

Jefferson County Circuit Court

Case file Civil

November 1856 No 20

Box

2

Folder 59

Applegate, John D

Applegate, Ann

Schenck, T. F.

Schenck, America

etal

✓

Smith, James

Smith, Thomas

Title

640 acres on Joachim Creek in

U.S. Survey 1979 T40N5E; depositions

from Kentucky; other plaintiffs

Elizabeth Jeffries, Richard Jeffries,

Polly Applegate

Whereas it is adjudged that Thomas Applegate late of the City of Louisville in the State of Kentucky died intestate as to a certain tract of land lying upon Lochim Creek in the County of Lippson in the State of Missouri it being the one half of a comprahension made to Richard Applegate of six hundred and forty acres and being ~~the~~ one half of said tract which was purchased by Robert M. Brown at the sale of said tract made by the order of the Circuit Court of Lippson County upon the petition of Mary and Thomas Applegate for partition among the heirs of Richard Applegate which half was afterwards purchased by said Thomas Applegate from the said M. Brown

And whereas also the said Thomas Applegate after making said purchase died without children or other descendants capable of inheriting leaving a widow named Martha who has since intermarried with Nicholas B. Howard.

Now this writing witnesseth that the above named N. B. Howard and Martha his wife late the widow of the said Thomas Applegate deceased she acting with his consent and approbation make their and her election to that she the said Martha be endowed with the one half of the said tract of land absolutely subject to the payment of debts of the said Thomas Applegate deceased her late husband if it should be adjudged that the said Thomas died intestate as to said land and also with the half of ~~said~~ any other land in the State of Missouri as to which the said Thomas may be adjudged

to have died intestate

In testimony whereof we have hereunto
set our hands and affixed our seals this 10th
day of December 1855

Nicholas C. Howard

Martha Howard

State of Kentucky
Jefferson County

I Chas. M. Thurston Clerk of the
County Court for the County aforesaid Certify that on this day the foregoing
instrument of writing was produced to me in my office and
acknowledged & delivered by Nicholas C. Howard and
Martha his wife parties thereto to be their act & deed (they being
personally known to me to be the identical persons who are parties
to the signed instrument of writing) that I warned her
privily & apart from her husband & having shown and explained
to her she declared that she had signed & sealed
acknowledged & delivered it freely and willingly without the
coercion, threats or Compulsion of her husband that she was
willing it should be recorded and did not wish to retract her
acknowledgments - All of which is certified to the State
of Missouri for record.

In Testimony whereof I have hereunto
set my hand & official seal at Louisville Ky this
10th day of December 1855
Chas. M. Thurston

So P. Howard
Martha Howard

Beaton to take
down under the 3^d
action.

Filed Dec 19th 1885.
Geo. W. McPherson
Cllr

John D Applegate
Mary Ann Applegate
J. P Schenk R. America Schenk
Elizabeth Jeffries & Richard Jeffries
Polly Applegate plaintiffs
against
James Smith &
Thomas Smith defendants

In the Circuit Court of
Jefferson County
Missouri

The plaintiffs state that one Thomas Applegate departed this life in the year 1851 and left no children or other descendants in being capable of inheriting his estate

But he left surviving him his mother Polly Applegate, a sister Mary Ann who married John D Applegate, a sister named America who married J P Schenk & a sister named Elizabeth who married Richard Jeffries

Plaintiffs further states that said Thomas Applegate was seized of and was owner in fee simple of certain lands lying in Jefferson County Missouri at the time of his death to wit a tract of 640 acres of land situate on the Joachim Creek in Jefferson County Mo being United States Survey No 1919 in Township No 40 R 5 East confirmed to Richard Applegate. Plaintiffs further state that said real estate descended by law to said mother & sisters of Thomas Applegate in consequence of his death & failure of children or other descendants capable of inheriting. Plaintiffs therefore charge that they are the owners of said land and further state that defendants did enter

into the possession of said land since the death of Thomas applegate & that defendants are now in possession, so plaintiffs are informed & believe

But how much rents & profits & what length of time defendants or either of them has had & enjoyed, plaintiffs cannot state & pray for a discovery of these facts & charges, and how many years each has occupied the premises together or by himself, what rents, profits, timber, rock & wood they or either of them has received of said land. Plaintiff therefore states that they were entitled to the possession of the premises on the 1st day of January 1852, that afterwards the defendants on the ~~4~~ day of ~~January~~ 1852 entered into said premises & unlawfully witheld from the plaintiffs the possession thereof to the damage of the plaintiffs but what amt of damage plaintiffs have no idea so as to state the amt & it is for this reason they pray for a discovery of rents, profits & timber & wood

Plaintiffs pray for judgment for the possession of said premises and such damages, rents & profits as may appear on the trial from the discovery of defendants & other evidence

Wells & Beal, attorneys
for plaintiffs

J A Beal attorney for the plaintiffs states that he believes the foregoing petition & the

Matters as therein stated are true

Sworn to and Subscribed

before me. Sept 17th 1856

Thos C Fletcher Clk

By C. J. Honey Sept

J. A. Paul Attorney
for plaintiffs

Geo D. Appleby
as
James Duane et al

Filed Sept 19th 1856
Jno C Fletcher
clerk

2 copies sent to
2 copies of same

25-26

John D Applegate, Mary
Ann Applegate, I. P.
Schenck, America Schenck
Elizabeth Jeffries & Richard Jeffries
Polly Applegate Plaintiffs

against
James Smith & Thomas Smith. defendants

In the Circuit Court
of Jefferson County
Missouri

The plaintiffs state that one Thomas Applegate, departed this life in the year 1851 and left no children or other descendants in being capable of inheriting his estate; But he left surviving him his mother Polly Applegate, a sister Mary Ann who married John D Applegate, a sister name America who married I. P. Schenck & a sister named Elizabeth who married Richard Jeffries. Plaintiffs further state that said Thomas Applegate was seized of and was owner in fee simple of certain land lying in Jefferson County Missouri at the time of his death to wit: a tract of 640 acres of land situate on the Soachim Creek in Jefferson County Mo. being United States Survey No 1979 in Township No 40 R 5 East. Confirmed to Richard Applegate; Plaintiffs further state, that said real estate descended by law, to said Mother & sisters of Thomas Applegate, in consequence of his death & failure of children or other descendants capable of inheriting. Plaintiffs therefore charge that they are the owners of said land and further state, that defendants did enter into the possession of said land since the death of Thomas Applegate & that defendants are now in possession, so plaintiffs are informed & believe; But how much rents & profits and what length of time defendants or either of them has had & enjoyed plaintiffs cannot state & pray for a discovery of these facts & charges and how many years each has occupied the premises together or by himself, what rents profits, timber, rockwood they or either of them has received of

said land: Plaintiffs therefore state that they were entitled to the possession of the premises on the 1st day of January 1852. that afterwards the defendants on the day of entered into said premises & unlawfully withholds from the plaintiffs the possession thereof to the damage of the plaintiffs but what amt of damage plaintiffs have no idea, so as to state the amt, & it is for this reason they pray for a discovery of rents, profits & time bars &c. &c. Plaintiffs pray for judgment for the possession of said premises and such damages, rents & profits as may appear on the trial from the discovery of defendants & other evidence

Noell & Beal attorneys for
Plaintiffs

J. A. Beal attorney for the plaintiffs states that he believes the foregoing petition & the matters as therein stated are true.

Sworn to and subscribed before me Sept 17th 1856 Thos L. Fletcher Clerk By E. Honey sept.	} J. A. Beal attorney for Plaintiffs
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A true copy of the original petition and
affidavit on file in my office

For Testimony whereof I hereto set my
hand and affix the seal of said
Court at office September 26th 18
56 Thos L. Fletcher Clerk

By E. Honey sept

COUNTY OF JEFFERSON, SS.

The State of Missouri.

To the Sheriff of the County of Jefferson--Greeting:

We command you, that you summon James Smith &
Thomas Smith

----- if they be
found in your County, that they be and appear before the Hon.
Judge of our Circuit Court, on the first day of the next term thereof,
to be begun and held at the town of Hillsboro, within and for the
County of Jefferson, on the fourth Monday of November
next, then and there to answer unto John D. Applegate
Mary Ann Applegate and others

upon ~~their~~ original petition, a copy whereof is herunto annexed and
accompanies this writ—and have you then there this writ.

Witness, THO. C. FLETCHER, Clerk of our said Circuit
Court, with the seal thereof hereto affixed, at
office, in Hillsboro, this 26th
day of September A. D. 1856

Thos C Fletcher

CLERK CIRCUIT COURT.

By E. H. Honey sep

I Executed the within writ at the county of Jefferson on
the 16th Day of October 1856 by Delivering to James Smith a true
Copy of the within writ and the arrest petition (as furnished
by the clerk and also on Thomas Smith on the 16th Day of
October 1856 by leaving a true copy of the within writ at his
usual place of abode with a free white person of the family
over the age of fifteen years

Augustine Wiley Sheriff

No 20

Jefferson Co. Court.

November Term 1856

1856

John D. Applegate vs Thomas

vs } Defendants

James Smith & Wm. Smith

Sherriff's fee. \$2.00

John D. Applegate & others

James Smith
Thomas Smith

} In the circuit
court before me

we John W. Noell & James A.
Beal obligate ourselves as security for
costs pay the costs that may be adjudged
against plaintiffs in said suit

Nov 29 1856

John W. Noell

James A. Beal

45

Ad Smith and

Dear Parents

Filed Nov 29 1856
The Clerk of the Court
CEN

John D Applegate &
Mary Applegate & others
against
James Smith &
Thomas Smith

James Smith one of said
defendants come and say that Thomas Smith
made conveyance out with him has no interest
in said land nor is he in possession of the
whole or any part of it

He denies that the real estate in the petition
mentioned descended to said plaintiffs but the same
passed by the last will and testament to Martha
Applegate the widow of said Thomas now Martha Howard

Defendant denies that said plaintiffs are
the owners of said land or that he or any person
for him did enter in to the possession of said land
otherwise than by a sufficient warrant

~~They~~ He denies that said plaintiffs are
entitled to possession on the 1st day of January
1852 or at on any other day nor did he nor
does he now unlawfully withhold from the
plaintiffs the possession of said land

He also denies that they have suffered any damage
or that he is liable to account for the rents and
profits

He further says that he and one George
Mc Goff are possessed of said land joint as tenants
in common by an indefeasible title

He therefore prays to be never disturbed.

his
James X Smith
mark

James Smith states on oath that the foregoing
answer and the matters therein as stated he
believes to be true

Signed & Sworn to before

me Dec 3rd 1856

James ^{his} Smith
mark

Wm C Fletcher cex }

John D Appleton

& others

127

James Smith et al

Answer

Filed Dec 5th 1856

Wm C Fletcher
cex

I Thomas Applegate being now of sound mind and in good health do hereby make and publish this my last will and Testament -

First. I give and devise to my wife Martha my whole Estate real, personal and mixed and wherever it may be situated -

2^d. I appoint my said wife Sole Executor of this my will and request that no security may be required of her.

In Testimony Whereof I have hereunto signed my name & affixed my Seal on this Eighteenth day of November, 1844.

Witness
Garnett Duncan
J. Maxey.

Thomas Applegate

State of Kentucky

At a County Court held for Jefferson County at the Court House in the City of Louisville on the thirteenth day of October 1851.

The foregoing instrument of writing purporting to be the last will and Testament of Thomas Applegate deceased of this County was produced in Court and proved by the oath of Garnett Duncan one of the subscribing witnesses thereto who also made oath that Patrick Maxey the other subscribing witness signed the same in his presence and at the request of the testator. Whereupon the same was established by the Court to be the last will and Testament of said Thomas Applegate and ordered to be recorded and is recorded in my office as Clerk of said Court.

Attest. Curran. J. P. Clerk.

State of Kentucky
Jefferson County

At a County Court held for Jefferson

County at the Court House in the City of Louisville on the 26th day of May 1857. it being suggested to the Court that the Probate of the will of Thomas Applegate dec'd is not sufficient under the laws of the State of Missouri to admit a Certified Copy of said will and the probate thereof to record in the State of Missouri and that a considerable portion of the Estate of said deceased lies in the said State of Missouri, great loss and injury may result to the decedent unless said will be properly established & admitted to record in the State of Missouri in accordance with the order of the Court the foregoing instrument of writing was again produced in Court and this day came into Court in his proper person Garnett Duncan one of the subscribing witnesses to said instrument of writing (said Court being a Court of record and the only probate Court for said County in said State) and being duly sworn according to law. deposes and says that the paper was shown to him by the Clerk of said Court and signed by Thomas Applegate under date of the 18th day of November A.D. 1844. is the last will & testament of said Thomas Applegate. that the said Thomas Applegate signed the same on the date above mentioned & in the presence of him the said Garnett Duncan and Patrick Marcy the subscribing witnesses that the signatures of the said witnesses Garnett Duncan and Patrick Marcy are in the proper hand and writing of the said subscribing witnesses who were on the day above mentioned & altogether called on by said Thomas Applegate and by him requested to sign their names to the said writing as witnesses which ^{was} done in his presence & in the presence of each other - And that the said Thomas Applegate stated thus & in the presence of the said witnesses Garnett Duncan & Patrick Marcy that the said writing so signed by him on the 18th day of

November 1844. was his last Testament - And the said
Garnett Duncan further deposes & says that Patrick Marcy
the other subscribing witness to said will is dead - that he
is acquainted with the hand writing of s^r. Patrick Marcy
and that the signature of s^r. Patrick Marcy to s^r. will
is his genuine signature - And he further deposes & says
that said Thomas Applegate at the time of signing
the said will lived on the 18th day of November. 1844
was of sound mind & disposing memory - And he further
deposes and says that he was acquainted with Thomas
Applegate from his boyhood - that he was for years before
the execution of s^r. will the legal adviser of said Thomas
Applegate and at the date of the said will lived on
the 18th day of November. 1844. the said Thomas
Applegate came to defendant's office and desired him
to write his will which he did he was then in good
health & of perfectly sound mind - And he further deposes
& says that he was intimately acquainted with Patrick
Marcy the other subscribing witness to s^r. will that he is
dead & that he died before the said Thomas Applegate -
he thinks that the said Patrick Marcy died in 1849
or 1850 and the s^r. Thomas Applegate died in 1851.

Witness my hand this 26th day of May 1857.

Garnett Duncan

Subscribed & sworn to before me as Clerk
of the Sup^r Court by Garnett Duncan
this 26th day of May. 1857.

Witness my hand & seal of office -

Chas. M. Thurston clerk

And Charles W. Carr Michael P. Murphy personally
into Court and being duly sworn deposes & says that he
knows the hand writing of Thomas Applegate whose
signature appears to s^r. will & with the hand writing of

Garnett Duncan & Patrick Maxey the subscribing witnesses
to s^d will & that the signature of s^d Thomas Applegate
to s^d will is in his proper hand writing - And that
the attestations of s^d Garnett Duncan & Patrick Maxey
are in the proper hand writing of s^d witnesses - that he
was intimately acquainted with s^d Patrick Maxey
that he was present when he died & he thinks it was
in 1850. - he further says that the said Patrick Maxey
died before the said Thomas Applegate - that he
has often seen the s^d Thomas Applegate, Garnett
Duncan & Patrick Maxey unite -

Witness my hand this 26th day of May 1857.

Michael R. Murphy

Subscribed & sworn to before me as Clerk
of the Sup^r Court by Michael R.
Murphy this 26th day of May 1857.
Witness my hand & seal of office -

Ch. M. Thurston Clk.

Whereupon the same was again established by the Court
to be the last will & testament of said Thomas Applegate
& again ordered to be recorded & is again recorded in my
office as clerk of s^d Court.

Attest Ch. M. Thurston Clk.

State of Kentucky
Jefferson County

I Ch. M. Thurston clerk
of the County Court for the County of
Jefferson is a full, true and complete copy of the
last will and testament of Thomas Applegate dec^d
and the probate thereof, the original of which
is on file in my office - And I further ^{certify} that Edward
Garland is the sole & acting Exor^r of s^d Court.

In Testimony Whereof I have hereunto
set my hand & official Seal this 26th
day of May 1857
Chas. M. Thurston.

State of Kentucky
Jefferson County

I Edward Garland Judge
of the County Court for the County aforesaid certify that Chas. M.
Thurston whose genuine signature appears to the foregoing
Certificate is the Clerk of s^d. Court duly elected and
qualified and that full faith and Credit are due
his official acts as such & that the s^d. Certificate is in due
form of law & by the proper officer
Witness my hand this 26th day of
May 1857

E. Garland

State of Kentucky
Jefferson County

I Edward Garland Judge of
the County Court for the County aforesaid certify that Chas. M. Thurston
whose genuine signature appears to the foregoing Certificate is duly
at the date thereof Clerk of s^d. Court & that s^d. Certificate is
in due form of law and given by the proper officer
Witness my hand this 8th day
of June 1857

E. Garland

State of Missouri

County of Jefferson

I the undersigned clerk of
the Circuit Court and Ex officio Recorder in and
for said County Certify that the foregoing instru-
ment in writing was filed for record in my office
June 19th 1857 and is truly Recorded in Book

N^o pages 620.621+622.

Witness my hand and official
Seal at office the 19th day of June
1857

Elias J. Honey Recorder



1854
1855

June 19th 1854

Edwin J. Horney
Recorder

1.25

J & D Applegate & others
vs
James Smith et al }

The plaintiffs comes & moves
the court to set aside the finding of the
Court sitting as a jury & grant them a new
trial for these reasons viz

- 1st Because the court admitted improper
evidence on the part of the defendants
- 2 The court improperly permitted defendants
to read in evidence the pretend will of Thomas
Applegate and the accompanying proofs
of probate attached thereto
- 3^d The finding of the Court is against
the evidence and against the law &
evidence
- 4 The decision of the Court to the effect that the
will of Thos Applegate was sufficient in law
to pass to the devisee subsequently acquired real
Estate is erroneous

Beal & toll for pffs

John D. Applegate

no

James Smith of Cal

Protons for New Trail

Filed Dec 2nd 1857

Chas J. Honeywell

has taken a new
trial from the

John D. Applegate
& others
Plaintiffs

In the Circuit Court for the County of Jefferson
State of Missouri —

James Smith &
Samuel M. Boffine
Defendants

To the above named ~~parties~~
(in the copies attached of Exhibits)

You are hereby notified, that depositions of witnesses, to be read in evidence in the above entitled cause, on the part of the defendants will be taken at the office of the Clerk of Jefferson County Court in the City of Lewisville State of Kentucky

in the County of Jefferson and State of Kentucky on
the 28th day of June 1858, between the hours of eight
o'clock in the forenoon and six o'clock in the afternoon; and that the taking of said depositions, if not
completed on that day, will be continued from day to day, at the same place, and between the same
hours, till completed.

Wm. Bell & Son for
defendants

I send the notice, note upon John D. Applegate
and Mary Applegate his wife, to George B. Perry -

by delivering to each a true copy of the returns
on the 15th day of June 1858.
Thomas to and authorized the
15th day of June 1858 before
me in Open Court
E. Stanton Judge of the Peace for the County of
Geo. E. Whelan
Geo. E. Whelan
and Messrs. and

Depositions of Witnesses, produced, Sworn, and examined at the Jefferson County Court for the State of Kentucky on this 28th day of June 1858, Between the hours of 8 O'clock in the forenoon, and Six O'clock in the afternoon - Agreeably to the Notice, to the heirs of Thomas Applegate, deceased, hereto Attached, before the Hon^{ble} Edwards Garland, Judge of said Court, - to be used as evidence in a Cause now pending in the Circuit Court for the County of Jefferson in the State of Missouri, Between John Applegate and others, as Plaintiffs, and James Smith, and Samuel McGoffin. Defendants on the part of Defendants -

Garnett Duncan of lawful age, being first Sworn and examined on the part of Defendants

Deposits and Says

Question 1st by Defendants - Were you, or not acquainted with Thomas Applegate deceased, late of the City of Louisville State of Kentucky.

If so - how long? And did you or not consider him to be a man of sound mind and understanding in the conduct of his ordinary business

Question 2nd By same did you or not procure said Will, Copy of which is here Attached when same was admitted to records before the Judge of Jefferson County Court as one of the witnesses thereto?

3rd - did or not said Thomas Applegate sign his name to said Will in your presence, and did he or not request you to sign your name as witness thereto, and did you then witness the same by signing your name thereto in his presence?

4th - What was the state of his mind at the time of his making said Will? did you or not consider him to be sound in mind and Memory

And understanding, & did he perfectly understand the nature of the Act he was about to execute and did you then Consider him fully, and in every way, Capable and Competent to make his said Will and testament?

5th { did Patrick Maxey the other subscribing witness affix his name thereto and was it or not done at the same time by the Request and in the presence of the Testator.

6th - Do you or not know that said Maxey has since died? Have you or not well acquainted with him? And with his Writing and do you know that at same time he wrote his Name as witness thereto, by the Request, and in the presence of Testator, and that his signature is genuine.

7th State any other fact you may know Material to either of the parties to this Suit.

For answer to Interrogatory No One I respond that I knew Thomas Applegate well from childhood & his father before him - I was born ^{trained} in Louisville Kentucky in 1800 and Thomas Applegate was also I think - There was very little difference in our ages & I may say that I knew him forty years - He was always a man of sound mind and understanding in the conduct of his ordinary business -

To Interrogatory No 2 I answer that the original will of Thomas Applegate belonging to the files of this Court is now before ^{me} & I have just examined it and also the copy thereof on this sheet which I have carefully compared with the original & find it to be a correct & true copy thereof - I was called on the 13 October 1857 as a witness in this Court to prove said original will of Thomas Applegate and the same was admitted to probate on my testimony

I Thomas Applegate being now of sound mind and in good health do hereby make and publish this my last will & Testament
 1st I give and devise to my wife Martha my whole estate real personal and mixed and wherever it may be situated -

2^d I appoint my said wife Sole Executrix of this my will and request that no security ~~that~~ may be required of her.

In ~~Witness~~ Testimony Whereof I have hereto signed my name and affixed my seal on this 18th day of November 1844.

Witness
 Garnett Duncan
 P. Maxcy

Thomas Applegate

State of Kentucky

At a county Court held for Jefferson County at the Court House in the city of Louisville on the 13th day of October 1851. The foregoing instrument of writing purporting to be the last will and Testament of Thomas Applegate dec^d late of this County was produced in court and proved by the oath of Garnett Duncan one of the subscribing witnesses thereto who also made oath that Patrick Maxcy the other subscribing witness signed the same in his presence and at the request of the Testator. Whereupon the same was established by the court to be the last will and Testament of the said Thomas Applegate and ordered to be recorded and is recorded in my office as clerk of

(A)

Said Court

att Curran Pope clk

State of Kentucky}

Jefferson County } set

J. Ch. M. Thruston clerk of
the County Court of the County aforesaid
do certify that the foregoing is a true
complete and correct copy of the last
will and Testament of Thomas Applegate
dec'd as taken from the records of said
Court. In Testimony whereof I have
herewith set my hand and
Official Seal this 28. day of
June 1858.

Ch. M. Thruston clk

State of Kentucky}

Jefferson County } set

J. Edw^d Garland Sole Judge
of the County Court of the County afo^r duly
elected, sworn and qualified do certify
that Ch. M. Thruston who has signed the
foregoing certificate is now and was at
the time of signing the same the acting
clerk in and for said County duly elected
and qualified and that full faith and
credit are due all his Official acts
as such and that his Signature thereto
is genuine - Witness my hand this
28. day of June 1858.

E. Garland Judge

I have examined that probate and now reaffirm the statements then made by me & committed to record

Afterwards on the 26 May 1857 I was called upon before the court as a witness to prove said will and additional interrogatories were propounded to me not required by our law & therefore omitted in the original probate & I gave my testimony which was put on record upon that second probate & I have just carefully examined it & find it correct & now reaffirm the statements of mine embodied in that probate on this record. ~~I reaffirm the~~

The original will & the first probate are on the first sheet of this deposition and a copy of the said second probate is herewith made part of this deposition marked

A -

For answer to Interrogatory No 3 I answer - Thomas Applegate did sign said will in my presence and I did attest ~~there~~^{same} by signing my name thereto in his presence & at his request - & this was on the day of its date -

For answer to interrogatory No 4 I answer that at the time of making said will Thomas Applegate was of sound & disposing mind & memory - He was in good health - I was his legal adviser & he came to my office in this city to get me to write his will; and dictated it; & I then wrote it down for him as he had dictated it; and it was then executed in my law office - He perfectly understood the nature of the act he was about to execute and I am sure that he was fully and in every way capable to make a will & testament

For answer to Interrogatory No 5 I answer that Patrick Mayey the other subscribing witness was present in my office when this will was executed

and that said Mayey attested said Will by signing his name thereto at the request of said Appelgate and in his presence & in my presence & I signed my name in the presence of said Mayey & Appelgate. To Interrogatory No 6 I answer that said Mayey has since died - I was well acquainted with him - He was for many years a client of mine & I often saw him write & I know that his attestation to said will is genuine because I know his writing & because I saw him make the particular signature -

To the 7 Interrogatory I answer that I do not know that I can make any additional statement of use to either party - Nothing further occurs to me as material - except that Julius P. Schenck & John D. Appelgate are both present at the taking of this deposition and that my answers were read to them by me & they said they did not wish to ask me any questions further - I further say that
 Garnett Duncan

State of Kentucky
 Jefferson County } ss.

I Edw. Garland, Judge of Jefferson County Court, State aforesaid do hereby certify, that the deponent whose place of residence is Jefferson County, in the State of Kentucky, was by me sworn, to testify the whole truth of his knowledge, touching the matter in controversy mentioned

in the Caption, and according to the
notices hereto attached, marked B & C
and that his deposition, was reduced
to writing, and subscribed by him, in my
presence, on the 28th day of June 1858
between the hours of 8^{1/2} o'clock ^{in the forenoon} AM, and
5 o'clock PM, in the afternoon, at the
Clerks Office of the Jefferson County
Court, in the County of Jefferson and
State of Kentucky -

Witness my hand this June 28th 1858.

E. Garland, Judge of
Jefferson County Court

State of Kentucky
Jefferson County Oct

I, Ch. M. Thruston clerk of the
County Court of the County afo^r do certify that
E. Garland who has signed the foregoing
certificate is now and was at the
time of signing the same the sole and
acting Judge of the County Court of the
County afo^r and that his signature thereto
is genuine and that full faith & credit
are due all his official acts as such
and that he was duly elected & qualified
as such. In Testimony Whereof I have
herewith set my hand and
Official seal this 28th day
of June 1858.

Ch. M. Thruston clk

clks fees \$3⁰⁰ paid by Defts

C. M. T.

John D. Applegate & others, Plaintiffs
vs
James Smith, & Saml Mc Guffin, Defendants } In the Circuit Court for the
County of Jefferson, State of
Missouri,

To the above named Plaintiffs

You are hereby notified that, Depositions of Witnesses
to be used in evidence in the above entitled cause, in the Court
of Defendants will be taken at the office of the Clerk of the Jefferson
County Court in the City of Louisville - State of Kentucky, between
the hours of 8 o'clock in the forenoon, and six o'clock in the
afternoon on the 28 day of June 1858, and that the taking of
said Depositions if not completed on that day, will be continued
from day to day at same place & between the same hours, till
Completed.

Samuel S. Green
for Defendants

I served the within notice upon
M^{rs}, Mary Applegate, Julius P.
Schenck, and American Schenck
his wife by delivering to each
a true copy of the within
this 15th day of June 1858

Sworn to and Subscribed
by H. J. Lyon this 21 June 1858 H. J. Lyon
in open Court

E. Garland, J. J. C. C.

B

A (referred to in G. Duncan's Deposition)

State of Kentucky
Jefferson County (Set

At a county Court held for Jefferson County at the Court House in the city of Louisville on the 26th day of May 1857, it being suggested to the court that the Probate of the will of Tho^s. Applegate dec^d is not sufficient under the laws of the state of Missouri to admit a certified copy of said will and the Probate thereof to be admitted to record in the state of Missouri and that a considerable portion of the estate of said deceased lies in the state of Missouri great loss and injury may result to the devisee unless said will be properly established & admitted to record in said state of Missouri in accordance with the order of the court the foregoing instrument of writing was again produced in court and this day came into court in his proper person Garnett Duncan one of the subscribing witnesses to said instrument of writing (said court being a court of record and the only probate court for said county in said State) and being duly sworn according to law deposes and says that the papers now shown to him by the clerk of said court and signed by Thomas Applegate under date of the 18th day of November A. D. 1844 is the last will and testament of said Thomas Applegate that the said Thomas Applegate signed the said writing on the date above mentioned in the presence of him the said Garnett Duncan and Patrick Marcy the subscribing

witnesses that the signatures of the said witnesses
Garnett Duncan and Patrick Marcy are
in the proper hand writing of the said
subscribing witnesses who were on the day
above mentioned and altogether called on
by said Thomas Applegate and by him
requested to sign their names to said writing
as witnesses, which was done in his presence
and in the presence of each other and that
the said Thomas Applegate stated then in
the presence of the said witnesses Garnett
Duncan & Patrick Marcy that the writing
so signed by him on the 18 day of November
1844 was his last will and testament and
the said Garnett Duncan further deposes
& says that Patrick Marcy the other subscribing
witness to said will is dead. that he is
acquainted with the hand writing of said
Patrick Marcy and that the signature of
said Patrick Marcy to said will is his
genuine signature and he further deposes
& says that said Thomas Applegate at the
time of signing the said will lived on the
18 day of November 1844 was of sound
mind and disposing memory and he
further deposes & says that he was acquainted
with Thomas Applegate from his boyhood
that he was for years before the execution
of said will the legal adviser of said
Thomas Applegate and at the date of
the said will lived on the 18 day of
November 1844 the said Thomas Applegate
came to defendant's Office and deposed

him to write his will which he did that he was then in good health & of perfectly sound mind, and he further deposes and says that he was intimately acquainted with Patrick Maxey the other subscribing witness to said will that he is dead and that he died before the said Thomas Afflegate. he thinks that the said Patrick Maxey died in 1849 or 1850 and the said Thomas Afflegate died in 1851. Witness my hand this 26. day of May 1857.

Subscribed & sworn to before me as clerk of the Court, by J^r Garnett Duncan on the 26 May 1857. Witness my hand & seal of office

J. J. Gamett Duncan

Ch. M. Houston

And thereafter came Michael R. Murphy personally into court & being duly sworn deposes & says that he knows the hand writing of Thomas Afflegate whose signature appears to be well & with the hand writing of Garnett Duncan & Patrick Maxey the subscribing witnesses to be well & that the signature of said Thomas Afflegate to be well is in his proper hand writing and that the attestations of J^r Garnett Duncan & Patrick Maxey are in the proper hand writing of said witnesses that he was intimately acquainted with J^r Patrick Maxey that he was present when he died & he thinks it was in 1850 he further says that the said Patrick Maxey died before

the said Thomas Afflegate that he has
often seen the said Thomas Afflegate
Garrett Demingo & Patrick Mayey
write- Witness my hand this 26th day of
May 1857. Michael R. Murphy

Subscribed & sworn to
before me as clerk of the
Suff. Ct. by Michael
R. Murphy this 26th
May 1857. Witness
my hand & seal of

Office
Ch. W. Thurstons

Whereupon the same was again
established by the Court to be the last
will and testament of said Thomas

Afflegate & again ordered to be recorded
is again recorded in my Office as
clerk of said Court

Att Ch. W. Thurstons C

John S Applegate vs James Smith & al Circuit Court
of Jefferson Co.
June term 1860

Plaintiffs in the above entitled
cause move the Court to set aside
the finding of the Court in said
cause & grant them a new
trial for the following reasons

- 1 The Court erred in refusing to
declare the law to be as asked
by Pffs in the 1st & 2nd. instructions
as also the 3. 4. 5. 6. 7. 8. 9. 10. 11. & 12th
- 2 The finding was against the law.
A will made in Kentucky in
1844 devising property generally
was not sufficient to pass real
estate acquired by the testator
after that time. And if the will
could have had that effect yet
those claiming under the devise
are estopped by her election
to take Dower, from setting up
a will of which she had full
knowledge & possession at the
time.
- 3 The Court permitted Defend-
ents to give illegal & improper
testimony. The paper purport-
ing to be a copy of the Will of
Thomas Applegate with the two
sets of probates thereof as certified
by the County Court of Jefferson

county Kentucky was inadmissible as evidence, & the Court erred in permitting Deft to read the same as such. The Court also erred in permitting the Depositions of Gerrit Duncan & other witnesses in support of said copy of the Will to prove the execution thereof.

The copy of the record of said Will & probate were inadmissible, incompetent, irrelevant & secondary, as also were the Depositions read by Defendants.

4 The finding of the Court was against the evidence. There was no competent evidence before the Court to show that Thomas Applegate had made a will in conformity with the provisions of the laws of Missouri.

5 The Court erred in its decision that the will of Thos Applegate was sufficient to pass real estate afterwards acquired; & the Court erred in deciding that the election of Martha Howard being conditional did not estop her from claiming by devise property in which she had elected to take down.

Beal & Moell, Atty for plffs

W. H. Moell
Beal & Moell
Beal

Mr & C. M. M. M. M. M.
at

James Smith

Proton for new tract

Decd June 16th 1860

Wm. D. H. H. H. H.

Overruled June 16th 1860

John D Applegate vs Current Court
James Smith vs of Jefferson
Co Mo. June 1862

Be it remembered that on the
trial of the above cause the fol-
lowing proceedings were had to
wit

1 It was admitted by Defts that
Thomas Applegate died in 1851
without heirs or issue of his
body; that he was seized of
the land in controversy at
the time of his death. That
plaintiffs were his brothers
& sisters & that defendants were in possession of the land.

2 Plaintiff had in evidence
a deed from Robert McEwen to Thomas
Applegate for the land in con-
troversy, Dated 28 November
1845 which is words & figures
as follows to wit

(here copy same from Book
H p 53. In Record of Deeds)

And then plff rests his case.
And Defendant then pro-
ceeds to offer in evidence a
certified copy of the Record of a
will & probate & proceeding had
thereon - which is in words
& figures as follows.

(Here copy the certified record
& the certificate of the record
of Jeff Co Mo.)

To the reading which in evidence
pleff objects, because the same was
not competent or admissible, the
Court overrules the objection & the
pleff excepts.

Defendant then offers to read the Depo-
sitions of Garret Duncan & other
witnesses in support of & to prove
the execution of the will of the
Applegate, a copy of which
is attached to or accompanies
the Depositions, the original
will (if any) being on file in
the office of the Co Court of
Jefferson County Ky - Which
Depositions are in words
& figures as follows
(Here Copy Depositions)
Pff objects to Deft's reading the
same, because they are in-
competent, irrelevant, inadmis-
sible, secondary, and otherwise
improper - The Court overrules
the objection & Pffs except.
(Here Deft closes his tes-
timony)

Pffs then read in rebuttal
the election of Mrs Howard (the
so called Devise under the will)
which is in words & figures
as follows
(Here copy same & time of
filing, &c)

apaligati
by
South

Plaintiff here closes his
case and this is all the
testimony offered by either
party in said cause

And thereupon Plff ask
the Court to declare
the law to be as follows.
(Here copy all plff instructions.)
Which the court refuses
to do & plff excepts

Thereupon the Court ~~proceeds~~
~~to declare the law~~ ^{renders judgment for defendants} as
follows - (Here copy same)
And finds the facts to be
as follows (here copy same)

And thereupon Plff file their
motion for a new trial
which is in words & figures
as follows (here copy same)

Which motion the Court
overrules & plff except to the
^{opinion & decision of the Court overruling their motion for a new trial}
To all which rulings decision
and proceedings of said Court
Plaintiffs then & there excepted
and here tender his bill of
exceptions which is signed
sealed & made a part of the
record -

Wm H Stone 

John D. Applegate
James Smith at

Will. E. Appleton

Stated June 16th 1860
Chas. J. Honey
Clerk

Refused

1. That the will of Thomas Applegate, if any, was not sufficient to pass title to this land in controversy unless Testator owned said land at the time the same was made & published.

Refused

2. The election of Martha Applegate ~~et al~~, those claiming under her from setting up a devise from her deceased husband of which she had full knowledge at the time of her election

Applegate & others
vs
Smith & others

In the Jefferson Circuit

The plaintiffs ask the Court
for the following instructions viz

- 3 § That the will of Thomas Applegate read in evidence does not ~~intend~~ to dispose of real estate acquired after its execution
- 4 § That Thomas Applegate did not intend by the provisions of the will read in evidence to will or devise real estate acquired after its execution
- 5 § If the Court finds from the evidence that Thomas Applegate made this last will & testament in Kentucky on the 18 day of November 1854 and after that time purchased of Robert McEwen 320 acres of land in Jefferson Co Mo, then the Court will find for the plaintiff
- 6 § If the Court finds from the evidence that Thomas Applegate did not own the land in controversy on the 18 day of Nov 1854 but purchased of Robert McEwen on the

(B. 14 p 53)

28th day of November 1845, then the Court will find for plaintiff to the extent of 866 acres of said land

7 5 That the will is not probated according to the laws of Ind & cannot be received in evidence as a probated will

8 6 That the deposition of Garnett Duncan read in evidence ^{by defendant} is not sufficient proof of the execution & attestation of the will read in evidence

9 7 That the law requires the evidence of both subscribing witnesses to prove the execution & attestation of the will, when the will is not admitted to probate according to the laws of Missouri & afterwards a copy is ^{not} duly recorded in Jefferson Co Mo.

10 8 If the Court finds from the evidence that one of the subscribing witnesses to the will ~~was~~ before he proved his attestation, then the evidence of the other subscribing witness is not sufficient to establish the will & the Court will find for plaintiffs

11 9 If the Court finds from the evidence

that whether the estate of Thomas Applegate made an
instrument of writing on the 10 day of December 1855, as he
alleges it before the Clerk of the County Court of
Jefferson County in Kentucky & filed the same
with the Clerk of the County Court of Jefferson
County Mo in December after the proof of the
will of Thomas Applegate, & in which instrument he
did not accept the provisions made for her
in the will, then the Court shall decree there-
on as the will & the Court will decide accordingly as in
Case of intestacy -

10 That proceedings in the Probate Court of Jeff.
Coon Kentucky be had after the will was

Applegate & others
vs
Smith & others

Instructions given
and for by selfs
& refund —

Filed. June

1860

and not a purchase of the work
by of 18 — all are within 1860
it is to be purchased on the 1860

J. D. Applegate
as
Jesse Smith
Sheward Smith }

In the Circuit Court
of Jefferson County
Mo

W of C Noell Agent for the appellants
states that the appeal in the above cause is
not made for vexatious or delay but be-
cause the affiant believes that the appellants
are aggrieved by the judgment or decision
of the Court -
Subscribed & sworn to
before me this 16 day
of June 1866
Elias J. Hooley &c }

Wm of C Noell

Applegate voters
vs
Smith voters

affidavit for appeal.

Filed June 16th 1866
Elias & Honey

IN THE SUPREME COURT OF MISSOURI, HELD AT ST. LOUIS.

-----October-----Term, 1860.

John D. Applegate & al.	ap.	Appeal from Jefferson
James Smith & al.	res.	Circuit Court.

Now at this day come again the parties aforesaid, by their respective Attorneys, and the Court here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jefferson Circuit Court rendered, be in all things affirmed, and stand in full force and effect. And it is further considered and adjudged by the Court that the said respondents recover against the said appellants their costs and charges herein expended, and have therefor execution.

STATE OF MISSOURI, } SOT.

I, WILLIAM S. GLANVILLE, Clerk of the Supreme Court of the State of Missouri, at St. Louis, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the October Term thereof, 1860, in the above entitled cause.

Given under my hand and the Seal of said Court, at the City of Saint Louis, this
26th day of December
 1860.

W. S. Glanville,
 Clerk.

John D. Applegate & Co. ap.

vs.

James Smith & Co. re.

Judgment of the Supreme Court.

affirmed.