (1904).

³¹ 70 W. Va. 333, 73 S. E. 978 (1912).

ously employed.” And it gives as an illustration a case where the court obtains jurisdiction of a defendant while living it may proceed with the case to judgment after he is dead; and says that, in such a case, the court ought to cease to exercise jurisdiction over the party when he dies, but its failure to do so is an error to be corrected on appeal or writ of error.

Sales of real estate may be made in suits for partition, as well as some other kinds of suits; but the time allowed will not permit me to discuss them. A full discussion of all the principles applicable to judicial sales cannot be expected in a paper of this character. However, I have endeavored to point out as many as I could of the mistakes of the past, in order that they may be avoided in the future.