

No. 14406

Supreme Court of Illinois

Burger et al

vs.

Potter et al

STATE OF ILLINOIS,
SUPREME COURT,
Third Grand Division

No. 61

Burger
vs
Patterson

1476

1863

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

LEMUEL BURGER, *et al.*,
vs.
ELISABETH POTTER, *et als.* } ERROR TO WOODFORD.

PLAINTIFFS' BRIEF AND POINTS.

1. The complainants below had no legal or lawful right to exhibit their Bill against the defendants below.

*The executors of Potter
could not properly join the
infants as co-complainants as
their interests were not identical*

A. The County Court of Woodford County has no power to appoint an executor. This power is vested alone in the person making a will.

See Sec. 19, Chapter *Wills*, Purple's Stat., page 1195.

"All persons named as executors in any will, testament, or codicil, as aforesaid, shall, after the same shall be proved, * * * be entitled to letters testamentary thereon; and if there be no executors named in such will, testament, or codicil, or the executor named therein shall die, refuse to act, or be otherwise disqualified, letters of administration, with the will annexed, shall be granted," etc.

See also Section 25, Statute Wills.

Purples Statutes

Page 1196.

Sec. 25. Where two or more executors are appointed in and by the same will, and one or more of the persons named as such, shall die, refuse to take upon himself or herself such executorship, or be otherwise disqualified, letters testamentary shall be granted thereon to the other person or persons so named, not renouncing as aforesaid, and not disqualified.

But no authority is conferred on any court to appoint an executor.

B. By the 4th section, title *Chancery*, it is provided and declared that "Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend."

The Bill is exhibited by twenty-six complainants, the last eight of whom are minors (see printed abstract, page 7), and appear by their next friend, Leven P. Hereford. Can it be claimed by or for the defendants in error that this averment in the bill is a compliance with the statute above quoted?

Again, by the 13th Section of Chapter 47, Title Guardian and Ward, Purples Statutes Page 594, it is provided that Minors

may bring suit in all cases whatever by any person that they may select as their next friend and the persons so selected shall file bond with the Clerk &c and after bond shall be so filed, said suit shall progress to final judgment and execution as in other cases.

Here was no selection by the infants of a next friend. No bond for costs filed. The infants appear only by L Skerford their next friend.

C. There is no averment in the Bill as to the residence of any of the complainants. Can the court see that this proceeding is prosecuted either with the knowledge or consent of the ^{infants} complainants?

See also Sections 31, 32, 33, 34, and 35, title Conveyances.

Purple Statutes
Page 160.

Sections 33, 34 & 35 are as follows, to wit:—

Sec 33. — In all cases where any minor heirs shall be interested in such proceeding as aforesaid, reasonable notice of such application shall be given to the guardian or guardians of such minors; and if there shall be no guardian, then the said court shall appoint a guardian or guardians to litigate and act in such case.

Sec 34. The Executors, administrators or heirs of any deceased person or persons who shall have made such contract, bond or memorandum in writing as aforesaid, in his or her lifetime for the conveyance of land for a valuable consideration, when such consideration has been paid and fulfilled as aforesaid, may, upon application in writing, obtain such decree as aforesaid, upon giving notice to the party to whom such deed is intended to be made, and under the same condition as is provided in this Chapter

Sec. 35. In all cases where application shall be made as aforesaid, the Court shall have power to continue the same from term to term, to obtain such evidence as the nature of the case shall require; and no decree for the conveyance of land, upon application as aforesaid, shall be made, unless the said Courts shall be satisfied that decree can be made without injustice to any heir or creditor of the deceased, and that the same is just and equitable.

D. If this proceeding can be sustained, then the estate of any infant can be taken from him without his knowledge or consent, by making him a party complainant.

If it be law that executors or administrators can unite with them in a proceeding of this character, the infants whose estates they have in their hands, then any similar proceeding can be instituted in our courts and the ~~property~~ patrimony of infants swept from them without knowing or hearing of the proceeding.

In this case the land descended to and vested in the heirs of Potter and unless Burger pays for the land it would remain vested in them. But the deed takes the title out of the heirs and vests it absolutely in Burger without payment. Could Burger get this land from these infants without complying with the terms of the bond in any proceeding or

suit instituted by him? Certainly not. Before he can do so he must pay and the speculators have no better right.

2. The minor heirs of Potter were not properly made complainants. They should have been made defendants, so that the court could appoint a guardian *ad litem* for them, and to hold parties to strict proof that seek to divest them of their estate. Further, suppose the minor heirs of Potter should hereafter seek to set aside the decree, what rule of law or equity would prevent them from so doing?

With such uncertainty about the validity of the proceeding, and of the title acquired under it, the premises would be sacrificed at a forced sale.

It is further submitted on this point, that when the minors are made defendants, notice must be given to the guardian if they have any and the Court below must, not, only see that the rights of infants are properly secured, but it must go further and see that the evidence upon which the decree is founded is preserved in a proper manner or this Court will reverse the decree.

A safeguard that should not be set aside except for the most cogent reasons.

3. The decree was taken without proof. This Court has held that a decree divesting infants of their estate must set out the evidence in the case or refer to the evidence, so that the court can see that the decree was properly rendered.

See *Chafflin vs. Heirs of Kimball*, 23 Ill. 38, and authorities cited. Can it make any difference in principle whether the minors are made complainants or defendants?

See also Tuttle et al
vs. Garrett, 16 Ill., 354. The Court say,
 " As against them (infants), nothing
 " could be taken as admitted, but it
 " was the duty of the complainant to make
 " complete proof of his entire case before
 " they could be deprived of the estate which
 " had regularly descended to them from
 " their father. For the want of such proof,
 " the decree must be reversed. "

4. There is no averment that a deed was ever tendered by Potter, or his legal representatives, to Burger. On the contrary, the bill proceeds upon the ground that the executors had no power to make a deed. Unless they could make a deed, they could not compel Burger to pay. When Burger paid he was entitled to a deed. Nor does the statute aid the complainants. See as to executors, administrators, or heirs, applying for authority to make deeds, Statutes, title *Conveyances*, Secs. 34, 35, and 36.

Again, the bond set out, as an exhibit, with the petition describes the note as executed by Lemuel Burger, while the note offered in evidence is signed also by James Burger.

It is submitted, that as

Potter took and accepted a note with personal security he thereby waived his lien as vendor. 4. Kent-Comm. 153. 2^o

Story Equity Jurisprudence, 475. 4th Wharton 235. 1st Page, 20. 1st Gil 501.

See particularly 1st Paige's Chancery Reports page 20.

5. The Court will notice that the description of the third piece of land in the bond and in the Bill is alike, but in the decree it is different. No mistake is averred or proved.

The decree describes the land by metes and bounds, and probably correctly, but can this Court see from the evidence that Potter intended to sell or convey this piece of land? The bill should have averred the mistake, the ~~misdescription~~ misdescription and a prayer that it might be corrected. Does it appear from the bond or from the evidence that Potter sold this piece or parcel of land?

6. The prayer of the Bill is that the executors may have power to convey, but the decree vests the title in Burger absolutely, and no power to convey is given.

It will be noticed that there is no prayer in the bill that James Burger shall be decreed to pay any amount, yet, the decree provides that an execution may issue against him for any balance due after ~~the~~ the land is sold.

N. B. The decree vests the land in Burger without payment. Suppose Lemuel Burger paid off the decree, would he be secure in his title? It is submitted, he would not.

7. The prayer in the Bill is that a vendor's lien may be decreed, while the decree provides that if the land does not sell for enough an execution may issue against the defendants below for the overplus.

H. GROVE,
For Plaintiffs in Error.

In the Supreme Court.

APRIL TERM, A. D. 1863.

LEMUEL BURGER *et al.*,
PLAINTIFFS IN ERROR,
vs.
ELISABETH POTTER *et als.*,
DEFENDANTS IN ERROR.

PLAINTIFFS'
BRIEF AND POINTS.

NASON, LAW PRINTER, COR. FULTON & WASHINGTON, PEORIA.

Filed April 21st 1863
L. Leland
Clerk

State of Illinois.

Lemuel Surger and
James Surger

vs.
Elizabeth Potter et al.

In the Supreme Court,
April Term 1862.

Additional points under question for writ of
Error to operate as supersedeas.

1. It is suggested that James Surger only -
assigns errors on the record
2. The Bill seeks to enforce vendor's lien against
premises sold to Lemuel Surger, and is a
proceeding in rem.
3. It was therefore erroneous to award execution
against James Surger, if land should not
satisfy debt - by sale.
4. How could such decree be legally made (when
Bill only seeks to enforce vendor's lien against
the premises sold to Lemuel Surger) -
under the prayer for general relief - it should
have been specifically prayed for - and
such assents should have been made
in the Bill as would authorize ^{such a} decree.

5 A decree for a ^{note} should not have been made in the first instance - but decree should have ~~been~~ ~~directed~~ directed to tender a deed and thus gave Lemuel Binger opportunity to complete his contract. "He who seeks equity must do equity"

6 The deft, below, James Binger, was a mere security upon the note, and the proceeding to enforce vendor's lien, being a proceeding in rem. He was not obliged to answer the bill in order to protect his rights, because the Court below could not in any event, legally render a decree in anywise affecting him.

Grove & John D. Rouse
attys. for James Binger

61 306

Binger et al

v.

Potter et al

Filed May 19. 1872

L. Leland

CM

Know all Men by these Presents, That we, James Burger

as principal, and George

W. Burger as security, are held and firmly bound

unto Elizabeth Potter, Abram Potter & Sever P. Harefad

Executors of Ephraim Potter deceased & William Potter, Sterling Potter, James M. Potter, Andrew J. Potter, Polly Spein, Ephraim Potter Jr., Serena Warner, Burnis Warner, Elvetha Warner, Linford Warner, Catharine Horner, James Horner, William Potter, Elvetha Potter, John Potter, & the following Minors who appear by their next friend Sever P. Harefad, to wit: Abram Potter, Clarissa Potter, Candis Potter, Elizabeth Potter, Albert R. Potter, Frank Potter, William Potter Jr. & Albert Potter.

in the penal sum of fifteen hundred dollars good and lawful money of the United States, for the payment of which, well and truly to be made, the said James Burger & George W. Burger

bind themselves, their heirs, executors and administrators, jointly, severally and firmly by these Presents.

Witness, the hands & seals of James Burger & George W. Burger

this 29th day of May A. D. 1862

The Condition of the above Obligation is such, That, whereas the above named Elizabeth Potter & others - Obligees

did, at the August Term of the Circuit Court of Woodford in the State of Illinois, A. D. 1861 recover a judgment against the above bounden

James Burger & Samuel Burger

on a Bill to facere a matzen for the sum of eight hundred & sixty two dollars

said James Burger to reverse which said judgment

has sued out a Writ of Error from the Supreme Court, within and for the Third Grand Division of said State, which Writ of Error is made a Supersedeas. Now if the said James Burger

shall duly prosecute said Writ of Error, and pay, or cause to be paid, the amount of said judgment, and all judgments, costs, interest and damages which the said Supreme Court shall adjudge against him

and abide the order and judgment of said Supreme Court in this behalf, then this obligation is to be void, otherwise to remain in full force and effect.

James Burger [SEAL.]

George W. Burger [SEAL.]

[SEAL.]

[SEAL.]

No. 306-61

SUPREME COURT,

THIRD GRAND DIVISION.

James Burgin

vs.

Elizabeth Potter et al.

SUPERSEDEAS BOND.

Filed May 30th 1862

L. Lewis Clerk.

[Faint, mostly illegible handwritten notes and signatures, possibly including names like 'James Burgin' and 'Elizabeth Potter']

STATE OF ILLINOIS, }
SUPREME COURT, } ss.

The People of the State of Illinois,

To the Clerk of the Circuit Court for the County of Woodford Greeting:

Because, In the record and proceedings, as also in the rendition of the judgments of a plea which was in the Circuit Courts of Woodford County, before the Judge thereof, between James Burger & Leonard Burger Defendants

plaintiffs and Elizabeth Potter & others plaintiffs

defendants, it is said manifest error hath intervened, to the injury of the aforesaid defendants James Burger

as we are informed by his complaints and we being willing that error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgments thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the record and proceedings of the pleas aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Ottawa, in the County of La Salle, on the first Tuesday after the third Monday in April next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 30th day of May in the Year of Our Lord One Thousand Eight Hundred and Sixty two



L. Leland

Clerk of the Supreme Court.

J. B. Rice Deputy

James Burger

No.

vs.

Elizabeth Potter

WRIT OF ERROR.

This Writ of Error is made a
Supersedeas, and as such is to be
obeyed by all concerned.

L. Leland

Clerk.

J. P. Rice Deputy

FILED

May 30th

A. D. 1862

L. Leland

Clerk.



STATE OF ILLINOIS, }
Clerk's Office of the Supreme Court. } ss.

I Hereby Certify, That a Writ of Error hath issued from this Office for the Reversal of a ~~judgment~~ ^{Decree} obtained by Elizabeth Potter & others

against James Burger & Leonard Burger

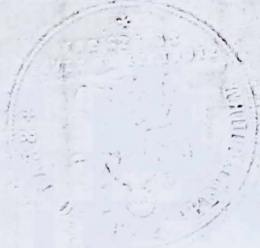
in the Circuit _____ Court of
Woodford _____ County, at the August _____ Term, in
the year of our Lord one thousand eight hundred and sixty one
in a certain ~~action~~ of Chancery suit _____

_____ which Writ of Error is made a
Supersedeas, and is to operate as a suspension of the execution of the
~~judgment~~ ^{Decree}, and as such is to be obeyed by all concerned.

Given under my hand, and the Seal of the
said Supreme Court, at Ottawa, this 30th
day of May _____ in the year of our
Lord one thousand eight hundred and Sixty two

L. Leland

Clerk of the Supreme Court.
L. J. B. Rice



61

James Burger

No. 10E

vs.

Elizabeth Potter & others

SUPERSEDEAS.

Filed A. D. 186

Black.

Served by reading to A E Stearns
S J Cross & Co this 10 day of June
A D 1862 R B Sawick
Sheriff

Shipp fees 2.00 Paid Henry Groat

James Burger et al

ABSTRACT.

State of Illinois, Supreme Court within and for the
Third Grand Division, of said State.

TO, THE APRIL TERM OF SAID COURT A. D. 1863.

LEMUEL BURGER, et al Pl'ffs. in Error }
and Defts. below, }
vs. } Error to Woodford.
ELIZABETH POTTER and others, Defts. }
in Error and Pl'ffs. below. }

Page of
Record.

ABSTRACT OF RECORD.

- 1 Precipe filed July 26, 1862.
3 Exhibit D filed July 26, 1862.

KNOW ALL MEN BY THESE PRESENTS, That Ephriam Potter of the County of Woodford and State of Illinois, are held and firm'y bound unto Lemuel Burger of the County of Woodford and State of Illinois, in the penal sum of seventy-two hundred dollars, for which true payment to be made, I do hereby bind myself, my heirs, administrators and executors firmly by these presents: Witness my hand seal this 9th day of May, A. D., 1860. The condition of the above obligation is such that, where-as, the above named Ephriam Potter has this day sold to the said Lemuel Burger the following described real estate, lying and being in the County of Woodford and State of Illinois, to wit: Lot fourteen, (14), s. e. of the s. e. qr. of section sixteen, (16), town twenty-six, (26), containing forty, (40), acres and the north half of the north-east qr. of section twenty-one, (21), town twenty-six, (26), containing eighty (80) acres.

Record, page 6.

old. Also one sett of double harness, one two horse wagon. Also the three head of cows described as follows: one brown cow, and one black cow, and one red cow; and ten head of stock hogs, and one white sow and pigs. Also one breaking plow, one harrow, two shovel plows, and one horse scowering plow. Also corn and hay sufficient for the stock, and small grain enough for the use of the family and provisions for the family for one year. Also four ewes and lambs and all the poultry she wants to keep, and one one-horse buggy.

SECONDLY, I also give and bequeath unto my son, Abram Potter, the following described tract of land, viz: lying and being in the County and State aforesaid, known and described as the south half of the lot eleven, (11), in section sixteen, (16), township twenty-six, (26,) north of range one, (1), east of the third principal meridian, containing twenty acres, more or less. Also two colts, described as follows: one bay mare colt, two years old, and one dark bay colt, one year old.

THIRDLY, I also give and bequeath unto my son, Marian Potter, the following described tract of land, lying and being in the County and State aforesaid, known and described as the south half of lot No. five, (5), section No. (16) sixteen, township twenty-six, (26), north of range one, (1), east of the third principal meridian, containing twenty (20) acres, more or less. Also one bright bay colt, one year old.

Record, page 7.

And, LASTLY, As to all the rest, residue and remainder of my estate, whatsoever, after payment of my just debts, to be legally divided between my lawful heirs. It is my request that the aforesaid Elizabeth Potter, my wife, and my son Abram Potter shall administer on my estate.

In witness whereof, I have hitherto set my hand and seal this 11th day of December, A. D., 1860.

His
EPHRIAM ✕ POTTER, SEN.
Mark.

Signed, sealed and delived by the above named Ephriam Potter, Sen., to be his last will and testament, in the presence of us, who at his request, and in his presence, have subscribed our names as witnesses thereto.

J. A. HAYS, Illinois,
W. H. CUMMINS, Illinois.

STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

I, Robert B. Hanna, Clerk of the County Court in and for said County, do hereby certify that the foregoing is a true and correct copy of the

last will and testament of Ephriam Potter, Sen., late of said County, deceased, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and
 { SEAL } affixed the seal of said County at my office in Metamora
 this 26th day of July, A. D., 1861.

ROBERT B. HANNA, Clerk.

COUNTY COURT, JANUARY TERM, A. D., 1861.

County Court of Woodford County met January 21st, A. D., 1861,
 pursuant to adjournment.

Record, page 8. Present—Hon. B. D. Meek, County Judge, presiding, R. B. Hanna,
 Clerk, and R. L. Sidwell, Sheriff.

The Sheriff announced that the County Court of Woodford County
 was in session pursuant to adjournment.

*IN THE MATTER OF THE ESTATE OF }
 EPHRIAM POTTER, SEN., DECEASED. }*

This day came into Court Elizabeth Potter and presented to the Court
 application for letters testamentary upon the last will and testament of
 said deceased for Probate. Upon examination of said will the witnesses
 hereto, to-wit: J. A. Hays and W. H. Cummins being present, ordered
 by the Court that the Clerk proceed to take proof of said will as requir-
 ed by statute in such case made and provided, and upon such proof being
 taken, it is ordered by the Court that said will and testament be admitted
 to probate and recorded, and it also appearing from said will that Eliza-
 beth Potter and Abram Potter were by said deceased in his said last will
 and testament appointed executors of the same, it is ordered by the Court
 that the application be received and filed; and further order by the
 Court that L. P. Hereford be and is hereby appointed to act in conjune-
 tion with the aforesaid Elizabeth Potter and Abram Potter, in the settle-
 ment of said estate, and ordered that letters testamentary be granted
 with the will annexed, to the aforesaid Elizabeth Potter, Abram Potter
 and L. P. Hereford upon their entering into a good and sufficient bond,
 to be approved by this Court.

Record, page 9. COUNTY COURT, FEBRUARY TERM, A. D., 1861.

County Court of Woodford County met February 18th, A. D., 1861,
 pursuant to adjournment.

Present—Hon. D. B. Meek, County Judge, presiding, R. L. Sidwell,
 Sheriff, and R. B. Hanna, Clerk.

Court opened by proclamation.

IN THE MATTER OF THE ESTATE OF }
 EPHRIAM POTTER, SEN., DECEASED. }

The executors of the last will and testament of Ephriam Potter, deceased, this day presented to the Court, their bond as such, executed for approval. The Court upon examination of the same being fully advised in the premises, ordered that said bond be approved, and further ordered that the same be filed and entered of record and that letters testamentary issue.

STATE OF ILLINOIS, } ss.
 WOODFORD COUNTY, }

I, R. B. Hanna, Clerk of the County Court in and for the said County, do hereby certify that the foregoing is a true and correct copy of the proceedings had by said County Court at the January and February Terms thereof, A. D., 1861, in the matter of the last will and testament of Ephriam Potter, Sen., deceased, as appears of record in my office.

Witness my hand and the seal of said Court at my office
 { SEAL } in Metamora this 26th day of July, A. D., 1861.

ROBERT B. HANNA, Clerk.

LETTERS TESTAMENTARY.

Record, page 10.

STATE OF ILLINOIS, } ss.
 WOODFORD COUNTY, }

The People of the State of Illinois, to all to whom these Presents shall come Greeting:

KNOW YE, That, whereas, Ephriam Potter, late of the County of Woodford and State of Illinois died on or about the 1st day of January, A. D., 1861, as it is said after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this State which may be lost, destroyed or diminished in value, if speedy care be not taken of the same, and in as much as it appears that Elizabeth Potter and Abram Potter has been appointed executors in and by the said last will and testament to execute the same, and to the end that the said property may be preserved for those who shall appear to have legal right or interest therein, and that the said will may be executed according to the request of the said testator, we do hereby authorize them, the said Elizabeth Potter, Abram Potter, and also L. P. Hereford as such executors to collect and secure all and singular the goods and chattels, rights and credits which were of said Ephriam Potter at the time of his decease, in whosever hands or possession the same may be found in this State, and well and truly to perform and fulfill all such duties as may be enjoined upon them by the

Record, page 11. said will, so far as there shall be property and the law charge them, and in general to do and perform all other acts which now are, or may hereafter be required of them by law.

In witness whereof I have hereunto set my hand and affixed the seal of the said County Court at my office in Metamora this 21st day of January, A. D., 1861.

R. B. HANNA, Clerk of the County Court.

We do solemnly swear that that this writing contains the true last will and testament of the within named Ephriam Potter, deceased, so far as we know or believe, and that we will well and truly execute the same by paying first the debts and then the legacies mentioned therein, as far as his goods and chattels thereunto extend and the law charge us, and that we will make a true and perfect inventory of all such goods and chattels, rights and credits as may come to our hands or knowledge, belonging to the estate of said deceased, and render a fair and just account of our executorship when thereunto required by law, to the best of our knowledge and abilities, so help us God.

ELIZABETH POTTER,
ABRAM POTTER,
L. P. HEREFORD.

Subscribed and sworn to before me this 21st day of January, 1861.
R. B. HANNA, Clerk.

STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

I, R. B. Hanna, Clerk of the County Court for said County, do hereby certify that the foregoing is a true and correct copy of the letters testamentary, granted by the County Court of said County, to Elizabeth Potter, Abram Potter and L. P. Hereford, executors of the last will and testament of Ephriam Potter, Sen., deceased, as the same appears of record in my office.

Record, page 12.

Witness my hand and official seal at my office in Metamora this 26th day of July, A. D., 1861.

ROBERT B. HANNA, Clerk.

STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

Record, page 13.

IN THE CIRCUIT COURT OF WOODFORD COUNTY TO THE AUGUST TERM,
A. D., 1861.

To the Hon. Samuel L. Richmond, Judge and Chancellor of the 23d Judicial Circuit:

Humbly complaining, would respectfully represent unto your Honor, your orators, Elizabeth Potter, Abram Potter and Leven P. Hereford,

executors of Ephriam Potter, deceased, late of said County, and your orators William Potter, Sterling Potter, James M. Potter, Andrew J. Potter, Polly Spicer, Ephriam Potter, Jr., Serena Warner, Barris Warner, Martha Warner, Liceford Warner, Catherina Horner, James Horner, and William Potter, Munroe Potter, and John Potter, and Abram Potter, Marian Potter, Candis Potter, Elizabeth Potter, Albert R. Potter, Frank Potter, William Potter, Jr., and Albert Potter, (the last eight of whom are minors, and appear by their next friend Leven P. Hereford), would respectfully show unto your Honor that on the first day of January, A. D., 1861, the above

Record, page 14. named Ephriam Potter departed this life in said Woodford County the place of his residence, and that said Potter died testate leaving two of your said orators to-wit: Elizabeth Potter (his widow), and Abram Potter (his son), his executors. Orators would show that said will has been duly probated in said County of Woodford, a copy of which is herewith filed marked "A" and made part of this bill. Orators would show that at the January Term, 1861, of said Probate Court upon the request of said Elizabeth Potter and Abram Potter, executors, as aforesaid; and with the advice and consent of the other heirs, your orator said Leven P. Hereford was appointed by the Probate Court of said County a co-executor with said Elizabeth Potter and Abram Potter, a copy of which order of appointment is herewith filed marked "B" and made part of this bill. Orator would further show that at said January Term of said Probate Court letters testamentary were issued to your orators Elizabeth Potter, Abram Potter and Leven P. Hereford, of which said letters a copy is herewith filed marked "C," and made part of this

Record, page 15. bill. Your orators would show that on the 9th day of May, 1860, and during the lifetime of said Ephriam Potter, said Potter was the owner in fee simple, free from all incumbrance, of the following described real estate, to-wit: Lot No. fourteen, (14), south east quarter of the south east quarter of section sixteen, (16), town twenty-six, (26), containing forty (40) acres, and the north half of the north east quarter, section twenty-one, (21), town twenty-six, (26), containing eighty acres, and also twenty acres commencing ten rods north of the south east corner of the north east of the north east quarter section thirty one, (31), town twenty six, (26), and running west eighty rods, thence south 40 rods to the place of beginning, all in range one, east of the 3d principal meridian in the County of Woodford and State of Illinois, and on said last mentioned day said decedent, by a bond a copy of which is herewith filed marked "D" and made a part of this

Potter, deceased, made his said will. Orators would further show that at the time said land was sold to said Lemuel Burger, said Burger took possession of said land and is still in possession of said land, claiming the same under said bond, given by said decedent. Now, in as much as by the terms of said will the executors are not empowered to convey said land, and as by a suit at law receives said purchase money from said purchaser, Lemuel Burger, without first delivering him a deed to said land, orators are without remedy at law; wherefore, orators pray that said Lemuel Burger, purchaser of said land, and said James Burger who signed the said note jointly with said Lemuel Burger—be made defendants and summoned to appear and answer this bill under their oaths, and for a decree authorizing the executors of said deceased to convey to said Lemuel Burger a deed to said above described land, and for a decree that the purchase money still unpaid be a vender's lien on said land in pursuance against the said Lemuel Burger and James Burger for the amount so found to be due, and for a further decree and that unless said Lemuel Burger pay to your orators Elizabeth Potter, Abram Potter and Leven P. Hereford, executors as aforesaid, amount so found to be due within a short day, to be fixed by the Court, that said land be sold for cash, without redemption, to satisfy said decree, and for costs, and for such other further and general relief as to equity and good conscience may belong and as in duty bound, &c

Record, page 19.

WILLIAMS & STEVENSON,
Comp'l Sol's.

\$1,073 86.

EL PASO, Jan. 21, 1860.

One day after date we, or either of us, promise to pay to the order of Ephriam Potter, one thousand and seventy-three dollars and eighty-six cents, for value received, at ten per cent. from date.

LEMUEL BURGER, [L. s.]

JAMES BURGER, [L. s.]

Record, page 20.

On which note the following endorsements were made, to-wit:
August 15th, 1860, received on the within note twenty-five dollars.
October the 26, 1860, received on the within note, one hundred and seventy dollars.

Nov. 7th, 1860, paid on the within note, one hundred and thirty-five dollars.

Received on the within note, September the 15th, 1860, twenty-six dollars.

Record, page 21. STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

The People of the State of Illinois, to the Sheriff of said County, Greeting:

We command you, that you summons Lemuel Burger and James Burger, if they shall be found in your County, personally to be and appear before the Circuit Court of the said Woodford County on the first day of the next term thereof, to be holden at the Court House in Metamora, in said Woodford County, on the second Monday of August, A.D., 1861, to answer the matters and things contained in a certain bill of complaint exhibited against them, in our said Court on the chancery side thereof, by Elizabeth Potter, Abram Potter and Leven P. Hereford, executors of Ephriam Potter, deceased, and William Potter, Sterling Potter, James M. Potter, Andrew J. Potter, Polly Spicer, Ephriam Potter, Jr., Serena Warner, Barris Warner, Martha Warner, Liceford Warner, Catherine Horner, James Horner, William Potter, Munroe Potter, John Potter, and the following minors, who appear by their next friend Leven P Hereford, to-wit: Abram Potter, Marian Potter, Candis Potter, Elizabeth Potter, Albert R. Potter, Frank Potter, William Potter, Jr., and Albert Potter, heirs-at-law of Ephriam Potter, deceased, complainants for bill to foreclose vender's lien and for relief.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, James D. Perry, clerk of our said Court, and the seal thereof, at Metamora aforesaid, this 26th day of July, A. D., 1861.

JAMES D. PERRY, Clerk.

Record, page 23. ELIZABETH POTTER,
ABRAM POTTER,
LEVEN P. HEREFORD,
Executors of Ephriam Potter, deceased, and others. } Bill to Foreclose. No. 109.
vs.
LEMUEL BURGER, and
JANE BURGER,

Now on this day came the complainants by Williams and Stevenson their attorneys, and the said defendants being three times solemnly called came not, but made default, it is therefore considered by the Court the bill be taken as confessed, and a decree is entered herein which is in the words and figures following :

ELIZABETH POTTER,
 ABRAM POTTER, and
 LEVEN P. HEREFORD,
 Executors of Ephriam Pot-
 ter, deceased, and others.

vs.
 LEMUEL BURGER, and
 JAMES BURGER,

STATE OF ILLINOIS, WOODFORD CIRCUIT COURT AUGUST TERM, 1861.
 IN EQUITY.

And now on this 13th day of August, 1861, this cause came on, and was called by the Court and it appearing to the Court from the writ and Sheriff's return that both of the defendants have been duly served with process, more than ten days before the commencement of this term of the Court, and upon motion of the solicitors for the complainants the defendants, were three times solemnly called to come into Court to appear, plead, answer, or demur to the complainant's bill, but the said defendants both made default and came not, and therefore upon motion of the solicitors for the complainants a decree pro confesso is entered against said defendants and the bill is ordered by the Court to be taken as true, and it appearing to the Court, from the papers filed, that the contract for the sale of the land as described in the bill was made, that is, that Ephriam Potter (who was deceased before the filing of this bill) did on the 9th day of May, 1860, enter into a bond by which he, the said Ephriam Potter, since deceased, had bound himself, his heirs, &c, unto the defendant, Lemuel Burger, to convey to said Burger, the following lands in the said County of Woodford and State of Illinois, to-wit: Lot (14) fourteen, s. e. $\frac{1}{4}$ of s. e. $\frac{1}{4}$ of section sixteen, (16), town twenty-six, (26), containing forty acres, and the north half of the north east quarter of section twenty-one, (21), town twenty-six, (26), containing eighty (80) acres, and also twenty acres commencing ten (10) rods north of the s. e. corner of the n. e. of the n. e. quarter, section thirty, (30), in town twenty-six and running west (80) rods, thence south (40) rods, thence east (80) rods, thence north (40) rods to the place of beginning, all in range one (1), east of the 3d principal meridian, upon condition that the said Lemuel Burger should pay to the said Ephriam Potter (since deceased) one note for the purchase money of said land, dated January 21st, 1860, for the sum of one thousand, seventy-three and 86-100 dollars due one day after its date, bearing ten per cent. interest from its date, and should further pay all the taxes that should thereafter accrue on said land, and it further appearing to the Court that said note was a joint and several note of both defendants to him, the said Ephriam Potter (since deceased), and

Record, page 24.

it further appearing to the Court that the said defendant Lemuel Burger went into possession of said land under said contract and remains now in possession of the same, claiming the same under said contract, and it further appearing to the Court that nothing has been paid upon said note, except the sum of \$25.00 on the 15th day of August, 1860, and \$170 on the 26th of October, 1860, and the sum of \$26.00 on the 15th of September, 1860, and the sum of \$135 on the 7th day of November, 1860, and that there is now due and owing on said note the sum of eight hundred and sixty and 25-100 dollars and that said Ephriam Potter died on or about the 1st day of January, 1861, testate, leaving as his heirs-at-law and devisees and legatees the parties complainant, except the complainant Hereford, and that letters testamentary have issued from the Probate Court of said Woodford County on the last will and testament of said Ephriam Potter, deceased, to the complainants Elizabeth Potter, Abram Potter and Hereford, and that they are now acting as such executors, and now the Court being fully advised in the premises, it is therefore considered and decreed by the Court that all the estate, right, title and interest that was in the said Ephriam Potter, deceased, at the time of his death in and to the above described lands and real estate be and the same is hereby as fully vested in the said defendant Lemuel Burger, his heirs and assigns as the same was vested in the said Ephriam Potter at the time of his decease, and that all the right, title and interest of any and all the complainants in and to the said land, devised by them, either as heirs or devisees of said Ephriam Potter, deceased, (or from coveture with said deceased) be and the same is hereby fully vested in the said defendant Lemuel Burger, his heirs and assigns, subject to the following lien, that is to say, the above amount found to be due on said note, together with the costs of this proceeding, be and the same is hereby decreed by the Court to be a vendor's lien on said land, and it is further decreed by the Court that the complainants, the executors aforesaid, do have and receive of and from the said defendants, the said sum of eight hundred and sixty and 25-100 dollars, above found to be due, together with their costs in this behalf expended. And it is further decreed by the Court that unless the said defendants do, within six months from this day, pay to the said complainants, who are executors as aforesaid, the amount so found to be due, that the said lands or so much thereof as may be necessary, be sold for cash in hand without redemption, to satisfy this decree, after advertising the same for sale for the time, and in the manner required by law for Sheriff's sales of real estate under execution at law,

and for the remainder, if any remaining unpaid after said sale on execution may issue, and that Samuel J. Cross be appointed as special master to carry this decree into effect and execute this decree and report to this Court, and that the cause now stand continued.

S. L. RICHMOND,
Judge 23d Judicial Circuit.

Record, page 27.

DECEMBER TERM, A. D., 1861.

ELIZABETH POTTER.
ABRAM POTTER,
LEVEN P. HEREFORD,
Executors of Ephriam Pot-
ter, deceased, and others.
vs.
LEMUEL BURGER, and
JAMES BURGER,

} Bill to Foreclose Vender's Lein. No. 109.

Now on this day this cause came on to be heard and it appearing to the Court that the master in chancery of this Court has not made report of sale of the premises under the decree in this cause, it is therefore ordered by the Court that this cause stands continued for said Master's Report.

ERRORS ASSIGNED.

Record, page 1.

1. The County Court of Woodford County had no authority to appoint an executor of Ephriam Potter, deceased.
2. The infant defendants were not properly made complainants.
3. The estate of infants cannot be diverted in the mode pursued.
4. The bill of complainant filed it without equity.
5. The decree was rendered without proof.
6. There is no averment or evidence that a deed was tendered to Lemuel Burger.
7. The Court below erred in rendering a decree directing execution to issue against the defendants below for balance of decree after sale of lands.
8. The complainants below had no right to a decree against the land as their bill shows plaintiffs error executed the note jointly.
9. Other errors.

IN THE SUPREME COURT.

61

APRIL TERM, A. D. 1863.

LEMUEL BURGER, et. al. PLAINTIFFS IN ERROR,

vs.

ELIZABETH POTTER and others, DEFENDANTS IN ERROR.

ABSTRACT,

AND

ASSIGNMENT OF ERRORS.

Morning Mail Print.—Peoria.

Filed Apr. 23-1863

G. Leland

Clerk

GROVE,

For Plaintiffs in Error.

III

Same suggestion as to II.

IV

There can be no uncertainty on a question of law. The interest which the purchaser would acquire is fixed and certain as the law itself.

V

This is untrue as appears from the decree: but if true it is no error. There can be no question that the Circuit Court may under an Statute hear evidence on a Bill taken pro Confessor or not. It is a matter solely in the sound discretion of the Court.
Rev. Stat. Page 95: Sec. 19.

VI

If the Court erred in awarding execution for the balance after Sale the plaintiffs in error are not entitled to & persuaded to stop the Sale but only to stop the issuing and proceedings under execution.

General

The Executors obtain a decree against the defendants for such money - the money is on account of the land sold and is a lien on the land. It is personal assets in the hands of the Executors. And is a specific lien in the nature of a mortgage - Can learn they complain if the property is sold to satisfy such claim - They have their remedy on the bond, or they may file their Bill against the heirs for a conveyance. Could the Executors file their Bill against the heirs and compel them to make conveyance of the land? Is it not necessary in all such cases to proceed under the Rev. Stat. p 109. Sec. 31. et seq.

If the obligees in such Bonds refuse and neglect to pay the Consideration or to file a Bill under the Statute Can not the executor proceed in rem upon equity principles We respectfully ask consideration of these points -

A. C. Stevenson & S. M. Shaw
for Defendants in Error

306 (6)
Johannes Berger
et al. vs.

Potter et al.

Suggestions by
Defendants in
Error against Mr.
for Supersedeas

State of Illinois } April Term 1862.
Supreme Court ss }

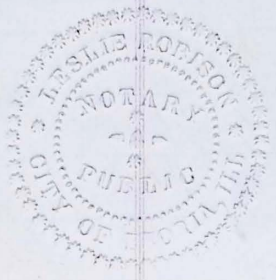
Burger } Application for
vs } a Supes Seceas
Potter et als }

Henry Grove
being sworn on oath says that
he is informed and verily believes
that the Liana mentioned in the de-
cree sought to be reversed is worth
in cash more than twice as much
as the amount of the decree interest
and costs. He further states that
George W Burger is proposed as secu-
rity for on the Bond required in this cause
that he cannot state from personal knowl-
edge as to the property and means of said
George W Burger. He states however that
he is informed by persons living in his
neighborhood that he owns a farm
and that he is worth for at least two
thousand dollars. He further states that
he believes said George W Burger to
be abundantly good for the amount of
security required in the cause.

Sworn to Subscribed be-
over

H. Grove

you me thro 15 day of
May A D 1862 witness
my hand seal notance
Lustie Robison
Notary Public



304 61
Beyr
Potter

affiant

Fid May 20. 1862
L. Robison
Clerk

Supersedes
allowed
Bond \$1500, 00
George W. Deane
guaranty

Samuel Berger
 James Pruzer
 Plaintiff in error
 " "
 Elizabeth Potter
 and others ~~vs~~

In the Supreme
 Court
 April Term 1862

Motion for a writ
 of error to operate ~~as~~ as a Supersedeas

This was a Petition
 to enforce a venditor Lien. The Bill
 is set out in record pages 13, 14, 15, 16,
 17, 18 & 19.

The Bill is filed by the executor
 and heirs of Ephraim Potter deceased
 and recites that Potter died leaving
 a will & therein appointed two of the
 complainants executors and that
 the County Court ^{of Warrassee County}, afterwards appoin-
 ted Herriford an additional execu-
 tor.

Among complainants are eight
 minors and Herriford owns as their
 next friend. The Bill recites that
 Potter in his life time sold the lands
 therein described to Samuel Berger
 and prays that the executors be au-
 thorized to make a deed of the lands
 to said Samuel Berger. A Copy
 of the Bond from Potter to Berger is
 found on record page 3.

A default was taken and a decree rendered without any proof whatever. See decree u cora pages 23 24 & 25.

It is submitted that the whole proceeding is loose, uncertain and illegals & that the decree should be reversed.

1. Because the county Court of Woodford County has no authority in law to appoint an additional executor for Potter
2. The infant heirs of Potter should have been made defendants instead of complainants
3. This Court ~~will~~ can see that if this practice is tolerated infants can be divested of their estates without notice or without the opportunity of defending their rights
4. The uncertainty about the proceeding with respect a full price being paid for the land
5. The decree was rendered without proof, not a witness was examined, not a document of proof in evidence

6 This decree instead of pronouncing for
a decree to Burger as prayed in the
Bills actually vests the lands absolute
in Samuel Berger & orders a sale thereof.
It pronounces that an execution shall
issue against Plaintiff in error & in
Samuel Berger after sale of lands or
made. For all of which and other
errors Plaintiff in error prays for
a writ of error to overrule as
a superfluous

Given for James
Burger, Plaintiff in Error

306 61

Buena y Potter
seals.

Abset. cc

Hills, Apr, 24, 1862
Beland
Ch.

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1863.

LEMUEL BURGER *et al.*)
vs.) *Error to Woodford.*
ELIZABETH POTTER *et al.*)

DEFENDANT'S BRIEF.

I.

The executors, administrators, or heirs of any deceased person, who shall have made a bond for the conveyance of land, when the consideration has been paid, may, upon application and notice, obtain decree to convey the land to vendee.

Scates Stat. p. 163, sec. 34.

II.

It is not error against plaintiffs, after default, that unnecessary, or even improper parties were complainants. It should have been taken advantage of by special demurrer.

Story's Equity Pleading, 237.

III.

But the parties were all proper and necessary; and even admitting that Hereford was not executor, the other two were, and the estate was represented.

IV.

In this case the consideration had not been all paid, and it was eminently proper that in addition to vesting the title to the land in the equitable owner, Burger, the decree should settle all the equities, and make the proper decree to secure the payment of the purchase money.

V.

The decree operated as a conveyance, and were this not the case, the decree should only be modified by ordering the proper parties to make the conveyance.

VI.

The 34th section does not contemplate that the heirs should be made defendants, but plaintiffs, and this whether they are minors or not.

VII.

The Court will presume that the party who appeared as next friend for minors was authorized, and was acting in good faith and for their benefit. If the contrary were made to appear, the Court would interfere and protect their rights.

VIII.

The bill was taken for confessed, and shows that it was for the benefit of the minors.

IX.

It does not follow, because a proceeding divests a minor of his estate, that the same is against his interest, or that he should be a defendant. A proceeding by guardian to sell the real estate of ward divests him of his estate; yet this Court has said that it is not against his interest, and he need not be a defendant. This proceeding is certainly not more against his rights.

X.

The decree describes one of the tracts a little more fully than the contract; but plaintiff cannot complain of that.

XI.

Plaintiffs are seeking to avoid the payment of a just debt, by setting up the rights of the persons whom they are wronging. They can avoid the forced sale by payment, and then, if there is really any cloud upon their title, they can easily remove it under the 32d section; but we think the title would be clear.

A. E. STEVENSON,
BANGS & SHAW,
For Defendants.

61

Potter et al
vs.

Burgess et al

Deft. Brief

Filed May 6, 1863

S. G. ...
C. M.

... the contract; but plaintiff cannot complain of this

IX

... the 52d section; but we think the title would be clear
... they can avoid the forced sale by payment, and that if there is
... making up the rights of the persons whom they are wronging.
... plaintiffs are seeking to avoid the payment of a just debt, or

NOV 1863
...
...

James Birger }
+ Lemuel Birger } In the Supreme Court
vs } of Illinois
Elishach Potter } April Term 1862
and others }

James Birger comes
and says that in the above proceeding,
and in the execution of a decree against
him in this cause manifest injury
hath intervened to his injury and
for assignment of Errors when the case
shows the following

1. The County Court of Warrick County
had no authority to appoint an executor
of Ephraim Potter deceased
2. The Infant defendants were not properly
made complainants
3. The estate of infants cannot be directed in
the mode pursued
4. The Bill of complaint filed is without
equity
5. The decree was rendered without proof
6. There is no assignment or evidence that
a decree was rendered to Lemuel Birger

7. The Court below erred in rendering a decree directing execution to issue against the defendants below for Balance of decree after sale of lands

8. The complainants below had no ~~authority~~ right to a decree against the bank as their Bill shows Plaintiff in error executed the note jointly

9 Other Errors

Are Plaintiffs in error
Pray that said decree may be wholly
annulled set aside & you brought down
your own

Why

And the said respondents come by
A. E. Stevenson & Bump & Shaw their atts
and say that there is no such errors in
the said Record and proceedings as
alleged by plaintiffs &

whereas they say that the said decree
be in all things affirmed

A. E. Stevenson Bump & Shaw

Supreme Court of the State of Illinois
In ^{the} Third Division So Ottawa April Term A D 1862

State of Illinois } Woodford Circuit Court
Woodford County } So August Term A D 1861

Elizabeth Patter Abram Patter and
Seven P Hereford Executors of Ephriam Patter deceased
and William Patter Sterling Patter James M Patter Andrew
J Patter Polly Speier Ephriam Patter jr Serena Warner
Burriss Warner Martha Warner Linford Warner Catharine
Harner James Harner William Patter Monroe Patter John
Patter and the following Minors who ^{appear} by their next friend
Seven P Hereford to wit Abram Patter Marion Patter
Kandis Patter Elizabeth Patter Albert R. Patter
Frank Patter

William Patter jr
and Albert Patter
Heirs at Law of
Ephriam Patter deceased

vs
Samuel Burger and
James Burger

In Chancery
Bill to
Have Close vendors
Lien and
for Relief

Clerk I do Summons in
Chancery to Shff of Woodford Co
Williams & Stevenson
Compt Sol

2

No 109
Elizabeth Patter et al
vs
Samuel Burger et al

Chancery
Prossinope

Filed July 26th 1861

James D. Perry Clerk

Issued July 26/61

WVS

3.

No 109

An exact copy of
Ephraim Patters^{sen}
Bond to
Semuel Burger

"D"

Filed July 26th 1862

James D. Perry Clerk

Know all men by these presents that Ephraim Patter
of the County of Woodford and State of Ills are held
and firmly bound unto Semuel Burger of the County of
Woodford and State of Ills in the special sum of twenty
two Hundred Dollars for which true payment to be
made I do hereby bind myself my heirs administrators
and Executors firmly by these presents Witness
my hand and seal this 9th day of May A D 1860
The Condition of the above obligation is such
that Whereas the above named Ephraim Patter has
this Day Sold to the said Semuel Burger the following
Described Real Estate lying and being in the County
of Woodford and State of Ills. to wit Lot fourteen (14)
S.E. of the S.E. qr of Section sixteen (16) Town Twenty Six
(26) Containing forty (40) acres and the north half of
the North East qr Section Twenty one (21) Town
Twenty Six (26) containing eighty (80) acres and also
Twenty (20) acres commencing ten (10) Rods North of

the SE corner of the North East of the North East
 quarter Section Thirty one (31) in Township Twenty Six
 and running west Eighty Rods (80) thence South forty Rods
 (40) to the place of Beginning all in Range one (1) East of
 the third principal meridian for the Sum of one thousand and
 Seventy three and $\frac{86}{100}$ Dollars and used in payment on Said
 Lot of Land one note for the above amount Dated the 31st
 Day of Jan A D 1860 at ten per cent interest from Date Drawn
 Payable one Day after Date now if the Said Semmel Burger
 his heirs or assigns shall well and duly pay or cause to
 be paid the amount of the aforesaid note and shall pay
 the taxes that hereafter accrue on said land then the Said
 Ephriam Patter will execute and Deliver to Said Semmel
 Burger his heirs or assigns a good and Sufficient Warranty
 Deed for said Lands and this Bond to be null and
 void otherwise to remain in full force and Effect

Witness my hand and Seal this 1st day of Feb 1860
 Attest W. S. Keeford } Ephriam Patter
 Attest Abram Patter }

5
" A "

In the Name of God Amen

I Ephraim Patter Sen in the County of Woodford and State of Illinois being weak in body but of sound and perfect memory blessed be Almighty God for the same do make and publish this my Last will and testament in manner and form following that is to say First I give and bequeath unto my beloved wife Elizabeth Patter the house in which I now live and the buildings appertaining to the same and the household furniture of every kind now being in said house and the following described tract of Land lying and being in the County and State aforesaid known and described on the North East Quarter of Section No twenty one (21) in Township No. twenty six (26) North of Range No. one (1) East of the third Principal Meridian containing one hundred and sixty acres more or less also the South East Quarter of the South West qr and the South West Quarter of the South East qr of Section sixteen Township (26) twenty six North Range No. one East (1) of the third Principal Meridian containing eighty acres (80) more or less also Lot No thirteen (13) being the South West Quarter of the South West Quarter of Section sixteen township twenty six (26) North of Range one East (1) containing thirty nine $\frac{3}{16}$ Acres also two mares described as follows one bay mare six years old and one Sarret mare eight years old also one set of double harness one 2 horse organ also the 3 hets of corns described as follows one brown cow and one black cow and one red cow

6
and ten head of Stock hogs and one white Sow and
pigs also one breaking plow one harrow two Shovel plows
and one horse Scouring plow also corn and hay suf-
-ficient for the Stock and Small grain enough for the
use of the family and provisions for the family for one
year also four ewes and lambs and all the Poultry
she wants to keep and one one horse buggy

Secondly I also give and bequeath
unto my Son Abram Patter the following described
tract of Land viz lying and being in the County and
State aforesaid known and described as the South half
of the Lot Eleven (11) in Section Sixteen (16) Township
Twenty Six (26) North of Range One (1) East of the third
Principal Meridian containing twenty acres more or
less also two colts described as follows one bay mare
colt 2 years old and one dark bay colt one year old

Thirdly I also give and bequeath unto
my Son Marion Patter the following described tract
of Land lying and being in the County and State
aforesaid known and described as the South half
of Lot No five (5) Section No (16) Sixteen township
twenty Six (26) North of Range one (1) East of the
third Principal Meridian containing twenty (20) acres more
or less also one light bay colt one year old. And Lastly
as to all the rest, residue and remainder of My Estate
Whataever after payment of all my just debts to be legally
decided between my Lawful heirs. It is my request that
the aforesaid Elizabeth Patter my wife and My Son

7

Abram Patter shall administer on my Estate.
In witness whereof I have hitherto set my hand and
Seal this the 11th day of December A D 1860

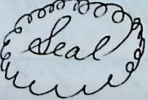
Ephraim ^{his} Patter Sen
_{mark}

Signed Sealed and delivered by the above named Ephraim
Patter sen to be his Last will and Testament in the presence
of us who at his request and in his presence have subscribed
our names as witnesses thereto

J. A. Hay Illinois
W. H. Cummings Illinois

State of Illinois }
Woodford County } ss

I Robert B. Hanna clerk of the
County Court in and for said County
do hereby certify that the foregoing is a true and correct
copy of the last will and testament of Ephraim Patter sen
late of said County deceased as the same appears of record
in my office



In testimony whereof I have herewith set my
hand and affixed the seal of said court
at my office in Metamora this 26th day
of July A D 1861

Robert B. Hanna clerk

County Court January term A D 1861
County Court of Woodford County met January 21st A D
1861 pursuant to a adjournment Present Hon B. D. Meek
County Judge Presiding R. B. Hanna clerk and

8
R. L. Sidwell Sheriff The Sheriff announced that
the County Court of Woodford County was in
Session pursuant to adjournment

In the Matter of the Estate
of Ephraim Patter ^{deceased}

"B," v "C,"

This day came into court
Elizabeth Patter and presented to the court application
for Letters Testamentary upon the Last will and Testament of
Ephraim Patter, ^{deceased} also presented the Last will
and Testament of said deceased for Probate upon Examination
of said will the Witnesses hereto to wit J. A. Kays and W. H.
Cammings being present ordered by the Court that the
Clerk proceed to take proof of said will as required by
Statute in such case made and provided and upon such
proof being taken It is ordered by the Court that said will
and Testament be admitted to Probate and recorded and it
also appearing from said will that Elizabeth Patter and
Abram Patter were by said deceased in his said last will
and Testament appointed Executors of the same It is ordered
by the Court that the application be received and filed
and further ordered by the Court that S. P. Keefe
be and is hereby appointed to act in conjunction with the
aforesaid Elizabeth Patter and Abram Patter in the Settlement
of said Estate and ordered that Letters Testamentary be granted
with the will annexed to the aforesaid Elizabeth Patter
Abram Patter and S. P. Keefe upon their entering
into a good and sufficient bond to be approved by this Court

9

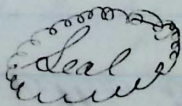
County Court February term A D 1861
of Woodford County
County Court met February 18th A D 1861 pursuant
to adjournment Present Hon B. D. Meek County
Judge Presiding R. L. Sadwell Sheriff and R. B.
Kanna Clerk Court opened by Proclamation

In the Matter of the Estate }
of Ephriam Patter^{sen} deceased } The Executors of the Last
Will and Testament of
Ephriam Patter deceased this day presented to the Court
their bond as such Executors for approval the Court upon
Examination of the same being fully advised in the prem-
-ises ordered that said bond be approved and further ordered
that the same be filed and entered of record and that
Sellers testamentary Issue

State of Illinois } ss
Woodford County } I R. B. Kanna clerk of the County
Court in and for said County do hereby
certify that the foregoing is a true and correct copy of the
proceedings had by said County Court at the January and
February terms thereof A D 1861 in the matter of the Last
will and testament of Ephriam Patter^{sen} deceased as appears
of Record in my office

Witness My hand and the Seal of said Court
at my office in Mtamara this 26th day of
July A D 1861

Robert B. Kanna clerk



Letters Testamentary }

State of Illinois }
 Woodford County } ss

The People of the State of Illinois to all ^{to} whom
 these presents shall come greeting

Know Ye That whereas Ephraim Patter late of the County of Woodford and State of Illinois died on or about the 1st day of January A D 1861 as it is said after having duly made and published his last will and testament a copy whereof is herewith annexed bearing at the time of his death property in this State which may be lost destroyed or diminished in value if speedy care be not taken of the same and inasmuch as it appears that Elizabeth Patter and Abram Patter has been appointed executor in and by the said last will and testament to execute the same and to the end that the said property may be preserved for those who shall appear to have legal right or interest therein and ^{that} the said will may be executed according to the request of the said testator we do hereby authorize them the said Elizabeth Patter Abram Patter and also S. P. Wereford as such executor to collect and secure all and singular the goods and chattels rights and credits which were of the said Ephraim Patter at the time of his decease in whose ever hands or possession the same may be found in this State and well and truly ^{to} perform and fulfil all such duties as may be enjoined upon them by the said will so far as there shall be property and the Law charge them; and in general to do

and perform all other acts which now are or may hereafter be required of them by law

In Witness Whereof I have hereunto set my hand and affixed the Seal of the said County Court at My Office in Metamora this 21st day of January A.D. 1861



R. B. Hanna Clerk of the County Court

we do Solemnly Swear that this writing contains the true Last will and testament of the within named Ephraim Patter deceased so far as we know or believe and that we will well and truly execute the same by paying first the debts and then the legacies mentioned therein as far as his goods and Chattels thereunto extend and the law charge us and that we will make a true and perfect inventory of all such goods and Chattels rights and credits as may come to our hands or knowledge belonging to the estate of said deceased and render a fair and just account of our executorship when thereunto required by law to the ^{best} of our knowledge and abilities So help us God

Subscribed and sworn

Elizabeth Patter

to before me this 21st

Abram Patter

day of January 1861

L. P. Hereford

R. B. Hanna Clerk

State of Illinois }
Woodford County }^{ss}

I R. B. Hanna Clerk of the County Court for said County do hereby certify that the foregoing is a true and correct copy of the letter testamentary granted by the

County Court of said County to Elizabeth Potter
Abram Potter and S. P. Kereford Executors of the Last
will and Testament of Ephraim Potter ^{sen} deceased as the
Same appears of Record in my office



Witness my hand and
official Seal at my
office in Metamoras this
26 day of July A.D. 1861
Reuben B. Hanna clk

No 109
Elizabeth Potter Etal

v

Samuel Burger Etal
Copy of Will
Letters Testamentary &c

Filed July 26th 1861

James D. Perry Clerk

State of Illinois }
 Woodford County } In the circuit-Court of
 Woodford County } To the
 August-Term A D 1861

To the Hon Charles S Richmond Judge
 and Chancellor of the 23rd Judicial
 Circuit

Humbly complaining would
 respectfully represent unto Your
 Honor Your Orators Elizabeth Potter
 Abram Potter Cered P Heriford
 executors of Ephriam Potter deceased
 late of said County - and your
 Orators William Potter Sterling Potter
 James M Potter Andrew J. Potter
 Polly Spicer. Ephriam Potter Jr
 Serena Warner Purris Warner
 Martha Warner Linford Warner
 Catharina Horner James Horner and
 William Potter Monroe Potter and
 John Potter and Abram Potter Marion
 Potter Candis Potter Elizabeth Potter
 Albert B Potter Frank Potter William
 Potter Jr and Albert Potter (the last eight
 of whom are minors and appear by their
 next friend Cered P Heriford) would
 respectfully show unto Your Honor that
 on the first day of January A D 1861 the
 above named Ephriam Potter departed

This life in said Woodford County
 the place of his residence and that
 said Potter died testate leaving two
 of your said orator to wit Elizabeth Potter
 (his widow) and Abram Potter (his son) his
 Executors Orators would show that
 said will has been duly probated in
 said County of Woodford a copy of which
 is herewith filed marked "A" and made part
 of this Bill. Orator would show that at
 the January term 1861 of said Probate Court
 upon the request of said Elizabeth Potter
 and Abram Potter Executors as aforesaid
 and with the advice and consent of the
 other Heirs your orator said Leven P. Heriford
 was appointed by the Probate Court of said
 County a Co Executor with said Elizabeth
 Potter and Abram Potter a copy of which
 order of appointment is herewith filed
 marked "B" and made part of this
 Bill - Orator would further show that
 at said January term of said Probate Court
 letters testamentary were issued to your
 Orator Elizabeth Potter Abram Potter and
 Leven P. Heriford, of which said letters a
 copy is herewith filed marked "C" and
 made part of this Bill. Your Orators would
 show that on the 9th day of May 1860 and

during the life time of said Ophirius Potter
 said Potter was the owner in fee simple
 free from all incumbrance of the following
 described Real Estate to wit: Lot No Fourteen
 (14) south east quarter of the south east quarter
 of section Sixteen (16) Town Twenty six (26)
 Containing Forty (40) acres and the north half
 of the North East quarter Section Twenty one
 (21) Town Twenty six (26) Containing Eighty acres
 and also Twenty acres commencing ten rods
 North of the South East corner of the North
 East of the North East quarter Section
 Thirty one (31) Town Twenty six (26) and running
 west Eighty rods thence south 40 rods to the
 place of beginning all in range one east
 of the 3rd Principal Meridian in the County
 of Woodford and State of Illinois and on
 said last mentioned day said Decedent
 by a Bond - a copy of which is is here with
 filed marked "D," and made a part of this
 Bill by said Bond said Potter sold
 to one Samuel Burger whom your
 Grators praying may be made a party
~~to~~ defendant to this Bill all of the
 above described Real Estate for the
 Sum of one thousand Seveny three & ⁸⁰/₁₀₀
 Dollars as shown by a note from said
 Samuel Burger and one James
 Burger dated Jan 21st 1860 due

note

one day after date and payable to said Potter which said note is herewith filed and asked to be taken as part of this Bill: Your Creator would show that the condition of said Bond was that if said Lemuel Burger his heirs or assigns should well and truly pay or cause to be paid said above mentioned

and should pay all taxes which might hereafter accrue upon said land then said Ephriam Potter should well and truly make and deliver to said Lemuel Burger his heirs or assigns a good and sufficient warranty deed for said land Creator would show that said note has not been paid in full the following being the only payment made on said note to wit on the 18th

Sep 1860 \$26. -
 13th Aug 1860 \$25. -
 26th Oct 1860 \$70. -
 7th Nov 1860 \$35. -

and that there is now due to your said Creators Elizabeth Potter Abram Potter and Leven P Herford as executors as aforesaid, on said Contract and said note the sum of \$42. ⁵⁹/₁₀₀ said amount being due ~~was~~ on said note which amount said Lemuel Burger and said James Burger refuse to pay

17.

Your Orators would further show unto
Your Honor that said decedent
Potter at his death left as his heirs at
Law his Widow Your Cratrix Elisabeth
Potter his Children William Potter
Starling Potter James M. Potter
Anand of Potter Polly Spicer (wife of
Abram Spicer now deceased), Effricam
Potter or Sirena Warner wife of Paris
Warner Martha Warner wife of Gairford
Warner & Catharina Horner wife of
James Horner; and the following named
Children who are Minors to wit
Abram Potter Marion Potter Candis Potter
Elisabeth Potter Albert R Potter and
Frank Potter; And said Decedent left
the following named heirs who are his grand
Children being the Children of Potter
now deceased; to wit; William Potter
Mourve Potter and John Potter and the
following Grand Children the Sons of
Potter now deceased to wit; William
Potter and Albert Potter Cratrix would
show that of the above named Grand
Children the three first named are of
lawful age and the two last named are
Minors. And Cratrix would show
that said Heirs are the sole and
only legates and assigns of said

Ephraim Potter deceased made his
 said will - Cratur would further
 show that at the time said land was
 sold to said Lemuel Burger said
 Burger took possession of said land
 and is still in possession of said
 land claiming the same under said
 Bond given by said decedent
 Now inasmuch as by the terms of said
 will the executors are not empowered
 to convey said land and as by a
 suit at Law ~~to recover~~ said purchase money
 from said purchaser Lemuel Burger
 without first delivering him a deed to
 said land Cratur are without remedy
 at Law; wherefore Cratur pray that
 said Lemuel Burger purchaser
 of said land and said James Burger
 who signed the said note jointly with
 said Lemuel Burger be made
 defendant and sum moned to appear
 and answer this bill under their oaths
 and for a decree authorizing the executors
 of said deceased to convey to said
 Lemuel Burger a deed to said
 above described land; and for a decree
 that the purchase money still unpaid
 be a vendors lien on said land

2

in pursuance against the said
 Lemuel Burger and James Burger
 for the Amount so found to be due
 and for a ^{for their decree} ~~deed~~ that unless said Lemuel Burger
 pay to your brother Elizabeth Potter
 Abram Potter and Sewer P Heriford
 Executors as afore said Amount
 so found to be due within a short
 day to be fixed by the Court that said
 land be sold for cash without
 redemption to satisfy said decree and
 per cost^s and for such other further
 and general relief as to equity and
 good Conscience may belong and
 as in duty bound &c

Williams & Stevenson
 Compt Sol^r

\$1073.86
 100

Ill Pass Jan 21st 1860

One day after date we or either
 of us promise to pay to the order of
 Ephraim Potter one thousand and seventy
 three dollars and eighty six cent^s for
 value received at ten per cent from date

Lemuel Burger
 James Burger

August 13th 1860

Received on the within note
twenty five dollars

October the 26th 1860

Received on the within note
one hundred & seventy doll

Nov 9th 1860 paid on the within
note one hundred & thirty five
dollars

Received on the within note

September 13th 1860

Twenty six dollars

20

James H. Hays
\$1073.56
Paid for

STATE OF ILLINOIS, }
WOODFORD COUNTY. } SS

The People of the State of Illinois, to the Sheriff of said county, Greeting:

WE COMMAND YOU, THAT YOU SUMMON *Samuel Burger and James Burger*
21

if they shall be found in said county, personally to be and appear before the Circuit Court of
said Woodford county, on the first day of the next term thereof, to be holden at the Court House, in
Metamora, in said Woodford county, on the Second Monday of August

A. D. 1861, to answer the matters and things contained in a certain Bill of Complaint exhib-

ited against them in our said court, on the chancery side thereof, by
Elizabeth Patter, Abram Patter and Leven P. Hoareford executors of Ephraim Patter deceased and William Patter
Martha Patter, James M. Patter, Spurgeon Patter, Sally Spruce, Ephraim Patter, Mrs. Lezana Warner,
Martha Warner, Martha Warner Linford, Warner, Catharine Hoover, James Hoover, William Patter, Monroe Patter,
John Patter and the following heirs who appear by their next friend Leven P. Hoareford

to wit: Abram Patter, Mariah Patter, Candis Patter, Elizabeth Patter, Albert B. Patter,

Frank Patter, William Patter, and Albert Patter, heirs at Law of Ephraim Patter, deceased

complainant of said Bill, to foreclose vendors lien and for Relief

And have you then and there this writ, with an endorsement thereon,
in what manner you shall have executed the same.

Witness, JAMES D. PERRY, Clerk of our said court, and the seal
thereof, at Metamora aforesaid, this 26th day of

July A. D. 1861
James D. Perry Clerk

Chancery
SUMMONS.

WOODFORD CIRCUIT COURT.

D. Docket No 109 Page

Elizabeth Patten, Susan Patten
Levin P. Woodford et al

vs.

Samuel Burger &

James Burger

STATE of ILLINOIS,

Woodford County.

I have duly served the within, by reading
and delivering a true copy of the same to
the within named

Samuel Burger &
James Burger

August 2/61

DNs

day of

1861 as I am therein commanded.

~~Returned this~~

day of

1861

R. S. Sidwell Sheriff.

FEES—Service 1.00

Copies, 1.00

Milcage, 2.00

Return 1.00

84.00

Filed in Circuit Court, this 26th

day of July 1861

James D. Carrick Clerk.

William D. Harrison Attorney.

22

Elizabeth Potter Abram Potter
 & Lewis P. Keuffner Executors of Ephraim
 Potter deceased & others
 vs
 Samuel Burger & James Burger

Bill to Foreclose No 109

Now on this day come the Complamants
 by Williams and Stevenson their Attorneys and the said Defendants being
 three times solemnly called come not-but made default, It is therefore
 considered by the Court the bill be taken as confessed and a decree is entered
 herein which is in the words and figures following

Elizabeth Potter Abram Potter
 & Lewis P. Keuffner Executors of
 Ephraim Potter deceased & others
 vs
 Samuel Burger & James Burger

State of Illinois, Woodford Circuit
 Court- August term 1861
 In Equity

And now on this 13th day of August
 1861 this cause came on and was called by the Court and it appear-
 -ing to the Court from the writ and Sheriff's return that both of the Defende-
 -ants have been duly served with process more than ten days before
 the commencement of this term of the Court and upon motion of the
 Solicitors for the Complamants the Defendants were three times solemnly
 called to come into Court to appear plead answers or demurs to the
 Complamants Bill but the said Defendants both made default and
 came not and therefore upon motion of the Solicitors for the Complam-
 -ants a decree Pro confesso is entered against said defendants
 and the bill is ordered by the Court to be taken as true and it appear-
 -ing to the Court from the papers filed that the contract for the sale
 of the land as described in the bill was made that is that Ephraim
 Potter (who was deceased before the filing of this Bill) did on the
 9th day of May 1860 enter into a bond by which he the said Ephraim
 Potter since deceased had bound himself his heirs &c into the Defende-
 -ant Samuel Burger to convey to said Burger the following lands

24
in the said County of Woodford and State of Illinois to wit; 3/4 of Section sixteen (16) Town twenty six (26)
containing forty acres and the North half of the North East quarter of
Section twenty one (21) Town twenty six (26) containing eighty 80 acres
and also twenty acres commencing ten (10) rods North of the SE corner
of the NE of the NE quarter Section thirty (30) in Town twenty six and
running west (80) Rods thence south (40) Rods thence East (80) rods
thence North (40) rods to the place of Beginning all in range one (1)
east of the 3^d R.M. upon condition that the said Samuel Berger should
pay to the said Ephraim Potter (since deceased) one note for the purchase
money of said land dated January 21^o 1860 for the sum of one thousand
seventy three & 50/100 dollars due one day after its date bearing ten per
cent interest from its date and should further pay all the taxes that
should hereafter accrue on said land and it further appearing to
the Court that said note was a joint and several note of both defend-
ants to him the said Ephraim Potter (since deceased) and it further
appearing to the Court that the said defendant Samuel Berger went
into possession of said land under said Contract and remains now in
possession of the same claiming the same under said Contract, and it
further appearing to the Court that nothing has been paid upon said
note except the sum of \$25⁰⁰ on the 15^o day of August 1860 and \$170⁰⁰
on the 26^o of October 1860 and the sum of \$26⁰⁰ on the 15^o of September
1860 and the sum of \$133⁴⁰ on the 7^o day of November 1860 and that
there is now due and owing on said note the sum of Eight hundred and
sixty & 50/100 dollars and that said Ephraim Potter died on or about
the 1^o day of January 1861 testate leaving as his heirs at law and
devisees and legatees the parties Complainant except the Complainant
Hereford and that letters Testamentary have issued from the Probate Court
of said Woodford County on the last will and testament of said
Ephraim Potter deed to the Complainant Elizabeth Potter Abram Potter
and Hereford and that they are now acting as such executors, and now
the Court being fully advised on the premises it is therefore considered and
decreed by the Court that all the estate right title and interest that

was in the said Ephraim Potter deceased at the time of his death in
 and to the above described lands and real estate be and the same is
 hereby as fully vested in the said Defendant Samuel Burgin his heirs
 and assigns as the same was vested in the said Ephraim Potter at the
 time of his decease and that all the right title and interest of any
 and all the Complainants in and to the said land devised by them
 either as heirs or devisees of said Ephraim Potter deceased (or from
 X Coverture with said deceased) be and the same is ^{now} fully vested in the said
 Defendant Samuel Burgin his heirs and assigns subject to the
 following lien that is to say the above amount found to be due on
 said note together with the costs of this proceeding be and the same
 is hereby decreed by the Court to be a vendors lien on said land
 And it is further decreed by the Court that the Complainants the Exe-
 cutors aforesaid do have and recover of and from the said Defendants
 the said sum of Eight hundred and Sixty & 25/100 dollars above
 found to be due together with their costs in this behalf expended
 And it is further decreed by the Court that unless the said Defen-
 dants do within six months from this day pay to the said
 Complainants who are Executors as aforesaid the amount so found
 to be due that the said lands or so much thereof as may be
 necessary be sold for cash in hand without redemption to satisfy
 this decree after advertising the same for sale for the time and in the
 manner required by law for Sheriff's sales of Real Estate under execution
 at law ^{and} for the remainder if any remaining unpaid after said sale
 on execution may issue And that Samuel J. Croft be appointed a
 Special Master to carry this decree into effect and execute this
 decree and report to this Court and that the cause now stand

Continued

J. P. Richmond Judge
 23^d Judicial Circuit

December Term A D 1861

27

Elizabeth Patter Abram Patter &
Seven P. Hereford Executors of
Ephriam Patter deceased & others

vs

Samuel Burger and James Burger

Bill to Foreclose Vendors Lien
No. 109

Now on this day this cause
came on to be heard and it appearing to the Court that the
Master in Chancery of this Court has not made report
of Sale of the premises under the decree in this cause It
is therefore ordered by the Court that this cause stands
continued for said Masters Report

State of Illinois } ss

Woodford County }

I James D. Perry Clerk of the Circuit
Court in and for said County in the
State of Illinois do hereby certify that the foregoing is a
true and correct copy of the precipe Summons and Sheriff's
return on Summons Complainants Bill. Bond Marked D.
Note. Will. & Letters testamentary and orders of the County
Court Marked "B" & "C", the decree, and order of Circuit Court
made August and
December terms A.D. 1861 as appears of the Papers on
file and of the Record made in the Cause, ^{in my office} wherein
Elizabeth Patter Abram Patter & Seven P. Hereford

28

Executors of the Estate of Ephraim Potter deceased
Complainants and Samuel Burger and James Burger
are defendants

Given Under my hand and the Seal of
Said Circuit Court at Metamora

This 5th day of March A.D. 1862

James D. Perry Clerk
By J. C. Myers Deputy



306 61 - 4
James Bought
Leppert Buisson
Plaintiff - error

↳

Elizabeth Potter
and others

Record

Filed Apr. 24. 1862
L. Seland
Clk.

Metamora April 18th 1866

H. Grove Esq.

Si Si

I see the Potter case in Supreme Court from this Co about which we spoke to you when here. I think we shall not be able to attend first week and wish you to submit it for us on printed and written or printed arguments to be filed so by ——— (as long a time as practicable). If necessary you may write out and sign in our name the order in error.

Yours truly

Benjamin Stevenson

Advise us at Sacon what is done.

61.-4

Left to Submit

181, Shygaras
61. Bergers Cove

Filed Apr. 22.
1863 L. Leland
C. C. K.

Supreme Court of
Illinois - April Term 1862 -

James Bogue
Et al. = plaintiffs
in Error

vs

Elizabeth Patton
Et al. = Defendants
in Error

Error to
Woodburn

And now come
the said Defendants in Error
in said Cause by A. E. Stearns =
Son & J. M. Shaw their Attorneys
and enter their appearance herein
& waive the service of process.

A. E. Stearns
J. M. Shaw
for Defendants in Error

61
No 300

Annus Burger
regul

Lebathu
regul

Appensan
of Deftin

Buysen stal

Potter stal

Stipulation

Fid. July 26, 1863.

L. Schand
Cher

[Faint handwritten notes on the left margin]

[Main body of handwritten notes, including a vertical list of numbers and names]

[Faint handwritten notes on the right margin]

ABSTRACT.

State of Illinois, Supreme Court within and for the
Third Grand Division, of said State.

TO THE APRIL TERM OF SAID COURT A. D. 1863.

LEMUEL BURGER, et al Pl'fs. in Error }
and Defts. below, }
vs. } Error to Woodford.
ELIZABETH POTTER and others, Defts. }
in Error and Pl'fs. below. }

Page of
Record.

ABSTRACT OF RECORD.

- 1 Precipe filed July 26, 1862.
- 3 Exhibit D filed July 26, 1862.

KNOW ALL MEN BY THESE PRESENTS, That Ephriam Potter of the County of Woodford and State of Illinois, are held and firmly bound unto Lemuel Burger of the County of Woodford and State of Illinois, in the penal sum of sventy-two hundred dollars, for which true payment to be made, I do hereby bind myself, my heirs, administrators and executors firmly by these presents: Witness my hand seal this 9th day of May, A. D., 1860. The condition of the above obligation is such that, whereas, the above named Ephriam Potter has this day sold to the said Lemuel Burger the following described real estate, lying and being in the County of Woodford and State of Illinois, to wit: Lot fourteen, (14), s. e. of the s. e. qr. of section sixteen, (16), town twenty-six, (26), containing forty, (40), acres and the north half of the north-east qr. of section twenty-one, (21), town twenty-six, (26), containing eighty (80) acres.

Record, page 4.

and also twenty (20) acres, commencing ten (10) rods north of the s. e. corner of the north-east of the n. e. quarter, section thirty-one, (31), in township twenty-six, (26), and running west eighty rods, (80), thence south forty rods, (40) to the place of beginning, all in range one, (1), east of the third principal meridian, for the sum of one thousand and seventy-three and 86-100 dollars, and received in payment on said lot of land one note of the above amount, dated the 21st day of Jan, A. D., 1860 at ten per cent. interest from date. Drawn payable one day after date. Now if the said Lemuel Burger, his heirs or assigns shall well and truly pay or cause to be paid the amount of the aforesaid note, and shall pay the taxes that hereafter accrue on said land, then the said Ephriam Potter will execute and deliver to said Lemuel Burger, his heirs or assigns, a good and sufficient warranty deed for said lands and this bond to be null and void, otherwise to remain in full force and effect.

EPHRIAM POTTER. [SEAL.]

[First Attest] - W. T. HEREFORD,

[Attest] ABRAM POTTER.

Record, page 5.

Exhibit "A" filed July 26, 1862.

In the name of God, Amen.

I, Ephriam Potter, Sen., in the County of Woodford and State of Illinois, being weak in body, but of sound and perfect memory, blessed be Almighty God for the same, do make and publish this my last will and testament, in manner and form following, that is to say: First, I give and bequeath unto my beloved wife, Elizabeth Potter, the house in which I now live and the buildings appurtenant to the same and the household furniture of every kind now being in said house, and the following described tract of land lying and being in the County and State aforesaid, known and described on the north east quarter of section No. twenty-one, (21), in township No. twenty-six, (26), north of range No. one, (1), east of the third principal meridian, containing one hundred and sixty acres, more or less. Also the south east quarter of the south west qr. and the south west quarter of the south east qr. of section sixteen, (16), township twenty-six (26) north, range No. one, (1), east of the third principal meridian, containing eighty acres, (80), more or less. Also, lot No. thirteen, (13), being the south west quarter of the south west quarter of section sixteen, (16), township twenty-six, (26), north of range one (1) east, containing thirty-nine 32-160 acres. Also two mares described as follows: one bay mare, six years old, and one sorrel mare eight years

Record, page 6.

old. Also one sett of double harness, one two horse wagon. Also the three head of cows described as follows: one brown cow, and one black cow, and one red cow; and ten head of stock hogs, and one white sow and pigs. Also one breaking plow, one harrow, two shovel plows, and one horse scowering plow. Also corn and hay sufficient for the stock, and small grain enough for the use of the family and provisions for the family for one year. Also four ewes and lambs and all the poultry she wants to keep, and one one-horse buggy.

SECONDLY, I also give and bequeath unto my son, Abram Potter, the following described tract of land, viz: lying and being in the County and State aforesaid, known and described as the south half of the lot eleven, (11), in section sixteen, (16), township twenty-six, (26,) north of range one, (1), east of the third principal meridian, containing twenty acres, more or less. Also two colts, described as follows: one bay mare colt, two years old, and one dark bay colt, one year old.

THIRDLY, I also give and bequeath unto my son, Marian Potter, the following described tract of land, lying and being in the County and State aforesaid, known and described as the south half of lot No. five, (5), section No. (16) sixteen, township twenty-six, (26), north of range one, (1), east of the third principal meridian, containing twenty (20) acres, more or less. Also one bright bay colt, one year old.

Record, page 7.

And, LASTLY, As to all the rest, residue and remainder of my estate, whatsoever, after payment of my just debts, to be legally divided between my lawful heirs. It is my request that the aforesaid Elizabeth Potter, my wife, and my son Abram Potter shall administer on my estate.

In witness whereof, I have hitherto set my hand and seal this 11th day of December, A. D., 1860.

His
EPHRIAM ✕ POTTER, SEN.
Mark.

Signed, sealed and delived by the above named Ephriam Potter, Sen., to be his last will and testament, in the presence of us, who at his request, and in his presence, have subscribed our names as witnesses thereto.

J. A. HAYS, Illinois,
W. H. CUMMINS, Illinois.

STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

I, Robert B. Hanna, Clerk of the County Court in and for said County, do hereby certify that the foregoing is a true and correct copy of the

last will and testament of Ephriam Potter, Sen., late of said County, deceased, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and
 { SEAL } affixed the seal of said County at my office in Metamora
 this 26th day of July, A. D., 1861.

ROBERT B. HANNA, Clerk.

COUNTY COURT, JANUARY TERM, A. D., 1861.

County Court of Woodford County met January 21st, A. D., 1861, pursuant to adjournment.

Record, page 8. Present—Hon. B. D. Meek, County Judge, presiding, R. B. Hanna, Clerk, and R. L. Sidwell, Sheriff.

The Sheriff announced that the County Court of Woodford County was in session pursuant to adjournment.

*IN THE MATTER OF THE ESTATE OF }
 EPHRIAM POTTER, SEN., DECEASED. }*

This day came into Court Elizabeth Potter and presented to the Court application for letters testamentary upon the last will and testament of said deceased for Probate. Upon examination of said will the witnesses hereto, to-wit: J. A. Hays and W. H. Cummins being present, ordered by the Court that the Clerk proceed to take proof of said will as required by statute in such case made and provided, and upon such proof being taken, it is ordered by the Court that said will and testament be admitted to probate and recorded, and it also appearing from said will that Elizabeth Potter and Abram Potter were by said deceased in his said last will and testament appointed executors of the same, it is ordered by the Court that the application be received and filed; and further order by the Court that L. P. Hereford be and is hereby appointed to act in conjunction with the aforesaid Elizabeth Potter and Abram Potter, in the settlement of said estate, and ordered that letters testamentary be granted with the will annexed, to the aforesaid Elizabeth Potter, Abram Potter and L. P. Hereford upon their entering into a good and sufficient bond, to be approved by this Court.

Record, page 9.

COUNTY COURT, FEBRUARY TERM, A. D., 1861.

County Court of Woodford County met February 18th, A. D., 1861, pursuant to adjournment.

Present—Hon. D. B. Meek, County Judge, presiding, R. L. Sidwell, Sheriff, and R. B. Hanna, Clerk.

Court opened by proclamation.

IN THE MATTER OF THE ESTATE OF }
 EPHRIAM POTTER, SEN., DECEASED. }

The executors of the last will and testament of Ephriam Potter, deceased, this day presented to the Court, their bond as such, executed for approval. The Court upon examination of the same being fully advised in the premises, ordered that said bond be approved, and further ordered that the same be filed and entered of record and that letters testamentary issue.

STATE OF ILLINOIS, }
 WOODFORD COUNTY, } ss.

I, R. B. Hanna, Clerk of the County Court in and for the said County, do hereby certify that the foregoing is a true and correct copy of the proceedings had by said County Court at the January and February Terms thereof, A. D., 1861, in the matter of the last will and testament of Ephriam Potter, Sen., deceased, as appears of record in my office.

Witness my hand and the seal of said Court at my office
 { SEAL } in Metamora this 26th day of July, A. D., 1861.

ROBERT B. HANNA, Clerk.

Record, page 10.

L E T T E R S T E S T A M E N T A R Y .

STATE OF ILLINOIS, }
 WOODFORD COUNTY, } ss.

The People of the State of Illinois, to all to whom these Presents shall come Greeting:

KNOW YE, That, whereas, Ephriam Potter, late of the County of Woodford and State of Illinois died on or about the 1st day of January, A. D., 1861, as it is said after having duly made and published his last will and testament, a copy whereof is hereunto annexed, leaving at the time of his death property in this State which may be lost, destroyed or diminished in value, if speedy care be not taken of the same, and in as much as it appears that Elizabeth Potter and Abram Potter has been appointed executors in and by the said last will and testament to execute the same, and to the end that the said property may be preserved for those who shall appear to have legal right or interest therein, and that the said will may be executed according to the request of the said testator, we do hereby authorize them, the said Elizabeth Potter, Abram Potter, and also L. P. Hereford as such executors to collect and secure all and singular the goods and chattels, rights and credits which were of said Ephriam Potter at the time of his decease, in whosever hands or possession the same may be found in this State, and well and truly to perform and fulfill all such duties as may be enjoined upon them by the

Record, page 11. said will, so far as there shall be property and the law charge them, and in general to do and perform all other acts which now are, or may hereafter be required of them by law.

In witness whereof I have hereunto set my hand and affixed the seal of the said County Court at my office in Metamora this 21st day of January, A. D., 1861.

R. B. HANNA, Clerk of the County Court.

We do solemnly swear that that this writing contains the true last will and testament of the within named Ephriam Potter, deceased, so far as we know or believe, and that we will well and truly execute the same by paying first the debts and then the legacies mentioned therein, as far as his goods and chattels thereunto extend and the law charge us, and that we will make a true and perfect inventory of all such goods and chattels, rights and credits as may come to our hands or knowledge, belonging to the estate of said deceased, and render a fair and just account of our executorship when thereunto required by law, to the best of our knowledge and abilities, so help us God.

ELIZABETH POTTER,
ABRAM POTTER,
L. P. HEREFORD.

Subscribed and sworn to before me this 21st day of January, 1861.

R. B. HANNA, Clerk.

STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

I, R. B. Hanna, Clerk of the County Court for said County, do hereby certify that the foregoing is a true and correct copy of the letters testamentary, granted by the County Court of said County, to Elizabeth Potter, Abram Potter and L. P. Hereford, executors of the last will and testament of Ephriam Potter, Sen., deceased, as the same appears of record in my office.

Witness my hand and official seal at my office in Metamora this 26th day of July, A. D., 1861.

ROBERT B. HANNA, Clerk.

Record, page 13. STATE OF ILLINOIS, }
WOODFORD COUNTY, } ss.

IN THE CIRCUIT COURT OF WOODFORD COUNTY TO THE AUGUST TERM,
A. D., 1861.

To the Hon. Samuel L. Richmond, Judge and Chancellor of the 23d Judicial Circuit:

Humbly complaining, would respectfully represent unto your Honor, your orators, Elizabeth Potter, Abram Potter and Leven P. Hereford,

executors of Ephriam Potter, deceased, late of said County, and your oratois William Potter, Sterling Potter, James M. Potter, Andrew J. Potter, Polly Spicer, Ephriam Potter, Jr., Serena Warner, Barris Warner, Martha Warner, Liceford Warner, Catherina Horner, James Horner, and William Potter, Munroe Potter, and John Potter, and Abram Potter, Marian Potter, Candis Potter, Elizabeth Potter, Albert R. Potter, Frank Potter, William Potter, Jr., and Albert Potter, (the last eight of whom are minors, and appear by their next friend Leven P. Hereford), would respectfully show unto your Honor that on the first day of January, A. D., 1861, the above named Ephriam Potter departed this life in said Woodford County the place of his residence, and that said Potter died testate leaving two of your said orators to-wit: Elizabeth Potter (his widow), and Abram Potter (his son), his executors. Orators would show that said will has been duly probated in said County of Woodford, a copy of which is herewith filed marked "A" and made part of this bill. Orators would show that at the January Term, 1861, of said Probate Court upon the request of said Elizabeth Potter and Abram Potter, executors, as aforesaid; and with the advice and consent of the other heirs, your orator said Leven P. Hereford was appointed by the Probate Court of said County a co-executor with said Elizabeth Potter and Abram Potter, a copy of which order of appointment is herewith filed marked "B" and made part of this bill. Orator would further show that at said January Term of said Probate Court letters testamentary were issued to your orators Elizabeth Potter, Abram Potter and Leven P. Hereford, of which said letters a copy is herewith filed marked "C," and made part of this bill. Your orators would show that on the 9th day of May, 1860, and during the lifetime of said Ephriam Potter, said Potter was the owner in fee simple, free from all incumbrance, of the following described real estate, to-wit: Lot No. fourteen, (14), south east quarter of the south east quarter of section sixteen, (16), town twenty-six, (26), containing forty (40) acres, and the north half of the north east quarter, section twenty-one, (21), town twenty-six, (26), containing eighty acres, and also twenty acres commencing ten rods north of the south east corner of the north east of the north east quarter section thirty one, (31), town twenty six, (26), and running west eighty rods, thence south 40 rods to the place of beginning, all in range one, east of the 3d principal meridian in the County of Woodford and State of Illinois, and on said last mentioned day said decedent, by a bond a copy of which is herewith filed marked "D" and made a part of this

Record, page 14.

Record, page 15.

Record, page 16.

bill, by said bond said Potter sold to one Lemuel Burger, whom your orators praying may be made a party defendant to this bill, all of the above described real estate for the sum of one thousand, seventy and 80-100 dollars, as shown by a note from said Lemuel Burger and one James Burger, dated Jan. 21st, 1860, due one day after date and payable to said Potter, which said note is herewith filed and asked to be taken as part of this bill. Your orator would show that the conditions of said bond was that if said Lemuel Burger, his heirs or assigns should well and truly pay or caused to be paid said above mentioned note, and should pay all taxes which might hereafter accrue upon said land, then said Ephriam Potter should well and truly make and deliver to said Lemuel Burger, his heirs or assigns a good and sufficient warranty deed for said land. Orators would show that said note has not been paid in full, the following being the only payments made on said note, to-wit:

13th Sept., 1860, \$26.

15th Aug., 1860, \$25.

26th Oct., 1860, \$170.

7th Nov., 1860, \$135.

Record, page 17.

And that there is now due to your said orators, Elizabeth Potter, Abram Potter and Leven P. Hereford as executor as aforesaid, on said contract and said note the sum of \$842, 59-100, said amount being due on said note which amount said Lemuel Burger and said James Burger, refuse to pay. Your orators would further show unto your Honor that said decedent Potter at his death left as his heirs-at-law, his widow, your oratrix, Elizabeth Potter, his children William Potter, Sterling Potter, James M. Potter, Andrew J. Potter, Polly Spicer, (wife of Abram Spicer, now deceased), Ephriam Potter, Jr., Livina Warner, wife of Barris Warner, Martha Warner, wife of Liceford Warner, Catherina Horner, wife of James Horner, and the following named children who are minors, to-wit: Abram Potter, Marian Potter, Candis Potter, Elizabeth Potter, Albert R. Potter, and Frank Potter. And said decedent left the following named heirs who are his grand children being the children of Potter, now deceased, to wit: William Potter, Munroe Potter and John Potter and the following grand children, the sons of Potter now deceased, to-wit: William Potter and Albert Potter. Orators would show that the above named grand children, the three first named are of lawful age, and the two last named are minors. And orators would show that

Record, page 18.

said heirs are the sole and only legatees and devisers of said Ephriam

Potter, deceased, made his said will. Orators would further show that at the time said land was sold to said Lemuel Burger, said Burger took possession of said land and is still in possession of said land, claiming the same under said bond, given by said decedent. Now, in as much as by the terms of said will the executors are not empowered to convey said land, and as by a suit at law receives said purchase money from said purchaser, Lemuel Burger, without first delivering him a deed to said land, orators are without remedy at law; wherefore, orators pray that said Lemuel Burger, purchaser of said land, and said James Burger who signed the said note jointly with said Lemuel Burger—be made defendants and summoned to appear and answer this bill under their oaths, and for a decree authorizing the executors of said deceased to convey to said Lemuel Burger a deed to said above described land, and for a decree that the purchase money still unpaid be a vender's lien on said land in pursuance against the said Lemuel Burger and James Burger for the amount so found to be due, and for a further decree and that unless said Lemuel Burger pay to your orators Elizabeth Potter, Abram Potter and Leven P. Hereford, executors as aforesaid, amount so found to be due within a short day, to be fixed by the Court, that said land be sold for cash, without redemption, to satisfy said decree, and for costs, and for such other further and general relief as to equity and good conscience may belong and as in duty bound, &c

Record, page 19.

WILLIAMS & STEVENSON,
Comp'l Sol's.

\$1,073 86.

EL PASO, Jan. 21, 1860.

One day after date we, or either of us, promise to pay to the order of Ephriam Potter, one thousand and seventy-three dollars and eighty-six cents, for value received, at ten per cent. from date.

LEMUEL BURGER, [L. s.]

JAMES BURGER, [L. s.]

Record, page 20.

On which note the following endorsements were made, to-wit :

August 15th, 1860, received on the within note twenty-five dollars.

October the 26, 1860, received on the within note, one hundred and seventy dollars.

Nov. 7th, 1860, paid on the within note, one hundred and thirty-five dollars.

Received on the within note, September the 15th, 1860, twenty-six dollars.

Record, page 21. STATE OF ILLINOIS, }
 WOODFORD COUNTY, } ss.

The People of the State of Illinios, to the Sheriff of said County, Greeting:

We command you, that you summons Lemuel Burger and James Burger, if they shall be found in your County, personally to be and appear before the Circuit Court of the said Woodford County on the first day of the next term thereof, to be holden at the Court House in Metamora, in said Woodford County, on the second Monday of August, A.D., 1861, to answer the matters and things contained in a certain bill of complaint exhibited against them, in our said Court on the chancery side thereof, by Elizabeth Potter, Abram Potter and Leven P. Hereford, executors of Ephriam Potter, deceased, and William Potter, Sterling Potter, James M. Potter, Andrew J. Potter, Polly Spicer, Ephriam Potter, Jr., Serena Warner, Barris Warner, Martha Warner, Liceford Warner, Catherine Horner, James Horner, William Potter, Munroe Potter, John Potter, and the following minors; who appear by their next friend Leven P. Hereford, to-wit: Abram Potter, Marian Potter, Candis Potter, Elizabeth Potter, Albert R. Potter, Frank Potter, William Potter, Jr., and Albert Potter, heirs-at-law of Ephriam Potter, deceased, complainants for bill to foreclose vender's lien and for relief.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, James D. Perry, clerk of our said Court, and the seal thereof, at Metamora aforesaid, this 26th day of July, A. D., 1861.

JAMES D. PERRY, Clerk.

Record, page 23. ELIZABETH POTTER,
 ABRAM POTTER,
 LEVEN P. HEREFORD,
 Executors of Ephriam Potter, deceased, and others. } Bill to Foreclose. No. 109.
 vs.
 LEMUEL BURGER, and
 JANE BURGER, }

Now on this day came the complainants by Williams and Stevenson their attorneys, and the said defendants being three times solemnly called came not, but made default, it is therefore considered by the Court the bill be taken as confessed, and a decree is entered herein which is in the words and figures following :

ELIZABETH POTTER,
 ABRAM POTTER, and
 LEVEN P. HEREFORD,
 Executors of Ephriam Pot-
 ter, deceased, and others. }
 vs.
 LEMUEL BURGER, and
 JAMES BURGER, }

STATE OF ILLINOIS, WOODFORD CIRCUIT COURT AUGUST TERM, 1861.
 IN EQUITY.

And now on this 13th day of August, 1861, this cause came on, and was called by the Court and it appearing to the Court from the writ and Sheriff's return that both of the defendants have been duly served with process, more than ten days before the commencement of this term of the Court, and upon motion of the solicitors for the complainants the defendants, were three times solemnly called to come into Court to appear, plead, answer, or demur to the complainant's bill, but the said defendants both made default and came not, and therefore upon motion of the solicitors for the complainants a decree pro confesso is entered against said defendants and the bill is ordered by the Court to be taken as true, and it appearing to the Court, from the papers filed, that the contract for the sale of the land as described in the bill was made, that is, that Ephriam Potter (who was deceased before the filing of this bill) did on the 9th day of May, 1860, enter into a bond by which he, the said Ephriam Potter, since deceased, had bound himself, his heirs, &c, unto the defendant, Lemuel Burger, to convey to said Burger, the following lands in the said County of Woodford and State of Illinois, to-wit: Lot (14) fourteen, s. e. $\frac{1}{4}$ of s. e. $\frac{1}{4}$ of section sixteen, (16), town twenty-six, (26), containing forty acres, and the north half of the north east quarter of section twenty-one, (21), town twenty-six, (26), containing eighty (80) acres, and also twenty acres commencing ten (10) rods north of the s. e. corner of the n. e. of the n. e. quarter, section thirty, (30), in town twenty-six and running west (80) rods, thence south (40) rods, thence east (80) rods, thence north (40) rods to the place of beginning, all in range one (1), east of the 3d principal meridian, upon condition that the said Lemuel Burger should pay to the said Ephriam Potter (since deceased) one note for the purchase money of said land, dated January 21st, 1860, for the sum of one thousand, seventy-three and 86-100 dollars due one day after its date, bearing ten per cent. interest from its date, and should further pay all the taxes that should thereafter accrue on said land, and it further appearing to the Court that said note was a joint and several note of both defendants to him, the said Ephriam Potter (since deceased), and

Record, page 24.

it further appearing to the Court that the said defendant Lemuel Burger went into possession of said land under said contract and remains now in possession of the same, claiming the same under said contract, and it further appearing to the Court that nothing has been paid upon said note, except the sum of \$25.00 on the 15th day of August, 1860, and \$170 on the 26th of October, 1860, and the sum of \$26.00 on the 15th of September, 1860, and the sum of \$135 on the 7th day of November, 1860, and that there is now due and owing on said note the sum of eight hundred and sixty and 25-100 dollars and that said Ephriam Potter died on or about the 1st day of January, 1861, testate, leaving as his heirs-at-law and devisees and legatees the parties complainant, except the complainant Hereford, and that letters testamentary have issued from the Probate Court of said Woodford County on the last will and testament of said Ephriam Potter, deceased, to the complainants Elizabeth Potter, Abram Potter and Hereford, and that they are now acting as such executors, and now the Court being fully advised in the premises, it is therefore considered and decreed by the Court that all the estate, right, title and interest that was in the said Ephriam Potter, deceased, at the time of his death in and to the above described lands and real estate be and the same is hereby as fully vested in the said defendant Lemuel Burger, his heirs and assigns as the same was vested in the said Ephriam Potter at the time of his decease, and that all the right, title and interest of any and all the complainants in and to the said land, devised by them, either as heirs or devisees of said Ephriam Potter, deceased, (or from coveture with said deceased) be and the same is hereby fully vested in the said defendant Lemuel Burger, his heirs and assigns, subject to the following lien, that is to say, the above amount found to be due on said note, together with the costs of this proceeding, be and the same is hereby decreed by the Court to be a vender's lien on said land, and it is further decreed by the Court that the complainants, the executors aforesaid, do have and receive of and from the said defendants, the said sum of eight hundred and sixty and 25-100 dollars, above found to be due, together with their costs in this behalf expended. And it is further decreed by the Court that unless the said defendants do, *within six months from this day*, pay to the said complainants, who are executors as aforesaid, the amount so found to be due, that the said lands or so much thereof as may be necessary, be sold for cash in hand without redemption, to satisfy this decree, after advertising the same for sale for the time, and in the manner required by law for Sheriff's sales of real estate under execution at law,

and for the remainder, if any remaining unpaid after said sale on execution may issue, and that Samuel J. Cross be appointed as special master to carry this decree into effect and execute this decree and report to this Court, and that the cause now stand continued.

S. L. RICHMOND,
Judge 23d Judicial Circuit.

Record, page 27.

DECEMBER TERM, A. D., 1861.

ELIZABETH POTTER,
ABRAM POTTER,
LEVEN P. HEREFORD,
Executors of Ephriam Pot-
ter, deceased, and others.

vs.
LEMUEL BURGER, and
JAMES BURGER,

} Bill to Foreclose Vender's Lien. No. 109.

Now on this day this cause came on to be heard and it appearing to the Court that the master in chancery of this Court has not made report of sale of the premises under the decree in this cause, it is therefore ordered by the Court that this cause stands continued for said Master's Report.

ERRORS ASSIGNED.

Record, page 1.

1. The County Court of Woodford County had no authority to appoint an executor of Ephriam Potter, deceased.
2. The infant defendants were not properly made complainants.
3. The estate of infants cannot be diverted in the mode pursued.
4. The bill of complainant filed it without equity.
5. The decree was rendered without proof.
6. There is no averment or evidence that a deed was tendered to Lemuel Burger.
7. The Court below erred in rendering a decree directing execution to issue against the defendants below for balance of decree after sale of lands.
8. The complainants below had no right to a decree against the land as their bill shows plaintiffs error executed the note jointly.
9. Other errors.

61 - 4
IN THE SUPREME COURT.

...
APRIL TERM, A. D. 1863.

LEMUEL BURGER, et. al. PLAINTIFFS IN ERROR,

vs.

ELIZABETH POTTER and others, DEFENDANTS IN ERROR.

ABSTRACT,
AND
ASSIGNMENT OF ERRORS.

Morning Mail Print.—Peoria.

Filed Apr. 21-1863.
G. G. Garland
Clerk

GROVE.
For Plaintiff's in Error.

IN THE SUPREME COURT OF THE STATE OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

LEMUEL BURGER, *et al.*,
vs.
ELISABETH POTTER, *et als.* } ERROR TO WOODFORD.

PLAINTIFFS' BRIEF AND POINTS.

1. The complainants below had no legal or lawful right to exhibit their Bill against the defendants below.

*The executors of
Potter could not properly join
the infants as co-complainants
as their interests were not identical*

A. The County Court of Woodford County has no power to appoint an executor. This power is vested alone in the person making a will.

See Sec. 19, Chapter *Wills*, Purple's Stat., page 1195.

"All persons named as executors in any will, testament, or codicil, as aforesaid, shall, after the same shall be proved, * * * be entitled to letters testamentary thereon; and if there be no executors named in such will, testament, or codicil, or the executor named therein shall die, refuse to act, or be otherwise disqualified, letters of administration, with the will annexed, shall be granted," etc.

See also Section 25, Statute Wills.

Purplis Statutes
Page 1196.

Sec. 25. When two or more Executors are appointed in and by the same will, and one or more of the persons as such, shall die, refuse to take upon himself or herself, such executorship, or be otherwise disqualified, letters testamentary shall be granted thereon to the other person or persons so named, not renouncing as aforesaid, and not disqualified. But no authority is conferred on any Court to appoint an executor.

B. By the 4th section, title *Chancery*, it is provided and declared that "Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend."

The Bill is exhibited by twenty-six complainants, the last eight of whom are minors (see printed abstract, page 7), and appear by their next friend, Leven P. Hereford. Can it be claimed by or for the defendants in error that this averment in the bill is a compliance with the statute above quoted?

Again, by the 13th Section of Chapter 47, Title Guardian and Ward, Purplis Statutes, Page 394, it is provided, That "Minors

may bring Suit, in all cases whatever by any person that they may select as their next friend and the persons so selected shall file bond with the Clerk &c and after bond, shall be so filed said Suit, shall progress to final judgment, and execution as in other cases. Here was no selection by the infants of a next friend, no bond for costs filed. The infants appear only by L. Hereford their next friend

C. There is no averment in the Bill as to the residence of any of the complainants. Can the court see that this proceeding is prosecuted either with the knowledge or consent of the ^{infant} complainants?

See also Sections 31, 32, 33, 34, and 35, title Conveyances.

Purple's Statutes, Sections 33, 34 & 35 are as follows,
Page 160. Sec. 33. In all cases where any minor heirs shall be interested in such proceeding as aforesaid, reasonable notice of such application shall be given to the guardian or guardians of such minors; and if there shall be no guardian, then the said court, shall appoint a guardian or guardians to litigate and act in such cases.

Sec 34. The Executors, Administrators or heirs of any deceased person or persons who shall have made such Contract, Bond or Memorandum in writing as aforesaid, in his or her lifetime for the conveyance of land for a valuable consideration, when such consideration has been paid and fulfilled as aforesaid, may, upon application in writing, obtain such decree as aforesaid, upon giving notice to the party to whom such deed is intended to be made, and under the same condition as is provided in this Chapter.

Sec 35. In all cases where application shall be made as aforesaid, the Court shall have power to continue the same from term to term, to obtain such evidence as the nature of the case shall require; and no decree for the conveyance of land, upon application as aforesaid, shall be made, unless the said Courts shall be satisfied that decree can be made without injustice to any heir or creditor of the deceased, and that the same is just and Equitable.

D. If this proceeding can be sustained, then the estate of any infant can be taken from him without his knowledge or consent, by making him a party complainant.

If it be the law that Executors or Administrators can unite with them in a proceeding of this character, the infants whose estates they have in their hands, then any similar proceeding can be instituted in our Courts and the patrimony of infants swept from them without knowing or hearing of the proceeding. In this case the land descended to and vested in the heirs of Potter and unless Burger pays for the land it would remain vested in them. But this decree takes the title out of the heirs and vests it absolutely in Burger without payment. Could Burger get this land from these infants without complying with the terms of the bond, in any proceeding or suit instituted by him? Certainly not. Before he can

do so we must pay and the
 executors have no better right

2. The minor heirs of Potter were not properly made complainants. They should have been made defendants, so that the court could appoint a guardian *ad litem* for them, and to hold parties to strict proof that seek to divest them of their estate. Further, suppose the minor heirs of Potter should hereafter seek to set aside the decree, what rule of law or equity would prevent them from so doing?

With such uncertainty about the validity of the proceeding, and of the title acquired under it, the premises would be sacrificed at a forced sale.

It is further submitted
 on this point, that ^{when} the minors
 are made defendants, notice must
 be given to the guardian if they have
 any and the court, below must not only
 see that the rights of the infants are
 properly secured but it must go further
 and see that the evidence upon which
 the decree is founded is preserved in a
 proper manner or this court will reverse
 the decree. A safeguard that should
 not be set aside except for the most
 cogent reasons.

3. The decree was taken without proof. This Court has held that a decree divesting infants of their estate must set out the evidence in the case or refer to the evidence, so that the court can see that the decree was properly rendered.

See *Chaffin vs. Heirs of Kimball*, 23 Ill. 38, and authorities cited. Can it make any difference in principle whether the minors are made complainants or defendants?

*See also Tuttle et al vs
Garrett, 16 Ill. 354. The Court say,
" As against them (infants) nothing
" could be taken as admitted. But it
" was the duty of the Complainant, to
" make complete proof of his entire case
" before they could be deprived of the
" estate which had regularly descended
" to them from their father. For the
" want of such proof the decree must,
" be reversed."*

4. There is no averment that a deed was ever tendered by Potter, or his legal representatives, to Burger. On the contrary, the bill proceeds upon the ground that the executors had no power to make a deed. Unless they could make a deed, they could not compel Burger to pay. When Burger paid he was entitled to a deed. Nor does the statute aid the complainants. See as to executors, administrators, or heirs, applying for authority to make deeds, Statutes, title *Conveyances*, Secs. 34, 35, and 36.

Again, the bond set-out-as an exhibit-with
the petition describes the note as executed
by Lemuel Burges while the note offered
in evidence is signed also by James
Burges.

It is submitted that
as Potter took and accepted a note with
personal security, he thereby waived his
lien as vendor. 4 Kent Com. 153. 2 Story
Equity Jurisprudence 475. 4. Wheaton 235.
1 Paige 20. 1 Gil. 301.

See particularly 1. Paige
Chancery Reports page 20.

5. The Court will notice that the description of the third piece of land in the bond and in the Bill is alike, but in the decree it is different. No mistake is averred or proved.

The decree describes the land by metes and bounds and probably correctly but can this Court see from the evidence that Potter intended to sell or convey this piece of land. The bill should have averred the mistake, the misdescription and a prayer that it might be corrected. Does it appear from the bond or from the evidence that Potter sold this piece or parcel of land.

6. The prayer of the Bill is that the executors may have power to convey, but the decree vests the title in Burger absolutely, and no power to convey is given.

It will be noticed that there is no prayer in the bill that James Burger shall be decreed to pay any amount, yet the decree provides that an execution may issue against him for any balance due after the land is sold.

N. B. The decree vests the land in Burger without payment. Suppose Lemuel Burger paid off the decree, would he be secure in his title? It is submitted, he would not.

7. The prayer in the Bill is that a vendor's lien may be decreed, while the decree provides that if the land does not sell for enough an execution may issue against the defendants below for the overplus.

H. GROVE,
For Plaintiffs in Error.

61

In the Supreme Court.

APRIL TERM, A. D. 1863.

LEMUEL BURGER *et al.*,
PLAINTIFFS IN ERROR,
vs.
ELISABETH POTTER *et als.*,
DEFENDANTS IN ERROR.

**PLAINTIFFS'
BRIEF AND POINTS.**

NASON, LAW PRINTER, COR. FULTON & WASHINGTON, GEORGIA.

Filed April 21- 1863.

*Go. Goeland
Clerk*

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

APRIL TERM THEREOF, A. D. 1868.

LEMUEL BURGER *et al.* }
 vs. } *Error to Woodford.*
ELIZABETH POTTER *et al.* }

DEFENDANT'S BRIEF.

I.

The executors, administrators, or heirs of any deceased person, who shall have made a bond for the conveyance of land, when the consideration has been paid, may, upon application and notice, obtain decree to convey the land to vendee.

Scates Stat. p. 163, sec. 34.

II.

It is not error against plaintiffs, after default, that unnecessary, or even improper parties were complainants. It should have been taken advantage of by special demurrer.

Story's Equity Pleading, 237.

III.

But the parties were all proper and necessary ; and even admitting that Hereford was not executor, the other two were, and the estate was represented.

IV.

In this case the consideration had not been all paid, and it was eminently proper that in addition to vesting the title to the land in the equitable owner, Burger, the decree should settle all the equities, and make the proper decree to secure the payment of the purchase money.

V.

The decree operated as a conveyance, and were this not the case, the decree should only be modified by ordering the proper parties to make the conveyance.

VI.

The 34th section does not contemplate that the heirs should be made defendants, but plaintiffs, and this whether they are minors or not.

VII.

The Court will presume that the party who appeared as next friend for minors was authorized, and was acting in good faith and for their benefit. If the contrary were made to appear, the Court would interfere and protect their rights.

VIII.

The bill was taken for confessed, and shows that it was for the benefit of the minors.

IX.

It does not follow, because a proceeding divests a minor of his estate, that the same is against his interest, or that he should be a defendant. A proceeding by guardian to sell the real estate of ward divests him of his estate; yet this Court has said that it is not against his interest, and he need not be a defendant. This proceeding is certainly not more against his rights.

X.

The decree describes one of the tracts a little more fully than the contract; but plaintiff cannot complain of that.

XI.

Plaintiffs are seeking to avoid the payment of a just debt, by setting up the rights of the persons whom they are wronging. They can avoid the forced sale by payment, and then, if there is really any cloud upon their title, they can easily remove it under the 32d section; but we think the title would be clear.

A. E. STEVENSON,
BANGS & SHAW,
For Defendants.

61 - 4

Potter et al
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Burger et al

Defts. Boief

Incl'd May 6, 1863

G. L. Linn
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J. E. SARRIS

For the papers