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Supreme Court of Illinois
Third Grand Division
April Term thereof A.D. 1864
Ralph Lockwood appellant } appeal from
by } Marshall
Elisha L. Mills et al appellees }

Argument of Appellees.

In addition to defendant's brief herein filed their Counsel respectfully submits the following suggestions on some of the points raised in the brief, not desiring ~~them~~ to comment on all those points.

The main question in the case to be decided is this, as we think, was the Administrator's title, offered by Lockwood, void, either for want of jurisdiction of the County Court, or on account of fraud?

And first, was the order of the County Court in appointing W. B. Green Administrator of Estate of Mills, the decree of sale and the sale of the land to Parker void for want of jurisdiction of either the subject matter or the person. We answer in the affirmative. The order of the County Court appointing Green as administrator of the estate of said Mills is as follows: "On this day appeared W. B. Green and asks that administration be appointed upon the estate of Cephas Mills deceased and it appearing to the satisfaction of the Court that the said deceased departed this life on or about the — day of A.D. 1842, it is therefore ordered by the

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Court that said William B Green he and is hereby appointed administrator of all and singular the goods and chattles, and personal estate of Cephas Mills deceased, and it is further ordered that said Wm B Green enter into bond in the penal sum of fifteen hundred dollars conditioned as the law direct". Abstract page 3 and record page 30. There was no affidavit of facts as appears from the files or the county Court Record by said Green or any one else. That the law requires, to call out the power of the court in making the appointment, and the facts necessary to give the court jurisdiction do not appear, on this point we invite especial attention to case of Unknown heirs of Longworth vs. Baker Administrator, 23rd Ill. 484 in that case Baker was appointed administrator as public administrator of estate of ~~David~~ ^{Longworth} ~~2 Mills~~ proof only being made to the county Court of the death of ~~Mills~~ ^{Longworth}. The Court (p. 489) after referring to Sec. 58, St. of Mills, say, "We think before this Court could get jurisdiction of this case to act, it should have affirmatively appeared to the Court, that there was no relative within the State, or creditor, that administration might be committed, it should further have affirmatively appeared, that the application for the appointment of an administrator on the estate was made by a party interested in the estate. Neither of these facts, and they are fundamental facts, are shown and the question arises, must this Court presume they did exist,

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for it is a rule that intendment as liberal will
be indulged in its favor as would be to the
proceedings of the Circuit Court. Propst vs
Meadow, 13 Ill R. 169 But the requirement
of the Statute goes to the very origin of the
proceeding. It is the existence of these facts
which annuls the power of the court - which calls it into action. They
are fundamental facts, and although the
court had cognizance of the general subject
it not appearing by the record that the
facts were such as to give the court juris-
isdiction in the particular case, we are
not authorized to presume their existence.
The record purports to show all the facts
on which the court assumed to act, and
we cannot, therefore, intend other and indis-
pensable facts existed. Had the court found
the fact to be, that there was no relative in this
State, and that the party making the application
for the appointment of an administrator, was
interested in the estate, we would presume
there was evidence of the facts, but not be-
ing found in the record, we cannot pre-
sume they existed. * * * "But where the
question is, whether the court has jurisdiction
of the particular subject or not the judge
must decide it - at his peril. If he errs
by assuming a jurisdiction which does not be-
long to him, his acts are void. We think
on the facts presented by the record the
County Court had no jurisdiction of the
subject-matter, and his proceedings are
consequently coram non iudice and

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void. The County Court having no jurisdiction to appoint this administrator the subsequent order of sale of the land and the sale under the order by him, are necessarily void."

Now in the case at Bar the Court will see by reference to Green's testimony (Rec. P. 61) that it is somewhat doubtful whether Green was appointed as "Public Administrator" or as a creditor of the estate. He says, "I was once public administrator of Marshall County, and made the sale of the land in controversy as administrator of Cephus Mills deceased" and further stated, "I appeared in the County Court as a creditor," ~~but we submit that~~ in the absence of any evidence in the Probate record, if Green's evidence on the trial ~~below~~, as above quoted, is to have any force, (though we think it cannot vary the record,) then the conclusion is that Green was appointed as a creditor of the estate and not as "public" administrator. The notice and the petition for the sale of the Real Estate disclose the fact that Mills was a resident of the State of Michigan at the time of ~~his~~ decease, and in such case the Statute provides that administration shall be granted to the public administrator of the proper county and to no other person. (St. Mills Sec 33) not even to a creditor. By the same section it is further provided, "That no administration shall in any case be granted

until satisfactory proof be made before the court of probate, to whom application for that purpose shall be made, that the person on whose estate letters of administration are requested is dead, and died intestate, so far as they have knowledge and belief." It appears then, if Green was appointed Administrator as a creditor, the appointment was void - one of the necessary or "fundamental facts" not appearing on the record, or mentioned as having been proved, to wit, that Mills died intestate, and for the further reason that if Mills was a non resident at the time of his decease administration should have been granted to the public administrator of Marshall County "and to no other person" as provided by said section 58 of St of Mills - This provision is unquestionably peremptory and a non-compliance with the same by the Probate Court would render its proceedings absolutely void. Again, if Green was appointed administrator as a creditor of the Mills estate such appointment was void, the record in no manner of form showing or pretending to show that said Mills died intestate. Now was this one of the "fundamental facts" the existence of which awakens the power of the court which calls it into action". By reference to said section 35 St. Mills it seems to us that proof of the existence of two facts are by the legislature of the State made fundamental and indispensable before letters of administration can be granted in any case - these facts are

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first, "that the person on whose estate letters of administration are requested is dead", and second, "and died intestate", ~~these~~ these facts are then specifically pointed out as essential to give the court jurisdiction. The record shows the existence of one of ~~these~~ facts, (see order appointing Green & abstract) the death of Mills, but does not show or find that he died intestate; and is not proof of the ~~existence~~ of the latter fact as material as that of the former? Most assuredly so, in our humble opinion, and we submit that the case of Langworthy v. Mrs. Baker determines the question of jurisdiction, as to the point now under discussion. And in the language of the court in that case we say, "We think on the facts presented by the record, the County Court had no jurisdiction of the subject matter, and his proceedings are consequently coram non iudice and void. The County Court having no jurisdiction to appoint this administrator, the subsequent order of sale of the land, and the sale under the order by him, are necessarily void".

In addition to the reasons and authorities given in support of appellee's second point in his printed brief we would invite your honors attention particularly to the second objection to the administrator's notice of the application for the sale of the real estate belonging to said estate, to wit, that said notice does not state in what State the said County Court of Marshall County is, in which

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The Petition will be filed (See record P. 37. P. 2
of brief) at the time of the publication of said
notice there was a Marshall County in each of
the following States Alabama, Tennessee, Vir-
ginia, Mississippi, ^{Indiana, Iowa and Kentucky} as well as in the State
of Illinois. The statute requires "notice of the
time and place of presenting such petition".
See Sec. 103 St. Mills. Did this ~~notice~~ spec-
ify the place where the Petition was to be
presented or the application made? "The
County Court of Marshall County" is the only
specification of the place. There were
then eight Marshall Counties in the United
States, and perhaps others in other countries.
In the County Court of which of said Mar-
shall Counties were the heirs of Mills,
or the parties interested in said estate,
notified to appear? If any inference
could be drawn from the notice, it would
be that the County Court of Marshall
County in the State of Michigan was in-
tended, as the notice discloses the fact
that Mills died in that State. If a no-
tice in which ~~the~~ State is left out is
to be construed as good, then a notice with
the County left out, thus, "to appear at the
County Court of Illinois," might with as
much reason be held good. With regard
to a similar defect in a notice in the case
of Bowles' Heirs vs Rome 3 Kil, 419 the
Court held that, the defect was cured by the
appearance of the parties interested. The
Court in that case, however said, "There
is a slight defect in the notice in this,

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that the words State of Illinois are not added to the words County of Peoria". We do not exactly agree with the court in regarding said omission as a "slight defect" and think the word slight was inadvertently used by Justice Kevermer. It might have been said that there was but one Peoria County in the United States or elsewhere and hence the defect not as material as in this case. The 103 Sec. St. Mills provides for two modes in which the parties may be brought into court - one by personal service, and the other by publication, in either, the parties must at least be informed of the time and place where the application will be made. In Pardon & Swire et al 23 Ill 372 the court held that a service by a constable in these words, "served by reading" was insufficient and the court did not get jurisdiction of the person of the defendant. But if material facts are to be guessed at as must be done in order to hold the notice of Green good, then the court should have guessed that the constable in that case had read the summons to the defendant and held the service sufficient. Though a general notice not giving name of defendants will suffice yet there must be a sufficient certainty or definiteness in the notice, so that the Stirs court may know without guessing, in what ~~case~~ ^{court} they may appear and contest the application for the sale of the land, which

"through collusion with an unfaithful administrator, or by the ignorance of an incompetent court, his whole estate ~~his whole es-~~
~~tate~~ is to be swallowed up". Hopkins et al
vs McLane 19 Ill 115 We submit then, that
the Heirs at Law of Cephus Mills were
not even by implication parties to the Pro-
ceedings of the County Court for the sale
of the land, and said proceedings as to them
were absolutely void.

The third point of our brief we submit
on the reasons and authorities therein
cited, but specially calling the attention
of the court to the case of McLeary vs Morrow
18 Ill 579.

We now come to the fourth point made
viz: that of fraud - and we insist, that
the evidence in the case, and the record
of the proceedings on the part of the admin-
istrator prove the same conclusively.

Cephus Mills dies in the State of Michi-
gan in 1842 - his family leave the country
and settle in Canada, in the year 1856.
Wm B Green and Ralph Luckwood
(the appellant) learning that said Mills
died seized in fee of certain lands
in this State, the land in controversy
being one of the tracts, - they go to work
to get a title to the land - an old note
amounting to some five thousand dollars
including interest is ~~found~~ ~~up~~ and
bought - doubtless for a song - the same
being barred by the statute of limita-
tions - one of them, Green, appears

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before the probate or County Court of Marshall County Illinois as a creditor of the estate of Mills and has himself appointed Administrator - and presents the said note he and his confederate Luckwood being the owners ~~thereof~~ thereof - and the Court either through ignorance or undue influence of Green adjudicates (if there was any adjudication on the note) upon the claim, without first appointing some discreet and disinterested person to defend on behalf of the estate - Green being part owner of the note, of course does not plead the statute - a decree for the sale of the land is entered - sale to be made in a certain way provided in said decree (see decree P. 33-3 Transcript) and three quarter sections, the one in question and two others the title to the latter by agreement of parties to this ^{suit}, to abide decision herein) are sold to Charles Parker for \$610 when the land at the time was worth from \$3000 to \$4800 as proved - no report of sale made by administrator - leaving it uncertain whether the land was sold at auction as provided by the decree, thus authorizing us to infer that the land was sold at private sale, or if at auction, then under such circumstances as did not admit of fair competition in bidding - The employment of Parker as a "stool Pigeon" to buy the land for Green and then reconvey to him, no consideration passing between them in either conveyance.

and indeed all the circumstances attending the transaction, in our opinion show a barefaced and unmitigated fraud and the conveyance to Parker void.

The appellant insists that the court erred "in vacating the order of dismissal and voluntary nonsuit and reinstating the cause on the docket."

The record shows that the motion to vacate and reinstate and so forth was based on an affidavit made and filed by Samuel L. Fleming one of the attorneys in the case. The appellant failed or neglected to have said affidavit incorporated in the record. It seems that it was deemed by the Court sufficient to justify the granting of the motion; and this Court had the right, and as we believe are bound to infer that the affidavit did contain all that was requisite for the order of the Court, made in the case. For instance, we have the right to assume, that the affidavit set forth that the said G. O. Barnes who appeared as attorney and took the nonsuit without having any authority from the plaintiff or their attorneys so to do, he being an entire stranger to the case & or any other fact or

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facts that we may suppose to have
existed. That the question of allow-
ing or refusing the motion was
one of discretion with the Court
is, we think, fully settled by
the case referred to in Brief.
Lombard vs Cheever 3 Gil 469
Rankin vs. Leirticas 12 Ill 334.

Referring the Court to the
other points and authorities
mentioned in the brief we
respectfully submit that the
judgment of the Court be-
low should be affirmed.

Fleming & McCoy,
Attys for appells.

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A. G. Dart et al

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Appellar Argument

Filed May 9, 1864

J. Leonard Orr