

No. 13449

Supreme Court of Illinois

Schnider.

vs.

Westerman.

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STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division.

No. 53.

Schneider

vs.
Hutcheon

13479

State of Illinois,) Third Grand Division.
SUPREME COURT.) APRIL TERM, 1860.

ANDREW SCHNIDER

^{vs.}
HENRY P. WESTERMAN.

ERROR TO TAZEWELL.

Brief for Defendant in Error.

The evidence in this case shows that one Adam Ewalt died in January, 1859; that Winkle, who gave the mortgage in question, married Ewalt's widow in the month of July following; that before the marriage, and after the death of Ewalt, Winkle took possession of and carried on the brewery that Ewalt had been engaged in in his lifetime.

That one George Seo bought a house of Ewalt for \$400, for which he was to make large beer barrels or puncheons; that three large tubs and two large hogsheads were taken away by Ewalt before his death; that ten or twelve more large tubs were done at or about the time of Ewalt's death; that Ewalt, in addition to the \$400, paid witness \$120 in money; that witness made ten other large tubs or puncheons, after the death of Ewalt, and Winkle paid him \$300 and took them away.

It is a just inference from all the evidence that all the tubs that were made, were made by the witness under the contract made with Ewalt in his lifetime, and that Winkle took possession and charge of them for the widow. There is no evidence whatever of any new contract between Winkle and the witness.

After the death of the intestate his personal property is considered in abeyance until administration is granted, and upon granting administration it is invested in the administrator by relation from the time of the death of the intestate. Jewett vs. Smith, 12 Mass. Rep., 309; Williams on Executors, 528.

The fact that the tubs were made under the contract made by Ewalt with the witness, and paid for by him before his death, and that ten or twelve of them were finished and set apart before his death, and that Winkle professed to be acting for the widow and not for himself, was sufficient to vest the property in the administrator at least as to the ten or twelve finished at the time of Ewalt's death.

But it is contended by the plaintiff that Winkle, by intruding himself into the affairs of the decedent, and taking possession of the property made himself an executor *de son tort*, and that he had by virtue of such wrongful

assumption a right to dispose of the property of Ewalt. The first instruction asked by the plaintiff assumed such to be the law, and was, as I shall be able to show, properly refused. That the acts here done would be sufficient to charge Winkle as an executor *de son tort* cannot admit of a doubt; but an executor *de son tort* cannot, by his own wrongful act, acquire any benefit. 1 Williams on Executions, 218. It is also true that all lawful acts which an executor *de son tort* does are good. But it must be of sales or transactions in the due course of administration, and must not be a mere solitary wrongful act. Mountford vs. Gibson, 4 East. Rep. 453; Williams on Executors, 223, 224.

It has been decided in England that if an executor *de son tort* takes possession of goods and sells them, and afterwards takes out letters, the sale will be good by relation. Lomax on Executors, 183, top page.

This decision clearly indicates that where a wrongful sale is made, as was done in this case, it is not good even at common law. The act of Winkle mortgaging the goods for his own private debt, was a wrongful act on his part, not in the course of administration, but in violation of it, and comes clearly within the case of Mountford vs. Gibson, 4 East. Rep., 454.

But whatever may have been the rule upon this subject at common law, such cannot be the law in the State of Illinois so long as our Statute of Wills is in force. The statute expressly requires an oath to be taken by the administrator, a bond to be given, and places him within the control of the county court, and requires him to sell personal property at public auction and upon credit; and a sale or mortgage for a private debt, even by a rightful administrator, would be in controvention of the statute, and void. It would be needless to refer to all the provisions of our statute made with the view of protecting the estate of deceased persons from waste and destruction. The thirty-fifth section provides for the appointment of an administrator to collect during a contest in relation to letters, and there are numerous provisions that can have no other object than to protect the estate and apply it to the payment of the creditors of the deceased, according to the classes specified in the statute. These provisions of the statute were certainly made for some purpose. What would be the necessity of having a public administrators appointed, of having administrators to give bond and take solemn oaths, of requiring goods to be sold at public auction, and creditors to be paid in classes, if any vagabond who may come along and get into the good graces of a widow of easy virtue, and thereby acquire the absolute ownership of the goods, with authority to sell them in payment of his own private debts? It would be better at once to turn the property of every deceased into a state of nature, as creditors would not then be deceived by the false lure of our statute, and might seize the goods in payment of their debts. But we are not without authority upon this side of the Atlantic upon this very question.

By the well settled rule of the common law, the person who had been appointed executor by the will of the testator, might, before probate of the will, take into his hands the effects of the testator, might sell or otherwise dispose of his goods and chattels. 1 Williams on Executors, 240. All this he may do for the reason that he derives his power from the will and not from the probate. 2 Black's Com., 507. But in Virginia, where the statute

is very similar to ours, it has been decided in the case of *Monroe vs. James*, 4 Munford's Rep., 200, that a sale of the testator's goods, by one of the executors who had not qualified, was void as against the executor who afterwards qualified, although the sale was for a valuable consideration, and at a time when there was no qualified executor. That was an action of detinue brought by the rightful executor against the purchaser of the slave, and was decided expressly upon the ground that their statute requiring the executor to take oath and give bond had changed the common law in this respect.

The first and second instructions for plaintiff, as modified by the court, certainly stated the law fully and fairly for him.

The instructions on the part of the defendant stated only the clearest propositions of law.

There was no evidence whatever that the tubs mortgaged were the tubs made by the witness. But, aside from this, it was clearly shown that some tubs had been taken away before the death of Ewalt; that ten or twelve more were completed at the time of his death; that ten only were made and taken by Winkle after the death of Ewalt; and it is no more than a fair and just inference from the whole evidence that the witness (Seo) having received his pay, had set apart and appropriated the tubs that were finished at the time of Ewalt's death. Such being the case, Winkle would have no right to mortgage them; and if it was the other tubs that were made after the death of Ewalt that were mortgaged, it was the duty of the plaintiff to have shown it; not having shown that the tubs about which the witnesses were talking were the tubs that were mortgaged, he has failed entirely on that ground alone to make a case, and the judgment should be affirmed.

ROBERTS & IRELAND, *Attorneys for Defendant in Error.*

10230-~~42~~ 33

Andrew Schindler

vs

Henry S. Kestuman

Defts. Brief

Filed May 24, 1860

L. Leonard

clerk

State of Illinois,) Third Grand Division.
SUPREME COURT.) APRIL TERM, 1860.

ANDREW SCHNIDER

^{vs.}
HENRY P. WESTERMAN.

ERROR TO TAZEWELL.

Brief for Defendant in Error.

The evidence in this case shows that one Adam Ewalt died in January, 1859; that Winkle, who gave the mortgage in question, married Ewalt's widow in the month of July following; that before the marriage, and after the death of Ewalt, Winkle took possession of and carried on the brewery that Ewalt had been engaged in in his lifetime.

That one George Seo bought a house of Ewalt for \$400, for which he was to make large beer barrels or puncheons; that three large tubs and two large hogsheads were taken away by Ewalt before his death; that ten or twelve more large tubs were done at or about the time of Ewalt's death; that Ewalt, in addition to the \$400, paid witness \$120 in money; that witness made ten other large tubs or puncheons, after the death of Ewalt, and Winkle paid him \$300 and took them away.

It is a just inference from all the evidence that all the tubs that were made, were made by the witness ~~under~~ the contract made with Ewalt in his lifetime, and that Winkle took possession and charge of them for the widow. There is no evidence whatever of any new contract between Winkle and the witness.

After the death of the intestate his personal property is considered in abeyance until administration is granted, and upon granting administration it is invested in the administrator by relation from the time of the death of the intestate. *Jewett vs. Smith*, 12 Mass. Rep., 309; *Williams on Executors*, 528.

The fact that the tubs were made under the contract made by Ewalt with the witness, and paid for by him before his death, and that ten or twelve of them were finished and set apart before his death, and that Winkle professed to be acting for the widow and not for himself, was sufficient to vest the property in the administrator at least as to the ten or twelve finished at the time of Ewalt's death.

But it is contended by the plaintiff that Winkle, by intruding himself into the affairs of the decedent, and taking possession of the property made himself an executor *de son tort*, and that he had by virtue of such wrongful

assumption a right to dispose of the property of Ewalt. The first instruction asked by the plaintiff assumed such to be the law, and was, as I shall be able to show, properly refused. That the acts here done would be sufficient to charge Winkle as an executor *de son tort* cannot admit of a doubt; but an executor *de son tort* cannot, by his own wrongful act, acquire any benefit. 1 Williams on Executions, 218. It is also true that all lawful acts which an executor *de son tort* does are good. But it must be of sales or transactions in the due course of administration, and must not be a mere solitary wrongful act. Mountford vs. Gibson, 4 East. Rep. 453; Williams on Executors, 223, 224.

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ROBERTS & IRELAND, *Attorneys for Defendant in Error.*

~~No 53~~ 53-33

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André Schneider

vs

Henry J. Westerman

Brief of Deft-

Filed May 25, 1860

L. Leland

Attorney

State of Illinois,) Third Grand Division.
SUPREME COURT.) APRIL TERM, 1860.

ANDREW SCHNIDER

vs.

HENRY P. WESTERMAN.

ERROR TO TAZEWELL.

Brief and Arguments of B. S. Prettyman for the Plaintiff in Error.

The plaintiff, a creditor of one August Winkle, to the amount of \$350, to recover the same took of said Winkle a chattel mortgage upon some ten large and six small beer barrels, then in possession of Winkle, and which he claimed to own in his own right. Payments were not made according to the condition of the mortgage, and Schnider seized the property under the mortgage. The defendant, Henry P. Westerman, then being appointed administrator of the estate of one Adam Ewalt, took the property so mortgaged and in controversy, claiming it as administrator of the estate of Ewalt, and as property belonging to that estate. Schnider demanded the property and Westerman refused to give it up; and the plaintiff brought replevin for it; and on the trial the jury found for the defendant. The court refused a new trial and the plaintiff appealed.

Winkle at the date of the mortgage to the plaintiff had full possession and control of the property, and had had from the time it was made, and then owned or claimed to own it. It had never been in possession of Ewalt, and the plaintiff, without any knowledge of any pretence of claim against it, took the mortgage in good faith, and seized the property to satisfy the debt; and possession of property should be received as *prima facie* evidence of the right to sell; *Carlyle vs. Peterson*, 3 Bibb, 93.

But it is insisted that Winkle obtained and held and disposed of the goods in fraud of the estate of Ewalt. Yet by such a sale to a *bona fide* purchaser without the notice of the fraud, the property passed to the latter, and the original owner cannot maintain trover for the goods. *Mowry vs. Walsh*, 8 Cowan, 238; *Jackson vs. Anderson*, 4 Wendall, 474.

And a person intermeddling with the property of an estate without authority becomes an executor *de son tort*. Winkle took all the goods of Ewalt and paid nearly all the debts; and whatever an executor *de son tort* does lawfully binds the estate. *Williams on Executors*, Vol. 1, page 155, and cases cited. A sale of personal property by an administrator for his private debt is not void unless the purchaser was guilty of a fraud in the purchase. *Ward vs. Lewis*, 3 J. J. Marsh, 505.

And an executor having a right to sell may mortgage the goods. See 2 *Williams on Executors*, page 671, and cases cited.

Who is an executor *de son tort* is a question of law. Padgot vs. Priest, Durnford and East. R., 2 Vol., page 97.

And the evidence showed that Winkle had paid debts of the estate to nearly the sum of 4,000, and all except \$225; while the whole property disposed of did not amount to half that sum; and the balance of the property of the estate was much more than sufficient to pay all remaining debts; and as to all the property disposed of by Winkle, and claimed to belong to the estate of Ewalt, Winkle, in a suit against him, would be entitled to recoup in damages all money lawfully paid by him on account of the estate. See 2 Vol. Durnford and East. Rep. Padgot vs. Priest, page 97; 3 Bacon's Abridgment, 25.

And the evidence shows that one of the notes for which the mortgage was given, \$250, was the debt of Ewalt, and that Winkle was only security; and equitably the payment of the debt, even if it were made out of the property of the estate, would be but just and proper. Such, being the law and the evidence, the finding of the jury was contrary to both, and a new trial ought to have been granted. 1 Gillman, 70, 406; 2 Scammon, 514.

The instructions asked for by the plaintiff were the law arising from the facts proved, and should have been given as asked. And the court erred in refusing and modifying the same.

There was no evidence whatever tending to show that the property was ever delivered to Ewalt or to his administrator, or evidence that it belonged to Ewalt at the time of his death, as it was not then manufactured.

The first and second instructions given for the defendant were not based on the facts as proved, and were calculated to mislead the jury; and the fourth instruction of the defendant from the evidence of the case ought not to have been given for a like reason.

B. S. PRETTYMAN, *Attorney for Plaintiff.*

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Schneider

Westernman

Pliff's. brief

Filed May 25, 1880
Lideland
Clerk

1
Pleas to a Term of the Circuit
Court begun and held at the
Court-House, in the City of Pekin
within and for the County of
Lazewell and State of Illinois, on
the first Monday of the Month of
February the same being the
Sixth day of said month in the
year of our Lord Eighteen hun-
dred and Sixty. Present the Hon-
orable James Harriott Judge of
the Twenty-first Judicial Circuit
Composed of the County of Laz-
ewell Mason, &c.

Be it remembered that on the 21st day of
January A.D. 1860. an affidavit was filed,
in the words and figures following to wit:

State of Illinois }
Lazewell County }

Andrew Schneider } Respondent:

- vs -

Henry Westerman } To the Lazewell Circuit
Court of the February Term
1860, -

Andrew Schneider who is about swearing
out a writ of Replevin from the said Court
against Henry Westerman, to recover the possess

-ion of Sixteen Beer Tubs now in the possession of said Henry Weternan, and unjustly detained by him. On oath states that he is the owner of said Beer Tubs for which he is about running out a writ of Replevin, and that he is entitled to the possession thereof, and the same has not been taken for any tax assessment, or fine levied by virtue of any law of this State, nor seized under any execution or attachment against the goods & chattels of said Andrew Schneider the said plaintiff liable to execution or attachment. Sworn & subscribed to ~ Andrew Schneider
this 21 Jan'y 1860 before ~
me Saml P Bailey, J.P. ~

And now afterwards to wit
on the 21st day of January A.D. 1860: a writ
issued in the words and figures following
to wit.

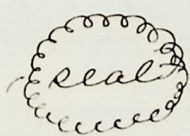
State of Illinois }
Jazewell County } ^{ss}

The People of the State of Illinois,
To the Sheriff of said County— Greeting—

If Andrew Schneider of said County
of Jazewell shall give you good and sufficient
security to prosecute his suit to effect

and without delay, and to make return of the following described goods and chattels the property of him the said Andrew Schneider to wit Sixteen Beer Tubs of the value of about four hundred dollars, which Henry Westerman, also of said County, and unlawfully took, and unjustly detains and returns the said property if return thereof be awarded - and further to save and keep you harmless in replenishing said property: then you are to cause the said goods and chattels to be replenished and delivered to said plaintiff without delay. And Summon the said defendant personally to be and appear before our Circuit Court in and for said Fagwell County, on the first Monday of February A.D. 1860, to answer to the said plaint of the said plaintiff for unjustly detaining the goods and chattels aforesaid. And make due return of the Bond to be taken of the said plaintiff as aforesaid, together with this writ, to the clerk of our said Court with an endorsement thereon as to your doings in the premises. Witness Merrill K. Young clerk of said Court, and seal thereof, at Pekin in said County this 21st day of January A.D. 1860

Merrill K. Young clerk
By S.W. Stone Deputy



Which said Writ was afterwards
 totit on the 3rd day of February A.D. 1860, ret-
 urned with the following endorsement thereon
 to wit:

State of Illinois }
 Jazewell County } ^{ss}

I have duly served the
 within by reading the same and delivering
 the within named property to Andrew Schnei-
 der this 21st day of January A.D. 1860.

And now afterwards totit on the
 23rd day of January A.D. 1860 a Declaration
 was filed, in the words and figures following.

State of Illinois }
 Jazewell County }

Andrew Schneider

=vs.=

Henry Westerman

Replevin

Henry Westerman

was summoned to answer unto Andrew
 Schneider plaintiff in this cause, of a plea
 wherein he took the Sixteen Beer Subs and
 unjustly detained them against Sinters
 and pledges &c and whereupon the said
 Andrew Schneider the plaintiff, by his
 attorney B. S. Priddyman, complains that the

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said Henry Westerman the defendant. On 21st day of January 1860 at Ohio town at the county and State aforesaid took the sixteen Beer Tubs - aforesaid of him the said plaintiff and unjustly detained the same against sureties and pledges until &c, whereby the said plaintiff hath sustained great damage to wit four hundred Dollars, and therefore he brings this suit.

B. S. Prtymann
Atty for plaintiff

And whereas also on the day and year aforesaid at the county & State aforesaid the said defendant took sixteen other Beer Tubs of great value to wit four hundred Dollars, of him the said plaintiff and then unjustly detains against sureties and pledges wherefor the said plaintiff hath sustained damages of the value of four hundred Dollars and therefore he brings suit &c,

B. S. Prtymann
Atty pro D,

And now afterwards to wit on the 8th day of February A. D. 1860. Pleas were filed in the words and figures following to wit:

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State of Illinois } of the February Term of the
 Jaycewell County } Jaycewell Circuit Court A.D. 1860.
 Henry P. Weternman }
 also }
 Andrew Schneider }

And the said def-
 -endant by Wm B Parker his attorney comes
 and defends the wrong and injury when he
 and says that he did not take the said goods
 and chattels in the said declaration ment-
 -ioned or any or either of them or any part
 thereof in manner and form as the said
 plaintiff hath above thereof complained
 against him and thus the said defenda-
 -nt puts himself upon the Country

Wm B Parker defendants atty
 and the Plaintiff
 doth the like

B. S. Prettyman.

And the said defendant comes and defen-
 -ds &c. and says that he does not wrongfully
 detain the goods and chattels in the declar-
 -ation mentioned or any part thereof in man-
 -ner and form as therein alleged and of this
 he puts himself upon the Country.

Wm B Parker defendants atty
 And the Plaintiff doth the like

B. S. Prettyman
 for Plff.

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And for a further plea in this behalf the said defendant says Actio Non because he says that the said goods and chattels in said declaration mentioned, at the said time when &c were the property of the said defendant, and not of the said plaintiff as by the said declaration is above supposed and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, and he also prays the return of said goods and chattels together with his costs in this behalf, according to the form of the Statute in such case made and provided, to be adjudged to him &c and this he ready to verify. Wm B. Parker defendant &c &c
And Plff doth swear
of the County.

Prothy man for
Plff.

And for a further plea in this behalf the defendant says Actio Non. because he saith that the said goods and chattels in the said declaration mentioned at the said time when &c, were the property of the said defendants as administrator of the Estate of Adam Ewald deceased and not of the

said plaintiff as by the said declaration is above supposed, and this the said defendant is ready to verify, and he brings into court here his letters of administration which give sufficient evidence to the Court that he is administrator of the said Adam Ewalds deceased, wherefor he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, and he also prays the return of the said goods and chattels, together with his costs in this behalf, according to the form of the Statute in such cases made and provided to be adjudged to him, and this he is ready to verify

Wm B Parker Defendant atty

And Plff puts himself upon
the Country Bretyman for
- Plff -

Andrew Schneider }
- vs - } Replevin
The Westerman }

And the said plaintiff as to the 2nd & 3 Count precludi non, because the said property said declaration is not the property of said defendant but is the property of said plaintiff, of this he puts

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himself to the Country.

B. S. Prettyman
Atty

And now afterwards to wit at a Term of the Circuit Court begun and held at the Court House in the City of Pekin within and for the County of Tazewell and State of Illinois on the first Monday of the month of February. the same being the sixth day of said month in the year of our Lord one Thousand eight hundred and ~~sixty~~. Present the Honorable James Harriott Judge of the Twenty first Judicial Circuit Hugh M. Fullerton Esq Prosecuting Attorney. Thomas L. Reers Sheriff and Merrill L. Young Clerk the following proceedings were had in said cause to wit:

Wednesday February 22 A.D. 1860

Andrew Schneider	}	Replevin
Henry Westerman		

And now on this day come as well the Plaintiff, by his attorney B. S. Prettyman, as the Defendant, by his attorneys, Parker & Son; Whereupon came

a Jury of twelve good and lawful men, to wit: James W. R. West. G. F. Cleveland John Sharp - Joseph G. Syford - J. F. Peyton Nathan W. Shaw - William Watson. A. Harding. J. Evans - U. W. Crosby - Josiah Sawyer and J. B. Hardman, duly elected, tried & sworn, who, having heard the allegations & proofs of the parties, and argument of Counsel thereon, for verdict say, "We the Jury find the defendant not guilty."

It is therefore ordered and adjudged, by the Court, that the Defendant recovers of said Plaintiff, the costs and charges by him, about his defence expended, and that Execution issue therefor.

Whereupon, the Defendant entered his motion for a new trial in this cause, which motion, is, by the Court, overruled.

= Bill of Exceptions. =

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Andrew Schneider } Of the February Term
vs. } of the Jazewell Circuit
Henry Weternan } Court A.D. 1860-

Be it remembered that on the trial of the above entitled cause, the Plaintiff called Christian Keft who testified that he knew the property in controversy, knew that one August Winkle had them in possession before he mortgaged them to the plaintiff, that before the commencement of this suit he heard Plaintiff demand them of the defraudant & he refused to give them up.

Plaintiff then read the following mortgage

August Winkle } No 1781
To : } Recorded Dec 17th 1859.
Andrew Schneider }

Know men by these Presents that I August Winkle of the Town of Pekin in Jazewell County Illinois of the first part for and in consideration of three hundred and fifty Dollars cash to me in hand paid by August Schneider of the second part the receipt of which is hereby acknow

-ledged. do hereby grant bargain & sell unto
 the said party of the second part his heirs
 and assigns the following goods and chattels
 to wit. Ten large Beer Barrells or Runckons
 and six small ones - all designed to hold
 325 Barrells of Beer when full and now sit-
 uated at the Beer Celler of said Whiske at
 the Bluff back of Pkino - To have and to
 hold all and singular. the said goods and
 chattels unto the said party of the second
 part his heirs and assigns forever. and
 the said party of the first part for himself
 his heirs Executors and administrators
 doth hereby covenant to and with the said
 party of the second part. his heirs and
 assigns that he is lawfully possessed of
 the said goods and chattels as his own
 property that the same are free from all
 incumbrances and that he will warrant
 and defend to him the said party of the
 second part and his assigns against the
 Lawfull claims and demand of all persons
 Provided nevertheless that if the said party of
 the first part his heirs executors and adm-
 inistrators shall will and truly pay to the
 said party of the second part his heirs exe-
 cutors administrators or assigns for the redempt-
 ion of the above bargained goods and chattels

the just and full sum of one hundred and fifty dollars or or before the 20th day of January next with interest according to the tenor and effect of two certain promissory notes given by the said party of the first part to the said party of the second part for \$500. and bearing date July 1859 and the other dated October 14th 1858. and for \$300. Dollars & if \$150 dollars is paid Jan'y 20. then Winkler isto have until June 1st 1860. to pay the residue. but if the hundred & fifty is not paid then Schnyder may foreclose & collect said note from Winkler and then this mortgage to be void. otherwise to remain in full force and virtue. And provided further that until default be made by the said party of the first part in the performance of the conditions. afore said it shall and may be lawfull for him to retain the possession of the said goods and chattels and to use and enjoy the same but if the same or any part thereof shall be taken on execution, attached or claimed by any other person or persons at any time before payment or if the said party of the first part shall attempt to sell the same without the authority and permission of the said party of the second part in writing expressed then it shall and may be lawfull for the said party

of the second part or his assigns to take immediate and full possession of the whole of the said goods and chattels to his and their own use.

In Witness whereof the said party of the first part has hereunto set his hand and seal this 12th day of December 1859.

August Winkler seal

State of Illinois }
Lazear County }^{ss}

This mortgage was acknowledged before me by August Winkler this 16th day of December 1859

Samuel R. Bailey

Justice of the Peace Lazear County

Plaintiff then called George Ho- who testified that he bought a House from Adam Ewalt in his lifetime for \$400. and was to make him Coopers work for it. was to make large Barrels or puncheons, at the rate of \$1.70 per barrel for each common barrel they held respectively - that before his death he made three large Tubs worth \$145. to \$150 = 18 1/4 barrels worth 36 dollars - did repairing to the amount of 30 dollars - and made two other large Hoop Trade or puncheons, all of which Ewalt took away before his

15 death, and that he made eleven or twelve more large Hogs Heads under that contract with Ewalt which were done about the time of his death and which after Ewalt's death were taken away from the shop by August Winkle - after the death of Ewalt. He made ten other Barrells or large Hogs Heads and Winkle paid \$300. Dollars to the Witness and took them away also. - Ewalt in his life time had paid witness \$120 in money & the \$400. in the house was all he ever paid - and the whole the work witness did. Making & repairing including the 10 large barrells made after the death of Ewalt & got by Winkle amounted to \$820, dollars - That August Winkle married the widow of Ewalt soon after his death.

Mrs Winkle was also called & testified, that Ewalt had a large lot of Beer on hand at his death, and that Winkle sold it; could not say how much. That Ewalt built a large Beer cellar, & that all of the large Barrells made by Geo. were taken out to the Beer cellar, that Ewalt owed at his death about \$4000, - and that she and her husband had settled and paid it all off except about \$225, dollars which was unpaid as far as she knew. that she

& her husband Minklo never took out any letters of administration upon Ewals Estate, and she had agreed to give to his Mother & Sister \$200. dollars as their portion of his Estate.

M. J. F. was then called & offered to prove that Ewalt at his death owed him \$400. for the House sold Leon. and Minklo after his death paid it: that Ewalt at his death owed Minklo \$700 dollars Borrowed money. That Minklo paid on account of work Ewalt for his cellar \$300. to one man and \$600. to another \$210 to Shomffler \$245. to Amb. and that Minklo had paid all of the debts of Ewalt amounting to \$4000. except \$225. and that the Beer cellar of Ewalt was worth \$2500. dollars, & the same was objected to by defendant & the Court sustained the objection, & rejected the evidence to which Plaintiff excepted.

The Plaintiff then called Francis Hovy who testified that all the barrels were brought from the cooper shop by Minklo to the Brewery occupied by Ewalt in his life-time & were all taken by Minklo out to the Beer cellar spoken of some time in February or March 1854 that they all came from the shop after the death of Ewalt.

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That immediately after the death of Ewalt Winkle took hold of and carried on the Brewery until he married the Widow & then continued in the business untill Jan'y 1860 when he left - that when Ewalt died & Winkle commenced there was on hand about 35 or 40 barrels of Beer - that Winkle had since the death of Ewalt expended about \$200 dollars in draining the brs cellar of Ewalt and that the cellar was worth about \$2300 dollars. Ewalt died Jan'y 5/59 & Winkle married the Widow July/59.

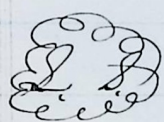
Plaintiff then stated his case -

Defendant then offered his letters of administration of the estate of Ewalt testat

State of Illinois }
Jazsull County } ss

The People of the state of Illinois: To all to whom these presents shall come - Greeting. Know Ye that whereas Adam Awald late of said County of Jazsull, and state of Illinois died intestate as it is said, on or about the 7th day of January A.D. 1859. having at the time of his decease, personal property in this State which may be lost, destroyed, or diminished in value if speedily

can be not taken of the same: to the
 end therefore that said property may be
 collected and preserved for those that
 shall appear to have a legal right or inter-
 est therein, we do hereby appoint Henry P. West-
 ernman of the County of Tazewell and State
 of Illinois Administrator of all and sin-
 gular the goods and chattels rights and
 credits which were of the said Adam Awaldt
 at the time of his decease, with full power
 and authority to receive and collect the
 said property and debts whenever the
 same may be found in this State, and in
 general to do and perform all other acts
 which now are, or hereafter may be requi-
 red of him by law.



Witness John Gindley Clerk
 of the County Court, in and
 for the County of Tazewell, at his offi-
 ce in Pekin, this 4th day of January
 A.D. 1860. John Gindley Clerk

State of Illinois }
 Tazewell County } ss

I do solemnly swear that
 I will well and truly administer all and
 singular the Goods and Chattels rights and
 credits and effects of Adam Awaldt deceased
 and pay all just claims and charges aga-

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- against said estate so far as his good chattels and effects shall extend, and the law charge me: and that I will do and perform all other acts required of me by law to the best of my knowledge and abilities

Henry R. Ursternman

Sworn to and subscribed
before me this 14th day of
January A.D. 1860.

John Bradley County Clerk

And this was all the evidence offered in the case. - And the plaintiff then asked the Court to instruct the jury as follows

The Court instruct the jury that an executor of an Estate has the lawfull right to dispose of the personal property of the Estate as he may think proper and the purchaser of him gets a good title to the same. And that executors de son tort. Has the same power of disposition as a rightful executor. and if they believe from the evidence that Wickle was an executor de son tort, of the Estate of Ewalt and did dispose of the property in controversy as such bona-fide. to the Plaintiff they will find for the plaintiff.

Which was refused & Plaintiff

excepted, - The Plaintiff then asked the Court to give the following instructions to the jury

That the fact that Ewalt made a contract for the making \$400. dollars worth of Cooperage in his lifetime did not entitle him to the Barrells made after his death which exceeded that sum and price, - And if the jury believe from the evidence that the barrells in controversy, were made after the death of Ewalt, and were paid for by Winkler they were the property of Winkler & they will find for the Plaintiff, -

That the administrator of Ewalt had no right to take the Barrells from the Coopers-Shop, beyond the amount paid on the contract by Ewalt, without first paying the balance due the Cooper for making them. And if they believe from the evidence that Winkler paid the \$300. to the Cooper for making them, the administrator of the estate of Ewalt was not entitled to take them until he had paid to Winkler the amount paid by him for the making of the same. And unless they believe the administrator has so paid or offered to pay the \$300. they will find for the Plaintiff.

which the Court modified thus:-

That the fact that Ewalt made a contract for the making \$400 dollars worth of cooperage in his lifetime, did not entitle him to the barrels made after his death which exceeded that sum and price - And if the jury believe from the evidence that the Barrels in controversy were made after the death of Ewalt and were bought of Ehrhard paid for by Mickle, they were the property of Mickle & they will find for the plaintiff.

That the Administrator of Ewalt had no right to take the Barrels from the cooper-shop beyond the amount paid on the contract by Ewalt without first paying the balance due the cooper for making them, and if they believe from the evidence that Mickle "bought the Barrels over that amount & paid the \$300. to the cooper for making them, the administrator of the estate of Ewalt, was not entitled to take them until he had paid to Mickle the amount paid by him for the making of the same, and unless they so believe the administrator was so paid or offered to pay the \$300. they will find for the plaintiff,

And gave as modified and pla-

-intiff excepted to the modification.

& The Court gave for the defendants the following instructions

1st If the jury believe from the evidence that Ewald contracted for the property in question before he died and the same was made under that contract, then the property would vest in the Administrator of Ewald upon delivery to him or his administrator and if such are the facts, Winkle would have no right to mortgage the property. And if such is the only evidence of title on the part of the plaintiff they will find for the defendant.

2nd That if the property in question was made under a contract with Ewald and not under a contract with Winkle, then the property whether made before or after the death of Ewald would vest in the Administrator of Ewald if delivered to Ewald or his administrator. And if the jury believe such to be the fact, they will find for the defendant.

3rd If the jury believe from the evidence that the property in question belonged to Ewald at the time of his death they will find for the defendant.

4th Unless the plaintiff has proved that

Whikle was the owner of the property in question they will find for the defendant.

To which the plaintiff then and then excepted. And thereupon the jury found for the defendant. Plaintiff then moved for a new trial for the following reasons.

Schryder } Of the February Term of the
-vs- } Term Ct. Ct. AD 1860=
Westerman }

Plaintiff enters his motion for a new trial in this cause for the reasons that:-

1st The finding of the jury was contrary to the facts & the instructions of the court.

2nd The court gave improper instructions for the defendant & refused to give proper instructions asked by Plaintiff.-

3rd The court improperly modified Plaintiff's instructions.- Portyman for Plff-

which was overruled by the court & Plaintiff then and then excepted and prayed that this his bill of exceptions may be signed and sealed which is done

James Harriott *seal*

State of Illinois } ss.
 Tazewell County }

I Merrill C. Young
 Clerk of the Circuit Court within
 & for said County, do certify that
 the foregoing Twenty ~~three~~ pages contain
 a true perfect and complete copy
 of the Record of the proceedings had
 in the Cause therein named as the
 same appears of Record in my Office
 In witness whereof I have
 hereunto set my hand &
 affixed the Seal of said Court
 at Pekin this 27th day of
 March A.D. 1860



Merrill C. Young Clerk

Andrew Schneider,
vs Error to Laywell
Henry Westermann

} In the Supreme
Court, Third
Grand Division
April Term 1860.

And now comes the said Plaintiff and says, that in the record and proceedings aforesaid, and in the rendition of the judgment aforesaid, manifest error hath intervened to his injury in this:

1st That the Circuit Court erred in over-ruling the Plaintiff's motion for a new trial

2nd That the Circuit Court erred in giving improper instructions asked by Defendant, and refusing proper instructions asked by the Plaintiff

3rd That the Circuit Court erred in improperly altering and modifying the instructions asked by the Plaintiff -

4th That the Circuit Court erred in rendering judgment on the verdict, because said verdict was unwarranted by the law and the evidence -

For which and for other errors,

manifest in the record and proceedings
aforesaid the said Plaintiff prays that
said judgment be wholly reversed
set aside & for naught held & esteemed.

R. B. Prittyman &
N. M. & J. D. Head
For Plaintiff in Error

53 290-189

Andrew Schneider

v

Henry Westerman

Manuscript

Filed April 18. 1860
A. C. C. C.
C. C.

Prittyman for P. M.
Robertson for G. M.